Immigration Assessment Authority Procedural Law Guide

Chapter 1

Purpose and functions of the IAA

Current as at 19 September 2019

1. PURPOSE AND FUNCTIONS OF THE IAA

1.1 INTRODUCTION

1.1.1 The Immigration Assessment Authority (IAA) commenced on 18 April 2015[1] and introduced a fast track review process for certain unauthorised maritime arrivals (UMAs).[2] The IAA was established as a new review body to sit within the former Refugee Review Tribunal (RRT). Following the amalgamation of the Commonwealth merits review tribunals on 1 July 2015, the IAA sits within the Migration and Refugee Division (MRD) of the Administrative Appeals Tribunal (AAT).[3] The IAA consists of the President of the AAT (the President), the Division Head of the MRD, the Senior Reviewer and Reviewers.[4] It also receives administrative support from officers of the AAT, made available by the Registrar.[5]

1.1.2 The IAA must review a fast track reviewable decision referred to it by the Minister of Immigration (the Minister) in a manner that is efficient, quick, free of bias and consistent with its statutory conduct of review provisions.[6] Fast track reviews are generally expected to be conducted on the papers based upon information provided to the IAA by Secretary of the Department of Immigration (the Secretary).[7]

1.1.3 The fast track process introduced a broad range of new terms and definitions into the *Migration Act* 1958 (the Migration Act). Whilst some were inserted into existing s.5 of the Migration Act others were inserted into the new s.473BB. These new terms and definitions are described in more detail immediately below.

1.2 TERMINOLOGY

Unauthorised maritime arrival

1.2.1 A person is an 'unauthorised maritime arrival' (UMA) if they 'entered Australia by sea' (i.e. entered the migration zone not on an aircraft) at an 'excised offshore place' such as Christmas Island, at any time after the excision time for that place,[8] or at any time on or after 1 June 2013; and become an unlawful non-citizen because of that entry; and is not an 'excluded maritime arrival'.[9] A child born to an UMA in the migration zone or a regional processing country, [10] and who is not an Australian citizen at birth, is also an UMA.[11]

[1] r.2, table item 11, and items 27 and 28 of the *Migration and Maritime Powers (Resolving the Asylum Legacy Caseload) Act 2014* (No.135 of 2014).
[2] s.473BA. 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.
[3] s.473JA(1) as amended by s.178 of the *Tribunals Amalgamation Act 2015* (No.60 of 2015). See also transitional arrangements: item 187, Schedule 2, Part 3 of the *Tribunals Amalgamation Act 2015* (No.60 of 2015).
[4] s.473JA(2). After 1 July 2015 the President of the AAT replaced the Principal Member of the former RRT as head of the IAA: s.179 of the *Tribunals Amalgamation Act 2015* (No.60 of 2015).
[5] s.473JE.
[6] ss.473CC(1) and 473FA(1).
[7] s.473DB.
[8] See *GGD18 & Ors v MHA (No.3)* [2019] FCCA 444 (Judge Street, 26 February 2019) at [39]–[40] where the Court considered that applicants who entered Australia at Christmas Island to have entered by land at an 'excised offshore place' which is defined in s.5(1) of the Migration Act to include Christmas Island, rendering them unauthorised maritime arrivals. However, the Court did not explicitly consider s.5AA(2) which provides that, for the purposes of determining whether an applicant is an unauthorised maritime arrival, a person 'entered Australia by sea' unless one of the exceptions in that subsection applied (such as by aircraft), which do not appear to be the case in this instance.
[9] Section 5AA(1), as inserted by the *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013* (No.35 of 2013), which commenced on 1 June 2013. Section 5AA(3) defines a person who is an 'excluded maritime arrival' as a person who is a New Zealand citizen who holds and produces a New Zealand passport that is in force; or is a non-citizen who holds and produces a passport that is in force and is endorsed with an authority to reside indefinitely on Norfolk Island; or is included in a prescribed class of persons. Regulation 1.15J, as inserted by the Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Regulations 2013 (SLI 2013, No.95), prescribes classes of persons for s.5AA(3)(c) of the

1.2.2 At present, a person is not a UMA through the act of entering Australia by sea at the Territory of Ashmore and Cartier Islands.[12]

Fast track applicant

1.2.3 A 'fast track applicant' is defined in paragraph (a) of s.5(1) of the Migration Act as a UMA who entered Australia on or after 13 August 2012 but before 1 January 2014; has not been taken to a regional processing country; and has made a valid application for a protection visa after the Minister, exercising his personal powers, has lifted the bar in s.46A(1).[13]

1.2.4 In addition to the above definition, the Minister has also specified the following classes of persons as a 'fast track applicant' under paragraph (b) of the definition in s.5(1) of the Migration Act:[14]

A person:

- born in the migration zone on or after 6 November 2014 and before 5 December 2014; who is a child of a person who is a UMA who entered the migration zone on or after 19 July 2013 and was taken to the Republic of Nauru under s.198AD of the Migration Act; and is not an Australian citizen and has made a valid application for a protection visa;[15]
- who is a UMA who entered the migration on or after 19 July 2013 and was taken to the Republic of Nauru under s.198AD of the Migration Act; is the parent of a person born in

definition of 'excluded maritime arrival.' The classes prescribed are persons who enter Australia on or after 1 June 2013 and hold and produce an ETA-eligible passport, or at the time of entry into Australia are accompanied by another person who holds and produces an ETA-eligible passport in which they are included.

[10] 'Regional processing country' is defined in s.5 of the Migration Act to mean a country designated by the Minister under s.198AB(1) as a regional processing country.

[11] Subsections 5AA(1A) and 5AA(1AA), inserted by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (No.135 of 2014), commenced on 16 December 2014. These amendments clarify the position for children born in these circumstances, which before these amendments was subject to litigation in *Plaintiff B9/2014 v MIBP* (2014) 227 FCR 494.

[12] *DBB16 v MIBP* [2018] FCAFC 178 (Perram, Wigney and Lee JJ, 6 August 2018, reasons published on 19 October 2018) at [37]. The Court declared that the Minister had no power to appoint the Western Lagoon of Ashmore Island to be a port, as it is not a port as the term is used in s.5(5) of the Act. Section 5AA provides that a person becomes an 'unauthorised maritime arrival' if they entered Australia by sea, and to have entered Australia by sea requires a person to enter the migration zone which is defined in s.5(1) to include a 'port' but does not include sea within the limits of a State or Territory but not in a port. 'Port' is defined in s.5(1) to mean a 'proclaimed port' or 'proclaimed airport'. As the area described was not a 'port' within the meaning of the Act, the instrument made under s.5(5) declaring it as a 'proclaimed port' was not valid. This means that DBB16 was not a UMA on the basis of entering Australia via the excised offshore place of Ashmore and Cartier Islands. Note that s.5AA(1)(a)(ii) which provides that a person is a UMA if they enter Australia at any other place at any time on or after the commencement of this section was not applicable as this section commenced on 1 June 2013 and DBB16 entered the Western Lagoon within the Ashmore Reef on 7 November 2012. See also *DBD16 v MIBP* [2018] FCCA 1801 (Judge Smith, 11 July 2018) at [55]-[56]. and *BQI16 v MIBP* [2018] FCCA 2342 (Judge Kirton, 23 August 2018) at [28] where the Court gave summary judgment and made orders to the same effect as in *DBB16* on the basis that it was bound by to follow them where the applicant entered Australia via the Ashmore and Cartier Islands. The Migration (Validation of Port Appointment) Bill 2018 is currently before Parliament and seeks to address the issue raised by this judgment. By way of contrast, in relation to Christmas Island and the power to appoint proclaimed ports, see *GGD18 & Ors v MHA (No.3)* [2019] FCCA 444 (Judge Street, 26 February 2019) at [36]–[38] where the Court rejected the applicant's argument that the purported declaration of a port on Christmas Island by notice in the Gazette was invalid on the basis that it was published prior to the enactment of the power to appoint a port in the Territory of Christmas Island as a proclaimed port. The Court held that the language in the power, introduced by s.3(2)(c) of the *Migration Amendment Act (No.2) 1980* (Cth), expressly referred to 'published', which is past tense, and that the language does not manifest a contrary intention to s.4 of the *Acts Interpretation Act*.

[13] Paragraph (a) of the definition of 'fast track applicant' in s.5(1). Section 46A(1) specifies that an application for a visa is not a valid application if it is made by an offshore entry person who is in Australia and is an unlawful non-citizen or holds a bridging visa or a temporary protection visa, or a temporary visa of a prescribed kind. Only the Minister, exercising his power personally under s.46A(2), may, if in the public interest to do so, by written notice given to an offshore entry person determine that s.46A(1) does not apply to an application by the person for a visa of a class specified in the determination.

[14] Paragraph (b) of the definition of 'fast track applicant' in s.5(1).

[15] Paragraph (a) of IMMI 16/010 – Class persons defined as fast track applicants 2016/010, commenced 1 April 2016.

the migration zone on or after 6 November 2014 and before 5 December 2014; and is not an Australian citizen and has made a valid application for a protection visa;[16]

- who is a UMA; is the brother or sister of a person born in the migration zone on or after 6 November 2014 and before 5 December 2014; and is not an Australian citizen and has made a valid application for a protection visa;[17]

- who, except in very limited circumstances,[18] is a UMA born in the migration zone on or after 1 January 2014; is a child of a 'fast track applicant' within the meaning of paragraph 5(1)(a) of the Migration Act; has made a valid application for a protection visa; and has not been included in a valid protection visa application made by a parent who is a UMA who entered Australia before 13 August 2012;

- who is a UMA or transitory person;[19] who, during the period 13 August 2012 until 19 July 2013, was taken to a regional processing country under s.198AD of the Migration Act; has returned from the regional processing country to Australia; is currently in the migration zone; and has made a valid application for a protection visa;[20]

- born in the migration zone or a regional processing country; who is a child of a UMA and transitory person who during the period 13 August 2012 until 19 July 2013 was taken to a regional processing country under s.198AD of the Migration Act who has returned from the regional processing country to Australia and is currently in the migration zone and made a valid application for a protection visa, who is currently in the migration zone and had made a valid application for a protection visa; [21]

- with the DIBP Person Identification Digit set out in Schedule 1 to IMMI 17/015.[22]

To access a copy of the relevant instruments above see the 'fast track applicants' tab in the 'Register of Instruments – Protection visas and IAA'.

1.2.5 Under s.5(1AC), children born in Australia on or after 13 August 2012 to a UMA parent who entered Australia before 13 August 2012 are not 'fast track applicants' within the meaning of paragraph (a) of the definition in s.5(1).[23] However, depending upon their particular circumstances, they may still be a 'fast track applicant' if they fall within a class of persons specified by the Minister under paragraph (b) of the definition.

1.2.6 For example: A is a UMA who entered the migration zone on 10 January 2012 and is not a 'fast track applicant' within the meaning of paragraph (a) of the definition in s.5(1). B is a UMA who entered the migration zone on 15 August 2012 and is a 'fast track applicant' within

[16] Paragraph (b) of IMMI 16/010 – Class persons defined as fast track applicants 2016/010, commenced 1 April 2016.
[17] Paragraph (c) of IMMI 16/010 – Class persons defined as fast track applicants 2016/010, commenced 1 April 2016.
[18] This is because the reference in paragraph (1)(d) of IMMI 16/007 – Class of persons defined as fast track applicants 2016/007 which commenced 1 April 2016 to a UMA parent who entered Australia before 13 January 2012appears to be a typographical error. Clause 3 of the Explanatory Statement which accompanied IMMI 16/007 refers to the UMA parent entering Australia before 13 August 2012, and IMMI 16/007 was subsequently revoked by IMMI 16/049 which is in identical terms to IMMI 16/007 except for the date in paragraph (2)(a)(iv) being 13 August 2012. IMMI 16/049 revoked and replaced IMMI 16/007 effective from 7 May 2016, however IMMI 16/007 still applies between the period 1 April 2016 to 6 May 2016.
[19] A 'transitory person' is a person taken to a place outside Australia under the repealed s.198A; a person who was taken to a regional processing country under s.198AD; a person taken to a place outside Australia under s.245F(9)(b) of the Migration Act or under certain provisions of the Maritime Powers Act 2013; or a person who, while a non-citizen and during the period 27 August 2001 to 6 October 2001 was transferred from the MV Tampa or MV Aceng to the MV Manoora and taken to another country, and disembarked in that country. A child born to a 'transitory person' in the migration zone or a regional processing country, and who is not an Australian citizen at birth, is also a 'transitory person': s.(5)(1) of the Migration Act.
[20] Paragraph (1) of IMMI 16/008 – Class of persons defined as fast track applicants 2016/008, commenced 1 April 2016.
[21] Paragraph (2) of IMMI 16/008 – Class of persons defined as fast track applicants 2016/008, commenced 1 April 2016.
[22] Paragraph (6) of IMMI 17/015 – Person who is a Fast Track Applicant, commenced 26 July 2017.
[23] s.5(1AC).

the meaning of paragraph (a) of the definition. Whilst in the migration zone, X is born to A and B on 2 January 2014. Because X is the child of A, a UMA who entered Australia before 13 August 2012, X is not a 'fast track applicant' within the meaning of paragraph (a) of the definition: see s.5(1AC). However, because X is a UMA who was born in the migration zone on or after 1 January 2014, and is also the child of B who is a 'fast track applicant' within the meaning of paragraph (a) of the definition, if X had not already made a combined protection visa application with A before 7 May 2016 child X will fall within a class of persons specified by the Minister as a 'fast track applicant'.[24]

Fast track decision

1.2.7 A 'fast track decision' is, generally speaking, a decision to refuse a protection visa to a fast track applicant. It does not, however, include a decision to refuse a protection visa to a fast track applicant based on s.501 character grounds, or a decision made on the basis of s.5H(2) (Article 1F type crimes), s.36(1B) and (1C) (adverse ASIO assessment/ threat to security) or s.36(2C)(a) or (b) (Article 1F or 33 type crimes).[25]

Fast track review applicant

1.2.8 A 'fast track review applicant' is a fast track applicant who is not an 'excluded fast track review applicant'.[26]

Excluded fast track review applicant

1.2.9 An 'excluded fast track review applicant' is a 'fast track applicant' who in the Minister's opinion, either:

- is subject to a Comprehensive Plan of Action/safe third country agreement (s.91C) or is a dual national or has a right to enter and reside in a declared country (s.91N);[27] or
- has previously had a claim for protection refused or withdrawn whilst they were in Australia;[28] or
- has made a claim for protection in another country that has been rejected by that country or the UNHCR;[29] or
- without reasonable explanation gives or presents, or causes to be provided, given or presented, a bogus document to the Minister or an officer in support of their visa application;[30] or

[24] See paragraph (2)(a) of IMMI 16/049 – Class of persons defined as fast track applicants 2016/049, commenced 7 May 2016.
[25] See definition of 'fast track decision' in s.5(1). Note that some decisions made in the circumstances described in paragraph (a), or sub-paragraph (b)(i) or (iii) of the definition are reviewable by the General Division of the AAT in accordance with s.500.
[26] See definition of 'fast track review applicant' in s.5(1).
[27] Paragraph (a)(i) of the definition of 'excluded fast track review applicant' in s.5(1).
[28] Paragraph (a)(ii) of the definition of 'excluded fast track review applicant' in s.5(1).
[29] Paragraph (a)(iii) and (iv) of the definition of excluded fast track review applicant in s.5(1). In *FMM17 v MIBP* [2019] FCCA 1500 (Judge Lucev, 12 June 2019) at [39]-[40] the Court held that, for an applicant to be an 'excluded fast track review applicant' in relation to paragraph (a)(iii), the claim for protection made in another country does not need to be the same or similar to the one being made in Australia. The Court reasoned that if Parliament had intended that only the same or similar claims would render an applicant an 'excluded fast track review applicant', it would have said so using those words.
[30] Paragraph (a)(vi) of the definition of excluded fast track review applicant in s.5(1). Note that the term 'bogus document' is defined in s.5(1). There must be a temporal connection between the provision of the bogus document and the visa application, such that only documents provided in support of the protection visa application may enliven s.5(a)(vi): *DSM16 v Minister for Immigration* [2018] FCCA 1615 (Judge Kendall, 21 June 2018) at [84]-[92]. In this judgment, the Court, adopting reasoning

- makes a claim for protection that the Minister considers 'manifestly unfounded' (including one which has no plausible or credible basis, or is based on conditions, events or circumstances that are not able to be substantiate by objective evidence, or is made solely for the purpose of delaying or frustrating the person's removal from Australia);[31] or

- who is in a class of persons specified by the Minister by legislative instrument.[32]

Fast track reviewable decision

1.2.10 A 'fast track reviewable decision' is a 'fast track decision' in relation to a 'fast track review applicant';[33] or a specified 'fast track decision' or class of 'fast track decisions' in relation to an 'excluded fast track review applicant' that the Minister has determined should be reviewed.[34]

1.2.11 The existence of a 'fast track reviewable decision' does not turn on the validity of the primary decision,[35] accordingly the IAA has jurisdiction to review purported decisions of a delegate.[36]

1.2.12 The Minister may, however, issue a conclusive certificate which prevents review of a fast track decision by the IAA if the Minister believes it would be contrary to the national interest to change the decision or for the decision to be reviewed.[37]

Referred applicant

1.2.13 'Referred applicant' means an applicant for a protection visa in respect of whom a fast track reviewable decision is referred under s.473CA.[38]

New information

1.2.14 'New information' means, in relation to a fast track decision, any document or information that was not before the Minister when the Minister made their s.65 decision and that the IAA considers may be relevant.[39]

Review material

1.2.15 'Review material' means, in respect of each 'fast track reviewable decision' referred to the IAA:

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consistent with *BGM16 v MIBP* (2017) 252 FCR 97, found that the provision of documents prior to an irregular maritime entry interview were not provided in support of a Safe Haven Enterprise (Subclass 790) visa application and therefore could not be bogus documents provided in support of the visa application.

