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JOINT COMMITTEE ON MIGRATION

Monday, 8 May 2000

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

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

Terms of reference for the inquiry:

Migration Legislation Amendment Bill (No. 2) 2000

WITNESSES

MATTHEWS, Mr John, Assistant Secretary, Legal Services and Litigation Branch, Department of Immigration and Multicultural Affairs.....1

METCALFE, Mr Andrew, Deputy Secretary, Department of Immigration and Multicultural Affairs.....1

STORER, Mr Des, First Assistant Secretary, Parliamentary and Legal Division, Department of Immigration and Multicultural Affairs.....1

WALKER, Mr Douglas, Assistant Secretary, Visa Framework Branch, Department of Immigration and Multicultural Affairs1

Committee met at 5.13 p.m.

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

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

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

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

CHAIR—I now open this first public hearing of the Joint Standing Committee on Migration's review of the Migration Legislation Amendment Bill (No. 2) 2000. On 12 April 2000 the committee was asked by the Minister for Immigration and Multicultural Affairs to consider the bill, and is to report by 8 June 2000. The bill was introduced into the House of Representatives on Tuesday, 14 March 2000. It amends the Migration Act 1958 to:

give effect to the government's policy intention of restricting access to judicial review in visa related matters by prohibiting class actions and limiting those persons who may commence and continue proceedings in the courts;

clarify the scope of the minister's power under section 501A to set aside a non-adverse section 501 decision and substitute an adverse decision; and

rectify an omission which allows for the consequential cancellation of visas.

The bill also corrects a number of misdescribed amendments of the act.

I welcome witnesses from the Department of Immigration and Multicultural Affairs who will be giving evidence. Although the committee does not require witnesses to give evidence under oath, you should understand that these hearings are legal proceedings of parliament and warrant the same respect as proceedings of the parliament itself. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament.

Are there any corrections or amendments you would like to make to your submission? The committee prefers that evidence be taken in public. But, if you wish to give confidential evidence, you may request that the hearings be held in camera and the committee will consider your particular request. Mr Metcalfe, would you like to make an opening statement?

Mr Metcalfe—Thank you, Madam Chair. There are no corrections or additions to our submission, but I would be grateful for the opportunity to make an opening statement.

Madam Chair and members of the committee, I simply add that what I will say by way of this statement should be seen as complementary to the second reading speech and the other explanatory material that the minister presented when the bill was introduced. The bill is an omnibus bill with two schedules. The first deals with judicial review of migration decisions and the second makes some technical amendments to the Migration Act. The majority of my

remarks will deal with schedule 1 to the bill. Firstly, I would like to emphasise that the main body of amendments in the bill complement and do not replace the amendments in what is now known as the Migration Legislation Amendment (Judicial Review) Bill 1998.

CHAIR—I am sorry, complement and do not what?

Mr Metcalfe—Complement and do not replace. The judicial review bill is presently before the Senate and contains a privative clause which would reduce the grounds of judicial review in visa related matters before the Federal Court and the High Court. This bill contains other and separate measures, which also seek to give effect to the government's policy intention of restricting access to judicial review in visa related matters in all but exceptional circumstances. These amendments seek to address a recent trend, which has seen class action litigation being used by people with no lawful authority to remain in Australia to obtain a bridging visa and thereby substantially extend their time while they are here.

Judicial review in migration matters is quite a unique jurisdiction, I would submit. Speed is not of the essence in migration litigation, as far as the applicant is concerned, in many circumstances. In fact, the opposite is the case: delay is one of the outcomes that many people are seeking. Delay in obtaining an outcome means more time that the person is able to spend in Australia. Successive governments have attempted to streamline the review processes in the immigration jurisdiction by reducing the need for judicial review by enhancing rights to merits review and limiting access to judicial review. Unfortunately, to date these reforms have not been successful in reducing the numbers involved in litigation. In fact, the numbers are increasing at a quite alarming rate.

Advertisements are being placed in various newspapers, using eligibility for a bridging visa as a selling point for joining class actions. I invite you to look at the sample of advertisements attached to the department's submission and I ask you to draw your own conclusions as to the motivation of people joining class actions based upon the material that they are responding to in the advertisements. The benefit of a bridging visa is that a non-citizen is able to prolong his or her stay in the Australian community and, therefore, delay and frustrate their eventual departure from Australia. In class actions, we are also seeing people who will not benefit from a court decision in favour of the class—that is, they have not applied for the relevant visa class being challenged. In other words, some people are joining class actions even though the basic requisite of a visa decision has not even been achieved as far as they are concerned.

The bill also includes measures to ensure that those bringing a challenge in the courts have an interest in the outcome of the proceeding—that is, the bill ensures that they have applied for the relevant visa decision being challenged. Since October 1997, 15 class actions have been commenced involving several thousand people. All 10 of the class actions decided so far, involving about 4,000 people, have been dismissed by the courts. A further 3,500 people are participants in five class actions that are currently before the courts. I should also point out that one of the class actions known as Fazal Din, which was commenced before October 1997, was successful. However, when tested following the court's decision, the class was reduced and the case only formed the precedent for the settling of five individual applications.

Some of the current class actions have involved challenges to the validity of the Migration Regulations 1994 by persons who have not even been the subject of a relevant visa decision, as

I have indicated before. This is inconsistent with the intention behind part 8 of the act that only a person actually affected by a visa decision and who had sought merits review, where available, should have access to the Federal Court. Even where members of class actions are the subject of a relevant visa decision, often a significant number would be out of time to make an individual application to the Federal Court. For example, as of 9 November 1999, only three per cent of the members of the Muin class action would have been in time to make individual applications to the Federal Court in relation to their own visa decisions. That is a requirement that, in relation to a relevant judicially reviewable decision, a person make an application to the court within 28 days.

Further, in the department's examination of the visa applications and decision details of approximately 50 per cent of the members of the Macabenta class action, we could not identify any person who, at the time of opting into that action, would have been within time to make a valid application under part 8 of the act in respect of the last substantive visa decision made in relation to them. In fact, for 25 per cent of these people more than three years had elapsed since the last substantive visa refusal decision in relation to them had been made. This is also inconsistent with the intention of government policy that applicants who wish to pursue judicial review should do so expeditiously. A pattern has also developed of people moving from one class action to another in order, we would submit, to prolong their stay in Australia. Of the sample examined in the Macabenta class action, 40 per cent or more of its members were identified as moving between class actions.

The proposed amendments will apply to a proceeding commenced on or after 14 March 2000, the date on which the bill was introduced into the parliament. The amendments will not, however, affect a proceeding if a court began the substantive hearing of the proceeding before the commencement of the amendments. The retroactive application of the amendments is necessary to deter any attempt to promote a rush of class actions before the amendments are considered and, we would hope, passed by the parliament. However, pursuant to the transitional arrangements included in the bill, a person involved in a class action that was begun before the commencement of the amendments and which contravenes the proposed new provisions will have 28 days after commencement of the amendments to start fresh proceedings. Recommencing an action will not prejudice the person because, as I mentioned before, the proposed new provisions only apply to proceedings commenced on or after 14 March 2000 where there has been no substantive hearing of the matter before the commencement of the amendments.

Schedule 1 to the bill also amends the act to make manifestly clear the previously understood position regarding the Federal Court's jurisdiction in relation to a matter remitted to it by the High Court under section 44 of the Judiciary Act 1903. The amendments confirm that the Federal Court must treat the matter as if it were a judicially reviewable decision under section 476 or 477 of the Migration Act. In particular, the court is subject to the limitations, powers and requirements in division 2 of part 8 of the Migration Act. In addition, the amendments clarify that, despite any other law, the Federal Court does not have any jurisdiction in relation to non-judicially reviewable decisions.

