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JOINT STANDING COMMITTEE ON MIGRATION

Reference: Review of Migration Regulation 4.31B

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JOINT COMMITTEE ON MIGRATION

Friday, 21 March 2003

Members: Ms Gambaro *(Chair)*, Senators Bartlett, Eggleston, Kirk and Tchen and Mr L.D.T. Ferguson, Mrs Gash, Mrs Irwin, Mr Randall and Mr Ripoll

Senators and members in attendance: Senators Eggleston and Tchen, Ms Gambaro and Mrs Irwin

Terms of reference for the inquiry:

2003 Review of Migration Regulation 4.31B

WITNESSES

Committee met at 9.47 a.m.

SRIPATHY, Ms Meena, Director/Principal Solicitor, Immigration Advice and Rights Centre

CHAIR—I now open the second part of the meeting of the Joint Standing Committee on Migration: Review of Migration Regulation 4.31B. Regulation 4.31B provides that unsuccessful applicants to the Refugee Review Tribunal must pay a $1,000 fee within seven days of receiving the RRT decision. Where RRT applications have been combined however, only one fee per family is imposed irrespective of the number of applicants. There are two exceptions where the fee is to be refunded or waived: regulation 4.31C provides that the fee must be refunded or waived if the applicant seeks judicial review, the case is significantly remitted to the RRT and the tribunal finds in the applicant's favour; or, the minister substitutes a favourable decision for that of the RRT by using the power under section 417 of the Migration Act. Following its review of this regulation in May 1999 and June 2001 and in accordance with the recommendation in its 2001 report, the minister has asked the committee to review migration regulation 4.31B and report to the parliament by 30 April 2003. If you would like any further details about this particular inquiry, please feel free to ask any of the committee staff here at the meeting.

I welcome our first witness today. Although the committee does not require witnesses to give evidence under oath, you should understand that these hearings are the legal proceedings of the parliament and warrant the same respect as proceedings of the parliament itself. Giving false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. The committee prefers that evidence be taken in public. However, if at any stage you wish to give confidential evidence to the committee, you may request that the hearings be conducted in camera and the committee will consider your particular request. Are there any corrections or amendments that you would like to make to your submission at this point?

Ms Sripathy—I have no corrections or amendments, but I may make some additional comments.

CHAIR—Would you like to make an opening statement to the committee?

Ms Sripathy—I will make an opening statement, and perhaps include my additional comments.

CHAIR—Certainly.

Ms Sripathy—I represent the Immigration Advice and Rights Centre, which is a community legal centre specialising in the provision of advice, assistance, education and policy reform in the area of migration law. We provide free and independent immigration advice to almost 5,000 people a year and a further 1,000 people attend our education seminars annually. We produce publications such as the *Immigration Kit*, which is a comprehensive plain language guide to Australia's immigration laws now in its sixth edition, and the *Immigration News*, a quarterly newsletter covering recent developments in immigration law. Clients for whom we provide ongoing assistance are often of low or no income, and frequently suffer other disadvantages including low-level English language skills and other cultural, social or economic disadvantages. IARC's main focus of work is in the immigration area rather than the refugee

area of migration law. We do not act for applicants seeking to lodge primary applications for protection visas, or for applicants who have sought review of an adverse decision by the Refugee Review Tribunal or through the courts.

In its submission to the committee, IARC draws from its extensive experience in advising people on non-protection migration issues. The point we seek to make is a fairly narrow point—that is, the post-decision fee, imposed as a result of regulation 4.31B, has the potential to cause hardship to vulnerable Australian families. We say this in our submission because, ultimately, the only people who are really compelled to pay the fee are those who seek to return to Australia following an unsuccessful protection visa claim. By and large, this would be a person who leaves Australia and seeks to return to join family here. It is in this situation that the fee is most likely to be paid, and where the fee is not paid prior to departure it becomes a debt to the Commonwealth. Payment of outstanding debts owed to the Commonwealth is a criterion for the grant of any visa application. There are numerous costs involved that applicants incur in the migration process. An outstanding post-decision fee adds yet another barrier to access into Australia that ultimately harms the most vulnerable members of the community. To illustrate this point, in our written submission we give an example of a case drawn from our casework experience. I would like here to give the committee another example to further illustrate the point.

Mr X came to Australia on a visitor visa to visit his family, who had been settled in Australia for many years. Following his arrival, he was interested in exploring the option to remain in Australia permanently, given that many of his family members were here—in fact, the bulk of his family lived in Australia. Through word of mouth in the local community, he went to a local migration agent for some advice and assistance about options to remain in Australia permanently. He was charged a fee and signed some forms. Ultimately, it turned out that a protection visa application had been lodged without his instruction or knowledge. When he realised what had happened, he left that agent and went to another migration agent. This agent again charged him a fee and ultimately told him: 'There is really nothing that can be done. You have already lodged the application for protection visa.' By that stage, a primary decision had been made. The second migration agent told him that he just had to wait to get to the tribunal, and that the next step would be that he could access the minister's discretion but, basically, did not advise him any further. The second agent did not appear at the tribunal for him—basically, did nothing for him—but managed to charge him along the way. By this time Mr X had formed a relationship with an Australian citizen, and they were planning to get married. By the time the Refugee Review Tribunal decision was handed down to him, Mr X and his new wife were expecting their first child. By now, he had spent over $5,000 on migration agents who had done nothing for him. He is now faced with a $1,000 post-decision fee.

When he comes to us for advice, which is after all of this, our advice to him is that he must leave Australia in order to make the application for the spouse visa from offshore, because essentially he has been refused a visa here and he is barred, under section 48 of the Migration Act, from making a further application while in Australia. Mr X and his wife have few resources and they have had to borrow money to pay the post-decision fee so that it does not later delay the visa application process offshore. Now they have to find the money for Mr X to leave Australia, the money to then lodge a fresh application and the money for all of the associated costs of the process. This is another example of how the post-decision fee can cause harm to low-income vulnerable families. This is a new family and Mr X's wife is an Australian citizen expecting her first child and the family is facing all of these additional financial pressures. We

have given a previous example in our submission, which was reiterating the example that I gave to the committee at the previous review of this regulation.

These stories demonstrate the practical effect of and the hardship caused by the imposition of the post-decision fee. In each of the cases, making a protection visa application was an unfortunate error. In the case of Mr X, it was caused by incompetent or unscrupulous advice and in the previous example we gave in our written submission it was caused by ignorance. Had the application not been made, each of them could have lodged an application for a spouse visa without leaving the country. The post-decision fee adds another penalty on top of what the system has already imposed for making such errors of judgment. Those who are harmed tend to be those in the community who can least cope with the burden of such penalties.

A point that we wish to make is that there are many reasons why people are unsuccessful in their refugee claims. We would submit that it is unfair and inaccurate to conclude that all unsuccessful applicants are non-genuine refugees and people who are seeking to abuse the refugee determination process in Australia. Some of the other reasons why people may be unsuccessful in their refugee claims can be put down to factors such as lack of access to quality migration advice and representation, especially accessible advice in the community about the general non-refugee migration program and the possible visa options that are available. Together with language and cultural barriers to accessing community services, these sorts of factors often result in people lodging inappropriate protection visa applications. IARC has direct evidence of the overwhelming need for free migration advice services in the general community. It is demonstrated by the excess demand for our services. We run phone and face-to-face advice services in Sydney. We are a small organisation with seven staff, four of whom are part time. We see almost 100 people a week, giving them free migration advice. We are essentially the only place in New South Wales from which to get that sort of advice. We cover the whole state of New South Wales and also often take calls from interstate. There is a real dearth of places for people to go to get advice about migration options, family migration options in particular, without paying for services.

Another point that we wish to make is that there are also cases where the lodgment of a protection visa application can be a legitimate option and the only option that is available for a person to be able to access the minister's discretion to grant a visa, using his powers under section 417 of the Migration Act. The Australian migration system is based on categories and on being able to fit a particular category of subclass of visa in order to apply for a permanent visa. People fall through the cracks. In the situation of people who fall through the cracks and do not meet the criteria for a particular visa subclass, the only option is to access the minister's discretion. In order to access the minister's discretion, the lodgment of the protection visa application is often a viable—and sometimes the only—possibility.

If the committee is interested, I can give a few examples of those sorts of circumstances. One example, drawn from the casework experience of IARC, is the situation of a woman who came from Fiji to Australia on a short-term visa to access medical treatment in Australia. She suffered from kidney failure and needed dialysis treatment. She came to Australia on a medical treatment visa and was going to pay some $25,000 to access medical treatment here. Upon arriving in Australia, her condition deteriorated significantly and she could not apply for extensions of the medical treatment visa, because that is not permitted under that subclass of visa. The effect was that, if she were to return to her country, she would die. There was medical evidence to the effect that the only treatment that she could receive to keep her alive was here in Australia.

Faced with that dilemma, the family lodged an application for a protection visa. This was clearly an exceptional and compelling case. There was no other visa that she could make an application for and she needed to access the minister's discretion. Her family members were here with her. Some four years had passed by this time and the family had integrated into the Australian community in a very productive and supportive way. In every sense, in this situation, having the family and this woman remain was really the right thing to do. She made the application for the protection visa knowing full well that, coming from Fiji, she was not making protection claims. She put that up-front in the application. She went through the review process and we assisted her in making a submission to the minister. In that case, she and her family were granted permanent visas by the minister. It is an example of a situation where, clearly, this was a genuine application and there was a legitimate reason to make a claim for a protection visa.

As the committee would be aware, in a situation like that, where the minister has used his discretion, any payment of the post-decision fee is then refunded. We would say that, similarly, there ought to be a provision to refund or waive the fee in circumstances where a person is granted a visa when the application is subsequently made offshore. The examples that I provided are situations where it would be an option to make an application to the minister to exercise his discretion while the family is onshore. It is also an option to go offshore and lodge from offshore. This is a difficult decision for families to make because of the length of the process before getting a decision. We often give people their options and advise them of what is available to them. They can remain in Australia and make an application to the minister, but, as we know, the minister gets many thousands of applications to exercise his discretion and he makes very few favourable decisions. An equal option for some people would be to go offshore and lodge the claim. There is a significant difference in that an additional penalty applies in having to pay the post-decision fee.

We acknowledge the government's concern to deter abuse of the refugee determination process and we acknowledge that that is a legitimate concern. We would submit that there are other provisions in the migration law that serve this purpose, including the provision which restricts the right to work for applications made outside of 45 days of entry and the bar on subsequent onshore visa applications. We would submit that the post-decision fee is not necessary, nor is it effective to deter non-genuine claims.

Our final point is that it appears that there continues to be a lack of evidence of the effectiveness of the post-decision fee to deter non-genuine claimants. This, together with the adverse impact that it may have on Australian families in the context that we have described, leads us to oppose the continued application of the post-decision fee. Our recommendation would be that the regulation be repealed. In the alternative, if it is not repealed, we would recommend the introduction of a discretion to waive the imposition of the post-decision fee in compelling circumstances or to refund where the person has been successful in a subsequent visa application.

CHAIR—You appear to be fairly certain that there is a lack of evidence to support the post-decision fee for genuine claimants, yet the department produces evidence to the committee saying that, in low refugee producing nationalities, there has been evidence to the contrary. What can you say about that? As a committee we are trying to look at this fairly objectively, yet we seem to have different evidence from different quarters.

Ms Sripathy—I have had a chance to look over the department's submission, although fairly quickly. In a number of respects the department, in its submission, has qualified the statistics that are produced. To that extent one can make statistics lead to all sorts of conclusions. Our experience is from seeing real people come to our centre—clients who make protection visa applications for a number of reasons. I guess the danger of just looking at figures is that you forget that there are people behind every story. Certainly for the people whom we have seen, who have been harshly affected by this provision, the stories are very compelling and unfortunate.

There are a number of reasons why a large number of protection visa applications are made. Among those reasons are people who are abusing the system and simply lodging to delay their time in Australia. It would be my submission that a thousand dollars is not necessarily going to deter them, if that is their only reason to do it, whereas it is an unfortunate situation when somebody has made an application for a protection visa when another option would have been available to them. In situations such as the ones that I have been describing, the fee is a penalty. It is a penalty that is imposed on the wrong people—it affects the wrong people. My answer is simply that the statistics do not necessarily say very much.

CHAIR—You gave us a couple of examples of people using migration agents. I know that is an area that has been brought up before. In terms of what can be done—and you raised this a minute ago—to provide the right information to people who do not necessarily need to lodge a protection visa but could take another course of action, do you have any recommendations as to what can be done at the start of that process to perhaps influence people's decision to make an application for a protection visa?

Ms Sripathy—One of the difficulties in the scheme as it currently operates is that, once you have made a protection visa application and you have received a refusal, you cannot make a subsequent application for, for example, a spouse visa in Australia; you need to go offshore. So the damage has been done in terms of the section 48 bar applying. Some people come to you early enough that you can withdraw the inappropriate application and submit a fresh application for, say, a spouse visa. More often than not, people come to you after that point and there is no scope to withdraw from the proceedings—hence, people follow through to the tribunal.

A change in the legislation that permitted a person who wished to lodge a fresh application while still in Australia and to not proceed to the tribunal would be one suggestion of how you could assist people to not carry through to the tribunal, which has heavier cost implications for the system than simply pursuing the more appropriate application. It gives a bit more of an option within the scheme as it operates now. Currently there is a disincentive for people to pull out, especially in the circumstance where Australian family members and children are involved. That falls within the minister's guidelines and people often pursue the process to reach the minister and apply to the minister to exercise his discretion. An alternative is to permit them to lodge a fresh application at an earlier stage. That would require legislative change, because currently section 48 would bar that.

CHAIR—Thank you very much for that.

Mrs IRWIN—Thank you for the excellent briefing you have just given us. I had a number of questions to ask you today, but you have covered virtually all of them in your briefing and given us some examples. I want to ask about the waiving of the fee. In your submission, you make

two recommendations. Naturally, one is that Migration Regulation 4.31B be repealed. In your second recommendation, you say:

> On the other hand if it is not repealed, then we recommend the introduction of discretion to waive the imposition of the post decision fee in compelling circumstances such as the case study mentioned above.

