

1. PURPOSE AND FUNCTIONS OF THE IAA

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1.2 Terminology

Unauthorised maritime arrival
Fast track applicant
Fast track decision
Fast track review applicant
Excluded fast track review applicant
Fast track reviewable decision
Referred applicant
New information
Review material

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Combined reviews / referrals
Withdrawal from the IAA review
Withdrawal of protection visa application during IAA review
Death of referred applicant during review

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1.5 HOW ARE APPLICATIONS REFERRED TO THE IAA?

1.5.1 The IAA does not have a review application process. Instead, the Minister must refer a fast track reviewable decision to the IAA as soon as reasonably practicable after the decision has been made.⁴⁴ This means that all fast track reviewable decisions will be reviewed by the IAA upon referral from the Minister and that the IAA's jurisdiction, unlike the MRD of the AAT, for example, does not require and is not dependent upon a valid application for review being lodged within a specified period.

What materials must be provided on referral?

1.5.2 Either at the same time as, or as soon as reasonably practicable after, referring a fast track reviewable decision to the IAA, the Secretary must also provide the IAA with the 'review material'. Review material means the statement of reasons for the decision, any material in the Secretary's control considered by the Secretary to be relevant to the review, any material provided by the referred applicant before the decision was made and the last known contact details for the referred applicant.⁴⁵ The contact details are not limited to those that have been specifically provided by the referred applicant for the purposes of receiving documents but includes contact details that the Minister reasonably believes to be correct at the time the decision is referred to the IAA as well as the contact details of a carer if the referred applicant is a minor.⁴⁶

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁴⁴ s.473CA.

⁴⁵ s.473CB. While the IAA must still form its own view on the relevance of the review material given, it may generally be assumed that material given to the IAA by the Secretary was because it was subjectively considered relevant to the review: *MIBP v AMA16* [2017] FCAFC 136 (Dowset, Griffiths and Charlesworth JJ, 30 August 2017) at [73] and [99].

⁴⁶ See Part 4 of this Guide for further details.

[REDACTED]

[REDACTED]

[REDACTED]

1.7 IAA'S FUNCTIONS AND POWERS

- 1.7.1 The IAA must review a fast track reviewable decision referred to it by the Minister.⁵² In carrying out its functions under the Migration Act, the IAA is to pursue the objective of providing a mechanism of limited review that is 'efficient, quick, free of bias and consistent with its statutory conduct of review provisions'.⁵³ This is in contrast to the MRD of the AAT which is required to pursue the objective of providing a mechanism of review that is accessible, fair, just, economical, informal, quick, proportionate to the importance and complexity of the matter, and that promotes public trust and confidence in decision making.⁵⁴ The difference reflects the role of the IAA as a limited review body. Like the MRD of the AAT, however, the IAA is not bound by technicalities, legal forms or rules of evidence.⁵⁵
- 1.7.2 The IAA does not conduct hearings and can only consider new information in very limited circumstances.⁵⁶ Except in those limited circumstances, the IAA is required to review decisions only on the review material provided to it by the Secretary at the time the reviewable decision is referred to it by the Minister.⁵⁷
- 1.7.3 Like the MRD of the AAT, the IAA is not restricted to the correction of an error made by the delegate, and has the power to make findings of fact, or take an approach, that differs from that of the delegate.⁵⁸ However, if the IAA is to affirm the review on a different basis from the delegate, it should consider whether it is required to provide the applicant with an opportunity to be heard on the new issue.⁵⁹

The remittal power

- 1.7.4 In conducting its review, the IAA may only affirm the fast track reviewable decision or remit the decision in accordance with the permitted remittal directions, it has no power to set aside and substitute a new decision, or to vary the decision under review.⁶⁰

[REDACTED]

s.473CC(1).
⁵³ s.473FA(1).
⁵⁴ s.2A of the *Administrative Appeals Tribunal Act 1975* (AAT Act).
⁵⁵ s.473FA(2).
⁵⁶ See Part 2 of this Guide for further details.
⁵⁷ s.473DB.
⁵⁸ *BMB16 v MIBP* [2017] FCAFC 169 (Dowsett, Besanko and Charlesworth JJ, 27 October 2017) per Dowsett J at [16], Besanko J at [31] and Charlesworth J at [88].
⁵⁹ See for example *CRY16 v MIBP* [2017] FCCA 1549 (Judge Riethmuller, 6 July 2017) at [21] where the Court 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.
⁶⁰ s.473CC(2) and r.4.43(1). This is in contrast to the MRD of the AAT which, in conducting reviews of protection visa refusals, has the power to set aside and substitute a new decision, or to vary the decision under review.