Finally, a 28-day limit is imposed on applications to the High Court for judicial review of a decision made under subsections (1), (2) or (3) of section 475 of the Migration Act. This will ensure that the High Court does not become a way of circumventing the time limit for

applications to the Federal Court. By imposing the same time limit on applications in both the High Court and the Federal Court, it also partly addresses the concerns recently expressed by judges of the High Court about persons seeking to make applications to that court. Of course, the judicial review bill currently in the Senate would completely align the jurisdiction of the Federal Court and the High Court and remove any incentive to seek review in the High Court. The 28-day period runs from the date of notification of the decision and not the date of the decision itself. We believe that this is sufficient time to receive legal advice and decide whether an application to the High Court should be made.

In conclusion, schedule 2 makes a number of technical amendments to portfolio legislation. The most significant are the amendments to section 501A of the act to clarify the scope of the minister's power to set aside a non-adverse section 501 decision of a delegate or the Administrative Appeals Tribunal and substitute his or her own adverse decision. These amendments do not represent a policy change from that which was considered by the parliament during deliberation of the Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Act 1988, which inserted section 501A. Rather, they seek to ensure that the parliament's intent is given full effect in the legislation. Therefore, the retrospective commencement of these amendments is unlikely to affect existing or proposed litigation.

Again, I thank the committee for the opportunity to appear today. I realise that these are quite technical issues that we are discussing. Of course, my colleagues and I are very happy to attempt to answer any questions that the committee may have and, indeed, to come back before the committee to deal with any further issues during the course of your hearings.

CHAIR—Thank you. In your submission, you refer to people seeking to extend the period of time that they are in Australia. There is a suggestion in your submission that the underlying reason for taking any legal decision to the High Court is to stay longer in Australia. But do we know that for a fact? Wouldn't somebody who is in fear of going back to their own country also take out every possible way they possibly could to stay here?

Mr Metcalfe—It may well be the case that some people may take every opportunity. At the end of the day, it is a question for the parliament as to how many opportunities a person ultimately should have. We are talking about people who should be refused as visa applicants. I use the words 'should be' advisedly because you will recall that I mentioned in my opening statement that, in fact, some people who are being caught up in class actions are not in receipt of the decision in the first place. One has to wonder about their motivation or their level of information in joining a class action. But we are talking about people who, on the whole, have been through a substantive and substantial series of processes to arrive at the stage of actually seeking a judicial review. Firstly, they have been the subject of a refusal decision by the department. They have then had the opportunity, pursuant to statute, to pursue merits review before the Refugee Review Tribunal or the Migration Review Tribunal.

CHAIR—This is a different argument you are making then, isn't it? You are really saying that yes, there are some people who are obviously genuine, but you believe that there are some people who are not. Your next argument is simply that the other system outside the judicial system is adequate.

Mr Metcalfe—I suppose what I was saying was the long way of saying that some people will use, I would submit, whatever process is available. Ultimately, the question of motivation may vary substantially from person to person. Some people may simply want to stay in Australia longer because they like it here, because they want to work here, because they prefer the climate. Other people may very well have a subjective view that they do not wish to return home because of what may happen to them when they do. The point I am making is that there is a multitude of process available based on the merits of the particular case, including the capacity for ministerial consideration of cases as well as the other processes I have outlined.

While I certainly would not be purporting to suggest that every applicant in a class action is motivated only by a desire to stay here for whatever reason, I think it is worth having a look at some of the correspondence that we have attached to our submission. For example, one of the letters that is attached there indicates that, ‘if you do not depart Australia within 28 days, compliance action may be taken but you might be able to qualify for a new bridging visa’. There is an element, I would submit, that the schemes have been marketed as a means of staying in Australia, rather than the person actually understanding that they are pursuing an individual court application in relation to their own particular circumstances. This legislation, of course, does not affect that right.

CHAIR—Can I take up those two points with you? First of all, regarding the letters that have been sent out, I do not think anyone would disagree with you that they are a somewhat questionable practice. But this practice is not being committed by those seeking refugee status or seeking to stay here longer; it is being run by the migration agents themselves or the legal firms. You have actually closed that out, so I am not sure who is sending these letters.

Mr Metcalfe—It would ordinarily be a legal practitioner.

CHAIR—It is not actually those people themselves who are doing this; it is people who are in Australia. Are we aiming the rifle not at the people committing a crime but at another group altogether, who are also in their own ways victims of this system too? When you were speaking, you said that they may have joined these because of a poor level of information, so aren't they then being victimised by these migration agents or legal practitioners if they do not have sufficient information to know that this is not appropriate?

Mr Metcalfe—The degree of exploitation that a promoter of a particular class action may be applying to the people who join the class action is an interesting question. The legislation attempts to remove the capacity for class action to occur. As a result of that, the promotion of such schemes will not be possible. Therefore, to use your argument, the capacity for promoters of the schemes to exploit people will be removed. But I stress that, for a person who is the subject of a decision and who makes an application within time, the capacity for that person to individually go to the court still remains. The government's legislative intentions in relation to that other area of judicial review are, as I indicated, in the Senate itself, but this legislation is intended to remove the capacity to use the process. Whether it is something that will impact on promoters and/or individuals, and how they will perceive it, will be interesting to see in the submissions you receive.

CHAIR—How do you answer the criticism by Amnesty International, in the submission they have given to the committee, that by stopping the class actions you are stopping people who do not have the income or the funds to go forward in actions by themselves?

Mr Metcalfe—Mr Walker or Mr Matthews may be able to answer in a little more detail. I will be interested to study the Amnesty submission, and we may well wish to make a supplementary submission to the committee, responding to any points they have made. In the first instance, there would appear to be no inability for a very large number of people to access the Federal Court in the individual circumstances, and we are seeing increasing numbers of applications going to the court each year. I understand that there are provisions for the remission of fees associated with applications to the Federal Court in cases of demonstrated hardship and, of course, we see many applicants who are self-represented. So the actual cost of accessing justice in that area, I would submit, may be very low.

Mr Matthews—Mr Metcalfe is quite correct. The evidence appears to be from the Federal Court that, in about 60 per cent of all applications to review migration decisions, the court waives its fees; in other words, there would be no filing fee to pay in those instances. As Mr Metcalfe said, in Sydney, for example, where we have a large number of our matters, about 55 per cent or 60 per cent are unrepresented, so they would not be incurring legal fees at all in those processes.

Mr Walker—There are also a couple of other points I would like to make. First of all, in our examination of the participants of class actions there were very large numbers who were well out of time, as Mr Metcalfe mentioned in his opening statement. For example, of the 50 per cent of the individuals we examined in the Macabenta case, for 25 per cent of those people it was three years or more before joining the action that they had had their last visa decision, so they were well out of time. Another important factor is that in administrative law matters, once the principle of law has been examined by the court, it is applicable across the board to either that piece of legislation or the procedure that is being called into question. Our practice is that when any individual comes forward where a court has made a decision in a previous case, and that issue comes up in the case, then it is not run to hearing and we in fact withdraw. Mr Matthews could tell you more about that practice of our examination of the cases, and that includes unrepresented matters—that we do examine them and, if there seems to be a flaw, we withdraw.

CHAIR—Am I right that in the Fazal Din case there were five applicants who got through?

Mr Walker—I think there were a few more than the five that got through. I think 16 of the original participants of the original class action were found to fall within the class described. There were another five individual applications—or five applications to the court by individuals—that raised the same issue as the Fazal Din case. We settled those matters on the basis of the court's decision in Fazal Din, so those people had their applications examined again.

CHAIR—Successfully for them?

Mr Walker—Yes, successfully for them.

CHAIR—So, of the 16 participants who fell within that class, they had their previous decision reversed by the court?

Mr Walker—They had their original applications reassessed.

CHAIR—Presumably positive in the outcome?

Mr Walker—I am not aware of what the merits are; it would be based on the merits of the case.

