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LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

Reference: Migration Amendment (Judicial Review) Bill 2004

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SENATE**LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE****Wednesday, 12 May 2004**

Members: Senator Payne (*Chair*), Senator Bolkus (*Deputy Chair*), Senators Greig, Ludwig, Mason and Scullion

Participating members: Senators Abetz, Bishop, Brandis, Brown, Carr, Chapman, Eggleston, Chris Evans, Faulkner, Ferguson, Ferris, Harradine, Harris, Humphries, Kirk, Knowles, Lees, Lightfoot, Mackay, McGauran, McLucas, Murphy, Nettle, Robert Ray, Sherry, Stephens, Stott Despoja, Tchen, Tierney and Watson

Senator Bartlett for matters relating to the Immigration and Multicultural Affairs portfolio

Senators in attendance: Senators Bartlett, Bolkus, Kirk, Ludwig, Mason, Payne and Scullion

Terms of reference for the inquiry:

Migration Amendment (Judicial Review) Bill 2004.

Committee met at 5.47 p.m.

CHAIR—This is the hearing of the Legal and Constitutional Legislation Committee's inquiry into the provisions of the Migration Amendment (Judicial Review) Bill 2004. The inquiry was referred to the committee by the Senate on 30 March 2004 for report by 15 June 2004. The bill seeks to restore the following key procedural elements of the Migration Judicial Review Scheme: to set time limits on judicial review application, to restrict the hearing of judicial review of migration applications to the High Court, the Federal Court and the Federal Magistrates Court, and to prohibit judicial review if merits review of the primary decision is available.

The committee has received 19 submissions for this inquiry, all of which have been authorised for publication and are available on the committee's web site. Witnesses are reminded of the notes they have received relating to parliamentary privilege and the protection of official witnesses. Further copies are available from the secretariat. Witnesses are also reminded that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. This committee does prefer all evidence to be given in public but, under the Senate's resolutions, witnesses do have the right to request to be heard in private session. It is important that witnesses give the committee notice if they intend to ask to give evidence in camera.

[5.48 p.m.]

CLOTHIER, Mr Michael, Member, International Law Section, Law Council of Australia

CHAIR—Welcome. The Law Council has lodged a submission with the committee which we have numbered 17. Do you wish to make any amendments or alterations to that submission?

Mr Clothier—No.

CHAIR—Then, as we normally do, I will invite you to make an opening statement and we will go to questions from the committee.

Mr Clothier—The Law Council's view, with respect, is that this bill is demonstrably at odds with settled constitutional principle that access to the High Court under section 75(v.) of the Constitution should always be available for persons aggrieved by decisions of Commonwealth officers.

I should perhaps give you some indication of my background in these matters. I have grown old with judicial review in this jurisdiction. I can remember, as a young legal aid lawyer back in 1979, issuing proceedings under the new Administrative Decisions (Judicial Review) Act 1977 against immigration officers and other Commonwealth officers. The highlight of my legal aid days was running a case involving an illegal Tongan, Mr Jason Kioa, to the High Court. That landmark decision in 1985, *Kioa v. West*, decided once and for all that at common law illegal immigrants were entitled to natural justice. In that decision, the High Court said that there was nothing innate about immigration decisions that precluded the ordinary rules of judicial review applying—and I cannot but agree with the High Court.

The topsy-turvy ride in the immigration law area since 1985 seems to me to have had successive ministers attempting to limit the jurisdiction of the courts in reviewing decisions of their officers and decisions of tribunals. The AD(JR) Act applied for a very long time in this area. The first attempt to limit the number of cases going to the Federal Court was effectively made by Senator Ray when he introduced a codification of the migration laws. He was unfortunately persuaded not to adopt the model migration bill of the Cape committee, which recommended that each regulation in the codified system have an in-built discretion. Instead, the codification is a very rigid piece of work and, I think, is largely the reason why we are seeing so much judicial review today and so much unhappiness with immigration decisions.

Senator Ray was also unwisely persuaded not to allow merits review to go to the general Administrative Review Tribunal like all other decisions. He created an internal portfolio tribunal called the Immigration Review Tribunal. That tribunal had special procedures whereby applicants were not entitled to be represented. They were not entitled to call witnesses and they were not entitled to examine or cross-examine witnesses that might be called. This style of inquisitorial tribunal was copied by Gerry Hand when he was minister in 1992, when he created the Refugee Review Tribunal—again, within the portfolio.

I know there was an attempt to move these tribunals back under the umbrella of the general administrative tribunal model, but that failed because of the government's insistence that the

GATT model have more of the procedures of the inquisitorial models within the portfolios. I think the corresponding judicial review arrangements got out of hand when, with respect to Senator Bolkus, he introduced part 8 of the Migration Act and removed ordinary judicial review from the courts and introduced such concepts as a denial to applicants of seeking judicial review where a tribunal member or an officer had made a decision that was so unreasonable no reasonable decision maker would make it, precluding *Wednesbury* unreasonableness. That spurred migration lawyers on to greater heights. Those lawyers, of course, discovered section 75(v.) of the Constitution: the constitutional guarantee that allows anyone to sue in the High Court for actions of a Commonwealth officer.

Philip Ruddock's donation to the cause of judicial review was the privative clause legislation, which, again, was an abject, almost complete failure. The High Court neatly sidestepped the privative cause legislation by simply saying, 'It doesn't apply to unlawful decisions'—that is, decisions where there is jurisdictional error. The Law Council think this further attempt at limiting judicial review will equally fail.

I would like to give you an example of one client I had in the last few weeks. This was an overseas student. He was studying in Australia and paying private overseas student fees and he was most anxious to apply for permanent residence under Philip Ruddock's new regime for graduate students. His college closed down and he was told that he could swap over to another college but he needed to sign some forms, which he was to give to the student counsellor, and he did. One of those forms was a visa application.

Unbeknownst to the student, the department of immigration granted him a visa, but that visa was six months shorter than the one in his passport. The department forgot to send him a letter saying that he had the new visa. So when he finished his degree and he applied at the Adelaide Skilled Processing Centre for his permanent residence he was told that approximately a year earlier he had been granted this earlier visa on the department's computer and therefore he had been unlawful at some time in the last six months. His application was declared invalid and he was told he had 28 days to leave the country.

Here is a classic case of a decision that was more than 84 days old. I issued judicial review proceedings in the Federal Court using the original jurisdiction of the High Court. I attacked that decision and the Commonwealth, three weeks ago, rolled over and paid my client \$6,000 in costs. This was a very deserving young man. He did not deserve to be treated that way and he was entitled to seek judicial review of that decision. That was a decision where they had actually granted a visa. So it is a moot point whether merits review would be available.

There are two aspects of this bill which worry me: firstly, that primary decisions where merits review is available are going to be ousted; and, secondly, these time limits. If I had to act for that young man today—and there are plenty of students, who are victims of the rather draconian 880 legislation, trying to apply for permanent residence—I would be forced to issue proceedings in the High Court of Australia and to challenge these time limits on the basis that they are an impermissible attempt to oust the court's jurisdiction under section 75(v.) of the Constitution.

Traditionally, the courts, particularly the High Court, had their own rules of court, setting things like time limits. I think this is the first time that a general time limit of this nature has

been attempted to be imposed on the High Court. I may be wrong. I am just a solicitor; I am not a QC. The Law Council of Australia is of the view that the issue of judicial review should be brought back into the mainstream of judicial review in Australia, that the Administrative Decisions (Judicial Review) Act should be the act which covers decisions of Commonwealth officers and that there are other ways in which the things that worry the government at the moment can be addressed. The Law Council sets those out in its submission.

CHAIR—Thank you very much, Mr Clothier. The committee will, I am sure, pursue the question of whether this is the first time a time limit in an approach such as this has been applied in the High Court. I am not sure of the answer to the question either.

Mr Clothier—I am sorry; I should have researched it more.

CHAIR—No, not at all. That is the purpose of the hearing process—we can pursue that ourselves. You used an example to address the time limit question, particularly from your own experience. More broadly though in your experience, is 84 days going to be an adequate period?

Mr Clothier—I have just issued proceedings for a couple who have been refused a religious worker visa. They are ministering to Aboriginal communities in the Far North of Queensland. They are out of time, too. It will mean that those of us who litigate in this area will have to choose the High Court. I think it is going to block up the High Court. The High Court may decide that these time limits are set in concrete and give full weight to them, but I think they will be looking very closely at these time limits. If the government had set, say, a seven-day time limit for applications under section 75(v.) of the Constitution in the immigration law area, the High Court would probably—

Senator BOLKUS—It would only take one decision in the High Court to determine, for instance, that the time limit provided is a reasonable time, and they would not hear any more, would they?

Mr Clothier—My limited intellect would say, ‘Yes, it should only take one decision,’ but with High Court judges you never know.

Senator BOLKUS—That is right, but when you say that it would clog the High Court there is a capacity there for the High Court to decide: ‘Eighty-four days or whatever is a reasonable time. Go back to where to you should be.’

Mr Clothier—The High Court gave a rather stern warning in S157 to the executive and the legislature. They said:

The centrality, and protective purpose, of the jurisdiction of this Court ... places significant barriers in the way of legislative attempts (by privative clauses or otherwise) to impair judicial review of administrative action. Such jurisdiction exists to maintain the federal compact by ensuring that propounded laws are constitutionally valid and ministerial or other official action lawful and within jurisdiction.

With respect, the High Court has set time limits in 75(v.) applications for a long time. It is really not the job of the executive or the legislature to interfere and create extra time limits under the Constitution.

Senator BOLKUS—Why not? The legislature does it all the time.

Mr Clothier—Because if the legislature said, ‘You have two days or one day to apply under 75(v.)—

Senator BOLKUS—That might be unreasonable, but I am saying that the High Court could determine what a reasonable time is and, as a consequence, the High Court would not be clogged by a whole series of applications.

Mr Clothier—Yes, that may be a result. You might be as optimistic as Philip Ruddock was when he put in the privative clause.

Senator BOLKUS—Isn’t your stronger ground the definition of the privative clause decision and purported decision? What do you say is the impact of this legislation on a decision that would otherwise have been outside the jurisdiction?

