



COMMONWEALTH OF AUSTRALIA

# Official Committee Hansard

## SENATE

LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE

**Reference: Migration Legislation Amendment (Procedural Fairness) Bill 2002 and  
Migration Legislation Amendment Bill (No.1) 2002**

TUESDAY, 9 APRIL 2002

SYDNEY

BY AUTHORITY OF THE SENATE

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**SENATE**  
**LEGAL AND CONSTITUTIONAL LEGISLATION COMMITTEE**  
**Tuesday, 9 April 2002**

**Members:** Senator Payne (*Chair*), Senator McKiernan (*Deputy Chair*), Senators Cooney, Greig, Mason and Scullion

**Substitute members:** Senator Ludwig to substitute for Senator McKiernan until close of business on 12 April 2002

**Senators in attendance:** Senators Bartlett, Cooney, Ludwig, Payne and Scullion

**Terms of reference for the inquiry:**

Migration Legislation Amendment (Procedural Fairness) Bill 2002 and Migration Legislation Amendment Bill (No.1) 2002.

**Committee met at 9.07 a.m.**

**BIOK, Ms Elizabeth Mary, Council Member, International Commission of Jurists**

**BITEL, Mr David Lee, Secretary-General, Australian Section of International Commission of Jurists**

**CHAIR**—Welcome to this hearing on the provisions of the Migration Legislation Amendment (Procedural Fairness) Bill 2002 and the Migration Legislation Amendment Bill (No. 1) 2002. On 20 March 2002 the Senate referred the provisions of the Migration Legislation Amendment (Procedural Fairness) Bill 2002 and the Migration Legislation Amendment Bill (No. 1) 2002 to the Senate Legal and Constitutional Legislation Committee for inquiry and report by 15 May 2002.

The bills were referred separately to the committee and the committee will be giving separate reports on them. However, it is not particularly convenient for a separate hearing to be held on each bill, so this hearing is to take evidence on both. The committee has received nine submissions on the procedural fairness bill and eight submissions on the No. 1 bill. Most of those submissions in fact dealt with both bills.

I remind witnesses of the notes they have received relating to parliamentary privilege and the protection of official witnesses. Further copies of those are available from the secretariat. Witnesses are also reminded that the evidence given to the committee is protected by parliamentary privilege. I also remind witnesses that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate.

I call the committee to order and welcome the witnesses. Do you have any comments to make on the capacity in which you appear?

**Mr Bitel**—I should indicate that I am the President of the Refugee Council of Australia, which, I believe, faxed a brief submission to the committee secretariat yesterday afternoon basically endorsing the submissions of RILC and the ICJ. I thought it appropriate to state that for the public record.

**CHAIR**—RILC being the Refugee and Immigration Legal Centre. The ICJ Australia has lodged a submission which deals with both bills. It has been numbered submission No. 8 for

the inquiry into the procedural fairness bill and No. 7 for the inquiry into the No. 1 bill. Have you any amendments or alterations you wish to make to those submissions?

**Ms Biok**—Yes, there is a typo on page 3 of our submission. Amendment (4) relates to provisions to be inserted before ‘section 128’ rather than ‘section 28’.

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

**Mr Bitel**—I will commence by expressing the concerns that I am sure will be shared by other persons who will be making submissions and perhaps also by the members of the committee: the haste with which the committee has been called on to report to the parliament and the issues, which are the subject of consideration—particularly with regard to the Migration Legislation Amendment (Procedural Fairness) Bill 2002—are very significant, especially in the light of the privative clause legislation which went through parliament last year, which is still the subject of judicial scrutiny. There is a lack of conclusiveness in terms of the effect of that. The haste with which the parliament has called the committee to report, I believe, may well result in submissions that otherwise would have been made not being made. That is a pity because the committee is then not in a position to hear from other persons who may be concerned. For example, I believe the Law Society and—I am not sure but someone can confirm this—the Legal Aid Commission may wish to make submissions, but the short deadline that has been imposed has essentially prevented them from doing so. Also, it has caused considerable problems for organisations, such as the ICJ, to analyse and pass it through all their members to gain the benefit of the considered thoughts of all the members for the benefit of the committee in its deliberations. Those are some preliminary comments which I thought would be appropriate to mention.

The primary concern in relation to the issue of procedural fairness has been explained in the opening section of the submission. As I said, there is a lack of clarity when you read *Miah* and when you read the five or six privative clause decisions which have come out of the Federal Court since the *Walton* case in December—a decision of Justice Merkel—and there have been some decisions of the Federal Court in March. Judges of the Federal Court seem to be following two different tacks. If the privative clause legislation amendment to section 474 is found to be valid by the High Court, which of course is still an issue to be determined, that taken in conjunction with what is, as I see it, the intent of this bill—which is to take up the concerns certainly expressed by the Chief Justice and Justice Hayne in their joint decision in *Miah*, and also by Justice McHugh—means that there needs to be expressed legislative intent to oust the provisions of natural justice. It seems that applicants within the area will be faced with a somewhat second-rate ability to access natural justice. The common law principles, which have been developed over centuries in the administrative law area, will essentially have been removed. The precedent that that creates in respective other areas of public administration is something which of course is a worry.

Also of concern are comments which appear in the second reading speech of the minister to the effect that *Miah* was only a three to two majority decision. The law is well settled that a decision—be it three to two, two to one, four to three, or whatever—is a decision. It is the majority which is the law; it is the final arbiter of the law. It is distressing and concerning when you see comments which seem to imply that a decision which is only three to two is therefore a watered down decision and of lesser value. That cannot help create public confidence in judicial law making, which is of course the fundamental element of the common law system. Those are some opening comments I would wish to make.

I would just like to make one other comment in relation to the Migration Legislation Amendment Bill (No. 1). We do not make any comments in respect of item 1 of schedule 6, which deals with amendments to section 48—that is obviously a matter for the parliament—but I query the terminology that it is a ‘minor amendment’. I think it is a fairly substantial amendment.

**Senator COONEY**—I am trying to catch up to you. What are you looking at?

**Mr Bitel**—We are looking at Migration Legislation Amendment Bill (No. 1). This appears on page 14 and it is headed ‘Schedule 6—minor amendments’. It is the amendment to section 48, the effect of which is to remove the loophole that existed whereby people got bridging B visas, left Australia and then came back and could lodge applications for further substantive visa applications if they met the criteria and the regulations, without the limitation of section 48. It is clearly neither here nor there for the ICJ in terms of the right of the parliament to make that legislation. My only concern is that it is not a minor amendment; it is a fairly substantive amendment—and, because it is sort of tucked away in a section of the bill under ‘minor amendments’, people may not appreciate that. That is the only point I would make on that.

**Ms Biok**—If I can just support what Mr Bitel has said, I think that these bills are crucially important, especially the procedural fairness bill, because the aim there is to codify procedural fairness. I would argue that procedural fairness is such an animal, it is so much part of the common law, that it is impossible to do so. It has been established in English common law, which has been adopted into Australia, that procedural fairness must consider all the aspects of the case and must provide a fair opportunity. I refer the committee to Lord Loreburn’s statement in 1911. He said that administrative decision makers:

... must act in good faith and fairly listen to both sides ...

He continues that they must always give:

... a fair opportunity to those who are parties to the controversy for correcting all contradicting any relevant statement prejudicial to their view.

Therefore, even in 1911, the common law was indicating that fairness is the key issue. I would suggest that it is impossible to codify that, and certainly not in four sections in the Migration Act, an act which deals with crucial decisions in people’s lives and which is very complex—where tribunal hearings can deal with a lot of very complex legal issues.

I would also indicate to the committee that I fear there could be a contradiction within the act if these amendments were to go through. Section 420, talking about the Refugee Review Tribunal, indicates that the tribunal’s mechanism of review should be fair, just and always act according to substantial justice. So here we have one section of the act saying that you have a broad view of substantial justice, of acting fairly and justly, and yet these amendments will try to narrow that. I fear that that is going to provide a lot of confusion for tribunal members, to indicate how they should then conduct themselves in hearings, and it would always make it very difficult for advocates and applicants to question what happens in some tribunal hearings.

My suggestion would be that fairness and justness in a tribunal hearing imply that the applicant understands when the hearing will be and what the hearing will be about and that the hearing itself is conducted openly and fairly, with the applicant to have opportunities to provide information and to answer comments. I do not feel that these requirements can be strictly codified in a way that will apply to all tribunal hearings.

I would also like to point out to the committee that these hearings are often the most important legal issue that a person will face in their lives. For refugees, it can be a life and death matter. For people before the Migration Review Tribunal, they are dealing with bringing their spouses or their children to Australia. They are dealing with complex legal issues, but at the heart of them are very key close emotional and family ties. So it is essential that people have a fair chance to explain their views. The committee should be aware that in the context of current migration policy the tribunal often provides the only opportunity that people have to express their views and to answer adverse information.

There has been a slight change recently in that the department of immigration is providing more adverse information prior to decision making, but still it is my experience that in the majority of cases people get very little chance to explain their circumstances and their claims, especially for onshore protection applications. Therefore, it is essential that this one tribunal hearing be allowed to have a format which is geared towards fairness, and I am afraid I do not think that these amendments will allow for any fairness or flexibility in tribunal hearings. I am sure that Mr Bitel and I could provide the committee with a lot of case studies which would indicate tribunal hearings which have not gone to plan, where there has been some misadventure or where the applicant has not been able to provide all their information, and they would be limited by these amendments. Therefore, I think they would narrow very much what we see as part of our common law.

I am also concerned that there is a provision to limit natural justice provisions for people on special purpose visas in these amendments and also for cancellations of visas for people who are overseas. My same arguments would apply with those amendments.

**CHAIR**—Thank you very much. Before we go to questions, Mr Bitel, I want to take up a point that you made in relation to the time frame, a point which was raised yesterday by witnesses before the committee on other legislation pertaining to espionage bills and security bills, known as the security package of bills. This committee had referred to it in the last sitting week of the Senate a program of approximately 10 bills for inquiry and report by early May. The largest of those packages is the security package, and it has attracted a great deal of public attention in that regard. We must work within the program that is given to us by the Senate—and I realise that you acknowledged that in your remarks—but the committee has undertaken, as it always does, to inquire into and report on matters that are referred to it by the Senate in the most comprehensive and considered way possible within those guidelines that the Senate also provides us.

We have held this hearing in Sydney today to enable as many people as possible who are interested to come and make submissions and we have been quite open to receiving submissions that people were not able to get in by the due date, if intent had been advised to us in advance. So we have done our best to assist members of the public and organisations to participate. I take note of the remarks that you made and the committee is acutely aware of the time frame and the load of legislation which we are currently working towards inquiring into and reporting on—are we not, Senator Ludwig, Deputy Chair?

**Senator LUDWIG**—We are; I am still reading.

**Mr Bitel**—I think I made it perfectly plain that obviously there was no criticism of this committee as it works within the parliamentary time frame that is imposed on it.

**CHAIR**—I appreciate that.

**Mr Bitel**—My concern was rather that there seems to be a pattern developing of overburdening committees that are dealing with substantive, significant areas of change in public administration and giving members of the public who may wish to make significant contributions limited time within which to do that, which therefore reduces the ability to make a meaningful submission. That, in some respects, might hinder the ability of the committee to do its work properly.

**CHAIR**—We appreciate those points.

**Senator LUDWIG**—Mr Bitel, could you look at proposed section 51A—Exhaustive statement of natural justice hearing rule. First of all, I will deal with the Migration Legislation Amendment (Procedural Fairness) Bill 2002. As I understand the proposed amendment—and this is where I seek your help—it is an exhaustive statement of the requirements of the natural justice hearing rule, that is section 51A, and then that again is reflected throughout the applications with the intent to, as I understand it, effectively codify what is already in the provisions of the act. Does that exclude, in your view, only the natural justice hearing rule so that the bias rule remains? What else would remain outside of that?

**Mr Bitel**—To a certain extent, there is a lack of clarity in that. If you read the Miah decision, several of the judges are at pains to distinguish the various aspects of the natural justice rule. There might be a lack of clarity on that, because certainly the decisions of Justices Gleeson, Hayne and, I think, McHugh—or maybe Justice Gaudron, I am sorry—specifically give as examples of a natural justice rule areas where the issue of bias is a factor which is taken into consideration. To the extent that a broad statement is made that the natural justice hearing rule is excluded, I suppose that would have to be taken literally and expansively and then all aspects of it would therefore be excluded.

**Senator LUDWIG**—So what would be left, in this sense—or do you say nothing would be left?

**Mr Bitel**—Ultimately, it may well be that this, again, is something which the High Court would have to interpret.

**Senator LUDWIG**—I am not asking you to be a High Court judge; I am merely asking your view.

**Mr Bitel**—The concern is that, on its face—and presumably this is the legislative intent—all the provisions of natural justice would be excluded and, as a consequence, primary decision makers and decision makers in tribunals would be left with the code of conduct as the procedure which must be followed. To the extent that they are or are not followed, there would not be grounds for judicial review.

**Senator LUDWIG**—If you look at the actual provisions in the act—and I am sure you have—which are effectively the codes of procedure that the various tribunal members have to follow, do you say that they are, in effect, not sufficient to deal with all of the issues that would otherwise arise in immigration matters before them?

**Mr Bitel**—Yes, I do say that. In my respectful submission, they are deficient. They cannot possibly cover the field. As we said in our submission, my reading of the legislation is that they in fact relate only to visa applications, not to visa cancellations.

**Senator LUDWIG**—Yes. Could you expand on that a bit.

**Mr Bitel**—Decisions are taken in a whole range of areas—visa applications, visa cancellations and decisions of an administrative nature generally—in relation to the

administration of the legislation. The code of conduct set out in subdivision AB of division 3 of part 2 relates to visa applications but not to visa cancellations.

**Senator LUDWIG**—Which ones of AB? I wonder whether you could point to them.

**Mr Bitel**—Section 57 is a fundamental section in terms of the way in which information is to be given and what information is to be given. That is a classic case of an element of confusion. Going back to the Miah case, which is the case that has enlivened this bill, the fundamental question there was whether or not it was necessary to advise the applicant of the consequences that a change of government in Bangladesh—which was referred to by the departmental officer who made the decision but was not advised to the applicant that it was being taken into consideration—would have in respect of his protection visa application.

The judges of the High Court were divided as to whether that material would or would not have to be given to an applicant. I think three of the majority were of the view that the material should have been given to the applicant. The minority was of the view that the material did not have to be given to the applicant, within the provisions of the natural justice rule. Given the terminology of section 57—I am looking at section 57(1)—I think that it probably would not have to be given to the applicant because it only talks about relevant information that is specifically about an applicant. A change of government would probably not be relevant information specifically about an applicant but would be a general issue. That sort of material probably would not be caught within the existing code.

**Senator LUDWIG**—Tell me about the operation of these provisions with what is generally referred to as the privative clause, based on the Hickman principle. How do you say that that operates with this? Do you say that that privative clause then excludes the ability to appeal? My understanding is that it does not take all the grounds of appeal away, and I was just wondering how your submission—

**Mr Bitel**—If you will forgive me, I am still coming to terms with it. It is unbelievably complex—

**Senator LUDWIG**—Yes, it seems so from this side of the table as well.

**Mr Bitel**—And the fact that the five judges who have had to look at it in the Federal Court have come to what seem to be two differing views. I think it boils down to a question of what is jurisdictional error and whether a failure to accord the rights of natural justice is jurisdictional error and whether, if there is jurisdictional error in that instance, that enlivens, for an applicant, the exception to the Hickman clause principle. To the extent that this bill seeks to remove the common law principles of natural justice, I think there is a corollary that it is also taking out of the concept of jurisdictional error the issue of natural justice, however that is determined—as you first raised, Senator—in terms of being able to seek an exception to the Hickman clause principle. That is how, in my mind, I have brought the two together.

**Senator LUDWIG**—I understand. Well, I hope to try to understand! In effect, you say that the interaction of the two provisions causes a circumscription of the grounds that might otherwise be relied on under part 8 for an appeal on jurisdictional grounds, because of the way they have excluded the natural justice.

**Mr Bitel**—I think if the court were interpreting broadly the legislative intent—assuming this bill is carried—it would be within scope for essentially the court to say, ‘Your complaint relates to natural justice. You have got natural justice coded within the act and that is being followed; therefore, you cannot lodge a complaint against that. If you do attempt to lodge a complaint—a justiciable complaint—it will be refused, relying on the Hickman principle.’

So, essentially, it is removing judicial review. In consequence, applicants are left with the situation where you have a primary decision, a merits review and that is it. It removes judicial scrutiny of the manner in which the tribunal conducts itself during the course of reviews and, significantly, of the manner in which departmental officers make assessments at the primary instance—because of course that is what Miah was all about. In that regard, perhaps all I can do is repeat the concerns in the submissions which the ICJ gave in writing and orally to this committee at the time of the consideration of the privilege laws legislation. I do not have those submissions, but it may be appropriate for them to be brought to the attention of the committee again.

**Senator LUDWIG**—So you say there is then no gap left? I did not understand that to be the position originally put by you, but do you say then there is no gap that is available for judicial review?