[31] Paragraph (aa) of the definition of excluded fast track review applicant in s.5(1).

[32] Paragraph (b) of the definition of excluded fast track review applicant in s.5(1). At the time of writing no such instrument has been made.

[33] Paragraph (a) of the definition of 'fast track reviewable decision' in s.473BB.

[34] s.473BC and paragraph (b) of the definition of 'fast track reviewable decision' in s.473BB. Currently there are no 'fast track decisions' or classes of 'fast track decisions' specified for this purpose.

[35] See *Plaintiff M174/2016 v MIBP* [2018] HCA 16 (18 April 2018) at [52] per Gageler, Keane and Nettle JJ (Gordon and Edelman JJ agreeing) the High Court followed the construction in *Collector of Customs v Brian Lawlor Automotive Pty Limited* (1979) 24 ALR 307 finding that it is within the IAA's review power to review a 'decision' to refuse to grant a protection visa to a fast track applicant regardless of whether or not that decision is legally effective.

[36] *Collector of Customs v Brian Lawlor Automotive Pty Limited* (1979) 24 ALR 307.

[37] s.473BD and the definition of 'fast track reviewable decision' in s.473BB.

[38] definition of 'referred applicant' in s.473BB.

[39] s.473DC(1).

- a statement that sets out the findings of fact made by the person who made the fast track reviewable decision, refers to the evidence on which those findings were based and gives the reasons for the decision;[40]

- material provided by the referred applicant to the person who made the fast track reviewable decision before the decision was made and any other material that is in the Secretary's possession or control and is considered by the Secretary at the time the decision is referred to the IAA to be relevant to the review;[41]

- the last address for service, residential or business address, fax number, email address or other electronic address provided to the Minister by the referred applicant for the purpose of receiving documents;[42]

- if the last address for service, residential or business address, fax number, email address or other electronic address has not been provided to the Minister by the referred applicant, or if the Minister reasonably believes that the last such address or number provided to the Minister by the referred applicant is no longer correct, an address or number (if any) that the Minister reasonably believes to be correct at the time the decision is referred;[43]

- if the referred applicant is a minor, the last address for service, residential or business address, fax number, email address or other electronic address for a carer of the minor.[44]

1.3 FAST TRACK PROCESS

1.3.1 The fast track process only applies to fast track applicants, being persons or classes of persons specified by the Minister or UMAs who entered Australia on or after 13 August 2012 but before 1 January 2014 and have not been taken to a regional processing country and have made a valid application for a protection visa on or after 18 April 2015 following the Minister's decision to lift the s.46A bar.

1.3.2 The Minister's (or delegate's) decision to refuse a fast track applicant a protection visa is a fast track decision.

1.3.3 A fast track decision will become a fast track reviewable decision that must be referred to the IAA for review unless the Minister has issued a conclusive certificate under s.473BD or the visa applicant is an excluded fast track review applicant within the meaning of s.5(1) and the decision is not a decision, or within a class of decisions, specified by the Minister under s.473BC that should be reviewed.

1.3.4 Fast track reviewable decisions must be referred to the IAA by the Minister as soon as reasonably practicable after a decision is made. A person (including a fast track applicant) cannot themself make an application for review directly to the IAA.

1.3.5 Except in limited circumstances, decisions to refuse to grant protection visas to fast track applicants are not otherwise reviewable.

[40] s.473CB(1)(a).
[41] s.473CB(1)(b) and (c).
[42] s.473CB(1)(d)(i) - (iii).
[43] s.473CB(1)(d)(iv).
[44] s.473CB(1)(d)(v).

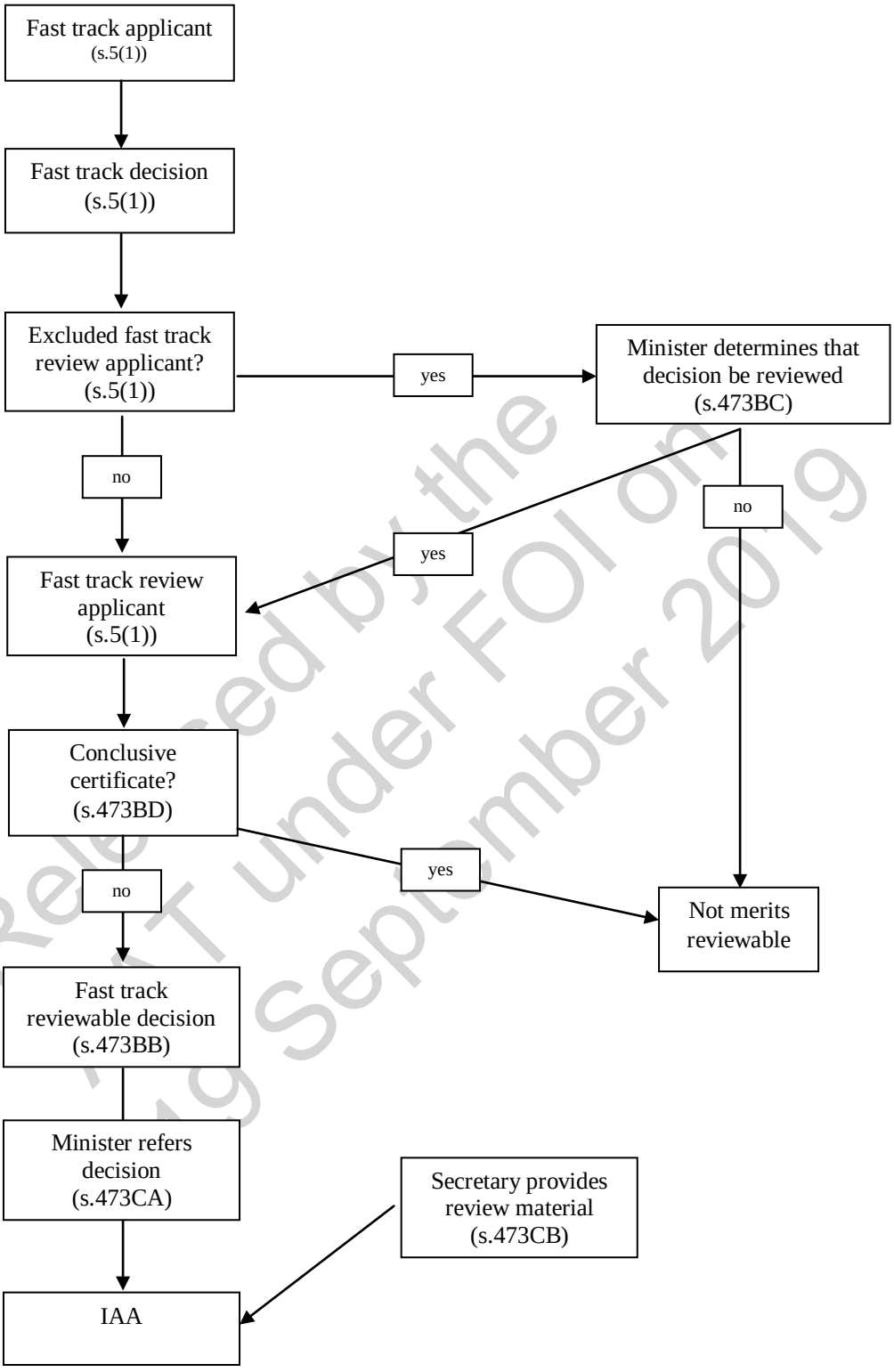
1.3.6 In reviewing fast track reviewable decisions, the IAA is required to pursue the objective of providing a mechanism of limited review that is efficient, quick, free of bias and consistent with its statutory provisions governing its conduct of a review.

1.3.7 Except in very limited circumstances, the IAA does not hold hearings and is required to review decisions only on the papers that are provided to it by the Secretary at the time the reviewable decision is referred to it.

1.3.8 In exceptional circumstances the IAA may consider new material and may invite referred applicants to provide, or comment on, new information at an interview or in writing.

1.3.9 The powers of the IAA are limited to affirming a referred decision or remitting the decision for reconsideration in accordance with directions.

Fast Track Referral Process



1.4 WHICH DECISIONS CAN BE REVIEWED BY THE IAA?

1.4.1 Only a fast track reviewable decision can be referred to the IAA for review.[45]

1.4.2 Section 473BB defines 'fast track reviewable decision' to mean a:

- fast track decision in relation to a fast track review applicant; or
- a specified fast track decision or class of fast track decisions in relation to an excluded fast track review applicant that the Minister has determined should be reviewed.[46]

1.4.3 However a fast track reviewable decision does not include a fast track decision in respect of which the Minister has issued a conclusive certificate preventing review by the IAA.[47]

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.[48] 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.[49] 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.[50]

1.6 IAA'S ORGANISATIONAL STRUCTURE

1.6.1 The President and the MRD Division Head are responsible for the overall administration and operation of the IAA and either may issue directions or determine policies.[51] The President may delegate, in writing, all or any of his powers or functions to the Senior Reviewer.[52] The Senior Reviewer is to manage the IAA subject to the directions of, and in accordance with

[45] s.473CA.
[46] ss.473BB and 473BC. Currently there are no fast track decisions or classes of fast track decisions specified for this purpose.
[47] s.473BD and the definition of 'fast track reviewable decision' in s.473BB.
[48] s.473CA.
[49] 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].
[50] See Part 4 of this Guide for further details.
[51] s.473JB(1).
[52] s.473JF(1).

directions determined by, the President or MRD Division Head,[53] and must also comply with any written direction of the President when exercising a power under a delegation.[54]

1.6.2 The Senior Reviewer and other Reviewers are engaged under the *Public Service Act 1999* with the Registrar of the AAT to make available officers of the AAT to assist the IAA in the performance of its administrative function.[55]

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.[56] 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'.[57] 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.[58] 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.[59]

1.7.2 The IAA does not conduct hearings and can only consider new information in very limited circumstances.[60] 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.[61]

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.[62] 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.[63]

[53] s.473JB(2).
[54] s.473JF(2).
[55] s.473JE. Note that the appointment of the Senior Reviewer is by written instrument of the President after consultation with the Minister: s.473JC. The President may also appoint a person to act as the Senior Member in certain circumstances.
[56] s.473CC(1).
[57] s.473FA(1).
[58] s.2A of the *Administrative Appeals Tribunal Act 1975* (AAT Act).
[59] s.473FA(2).
[60] See Chapter 2 of this Guide for further details.
[61] s.473DB.
[62] *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]. See also *BJB16 v MIBP* [2018] FCAFC 49 (Kenny, McKerracher and White JJ, 29 March 2018) as per [71] the Court follows *BMB16* confirming that the power of the IAA to reach its own conclusions concerning the authenticity of documents and other material before it is not dependent on new information. It also held that the findings of the delegate do not control the reasons or findings of the IAA.
[63] 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. This was upheld on appeal in *MIBP v CRY16* [2017] FCAFC 210 (Robertson, Murphy and Kerr JJ, 14 December 2017) at [82] where the Court held that the legislature is to be taken to intend that the IAA's statutory power in s.473DC will be exercised reasonably. An application for special leave to appeal to the High Court was dismissed: *MIBP v CRY16* [2018] HCASL 102 (19 April 2018).

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.[64]

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;[65] or
- the referred applicant is a refugee within the meaning of s.5H(1);[66] or
- s.36(3) does not apply to the referred applicant;[67] 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;[68] or
- the grant of the visa is not prevented by ss.91W, 91WA or 91WB of the Migration Act.[69]

1.7.6 The IAA may <u>not</u>, however, remit with a direction that:

- s.5H(1) applies to the referred applicant;[70] or
- s.5H(1) does not apply to the referred applicant because of s.5H(2);[71] or
- the referred applicant satisfies, or does not satisfy, the criterion in s.36(1C);[72] 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;[73] or
  - the referred applicant committed a serious non-political crime before entering Australia;[74] or
  - the referred applicant has been guilty of acts contrary to the purposes and principles of the United Nations;[75] or

[64] 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.
[65] r.4.43(2)(a).
[66] r.4.43(2)(b).
[67] r.4.43(2)(c).
[68] r.4.43(2)(d).
[69] r.4.43(4).
[70] r.4.43(3)(a).
[71] r.4.43(3)(b).
[72] r.4.43(3)(c).
[73] r.4.43(3)(d)(i).
[74] r.4.43(3)(d)(ii).
[75] r.4.43(3)(d)(iii).

- 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;[76] 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 Australian offence or serious foreign offence, is a danger to the Australian community.[77]

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.

1.7.8 A permissible remittal direction made by the IAA is binding on the Minister to comply with the direction. In *Plaintiff M174/2016 v MIBP*[78] the High Court held that the power conferred on the IAA to remit or refuse to grant the visa places a duty on the Minister to not only consider the remitted decision but to comply with any permissible direction when undertaking that reconsideration. This is in accordance with the terms of r.4.43(1) that the applicant '*must be taken to have satisfied the criteria'* (similar to the wording in r.4.15 for the MRD of the AAT) suggesting that the Minister is taken to comply with any permissible direction made by the IAA.

Practice directions

1.7.9 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.[79] The MRD Division Head has all the powers of the President, including that to issue written practice directions.[80]

Scope of directions

1.7.10 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'[81] in writing or at interview.[82] Currently, two practice directions have been issued by the President and are in force. These are Practice Direction for Applicants, Representatives and Authorised Recipients[83], which sets out the requirements to be followed by applicants, their representatives and authorised recipients when dealing with the

[76] r.4.43(3)(e)(i).
[77] r.4.43(3)(e)(ii).
[78] [2018] HCA 16 (18 April 2018) at [19].
[79] s.473FB(1).
[80] s.473JB(1A).
[81] '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.
[82] s.473FB(2).
[83] This direction has effect from 7 February 2017. In *DGZ16 v MIBP* [2018] FCAFC 12 (Reeves, Robertson and Rangiah JJ, 1 February 2018) at [103]-[107] the Court held that paragraph 21 of this Practice Direction (which states that any submission to the IAA must be concise and that is should be no longer than five pages) was not inconsistent with ss.473DC or 473DD, or an unreasonable exercise of the power conferred by s.473FB. The Court reasoned that paragraph 21 is not directed to 'new information'.

IAA and Practice Direction: The giving of information to the IAA by the Secretary of DIBP[84], 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

1.7.11 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.[85]

1.7.12 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.[86] 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.[87] However, where a written practice direction hasn't been complied with but the IAA nevertheless goes on to consider whether to accept 'new information', the IAA should not take into account the non-compliance with the Practice Direction as a relevant consideration in determining whether the matters in s.473DD are satisfied.[88]

Guidance decisions

1.7.13 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.[89] As with other presidential powers, the MRD Division Head may also exercise the power to issue a guidance decision.[90]

1.7.14 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

[84] This direction has effect from 30 September 2016. In *DBA16 v MIBP* [2017] FCA 1580 (Lee J, 14 December 2017) at [23]-[24] the Court accepted that Practice Direction 2 of this Practice Direction operates as intended and is valid. Practice Direction 2 relevantly provides that where the delegate's written statement of a decision to refuse a protection visa that is referred to the IAA for review contains a reference to a document comprising country of origin information and that document is available to the IAA in CISNET, the document in CISNET will be taken to be review material given to the IAA pursuant to s.473CB(1)(c). The relevant document refered to in the delegate's decision was not given to the IAA by the Secretary but it was available to the IAA on CISNET. Therefore, pursuant to Practice Direction 2, it was validly taken to be review material given to the IAA.

[85] s.473FB(3). In *CRW16 v MIBP* [2017] FCCA 984 (Judge Street, 15 May 2017) at [62]–[67] the Court rejected that the IAA's consideration of a translated document, which 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. Upheld on appeal in *CRW16 v MIBP* [2018] FCA 710 (Flick J, 21 May 2018), however the Court did not consider this issue in its judgment. An application for special leave to appeal from this Federal Court judgment was refused: *CRW16 v MIBP* [2018] HCASL 257 (12 September 2018).