Mr Clothier—I think it is very carefully crafted to try to take the High Court up on its decision in S157 that the privative clause legislation was constitutionally valid.

Senator BOLKUS—What does this extended definition do in your eyes?

Mr Clothier—On the face of it, it makes an unlawful decision unreviewable.

Senator BOLKUS—Can it do that?

Mr Clothier—If a decision is unlawful, it is a purported decision. It makes it unreviewable.

Senator BOLKUS—If it is unlawful because of a lack of jurisdiction, is it not ultra vires and, constitutionally, you cannot remedy it by a mere act of parliament?

Mr Clothier—You might have me there.

Senator BOLKUS—Think about it. You might want to come back to us.

Mr Clothier—I do not know which way the High Court is going to jump on this, but it seems to me that if they perceive it to be an interference in their jurisdiction under 75(v.) they will take steps similar to those they took in S157. It does not help in this jurisdiction to put absolute time limits on applications. It should be left with the courts and the AD(JR) Act. The Administrative Decisions (Judicial Review) Act that everybody else uses sets a 28-day time limit, but in particular circumstances that can be waived—and those are circumstances determined by the courts.

Senator MASON—The argument behind the public policy dilemma is that the AAT, the Federal Court or whatever are all clogged up with these cases. You can see what the public policy problem is for governments of either persuasion; this is not a partisan point. How is the parliament going to address this?

Mr Clothier—The courts are perfectly able to clean out their own stables. They have plenty of power to do that.

Senator MASON—That has not been the experience in the past. That is the problem. That is our dilemma.

Mr Clothier—I know successive governments have thought that, but where has it got you? We have two portfolio tribunals. A large number of applicants are voting with their feet and saying, ‘We didn’t get a fair hearing before those tribunals.’ I think that is the place where

public policy needs to have a good hard look. I think those tribunals should be moved back into the general administrative stream. With respect, that is the Law Council's submission.

Senator BOLKUS—With respect, we have a piece of legislation before us and it would actually help your case if you concentrated on it.

CHAIR—Senator Bolkus, I think Mr Clothier was in fact responding to Senator Mason's question. It was a reasonable response for Mr Clothier to have taken.

Senator MASON—I am sorry, Senator Bolkus. Mr Clothier, you understand the policy dilemma we have here. Past experience indicates that there is a problem with claims which technically are not vexatious but which the system cannot cope with. That is the argument. That is what everyone I have ever spoken to says. We need some way of streamlining the process so that justice can be seen to be done and will be done. That is our problem. That is a public policy problem. It is one that exists. Everyone talks about it. We need some solutions.

Mr Clothier—The problem with these absolute solutions is that all the innocent parties who deserve judicial review in circumstances where they are out of time will, if this legislation becomes valid, be left out in the cold. I understand the concerns of the government with respect to the huge number of refugee cases which are being lodged with the courts. I might say that the last four cases I have done finished in the last month or so and none of them were refugee cases. I won three out of four of them. Something like \$21,000 in legal costs has been paid to my clients—and quite rightly, too—because of these absurd laws, which really need to be looked at very closely. The Law Council suggests that there are ways in which you can satisfy that demand without forcing people to go right to the top—that is, either to the minister, with ministerial discretion—

Senator MASON—Or to the High Court?

Mr Clothier—or to the High Court. You can do that by empowering Immigration officers to again have discretion to grant visas, particularly where there are strong humanitarian or compassionate reasons. You do not force them up to the top. You remove a lot of that desire to litigate.

Senator MASON—But are you sure about that? If people are unsuccessful and the discretion of an Immigration officer is exercised against them, they still have to have appeal rights. Are you sure that in the end the system will not again be clogged? If the discretion is exercised in accordance with the wishes of the refugee, fine; that is easy. But, if it is not, the appeal rights remain and up we go again. This is a dilemma that the parliament faces and it is one to which we really need some solutions.

Mr Clothier—I personally represent Australian citizens who are litigating about their spouses and Australian companies that are litigating about overseas skilled labour. These are people who are entitled to use the AD(JR) Act or its equivalent.

Senator MASON—I accept that.

Mr Clothier—What we are really talking about, aren't we, is refugee cases? That is what we are really talking about.

Senator MASON—That is probably the most difficult public policy aspect. I accept that.

Mr Clothier—Yes. I would be going beyond the Law Council’s brief to say anything about dividing those two up.

Senator MASON—I understand that.

Mr Clothier—I agree a solution has to be found. The Law Council proposes some solutions and thinks they are well overdue and will go a long way to fixing the problems. If you have had a good hearing—for example, in the AAT, where you can have your own lawyer or representative, where you can call evidence, you can cross-examine witnesses and you can do all the things that you normally do—and you lose, you are not likely to be litigating further up the road. You only have to look at the number of cases that go from the AAT to the Federal Court compared to the number of cases that go from portfolio tribunals to the Federal Court. As a legal aid lawyer, I remember that, if we lost in the AAT, it was extremely rare for us to advise a client to go to the Federal Court. We had had our day in court; we had had a fair hearing. But I come out of those portfolio tribunals—and so do just about all the other lawyers that I know, and I am chairman of the Migration Law Committee of the Law Institute of Victoria—and say, ‘Our clients don’t get a fair hearing in those tribunals.’ Something has to be done about it. We have been saying this for decades. We have been troubling deaf heaven with our bootless cries for a long time. We see attempts to produce these quick fixes where everybody loses out. That is the key.

Senator LUDWIG—I want to ask about your view in relation to whether a reported decision—and this is the difficulty, I guess—will encompass all jurisdictional errors as a label. If the court decides that it is not a jurisdictional error, but an error, is there still a purported decision made under the act? Of course, if the act is ultra vires, as Senator Bolkus has said, how can it be a purported decision if it is not made under the act? I suspect that we can flesh out some of these with the department itself, but I am interested in the view of a solicitor or the Law Council as to how it would then seek to use the legislation and advise its members about the particular way to go. The other problem is that you might end up in the High Court determining at first instance whether it is reasonable or a reasonable time in every instance. There might be circumstances where you can imagine that you might say, ‘This is unreasonable given these sets of circumstances’ and everyone might then decide to fit themselves within that scope.

Mr Clothier—Yes. I am guided by my QCs in these sorts of matters; I do not appear in the High Court myself. But I would agree that none of us knew or realised—none of us could predict—that the High Court would jump the way it did in S157. We thought that the court would hold that privative clause legislation to be unconstitutional. That was our fond hope. What they did was to say, ‘Well, it’s constitutional but it doesn’t apply to illegal decisions.’ That was probably more than we ever hoped for in terms of being able to litigate under 75(v.). I suspect the High Court may well adopt that view. If this bill goes through, we are certainly going to find out which way the High Court decides on the question.

Senator LUDWIG—In terms of the notification that is being set up, which seems to follow the same idea, do you think the way the notification regime is set up is adequate for people to be able to ensure that they have some knowledge of the decision that is being made, the appeal times and when they will run from?

Mr Clothier—At the end of last year, I had a very big case that came before the Federal Court on notification. It was a decision in the case of Chan Ta Srey—Mr Justice Gray, V995/2003. We attacked a decision that was over three years old—a refusal of a spouse visa to Mr Srey—on the grounds that it had not properly been notified to him and that time limits only run from date of notification. Section 66 of the act says that certain strict things must be done before a person can be deemed to be notified of a decision.

There are horrendous consequences for an applicant. The act says that if you follow those procedures you are deemed to be notified even if you were not notified. That is what the act itself says. You can find yourself arrested as an unlawful noncitizen because the letter fell down the back of the post office filing cabinet. Justice Gray realised that and said that this has to be strictly construed. He found that there was a technical deficiency in notification three years earlier and said that time limits do not start running until lawful notification. If you want to know about notification, it may assist the committee to have a look at the judgment—*Chan Ta Srey v. Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCA 1292—because notification is a two-edged sword. You have these strict rules of law which are trying to bind applicants but, more often than not, I am finding that I can hoist the government with its own petard. Srey is one of those. We reopened a decision that was three years old. I am sure the government did not intend applicants to use that as a shield as well as the government using it as a sword. Srey is a classic case of that. I am not sure if that assists you with the notification issues.

Senator LUDWIG—It is helpful.

Mr Clothier—It is slightly off the point.

Senator LUDWIG—You indicated that you do not appear before the High Court. The questions earlier related to the floodgates argument that has been raised by the government for why the privative clause was originally necessary and why subsequently S157, having failed in some way, requires a staunching up to ensure that we prevent this flood. Is it your experience that there is a flood of litigation in the High Court that is bogging it down? You indicated that you do go there. How long does it take for an ordinary matter you might have to get heard and dealt with?

Mr Clothier—We invariably agree to consent orders for the High Court referring the matter back to the Federal Court. We issue in the High Court in order to get the protection of 75(v.). That is what we used to do until S157. S157 made it—it was rather smart of the High Court—just as easy to issue in the Federal Court or even the Federal Magistrates Court as in the High Court because the privative clause constrictions did not apply to unlawful decisions. In my experience, jurisdiction has been pre-S157, where we would issue quite often in the High Court but we almost always agreed to remittal down to the Federal Court.

CHAIR—Did the Law Council make a submission or was it invited to make a submission to the migration litigation review? You might not be able to answer that question; you might want to take it on notice. I am just interested if these matters were canvassed in the council's submission and, if that were the case, whether the council has received any response to the issues they raised.

Mr Clothier—I think the Law Council was scrambling to get this submission together. The nationality and residence committee comprise a disparate group of lawyers all around Australia. I am not sure that they made a submission. In fact, I suspect they have not but I will check.

CHAIR—On behalf of the committee I thank you and the Law Council for the submission. We understand that the time frame has been narrow but we appreciate the contribution and your assistance to the committee this evening.

Mr Clothier—Thank you.

[6.20 p.m.]

HORAN, Mr Christopher J., Pro bono counsel, Public Interest Law Clearing House and Victorian Bar Legal Assistance Scheme

CHAIR—I now welcome by teleconference Mr Christopher Horan from the Public Interest Law Clearing House and the Victorian Bar Legal Assistance Scheme. PILCH and the Victorian Bar Legal Assistance Scheme have lodged a submission with the committee which we have numbered 9. Do you wish to make any amendments or alterations to the submission?

