



COMMONWEALTH OF AUSTRALIA

Proof Committee Hansard

JOINT COMMITTEE ON MIGRATION

Reference: Migration Legislation Amendment Bill (No. 2) 2000

TUESDAY, 20 JUNE 2000

CANBERRA

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JOINT COMMITTEE ON MIGRATION

Tuesday, 20 June 2000

Members: Mrs Gallus (Chair), Senators Bartlett, Eggleston, McKiernan and Tierney and Mr Adams, Mr Baird, Mrs Irwin, Mrs May and Mr Ripoll

Senators and members in attendance: Senators Bartlett, Eggleston, McKiernan and Tierney and Mr Adams, Mr Baird, Mrs Gallus, Mrs Irwin, Mrs May and Mr Ripoll

Terms of reference for the inquiry:

Review of Migration Legislation Amendment Bill (No.2)

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Committee met at 8.01 p.m.

CHAIR—I now open this fifth public hearing of the Joint Standing Committee on Migration's review of the Migration Legislation Amendment Bill (No. 2) 2000. On 12 April 2000, the committee was asked by the Minister for Immigration and Multicultural Affairs to consider the bill and to report by 8 June, but certain considerations, one being that we did not have DIMA's report on time, prevented that from happening. The bill was introduced into the House of Representatives on Tuesday, 14 March 2000. It amends the Migration Act 1958 to: give effect to the government's policy intention of restricting access to judicial review in visa related matters by prohibiting class actions and limiting those persons who may commence and continue proceedings in the courts; clarify the scope of the minister's power under section 501A to set aside a non-adverse section 501 decision and substitute an adverse decision; and rectify an omission which allows for the consequential cancellation of visas. The bill also corrects a number of mis-described amendments of the act.

The committee has received 29 submissions from individuals and organisations with an interest in these issues. The committee authorises submissions for publication and they are placed on the committee's web site, which I am sure you know. Three submissions have been received since the committee's last meeting. DIMA's was distributed to members on 8 June, MARA's on 19 June and Amnesty's at tonight's meeting. They are 27, 28 and 29.

Resolved (on motion by **Senator McKiernan**)

That submissions 27, 28 and 29 be accepted as evidence to the consideration of Migration Legislation Amendment Bill (No. 2) 2000 and be authorised for publication.

[8.02 p.m.]

MATTHEWS, Mr John Charles, Assistant Secretary, Legal Services and Litigation Branch, Department of Immigration and Multicultural Affairs

METCALFE, Mr Andrew Edgar Francis, Deputy Secretary, Department of Immigration and Multicultural Affairs

WALKER, Mr Douglas James, Assistant Secretary, Visa Framework Branch, Department of Immigration and Multicultural Affairs

CHAIR—Welcome. As you are aware, the committee does not require witnesses to give evidence under oath, but you understand that these hearings are legal proceedings of parliament and warrant the same respect as proceedings of the parliament itself. Giving false or misleading evidence is a serious matter and may be regarded as contempt of parliament. I presume there is nothing you want to go in camera for. Do you want to make an opening statement before we ask questions of your most recent submission?

Mr Metcalfe—We would like to do that if possible?

CHAIR—Please go ahead.

Mr Metcalfe—Madam Chair and members of the committee, thank you for the opportunity to appear again tonight and to clarify some of the issues that have arisen out of the committee's previous hearings and submissions by other parties. The department has attempted to cover the issues raised in these submissions and hearings in our supplementary submission. I would like to take this opportunity to add to and clarify some of the points that have been raised.

I reiterate that the government's primary objective in proposing to remove class, grouped or representative actions in migration matters is to stop the use of a process that is being used merely to extend a person's stay in Australia for lengthy periods of time. Since the preparation of our first submission to the committee and our first attendance before the committee at a public hearing on 8 May 2000, the department has undertaken further analysis of the members of several class actions. We believe that this research supports our view that class action members are using class actions solely to delay removal from Australia.

We believe this is evidenced by the fact that many of the members have not sought to challenge their decisions within time—in fact, they were substantially out of the 28-day period provided for in the Migration Act—and some have previously brought individual applications. Further details of these are included on pages 1 and 2 of our supplementary submission. These characteristics have led the government to the view that removal of class actions is unlikely to result in significant increases in the number of individual applications to the courts.

The department has provided an indication of costs related to this bill in our supplementary submission. Briefly, the department's average litigation cost per individual case is approximately \$10,000. Class actions are more complex and hence more costly. Depending on the issues involved and the numbers of class members; costs may range from three to 15 times the cost of

an individual application. The average cost of a class action over the last three years is approximately \$77,000. If participants did not pursue individual applications for judicial review there could be significant savings. As I mentioned earlier, on the basis of our views of the type of people who join class actions in the migration arena, the government believes that very few participants of class actions would take individual applications. It would take only a small percentage of these persons to make individual applications for judicial review to reduce any savings arising from removal of class actions. The primary objective is to stop misuse of a court process solely to remain in Australia. It is not a measure to regulate the behaviour of lawyers who have conducted class actions.

As our supplementary submission states, the Minister for Immigration and Multicultural Affairs wrote to the Law Society of New South Wales in March 1999 raising concerns about the manner in which a particular class action was being conducted. Another element of his concerns related to the conduct of a law firm involved in a particular class action. As this issue involved the conduct of lawyers, the matter was raised with the Law Society of New South Wales. They investigated the matter and made recommendations. These issues are only one element of the minister's concerns in these matters. The government intends to use the appropriate avenues available to have questionable conduct investigated by the relevant authorities. I understand that the Migration Agents Registration Authority have advised that the particular advertisement attached to the department's first submission was provided to them on 21 October 1999. The authority also received a copy of the minister's letter of 23 March 1999.

One of the other issues that arose out of the many submissions was the status of the Lay Kon Tji action. As we confirm in our supplementary submission, it was always run as an individual test case. Twenty-eight similar matters were stalled in the Federal Court pending resolution of this matter. As a result of the outcome in Lay Kon Tji, all 28 of these matters were settled between the minister and each applicant and remitted to the Refugee Review Tribunal for reconsideration. Processing of similar matters within the department was also held up pending the outcome of the test case. It is these types of test cases that we believe can more efficiently deal with matters that are currently being dealt with in class actions. We elaborate on this concept more fully in our supplementary submission. Test cases will, of course, remain possible if the bill is passed.

While the government sees this bill as complementary to the Migration Legislation Amendment (Judicial Review) Bill 1998, the bill is drafted to stand alone. As was noted in the second reading speech and the explanatory memorandum on this bill, the amendments to section 501A are technical. The issues that the third-party submissions have raised about the amendments to section 501A were considered when the provisions were passed in the Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Act 1998. The present technical amendments put beyond doubt that the minister can, in the national interest, substitute his or own section 501 decision for that of a delegate or the Administrative Appeals Tribunal. As these amendments are purely technical and aimed at clarifying our original position, we are of the view that, if they were not made, any interpretation of the provisions by the courts would have the same result as our proposed amendments.

Again, I thank the committee for the opportunity to appear before you today. My colleagues and I are of course very happy to answer any questions from the committee.

CHAIR—Thank you, Mr Metcalfe. I just want to address a couple of questions to you and then I will pass you to the deputy and other members of the committee. I want to clarify a few things. You say in your submission, on page 6:

DIMA has been unable to find an asylum seeker who has benefited from being a member of a class action (other than delaying his/her removal from Australia).

I was a bit curious that you said DIMA has been ‘unable to find’ an asylum seeker who has benefited from being a member of a class action other than delaying his or her removal from Australia. You must know. If anything came out of the class action that enabled an asylum seeker to stay who would not otherwise have been able to, you would have had to give them that permission to stay. So I am curious about what you mean by ‘unable to find’ an asylum seeker. Does that mean that none exist? Perhaps you could explain, Mr Walker.

Mr Walker—I think that what we were meaning is basically that, with the exception of the delay in removal, we have not located any asylum seeker who has, in fact, obtained a substantial benefit or a permanent resolution to remain in Australia arising from the class action—or any class action.