CHAIR—Do you know?

Mr Walker—We could try to track that.

CHAIR—If we look at whether they were successful or not, we had 21 people who had their cases relooked at, which would not have been relooked at if not for that class action.

Mr Walker—If I can switch it around another way, if one of the five had been heard before the Fazal Din case, the outcome would have been the same. The other individual applications to the Federal Court would have been settled, because the issue had been resolved in their favour. Similarly, if we looked at the members of the class, it would have been resolved the same way.

Mr BAIRD—I think you make a pretty compelling case in the whole exercise. I suppose in terms of looking at the other side, if there are no effective barriers to people taking an alternative course of action, we need to look at whether this contravenes our United Nations agreements. What you seem to be saying is to stop the rorting that is going on and to save a lot of expense. Before moving on to the international convention, what type of costs can we expect to save with avoiding this class action?

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

They also in my view encourage litigation. I feel that if class actions were not available there would be less litigation—and, of course, if there is less of it, there are obvious savings in that. Individuals tend to move between classes; in other words, we have had quite a substantial number of class members in different class actions who crop up in the one and then crop up in another one a bit later on, and then they are again in a third, and so on. It would obviously take away the capacity for people to have multiple bites at the cherry. In the normal course of events, if you wish to review a decision on whatever grounds you do it once and you raise the grounds you want to use as the basis to challenge that decision. Class actions cut through that and enable people to raise different ideas or points in different contexts during different class actions at different times.

They are also expensive because of the nature of the schedule of members, which is the way most of them seem to be run in our jurisdiction. You will have attached to it a schedule of names. There is a lengthy, complicated and expensive process of finding out the details of who is on them and, when you go through the opting out processes, finding out who they are. What perhaps is the most difficult of all is whether the individuals who are actually within the schedule fall within the description class, because often they do not. I suppose I am saying in a long-winded way that there are lots of issues or aspects of class action that are actually very expensive, not the least of them being that the very existence of them encourages more litigation and more class actions.

Mr BAIRD—Do you have a ballpark figure for how much you think we would save by removing this? Would it be tens of millions?

Mr Matthews—No.

Mr Metcalfe—It is not tens of millions, but it is certainly a very substantial amount. We will try to come back to the committee with a response.

Mr BAIRD—What about the second part of the question, which was the UN.

Mr Storer—As Mr Metcalfe said, not all the people entering class actions—I am not sure of the numbers, but I think not even half of them—are people seeking protection visa requirements in Australia. But, for those who are, we have had advice from A-G's that it does not break any conventions. They can still apply individually. They have access to all the administrative and other processes available. They do it the same. To supplement your other comment about costs, the other way that we propose—that did happen before class actions, that we take great note of and we could go into great detail to show we do do this—is that if there was only one case it be used as a test case, and other people wait behind that. Then the Commonwealth—the taxpayers—and the individuals have to pay the costs of only that one test case, the government takes note of the decisions of the courts in that particular test case, and we obey the law as it stands at that time. So you would save lots of money in that regard as well.

Mr Metcalfe—On the international law point, I am advised that article 14 of the International Convention on Civil and Political Rights does talk about essentially access to justice and does indicate that certainly one level of judicial review must be able to be accessed and, of course, one level of judicial review—indeed, multiple levels—are able to be accessed by everyone in this situation by individually applying to the court. What this is attempting to do is to remove these potentially very large, very uncertain class actions which throw up many of the issues that Mr Matthews raised earlier.

I suppose there is a practical aspect of administration for the department as well. If the committee looked at page 6 of the department's submission, we go through the details of some of the class actions. Perhaps the most noteworthy is the Macabenta, Kagi, Vega and Suprianto class actions that were filed in late 1997 and into late 1998, covering 3,737 people in all. The government was successful in all of those matters. You will note that the Macabenta class action was dismissed by a Federal Court judge in April 1999, then went on to appeal to the Full Federal Court and was dismissed on 18 December 1999, and then the High Court refused

special leave to appeal subsequent to that. So there were quite substantial delays in relation to a very large number of people.

It has a practical side because, under the Migration Act, the obligations on officers are very black and white. If a person does not have a visa, the person must be detained; and if an officer reasonably suspects that someone does not have a visa, there is an obligation placed by the legislation on the officer to detain that person. Those are pursuant to amendments that were made to the act in 1994. Where there is some doubt as to a person's status—in particular, is the person in a class action or not in a class action; and do they hold a visa as a result of being in the class actions—there are very practical issues that our officers have to deal with in administering the law. It is a much simpler proposition if a person has themselves individually made an application to a court, in which case it is well known as to whether they have applied in time, whether they have a bridging visa and our treatment of them can occur very properly. But it puts our own officers in a very difficult and uncertain situation and, I would submit, the individual person who is in the class action as to their legal status in this situation.

Mr BAIRD—I had a case last week of a constituent on a bridging visa in terms of applying for refugee status when it clearly should have been a spouse application visa. Part of it seems to me that they end up with these legal and migration people who advise them and often can maximise their own returns by providing it. It seems to me that we need a user-friendly place where people can go to sort out advice as to what they should do. Quite a number of the people I see here have come in on a visitors visa and then have gone to migration agents, have got the wrong advice and then they try to rectify it, rather than trying to put them on the right track by saying, 'This is what you do and this is the normal requirement of what happens.'

Mr Metcalfe—I certainly agree, Mr Baird. Without wanting in any way to appear glib, there is such a place and it is called 'the department' in that if a person comes into the department to talk to us and says, 'I have just got married' then we are able to say this to a person—

Mr BAIRD—But it needs to be user-friendly in the first place. In some cases it is; and in some cases it is not.

Mr Metcalfe—It is. Certainly, it is a key objective for us to make it as user-friendly as possible. But some of our officers are extremely busy. Those are objectives we are working towards to try to provide the best service we can.

Mr BAIRD—I agree totally with what you are doing here. If you are making savings in this area through class actions, then perhaps you should put back some of it in terms of your migration offices. I was exposed to going into one of the offices the other day and it is not user-friendly. It was certainly user-friendly to me. In terms of the average person and the treatment they get, some of the stories I hear from the other side are nothing short of horrific—from both sides. I know people who are involved in that can vary a lot. But maybe we need to put more resources in so that people can spend the time in talking people through.

Mr Metcalfe—I certainly take on board everything you have said. It is obviously a complex series of issues as to being able to apply resources into particular areas but it is a key objective to try to continue to improve client services. In some offices you will walk in, walk straight to a

counter and get an answer; in others, there will be lengthy delays and lengthy queues. A whole set of issues lie behind that particular point, but I accept what you are saying.

Mr BAIRD—I accept that.

Mr Metcalfe—In terms of your other issue about the quality of migration advice and whatever, there is the statutory self-regulation of the migration advice industry. If there are particular instances of poor advice or bad advice, then the Migration Agents Registration Authority is able to work on those sorts of issues. But what we are seeing in some of the letters that we have provided to the committee is a quite deliberate invitation to find ways of extending stay. It is quite deliberate.

Mr BAIRD—I am sure that is true. I am sure there is a lot of deviousness out there.

Mr Storer—Just to supplement that, there are problems with migration agents, but we do try to work constructively with them, too. All migration law is complex, as we have found out. We try to work with everyone, including members of parliament, to try to advise them about recent changes and how we can cooperate to get the same message of what the parliament intends to be delivered out there in the community. As Mr Metcalfe said, we are interested in any ideas and suggestions that committee members and others have as to how we can do this better—with our own officers and working cooperatively with migration agents, other community groups and so forth.

Mr RIPOLL—Mr Metcalfe, I want to ask you to clarify a couple of points in terms of the actual intent of the legislation. Is it a matter of cost and saving money; is it time; is it trying to reduce access to judicial review; or is it trying to prevent people from extending their stay in Australia? I would like to have a better idea of where it is actually targeted.

