2. CONDUCT OF REVIEW

2.1 INTRODUCTION

2.1.1 The Immigration Assessment Authority (IAA) must review a fast track reviewable decision referred to it by the Minister for Immigration (the Minister) under s.473CA the *Migration Act 1958* (the Act).[1]

2.1.2 In reviewing a fast track reviewable decision, the IAA is required to pursue the objective of providing a mechanism of limited review that is efficient, quick, free of bias,[2] and consistent with its conduct of review statutory provisions.[3]

2.1.3 The IAA does not hold hearings and is required to review fast track reviewable decisions by considering the review material provided to it by the Secretary of the Department of Immigration (the Secretary) at the time the decision is referred.[4] In exceptional circumstances, the IAA may consider new information and it may also invite a person to provide, or comment on, new information at an interview or in writing.[5] The IAA may also make a decision on a fast track reviewable decision at any time after the decision has been referred to it.[6]

2.2 CONDUCT OF REVIEW

2.2.1 Under the fast track process, the IAA provides a limited form of review. The IAA's procedures are set out in Division 3 of Part 7AA of the Migration Act which, together with ss.473GA and 473GB[7], contains an exhaustive statement of the natural justice hearing rule in relation to reviews conducted by the IAA.[8]

2.2.2 Generally speaking, the IAA is required to:

- review a fast track reviewable decision based upon the review material provided to it by the Secretary at the time the decision was referred;[9]

[1] s.473CC. Unless otherwise specified, all references in this chapter to legislation are references to the *Migration Act 1958* and the Migration Regulations 1994 as now in force, and all references to the Minister include a reference to delegates exercising the Minister's powers and functions.

[2] Bias has been found to have occurred in circumstances where the IAA could have been affected by material before it, even subconsciously and where the material isn't relevant to the applicant's claims or referred to in the decision. See for example *MIBP v AMA16* [2017] FCAFC 136 (Dowsett, Griffiths and Charlesworth JJ, 30 August 2017) at [75] and [78] where the Court found apprehended bias was established in circumstances where the Secretary provided irrelevant and prejudicial material to the IAA under s.473CB, which the IAA did not refer to it its decision. The Court held a fair-minded lay observer, acting reasonably, might apprehend that the IAA may have been affected by the material, even subconsciously. By way of contrast in *AXD17 v MIBP* [2017] FCCA 2081 (Judge Driver, 9 October 2017) at [53], [56] and [57], the Court distinguished *AMA16* and held that the concern expressed in *AMA16* is far less pronounced where the applicant has an opportunity to make submissions about the information. Unlike in *AMA16,* the relevant information was required to be put before the Tribunal as such information was contained in the delegate's reasons, and therefore it was not in receipt of 'extraneous' information. The applicant was also on notice that the Tribunal was aware of his criminal convictions and had the opportunity to comment on this at the Tribunal hearing.

[3] s.473FA(1).

[4] s.473DB(1).

[5] s.473DC.

[6] s.473DB(2).

[7] ss.473GA and 473GB deal with the disclosure of certain information by the IAA which is the subject of a certificate issued by the Minister.

[8] s.473DA(1). Some guidance on the operation of s.473DA(1) can be derived from like provisions in Part 5 Division 5 and Part 7 Division 4 of the Migration Act which apply to the Migration and Refugee Division (MRD) of the Administrative Appeals Tribunal (AAT). The proper construction of those provisions, namely ss.357A and 422B, have received considerable judicial attention. See Chapter 7 of the MRD Procedural Law Guide for further details.

[9] s.473DB(1).

- only consider new information in exceptional circumstances;[10] and
- give to a referred applicant any new information that has been, or is to be, considered by the IAA under s.473DD and would be the reason or a part of the reason for affirming the decision under review.[11]

2.2.3 The IAA is not required, however, to give a referred applicant any material that was before the Minister when the Minister made the primary decision.[12]

Review on the papers

2.2.4 Except with very limited exceptions, the IAA must review a fast track reviewable decision based only upon the review material provided to it by the Secretary, without accepting or requesting new information, and without interviewing the referred applicant.[13] Subject to Part 7AA of the Migration Act, the IAA may also make a decision on a review at any time after the primary decision has been referred to it.[14]

2.2.5 The 'review material' which the Secretary is required to provide to the IAA at the same time, or as soon as reasonably practicable after, a decision has been referred to it is set out in s.473CB and includes:[15]

- a statement that sets out the findings of fact made by the primary decision maker, refers to the evidence on which those findings were based and gives the reasons for the decision;
- material the referred applicant gave the primary decision maker before the decision was made, and any other material in the Secretary's possession or control that the Secretary considers (at the time the decision is referred to the IAA) to be relevant to the review;[16]
- contact details for the applicant to receive documents.

2.2.6 The contact details to be provided are the last address for service, residential or business address, and electronic address (fax number, email address or other) the referred applicant gave the Minister for the purpose of receiving documents.[17] If the referred applicant has not given the Minister such an address, or if the Minister believes that such an address is no longer correct, the Secretary must provide an address or number (if any) that the Minister reasonably believes to be correct at the

[10] ss.473DC and 473DD.
[11] s.473DE.
[12] s.473DA(2).
[13] s.473DB(1). In *CMR16 v MIBP* [2017] FCCA 1715 (Driver J, 24 July 2017) at [20] the Court confirmed that there is no duty in Part 7AA to make enquiries to ensure the applicant's participation in the review, the IAA can make a decision without accepting or requesting new information (even where it may be reasonably easy for the IAA to obtain information about a critical fact), and can make its decision at any time after referral.
[14] s.473DB(2).
[15] s.473CB.
[16] See *MIBP v AMA16* [2017] FCAFC 136 (Dowsett, Griffiths and Charlesworth JJ, 30 August 2017) at [73]–[74] where the Court found the IAA must consider the review material provided to it under s.473CB. The Secretary provided irrelevant and prejudicial material to the IAA under s.473CB, which the IAA did not disclose to the applicant or refer to in its decision. The Court found that the Secretary must have considered the material relevant to the review, because otherwise it would not have provided them. The IAA failed to comply with its statutory obligation under s.473DD, as the decision was silent on whether the prejudicial material was relevant to the review.
[17] s.473CB(1)(d)(i) - (iii).

time the decision is referred.[18] If the referred applicant is a minor, the Secretary must provide equivalent contact details for a carer of the minor.[19]

2.3 NEW INFORMATION

2.3.1 The IAA is under no duty to get, request or accept any 'new information' whether requested to do so by a referred applicant, by any other person, or in any other circumstances.[20] Where the IAA does wish to get and consider new information, it must go through a two-step process. The first step involves a discretionary power under s.473DC to *get* new information, while the second, in s.473DD, involves determining whether the IAA can *consider* the new information, as it is prohibited from considering any new information unless the test set out in that section is first satisfied.[21]

What is new information?