That case study was in your submission, and you have also given us one very good example today. Who do you feel should have the power to do this? You have given us one example of a compelling circumstance. What would other examples be? Marriage? A de facto relationship? As you were saying, a child? A lot of people I have met who have gone through migration agents get very frustrated because of the time frame, the wait. I think you said one person had to wait about five years. The application is completely rejected by the tribunal, then we take it to the minister. I have been fortunate—I have to give the minister credit—because in the time that I have been in the parliament I have sent off six letters to him and I have been lucky in two circumstances. I think the time frame is pretty long, and I want to know some other examples of compelling circumstances.

Ms Sripathy—The first question was who would grant the waiver. It could operate prior to the fee being imposed so that it would not be imposed if compelling circumstances could be shown. It would probably be more appropriate at that point for an unsuccessful applicant to be sent a letter asking them to give reasons why they think a post-decision fee ought not apply. That would give them an opportunity to explain how they came to make this application. Of course, one of the difficulties is that often people need some assistance to tell that story, but I think that would be one way that it could be done. It would not automatically apply; it would apply if there were no compassionate circumstances to justify it not applying.

I think that would be preferable to doing it the other way round—that is, applying it and then requiring a person to take the active step of disputing it on the ground that compassionate circumstances apply. We must understand that the majority of people in this situation suffer from disadvantage, whether it be social disadvantage, language disadvantage or one of the numerous other disadvantages in our community. Putting the onus on them to explain what has happened to them is, I think, too heavy a burden. It would be more appropriate to make that inquiry from our system and to say, 'How did you get to this point?' I would submit that a substantial number of people would have compassionate circumstances to put forward.

That brings me to your next question: what are other examples? Clearly, one example is where an Australian family unit would be harmed by the additional financial burden. Other examples include people who have been victims of unscrupulous migration agents. Unfortunately, that is the reality, and I know the committee has heard this point made a number of times. I have also heard the response that people can complain about their migration agents and there are avenues to take it up. The reality is that people do not, because they are migrants and refugees who have been badly done by and had their money taken from them and who are not the most assertive clients or consumers to follow through a complaint to a migration agent—even if that were of any use. Essentially, in our experience, not very much is done with complaints that have been taken up. It is the nature of the clientele we have seen that they are not necessarily assertive about their consumer rights.

I would submit that there may be other compassionate circumstances. It is not just a question of having to pay the fee. They have often lost a significant right to make an application for a

visa that they would have been granted had they been properly advised. I think that is a really significant penalty that they have suffered through being the victim of unscrupulous advice. Being able to put forward their experience—that they were poorly advised or not advised; that they simply did not know what to do—basically gives them a chance to tell their story. I think that there are a number of other compassionate circumstances.

Mrs IRWIN—Sometimes it is very hard to find that fee because they have work restrictions.

Ms Sripathy—Exactly.

Mrs IRWIN—Thank you very much for that.

Senator EGGLESTON—I must say I agree with my colleague that your submission was well presented. You are addressing the issue of people who have difficulty with this fee, but I suppose one has to recognise the validity of the department's case that there is a potential for a large number of people who do not have a realistic case to seek to have their decisions reviewed. The fee, more than anything else, is a sort of barrier so that people have to think through whether or not they really do have a case before they proceed. Although $1,000 is not a lot of money, it is still enough to make people—so the theory goes—think about the validity of their claim. If the fee were not there or if it were subject to waiver, would you not agree that there should be some other filtering system in place to deal with spurious claims? Would you perhaps agree that some sort of preliminary hearing on submitted documents should be conducted by a bureaucrat who would make a preliminary decision about the validity of a case before it proceeded to the tribunal? Is that something you would find acceptable?

Ms Sripathy—I probably will not answer that part of the question, only because I come here from the Immigration Advice and Rights Centre, which does not represent people in the refugee determination process, so I do not want to go on the record as making any comments about alternative procedural suggestions to deal with it. I will say that I believe that the system already has a number of filtering mechanisms and they include the 45-day rule, which makes people think twice about what benefits they will get if they make a spurious refugee claim. There is also the section 48 bar, which is a significant deterrent to making a spurious claim because it prevents you from making any other application in Australia. They are two significant filtering mechanisms that exist.

I think it is interesting that the department makes the argument on the one hand that the imposition of a post-decision fee does not deter genuine refugees from making applications and is not a barrier yet also in the same breath makes the submission that it is a barrier and that is why it is there. It either is or is not. It is our submission that it is a barrier and it frightens people. It is significant. Given that this is in the context of making available or accessible the avenue of applying for protection in Australia, there ought not to be financial barriers to people who by and large suffer economic disadvantage or are vulnerable in other ways. The bottom line is that not a whole lot of money is collected from this fee. The point of our submission is that the people who really have to pay it are those who have family connections in Australia. For the majority of people who seek to return by going offshore, it is really only through family migration that people are going to end up coming back into Australia in all reality. It is people who are making partner applications, and quite often Australian citizen children are involved. That is where the harm lies and that is the point of our submission—that that harm outweighs any benefit that the department might say is provided by this provision.

Senator EGGLESTON—Nevertheless, although the other barriers which you refer to do exist, quite clearly the department believes—I would say, on the basis of their experience—that there is a need to filter down these applicants. If you did not have the fee, which is basically what you seek, then I still feel some other kind of pre-assessment mechanism would be necessary. I thank you for your answer. I see you produce an immigration kit in your office. I would be very grateful if you could send me a copy so that I could look at it.

Ms Sripathy—Okay. It is a book that we produce. We are about to produce the seventh edition some time this year. Essentially, it is a plain English guide to Australia's migration laws. I can forward you a copy.

Senator EGGLESTON—Please send me one.

Senator TCHEN—With an invoice as well.

Ms Sripathy—Yes, with an invoice.

Senator EGGLESTON—So long as it is not $1,000!

Senator TCHEN—I would like to thank you, Ms Sripathy, for your submission—the best part of it is that it is only two pages! I am interested in a number of things you have said. Firstly, you told us what you do at IARC and that you are a community legal centre, but can you tell us who you are and how the centre is composed?

Ms Sripathy—We are a community legal centre, so we are part of a network of community legal centres throughout Australia. There are some 150 community legal centres. We are a specialist community legal centre based in New South Wales and we specialise in immigration law and policy. We provide a combination of direct legal advice and casework. We provide community education services and we have a program providing commercial immigration law seminars and CPD seminars. We also engage in policy and law reform, such as attending hearings such as this. We have seven staff, four of whom are part time. We have three caseworkers who provide immigration advice and do some ongoing casework. We have an education and publications officer, an administrative assistant and I am the director and principal solicitor. We are able to see as many clients as we see because, in our advice sessions, we have the benefit of some 50 to 60 migration agents who give advice on a volunteer basis under the supervision of our staff, migration agents and the solicitors.

Senator TCHEN—So you have a network of migration agents who assist you.

Ms Sripathy—We have a volunteer program whereby we train them and they are under our supervision.

Mrs IRWIN—Only the good ones.

Ms Sripathy—Only the good ones.

Senator TCHEN—What is this community you represent? Where do you draw your membership from? I assume you have a membership.

Ms Sripathy—We are an incorporated association. The term 'community legal centre' describes a network of organisations that do a combination of casework, community education and policy law reform. Many community legal centres are located in local communities and are managed by community based management committees. Our organisation specialises in an area of law. We are also managed by a volunteer management committee made up of community members. In our case, our management committee are mostly migration agents who have an interest in the work we do and in our mission. We are not a local area related community legal centre; we are specialists, so we are not 'community' as such.

Senator TCHEN—I was not looking for a basis to criticise you. Having read your submission and listened to your responses to other committee members it occurs to me that a lot of the hardship cases you talked about are due to incompetence or in fact sometimes criminally negligent work by migration agents. It seems to me from your description that you do a lot of community education work. We should encourage that, possibly by way of a levy on migration agents' fees to fund an organisation like yours.

Ms Sripathy—Certainly we would support any additional funding of organisations like ours. As for where the funding comes from—

Senator TCHEN—Do you think it is a good idea to put a levy on migration agents' fees? It is a possibility.

Ms Sripathy—You would probably want to raise that with the body that regulates the migration agents. But one of the major areas of our work is resourcing and training a network of community based non-fee charging migration agents to be available to give advice and to assist people.

Senator TCHEN—Yes, of course. I am talking about fee-charging migration agents, not volunteers.

Ms Sripathy—There are requirements of all migration agents to maintain their knowledge and to do continuing professional development et cetera. There are clearly mechanisms in place to ensure that the standard of migration agents is to a certain quality. Unfortunately, there are incompetent people, unscrupulous people and those who are simply not registered but who continue to take money and provide advice.

Senator TCHEN—That is the sort of story that all my colleagues and I have heard. We often have to deal with them. It is a problem as well. Following your response to Senator Eggleston's question, you specialise in advising migrants rather than refugee claimants, is that correct?

Ms Sripathy—That is correct. In New South Wales there is the Refugee Advice and Casework Service, which is also a community legal centre that provides assistance with onshore protection issues, so we have delineated that we do not do that area; we refer them to RACS.

Senator TCHEN—This regulation deals specifically with perceived abuse of the refugee appeals system. Your submission does not directly relate to that. You deal only with specific cases of hardship—that is, as you say in your submission, people who were forced into the refugee appeals streams rather than refugees who are trying to abuse the system. Is that right?

Ms Sripathy—We see the people who are affected by the post-decision fee. We often see people who are or may be liable to pay a post-decision fee once their matter is completed. They come to us for advice about their options. The point that I have made is that for some of those people there are family options in the family migration program. We are seeing people who are affected. Refugees are not necessarily people who do not have families or do not make connections while they are in Australia.

Again, as I noticed in the submission by the Refugee Council of Australia, there are a number of reasons why people make protection claims. It is not that they are not genuine or are seeking to abuse the system; some of those people are subjectively refugees in their minds. They may not meet the convention definition and they may ultimately be unsuccessful in our determination process but they may well be genuine in their fear of returning. They may also be people—I gave the example previously—in exceptional or compassionate circumstances where they have specifically lodged a protection visa because it is the only thing they can lodge in order to access the minister's discretion. There are a number of people in the system in that situation. Although we do not give advice and take people through the refugee determination process, we cannot completely isolate the refugee determination process in the advice we give.

Senator TCHEN—But your experience involves people who would otherwise have grounds for making applications as migrants. I think you suggested that there may be an alternative built into the immigration regulations now which will allow people to withdraw from the refugee stream and make fresh applications as migrants. I think it would be worth while making that a formal process on your part as it would alleviate a lot of the problems you have raised.

Ms Sripathy—The question is at what point people realise that this option is there. It would definitely alleviate the issue for a lot of the people who come at the point where they have had a refusal but have not been to the tribunal. Sometimes people come after that point. It is a matter of when they come to realise what options are available to them. We should make it as widely available as possible.

Senator TCHEN—I wanted to clarify that because, in your submission, you make no comments on any effects—if any—that the regulation had on bona fide applicants. The stated purpose of regulations like this is to discourage non-bona fide appeals. One of the issues as to whether the regulation should remain in place is whether it has an adverse effect on bona fide applicants. I assume you have no evidence that it has had an adverse effect on bona fide applicants.

Ms Sripathy—We do not give advice in that area.

Senator TCHEN—Thank you. I would like to follow up a question from Mrs Irwin. In your second recommendation you talk about a formal process to waive in compelling circumstances the imposition of the post-decision fees. You said something about an advisory letter. What do you have in mind? Who should issue that letter and manage that process? Obviously this is not a matter for the Refugee Review Tribunal because all it does is review; it does not handle the administrative side. Who should handle this and issue the letter? Who should assess the grounds?

Ms Sripathy—I understand that at the moment the Department of Immigration and Multicultural and Indigenous Affairs imposes the fee or sends the letter advising that the fee is

payable. If the process were in place prior to the fee being imposed for an applicant to have an opportunity to explain whether there were any compassionate circumstances, it would probably be appropriate for it to come from the department.

Senator TCHEN—The process would be administrative. Would the decision under that process be appealable? If it is an administrative process, the decision should be appealable. Would that open another avenue for appeal, particularly for those who did not have genuine cases?

Ms Sripathy—While I would always say that it would be appropriate to have a right of appeal for any administrative decision, given that a decision is made by an individual and it is preferable to have a further avenue—

Senator TCHEN—I agree with that. The question is: does it open another avenue for appeal?

Ms Sripathy—That may be the case. There are a number of non-appealable, non-compellable discretionary powers within the migration scheme currently. Given that there is nothing now, it would be an improvement to have a discretionary power available. I would say that that would be an improvement, even if it were not appealable.

CHAIR—Thank you very much, Ms Sripathy. I also thank you for representing the Immigration Advice and Rights Centre and for making yourself available and for fielding a great number of questions with such frankness. We appreciate the evidence you have given us here today. There might be some matters on which we need some additional information, and the secretary will write to you about them. You will be sent a copy of the transcript of your evidence on which to make editorial corrections. Thank you very much for your attendance.

[10.36 a.m.]

MAHON, Ms Claire, Chair, Law Reform Committee, Young Lawyers Section, Law Institute of Victoria

RODAN, Mr Erskine, Law Institute Council Member, Law Institute of Victoria

CHAIR—Please state the capacity in which you appear.

Ms Mahon—I appear as Chair of the Law Reform Committee of the Young Lawyers Section of the Law Institute of Victoria.

Mr Rodan—I appear as a member of the Law Institute Council. I have been practising immigration law for 20-odd years and I am an accredited specialist in Victoria. I am also a member of the migration committee and a member of the law council nationality and residence committee.