Mr Metcalfe—It is trying to do two things. It is attempting to remove what we regard as a substantial vehicle that has now emerged for people to extend their stay in Australia for lengthy periods of time based upon a quite unmeritorious situation whereby they are part of a class action where all they have to do is pay a couple of hundred dollars to a migration lawyer to become part of that class action. As we have seen in practice, many people may be entitled to access the court, and some may not even be in receipt of a decision. It is part of a much broader canvas whereby people are very much entitled to get a fair go: to access the system, to get a decision, to have a merits review of that decision and to seek to obtain a result. But, at the end of the day, if they fail in their entitlement to a particular visa, they need to accept the result and then leave Australia and get on with their lives. We have seen many examples in recent years of particular processes being exploited for the sake of the process and the benefit that accrues from that. Perhaps where the migration jurisdiction is different from every other administrative law jurisdiction, and probably every other area of litigation, is that the delay in itself provides a benefit for the applicant, because they are able to continue to stay in Australia, notwithstanding the fact that there has been a decision that they should not stay in Australia. That is certainly one policy intention.

The second is that it is, as we have heard from Mr Matthews, complex and costly in terms of administration. As I have indicated, there are potentially some difficult areas regarding quite fundamental rights as to whether people should or should not be detained and those sorts of

issues, and we do not want to trip over in that particular area. So while cost saving and efficiency are part of it, I would submit that the primary purpose of the legislation is to eliminate a process that is being used for the sake of the process itself rather than seeking to obtain real justice, bearing in mind that it is part of the wider set of initiatives of the legislation already in the Senate relating to judicial review. It is allied with other measures that have been taken by not only this government but also the previous government over a number of years.

Mr RIPOLL—Are you aware of advice that claims that parts of this legislation, particular the limitation of 28 days, may be unconstitutional?

Mr Metcalfe—I am aware of various comments that have been made by various people. The advice that we have is that it is within powers and it is constitutional.

Mr RIPOLL—How strong is that advice?

Mr Walker—We believe that it is quite strong. In fact, we made some concessions to ensure that we were within power. For example, the fact that the 28-day time limit in the High Court from date of actual notification rather than deemed notification—as is the case with the Federal Court—was done specifically on the basis of legal advice. Our advice is that imposing a 28-day time limit goes to a matter of procedure within the court and not to the fundamental right to access the High Court.

Mr RIPOLL—For the purpose of the committee, can you provide a copy of that advice so that we can have a look at that?

Mr Walker—I think we will have to check with our minister.

Mr Metcalfe—We will check with the minister but, to the extent that we can cooperate, we will. I think the advice would be from the Attorney-General's Department or may have been received by the parliamentary drafter in the course of drafting the legislation. We will make a supplementary submission and we will certainly talk with the minister about giving you access to that advice.

CHAIR—I suspect that we will be seeing you again after we have heard from everybody else.

Mr RIPOLL—Can I pursue this a bit further: I was trying to get a better idea of the overall intent and what area the legislation is specifically targeting. You have broken it down into two areas. One is about reducing people's stay in Australia and circumventing that; and the other one is cost. Mr Baird had a question about cost—

Mr Metcalfe—We took it on notice.

Mr RIPOLL—That is not a problem; that is fine. I would be interested to see what cost savings there are. I want to pursue what Mr Matthews said about the substantial savings—even if we can get some ballpark figure. I note that the explanatory memorandum contains a financial impact statement, which specifically states that there would be no cost saving. Are you aware of that statement by the minister or—

Mr Metcalfe—We certainly are because it would have been drafted by the department.

Mr Walker—When we were analysing this proposal, we felt there would be overall probably fairly minor savings, if any savings at all. The number of class actions have been increasing, but an important part of our management of those actions has been that we have not tested who is actually within the description of the class. The way these processes run is that there is a schedule of people who claim to be within the class and are applicants. If we went through and tested whether they were true members of the class before the issue was considered by the court, that would add further delay, complexity and cost. The way we have run these matters is basically to have the court examine and determine the issue. In the 14 applications since October 1997, the 10 of those that have been decided have all been unsuccessful. So we have not had to proceed to those costs. Obviously, in the others, if the applicants were successful, we would then have to proceed. On the basis of what we have had at the moment, the costs have not been as significant as they could be.

Mr RIPOLL—Whether it is ‘minor savings’, as you have just said, or whether it is ‘substantial savings’ as you said earlier, where are those savings going to be coming from?

Mr Metcalfe—Primarily within the litigation budget of the department.

Mr RIPOLL—I take note again of the explanatory memorandum which said that there may be an increase in litigation costs.

Mr Metcalfe—That would be based on the assumption that some people who are currently in a class action would translate into an individual application. To the extent that we can provide information in relation to our best knowledge of the cost situation, we will certainly provide that to the committee.

Mr RIPOLL—That will be fine. I want to pursue also the issue of extended stay. I am not too sure how the changes to this legislation are going to decrease the opportunity for people to pursue individual cases—I think we have clearly established by your own testimony that people will use every opportunity available to them. So if class action no longer is an opportunity, then they will find other ways. If people are seeking to stay purely for the matter of extending a stay, then they will use every other opportunity, including taking individual action. My view would be that, instead of making things more user-friendly or easier, we are going to clog up the legal system further by taking away one mechanism and forcing people through this legislation to go another road.

Mr Metcalfe—It is for that reason, Mr Ripoll, that I said during my opening statement that this piece of legislation is complementary to other legislation that is already before the parliament, particularly the judicial review legislation—the so-called privative clause legislation—which seeks to limit the powers of the courts to provide an alternative decision in relation to a person.

We also mentioned that many of the people who were part of class actions were well out of time in relation to the 28 days. The 28-day requirement in relation to seeking an application for judicial review following an adverse merits review decision has been in place since, from memory, 1 September 1994. So that is a piece of legislation that has been in place for 5½ years

now. This is part of a much wider scheme of attempts by the government to ensure firstly that people have reasonable opportunities to have a fair go but that they cannot ad infinitum access processes which mean they have very lengthy stays in Australia as those processes work through.

Mr Walker—There are a couple of points in bear in mind. There are three measures in the bill that operate in a complementary way: the removal of class actions, the 28-day time limit, and also the standing that you have to have a visa decision or action in order to make an application to the Federal Court. Our analysis of the participants in the most recent class actions has shown that the overwhelming majority of these people are either quite a significant way out of time from that 28-day time limit or have not had any visa decision or any issue—they are people who have overstayed their original visa and have decided that this is a vehicle for staying lawfully within Australia.

Mr RIPOLL—But how does the barring of the class action then prevent individual action which would otherwise—

Mr Metcalfe—They would have no matter to bring before the court. By definition, to go to court you have to be aggrieved by something or other so that if you have not applied for anything and been in receipt of a refusal decision then you cannot be aggrieved by it. It indicates the fact it is being used as a vehicle—perhaps unwittingly by many people who are not understanding exactly what it is—by some people who are seeing it as a means of extending their stay in Australia.

In the same way, you possibly may recall that a couple of years ago we had a situation of some people applying for protection visas for refugee status in Australia on the basis that it brought work rights with it, and it had been marketed by some innovative individuals as a work visa. We had people who were making applications for refugee status in Australia. They did not understand they were making application for refugee status in Australia; they thought they were applying to work. The promoters were attempting to take advantage of delays in the process. As a result of that, and I recall that was back in the middle of 1997, some changes to the regulations were made which substantially overcame that problem. This, I would submit, is another symptom of the motivation of some applicants and of some promoters to provide and to explore opportunities to find process delay. This legislation is a response by the government to that.

Mr RIPOLL—Are you aware of criticism by the Law Council in terms of shifting workloads from one court to another court, the problems that may be encountered and the extra costs involved in shifting the jurisdiction, in moving it from one area to another?