**Mr Bitel**—Unless you fall within the very limited provisions—

**Senator LUDWIG**—I am just trying to find what you say is left. You say that if you take out jurisdictional error, effectively—

**Mr Bitel**—No, you take out natural justice from the jurisdictional wing of the jurisdictional error—

**Senator LUDWIG**—As I understand it, there are still bits left.

**Mr Bitel**—There are still some aspects of—to go back to Hickman, I think it was Chief Justice Dixon who set out the three aspects—

**Senator LUDWIG**—Yes, so that the other two aspects—

**Mr Bitel**—Of course—those would remain there; I am not suggesting that they do not apply. But this is attempting to limit even further the areas where cases may fall within the exceptions which were set out by Justice Dixon in *R v. Hickman*; *ex parte Fox and Clinton*.

**Senator BARTLETT**—Has there been any other case in other acts that you are aware of where attempts have been made to codify natural justice?

**Mr Bitel**—I could not answer that with any certainty.

**Senator BARTLETT**—Because it seemed to me from explanations given to date that in effect, from the government's side of things, subdivision AB replaces natural justice.

**Mr Bitel**—Yes.

**Senator BARTLETT**—Are you saying that it is deficient in that regard, and it would be okay if people could come up with a better and more comprehensive—

**Mr Bitel**—One of the things I would say is that over the centuries the common law has developed rules of natural justice which are complex. They are complex because they are designed to protect the interests of persons who are the subjects of administrative decisions. An attempt at codification of them, if it has happened—it may have happened; I do not know—would need to be very seriously and carefully thought through to ensure that all of the common law protections still exist. The Administrative Decisions (Judicial Review) Act exists to provide appeal rights to applicants who feel aggrieved by the denial of the principles of administrative decision making, and that act is ousted in the immigration area.

My concern remains that if the parliament is determined to remove judicial scrutiny of administrative decision making in the immigration area—except in the most egregious areas of concern which fit within the Hickman principle as narrowly determined—you are creating

a precedent for administrative decision making in the public law concept that can then be adapted to any other area of government, which brings the executive out of the scrutiny of the judiciary and which is not good for public administration. It can lead to sloppiness of decision making, and decision makers may not have the benefit of judicial interpretation of the correct legal principles. It is quite likely that, if this legislation had been in existence, you would not have had *Chan v. Minister for Immigration and Ethnic Affairs* or so many of the other significant cases in the immigration area. That is of crucial significance, given the importance that administrative decisions have on the lives of people in this area.

Certainly, there are decisions which are the subject of privative clauses in dealing with appeals against licences for greyhound trainers, and things like that. But one cannot compare the significance of a decision in that area with the significance of a decision, for example, to determine that a person is not a refugee and therefore can be returned to a country where that person may suffer loss of life or where Australia can be accused of failing in its obligations not to refoulerefugees or, in the non-refugee context, a decision that a child shall not be reunited with its parents or that spouses cannot be allowed to live together. The privative clause legislation applies across the board, not only in decisions relating to refugees—although that was the prime reasoning that was put to the public at the time that the legislation was carried. It applies across the board not only in the RRT but also in the MRT.

**Senator BARTLETT**—We have already got, for better or worse, that privative clause situation, as we have in one or two other areas. This aspect of either precluding or codifying natural justice—depending on which way you want to go—has not been done in other areas that are subject to privative clauses, as far as you are aware?

**Mr Bitel**—Not that I am aware.

**Ms Biok**—If I could make a correction: one of the things I had hoped to research before we put in our submission, but did not have time to do, was the procedure of the Administrative Appeals Tribunal. Decisions under this act will go to the AAT on character and on cancellation. Certainly, the AAT has extensive natural justice provisions and a lot of procedural safeguards. This would be a limitation on what the AAT currently does: advise people with adverse information and give them opportunities to provide statements of facts and contentions prior to any final conference on a matter, before deciding whether it should be conceded or go to hearing. We could, then, get a two-tier system where matters going before the Refugee Review Tribunal and the Migration Review Tribunal were limited by these provisions; while matters going to the AAT and dealing with character or cancellation would have much fairer and wider natural justice provisions. To me, that would create problems and create a sense of injustice.

**Senator BARTLETT**—You are basically saying that, on principle, it is a bad idea to preclude natural justice and, rather than suggest that we look at what is in subdivision AB at the moment and try and improve it further, it is better on principle to not preclude natural justice.

**Ms Biok**—I just do not think there can be an animal such as an exhaustive list of natural justice provisions, because a tribunal member cannot predict the situation that is going to occur. We do not know what will happen to people in terms of getting notice, or having a fair hearing, or questions of bias or, as Mr Bitel has indicated, the provision of new country information—which could occur quite late in the decision making process. So we need that scope. We need to have flexibility. That is what the creature of natural justice is: fairness and flexibility.

**Senator BARTLETT**—You mentioned in your remarks before that you could give a range of case studies of situations where, if this legislation went through, the problems would not have been addressed. Can you outline one or two of those off the top of your head?

**Ms Biok**—I can give you an example of something that would not have been covered by this but which a tribunal member realised was certainly an act of natural justice. It was a client of mine who was severely traumatised. When she went for her RRT hearing, during the hearing she appeared to be quite uninterested in what was happening. She gave poor responses and, as the hearing went on, appeared to be going to sleep. The tribunal member was aware that there were some problems, and we had a break and indicated that there were psychological problems for which there were reports. The tribunal member then ended the hearing and allowed for a further hearing in that matter when the client's psychiatrist could come and give evidence which supported her behaviour and referred it back to her experience of persecution. That was providing natural justice. That was allowing that this person had a special circumstance and it was allowing for an additional hearing, which other members may not have done. This indicates, therefore, that there needs to be a broad scope. Natural justice in that situation meant that this client had to have two hearings. It is something that cannot be codified.

**Mr Bitel**—I can give you the example of a case where the factual circumstances almost correlate with the Miah circumstances. A person from Bangladesh, who entered into a mixed marriage and who had applied for refugee status on similar grounds, had his hearing in the RRT. The member waited for over a year after the hearing to hand down the decision. In the meantime there had been a change of government—again, in Bangladesh—and the new government was a coalition involving the Muslim fundamentalist party. This person was a Muslim who had converted to become a Hindu and it was a substantive part of his claims that he feared the Muslim fundamentalists. This is a case on which I am acting. The member handed down a decision two weeks ago which referred to the change of government in Bangladesh and said that she did not believe it would have any significance to him. She did not tell him that she was referring to it, did not give him an opportunity to make any submissions in relation to the consequences of the change of government and, of course, refused his application. It is almost identical to the Miah facts and, if it were relying on a decision of the majority, it seems to me that there would be a ground of appeal. But, if you remove that, then you remove his right of appeal.

**CHAIR**—I would like to consider a couple of your propositions for amendments that are contained in your submission. The suggestion in relation to section 51A is that written notice should not be provided only to the authorised recipient, but also to the applicant. If I recall, the department has responded previously that that is the case in the current act because it is often very difficult to find the applicant at the end of the day in respect of last known addresses and because people do not notify changes of address and so on. Setting in place a system whereby the authorised recipient is the person to whom documentation is provided has, I suppose, simplified the administrative process. Are you suggesting that duplicates of information should be provided? The act does not preclude that happening now. It states that it does not stop a copy being provided. Is this more a practice issue than a legislative issue?

**Mr Bitel**—I am glad that you have raised that point because I wanted to address the issue of the strict time limits imposed by the act on people lodging appeals. A succession of recent Federal Court have held that, where applicants in immigration detention centres have given to guards the appeals that they wished to lodge and the guards have failed to lodge them, when

the appeals finally reached their destination, the Federal Court or the RRT, they were received out of time.

**CHAIR**—And if they are out of time, they are out of time.

**Mr Bitel**—They are out of time and their rights of appeal have been excluded.

**Senator COONEY**—The Chief Justice of the Federal Court, Michael Black, referred to that in his last report. Did you see that?

**Mr Bitel**—No, I have not seen that.

**CHAIR**—It is in the annual report.

**Mr Bitel**—It is so serious, and in the last three months I have seen four decisions of the Federal Court on that issue. Applicants lost their rights to merits review and they are excluded from judicial review. The applicants are left with just the primary decisions because of the intransigence of the legislation on time limits. In that context, it is essential that every effort be made to ensure that applicants receive the notice. I am sure this is not unique, but a migration agent died last year. After he died, his office received letters and, because he was deceased, the letters were not forwarded to the applicants. He had over 100 cases. MARA finally took over and redirected his files to another solicitor. However, in the meantime, large numbers of people lost their rights to lodge appeals.

**CHAIR**—I note your similar concerns about movement of information in relation to section 128 and amendment 4 that you have raised. We can raise these issues with the department when they appear later today. In reference to amendment 6 and ‘Strict liability for persons involved in people smuggling’, I assume that we are talking about section 233.

**Ms Biok**—The strict liability on people smuggling?

**CHAIR**—Yes, and the strict liability imposition that No. 1 makes. What amendment are you suggesting there?

**Ms Biok**—My concern would be about people involved in people smuggling and I was thinking particularly of Indonesian fishermen and especially people who are quite uneducated who are involved in landing some of these boats. They would have no knowledge of Australian migration law and have no intention of breaking that law. Perhaps the person who had organised the boat and certainly the people involved as non-citizens entering Australia wish to do that to access protection obligations. However, many of the people on the boats would not be aware of that. I raise this concern because, two years ago, I went to an Indonesian island where there were people waiting to be brought to Australia by boat and many of the people in the ports close by were very uneducated. They had no idea of protection obligations or of the whole process of refugee status.

**CHAIR**—So you are making a distinction between the organisers and the crews, generally speaking?

**Ms Biok**—Yes, and the crews would be caught as people smugglers under the legislation.

**CHAIR**—I understand your point now.

**Senator COONEY**—Can I take you to the submission that you wrote. On the second page, in the third paragraph down—the paragraph in the middle there—the second last sentence reads:

It is general practice at both overseas and onshore Immigration offices that applicants at a primary level are not interviewed by departmental staff.

**Ms Biok**—Yes.

**Senator COONEY**—Can you develop that a bit? I had not understood that to be the situation overseas. Could you tell us a bit about it. That is the best way I can put it.

**Mr Bitel**—The legislation applies across the board. It applies not only to refugee applicants but to all onshore cases. For example, I can give you a case of a student visa application. This was a case in which I professionally acted last year. The fellow applied for an extension of his student visa. The departmental officer contacted the college where he was studying. The college gave wrong information about his course attendance and as a consequence told the departmental officer that the fellow had failed to meet the 80 per cent requirement, which was in fact not correct. The department did not question the applicant or ask him to comment in relation to that. That fits directly within section 57(1) of information directly relating to the applicants. The officer then proceeded to refuse the application.

The letter was sent but it was admitted by the department that it was not received. I cannot remember whether it was sent to the wrong address or whether in fact it was just kept on the department's file and was not posted; but in any event the applicant did not receive notification until after the time limit to lodge his application for review, notwithstanding that he had been to the department on at least four occasions saying, 'What has happened on my application?' and was told, 'Go away. You'll hear from us in due course.' In that case, we lodged an appeal to the MRT. The MRT said, 'Sorry, you are out of time. You can't lodge an appeal.'

We then appealed to the High Court, very much on the Miah grounds, and the case was remitted by consent back to the department for reconsideration on the basis that there had been a clear failure by the department to follow its code. That is where the application now remains. But that is a case where there was no interview, adverse information, wrong information, refusal.

**Senator COONEY**—The Migration Review Tribunal—is that what it is now called?

**Mr Bitel**—Yes.

**Senator COONEY**—And it is the Refugee Review Tribunal?

**Mr Bitel**—Yes.

**Senator COONEY**—How long are people appointed to that for, do you know?

**Mr Bitel**—The appointments range from six months, 12 months, three years. There were a range of short-term appointments when the parliament was going to set up the administrative appeals tribunal—the new tribunal—

**Senator COONEY**—The Administrative Review Tribunal.

**Mr Bitel**—the review tribunal, which of course did not happen. I believe now the appointments are for longer terms.

**Senator COONEY**—And they can be renewed?

**Mr Bitel**—The appointments are renewed. I am not aware of any study being done but it would be interesting to see whether in fact any study was done to see the manner of decision making by members prior to the period of their reappointments and whether there was a relationship between the decisions and refusals or approvals during that period.

**Senator COONEY**—You would have to be a person of heroic proportions to not think about those sorts of things as your term came to a close.

**Mr Bitel**—One of my great concerns—and I have made submissions on this in other areas—is that tribunals are supposed to be accountable and transparent and the legislation that now exists permits the Refugee Review Tribunal to only publish decisions which it considers to be of significance. As a consequence, not all decisions are published. It is therefore not possible to monitor from the public perception the decisions which are taken by tribunal members.

As an example, that case that I mentioned to you earlier—the Bangladeshi who had been refused in identical circumstances—was refused by a member who has, my research has indicated, never found for an applicant in any case that has been published. I cannot say that that particular member has never found for an applicant, because not all decisions are published. But, certainly, of all the published decisions, if you go into the Internet and type in the member's name and the words 'set aside' or 'remit', which are the two key words, you will find nil results.

**Senator COONEY**—It is a bit like that judge in Melbourne who never found for an applicant in workers compensation cases; they shifted her on.

**Mr Bitel**—This particular member has been reappointed consistently.

**Senator COONEY**—If you talk about push-pull factors, the fact is that members are appointed for only a certain period and then need to be reappointed. They do not get a pension, do they?

**Mr Bitel**—I do not know.

**Senator COONEY**—That would concentrate the mind. The balancing factor to that would be a review by the Federal Court, where members would say, 'If I make a wrong decision, I am going to end up in court, and the court might find against me.' That would be a balancing factor to adjust the mind in a different way than the pull factor of wanting to be reappointed. If you were going to remove the court, that balancing factor is gone.

**Mr Bitel**—Absolutely. And members, as well as departmental officers, are left as an authority unto themselves—non-reviewable, non-accountable.

**Senator COONEY**—And wanting to be reappointed at the end of three years or six months or whatever it is.

**Mr Bitel**—Yes.

**Ms Biok**—Just adding to that point, one of the other pressures on tribunal members is to complete a number of decisions within a certain time. It is my understanding that the arrangement between the tribunal and the Department of Finance and Administration indicates that the tribunal's income depends on the number of completed applications. Certainly, there is pressure on tribunal members to produce a lot of decisions. It does not matter whether they are set-asides or acceptance. Because of that, what has tended to happen is that cases from those countries which have low refugee acceptance rates get dealt with a very quickly. Countries such as Burma and South America, where there are equal numbers of applicants who are successful and who are rejected, tend to take a lot longer. Consequently, some people could lodge an application with the tribunal and have a hearing and a decision within two months; other people may wait two years. As Mr Bitel has pointed out, often the periods are extended—that is, there will be a hearing and then it may be six months or nine months before a decision is made.

**Mr Bitel**—It is not uncommon for it to take up to 12 months, two years or three years.

**Senator COONEY**—Can it take up to three years?

**Mr Bitel**—Yes. There was one particular member, who retired about a year ago, who sat on decisions for several years. I have several cases where hearings were held in 1999, and I am still waiting for decisions.

**Senator COONEY**—There is a Supreme Court judge in your state, Chair, who got into trouble over that.

**Mr Bitel**—Yes. Of course applicants are not particularly motivated to approach members to hurry them up with their decision, because they do not know what they are going to get. If they are genuine, it is a life and death decision, and they do not want to do anything to aggravate the member.

**Senator COONEY**—What has become a matter of concern here is that the whole process, if you remove the jurisdiction of the Federal Court, becomes one of decision laundering—making respectable what in fact is a putrid system. Perhaps you do not want to comment on that.

**Ms Biok**—My brief comment would be that it makes the whole process very arbitrary and it becomes a lottery, depending on who you get as your member at the tribunal.

**Mr Bitel**—It enables political influence. I am not saying that it would under this present administration or under another administration that we currently know. It does not even have to be in the immigration area. If this precedent is allowed to stand, it could be in any area. It enables political influence and political control in arbitrary, non-appellable decision making to become yet more obvious and more able to be effective.

**Senator COONEY**—All the citizenships that we hold depend upon legislation. The Commonwealth could just legislate any of us into non-Australianism.

**CHAIR**—I do not think it would get through the Senate, Senator Cooney!

**Senator COONEY**—I am not too sure about that.

**Senator SCULLION**—Ms Biok, I was interested in your comments on the people smugglers themselves and on the capacity to be able to be aware. It is great to come from a background of some experience—as you said, you visited there. In your discussions with the fishermen did you talk about what happens to the people smugglers and things of that nature?

**Ms Biok**—They were aware that people who had been taken were languishing in jails in the Northern Territory and Western Australia, but for them it is a financial impetus. The island that I visited is extremely poor and all the traditional fishing areas have been taken because of national park and fishing provisions. Certainly people had no knowledge of even what was happening in Jakarta. People knew nothing about what was happening in Australia—that these people were Iraqis. They knew they were Middle Eastern and Muslim, but that was it.

**Senator SCULLION**—But what I am getting at is that they certainly understood that the piloting or conning of a vessel to Australia with the intention of landing people in Australia was clearly against the law here and that there would be pretty serious punitive provisions through mandatory or minimum sentencing, where they would end up in jail. Was that pretty well known?