[86] s.473FB(4).

[87] 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 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.

[88] *DHV16 v MIBP* [2018] FCCA 349 (Judge Driver, 14 March 2018) at [96]. The IAA considered whether documents were 'new information' but as the applicant had not complied with the Practice Direction made under s.473FB to provide reasons relevant to s.473DD, it did not take the information into account. The Court held that, by embarking upon consideration of s.473DD, the IAA had moved beyond the exercise of that antecedent and non-compellable discretion in s.473FB(5) and there was nothing in s.473DD(b) which rendered non-compliance with the Practice Direction to be a relevant consideration. The Court also considered that it was self-evident why the information had not been provided to the Minister. See also *AST18 v MIBP* [2018] FCCA 1990 (Judge Driver, 23 July 2018) at [25]-[26] where the Court confirmed that s.473FB(5) provides a separate and antecedent discretion which, if lawfully exercised, relieves the IAA from engaging in the consideration under s.473DD. There was no express consideration of the new information against s.473DD in the decision record, which led the Court to assume that the IAA had not considered the information against s.473DD and had declined to receive the information pursuant to s.473FB(5), which it was entitled to do.

[89] s.473FC(1).

[90] s.473JB(1A).

guidance decision,[91] however non-compliance with a guidance decision does not mean that the IAA's decision is invalid.[92]

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.

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,[93] it does not appear open for a referred applicant to withdraw themself 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.[94] 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.

[91] s.473FC(2). At the time of writing, the President has not issued any guidance decisions under s.473FC(2).
[92] s.473FC(3).
[93] ss.473CA and 473CC(1).
[94] *SZASD v MIMIA* [2004] FMCA 472 (Driver FM, 29 July 2004) and the cases cited at [10].

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'[95], does not avoid or remove the consequence of a visa having been refused.[96]

1.8.8 Further, as the effect of a withdrawal is that 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.[97] 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.[98]

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 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.

[95] As defined in s.5(9) and (9A).
[96] 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.
[97] *V120/00A v MIMA* (2002) 116 FCR 576 at [53].
[98] *V120/00A v MIMA* (2002) 116 FCR 576 at [53].

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.

Immigration Assessment Authority Procedural Law Guide

Chapter 2

Conduct of review

Current as at 19 September 2019

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 is required to engage in a *de novo* consideration of the merits of the decision, which means that it considers the application for the protection visa afresh and is not concerned with the correction of error on the part of the delegate.[4] 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 Home Affairs (the Secretary) at the time the decision is referred.[5] 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.[6] The IAA may also make a decision on a fast track reviewable decision at any time after the decision has been referred to it.[7]

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[8], contains an exhaustive statement of the natural justice hearing rule

[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 in 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. It is unclear whether an express finding that such material was irrelevant and played no role in the review would remove the risk of apprehended bias. See also *CKV16 v MIBP* [2019] FCA 342 (Besanko J, 14 March 2019) at [28] where the Court held that extraneous information about a police investigation into the applicant which the Department provided to the IAA as part of the review material and which the IAA did not refer to in its reasons was prejudicial information that gave rise to an apprehension of bias. By way of contrast in *CNY17 v MIBP* [2018] FCAFC 159 (Mortimer, Moshinsky and Thawley JJ, 21 September 2018) at [135]-[136], [162]-[163] and [174] the Court distinguished *AMA16* as the information that was provided to the IAA did not have the same prejudicial quality as the Departmental communications in *AMA16.* The Court stated that the mere existence of irrelevant material provided under s.473CB(1) (with the implication that the Secretary considered it relevant) does not automatically give rise to an apprehension of bias. The Court focused on whether the reviewer would bring an impartial mind to the review, having seen the material, and considered that a fair-minded observer would not conclude that the IAA was unable to disregard irrelevant material. An application for special leave to appeal from this judgment to the High Court was granted: *CNY17 v MIBP* [2019] HCATrans 101 (17 May 2019).

[3] s.473FA(1).

[4] In *Plaintiff M174/2016 v MIBP* [2018] HCA 16 (Gageler, Keane, Nettle, Gordon and Edelman JJ, 18 April 2018) per Gageler, Keane and Nettle JJ at [17]. Following *Plaintiff M174*, the Court in *MIBP v EEI17* [2018] FCAFC 166 (McKerracher, Gleeson and Burley JJ, 28 September 2018) at [45] and [48] held that the IAA is not concerned with the correction of error on the part of the delegate but is engaged in a *de novo* consideration of the merits of the decision that has been referred to it. The task of the IAA under s 473CC(1) is to consider the application for a protection visa afresh.

[5] s.473DB(1).

[6] s.473DC.

[7] s.473DB(2).

[8] 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.

in relation to reviews conducted by the IAA.[9] There is no scope for the principles of procedural fairness to apply where the IAA follows Part 7AA, except to the extent that those principles overlap with legal unreasonableness.[10]

2.2.2 In light of the limited opportunity to put forward new information before the IAA under s.473DC (discussed below), the proper performance of the IAA's functions may be stultified by dishonest or reckless conduct by a representative.[11]

2.2.3 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;[12]
- only consider new information in exceptional circumstances;[13] 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.[14]

2.2.4 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.[15] For information to be 'before the Minister' in this context, it must have been physically before the Minister in relation to the particular matter, and where it is only information in the constructive knowledge of the Department, because of the breadth of information held by the Department or in the Minister's control, it cannot be said to be 'before the Minister'.[16]

Review on the papers

2.2.5 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.[17]

[9] 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.

[10] See *MIBP v DZU16* [2018] FCAFC 32 (Robertson, Murphy and Kerr JJ, 12 March 2018) at [99]. This was followed in *BMK17 v MIBP* [2018] FCA 811 (Derrington J, 15 May 2018) at [21] where the Court discussed if a misrepresentation has been made by the IAA where one of the natural justice rules provided for by the legislature was inapplicable, it would have the effect of causing the authority not to comply with the limited requirements under the Act.

[11] See *DUA16 v MHA; CHK16 v MHA* [2019] FCCA 1128 (Judge Riethmuller, 30 April 2019) at [84]-[86] where the Court held a solicitor's conduct in using the same submissions in around 40 unrelated cases had thwarted any real or substantive engagement by the applicants with the IAA by depriving them of their opportunity to make submissions that new information should be considered.

[12] s.473DB(1).

[13] ss.473DC and 473DD.

[14] s.473DE.

[15] s.473DA(2). See *AHF18 v MIBP* [2018] FCCA 1458 (Judge Cameron, 18 June 2018) at [24], [30]-[31] the Court found the IAA does not have a duty to give an applicant requested material, however it found the IAA does have a discretionary power to give information to the applicant in order for the applicant to make a meaningful submission under s.473DC(3).

[16] *DTK17 v MIBP* [2018] FCAFC 170 (McKerracher, Gleeson and Burley JJ, 10 October 2018) at [38].

[17] s.473DB(1). See *AJE17 v MIBP* [2018] FCA 111 (Flick J, 21 February 2018) at [22] where the Court found that it was not unreasonable for the IAA to decline a request for an interview with an applicant where adverse credibility findings were made against the applicant. The Court found that consideration should be given to conducting an interview given that adverse credibility findings were made but this needs to be considered in the statutory context of a Part 7AA review which is a limited form of review and that the adverse findings were based largely upon inconsistencies in the accounts given by the applicant and not an assessment 'founded merely upon whether the evidence being given should be believed or the weight to be given to such evidence'. The IAA had provided the applicant with an opportunity to provide submissions to the IAA, and the Court held

2.2.6 The 'review material' which the Secretary is required to provide to the IAA at the same time, or as soon as reasonably practicable after,[18] a decision has been referred to it is set out in s.473CB and includes:[19]

- 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 person who made the decision (i.e. primary decision maker) before the decision was made,[20] 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;[21]
- contact details for the applicant to receive documents.

2.2.7 Practice Direction No. 2 on 'The Giving of information to the Immigration Assessment Authority by the Secretary of the Department of Immigration and Border Protection' (dated 22 September 2016) specifies the methods by which the Secretary is to give information to the IAA. In particular, it provides that where the written statement of a delegate's decision contains a reference to a document comprising country information:

- if the document is available on CISNET, the document will be taken to be review material given to the IAA under s.473CB(1)(c); or

that there was no denial of procedural fairness because an interview was not the only way the applicant could present his claims. In *DBA16 v MIBP* [2017] FCCA 320 (Judge Driver, 23 February 2017) at [46], the Court noted that 'if the [IAA] were compelled to invite an applicant to an interview merely because his or her credibility is called into question, the result would be the [IAA] generally coming under an obligation to issue an invitation, as adverse credibility findings are made in the majority of cases coming before the courts. That would not only be inconsistent with the text of s.473DC(2), but would also defeat the purpose of the fast track assessment process'. The Court's comments were endorsed in *obiter* on appeal in *DBA16 v MIBP* [2017] FCA 1580 (Lee J, 14 December 2017) at [17] and in *DYK16 v MIBP* [2018] FCAFC 222 (Collier, Middleton and Rangiah JJ, 7 December 2018) at [74]. An application for special leave to appeal from this judgment to the High Court was dismissed: *DYK16 v MIBP* [2019] HCASL 124 (17 April 2019). See also *BKY17 v MIBP* [2019] FCA 487 (Perram J, 10 April 2019) at [17] where the Court found that there is no obligation on the IAA to notify an applicant that it intends to depart from a favourable finding made by the delegate.

[18] In *ARM18 v MHA* [2018] FCCA 3326 (Judge Manousaridis, 31 October 2018) the Court held at [26] that the 'or' in s.473CB(2) should be construed to mean 'either or both' so that the Secretary may provide review material either at the same time the decision is referred to the IAA or as soon as practicable after the decision is referred.

[19] s.473CB.

[20] See *BAK18 v MIBP* [2018] FCCA 2953 (Judge Vasta, 2 October 2018) at [62]-[63] where the Court found that review material in s.473CB(1)(b) refers to material given 'to the person making the decision' rather than the Minister. Hence, the person making the decision means the actual delegate, which means anything before the delegate must be provided to the IAA.

[21] 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 it. The IAA failed to comply with its statutory obligation under s.473DB, as the decision was silent on whether the prejudicial material was relevant to the review. See also *CNY17 v MIBP* [2018] FCAFC 159 (Mortimer, Moshinsky and Thawley JJ, 21 September 2018) at [149] where the Court found that information provided by the Secretary under s.473CB was irrelevant to the IAA review but that it did not mean that the Secretary's decision to give that material to the IAA was invalid. In *ARM18 v MHA* [2018] FCCA 3326 (Judge Manousaridis, 31 October 2018), the Court found at [27]-[28] that material was not 'review material' as the information was given to the IAA because the IAA requested it and not because the delegate considered it relevant. See also *CRS18 v MHA* [2019] FCCA 280 (Judge Vasta, 1 February 2019) at [58] and [68] where the Court found that information from the applicant's husband's separate visa application, namely the delegate's conclusions in that application that the applicant was stateless and her husband was owed protection, was not 'review material' because the information was opinion rather than fact and it was not 'significant or material' (i.e. relevant) to the review.. It was not logical to say that the applicant's claims should be accepted because her husband's claims had been accepted in a separate application.

- if the document is not available on CISNET, the Secretary must give the document to the IAA in electronic form along with any other material in the Secretary's possession or control which is considered to be relevant to the review.[22]

2.2.8 The IAA is required to consider all the 'review material' referred to it by the Secretary.[23] Express reference to all of the 'review material' may not be necessary to show consideration of the material in circumstances where that review material supports propositions already found by the IAA in favour of the applicant's claims on the basis of other review material cited in the decision.[24] However, where it is not clear on the face of the material whether it supports findings in favour of the applicant, it would be prudent to refer to the review material in the decision to show that it has been considered.

2.2.9 Where the Secretary fails to give review material to the IAA in breach of s.473CB(1), jurisdictional error will be established where the review material that was not provided could have affected the outcome of the decision.[25] Where it becomes apparent that the Secretary has omitted a document from the review material that may be relevant to the review, the IAA should consider making enquiries of the Department to obtain the document so that it can consider it or invite the applicant under s.473DC to provide new information in respect of the omitted document. Notably in *ARM18 v MHA*, the Court found material that the Department provided to the IAA at the IAA's request but the delegate maintained was not relevant to the review was not 'review material', nor was it 'new information' if it was before the delegate, so could not be considered by the IAA on review.[26] However, the Court did not appear to consider whether the material was information given by the applicant within s.473CB(1)(b). Further, s.473DB does not expressly prohibit the IAA considering information outside the review material that is not new information.

2.2.10 The IAA is not obliged to consider findings of fact made by the delegate on claims that were not made by the applicant.[27]

[22] See *AHM18 v MHA* [2018] FCCA 2016 (Judge Street, 25 July 2018) at [27]-[30] where the Court found there was no breach of item 2(b) of Practice Direction No.2 where the Secretary provided the delegate's decision to the IAA which contained a URL reference to country information that was not available on CISNET but did not provide a physical copy of the country information. It held even if there was a breach of Practice Direction No.2 there was no practical injustice as the article was not material to the determination of the applicant's claims and did not disable the IAA from conducting a review required under Part 7AA. This judgment was upheld on appeal: *AHM18 v MHA* [2019] FCA 409 (Wheelahan J, 26 March 2019) although this issue was not discussed in the judgment.

[23] s.473DB(1).

[24] In *BVM16 v MIBP* [2018] FCA 381 (Logan J, 9 March 2018) at [8] the Court found no error by the IAA where there was a lack of express reference in the IAA's decision to review material that was referred to in the delegate's decision and given to the IAA under s.473CB. The Court noted that such a reference was not necessary in these circumstances because the review material, if accepted, supported propositions already found in the appellant's favour on the basis of other material before the IAA.

[25] In *EVS17 v MIBP* [2019] FCAFC 20 (Allsop CJ, Markovic and Steward JJ, 11 February 2019) at [54]-[56] the Full Federal Court held that the Department's failure to provide the IAA with medical documents provided to the delegate by the appellant before the primary decision was made prevented the IAA from conducting its review such that jurisdictional error was established because the documents could have led to the IAA drawing different conclusions in relation to some of the appellant's claims. This approach was followed in *MIBP v CPA16* [2019] FCAFC 40 (Yates, Murphy and Moshinsky JJ, 12 March 2019) at [38] where the Court held that a corroborative letter from the appellant's parish priest that the applicant provided to the Department but was not included on the Department file and consequently not considered as part of the review material by the IAA could realistically have resulted in the IAA making a different decision, distinguishing the circumstances from those in *MIBP v SZMTA* [2019] HCA 3 (Bell, Gageler, Keane, Gordon and Nettle JJ, 13 February 2019). See also *AKK17 v MIBP* [2017] FCCA 2486 (Judge Driver, 15 November 2017) at [59], [63]–[64], where the Court held the review function by the IAA was disabled by the failure of the Secretary to comply with their s.473CB obligation to refer a letter to the IAA because, had the letter been before the IAA, it could have impacted upon the outcome.

[26] *ARM18 v MHA* [2018] FCCA 3326 (Judge Manousaridis, 31 October 2018) at [24], [27]-[28] and [39].

[27] See *MIBP v EEI17* [2018] FCAFC 166 (McKerracher, Gleeson and Burley JJ, 28 September 2018) at [48]. The Court held that the IAA's obligation to give reasons does not extend to an obligation to accept, reject or otherwise comment upon the apparent anomalies within the delegate's reasons concerning the respondent's Bidoon ethnicity (which was a claim not made by the applicant). This judgment overturned the lower court authority of *EEI17 v MIBP* [2018] FCCA 527 (Judge Manousaridis, 9 March 2018) at [50] which held that the IAA fell into jurisdictional error by not explicitly considering the delegate's finding on

2.2.11 The IAA is required to have regard to any submission made consistently with a practice direction that is responsive to the decision under review.[28] Submissions relating to the decision under review do not need to be considered as a request for new information prior to considering them.[29] This was confirmed by the Federal Court in *CLIV16 v MIBP*[30] which held that the IAA is not precluded from entertaining a 'submission' as to the consequences flowing from an established pool of facts and is not required to consider them against s.473DC. However, the Federal Court in *BKY17 v MIBP*[31], contrary to *CLV16*, suggested that the IAA has no power to seek further submissions and that there is no provision for an applicant to give submissions relating to issues arising in relation to the decision under review, however, the Court was not required to reach a concluded view on this point. On present authority, the IAA may receive submissions, but it is unclear whether Part 7AA enables it to seek them.

2.2.12 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.[32] 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 time the decision is referred.[33] If the referred applicant is a minor, the Secretary must provide equivalent contact details for a carer of the minor.[34]

2.2.13 If the delegate errs in notifying the applicant under s.66 of their decision, it will not affect the IAA's jurisdiction as the applicant's knowledge or consent is not required for the decision to be referred to the IAA.[35] In *FPT17 v MHA (No.2)*[36] the delegate sent their decision to the wrong address and the applicant was consequently not aware of the review. The applicant contended that they were deprived of an opportunity to present information to the IAA. The Court held that there was no jurisdictional error as there was nothing in the material to suggest that the IAA should have reasonably considered exercising its discretion under s.473DC to obtain new information.