Mr Horan—No.

CHAIR—Thank you. I invite you to make a brief opening statement. At the conclusion of that, we will go to questions from members of the committee.

Mr Horan—As set out in the submission, the main concerns of PILCH and the Victorian Bar Legal Assistance Scheme relate to three aspects of the bill. The first is the absence of any power to extend time to seek judicial review beyond 84 days. The second is the effect of deemed notification, especially in relation to review in the High Court. The third is the restriction on judicial review of primary decisions. Some of those points are interrelated to some extent.

I will start with the time limits and deal with the first and second aspects together. Part 8 of the Migration Act has always imposed an absolute 28-day time limit on review in the Federal Court. However, initially, there was no time limit on applications made to the High Court. The privative clause amendments from October 2001 imposed similar 28-day limits on the Federal Court and, ultimately, on the Federal Magistrates Court, but they also introduced a time limit on the High Court which was, and currently is, slightly different—it is 35 days from actual, as opposed to deemed, notification of the decision.

The High Court decision in plaintiff S157 deprived all of these time limits of any effective operation. The bill seeks to address that anomaly and restore the time limits on applications for judicial review. I note that the bill has added a limited power to extend time, but this power is not available beyond 84 days, irrespective of the circumstances of the particular case and the interests of justice. For example, there might be particular cases where an applicant does not receive actual notification of a decision due to circumstances beyond his or her control, or there may be cases where the application is not lodged with the court within the time limit through no fault of the applicant. This is particularly so where the applicant is in immigration detention, with no ability to communicate with the court directly. In fact, there have been many cases in which the noncompliance with the time limit was brought about through the fault of officers of the department or Australasian Correctional Management—for example, where applications were completed within time but officers failed to send the documents to the court. There might also be cases of negligence or even fraud on the part of an applicant's migration agent.

The bill would prevent an applicant from obtaining judicial review where the application is more than 56 days out of time—that is, 56 days beyond the 28-day time limit—irrespective of the reasons for the delay or the circumstances of the particular case, and even where the

decision might be patently wrong on its face. It is also proposed for the first time that the High Court will be constrained by the same time limit—that is, operating from deemed notification rather than from actual notification. As is noted in the submission, it is likely that there will be a challenge to the constitutional validity of this absolute limit on the jurisdiction conferred on the High Court by the Constitution.

The courts have long recognised the potential injustice caused by absolute time limits and there is a list of cases set out in the submission made to the committee. In addition to those cases I would like to refer to two very brief passages. The first is from Justice French in case *W281 v. Minister for Immigration & Multicultural Affairs* [2002] FCA 419 at paragraph 40. His Honour said:

The draconian operation of the time limit provisions of the Act illustrates the proposition that absolute, one size fits all, time limits are capable of giving rise to injustice in particular cases.

The full Federal Court in a subsequent case, *WAFE of 2002 v. Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCAFC 254, at paragraphs 36 and 37—after holding that an application in that case was out of time, said:

... we cannot forebear from expressing our strong disquiet at the result. The construction of ss 478(1)(b) and (2) which we are constrained to adopt is manifestly unjust, and reflects what Mansfield J described as an “irrational intent on the part of the legislature”.

It went on:

Provisions such as ss 478(1)(b) and (2) ... are capable of operating so unjustly that they may erode confidence in the rule of law.

For those reasons, and as set out in more detail in the submission, PILCH and the Victorian bar suggest that there should be a general power to extend time where it is in the interests of the administration of justice. That could be achieved by simply removing the paragraphs imposing the 84-day limit—that is, the 28- plus 56-day limit. Alternatively, if necessary, any power to extend time beyond 84 days could be qualified by an additional requirement that the applicant demonstrate special circumstances or some other appropriate test. At the very least there should be power to extend time where the failure to comply with the time limit is for reasons beyond the applicant’s control or is due to the actions or omissions of the department or its agents, or in cases of fraud.

That covers the time limit aspect of the bill. Another aspect of the amended definition of the privative clause decision relates to the restriction on review of primary decisions. Part 8 of the Migration Act has always prevented judicial review by the Federal Court of primary decisions. These are decisions where merits review—for example, by the Refugee Review Tribunal or the Migration Review Tribunal—is, or was at some stage, available. The restrictions are currently contained in section 476(1). The problem arises because there are also strict time limits that apply in relation to merits review. So an applicant who, for whatever reason, could no longer seek merits review previously at least had the option of seeking judicial review of the primary decision in the High Court. A good example of that is the High Court’s decision in *Re Minister for Immigration & Multicultural Affairs and Anor; Ex parte Miah* [2001] 206 CLR 57. That was a case in which an applicant was, through the

fault of his migration agent, out of time to seek merits review but successfully sought review of the primary decision of the delegate in the High Court.

It is now proposed that the avenue of judicial review in the High Court be subject to an absolute time limit which runs from deemed notification so that there is the possibility of a person being left without any recourse to correct jurisdictional error affecting a primary decision. So a person in the position of Mr Miah would not have anywhere to go. PILCH and the Victorian bar recommend that the absolute restriction on the judicial review of primary decisions be removed, leaving the courts still with the power to decline review of a primary decision in appropriate cases where an alternative avenue of review is, or perhaps was, available. That concludes my opening statement.

CHAIR—Thank you very much, Mr Horan. I would like to talk briefly about the first of your recommendations, where you make reference to the court retaining a discretion to grant an extension of time in ‘special circumstances’. Why do you think that is necessary and how would you envisage that special circumstances would be determined?

Mr Horan—As I outlined, and this departs slightly from the form of the recommendation, it would be possible not to have that additional requirement and simply to have the requirement which is currently reflected in, for example, proposed paragraph 477(1AA)(b). The proposed powers currently involve a requirement that the Federal Court or the Federal Magistrates Court be satisfied that it is in the interests of the administration of justice to extend time. It would be possible simply to have that as the test.

The special circumstances test is suggested to address perhaps the underlying concerns of the bill that there should be some time restriction on applicants that distinguishes between those who apply promptly and those who delay. The special circumstances test would leave it largely to the court to determine when it was appropriate to grant an extension of time, but it would perhaps provide an indication of a legislative intention that an extension was not to be granted automatically. I think there is an example of that phrase being used in section 29(7) of the Administrative Appeals Tribunal Act, in an analogous context of applying for an extension of time for review to the tribunal, but it would leave it to the court really to give content to that requirement.

Senator LUDWIG—I am curious to know whether in your view the deemed notification provision on its own would be enough to enliven the constitutional difficulty in the High Court or whether you think that it requires a coupling of the deemed notification provision with the issues surrounding the purported decision—whether it is within or without power.

Mr Horan—I think the problem would arise from the absence of any power to extend time and the requirement that that time run from a period potentially before the applicant knows of the decision. If there were a power to extend time then the constitutional problem would perhaps not disappear but would be greatly reduced. Alternatively, if the time period ran from actual notification then, again, that would make the time period more reasonable. A danger arises because it might be argued that the court’s jurisdiction cannot be removed and the imposition of a time limit, which might be in particular cases quite unreasonable in its application, would be inconsistent with that constitutional right of review. But it does assume that the decision that is being challenged might be capable of being beyond jurisdiction.

Senator LUDWIG—Could you explain a little further in what circumstances, in your view, it would be unconstitutional?

Mr Horan—To impose the limit?

Senator LUDWIG—Yes.

Mr Horan—The constitutionality probably would not turn on the facts of the particular case. The provision would be either valid or not valid in its general application, but of course any challenge would have to arise in the context of a particular application. But the argument would be that the time limit is inconsistent with the constitutional right or entitlement to judicial review which is conferred by section 75(v) of the Constitution and that to withdraw from the court the power to extend time—and that is done quite expressly in the act by providing that the court shall not make any order which has the effect of extending time—would be seen as an attempt to effectively restrict the jurisdiction conferred by the Constitution. But I think it would be in a case where, for some reason, the problem was particularly acute, where an applicant had never become aware of the decision and as soon as he or she did become aware of it sought judicial review and discovered that the time limit had already expired by reason of the deemed notification provision.

Senator LUDWIG—I am curious as to whether you are aware of any case or precedent in relation to the argument that you are progressing. I am interested in the fact that there are time limits set, and many time limits that are set are also referred to as being within a reasonable time. What I am grappling with is: why couldn't the High Court say that the particular period was a reasonable time as the case may be and, therefore, within jurisdiction?

Mr Horan—There has not been any case that I am aware of that has considered the extent to which a time limit can be imposed on section 75(v) jurisdiction. I think there was some discussion during argument in plaintiff S157 and there may be some obiter comments in some of the judges' judgments which touch upon the issue, but there certainly is no guidance on what the limits are as to the ability of parliament to impose a time limit on that jurisdiction. It has been argued that it is open to parliament to impose a time limit provided that it is reasonable, and in that context it would be relevant whether or not a provision which ran from a deemed notification could be upheld as being reasonable.

Senator BOLKUS—Would you say that if you did not have that deemed notification provision and had actual notification then a time limit would probably be acceptable in those circumstances? The examples you provide on page five, paragraph 15, all seem to be cases where the applicant was not served directly and there was no discretion to allow the applicant to appeal, because time had run out. Are you saying that if you had the deemed provision then there would need to be some discretion, or are you saying that if you did not have the deemed provision the law could then work?

Mr Horan—Overall we are saying there should be a power to extend in addition to the time limit running from actual notification, but the provision would be less likely to be unconstitutional if it ran from actual notification—although as you point out that would not, of itself, address the problem where the reason for the application being out of time was not because of a problem with notification but a problem with getting the application to the court.

Many of the cases involving the time limits in the old part 8 involved that aspect, where there was no dispute that the applicant had been notified but for various reasons the application was not lodged within time. That raises a different issue. Even the validity of the current provision in section 486A, where the time runs from actual notification, has never been directly upheld. It may be that any absolute limit, even one from actual notification, may be open to challenge if the court does not have the power to extend time in appropriate cases. There is very little judicial guidance on the question. It might be open to argue that no absolute time limit is permissible. Alternatively it may be arguable that a reasonable time limit is permissible. The question would then become one of whether the provisions were reasonable or capable of operating unreasonably in particular cases.