**Ms Biok**—They realised that they would end up in jail but they did not particularly know why. So I would say that there was not a clear intent that they were breaching the Migration Act. They may have been breaching the Fisheries Act as far as they knew.

**Senator SCULLION**—I have interviewed a number of the people who are currently languishing, as you say, in Berrima jail. They actually make some provisions before they leave. Are you aware of the provisions they make and the payment process? They are paid before they leave and arrangements are made with their family for them to be away for a considerable period of time. It would appear in that circumstance that they were reasonably aware. I can understand your point that they are not necessarily sure what law they may have broken, but they certainly appear to make pretty extensive arrangements to be away for a period of time and to ensure that their family's affairs are in order for a period of time. It would appear that they are fairly well aware of the nature of the punitive aspects and the length of time they are to be away. Would you agree with that?

**Ms Biok**—It could also be that that is the practice for fishermen who know they are going to be away for long periods of time on very rickety old wooden vessels going across extensive oceans. They realise there is a chance that they may not return. Certainly the ones that I have spoken to came from families that had cultures of being fishermen, and that was on wooden vessels largely, with small engines or completely unpowered. So there would be a good risk that a lot of people would not be returning.

**Senator SCULLION**—The point I am making is that your reference to amendment (6) indicated that they really had no knowledge because of their poor education. Whilst I agree with that, from a number of issues it would not seem to be the case—specifically with regard to the consequences of their action in this matter.

**Ms Biok**—This could be something that could be resolved in cooperation with the Indonesian authorities. It would be quite easy to have an education campaign in eastern Indonesia, in those areas where the fishermen are coming from, to let people know what is Australian law and what they would be breaching. They are aware of the restrictions on fishing.

**Mr Bitel**—I have not put my mind to this but it is something that the committee might like to consider: you have been talking in terms of the fishing vessels, but I would query whether this issue would also apply to international aircraft and crews of aeroplanes.

**Senator SCULLION**—As I understand it, it does.

**Mr Bitel**—So just as Qantas is currently being sued for taking Chinese into America, it may be that the crew of aircraft could also find themselves the subject of a prosecution for innocently being involved in bringing into Australia people who—

**Senator SCULLION**—I suggest that it would still hinge on the clear intent. I think the provisions that apply to the Indonesian people smugglers, or whatever you wish to call them, apply because that has been clearly demonstrated—that is the reason they are incarcerated—and in fact, in most cases, has usually been admitted.

**CHAIR**—Thank you, Ms Biok and Mr Bitel, for your assistance to the committee this morning. We are grateful both for your written submission and for the oral evidence that you have been able to provide to the committee.

[10.06 a.m.]

**COSENZA, Ms Isabella Josephine, Refugee Caseworker, Amnesty International Australia**

**THOM, Dr Graham Stephen, Refugee Coordinator, Amnesty International Australia**

**WOOD, Ms Catherine, Refugee Caseworker, Amnesty International Australia**

**CHAIR**—Welcome. Amnesty International has lodged a submission for the inquiry into the Migration Legislation Amendment (Procedural Fairness) Bill 2002, which the committee has numbered (6). Are there any amendments or alterations that you need to make to that submission?

**Dr Thom**—No, although we would like to note that it was an executive summary. If the committee would like us to do a fuller report, we would welcome that opportunity.

**CHAIR**—Let us see how we go this morning. I invite you to make a brief opening statement, at the conclusion of which members will have questions for you.

**Ms Wood**—Amnesty International thanks the committee for the opportunity to make this submission. The main area of concern that Amnesty International have in relation to the Migration Legislation Amendment (Procedural Fairness) Bill is the operation of the legislation within the context of Australia's international obligations. It is the view of Amnesty International that the passage of the legislation appears to breach Australia's international human rights obligations. Further, the erosion of the fundamental common law rules for natural justice, which are flexible in their nature, have a consequent effect on the quality of administrative decision making and have the adverse impact of the excising of a course for review in the circumstances of particular cases—such as the situation outlined in the High Court case of the Minister for Immigration and Multicultural Affairs *ex parte Miah* 2001—and, further, the undesirable consequences that flow from the combined effect of the removal of the common law natural justice under the proposed legislation, and the curtailment of judicial review by asylum seekers in the last five years by the passage of a number of bills dealing with that issue. The general effect of the passing of recent legislation amending the Migration Act has increased the powers of the administrative decision makers and curtailed access to judicial review.

I will now turn to Australia's international obligations. Amnesty International is concerned at provisions of the Migration Legislation Amendment (Procedural Fairness) Bill 2002 which, as the Minister for Immigration and Multicultural and Indigenous Affairs indicated in the second reading speech, provide that the codes of procedure contained in the Migration Act replace the common law requirement of the natural justice hearing rule.

Amnesty International wishes to point out Australia's obligation to treat those seeking asylum in the same way as nationals of Australia. It is imperative, given Australia's non-refoulement obligation not to send someone back to face torture or death, that those seeking asylum are not limited to the application of a country's justice system before any courts. In this sense, all components of the justice system should be available and those seeking asylum should not face systems which have been reduced to the lowest common denominator.

Amnesty International has previously expressed its concern about the level of access to court review by asylum seekers in a system which is becoming restrictive. Amnesty International recommends that access to the courts and to the remedy of full court review for

asylum seekers be unrestricted and comply with Australia's obligations under international law. Conventions that outline Australia's international obligations to asylum seekers with regards to their rights before the law that this inquiry should be aware of include the 1951 Convention Relating to the Status of Refugees and its 1967 protocol, specifically article 16, which states:

- (1) A refugee shall have free access to the courts of law on the territory of all Contracting States.
- (2) A refugee shall enjoy in the Contracting State in which he has habitual residence the same treatment as a national in matters pertaining to access to the courts, including legal assistance and exemption from *cautio judicatum solvi*.
- (3) A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.

The next convention I want to turn to is the International Covenant on Civil and Political Rights, specifically article 14, which states:

- (1) All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

Article 16 of that convention states:

Everyone shall have the right to recognition everywhere as a person before the law.

Article 26 states:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

A further convention is the Convention on the Rights of the Child, specifically article 3, which states:

- (1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be primary consideration.

Article 12 says:

- (2) States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
- (3) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

We would point out that the common law requirement of natural justice is very longstanding. Amnesty International submits that it is entirely appropriate that all decisions in relation to the rights of asylum seekers should be made in accordance with the requirements of natural justice. In this regard we are particularly concerned that the common law requirement of natural justice is excluded from the deliberations of the Refugee Review Tribunal by the proposed section 422B. Amnesty International considers that the Refugee Review Tribunal should be obliged both to comply with the common law requirement of natural justice and to refrain from *Wednesbury* unreasonableness.

In December 1999, in a case that remains current, the Refugee Review Tribunal member drew unfavourable inferences from an asylum seeker's not attending Roman Catholic mass during periods in which he received Holy Communion as a Protestant. The member's reasoning appeared to be that, if a person who has for some years been a practising Protestant claims to have in the past been a devout Catholic, that claim is not to be believed. Amnesty International submits that there should be an effective remedy against decisions of this character.

In this bill, natural justice has been replaced with the ground that procedures required by the act have not been followed. The bill effectively excludes common law natural justice for review of the decision. This may add further to the risk of breaching the fundamental principle of non-refoulement. The bill would also mean that the role of the RRT in the administrative review process is further strengthened, and the role of the higher courts in providing judicial review restricted. There should be concern for further restrictions on the scope of judicial review and the possibility of overreliance on the RRT and the minister's discretionary power under section 417.

Amnesty International recommends that the final decision makers on refugee status should be independent of the government, their status and tenure should afford the highest possible guarantees of confidence, impartiality and independence and they should be experts in international refugee and human rights law.

Amnesty International is concerned about the undesirable and unjust position that asylum seekers are facing when one considers the combined effect of the provisions of the proposed bill which excludes the common law rules of natural justice and the curtailment of judicial review over the past five years by the passage of a number of bills, including the following: the Migration Legislation Amendment Bill (No. 6) 2001, the Migration Legislation Amendment Bill (No. 1) 2001, the Migration Legislation Amendment (Judicial Review) Bill 2001, the Migration Legislation Amendment (Judicial Review) Bill 1998—introducing the privative clause—the Migration Legislation Bill (No. 4) 1997 and the Migration Legislation Bill (No. 5) 1997.

In summary, Amnesty International is concerned about the passing of the bill on a number of grounds, including the potential for the bill to breach Australia's international human rights obligations; the fact that the bill, whilst purporting to codify the natural justice hearing rule, in effect removes a very fundamental, significant and long living common law right and will adversely affect administrative decision making in an area potentially concerning the life and physical safety of asylum seekers; the access to judicial review in cases analogous to *ex parte Miah*, where there was a serious procedural injustice, will be removed; and the fact that it further impacts adversely on the rights of asylum seekers whose rights to judicial review have been systematically curtailed by the passing of legislation over the past five years. Amnesty International again thanks you for the opportunity to make this submission to the committee.

**CHAIR**—We appreciate your assistance, Ms Wood. We have about half an hour for questions. It would be helpful if senators could ask brief questions and if witnesses could give concise answers. We will begin with Senator Bartlett.

**Senator BARTLETT**—Firstly, could you outline for me from article 16 of the Refugee Convention what *cautio judicatum solvi* means?

**Ms Wood**—It means an order for security for costs.

**Senator BARTLETT**—Thanks for that. I always wondered about that. In terms of the Covenant on Civil and Political Rights you talk about people being equal before the law. It would seem to me that, whether it is under this proposed change to the law or anything else, everyone is equal before it. The law might be completely stuffed, but everybody is equal before the completely stuffed law, in that sense. Is there any aspect where the law applies unequally?

**Dr Thom**—We are particularly concerned that this is excluding non-citizens, in particular asylum seekers, from common law to which all other Australians are entitled. It will not affect Australian citizens in that respect. So, in terms of being equal before the law, it is very clear that they will not be equal before the law with regard to natural justice.

**Senator BARTLETT**—Are you aware of any other law, bill or act that purports to codify natural justice in Australia?

**Dr Thom**—We are not aware of any. Following on from what David Bitel was saying, we are aware that private clauses have been used in other forms of administration. However, we would reiterate the statement made by David Bitel in the previous submission that, in such a significant case where people's lives are in danger, as we put in our submission, lowering justice in this sense to its lowest common denominator could significantly put the lives of these individuals at risk and is inappropriate when you look at the principles of international law with regard to the various covenants and conventions Ms Wood mentioned in her opening address.

**Senator BARTLETT**— In your submission and your opening remarks, you mention the case from December 1999. You said that that case remains current and that there should be an effective remedy against decisions of that character. When you say 'it remains current' does that mean it is still under appeal somewhere or other?

**Dr Thom**—That case has been brought to the attention of the minister by a number of church organisations, members of parliament and by us, although our international secretariat is still collecting information from the particular country about this individual. The minister has been made aware of the case but, as you know from previous statements by Amnesty International, where the final redress is noncompellable and nonreviewable we still have serious concerns.

**Senator BARTLETT**—Was that case an issue where natural justice was not applied? If it was not, then I presume it could have been appealed to the courts.

**Dr Thom**—That was our concern. This comes back to questions of unreasonableness—which are part of common law tradition—and potential bias, which is not for Amnesty to comment on but is certainly what the courts are there to comment on and why natural justice provisions are important. In this case we felt that the decision was particularly unreasonable. We are extremely concerned about the way credibility is used in decision making—at the primary decision and at the tribunal. If somebody's credibility is being questioned on the basis of a patently unreasonable decision, then that has serious consequences for an individual whose life we believe is at risk.

**Senator BARTLETT**—Does the Wednesbury unreasonableness provision get excluded as a ground by this as well?

**Ms Wood**—It has been previously excluded.

**Dr Thom**—It seems to have been previously excluded under privative clause. We see this as further erosion of that.

**Senator LUDWIG**—Could you explain the Wednesbury unreasonableness provision? Just basically.

**Dr Thom**—Basically, it means that—

**Ms Wood**—It is a decision that is so unreasonable that no reasonable person would have made that decision or arrived at that decision.

**Senator LUDWIG**—Thank you. That might help the committee in its deliberation. Dealing with, then, your statement in relation to natural justice, do you say that all of the procedural fairness is excluded or just simply that which is the hearing rule in relation to procedural unfairness, which then leaves other areas, such as bias?

**Dr Thom**—Again, that is not clear to us and our fear is that we are moving to a situation where all will be removed, apart from what is clearly codified. We agree with the submission by the ICJ that it is impossible to codify everything and that it is necessary to have a system that has developed over hundreds of years, that deals with areas that may fall outside any code, to ensure that people's lives are protected.

**Senator LUDWIG**—Following on from that, you then say that your objection is based on the understanding that procedural fairness will be excluded. I think Senator Bartlett asked whether or not there were other areas where you had apprehended that that had happened; you said are unsure or you do not know, but you think not. But you are aware of the reverse: areas where Australian citizens—and in the immigration area as well—are excluded from procedural fairness. That is right, isn't it? Procedural fairness does not apply at large to everything we make and do under legislation. You would agree with me that procedural fairness—such as section 417 under the Migration Act, where the minister can make a nonreviewable, non-compellable decision—is not subject to procedural fairness?

**Dr Thom**—That is our concern, yes.

**Senator LUDWIG**—So procedural fairness does not exist at large, in all decisions that are available to be made by tribunal members in this and other areas as well?

**Dr Thom**—No, it does not.

**Senator LUDWIG**—Do you say that the attempt to codify procedural fairness is a poor attempt, an insufficient attempt, or should not be attempted?

**Dr Thom**—I do not think we are saying that it should not be attempted, but we are saying that there should still be an area where people have a right to go and have it tested by an independent judicial authority. That independent component is crucial for accountability of any administrative decision, and that is what is being removed. Again, we are saying that the principle of international agreements is that there should be equality, and that principle is being undermined in this way.

**Senator LUDWIG**—Perhaps I missed your point. Are you saying that the legislation can attempt to codify procedural fairness in the way that it has, but not allowing the matter to be reviewable under the current legislation is not acceptable?

**Dr Thom**—That's—

**Senator LUDWIG**—In relation to the codification of the procedural fairness rule, do you think that is a fair and helpful attempt? Or would you say it is unfair and negative in its effect on people seeking asylum?

**Dr Thom**—I would say it is negative in that people who are using it are unaccountable. Therefore, if there is no form of judicial review to test it, there is no way to determine whether or not they are sticking to that code.

**Senator LUDWIG**—Would you say the judicial review exclusion, or the privative clause that now exists in the migration legislation, excludes a review of those codes of procedure? Is that your view?

**Dr Thom**—Yes. Not entirely, but it is increasingly being limited; and, with every piece of legislation that limits it further, we believe that the lives of those seeking asylum in this country are put further at risk.

**Senator LUDWIG**—What would you say is left? As I understand it, the privative clause is based on the Hickman principle. There are three parts which allow for review. What would you say is able to be reviewed? Jurisdictional error? Do you have a view about that?

**Dr Thom**—Yes. I think the Miah case is one of the few areas left for this form of judicial review. I think even the fact that Wednesbury unreasonableness can no longer effectively be reviewed is so problematic that to take it further is a significant step with regard to Australia's obligations to protect people.

**Senator LUDWIG**—Do you have a comment to make in relation to the Migration Legislation Amendment Bill?

**Dr Thom**—That is the other bill?

**Senator LUDWIG**—Yes, there are two bills being done. I was just curious as to whether or not you would comment if you had time or if you did not because you did not think there is anything requiring your comment.

**Dr Thom**—For us it was a time limit. It may be that, once we had a chance to review it thoroughly, we would not have made a comment anyway; but, from our initial examination of both bills, we felt the procedural fairness question was more significant for us, and that is why we have channelled our energies into commenting on that one.

**Senator LUDWIG**—All right. So it is fair to say that I should not ask you any questions in relation to the latter bill.

**Dr Thom**—Yes.

**CHAIR**—Thank you. Questions, Senator Cooney?

**Senator COONEY**—Ms Wood, do you appear before the tribunal?

**Ms Wood**—No, I don't.

**Dr Thom**—Amnesty International generally provides human rights information for those who are appearing before a tribunal, so we do examine individual cases prior to that. If we do feel that Amnesty has something significant that we can add to a particular case—where we can verify that someone has been arrested on a number of occasions in Sri Lanka or verify the way people are able to flee a particular country—then we will write a specific letter of support for that particular individual based on the human rights situation and whether or not we believe someone is credible. In that sense we will interview people on a number of occasions in order to determine (1) whether we can verify particulars of their claims and (2) whether we

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believe they are making credible claims. In that sense we have again reviewed a number of cases where people have had decisions from the Refugee Review Tribunal and we will make a similar appeal to the minister on behalf of those individuals.

**Senator COONEY**—You mentioned before the issue of credibility. Do you have any further things to say about the way credibility is used?

**Dr Thom**—I think it is becoming increasingly significant. We mentioned the fact that the Migration Legislation Amendment Bill (No. 6) 2001 has now been passed into legislation. That has given those making decisions far greater scope to make subjective interpretations.