2.3.2 In this process, the term 'new information' means any documents or information that were not before the Minister at the time of the primary decision and that the IAA considers may be relevant.[22] Generally speaking, 'information' is to be given its ordinary meaning, namely 'that of which one is informed' or 'knowledge communicated or received concerning some fact or circumstance'.[23]

2.3.3 Review material, as defined in s.473CB (described above), would generally fall outside the meaning of new information as it would already have been before the Minister at the time of the primary decision (unless it was received by the Minister after the primary decision).[24] Similarly, information that was before the Minister at the time of the primary decision but which he or she failed to take into account would not constitute new information. An applicant's silence or failure to provide information would not generally constitute new information.[25] While lower court authority has found that a s.473GB certificate may in some circumstances constitute new

[18] s.473CB(1)(d)(iv).
[19] s.473CB(1)(d)(v).
[20] s.473DC(2).
[21] See *BYM16 v MIBP* [2017] FCCA 2445 (Judge Smith, 20 October 2017) at [41] where the Court held that the IAA is entitled, if not obliged, to consider any new information for the purposes of determining whether s.473DD prevents it from considering that information for the purpose of making a decision in relation to a fast track reviewable decision. The prohibition in s.473DD against considering any new information does not refer to the IAA's determination of whether it is first satisfied of the matters in ss.473DD(a) or (b).
[22] s.473DC(1).
[23] *SZASX v MIMIA* [2004] FMCA 680 (Barnes FM, 18 October 2004) at [18]. 'Information' need not be contained in a written document – a photograph may suffice: *SZESF v MIMA* [2007] FCA 6 (Stone J, 12 January 2007).
[24] In *ABJ17 v MIBP* [2017] FCCA 1240 (Judge Driver, 8 June 2017) the Court considered whether a translation given to the IAA of an untranslated document that had been before the delegate was 'new information'. The Court held that the translation merely made the untranslated document that was already before the delegate comprehensible to the IAA and was not new information in and of itself: at [36]. In *CHA16 v MIBP* [2017] FCCA 2319 (Judge Howard, 15 August 2017) at [20]-[21], the Court followed the approach in *ABJ17* and held that a document in English, and another document containing the same information which may be in a foreign language, ought to be seen as one document, and that the correct date of the document is that of the document itself and not the translation. The document written in a foreign language predated the delegate's decision and had not been provided to the delegate (and the translation was dated after). The Court found no error in the IAA's finding that it was prohibited from considering it, as it not satisfied that there were exception circumstances as provided for by s.473DD(b).
[25] *ALZ16 v MIBP* [2017] FCCA 2631 (Judge Riethmuller, 31 October 2017) at [27]–[28] where the Court held the applicant's failure to provide evidence was conduct of the applicant and not fresh information or new information within the meaning of s.473CD. As it was not new information, the Court rejected the applicant's argument that the IAA should not have taken it into account unless it considered it against s.473DD.

information,[26] the Federal Court in *MIBP v BBS16* [2017] FCAFC 176 held that the procedural requirements in relation to a s.473GB certificate are governed by that provision and not the provisions of Division 3 of Part 7 of the Act, which includes the provisions relating to new information.[27] Therefore, the IAA does not appear to need to put the certificate to the applicant even if that material was not before the delegate when the decision was made.

2.3.4 In some cases, a distinction may also be drawn between material that is new information or a submission. Although the term new information is very broad in meaning, an applicant's evidence or statement to the IAA that only addresses existing material before the Minister may sometimes be more accurately characterised as a submission and therefore not subject to the new information restrictions. This is because an applicant's statement to the IAA about how the Minister misunderstood their claims, for example, does not appear to be introducing a document or information that is new, but rather is providing comment on a document or information that was already before the Minister.[28]

2.3.5 Submissions about the IAA's procedures or the limits of its jurisdiction would also not be 'new information'.[29]

2.3.6 This distinction between new information and submissions is also reflected in the IAA's Practice Direction for Applicants, Representatives and Authorised Recipients. While it notes that new information can only be considered in very limited circumstances, it also expressly provides for an applicant to give the IAA a written statement on why he or she disagrees with the decision of the Department and any claim or matter that was presented to the Department but was overlooked.

2.3.7 To the extent that a submission also contains new information, that aspect of the submission can not be considered unless the requirements in s.473DD are met (see below for discussion).

Getting new information

2.3.8 The IAA may exercise its discretionary power to *get* any documents or information (new information) that was not before the Minister at the time of the primary decision and that the IAA considers may be relevant.[30] This general power allows the IAA to

[26] The Court in *BAT16 v MIBP* [2017] FCCA 1135 (Judge Smith, 29 September 2017) at [42]-[43] found that a s.473GB certificate could potentially be new information where the non-disclosure certificate was issued after the delegate's decision.
[27] *MIBP v BBS16* [2017] FCAFC 176 (Kenny, Tracey, Griffiths JJ, 10 November 2017) at [100].
[28] See for example *BWF16 v MIBP* [2017] FCCA 1080 (Judge Street, 23 May 2017) where the IAA treated a submission discussing information which was before the delegate and responding to the delegate's decision as not constituting new information for the purposes of s.473DC(1) and the Court found no error in that approach: at [10] and [36]. Although an alternative view of s.473DB(1) is that it precludes the IAA from considering submissions because the review must be conducted only on the referred material provided and any new information if one of the limited exceptions apply, this has not been the subject of direct judicial consideration and the better view appears to be that Part 7AA does not prevent the IAA from considering submissions to the extent they do not contain new information.
[29] See for example, *MIBP v AMA16* [2017] FCAFC 136 (Dowsett, Griffiths and Charlesworth JJ, 30 August 2017) at [101] where the Court held that had the IAA invited submissions about whether prejudicial material provided by the Secretary was relevant to the review, this submission would not constitute 'new information', as s.473DC is concerned with information bearing on the substantive merits of the decision.
[30] s.473DC(1). See *CDZ16 v MIBP* [2017] FCA 967 (Logan J, 18 August 2017) at [10] where the Court held that s.473DC(1) consigns the subject of relevance to the IAA's evaluative judgment and then only to the extent the IAA considers that the info concerned 'may', not 'must', be relevant. It is enough that a conclusion is reasonably open to the IAA that the information may, or may not, be relevant. The IAA referred to two news articles that the applicant provided, and found that they were not relevant

get information of its own motion (e.g. country information), but it might also receive information from other sources (e.g. unsolicited information from a third party). Regardless of the means by which the information reaches the IAA, there must still be exceptional circumstances before the IAA can consider it. The IAA's broad discretion to get new information must be understood in light of restrictions on considering any information that has been obtained (see below for discussion). It would be futile for the IAA to get new information if it was not information that the IAA could consider.

2.3.9 The IAA's power to get information also includes (but is not limited to) the IAA inviting a person to give new information.[31] Such an invitation may be given orally or in writing, and may be an invitation to give new information in writing or at an interview.