Senator LUDWIG—There is a difficulty. Do you say that the purported notification or a procedure where time limits are set—whether it be by purported notification or actual notification—can in fact be a time limit as such? I think Justice Callinan in Plaintiff S157 recognised that the Commonwealth could in fact provide or regulate for a time period to be set providing it was not a prohibition on the court. Do you have a different view on that?

Mr Horan—It might be that an absolute time limit is capable of operating as a prohibition in one sense, particularly if it runs from deemed notification, where the applicant did not have the option of seeking review because they did not know about the decision until after the period expired. Whether that is reasonable or not could then involve consideration of whether the deeming provision operated in a reasonable way. It would involve looking at when you were deemed to be notified of a decision. In broad terms the provisions, which have been in place for many years, require applicants to keep the minister or the tribunal informed of their current address or address for service and notifications sent to that address are effectively deemed to have been received by the applicant. I think there has been at least one case where the postal service were at fault, in that an article sent by registered mail was misplaced within the post office. So the operation of the deeming provision itself may need to be examined in that context.

Senator SCULLION—Mr Horan, in your submission, in relation to protection visa decisions, you submit:

... the imposition of an absolute time limit on judicial review ... may result in an increased risk of refoulement ... of genuine asylum seekers, and consequently the violation of Australia's international obligations under the Refugee Convention.

As I understand it, after the primary decision is made the UNHCR have a decision made by one other individual officer in terms of appeal. In view of that fact, do you think that the processes undertaken by the UNHCR are also potentially in breach of the refugee convention?

Mr Horan—That is a very difficult question. The difficulty is in applying the provisions of the convention. The concept of refoulement assumes that the person is a refugee within the meaning of the convention. If they have had an adverse determination at whatever level then one could argue that they do not fall within the convention, simply by reason of the fact that their claim has not been accepted. The convention does not require any particular appeal or review process to be in place to prevent or minimise the risk of genuine refugees being sent back to their home countries after an adverse determination which is incorrect.

On the other hand, the general principle of the convention is to protect people from being sent back to countries where they face persecution. An example is given in the submission. An applicant who was out of time in the Federal Court then sought review in the High Court and had the decision set aside. On subsequent reconsideration by the tribunal, that applicant was found to have been entitled to protection. It is a difficult question as to whether sending someone back would necessarily involve a breach of the convention, because you do not know at that stage whether or not the person is an actual refugee. But, certainly, the example that is given suggests that it is important when dealing with protection claims to have a credible and thorough review process to ensure that errors are not made, because the consequence of an error being made is that somebody will be sent back to circumstances where they might face a risk of persecution for a convention reason.

That is a roundabout answer, but it is a difficult question. Your point is a good one. The absence of one or more levels of review does not necessarily lead to a direct inconsistency with the convention, because it might be argued that all that is necessary is to have a single determination of refugee status which is conclusive. It is more in the broader sense of ensuring that those determinations are made correctly and in accordance with law. A decision which is in fact effected by jurisdictional error is not really a decision at all, so the person is really being sent back on the basis of a determination which is not a proper determination of their claim.

Senator SCULLION—Thank you, Mr Horan.

Senator KIRK—Thank you for your submission, Mr Horan. I have a question that I do not think you have raised in your submission. It goes to the proposed definition of a ‘privative clause decision’ in section 5 and in particular where it refers to a privative clause decision including a purported decision under section 5(1)(b). In other submissions we have been told that that could well face constitutional obstacles and I wonder if you could tell the committee what your view is in relation to that, in particular the effect that would have on the jurisdiction of the High Court under section 75(5).

Mr Horan—The extended definition does not apply to section 474 itself—which would have led to constitutional issues because it would have effectively attempted to reverse the decision in *Plaintiff S157/2002 v. Commonwealth of Australia*—but because it is restricted to the other provisions that use the term ‘privative clause decision’, I think that those clauses were probably drafted on the assumption that that term covered decisions that were covered by the amendments, and it was not intended that those provisions would be limited to decisions within jurisdiction. I cannot see any constitutional problem with extending the time limits to purported decisions, other than the constitutional issue which has been raised in the submission in relation to the High Court, where there is a question about whether any time limit, or at least any absolute time limit, is consistent with the Constitution. Certainly in relation to the Federal Court, the extended definition as it applies to section 477 would, I think, not have any constitutional implications. Section 486A is a different matter.

Senator KIRK—We received a submission from Professor George Williams. He suggested that the reference to ‘purported decisions’ in the bill is contradictory in that it is seeking to regulate something that is not a decision at all and therefore it could be invalid because it does not have a connection with the head of power. Do you have a view about that?

Mr Horan—That is an interesting argument. Insofar as the definition applies for the purposes of sections like section 476 and section 477, those provisions—as has been demonstrated in the aftermath of the High Court’s decision—really have no effect at all unless the term ‘privative clause decision’ does extend to purported decisions. If it is suggested that that means it is no longer a law with respect to a head of power, I cannot see how that would necessarily follow, because all the provision is doing is removing the jurisdiction of the Federal Court to review certain types of decisions—at least after a specified period of time—and those provisions really need to encompass purported decisions. Otherwise, they do not operate effectively as time limits. That is the anomaly that arose from the High Court’s decision.

I do not think it was a direct consequence of the central issue that the High Court was looking at; it was just a consequence of the fact that the term ‘privative clause decision’ had been used in a broad sense in these different provisions. The approach the High Court took was to read that term down. It did that principally for the purposes of construing section 474. But the consequence was that it had an indirect effect on the operation of other sections which used that term. Insofar as the bill simply attempts to clarify the meaning of ‘privative clause decision’ as used in those sections, I think that that of itself would be within power. But section 486A is a different question, because it raises the considerations that I have mentioned earlier in relation to the entrenched jurisdiction of the High Court.

CHAIR—Thank you very much, Mr Horan.

Mr Horan—I am giving constitutional advice on the run.

CHAIR—We are eternally grateful, let me say. I want to thank you on behalf of the committee for appearing this evening. I also want to thank you for the submission from PILCH and the Victorian Bar Legal Assistance Scheme.

Mr Horan—You are welcome.

[6.56 p.m.]

HUNYOR, Mr Jonathon, Senior Legal Officer, Human Rights and Equal Opportunity Commission

LENEHAN, Mr Craig, Acting Director, Legal Services, Human Rights and Equal Opportunity Commission

CHAIR—Welcome. The Human Rights and Equal Opportunity Commission has lodged a submission with the committee, which we have numbered five. Do you wish to make any amendments or alterations to that submission?

Mr Lenehan—No.

CHAIR—I invite you to make an opening statement. At the conclusion of that we will go to questions from members of the committee.

Mr Lenehan—The commission's primary concern with the amendments proposed by the bill is their attempt to impose absolute time limits on rights of judicial review in cases involving asylum seekers. The commission supports measures to enhance the efficient management of migration cases. However, care must be taken to ensure that such measures do not come at the cost of the fundamental rights of the people involved. A system for managing migration cases involving asylum seekers must contain adequate procedural safeguards. If it does not, it may fail in its fundamental purpose—namely, to provide protection for those who fear persecution, people to whom Australia owes protection obligations.

The commission's key submission is that the imposition of strict procedural requirements such as absolute time limits in cases involving refugee claims creates an unacceptable risk of returning a person to a country where they face persecution. You would have heard that that is referred to as *refoulement* in international law. In addition to the grave personal consequences of *refoulement*, this would also place Australia in breach of international law.

The commission acknowledges that the bill allows for a discretion to extend time by up to 56 days where the court is satisfied that it is in the interests of the administration of justice to do so. This is an improvement on the current time limits in the Migration Act. However, at the expiry of this additional period the fundamental problem remains. The commission does not suggest that there be no time limits or that time limits generally be ignored. That is not the approach that the courts take to time limits imposed by statutes, and nor should they take such an approach. Ultimately, however, there must be a discretion available to a court to grant an extension of time in appropriate cases—even if those are only rare—to avoid injustice and breaches of human rights.

It must be remembered that persons making claims under the Migration Act may have little familiarity with Australian legal processes and may face linguistic and cultural barriers to effectively managing their application and advocating on their own behalf. This is particularly the case with asylum seekers, who may be fleeing from torture and trauma. There is also the risk of noncompliance with procedural rules occurring through no fault of the asylum seeker, thereby denying them rights of review which may be essential to their protection from

refoulement. Mr Horan has referred to some of those cases, and the commission has also referred to some in its submission.

The commission has also referred specifically to the rights of children. The rights of children are of particular relevance when considering procedural requirements such as time limits. The vulnerability of children seeking asylum, particularly those who are unaccompanied, means that they may require special flexibility in relation to rules and procedures. Any measure which denies children review rights on the basis of a failure to comply with specific provisions of the Migration Act should be very carefully scrutinised to ensure that it does not breach the Convention on the Rights of the Child and, in particular, that it allows for a proper consideration of the best interests of the child.

The commission notes concerns expressed about the growing number of unmeritorious judicial review applications being made. The bill is said to address those concerns. The commission notes, however, that the bill does not prevent unmeritorious claims actually being made provided that they are within time. The commission maintains that an alternative measure which might both reduce the number of unmeritorious claims brought before the courts and enhance the protection of human rights would be to increase the availability of legal advice, assistance and representation available to the individuals involved in migration litigation. The commission has also previously observed that an appropriate means of dealing with unmeritorious appeals is to enhance the powers of single judges in the Federal Court to dismiss appeals which do not disclose an available ground of appeal. Importantly, such an approach focuses on the merit of the matter, not on issues of procedure.

The commission has further previously observed that the risk of refoulement contrary to the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child and the convention against torture is not presently a sufficient basis for a claim for a protection visa under the Migration Act unless the breach of the rights feared also gives rise to Australia's protection obligations under the refugees convention. This may mean that so-called unmeritorious claims for a protection visa are brought for want of another basis for seeking protection. The introduction of a system for dealing with claims in relation to refoulement under the ICCPR, the Convention on the Rights of the Child and the convention against torture may relieve some of the pressure on the system caused by those cases being brought as protection visa applications.