1.7.5 The permissible remittal directions that the IAA may make are set out in r.4.43 of the Migration Regulations 1994 (the Regulations). They are that:

- the referred applicant must be taken to have satisfied the criteria for the visa that are specified in the direction;⁶¹ or
- the referred applicant is a refugee within the meaning of s.5H(1);⁶² or
- s.36(3) does not apply to the referred applicant;⁶³ or
- the referred applicant satisfies each matter, specified in the direction, that relates to establishing whether the he or she is a person to whom Australia has protection obligations because the criterion mentioned in s.36(2)(aa) is satisfied in relation to the applicant;⁶⁴ or
- the grant of the visa is not prevented by ss.91W, 91WA or 91WB of the Migration Act.⁶⁵

1.7.6 The IAA may not, however, remit with a direction that:

- s.5H(1) applies to the referred applicant;⁶⁶ or
- s.5H(1) does not apply to the referred applicant because of s.5H(2);⁶⁷ or
- the referred applicant satisfies, or does not satisfy, the criterion in s.36(1C);⁶⁸ or
- the referred applicant satisfies a matter that relates to establishing whether there are serious reasons for considering that:
 - the referred applicant has committed a crime against peace, a war crime or a crime against humanity, as defined by an international instrument mentioned in r.2.03B;⁶⁹ or
 - the referred applicant committed a serious non-political crime before entering Australia;⁷⁰ or
 - the referred applicant has been guilty of acts contrary to the purposes and principles of the United Nations;⁷¹ or
- the referred applicant satisfies a matter that relates to establishing whether there are reasonable grounds that:
 - the referred applicant is a danger to Australia's security;⁷² or
 - the referred applicant, having been convicted by a final judgment of a particularly serious crime, including a crime that consists of the commission of a serious

⁶¹ r.4.43(2)(a).

⁶² r.4.43(2)(b).

⁶³ r.4.43(2)(c).

⁶⁴ r.4.43(2)(d).

⁶⁵ r.4.43(4).

⁶⁶ r.4.43(3)(a).

⁶⁷ r.4.43(3)(b).

⁶⁸ r.4.43(3)(c).

⁶⁹ r.4.43(3)(d)(i).

⁷⁰ r.4.43(3)(d)(ii).

⁷¹ r.4.43(3)(d)(iii).

Australian offence or serious foreign offence, is a danger to the Australian community.⁷³

- 1.7.7 With the exception of powers relating to ss. 91W and 91WA, the permissible directions that apply to the IAA are the same as those that apply to the MRD of the AAT in the review of a Part 7-reviewable decision for post 16 December 2014 visa applications.

Practice directions

- 1.7.8 The President may issue written practice directions as to the operation of, and conduct of reviews by, the IAA provided such written directions are not inconsistent with the Migration Act or Regulations.⁷⁴ The MRD Division Head has all the powers of the President, including that to issue written practice directions.⁷⁵

Scope of directions

- 1.7.9 Written practice directions may, for example, relate to the application of efficient processing practices in the conduct of reviews or set out procedures to be followed by persons giving 'new information'⁷⁶ in writing or at interview.⁷⁷ Currently, two practice directions have been issued by the President and are in force. These are [Practice Direction for Applicants, Representatives and Authorised Recipients](#)⁷⁸, which sets out the requirements to be followed by applicants, their representatives and authorised recipients when dealing with the IAA and [Practice Direction: The giving of information to the IAA by the Secretary of DIBP](#)⁷⁹, which sets out when the IAA is taken to have received country of origin information from the Secretary and when the Secretary must give country of origin information to the IAA.