2.3.10 While the IAA is under no statutory duty to get, request or accept new information,[32] it remains a discretionary power that must be exercised reasonably having regard to the IAA's statutory framework and all the circumstances of each case. Examples of where the IAA has acted unreasonably by not considering the exercise of this power include where it has decided the review on a different basis from the delegate without first providing the applicant with an opportunity to be heard on that new issue.[33]

2.3.11 Where a referred applicant is invited to give new information, specific procedures, prescribed periods and consequences apply to that invitation. These are discussed below.

2.3.12 Where a person other than a referred applicant is invited to give new information, there are no statutory procedures, consequences or prescribed periods that apply. However, the IAA should ensure that it specifies with sufficient detail the new information it requires as well as the manner in which that new information is to be provided – for example, that the information should be provided in writing or at an interview (as relevant). To facilitate a timely response, the IAA's invitation should also specify a time period within which the information requested should be provided. In the absence of a prescribed period for this purpose, a reasonable period should be allowed. A reasonable period could be the same period as the prescribed period for a referred applicant to give new information.

to his claims. As the IAA found the news articles were not relevant and therefore did not fall within 'new information' under s.473DC(1), it was not necessary to consider whether it was prohibited from considering them by s.473DD.

[31] s.473DC(3).

[32] s.473DC(2). See also *BWF16 v MIBP* [2017] FCCA 1080 (Judge Street, 23 May 2017) at [37] in which the Court held that it was not unreasonable for the IAA to not expressly consider exercising its discretion under s.473DC to get new information by inviting the applicant to address an issue that was the subject of express findings by the delegate. The applicant also did not make any request for the IAA to exercise its discretion under s.473DC. See also *CMR16 v MIBP* [2017] FCCA 1715 (Judge Driver, 24 July 2017) at [20] in which the Court found no error in circumstances where the IAA failed to invite the applicant to a hearing or did not take steps to obtain new information about the existence of an LTTE official, which the applicant argued was a critical aspect of his claim. However see *BYM16 v MIBP* [2017] FCCA 2445 (Judge Smith, 20 October 2017) at [41] where the Court held that the IAA is entitled, if not obliged, to consider whether it is satisfied of the matters in s.473DD in relation to any new information it gets.

[33] In *DZU16 v MIBP* [2017] FCCA 851 (Judge Driver, 22 June 2017) at [120]-[124] the Court found that it was unreasonable for the IAA not to consider inviting the applicant to give new information about a new issue that would be dispositive to the review, in this case that the applicant could relocate to a city different from the one considered by the delegate. *DZU16* was followed in *CRY16 v MIBP* [2017] FCCA 1549 (Judge Riethmuller, 6 July 2017) at [21] which held that it was unreasonable not to afford the applicant an opportunity to be heard on an issue that was not considered by the delegate (relocation). The Court found that the options open to the IAA included exercising its discretion under ss.473DC and 473DD to get and consider new information from the applicant and that it had erred by failing to do so.

Considering new information

2.3.13 While s.473DC provides the IAA with a discretionary power to *get* new information, s.473DD provides that the IAA must not *consider* any new information[34] unless:

- it is satisfied that there are exceptional circumstances to justify considering it;[35] and
- in relation to any new information that is given, or proposed to be given to the IAA by the referred applicant - the new information was not, and could not have been provided to the Minister before the primary decision was made, or is credible personal information which was not previously known and, had it been known, may have affected the consideration of the referred applicant's claims.[36]

2.3.14 According to the Explanatory Memorandum, the purpose of these requirements is to reinforce the policy position that fast track applicants must be forthcoming with all their claims and provide all available information to the Minister before the primary decision.[37] Where the IAA has not considered the new information due to s.473DD, there is no obligation to communicate to the applicant its views in relation to s.473DD before making its decision on the review.[38]

2.3.15 It is also necessary to have regard to both limbs of s.473DD before deciding not to consider new information, despite a plain reading of the provision suggesting if *either* paragraph (a) or (b) is not met, it would be unnecessary to also consider the other.[39] Although there may often be a degree of overlap between the considerations, it should still be clear from the decision record that independent consideration has been given to sub-paragraphs (a), (b)(i) and (b)(ii) before it was concluded that the material could not be considered. These steps are discussed in more detail immediately below.

[34] In *CDZ16 v MIBP* [2017] FCA 967 (Logan J, 18 August 2017) at [8], the Court held that 'new information' in s.473DD has the meaning specified in s.473DC(1), such that if the IAA does not consider that information may be relevant, it is not 'new information' and s.473DD will not be engaged.
[35] s.473DD(a).
[36] s.473DD(b)(i) and (ii).
[37] The second supplementary Explanatory Memorandum to the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 at p.6, paragraph 31.
[38] *ANO16 v MIBP* [2017] FCCA 2633 (Judge Riethmuller, 31 October 2017) at [39] where the Court held that ss.473DC and 473DD, in the context of Part 7AA, do not, give rise to a requirement to foreshadow to an applicant that information or submissions may not be new information or may not be considered as a result of s.473DD.
[39] In *BVZ16 v MIBP* [2017] FCCA 775 (Judge Cameron, 3 March 2017) the Court found it would be erroneous to consider s.473DD(a) only, because s.473DD(b) refers to matters which the IAA is obliged to consider when dealing with 'new information'. This reasoning was upheld on appeal in *BVZ16 v MIBP* [2017] FCA 958 (White J, 18 August 2017). In *MIBP v BBS16* [2017] FCAFC 176 (Kenny, Tracey and Griffiths JJ, 10 November 2017) at [104], the Federal Court held that 'exceptional circumstances' is to be given a broad meaning. It found the IAA erred by finding there were no exceptional circumstances to justify considering the new information without addressing other matters which were potentially relevant to its consideration. However, the Court did not explicitly consider whether the IAA is required to consider both limbs of s.473DD. See also *CQW17 v MIBP* [20187] FCCA 2378 (Judge Cameron, 29 September 2017) at [17] and [19] in which the Court considered it was bound to follow *BVZ16 v MIBP*, in circumstances where the IAA only considered s.473DD(b). The Court held that it appears to be implicit in s.473DD(a) that the IAA must consider whether new information placed before it is of a quality and significance that its availability, and possibly its existence, amounts to a circumstance which is exceptional for s.473DD(a), even where those matters are explicitly considered in s.473DD(b). However in *CUP16 v MIBP* [2017] FCCA 2438 (Judge Smith, 20 October 2017) at [25], the Court did not refer to the conflicting authority in *BVZ16* in finding there was no jurisdictional error where the IAA only considered s.473DD(a). See also *CSR16 v MIBP* [2017] FCCA 2222 (Judge Wilson, 13 September 2017) at [63], where the Court did not refer to the conflicting authority in *BVZ16* in finding that held it was not a jurisdictional error for the IAA to not expressly consider s.473DD(a).