CHAIR—But doesn’t that mean you have not given anybody a visa that would allow them to do that as a result of the class action, rather than being unable to find them? I would have thought it was a matter of giving them a visa on that basis.

Mr Walker—Yes, we have not given them a visa as a result of the outcome of a class action. That is correct.

CHAIR—So we could say clearly that there has been no asylum seeker who has gone into a class action and gained a permanent residency visa as a result of that class action?

Mr Walker—That is correct.

CHAIR—Thank you. I just wanted to clarify that. The other one I wanted to clarify concerned the Muin and Lie cases. You had a look at 50 per cent of the class members of that and gave us details. How did you select that 50 per cent?

Mr Walker—That is a very good question—I am not quite sure how we did. I think it was basically random. It was probably a matter of taking the—

CHAIR—I think we are getting more information.

Mr Walker—the first 50 per cent of the participants in the class action on the particular day, 28 April, in alphabetical order. It would have been the first half of the names alphabetically.

CHAIR—You also said, in relation to that same case, that some of the people in the class action undertook the action even before they had an RRT decision. Would you be surprised at this? While they were waiting for an RRT decision, they might have been scared that they would get a negative and the boat would have sailed, and it would be too late for them to board.

So, as a precautionary measure, surely they would have gone into that class action to cover bases. It need not be anything particularly venal, rather just a precautionary measure by somebody who genuinely believes in their case.

Mr Walker—It is possible.

CHAIR—They are just some of the details. The main issue I want to get on to, as I suspect other members of the committee do, is your claim that you do not need class actions because you can run them as individual test cases. In that regard I refer to the legislation itself where it actually said anybody ‘joined’, and our reading of this:

- (1) In any proceeding in the High Court or the Federal Court that raises an issue in connection with visas ... deportation, or removal of unlawful non-citizens, the following are permitted:
 - (a) joinder of plaintiffs or applicants.

Mr Walker—That is right. The term comes from the Federal Court rules.

CHAIR—Would it not apply to people joining in a test case for the legal reason of being recognised by DIMA so that they would get a bridging visa?

Mr Walker—We do not believe so. The test case is run by an individual applicant with other cases running behind.

CHAIR—Who decides who goes in these other cases?

Mr Walker—It is entirely up to the individuals to bring an application in their own name.

CHAIR—So you have got an individual application. Let us say I am the individual, I bring an application but the rest of the committee feel that they fall under that. Is that a decision of DIMA or a decision—

Mr Metcalfe—Madam Chair, the point you are making is, I gather, that there are a series of individual applications. Is your question how the test case is chosen?

CHAIR—No it is not actually. I am trying to look at a substitute for class actions. I am saying that if I wanted to as an individual, how would the other people come in under that class action? I understand they have to put in their individual cases. Once they have put them in, is it the courts that decide that this is a test case or does DIMA say they will take this is a test case?

Mr Walker—Mr Matthews is probably the best one to answer this, but I understand it can in fact be a series of either the representatives of the individuals, the minister’s solicitor and, similarly, the department’s, and the court itself. It is in everyone’s interest to have the issue determined as quickly as possible.

CHAIR—I understand your rationale. So if I put in my individual application and the deputy thinks it also applies to him—we are potential immigrants—what does he have to do? Does he have to put in his individual application?

Mr Walker—He has to file an individual application.

CHAIR—That cost would be approximately how much?

Mr Matthews—There is the filing fee in the Federal Court which at the moment is approximately \$1,200.

CHAIR—That is waived for people in detention?

Mr Matthews—It is.

CHAIR—And can be waived for people in other—

Mr Matthews—Yes.

CHAIR—Okay. So he can put in, and at that stage we have both got similar cases running on similar matters. Whose becomes a test case and how?

Mr Matthews—What would happen is that if, for example, there are eight or 10 or 20 and they all raised similar issues, there would be a negotiating process between the minister's solicitor and the solicitor or solicitors or even the individual applicants themselves. Through that process usually one of them is chosen as a frontrunner, as it were. It is agreed that the others will simply sit behind it or are stored behind it, and whatever the outcome of the frontrunner will be will apply to all the rest.

CHAIR—Say the visas for the rest of the committee are just about to run out. Once they have got that application before the courts, they get a bridging visa automatically, don't they?

Mr Matthews—That is correct.

CHAIR—So they have got to put that application in. I know the deputy has lots of questions on that so I am not going to take any further; I will hand that over to the deputy. I have one other question which does not relate to that. I understand you said 90 per cent of the people in class actions have put it in beyond the 35 days. Is that a correct reading of what you have said?

Mr Walker—That is the matters in the High Court.

CHAIR—My inquiry stemming out of that is that if bringing in the 28-day rule is such that it would eliminate class actions, is it sufficient to bring in a 28-day rule and will that, by virtue of the fact that most of them are late, eliminate your class actions in a de facto sense without having to do it in legislation?

Mr Metcalfe—To go back to your original question first, page 2 of our submission is probably where you were referring to.

CHAIR—The new one?

Mr Metcalfe—Of our new submission. In the middle of the page there is information in relation to High Court matters, as Mr Walker indicated: only 10 per cent of the applications were made within 35 days of the date being challenged, 19 per cent within six months, and 40 per cent within 12 months. You raise the point as to whether if there was to be a 28-day rule brought in in relation to the class actions, to mirror the longstanding provisions in the Migration Act relating to individual applications, that would that have an impact. Yes, possibly, but we do not believe it would deal with the various other concerns that have been raised on the rationale for bringing forward the legislation.

In relation to your earlier line of questioning—and I am aware that the deputy chair may pursue this matter as well—a good example of the issue of a test case being run where there are similar cases waiting in the wings is referred to at page 8 of our second submission, and that is, of course, the Lay Kon Tji case that I mentioned in my opening statement which dealt with the issue of East Timorese asylum seekers in Australia. There was a series of individual applications brought, there was a test case run and the issues were able to be resolved in a particular way.

CHAIR—The committee does have some concerns about the general applicability of that. I will turn over now to the deputy chair who will probably follow that through, and then to other members as they indicate that they wish to ask questions.

Senator McKIERNAN—Thank you, Mr Metcalfe, for the explanation on the Lay Kon Tji case. It did receive some attention during the course of some of the earlier public hearings of the committee and your submission has now helped to explain it, but I would suggest it perhaps might have muddied the waters somewhat as well. It is referred to in the submission that this was always run as an individual test case, but the very next line says that 28 similar Federal Court cases were stalled pending it. When was the decision taken, and by who, for this to become a test case?

Mr Matthews—I cannot answer your question specifically because I do not recall, but it would have been simply that Lay Kon Tji was perhaps the most advanced in terms of its progress. I really cannot be specific because I do not recall. It would have been chosen for some compelling reason as the one to go forward with the others sitting behind it pending its outcome.

Senator McKIERNAN—Quite a deal is hanging on this case now as you would appreciate from the conversations that have gone back and forward. As I recall the case, the persons who were involved in the case did not arrive just as merely one group, they came in over a period of time—these are the persons who came from East Timor—and there was a gradual process and a built-up process on it.

Mr Metcalfe—My recollection is that this is largely the group who arrived in the second half of 1994. I thought—and again, this is purely my recollection—that the group did arrive within a

reasonably short period of time, that there were around 1,500 or so people who obtained visas through the Australian consulate in Bali. It was certainly not within a day or two, but over a period of two or three months this group of people came to Australia and subsequently sought refugee status on the basis of their then situation. Of course, events have moved on significantly since then.

Senator McKIERNAN—Okay. But it was a gradual process, it was not people arriving on the shore and all claiming refugee status.

Mr Metcalfe—No, it was not one boat, it was a large number of individuals with broadly similar types of background in that they were East Timorese, many of course of whom there was a view that they may have had access to Portuguese nationality, which raised issues under the refugee convention.

Senator McKIERNAN—Was the decision taken to run this as an individual test case after the lead individual in the action had been through process at primary stage and at refugee stage?