2.2.14 Subject to Part 7AA of the Migration Act, the IAA may make a decision on a review at any time after the primary decision has been referred to it.[37] Part 7AA of the Migration Act constrains, or overrides, any common law entitlement to have the review adjourned so that

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the Bidoon claim even though it was not supported by evidence. The Court found that the IAA considered the claim as raised by the applicant but did not refer to the delegate's erroneous finding, as it was required to do by s.473DB. In *BYR17 v MIBP* [2018] FCA 1324 (Bromberg J, 7 September 2018) at [51] the Court held the IAA is not necessarily bound to consider all issues considered by the delegate where such matters are no longer in issue including where claims have been abandoned or withdrawn. See also *CWP16 v MIBP* [2018] FCAFC 28 (Robertson, Kerr and White JJ, 23 February 2018) at [44]-[45] where the Court held that because the delegate had not made a finding on a particular claim, the IAA did not fail to complete its review by not further considering that material. The claim was therefore 'new information' before the IAA.

[28] *CDH16 v MIBP* [2018] FCA 668 (Kerr J, 14 May 2018) at [85].

[29] *CDH16 v MIBP* [2018] FCA 668 (Kerr J, 14 May 2018) at [34] and [99]. The Court found no error in the IAA treating aspects of a document titled 'submission' provided by the applicant as 'new information' and considering other aspects as submissions rather than a request to adduce new information.

[30] *CLV16 v MIBP* [2018] FCAFC 80 (Flick, Griffiths and Perry JJ, 25 May 2018) at [54] and [73].

[31] *BKY17 v MIBP* [2019] FCA 487 (Perram J, 10 April 2019) at [27].

[32] s.473CB(1)(d)(i)-(iii).

[33] s.473CB(1)(d)(iv).

[34] s.473CB(1)(d)(v).

[35] *FPT17 v MHA* [2018] FCCA 2165 (Judge Manousaridis, 10 August 2018) at [30]-[34].

[36] *FPT17 v MHA* [2018] FCCA 2165 (Judge Manousaridis, 10 August 2018) at [30]-[34].

[37] s.473DB(2).

an applicant may obtain further information and provide it to the IAA.[38] However, where an applicant requests an adjournment on the basis they wish to provide further information, they can show that information is likely to be imminently provided to the IAA and the delay is due to a third party, there may be a denial of procedural fairness if the IAA makes a decision without adjourning the review.[39]

2.2.15 There is no general duty on the IAA to obtain translated copies of documents or accept untranslated copies of documents.[40] Nor is there a duty to make enquiries with an applicant if submissions containing incorrect web links are provided to the IAA.[41]

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.[42]

2.3.2 The IAA is required to turn its mind to all of the material submitted to it when deciding whether there is 'new information' placed before it, and if so what should occur in relation to that new information.[43] Where new information is provided to the IAA, and the IAA is satisfied of the matters in s.473DD (discussed below) in relation to the new information, the IAA has an obligation to consider that information.[44]

[38] *CRW16 v MIBP* [2018] FCA 710 (Flick J, 21 May 2018) at [24]-[26]. An application for special leave to appeal from this judgment to the High Court was dismissed: *CRW16 v MIBP* [2018] HCASL 257 (12 September 2018).

[39] *CRW16 v MIBP* [2018] FCA 710 (Flick J, 21 May 2018)) at [30] and [40]. The applicant had made a request under the *Freedom of Information Act1982* for access to all department files, and requested that the review be adjourned until they had received the files and had an opportunity to present material to the IAA. The Court held that it was not unreasonable to proceed to decision in circumstances where there was no evidence before the IAA that the FOI request would be completed shortly. The IAA did not make any enquiries about when the FOI request would be completed, and its failure to do so was not unreasonable. An application for special leave to appeal from this judgment to the High Court was dismissed: *CRW16 v MIBP* [2018] HCASL 257 (12 September 2018).

[40] *AAY18 v MHA* [2018] FCA 1844 (Colvin J, 27 November 2018) at [12]. An application for special leave to appeal from this judgment to the High Court was dismissed: *AAY18 v MHA* [2019] HCASL 41 (13 March 2019). See also *DBR16 v MIBP* [2018] FCCA 1181 (Judge Emmett, 10 May 2018) at [24]-[25] in which the Court held that there was no duty to obtain translated copies of documents and that it was open to the IAA to find that there were no exceptional circumstances, as required by s.473DD, to justify considering the information partly on the basis that it was not translated into English. This judgment was upheld on appeal: *DBR16 v MHA* [2019] FCA 101 (Wheelahan J, 12 February 2019) and an application for special leave to appeal from that judgment to the High Court was dismissed: *DBR16 v MHA* [2019] HCASL 142 (8 May 2019). See also *DWZ17 v MIBP* [2018] FCCA 2908 (Judge Young, 19 September 2018) at [19] the Court held that it would be impossible for an untranslated document to meet s.473DD. The IAA would need to be satisfied of the matters within an untranslated document and if a document was in a language other than English, unless the Authority speaks that language, then it is impossible for it to reach the relevant state of satisfaction to meet s.473DD.

[41] *DXM16 v MIBP* [2018] FCCA 3675 (Judge Riethmuller, 12 December 2018) at [27]. The Court noted that the IAA would, however, be required to make enquiries if it received a corrupted electronic document that could not be opened.

[42] s.473DC(2). In *CHM16 v MIBP* [2018] FCA 1132 (Perry J, 1 August 2018) at [59] the Court noted in *obiter* that s.473DA and s.473DC(2) seem to operate to exclude the obligation that the IAA must invite an applicant to provide submissions and new information. An application for special leave to appeal from this judgment to the High Court was dismissed: *CHM16 v MIBP* [2018] HCASL 296 (10 October 2018). See also *BEL18 v MHA* [2018] FCA 2103 (Middleton J, 21 December 2018) at [67] and [69] where the Court found no unreasonableness in the IAA not obtaining new information or remitting the application to the Department in circumstances where there was a gap in the Department's interview recording but the appellant did not identify what information had been omitted or the significance. The Court held, at [81], that the IAA was able to conduct its review by taking into account the Department's decision statement, which covered the contents of the interview, and the other 'review material', including the audio recording as it existed. An application for special leave to appeal from this judgment to the High Court was dismissed: *BEL18 v MICMA* [2019] HCASL 150 (14 May 2019). See also *DYU17 v MIBP* [2019] FCCA 824 (Judge Lucev, 5 April 2019) at [29] where the Court held that the IAA was under no obligation to refer itself to new country information published after the delegate's decision.

[43] See *BZC17 v MIBP* [2018] FCA 902 (Mortimer J, 14 June 2018) at [53] the Court held the IAA may not have a duty to 'get, request or accept' new information but in order to perform its statutory task of review it is required to turn its mind to all of the material submitted to it, at least for the purpose of deciding whether the primary rule to review a decision 'on the papers' applies, or whether there is 'new information' placed before it, and if so, what should occur in relation to that information.

[44] See *BYA17 v MIBP* [2019] FCAFC 44 (Rares, Perry and Charlesworth JJ, 14 March 2019) at [55] where the Court held that the IAA is required to form a state of satisfaction under s.473DD in respect of new information provided by an applicant and, if satisfied that it should be considered in the review, to consider it.

2.3.3 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.[45]

What is new information?

2.3.4 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.[46] Information that was before the Minister at the time of the primary decision but is not referred to in the decision is not new information.[47] 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'.[48] The words 'before the Minister' should also be given their ordinary meaning. For information to be 'before the Minister' in this context, it must have been physically before the Minister in relation to the particular matter, and where it is only in the constructive knowledge of the Department because of the breadth of information held by the Department or in the Minister's control, it cannot be said to be 'before the Minister'.[49]

2.3.5 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).[50] Similarly, information that was before the Minister at the time of the primary decision but which the delegate 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.[51]

[45] 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. This judgment was upheld on appeal: *BYM16 v MIBP* [2018] FCA 327 (Bromwich J, 1 March 2018) although this issue was not discussed in the judgment.
[46] s.473DC(1).
[47] See *CKG16 v MIBP* [2018] FCA 362 (Rares J, 27 February 2018) at [15].
[48] *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). In *AKK17 v MIBP* [2017] FCCA 2486 (Judge Driver, 15 November 2017) at [46]-[49], the Court held that a claim can only be advanced and established by giving information to the decision maker. Therefore, if an applicant raises a new claim by providing documents or information that were not before the Minister at the time of the primary decision and that the IAA considers may be relevant, the IAA will need to consider whether it can consider the claim under s.473DD. The Court remarked that if s.473DD did not apply to a new claim, it would undermine one of the objects of Part 7AA. See also *CXO16 v MIBP* [2018] FCCA 2574 (Judge Riethmuller, 21 August 2018) at [41]-[43] where the applicant argued that a request to provide oral evidence before the IAA was a request to provide 'new information' in circumstances where the delegate made adverse credibility findings based on the applicant's evidence at interview. The Court held that this argument misconstrues the nature of the test in s.473DD(b) which relates to the nature of the information or material, not to the presentation of an applicant in giving the evidence before a decision maker.
[49] *DTK17 v MIBP* [2018] FCCA 746 (Judge Street, 27 March 2018) at [52].
[50] See *EEM17 v MIBP* [2018] FCAFC 180 (Barker, Griffiths and Moshinsky JJ, 19 October 2018) at [42] where the Court found that a post interview submission provided to the delegate after the delegate's decision and provided to the IAA on referral by the Secretary as review material in accordance with s.473CB was considered to be new information. It also found that the expressions 'new information' and 'review material' are not mutually exclusive. See also *DHP17 v MIBP* [2018] FCCA 1677 (Judge Driver, 26 June 2018) at [27] where the Court held a sound recording of a department interview and the transcript of that interview would not be 'new information'. It further found the transcript would not be 'new information' as it would simply be the same information in a different format.
[51] See *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 first considered it against s.473DD.

2.3.6 Where information in the review material was not before the Minister when the delegate's decision to refuse the visa was made and that material is relevant to the review, it will be 'new information' and the IAA will need to consider whether the requirements in s.473DD are satisfied before considering that new information and where applicable, put the information to the applicant under s.473DE.[52]

2.3.7 Where a document in a foreign language was before the delegate and the applicant has provided an English translation of that document to the IAA, the translation is not likely to be new information.[53]

2.3.8 A new claim, which was not raised before the delegate, but is based on existing material that was before the delegate should be treated as new information, and cannot be considered unless the requirements in s.473DD are satisfied.[54]

2.3.9 In relation to s.473GB certificates/notifications, the Federal Court in *MIBP v BBS16* [2017] FCAFC 176 held that the procedural requirements in relation to a *valid* s.473GB certificate/notification 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.[55] Therefore, the IAA does not appear to need to consider whether a *valid* certificate/notification or material subject to a *valid* certificate/notification is 'new information', whether there are exceptional circumstances to consider it, and whether the procedural fairness requirements of s.473DE are engaged.[56] This is the case even where that material, which is subject to the certificate, was not before the delegate.[57] However, consideration will still need to be given to whether information or documents subject to a s.473GB certificate/notification, which were not before the delegate, should be disclosed to the applicant using the provision in s.473GB(3) (discussed in Chapter 5 of the IAA Procedural Law Guide).[58] Whether or not the information

[52] *Plaintiff M174/2016 v MIBP* [2018] HCA 16 (Gageler, Keane, Nettle, Gordon and Edelman JJ, 18 April 2018) per Gageler, Keane and Nettle JJ at [25]-[27]. The Court held that the IAA will not need to invoke s.473DC to receive the new information where it is part of the review material, but will need to comply with s.473DD and, where applicable, s.473DE, if the IAA is to take that new information into account.

[53] In *ABJ17 v MIBP* [2018] FCA 950 (Bromwich J, 22 June 2018) at [22] the Court found that the IAA did not err in finding that a translated document was not treated as 'new information'. It found that s.473DC(1) must be read in a substantive and practical way and as part of a unified scheme, not in an unduly technical way. This judgment upheld the lower court decision in *ABJ17 v MIBP* [2017] FCCA 1240 (Judge Driver, 8 June 2017) 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. However in *BJH17 v MIBP* [2017] FCCA 2932 (Judge Street, 28 November 2017) at [43], the Court found no jurisdictional error in the IAA finding that an English translation of an untranslated media article constituted new information where the untranslated article was before the delegate but the translation was not. The Court did not refer to the conflicting authority in *ABJ17*, and found that the IAA did not err in considering s.473DD and concluding that it could not consider the information. This judgment was upheld on appeal: *BJH17 v MIBP* [2018] FCA 891 (Logan J, 18 May 2018) although this issue was not discussed in the judgment. An application for special leave to appeal from this judgment to the High Court was dismissed: *BJH17 v MIBP* [2018] HCASL 281 (12 September 2018). However, in *AAY18 v MHA* [2018] FCA 1844 (Colvin J, 27 November 2018) the Court reasoned at [13] that a translation of a document, where only the untranslated document was before the delegate and the IAA, would constitute new information. Unlike *ABJ17*, this judgment considered the question of whether the IAA is obliged to obtain a translation of untranslated 'review material', rather than the question of whether a translation would constitute 'new material'. An application for special leave to appeal from this judgment to the High Court was dismissed: *AAY18 v MHA* [2019] HCASL 41 (13 March 2019).

[54] In *CVK16 v MIBP* [2017] FCA 1434 (McKerracher J, 1 December 2017) at [49]-[53], the Court held that a new claim will fall within the definition of 'new information' for the purposes of s.473DD and the statutory prohibition against receiving 'new information' applies to those claims. In this instance, the applicant's claim raised for the first time pertained to a different fear than was expressed before the delegate. An application for special leave to appeal from this judgment to the High Court was dismissed: *CVK16 v MIBP* [2018] HCASL 47 (21 March 2018).

[55] *MIBP v BBS16* [2017] FCAFC 176 (Kenny, Tracey, Griffiths JJ, 10 November 2017) at [100].

[56] *MIBP v BBS16* [2017] FCAFC 176 (Kenny, Tracey, Griffiths JJ, 10 November 2017) at [92] where the Court 'strongly doubted' that the reference at the outset of s.473DB(1) to 'subject to this part' was intended to bring in via the back door the possibility of a s.473GB certificate/notification and related information being 'new information'.

[57] *MIBP v BBS16* [2017] FCAFC 176 (Kenny, Tracey, Griffiths JJ, 10 November 2017) at [87] and [92].

[58] *MIBP v BBS16* [2017] FCAFC 176 (Kenny, Tracey, Griffiths JJ, 10 November 2017) at [100] where the Court held that the procedural fairness entitlements in relation to s.473GB certificates/notifications are governed exhaustively in s.473GB(3), and

or document was before the delegate when they made their decision may be a relevant consideration in deciding whether to disclose any matter contained in the document or information to the applicant.

2.3.10 In contrast, the procedural fairness entitlements differ regarding an *invalid* s.473GB non-disclosure certificate/notification. In the Federal Court case of *CED16 v MIBP* [2018] FCA 1451 the Court held if a certificate is found to be *invalid* the certificate and the information covered by the certificate would be subject to the requirements of the 'new information' provisions.[59] If the information in the certificate/notification has no bearing on the applicant's case, it would be prudent to indicate that this is the case in the decision record so as to avoid an inference being drawn that the IAA's reasoning was in some way affected by the invalid certificate/notification.

2.3.11 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.[60]

2.3.12 Submissions about the IAA's procedures or the limits of its jurisdiction would also not generally be 'new information'. This should be contrasted with a submission which contains information not already available to the IAA about procedures undertaken by the delegate; in this instance it may be necessary to consider whether it is 'new information'.[61]

2.3.13 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.[62]

that there is scope for the bias limb of procedural fairness to apply in an appropriate case. See also *CSR16 v MIBP* [2018] FCA 474 (Bromberg J, 11 April 2018) at [20] and[27]-[29] in which the Court followed *BBS16* and held that the exercise of the power under s.473GB(3) must be exercised reasonably.

[59] See *CED16 v MIBP* [2018] FCA 1451 (Derrington J, 25 September 2018) at [47] and [55] where the Court followed *Plaintiff M174/2016* holding that an invalid certificate would need to be treated as 'new information'.

[60] 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].

[61] 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. By way of contrast *CBA16 v MIBP* [2018] FCA 1043 (Markovic J, 13 July 2018) at [31] where the Court held that paragraphs in a submission by the applicant stating that he had difficulty understanding an interpreter was 'new information'. This was because it contained additional factual information and did not address information already available to the IAA.