Exceptional circumstances to justify consideration

2.3.16 Before *considering* any new information, the IAA must be satisfied that there are exceptional circumstances to justify its consideration.[40] The relevance of new information to the applicant's claims is a relevant consideration in assessing whether there are 'exceptional circumstances' to receive 'new information'.[41] While the term 'exceptional circumstances' is not defined in the Migration Act and should be given its ordinary English meaning,[42] the Explanatory Memorandum that introduced this provision contained the following examples:

- a material change in the referred applicant's circumstances, including a factual event such as significant and rapidly deteriorating conditions emerging in a referred applicant's country of claimed persecution (e.g. a change in the political or security landscape) which occurred after the primary decision. [43]

2.3.17 Consideration should also be given to whether a change in the dispositive issue(s) between the Minister's decision and the IAA's decision are exceptional circumstances that justify new information being considered. This might be the case, for example, where the issues have changed but the applicant has not been provided with an effective opportunity to address the new issues.[44]

2.3.18 The Explanatory Memorandum also lists examples of circumstances that would not justify consideration of the information:

- information that was available to the applicant at the primary stage and was not presented for unsatisfactory reasons;
- a general misunderstanding or lack of awareness of Australia's processes and procedures.

2.3.19 While such examples provide a useful guide, it is ultimately a question of fact for the decision maker whether circumstances are exceptional having regard to all the circumstances of the case.[45]

New information not provided earlier or credible personal information

2.3.20 If the new information is given or proposed to be given by a referred applicant, the IAA must also be satisfied that it:

[40] s.473DD(a).
[41] See *AVN17 v MIBP* [2017] FCCA 2524 (Judge Street, 18 October 2017) at [6] and [19] where the Court held that it was open to the IAA to take into account the relevance of new information to the applicant's protection claims when determining whether there were exceptional circumstances to receive that new information.
[42] In *BNN16 v MIBP* [2017] FCCA 145 (Judge Driver, 30 January 2017) the Court held that what are exceptional circumstances in a given case, and whether certain facts as found the IAA fall within the phrase, there being different conclusions reasonably open to the IAA, are questions of fact for it, since the statutory phrase is a simple, non-technical one that is used in its ordinary English sense. The IAA did not consider new information the applicant was providing about a claimed incident that occurred after his interview with the delegate was an exceptional circumstance for a variety of reasons including that the delegate had explained to the applicant he may not have another chance to present information about his claims and he had been represented by a migration agent throughout the process and the Court found no error with this determination.
[43] Explanatory Memorandum to the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 at p.134, paragraph 915.
[44] For example, if the Minister found there was no real chance of harm but the IAA's decision would turn upon relocation: *DZU16 v MIBP* [2017] FCCA 851 (Driver J, 22 June 2017) at [120] – [124]; *CRY16 v MIBP* [2017] FCCA 1549 (Judge Riethmuller, 6 July 2017) at [18]-[21].
[45] In terms of what constitutes all the circumstances of the case, see for example *CJH16 v MIBP* [2017] FCCA 2375 (Judge Smith, 13 October 2017) at [27] where the Court held there is no obligation on the IAA to 'excavate some possible reason' in the material that might satisfy it that there are exceptional circumstances to consider new information, and that it is extremely unlikely that there is any obligation on the IAA to go beyond what is expressly put before it.

- was not, and could not have been, provided to the Minister before the primary decision was made; or

- is credible personal information which was not previously known and, had it been known, may have affected the consideration of the referred applicant's claims.[46]

2.3.21 There is a clear distinction between the new information that s.473DD(b)(i) and (ii) are each concerned with. While (b)(i) requires a factual enquiry as to whether or not the new information could have been presented to the Minister, (b)(ii) requires an evaluation of the significance of the new information in the context of the applicant's claims more generally.[47]

2.3.22 The reference to 'information…not previous known' in s.473DD(b)(ii) also means information not previously known to the original decision maker. In this sense, information that was previously known to an applicant but not provided to the original decision maker does not appear caught by this provision.[48]

2.3.23 It is a question of fact whether new information was given, or proposed to be given, to the IAA by a referred applicant or another person. This does not appear to require the referred applicant to personally give the new information however, and the principles of agency would suggest that new information given or proposed to be given to the IAA by a person on the referred applicant's authority or behalf would also engage s.473DD(b).[49]

New information in response to an invitation to comment on adverse new information

2.3.24 It is unclear how the restrictions on considering new information are intended to operate where new information is given in response to an invitation to comment on adverse new information (see below). On the one hand, it would seem onerous to require the steps described above to be taken before considering such comments, in circumstances where the IAA is under a duty to invite the applicant to give the comments. On the other hand, no express exemption from the restrictions on considering new information is provided for in these circumstances, and it does not appear to have been intended to allow referred applicants to introduce new information as a result of this process. This tension might be reconciled in some cases by considering the comments only to the extent that they are in the nature of a submission, and applying the restrictions to any new material in the comments that is in the nature of evidence.

2.4 ADVERSE NEW INFORMATION

2.4.1 Subsection 473DE(1) imposes, with limited exceptions, an obligation on the IAA to:

[46] s.473DD(b)(i) and (ii). In *BRA16 v MIBP* [2016] FCCA 2855 (Judge Street, 7 November 2016) the Court held that there was no error in the IAA's finding that a newspaper article published only one day before the delegate's decision was made was new information and, as the article could not have been provided at the time of the delegate's decision.
[47] *BVZ16 v MIBP* [2017] FCA 958 (While J, 18 August 2017) at [57].
[48] *BVZ16 v MIBP* [2017] FCA 958 (While J, 18 August 2017) at [51] – [57].
[49] In considering information given by an applicant in the context of ss.359A and 424A of the Act, courts have held that information might be given by an applicant where it is given by an agent acting under the applicant's instructions, an 'advisor' or friend acting with the referred applicant's consent or authority, or a parent in their role as guardian for a referred applicant child or minor: see *SZIOQ v MIAC* [2007] FMCA 1292 (Nicholls FM, 8 August 2007) at [16]; *SZGSG v MIAC* [2008] FMCA 452 (Lloyd-Jones FM, 10 April 2008); *SZLND v MIAC* [2008] FMCA 1047 (Nicholls FM, 31 July 2008).

- give a referred applicant the particulars of any new information that has been, or is to be, considered by the IAA and would the reason, or a part of the reason, for affirming the decision under review;
- explain to the referred applicant why the new information is relevant to the review; and
- invite the referred applicant to comment in writing or at an interview (conducted in person, by telephone or in any other way).[50]

2.4.2 However s.473DE(3) exempts certain categories of material from this requirement, namely new information that:

- is not specifically about the referred applicant and is just about a class of persons of which the referred applicant is a member;[51] or
- is non-disclosable information;[52] or
- is prescribed by regulation - currently new information given to the IAA by a referred applicant for the purpose of the IAA reviewing their fast track reviewable decision is prescribed.[53]

2.4.3 Each of these aspects is discussed in more detail below.

New information that would be the reason, or part of the reason, for affirming the decision

2.4.4 The statutory obligation to invite a referred applicant to give comments only arises in relation to 'new information' that has been, or is to be, considered by the IAA under s.473DD (see above) and would be the reason, or part of the reason, for affirming the decision under review. Accordingly, if the test for considering new information in s.473DD is not met, that new information must not be considered by the IAA meaning there would be no need to invite the applicant to comment on it.