Mr Metcalfe—Yes. The only access to the court is following the Refugee Review Tribunal decision.

Senator McKIERNAN—How can we find out in a reasonably short time when the decision was made that this became a test case and be seen as the test case, and by whom?

Mr Metcalfe—The expertise on this matter in the department is probably with General Counsel to the department, Mr Bert Mowbray. I can undertake to try to provide a response to the committee secretariat tomorrow as to the circumstances of the decisions around this particular case. I do recall, for example, that there had been some significant legal discussion in relation to another case, from memory the name was John, but subsequently the Lay Kon Tji case was identified by the relevant lawyers and the parties, and possibly court officials, as the case that would proceed as the test case. I will take that on notice. We will attempt to provide the committee with that information very quickly tomorrow as to the circumstances of how that particular matter was handled and identified.

Senator McKIERNAN—Can I follow on with a further question, and perhaps you would want to take this on notice to Mr Mowbray as well, and that is the matter of a representative action and what a representative action is. The committee has a definition from Butterworths as to what a representative action is and I just might quote it here. I will provide this to you so you can take it away and give it to Mr Mowbray or others whom you feel might assist the committee in our deliberations. It says:

Representative action Where numerous parties to a court proceeding who have the same interest in the proceedings are represented by one of the parties:

It goes on to quote New South Wales Supreme Court rules. Further on it says:

Three criteria must be satisfied for a representative action: a common interest, a common grievance, and the relief sought must be beneficial to all parties represented by the party on the record:

I put it to you, and perhaps through you to Mr Mowbray, that the Lay Kon Tji case, as it was during the course of the hearings, would probably have been seen as being a representative action, if that is a proper definition of what a representative action is.

Mr Metcalfe—I will not attempt to give a legal opinion, Senator, but I might comment that I suspect that the definition that you are describing, which appears to derive from the New South Wales Supreme Court rules, may somehow differ from the Federal Court rules. I think that we are quite clear as to the distinction between a test case and a series of similar applications all proceeding individually—where some may in fact not proceed through the courts until a particular matter takes the lead in the case of a test case—as opposed to a representative action, where there is a joinder of the actions. That issue would essentially be determined by the Federal Court rules. Mr Walker indicated right at the outset that the parliamentary drafter, in providing this legislation, was seeking to essentially undo the Federal Court rules that have provided the capacity for class actions, for representative actions, but in no way interfering with the ability for individual applications to proceed in some situations as we have here, where there may be a leave case, a test case.

Mr Walker—I think one of the important distinctions between a representative action and an individual test case is that the individual test case has a series of orders that apply solely to the individual who brings the action, although the actual decision itself is a precedent for all the other actions behind it. For example, in the Lay Kon Tji matter and the 28 similar Federal Court cases, the 28 cases were each individual applications. Following the court's decision in Lay Kon Tji, the minister's solicitors then negotiated with the solicitors of each of the other applicants and went to the court and had separate consent orders for remitting it to the tribunal. In a representative action, the order can apply across the named class, or the individuals in the class or the representative class. Often those terms are used very interchangeably. There really is not a distinction between them. The reason that they have both been used in the bill is to ensure that it is quite clear what is covered.

Senator McKIERNAN—The distinction I am trying to draw is between representative and test case. In particular, you are saying, certainly in the supplementary submission, that they can be adequately dealt with by way of a test case. I am trying to draw a distinction between the test case and the representative action. The argument that I am trying to float is that the Lay Kon Tji case could be seen as being a representative action. As you say in the supplementary submission:

After the decision in *Lay Kon Tji* the processing of these matters recommenced with the result in *Lay Kon Tji* being made known to all those involved in the processing.

They were all stayed while those proceedings were going on. So there is a small difference between this case being a representative action and its being a test case.

Mr Walker—There are some distinctions. With a representative action, particularly in an administrative law matter, there can be a common interest but it may not be the only interest in the case. To give you an example of what happens and what can happen after the decision in a representative matter: they can in fact fragment into individual cases. The Zhang matter is a good illustration of where that did occur. What happened in Zhang was that the issue was whether the review committee that existed prior to the RRT was required under the rules of

natural justice to give every individual an oral hearing. The court determined there was not a general right to an oral hearing; it depended on the circumstances of each case. So that one principle applied to all members of the class, but then their individual circumstances had to be examined. In some matters—and in Lay Kon Tji where the issue of Portuguese nationality was critical—it may not have been the only factor that was in issue in relation to the decision, but it was obviously a significant factor in these particular cases.

Senator McKIERNAN—I will just ask one more question for now. I have got possibly some more on this area and certainly some on other areas of the bill. In the event of the passage of this bill, and since, as you say over the page, this present bill does not prevent test cases such as Tji and Ali from proceeding in the same way as they have proceeded, who would be responsible for the granting of the border visas or whatever visas would be required if people were part of that action—joined to that action? Would this then have to go to the court and start individual actions in order to remain, for want of a better term, a joiner to the action, a part of that action if it were a test case in its own right and not part of a representative or class action?

Mr Walker—If there were a test case, in order to obtain a bridging visa they would each have to make an individual application to the court. The bridging visa would be available to them as an applicant for judicial review.

Mr Metcalfe—The Migration Regulations provide that, for an applicant for judicial review, a bridging visa comes into effect and essentially that bridging visa remains in effect until, I think, 28 days after the conclusion of any judicial proceedings, including review proceedings. The visa continues by operation of law through that period, however long it might be. And if the case is queued, waiting upon the progress of a test case, then the visa continues to allow those persons lawful presence in Australia.

Senator McKIERNAN—I did not read all the references on that Butterworths class action, but Federal Court rules are also mentioned. I give that to you so that you can respond.

Mr Metcalfe—I do think we are talking about a distinction of a test case—which is chosen to most effectively deal with the issues where there are series of similar individual applications, which under the current rules require that they are lodged within 28 days and bridging visas have flowed from that—as opposed to a single application which has multiple members of it, which can be variously described as a class or representative action.

CHAIR—Mr Walker, I must admit my own inadequacy here. I am still having trouble. The actual legislation that excludes ‘joinder of plaintiffs or applicants’. We have got other people putting individual claims in, so they are not actually joined at that stage, although they get joined in the fact of using a test case. They are not joined; I will accept that. But then we have:

- (d) a person in any other way being party to the proceeding jointly with, on behalf of, for the benefit of, or representing, one or more persons ...

That seems to me to cover a test case. I cannot see how that part (d) of 486B does not actually cover a test case. I take your word that you do not intend it to.

Mr Walker—It is not intended to. If I can take a step back: a test case can apply in terms of resolving a particular issue. Let us take an example and say the issue relates to a specific legislative provision. A person has had a decision made under that provision. They challenge the validity of that provision—leaving aside others being affected by it for the moment and whether they have in fact commenced individual applications to the Federal Court for review of a decision or challenging the validity of that provision. The court determines that that provision is invalid. Any decision that has been made under that provision is equally not lawfully effective. Every person—

CHAIR—Just stop there. We have already specified that, to be party to a test case, they have got to actually put in individual applications to the court anyway.

Mr Walker—There is only one party to the test case. The rest remain behind.

CHAIR—But, to get their bridging visa, the people have had to put in their applications to the court.

Mr Walker—That is right. They have to make a separate application.

CHAIR—To the court.

Mr Walker—That is right.

CHAIR—And this is where I see a possible slippage. They have put in the individual cases. This legislation stops at being seen automatically as a joint or a representative action.

Mr Walker—It stops them from being all heard together by the court. The circumstances of the one particular case can be heard.

CHAIR—And the court then decides which of the other individual cases this covers?

Mr Walker—The court, the parties. For example, in a situation where the minister is successful in defending an action—let us say that in the example I gave the legislative provision is upheld—then there is nothing stopping each other individual applicant from pursuing that action in the court. It may well be that because the courts decided the issue, they—once the matter is heard—will decide in the same way. There is nothing stopping the individual from going on.