Mr Walker—We are certainly aware of the Australian Law Council's concerns. We do not believe that will be the case. Once again, the bringing in of a 28-day time limit to the High Court aligns as much as possible, barring the privative clause, the jurisdictions of the court and the time limit. We have found that the majority of applications to the High Court in its original jurisdiction have been by people who are outside the strict 28-day time limit to apply for a judicial review to the Federal Court. So we do not believe that there will be a shift from the Federal Court to the High Court.

Mr Metcalfe—It may be of interest to the committee in examining this reference to go back in time and have a look at some of the rationales for legislative amendments back in 1994, which came into effect in 1994 but I think the legislation was actually debated in the parliament in 1992. That was very much about concerns of an increasing workload in the Federal Court in the migration jurisdiction. The legislative response in the parliament, following consideration and review by the joint committee at that time, was to enshrine rights of review in relation to protection visas, to create the Refugee Review Tribunal and to provide what is now part 8 of the act, which places those limitations on the role of the Federal Court. Much of the discussion at that time was that this would be a way to ensure that people get a merits review decision—a decision as to whether or not they are a refugee and whether they have an entitlement to this visa—and the more technical question as to whether the processes have been worked through properly. The issues that are properly explored in the judicial matter tend to fall away, providing there is high quality merits review.

I note that another committee of the parliament, a Senate committee, is currently looking more broadly at refugee decision making and at a couple of cases in particular. If you have a look at the history of what was attempted to be obtained by the government and the parliament six, seven or eight years ago, the reality is that there has been an increase in merits review but the reality is that there has also been an explosion in litigation. We are now looking at a departmental budget on litigation of around \$10 million and we expect that will increase substantially.

We have seen a response by the current government in relation to some of those matters in the bill that is currently in the Senate, the judicial review bill. But over the last couple of years we have seen this new phenomenon of class action entitlements being used in a way that has never been seen before in this jurisdiction in these 14 class actions that have been emerging over the last couple of years. Hence, I would submit that this bill is part of a long line of attempts by government to ensure that people have a high-quality decision on the merits but limit access to the courts to reduce the potential for delay in the ultimate actioning of the decision.

Mr Storer—Just to supplement, it might be worth reading the debate at 1992—some of us were involved in it then. When then Minister Hand introduced the bill, there was quite a lively, exciting debate about the explosion of Federal Court cases, which then were less than 200 I think, and the costs on the community. As Mr Metcalfe has said, it has grown to the extent that we expect some 1,400 applications this year to the courts and the AAT and around \$15 million to be expended on it.

Mr RIPOLL—In your view—I think I am pretty clear that it is more a problem with the migration agents and other people bringing forward these cases and bringing people together—

Mr Metcalfe—I suppose someone has to organise the action.

Mr RIPOLL—Absolutely. But given that the legislation is going to remove that, what is preventing these people organising it in a different way? To take one case that you mentioned, where I think there were 10 class actions involving 4,000 people and another involving 3,500, what is preventing migration agents saying, ‘This is going to be a huge cash cow for us because we would take each one of these, slightly vary them and start clogging up the system’? If we believe that the ultimate goal—we have said it over and over—of these people is to extend their

stay, this would play right into their hands. This would be a perfect way of extending your stay almost indefinitely because the system would not be able to cope.

Mr Metcalfe—Firstly, many of the applicants in these class actions are not even in receipt of a decision that would entitle them to go to the court. Secondly, there are time limits applicable to them going to the court and people out of time—outside the 28 days—at least as far as the Federal Court is concerned, are not able to access the court. That is why we are starting to see more cases going to the High Court because there is not the same limitation there at the moment. While we have seen an increasing caseload—I agree that by taking some people out of a class action process some of them may be interested in getting into an individual application process—this legislation has to be seen as complementary to the other measures in the Senate that are designed to address the more fundamental issue of access to the High Court and the Federal Court in this jurisdiction.

Mr RIPOLL—Given that there is no legal aid, do you believe that 28 days is a reasonable period of time from receipt to be able to mount not only a case but to seek possibly financial assistance? If people are going to be given a fair go, as you said earlier, in terms of being able to pull this together, what sort of real opportunity are they going to have to be able to pull together not only comprehension of what is going on but also then financial assistance and some sort of legal assistance, and actually be able to do that in that 28-day time frame?

Mr Metcalfe—The answer is that we do believe 28 days is sufficient, and it is being evidenced by the fact that increasing numbers of people are making applications to the court. As I said earlier, we see a large number of self-represented applicants, and in many situations there are no fees payable for the application itself. It is a separate issue, I would submit, as to access to legal aid. There have clearly been policy decisions made that I cannot go into in relation to that issue. But, in all the circumstances, we believe these arrangements are quite fair and do provide access to justice to a person who needs access to justice. This whole process sits on top of a very comprehensive opportunity to state your case for a visa to a departmental decision maker. If you are unhappy with that and provided you seek the review within time you are able to go to an independent merit review tribunal. The court is not there cogitating as to whether this person should or should not get the visa or whatever; the court is concerned with process. Did the tribunal go about making its decision in a lawful and correct manner? It is a process driven issue—it is not just should applicant X get a visa or not get a visa.

Mr RIPOLL—I understand that.

Mr Metcalfe—Successive governments have seen that the key area of quality is in that merits decision making system itself, with the judicial review system there as a safeguard to pick up those cases where that process system falls down. We have seen that many hundreds of people a year are accessing that process, but the actual numbers of cases of successful applicants are quite small in that overall process.

Mr Walker—There are a couple of points in relation to clogging up the system with individual applications. I would refer back to what I said earlier about test cases in that generally we can push a test case along relatively quickly and have the actual issue determined. Depending on whether that issue is successful or unsuccessful for an individual obviously leads

to a speedier resolution in the courts overall. For example, if the government is unsuccessful, we are not going to have all those cases proceed to hearing.

Mr Matthews—If I could just add to that: in Sydney, where a substantial number of our cases take place, the Federal Court resolves individual matters in a little over five months, whereas class actions often take considerably longer than that—I would say an average of 18 months and some of them actually go for years.

I want to build another point onto Mr Metcalfe's answer in relation to your question about the 28 days. All that is required to happen within 28 days is an application to be lodged. In the case of unrepresented applicants, following the lodgment of an application the department takes on the role and the responsibility of providing the bundle of relevant documents—including the decision and any other documents that may be relevant to the application. There is opportunity at directions hearings and so on after that for applicants to amend their applications, to add grounds or to do whatever prior to the hearing. It is not as if the whole list of things that you stated has to be completed within 28 days; it is really just the application that has to be filed.

CHAIR—What percentage of people in a class action would have been able to do that action by themselves—legally, not financially?

Mr Metcalfe—Within the 28 days and in receipt of the decision?

CHAIR—And that the courts also had the right to throw out as vexatious? Do we have a number on that?

Mr Matthews—I suppose one has to speculate a little in answering that question, but there seems to be no impediment in unrepresented applicants filing applications for review decisions in the Federal Court. As I said, probably more than half of them would be in New South Wales, which is our biggest case load.

CHAIR—I mean in a class action. If we had a look at that class action, what percentage would not be able to go forward in that by themselves because they did not fall under that proper class?

Mr Walker—We have examined a couple of the class actions that have been run. In the Muin class action, for example, we looked at all the participants—there were 322 as at 9 November 1999—and only three per cent of them would have been within the time limit.

CHAIR—So that is a very small proportion. That bears much on your question.

Mr RIPOLL—It raises another one.

CHAIR—No, it is Mrs May's turn.

Mr Storer—There was some other evidence introduced by Mr Metcalfe about the same issues in his opening statement that we could table.