**Senator COONEY**—So you are saying that more and more the tribunals are deciding whether people are credible rather than asking if they are refugees?

**Dr Thom**—I would hope they would be doing both, but I think credibility has often been used to undermine people's claims. Again, this is why Miah is so important, because it does give that natural justice for people to be able to counter things that have been used to undermine their credibility. If you examine cases coming from the refugee tribunal, a significant number of those people from countries where we know human rights violations are occurring are being rejected on credibility grounds. So to add increasingly subjective interpretations or to allow people to make subjective interpretations and then removing individuals' rights to natural justice in order to challenge some of those subjective interpretations puts Australia at far greater risk of breaching its non-refoulement obligations.

**Senator COONEY**—I suppose I should not ask you this because Senator Ludwig has obtained from you that you have not looked at bill No. 1. In that bill there is retrospectivity going back to 1 September 1994. Do you have any comment on that?

**Dr Thom**—We have not examined the bill.

**Senator COONEY**—All right, thanks for that.

**Dr Thom**—Where things are retrospective, with regard to other bills, we would certainly have commented, and with regard to temporary protection visas.

**Senator COONEY**—All right.

**CHAIR**—As there are no further questions, I thank the representatives of Amnesty International for assisting the committee today and for your written submission. I think you were in the room earlier when I commented on the time frames under which the committee is working, so we appreciate your assistance very much and thank you for both your written submission and your oral evidence today.

**Proceedings suspended from 10.34 a.m. to 10.48 a.m.**

**CROCK, Dr Mary, Member, Law Institute of Victoria, and Chair, Nationality and Residence Committee, International Law Section, Law Council of Australia**

**CHAIR**—Welcome, Dr Crock. Do you have any comments to make on the capacity in which you appear?

**Dr Crock**—As well as representing the Law Institute of Victoria, I have now been authorised to speak on behalf of the Law Council of Australia as well, and I have tabled a submission from them as well. I am a senior lecturer in law at the University of Sydney.

**CHAIR**—The Law Institute of Victoria has lodged a submission which deals with both of the bills under consideration. The first has been numbered seven for the inquiry into the Migration Legislation Amendment (Procedural Fairness) Bill 2002 and the second has been numbered six for the inquiry into the Migration Legislation Amendment Bill (No. 1) 2002. Are there any amendments or alterations you wish to make to that submission?

**Dr Crock**—I have not received any amendments for their submission.

**CHAIR**—You wish to make a statement in relation to the Law Council?

**Dr Crock**—Yes. As I said, I have now been authorised to appear on behalf of the Law Council of Australia as well, as the Chair of the Nationality and Residence Committee of the International Law Section.

**CHAIR**—Thank you. I appreciate that information, Dr Crock. I understand you have tabled a document from the Law Council. At this stage, although you may be here and are authorised also to represent the Law Council, it does make it difficult for senators that they have not had an opportunity to view that document.

**Dr Crock**—I understand.

**CHAIR**—So if you can speak generally to the Law Institute's submission, I am sure we will be asking you questions on that submission.

**Dr Crock**—Senator, the supplementary document that I have given to you really does not add to the Law Institute's submission. In fact, I intended to just speak to you today but I had time last night to put something together. So that is why I have provided, basically, a written version of what I will be saying.

**CHAIR**—We appreciate that assistance; thank you very much. What I will do is invite to you make an opening statement and then members of the committee will direct questions to you.

**Dr Crock**—Thank you, Senator. The Law Institute of Victoria and the Law Council of Australia object to the procedural fairness bill, which is the first bill I will speak to, on two main bases: first, that the bill is not necessary because the Migration Legislation Amendment (Judicial Review) Act, which I will refer to as the privative clause provisions, has covered the field of possible error, and that act applies to all decisions sought to be covered by the present bill. Secondly, if the bill is thought to be necessary or thought to perform a function, it is our view that, if the function is to restrict even further the scope for judicial oversight of migration decision making, then the bill is offensive to the notion that each of the three arms of government in Australia should be in balance and subject to the rule of law.

Can I begin addressing the procedural fairness bill, as I call it, with some preliminary comments. I apologise that I have not been here for the submissions earlier today, Senator.

Perhaps you have had people talk to you about the basis of procedural fairness, which you would be familiar with as a lawyer.

**CHAIR**—From both the ICJ and Amnesty.

**Dr Crock**—They have spoken?

**CHAIR**—Yes.

**Dr Crock**—If I may begin by bringing you back to the natural justice-procedural fairness point, the bill before you is predicated on a certain understanding of the law of procedural fairness as it has evolved over the centuries in English and Australian law. The terms are legal terms of art and they have their provenance in legal pre-history. The basic concept, however, can be expressed as that the common law rules of procedural fairness and natural justice envisage that a person whose interests are likely to be affected by an exercise of power will be afforded a fair opportunity to respond to information or relevant material adverse to the person's interests which the person holding the power proposes to take into account in exercising the power.

The question that has exercised courts and parliaments for years is the relationship between the common law principles as they have applied and legislation that sets out rules about the way the decisions are meant to be made. Put simply, the courts have recognised that the application of the rules of procedural fairness can be affected by legislation. They have also said that the content—in other words, the type of hearing that has to be given—will be affected by legislation. Where the courts have divided is on the question of the effect that legislative procedures will have on the common law.

In Miah's case, which is referred to in the explanatory memorandum, the High Court held that the existence of a code of procedures in the Migration Act governing the making of primary decisions did not indicate an intention in parliament to exclude the common law rules of procedural fairness. In that case, just to bring it to the fore, the refugee claimant was treated in a way that clearly breached the hearing rules that I have just referred to. In normal circumstances, the error of law would have been corrected had the man exercised his right of appeal to the RRT. The problem is that, through no fault of the refugee claimant, he lost his right of appeal to the RRT and so judicial review became the only way left for him to challenge the legality of the decision. The court acknowledged that parliament had put time limits on access to administrative review in the RRT but it found that the mere existence of this right to appeal, together with a code of procedures for primary decision makers, did not amount to parliamentary exclusion of the common law rules of natural justice.

This bill attempts to overturn that decision. That is quite clearly stated in the explanatory memorandum. Our problem with this is that we are not told what is wrong with that decision. In Miah, the circumstances that led the High Court to overturn the decision were quite extreme. As I said, judicial review was the only avenue available to the applicant. The simple point is if you want to overrule Miah's case, tell us what is wrong with the decision. Once again we have a situation where parliament is overriding a decision of the High Court. Surely in deference to that body we should be told why that decision is wrong.

The second point I want to make is that the bill is not needed. We have had, since September last year, a privative clause regime, which is as powerful as any regime, in place in Australia at the moment. This has reduced the power of the courts to review migration decisions to the most extreme extent possible. At the very least, you would have to say that

this bill is premature, because the scope and validity of those privative clause provisions have yet to be determined by the High Court.

I have at this point two points to make. The bill is premature because we do not have an indication of how your existing privative clause provisions are working—indeed, whether they are constitutional. The matter has gone to the High Court, and will be litigated shortly in the High Court, to see whether those provisions are constitutional. More importantly, though, you have cases before the High Court at the moment that have been heard and we are waiting for the decision to be handed down. In our view, this bill in that context becomes close to contempt of court. If you have a look at—

**Senator COONEY**—I am sorry to interrupt. Which ones?

**Dr Crock**—The cases I am referring to—

**Senator COONEY**—No, the contempt of court point.

**Dr Crock**—The cases I am referring to are the cases of Mui and Lie, which are class actions in the High Court at the moment. The subject of those class actions is on all fours with this legislation. At the very least, in our view, this legislation appears to be intimidatory to the High Court, which is in the process of writing its decision in those cases. To explain, the argument that is raised in those cases is that the code of procedure in the Migration Act sets out certain procedures that have to be followed by the primary decision makers in handing material and other things through to the Refugee Review Tribunal. The evidence that has been given in court in those cases is essentially, ‘Yes, the code of procedures exists but we do not have to comply with it because the Refugee Review Tribunal makes its own decision.’

The case is on all fours with this legislation because what was argued and what is being argued in those cases is that, notwithstanding a code of procedures at first instance, the primary decision makers are free to depart from that code of procedures with impunity. If you put together this bill and the privative clause provisions, the argument goes that not only do primary decision makers not have to comply with the code of procedures given to them by parliament but the courts then cannot hold the primary decision makers to account.

My final point that I would like make on this bill is that you have already last year, with the amendments to the Migration Act, given the executive plenary power, it would appear, with respect to the exclusion or removal of any person from Australia for the purpose of border control—no legislation needed; not reviewable by a court. Are you to do the same with respect to all migration decisions so that your own rules become matters of I do not know what legal import at all? Who knows? As I said before, we do not know whether the High Court is even going to uphold the constitutionality of the provisions we have in place. In conclusion, at the very least our view is that this bill is premature; at worst, it is misconceived. Our view is that it should not receive your support. Thank you.

**CHAIR**—Thank you very much for those comments, Dr Crock.

Resolved:

That this committee receive as evidence and publish the submission received from the Law Council of Australia.

**Dr Crock**—Would you like me to briefly speak to the other bill?

**CHAIR**—Yes, Dr Crock.

**Dr Crock**—The other bill I would like to address only in two respects. I apologise that I have not had the time to present written material on this; you have, however, written submissions on section 48 which I think are clear in their import—if senators have had a chance to read them. Essentially, the complaint is that the proposed new subsection 48(3) would eliminate the ability of people to do what is sometimes called the ‘Auckland shuffle’. Our main complaint with this is, once again, that it is a measure that works against the fairness of the system. It works against the efficiency of the system. We are talking here not about refugee claimants this time but people who may have been misled by departmental officials so that they have applied for the wrong visa at a particular time. At the moment, they are able to maintain their lawful status in Australia, go offshore, lodge an application offshore as required under the legislation, come back, wait out their time here, and gain legal status. It is efficient, it is effective and it is fair.

What this amendment seeks to do is remove that; for what reason, we are not told. I cannot see that anything would be gained from this. Frankly, it is beyond me as to why they are doing it, because it does not make the system more efficient. It makes it more vindictive, so that people really have to cut their ties and go. I suppose it is in tune with the basic idea that we do not want migrants unless they come from overseas; we do not want them here; we do not want them to be able to stay here. Again, from a former practitioner’s point of view I can see no merit in this and no internal logic.

May I go to another part of the bill. The second aspect which concerns me grievously is items 6 and 7. Senator, my understanding is that these omnibus amendment bills are supposed to concern minor amendments. Is that correct?

**CHAIR**—That is the way they are described in the legislation, Dr Crock, yes.

**Dr Crock**—I have been very busy, and please correct me if I am wrong, but as I read item 7—let us take item 7 because I have the page open—it is an ‘offence’ to arrange pretended de facto relationship to obtain permanent residence. This is an offence we are talking about: ‘Penalty: \$100,000 or 10 years in prison’—yes?

**CHAIR**—You are reading correctly. I am not sure that I am in a position to correct you if you are ‘wrong’, but you are certainly reading correctly, Dr Crock.

**Senator COONEY**—This relates to bringing noncitizens into Australia in contravention of the act—‘harbouring’.

**CHAIR**—Yes.

**Dr Crock**—So strict liability applies to the element of an offence against paragraph 1A; I am sorry, I am reading the wrong one—

**CHAIR**—Yes, it is right.

**Senator COONEY**—You are right. It is 1A: ‘Strict liability applies to the element of an offence against paragraph 1A’.

**CHAIR**—That is what you were speaking to, Dr Crock.

**Dr Crock**—So it seems to me that what we are trying to do here is create an offence that would have made Arne Rinnan strictly liable to an offence, making him liable to 10 years in prison or a \$100,000 fine.

**CHAIR**—You are referring to the captain of the MV *Tampa*.

**Dr Crock**—Now we are, yes. I cannot see how, in anybody's name, that could be seen as a minor amendment. Similarly, let us go to section 241. I apologise for jumping around. This one reads:

... offence for a person to make arrangements that make it look as if two people are de facto spouses ...

What mystifies me here is that the proposal again relates to an offence that is enormously significant in the penalty imposed, but the actual provision in respect of which strict liability is to be applied involves 'belief on reasonable grounds'. It says:

Subsection 241(1) makes it an offence for a person to make arrangements that make it look as if two people are de facto spouses *for the purposes of the regulations* where that person knows or believes on reasonable grounds that they are not de facto spouses.

Do you get the drift?

**CHAIR**—Yes.

**Dr Crock**—How can a strict liability offence attach to something that involves 'knowing or believing on reasonable grounds'? It is a legal nonsense.

**Senator COONEY**—What you are saying is that, as you look at it now, before it is amended, the Crown has to prove that you believe it on reasonable grounds, but in future it will be presumed that you do know on reasonable grounds.

**Dr Crock**—It is just a nonsense. If somebody could explain it to me, I would be very grateful.

**CHAIR**—It is a matter that senators can take up with the department when they appear later this morning.

**Dr Crock**—It is just a bit of a mystery.

**CHAIR**—Is there anything further on No. 1, Dr Crock?

**Dr Crock**—No. I am very concerned about 233, for the reasons I have just outlined. That is all.

**Senator COONEY**—What do you say about the retrospective provision?

**Dr Crock**—Yes, I noticed that. Section 48 is retrospective too. Again, that is a matter that is written into the guidelines that govern this committee. You should look out for those provisions.

**Senator COONEY**—Dr Crock, may I say that you have done grand work in this field for many years now. I am not suggesting for one moment that you are not young, but you have been at the coalface for many years. I do not know how many more times I will have the opportunity of your being before me, so I would just like to thank you for all the work and effort you have put in over the years.

Now that judicial oversight—which is really just a means of quality control: making sure that the law is properly applied—has been taken away, do you think the point has been reached whereby the system of having a review simply launders the decision, so that what is very suspect becomes, as it were, purified by a system that does not really purify it but gives the appearance of doing so? It is just a matter of whether it is worthwhile keeping on with this system at all. Have you got any thoughts about that?

**Dr Crock**—I am not going to take the opportunity of this hearing to attack the Migration Review Tribunal, the Refugee Review Tribunal or the Administrative Appeals Tribunal. I

think those bodies still operate within their mandate: they try to make decisions on the merits of cases in ways that are free and fair. I am a long-term opponent of privative clauses per se—in fact, I have taken the liberty today of handing back to the committee the submission that the Law Council prepared at the time the original privative clauses were introduced.

I watch with interest the developments in the courts in this area. It is interesting that what I would call the orgy of legislation that was made last year on 26 September was made at a time of tremendous uncertainty and fear in the community. I was in North America at that time, and I felt the fear there as well. This parliament was one of the first parliaments in the world to legislate after the horrific events of September 11. You may be interested to know that, in America, privative clauses in the migration area were introduced within weeks of the Oklahoma bombing, at a time when they thought the Oklahoma bombing was the work of terrorists from overseas. I find that quite interesting because in some ways I think our response here was very much built around the same fear of the foreigner and what might happen.

**Senator COONEY**—And what do you say about that—that, since it was passed in the context of horrific events, it is all right?

**Dr Crock**—No, not at all. I think that we are now coming into a calmer period of our history. We are not as pressured by all these events that are happening. People are beginning to realise that we were not being invaded and that perhaps we are not in a situation of national crisis. That is another reason why I think that it is premature and very counterproductive to be further trying to strengthen an already strong privative clause. I await with interest what happens in the courts because I think that cooler heads are going to prevail and, with luck, we will come back to a system that is more balanced and even.

**Senator COONEY**—When you were talking in that context, about contempt of court—I suppose parliament, when you think about it, can never be in contempt of court—what were you thinking of? The function of the parliament is to legislate, and, if they think the courts have put the law in a position it ought not to be in, there is no problem with parliament legislating when that is its function. What I am trying to get at is your thinking behind that statement, because it might be of some value to work that out.

**Dr Crock**—Perhaps I could withdraw the contempt of court statement because I agree with you that—

**CHAIR**—Dr Crock, I think you will find it is actually in the Law Institute's submission.

**Dr Crock**—Right.

**CHAIR**—So it is hard to withdraw at this stage.

**Dr Crock**—Okay. Fair enough.

**Senator COONEY**—That is probably an expression that is meant to convey something else, rather than what it does convey when you look at it in plain daylight. Maybe the point you are making is the one that you made before. Is it saying that parliament is in a certain sense panicking—if parliament can panic—and passing laws before they are really called for in terms of the situation?

**Dr Crock**—I think sometimes it is difficult for individual parliamentarians to be on top of exactly what is happening and so there is a tendency to react emotively to what is going on. This is why it is so useful to have hearings such as this so that parliamentarians can have brought to their attention the existence of, for example, the cases that are pending before the

High Court. I think the point that the Law Institute is trying to make is that there is a very unhealthy battle raging here between parliament and the courts, that is not clarifying in any helpful way the appropriate relationship that should exist between parliament and the courts.

**Senator COONEY**—You talked about strict liability and what have you. Yesterday we were conducting hearings into the terrorist legislation—strict liability being imposed there in reference to offences which carry very heavy penalties. In fact, in a couple of cases the liability was absolute. Can you tell us, from your various travels overseas and from your study of overseas literature, whether strict liability is used in common law countries in reference to offences which carry up to life sentences?