CHAIR—Although the committee does not require witnesses to give evidence under oath, you should understand that these hearings are the legal proceedings of the parliament and warrant the same respect as the proceedings of the parliament itself. Giving false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. The committee prefers that evidence be taken in public, but if you wish to give confidential evidence to the committee you may request that the hearing be held in camera and the committee will consider your particular request. Are there are any corrections or amendments that you would like to make to your submission at this point?

Ms Mahon—No, there are not.

CHAIR—Before we ask you some questions, I invite you to make an opening statement.

Ms Mahon—Thank you for inviting us to appear today. The Law Reform Committee of the Young Lawyers Section has four main concerns with migration regulation 4.31B, which have been set out in our written submission to the committee. First, this fee is in all practicality a financial penalty imposed upon unsuccessful applicants to the Refugee Review Tribunal and it is not merely a fee for review. Second, we are concerned about the way in which unsuccessful applicants are restricted in their ability to apply to enter Australia by other avenues in the future due to the existence of a debt to the Commonwealth. Third, we believe that this regulation places Australia in breach of its international obligations. Lastly, the regulation is unable to specifically target abusers of the immigration system and thus it has an undesirable deterrent effect upon genuine refugees. In addition, as Mr Rodan will set out in more detail, we are concerned about the validity of this regulation.

In my opening address this morning, rather than repeat what is set out in our written submission, I would like to address our concerns about the views put forward to this committee by the Department of Immigration and Multicultural and Indigenous Affairs as set out in their submission of February 2003. First we point your attention to paragraph 2.4.6 where the department states:

Australia is the only country which has a post decision fee.

However, Australia is not the only country to provide a system for the proper processing of refugees. It is therefore essential that we ensure that this system is one that does not punish those who are genuinely applying for refugee status, as is their right under international law.

The imposition of a post-decision fee creates a financial penalty for their application and acts as a deterrent and an impediment. It is an impediment to the full application of article 14 of the Universal Declaration of Human Rights, which protects the right to seek and enjoy asylum from persecution. Further, article 14 of the International Covenant on Civil and Political Rights sets out the principle of access and equality of access to the courts and tribunals. The imposition of a penalising fee impedes access to our justice system for all users, not just the abusive users. As it therefore discriminates against unsuccessful applicants for refugee status, it is further in contravention of the obligation not to discriminate in section 29 of the refugee convention. The imposition of this fee hinders Australia's ability to comply with the refugee convention by restricting access to an effective review process.

In its submission, the department sets out its objective of deferring mala fide applicants at the review stage. However, we submit that this access to review is a vital element of the open and accessible justice system that we have valued in Australia. The imposition of this fee unduly restricts that. It is vital in our opinion that access to the review stage be unimpeded and that this aspect of access is a fundamental tenet of our justice system.

Further, the department's claim that this regulation will impact only upon nongenuine applicants is simply not true as there are many people in need of protection and humanitarian assessments who do not fall under the convention definition of a refugee. As the department states in its submission at paragraph 5.4.3:

Not all unsuccessful PV applicants are intentionally misusing the onshore protection process. Applicants may harbour subjective fears for their safety where those fears are not objectively based. Because these applicants genuinely, if incorrectly, perceive that they are in danger, they are by definition *bona fide*.

Yet these people, too, are penalised for seeking a review and effectively charged an up-front fee in order to seek an exercise of the ministerial discretion under section 417. These non-convention defined refugees, who are validly and genuinely seeking asylum from persecution, with legitimate fears of being subjected to serious human rights violations, should not be penalised for their application for review.

The department states that it has concerns about the applicants who do not genuinely fear for their safety and who are misusing the protection visa system for other reasons—for example, to access work rights and Medicare—but, as the department has pointed out, these rights are restricted to the pre-45-day applicants. This excludes over 38 per cent of the applicants from the category of potential abusers.

Based on table 5.3.1T in the department's submission, only 62 per cent of applicants apply within the 45-day period in which they are entitled to access work rights and Medicare. This is clear evidence that a large number—38 per cent—of users of the system are, by DIMIA's own definition, unlikely to fall within the category of potential abusers of the system. Rather, the 38 per cent of people who apply after the 45-day period, when there is no incentive to remain in

Australia and go through the appeal process, are more likely to be those who need the assistance of the review process.

The department's claim that there is sufficient evidence that deterrence of abusers is working with this system and that no genuine applicants are being turned away is based on a statistical comparative analysis of supposed low refugee producing countries versus high-refugee-producing countries. We believe that this evidence is unconvincing, especially when the department further states—for example, at paragraph 5.5.27—that people from low refugee producing countries may well be bona fide applicants, even if their claims have been rejected.

The department also states that the fee has resulted in a decrease in applications for review to the tribunal by 32.5 per cent since the introduction of the fee in 1997. The point to note about this contention is that it is illogical, unfounded and simply not possible to assume that a 32.5 per cent decrease in applicants has occurred without any deterrence of at least some genuine applicants as well.

The persons most disadvantaged by the imposition of this fee are those genuine asylum seekers who are unnecessarily deterred by the psychological impediment of incurring a debt to the Commonwealth and those who fall between the gaps of being bona fide applicants but who are not classified as genuine refugees. The department sets out its expectation that the effect of the fee will continue to be felt over time as the tribunal makes its decisions over a shorter amount of time. Therefore, the financial disincentive posed by the fee will carry more weight and will worsen the cost benefit balance for applicants who may be unsuccessful. We have a grave concern that the disincentive and deterrence for genuine applicants will also increase over time and, in effect, this increase of the fee for genuine applicants will be more clearly felt as time goes on. Therefore, we reiterate our strong recommendation that migration regulation 4.31B be removed.

CHAIR—Would you like to make a statement, Mr Rodan?

Mr Rodan—Just a very short one, if you do not mind. One of the worries that we have about this particular regulation stems from it appearing to be a tax. I refer you to Air Caledonie International v. The Commonwealth (1988) 165 CLR 462, which was a High Court decision in 1988. The decision stated:

... the Privy Council identified three features which sufficed to impart to the levies involved in that case the character of a 'tax'.

The three features of the levies were first, that they were compulsory; second that they were for a public purpose; and third were enforceable by law.

In a High Court judgment in a case a few years later the then Chief Justice Latham adopted those three features and made a general statement, which was approved by the High Court at a later time, of the:

... positive and negative attributes which, if they all be present, will suffice to stamp an exaction of money with the character of a tax:

'a compulsory exaction of money by a public authority for public purposes, enforceable by law, and ... not a payment for services rendered'.

Later in the decision, former Chief Justice Gibbs, in a 1977 case, was quoted as saying that it:

... made explicit what was implicit in the reference by Latham C.J. to 'a payment for services rendered', namely, that the services be 'rendered to' ... at the direction or request of—'the person required' to make the payment. The third is that the negative attribute—'not a payment for services rendered'—should be seen as intended to be but an example of various special types of exaction which may not be taxes even though the positive attributes mentioned by Latham C.J. are all present.

The decision then discussed sections 53, 54 and 55 of the Australian Constitution which talk about which laws are tax laws and which laws are not tax laws. The Air Caledonie case relates to a provision, section 34A of the Migration Act, which made everybody except children under the age of 12 pay a levy on arrival in Australia. It would either have to be paid by the passenger or be collected by the airline organisation. They would then have to pay those moneys to the Commonwealth government.

So there are a number of similarities here. One dissimilarity is that that came out of an act of parliament, whereas what we are talking about now is a regulation, which makes it much more difficult to defend not being a tax. If you look at the character of the review fee, the immigration department have already stated that the imposition of this particular fee is for a public purpose—to ensure that abusers of that section have to pay, which is a public purpose. It is compulsory and, while there are exceptions, this is very similar to the exceptions that are granted in the section 34A issue, which was discussed in the Air Caledonie case. It was prescribed there that children under 12 years old did not have to pay the fee. Here, it is prescribed that those who actually get refugee status through the RRT or are granted a visa by the minister do not have to pay that fee at a later time. So there is that positive comparison.

The third part to that is that it is not a fee for services rendered. If you look at page 31 of the immigration department's submission of February 2003, it states:

... removal of the post review decision fee would remove the only financial disincentive facing people who have no grounds for protection who want to use the asylum/appeal system to prolong their stay ...

At paragraph 5.11.4 , on the same page, they state:

Therefore, to remove the fee, would remove the only direct disincentive deterring applicants ...

So it is a deterrent; it is not a payment for services rendered. It has the characteristics of a tax and if that is the case then as the court says in the Air Caledonie case, there should be a separate act of parliament and it should not be hiding in a regulation. If it is not a tax then it is a penalty or a punishment. Before I go on to that, the section that grants the regulation's power is section 504. It says that the Governor-General may make regulations and it talks about the charging and recovery of fees et cetera. If it is a tax, it is not a fee and, therefore, it is ultra vires the act and that obviously means that the regulation is not valid.

There is an old saying by an American senator. During the anticommunist Senate committee hearings, Senator McCarthy said, 'It looks like a duck, it walks like a duck and it quacks like a duck—it must be a duck.' In this case, it looks like a tax and so forth—I am not saying it quacks like a tax or anything like that!—and it has these three characteristics: a compulsory exaction of money by a public authority for public purposes, it is enforceable by law, and it is not a payment for services rendered. Therefore, it looks like a tax and should be noted as a tax. That is one argument.

The second argument is that, as Claire said, it is a penalty. Recently in the Supreme Court in South Australia a decision was made on an appeal from a magistrate's court about a person who had been too long in detention. The argument put before the state Supreme Court at that time, by Mr Burnside QC, was that detention had become punishment, and that had been accepted by the magistrate but not by the state Supreme Court—but that matter is now on appeal to the High Court. That is an important issue.

The question now is whether this is a punishment for people who lodge appeals to the RRT and, if it is a punishment, then it must be looked upon as a penalty. If it is a penalty, it is also ultra vires the Migration Act because it does not come under either regulation power under section 504. They are the two main issues I wanted to bring to your attention. I know they probably have been argued to you before, but I think it imperative to ensure that the committee is aware of those issues. Could I raise a couple of other issues?

CHAIR—Mr Rodan, we are due to conclude at about 12.30 today, so if you made it very brief that would be fine. The committee can then ask further questions.

Mr Rodan—Fine. I wanted to talk about personal experiences in our own office. A middle-aged man from Fiji came to our office. He was on a visitor's visa and he was, we found out, part Aboriginal and part of the stolen generation. His father was forced to go over to Fiji—that was before Aboriginals were noted as citizens, before the referendum in 1966. This man did not have much money. We believed that the only way that we could get to the minister, who is also the minister for Indigenous affairs, was to show him this particular case and say, 'Look, this is a member of the stolen generation, or a person who is a result of the stolen generation, and he should be given the opportunity to come back to his home country.' The minister agreed. This man did not have a case as a refugee, and he did not have any money at all—we do a lot of cases on a pro bono basis—and we put that case to the minister, and the minister accepted it. I know this person did not have to pay the $1,000 fee in the end. But there are these kinds of cases which could be looked upon as abuses of the system which are not really abuses.

The second types of cases are the East Timorese cases. They are being refused by the tribunal at the moment. The problem is that they may not have sufficient humanitarian compassionate grounds and they may have to be refused by the minister. And they may not be able to come back to Australia because they cannot afford it. The East Timorese people are very poor. They have lived on ASAS payments or they have been so traumatised for the last 10 years, waiting—or whatever happened to them in East Timor.

CHAIR—Are you saying that the regulation will impact on them?

Mr Rodan—Yes, it will impact on them if they want to come back to Australia and join some of their family here. They may not have sufficient family here to be eligible for consideration. These are things that we have to concern ourselves with.

CHAIR—Thank you very much, Mr Rodan and Ms Mahon. If you would make the New Caledonia case material that you were quoting earlier available to the committee, we will take it as a submission. Mr Rodan, you started speaking about a levy, and tax came up as well. Can you tell me what the difference between a levy and a tax is? I think you were saying that a tax is a penalty. I have had experience with levies in this parliament and there are conditions where levies are applicable. I wonder what your thoughts are on that and perhaps you would clarify

what the difference is. In your opinion, is this a levy or a tax? You can take that on notice. You can get back to us if you do not have that material readily available.

Mr Rodan—Yes, it might be a good idea to get back to you about that. It is an esoteric argument in many ways.

CHAIR—One of the things that we have to look at and one of the things that concerns us as a committee is bona fide refugees. We are looking to ensure that they are not given any disincentive, so anything that deters or is a disincentive to genuine refugees is something that we need to consider very fully. Ms Mahon, you were talking about the department's figures, and you felt that there was a bit of dissonance with them and that they did not really provide a conclusive case that there had been a significant change with the low refugee producing nations. Would you elaborate on that for the committee's benefit, especially as to the areas which you think are the fail points? At the moment we are looking at different evidence and we are getting different trends. It is not exactly clear cut. Do you have any practical examples that you can give us? We heard earlier about the refugee convention and about some people who might slip through that.

Ms Mahon—I did state in the beginning that we have concerns about the figures that DIMIA are using to justify why there is evidence that, first of all, the fee is working to deter abuses of the system but not to deter bona fide applicants and, secondly, that the fee is not acting as a penalty but is acting as an effective cost recovery mechanism for the abusers of the system and is not having a detrimental impact upon the bona fide users of the system. The problem with this is that the only evidence that DIMIA has been able to provide about this is the statistics in its submission which are based on that comparative analysis between low refugee producing countries and high-refugee-producing countries. For a start, a number of other groups have put in submissions about their concerns about the way in which these statistics have and can be interpreted and the fear about being completely reliant upon this one set of statistics for determining whether or not bona fide applicants are being harmed by this regulation.

The difficulty that we find is that, first of all, the low refugee producing countries include countries such as Indonesia, which would include East Timor. As Mr Rodan stated, there are concerns about that. There is also a concern about the fact that DIMIA itself has recognised that low refugee producing countries do also include an element of genuine refugees who are refused their appeal from the tribunal because they do not fall within the convention grounds yet are still bona fide applicants; they are not abusers of the system. On this point I would refer to what I believe is in the Refugee Council's submission in 1999 where they listed what they saw as five broad categories of applicants under this system. Only one of those five categories could be classified under the refugee convention as applicants who would have their appeal result in a successful decision and only one of those categories could be classified as mala fide applicants, people trying to abuse the system. There were at least three other categories—and that was just on a broad generalisation. We would say that there are many different forms of applicants who are in genuine need of protection or genuinely have a subjective belief that they do need protection but who do not fall within the refugee convention as it is interpreted under the Australian Migration Act category of a genuine refugee.