[62] In *CQY16 v MIBP* [2017] FCCA 236 (Judge Driver, 10 November 2017) at [100]-[101] the Court held the IAA is entitled to consider submissions received from applicants in response to a notification of a referral. This is because s.473FB empowers the President of the Tribunal to make a Practice Direction, provided that it is not inconsistent with Part 7AA, and the Court found that there is nothing in the relevant President's Practice Direction which is inconsistent with Part 7AA.

2.3.14 To the extent that a submission also contains new information, that aspect of the submission cannot be considered unless the requirements in s.473DD are met (see below for discussion).[63]

Getting new information

2.3.15 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.[64] This general power allows the IAA to get information of its own motion (e.g. country information[65]), but it might also receive information from other sources (e.g. unsolicited information from a third party or post interview submissions).[66] 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 information if it was not information that the IAA could consider.

2.3.16 The question of whether to get new information under s.473DC(1) arises before consideration of whether the requirements in s.473DD are satisfied. Therefore, when deciding whether to get new information under s.473DC(1), the IAA should be careful to avoid expressing its reasons in terms of whether the requirements in s.473DD are met. In the case of *EMJ17 v MIBP* the Court found that the IAA erred in assessing 'exceptional circumstances' pursuant to s.473DD when deciding whether to get new information under s.473DC(1) as the IAA erroneously considered itself to be confined by a requirement that the exceptional circumstances in s.473DD exist at the time of considering whether to get information under s.473DC(1).[67].

[63] See for example *CBA16 v MIBP* [2018] FCA 1043 (Markovic J, 13 July 2018) at [31] the Court held that paragraphs in a submission by the applicant stating that he had difficulty understanding an interpreter was 'new information'. This was because it contained additional factual information and did not address information already available to the IAA.

[64] 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 information 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 to his claims. See also *BZC17 v MIBP* [2017] FCCA 2981 (Judge Street, 1 December 2017) at [65]-[67] where the Court held that photos attached to the applicant's submissions were not defined as 'new information' within s.473DC as their relevance to the claim being advanced by the applicant was not apparent. The Court stated that it is not necessary for the IAA to refer to every piece of evidence adduced. However, this judgment should be contrasted with *CWG17 v MIBP* [2017] FCCA 3178 (Judge Street, 15 December 2017) at [7] where the Court held that the IAA erred as it failed to take into account a psychologist report (provided in submissions) that it did not consider relevant under s.473DC but that the Court found was credible, relevant and significant to the review.

[65] In *ERN17 v MIBP* [2018] FCA 1672 (Thawley J, 5 November 2018) at [9] the Court found that it was open to the IAA to conclude there were 'exceptional circumstances' to justify considering an updated DFAT report that had not yet been published at the time of the delegate's decision. In *BDI17 v MIBP* [2018] FCCA 2162 (Judge Driver, 23 October 2018) at [70]-[72] the Court found that the IAA's failure to consider exercising its discretion to get an updated DFAT report was legally unreasonable even though the IAA is not bound by Ministerial Direction No.56. In *BHX18 v MHA* [2018] FCCA 3498 (Judge Baird, 29 November 2018), the Court distinguished *BDI17* at [52]-[53] to find that where the IAA had already had regard to country information on the relevant issue and the updated country information was not significantly different, it was not unreasonable for the IAA not to consider obtaining the more recent DFAT report.

[66] See *EEM17 v MIBP* [2018] FCAFC 180 (Barker, Griffiths and Moshinsky JJ, 19 October 2018) at [43] where the Court held that the definition of new information in s.473DC(1) is not limited to material sought out and obtained by the IAA. The word 'get' does not function to limit the definition to information sought out by the IAA. See also *FEZ17 v MIBP* [2018] FCCA 1216 (Judge Street, 14 May 2018) at [24] the Court held that the IAA did not err when it had obtained an updated DFAT country information report on its own motion, considered the relevance of the country information, and found exceptional circumstances to consider the new information. This judgment was upheld on appeal: *FEZ17 v MIBP* [2018] FCA 1689 (Thawley J, 7 November 2018).

[67] *EMJ17 v MIBP* [2018] FCA 1462 (Thawley J, 27 September 2018) at [63]. The appellant requested that the IAA make enquiries to get information from his application for protection made while in Nauru, however, the IAA did not do so as it did not consider that there would be exceptional circumstances to consider that information.

2.3.17 The IAA's power to get information also includes (but is not limited to) the IAA inviting a person to give new information.[68] 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.[69]

2.3.18 While the IAA is under no statutory duty to get, request or accept new information,[70] 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.[71]

2.3.19 The IAA may act unreasonably by not considering the exercise of this power 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. For example:

- In *MIBP v CRY16*[72] the Court held that it was legally unreasonable not to consider getting documents or information from the applicant on 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. The Court held that the IAA's power under s.473DC is to be exercised reasonably, and the failure to consider the exercise of that discretionary power to get new information lacked an evident and intelligible justification.

[68] s.473DC(3).
[69] 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. Upheld on appeal: *CMR16 v MIBP* [2018] FCA 916 (Gleeson J, 9 June 2018) although this issue was not discussed in the judgment. An application for special leave to appeal from this judgment to the High Court was dismissed: *CMR16 v MIBP* [2018] HCASL 309 (17 October 2018).
[70] s.473DC(2). See *DYK16 v MIBP* [2018] FCAFC 222 (Collier, Middleton and Rangiah JJ, 7 December 2018) where the Full Court found at [72] that Part 7AA may not impose the type of duty found in *MIAC v SZIAI* [2009] HCA 39 (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ, 23 September 2009) to make an obvious inquiry about a critical fact easily ascertained, endorsing the view expressed at [17] of the earlier judgment of *DJF16 v MHA* [2018] FCA 1285 (Logan J, 8 August 2018). Applications for special leave to appeal from *DYK16* and *DJF16* to the High Court were dismissed: *DYK16 v MIBP* [2018] HCASL 124 (17 April 2019) and *DJF16 v MHA* [2019] HCATrans 72 (12 April 2019). See also *AKC17 v MIBP* [2018] FCA 255 (Allsop CJ, 6 March 2018) at [21]-[22] where the Court held that, while it would have been preferable for the IAA to discuss its concerns about the appellant's claims with the appellant, the question is not so much what would have been preferable but whether it was legally unreasonable not to do so. An application for special leave to appeal from this judgment to the High Court was dismissed: *AKC17 v MIBP* [2018] HCASL 284 (13 September 2018). See also *COA16 v MIBP* [2018] FCA 475 (Rares J, 27 February 2018) at [37] where the Court held that there is nothing in Part 7AA that prevents an applicant putting submissions or providing, what they consider to be, new information to the IAA; however, there is also nothing to suggest that Part 7AA imposes on the IAA any obligation to afford an applicant an opportunity to provide new information or put submissions to it. 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. This judgment was upheld on appeal: *CMR16 v MIBP* [2018] FCA 916 (Gleeson J, 9 June 2018) although this issue was not discussed in the judgment. An application for special leave to appeal from this judgment to the High Court was dismissed: *CMR16 v MIBP* [2018] HCASL 309 (17 October 2018).
[71] See *BZC17 v MIBP* [2018] FCA 902 (Mortimer J, 14 June 2018) at [53] the Court held the IAA may not have a duty to 'get, request or accept' new information but to perform its statutory task of review it is required to turn its mind to all of the material submitted to it, at least for the purpose of deciding whether the primary rule to review a decision 'on the papers' applies, or whether there is 'new information' placed before it, and if so, what should occur in relation to that information.
[72] *MIBP v CRY16* [2017] FCAFC 210 (Robertson, Murphy and Kerr JJ, 14 December 2017) at [82]. This judgment upheld the lower the court decision in *CRY16 v MIBP* [2017] FCCA 1549 (Judge Riethmuller, 6 July 2017) at [21]. An application for special leave to appeal from this judgment to the High Court was dismissed: *MIBP v CRY16* [2018] HCASL 102 (19 April 2018). In *MIBP v DZU16* [2018] FCAFC 32 (Robertson, Murphy and Kerr JJ, 12 March 2018) at [79]-[83] the Court followed its judgment in *CRY16*. This judgment upheld the lower court decision in *DZU16 v MIBP* [2017] FCCA 851 (Judge Driver, 22 June 2017) at [120]-[124]. See also *AYJ17 v MIBP* [2018] FCCA 2227 (Judge Emmett, 16 August 2018) at [100]-[101] (which follows *M174* and *CRY16*). The IAA rejected the applicant's later claims made at the entry interview because the claims were not made at the arrival interview. The Court held that it was legally unreasonable to reject those claims on the basis that they were not mentioned at the arrival interview without exercising the power under s.473DC to give the applicant an opportunity to comment. This judgment was upheld in *MHA v AYJ17* [2019] FCA 591 (Moshinsky J, 1 May 2019) after an appeal by the Minister.

- In *DFW16 v MIBP*[73] the Court, following *CRY16,* found that the IAA erred by not considering whether it should invite the appellant to comment on the internal inconsistencies between an earlier visa application and the present one, in circumstances where the delegate had not referred to those inconsistencies.

- In *DPI17 v MHA*[74] the Court held that it was legally unreasonable not to consider obtaining new information from the applicant where the delegate accepted his claim to have been sexually assaulted based on his demeanour and credibility at interview and the IAA relied on inconsistencies between the application under review and an earlier invalid application to reject that claim.

- In *BKK17 v MIBP*[75] the Court held that it was legally unreasonable not to consider requesting further information where the IAA relied on inconsistencies in the applicant's evidence to reject his claim to be a genuine Christian, distinguishing *DGZ16* on the basis that the inconsistencies had not arisen as an issue during the primary stage, whereas the IAA in *DGZ16* found against the applicant on the same material as the delegate but for different reasons.

2.3.20 The reasonableness of the IAA not to exercise its discretion may also depend on how the delegate treated any relevant information in their primary decision and whether they complied with the code of procedure for delegates. For instance, in *Plaintiff M174/2016 v MIBP*[76] the High Court held that in circumstances where there has been non-compliance with s.57(2)[77] by the delegate and the IAA would consider the information (with which there have been non-compliance) as relevant, it may be unreasonable for the IAA to treat that information as the reason, or a part of the reason, for affirming the decision without first exercising the discretion conferred by s.473DC(3) to invite the applicant to give new information in response to the relevant information.

2.3.21 In contrast, examples of where the IAA has been found to not have acted unreasonably where it did not consider exercising this power to get new information include where a particular issue was not found to be dispositive by the delegate but the IAA made dispositive findings on that issue,[78] where the IAA did not get submissions on a new DFAT Report which was not before the delegate but was used in the similar way as the previous DFAT

[73] *DFW16 v MIBP* [2018] FCA 746 (Barker J, 25 May 2018) at [64]-[71].
[74] *DPI17 v MHA* [2019] FCAFC 43 (Griffiths, Mortimer and Steward JJ, 15 March 2019) at [45] and [127].
[75] *BKK17 v MIBP* [2019] FCCA 812 (Judge Riethmuller, 1 April 2019) at [16] and [27].
[76] *Plaintiff M174/2016 v MIBP* [2018] HCA 16 (18 April 2018) at [49] per Gageler, Keane and Nettle JJ (Gordon and Edelman JJ agreeing).
[77] Section 57(2) is similar to s.473DE, and provides that the Minister must give particulars of the relevant information to the applicant, ensure that the applicant understands why it is relevant to the consideration of the applicant and invite the applicant to comment on it.
[78] In *DGZ16 v MIBP* [2018] FCAFC 12 (Reeves, Robertson and Rangiah JJ, 1 February 2018) at [70]-[72],[76] and [78] the Court distinguished *CRY16,* and found the IAA was not obliged to inform the appellant that it is considering taking a different view, adverse to the applicant, of material considered by the delegate nor is it obliged to inform the applicant of the issues that it considered to arise on the review, insofar as those issues were not found to be dispositive by the delegate. It also found that s.473DA had the effect of excluding the requirement that the IAA comply with the requirements of procedural fairness in relation to its obligations under s.473DC. In *AKC17 v MIBP* [2018] FCA 255 (Allsop CJ, 6 March 2018) at [21]-[22] the Court stated that it would have been preferable for the IAA to have discussed its concerns with the appellant where the IAA decided a matter on a different basis to the delegate. However, the Court ultimately found the IAA did not err by not inviting the applicant to give new information in an interview as its conclusions did not lack an intelligible reasoning and justification. An application for special leave to appeal from this judgment to the High Court was dismissed: *AKC17 v MIBP* [2018] HCASL 284 (13 September 2018).The Court in *FGC17 v MIBP* [2018] FCCA 2217 (Judge Kendall, 5 September 2018) at [83] held the IAA did not act unreasonably when it did not exercise its discretion to get new information under s.473DC(3) in circumstances where it had relied on new country information which was not before the delegate to reach a different conclusion to the delegate on whether the applicant could return to his home area. The Court distinguished *DZU16 v MIBP* on the basis that the IAA was disagreeing

Report,[79] where there has been no practical injustice to the applicant, where there is no realistic prospect that the IAA would be able to consider the information under s.473DD[80] and where the IAA departed from a favourable finding by the delegate on the basis of inconsistencies but didn't give the applicant an opportunity to comment.[81]

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

2.3.23 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.

Considering new information

2.3.24 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[82] unless:

- it is satisfied that there are exceptional circumstances to justify considering it;[83] 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.[84]

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with the delegate's evaluation of the material (which did not give rise to an obligation to give the applicant an opportunity to respond) rather than determining the matter on a new issue.

[79] In *CCQ17 v MIBP* [2018] FCA 1641 (Thawley J, 31 October 2018) at [54] a decision by the IAA to not get information under s.473DC(1) from the applicant on a new DFAT Report which was used in a similar way as the previous DFAT Report to support materially similar conclusions as the delegate was found not to be legally unreasonable.

[80] In *CUL16 v MIBP* [2018] FCCA 1448 (Judge McNab, 7 June 2018) at [21] the Court distinguished *DZU16* and *CRY16* on the basis that there was no practical injustice as the applicant made submissions to the IAA on the relevant issue of relocation even though this issue was not considered in the delegate's decision record. The Court noted that the applicant had discussed this issue in the interview with the delegate prompting the applicant to submit written submissions on safety and reasonableness of relocation to the IAA. See also *DWN16 v MIBP* [2018] FCCA 1911 (Judge Riley, 13 July 2018) at [58] where the Court found that it was not unreasonable for the IAA to not consider whether to exercise its power under s.473DC(3) in circumstances where the applicant had not pointed (either in submissions to the IAA or to the Court) to any information that would have fitted within the requirements of s.473DD. The Court was also unable to think of any such information. An appeal was dismissed for non-appearance: *DWN16 v MIBP* [2018] FCA 2032 (Allsop CJ, 14 December 2018).

[81] In *BKY17 v MIBP* [2019] FCA 487 (Perram J, 10 April 2019) at [20] and [27], the Court found there was no error in the IAA failing to consider asking the applicant about inconsistencies in his evidence because an argument about an inconsistency could not be characterised as new information in the *Plaintiff M174* sense and the IAA has no other power to seek submissions about inconsistencies.

[82] 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.

[83] s.473DD(a).

[84] s.473DD(b)(i) and (ii). In *CYQ16 v MIBP* [2017] FCCA 3193 (Judge Smith, 21 November 2017) at [19]–[24] the Court considered whether the IAA misunderstood the test posed by s.473DD by using 'would' rather than 'may' and focusing on whether a college certificate, rather than the information contained within it, was new information and could have been provided to the delegate. The Court held the way in which the IAA considered the certificate did not give rise to jurisdictional error (given

2.3.25 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.[85]

2.3.26 The IAA is required to consider 'new information' for the purpose of determining whether s.473DD prevents it from considering that information in making its decision on the review.[86] Where the reason for the provision of new information to the IAA is self-evident, the Court has held it would not be appropriate to require an explicit explanation for providing that information.[87]

2.3.27 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.[88]

2.3.28 An untranslated document provided to the IAA is unlikely to satisfy the requirements in s.473DD unless the IAA Reviewer also understands the language of the document and can be satisfied of the matters in s.473DD.[89] New information provided by way of functioning hyperlinks will need to be considered against s.473DD.[90]

2.3.29 Despite a plain reading of the provision suggesting if *either* paragraph (a) or (b) is not met, when considering exceptional circumstances in s.473DD(a) on present authority it appears necessary to have regard to the matters in both limbs of s.473DD(b), where there is relevant material on these matters, before deciding that there are no exceptional circumstances to consider the new information.[91] This is because matters which are relevant to the

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that the information contained within it was not in dispute), but the judgment indicates care should be taken when referring to the provision of s.473DD.

[85] 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.

[86] 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 of the Act prevents it from considering that information. This judgment was upheld on appeal: *BYM16 v MIBP* [2018] FCA 327 (Bromwich J, 1 March 2018) although this issue was not discussed in the judgment.