Consequences of compliance and non-compliance

- 1.7.10 The IAA must, as far as practicable, comply with written practice directions however non-compliance will not invalidate the IAA's decision on a review.⁸⁰
- 1.7.11 Where the IAA does deal with the review of a decision in a way that complies with the written practice directions, it is not required to take any other action in relation to dealing with that review.⁸¹ The IAA is also not required to accept 'new information' or documents from a person who has failed to comply with a written practice direction that applies to them.⁸²

⁷² r.4.43(3)(e)(i).

⁷³ r.4.43(3)(e)(ii).

⁷⁴ s.473FB(1).

⁷⁵ s.473JB(1A).

⁷⁶ 'New information' is defined in s.473DC(1) to mean documents or information that were not before the Minister when the Minister made the decision under s.65 and that IAA considers may be relevant. Note however that the IAA must not consider any new information unless it is satisfied that there are exceptional circumstances to justify considering it and in relation to new information given or proposed to be given to the IAA by the referred applicant, it was not and could not have been provided to the Minister before the Minister's 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: s.473DD.

⁷⁷ s.473FB(2).

⁷⁸ This direction has effect from 7 February 2017.

⁷⁹ This direction has effect from 30 September 2016.

⁸⁰ s.473FB(3). In *CRW16 v MIBP* [2017] FCCA 984 (Street J, 15 May 2017), the Court rejected that the IAA's consideration of a translated document that did not comply with the President's Practice Direction resulted in a jurisdictional error. Although the written translation was not performed by someone qualified to the requisite standard, the non-compliance with the Practice Direction had no significance in the IAA's reasoning and the accreditation of the translator was not a matter that gave rise to any identified consequence in respect of the review: at [62] – [67].

⁸¹ s.473FB(4).

⁸² s.473FB(5). 'New information' is defined in s.473DC(1) to mean documents or information that were not before the Minister when the Minister made the decision under s.65 and that IAA considers may be relevant. Note however that the IAA must not consider any new information unless it is satisfied that there are exceptional circumstances to justify considering it and in

Guidance decisions

- 1.7.12 The President may direct, in writing, that a decision of the AAT, the IAA or of the former RRT is to be complied with by the IAA in reaching a decision on a specified kind of fast track reviewable decision.⁸³ As with other presidential powers, the MRD Division Head may also exercise the power to issue a guidance decision.⁸⁴
- 1.7.13 Reviewers must comply with guidance decisions unless they are satisfied that the facts or circumstances of their case are clearly distinguishable from the facts or circumstances of the guidance decision,⁸⁵ however non-compliance with a guidance decision does not mean that the IAA's decision is invalid.⁸⁶

1.8 COMBINED REVIEWS / WITHDRAWALS / DEATH OF APPLICANT

Combined reviews / referrals

- 1.8.1 Where more than one person has made a combined application for a protection visa at the primary stage (e.g. as members of the same family unit), each applicant who is deemed to be a fast track review applicant will be individually referred to the IAA by the Secretary. As there are no express legislative provisions that provide for individual fast track reviewable decisions to be combined before the IAA, there would appear no legal basis or power for doing so. However as the IAA's jurisdiction does not involve the lodging of a review application form within a prescribed period, and no fee is payable regardless of the review outcome, an inability to have a combined IAA review ultimately appears of little consequence.
- 1.8.2 Although there appears no basis for IAA reviews to be combined, this would not prevent, as a matter of internal administrative practice, the IAA from allocating related fast track reviewable decisions to the same reviewer for consideration, or subject to certain considerations determining them together. Where related cases are being considered together however it should be remembered that the notification provisions do appear to require that each referred applicant will be individually notified, and that the IAA's compliance with the *Privacy Act 1988* would also need to be considered. Although necessary to have regard to the circumstances of each case, applicants who had made a combined visa application may be assumed to be reasonably aware that their information would be used in relation to a related review.
- 1.8.3 Referred applicants who were part of a combined visa application may have different outcomes on review and, whilst there is nothing in the legislation preventing the IAA from preparing a single decision record for multiple applicants, this would also be subject to consideration of any privacy issues.

relation to new information given or proposed to be given to the IAA by the referred applicant, it was not and could not have been provided to the Minister before the Minister's 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: s.473DD.

⁸³ s.473FC(1).

⁸⁴ s.473JB(1A).