**Dr Crock**—I am not sure that I am really qualified to speak at length on this. I have looked at the Canadian anti-terrorist provisions and they have introduced some life sentences. As far as I am aware, however, they have not introduced strict liability provisions. Perhaps your researchers have dug up some material on this.

**Senator COONEY**—Don't you talk to the international law teachers at Sydney University?

**Dr Crock**—Yes, but we have a lot of matters on our plate at the moment.

**Senator COONEY**—You are under a heavy load at the moment?

**Dr Crock**—There are a few things happening.

**Senator COONEY**—Are you saying that the system is working well at the moment but that there ought to be a quality control system for decisions of the courts? I get the impression from what you said that you think the system is going fairly well, subject to the courts being able to continue to provide quality control for the system. Is that your position?

**Dr Crock**—My position is that we do not need a privative clause. The balance of the system is seriously out of whack as it stands at the moment. I would much prefer us to go back to a system more akin to that in New Zealand, Canada and other like Western countries.

**Senator COONEY**—I can follow that.

**Dr Crock**—The thrust of our submission is that the three-cornered support of our government in Australia in the migration area has become a uniped instead of a tripod. This type of legislation knocks the legislature out; hence the comments I make about the code of procedures. They are codes that you, as legislators, write, and they want to knock out the courts as well. So you are left with an executive arm—the administrators—being unaccountable to anybody.

**Senator COONEY**—If the courts were restored, would that be sufficient? If we got rid of the privative clauses, would that leave the system working reasonably well, at least in your view?

**Dr Crock**—I think this is ranging into the area of high academic theory.

**Senator COONEY**—No, it is not. I want to get to what your position is about this legislation. What it seems to be saying is that, as long as the courts are there, and you get rid of this legislation—perhaps the privative clause legislation, which as you say was rushed through in September—the system would work reasonably well.

**Dr Crock**—I am on the record as agreeing completely with that. I think we have systems for the judicial review of decisions in Australia that work very well in other jurisdictions, and it has been removed in the migration jurisdiction. I agree with the proposition that we should

do that; however, I say that knowing that there is no support whatsoever within parliament to go back to the Administrative Decisions (Judicial Review) Act for migration decision making—sadly.

**Senator COONEY**—If parliament were willing to restore judicial review, the Law Council of Australia and the Victorian Law Institute would be reasonably content with that position as far as the immigration system goes?

**Dr Crock**—I am concerned about ranging outside the proper area of this bill.

**CHAIR**—I am not sure that Dr Crock is in a position to answer.

**Dr Crock**—I could spend all day talking to you. There are lots of different things that could be argued here. We could talk about setting up a judicial system with immigration. There are all sorts of alternatives. I do not think it is proper for a law council to stand up and say which alternative should happen. We are here to respond to the proposals that are being put forward.

**CHAIR**—Yes, in relation to very specific pieces of legislation.

**Dr Crock**—I would like to limit my comments accordingly.

**Senator BARTLETT**—Are you aware of any other act in Australia that purports or attempts to codify natural justice for procedural fairness?

**Dr Crock**—Yes, it is very common for parliament to codify the procedures that are to be followed. It is probably more common to see codes of procedure—using that term loosely—than it is to see them not codified. It is so common that it is barely worthy of mention. What is uncommon is a proposition that people be free to depart from those codes of procedure without being accountable in some way to the judiciary.

**Senator BARTLETT**—And that is the case because of the privative clause, rather than this bill?

**Dr Crock**—No. The privative clause per se does not have that effect. I do not actually understand what item 8 of this bill says but, according to the explanatory memorandum, it purports to extend or expand the function of the privative clause.

**CHAIR**—Do you mean in reference to the relationship with section 474 of the act?

**Dr Crock**—Yes. It says:

The amendments made by items 1 to 6 are not to be taken to limit the scope or operation of section 474 of the *Migration Act 1958* in relation to anything done, or omitted to be done, in relation to any matter dealt with in any provision that is taken to be an exhaustive statement of the requirements of the natural justice hearing rule by a section of that Act that is inserted by one of those items.

**Senator BARTLETT**—Isn't that meant to ensure that the privative clause continues to operate in relation to the codes of procedure?

**Dr Crock**—If you look at paragraph 49 of the explanatory memorandum, which becomes something the courts can use—secondary material—when interpreting this legislation, it reads:

It is intended that the privative clause should protect from invalidity anything done or omitted to be done in relation to any matter dealt with—

again, it is not plain English—

in any provision taken to be an exhaustive statement of the natural justice hearing rule. That is, if there is a breach of a “code of procedure”, it must still fall within the *Hickman* grounds of review in order for a court to find the breach rendered the decision invalid.

I read that as saying, ‘You breached the code of procedure, and it has no effect at law.’ Hence the comments I made to you before about what this says to you as well as what it says to the courts.

**Senator BARTLETT**—Apart from this bill attempting to preclude natural justice, it also in effect negates the codes of procedure in the act.

**Dr Crock**—That is my submission, Senator.

**Senator LUDWIG**—On the face of it, a code of procedure is not a code of procedure when coupled with a privative clause, as explained by section 49. It effectively excludes all of what we would consider procedural fairness issues unless they were jurisdictional errors of law.

**Dr Crock**—That is right, and that is precisely what is being argued at the moment in the High Court in the class actions.

**Senator BARTLETT**—Just sticking with this procedural fairness bill for a second, in the Law Institute’s submission, the third dot point in the summary says:

... in practice decision-makers both at departmental and administrative review level frequently pay scant regard to the Codes of Procedure.

That statement is in the submission. Do you concur that currently decision makers frequently pay scant regard to the existing codes of procedure?

**Dr Crock**—Perhaps in answer to that you may be interested to know that in the High Court the department did not attempt to argue that it was complying with the codes of procedure. It basically conceded that point and went straight on to say—and there are 5,000 cases before the High Court in these class actions—‘We are not obliged to follow codes of procedure anyway, thank you very much.’

**Senator BARTLETT**—If this bill were to pass, would it negate the action currently before the High Court if the decision had not been handed down, or would it apply only to future applications—assuming it came into effect tomorrow—not that it will, though?

**Dr Crock**—The cases before the High Court at the moment relate to a different statutory scheme to the one in place now. I may have to take that question on notice. I am not quite sure.

**Senator BARTLETT**—It would be handy to know because in the past parliament has pushed through bills to overturn pending High Court decisions in the migration area. I was just wondering whether this would be the case or whether it would apply only to future cases.

**Dr Crock**—I would like to take that on notice.

**Senator BARTLETT**—I want to refer quickly to the Migration Legislation Amendment Bill (No. 1) 2002 and to the concept of the Auckland shuffle. On the surface, it has always seemed to be undesirable and strange for people to have to bounce out of the country to put in applications. In a sense, it seems to be an artificial thing to do. Why is it good to preserve people’s ability to do that?

**Dr Crock**—The alternative is that people have to leave the country completely.

**Senator BARTLETT**—They are leaving the country completely if they are going to Auckland.

**Dr Crock**—No, if you disturb the present situation, people will not be at liberty to remain in Australia while their proper visa is being processed. You may have a situation where an employee is needed in a firm and the present situation allows that person to remain in Australia while the visa they should have applied for, but for some administrative error or for whatever reason, is applied for offshore. Hence my earlier comment about the efficiency of the present system. Virtually every country I know which has an immigration program has conditions like this. In Canada they call it the Buffalo shuffle.

**CHAIR**—They basically shuffle off to Buffalo.

**Dr Crock**—Yes, through Niagara Falls. It is a nice little route.

**Senator BARTLETT**—The submission states that proposed section 48(3) excludes a person holding a bridging visa who has not had an application rejected from leaving the migration zone and lodging an application. Section 48(1) of the act, to which 48(3) relates, seems to apply only to people who have been refused visas or who held a visa that has been cancelled. How does proposed section 48(3) apply to a person who has not had an application rejected?

**Dr Crock**—There may be a situation where a person has not had their visa rejected yet, but they discover that the application they made onshore is not the correct application and it will be rejected in due course. Does that answer your question?

**Senator BARTLETT**—I don't think so. Under the existing provision, it seems that a person who does not hold a visa and was refused, or a person who held a visa that was cancelled, can apply for a certain class of prescribed visas. However, your submission refers to people who have not had an application rejected being precluded from going offshore and lodging something.

**Dr Crock**—I am sorry. I think that must be an error. It may be an oversight that we have not corrected.

**CHAIR**—Would you like to check that with the Law Institute and come back to the committee?

**Dr Crock**—Yes, I will take that on notice.

**CHAIR**—Is there anything further, Senator Bartlett?

**Senator BARTLETT**—No, I do not think so. It is right at the first paragraph of annexure A, on the very first line.

**Senator LUDWIG**—As I understand your submission, you say in relation to the Migration Legislation Amendment (Procedural Fairness) Bill 2002 that the current code—if it is to be a code—proposed by this bill is insufficient to capture all of those procedural fairness requirements that would otherwise exist if it was not a code.

**Dr Crock**—That is right.

**Senator LUDWIG**—You then say, in addition to that, 'whilst it operates in conjunction with the privative clause'. What do you say then—that it stopped being a code as a consequence, because you cannot appeal it and the decision makers do not have to follow it, or that they can only appeal it on those very narrow jurisdictional grounds that are provided for in the Hickman principle, under the privative clause?

**Dr Crock**—I think there are two matters in what you have just said. The first point is that the code that exists, as you quite correctly point out, is narrower in its legal import than the common law rules of procedural fairness. Essentially, the codification process has been done so as to reduce the administrative requirements of legal decision making. The second point relates to what happens when that code, that limited code, is breached. The effect of this bill would be to make even those limited codified procedures not reviewable by a court.

**Senator LUDWIG**—It is not unusual, is it, in codifying the common law, to take a narrow view of that, to make it workable, or for other legislative intents? Do you say that they have simply undertaken that process, or do you say that there is something wrong with that process that they have undertaken? We have not coloured the word ‘narrow’ yet, in that sense.

**Dr Crock**—That is a question that has exercised the courts for a number of years: what is the effect of codification? I do not accept that parliament always writes procedures so as to excise the common law rules of natural justice completely. Certainly, the purpose is to make it easier for decision makers to know what they have to do. You see that very much in cases that have come before the courts. Where the decision makers have followed the codes that have been set for them, generally the courts have been happy to say, ‘We see no breach of the rules of procedural fairness here.’ This is partly because codes of procedure, as a general rule, do not depart too far from the common law rules of procedural fairness—in particular, the principle that I opened my statement with: if you have got adverse critical material, then a person who is going to be affected by that decision should know about that adverse critical material. It is when that sort of material is not going to an applicant that the courts will step in, which is exactly what happened in Miah’s case. It was recent, adverse and central to the decision making process.

**Senator LUDWIG**—I want to ask about the Migration Legislation Amendment Bill (No. 1) 2002 and, specifically, your comments in relation to section 48. I think you have had a couple of goes at this—

**Dr Crock**—I am sorry. I am tired.

**Senator LUDWIG**—I am a little tired myself, unfortunately, from yesterday. I am referring to page 19 of the explanatory memorandum, schedule 6, ‘Minor amendments’, item 1, paragraph 122. Do you have that?

**Dr Crock**—I have not got the explanatory memorandum.

**CHAIR**—We can pass you one.

**Senator LUDWIG**—That is the mischief that it says it is overcoming. The mischief is that non-citizens are using the process to apply for an unending number of visas; in other words, the mischief is a person not doing an Auckland shuffle in the sense that they may have got here inadvertently with a wrong visa application and have then gone overseas to come back with the right one, which I suspect normal-minded citizens would not mind. The mischief is a person continually trying to find the right visa to fit their circumstances. That is as I understand the provision. As I understand what you say—I do not want to put words in your mouth—to affect the mischief that is currently portrayed in section 122 of the Migration Act, the unintended consequence is that you rule out a lot of other people who would innocently make an application, find that they have made the wrong one and need to correct that. The provision of section 48 of the Migration Act would then rule them out with the people who might be abusing the system.

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**Dr Crock**—Absolutely, Senator. That is right. I have concerns, Senator Bartlett, about the first—the Law Institute needs to take that on notice.

**CHAIR**—You have done that?

**Dr Crock**—Yes.

**Senator LUDWIG**—I am not sure I got that point, but I was going to look at the transcript. So I did not want to cut across that one either.

**Dr Crock**—No. I think you have expressed the situation correctly. What you have just outlined is consistent with my opening statement on this. You are dealing with people who have lost their substantive legal visa here and they have been put onto a bridging visa of some kind. To be on a bridging visa, you have to have applied—

**Senator LUDWIG**—It is becoming a very limited number now. Nevertheless, your view is that this is a heavy-handed way of dealing with it, because it encompasses both innocent people and those people who might otherwise be abusing it, which is highlighted by section 122. The alternative is a better way of dealing with it, but you have not had a look at what the alternative is.

**Dr Crock**—I think that puts it perfectly.

**Senator LUDWIG**—I am sorry to ask you this, but it flows from what I have just said. Have you had an opportunity to look at an alternative—I am hesitant to use the word ‘fairer’—way of dealing with it that ensures that only legitimate applications might be dealt with and that those that might be abusing the system are caught?

**Dr Crock**—I have not had a chance to discuss this with either of the parties that I am appearing for, but my personal view is: why tinker with the system? One of the biggest problems with this whole area is that we tinker, tinker, tinker—all the time. We keep trying to finetune to get rid of the rorts. I have no evidence of an overwhelming problem in this area. However, I do see that each little incremental change makes the system tougher, less efficient and less fair. So why tinker again?

**Senator LUDWIG**—Perhaps this is a matter I can wait to ask the department about, but I appreciate your comments in relation to it. Thank you very much. Thank you, Chair.

**CHAIR**—Thank you, Senator Ludwig. Dr Crock, we appreciate your assistance to the committee this morning, on behalf of both the Law Institute and the Law Council. You could convey to both of those bodies that we are very grateful for their submissions. We have noted earlier in the hearing—you may wish to refer them to the *Hansard*—that we appreciate that the time frame is difficult, but it is the time frame we have been set by the Senate and we are attempting to comply with it, not only in relation to these bills but in relation to approximately seven other significant pieces of legislation across a range of areas. So we thank you for your assistance. You took that one matter of clarification on notice in relation to the first paragraph of the Law Institute of Victoria’s submission on the Migration Legislation Amendment (Procedural Fairness) Bill 2002 [No. 1]. If you could return to the committee with information on that matter as soon as possible, we would be very grateful.

**Dr Crock**—Thank you, Senator. I think I took another matter on notice as well; namely, whether the bill would affect the current thinking on class actions.

**CHAIR**—Indeed. That would be very helpful on both of those questions. Thank you very much for your assistance.

**Dr Crock**—Thank you, Senator.

[11.42 a.m.]

**MANNE, Mr David, Coordinator, Refugee and Immigration Legal Centre**

**CHAIR**—Welcome, Mr David Manne. The Refugee and Immigration Legal Centre has lodged a submission dealing with both bills. The part of the submission dealing with the Migration Legislation Amendment (Procedural Fairness) Bill 2002 is No. 9 and the part dealing with the Migration Legislation Amendment Bill (No. 1) 2002 is No. 8. Do you have any amendments or alterations that you wish to make to the submission?

**Mr Manne**—The only amendments or alterations are typos. We request that we provide the submission without typos.

**CHAIR**—Thank you. We accept a clean copy. I would like you to make a brief opening statement and, at the conclusion of that, I will invite members of the committee to ask questions. We have had the benefit of your submission, so we can go from there.

**Mr Manne**—I would like to open by thanking the committee for providing the Refugee and Immigration Legal Centre with the opportunity to participate in this inquiry. We have previously participated in inquiries conducted by this committee in relation to other matters, which are actually relevant here today. So there is a bit of a history of our participation in these matters, particularly in relation to the Migration Legislation Amendment (Procedural Fairness) Bill 2002, which gives rise to matters of profound importance, as outlined in our submission. They include our system of governance, the separation of powers, the rule of law in Australia, procedural fairness and the like. We would also make the point that these matters impact on the very nature of decisions which could determine, for instance, whether a family unit is able to live together and, even more grave a matter, whether someone is to be protected from persecution.

Just briefly, as we have outlined in our submission, the Refugee and Immigration Legal Centre is a specialist legal community centre based in Victoria which provides free legal assistance and advice to asylum seekers and to disadvantaged migrants in the community. In effect, our organisation is the result of a merger between what was the Victorian Immigration Advice and Rights Centre and the Refugee Advice and Casework Service. We now deal with both refugee and general immigration matters.

In relation to our submissions, I would like to start by dealing with the Migration Legislation Amendment (Procedural Fairness) Bill 2002. The first submission is that the Migration Legislation Amendment (Procedural Fairness) Bill 2002 must be seen against a background of a whole package of amendments which were introduced into law last September, including the further and substantial curtailment of judicial review. In effect, the jurisdiction has already been stripped of all but a few judicial review grounds. With the procedural fairness bill, in a sense we have possibly the last substantive vestige of grounds of judicial review that are arguably still open. Our submissions have indicated that we have proceeded on the basis that the rules of natural justice, as they apply or are contained in common law probably have not been ousted by the privative clause in section 474. That being the case, it seems that the thrust of the procedural fairness bill is, first, to codify the natural justice requirements which will apply in relation to decisions under that Migration Act and, second, to immunise non-compliance with the rules of natural justice, as exhaustively defined, from judicial review.