Examples would be the Timorese refugees that Erskine was talking about and—these are things which I believe other organisations may be submitting to the committee—cases such as women fleeing domestic violence situations where, upon return to their country of origin, they

would face genuine persecution. But, because the categories are not clearly defined under the refugee convention, they would not gain refugee status in Australia. There is also, I believe, a case pending at the moment on the interpretation of the refugee convention status of homosexual refugees and whether they would face persecution when they returned to their country. So those are some examples of instances where people may be genuine applicants but may not win their appeals to the refugee tribunal. In those instances, this fee would impose a penalty on them and impede their ability to later apply to return to Australia under a different visa category.

CHAIR—Most of your submission hinges on the fact that you see it more as a penalty. Would it be fairer to impose the fee on all applicants at the beginning of the process and refund it to successful applicants? At the moment we are imposing it at the end stage on unsuccessful applicants. What are your thoughts on that? Would that be a fairer system? I think you might have been trying to speak about that earlier, Mr Rodan, when you were talking the New Caledonia case, saying that it should be fair to all et cetera.

Ms Mahon—In general, our committee would say—and Erskine addressed the New Caledonia case in that aspect—that it may avoid our concerns about the fee's invalidity according to law. However, we would definitely submit that that is not an appropriate response, because it would further deter all genuine applicants. It would be an even greater deterrent and impediment to accessing the justice system. This would, in our view, be entirely unacceptable.

CHAIR—I appreciate that, but we have been given comments that it should be imposed at a different stage.

Ms Mahon—If our concern is that we are deterring genuine refugees, this fee obviously has a deterrent effect at the review stage. But to increase the deterrent effect at the application stage would be even more detrimental.

CHAIR—So it would be even worse, in your opinion?

Mr Rodan—It may get you over the hurdle of it being a payment for services rendered, but, as Claire said, the problem is that not many of these applicants have $1,000 for lodging an application. You would find that the number of applicants who appeal to the RRT would be very minimal, because these people cannot afford it. You would probably have to have some kind of fee waiver, like the MRT has, but not such a strict fee waiver. You would have to have a fee waiver based on the fact that these people do not have sufficient funds. It would not be extreme financial hardship; just financial hardship. It may overcome the Air Caledonie situation in being a fee now for services rendered. Chief Justice Gibbs said that the services should be required to make the payment, so you make the payment and you get the service of the appeal procedures. But that, I think, is still arguable.

Ms Mahon—I think there would be a severe risk that this breaches further our international obligations in that, under the refugee convention, the ICCPR and the UDHR, we have an obligation to provide a justice system which is accessible and which does not impede people's ability to seek asylum from persecution. To enforce an application fee at the initial application stage would be very detrimental to proper access to the justice system.

Senator TCHEN—Mr Rodan, did you just say that relatively few applicants appeal to the RRT?

Mr Rodan—No, I did not. I said that if the $1,000 fee were imposed at the beginning, relatively few would be able to do it.

Senator TCHEN—I understand.

Mrs IRWIN—I want to talk about international obligations. In your submission, you stated that the Law Institute of Australia believed that the regulation places Australia in breach of its international obligations. Why do you believe this? One does not want to see Australia breaching its international obligations. Can you explain?

Ms Mahon—As we said in our submission, we are greatly reliant upon the previous submissions of organisations such as the Human Rights and Equal Opportunity Commission and the submissions I believe other organisations such as Amnesty International will submit on this issue. In general, as I said in my opening statement, our concern is that this does breach our international obligations in the way in which it impedes access to an open justice system and the way in which it means we are not complying with the spirit of the refugee convention, which requires us to provide a suitable system for people who have the right to seek and enjoy asylum from persecution. By having a post-review fee in place, which penalises those who have disputed their initial finding, we have here an inability to completely comply with the requirement to have an effective review procedure by which we determine who is and is not a genuine refugee in Australia.

Mrs IRWIN—You would have been here when the Immigration Advice and Rights Centre were here. Like you, they want to have the regulation repealed. They also said that, if it cannot be repealed, they would recommend the introduction of discretion to waive the imposition of the post-decision fee. Would you agree with that?

Ms Mahon—No.

Mrs IRWIN—You do not. You just want it repealed?

Ms Mahon—We do not think it is appropriate that there is any further discretion granted. We think that this will unnecessarily complicate the system and that the fee, which is currently a deterrent, should be removed. Mr Rodan has more comments about that also.

Mr Rodan—I think I have already stated them. We say at the threshold that it is a tax. If you changed it to a fee before the application is made, it may not be a tax because it may be a payment for a service rendered.

Mrs IRWIN—Mr Rodan, would you also agree that the regulation places Australia in breach of its international obligations?

Mr Rodan—Yes.

Senator EGGLESTON—I asked the previous witnesses a question about this. If the fee were abolished, would you see a need for some other kind of filtering mechanism to sort the more genuine cases from the less genuine cases that were to appear before that tribunal? I notice, on page 5 of some background material provided by DIMIA, that until mid-1989 there were fewer than 500 refugee applications per year. In 1990-91, the number went up to 16,937. It has come down since then. But, obviously, a lot of these people may consider appealing if the decisions are not favourable to their refugee applications. As I asked the previous witness, would you see another level of bureaucratic assessment as being an appropriate alternative to a fee?

Mr Rodan—No. What I think should happen is that, if the immigration department think an application is unmeritorious—which they do at the moment; they make a decision fairly quickly—then there should be a quick and efficient method of the appeal going through the RRT. The Migration Review Tribunal is able to do that. In some cases they have heard and finalised within three months. I do not see anything wrong with that happening. You cannot say there are no resources, because there are plenty of resources at the RRT level. That would probably solve the problem of people being alleged of trying to stay in Australia with a work permit and Medicare. Once their appeal is finalised by the RRT and, say, they have gone to the minister, they are on a bridging visa without work rights and no Medicare. If they have applied after 45 days, they have no Medicare and no work rights, so they are between the devil and the deep blue sea. The only way to control it is by being quick and efficient about it, but ensuring, of course, that natural justice prevails all the time.

Ms Mahon—In addition, the department has submitted in previous committee hearings and, I believe, in their current submission, that this fee is part of a package. That package has been extremely successful in achieving their aims of decreasing the number of abusers of the system. If this fee were to be abolished, the remainder of the package would still be in operation, such as the 45-day wait period for access to work rights and Medicare. The abolition of this fee is not going to have the effect of removing the only form of deterrent for nongenuine applicants.

Senator EGGLESTON—You could argue that the department might say that the other mechanisms were perhaps not achieving the objective that they desired, and so the fee was introduced to stiffen the process of eliminating spurious applications.

Ms Mahon—That may be the reason they have put forth, but, beside the statistical analysis of low refugee versus higher refugee producing countries, the department has been unable to provide any evidence that this fee has had an effect on decreasing the number of abusers in the system. In fact, on previous occasions they have relied on the fact that it is difficult to isolate the effect that this fee has had. Rather, they have relied on the fact that the entire package is what has had the effect. Therefore, we submit it is logical to conclude that the removal of the fee will not be the only measure which DIMIA has with which to deter nongenuine applicants.

Senator EGGLESTON—Thank you for your point of view.

Senator TCHEN—Thank you for coming along to give evidence today, particularly coming from Victoria. I am trying to get back to Victoria at the moment. The purposes of the regulation are to deter people from abusing the RRT system, while making sure that the bona fide cases are not adversely affected. One of the particular concerns of this committee is to make sure that this regulation has not adversely affected the bona fide cases. In your submission you said that the

effect of the fees on abusers does not succeed in adequately targeting abusers of the system. Also, the answers you gave to Senator Eggleston also imply that you accept that the institute accepts that there have been, and that there are, abusers of the system.

Mr Rodan—You will find that in every country that receives refugees or asylum seekers—and I think it is noted in your report or in a previous Immigration submission—there is abuse. There is abuse of social security, there is abuse of veterans affairs, there is abuse of any kind of people oriented organisations, vis-a-vis government. It is natural that there will be some abuse, but we are saying that the department has not given evidence to say how big that abuse is and whether we should be using a sledgehammer to try and break open a nut.

Ms Mahon—There is abuse in every system in which people are accessing a right to review and appeal and to have their case heard. For example, I work at a community legal centre and I run an intervention order support service at our local magistrates court. While the majority of people applying for intervention orders are genuinely in need of protection from domestic violence abuses and those kinds of things, there is always going to be a small percentage of people who access the system for other reasons as well and to achieve other ends. However, that does not mean that the system is not still absolutely vital to protect those who need it. The fact that there is always going to be a small number of potential abusers of a system does not mean that an impediment to genuine applicants should be imposed which has the effect of having a deterrent effect upon some people who genuinely need the system to be there for them.

Senator TCHEN—In that case the issue is the perceived degree of abuse, isn't it? There are two perceptions here. One is the perceived degree of abuse, and you said that any system would have a small number of people seeking to abuse it. The statistics provided by the department show that the RRT rejects 90 per cent of the cases that come before it. It would seem from that evidence that the people seeking to abuse the refugee appeal system is much greater than 'a few'.

Mr Rodan—Are you saying that the other 90 per cent are abusers?

Senator TCHEN—Given that their cases were not set aside, the—

Ms Mahon—Even though the department admits that although 90 per cent are rejected by the tribunal, that is because the people do not fall within the convention definition of refugees. It is not because they are not genuine applicants who are in need of protection. It is not because they are not bona fide applicants.

Senator TCHEN—Yes, I understand your argument because I have listened to you before about this. But the issue is that at the moment our refugee assessment system is based on the refugee convention. So if you are going to argue that there are other methods, that is a different argument, isn't it?

Ms Mahon—What it means is that through this regulation you are penalising people who do not happen to fall within our definition of what a refugee is but who are still genuinely in need of protection and therefore are able to access further procedures, such as the minister exercising his discretion under section 417.

Senator TCHEN—In which case, if they were successful, the fee would be waived.

Ms Mahon—After the point that they have already been penalised for applying for their review.

Senator TCHEN—Why?

Ms Mahon—Because the fee has already been imposed, because the tribunal has already rejected their appeal.

Senator TCHEN—Yes, but that is not payable if the minister exercised discretionary power.

Ms Mahon—However, it is still charged to them while the application for the exercise of discretion is going ahead.

Senator TCHEN—That is right.

Ms Mahon—So you are getting situations where applicants are having to make arrangements to either pay the fee or to enter into arrangements to show that the fee will be paid before or while they are in the process of applying for discretion.

Senator TCHEN—I will check with the department to see whether they insist that fee be paid when the matter is before the minister. That is a matter that the committee needs to follow up with the department. The other issue that you talk about—and I think you make a very strong point on this—is whether this is a penalty or a tax, neither of which is desirable. The department argue that it is a cost recovery process, which you dispute. From your institute's point of view, would you be happier if this fee regulation were substituted by granting the RRT the power to order costs in the same way that courts do?

Mr Rodan—No.

Senator TCHEN—The institute has a problem with the tribunal being able to order costs?

Mr Rodan—I do not think the RRT could do that. For instance, if they had the power to order costs, I think the courts would categorise them as a chapter III court because they have that extra power. They may categorise the ordering of costs as a chapter III power and therefore invalidate it.

Senator TCHEN—The Victorian Civil and Administrative Tribunal has the ability to impose costs.

Ms Mahon—There are many jurisdictions that do.

Mr Rodan—Yes, but that is Victoria. We have got the separation of powers argument running here.

Senator TCHEN—Yes, I know, but I am talking about principles.

Mr Rodan—It does not necessarily run in Victoria. There is no separation of powers in Victoria like we have here.

Ms Mahon—The point we would also like to make is that, although the courts do have the power to order costs, there are many jurisdictions in which the parliament has decided it is not appropriate for the courts to have an automatic cost jurisdiction. In those instances, costs should only be awarded when there are instances of vexatious litigants, for example, but there is not an automatic cost jurisdiction.

Senator TCHEN—Mr Rodan, in answer to Senator Eggleston's question you suggested that the filtering process should be something that can deal with these cases very quickly and that there is no reason why RRT cannot deal with them very quickly. But RRT has, on average, more than 6,000 appeal cases lodged every year. That is quite a large number. Are you looking at quick or hasty justice?

Mr Rodan—No, I am not looking at that. But, if that is the caseload—which we accept—then you should be appointing more RRT members and more support staff. That would get rid of your abusers because cases would be processed quickly, efficiently and given proper natural justice—they have a right to appear and a right to provide argument.

Senator TCHEN—Perhaps I ought to ask the department to cost that.

CHAIR—The department has not been able to give us any figures on what they feel is abuse of the system. Do you have any light to shed on that or is that, again, something that there is no clear evidence of? We will be talking to them about the debt recovery process and outstanding debts as well as evidence of abuse. Do you want to make any further comment on the percentage of abuse? I know it is difficult to put a figure on it.

Mr Rodan—One way I can put it is to point out some issues that have arisen in the practise of immigration law. For instance, at present they have the Immigration, Advice and Application Assistance Scheme, which is run by the department. They contract services out to various migration agents. Those migration agents do refugee work, whether it is for the boat people, who do not come any more, or people who have landed at the airports. They then do a case to the immigration department by filling out forms. If their case is rejected, they go on and appeal. Those migration agents do not attend those appeals because it is not in their contract to do so. They are not going to waste their money on attending appeals. The people either attend appeals themselves or they do not, so they do not know what is happening. So that is one lot of people.

CHAIR—You are saying there is no adequate follow-up and feedback in the process?