[87] *DHV16 v MIBP* [2018] FCCA 349(Judge Driver, 14 March 2018) at [96]-[98] where the Court held that the obligation in Practice Direction No.1 to require applicants to provide reasons why they couldn't have provided the information to the delegate is not relevant where that explanation is self-evident and inherent in the information itself. The IAA had erred by conflating the requirements of s.473DD(b) with s.473FB(5) and that by considering s.473DD(b), the IAA had moved beyond the exercise of the discretion under s.473FB(5) and that there is nothing in s.473DD(b) which renders non-compliance with the Practice Direction a relevant consideration. Following the approach in *DHV16*, the Court held in *AST18 v MIBP* [2018] FCCA 1990 (Judge Driver, 23 July 2018) at [25]-[26] that s.473FB(5) provides a separate and antecedent discretion which, if lawfully exercised, relieves the IAA from engaging in the consideration under s.473DD.

[88] In *EKW17 v MIBP* [2018] FCA 1366 (Bromwich J, 7 September 2018) at [24]-[25] the Court held the IAA is under no obligation to put to an applicant prospective findings as to whether information may not be considered to be 'new information'. An application for special leave to appeal from this judgment to the High Court was dismissed: *EKW17 v MIBP* [2018] HCASL 397 (14 December 2018).See also *FNR17 v MIBP* [2018] FCCA 1780 (Judge Street, 3 July 2018) at [25]-[27] the Court found there was no requirement to give the applicant a further opportunity to provide submissions on the matters in s.473DD in relation to material provided by the applicant to the IAA.

[89] See *DWZ17 v MIBP* [2018] FCCA 2908 (Judge Young, 19 September 2018) at [19] the Court held that it would be impossible for an untranslated document to meet s.473DD. The IAA would need to be satisfied of the matters within an untranslated document satisfy s.473DD(a) and (b) and if a document was in a language other than English, unless the IAA speaks that language, then it is impossible for it to reach the relevant state of satisfaction to meet s.473DD.

[90] In *BYA17 v MIBP* [2019] FCAFC 44 (Rares, Perry and Charlesworth JJ, 14 March 2019) at [55] and [59], the Court found the IAA erred in not forming a state of satisfaction on whether to consider news reports provided to the IAA by way of functioning hyperlinks and the error was material because it operated to deprive the applicants of the possibility of a successful outcome.

[91] *BVZ16 v MIBP* [2017] FCA 958 (White J, 18 August 2017) at [9]. See also *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 *DFP16 v MIBP* [2018] FCA 1901 (Colvin J, 30 November 2018) where the Court found at [19]-[21] that the IAA was guided by an unduly narrow view of what may constitute exceptional circumstances because, unlike the reasons of the IAA in *Plaintiff M174/2016*, its reasons did not engage with matters relevant to s.473DD(b), specifically the significance of the information and whether it was information that may have

consideration of both limbs of s.473DD(b) may be relevant to consideration of exceptional circumstances in s.473DD(a).[92]

2.3.30 In *BVZ16 v MIBP*[93] the Court held that the requirements of s.473DD(a) and (b) overlap and it is expected that the IAA will consider the matters in s.473DD(b)(i) and (ii) when considering s.473DD(a). As the IAA did not have regard to the matters in s.473DD(b)(ii), it had failed to discharge its review task. However in *Plaintiff M174/2016*[94] the High Court relied on *BVZ16* for the definition of 'exceptional circumstances', although it did not follow the approach in that case relating to the IAA's application of s.473DD. It found the IAA's reasoning was 'eminently justified' to not consider new information when it only addressed s.473DD(a), without addressing s.473DD(b)(ii), in its assessment of 'exceptional circumstances'. As the High Court did not explicitly consider the issue of whether the IAA is required to consider both limbs of s.473DD, it would be prudent to continue adopting the approach outlined in *BVZ16*.

2.3.31 The IAA will not always fall into error when it does not make a finding on both limbs of s.473DD(b) where it has made a valid finding on s.473DD(a), provided that it has taken into account all relevant matters when determining there are no exceptional circumstances. For example:

- In *AQU17 v MIBP*, the Court distinguished *BVZ16* on the basis that it was apparent, although not expressly stated, that both limbs of s.473DD(b) had been considered in the IAA's decision (although only s.473DD(a) and (b)(i) were specifically referred to), but stated that it may have been preferable for the IAA to have also 'spelt out' its consideration of s.473DD(b)(ii).[95]

- In *BDF17 v MIBP,* the Court distinguished *BVZ16, BBS16* and *CHF16 v MIBP* on the basis the new information in these cases was about or directly related to the applicants themselves. Conversely, the information in this case may be characterised as 'country information' which could not potentially have fallen within s.473DD(b)(ii) which the IAA in the cases of *BVZ16, BBS16* and *CHF16* failed to consider.[96]

affected the result had it been known to the delegate. This judgment overturned the lower court authority of *DFP16 v MIBP* [2018] FCCA 1586 (Judge Emmett, 27 June 2018). See also *BEZ17 v MHA* [2019] FCA 283 (Kerr J, 6 March 2019) at [78] where the IAA did not consider matters relevant to s.473DD(b) in its determination of whether there were exceptional circumstances under s.473DD(a) and the Court found that the IAA fell into jurisdictional error by giving the provisions of s.473DD too narrow a construction.

[92] In *CIH16 v MIBP* [2018] FCA 1317 (Derrington J, 7 September 2018) at [60] and *DHH16 v MIBP* [2018] FCCA 1638 (Judge Driver, 23 August 2018) at [103] the Courts held the IAA is obliged, pursuant to s.473DD(a), to consider relevant matters raised by the applicant that this will often include matters relevant to s.473DD(b).

[93] *BVZ16 v MIBP* [2017] FCA 958 (White J, 18 August 2017) at [9[].

[94] *Plaintiff M174 /2016 v MIBP* [2018] HCA 16 (18 April 2018) at [29]-[31] and [75] per Gageler, Keane and Nettle JJ (Gordon and Edelman JJ agreeing).

[95] *AQU17 v MIBP* [2018] FCAFC 111 (McKerracher, Murphy and Davies JJ, 13 July 2018) at [16]. This judgment upheld the Federal Circuit Court decision and an application for special leave to appeal from this judgment to the High Court was dismissed: *AQU17 v MIBP* [2018] HCASL 327 (7 November 2018). See also *BBE17 v MIBP* [2018] FCCA 2200 (Judge Driver, 25 October 2018) where the Court followed *AQU17* at [32], finding that when determining whether there are exceptional circumstances under s.473DD(a), there is no requirement to expressly consider the factors in s.473DD(b) in all cases. This judgment was overturned on appeal: *BBE17 v MIBP* [2019] FCA 573 (Murphy J, 26 April 2019) however the Court did not consider the point about making an explicit finding on s.473DD(b) and stated at [12]-[14] that it saw little merit in that ground of appeal.

[96] *BDF17 v MIBP* [2018] FCCA 2095 (Judge Mercuri, 5 September 2018) at [43]; *CHF16 v MIBP* [2017] FCAFC 192 (Gilmour, Robertson and Kerr JJ, 14 December 2017).

2.3.32 However, although there may often be a degree of overlap between the considerations, a conservative approach is to give independent consideration to sub-paragraphs (a), (b)(i) and (b)(ii) before it concluding that the material could not be considered.[97]

2.3.33 If the IAA does not refer to the specific words of s.473DD(a) or (b) when determining whether to consider any new information, it will not necessarily result in jurisdictional error; however, referring to the specific words assists a reviewing court to determine whether relevant matters have been considered.[98]

2.3.34 It appears that where the IAA has expressly considered whether both limbs of s.473DD(b) are satisfied in relation to the new information and has made a valid finding that s.473DD(b) is not met, there is no corresponding obligation to consider s.473DD(a).[99]

2.3.35 Where there are multiple family members who have combined their visa applications into a single application, it is open to the IAA to make a finding on s.473DD for one applicant and a different finding on s.473DD for another.[100]

Expert reports

2.3.36 Expert reports, including psychological reports, may need to be treated as a whole when considering whether s.473DD(a) and (b) is met for the purposes of considering new information if they cannot be separated and dissected in order to isolate new information from other factual information in the report which may have been before the delegate.[101]

Exceptional circumstances to justify consideration

2.3.37 Before *considering* any new information, the IAA must be satisfied that there are exceptional circumstances to justify its consideration.[102] The relevance of new information to the applicant's claims is a relevant consideration in assessing whether there are 'exceptional

[97] See *BRA16 v MIBP* [2018] FCA 127 (Gilmour J, 21 February 2018) at [25] where the Federal Court held the IAA did not err in circumstances where it considered whether material met the requirements of ss.473DD(b)(i) and (ii) but also whether for the purposes of s.473DD(a) there existed exceptional circumstances to justify considering that information.

[98] *DPO16 v MIBP* [2019] FCCA 206 (Judge Heffernan, 8 February 2019) at [40].

[99] See *AUH17v MIBP* [2018] FCA 388 (Mortimer J, 23 March 2018) at [32]-[33] where the Court held that a finding that s.473DD(b) was not satisfied was sufficient to trigger the prohibition in s.473DD and that there was nothing erroneous about the IAA directing its attention to s.473DD(b) rather than s.473DD(a). In *MIBP v CQW17* [2018] FCAFC 110 (McKerracher, Murphy and Davies JJ, 13 July 2018) at [68]-[73] the Federal Court held that the IAA did not fall into jurisdictional error by not considering s.473DD(a) in circumstances where any consideration of exceptional circumstances under s.473DD(a) would not have affected the IAA's decision on s.473DD(b)(ii). See also *DHV16 v MIBP* [2018] FCCA 349 (Judge Driver, 14 March 2018) at [90] where the Court held that a finding of exceptional circumstances under s.473DD(a) may be informed by the factors in s.473DD(b), but the reverse proposition does not necessarily follow such that there is no binding authority that a finding on s.473DD(b) must be informed by s.473DD(a).

[100] In *BJK17 v MIBP and BJJ17 v MIBP* [2019] FCCA 561 (Judge J D Wilson QC, 8 March 2019) at [101] the Court held that as the statutory scheme establishes two different visas (i.e. because each applicant makes a separate visa application), and each applicant can satisfy different criteria for the grant of the visa, the decision to reject the visa application should be treated as two decisions. On this basis, at [89]-[92] and [95]-[96], there was nothing unreasonable in the IAA's decision that it could have regard to a new claim concerning the son's sexuality in the father's application (because the father had been unaware of the son's sexuality until after the delegate's decision and the IAA was satisfied of the matters in s.473DD in relation to this claim) but come to a different conclusion on the claim in the son's application (as he had not raised his sexuality before the delegate such that the IAA was not satisfied of the matters in s.473DD).

[101] See *BBE17 v MIBP* [2018] FCCA 2200 (Judge Driver, 25 October 2018) at [25] where the Court found that it was not appropriate for the IAA to dissect a psychological report when considering whether the information within the report was new information. It held the report needed to be considered as a whole because the observations, opinions and recommendations expressed by the psychologist are not severable from the history provided by the applicant. This judgment was overturned on appeal: *BBE17 v MIBP* [2019] FCA 573 (Murphy J, 26 April 2019) however the Court did not consider the point about considering the psychologist report as a whole. In *DZU17 v MIBP* [2019] FCCA 491 (Judge Driver, 4 June 2019), Judge Driver clarified his observations in *BBE17* at [49], stating it will frequently be necessary to deconstruct a document to sever new claims from old and asserted new facts from argument about existing facts, however, documents cannot always be deconstructed in this way such that the IAA may fall into error by attempting to 'unscramble an omelette'.

[102] s.473DD(a).

circumstances' to receive 'new information'.[103] There is an onus on the applicant to at least identify factors which they say constitute 'exceptional circumstances'.[104] While the term 'exceptional circumstances' is not defined in the Migration Act and should be given its ordinary English meaning[105], 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. [106]

2.3.38 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.[107]

2.3.39 Circumstances arising from the way the delegate made their decision may give rise to an exceptional circumstance. For instance, the High Court in *Plaintiff M174/2016 v MIBP*[108] held that where there has been non-compliance by a delegate with s.57(2) and the IAA then issues an invitation under s.473DC(3) to comment or respond to the information in respect of which there was non-compliance, any new information provided by an applicant in response to an invitation under s.473DC(3), if relevant, responsive, credible and about the applicant or another person, would meet the precondition of s.473DD(a) because the delegate's non-compliance with the code of procedure would give rise to an 'exceptional circumstance'.

2.3.40 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.

[103] 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.
[104] See *BDF17 v MIBP* [2018] FCCA 2095 (Judge Mercuri, 5 September 2018) at [49] where the Court found it was up to the applicant to identify factors that constitute exceptional circumstances.
[105] See *Plaintiff M174/2016 v MIBP* [2018] HCA 16 (18 April 2018) at [30] per Gageler, Keane and Nettle JJ (Gordon and Edelman JJ agreeing) adopted the definition in *BVZ16 v MIBP* [2017] FCA 958 that the word 'exceptional' is an ordinary, familiar English adjective providing 'to be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered'.
[106] Explanatory Memorandum to the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 at p.134, paragraph 915.
[107] 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]. This was upheld on appeal in *MIBP v CRY16* [2017] FCAFC 210 (Robertson, Murphy and Kerr JJ, 14 December 2017). An application for special leave to appeal from this judgment to the High Court was dismissed: *MIBP v CRY16* [2018] HCASL 102 (19 April 2018).
[108] *Plaintiff M174/2016 v MIBP* [2018] HCA 16 (18 April 2018) at [49]-[51] and [89] per Gageler, Keane and Nettle JJ (Gordon and Edelman JJ agreeing).

2.3.41 It is ultimately a question of fact for the decision maker whether circumstances are exceptional having regard to all the circumstances of the case,[109] and without giving a 'unduly narrow interpretation' to the definition.[110] For example, a particularly strong focus on the question of whether an applicant could have provided the information to the delegate has led to the Federal Circuit Court finding that the IAA had erred in assessing whether there were 'exceptional circumstances' to consider the information within the meaning of s.473DD(a).[111]

New information not provided earlier or credible personal information

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

- was not, and could not have been, provided to the Minister before the primary decision was made;[112] 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.[113]

2.3.43 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.[114]

2.3.44 'New information' that 'was not, and could not have been, provided to the Minister before the primary decision' under s.473DD(b)(i) appears to relate to the date of the information itself (such as the date of a report) and not the date of the particular incident the information

[109] 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. This judgment was upheld on appeal: *CJH16 v MIBP* [2018] FCA 327 (Bromwich J, 5 March 2018) although this issue was not discussed in the judgment. An application for special leave to appeal from this judgment to the High Court was dismissed: *CJH16 v MIBP* [2018] HCASL 147 (13 June 2018). See also *DYS16 v MIBP* [2018] FCAFC 33 (Tracey, Murphy and Kerr JJ, 13 March 2018) at [22]-[23] where the Court found no error in the IAA finding there were no exceptional circumstances to consider a psychiatrist report in relation to the appellant's credibility, in circumstances where the report was founded upon the history given by the appellant and the psychiatrist did not have access to the relevant country information before the IAA. The Court held that the IAA was entitled to prefer its own assessment on the appellant's credibility and no psychiatric opinion on credibility could have been binding on it.

[110] See *BVZ16 v MIBP* [2017] FCA 958 (White J, 18 August 2017) at [46]-[47]. See also *CSJ17 v MIBP* [2018] FCCA 269 (Judge Wilson, 1 February 2018) at [19]-[23] where the Court found the IAA erred by failing to consider a report referred to in the applicant's submissions to the IAA. The Court held the IAA placed an unduly narrow interpretation on 'exceptional circumstances' when it stated that no exceptional circumstances existed to justify considering the report and that the IAA needed to see the report itself to comprehend the submissions made about the report.

[111] See *DOM17 v MIBP* [2018] FCCA 1318 (Judge Smith, 28 May 2018) at [31] where the Court held that the question posed by s.473DD(a) is whether the 'new information' has any relevance to the application for a protection visa and that it will generally not be sufficient for the IAA to conclude that there are no 'exceptional circumstances' because the applicant could have provided the information to the delegate prior to the making of their decision and failed to provide an adequate reason for not doing so. See also *DJY18 v MHA* [2019] FCCA 185 (Judge Riley, 1 February 2019) at [30] where the Court held that the ordinary meaning of s.473DD(a) says nothing about whether the applicant has provided a satisfactory explanation for not providing new information to the delegate. In this case, the IAA had focused on whether the applicant provided a satisfactory reason for not giving the delegate information about a clearly visible tattoo of an atheist symbol on his left hand which had been covered with tape during his interview with the delegate and had not separately considered whether the applicant's mental health constituted exceptional circumstances to justify considering the claim about the tattoo. See also *FCT17 v MIBP* [2019] FCCA 1167 (Judge Young, 3 May 2019) at [71]-[72] where the Court held that the IAA's focus on the lack of an explanation as to why a new medical letter was not provided earlier constituted jurisdictional error as this was only one of the matters the IAA might have taken into account in assessing whether there were exceptional circumstances to justify considering the information.