Our first submission in that regard relates to the proposal to render exhaustive in the codes of procedure the rules of natural justice. In our submission, the codes of procedure as they currently stand in the Migration Act are unjustifiably limited and narrow. They do not come close to reflecting the common law rules of natural justice. In that regard, in our submission we have referred in particular to a compelling case on that point, namely Miah's case. Without going into the details of Miah's case, it is clear that when the High Court looked at whether someone who had not been provided with relevant country information ought to have been provided with that country information—in other words, whether that person ought to have been able to answer the case—it was found that, clearly, they ought to have been provided with relevant country information which could lead to an adverse decision, a fairly fundamental and basic requirement of procedural fairness.

It is clear under section 57 of the Migration Act, which deals with disclosure of information, that information that must be disclosed is only that information which is personal to the applicant. That is a clear example where the codes of procedure do not deal exhaustively with the rules of natural justice. There is also a mirror provision in relation to RRT decisions and the like. In relation to this, it is our submission that country information and matters of credibility in our experience are generally fundamental to the decision as to whether to grant a visa. That being the case, and credibility and country information are inter-related issues, the codes of procedure fall well short of addressing one of the critical issues in relation to the decision making process. By doing that, they fail to provide a safeguard or mechanism by which the applicant can be afforded one of the most basic and fundamental requirements of procedural fairness and that is, as I said before, to answer a concern or have an opportunity to respond to a concern which could lead to an adverse decision.

Our second submission in relation to the codes of procedure is that, in our experience, the codes of procedure are not always complied with. That is an extremely important issue to note because it is our experience that, at both departmental and administrative review levels, there are commonly significant issues to do with non-compliance. I would be happy to provide some case studies to the committee within a short time frame if the committee would like to have them. Our normal procedure would be to actually seek permission from the client to disclose certain matters and I have not had time to do that.

But in our submission we did actually deal with one case that has come before the courts in relation to non-compliance. Again, our submission would be that an extremely compelling and grave error has occurred. It is the type of error which, if the procedural fairness bill comes into law, will not be protected. In that case, put simply, an Iranian asylum seeker, who was before the Refugee Review Tribunal for the second time, was facing the situation where the tribunal member was minded to find that an additional claim was of recent invention. In a sense, I guess, the inference arises that the asylum seeker was trying to somehow bolster their claim when the other claims were not looking like they were going to be successful.

The Iranian asylum seeker pleaded with the member of the tribunal to listen to some previous evidence which had been given orally and tape recorded at the departmental level. The tribunal member refused to listen to evidence which was, indeed, relevant to what became a critical matter in reaching an adverse finding. In other words, the tribunal member refused to let the person have an opportunity to respond at a most basic and fundamental level. That is the type of mistake that, regrettably and disappointingly, happens with regularity at both the departmental and tribunal level. That species of error is not uncommon.

Our third submission is in relation to the issue of whether or not those codes of procedure ought to be immunised from judicial review, even if the codes of procedure are to be considered exhaustive of natural justice requirements. It is clear that the procedural fairness bill seeks to do that. We have made reasonably detailed submissions in relation to the undesirability of the section 474 privative clause in so immunising decision making from those very limited natural justice requirements in the codes of procedure.

Our first submission is that the bill should be opposed because it is an unwarranted attempt to eliminate from judicial scrutiny denials of procedural fairness, which are fundamental and deep-rooted in our legal system. I will not make detailed submissions on this, but it is clear that this sort of provision attacks the very heart of the doctrine of the separation of powers. Indeed, it also attacks the very heart and notion of the rule of law in our society, which is, put simply, that as a fundamental necessity the judiciary should be able to ensure that executive power is made accountable and that the rights and entitlements of individuals are protected from excessive jurisdictional denial of natural justice to individuals. I would also like to make the point that, in this context, denying the ability of an individual to receive the protection of judicial scrutiny has particularly grave consequences when we are talking about decisions such as those affecting refugees.

Put simply, if we are looking at denials of natural justice, and in our submissions we have already referred to two stark denials of natural justice—clear and stark ones which are not protected by the codes of procedure—and no protection being afforded in terms of judicial review, we are quite simply looking at a situation where someone could be sent back to a situation of persecution without the basic safeguard of having the decision tested at the judicial level. Clearly that gives rise to very serious concerns about whether or not we are indeed breaching our international obligations under the refugee convention, which is underpinned by the obligation of non-refoulement—that is, not sending someone back to a place of persecution. I will make the point again that, if we are looking at saving a final vestige or there is a residual ground for judicial review being natural justice, that ought to be viewed against the background of what we find with the new privative clause—that is, extremely limited grounds that are left for judicial review.

**CHAIR**—Mr Manne, I do not want to interrupt you, but I did ask if you could make a brief opening statement. We have, as I said, the benefit of your submission. Were you going to go on to make comments in relation to the Migration Legislation Amendment Bill (No. 1) 2002?

**Mr Manne**—Yes, I can make just some very brief comments. I am quite happy to answer questions if the committee have questions on all our written submissions, if the committee has already read them.

**CHAIR**—We have been able to do that.

**Mr Manne**—I was wondering whether you had or not, given the time—

**CHAIR**—You would be surprised what we can accomplish overnight.

**Mr Manne**—I congratulate you on that.

**CHAIR**—We might go to questions then, if that is all right with you.

**Senator LUDWIG**—Dealing with the Migration Legislation Amendment Bill (No. 1) 2002 first, the explanatory memorandum—do you have that?

**Mr Manne**—I do.

**Senator LUDWIG**—I refer particularly to section 48 on page 19, paragraph 122, of the EM. It appears that the point of section 48 is encapsulated in paragraph 122. Do you say that that is broader in its application than it could otherwise be or that it captures people who should not otherwise be captured by that or that it is not necessary in any event? I am trying to get an understanding.

**Mr Manne**—Could I clarify that? Is the question you are asking: is it our view that the intention of this section does not contemplate people making offshore applications?

**Senator LUDWIG**—No, we can get to that, but why don't you answer that first then? Is that your view?

**Mr Manne**—Our submission is that it is not clear at all. What appears to be—

**Senator LUDWIG**—I understand your submission says that it is not clear at all, but do you say that they cannot make—

**Mr Manne**—Our submission is that, at the moment, the purpose of this section is to stop people going overseas on a bridging visa B whilst awaiting an outcome and then returning to make an onshore application.

**Senator LUDWIG**—To forum-shop for a visa, effectively.

**Mr Manne**—Yes.

**Senator LUDWIG**—Do you understand that occurs or do you understand that is—

**Mr Manne**—I do not accept the language, but I understand the import.

**Senator LUDWIG**—What I am trying to ascertain is: do you say that provision attacks a mischief that does not exist or that the mischief does exist? In other words, people are abusing the system by forum-shopping—and they are my words—for visas.

**Mr Manne**—Put simply, if we are talking about a situation where someone uses the device of going overseas and they can come back and make another application or the like, we have nothing much to submit on that matter. The substance of our submission is that it is not clear that this provision contemplates the quite valid and reasonable situation where someone goes on a bridging visa overseas to lodge an offshore application whilst another application is pending in Australia. Our view is that it is not at all clear and, indeed, probably not a consequence thought of that such people could be barred from making an application at all and therefore if they want to pursue the offshore application they must stay overseas and not re-enter the country. Does that answer the question?

**Senator LUDWIG**—Yes. So you do not object to the idea or the mischief behind 48, but you say that it does not achieve that.

**Mr Manne**—If it has another consequence which was not contemplated—that is, to bar people who have, as I say, quite a valid reason for going overseas and lodging offshore.

**Senator LUDWIG**—That is why I took you to 122. Notwithstanding what you say, isn't that the material that the courts would look at, if this bill were to pass, to help them understand what the provision means? What 122 tells us is that a non-citizen who leaves and re-enters Australia as a holder of a bridging visa that allows them to travel is able to circumvent this. So that is the mischief—that there is a circumvention of 48.

**Mr Manne**—Yes.

**Senator LUDWIG**—And they would then be barred from a further visa application—in other words, to prevent them shopping around for a visa that is suitable. I am happy to be corrected, but that is what I understand is the mischief that it is trying to address; that is, where a person might come in intentionally on a visa and then find it is not the visa that they actually need—

**Mr Manne**—And they are about to go down in a flaming heap.

**Senator LUDWIG**—Yes. So they return and come back with another one, or another one if they make the mistake again, I suspect.

**Mr Manne**—The way that we have read this provision is—

**Senator LUDWIG**—Yes, I know how you have read it. I am trying to stay away from that because I can read that. I was wondering whether you had gone to 122 of the EM and whether you had any comments in relation to the mischief it was trying to overcome. As I understood Dr Mary Crock from the Law Institute of Victoria, she said that, although the mischief might be there, there was no evidence of the mischief amounting to much and that the requirement to amend it to bar it was—and these are my words—perhaps excessive. You have addressed another issue, but I was wondering whether you had turned your mind to what 122 actually says it means rather than what you read it to mean.

**Mr Manne**—We had turned our mind to it. I guess to some extent our submission at paragraphs 3.1.1 to 3.1.3 seeks to address that matter before moving on to what we see as the potentially unintended onsequences of the provision.

**Senator BARTLETT**—My question is in relation to the procedural fairness issue. Are you aware of any other act that specifically seeks to preclude natural justice from its operation?

**Mr Manne**—None that I am aware of.

**Senator BARTLETT**—With respect to the existing codes of procedure that are in subdivision AB, is it your understanding that, if this bill were passed, you would not be able to appeal against those procedures not being followed?

**Mr Manne**—Certainly that is the clear intent of the legislation. Whether or not an appellate court would find that is something that really goes outside my expertise. It may, for instance, come down to a question, if we look at section 474, of whether one of the Hickman exceptions—those grounds that have survived—would contemplate or entertain an action which in effect would be saying that non-compliance with the codes of procedure was a jurisdictional error or something of the like. Indeed, it is an extremely complex question as to what jurisdictional error is and, particularly in that context, as to whether it could be entertained. It is not something that I could express any firm view on, but what I can say is that it is clearly intended that such non-compliance be immune from judicial review.

**Senator BARTLETT**—And your reading of the existing codes of procedure in the act is that they fall a fair way short of a complete representation or codification of the rules of natural justice?

**Mr Manne**—Conspicuously so—and dangerously so, as the cases that I have pointed out, I think, clearly illustrate. The rules of natural justice generally do not intervene on minor mistakes—that is clear. What they do is try to address conspicuous and major mistakes generally, and they are the types that we are seeing go to courts and that need redress.

**Senator BARTLETT**—Thank you.

**CHAIR**—Mr Manne, when you are talking about the rules of natural justice you are talking about the hearing rule and the bias rule and things like that, aren't you?

**Mr Manne**—Yes, that is right.

**Senator COONEY**—Looking towards the end of your submission at 3.1.13 and so on, where you say that there can be real problems with the advice that migrants get, the picture you paint is that the applicant runs the risk of getting bad advice and then runs the risk that the tribunal that he or she might appeal to does not operate on a particular occasion, as it should given the law, in the application of the law and in the finding of the facts. As I understand you said, with the privative clause the ability to correct all of that is much reduced. Have you got some examples—I think you gave an example before—that you could give the committee that might illustrate that, without names, or would that be too much of a problem?

**Mr Manne**—It would not be a problem. We would be prepared to provide some examples, some case studies, to the committee. I should say one thing briefly, and that is we have a telephone advice service open to the public eight hours a week and we also have an evening advice service. So we advise, in one way or another, a substantial number of people in the community in Melbourne and, in doing that, it is not uncommon for us to be dealing with exactly the matter that Senator Cooney has raised.

**Senator COONEY**—I have got to be a bit careful here, but what is the body that supposedly controls the migration agency?

**Mr Manne**—It is the Migration Agents Registration Authority—otherwise known as MARA.

**Senator COONEY**—Do you find that they correct any of this? You can only go on impressions here; what is the impression you have?

**Mr Manne**—It is a difficult question but I should say this: what we have found is that people who come to see us for advice find, because of their knowledge of the system, their limited English and a whole range of other factors, that going to MARA is not the best redress for their problem.

**Senator COONEY**—How close is the system at the moment to one that is based on capriciousness? By that I mean there seems to be a whole range of gates that an applicant has to get through and each of those gates can be good or bad, and if the court has gone there is no means of correcting that system, so that you might get people coming in who should not be coming in and people locked out who should not be locked out. Do you have any thoughts on the impression you have as to how the system is run?

**Mr Manne**—It is a very broad question.

**Senator COONEY**—Yes, it is. That is why I asked you. Don't answer the question now. If you want to answer it, answer it when you are giving your written submission. If you do not want to answer it, just leave it off.

**Mr Manne**—I can give you a brief answer. If we are getting situations like the cases that we have referred to—that is, Miah's case and the one involving the Iranian asylum-seeker—coming to courts, my submission would be that regrettably, and depressingly so, these are just not the only examples by any stretch. It is with depressing regularity that the codes of procedure at both levels—the primary and the review levels—are not complied with. Indeed, of the compliance matters some only address some of the natural justice issues anyway.

**Senator COONEY**—Just as a last comment, I was asking that partly because we have been dealing with regional forest agreements. You might think those have absolutely nothing to do with this, but they have. The same sort of complaint was made there, that people might complain about the agreements but a further complaint is that they are not complied with in any event. You find the same sort of thing in this area, from what you are saying.

**Mr Manne**—One example that I would like to bring to the committee's attention briefly is one that is not in our submission but that we find is very common. A question will be asked of an applicant, generally through an interpreter, because most of the people we are talking about require an interpreter, and the opportunity to address the question is often curtailed by interruption by the person asking the question. That is one problem. The person never gets to actually have the full answer provided.

The other problem is that quite often decision makers will ask more than one question in the same question. Whether that is properly interpreted and split up into various questions is in many cases highly unlikely, I would say, but the problem is that the answer that comes back may only be an answer to one of those questions. These are not small matters because they can actually result in extremely difficult questions on credibility. Someone may be seen to be trying to avoid a question or not properly answering it.

**Senator COONEY**—Our chair always pulls us into order when we interrupt, and properly so too.

**CHAIR**—Thank you, Senator Cooney. Mr Manne, in relation to your comments on section 48, if this legislative proposition does have the effect that you are concerned about, the solution that you put in 3.1.15 is to 'proscribe all offshore visa classes for the purposes of section 48(1) of the act'. Could you take the committee through what you intend to suggest there?

**Mr Manne**—In effect, the exception to section 48 at the moment is in relation to prescribed classes. Put simply, what we would say is that one mechanism of avoiding the consequence that we are talking about would be to include those as prescribed classes and therefore an exception to the rule. Does that make sense?

**CHAIR**—Yes.

**Mr Manne**—The way we propose to use it would be one technical way of avoiding what we see as an undesirable and possibly unforeseen consequence.

**CHAIR**—At 2.3.2 you say, in relation to the application of the section 474 privative clause:

... it is an attempt to make lawful actions which would otherwise be considered unlawful.

Are you really saying that the EM is saying is that the codes really do not have to be observed because everything is protected by this?

**Mr Manne**—I am saying two things. I am saying that if one is to take at all seriously the common law rules of natural justice and the flexibility with which they should be construed and applied, and then you compare them with the codes of procedure, what you are doing is excluding certain fundamental grounds like the giving of adverse country information to someone for comment. You are excluding that, and in that sense—the adverse information not being provided to the applicant—you are in effect allowing an act which would be unlawful in accordance with the common law rules of natural justice.

**CHAIR**—Which the High Court has said in *Miah*?

**Mr Manne**—Yes. You are allowing that to become lawful conduct if you allow the codes of procedure to be an exhaustive expression of the laws of natural justice. The second point that flows from that—

**CHAIR**—And you can make that claim legislatively without having to back it up, can't you?

**Mr Manne**—In what way?

**CHAIR**—You can say that this is an exhaustive depiction of the rules of natural justice without having to do anything other than say that.

**Mr Manne**—Yes, that is exactly what the Migration Legislation Amendment (Procedural Fairness) Bill 2002 seeks to do. That is my understanding of it; you can do that. In some respects you are therefore making unlawful only those matters in which you set out the rules of natural justice in the code and whereby they have not been complied with. But the second point in relation to the unlawfulness is that if you immunise non-compliance with those limited grounds that are codified then you are, in effect, making lawful that which would otherwise be unlawful in the Miah sense.

**CHAIR**—And they are immunised by item 8, which says:

The amendments made by items 1 to 6 are not to be taken to limit the scope or operation of section 474 of the *Migration Act 1958* in relation to anything done, or omitted to be done, in relation to any matter dealt with in any provision that is taken to be an exhaustive statement of the requirements of the natural justice hearing rule by a section of that Act that is inserted by one of those items.