Mr Rodan—Yes. The second thing is that there was a decision in the full court of the Federal Court about three years ago of the minister against applicant A. The case was based on the fact that the refugee application was put in and it said, 'Submissions to come soon.' The immigration department made the decision on the case before the submissions came. They never even materialised. They appealed to the tribunal and the tribunal said, 'You didn't make submissions at the immigration department and therefore we would refuse you.' The point about that particular case is that the full Federal Court turned around and said, 'That's not a valid application made, because there are no grounds.' From then on, in the last two or three years, when the tribunal sees those kinds of applications it says, 'You have not made a valid application.' So that is another part of the statistical net that you are looking at when you are looking at the alleged abusers—the 90 per cent.

The other feature is that, with the LRPs, I notice that one of the countries is Indonesia. Claire and I have already spoken about East Timor, but there are also people from Aceh, Ambon and West Irian. There are many Christians from Ambon and Aceh and many people from West Irian who have genuine claims and who have come over here. When there was a downturn in the South-East Asian economies in 1998-99 and 2000, people in Aceh and Ambon were targeted by the local communities, either because of their religion or because of their economic standing if they were Chinese. Those people came over here and put their case to the department and the tribunal and lost. Those people said that they were subject to targeting by fundamentalists. Because fundamentalists were not recognised by us in Australia until the Bali bombing, when we suddenly became aware of JI, those people lost their cases. I know of some who are living now in Singapore and who will never go back to Indonesia because of that. They are some of the other 90 per cent.

There are a number of others within that category who were genuine. The East Timorese had genuine cases at the beginning. Now they may not, because it may be only an economic issue now. There is no employment there. East Timor lives on foreign aid, so there is nothing for the East Timorese to go back to. But they were genuine refugees at the beginning. Some Sri Lankans were genuine refugees at the beginning, but now there is peace with the LTTE. These people make up a large part of the 90 per cent and they are from LRP countries.

CHAIR—Thank you very much for your comments.

Senator TCHEN—If, as you suggested, the RRT should be more resourced so that they can deal with cases more quickly, how long do you think is a reasonable period in which to do it?

Mr Rodan—How long is a piece of string?

Senator TCHEN—On average.

Mr Rodan—I think the immigration department can finalise fairly quickly matters where they believe there is an abuse of the system. That may be in a very short number of months or weeks. It is up to the tribunal then to get its act together and to ensure—

Senator TCHEN—Yes. I am talking about once it goes to the RRT. How long do you think they should take to handle it?

Mr Rodan—I would not impose my views on the RRT to that extent, because I think that they are an independent tribunal.

Senator TCHEN—Sorry, Mr Rodan. You just said you thought it should be quicker.

Mr Rodan—I am saying that it could be a least a few months, because it will take them time to get the file from the department.

Senator TCHEN—No, this is dealing Senator Eggleston's question about the filtering process. How long should the filtering process take? You suggest that the RRT should undertake that.

Mr Rodan—I do not want to put it in concrete terms, in months or whatever. All that needs to happen is that they have to get the file from the immigration department, they have to provide an opportunity to respond to any questions by the RRT, which is in the act, and then fix a date for the hearing and have the hearing. They can have their decision fairly quickly after the hearing.

Senator TCHEN—I think they do at the moment: within a week after the hearing.

Mr Rodan—Yes, they do.

CHAIR—Thank you very much, Ms Mahon and Mr Rodan, for representing the council of the Law Institute of Victoria here today. Thank you for your submission and your evidence. If there are any other matters on which we might need additional information the secretary will write to you.

[11.42 a.m.]

ENGELHART, Ms Juliette, Refugee Caseworker (Volunteer), Amnesty International Australia

THOMPSON, Ms Edwina, Campaign Coordinator, Amnesty International Australia

CHAIR—I welcome representatives from Amnesty International Australia. Do you have any comments to make on the capacity in which you appear?

Ms Thompson—I am acting campaign coordinator for Asia-Pacific and I worked in the refugee team for over 12 months.

CHAIR—Mrs Irwin from New South Wales, a member of the committee, is missing at the moment, but she will be returning. Although the committee does not require witnesses to give evidence under oath, you should understand that these hearings are the legal proceedings of the parliament and warrant the same respect as the proceedings of the parliament itself. Giving false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. The committee prefers that evidence be taken in public. However, if you wish to give confidential evidence to the committee, you may request that your hearing be held in camera, and the committee will consider your particular request. Do you wish to make any corrections to your original submission?

Ms Thompson—We would like to point out that procedural point No. VIII and procedural point No. IX in our introduction actually refer to pages 71 and 73 of *Human Rights Have No Borders*. So those procedural points do not really refer to anything in particular. It actually harks back to the United Nations High Commissioner for Refugees executive committee conclusions Nos 44 and 8.

CHAIR—At this stage, before we ask any questions, would you like to make an opening statement to the committee?

Ms Engelhart—Yes, I would. I would like to thank you for your time today. Amnesty International asked me and my colleague Ms Thompson to represent the organisation before the committee. I myself am not an Australian resident—I hold Dutch nationality. In the Netherlands, I have worked for the past three years as a refugee lawyer, dealing with all aspects of the procedures for asylum seekers and refugees. I have substantial knowledge of the international regulations and I have been a member of Amnesty in the Netherlands since 1993. Based on my experience, I hope I can answer any questions you might have on the subject.

Amnesty International's submission is very brief. We hope that it clearly states the concerns Amnesty International wants to raise about regulation 4.31B. Amnesty International wants to address these concerns because it believes that the $1,000 fee that asylum seekers have to pay when their application for asylum is refused by the Refugee Review Tribunal is a heavy burden. In making this submission, Amnesty International is not seeking to address or discuss the tribunal in general terms, nor do we wish to impugn or be seen to be impugning the

professionalism of the Refugee Review Tribunal and its members. The submission is directed at the regulation that implements the fee and the burden it puts upon asylum seekers.

I would like to draw your attention to one point in the written submission—the third bullet point under 'Points for consideration'. While the RRT is required to assess claims against the terms of the refugee convention, there will be other circumstances where asylum seekers fear serious human rights violations upon forcible return to their country of origin. Although they may fall outside the scope of the refugee convention, Amnesty International considers that they should not be penalised and that the principle of non-refoulement should still apply.

One aspect of this is that not everybody in the world is aware of the interpretations of the refugee convention. For example, asylum seekers fleeing a war are likely to have very genuine fears of persecution and may not be aware that they may fall outside the scope of the refugee convention. This would also apply to women fleeing domestic violence. In Europe, we have the European Convention for the Protection of Human Rights and Fundamental Freedom. Article 3 of this convention is similar to article 3 of the convention against torture, which is ratified by Australia. As a comparison, this European convention obligates states that have ratified this convention to assess whether an asylum seeker has a real risk of being subjected to torture, inhuman or degrading treatment, or punishment.

The last aspect I would like to address is that, when I was introduced to the Australian asylum process, I noticed that it was not necessary to have a face-to-face hearing with the asylum seeker at the beginning of the process and sometimes the first chance an asylum seeker has to orally communicate his or her fear of persecution is at the Refugee Review Tribunal. This means that the tribunal has a very important role in the assessment of claims for asylum, and appealing to the tribunal should not be discouraged by putting a potential financial burden on an asylum seeker. That is it. Thank you.

CHAIR—Thank you, Ms Engelhart. Ms Thompson, would you like to make any additional statements?

Ms Thompson—I think I will just address questions as they arise.

CHAIR—Thank you very much for that. I might move to questions then. One of the things that this committee has to look at is whether that particular fee has been a deterrent. In your submission you form the view that it has not attained its purported objective, and yet we have figures from the department that suggest that it has been a deterrent, particularly with low refugee producing countries. Would you like to expand on why you say you do not feel it has attained its objective?

Ms Thompson—I also have figures from the department, but ones that would show probably the reverse—that it has not had the desired effect. For example, for the period 1996-97, 85 per cent of applicants lodged appeals at the Refugee Review Tribunal. In 2001-02 it increased to 88 per cent, and in the previous financial year I think it peaked at 91 per cent. Would you be able to state your figures?

CHAIR—I am just asking for your opinion on that. I have seen the figures that you have also indicated. We are taking evidence at the moment to see what your views might be. I have noticed with those figures—in fact, I was speaking to the chair earlier this morning about

them—that there seemed to be a variance there. So would you like to shed some light on what you think might be the reason for that?

Ms Thompson—We would submit that the regulation does not distinguish between abusive and unsuccessful applicants. That is mainly because of the reasons that Juliette pointed out—that some of those applicants are not aware of the detail of the refugee convention, they have compelling reasons why they should not return to their country of origin, and they fear persecution. It is therefore very difficult, on statistics, to define whether these people are abusive. I think the previous witness also gave the same evidence. The evidence we have is very anecdotal, because we deal with casework. I am not sure that I am in a position to discuss the statistics unless you can give me a better indication of the department's alleged success.

CHAIR—We will be talking to the department later on today and we will go through those figures with them even more thoroughly. Are you saying that the abuse of the system is not as widespread as we are led to believe?

Ms Thompson—No. I did not quantify the abuse.

CHAIR—Would there be cases where you think there is abuse, and would you like to give the committee your thoughts on that?

Ms Thompson—As the previous witness stated, systemic abuse is in every country and ours is no exception. I do not think that a $1,000 fee is going to deter those who want to abuse the system because, as we have submitted, people that wish to prolong their stay will do anything. If they want to abuse the system, they will apply to the Refugee Review Tribunal because it will extend their stay and then they can leave without having paid the fee. So I do not think it really has the desired effect, especially with those genuine claimants that do have a genuine fear but who do not have the financial capacity to meet such a fee—who are law abiding, who want to be able to pay the fee and are aware that their cases may not be accepted even though they are genuine.

CHAIR—We are having some interesting evidence given to us and it is something that we have to look at very carefully. What are your thoughts on deterring unsuccessful applicants from obtaining other visas? Does it make it much more difficult for them?

Ms Thompson—It does. If they do not pay the fee, they are not allowed to apply for another visa. So it does affect those who have family connections within Australia who depart from the country and then want to reapply for family reunion. I do not think I am permitted to give you any information—

CHAIR—About individual cases. I understand that. We have had a few cases given to us today in evidence, and family is clearly one of those cases. Are there any other instances where you feel that there is unfair disadvantage placed on applicants?

Ms Thompson—I think that, very broadly, there is no provision within the refugee convention that allows for a recouping of costs. I heard Senator Tchen earlier talk about Australia's refugee determination system adhering to the refugee convention, but nowhere in the spirit of the convention does it advise governments to recoup costs from people applying for asylum. Amnesty International believes that contravenes article 14 of the Universal Declaration

of Human Rights, which states that every individual should be able to enjoy and seek asylum in another country. So it is more of a broad picture, I think, because rather than getting into the detail, it affects everybody in the asylum determination.

Senator EGGLESTON—I have a table before me which shows that 87 per cent of the people who unsuccessfully applied for protection visas in the period 1995-96 to 2001-02 sought to have that decision overturned by the Refugee Review Tribunal. That is a very large percentage. Your case is, it seems, based on the United Nations charter for refugees and the assessment system. You said you wanted to talk about broad principles. One could argue that if these people have not met the United Nations criteria then that perhaps should be it. They are being used in other countries as the criteria for admission. We in Australia offer five levels of appeal, including this level, so we probably offer a fairly generous system to permit review of the application of the United Nations criteria. Would you not agree?

Ms Thompson—It is a more complex issue in that that statistic you gave does not reflect the number that were represented, or those that were represented by reputable migration agents. I have another figure which shows that 50 per cent of those that were not represented failed, which is a very low estimate, but that is what the Refugee Advice and Casework Service advised us—that there is a lot of misinformation given to applicants, which does not necessarily reflect well on the applicants, because (1) they are not informed of what constitutes a refugee, and (2) they are not represented at the tribunal, so they are not aware of what information they need to give. We often find, as caseworkers, that applicants from some countries just assume knowledge of certain abuses, because they are so prolific in their countries, and they do not give evidence until very late stages. That is why the RRT is such an important independent review, as Juliette was saying. I would put the large amount of refusals down to misinformation and lack of representation, but I also concede that there are a number of people abusing the system.

Senator EGGLESTON—What about other countries? What kinds of appeal mechanisms are open in, shall we say, France, Germany or Italy for people who are disallowed on the basic United Nations criteria?

Ms Engelhart—In most of the European countries, the appeal system is free. It does not cost anything.

Senator EGGLESTON—What appeal system exists, though? In this country, they have five levels of appeal if their primary application is rejected. How many levels of appeal are there in France, Germany and Italy, for example? In this country they also get legal aid, of course, to go through the court system.

Ms Engelhart—I know that in the Netherlands we have a sort of appeal system that is embedded in the first phase of the procedure, which means that the minister of justice gives you his decision and allows you to respond to that in a written statement. After that, you go to a normal court and after that you go to a high court. So that would mean three stages.

Ms Thompson—To Amnesty International, the number of levels does not necessarily reflect the justice in the system. For example, the Refugee Review Tribunal is not a judicial process and, due to the privative clause, it is very difficult to bring cases to the court level, although they do exist. Essentially, the minister for immigration does have ultimate control over the decision. He can override any decision made by an RRT member, or appeal a court decision.

Despite the number of levels, I do not believe that the procedure is necessarily fair. I do not want to impugn the professionalism of the RRT members, but we would call for it to be more transparent and maybe more independent from the minister for immigration—maybe with members appointed by the Attorney-General rather than the Governor-General, just to separate it one more step.

Senator EGGLESTON—You began by saying you wanted to talk about general principles. I suppose by implication you are suggesting that the $1,000 fee is inherently unfair. The point I was seeking to make was that we do, in fact, have a very elaborate appeals system and, by international comparisons, it is a fair system.