CHAIR—But they have to pursue their individual case in the courts. It is not enough just to put in application because there is a test case; they actually have to pursue that in the court.

Mr Walker—They can withdraw at that time before proceeding to hearing if they feel that, having had the matter determined by the court, they will not be successful.

CHAIR—Yes, but I am thinking about if they think they will be successful.

Mr Walker—If they think they will be successful, they can pursue it.

CHAIR—How far, then, do they have to pursue it? This is what I am trying to get at. What does it involve if somebody is covered by a test case? Maybe we should take a hypothetical—

Mr Metcalfe—It becomes a question, I think, Madam Chair, of the precedent nature. Let us say we have six or seven cases raising a similar issue. They come to the attention of the court at about the same time and therefore there is a recognition—quite usually, I think, the department would recognise—that a series of similar applications are being lodged—

CHAIR—I think that is exactly where we have concerns: the phrase that ‘the department’ would recognise that these people have similar concerns.

Mr Metcalfe—We are not the only person, of course, who would be aware of it but, because we run 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 or whatever; 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. But that is not necessarily the only means by which it becomes apparent.

What I think Mr Walker and Mr Matthews have indicated earlier is that in that situation, if there are similar issues, there may be conferences between the lawyers associated with the various applicants to decide if there are efficiencies, and I assume the court registry process would have a significant input to this particular process—

Mr Matthews—That is correct, yes.

Mr Metcalfe—to identify where there were some benefits in having one case proceed to hearing while the other cases remain at a preliminary stage pending the outcome of that case. Let us say that one case was in fact identified and proceeded with, with the consent of the various parties, and proceeded to a determination. It could well be that a principle was established. For example, in the Lay case a particular principle was established. As a result of that, the minister’s legal representatives went into particular discussions with the applicants in the 28 other cases. So the need for all 28 to proceed to a substantive hearing in the court was obviated, but it was a means of dealing with the litigation arising from 28 individual applicants rather than some of the problems that we have identified through the class action provisions.

CHAIR—If I could speak on behalf of the committee, Mr Metcalfe: our problem is with your saying that it is up then to the department to talk to all those other lawyers. I am not suggesting the department is in any way not objective, but perhaps you have a vested interest in some ways. I think we would like some objective criteria that would satisfy the committee that, were someone to have a similar issue, they would definitely be covered under that test case—if their issue was the same.

Mr Metcalfe—I would suggest that the reason why the department would be aware of it is, as I said, is that there is one—

CHAIR—I am not questioning that you are aware of it.

Mr Metcalfe—It is because it is the minister who is the common factor in this. The minister is being sued by 28 different people in that particular situation—some in Brisbane, some in Melbourne, some in Sydney—so it is perhaps not surprising that it is the minister's legal advisers who are the people who say, 'Gee, this issue is happening in several places.' But it is not up to the department to then manage all of the issues that result from that. As I have said, it is an issue where the lawyers for each of those applicants, together with court officials and, of course, the department handling the minister's litigation for him—the minister may have views about this—as to how that litigation management process actually occurs. I do not see that there is an issue arising as to how any individual applicant is being somehow disadvantaged by their opportunity to pursue their case individually. I certainly do see that in our submissions and in our evidence we have pointed to significant public policy problems arising from representative actions where some people are not even aware that they are a member of a class.

CHAIR—We understand your point there, Mr Metcalfe. Just let me finish this one point. Yes, you said you cannot see they are disadvantaged. But they are disadvantaged vis-a-vis class actions if then they are hiring this lawyer. That is said to be just to make the application, but it is just not the application. Once the test case has been heard but then they still have to have a lawyer engaged to negotiate with your lawyers to see if they come under the test case, which is an increased cost to them. You agree with me that far?

Mr Metcalfe—Yes, but I do not regard that as an unreasonable burden on an applicant who has had several avenues of merits review. We need to go back to the fact that that is a judicial review exercise, and there is clear evidence placed before the committee as to the actual outcomes in judicial review circumstances, that at the end of the day a very small proportion of people actually get a visa out of pursuing judicial review.

CHAIR—I guess the point there was: how much does it cost to enter a class action, which I guess varies on the size of the number of people, and how much would it cost then to pursue that? Surely, it does give the minister the opportunity—and I am not saying the minister would do this—to say, 'Well, let us see how good their money is, and we will take this one. We will not see it as a test case and we will make them run their own case as well.' That is all I am getting to: the hypothetical possibilities that that could happen. You are with me?

Mr Metcalfe—Yes, but I still do not see the point in terms of the fact that, if a person takes a matter to court, then presumably the person is expecting to pay for the process they are obtaining.

CHAIR—The point is that one of the benefits of class actions is that people can join the class action at a limited cost to themselves. That is the point of that. But, Mr Baird, I think you wanted to ask some questions.

Mr BAIRD—I just think we are getting involved in a legalistic debate. The role of the committee is to try and sort this out: it sounds as if it is a rip-off in terms of those people who have been knocked back in other ways seeing an easy way of pursuing another avenue for a visa. But can we have it in short terms as to what are the disadvantages of this to the department and, by virtue of that, the people we are all meant to represent, the people of Australia? What is the

downside to it? If you have got a whole lot of people that you are trying to negotiate with, doesn't it save time and effort that you have got them all lined up in a row? That would be the other side of the argument. As a devil's advocate, I personally do not know why the minister even bothered asking us. I think I would just say, 'Get rid of this,' but I would like to know from your point of view why you would think it is a problem.

Mr Metcalfe—Thank you for that question, Mr Baird, because I think it does come back to the nub of the issue. Madam Chair has made the point—

CHAIR—I wondered why Mr Baird had come this evening. You had obviously planted him in the committee.

Mr Metcalfe—Perhaps I could attempt to very simply respond to points that you both raised. I agree that it is cheaper by a couple of hundred dollars for a person to pursue a process under a representative action.

Mr BAIRD—It would be cheaper for whom?

Mr Metcalfe—For the individual.

Mr BAIRD—For the department?

Mr Metcalfe—In our second submission we have indicated the overall costs of running test cases for the department. If you divide the number of parties to a test case by that overall cost, there are cheaper costs per individual in a test case. However, that is not the only determinant of the public policy issues here. There is clear evidence that people are joining test cases long after they have been the subject of final determinations in relation to the merits of their case. That has been many months in some circumstances. The intention of the parliament in the migration jurisdiction has been quite clear that a person should exercise any review rights in a timely fashion of 28 days maximum. If they do not do so, they should essentially accept the decision and depart. So we have the issue of class actions undermining that quite clear expectation of parliament that has been established for some years.

Mr RIPOLL—Those 28 days do not apply now though, do they?

Mr Metcalfe—They do not apply to class actions now and that is precisely what this bill is about. However, in 1994, after having considered a report of this committee and looked at the issues in association with the introduction of the Migration Reform Act, the parliament had real concerns about the capacity of people in the migration jurisdiction to obtain lengthy periods of stay in Australia. That was notwithstanding the fact that they had been the subject of an adverse decision in relation to a visa and then used processes such as judicial review processes to extend their stay for very lengthy periods of time. Hence a comprehensive scheme was introduced in 1994 to place time limits associated with bringing applications.

One of the issues that we are seeing with class actions is that they are very low cost for an applicant. The fact that there are no rules associated with time limits is completely undermining

that policy objective of people quickly having their legal status determined and then getting on with their life, whether that is staying in Australia or going home.

We have situations, and evidence has been provided to the committee, where some people have been joining class actions but do not even know what they are doing. They think it is simply a device to obtain further stay in Australia. What we are all about here is to say, 'Yes, a person should have access to justice and if you wish to proceed with a case on an individual basis, that is fine. The parliament has provided for that.' However, some of the concerns that have been arising as a result of the class action experience that we have had in recent years have shown that there are some major issues associated with large numbers of people being able to pursue litigation at low cost, therefore, not raising any particular concerns about joining a class action and obtaining the very thing that they have been denied by decision of the minister's delegate—that is, the permission to stay longer in Australia.