Senator LUDWIG—As I understand what you say, you agree that time limits can be imposed but you say they should not be imposed in circumstances where they might produce a manifestly unjust result. Is that the premise that you are putting?

Mr Lenehan—Yes, our concern is with absolute time limits with no discretion to allow an extension.

Senator LUDWIG—If there is to be discretion, where should it lie, who should exercise it and on what basis should it be exercised?

Mr Lenehan—The commission has not put forward a specific proposal in its submission, but I note that some proposals were mentioned by Mr Horan. The commission would, as I understand its position, envisage that the appropriate location of the discretion would be with the court.

Senator LUDWIG—So they would just have a general discretion in your view?

Mr Lenehan—No. A more narrow discretion along the lines that Mr Horan suggested would probably also alleviate the commission's concerns.

Senator LUDWIG—The purported aim of the bill is to in one aspect confine the number of matters that go to the High Court. Wouldn't all those matters have to go to the High Court if they were filed outside of time or if there was a view that the time was manifestly unjust to determine that issue at first instance to then determine whether or not the court should actually then look at the decision itself? So in essence what you are proposing does not assist the legislator's intent in trying to otherwise confine decisions.

Mr Lenehan—If the Federal Court and the Federal Magistrates Court were each given a discretion to extend time where it was in the interests of justice, I cannot see that that would necessarily involve the High Court in those matters.

Senator LUDWIG—I see, so you then say all of those people would then go to the Federal Magistrates Court, the Federal Court or the High Court when they had a view that the time limit should be substituted by a greater time limit.

Mr Lenehan—The process would probably be that a person made an application for an extension of time. In legal terminology those matters are referred to as interlocutory applications, and courts are quite accustomed to dealing with them.

Senator LUDWIG—If it is not granted at the lower court level what happens next?

Mr Lenehan—Just speaking from general knowledge, an interlocutory application generally requires the leave of the appellate court to make an appeal. So you are correct in saying that it could be the subject of an appeal but it would be an application that would be conditioned on the granting of leave, and leave could be refused.

Senator LUDWIG—And, if leave were granted, then it would be to a superior court?

Mr Lenehan—Yes. As I say, courts are accustomed to dealing with time limits and with applications for extensions of them.

Senator LUDWIG—So you say that this is, as a consequence, a completely unnecessary excise of the legislation in this area and that it should not be allowed?

Mr Lenehan—Our primary concern, as I think we have made clear in the submission, is that the absolute nature of the time limit gives rise to concerns about violations of human rights.

Senator LUDWIG—What—it may?

Mr Lenehan—It may.

Senator LUDWIG—If a purported decision is not a decision, which seems to be what the legislation is saying, then what is it in your view?

Mr Lenehan—You are asking me a question on something on which I do not have the views of the commission. I am probably not able to assist you much further in that.

Senator LUDWIG—Okay. Thank you.

Senator SCULLION—I would like to ask a supplementary question that deals with the time limit and what may be appropriate. You speak about two issues: a potential increase in the amount and availability of legal advice, and a time frame that potentially, because of cultural and linguistic issues, is not available—and I would like you to amplify that. But my principal question goes to this time limit. While you do not have the particular advice of the commission, could you give me some practical examples of why 84 days would not be long enough? Twelve weeks seems to me to be a long time, in view of the fact that the issues of content have been substantially established, irrespective of the linguistic and cultural aspects. What, in general terms, would be the sorts of circumstances where this would be unjust?

Mr Lenehan—I am very glad you asked that question and can in fact give you a specific example, which is one of the cases that Mr Horan mentioned. It is the case of W281 v. Minister for Immigration and Multicultural Affairs. Mr Horan gave you the reference and I will give it to you again. It is [2002] FCA 419. In that case, the applicant, having received a decision of the Refugee Review Tribunal on 27 March in the relevant year, attempted to lodge their application for review by handing it to the relevant officer at the detention centre in which the person was in detention. It was apparently the practice at that time in the detention centre for a fee to be charged for a fax. If a particular detainee did not have sufficient money in their account to pay the relevant fee, the fax was returned to them and they were told that they would need to find the money from another detainee or from elsewhere.

In this particular case, the detainee put in the application for review on 20 April and was subsequently told that they did not have sufficient money in their account to send the fax. They then made alternative arrangements and, as I understand it from the report of the decision, they borrowed money from another detainee. It was lodged again on 24 April. For reasons that are not entirely clear from the report, the fax was not sent until 5 July. That is more than the 84 days. It is a case that in our view involves really no fault on the part of the applicant and a case that the court, as Mr Horan mentioned, saw as being manifestly unjust.

Those are the kinds of cases the commission is particularly concerned about. Underlying our concern, as I mentioned to Senator Ludwig, is the idea that you are dealing with fundamental human rights—rights like the right to life, the right not to be tortured and the right not to be arbitrarily detained on return to a country where a person faces persecution.

Mr Hunyor—If I could add to that answer in relation to the first part of the question you asked about the potential availability of legal advice, another case that is referred to in the commission's submission and one that really ties in both the point of the time limit and the availability of legal advice is the matter of Barzideh v. Minister for Immigration and Multicultural Affairs (1997) 72 FCR 337.

In that case, Mr Barzideh originally lodged within time an appeal to the court which stated that the grounds for appeal would be amplified upon as soon as the legal advice was available. Mr Barzideh appears to have had access to some, but not much, legal assistance and he was unrepresented at the hearing. Ultimately, however, the court found that he had named the wrong respondent. He had named the Refugee Review Tribunal instead of the minister. That became apparent to Mr Barzideh many months later, in October, the original decision having been in May, so he was beyond the 86-day time limit. This was pointed out to Mr Barzideh

and he amended his application. But at that stage it was beyond the time limit and would have been beyond the 84-day time limit proposed here.

Senator SCULLION—So it had already been lodged and he wanted to lodge a supplementary that clarified that particular area?

Mr Hunyor—He needed to amend it, presumably because of his inexperience with legal matters—he had named the wrong respondent. He wished to commence against the correct respondent but was now a long way out of time. It was only because the court had pointed it out to the unrepresented appellant that he realised this. Again, it was through no fault of the appellant.

Senator SCULLION—Was he able to proceed in that particular matter?

Mr Hunyor—No, he was not.

Senator SCULLION—He was not able to proceed because of the incorrect application?

Mr Hunyor—That is right. In fact, His Honour Justice Hill actually heard the merits of the case and decided that there was an error of law and he would have remitted the matter except it was beyond the time limit. It raises the issue that a time limit may seem reasonable in one set of circumstances but you never know what particular facts are going to come up. If there is no overarching discretion then you come back to the point that was made by Mr Lenehan, by Mr Horan and by Justice French in the W281 case—that is, that a one size fits all time limit is capable of giving rise to injustice.

Senator SCULLION—So the decision that there had been an error in law was in relation to the facts of the application rather than the administrative process relating to the actual application?

Mr Hunyor—His Honour Justice Hill found that, had he been able to hear the matter, the appellant would have been successful but he could not hear the matter because of the time limit.

ACTING CHAIR (Senator Bolkus)—Thank you very much.

[7.13 p.m.]

**EYERS, Mr John, Assistant Secretary, Legal Services and Litigation Branch,
Department of Immigration and Multicultural and Indigenous Affairs**

**STORER, Mr Des, First Assistant Secretary, Parliamentary and Legal Division,
Department of Immigration and Multicultural and Indigenous Affairs**

**WALKER, Mr Doug, Assistant Secretary, Visa Framework Branch, Department of
Immigration and Multicultural and Indigenous Affairs**

ACTING CHAIR (Senator Bolkus)—I welcome representatives from the Department of Immigration and Multicultural and Indigenous Affairs. I invite each of you to make a short opening statement, at the conclusion of which we will move to questions.

Mr Storer—Thank you. We would like to make a brief statement which we hope will assist the committee. It is to be read in conjunction with the second reading speech. The purpose of the bill is to reintroduce three procedural requirements in relation to applications for judicial review of Migration Act 1958 matters. The requirements were originally introduced in the early 1990s to set a framework within which applications could be lodged. These requirements involved time limits within which a person could make an application for judicial review of a Migration Act matter; provided that only the High Court, the Federal Court and Federal Magistrates Court had jurisdiction to hear these applications; and precluded judicial review by the Federal Court and the Federal Magistrates Court of primary decisions subject to merits review.

The reason that these procedural requirements in the Migration Act no longer have any practical effect is that they were framed to apply to privative clause decisions. The High Court found in the case of plaintiff S157 that a privative clause decision is one that is not tainted by a jurisdictional error. This bill does not alter the grounds on which a decision can be set aside by a court, because it specifically excludes section 474 from the privative clause definition to be inserted into section 5(1) of the Migration Act.

The most significant amendments to the bill are those relating to time limits within which to seek judicial review. Since the handing down of the decision in S157 in February 2003, large numbers of judicial review applications have been made outside the time limits contained in the existing provisions. For example, in the last 12 months 44 per cent of judicial review applications, representing some 1,790 applications, were made within three months of the decision under challenge. A further six per cent, representing an additional 270 applications, were made within a year. This means that the remaining 2,043 applications, or 50 per cent, were made more than a year after the decision under challenge was made. In the most extreme cases applications have been made more than six years after the visa decision was made. The only way for the courts to resolve these applications is to determine whether there has been a jurisdictional error. In other words, the courts now have to conduct a full judicial review of the decision or action challenged.

The existing time limits for Federal Court applications were introduced by the previous government because of concern that some persons were making judicial review applications

to delay their removal from Australia when they were located by immigration officers—often a considerable time after their visa decision. The reforms introducing this time limit also included a statutory obligation for visa applicants to keep the minister informed of their residential address or addresses in Australia and of where correspondence in relation to their application was to be sent.

Secondly, there were provisions for deemed receipt of correspondence by persons. Deemed notification arose due to Federal Court findings that evidence of delivery of registered mail was not sufficient to establish that an applicant had received notification of their visa decision. The provisions containing these procedural requirements were amended in September 2001 to align them to the privative clause changes made at that time. The September 2001 amendments also introduced a time limit within which a person could make an application to the High Court. That time limit was 35 days.