[112] s.473DD(b)(i).

[113] s.473DD(b)(ii).

[114] See *BVZ16 v MIBP* [2017] FCA 958 (White J, 18 August 2017) at [57] where the Court held that s.473DD(b)(i) and s.473DD(b)(ii) refer to different kinds of new information such that (b)(i) 'requires a factual inquiry as to whether or not the new information could have been presented to the Minister' and (b)(ii) 'requires an evaluation of the significance of the new information in the context of the referred applicant's claims more generally'.

relates to. This is illustrated in *DHH16 v MIBP*[115] in which the applicant provided to the IAA an incident report which post-dated the delegate's decision but was about an incident that occurred prior to the delegate's decision. The IAA was not satisfied that there were exceptional circumstances under s.473DD because no explanation had been provided as to why the information was not provided earlier. The Court held the IAA was in error to focus on the date of the incident rather than the date the police had acknowledged the complaint and produced an incident report. The Court found the applicant would not have been able to provide the report any earlier as it was dated after the delegate's decision and the IAA erred by not considering this factor.

2.3.45 The High Court in *Plaintiff M174/2016 v MIBP*[116] stated that the following considerations must be met to consider new information under s.473DD(b)(ii):

- the information is credible information about an identified individual, or an individual who is reasonably identifiable;
- the information was not previously known by either the Minister or the referred applicant; and
- had the information been known by either the Minister or the referred applicant, the information may have affected the consideration of the referred applicant's claims.

2.3.46 For information to be 'credible' for the purposes of s.473DD(b)(ii), it must be capable of being accepted as 'truthful (or accurate or genuine)' but need not actually be truthful.[117] If information is evidently not credible, it will fail to meet the credibility requirement in s.473DD(b)(ii), however, the IAA will err if it imposes a higher standard by requiring that the information be true when determining whether it is satisfied of the matters in s.473DD(b)(ii).[118] It is at the deliberative stage of the review, once the information has been received into the review and considered, that the IAA is to determine whether or not the information is actually true. When considering whether information is 'credible', it is preferable for the IAA to reach a concluded view and phrases such as 'concerns about the reliability of this document' will not be sufficient to demonstrate consideration of s.473DD(b)(ii).[119]

2.3.47 'Personal information' should be given its meaning from s.5 of the Migration Act read with s.6 of the *Privacy Act 1988* to mean 'information or an opinion about an identified individual,

[115] *DHH16 v MIBP* [2018] FCCA 1638 (Judge Driver, 23 August 2018) at [98]-[99].
[116] *Plaintiff M174/2016 v MIBP* [2018] HCA 16 (18 April 2018) at [33]–[34] per Gageler, Keane and Nettle JJ (Gordon and Edelman JJ agreeing)
[117] See *CSR16 v MIBP* [2018] FCA 474 (Bromberg J, 11 April 2018) at [41] the Court held the IAA had erred by imposing a higher standard of satisfaction by requiring that the new information was true to meet s.473DD(b)(ii). In *DYA16 v MIBP* [2018] FCCA 2679 (Judge Smith, 8 November 2018) at [35] the Court considered *CSR16* when noting that it was 'troubling' that the IAA had based its findings on whether s.473DD is satisfied on the merits of the case when determining there were no exceptional circumstances under s.473DD(a) to consider new information. Although the Court did not come to a conclusive view.
[118] *CSR16 v MIBP* [2018] FCA 474 (Bromberg J, 11 April 2018) at [42]-[43]. In *ALJ18 v MIBP* [2018] FCCA 3835 (Judge Kendall, 21 December 2018), the Court distinguished *CSR16,* at [28], to find the IAA is not prevented from having regard to the factual context in which information arose in assessing whether that information is credible.
[119] In *BNV18 v MHA (No 2)* [2019] FCA 378 (Murphy J, 21 March 2019) at [30], the Court held it was necessary for the IAA to go further than express a concern about the reliability of an arrest warrant which was said to be proof of the applicant's claim to have illegally departed from Sri Lanka on more than one occasion. If the IAA had engaged in an active intellectual process or taken a careful, fair and reasonable approach to the credibility of the arrest warrant, it could realistically have reached a different conclusion: at [36].

or an individual who is reasonably identifiable.[120] (See Chapter 31 for further information on the meaning of 'personal information' in the MRD Procedural Law Guide).

2.3.48 The person in s.473DD(b)(ii) to whom the 'credible personal information' was not previously known is not to be confined solely to the applicant, and includes the original decision-maker (Minister).[121] The IAA should consider the provision in relation to whether the information was known either to the applicant or the Minister.

2.3.49 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).[122]

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

2.3.50 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:

- 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;

[120] See *Plaintiff M174/2016 v MIBP* [2018] HCA 16 (18 April 2018) at [33] per Gageler, Keane and Nettle JJ (Gordon and Edelman JJ agreeing).
[121] See *Plaintiff M174/2016 v MIBP* [2018] HCA 16 (18 April 2018) at [33]-[34] per Gageler, Keane and Nettle JJ (Gordon and Edelman JJ agreeing). In coming to this position, the Court cited the Explanatory Memorandum to the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014, which itself referred to the provision encompassing either the Minister or the referred applicant. This is because the purpose is to 'extend the types of new information that a referred applicant may present to the [IAA] to include, for example, evidence of significant torture and trauma, which, if it had been known by either the Minister or the referred applicant, may have affected the consideration of the referred applicant's claims by the Minister'. See also *BVZ16 v MIBP* [2017] FCA 958 (White J, 18 August 2017) at [51] where the Court held that (b)(ii) refers, *at least principally*, to information not known by the original decision-maker, and also *MIBP v BBS16* [2017] FCAFC 176 (Kenny, Tracey, Griffiths JJ, 10 November 2017) at [105]-[106] the Court agreed with the findings in *BVZ16* on s.473DD(b)(ii) and rejected the Minister's submission that the phrase should be construed as meaning 'not previously known to the [referred applicant]'. However, in *CCD16 v MIBP* [2018] FCA 343 (Rares J, 26 February 2018) at [6] the Court found that, as the information was known to the appellant prior to the delegate's decision, it did not fall within s.473DD(b)(ii). Contrary to *BVZ16* and *BBS16*, the Court did not consider whether the relevant person in s.473DD(b)(ii) was the original decision-maker. An application for special leave to appeal from this judgment to the High Court was dismissed: *CCD16 v MIBP* [2018] HCASL 123 (10 May 2018).
[122] 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

- 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).[123]

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;[124] or
- is non-disclosable information;[125] 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.[126]

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.[127]

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

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).

[123] s.473DE(1).

[124] s.473DC(3)(a).

[125] s.473DE(3)(b).

[126] s.473DE(3)(c) and r.4.41.

[127] 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.

circumstance'.[128] Information' need not be contained in a written document. A photograph may suffice.[129]

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.[130]

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.[131] 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.[132] Nor would legislation and judgments cited in IAA decisions.[133]

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.[134]

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.[135] 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.[136] 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.[137]

2.4.13 Likewise, information that merely assists the IAA to make assessments of the applicant's credibility[138] or in some cases, information which underpins an expert's opinion[139] would not fall within the purview of s.473DE.

[128] *SZASX v MIMIA* [2004] FMCA 680 (Barnes FM, 18 October 2004) at [18].
[129] *SZESF v MIMA* [2007] FCA 6 (Stone J, 12 January 2007).
[130] *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].
[131] *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.
[132] *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].
[133] *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).
[134] *SZTGV v MIBP* (2015) 318 ALR 450.
[135] *SZBYR v MIAC* (2007) 235 ALR 609 at [17].
[136] *SZBYR v MIAC* (2007) 235 ALR 609 at [17].
[137] *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].
[138] *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).
[139] *Wu v MIAC* [2011] FMCA 14 (Cameron FM, 28 January 2011).

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.[140] This view was taken in *CWL16 v MIBP* where the Court found the IAA was not obliged to put new information to the applicant because it was country information and not specifically about the applicant.[141]

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.[142]

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.[143]

[140] 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]. See also *CCQ17 v MIBP* [2018] FCA 1641 (Thawley J, 31 October 2018) at [53] where the Court found the country information (if adverse) does not need to be put to the applicant due to s.473DE(1)(a)(ii) and s.473DE(3)(a).

[141] *CWL16 v MIBP* [2018] FCCA 3280 (Judge Heffernan, 19 November 2018) at [22] and [41]. Further, as the IAA had extended an opportunity to comment that it was not obliged to extend, and had made an attempt to contact the applicant's agent, it was not unreasonable for it to make a decision in the timeframe that it had indicated (at [24]).

[142] 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.

[143] 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 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.

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.[144] 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.[145]

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.[146]

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,[147] an 'advisor' or friend acting with the referred applicant's consent or authority,[148] or a parent in their role as guardian for a referred applicant child or minor.[149]

[144] s.473DE(3)(b).
[145] *MIAC v Kumar* (2009) 238 CLR 448 at [34].
[146] See *BXZ16 v MIBP* [2018] FCCA 2833 (Judge Manousaridis, 5 October 2018) at [34] where the Court confirmed the consequence of r.4.41 is that information provided by a referred applicant to the IAA is not information to which s.473DE applies.
[147] *SZIOQ v MIAC* [2007] FMCA 1292 (Nicholls FM, 8 August 2007) at [16].
[148] *SZGSG v MIAC* [2008] FMCA 452 (Lloyd-Jones FM, 10 April 2008).
[149] *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.[150] Unlike in the MRD, the IAA is not required to disclose the existence of a valid s.473GB certificate to an applicant.[151] However a failure to disclose a valid s.473GB certificate and the documents or information subject to it, or a failure to consider the exercise of the discretion to disclose the documents or information subject to a valid s.473GB certificate, may be legally unreasonable if the documents or information covered by the certificate introduce a new issue not already considered by the delegate.[152]

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.

[150] s.473GB(3).

[151] 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 *AYF16 v MIBP* [2018] FCAFC 129 (McKerracher, Murphy and Davies JJ, 14 August 2018) at [33] where the Court followed *BBS16* that the applicant's procedural fairness entitlements in respect of s.473GB certificate rest solely on the wording in s.473GB(3). 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. This judgment was upheld on appeal: *BVM16 v MIBP* [2018] FCA 381 (Logan J, 9 March 2018) although this issue was not discussed in the judgment. See also *CMR16 v MIBP* [2017] FCCA 1715 (Judge Driver, 24 July 2017) at [25]-[28] in which the Court held there are no gaps in s.473DA(1) for the general law rules of procedural fairness to fill. 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. This judgment was upheld on appeal: *CMR16 v MIBP* [2018] FCA 916 (Gleeson J, 9 June 2018) although this issue was not discussed in the judgment. An application for special leave to appeal from this judgment to the High Court was dismissed: *CMR16 v MIBP* [2018] HCASL 309 (17 October 2018).

[152] See *BCQ16 v MIBP* [2018] FCA 365 (Thawley J, 20 March 2018) at [73] where the Court found the IAA did not act unreasonably when it failed to consider exercising its discretion under s.473GB(3) to disclose material covered by the certificate. The Court's reasoning suggests that a failure not to consider disclosing material subject to a s.473GB certificate or to refuse disclosing material subject to a s.473GB certificate may be legally unreasonable if the certified documents or information introduce a new issue or something not already considered by the delegate. In *BVD17 v MIBP* [2018] FCAFC 114 (Flick, Markovic and Banks-Smith JJ, 25 July 2018) at [49]-[56], [58] the Court followed *BCQ16* in finding that the absence of reference to the exercise of discretion under s.473GB(3) in the IAA's reasons does not of itself give rise to an inference that its exercise of the discretion was not considered. It also found that inferences drawn from the information covered by the certificate did not amount to any legally unreasonableness when the IAA declined to disclose the material to the applicant.

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 information.[153] It is sufficient to give an accurate summary or paraphrasing of the relevant new information,[154] and it would not appear necessary to produce documents or identify the source of the new information[155] unless not doing so would deprive a referred applicant of the meaningful opportunity to comment on it.[156]

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.[157] 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.[158] 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.[159] 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.[160]

2.4.35 The IAA should ensure that it adequately explains the relevance of the information being relied upon.[161] Merely sending the text of information relied upon will not be sufficient.[162] 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

[153] *Nader v MIMA* (2000) 101 FCR 352.
[154] *Shah v MIAC* [2011] FMCA 18 (Cameron FM, 16 February 2011) at [57].
[155] *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].
[156] *Nader v MIMA* (2000) 101 FCR 352.
[157] *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].
[158] s.473DE(1)(a). There is no MRD equivalent to this provision.
[159] 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).
[160] *Louis-Jean v MIAC* [2010] FMCA 710 (Riley FM, 21 September 2010) at [30] and [33].
[161] *SZQQA v MIAC* [2013] FMCA 231 (Barnes FM, 5 April 2013).
[162] *SZMKR v MIAC* [2010] FCA 340 (Gray J, 9 April 2010).

inquiries.[163] However, in some instances the clarity and detail of information provided may be sufficient without giving further explanation.[164]

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.

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.[165]

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.[166] There is no requirement that the invitation must be given in a referred applicant's native language.[167] 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.[168]

2.5.3 The invitation must however specify whether the new information or comments are to be given in writing[169] or at an interview.[170] It must also specify the period in which the information or comments are to be given, which is prescribed in the Regulations (see below).

[163] *SZKCQ v MIAC* (2008) 170 FCR 236 at [3]-[4] and [79].
[164] 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].
[165] *SZNYL v MIAC* [2010] FCA 1282 (North J, 9 November 2010) at [25] and [28].
[166] ss.473DC(3) and s473DE(1)(c).
[167] *BZAGU v MIBP* [2015] FCA 920 (Logan J, 18 August 2015) at [18].
[168] 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.
[169] ss.473DC(3)(a) and 473DE(1)(c)(i).
[170] ss.473DC(3)(b) and 473DE(1)(c)(ii).

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.[171] An interview may be conducted in person, by telephone, or in any other way, including by videoconference or online.[172] It must however be held within the prescribed period.[173] 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 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.[174] 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[175]. 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)*		

Comments to be given in writing

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

[171] s.473DF(3).
[172] Explanatory Memorandum to the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 at pp.133, 905.
[173] s.473DF(2).
[174] 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.

may be provided at any time within the prescribed period.[176] In *MIBP v DZU16,* the Court found that a written invitation to give information and or/comments in writing to an applicant in detention must allow a period of three working days to respond as opposed to setting a period within three working days.[177]

Comments to be given at interview

2.5.8 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. In *BMV16 v MHA* the Full Federal Court found that s.473DF(2) and r.4.42 allow the IAA to specify a 'period' which is within '14 days' as long as it is reasonable.[178] 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.[179]

2.5.9 When the IAA is conducting an interview, it must consider the reasonableness of the period it gives the applicant to give information and/or comments to the information put under s.473DE and s.473DC.[180]

Extensions

2.5.10 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 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

2.5.11 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,[181] or without taking any further action to allow or enable the referred applicant to take part in a further interview.[182] 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.

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[175] In *BMV16 v MHA* [2018] FCAFC 90 (Mortimer, Moshinsky and Thawley JJ, 21 June 2018) at [73] the Court discussed the relationship between s.473DE, s.473DF(2) and r.4.42 and the outer limits of the prescribed periods relating to written and oral invitations to provide comments and/or information.

[176] *CWL16 v MIBP* [2018] FCCA 3280 (Judge Heffernan, 19 November 2018) at [24] the Court found the IAA did not act unreasonably when it had invited the applicant to comment on information that was not 'new information' (country information), therefore not prescribed by the Act, allowing the 14 day prescribed period to comment that it was not obliged to provide.

[177] In *MIBP v DZU16* [2018] FCAFC 32 (Robertson, Murphy and Kerr JJ, 12 March 2018) at [73]-[75]. The Minister also conceded this point. However, in *BMV16* [74]-[75] the Court found the construction used in *DZU16* for the prescribed periods is not consistent with the intention of the legislature to have a limited review which is efficient and quick. The Court distinguished *DZU16* as the Court in that matter was only considering an invitation to an applicant (who is was in detention) to comment on new information in writing whereas in *DZU16*, the Court was considering an invitation to give comments at an interview.

[178] *BMV16 v MHA* [2018] FCAFC 90 (Mortimer, Moshinsky and Thawley JJ, 21 June 2018) at [73]-[75].

[179] *BMV16 v MHA* [2018] FCAFC 90 (Mortimer, Moshinsky and Thawley JJ, 21 June 2018) at [74].

[180] In *BMV16 v MHA* [2018] FCAFC 90 (Mortimer, Moshinsky and Thawley JJ, 21 June 2018) at [96]-[98] the Court held it was legally unreasonable for the IAA to require the applicant to respond immediately to inconsistencies put to him at an interview under s.473DE. However, the Court found that it will not always be unreasonable for the IAA to request a response in an interview immediately if the applicant has been afforded a meaningful opportunity to comment.