I think we have come to the very heart of the issue. The concern that has been very properly identified by the committee is whether litigation efficiencies associated with running a test case would somehow be interfered with by this particular provision. I do not think we believe that there are any issues associated with that. But there still will be litigation efficiencies associated with the capacity to run test cases. People in that situation, provided they are individual applicants to the court, will be able to take advantage of those litigation efficiencies. But the significant public policy objective, which is to return us to the situation that we all thought we were in during 1994, is the prime driver.

Mr BAIRD—What about the other side of the equation. I am some poor downtrodden person who has arrived and does not have much money and sees this as a way forward. How many class actions have been successful overall?

Mr Walker—I understand that only one has been successful to date.

Mr BAIRD—And how many people were involved in that?

Mr Walker—That was mentioned in the department's earlier submission. That was Fasil Din and that went down to a very small number who were successful. There were about 15 or 16. Sorry, I am incorrect. There was also another case where applicants did obtain a benefit from the class action—they were not asylum seekers. It originally had 75 members. The decision was in the minister's favour, but the outcome was such that, when put to proof that those stated members in fact had that common issue, only two could prove that they did. The rest withdrew, so two in that action did benefit.

CHAIR—Two out of the 75?

Mr Walker—Yes, two out of the 75.

Mr BAIRD—The other one had 16?

Mr Walker—Yes, 16 individuals.

Mr BAIRD—How many people altogether have applied under class actions?

Mr Metcalfe—At pages 5, 6 and 7 of the department's first submission to the committee we provide some detail on this. I have not got the aggregate numbers in front of me, but, for example, on page 6 of the submission we refer to the various class actions called Macabenta, Kagi, Vega and Suprianto. There were 3,737 people involved in that, an argument as to whether the resolution of status/visa classes in the Migration Regulations were invalid because they breached the Racial Discrimination Act. The government was successful in all 3,737 cases in relation to all those individuals. Macabenta was dismissed by a single judge, subsequently dismissed by the Full Court and subsequently refused special leave to appeal to the High Court. So 3,737 people stayed in Australia for a very significant period of time, for the price of a \$200 joining fee, after they had been in receipt of individual decisions—including merits review—indicating that they had no entitlement to stay on a visa. So it is clear evidence, I think, that it is a protest.

Mr BAIRD—So, in terms of reaching the objective of staying long term in Australia, it does not work overall. But in terms of the short-term objective that they want to extend their stay, it does work. Do you want to reduce that, in terms of overall parity with other schemes?

Mr Walker—That is correct.

Mr BAIRD—I think it all seems fine. Everyone agreed? No problems!

CHAIR—Just to clarify, Mr Baird: I think opposition members are not convinced that the stepped test cases will be sufficient to allow for those individual instances where there is a genuine case that could be covered by this.

Senator McKIERNAN—There has been evidence—I will not say completely convincing—in the course of the hearings, that merits and warrants committees such as this looking at class actions. However, we concentrated our energies on class actions. We did not look to the same degree at representative actions, and we certainly did not test representative actions against test cases in the way that we have been able to do tonight. We have got some information coming to us on that. You have responded to questions from the committee on the number of class actions. Can you give the committee similar information on representative actions that have been taken? How many of them have been undertaken, how many have been successful, how many people have been involved in them? There seems to be a paucity of information.

Mr Walker—As I said before, it is an interchangeable term.

Senator McKIERNAN—You have hit it on the head.

Mr Walker—The Federal Court rules and part 4A of the Federal Court Act, I understand, use the term 'representative actions'; the High Court rules talk in terms of 'joinder of plaintiffs or applicants'; and often the common term used in the legal fraternity can be 'class action'. That one probably comes more from the American terminology for joining together a group of people with a common issue.

Senator McKIERNAN—It is certainly not Irish!

Mr Walker—The reason representative or class action is used is to ensure that, should we use representative, there is not an argument mounted that a class action is something different and is permitted.

Mr Metcalfe—To add to that point, in the department's first submission on page 4 we identify the following words:

The generic term "class actions" is used in this submission to refer to any grouped court actions, however the members may be grouped or joined (whether by Part IVA of the *Federal Court Act 1976*, Order 6 Rule 2 or 13 or to 6 of the *Federal Court Rules* or Order 16 Rule 1 or 12 of the *High Court Rules*). In effect, a class action is one in which a person brings proceedings on behalf of a group of people where the claims arise out of the same or similar circumstances, and the claims give rise to substantial common issues of act or law.

We have then gone on, as I indicated to Mr Baird, at pages 5, 6 and 7 and given you the examples of the class actions—grouped, representative, joint, however described—that are of concern to us and which we have been involved with over the last few years.

Senator McKIERNAN—Thank you.

CHAIR—Would it help the committee if we got DIMA to give us a sheet of paper which was tabulated under test cases, with a column for representative actions and one for class actions so it clarified exactly where the differences lie? Would that be helpful?

Senator McKIERNAN—Yes.

Mr Metcalfe—We will certainly do our very best to assist.

Mr RIPOLL—I would just like to clarify what the department sees will be the actual gain, the real on the ground gain, if this legislation was to come into force. You have said that a shorter time period and no class actions will not change the outcome in terms of long-term stay because only a very small number get that visa long term. So it is more about preventing people staying short term.

Mr Metcalfe—Short term, I would submit, can be many months or in fact years, depending on the length of the process.

Mr RIPOLL—Whatever the case may be, whether it is weeks, months or years, if we are still talking about the goal being that of short term, because people do not get the visa that they are applying for and eventually are removed, what is the practical gain? Going back to the question of cost, I am not convinced there is a practical gain in terms of the department's cost. This legislation could potentially increase the cost to the department if there are no class actions because class actions cost about \$77,000 per unit, I think you said, whereas an individual case might cost \$10,000, so if eight people decide they have got a case—and there has been mention of 16 getting through—the cost would be substantially bigger. I cannot see a practical outcome in terms of cost.

The other question you might want to pursue or answer is on the 28 days. I do not see how the 28 days in the end really makes any difference in having people removed, or otherwise no longer here. If people are joining class actions some years or months down the track, what is the practicality of the 28 days?

Mr Metcalfe—I will make a couple of comments and the others may also respond. There are probably three broad areas to respond to. The first relates to cost. I do not think it has been the contention of the department or the government that the cost is a significant motivating factor in relation to this particular issue—either cost to the government or cost to the individual. The primary rationale for this legislation is that it is perhaps the last and the latest in a significant series of attempts by governments, both the present and the previous government, to reduce the potential for lengthy stay in Australia by people simply on the basis of pursuing a process. The governments have been concerned to ensure that applicants receive a fair hearing, that they are able to have their case determined against the guidelines set down in the migration regulations and, indeed, that if the answer in their particular case is adverse to them they have the access to merit review through the Migration Review Tribunal or the Refugee Review Tribunal.

However, there has been a constant theme in migration issues for many years that the outcome often sought by an applicant is simply a period of stay in Australia—access to work in Australia, access to other benefits in Australia—to possibly wait the government out. There is the forlorn hope—which, of course, both sides of parliament have rejected many times over many years—that there will be some sort of amnesty allowing people to stay in Australia. But the pursuit of process, as an end in itself, has been a clear pattern.

Just one other example was the issue addressed by the parliament and, I think, by the committee a couple of years ago relating to applicants for refugee status who were making applications for refugee status on the basis that it brought with it work rights and gave them access to the Australian labour market. Because of processing delays, merits review and access to judicial review, a person was able to obtain a lengthy period of residence in Australia with access to work, even though they had absolutely no merits associated with their case whatsoever.

We saw a very large number of applicants from the Philippines, for example. There were many hundreds of applications for refugee status from the Philippines. We had applications for refugee status from people from the United States and the United Kingdom. That is an example of the process providing a benefit even though the application was completely unmeritorious. The government and the parliament addressed that matter by bringing in limitations on access to work if people only applied within a certain period of time, and there were some other measures taken in relation to that.