Mr RIPOLL—I was interested in your answer when the chair asked the percentage of those in a class action who would be able to seek an individual case. You said, ‘What? Within the 28 days?’ So it is not a matter of whether they are legally able to; it is whether they fit into the 28-days. So the restriction is not whether they can or cannot, it is whether we can prevent them within the time frame. Isn’t that the case?

Mr Walker—It is whether they are eligible at the moment.

Mr RIPOLL—That is what I am asking specifically. Is the eligibility now a case of days? It does not restrict in the case of their legal ability or legal rights, but we have put in a hoop they cannot jump through, which is 28 days. We are restricting their capability legally, not through the merit of their case but through the timing of the legislation.

Mr Metcalfe—The 28-day concept has been in place since 1994. I think the point the chair was working towards was that in the Muin class action, three per cent of people would have qualified within the 28-day period determinative for the last six years, and in Macabenta, on examination of about half of the cases, we could not find anyone who would have fitted within the 28 days. So it is becoming a process for people who have missed out on the 28 days, or chosen not to seek judicial review, to then say ‘Gee, here is a chance to get a bridging visa,’ and to join a class action which is not specific to them but broadly is of appeal to them.

Mr ADAMS—What evidence is there that this legislation is based on that there is this extra money being expended through the courts?

Mr Metcalfe—We have had some discussion about whether or not there are savings, and we will try to give more information to the committee about what we think about that. The main issue is about finding a way to bring some finality to a person’s visa situation in Australia—people who have had the opportunity to have a decision, not once but twice, and who have had the opportunity to go to the Federal Court—these statistics indicate that they have, but they have chosen not to use that. They then join in class actions, some time after the time limit for their access to the court would have ordinarily expired, as a means of obtaining a bridging visa and continuing to stay in Australia. It is more a part of the very long-term canvas of successive governments saying, ‘We believe people should get a fair go, but you have to draw a line somewhere as to how long they can continue to access that.’

Mr ADAMS—Do you have some statistics?

Mr Storer—I will add a bit to save time. Most of these class actions—Macabenta and another one called De Silva—refer to a resolution of status process that was introduced at the time. Most of them are dealing with people who have been here at least five years. They had to be to even complain about the thing. They had been here, and a lot of them had not resolved their visas. They just joined in. They were the hidden illegals in the shadows out there—mostly people who had overstayed their visitor visas or other visas and who wanted to stay. They had to be here for five years to even participate, so in terms of timing 28 days is nothing in the scheme of things—they have been here for a long period of time. You say that only three per cent would have made the cut-off and made the 28 days, but of course, that is under this legislation, and not under what is proposed in the new one. Under the new legislation, where class action would not

be available, they would know that, so an individual case would be brought forward, even if it was just a matter of applying.

Mr Metcalfe—We are saying that the 28 days that currently exist in part 8 of the Migration Act. Currently there is a 28-day limit on applications to the Federal Court from the Refugee Review Tribunal or the Migration Review Tribunal. It is there, and it has been there since 1994. This bill also purports to extend that 28-day limit to the High Court. We find that, because of the 28-day limit with the Federal Court, some people who have not made the 28 days are now going straight to the High Court, where there is no limitation. Many others who have missed the 28 days—in fact, some of them have missed it by years—are now seeking to pursue class actions.

Mr RIPOLL—What is preventing their going straight to the High Court?

Mr Metcalfe—That is an issue where the other piece of legislation—the judicial review bill—is highly relevant. The parliament sought to limit judicial review in this jurisdiction in 1994 by making the changes to part 8 of the act and quite specifically limiting the role of the Federal Court. At the time, the decision was made not to seek to have similar measures applying to the High Court. There is the opportunity pursuant to the Constitution for anyone who is the subject of a decision of a Commonwealth officer to make an application to the High Court in its original jurisdiction—it is not an appeal to the High Court; you can go straight there. In the early days, we did not get many applications going straight to the High Court, but we are seeing an increasing number now. It is for that reason and for other reasons that the government has introduced the other bill, the judicial review bill, which essentially attempts to make the jurisdictions of the High Court and the Federal Court similar, and indeed to limit the jurisdiction of the High Court and the Federal Court because the attempted limitations with the Federal Court have clearly not been successful—there is more litigation now than there used to be in the past. That is why I repeat the point that it is complementary, and it is part of an overall scheme. Indeed, the committee's reference extends to what is an important additional element to some matters that have already been looked at in great lengths by the parliament.

Mrs MAY—Just on the 28 days again, are there any exceptional circumstances where you would allow someone to be heard outside that 28 days?

Mr Matthews—The 28-day period to appeal to the Federal Court is a strict one. There is no discretion on the part of the court to extend time.

Mrs MAY—So there is nothing for an exceptional circumstance?

Mr Walker—Currently with the Federal Court there is no exception. In this bill there is no exception for the High Court.

Mrs MAY—You talked about people joining one class action, with that class action finishing and their joining another. Do we have any figures on how people use that facility?

Mr Walker—The Macabenta class action was one of the largest. It dealt with some 400 or 500 people—we looked at their characteristics and so forth. We found that, of those 400 or 500 people, 40 per cent were identified as moving on to other class actions once that Macabenta class action concluded.

Mrs MAY—With each class action they join, is a new bridging visa then granted?

Mr Walker—Yes.

Mrs MAY—What about the idea of taking away a bridging visa altogether?

Mr Metcalfe—That is an interesting issue. Were we to remove the bridging visa but continue to have the access to the court, we would have the difficult situation that, where we located such a person in the community, we must detain them. We have already got detention accommodation for close to 4,000 people because of the recent influx of unauthorised boat arrivals. We would need twice as many places in detention when you have a look at the numbers of people in the class actions. I think that taking away the bridging visa would be treating the symptom and not the cause. The cause is the class action entitlement. The symptom is the bridging visa. Sure, by a stroke of the pen and the making of a regulation the minister could amend the regulations to remove the bridging visa, but that then puts the department in a difficult situation whereby section 189 of the Migration Act is a very black and white piece of legislation—if you are illegal you have to be detained. If they are detained, you have to put them somewhere. That is the problem we face.

Mrs MAY—You also stated somewhere—I do not know whether it was in your opening statement—that the majority are not seeking protection visas. Is that what you said?

Mr Metcalfe—Just to answer in a circular way, it may be of some assistance to the committee if we were to provide a bit more detail than we have in our submission about what the class actions have been about. For example, Mr Storer mentioned earlier that the Macabenta class action was largely based with people who missed out on the so-called ‘resolution of status’ arrangements from 13 June 1997, whereby certain Chinese students who had been considered for the 1993 concessions that were applicable to Chinese students following the Tiananmen incident in 1989, and who did not qualify under the 1992 arrangements, were able to be looked at again in 1997. Many of them were able to be picked up. There were also certain people from other countries who had been in Australia for quite long periods of time because of internal strife—from Yugoslavia, Sri Lanka, Bosnia and whatever. The Macabenta class action was largely made up of people who had been in Australia—quite often illegally—for some period of time and who were not covered by those resolution of status arrangements but who perhaps either thought they should have been or who were prepared to join a class action. Essentially that action challenged, under the Racial Discrimination Act, the validity of those particular resolution of status arrangements. As I said earlier, the department won that case in the Federal Court, in the Full Federal Court and in the High Court. So it was a very comprehensive rebuff to the class action.

What we are now seeing is the migration of some of those applications across into another class action which may be arguing that some other piece of legislation—not the individual decision the person was subject to but some broad set of circumstances—may be applicable or should be applicable to them. We provided some information in our submission, but if it would be of assistance we can provide a bit more detail as to some of the circumstances as to the decisions that were being challenged and the background to those decisions, which may be of interest and may put the matter in broader context.

Mrs MAY—Thank you. That would be appreciated.

Senator BARTLETT—Firstly, you have said that this bill is complementary to other measures in the Senate—presumably, the judicial review bill. Will the bill we are looking at tonight be able to stand on its own? Does it matter, in a sense, whether the judicial review bill goes through?