Ms Thompson—But the $1,000 as a provisional recoup of costs seems less of a deterrent and more of a penalty. I know the department has stated that it is not a penalty but, under the United Nations human rights mechanisms, it is clearly stated that persons seeking asylum should enjoy the right not to be penalised for doing so. If they are unsuccessful, that should not mean they then have to pay for the right to appeal an unsuccessful decision, especially when even the department has admitted that the primary stage is often lacking. The department interviews applicants very close to their arrival, so sometimes they are suffering the effects of torture and trauma. They do not understand the system and they are not advised well until the next stage. In relying on the Refugee Review Tribunal for the entire review, it is very important to be procedurally fair.

Senator EGGLESTON—Thank you. We will take those points up with the department.

Ms Engelhart—I would like to finish what I was telling you about the appeals system. Using my own country as a comparison, I think what is most important is that we do hear people twice before the whole procedure starts. They get two opportunities to identify themselves and tell their story. They get legal aid from the first day they enter the country, which means that someone can explain to them what is important and what kinds of documents they need. There might be fewer possibilities for appeal but, still, I think it is difficult to compare. Throughout Europe, every country has a different system and different rules, so it is very difficult to compare. I agree with my colleague that it should not be that important.

Senator EGGLESTON—I do understand that. I understand also that the Netherlands is a very liberal country in its approach to these matters.

Ms Engelhart—It is.

Senator EGGLESTON—Some other countries are slightly more conservative, I think.

Ms Engelhart—Yes, it varies a lot.

Mrs IRWIN—I apologise for having been called away when you were just about to start your briefing. However, I have had a chance to read your excellent submission to the inquiry. You were in the room when representatives from the Law Institute of Victoria were here. I asked them a question on international obligations. They, and also the Human Rights and Equal Opportunity Commission in its review to this committee in 1999, stated that they believe the regulation places Australia in breach of its international obligations. Have you at Amnesty

International—perhaps with your lawyers—looked at this? Do you agree with those organisations?

Ms Thompson—Are you referring to regulation 4.31B specifically?

Mrs IRWIN—Yes.

Ms Thompson—I think you were out of the room when we talked about how Australia does breach its obligations in that sense. We talked about how, within the refugee convention and other human rights mechanisms, there is no provision for recouping costs in the asylum process. Specifically, article 14 of the Universal Declaration of Human Rights states that every individual has the right to seek and enjoy asylum in another country. So we believe that the fee does penalise applicants—genuine and non-genuine claimants—at the appeals stage. Therefore, it is breaching Australia's obligations: yes, we do agree with the previous witnesses.

Mrs IRWIN—I am not sure whether you were here when the representative from the Immigration Advice and Rights Centre was speaking. Like you, the centre wants regulation 4.31B to be repealed. If it were not going to be repealed, the centre recommended the introduction of discretion to waive the imposition of the post-decision fee. What are your feelings on that? Do you agree with the centre?

Ms Thompson—As an organisation obviously we would prefer it to be abolished, full stop. But, if a waiver was put in place, I think it would be a very difficult thing. It would add another costly element to the system where people would have to appeal again for an appeal of a decision. It is very complicated. I think it should just be abolished. But, obviously, there are those genuine applicants who have arrived, especially those in detention, without any money to their names. I think that the fee waiver would be most applicable for those in detention. Ultimately, we believe that the fee should be abolished.

Mrs IRWIN—I think you would most probably also agree that, once someone has departed Australia and they owe money to Australia, with offshore applications you should look at it compassionately, in the sense of considering marriages, de facto relationships and children that could have been born here in Australia.

Ms Thompson—Definitely. With the length of the process at the moment, people do develop relationships in the community. We have many examples of people who got married for genuine reasons. It is not desirable for them to be parted from their spouses or children.

Senator TCHEN—Firstly, thank you for coming today and for your submission, which has greatly assisted the committee. I just want to check on one particular point that you raise. In your second dot point you are talking about this fee as being a disincentive. You say, near the end of that particular dot point, that:

> ... the fee effectively impedes the right of all applicants to seek and enjoy in other countries asylum from persecution ... by deterring asylum seekers from appealing negative primary decisions.

What do you mean by that? If they were deterred from seeking review, why would that damage their case? This is on page 2 of the submission.

Mrs IRWIN—Under 'Points for consideration'?

Senator TCHEN—Yes. I do not quite follow the logic.

Ms Thompson—I agree. It should say, 'in Australia'. There needs to be a correction. It should say, 'impedes the right of all applicants to seek and enjoy in Australia asylum from persecution'.

Ms Engelhart—If you have asked for asylum in Australia and you go to another country to ask for asylum, it would be likely that they would send you back or tell you that you have already used your right to ask for asylum or that your procedure in Australia has not finished.

Senator TCHEN—Yes, but that would have nothing to do with the fees payable. If they have failed in Australia then that is a matter of record. Whether they had to pay a fee or not is not a disincentive.

Ms Engelhart—I am sorry, I thought you meant if you did not have to pay your fee.

Ms Thompson—Yes, I agree with you, Senator Tchen. We will make that correction.

Senator TCHEN—You do not need to agree with me, but if you wish to take it on notice—

CHAIR—I might ask that you make some corrections to that and you can include with that some additional submissions to the committee.

Ms Engelhart—Yes, we will take that on notice.

Senator TCHEN—I was not trying to pick out mistakes.

Ms Thompson—No, go for it!

Senator TCHEN—Feel free to make an additional submission on that. The reason I was actually looking at it is that the department has told us that the evidence they have, which admittedly is not conclusive evidence, supports a conclusion that the fee is acting as a disincentive for proceeding to the RRT for applicants who have no grounds for protection. I think earlier you made the submission that, in terms of numbers, it actually has not changed and in some cases it has increased. But the department actually divide people up into what they call low refugee producing countries and high-refugee-producing countries. They actually do not expect any drop from high-refugee-producing countries because those variances depend on the conditions. But their evidence is that the appeals from low refugee producing countries have dropped.

Ms Thompson—We would have to see the statistics again and which countries they consider to be low refugee producing. With respect, that is imposing a rather large interpretation on the system. There is still no evidence that points to whether these people—because we cannot conjecture—were or were not genuine. It is all subjective information.

Senator TCHEN—I understand that. I am just saying it to you because you raised the issue in your submission. I am just saying that the department is quite open about what they call high-refugee-producing countries and low refugee producing countries. I suggest that AI should have a look at it to see whether you agree or disagree with the department's assessment or classification and then, if you wish, make a further submission to us. Also, the department has asserted that there has been no perceivable negative effect on bona fide applicants. Do you agree with that? Do you think that bona fide applicants should be deterred, or that these other people, if they are successful, should not have to pay the fee?

Ms Thompson—Again, that kind of evidence is anecdotal. I do not think I am in a position to release confidential information on that but I would emphasise that it does add a burden to an applicant when they are considering appealing. Because these people do not have much money, they are very vulnerable members of our community. So, in informing them that if they go ahead with the appeal to the Refugee Review Tribunal they might be up against a $1,000 fee or will be in debt to the government, it is clearly not going to have a good effect on the bona fide claimants because there is such a low acceptance rate at the tribunal anyway.

Senator TCHEN—But you do agree that there are nongenuine applicants?

Ms Thompson—Yes, of course. I wish there were not.

Senator TCHEN—Can I correct one perception that you may have formed from my question to the Law Institute earlier. You said that the refugee convention does not suggest that any government can claim a fee from asylum seekers. I make the point that this particular regulation only allows fees to be collected from people whom the RRT has assessed to be non-genuine.

Ms Thompson—But the RRT is imperfect.

Senator TCHEN—Yes, I know that. This is a different issue. This brings me to my second point, which has two levels. The first is that Senator Eggleston asked you about European countries and their processes. I am curious, because you did not mention it, as to whether the European countries use the United Nations refugee convention as a standard of assessment or whether they have other standards. Can you enlighten us on that?

Ms Engelhart—Yes. They use the refugee convention as a standard and, as an extra, they use a European convention on human rights, which I mentioned in my statement.

Senator TCHEN—I am not familiar with the European convention. Can you give us a quick summary? Chair, do we have time?

CHAIR—We do have the department appearing before us to give us a submission.

Senator TCHEN—I will put it on notice.

CHAIR—If you are able to make that information available to us, can you provide it in a written form. Would that satisfy you, Senator Tchen?

Senator TCHEN—Yes. I am interested to see how the Europeans deal with this issue. Perhaps you would like to take this question on notice and give the answer in writing as well: obviously, from things that you have said, AI has its own view of the United Nations refugee convention. You think it is inadequate. What does AI think should be the standard by which we judge whether a refugee asylum claim is genuine or not? Do you think that there should be a standard at all?

Ms Thompson—Did you state that AI was not satisfied with the current UNHCR?

Senator TCHEN—Yes. I get the impression that you are not totally satisfied with the United Nations refugee convention. If that is the case do you have other views on what standards should be used?

Ms Thompson—I will take that on notice.

Mrs IRWIN—I am not quite sure if you have been asked this question. I want to look at 'harsh consequences'. In your submission you raise the issue of an unpaid fee preventing the unsuccessful applicant from obtaining another visa. Does Amnesty International have any evidence of this happening? Could you give us an example? You might want to take this on notice and forward to us any evidence that you might have.

Ms Thompson—I do have examples but I would say they are confidential. I will submit them confidentially.

CHAIR—Without revealing too much detail, you could let the committee know of any instances where that has occurred.

Ms Thompson—Okay.

CHAIR—Before I conclude, I would like to welcome to the room members of the Parliamentary Education Office and the students who have joined us. Thank you very much for being here. This is a very important part of the parliamentary process and we are very honoured that you are here today to join us at this committee hearing on migration legislation.

Ms Thompson—Excuse me, would I be able to return for one second to one point that you made at the very start when I commented I wanted to talk more broadly? I have just thought of an example that might help to illustrate some individual cases where the fee might be deleterious.

CHAIR—Yes, that would be all right.

Ms Thompson—I refer to the East Timorese applicants that are now going through the second determination process. As you know, around 10 years ago they were granted temporary protection visas, so the government acknowledged that these individuals required protection. Now they have to start to go through the determination process again—from the primary decision, then appeal to the RRT and then appeal to the minister—as any other asylum seeker would do. But we are aware of the government's position, especially with the new circumstances in East Timor, so I would argue that the fee is a de facto lodgment fee for those

seeking humanitarian consideration under section 417. Because we are aware that these applicants are unlikely to be granted a humanitarian visa under section 417, we believe that such a fee would be redundant and irrelevant to them because they have had to go through this process once again, knowing that they really need to appeal to the minister first and foremost. Now we have 411 cases of people that have to pay that $1,000 fee.

CHAIR—Thank you for those additional comments. At this point I would like to thank you very much, Ms Engelhart and Ms Thompson, for appearing before the committee today. If there are any matters—and we have indicated what those are today—on which we need additional information, the secretary will write to you. You will also be sent a copy of the transcript of your evidence to which you can make editorial corrections. Again, thank you very much for your time today and for the efforts you have made in providing evidence to the committee.

[12.20 p.m.]

CAMPBELL, Ms Julie Amanda, Acting Director, Migration Agents Policy and Liaison Section, Department of Immigration and Multicultural and Indigenous Affairs

HUGHES, Mr Peter, First Assistant Secretary, Refugee and Humanitarian Division, Department of Immigration and Multicultural and Indigenous Affairs

ILLINGWORTH, Mr Robert, Assistant Secretary, Onshore Protection Branch, Department of Immigration and Multicultural and Indigenous Affairs

CHAIR—I welcome representatives from the Department of Immigration and Multicultural and Indigenous Affairs. Thank you very much for attending again and providing further evidence to the committee. Although the committee does not require witnesses to give evidence under oath, you should understand that these proceedings are a legal proceeding of the parliament and warrant the same respect as the proceedings of the parliament itself. Giving false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. The committee prefers that evidence be taken in public, but should you wish to give confidential evidence to the committee you may request that the hearings be held in camera, and the committee will consider your particular request. I know that you have provided additional information to the committee, but are there any corrections you would like to make to your submission?

Mr Hughes—No.

CHAIR—Before we ask further questions, would you like to make any further opening statements?

Mr Hughes—Not at this stage. Having made our submission, we thought we could best help you by responding to any questions you have arising from evidence or submissions from other organisations.

CHAIR—Thank you, Mr Hughes. Before we start asking you questions, I want to put my apology in. It seems that every time you give a submission I have to catch a plane. But today I have a very good excuse: I have to conduct a citizenship ceremony as soon as I arrive in Brisbane, so I apologise in advance. Senator Eggleston will take over as acting chair in my absence.

Mr Hughes—As the person who was in charge of citizenship in my former job, I could not think of a better reason or a better cause.

CHAIR—Thank you very much, Mr Hughes. It is at the Kedron-Wavell RSL. You were present this morning to hear evidence from a number of different groups, including the Immigration Advice and Rights Centre, the Law Institute of Victoria and, just previously, Amnesty International. The issue of whether we are deterring refugees who are making bona fide claims has been raised quite a lot in the evidence that we have been given. Is there any

further evidence or material that you can give us about cases where bona fide people may have been deterred?

Mr Hughes—Our feeling—and we have tried to put the evidence in the submission—is that there is no deterrent to bona fide applicants. We have tried to do as objective an analysis as we can produce by using a high-refugee-producing/low-refugee-producing analytical tool. The figures for high-refugee-producing countries show a continuing high rate of flow-on from departmental decisions to the RRT, which we think is an indicator that there has been no effect on people from high-refugee-producing countries since the introduction of the fee. That is the best objective advice that we can give the committee.

CHAIR—The situation of people from East Timor being granted temporary protection visas has been raised. Would you care to comment on that in light of the regulation and what you see as any problems or limitations which may occur?

Mr Hughes—I think there are actually some misperceptions underlying what was said earlier this morning. I will leave it to Mr Illingworth to talk about the particular case of the East Timorese and the effect of the fee in their circumstances.

CHAIR—I would appreciate that.