This is a similar issue. The access to judicial review has been an area where the parliament has sought to limit that access from a time limitation point of view. People do have the right to go to court. They enjoy that right under section 75(v) of the Constitution and under part 8 of the Migration Act. But in relation to the Migration Act, in 1994 there was a view that time limitations should be brought in relation to that process, or at least in relation to the application period for that process, so that a person was not able to receive an adverse decision and then many months later, when located by a departmental compliance officer, go to court and start off an entirely new process involving potentially several layers of judicial review.

The third aspect that I would like to mention briefly relates to our concerns about knowing who is and who is not lawfully in Australia, and I think we touched on this in our first submission. We have had the situation with some of the class actions where people have not even really realised that they are the party to a class action. They have simply paid a couple of hundred dollars and been told that that would allow them to stay in Australia and continue working. They simply regard it as a \$200 work visa in the same way that some people regarded refugee status as a \$30 work visa some years ago.

We face a very real situation in our compliance offices locating people in the community who are here illegally because their visa had expired but, upon investigation, finding out that in fact they are a member of a class action that brings with it access to a bridging visa and various other things. So the fact that we have moved away from an individual application—which brings with it an individual bridging visa and which is clearly able to be understood, recorded and processed so that a person has lawful status—becomes far more problematic when you get 3,737 people paying a couple of hundred dollars each and some of them not even being aware that they are actually the holder of a bridging visa and in the court.

This is simply one of many situations that the government and the parliament have been forced to look at in relation to process itself bringing benefits. While there is obviously strong bipartisan support in relation to the fact that people are entitled to a fair go, it is a question of whether or not that extends into a very undisciplined sort of process, as we are now seeing.

Mr RIPOLL—Can I just pursue a couple of things you have said there. One is that some people are part of a class action and do not really know what it is all about, how they even got there, what they are doing and what benefits it may bring. How does that fall into place with what is the claimed benefit if everyone doing this is on a prolonged stay just in terms of process and they do not even know they are doing it?

Mr Metcalfe—What they do know is that they have a work right.

Mr RIPOLL—But how do they comprehend that it is part of the process if they are seeking process? How do all these things in their mind say, ‘If I go down this path, I consciously take this action to join a class action to prolong my stay because I get this benefit?’ As you say, some do not even know they are part of a class action. I just do not think that is addressing the problem of these individuals themselves because we are saying that, at the core, this is about a prolonged stay in terms of seeking a process, whereas if they do not know they are actually doing that, they are getting a benefit. Someone is just saying, ‘Here’s the benefit.’ How do they understand this process?

Mr Walker—Potentially, they fall into two categories. As to those individuals who go to the solicitor who is running the class action, pay their contribution to be a member of that class action and ask about advice on what the potential outcome is and so forth, I am afraid we would not be able to answer. But there is another aspect to the way in which part IVA is constructed. It is an ‘opt out’ of the class action. To give you an illustration of what the potential consequences can be, in the current class actions that are running the RRT decision making process and RRT decisions, because of the nature of the ‘opt out’, everyone who has had an RRT decision, be it favourable to them or adverse, is potentially a member of that class and may be a member of the

class. Picking up Mr Metcalfe's point of the issue for our compliance officers, a failed asylum seeker who has been to RRT review could potentially be a member of that class and not be aware of it. Similarly, they are entitled to a visa.

Mr Metcalfe—We are therefore getting into the situation of potentially wrongful imprisonment and other very significant issues. I think those points I have made, Mr Ripoll, are encapsulated on page eight of our original submission, which talks about that theme of the problems where we do not understand that a person is a member of a class action. The second point is that people were arriving at the department with letters from solicitors asking that they pay some money themselves, not really comprehending what processes they were getting into.

Mr RIPOLL—In terms of those genuine cases, I still have a problem with the 28 days. I have had a look at the advice from the Australian Government Solicitor and, at best, it is not good advice. At best it says, 'I consider it could be held invalid,' or, 'It could be held valid in certain circumstances.' But, under section 75 of the Constitution, it could be argued in the High Court that it is not constitutional and could create more problems. In conclusion, Henry Burmester QC said:

I conclude that the risk of the High Court striking down any statutory time limit would be particularly acute if the time limit was unreasonable.

He goes on further to say that it may not be unreasonable, but it could be found to be. So I am not convinced by the 28 days. What about those genuine cases where somebody, for whatever reason, misses a fairly strict cut-off by a day or a week, excluding those who have been around for a long time—let us say, otherwise not available, hiding or coming into a class action?

Mr Metcalfe—I would like to make two comments in relation to that. Firstly, the 28-day period has been in place for the last six years in relation to applicants who go to the Federal Court on an individual basis under part 8 of the Migration Act. I do believe that there is case law on the fact that the 28-day period is there and that, if you go beyond the 28-day period, unfortunately your access to the court is no longer available. That is a clear policy intention of this parliament—that there be a time limit.

The second point is to expand on the point I raised earlier and as provided in evidence to other committees in relation to the judicial review bill, the bill that is currently before the Senate. The actual number of people who obtain a different decision by pursuing judicial review on which, at the end of the day, the court is able to make a decision only as to whether a decision was lawfully made—the only available sanction or power for the court is to remit it to a decision maker. It has to be seen that this sits as part of a comprehensive scheme where the minister also has powers to intervene in the public interest following a review by the Migration Review Tribunal or the Refugee Review Tribunal.

I think it is a matter of public record that the minister has intervened in a significant number of cases over issues of people falling between the cracks in the regulations where there are particularly pertinent and humane issues and where compassionate issues are not becoming available. The court is not the only place that a person can go. The person does have access to processes. They have been through a primary decision. They have been through a merits review decision. They do have access to the court within a 28-day time limit. They also have the opportu-

nity to approach the minister and for the minister to consider their particular circumstances under section 417 or other sections of the Migration Act.

Mr RIPOLL—I think one of the parts that are pointed out in this advice is that the difference with this legislation is that it is not quite, as you say, with the 28 days. This would have it deemed that the 28 days would commence from when it was proclaimed that the notification was received, whether it was received or not. That in itself could be part of that. I think that is one section of this advice that I find of some concern.

Mr Walker—We did act on that part of the advice. In contrast to the way in which the 28-day time limit operates in the Federal Court—where it is 28 days from the deemed notification—the way that the provision is drafted in the bill to apply to the High Court it is from date of actual notification. It is picking up that particular point.

Mr RIPOLL—That is picked up?

Mr Walker—Yes, that is right. That is picked up in the bill. It is not a deemed notification provision in relation to the High Court.

CHAIR—You were saying one of the advantages to people in a class action was that they got a bridging visa. In what circumstances do people on bridging visas get work rights?

Mr Metcalfe—Essentially, it is a question for the bridging visa as to whether there are work rights attached. For example, if a person is an applicant for refugee status, they need to apply within the first 45 days of arriving in Australia to obtain a bridging visa with work rights.

CHAIR—Presumably if this is going to the courts, they have obviously been here for quite a while, so that would not apply.

Mr Metcalfe—There is a flowthrough effect, though. It depends on the type of bridging visa you may have had in the past. I do not know whether anyone can help me on whether a bridging visa in relation to a class action brings or does not bring with it a work right. That is a technical point. We can take that on notice.

CHAIR—I understood that you were saying to Mr Ripoll that part of the advantage they were seeking was to work in Australia. If that bridging visa that they get because of the class action does not enable them to work in Australia, that is not actually a benefit to them.

Mr Metcalfe—There are circumstances where people work even though they do not have permission to work.

CHAIR—So there is a possibility of illegal work, and we know that is certainly going on. I take that point.

Mr RIPOLL—Say this bill goes through, and its legislation is enacted and class actions no longer take place, then all of those people that otherwise would have come forward no longer have that avenue so they do not come forward. What happens? They no longer come forward,

and whatever situation they are in, they just remain in that. I am trying to look at the practical effect in terms of what outcome you might have in the short term because we have established that it is the short-term prolonged stay we are trying to diminish.