Mr Metcalfe—Yes, it will in that it deals with class actions and removing access to the class action provisions of the judiciary act and it deals with time limits and various other matters. But we see it as complementary because, as I think the discussion here tonight has indicated, if you were to look at the broader issue of judicial review and some of the root causes for the increase or, some would say, explosion in litigation in this area, class actions are but one manifestation of that particular issue. So it is complementary but it stands alone.

Mr Walker—These measures and the amendments in the bill are drafted on the basis of part 8 as it exists today, not as amended by the judicial review bill.

Senator BARTLETT—The issue of savings, or possible savings, was touched on a bit, but I want you to nail it down a little more. When it was first raised Mr Matthews, and probably Mr Metcalfe as well, said that there would be substantial savings—or very substantial savings. The next time around, Mr Walker, you were saying that there may be minor savings, if any at all. The explanatory memorandum raises the possibility at least that there may be an increase in litigation costs. That is a fairly wide range of comment.

Mr Metcalfe—I think we agree that that issue is something we need to clarify and come back to the committee on.

Senator BARTLETT—Presumably if costs increase, it might be a bit of a pointer—no matter whether you call it abuse or use—as to court proceedings going up or down as well.

Mr Metcalfe—We accept that we need to give you some more detail on that.

Senator BARTLETT—As a link to that, you have given a number of examples of various changes that have been made back to 1992 or so of reforms or changes aimed at reducing access to courts, which basically have not been successful. Most of those reforms have been aimed at curtailing rights of appeal or other rights that people have whilst they are appealing. Out of all the others that you are continually putting in place, why is this one going to succeed, also taking into account that the number of appeals continue to increase?

Mr Metcalfe—I think that is a good question. I suppose what you are asking is: have we identified the last loophole?

Senator BARTLETT—I could be asking whether we are going in the right direction.

Mr Metcalfe—I think there are clearly some broad policy objectives that are being dealt with. The changes that were made by the previous government that commenced in 1994 were debated in the parliament in 1992. There were some quite clear statements by the then minister as to concerns about the increase in litigation. I think the minister—and I do not think I am

misquoting him in saying this—was hopeful that they would work but that, if they did not, certainly they would be looked at further.

I recall also that a report of this committee—I do not know whether it was on asylum border control and detention or a similar one—also looked at the judicial review measures. I think there was a recommendation or a note by the committee about these issues perhaps needing further work or being further looked at, depending upon the success or otherwise of the initial measures back in 1994. It is very well on the public record that the government has strong views on this particular issue. Indeed, I think one of the first issues the minister looked at on becoming a minister in 1996 was to commission a review in this area and to ultimately propose the judicial review legislation that is now in the Senate.

Are we confident that this will work? I think we are as confident as we can be that this will work. This is a reasonably technical piece of legislation in that it will simply remove an opportunity to access the court in a particular way. Will it reduce the overall number of applicants going to the Federal Court? I think, on the evidence that we have provided here tonight, that many of the applicants in these class actions would not be entitled to go to the Federal Court because of the fact that they are out of time. Will it mean that more people go to the Federal Court within time? I do not know the answer to that. But, combined with the legislation in the Senate, I think this is part of a comprehensive series of measures that deal with the role of the courts in this area of decision making. But it must be borne in mind that these are quite unique circumstances and also that this is simply one part of the much wider decision making process with opportunities to access independent review tribunals and opportunities to access the minister's non-compellable powers.

Senator BARTLETT—The 28-day time limit on the High Court that is in this bill: is there any precedent for that in any other legislation?

Mr Metcalfe—I do not think we are aware of it but, if we can locate anything, we will let the committee know.

Senator BARTLETT—That would be good. Can I clarify that the 28-day time limit for the High Court would not apply just to class actions; it would apply to anybody seeking to appeal?

Mr Walker—It would be anyone attempting to seek judicial review from the High Court in relation to a visa migration matter.

Senator BARTLETT—The Amnesty submission, which you may or may not have seen already, mentions a case of a person who appealed to the High Court or had the High Court exercise jurisdiction outside a 28-day time limit. This was an Iranian asylum seeker who was subject to detention and attempted removal. Basically, their injunction was granted by the High Court. Then further down the track, after various procedures, they were found to be granted refugee status. Wouldn't that be an example of someone whom we have now found to be a refugee who, if it were not for their ability to access the High Court on that occasion, would have been sent back to face the risk of persecution?

Mr Metcalfe—I have not had the opportunity to see the Amnesty submission. I think it would be inappropriate for me to comment in relation to that particular matter without being

aware of all of the circumstances. But certainly, either when we come back to the committee or in a written submission, we would be happy to try to respond to that.

Mr Storer—Perhaps this will just help in a general sense. You might be aware of this but, when a person gets a decision from a review tribunal, they are given a time to say when they can go to the Federal Court. They are not told at present about the High Court in its original jurisdiction. I think it is our intention—isn't it, Doug—that, if the bill is passed, the letter would be amended to include the High Court.

Senator BARTLETT—One would hope it would.

Mr Storer—I am just telling you, whereas that has not been the case to date. That is all I am saying.

Mr Metcalfe—The reason I cannot talk in more detail about that case is, firstly, I do not know it—I may know it, but I am not aware of the details at this time. I am not aware of whether that person had sought the minister's non-compellable power and been considered and so on. So we will look at that and get back to you.

Senator BARTLETT—I will turn to the UNHCR submission, and you probably are even less likely to have seen this one because I think it only came in last Friday.

CHAIR—These have not been published yet because we have only authorised them this evening, so the department has not seen any of these reports.

Senator BARTLETT—But I can mention what is in this one?

CHAIR—Yes, they have now been authorised. Before you continue, this is probably an opportune time to tell you that earlier on I referred to the Amnesty submission. You were going to look up and consider, when you had received that submission, whether this would limit it to people who did not have as much money. That was not from the Amnesty submission; it was from the Human Rights and Equal Opportunity Commission. So, when you are looking for that, that is where you will find it.

Mr Metcalfe—Thank you, Madam Chair.

Senator BARTLETT—The UNHCR, whom I know the government and the department pay a lot of attention to in considering their refugee obligations, expresses—I think it is fair to say—concern about the limitation of judicial review. Just quoting from that submission, 'The first benefit of judicial review is that, although the RRT has proven itself to be an effective appellate authority, it has no system of precedent.' Then there is 'limited scope for peer review' and 'some members who aren't legal practitioners'. Of course, as well as that, as you know, you cannot appeal on grounds of natural justice or bias or relevancy or unreasonableness. So it is, I guess, specifically, in pointing out the limitations of the Refugee Review Tribunal, highlighting the benefit and importance of judicial review. Wouldn't it be of concern to the department that the UNHCR, with its focus on non-refoulement, is expressing concern about curtailment of access to judicial review?

Mr Metcalfe—I will reserve my full comments until I have had the opportunity to see the submission. We do work closely with the UNHCR. My recollection is that the convention, in fact, requires governments that are party to the convention to have at least a merits review system or a judicial review system but not necessarily both. Australia, of course, does have both. I think the UNHCR would regard Australia as having one of the most sophisticated refugee determination systems in the world.

You have raised the issue of access to judicial review. Access to judicial review will continue and this bill will not affect that. What we are saying though is that it is reasonable for people to make an application within a particular period of time. We believe that, if people are going to proceed to judicial review, they should do so on an individual rather than a group basis where quite often their application or their circumstances may bear very little reality or connection with the actual matter that is being pursued.

In relation to criticism of changes to the role of the courts, as I have said, I have not had the opportunity to read that particular submission. But there has been a limitation on the role of the Federal Court since 1994, and the government's policy intentions in relation to this area are very well flagged and I probably do not need to repeat them. But there is extensive discussion. The minister has had a lot to say on a large number of occasions about the benefits of the legislation that is currently in the Senate being a means of ensuring that, while people are entitled to a fair go, ultimately the time comes when they have to accept a decision.