Mr Illingworth—The first point to make is that these individuals were not granted temporary protection visas. These individuals are applicants for protection visas. Over the last year or so we have been processing those applications. The situation at the moment is that a number of them are still awaiting primary decisions from the department. The balance are either able to seek a review—they are in that window between a primary decision and the close of opportunity to seek a review of a decision—or are actually in the review process and awaiting a review tribunal decision. There is a small number who have received a review tribunal decision. From memory, the review tribunal decisions so far have been refusals, so they have upheld a primary decision that the individual was not a refugee.

There was an assertion made earlier—I am trying to recall the actual words—along the lines of: 'We know that the minister is not going to intervene in these cases or in many of these cases.' That was the tenor of a piece of advice given in earlier evidence to the committee. All I can say is that it is a ministerial personal discretion, and it is his judgment about where the public interest lies in intervening in a case and it is a public interest criterion which is the determining issue. Our submission attaches the detailed guidelines he has given to the department on referral of these sorts of cases. You will see from that that there is a very wide range of issues he has identified as being matters that he wants to have drawn to his attention whenever there is a Refugee Review Tribunal decision which is affirming an original refusal decision.

The other point I would make is also on something that came out of evidence earlier today that there is some sort of requirement that individuals have to trigger the consideration of a 417 issue themselves. In fact, quite the reverse is true. The arrangements we have in place involve automatic consideration by the department of every single Refugee Review Tribunal affirm decision. So when the decision comes back from the tribunal, if it is not favourable to the applicant there is an automatic consideration of that case against the guidelines laid down by the minister. There are processes in place to refer to the minister's attention any cases where his

guidelines have identified issues that might be of interest to him. Where the minister chooses to intervene is a matter for him. But certainly there is no requirement to pay a fee. And if people are labouring under some concern so they will not make a formal request to the minister to intervene on their behalf, they will get into the consideration process for possible referral anyway irrespective of whether they ask.

CHAIR—Senator Tchen, do you want to ask your question now about the payment of the fee?

Senator TCHEN—Thank you. I just want to clarify whether a post-decision fee is payable should an application be made to the minister to exercise his discretionary power.

Mr Illingworth—They are issued a notice that says, 'You have received an adverse Refugee Review Tribunal decision.' In our submission we have covered the follow-up recovery arrangements. As I mentioned earlier, they are not finance company recovery techniques; they are a civilised and low-key recovery approach. Essentially, if they defer paying the fee or choose not to, some may pay the fee and then get it waived if the minister intervenes; others may just choose not to pay until they see what happens with an intervention request. The same goes for litigation. Some may get the notice, pay the fee and then mount litigation to challenge an RRT decision. If, at the end of the day, they are successful and they are not liable for the fee then they will get it back. Others may choose not to pay until they see the outcome of the case.

The recovery approach really reflects that as well. If there are issues in train which might result in an RRT decision being set aside and a fresh review being instituted, they are not going to be the cases where one would be very keen to keep asking an individual to pay up. Of course, others may choose to leave the country because they can bear on their conscience the fact that they owe the Australian government $1,000. There is also the issue of part payment, which has not come out in evidence, particularly this morning. There are very flexible arrangements for paying off fees. Indeed, some people pay off the fee of their own volition when they have no motivation other than just repaying a debt. In the case of people who leave, go overseas and want to apply for a visa, they can also, I suppose out of self-interest, arrange either for family in Australia to pay the bill for them or they can enter into an arrangement with the department to pay off the debt to the Commonwealth. It is the existence of that arrangement rather than the actual payment of the debt that allows them to proceed with the new visa. Once they have in place an agreement to pay off the debt that is satisfactory to the department, the fee is no longer an impediment to the granting of a visa.

Senator TCHEN—It is actually more liberal than I thought. I want it on record that the fact that a fee has been charged against a person is not a deterrent to his or her future application; it is only if there is still an outstanding debt.

Mr Illingworth—The impediment to gaining a further visa is the existence of a debt to the Commonwealth. A $1,000 fee becomes a debt to the Commonwealth when it is levied after the decision.

Senator TCHEN—But only if it stays a debt.

Mr Illingworth—That is right.

Senator TCHEN—Once it is paid off, it is no longer an impediment.

Mr Illingworth—Once it is paid off, there is no problem. The impediment to getting the further visa also disappears if you have entered into an agreement with the Commonwealth, that is satisfactory to the Commonwealth, to pay off the debt. You might still owe us $995, but if we are happy to get $5 a week for the next however many years, then you could get your visa.

Senator TCHEN—Is every unsuccessful appellant advised of that?

Mr Illingworth—I am not sure whether they are advised about the various ways of getting the visa.

Senator TCHEN—No, I mean about the way of payment.

CHAIR—The payment options.

Mr Illingworth—I am not sure; I would have to check. But we can provide that advice to the committee.

Mrs IRWIN—I would like to follow on with questions about fee recovery. The Migration Institute of Australia raised a question about the cost of fee recovery and administration. I have three questions to put to you. What is the gross revenue? What does it cost to recover the fee? We were just talking about the fee being paid. Can it be paid by instalment?

Mr Illingworth—I will work backwards. The fee can be paid by instalments onshore and offshore. Essentially, that is a flexible arrangement. We welcome any money; we are grateful to receive it. In our submission, at 5.8.5, in table 5.8.2T there is a list of revenue received over the last few years. It is on page 28.

Mrs IRWIN—I have a copy here. It is under 'Net Revenue Received'.

Mr Illingworth—Last year it was about $649,000, the year before it was about $1.35 million and the year before that it was about $832,000. In terms of costs, because the department has an agreement with the tribunal to provide some corporate support services on behalf of the tribunal, it is actually the corporate area of our department which manages the cost recovery process. This means that it is essentially just part of an existing capability that the department has to recover debts. So the total cost is a marginal cost rather than the sort of cost that would include the establishment of a cell inside the RRT just to do this work. The costs are about $120,000 a year to maintain the cost recovery process.

Mrs IRWIN—Ms Campbell, I have a question about migration agents. The Refugee Council of Australia recommends that increased measures be taken to curtail the activities of unscrupulous migration agents. We know that there are quite a few of those and of unregistered advisers. What practical steps have been taken to fix this?

Ms Campbell—We in the department acknowledge that a wide group of people hold concerns about unscrupulous agents. Ms Gambaro, who has already left, has given speeches in the House about the people who come through her office. It is fair to say that the vast majority

of registered migration agents are not part of the problem. It is a very small part of the registered industry that indulges in—perhaps this is a blunt turn of phrase—manufactured claims for refugee protection visa applications. By that I mean that they might put in, say, 50 applications and, remarkably enough, 25 of them might have the exact same factual circumstances—everyone was shot in the left leg, they all have the same set of aunties and uncles, the same sort of travel to Australia, and everything else. That part of the industry involves a very fairly small number of agents, but of course they can be very busy and put in a fairly large number of applications. I think that puts a sort of a perspective on the size of the problem within the industry.

The recent review of the industry in 2001-02, the report of which came out last year, makes 27 recommendations, one of which is to provide the MARA with increased powers to sanction agents who practise or are active in these sorts of vexatious applications. The Minister for Citizenship and Multicultural Affairs, Mr Hardgrave, is anticipating being able to introduce legislation into the House later this year to give the MARA increased powers to take action against the small but unscrupulous end of the industry that lodges a high number of vexatious applications. We look forward to that.

Mrs IRWIN—Mr Hughes, I have a question on international obligations. I do not know if you were here when I asked this question today of Amnesty International; it was also addressed to the Law Institute of Victoria. I believe that the Australian Catholic Migrant and Refugee Office say that the fee is out of character with the refugee convention. They have stated that they feel the regulation places Australia in breach of its international obligations. Would you like to comment on whether you feel that this is correct?

Mr Hughes—We simply do not accept that it is in any way in contravention of our international obligations. The main international obligation that we are talking about here arises from the refugees convention, which merely imposes an obligation on countries who are signatories not to return refugees to places of persecution. It does not prescribe the processes by which countries should consider applications for asylum, and simply does not cover this kind of issue. It is open to each country to decide how to fulfil its practical obligations not to return people to places of persecution. This issue was raised on occasions when this committee, in its previous incarnations, considered it—

Mrs IRWIN—That is correct. That was in the last parliament.

Mr Hughes—I think the view was that there is no practical evidence that it contravenes international obligations in any way.

Mrs IRWIN—In paragraph 2.4.6 of your submission, you stated:

Fees are by no means uncommon as part of the refugee determination processes in other countries.

It implies that not all countries impose fees. You may want to take this on notice: could we have a list of countries that impose these fees?

Mr Hughes—Yes. To reiterate some evidence at the last hearing, I think we said that we do not know of any other country that uses this post-review decision fee device but we do know of

some countries that charge up-front fees for review. I do not know whether we have that information with us at the moment—perhaps we do.

Mr Illingworth—I have some information. I understand New Zealand charges an up-front fee of $700 for review and the US charges an up-front fee of $US110. We will have to see whether there are other countries that charge fees.

Mrs IRWIN—But at this stage, to your knowledge there are only two countries?

Mr Illingworth—I think there are more. We did not look very far. We can provide you with a more exhaustive list.

Senator EGGLESTON—Can I intervene there. The British are changing their system. Are they proposing to introduce a fee of this nature?

Mrs IRWIN—It is not in place yet.

Senator EGGLESTON—No, but I asked whether they were proposing it.

Mr Hughes—In Europe—I recalled the discussion in Europe earlier this morning—there is quite rapid change in asylum systems and methods of considering asylum claims. I am sure you will have all read in the media some British proposals to not consider asylum claims within Britain but in some form of processing centre outside the UK. Offhand, I cannot tell you whether, amongst that package of proposals, there is a fee, because that is quite a new set of ideas which the UK government is developing with other countries in Europe, but I will check that for you.

Senator EGGLESTON—Thank you.

Mrs IRWIN—To your knowledge, at present New Zealand is charging $700 and the US is charging $US110. If such fees are not universal, what is it about Australia's circumstances that makes this fee necessary?

Mr Illingworth—I will preface a response with a couple of points. Firstly, we have some difficulty casting our eye across the international landscape because, for a start, there is no single way to make refugee assessments. Many countries do not have a merits review process, so we have nothing to look at that mirrors the RRT. Others rely on judicial processes as a way of reviewing primary decisions, and those processes, as in Australia, can involve very substantial fees. So we have not picked up those fees. I am not sure where the British are heading—whether the issue is about there being an administrative review point at which there may or may not be a fee charged or a judicial review point at which the standard judicial costs can fall due.

Secondly—turning back to the question of what makes us different—I think every country is approaching the determination issue in slightly different ways. Largely, it reflects the nature of the caseloads and the volumes that they deal with. Australia's development of refugee determination processes over the last 13 years is a good example of what has happened in many other countries. To some extent, Australia is at the front of the pack or, in some cases, possibly ahead of the pack in dealing with some of the challenges faced by countries that are attractive

countries for using TPV processes to convert temporary residence into a permanent stay. We are at the front of the pack in trying to deal with some of those problems, while still picking up the people who need protection and trying to keep some system integrity by suppressing the use of the system by people who are rather cynically trying to manipulate it.

To that extent I think there are a number of features of our system which are unique and which probably, to the credit of Australia, reflect that we are focusing on ways to get rid of the bathwater without throwing out the baby. The post-decision fee is a good example of that. It is an innovative way of trying to say, 'We're not going to put up a barrier, a requirement, that somebody has to come up with hard cash in order to get a review.' Then it becomes almost a consideration that is in the mind of a person in deciding to go to review. If their motivations for going to review circle around financial issues, then a $1,000 fee is a factor that sits in the balance there. If their judgments about going to review are about issues of personal safety and persecution, then, to be quite frank, the potential that you might end up with a debt of $1,000 to the Commonwealth down the track is not being weighed on the same scale; it is a different factor that would not be relevant.

Senator TCHEN—Mrs Irwin asked if the department is doing anything about increasing the measures against malpractice by immigration agents, and you have already answered that. Also on this issue, the committee heard earlier today from the Immigration Advice and Rights Centre of Surry Hills in Sydney. This particular group run a community legal centre which is probably familiar to the department. They provide free and independent immigration advice to almost 5,000 people a year and a further 1,000 people attend education seminars annually. They also produce the *Immigration Kit*, which they claim to be the only comprehensive, plain language guide to Australia's immigration laws, and it is now in its sixth edition. They also publish *Immigration News*, a quarterly newsletter covering recent developments in migration laws.

From the story I get in my office—and I am sure other members get it in their offices as well—many of the abuses of people are partly caused by people being misdirected into the refugee stream by some migration agents. It seems to me that one of the ways to overcome that would be by better education and better knowledge of how the system works and that an organisation like the IARC could do valuable work in that regard. I wonder whether there is any possibility of the department levying a small free on fee-paying agents on each case they brought in and directing the money to organisations such as the IARC to assist in their work. Has the department considered that possibility?

Ms Campbell—Thank you for the question, Senator Tchen. You have raised an interesting point. I might start by clarifying the fees that are charged and whom they are paid to. The industry is self-funding in the sense that registered migration agents, whether commercial or non-commercial, are charged a registration fee—a little bit higher for the initial fee—and then an ongoing reregistration fee, and that is paid annually. Although that is paid to the MARA, there is a reimbursement process that goes on through the Commonwealth.

The ability to charge that fee is set out in the Migration Agents Regulation Charge Act, so a change to that act would be required to increase the fee in terms of charging a levy, as you call it, or to add to the charge in some form or other. But it may well not be necessary in order to achieve the type of outcome you are suggesting. For example, one of the recommendations of the review was that more education be provided to consumers, and that is something the MARA and the department are looking at. There is nothing to prevent the MARA and the department

looking at that recommendation and seeing how best to implement it. It could well mean paying another organisation, whether it be IARC or someone else, to run education seminars. That is a decision to be taken with the MARA down the track, but it is certainly a possibility and one that we can share with the MARA when we meet with the board early next month.