Mr Metcalfe—I suppose there would be a couple of outcomes. The first would be that the opportunity for people to advertise and market the opportunity for a longer stay in Australia would disappear. It then becomes a decision for the individual as to whether they are going to seek to remain in Australia illegally. There clearly are implications that flow from that in relation to compliance action and the risk of apprehension, arrest, detention and removal, noting that around 13,000 illegal immigrants are located in the community every year and removed or otherwise have their status resolved. Alternatively, the person could decide to pursue an individual application, noting that they would need to do so within 28 days for that to be a valid application.

We do believe that the removal of the access to class actions would ensure that people would not be able to cling to hopes that they would have a further lengthy period of stay in Australia to do whatever they want to do while that particular class action is resolved and, as we saw in the Macabenta case, goes through several tiers of courts even though the applicants are unsuccessful at every stage of the process. Madam Chair, I have just been advised that in bridging visas that arises in relation to class actions, there are no work rights attached, so if there was to be work—

CHAIR—It is illegal?

Mr Metcalfe—They would be working illegally.

Mr RIPOLL—You raised the point that it will prevent people from advertising. This is a really roundabout way to prevent people from advertising about trying to prolong people's stay.

Mr Metcalfe—It just removes the basis for the advertising.

Mr RIPOLL—It seems that this is a lot of legislation just to prevent that. If that seems to be the problem, maybe some advertising legislation might be a better approach to that particular problem. I do not know that getting rid of class actions will do it. I think the advertising will just be aimed at another avenue to attract those people.

Mr Metcalfe—It is a question of whether you treat the symptom or the problem.

Mr RIPOLL—Given the fact that, clearly, from your effort in cities people do not really understand what they are doing, a clever advertiser who does understand what they are doing could advertise under another guise to get that same \$200 out of people for an individual case. I still do not see the practical benefit.

Mr Metcalfe—I cannot see any members of the legal profession simply saying it is going to cost \$200 to proceed with an individual case. I could not rule out the fact that some people may tout for business and whatever, but it would obviously be done on an individual basis and that is a more expensive individual undertaking. I accept that, while there is a market in people seeking

to stay in Australia for a longer period, clever people will always be looking for loopholes to exploit. We have seen that with refugee status and we are seeing it with class actions.

Mr RIPOLL—Are you saying that people are taking illegal work anyway if they are not getting a bridging visa to stay to work? Legally or not legally, I was not too sure.

Mr Metcalfe—I have not said that but I have suggested that perhaps some people who are here legally are working illegally.

Mr RIPOLL—I am concerned too about the number of people who are overstaying here. It is quite a substantial figure as you are aware. Obviously a lot of those people have got to survive somehow. I would assume that there is a great number of them working or otherwise gaining some sort of income. How does this legislation prevent that occurring? If class actions are no longer a viable option, how does that then, in itself, reduce a prolonged stay by those 50,000-odd people that are prolonged stayers?

Mr Metcalfe—It is part of a comprehensive scheme. While it is a standalone bill and we believe it has merit as a standalone bill, it sits also with the judicial review bill that is in the Senate. It sits with initiatives of the government to address the issue of non-compliance and overstayers generally in terms of boosting resources associated with detecting illegal immigrants in the community. It sits also with initiatives such as the review of illegal workers where there is a strong desire to ensure that employers are aware of the issue of work rights, that jobs are there for Australians and for people who have permission to work and that those jobs are not being stolen or undermined by people who are prepared to work in a black economy. It is an important piece of legislation but it is part of a comprehensive series of measures.

Senator McKIERNAN—I want to stay with that theme for a few moments with a couple of questions. You rightly picked up through the course of the public hearings that several witnesses, as you say in your supplementary, had suggested that the bill penalises class action participants when it is responding to the actions of particular solicitors who are conducting class actions. The point was made by a number of witnesses, but let me, just for the sake of me entering Heaven at a later time, make reference to Father John Murphy in Sydney. I know Father Murphy will appreciate it.

The attack is not on those who are perpetrating the scams which those advertisements that were provided to the committee so vividly illustrate, the bill is not attacking them. We have been told in your submissions and in other submissions that the minister wrote to the Law Society of New South Wales in regard to one of the letters in March of last year. Has anything happened to that?

Mr Walker—The New South Wales Law Society has investigated the matter. They have not responded to the minister in relation to the advertisement, although they have in relation to the concerns he expressed in relation to the class action. In particular, he had some concerns with the advice that the firms provided to applicants in their letters, and also with the way in which they were charging fees and accounting to applicants for the fees. The Law Society investigated the matter and responded that these did not breach any of the guidelines in relation to the conduct of class actions.

Senator McKIERNAN—Has the department investigated any ways and means of putting in place guidelines which would regulate and control the actions? Probably you would have to talk with the Attorney-General's Department on this one rather than doing it on your own, but has any initiative been taken in regard to that? Let's face it, the information was provided to the committee because of what it was—the exploitation of people who were in very vulnerable circumstances.

Mr Walker—We have not taken it up with the Attorney-General's Department. We are in the process of doing that. The Australian Law Reform Commission has made recommendations in relation to the operation of part IVA, 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. It is in the broader context, as you say, Senator, of the conduct and control of conduct of solicitors in running class actions.

Senator McKIERNAN—One area where the department has a more hands-on effect on the regulation of things is with the Migration Agents Regulation Authority who appeared before the committee some time ago. They were provided with copies of the advertising in October of last year, and we have found in their supplementary submission that we have received that it is only getting to the board this month. It seems to me that the system is falling down and that, whilst the government is attacking one particular part of it, it could be, in turn, penalising a number of individuals who may benefit by having access to the judicial process through the means of class or representative actions.

It could be argued, and I daresay some of the submissions do argue, that it is a sledgehammer approach to a problem. There is no doubt there is a problem there, but is the sledgehammer too big to attack the problem? Why don't we attack the problem at the MARA level in the first instance, then at the Law Society level, the ALRC, the Attorney-General's Department, and with whatever means we can use from the legal profession?

Mr Walker—There are two aspects to it. There is the concern with the conduct of some members of the legal profession in relation to how they promote class actions in this area, but there is also a concern that the government has in relation to many people using class actions and using the process, and that is what this is primarily directed at. The analysis that we have done to date indicates, and the belief the government has, is that they have not been successful, with the exception of one small class action, and that was Fasil Din on a particular issue. The participants in the class actions, and in relation to the Macabenta and related matters, were challenging regulations as being in conflict with the Racial Discrimination Act. There are many individuals there who had not made applications since they had come into Australia. So they had actually overstayed their visa and this was being used as an opportunity—it is use of the process.

The bill is directed at use of a process solely to remain in Australia. In our investigations, there are certainly individuals there who are unaware of what the process is, and there is an element of precisely what advice is being given to them. But there is also, we believe, a sizeable number—probably a predominant number—who knowingly are involved in class actions solely for the purpose of using the process to remain in Australia.

Senator McKIERNAN—According to your first submission there have been 21 class actions. We have not asked a question about which legal firms were involved in those 21 actions. Are there companies that were involved on more than one occasion? Secondly, are any of those actions started by individuals, as opposed to lawyers or legal firms?

Mr Walker—The firms would start the action on the instructions of an individual. I think they would tell you that. It is a matter on the public record, in the court records, but we can certainly provide in that table the names of the representative actions, the applicant solicitors' names and the numbers involved. I see now that only one did in fact start as an individual. That was the Wang matter.

Senator McKIERNAN—My reason for asking that question is that it may not be the individuals. The individual failed asylum seeker or failed person who had been through ordinary process may still believe they have got a genuine case, and they may be encouraged to enter these actions by way of the type of advertising—and I daresay there is other advertising of that type—that has been presented to us in evidence. If you can provide that information, it would be of assistance.

Another question: has there ever been a case where the courts have found that persons joined to class actions have been seen to be vexatious or unfounded inclusions? That was part of the evidence that was put to the committee during the course of the public hearings as well, that the courts themselves could regulate this process—that, if people were seen to be abusing the system, the courts could take action to sort matters out for the court and could identify persons who were unfounded or vexatious. Have there ever been instances like that?