As I mentioned earlier, since February 2003 there has been considerable growth in the number of applications being made outside the time limits contained in the Migration Act. This bill seeks to reintroduce a time limit within which to seek judicial review, with a further time within which the court may permit an application to be made if it believes that it is in the interests of the administration of justice to do so. The government believes that, if the court were to have discretion to extend the time limit regardless of where the application was made, the situation would be the same as exists now—that is, there would be large numbers of persons applying for extensions of time regardless of their prospects of success. In most cases, in order to decide whether to grant an extension of time the court would effectively hear the substantive case; thus there would be no reduction of the court's workload.

With this in mind the government sought advice from the Australian Government Solicitor on whether, having regard to the High Court's decision in the case of plaintiff S157, it would be possible to set a time limit with a further time within which a court—including the High Court—could decide to allow an application. The Australian Government Solicitor advised that this was possible, provided that the time within which the court could permit such an application to be made was reasonable.

CHAIR—Thank you very much, Mr Storer.

Senator BOLKUS—Who has advised on the preparation of this legislation in terms of senior counsel? Has the Solicitor-General been asked to advise on this or did you go outside senior counsel?

Mr Walker—It was the Chief General Counsel of the AGS, Mr Henry Burmester QC. I am not quite sure whether at the time he was Acting Solicitor-General or not.

Senator BOLKUS—He is the only person who has advised you?

Mr Walker—That is correct.

Senator BOLKUS—We have heard concerns—and I think some of you were here to hear the previous witnesses—which I think are quite compelling, going to what you are proposing. You are doing away with the need for actual service but at the same time imposing a fairly strict time line. We have had instances put to us where in similar circumstances people have had a constitutional right—and you could apply it in these circumstances—circumvented by

the dual application of the deemed service provision, with notice going anywhere but to the applicant and the time line having an effect. Has Mr Burmester been asked to advise on whether that sort of provision is constitutional?

Mr Walker—Mr Burmester was asked to advise on, as Mr Storer mentioned, whether it was possible in the context of having an end date or a finite period within which a person could apply within the legislative framework that we did have.

Senator BOLKUS—That is what you did have, but now you are proposing a change to the service requirements. He has not been asked to advise on this?

Mr Walker—I believe that he was but I cannot categorically say it because I do not have the advice in front of me.

Senator BOLKUS—It is pretty important. If you look at 157, at the sentiment of the court and at the letter of their judgments, they are not going to sit by idly and allow this department, in a two-game approach, to negate a constitutional right, are they? Does anyone know whether in fact you have received advice from the senior counsel on this point? Mr Storer, do you know? You are in charge of this.

Mr Storer—No, I do not.

Senator BOLKUS—Mr Eyers, you do not know?

Mr Eyers—No.

Senator BOLKUS—Mr Walker, you cannot—

Mr Walker—I believe that we did within the framework include the notification.

Senator BOLKUS—You said to me a little while ago that he had advised you on a finite time line in the context of the existing legislation, not in the context of an amendment which does away with the requirement for personal service.

Mr Walker—I may have been incorrect on that. I believe that he—

Senator BOLKUS—It is a fairly important point, though, isn't it? We have some constitutional issues here. You have been bounced by the High Court, and you come up here and you do not know whether you have actually had constitutional advice on this point. Who in the department is doing the homework at the moment?

Mr Eyers—At this stage the High Court has not ruled on absolute time limits.

Senator BOLKUS—No, they have not.

Mr Eyers—There were comments made in S157. Justice Callinan, who looked at the matter closely, stated that it was possible as long as the time period was reasonable and it was regulatory in nature.

Senator BOLKUS—Sure, but if you have a situation where effectively you do not have a reasonable time period because the applicant has not had service—and we all know how the department works; you can stuff things up from time to time, no matter who the minister is—you are bowling up a situation which effectively can negate a constitutional right.

Mr Storer—I do not think Mr Burmester did make a distinction between actual and deemed, if that is the question you are asking specifically.

Senator BOLKUS—It is important.

Mr Storer—He was asked to advise on that generally, I suppose. That is partly answering your question, but we would need to go back and check on how his advice was phrased.

Senator BOLKUS—Yes, and you need to go back and check it in the context of your try-on in terms of the privative clause decision definition. If you look at privative clause decision part B, you include in your purported decision definition a purported decision which is not a decision, because there has been a failure to exercise jurisdiction. On my reading, that means an officer can actually have a file before him or her, look at it and say: ‘Well, there might be a jurisdictional error problem here. I’ll do nothing.’ Have you contemplated that scenario? That is a failure to exercise jurisdiction. A failure to exercise jurisdiction can include a non-decision. You can decide not to make a decision and you can decide then to send advice off to wherever, and under your deemed service provision a person could be totally in the dark.

Mr Walker—I am afraid I do not see how that could happen in practice. If you are choosing not to do anything then the application will be in limbo.

Senator BOLKUS—But you have failed to exercise jurisdiction.

Mr Walker—There would not be any practical effect for the applicant.

Senator BOLKUS—Yes, there would. The applicant could be waiting—time would be passing and the clock ticking.

Mr Walker—In what sense, though? If they are out in the community, they are on a bridging visa, which expires 28 days after the decision is made.

Senator BOLKUS—A bridging visa gives you some rights; a more permanent visa gives you other rights. There is an impact on the applicant. Let us go to a more fundamental point. Have you had advice on whether by using this mechanism of purported decision you can give some sort of effect to a decision which otherwise is ultra vires?

Mr Walker—Certainly AGS were involved in clearing the draft of the bill. The purpose behind the definition of privative clause decision in section 5(1) is specifically to reintroduce the procedural requirements, not the grounds of judicial review.

Senator BOLKUS—What flows from those procedural requirements, in your mind?

Mr Walker—It goes back very much to the point that procedural requirements apply specifically to a privative clause decision and the privative clause decision is, in simple terms, a lawful decision, which means that those requirements do not apply in relation to an application seeking review of any action under the Migration Act. If I can put it simplistically, an unlawful decision is not a decision under the act. The difficulty is how you describe what that action is to have procedural requirements apply to it. The situation that we are in, and this is really what the government is focusing its mind on, is very much that the courts have to go through the process with every application to determine whether in fact the requirements apply. They effectively undertake a judicial review. The time limits only apply to lawful decisions, so there is a complete judicial review, which is an enormous workload.

Senator BOLKUS—What then do you say flows from this attempt to bring a non-decision under the umbrella of the act and to make it, for the purposes of—

Mr Walker—What flows is that, if a person wishes to challenge the lawfulness of a decision under the Migration Act in the context of the time limits, they have 28 days from deemed notification with a further 56 days within which they can seek the court's consent for the application to be accepted.

Senator BOLKUS—Going back to the point I made earlier, if the decision is ultra vires on the basis of no jurisdiction, is it a constitutional provision that demands that?

Mr Walker—Certainly there is a constitutional right under section 75 to seek judicial review of the actions of a Commonwealth officer.

Senator BOLKUS—If a decision has been bounced on that ground and a person does have a right to go to the High Court, your proposal to bring that under the umbrella of the act is an attempt to give it some sort of standing, to give a decision which is a non-decision some sort of standing for the purposes of process.

Mr Walker—It is an attempt to say that if you wish to challenge the decision to test its lawfulness then you, in the most extreme circumstances, have basically around three months in which to exercise that right. It is looking at having a situation where you can have an element of certainty and deal with the circumstance of where, if it is important for a person to challenge the lawfulness of the decision, they do so within a reasonable period and then move on.

Senator LUDWIG—But, if you couple that with a deemed notification to a person who cannot speak English and who might be detained in a remote location, a person who is not in regular contact with their lawyer, a person who may in fact be dealt with by a lawyer whom they no longer can afford or a person whose address has changed, how do they deal with the three months if they fall outside it? Does it get to the point where it becomes a prohibition—how can that be deemed notification if those circumstances arise? Do you say that it is bad luck for them?

Mr Walker—It is a situation where—and this is the point that Mr Storer made in his opening statement—there is a responsibility and a statutory obligation to keep the minister, or the department on the minister's behalf, informed of how you can be contacted and how you can be notified of anything in relation to your visa application. Working through that process, that is how the deemed notifications are a component of that process.

Senator LUDWIG—But you could envisage circumstances where the lawyer may be in regular contact as far as the department is aware and may be keeping up with those records but has lost contact with the applicant. Do you then say that the time limit is absolute? If the time limit is absolute—and there are circumstances which we could all envisage happening; rather than outline the scenarios, we might say it is unfair, unjust or even a manifestly unjust application of the law—do you say that this provision then says, 'Too bad; you can't do it'?

Mr Walker—Effectively, yes; it does stop an application after that time.

Senator LUDWIG—Are you confident that will be the same position that the High Court will adopt in relation to that? Justice Callinan said that if it amounts to a prohibition under S157 then in fact it may not truly be a deemed notification. Therefore time has not commenced to run and therefore they are entitled to seek a judicial review.

Mr Walker—That is possible; I would not wish to speculate on what the High Court may find. Certainly the question that we sought advice on was whether it was possible to have a finite time. The advice that we were provided with was that, yes, it could be possible provided it was a reasonable time. Justice Callinan certainly indicated that, with the specific 35-day time limit that currently exists in section 486A, it was not reasonable.

Senator BOLKUS—From what you told us earlier, you cannot give us a guarantee that this legislation provides that in normal circumstances there will be a reasonable time.

Mr Storer—No.

Senator BOLKUS—That is right.

Mr Storer—I do not think any legislation could, Senator, and they are very difficult issues that we are dealing with. You may recall I said in my introductory remarks that we used to do actual notification and I think it was Justice Einfeld who made a decision that that was not good enough. He said, ‘No, you have to do it by deemed notification.’ But we understand—

Senator BOLKUS—I have never found myself agreeing with Justice Einfeld, Mr Storer; you know that.