2.4.5 Given the similarities in language and purpose shared with s.473DE, guidance on this obligation may be derived from the adverse information provisions in ss.359A/424A as they apply to the MRD. Discussion of relevant principles follows immediately below; see Chapter 10 of the MRD Procedural Law Guide for further discussion of those provisions.

New information

2.4.6 The term 'new information' has a specific meaning under s.473DC(1), being any document or information that was not before the Minister when the primary decision was made and that the IAA considers may be relevant.[54]

[50] s.473DE(1).
[51] s.473DC(3)(a).
[52] s.473DE(3)(b).
[53] s.473DE(3)(c) and r.4.41.
[54] In *CDZ16 v MIBP* [2017] FCA 967 (Logan J, 18 August 2017) at [8] and [10], the Court held that the term 'new information' in s.473DD has the same meaning as in s.473DC(1), which requires that the information must be information that the IAA 'considers may be relevant'. The Court held that relevance is a matter for the IAA's own evaluative judgement, and it is enough that a conclusion is reasonably open to the IAA that the information may or, may not, be relevant.

2.4.7 Generally speaking, 'information' is to be given its ordinary meaning, namely 'that of which one is informed' or 'knowledge communicated or received concerning some fact or circumstance'.[55] Information' need not be contained in a written document. A photograph may suffice.[56]

2.4.8 Subjective appraisals, thought processes or determinations do not constitute information and therefore these would not fall within the scope of s.473DE.[57]

2.4.9 Gaps, inconsistencies, defects or a lack of detail or specificity in evidence identified by the IAA in weighing up the evidence are also not, of themselves, information and would not fall within the scope of s.473DE.[58] Nonetheless where the IAA perceives an inconsistency, omission or other deficiency in the evidence, consideration should be given to whether there is some underlying 'information' that is being relied on to support that conclusion.

2.4.10 Legal opinions or views on the proper interpretation of a statutory provision would not generally be regarded as information for the purposes of s.473DE.[59] Nor would legislation and judgments cited in IAA decisions.[60]

Would be the reason for affirming

2.4.11 New information must be information that 'would', not 'could' or 'might', be the reason or part of the reason for affirming the decision.[61]

2.4.12 Whether or not new information would be 'the reason, or a part of the reason', for affirming the primary decision depends on the criteria for the making of that decision in the first place.[62] The use of the future conditional tense ('would be') rather than the indicative, strongly suggests that the operation of s.473DE is to be determined in advance – and independently – of the IAA's reasoning on the facts of the case.[63] Accordingly, information which directly and in its terms contains a rejection, denial or which inherently undermines the applicant's claims may be subject to s.473DE, but information which is on its face neutral will not fall within the scope of s.473DE.[64]

[55] *SZASX v MIMIA* [2004] FMCA 680 (Barnes FM, 18 October 2004) at [18].
[56] *SZESF v MIMA* [2007] FCA 6 (Stone J, 12 January 2007).
[57] *Tin v MIMA* [2000] FCA 1109 (Sackville J, 14 August 2000) at [54]; *Paul v MIMIA* (2001) FCR 396 at [95]; *VAAM v MIMA* [2002] FCAFC 120 (Carr, Moore and Marshall JJ, 10 May 2002); *VAF v MIMA* (2004) 206 ALR 471 at [24]; *SZECF v MIMIA* (2005) 89 ALD 242; *SZBDF v MIMIA* (2005) 148 FCR 302; *SZEEU v MIMIA* (2006) 150 FCR 214 at [206] - [207] per Allsop J; *NBKT v MIMA* (2006) 156 FCR 419 per Young J at [30]; *SXSB v MIAC* [2007] FCA 319 (Besanko J, 9 March 2007) at [22].
[58] *SZBYR v MIAC* (2007) 235 ALR 609 at [18] and *MIAC v SZGUR* (2011) 273 ALR 223 at [9] per French CJ and Kiefel J and at [77] per Gummow J, Heydon and Crennan J agreeing.
[59] *Carlos v MIMIA* (2001) 113 FCR 456 in which the Court held that advice merely reiterates the facts of the case and comments on the legal issues. Applied in *Reynolds v MIAC* (2010) 237 FLR 7 per Lucev FM at [146].
[60] *SZASX v MIMIA* [2004] FMCA 680 (Barnes FM, 18 October 2004); *SZFTE v MIMIA* [2005] FMCA 1561 (Scarlett FM, 18 October 2005); *SZHUO v MIAC* [2007] FMCA 1688 (Raphael FM, 12 October 2007).
[61] *SZTGV v MIBP* (2015) 318 ALR 450.
[62] *SZBYR v MIAC* (2007) 235 ALR 609 at [17].
[63] *SZBYR v MIAC* (2007) 235 ALR 609 at [17].
[64] *SZICU v MIAC* (2008) 100 ALD 1 at [26]; *MZXBQ v MIAC* (2008) 166 FCR 483 at [29]; *SZJZB v MIAC* [2008] FMCA 848 (Barnes FM, 26 June 2008) at [65]; *SZGIY v MIAC* [2008] FCAFC 68 (Dowsett, Bennett and Edmonds JJ, 2 May 2008) at [23], [25]; *SZEYL v MIAC* [2008] FMCA 815 (Nicholls FM, 20 June 2008) at [54]; *SZMFI v MIAC* [2008] FCA 1894 (Rares J, 26 November 2008); *Bhandari v MIAC* [2010] FMCA 369 (Barnes FM, 17 May 2010) and *SZQSP v MIAC* [2012] FMCA 890 (Nicholls FM, 2 October 2012) at [45] - [47].

2.4.13 Likewise, information that merely assists the IAA to make assessments of the applicant's credibility[65] or in some cases, information which underpins an expert's opinion[66] would not fall within the purview of s.473DE.

2.4.14 Although worded differently from ss.359A/424A in that s.473DE does not refer to information that the IAA considers would be the reason, or part of the reason, for affirming the decision under review, this difference does not seem significant – the IAA needs to assess whether to put information under s.473DE, so the information must be a reason for affirming in the mind of the Reviewer. Accordingly, while the reasons given by the IAA for its decision are not necessarily determinative, a reviewing Court may draw inferences from the IAA's reasons as to whether the IAA considered the information to be a reason for affirming the decision. To ensure there is a clear understanding of the IAA's state of mind, Reviewers may consider making a clear and unequivocal statement in the decision record as to why the IAA did or did not consider the information would be the reason, or a part of the reason, for affirming the decision under review.

2.4.15 Where the IAA determines that it would not place weight on particular new information that could, if accepted, undermine an applicant's claims, care should be taken to ensure that the evidence, including the decision record and review-related correspondence, does not suggest a different attitude.