I will backtrack a bit to talk about the advice that agents give their clients. From 1 March this year—so just this month—it became an obligation for registered migration agents to give their new clients an information pamphlet about the industry and what they can expect from migration agents. So, if the agents are doing the right thing, consumers are much better placed to deal with the advice that agents are giving them. Certainly if they are not happy with that advice they are much better equipped to complain to the MARA about the service that agents have provided. We hope that that will improve the situation for consumers. In addition, also from 1 March, the code of conduct that all agents are obliged to follow was changed to clarify the conflict of interest provisions in the code. For example, agents who are also marriage celebrants have to take off one of their hats and just be either the marriage celebrant or the migration agent, not both, for the one client. So we are hoping for an improvement in the conduct of that end of the industry that needs that level of guidance about what a conflict of interest is. We also hope the new pamphlets to clients will improve the position of consumers.

Mr Illingworth—On the point about educating and supporting applicants in the community, the department already provides support for a network of community based organisations and commercial migration agent firms and some legal aid offices under the Immigration Application Assistance and Advice Scheme. An amount of some $900,000 a year is distributed to this network of agencies to provide both application assistance and more general advice and counselling to protection visa applicants who are in the greatest need. So there is a safety net there for those in the greatest need.

One of the issues we are looking at is how we communicate with applicants—our forms and instructions, our fact sheets and our correspondence. We are currently looking at all of those types of material to see whether there are ways we can make it clearer to people, very early on in the piece, what it is that they are doing and what process they are involved in. Although things like the application form already very clearly set out what it is that the person is applying for, there could be cases where individuals are not given an opportunity to see and read the whole form before it is whisked away or something like that. So we are looking at a range of issues to try and strengthen our client information.

Senator TCHEN—Thank you. The Refugee Council of Australia has taken issue with the department's interpretation of data showing that since 1995 this regulation has had an impact on reducing the number of applications to the RRT. Mr Hughes, I know that at the beginning of your evidence you gave a clear reason for how you came to your conclusion. You said it was because you separate the high and the low refugee producing countries. That is fine.

The Refugee Council also claims that, in fact, a more accurate analysis of the impact of the fee would come from the rates at which those applicants who were rejected at the primary stage sought a review of that decision. The committee secretary has gone through the information provided by the department. It shows that there has actually been an increase in the rate of appeals or cases appealed to the RRT—in fact, it has been a fairly consistent increase—from 80.1 per cent in 1995-96 to a peak of 91 per cent in 2000-01.

Mr Hughes—Which page is this on?

Senator TCHEN—This is information prepared for us by the secretariat. It seemed to me that, apart from the consideration of—

ACTING CHAIR (Senator Eggleston)—But this is the table from the submission?

Senator TCHEN—Yes, but it has been modified by the secretariat. They have calculated other things from it. If there has been an increase generally in appeal rates from a primary decision to the RRT, when you analyse it further you see evidence, from the department's point of view, of separating low refugee producing countries and high-refugee-producing countries, that they produce different patterns. But, in looking at this data, it seemed to me that there is also another possibility. There could always be a temptation for the primary decision makers to say, 'We now have a fall-back situation so I can be tougher in my decision making. I can reject this and the RRT can look at it again.' Do you consider that a possibility?

Mr Hughes—I would say a couple of things about that. There are a lot of points in there. Firstly, on the raw figures, as we said at the outset, it is quite difficult to isolate the effect of one particular mechanism from others over a number of years. That is why we use the analytical tool of the high and low refugee producing countries. I think we said that our analysis was probably based on a combination of three things over that period: the stabilisation of the rate at which people from low refugee producing countries appealed to the RRT over that period; the absolute drop in numbers of people from low refugee producing countries appealing to the RRT over that period; and the fact that, compared with the position in 1996-97, a much lower proportion of the RRT's work was now caught up with people from low refugee producing countries. It was that combination of indicators that we tried to use to isolate the effect. On the question of the gross appeal rates—which, from our point of view, is rather a separate one—I do not believe that there is a culture amongst our decision makers of saying—

Senator TCHEN—I am not suggesting that. I am just asking whether it is possible.

Mr Hughes—It is a very interesting issue that you raise. I have worked in this field for a long time and I recall that, many years ago, when appeal mechanisms were first introduced—there were not always appeal mechanisms—it was said, 'If you have appeal mechanisms it will affect the way that the first decision is made.' I do believe that our staff are professionally trained to address the issues and make a decision. They do not have a culture of saying, 'I should in some way be hard, because someone else will look at it.' I do not think there is any evidence at all for making that kind of analysis.

There are a whole lot of factors that affect appeal rates. It has to do with the nature of the case load coming through the system. Many things can affect them. Mr Illingworth might like to supplement that with some views on the gross appeal rates and the effect of the tribunal.

Mr Illingworth—I will make just a few points. Over time—and I think we looked at this in our submission—there is a review set-aside rate of about 10 or 11 per cent. Looking at the primary decisions—and this information is not in the submission, but it is something that we keep a very close eye on for a range of reasons—the enduring character of our decisions is that at the same time—this week, this month, this year—at both primary and review stages there will be wildly different approval rates for different nationalities. Looking over the last couple of

years, for example, there are some nationalities which have reliably had primary approval rates of well over 80 per cent, and sometimes well over 90 per cent, while other nationalities might get an approval rate, as our methodology on low refugee producing countries would indicate, of less than two per cent. I think that range of outcomes at the primary and review stages is probably a healthy thing, because it shows that there is no prejudging one way or the other. Cases get up on their merits, and the consequences, in terms of approval rates, are just a matter of totalling up the numbers and looking at how interesting it is, rather than saying that decisions have to be moulded to achieve some sort of outcome in terms of total approval rates.

I reinforce the advice of Mr Hughes. To look at one of the major impacts of the fee, look at table 5.6.1C on page 25 of our submission. It shows that at the time the fee was being introduced, 1996-97, there was an overall increase in review take-up rates. I think there is a historical flow about this. The tribunal was established in 1993, and it is fair to say that, over the years, the level of interest in, sophistication and support for refugee issues in the Australian community—and amongst asylum seekers and those in the migration industry—has not decreased; it has increased. So one could expect to see, in an evolutionary sense, more people being aware of, being comfortable with and being willing to pursue this review process. But the interesting feature is that the low refugee producing countries are rapidly closing on the high-refugee-producing countries. By 1997-98, essentially, it got to the point where so many people from the high-refugee-producing countries were flowing on that the variations come down, really, to one or two people making a decision not to go to review. That will affect things. Once you get to around 93 per cent refusals, there is not much difference between 96 per cent or 94 per cent. Essentially, we would reach flow-on saturation—if that is the right term—for high-refugee-producing countries. Continuing the dotted line between 1995-96 and the point at which the fee was introduced, you would have had low refugee producing countries at the same point in around 1998-99. That has not happened, and I think that is probably the most telling indication of the impact of the fee.

Mrs IRWIN—On page 25 you show the take-up rates. You might have to explain this to me. Let us look at the graph. It shows that the proportion of low refugee producing nationalities seeking RRT reviews since 1999-2000 is about the same as the rate for high refugee producing nationalities in 1995-96. That is prior to the fee. Therefore, what can you claim the fee has really achieved?

Mr Hughes—We are saying that the fee has decreased the rate. If you look at the graph on page 25, low refugee producing country appeal rates were heading upwards very quickly. Over the period of having the fee, we have seen three things happen. Firstly, that rate has been moderated. Yes, it is still fairly high but, secondly, the absolute numbers have fallen over that period. For example, in 1996-97 there were 4,300 applications from people from low refugee producing countries for review. In 2001-02 there were under 2,000. Thirdly, the composition of the RRT's workload has changed so that, in 1996-97, 52 per cent of its caseload was processing people from low refugee producing countries. In 2001-02, it was 33 per cent. It is a subtle thing, but when you put these three things together it has held down applications from people from low refugee producing countries.

Mr Illingworth—If I could add one more point, I have seen from the RCOA submission and we have heard earlier today the various examples of how people can be in a refugee determination process and not be refugees. If we think about those examples, what could it have been from 1996-97 that stopped the rate of increase of the flow-on rate for low refugee

producing countries increasing at such a dramatic rate? What is it that means that these people are no longer rapidly closing the flow-on rate to the high-refugee-producing countries in the sense that it tapered off a bit and is still flowing on at a significantly lower level five years down the track? If they entered the process and they did not know what they were doing, they had some wish to get to a ministerial intervention point for broad humanitarian reasons or they wanted to stay and work longer, why are they not flowing on? That is another way of coming at this. There must be some feature of the process which has meant that there was a dramatic change in the trend in 1995-96 and 1996-97 which is resulting in a significant difference in the decisions being made by people who are not refugees who are in the process. The fee seems to be empirically the only thing that we can point to which explains that.

Mrs IRWIN—I still have to get my head around it. I am still not quite sure what it is achieving.

Mr Hughes—It is not easy.

Senator TCHEN—Let's assume that this fee deters non-genuine applicants from pursuing their cases. It seems from the evidence that in the low refugee producing countries the rate is something like 10 per cent lower than in the high-refugee-producing countries. We assume that the high-refugee-producing countries produce refugees who are really desperate, whereas in the low refugee producing countries there is much less incentive for them. The $1,000 represents a disincentive for them to try to pursue their non-genuine cases. But in any system there will be people who have a genuine case who might be discouraged by this fee from further pursuing their cases, whether they receive bad advice, are frightened off or whatever. What mechanism is in place to deal with genuine cases like this? There may be only one or two such cases a year, but what mechanism is in place to deal with them?

Mr Hughes—We are saying that the statistical evidence does not seem to show that. Let us say there were such a case. As has been stated by Mr Illingworth already, there is a very soft repayment mechanism which could be used by any hypothetical person who felt that the $1,000 refusal fee was a massive burden that deterred them from applying and outweighed their fear of persecution.

Senator TCHEN—I asked this next question of you before, Mr Hughes, and you looked slightly stunned when I suggested it to you. But since then I have noticed that other people have also suggested it. The idea that this fee is an unfair impediment to genuine refugees, even though it is a post-refusal fee, has been raised by a number of people, yet this committee actually received a number of submissions which suggested that to improve the deterrent effect the fee should be increased or paid in advance. Last time I put this to you, you looked slightly stunned. What is the department's position on either or both of those suggestions—firstly, that the fee should be increased and, secondly, that it should be paid in advance?

Mr Hughes—I will try to answer this question with a straight face, looking neither stunned or not stunned. At the moment, there is no proposal to increase the fee. I said in my earlier evidence that the fee is a delicate balance between not putting barriers in the way of people applying for asylum and, in relation to the appeal process, sending a message to people who do not have any real case and want to use the appeal process as a way of staying on in the country. When you get to the level of appeal and impose quite an expense on the government there is a factor to consider if, in fact, you are just trying to use the appeal process to stay in Australia. It

is pitched at a relatively light level to maintain that delicate balance. Currently, there is no proposal to increase the level of the fee. A government could choose to do so. Quite often, other fees in the portfolio are indexed over time in accordance with the CPI or other indices, so it is something that is open to a government to do from time to time.

Charging the fee up front, as opposed to merely raising the fee, is a decision of a different order, because it is actually requiring people to come up with the money. I would see that as a much greater barrier than the fact that, if you are not successful, at some later time you will have to deal with the debt. It puts the barrier in between the person and the appeal, because they must find the money before they can actually exercise the appeal. Under the current system, you can have your appeal and the only issue you have to consider is that you may have a debt later if you are unsuccessful.

Senator TCHEN—On the one hand, the department obviously is seeking to have the regulation maintained. On the other hand, although your own evidence and the indications show that this fee is doing what it was designed to do, I think you would agree that the evidence is not conclusive at this stage. It shows strong evidence but it is not conclusive. Is that a fair comment?

Mr Hughes—I think it is conclusive enough for us to recommend that the fee, or the regulation, should be continued. We have also said in our submission that, since it has been in operation now for six years and reviewed several times, we think the evidence is conclusive enough to allow the regulation to continue without a sunset clause—in other words, for it to be a permanent feature.

Senator TCHEN—Would it impose difficulty on the department if this regulation were subject to a further review period?

Mr Hughes—It is not a matter of imposing difficulties. It is simply a question of whether the evidence warrants a further review period for something that has been in operation for six years. That is obviously something for the committee to draw a conclusion on. Our tentative conclusion is that it has been in operation for a long period of time, reviewed several times and renewed, so on balance we see a case for continuing it without further review.

ACTING CHAIR—I asked a couple of witnesses whether, should the fee be abolished, some sort of filter mechanism could be set up to sort the spurious applications from the genuine ones to some degree. Do you have any views on whether or not such a mechanism would work instead of this fee?

Mr Hughes—That is an issue that has been raised in the submissions, and it is an issue that is raised from time to time in relation to the whole process of dealing with applications for asylum. It is a major change to the way that we do our business and it raises quite a few policy implications. At the moment the way we do our business is to treat all applications for asylum on their merits. This business of high-refugee-producing and low-refugee-producing countries is an analytical tool that we used only for the purposes of this submission on this regulation. We treat all applications for asylum on their merits, irrespective of which country they come from. There is no formal process of making judgments about applications from one country or another. Once you go down that track, if you start distinguishing between potential source countries in a formal sense, you do start to raise a whole lot of policy issues—including foreign

policy issues about the values of those judgments and about how public or not they are. You also raise the expectation that you are making a prima facie decision about people from certain countries as opposed to others. So that is not a path that we have chosen to make a formal part of the system. Under the convention, we do consider applications on their individual merits.

ACTING CHAIR—Thank you for that answer; it provides an answer to the question I asked the other people from the department's point of view. That is all the questions the committee has for you, so I thank you for your attendance today. If there are any matters on which we need additional information, the secretary will write to you. You will be sent a copy of the transcript of your evidence to which you can make editorial corrections. You cannot, of course, change the substance. Thank you very much for appearing today.

Mr Hughes—Thank you.

ACTING CHAIR—I thank the witnesses, the secretarial staff, the committee staff and Hansard for their attendance today.

Resolved (on motion by **Mrs Irwin**, seconded by **Senator Tchen**):

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

Committee adjourned at 1.20 p.m.