Mr Walker—I will just clarify that. With respect to Mr Storer, I do not think Justice Einfeld suggested denotification. It was very much in the context of the implications from his observations in the particular case, which would be that the only way you would be seen in a practical sense to have evidence of notification was if an individual official handed that notification to the particular applicant. We did have, at that stage, records of registered mail and so forth.

Senator BOLKUS—All this does not overcome the fundamental constitutional problem. I go back to my question. If you have a decision which is not a decision because of excess of jurisdiction, say, I would have thought that in those circumstances the appeal rights available to an applicant would be different—different causes of appeal, different avenues available to the applicant—from an appeal on a privative clause decision under this act. Are you talking about a broader avenue of appeal to the High Court?

Mr Walker—No. Jurisdictional error has been interpreted by the courts—certainly the Federal Court—quite expansively, to the point where it appears to be any error of law. So in many respects the consequence of the High Court’s interpretation of the privative clause is that the grounds of judicial review are arguably basically the same as those that would be available under AD(JR).

Senator BOLKUS—And the processes?

Mr Walker—The processes?

Senator BOLKUS—The procedures.

Mr Walker—Certainly at the moment the time frames within which you can seek judicial review are probably more generous than under the AD(JR) Act in the sense that you can make an application at any time; you do not have to seek the leave of the court to make an application outside the 28-day time limit that is in the AD(JR) Act.

Senator BOLKUS—So bringing it under the—

Mr Walker—This would alter that, certainly. It would limit the time within which you could seek judicial review.

Senator BOLKUS—Have you taken advice as to whether that would infringe on constitutional principles that have applied so far?

Mr Walker—Yes. That is the advice we received.

Senator BOLKUS—Under the actual service provision?

Mr Walker—I will take on notice precisely what the advice was because, as I said, I am not certain.

Senator BARTLETT—Is it fair to say that the legislation that introduced the privative clause ended up not being interpreted by the High Court in the way that you had anticipated it would be?

Mr Walker—It is fair to say that it was not interpreted in the way that the advice we received at the time of framing the privative clause said it would be. It has certainly been interpreted somewhat differently.

Senator BARTLETT—Have you got any way to assure us that you have a greater chance of getting it right this time? I do not mean that in a smart alec way. High Court decisions are always fraught.

Mr Walker—All I can really say is that we have sought advice. We have advice. That is not to say that the thing is beyond challenge. No doubt if this were passed it is possible, if not probable, that it would be challenged. I would not like to speculate on what the High Court would decide.

Senator BARTLETT—It will be interesting. Is it lawful to run a book on what the High Court decisions are going to be? Probably not. You do not need to answer that one. You made the point that it probably will be challenged. A significant aim of the legislation is to reduce migration related applications to the courts, but isn't this just going to lead once again to a whole raft of applications seeking to test what the new provision will mean?

Mr Walker—I do not believe it will, any more than the applications that are currently being made to the courts. I say that on the basis that, quite clearly, if somebody wishes to seek judicial review outside the time frame and they make an application to the High Court outside that time, it will be a matter for the High Court to hear argument on in order to decide the constitutional lawfulness or otherwise of the provision. In consequence of that decision, those other applications will be determined to be outside the time limit if it is upheld as being constitutionally valid. If it is not, I do not think we will be in a situation that is terribly different from the one we have now, where we have a considerable number of applicants seeking judicial review 12 months or more after the decision has been made.

Senator BARTLETT—But at least the situation we are in now is that we have a clearer interpretation by the High Court of what the effect of the privative clause is. By putting this bill through we will get another great unknown and we will all be waiting again however long it takes to finally have it tested.

Mr Walker—As I said, I do not think that the situation will really change. There will be no more backlog than there is now.

Senator BARTLETT—Isn't it the case that, if this were to go through, people who wanted to test this modification of the privative clause would have to appeal to the High Court under its original jurisdiction rather than—

Mr Walker—Yes.

Senator BARTLETT—Isn't it the case now, following S157, that cases can be remitted back down?

Mr Walker—Certainly one of the results of the September 2001 changes was that the grounds of review were made identical in all three tiers—the High Court, the Federal Court and the Federal Magistrates Court. Those reforms enabled the High Court to remit matters to the Federal Court. That is currently the situation. I believe that following the decision in S157 the High Court were more comfortable, having determined what the grounds of judicial review were, to remit those matters. There was nothing before that that precluded them from doing so, but I believe they thought that it was desirable for them to give some direction to the lower courts before they remitted those matters.

Senator BARTLETT—Trying to make this simple in what is obviously a contentious and somewhat murky area of law, is it fair to say that the bill attempts to make a change that will make a decision that would otherwise be unlawful into a lawful decision?

Mr Walker—I would phrase it that it is seeking to provide a reasonable opportunity for people to challenge a decision. If they are unable to do it within the three-month period, the practical effect is that the decision would not be judicially reviewable and the conclusion you have put forward is a conclusion that is certainly open to people to make.

Senator BARTLETT—Statements were made a number of times in the second reading speech about reducing unmeritorious applications. Obviously, it is a ministerial speech and politicians speaking so there is a political point in there. The courts currently have the discretion to determine that something is an unmeritorious case, don't they?

Mr Walker—Yes.

Senator BARTLETT—Is it the place of parliament to determine in advance that cases are unmeritorious rather than leave that to the courts?

Mr Walker—I do not think I would choose to make a comment on that.

Senator BARTLETT—One is a legal finding and perhaps the other is just a rhetorical flourish. To say that this bill aims to reduce unmeritorious claims, it is basically trying to reduce claims on the assumption—

Mr Walker—The underlying comment in the second reading speech was that, with these lengthy delays between decision and seeking judicial review, the outcomes have been effectively that the courts have been upholding the decision that has been under challenge. The last figures I saw for the year to date were that the court set aside rate overall—this is set aside on the basis of either remittal by consent or remittal by the court having heard the

case—is about 7.5 per cent, but I do not have any breakdown on the basis of ones that are well outside time or whatever. It is exceptionally low.

Senator BARTLETT—You have got something there.

Mr Eyers—Figures I looked at for the year to date to the end of 30 April were that the set aside rate by the courts either by way of actual order of the court or by consent department withdrawal was something like seven per cent, so about 93 per cent of matters are upheld.

Senator BARTLETT—There is a distinction between an unsuccessful appeal and an unmeritorious one. They are not automatically the same, are they?

Mr Walker—No, they certainly are not. I do not know whether Mr Eyers has any figures, but there are also issues of how many matters applicants withdraw from. Frequently, it is at the court door and that can be a period of running from the shortest time from application to possible hearing of around three months to circumstances where in the Magistrates Court in Sydney hearing dates are something like 15 or 16 months out from time of application.

Senator BARTLETT—It is certainly not very quick.

Senator LUDWIG—Wasn't that the idea of it?

Mr Walker—It is also why the government has decided to put more resources into it and appoint more magistrates to deal with the situation.

Senator LUDWIG—We can ask you about that in a fortnight.

Mr Walker—You can ask the Attorney-General's Department.

Senator LUDWIG—The migration litigation review—where is that? It seems to be mentioned in the budget. It seems to be mentioned in these submissions and in the second reading speech of the minister.

Mr Walker—It is a review that was undertaken at the request of the Attorney-General, so it is probably more appropriate to ask the Attorney-General's Department about it. The bill is certainly one of the government's responses to that review.

Senator LUDWIG—Have you seen the review?

Mr Walker—Have I seen it?

Senator LUDWIG—Has your department seen a copy of the review?

Mr Walker—Yes, the department has seen the review report.

Senator LUDWIG—Tell me if I can ask this: is one of the recommendations that flow from the review to amend the act in this way?

Mr Walker—I believe it is. Certainly time limits were discussed in the review. It is some time since I looked at the recommendations.

Senator LUDWIG—Perhaps you could check on that.

CHAIR—You have the advantage over us, Mr Walker.

Senator LUDWIG—That was the question I was leading to. Why can't you provide a copy of the review to the committee?

Mr Storer—It is a report to the Attorney-General. I understand he has made a public comment to the effect that he does not intend to release it publicly because it was a report to him that contained information that was going to be used in cabinet deliberations.

Senator LUDWIG—I wonder if he took it to cabinet.

Mr Storer—I do not know, Senator.

Senator LUDWIG—I suppose I could always try an FOI to see how it goes, couldn't I?

Mr Storer—That was his public comment.

Senator LUDWIG—If I FOIed your department I would probably have a better chance, wouldn't I?

CHAIR—That was a rhetorical question, I think, Mr Storer.

Mr Storer—It was obviously rhetorical.

Senator LUDWIG—The matter of whether there is a breach of an obligation under various international conventions was raised by a number of submitters. Do you have a view as to whether it does or it does not?

Mr Walker—We do not believe it does. In the context of refoulement we believe that the opportunity for judicial review is there. Also the executive committee of UNHCR has indicated that one level of review is all that is necessary—be it merits review or judicial review. We do have merits review and we would have judicial review opportunities here. We believe that access to the courts is available under these proposals so we believe it is consistent with the ICCPR requirements.

Senator LUDWIG—So, if a person is returned because their case has fallen out of time and they are subject to persecution overseas as a consequence of that, do you say that it does not breach a convention or a treaty?

Mr Walker—I am not saying that but I could also put the proposition that if a person had sought merits review, sought judicial review, had a court determine that the decision is lawful and was returned overseas to the unfortunate circumstances that you mentioned, that would be as much of a breach as a person who had not sought judicial review within the time frame and had been returned.

Senator LUDWIG—I think we have asked you at estimates how you follow up what happens to overseas refoulements. That is another matter. You mentioned some figures in relation to the number of cases a bit earlier but I was wondering if you could distil that for me a little bit. Have you asked the registrar of the High Court whether or not they have been dealing with the case load recently? If so, what was the nature of the correspondence which you forwarded or requested from them?

Mr Walker—I do not believe we have been in correspondence with the registrar of the High Court. As our minister is a respondent to the applications in the High Court we have to keep accurate statistics and figures and monitor each of those applications. I do not know whether Mr Eyers can inform you further of High Court applications and what has happened with them.

Senator LUDWIG—We can include in this too the registrar of the Federal Court or the registrar of the Federal Magistrates Court. Have you been in contact with them about their case loads and about whether they are adequately dealing with the case load in relation to migration matters?