**Mr Manne**—Precisely. But also if we go to page 2, paragraph 6 of the explanatory memorandum, it says:

It is also intended that the privative clause should protect from invalidity anything done or omitted to be done in relation to any matter dealt with in any provision taken to be an exhaustive statement of the natural justice hearing rule.

So it seems to make it pretty clear.

**CHAIR**—Unless, of course, the act falls within the Hickman grounds for invalidity.

**Mr Manne**—Precisely, but only by virtue of the fact that there has been, correctly we would say, an acceptance that Hickman preserves certain grounds that just cannot be ousted.

**CHAIR**—Mr Manne, thank you for your assistance to the committee.

**Mr Manne**—May I raise two very brief matters? They relate to what is not contained in Migration Legislation Amendment Bill (No. 1) 2002. As a result of the border protection legislation which was rushed through parliament in great haste last year, there are at least two matters—two extremely serious glitches—in those provisions, which one would have thought, with the introduction of this bill, would have been dealt with. The first one is in relation to the question of direct flight. That is, people who directly come to those places which have been excised from the migration zone, namely the situation of Sri Lankans who have come directly from Sri Lanka by boat to those excised offshore places since the introduction of the legislation.

The second issue is in relation to subclasses 200, 202 and 204, which are the offshore humanitarian visa categories, which now have inserted—pursuant to legislation introduced in September—safe third country clauses, which effectively bar someone who is in a third country from being eligible for one of those visas if they could have sought and obtained effective protection from the country they are in or from the officers of the United Nations in

that country. It is clear that in practical terms one of the main ways in which people do avail themselves of those visas is when they go to the United Nations in one of those countries. In effect, we are looking at an amendment which could potentially bar people from access to the visa in circumstances in which they would normally avail themselves of the visa. It at least appears to be a serious glitch which requires fixing.

Going back to the first one just briefly, it seems at the moment that the act only contemplates, in relation to excised offshore places, secondary movement—that is, people who come by way of secondary movement. It is clear that the act does not contemplate people coming directly to excised offshore places. At the moment, it seems that the only provision in the act is to provide them—if the minister determines that they are eligible—with a 447 visa, which is a secondary movement visa. There are also serious questions in relation to excising a place from which people come directly. Clearly, there are more general issues, in our submission, which ought to be fixed.

**CHAIR**—Thank you very much, as I said, for your assistance to the committee today. We are very grateful, both for your written submission and for your presentation here today. It has all assisted the committee in its deliberations.

[12.23 p.m.]

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

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

**CHAIR**—Departmental officers should note that they will not be asked to give opinions on matters of policy or reasons for policy decisions and, if necessary, will be given reasonable opportunity to refer questions to superior officers or to the minister. Officers are also reminded of the *Government guidelines for official witnesses before parliamentary committees and related matters*, published by the Department of the Prime Minister and Cabinet. I invite you to make a short opening statement if you wish to, Mr Storer, and at the conclusion of that the committee will direct questions to you.

**Mr Storer**—I do not think we need to, Senator. There was an earlier briefing. We can, if you want us to; it is up to you. We are quite happy to include it in the record.

**CHAIR**—So you are happy for the *Hansard* of the previous briefing to be included as part of this record?

**Mr Storer**—Yes.

**CHAIR**—I think that is possible. We will clarify that. I will start with some of the submissions that we have received and evidence received today. Has the department had a chance to look at any or all of those submissions?

**Mr Storer**—I personally have not but I think Mr Walker has had the chance to look at a couple of them.

**CHAIR**—We received the submission from the Law Council only during the proceedings today—which makes it difficult to consider in this context—so I understand that completely. The International Commission of Jurists raised a question on the propositions for section 51A of the bill in relation to section 494D of the current act which permits the minister to provide written notice of hearings and so on to the applicant's authorised recipient, not necessarily to the applicant. I think we have discussed previously that often that is difficult because of movement of the applicant—difficulty of location and things like that. They make the point, though, that with this amendment applicants will be further disadvantaged—in the view of the ICJ—and that it may be appropriate to include an amendment to provide written notice to the authorised recipient and to the applicant at last known address. Does the department have a view on that?

**Mr Walker**—It is probably fair to say that, in our view, the Commission of Jurists are examining something that is really not essentially part of this bill. It is part of the consequences of section 494D and the deemed notification. One of the reasons why the provisions of sections 494A through to 494D came about was some concerns about uncertainties of who in fact should or should not be notified. We did have a series of Federal Court decisions where the authorised recipient or the solicitor had in fact been notified but the applicant had not, and the Federal Court found that there had not been deemed notification under the regulations. Similarly, we have had situations where in fact an applicant has been notified but their authorised recipient or agent or lawyer has not been notified, and that was found not to be adequate notification either. So it was provision that was put in some time ago

to deal with those specific circumstances where, depending on the particular case, we would be caught in a bind as to whom to notify.

**CHAIR**—If you notify both then there is no bind.

**Mr Walker**—The problem is that you double the expense, essentially, of postage and so forth.

**CHAIR**—I will give you the 45c if that helps, Mr Walker.

**Mr Walker**—When you multiply it by the number of applicants we have, it is quite a considerable cost.

**CHAIR**—That is an interesting reason. I think the point the ICJ are making is that the new subsection 51A(2) is making it clear that sections 494A to 494D are now going to be covered by the so-called exhaustive statement of the requirements of the natural justice hearing rule in relation to subdivision AB of the code of procedure and that applicants may be further disadvantaged in this process. If we do cross t's and dot i's then we minimise that problem.

**Mr Walker**—Our view is that these provisions apply anyway and that, if you do follow the provisions and meet the requirements for notification there, you actually do discharge your obligations to adequately notify the particular person or their authorised representative.

**CHAIR**—And you save 45c.

**Senator LUDWIG**—Don't you charge a filing fee in any event?

**Mr Walker**—There is an application fee for the application.

**Senator LUDWIG**—What is that supposed to cover?

**Mr Walker**—The processing of the application.

**Senator LUDWIG**—But not the postage?

**Mr Walker**—It would cover the postage to one person.

**Senator LUDWIG**—I think I have made my point.

**CHAIR**—What is the filing fee?

**Mr Walker**—It depends on the visa application.

**CHAIR**—The ICJ make a number of suggestions in their submission in relation to amendments. We probably do not have time to go through them one by one today, but do you accept as possible any of those suggested amendments?

**Mr Walker**—I have not looked at them in a great deal of detail, so I would not be able to comment on them.

**CHAIR**—Would you do that on notice, Mr Walker?

**Mr Walker**—Yes. I can make a couple of observations about comments that have been made. Under amendment (6), 'Insertions relating to review', on page 3 of the ICJ submission, there is a reference to section 416 dealing with applications that are remitted to the tribunal from the Federal Court. That is incorrect. An application that is remitted from the Federal Court to the tribunal is the initial application. It is not a repeat application for review. Section 416 does not actually apply in those circumstances.

**Senator LUDWIG**—Is that a de novo application?

**Mr Walker**—Yes, it is treated as a de novo application because it is the original application going back for reconsideration. It is not a new review application. Similarly, I would make an observation about amendment (1) to the Migration Legislation Amendment Bill (No. 1). I do not think that we would agree to the need for any change in relation to the circumstances that are mentioned there. Where a child is born to a person who does not hold a substantive visa and who has not been immigration cleared, should that person apply for and be granted a substantive visa, we would also have to examine whether or not the child was entitled to a visa at that time.

**CHAIR**—So that would happen in the natural course of events?

**Mr Walker**—Yes. But if you are talking about a situation where a person who bypasses immigration clearance is granted a substantive visa and then a child is born to that person, the provision would cover them, because, on the wording of section 172, they are immigration cleared upon being granted a substantive visa.

**Senator BARTLETT**—If they have already applied—like a protection visa when people are in detention—and then a child is born before it is determined, would the child be attached to that application?

**Mr Walker**—The child would be attached to the application, but they would not be immigration cleared until such time as a protection visa is granted. They are attached to the application.

**CHAIR**—Thank you. On another issue, you heard evidence from Mr Manne, from the Refugee and Immigration Legal Centre, particularly in relation to section 48 and the amendments thereto. It is a matter which has been raised with us today by other witnesses and in submissions, and it is not referred to in the explanatory memorandum: what happens to people who find themselves in the situation raised by Mr Manne? I think most of us would have, in our constituency work, encountered people who have been in this position. Is it the intent of the legislation to prevent somebody doing what I think is called, in the words of the Law Institute of Victoria, the ‘Auckland shuffle’?

**Mr Walker**—I do not think that is the intention.

**CHAIR**—Is that the result?

**Mr Walker**—I do not believe it is the result. I can appreciate where that view may arise. Basically, it is intended to cover circumstances where the person leaves the country, then comes back and, on their return, attempts to make an application, and they use their departure and return to Australia to get around the making of an onshore application.

In effect the situation is while they are offshore they would be entitled to make an application for a new visa that is offshore. There is nothing in this provision, unlike some of the other provisions, in different circumstances, that says that the making of that application is invalid and is to be ignored. There is nothing that is explicit within section 48 that says that, if somebody goes offshore and makes an application offshore for a visa class to which they are entitled to apply, we are to treat that as invalid; there is nothing in the legislation.

**CHAIR**—I appreciate you clarifying that, Mr Walker, because it has been raised in some detail in a number of submissions. If it is a misunderstanding, I am not sure how it came about. To put this explicitly: if a person on a bridging visa leaves an Australian city, goes to Auckland, makes an offshore application from Auckland and returns to Australia, that process is not precluded by this amendment in relation to section 48?

**Mr Walker**—No—that is what I am saying, because there isn't anything here that says that we are to treat that application as—

**Mr Storer**—It is very much that, over the last year, there has been a growth in the number of people on bridging visa B. Senator Ludwig used the term 'shopping around'; I would not quite use that. But there have been well over 120 in the last year—just going down to the Rocks here—who might have come on a tourist visa or something else and who have used the lack of this clarity that we are trying to provide to apply for another visa when they come back into Australia.

**CHAIR**—That is not an issue which has been raised substantially in the submissions. In relation to the codes of procedure, so described, and the view put by most lawyers that the natural justice 'rules', the concepts of procedural fairness, require the inclusion of things like the hearing rule, the bias rule, the rule that—I will do it in English, not Latin—no-one should be the judge in their own case and so on, are those rules included in the codes of procedure?

**Mr Storer**—If I can just go back to the purpose of this—

**CHAIR**—You could answer my question as well, Mr Storer.

**Mr Storer**—I will answer the question. The parliament has already passed codes of procedure a number of times. There is no doubt the decision being referred to, *Miah*, was a bad decision of a decision maker. With regard to what the High Court was saying, though, in relation to how you then provide codes of procedure, whatever you want to call them—and I think Senator Cooney said this last time—we are trying to treat people fairly without going into terms, which can be interpreted in different ways, like natural justice hearing rules, procedural fairness and so on. In relation to what we were attempting to do here—and it happened before the privative clause was passed by parliament last year, as you will recall—the High Court in this particular decision said, 'Yes, we can see what you have tried to do in terms of that, Parliament, but we think you ought to do it exhaustively.' That is all this procedural fairness bill is trying to do—to do that exhaustively. One submission I did see was from the Bar Association, Bret Walker's association, which I think spelt it out better than we did. He commended the government department for trying to do what the High Court suggested be done, as soon as we were able to.

Your question was: can you, I presume, codify every single thing that could be loosely classified in how you go about treating people fairly? I am not sure about that. But we have attempted to at least set the frameworks in the codification as best we can. In the department we have a whole series of instructions that go down to our primary decision makers that say, 'Here's a framework that parliament's asking for, about how do we treat people fairly?' We build upon that in our instructions for decision makers, and so on. Every so often, of course, someone does not follow that. This is a longwinded way of answering, but I am trying to get to the intent of it.

**CHAIR**—I think I recognise and understand the intent. Let us take just one; let us just take the question of the hearing. Let us just talk about the requirement to, as the Law Institute of Victoria said, hear both sides of the story, including giving the subject of any decision details of any adverse information and a reasonable opportunity to respond to that information. So my first question would be: is the hearing rule incorporated in the codes of procedure?

**Mr Storer**—Yes.

**CHAIR**—Is that the case when the codes say that the applicant is only able to receive adverse information specifically pertinent to the applicant and not other adverse information,

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which in this case may include country information and which, Mr Storer, you have just acknowledged has gone to the root of a series of bad decisions which I referred to in submissions here? Is the hearing rule really covered in the codes of procedure?

**Mr Storer**—Mr Walker has it in front of him and he will deal with the details.

**Mr Walker**—Part of the problem is precisely what is meant by the hearing rule. There are arguments at times that the hearing rule is actually a face-to-face appearance before a decision maker. It can vary. In fact, that was an issue that was challenged several years ago—as to precisely whether a departmental delegate was required to interview an individual. I have forgotten whether it was the Federal Court or the High Court which said that no, the rules of natural justice required a hearing but it depended on the circumstances of the case as to whether the hearing was done on the papers and through written submissions or orally. That can lead to some uncertainty—for example, for an illiterate person, doing an oral hearing would be the sort of thing you would expect; but, if that person has a representative who can articulate their case in writing and respond, you may well be able to do it in writing.

What the codes within the act are attempting to do is set out what is fair and reasonable. There are requirements such as section 57 to disclose relevant information that would be the reason, or part of the reason, for refusing to grant a visa, for example, and specifically about the applicant. These are setting the basic requirements. As Mr Storer mentioned, there are guidelines that expand on those. There are circumstances in which certainly that general country information may not be required by this code.

The reason for that is that we had situations where people would run arguments that natural justice in the past, prior to this codification, required you to present every piece of information, every article and every document written about the particular country to the individual, and decision makers and tribunals could get hamstrung. The essential part is that they are actually provided with information that is relevant to their circumstances. That is the pertinent element that goes to influencing the decision, not the whole mass of information about the particular country itself. So that was the purpose behind it. As I think Miah demonstrates, you could arguably meet the code but not provide that information, and that is certainly not the intention, hence the guidelines that are provided. So this sets the minimum standard.

**CHAIR**—It sets the minimum standard?

**Mr Storer**—Yes.

**Senator COONEY**—You mean the full standard, as well—the exclusive standard?

**Mr Walker**—Yes. It sets the exclusive standard. The objective behind it is to set out clearly the requirements for a fair decision making process to give the applicant the opportunity to know the case against them and to respond and to move on with some certainty within the decision making process.

**CHAIR**—We as a committee have been presented with examples of which I am sure the department is aware—such as the Iranian example referred to by Mr Manne and other examples in the evidence and submissions—of the practice of tribunal members, who, and I quote from the Law Institute's submission:

...if they deign to invite an applicant to comment at all, might *consider it appropriate in the circumstances* to offer a sheaf of reports across the bench to applicants and ask them to comment, with little regard to the applicant's English language skills, their education level in their own language, or whether they are represented.

In the circumstances in which the committee is presented with examples such as that and experiences such as that of individuals in the Australian system, when you are excluding aspects that are broadly regarded as included in the rules of natural justice it makes it difficult for the committee to consider that they are being adequately covered.

**Mr Walker**—I think it gets down to the situation. You could have debates in particular cases—for example, handing across sheaves of paper is, I would suggest, an undesirable practice. But you have to look at the situation in the individual circumstance and—

**CHAIR**—That is right. This is all about particular cases, I agree.

**Mr Walker**—The problem is that precisely how a court is going to find in those circumstances can be very uncertain and very difficult for decision makers as such.

**CHAIR**—Okay. I have taken too much time at this point but I did not ask questions during the proceedings this morning. I do want to clarify the point I was making at the end of the evidence presented by Mr Manne. That is to say that in a time line, if you like, or a chronology, we have the rules of natural justice as they are broadly regarded to exist—whether we quibble about whether the hearing rule means A or B. We have, following on from that, the so-called codification of a procedures practice within the legislation which says that these are the rules of natural justice and this is the way we are going to follow them. We then have the High Court indicating in a particular case—and other courts in other matters—that in their view there are issues of natural justice which were not covered in the codification and so they have found in those cases for the appellants, as I understand it—in *Miah* and so on.

**Mr Walker**—In *Miah*.

**CHAIR**—In *Miah*. Then we come to this legislation today which says even if there are gaps in the codes of procedure that relate to natural justice, we are saying that they are an exhaustive codification of the rules of natural justice and that, when we insert also the operation of section 474 of the Migration Act, any actions taken under them are excluded from review unless they fall within the grounds commonly known as the Hickman grounds. Is that correct?

**Mr Walker**—That is correct.

**CHAIR**—When you are sitting on the tip of that pin which you have ended up on after you have been through that process, what actual grounds for review for departmental error, tribunal error, flagrant disregard of country information or incorrect country information—examples that we have had presented to us today—exist for individuals?

**Mr Walker**—The grounds are basically the Hickman grounds.

**CHAIR**—Which this committee has considered before.

**Mr Walker**—Yes. It is fair to say that our view is that the failure to comply with the rules of natural justice is not a ground which comes within the Hickman principles. That is certainly open to argument. It has not been conclusively settled by any court. There are some judges in the Federal Court who, while they have not actually decided a matter on that basis, have indicated that they are inclined towards that view. There are others who have quite emphatically said that any breach of the rules of natural justice is not a Hickman ground. I think the main decision that we have had in that is Justice Gyles in the case of *NAAX*. I think there is also another case, *Wang*. I cannot recall the judge in that particular case, but the judge found that a breach of a fundamental provision—

**CHAIR**—Was it *Mansfield*?

**Mr Walker**—That is correct. The judge found that a breach of a particular statutory requirement could in fact come within the Hickman grounds. So, in fact, the effect could potentially be that, if you failed to follow one of the provisions in the code set out in the act, a decision could be found to be unlawful.