Exceptions

Class of persons

2.4.16 The requirement to provide a referred applicant with particulars of new information does not apply to new information that is not specifically about the referred applicant and is just about a class of persons of which the referred applicant is a member. On the basis of judicial consideration of the similarly worded exemptions in ss.359A/424A of the Act, this would include general country information.[67]

2.4.17 New information which is about a specific person (and therefore is not just about a class of persons), other than the referred applicant, would fall outside of this exception and therefore would need to be put to the referred applicant for comment unless another exception applies.[68]

2.4.18 If the information which the IAA considers is the reason, or a part of the reason, for affirming the decision only obliquely or tangentially refers to a specific person, it may still fall within the exception.[69]

[65] *SZNPJ v MIAC* [2010] FMCA 410 (Driver FM, 15 July 2010) at [66] and *SZUMY v MIBP* [2015] FFCA 1482 (Judge Smith, 3 June 2015).
[66] *Wu v MIAC* [2011] FMCA 14 (Cameron FM, 28 January 2011).
[67] See for example, judicial consideration of s.424A(3)(a) in *W252/01A v MIMA* [2002] FCA 50 (Nicholson J, 5 February 2002); *NACL v RRT* [2002] FCA 643 (Conti J, 3 May 2002); *Tharairasa v MIMA* (2000) 98 FCR 281; *NARV v MIMIA* (2004) 203 ALR 494 per Downes J at [54]; *SZNIU v MIAC* [2009] FMCA 573 (Nicholls FM, 23 June 2009) at [22]; *VHAJ v MIMIA* (2004) 75 ALD 609 per Kenny J at [50], per Downes J at [71]; and *SZJJD v MIAC* [2008] FCAFC 93 (Gray, Stone and Tracey JJ, 30 May 2008) at [13].
[68] See for example, judicial consideration of s.424A(3)(a) in *Schwallie v MIMA* [2001] FCA 417 (O'Loughlin J, 11 April 2001) at [24], where the Federal Court found that the exception did not apply to country information about a former government minister for whom the applicant claimed to have worked.
[69] See for example, judicial consideration of s.424A(3)(a) in *MIAC v SZHXF*, where a Full Court of the Federal Court found that references to religious leaders or figures such as Mirza Ghulam Ahmad, Jesus Christ and the prophet Muhammad, were not

2.4.19 For further details, see the discussion of the equivalent exemption in ss.359A/424A in Chapter 10 of the MRD Procedural law Guide.

Non-disclosable

2.4.20 New information which meets the definition of 'non-disclosable information' under s.5(1) of the Act is explicitly exempted from the obligation in s.473DE.[70] Non-disclosable information as defined in s.5(1) means information or matter whose disclosure would:

- found an action by a person, other than the Commonwealth, for breach of confidence, or
- in the decision-maker's opinion, be contrary to the national interest because it would prejudice Australia's security or disclose Cabinet deliberations, or
- in the decision-maker's opinion, be contrary to public interest for a reason which could form the basis of a claim by the Crown in judicial proceedings.

2.4.21 The definition of s.5(1) and its relationship to the mirror exemption in ss.359A/424A, as they apply to the MRD, has been the subject of judicial consideration. On current High Court authority in relation to s.359A, if there is non-disclosable information within the meaning of s.5(1) before the IAA such as a 'dob-in', it would be sufficient to comply with s s.473DE for the IAA to inform the applicant that it had received information, in confidence, which stated, for example, that the applicant's claims were contrived, and inviting comments without disclosing the identity of the informant.[71]

2.4.22 See the discussion of 'non-disclosable information', particularly in relation to 'dob-ins' in Chapter 10 and Chapter 31 of the MRD Procedural Law Guide for further details.

Categories prescribed by regulations

2.4.23 Subsection 473DE(3)(c) allows for the prescribing of other categories of exceptions from s.473DE(1) by way of regulation. Only new information given to the IAA by the referred applicant for the purpose of the IAA reviewing that applicant's fast track reviewable decision has been prescribed for this purpose: r.4.41 of the Regulations.

2.4.24 For new information to fall within the exception in s.473DE(3)(c) and r.4.41, it must be given to the IAA by the referred applicant for the purposes of the IAA's review of the applicant's fast track reviewable decision. Whether such information is given to the IAA by the referred applicant is a question of fact, however common law principles of agency would also extend this category to any new information given to the IAA by a referred applicant's agent acting under the applicant's instructions,[72] an 'advisor' or friend acting with the referred applicant's consent or authority,[73] or a parent in their role as guardian for a referred applicant child or minor.[74]

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information specifically about another person. Rather, the references to these figures and material about how they were perceived by the Ahmadi faith, were said to be information about how others perceived those figures and the role that such a perception plays in the lives of those who hold it.

[70] s.473DE(3)(b).
[71] *MIAC v Kumar* (2009) 238 CLR 448 at [34].
[72] *SZIOQ v MIAC* [2007] FMCA 1292 (Nicholls FM, 8 August 2007) at [16].
[73] *SZGSG v MIAC* [2008] FMCA 452 (Lloyd-Jones FM, 10 April 2008).
[74] *SZLND v MIAC* [2008] FMCA 1047 (Nicholls FM, 31 July 2008).

2.4.25 The exception in s.473DE(3)(c) and r.4.41 only applies to new information given to the IAA by a referred applicant for the purposes of reviewing their fast track reviewable decision. This exception would not apply to information that was given by a referred applicant to the Minister before the primary decision was made, but such material would not anyway fall within the meaning of 'new information' in s.473DC such as to engage the obligation in s.473DE(1).

Other restrictions on the obligation – s.473GB

2.4.26 Section 473GB applies where the Minister certifies that certain documents or information should not be disclosed by the IAA, or where a document or information was given to the Minister or a Departmental officer in confidence. If the Secretary notifies the IAA that s.473GB applies in relation to a document or information given to it, the IAA may have regard to the document or the information for the purpose of the review. The IAA may also disclose the document or information to the referred applicant (subject to a further non-disclosure direction) if it thinks it appropriate to do so having regard to any advice given by the Secretary.[75] Unlike in the MRD, the IAA is not required to disclose the existence of a s.473GB certificate to an applicant.[76]

2.4.27 If the IAA considers it appropriate to withhold the document or information, it will be necessary for it to consider whether the applicant can be informed of at least the gist of the information.

2.4.28 See 'Ministerial certifications under s.473GB' in Chapter 5 of the IAA Procedural Law Guide for further discussion on s.473GB, in particular procedural fairness obligations which arise in relation to certificates.

Giving particulars and explaining relevance

2.4.29 The IAA must give a referred applicant particulars of the new information that is subject to s.473DE and explain why it is relevant to the review.