⁸⁵ s.473FC(2). At the time of writing, the President has not issued any guidance decisions under s.473FC(2).

⁸⁶ s.473FC(3).

Withdrawal from the IAA review

- 1.8.4 As the IAA's jurisdiction is engaged by way of a direct and unilateral referral from the Minister based upon the existence of a fast track reviewable decision,⁸⁷ it does not appear open for a referred applicant to withdraw themselves from the IAA process. Whilst the right does exist at common law for a person to withdraw from a civil proceeding before a statutory tribunal at any time before a decision is given, this right is subject to any contrary express or implied legislative provisions.⁸⁸ In the absence of any express legislative reference to withdrawals in the context of an IAA review, together with the statutory framework in which the Minister, pursuant to s.473CA, is *obliged* to refer a fast track review decision, there would appear no legal basis for a referred applicant to withdraw from an IAA review.
- 1.8.5 The lack of any payable review fee by a referred applicant in the event of an unsuccessful review also suggests that there is no disadvantage in the review continuing, even in circumstances where the referred applicant no longer wishes to proceed.

Withdrawal of protection visa application during IAA review

- 1.8.6 Once a fast track reviewable decision has been referred to the IAA by the Minister, a referred applicant's purported withdrawal of their protection visa application will have no effect upon the IAA's jurisdiction and obligations to review that decision.
- 1.8.7 Section 49 of the Migration Act expressly provides that an applicant may withdraw a visa application by written notice given to the Minister and s.49(3) also provides that for the purposes of the statutory bars on further applications in ss.48 and 48A, the Minister is not taken to have refused to grant the visa if the application is withdrawn 'before the refusal'. The withdrawal of a visa application at review stage, before the visa application is 'finally determined'⁸⁹, does not avoid or remove the consequence of a visa having been refused.⁹⁰
- 1.8.8 Further, as the effect of a withdrawal is that there is no longer any application on foot and hence no power to make any order in connection with the application, such an outcome is not possible in circumstances where the protection visa application has already been considered and refused by a person with power to make such a decision.

Death of referred applicant during review

- 1.8.9 Whether a statutory entitlement (such as that to merits review of a decision) survives, lapses or devolves to another person on the death of the claimant depends upon the language of the legislation under which the entitlement arises.⁹¹ Generally speaking, where a statutory entitlement does not devolve upon another person on an applicant's death, death will extinguish both the entitlement and the relevant decision maker's power, including the power of a tribunal upon review.⁹²
- 1.8.10 In the MRD for example, it does not appear possible, following the death of a review applicant, for the review application to be pursued by another person, such as the executor

⁸⁷ ss.473CA and 473CC(1).

⁸⁸ *SZASD v MIMA* [2004] FMCA 472 (Driver FM, 29 July 2004) and the cases cited at [10].

⁸⁹ As defined in s.5(9) and (9A).

⁹⁰ Whilst successful merits or judicial review may render the primary refusal decision overturned or ineffective, it is unclear in what circumstances this could occur where there is an active review on foot before the IAA because jurisdiction to review the primary decision will have vested in the IAA.

⁹¹ *V120/00A v MIMA* (2002) 116 FCR 576 at [53].

⁹² *V120/00A v MIMA* (2002) 116 FCR 576 at [53].

of the review applicant's estate or, where the review applicant is not the visa applicant, by the visa applicant themselves.

- 1.8.11 By analogy, in respect of an IAA review, death of the referred applicant would also appear to extinguish the IAA's power to conduct a review. In these circumstances, upon receiving satisfactory evidence of the referred applicant's death, the IAA should proceed to finalise its review. Although under no statutory obligation to do so, it would be good administrative practice to produce a letter or statement explaining the review has been terminated on the death of the referred applicant. A copy of this record should be sent to the estate of the deceased referred applicant at the last address for the referred applicant held on file by the IAA as well as to the Secretary.
- 1.8.12 The death of one referred applicant will also have no bearing upon the IAA's jurisdiction in respect of another referred applicant, even where, for example, they were members of the same family unit. As, unlike in the MRD, there is no capacity for referred applications to be combined before the IAA, the situation will not arise where one part of a *combined* application can still survive following the death of another.

Released under FOIA