**CHAIR**—I indicate that the only other area I would like followed up, if it is possible, on notice—given that we did not receive it in writing—are the issues that Mr Manne raised and described in his terms as ‘glitches’ that he thought might be included in the No. 1 bill, but were not, which he asserted flowed from the border protection legislation passed in 2001.

**Mr Walker**—There are a couple of comments we would make in relation to that. They are not the subject matter of the bill in question. My understanding, just taking it a little bit further, is that the issues that Mr Manne raised, relating to what he described as ‘glitches’, are in the regulations. If the government is going to make any change the changes would be made to the regulations.

**CHAIR**—We might seek further information from Mr Manne on that and take it from there.

**Senator LUDWIG**—I am reading from the submission of the Law Institute of Victoria, Migration Committee, annexure B, which says:

2. The Codes of Procedure laid down in the *Migration Act* fall far short of a codification of the rules of procedural fairness, and for this Bill to suggest that they are an adequate substitute is nonsense.

Do you disagree with that? Do you say that they are a fulsome—

**Mr Walker**—I do not say that they are a comprehensive statement of the common law rules of natural justice. What I would say is that the procedures set out in the act have the intention of providing a legislative statutory framework for a fair decision making process and to give the applicant a fair opportunity to state their case, know the case against them and respond.

**Senator LUDWIG**—As I understand it—and correct me if I am wrong—what you are effectively now saying to me is that you disagree with what the Law Institute of Victoria says, but your disagreement is not that strong in the sense that you say that it is not a complete codification and that it becomes a framework—which, in my mind, is not a complete building; it is a ladder or, if you use the American construction, it certainly does not have cladding on it. I am wondering what cladding is missing? You might be able to put your finger on it closer than we can. I would like to know—and I suspect the committee might also like to know—what areas you have left out.

**Mr Walker**—It is very difficult to comprehensively describe what we have left out, but I can give you an illustration of what occurred at the particular time, prior to the codes being developed in 1992. In one particular case, the Federal Court decided that the migration regulations were so complex and the application process had too great degree of complexity that natural justice required that we actually have comprehensive statements of the precise requirements for making an application in a particular situation. We were required to produce reams of explanatory material to explain the law. That was something the government at the time was disturbed about. The principle is that you take the law as it is written and get your advice accordingly—bearing in mind that we have a duty of care to make sure that any material we produce is accurate.

**Mr Storer**—What we are calling the ‘codes of procedure’ here were built upon in 1992 but they have been developed at different stages at different times. For example, the codes of

procedure—and I think this concerned the Migration Review Tribunal—were added later in the process. With all the difficulties and complexities involved in migration legislation that we are all grappling with, there was an attempt to try—as Mr Walker said—to get some common understanding between the different parties of what a fair process might look like. That was the attempt. That is a bit of a background. So it has been built on at different stages. I have not been involved in all the stages, obviously, but at each stage parliament and parliamentarians have grappled with these issues and discussed the legislation at different times as it has been going along.

**Senator LUDWIG**—At 2.1.4 of the submission by the Refugee and Immigration Legal Centre, their argument is an extension of the argument that is being presented to you by the chair, I think. At 2.1.4, they argue:

... section 474 privative clause serves to preclude such grounds from judicial review, then the Bill is superfluous.

Do you disagree with that?

**Mr Walker**—Our view is that common law grounds of natural justice do not fall within the Hickman principles. This is an area that is not free from uncertainty. As I mentioned, no court has yet conclusively decided whether or not the common law natural justice is a ground under the Hickman principles. If it is, then arguably the bill is superfluous, but from where we are sitting, we wish to have certainty as much as possible.

**Senator LUDWIG**—Is the reason why you wish to have certainty motivated by what the Law Institute of Victoria Migration Committee state in their submission, in annexure B—and I quote:

The Bill also straddles an issue that is before the High Court at the moment in a major class action. As such it comes close to being a contempt of the High Court.

Is that the issue you are trying to insulate yourself against?

**Mr Walker**—No, we are not.

**Mr Storer**—I can see where people are coming from, but I would like to get on the record that the reason this bill was drawn up was as a reaction to the High Court, in *Miah*, at the time. I sent around some advice—and I am happy to table it—to our decision makers about the implications of the *Miah* decision and why it was abandoned, and it covers some of the issues Mr Walker talks about here. We do want to make fair decisions as a department, as decision makers, and we want people to have fair opportunities. It was based upon, as I said, this evolving nature of trying to come up with some sort of a framework, as we call it, to give people a fair opportunity to put their case—the hearing rule, if you want to put it in those terms—before decision makers at all levels.

This was a response to the *Miah* decision only, and it happened before the privative clause was debated in parliament. It was very much in line—and I think the New South Wales Bar Association said it—with trying to work a bit more constructively with the courts. At the time, we were trying to work in that sense. As for why the bill was drafted, it was drafted in reaction to the *Miah* decision. I am happy to table our advice on that, if that is helpful.

**CHAIR**—That would be helpful. Thank you very much, Mr Storer.

**Senator LUDWIG**—We are running out of time, unfortunately. Perhaps it would be easier to take this on notice, but I take you to the explanatory memorandum to the Migration Legislation Amendment Bill (No. 1) 2002. There was a matter raised by Mary Crock—

**CHAIR**—And the ICJ.

**Senator LUDWIG**—and by the International Commission of Jurists, in relation to page 14, item 5, at the end of section 232A. Paragraph 76 says:

76. In summary, section 232A makes it an offence to bring a group of 5 or more non-citizens into Australia if they have no lawful right to come to Australia.

The penalty for that, I am told, is 100,000—I suspect that is either dollars or penalty units.

**Mr Walker**—That would be penalty units.

**Senator LUDWIG**—Yes, I suspected that for people-smuggling.

**Mr Walker**—Yes, people-smuggling. I think it also was the offence that introduced a 20-year imprisonment for people-smuggling.

**CHAIR**—Twenty years or 2000 penalty units—yes, that is right.

**Senator LUDWIG**—It includes an absolute liability, as I understand it. You do not think that it does.

**Mr Walker**—No, I think that is strict liability.

**Senator LUDWIG**—Strict liability, I should say. What was put to us by Mary Crock, as I understand it, was that the captain of the *Tampa* would be caught by the provision.

**Mr Walker**—If he was prosecuted, he could be.

**Senator LUDWIG**—The Director of Public Prosecutions could well—

**CHAIR**—There is the DPP again!

**Mr Storer**—It depends whether he is charged.

**Mr Walker**—He has got to be charged first, Senator.

**CHAIR**—The DPP has been figuring largely in our considerations in the past few days.

**Senator LUDWIG**—And is that your intention?

**Mr Storer**—No. The intention came before the *Tampa*, but it was to stop people-smuggling activities, to stop people bringing people to Australia illegally.

**Senator LUDWIG**—Yes, but I am interested in the unintended consequences. I understand when you say that the intention is to stop people-smuggling, but I am interested in the unintended operation of some of the clauses as they read.

**Mr Walker**—If we take the *Tampa* circumstances—and I am not professing to be a criminal law expert—one of the issues there is not only the organising or facilitating the bringing or coming to Australia; it moves on to say ‘and does so recklessly’ as to whether the person or people had the lawful right to come to Australia, so there is a recklessness element in there. Obviously, factors of rescuing people and taking them off are issues which would be much more complex. This current provision has been used for people—

**CHAIR**—People smugglers?

**Mr Storer**—Yes, those who have brought people. There have been a number of prosecutions under it. I think I am right in saying that, Doug?

**Mr Walker**—That is right. The purpose behind the amendment is to maintain the provision’s effect upon the introduction of the Criminal Code.

**CHAIR**—The other issue that pertains to that section is the question of criminal intent on the part of the smuggler. The ICJ seem to have the view that the only requirement for criminal intent is imposed on the citizen having an intent to enter Australia illegally, as opposed to a requirement for the smuggler to have a criminal intent in their activities. Is that a distinction that they have drawn correctly, Mr Walker?

**Mr Walker**—I am afraid I will have to take that on notice.

**CHAIR**—That is fine. Thank you. That is on page 4 of their submission under the heading ‘Amendment 6’. We will go to questions from Senator Cooney, Senator Bartlett and Senator Scullion who, I am sure, have questions. I do realise that we are running over time. I wish to clarify one other point in relation to section 241 which carries a penalty of \$100,000 or imprisonment for 10 years or both. Dr Crock pointed out that the only requirement for knowledge is one of reasonable grounds. Yet you are importing a strict liability requirement which she regarded as legally inconsistent; that is, to have a reasonable grounds level of knowledge and make it a strict liability offence. If you do not want to comment on that now, Mr Walker, would you let us have your view on that?

**Mr Walker**—We will take that one on notice.

**Senator BARTLETT**—Could you clarify for me whether, if the procedural fairness bill is passed, that would impact on cases that are currently before the courts or only on new ones that were submitted?

**Mr Walker**—I think it would only apply to any decisions made from the particular date of proclamation.

**Senator BARTLETT**—So, if a case is already before the courts but a decision has not been brought down yet, it would need to take into account the change made here?

**Mr Walker**—No. To clarify, I am talking about administrative decisions taken after the provisions came into effect, not judicial decisions.

**Senator BARTLETT**—I understand the intention is to bring the strict liability issue which arises from the false de facto relationship component of the act back into consistency following the application of the Criminal Code, but what is the difference between making it strict liability or not doing so, in terms of the level of burden of proof?

**Mr Walker**—The issue at the moment is the way in which the provision is worded. What the prosecution will have to show is that the person who was making those arrangements knew that it was not a de facto relationship as defined by the regulations. The regulations use the term ‘to the minister’s satisfaction’, and the issue with these amendments is really that the prosecution would have to demonstrate that the individual knew what the ‘minister’s satisfaction’ was. The amendments will have the effect that the prosecution will still have to prove that the person knew that it was not a de facto relationship, and that the arrangements were being made in an attempt to make that relationship appear to be a de facto relationship for the purposes of a visa application.

**Senator BARTLETT**—As you stated in the explanatory memorandum, the definition of ‘de facto’ is complex. You are still in a situation where someone would have to prove that they did not know something was not genuine. But the definition of whether it is genuine is, as you say here, complex.

**Mr Walker**—It is complex, but the prosecution still has to prove the person’s knowledge that it was not genuine. So the onus is still on the prosecution.

**Senator BARTLETT**—The final page of the ICJ submission, amendment (3), relating to special purpose visas, suggests that there may be circumstances where a spouse of somebody—defence personnel or whatever—suggests the relationship has broken down or something. Is that a viable circumstance where a special purpose visa could be cancelled?

**Mr Walker**—Probably the starting point is the nature of the special purpose visa. It is a visa that is granted by operation of law by the fact that the person comes within a group prescribed or designated by the minister. So there is not actually any application process as such. The circumstances where the visa would cease or be an operative provision of the changes where natural justice is taken away is the minister's declaration that the visa not apply. That would be in quite exceptional circumstances. The sorts of circumstances are quite clearly where there is a threat to national security or a particular individual that is not here. So while it is possible that a spouse could come within that group of individuals that the minister's declaration covers, it is certainly not the sort of circumstance where special circumstance visas generally apply.

**Senator SCULLION**—I want to go back to amendment (6), 'Strict Liability for Persons Involved in People Smuggling'. Are you aware of the amendments to the Northern Territory legislation in regard to fine defaulting?

**Mr Walker**—No.

**Senator SCULLION**—Then perhaps it is not worthwhile going down that line. Effectively, in relation to the Indonesian fishers who are currently visiting the shores of the north, traditionally the courts imposed a fine, and that was the end of it. On default of the fine they spent some time in prison, only on the occasion of a recidivist offence. If a people smuggler were to arrive in the same circumstances, where this provision did not occur, there would be no capacity for them to be held in Australia. In fact, we would be pursuing them as fine defaulters overseas. It is very difficult to do that.

My principal concern today—and either of you can answer my concern—is that I have listened to a suite of people talk fairly articulately about the capacity for decision makers to stick to a range of protocols that have been in place. The question I am asking is not so much in a legislative sense but more in an operational sense. I think Dr Mary Crock put it pretty concisely. She went beyond saying that primary decision makers are not so much sticking to those protocols; the department has in fact conceded that it does not always follow the codes of procedures—and in defence of that they have simply said they do not have to. If we are leaning towards these protocols as some sort of an independent process to follow that takes over natural justice—and I know you tabled one document about that—what sorts of steps have you taken in an operational sense to ensure that the number of flawed decisions—not dotting an 'i' or crossing a 't'; these are substantive errors—are going from what is obviously an unacceptable level to something more acceptable, the occasional error?

**Mr Walker**—I think that we would be very disturbed to hear that there are assertions made that our decision makers do not have to follow the codes.

**Senator SCULLION**—They have certainly been made today.

**Mr Walker**—We will certainly take that back and make sure that it comes from the most senior levels. But that is not an acceptable practice. Moving on to what we actually do, we have comprehensive training courses in what we call lawful decision making for all our decision makers that spell out precisely what they are required to do under the law as it stands. They cover not only the codes of procedure but also what would be expected in the

broader natural justice requirements. There is also a series of directions, where necessary, that are made to decision makers. We also continue to have updates both of legislative change and of any court law that is applicable in those particular areas of decision making. We are certainly interested. Perhaps we can follow it up with Dr Crock in terms of specific examples that she or other people are aware of, and we will deal with them.

**CHAIR**—Do you, Mr Storer or Mr Walker, have a view on the proposition that was put to us—I think it was in response to a question from Senator Cooney; I cannot find my note on the matter—that the Department of Finance and Administration in fact makes a link between the number of cases dealt with by the tribunals and the funding that they receive?

**Mr Storer**—The tribunals?

**CHAIR**—Yes, it was in relation to tribunals.

**Mr Walker**—With regard to the funding arrangements that are dealt with, my understanding is that there is base funding for the tribunal but also funding that is determined by work level. So, yes, in that sense, the greater the workload the more resources they need to get through that workload, so there is a link.

**Mr Storer**—Just to supplement that, Senator, the links between funding are quite complex. They range into purchasing agreements along the lines that Mr Walker mentioned. We are not the experts on these purchasing agreements; we would have to get our resource management people. There are links, but the arrangements are very, very complex.

**CHAIR**—Thank you for clarifying that point which was raised in relation to the ICJ submission.

**Senator COONEY**—In Australia, what other criminal offences that bring penalties of 10 or 20 years contain elements of strict liability?

**Mr Walker**—I am afraid I would have to take that on notice, Senator.

**Senator COONEY**—There are some proposed with the terrorism act, but can you tell me any other ones that might do that?

**Mr Walker**—Not at the moment, but we will take it on notice.

**Senator COONEY**—If you look at item 6 of schedule 5—233(1)—that is a strict liability offence. Do you know why that is strict liability? A person should not take part in—and I quote:

... the bringing or coming to Australia of the relevant non-citizen ... under circumstances from which it might reasonably have been inferred that the non-citizen intended to enter Australia in contravention of this Act.

Why should somebody get 10 years because the DPP can prove that there were circumstances from which a reasonable person might infer that the non-citizen intended to enter Australia in contravention of the act while another reasonable person might have taken a different view?

**Mr Walker**—I think I will have to take that on notice and find out the details behind that.

**CHAIR**—Would you also consider taking on notice, Mr Walker, the observations made in the Amnesty International submission in relation to compliance with a number of international conventions—the Convention Relating to the Status of Refugees, the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child—and whether, in making the amendments in relation to procedural fairness, Australia would be continuing to comply with the provisions they refer to in their submission?

**Mr Walker**—Yes.

**CHAIR**—Thank you.

**Senator LUDWIG**—I thank you for the minute that you have handed up, but I also note that it is missing the copy of the Australian Government Solicitor's advice.

**Mr Storer**—Okay. I did not bring it but I will send that to you.

**CHAIR**—Thank you, Mr Storer.

**Senator LUDWIG**—It is always the case. Thank you.

**Mr Storer**—I did not mean to. I did not actually intend to table it but I thought it might be helpful.

**CHAIR**—It is very helpful.

**Senator LUDWIG**—Thank you.

**CHAIR**—I believe that concludes questions from committee members. As you know, our reporting date is 15 May, but the committee is labouring under a load of approximately 10 pieces of legislation at the moment. I know the department is also busy and always pressed. We would appreciate your assistance with returning answers to questions taken on notice as soon as possible. If there is any further information you need to seek from the committee, then, please, by all means contact the secretariat. Thank you very much, Mr Walker and Mr Storer, for your assistance with our hearing today. I thank my colleagues, the secretariat and, of course, Hansard for their assistance. I declare this meeting of the Legal and Constitutional Legislation Committee closed.

**Committee adjourned at 1.27 p.m.**