Mr Eyers—I have anecdotally had conversations with the Federal Court, and they are particularly concerned by the migration case load. It was not a formal conversation, but it was a conversation that I had.

Senator LUDWIG—But what we are told in the second reading speech by the minister is that the government has grave concerns about the growing number of unmeritorious judicial review applications being made. You have not asked them about case load, but have you asked them about unmeritorious judicial review numbers?

Mr Eyers—We know what their case load is.

Senator LUDWIG—No. I am asking whether you have asked them—it is a slightly different question—and how you judge an unmeritorious judicial review application.

Mr Storer—The High Court of course comes under the A-G's jurisdiction. I understand that the Attorney in his press release about various matters made comments about the increasing workload on the courts generally. We as a department cannot really have other than informal contact, as it were, with the registries of those courts because they are under the purview of the courts and the Attorney-General.

Senator LUDWIG—You are bringing the legislation forward I take it, not the Attorney-General.

Mr Storer—Yes, we are for the Migration Act purposes. They will probably bring other legislation forward in terms of judiciary acts et cetera.

Senator LUDWIG—I am sure that they will.

CHAIR—I might note for the record that the committee, in an effort to invite the Attorney-General's Department to appear before it this evening or to participate in this hearing, did not receive a particularly receptive response. It indicated that the matters that we wished to ask questions on this evening were the responsibility of your department. I also understand that the secretariat advised the nature of the questions we wished to pursue this evening, and I do not think we received any advice from your department that we should have the Attorney-General's Department here as well.

Mr Storer—No.

Senator LUDWIG—I think that is clear from the evidence, the reason, the motivation, the statistical support for bringing this bill forward. Based on the second reading speech, at least I would imagine that you could substantiate the comments made by the minister.

Mr Storer—From the Migration Act viewpoint, as the second reading speech has said, it is costing our department a lot of money. The courts can speak for themselves on their workloads. From our viewpoint it is costing us a lot to defend all these decisions on behalf of the government and the minister. As we have said, they have grown enormously in the last 12

months since that decision. Because of the cost of the minister's defence of these decisions—most, as we have said, he ends up winning—it is very important.

Mr Walker—The point that I was making earlier is that the government's view is that there are substantial numbers of unmeritorious applications made and the basis of that is that we have overall with applicant withdrawals and court decisions around 93 per cent of the decisions upheld by the court and substantial numbers of applicants withdrawing within that number. That is the basis on which the government believes that there are many unmeritorious applications. On one point that you raise of whether we have in fact sought observations and comments from the court and we have indicated that we have not of what we believe is unmeritorious, I would be most reluctant to ask them that question because it is very much a matter for, in my view, the judges to determine in the context of something before them whether they believe it is unmeritorious or an abuse of process within the parameters within which the court operates. What is in the second reading speech is very much the government's view and in the government's view it is unmeritorious.

Senator LUDWIG—So there is a growing number of unmeritorious claims in judicial review applications being made. That is, as you have said, the government's view. In your view, how many of those relate to migration matters?

Mr Walker—Of unmeritorious claims?

Senator LUDWIG—Yes, or purported unmeritorious claims.

Mr Walker—Or what the government believes are unmeritorious? We are talking about migration applications. I would not venture to make a comment on how many unmeritorious applications are made to the court across the board.

Senator LUDWIG—No. If we can confine it to how many you think are unmeritorious in relation to migration matters and whether or not you can statistically break that up between which type—whether they be visas or—

Mr Walker—I do not believe we would be able to break them up by type.

Senator LUDWIG—In general terms, how many?

Mr Storer—About three-quarters of overall applications to the courts are for refugee status. Others relate to other migration matters and other visa applications.

Senator LUDWIG—You say three-quarters; I am looking for the total—

Mr Storer—75 per cent.

Senator LUDWIG—How many of those, though? Is it 20, 40, 60, 100 or 1,000?

Mr Storer—On the figures already provided today, if 93 per cent are won in effect when they get to court and they are consistent across both those levels of broad visa categories, if I can call them that, that should pretty well give you an estimate.

Senator LUDWIG—So you say that those 93 per cent are unmeritorious?

Mr Eyers—The court has found them to be unmeritorious. It has rejected the application, on a very simplistic view.

Senator LUDWIG—That is all I was getting at. I am not going to put words in your mouth; I am asking you the question. Do you say they are all unmeritorious? If you say that, we will examine that in detail some other time. We are going to run out of time this evening. The other issue I wanted to explore briefly with you was the idea that there would be a decrease. Do you say that there will be fewer applications made as a consequence of the passage of this bill?

Mr Walker—We believe so on the basis that, as we indicated earlier, around half, if not slightly more than half, of the applications are made 12 months or more after the visa decision that is under challenge. We are not suggesting that there would be a reduction of 50 per cent. We believe that it would be less than that. There is a factor that you have to take into account, which is that, where there is no effective time limit, there is not a discipline imposed on the person or motivation for the person to move quickly. We believe there would be quite a substantial number of the 50 per cent who would be motivated to move more quickly. Certainly we believe that conservatively there would be probably at least a quarter of our existing applications, because they are so far out of time. Many of them come about following the location of somebody who has avoided us for several years.

Senator LUDWIG—So these are people who does not have a bridging visa or a visa? They are unlawful arrivals or have overextended a visa?

Mr Walker—No. The sort of situation is this: you apply for a protection visa, you are rejected and you go to the tribunal. The tribunal affirms the primary decision. Your bridging visa ceases 28 days after that tribunal decision and you just disappear. You are no longer at the address you have given us. We do not know where you are. We may come across you as a result of a police action investigating criminal matters or traffic accidents—as a result of a range of circumstances or just in other ways. We locate you, detain you as an unlawful noncitizen and commence removal action. An application is made to court and the result of that is that your removal is stayed until that application is finalised by the court.

Senator LUDWIG—Thank you.

Senator SCULLION—I understand quite clearly the intent of the bill. I accept that the mischief it is there to prevent is extensive and needs to be ameliorated. There is no question about any of that. The capacity to challenge lawfulness within a certain period of time certainly seems to be the area to go. I have heard your response with regard to the capacity for refoulement. Whilst I understand that specifically within the refugee convention we are only required to have two tiers, it appears to me that when we have embarked on another tier—whether we want to or not—it is reasonable to say that if we knew for sure that that other process had said, ‘Yes, you are a refugee,’ and it was some sort of legitimate appeal process then it would be the reasonable thing to do.

Today I have asked for examples of this. Witnesses have given me the example of the case of applicant W281. In that case an individual was not able to provide, in an administrative sense, documentation within the required time. From what I heard, it seems quite reasonable to believe that he made every attempt to do so. That was outside the mischief that we are trying to prevent. There was another case of an individual who had provided it within the time, but there were complications because of some administrative detail. Again, that is

outside the mischief that we are trying to prevent. In one of the cases that have been put to me, as I understand it Justice Hill made a determination that he may have remitted that case had he been able to hear it. That is only one case, but particular and peculiar circumstances are of concern to me.

Have you thought about that? They seem to be a very narrow group. It is, effectively, an administrative error or similar. The application either could not reach the court or was somehow faulty when it got there. It fell out of time for reasons that were beyond the capacity of the person to combat. We then say that it is not appropriate that the court have an open-ended way of doing things. I agree with that. Is there no way that, under those prescribed circumstances—and we know that over a period of time there will only be a very small number of such circumstances—there can be some process to allow those cases to be heard? That is the only Achilles heel in this. Have you given any practical thought to that?

Mr Walker—It is probably fair to say that certainly there are cases—I know that some of the submissions have referred to cases under the old 35-day time limit, or the 28 days from deemed notification; in effect, a 35-day time limit—where detainees, through no fault of their own, have had their applications received by the court outside that time frame, and there was no discretion for the court to do anything.

Senator SCULLION—Were the examples that were brought to me examples where the time limit was 35 days?

Mr Walker—Yes, and effectively no extension was possible.

Senator SCULLION—We are now saying that it may be 84 days?

Mr Walker—We are now saying that you have the 35 days. You also have a further 56 days within which the court has a discretion to say, ‘In the interests of the administration of justice we will permit this application to be made to the court.’ So, yes, we were certainly very conscious of that. We wanted to have a situation where there was a time limit and there was then a further reasonable period in which the court could exercise its discretion to accept an application.

Senator SCULLION—They could be because of those reasons described?

Mr Walker—Yes, they could. The problem in the examples that you have given is that if at, let us say, day 57 of that 56-day period then no, there would not be any discretion. The concern that we had was that, unfortunately, we believe that if there is a limited discretion, and you frame it in terms of saying the court may decide that through no fault of your own you were unable to do it within this time frame—let us say 56 or 84 days or whatever number of days you choose to have—that substantial numbers of individuals, regardless of the prospects of success, would make those claims. With the nature of the decisions under challenge, the court would effectively have to conduct a judicial review of the whole decision process and so forth, and the practical effect would be no different to the circumstance we are in now, where there is no effective time limit.

Senator SCULLION—I understand why you have taken that view, but it would seem to me it is reasonable to say that the extra 21 days that have been provided since both those

examples were given would have meant that at least those cases would have been able to have been heard because of the extra time.

Mr Walker—Yes, they certainly would.

Senator SCULLION—That is a consideration you have given to those particular circumstances?

Mr Walker—Yes, that is right because in those circumstances it was only a matter of days after the 35 days. There is now an additional 56 days for the court to decide, yes, they will accept the application. In the circumstances that arose in those three particular cases, it would be reasonable and nobody would dispute the sense of the court accepting those applications.

CHAIR—In the course of that discussion, there may have been one or two minor issues taken on notice by the department.

Mr Walker—Yes, there is certainly one for Senator Bolkus on precisely what advice we receive.

CHAIR—If you would assist the committee with responses on those, Mr Walker, we would be very grateful. Mr Storer, Mr Evers and Mr Walker, thank you very much for your assistance this evening. If there are any other issues which arise from further submissions or evidence taken this evening, the secretariat will be in touch with you on those matters. I thank all of the witnesses who have given evidence to the committee this evening.

Committee adjourned at 8.12 p.m.