Giving particulars

2.4.30 Section 473DE(1)(a) requires the IAA to give the referred applicant particulars of the relevant new information. Having regard to the similarly worded provisions in ss.359A and 424A as they apply to the MRD, this requires that a referred applicant be supplied with sufficient particulars to enable them to meaningfully comment on that new

[75] s.473GB(3).

[76] See *MIBP v BBS16* [2017] FCAFC 176 (Kenny, Tracey, Griffiths JJ, 10 November 2017) at [97]-[100] where the Court held that *MZAFZ v MIBP* [2016] FCA 1081 (which provided that an applicant in a Part 5 or 7 review must be informed of the existence of a ss.375A, 376 or 438 certificate) has no application to a Part 7AA review as the regime does not create any duty on the IAA to be involved in the IAA's determinations as to whether the certificate is valid or not, nor whether the IAA should accept or reject any written advice provided by the Secretary under s.473GB(2). See also *BVM16 v MIBP* [2016] FCCA 3183 (Judge Jarrett, 22 November 2016) in which the Court held that the reasoning in *MZAFZ v MIBP* [2016] FCA 1081 and *Singh v MIBP* [2016] FCCA 2464 does not apply to Part 7AA as there is no similar statement to that which appears in s.473DA(2) in either Part 5 or Part 7 of the Act. On this basis, there is no obligation to disclose to an applicant the existence of a certificate issued under s.473GB. See also *BBS16 v MIBP* [2017] FCCA 4 (Judge Driver, 1 February 2017) at [78]–[80] in which the Court followed *BVM16* and held that the principle in *MZAFZ* is inapplicable in the context of s.473DA given the much more limited obligation of disclosure under s.473DE(1); and also *CMR16 v MIBP* [2017] FCCA 1715 (Judge Driver, 24 July 2017) at [25]-[28] in which the Court held that, unlike s.422B(2) which does not 'cover off or exclude' the procedural fairness obligations outlined in *MZAFZ,* s.473DA(1) provides that Division 3 of Part 7AA (ss.473DA-473DF), and ss.473GA and 473GB, are taken to be an exhaustive statement of the requirements of the natural justice hearing rule for reviews conducted by the IAA. There are no gaps in s.473DA(1) for the general law rules of procedural fairness to fill. Further, the information covered by the s.473GB(1) certificate is not 'new information' as defined in s.473DC(1); rather, it is information that was before the Minister. Even if the certificate came within the definition of 'new information', it could not be said to be the reason, or a part of the reason, for affirming the delegate's decision such that the IAA's disclosure obligation in s.473DE(1) would apply to it.

information.[77] It is sufficient to give an accurate summary or paraphrasing of the relevant new information,[78] and it would not appear necessary to produce documents or identify the source of the new information[79] unless not doing so would deprive a referred applicant of the meaningful opportunity to comment on it.[80]

2.4.31 Whether new information has been identified with sufficient specificity to satisfy s.473DE(1)(a) is a matter of fact, degree and context depending on the circumstances.[81] The test is an objective one for which the surrounding circumstances must be taken into account.

2.4.32 The IAA may give the particulars of the relevant new information in the way that it thinks appropriate in the circumstances.[82] This provides flexibility in the manner in which the IAA may give the relevant new information to an applicant.

Explaining the relevance

2.4.33 In addition to providing particulars of the new information, s.473DE(1)(b) requires the IAA to explain why it is relevant to the review.

2.4.34 Having regard to the similarly worded provisions in ss.359A/424A as they apply to the MRD, a referred applicant should be given an adequate indication of why the new information adversely affects their case such that they are put in a position to respond to the invitation to comment.[83] The context of each specific case, for example, the prominent issues in the review and matters that a referred applicant should already be aware of, will be relevant in determining the scope of explanation required.[84]

2.4.35 The IAA should ensure that it adequately explains the relevance of the information being relied upon.[85] Merely sending the text of information relied upon will not be sufficient.[86] Depending on the circumstances, it may be necessary to give the referred applicant some additional contextual information to enable them to understand its relevance. This is particularly likely to be necessary where the information is obtained through the IAA's own inquiries.[87] However, in some instances the clarity and detail of information provided may be sufficient without giving further explanation.[88]

2.4.36 As the obligation in s.473DE only applies to new information that *would be the reason, or a part of the reason, for affirming the decision,* to ensure the applicant understands why the information is relevant to the review it would be prudent that, at the very least, these words form a part of the IAA's invitation and explanation.

[77] *Nader v MIMA* (2000) 101 FCR 352.
[78] *Shah v MIAC* [2011] FMCA 18 (Cameron FM, 16 February 2011) at [57].
[79] *Nader v MIMA* (2000) 101 FCR 352; *SXRB v MIMIA* [2006] FCAFC 14 (Kiefel, Kenny and Graham JJ, 20 February 2006); *MIMIA v SZGMF* [2006] FCAFC 138 (Branson, Finn and Bennett JJ, 7 September 2006) at [27].
[80] *Nader v MIMA* (2000) 101 FCR 352.
[81] *Shah v MIAC* [2011] FMCA 18 (Cameron FM, 16 February 2011) at [56], following *MZXKH v MIAC* [2007] FCA 663 (Tracey J, 15 June 2007) at [18].
[82] s.473DE(1)(a). There is no MRD equivalent to this provision.
[83] See for example *MZYFH v MIAC* (2010) 115 ALD 409 at [60], [62] and [65]; *SZONE v MIAC* [2011] FMCA 420 (Barnes FM, 9 June 2011) at [112]; *Shaikh v MIBP* [2014] FCCA 1011 (Riethmuller J, 23 May 2014).
[84] *Louis-Jean v MIAC* [2010] FMCA 710 (Riley FM, 21 September 2010) at [30] and [33].
[85] *SZQQA v MIAC* [2013] FMCA 231 (Barnes FM, 5 April 2013).
[86] *SZMKR v MIAC* [2010] FCA 340 (Gray J, 9 April 2010).
[87] *SZKCQ v MIAC* (2008) 170 FCR 236 at [3]-[4] and [79].
[88] For example, there may be circumstances where the relevance of the information is self-evident from the information itself: see e.g. *Shah v MIAC* [2011] FMCA 18 (Cameron FM, 16 February 2011) at [67].

2.4.37 Where the IAA is putting more than one piece of information to a referred applicant at the same time, it would also be prudent to separate the various strands of information and be careful to explain what, in relation to each strand of the information, is its relevance to the review.[89]

2.4.38 The additional obligation in ss.359A/424A, as they apply to the MRD, to explain the consequences of the information being relied upon does not feature in s.473DE. However, as the relevance and consequences of relying on information are inextricably linked together, and given that generally in explaining the relevance of information the consequences of relying on that information would be explained, this does not make any practical difference.

2.5 PROCEDURAL REQUIREMENTS FOR INVITATIONS TO A REFERRED APPLICANT AND CONSEQUENCES OF FAILING TO RESPOND

2.5.1 The IAA may invite a referred applicant under s.473DC to give new information, and in certain circumstances it must invite a referred applicant under s.473DE to comment on new information. In addition to the requirements for invitations in those sections, further requirements for these kinds of invitations are found in s.473DF.