Mr Walker—I am not aware of any where the court has found that they—

Senator McKIERNAN—Has the department then, in the course of your monitoring of what is going on, found that vexatious or unfounded claims have been part of the actions? Other than the action of the minister writing to the Law Society, has the department or, indeed, the minister taken any action to attack those vexatious or unfounded claims at source rather than through the parliamentary process of changing the legislation?

Mr Matthews—I am not sure if 'vexatious' is the right word, but part of the process of class actions or representative actions, and part of the reason that they are complicated and slow, is that, as Mr Walker was talking about earlier, there is this opting-out process and, for our purposes, because of the bridging visa, there are de facto opting-in processes. The court attempts, at least, to go through some sort of management of the class action process, in terms that it has to decide whether the persons that purport to be part of the group or the class are in fact part of the class. I think that there have been instances where certain persons who purport to join classes have been found by the court not to have a common interest and so on. Hence I am not sure that 'vexatious' is the right angle into that. Whether they are vexatious because they have gone into the class I would have no idea, but they do not actually fall within the common interest or the class as defined by the front runner, the representative party.

Senator McKIERNAN—I did not want to use the term 'abusers' because I am not so sure that was a fitting legal term to be using.

Mr Walker—There is some illustration of how we have approached some of the issues on pages 3 to 6 of our supplementary submission, in particular from page 5 in the Macabenta case. On pages 5 and 6 there is a quote from the transcript of where the minister's solicitor has raised issues in relation to the common issues and so forth.

Mr Metcalfe—The point I made with Mr Ripoll earlier is that the government does see that the appropriate response and the most substantive response to this particular issue is to move away from access to class actions in this jurisdiction. I would simply invite the committee to recall the issue that has come up many times, and that is that this is probably the only administrative law jurisdiction where delay ordinarily benefits the applicant rather than works against the applicant, and I invite the committee to look at this in the context of many attempts over the years by imaginative people to find processes to use.

Senator McKIERNAN—You have been reading the transcript, haven't you!

Mr Metcalfe—Certainly the marketing of these schemes is an issue—those various examples attached to our first submission. Certainly some people could say it has been a means of people who wish to stay in Australia longer and who are desperate to do so finding a process to attach themselves to. Or you could also take a view that there are vulnerable people who are being exploited and given false hopes through these processes. Both are equally valid views, I think, but at the end of the day you can treat the symptoms or you can go to the root of the problem. We believe this bill goes to the root of the problem.

Mr RIPOLL—Can I just pursue one more point. It is pretty well established by all the data we have got and all the evidence that has been brought to us about the very high number of failed cases, and you would obviously have names, documentation and everything that comes with that. What has happened to those people in those failed cases? Where are they today? I will raise one particular one to make it more specific. In the Macabenta case, October 1997, there were 3,737 people involved. All failed. What happened to them?

Mr Metcalfe—I will take on notice whether we can provide the committee quickly with that advice. With 3,737 people, a variety of things could possibly have occurred. Some may have subsequently applied for refugee status, because you do not need to be lawfully here to apply for refugee status; some may have succeeded, some may still be in a process. Some may have sought the minister's intervention and either succeeded or not succeeded in respect of that. Some may have departed Australia. Some may be here illegally. Whether we have an accurate breakdown of those 3,737 cases as a cohort I am just not sure, but if we can provide the information we will.

Mr RIPOLL—Given what you have just said, and let us just assume that some are here illegally, how does taking away a class action prevent that happening otherwise?

Mr Metcalfe—It removes the ability for people to continue to stay in Australia legally. Therefore they have to make that very real decision as to whether they are going to remain illegally in Australia and face the consequences of what that brings with it: not only the risk of arrest, detention and removal from Australia, but also a ban on ever coming back to Australia and also significant problems in travelling to other developed Western countries where issues of

overstay and whatever would be valid considerations in terms of future visas. So it removes a process that is currently being used by people to stay longer in Australia in what we regard, in the vast majority of cases, as unmeritorious circumstances.

Mr RIPOLL—I am not totally convinced. Okay, some stay illegally afterwards, and you say that it removes the possibility then of people staying here legally. How many of those entering the class action in the first place were here illegally to start with? How does the class action remove those items? How does that change what is the outcome in the end? We are told that the core goal, the core outcome the government is seeking through this bill is to prevent stay. But then, if class action is removed and the terminology and language is different, the same people are still here, the prolonged stay still occurs, just under different language.

Mr Metcalfe—I do not accept that the same people are still here because it does mean that, if a person chooses to stay in Australia, instead being lawfully in Australia they are unlawful and therefore are subject to compliance activity.

Mr RIPOLL—That is fine. That gave me what I am looking for. But, given the fact that we started with the point that 90-odd per cent or whatever—an extremely high percentage—of cases fail, then wouldn't this be working in your favour? This means that those who have failed in that case have one less avenue available. In fact, they really do not have any other avenue any longer to be there.

Mr Metcalfe—We would argue that they should not have this avenue. We should say that they do have avenues to access the judicial review of matters through part VIII of the Migration Act and whatever.

Mr Walker—I think that in our original submission we did identify individuals who were jumping from one class action to another. So, as one failed, they were into another. They were virtually in a perennial cycle of delaying the inevitable departure from Australia. I think there are significant—

Mr Metcalfe—Just to amplify that point, annexed to our original submission is a letter, with details blanked out, from a solicitor:

Dear Client,

URGENT NOTICE – MACABENTA CLASS ACTION FINISHED –

JOIN OUR NEW CLASS ACTION! KAGI HAS ALSO FINISHED!

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 ...

It is very easy to join!

Mr RIPOLL—Should we do something about these—

Mr Metcalfe—It is very easy to join. What we would submit is that, if the availability of the class action process is removed, then that type of advertising will simply not be able to occur.

Senator McKIERNAN—There is one thing about the costs. In your supplementary you said that the average class action cost, over the last three years, \$77,000. Could you identify which three years, how many actions were involved and how many people were involved in that, to give us a perspective on it. I think that \$77,000 over three years makes it look a little bit vague.

Mr Metcalfe—On notice, yes.

Senator McKIERNAN—This could go on to on notice as well if you want it to. You talk about average litigation costs. Can you give us an idea of what costs are included in this, what costs are excluded and what are the average administrative costs for class and individual cases. I guess we can give you that.

Mr Walker—What is covered there are essentially our costs, or the government's costs. What they cover, I understand, is the totality of our solicitors' fees, barristers' fees and the costs of the internal litigation area of the department.

Senator McKIERNAN—If you are putting barristers in there, you are getting it cheap at \$77,000 over three years. That is why I would like a breakdown.

Mr Walker—That is the average. It has ranged from three to 15, so that is between \$30,000 and \$150,000 depending on the action, how far it has gone and also how many individuals are involved.

Mr Metcalfe—We will take that on notice and come back to the committee.

CHAIR—If you will give us a list which clarifies principles of difference between class, representative and test cases, and if you could come up with a hypothetical example to show us how it would be dealt with in each of those three types of cases, that would be very helpful.

Mr Metcalfe—We will certainly attempt to do that.

CHAIR—Sorry, that is probably quite a task for you, but it would be helpful. The other matter is that we asked you for a copy of the A-G's advice on Australia's international obligations. Did you give that to us?

Senator McKIERNAN—It is an attachment.

Mr Metcalfe—I think that was Mr Burmeister's advice that Mr Ripoll referred to earlier. We also took at least one item on notice for Mr Ripoll, in terms of where the Macabenta class members now are, to the extent possible. But we will read the transcript carefully.

CHAIR—We have kept you again for quite a long time. Thank you very much for your attendance today. If there are any corrections to be made to the *Hansard*, let us know. Thank you very much for your tolerance in staying here until 20 to 10.

Resolved (on motion by **Senator McKiernan**):

That this committee authorises publication of the evidence given before it at public hearing this day.

Committee adjourned at 9.40 p.m.