Senator BARTLETT—There is the issue of the changes to the standing rules. The Law Council's submission—and, again, you can address that when you come back to us with more detail—suggests that those changes would prevent people who are held incommunicado at airports from having any access to the courts through Australian friends or relatives. Is that the case?

Mr Walker—I think there are a couple of points to make. Basically, if the individual asks to see a lawyer, we are obliged to put them in contact or facilitate access to legal representation or legal advice. There are also other mechanisms that are often used, such as the Human Rights and Equal Opportunity Commission and the Ombudsman. They are used quite effectively, I think it is fair to say, by friends, relatives or whoever about individuals. As well, they certainly are I think cheaper and probably equally as effective or more cost effective.

Senator BARTLETT—But there have been a number of cases—I do not know how many but certainly a few—where applications have been lodged on behalf of people who are at the point of entry that prevent their removal and subsequently they have been granted protection visas. Would this change in standing prevent applications being lodged on behalf of people, or access to appeals to courts in seeking injunctions to courts on behalf of people?

Mr Walker—If they are people who are not representing an individual in custody but doing it of their own volition, yes.

Senator BARTLETT—It would prevent that?

Mr Walker—It would prevent them from making an application. It has to be a person who is directly affected by the action or the decision.

Senator BARTLETT—You are saying it is 28 days from the date of receiving the notification. Is that right?

Mr Walker—That is right.

Senator BARTLETT—This may be off the track, but I was reading very briefly something this morning about a fairly recent court decision relating to the determining of where you calculate the date of notification from. Are you aware of that one?

Mr Walker—I am aware of the case, but I cannot remember the name. That is applicable in relation to the Federal Court and the regime that we have currently in relation to the Federal Court where the 28 days is 28 days from date of deemed notification. The migration regulations I think currently provide for the notification to be deemed to have been received seven days after the date of the notification letter. That is the issue that the Federal Court examined in that particular case. In the High Court, under what is proposed by the bill, it is actually 28 days from the date of actual notification; there is no deeming regime.

Senator BARTLETT—So that recent ruling would not affect—

Mr Walker—No.

Senator BARTLETT—Finally, schedule 2, which I do not think we have touched on tonight, is to do with the character test. It appears to me from the few items there that, whilst it talks about clarifying the policy intent, the effect is to extend the minister's power in terms of that character test component of the act. Is that correct?

Mr Walker—No. I think section 501A basically provides that the minister may intervene and substitute his decision for that of a tribunal or a primary decision maker. But I believe it refers to a decision to grant a visa. The AAT does not have the decision to grant a visa; it has a power to make a finding as to whether a person is or is not of good character and then, if they are found to be not of good character, to waive that criterion. The amendments are intended to make it quite clear that it is not the grant of the visa decision, that the tribunal does not have the power to do it but to substitute the decision that is within its power to make.

Senator BARTLETT—So it just removes the confusion about incorrectly suggesting the AAT has a power; it does not change what the minister's power currently is.

Mr Walker—No, that is right. The minister's power is and was always intended to be—

Senator BARTLETT—I do not want to know what it might have been intended to be; I want to know what it is under the act as it stands.

Mr Walker—We believe that it is the power to substitute the decision of the tribunal.

Senator BARTLETT—So that the minister's power under the act, as it stands without these amendments, can already without dispute substitute a negative decision over the top of an AAT favourable decision on the grounds of character?

Mr Walker—I believe that is the case, yes.

Senator BARTLETT—The UNHCR submission makes a comment about the operation of the character test extending beyond the grounds of the refugee convention. It specifically mentions that a person does not pass the character test if a person has had an association with someone else or a group or organisation whom the minister reasonably suspects has been or is involved in criminal conduct. It also raises the possibility of that being used to overturn protection visa applications by people who have arrived here via people smugglers, who by definition are involved in criminal conduct, and suggests that that exposes them to a risk of refoulement. I suppose in a sense we are debating something that is already in the act so it might be a bit academic—

Mr Metcalfe—Yes, and I think there was some discussion about that when that legislation went through the parliament. We are very conscious of our obligations in relation to non-refoulement. At the time I think statements were made that essentially the character test gives rise to the capacity of whether or not the character test will be waived in all the circumstances or will be applied. Notwithstanding the fact that a person does not meet the character test, will the visa be refused? That is a separate area of discretion that is applied, and the issue you have raised is relevant to that. If we can add anything further after we have seen the UNHCR submission, we will certainly do so.

Mr ADAMS—You gave an indication of section 501A, which is the discretion that the minister has to overturn any decision made by the tribunal or—

Mr Walker—Made by the AAT or a departmental decision maker in relation to a determination of whether or not a person is of bad character. The act currently sets out matters that need to be determined, whether they in fact fall within being ‘not of good character’ or ‘of good character’—

Mr ADAMS—Sure, but it is not only for good character. I mean, the minister has a discretion on any decision made.

Mr Walker—These are other powers. This one is specifically related to character testing.

Mr Metcalfe—Mr Adams, this is a slightly different power in that this does allow the minister, were he or she so minded, to substitute a favourable decision of the AAT to a person of good character and say, ‘No, sorry, the person is not of good character.’ The other provisions that I think you might be alluding to are decisions where a tribunal has found that a person is not entitled to a visa and where the minister can substitute a more favourable decision. It is, in fact, the reverse of those other decisions.

Mr ADAMS—I am always interested that the minister does not have to be accountable to courts but usually ministers are accountable to parliaments by written decisions. In this act, the minister is not answerable to the parliament.

Mr Walker—In relation to section 501A, the minister’s decisions are reviewable by the Federal Court.

Mr ADAMS—They are?

Mr Walker—They are reviewable.

Mr ADAMS—By the Federal Court?

Mr Walker—Yes, that is right. We will certainly clarify that for you, but that is my understanding.

Mr ADAMS—Has somebody dealt with the international obligations of this?

Mrs MAY—Yes.

CHAIR—Have you finished, Mr Adams?

Mr ADAMS—Yes.

Mrs MAY—I understand that you want to backdate this to March 2000; is that right?

Mr Metcalfe—The intention is that the legislation, if passed, would have effect from the date of introduction to the House of Representatives.

Mrs MAY—How many people would be affected? Is that the people who have class actions now that are going to be affected—

Mr Metcalfe—The question is: has anything started since 10 March?

Mr Walker—There has in fact been one class action that has commenced of 172 people, which was filed on 13 April. Basically, people fit within three categories: those in class actions prior to 14 March—those actions proceed and are not affected by the restrictions; of the class actions that are commenced after 14 March, those that have had substantive hearings commenced by the court—and that means the actual argument on the issue has commenced—will not be affected and will proceed as class actions; and those that have not come on for substantive hearing, the class action will stop and the court will no longer have jurisdiction. Those individuals will have any fees paid to the court refunded; they will also have 28 days from the date of commencement of the bill's provisions in which to file individual applications. So, in fact, if there were people who were participants in class actions who were outside the existing 28-day time limit when they became a participant in the class action, they would, in fact, receive a further 28 days running from the time of the bill being passed. The reason was basically that if people had joined a class action rather than taken an individual action they would not lose that right of appeal.

Mr Storer—When the bill was introduced, the minister put out a press release, and that was sent to all migration agents at the time. I will check that but I believe that was the case.

CHAIR—That was my understanding. There being no further questions, I thank you for your attendance here today. If there are any matters on which we might need additional

information—I am sure there will be—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.

Resolved (on motion by **Mrs May**):

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

CHAIR—Thank you very much for coming. Thank you Hansard. I now declare this meeting closed.

Committee adjourned at 6.53 p.m.