2.5.2 Both kinds of invitation may be given to a referred applicant orally or in writing.[90] There is no requirement that the invitation must be given in a referred applicant's native language.[91] However, if giving an oral invitation, while there is no statutory obligation to provide an interpreter, if an interpreter was not present in certain circumstances it may be taken not to be a meaningful invitation to comment on the information. There is also no requirement to specify the provision under which an invitation is given.[92]

2.5.3 The invitation must however specify whether the new information or comments are to be given in writing[93] or at an interview.[94] It must also specify the period in which the information or comments are to be given, which is prescribed in the Regulations (see below).

2.5.4 Where a referred applicant is invited to an interview, the IAA may determine the manner, place and time that the interview is to be conducted.[95] An interview may be conducted in person, by telephone, or in any other way, including by videoconference or online.[96] It must however be held within the prescribed period.[97] For further information regarding prescribed periods please see below.

2.5.5 There may be a jurisdictional error if the IAA does not comply with these requirements when giving an invitation. For example, if the IAA failed to specify the prescribed

[89] *SZNYL v MIAC* [2010] FCA 1282 (North J, 9 November 2010) at [25] and [28].
[90] ss.473DC(3) and s73DE(1)(c).
[91] *BZAGU v MIBP* [2015] FCA 920 (Logan J, 18 August 2015) at [18].
[92] See e.g. *Bakshi v MIBP* [2015] FCCA 2092 (Judge Smith, 7 August 2015) for comments to this effect in relation to the MRD context.
[93] ss.473DC(3)(a) and 473DE(1)(c)(i).
[94] ss.473DC(3)(b) and 473DE(1)(c)(ii).
[95] s.473DF(3).
[96] Explanatory Memorandum to the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 at pp.133, 905.
[97] s.473DF(2).

period for response and then proceeded to decision without the referred applicant having an opportunity to give or comment on the new information, it is likely that a jurisdictional error would be established. However, not all instances of technical non-compliance with the obligations in s.473DF are necessarily fatal.[98] For example, if the period stipulated in a ss.473DC or 473DE invitation was not correct in that it was *longer* than the prescribed period, it would not invalidate the IAA decision.

Prescribed periods

2.5.6 Subsection 473DF(2) provides that new information or comments on new information are to be given by a referred applicant 'within' a period prescribed by regulation. Regulation 4.42 of the Migration Regulations 1994 (the Regulations) specifies the prescribed periods, which vary depending upon whether the referred applicant is in detention; has been given an oral or written invitation; and has been invited to give information or comment in writing or at an interview. These are set out in the following table:

PRESCRIBED PERIODS – INVITATION TO GIVE OR COMMENT ON NEW INFORMATION			
	Oral invitation to give information and/or comments in writing	**Oral invitation to give information and/or comments at an interview**	**Written invitation to give information and/or comments in writing or interview**
Referred applicant NOT in immigration detention	7 days after invitation is given. *r.4.42(b)(i)*	14 days after invitation is given. *r.4.42(b)(ii)*	14 days after notified of the invitation *r.4.42(b)(iii)*
Referred applicant in immigration detention	3 working days after notified of invitation. *r.4.42(a)*		

2.5.7 In the case of new information or comments to be given in writing, the referred applicant should be given the full prescribed period to respond and the new information or comments may be provided at any time within the prescribed period.

2.5.8 However, where new information or comments are to be given at an interview, the interview may be scheduled at any time within the prescribed period, provided it is a reasonable period after the invitation has been given. To interpret the provisions otherwise would present practical difficulties, as the interview would always need to be scheduled for the last day of the prescribed period; such an interpretation would also appear at odds with the discretion in s.473DF for the IAA to determine the place and time for the interview.

Extensions

2.5.9 Unlike the MRD, there is no express statutory provision for extending a referred applicant's time period to provide new information or comments. However, if the

[98] See consideration of similar provisions in the MRD context e.g. in *SZEXZ v MIMIA* [2006] FCA 449 (Jacobson J, 27 April 2006); *M v MIMA* (2006) 155 FCR 333.

information or comments nevertheless are received by the IAA before a decision is made, it would need to address them.

Failure to provide information or comment

2.5.10 If a referred applicant is invited to provide, or comment upon, new information and does not do so in accordance with the invitation, the IAA may make a decision on the review without taking any further action to get the information or comments,[99] or without taking any further action to allow or enable the referred applicant to take part in a further interview.[100] The IAA is not obliged to proceed immediately to a decision, however, and may choose to take further action to get the information or comments (for example, by sending a further invitation). This discretion to make a decision without further action must be exercised reasonably.

2.5.11 What constitutes a failure to provide information in accordance with an invitation issued under s.473DC will depend on the circumstances of the case. A complete failure to provide any information would enliven s.473DF(4) such that the IAA could make a decision without further action. Where the referred applicant provides some, but not all, of the requested information, the IAA should nevertheless fairly address the information provided. A request by an applicant for an extension of time would not constitute a provision of information.[101] Although there is no express statutory provision for extending the time period to provide information, if information is received by the IAA before a decision is made by the IAA, it would need to address it.

2.5.12 What constitutes a failure to provide comments in accordance with an invitation issued under s.473DE will also depend on the circumstances of the case. The legislation does not expressly define the term 'comment'. The limited judicial consideration of what constitutes a 'comment', indicates a fairly broad interpretation should be given. In *MIAC v Saba Bros Tiling Pty Ltd*,[102] in respect of a Part 5-reviewable decision the Tribunal had invited the applicant's solicitor to give comments on or respond to the information in question. The respondent's solicitor's letter 'noted' the 'adverse information', that this information had been put to the respondent and that he still wished to proceed with a hearing. The Court held this constituted a response to the information in the invitation. Similarly in this context, a 'comment' may not require substantive remarks or observations, and any reply or answer directed to the information could constitute a comment on it.

2.5.13 Unlike the MRD where the failure to provide information or comments can lead to the loss of a hearing entitlement, in the IAA context it only enlivens s.473DF(4) such that the IAA could make a decision on the review without further action. When proceeding to make a decision without taking any further action to get the information or comments, or to allow or enable the referred applicant to take part in a further interview, the IAA should first ensure that its invitation was correctly issued under s.473DF and sent, and that the prescribed period has elapsed such that the discretionary power to proceed under s.473DF(4) is properly enlivened.

[99] s.473DF(4)(a).
[100] s.473DF(4)(b).
[101] See *Singh v MIBP* [2014] FCCA 1403 (Judge McGuire, 13 August 2014) where in relation to a Part 5-reviewable decision the Court found that a request by the applicant for an extension of time did not constitute a response to an invitation under s.359(2) of the Act for information of the applicant's competency in English.
[102] *MIAC v Saba Bros Tiling Pty Ltd* [2011] FCA 233 (Jagot J, 18 March 2011).