[181] s.473DF(4)(a).

[182] s.473DF(4)(b).

2.5.12 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.[183] The IAA will need to consider all the circumstances before refusing a request for an extension of time.[184] 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.

2.5.13 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*,[185] 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.

2.5.14 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.

[183] 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.
[184] See *DPD16 v MIBP* [2018] FCCA 2783 (Judge Riethmuller, 27 September 2018) at [58] where the Court found the IAA's refusal to allow the applicant an extension of 7 days to provide submissions was legally unreasonable. The IAA in refusing the request for an extension of time did not consider the circumstances of the request including the short time period and the fact that the applicant had received a copy of the IAA's file in response to an FOI request on the same day and was requesting time to make submissions.
[185] *MIAC v Saba Bros Tiling Pty Ltd* [2011] FCA 233 (Jagot J, 18 March 2011).

Immigration Assessment Authority Procedural Law Guide

Chapter 3

Decisions and publication

Current as at 19 September 2019

3. DECISIONS AND PUBLICATION

3.1 INTRODUCTION

3.1.1 The Immigration Assessment Authority (the IAA) must produce a written statement containing its decision and reasons and give a copy to the referred applicant and the Secretary of the Department (the Secretary) within 14 days after the day and time that the written statement was made. A decision is taken to have been made by the making of the written statement and on the day and time that the written statement is made.

3.1.2 Subject to limitations regarding identifying a referred applicant or certain other persons,[1] decisions of particular interest may also be published[2] however there is no statutory requirement to do so.

3.2 WRITTEN STATEMENT OF DECISION AND REASONS

3.2.1 When making a decision on a review, the IAA must make a written statement that sets out the decision and the reasons for it, and records the day and time the written statement was made.[3] A decision is taken to have been made by the making of the written statement on the day and time that the written statement is made,[4] and the IAA has no power to vary or revoke a decision after the day and time that the written statement has been made.[5]

3.2.2 However, a decision may be re-opened where it is both lawful and sound to treat that decision as a nullity.[6] This may be the case where the existence of jurisdictional error is so

[1] s.473EC(2).
[2] s.473EC(1).
[3] s.473EA(1).
[4] s.473EA(2).
[5] s.473EA(3).
[6] See *MIBP v CLV16* [2018] FCAFC 80 (Flick, Griffiths and Perry JJ, 25 May 2018) at [68]-[69], the Court found that the 'normal position' of re-opening an administrative decision established in *MIMA v Bhardwaj* (2002) 209 CLR 597 was not displaced by s.473EA(3). The Court held that s.473EA(3) did not prevent the IAA from re-opening a decision it made without having regard to submissions which had been provided prior to the date of the decision (as the decision was affected by jurisdictional error for not having regard to the submissions). In *Bhardwaj*, the Court held that where a decision was made in excess of statutory

obvious as to leave no real doubt about that conclusion, and there are no plausible countervailing considerations weighing against doing so. Where there is some doubt as to whether there has been a jurisdictional error, a court would appear to be best placed to make a binding decision in relation to the lawfulness of the decision and not the IAA itself.

3.2.3 As a number of the provisions relating to the IAA's decision and reasons are similar to equivalent provisions for the Migration and Refugee Division (MRD) of the Administrative Appeals Tribunal (the Tribunal), some guidance may be drawn from judicial consideration of those provisions. See Chapter 25 of the MRD Procedural Law Guide for further discussion.

3.2.4 Unlike in the Tribunal's MRD, the IAA cannot give or make a decision orally.

Decision

3.2.5 The written statement must set out the IAA's decision on the review.[7]

3.2.6 In determining a review, the IAA has the power either to affirm a fast track reviewable decision or to remit the decision in accordance with the permitted remittal directions.[8] Affirming the primary decision leaves it intact, while remitting it returns it to the primary decision-maker for reconsideration.

3.2.7 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;[9]
- the referred applicant is a refugee within the meaning of s.5H(1);[10]
- s.36(3) does not apply to the referred applicant;[11]
- the referred applicant satisfies each matter, specified in the direction, that relates to establishing whether the referred applicant 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;[12]
- the grant of the visa is not prevented by ss.91W, 91WA or 91WB of the Migration Act.[13]

3.2.8 The IAA may not, however, remit with certain directions that encompass the exclusion type provisions relating to serious criminality or national security, namely that:

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authority or failing to exercise statutory authority, it may be regarded as vitiated by jurisdictional error and treated as no decision at all. *MIBP v CLV16* overturned *CLV16 v MIBP* [2017] FCCA 1200 (Judge Street, 5 June 2017) which found that the IAA had no power to vary or revoke a decision once made and lacked this power even where there was a jurisdictional error. An application for special leave to appeal from this judgment to the High Court was dismissed: *CLV16 v MIBP* [2018] HCATrans 266 (14 December 2018). See also *DOR17 v MIBP* [2018] FCCA 3933 (Judge Smith, 13 December 2018) at [6] and [14]-[19] where the Court followed *MIBP v CLV16* [2018] FCAFC 80 and held that the IAA was permitted to reopen its decision where the earlier decision was clearly affected by jurisdictional error. This was in circumstances where the IAA realised reasons from another decision for a different applicant were uploaded into the system, removed that decision and made a decision in respect of the correct applicant.

[7] s.473EA(1)(a) and (b).
[8] s.473CC(2) and r.4.43(1).
[9] r.4.43(2)(a).
[10] r.4.43(2)(b).
[11] r.4.43(2)(c).
[12] r.4.43(2)(d).
[13] r.4.43(4).

- s.5H(1) applies to the referred applicant;[14]
- s.5H(1) does not apply to the referred applicant because of s.5H(2);[15]
- the referred applicant satisfies, or does not satisfy, the criterion in s.36(1C);[16] or
- the referred applicant satisfies a matter that relates to establishing whether:
  - there are serious reasons for considering that the referred applicant has committed certain serious crimes (crimes against peace, war crimes, crimes against humanity, or serious non-political crimes before entering Australia) or is guilty of acts contrary to the purposes and principles of the United Nations;[17] or
  - there are reasonable grounds that the referred applicant is a danger to Australia's security or the Australian community (in circumstances involving a conviction for a particularly serious crime).[18]

Reasons

3.2.9 In addition to setting out its decision on the review, the IAA's written statement must also set out its reasons.[19] This includes its findings on material questions of fact and the evidence or other material on which those findings were based.[20] The written statement does not need to set out procedural decisions made during the review process.[21]

3.2.10 In considering similar provisions about reasons in the MRD context, the courts have made a number of observations about what is required, which would appear equally applicable to the IAA. For example, reasons should flow logically and address each necessary material fact and question systematically.[22] The obligation to set out the reasons for the decision requires the IAA to resolve competing facts where there are conflicting accounts,[23] and a failure to address each necessary material fact and question systematically could indicate to a court that a relevant claim, or integer of a claim, has not been considered.

[14] r.4.43(3)(a).
[15] r.4.43(3)(b).
[16] r.4.43(3)(c).
[17] r.4.43(3)(d).
[18] r.4.43(3)(e).
[19] s.473EA(1)(b). Note that in *DNQ17 v MIBP* [2017] FCCA 3032 (Judge Cameron, 7 December 2017) at [15], the Court followed the judgment in *MIAC v SZLSP* (2010) 187 FCR 362 which considered s.430, and held that s.473EA is not a requirement which goes to jurisdiction in the sense that a decision will be invalid if a statement of reasons complying with the requirements of s.473EA has not been prepared. This means that even if the reasons were inadequate, without more that would be insufficient to find that the IAA's decision was affected by jurisdictional error. However, inadequacy of reasons may indicate inadequate consideration of claims, which would be a jurisdictional error. Upheld on appeal: *DNQ17 v MIBP* [2018] FCA 1781 (Derrington J, 21 November 2018) in which the Court held that the IAA had dealt appropriately with issues raised by the appellant in its decision record, but did not specifically refer to whether s.473EA is a requirement which goes to jurisdiction.
[20] Although not expressly set out in s.473EA(1) itself, the requirement to provide written reasons includes setting out the findings on material questions of fact and referring to the evidence or other material on which those findings were based: s.25D of the *Acts Interpretation Act 1901*. See also *MIBP v AMA16* [2017] FCAFC 136 (Dowsett, Griffiths and Charlesworth JJ, 30 August 2017) at [74]. There isn't a requirement that the IAA exhaustively catalogue all documents which have been provided to it by the Secretary in its decision: *CJD16 v MIBP* [2017] FCCA 2748 (Judge Brown, 13 November 2017) at [107]. Upheld on appeal in *CJD16 v MIBP* [2019] FCA 20 (Charlesworth J, 3 August 2018), although this point was not addressed in the judgment. Special leave to appeal from the Federal Court judgment was refused: *CJD16 v MIBP* [2019] HCASL 107 (17 April 2019),
[21] See *CVS16 v MIBP* [2018] FCA 951 (Judge Bromwich, 22 June 2018) at [29] where the Court found that there is no requirement to record procedural decisions, or antecedent decisions, made along the review, and such a finding would be inconsistent with s.473EA which is directed to the decision and reasons for decision.
[22] See *MZYJN v MIAC* [2011] FCA 548 (North J, 12 May 2011).
[23] *SZMIB v MIAC* [2008] FMCA 1433 (Raphael FM, 20 October 2008) at [18].

3.2.11 While the Courts have held that reasons for administrative decisions should not be scrutinized 'with an eye keenly attuned to the perception of error',[24] it may in some circumstances be inferred from a failure to expressly deal with an issue in the reasons for a decision, particularly in relation to contentious issues, that there has been a failure to consider it.[25] In *MIMA v Yusuf*, for example, Gummow and Hayne JJ observed that s.430 'entitles a court to infer that any matter not mentioned in the s.430 statement was not considered to be material. The identification of what the decision maker considered to be the material questions of fact may demonstrate that it took into account some irrelevant consideration or did not take into account some relevant consideration'.[26]

3.2.12 To avoid uncertainty, the IAA should be clear about the basis or bases on which a decision has been reached.[27] Any alternative reasons for a decision should also be expressly identified as such within the written statement to avoid uncertainty.[28]

3.2.13 In relation to credibility findings, the Federal Circuit Court held in *CTM16 v MIBP* that there is no obligation for the IAA to explicitly refer in its reasons to any disadvantages it faces in comparison to the delegate in arriving at credibility findings, where it has not conducted an interview with the applicant in person.[29] Referring to Part 7AA of the Migration Act which provides that the IAA is to review the delegate's decision 'on the papers' and, notwithstanding s.473DE of the Migration Act, the Court found that it is implicit that the IAA is generally unable to have the benefit of interviewing an applicant, and not referring to the lack of this benefit did not lead to error.[30]

Addressing claims

3.2.14 As the failure to address a claim will involve jurisdictional error,[31] Reviewers need to ensure that they consider not only specific incidents which may be raised by a referred applicant in detail, but also claims of a more generalised nature that arise on the evidence (for example, the general situation of Tamils in Sri Lanka or generalised violence in Afghanistan or Pakistan).[32] If a claim is not apparent on the material available to the IAA, the IAA is not required to consider it.[33]

[24] *WAEE v MIMIA* (2003) 75 ALD 630 at [46].
[25] See e.g. *MIAC v Khadgi* (2010) 190 FCR 248 at [64]-[65]; *SZODR v MIAC* [2010] FCA 1362 (Jessup J, 8 December 2010); *MIBP v SZRUT* [2013] 1276 (Rares J, 20 November 2013).
[26] *MIMA v Yusuf* (2001) 180 ALR 1 per Gleeson CJ at [10], McHugh, Gummow and Hayne JJ at [69]. In *CVS16 v MIBP* [2018] FCA 951 (Judge Bromwich, 22 June 2018) at [28]-[29] where the Court found that procedural decisions along the review is inconsistent with s.473EA which directs a decision to record its date and time. Further, the Court accepted the Minister's submissions that the obligation in s.473EA applies to the ultimate decision, and does not extend to procedural or antecedent decisions made during the review process. This judgment upheld the lower court decision in *CVS16 v MIBP* [2017] FCCA 249 (Driver J, 18 May 2017) where the Court, citing *Yusuf*, inferred that the IAA did not consider documents to be material that it had not referred to in its decision (at [38]).
[27] See e.g. *MZYLH v MIAC* [2011] FMCA 888 (Whelan FM, 17 November 2011) at [147] - [148]; *SZPAB v MIAC* [2011] FCA 1253 (Flick J, 4 November 2011) at [28]–[29].
[28] See e.g. *AZABC v MIAC* [2011] FCA 1179 (Mansfield J, 20 October 2011) at [19].
[29] *CTM16 v MIBP* [2018] FCCA 2865 (Judge Kendall, 17 October 2018) at [99]-[104]. The Court concluded that the IAA conducted its review having regard to all the material before it and understood the limits of its statutory task, including the lack of interview with the applicant. This was in circumstances where the IAA made a different credibility finding to that of the delegate.
[30] *CTM16 v MIBP* [2018] FCCA 2865 (Judge Kendall, 17 October 2018) at [104].
[31] See e.g. *SZQLV v MIAC* [2012] FMCA 337 (Barnes FM, 24 April 2012); *MZYLX v MIAC* [2012] FCA 580 (Bromberg J, 5 June 2012); *MZYPA v MIAC* [2012] FCA 581 (Bromberg J, 5 June 2012).
[32] See e.g. *NABE v MIMA (No.2)* (2004) 144 FCR 1; *SZQII v MIAC* [2012] FCA 402 (North J, 22 February 2012); *DZADA v MIAC* [2012] FMCA 874 (Reithmuller, FM, 17 August 2012) at [13] and [16].
[33] See e.g. *MZYKW v MIAC* [2011] FMCA 630 (Whelan FM, 18 August 2011); *SZTDM v MIBP* [2013] FCCA 2060 (Judge Barnes, 24 October 2013); *SZSGA v MIMAC* [2013] FCA 774 (Robertson J, 6 August 2013): at [43] and [52].

3.2.15 Where claims presented by a referred applicant are numerous and interrelated, Reviewers must be conscious to address each integer of each claim as raised[34] and ensure that claims are not mischaracterized or misconstrued[35] such that the claim actually being made is not squarely addressed, and that its findings are not affected by illogicality or irrationality.[36] There is also a duty to consider an applicant's claims cumulatively where this arises on the facts.[37]

3.2.16 If a claim is not expressly made by the applicant, the extent of the obligation to consider it may depend on whether or not an applicant is represented. For example, in *MZYPB v MIAC*[38] the applicant did not raise a claim until post hearing submissions by his agent and it was submitted the reason for the late claim was because the applicant was not aware of the terms of the statute. The Court found that as the applicant was represented, his agent would have been aware of the terms of the statute.

3.2.17 An applicant can however instruct an agent to make a claim on his or her behalf.[39] Accordingly, submissions by an advisor should be considered, however if a submission is not reflected in the applicant's own claims this may be relevant when determining whether to prefer the evidence of an applicant over submissions made by the agent.[40]

3.2.18 The question of whether a claim has been abandoned such that the IAA is no longer required to consider it must be approached with caution. It should not be assumed that a claim initially made has been abandoned just because it was not articulated on review.[41] Whether such a claim needs to be considered will depend on all the circumstances.[42]

Form of the decision record and the inclusion of procedural steps

3.2.19 When setting out and applying the relevant law, there is no expectation that the decision-maker constantly find new ways to express well-settled legal propositions, or focus on creative and inventive drafting, merely to demonstrate that it has properly engaged with or actively considered the correct test.[43] The fact that the IAA may recite a test in a 'boilerplate' fashion does not mean that it has not engaged with the correct test in an active intellectual manner.[44]

3.2.20 Even if the IAA has misstated a test, it will only fall into jurisdictional error if it actually misapplies the test. However, using language in the reasons for the decision that is

[34] See e.g. *CCU16 v MIBP* [2018] FCCA 1069 (Judge Riley, 2 May 2018) at [54]-[55] where the Court found the IAA had erred by not considering part of the applicant's claim to fear harm based on his being perceived as a person with wealth because he had spent his formative years in a Western country. The IAA had accepted that he had 'Western' characteristics and accepted country information that unaccompanied children, such as the applicant, who had been to the West and were forcibly returned as young adults were at risk of being robbed and kidnapped. See also *SZQGJ v MIAC* [2012] FCA 434 (McKerracher J, 2 May 2012); *EHA17 v MIBP* [2019] FCCA 158 (Judge Riley, 30 January 2019) at [23]-[27]; and *FJN17 v MIBP* [2019] FCCA 274 (Judge Riley, 8 February 2019) at [21].
[35] See e.g. *SZQGP v MIAC* [2011] FMCA 701 (Smith FM, 23 September 2011), and *FJN17 v MIBP* [2019] FCCA 274 (Judge Riley, 8 February 2019) at [9]-[11].
[36] See e.g. *CXP16 v MIBP* [2019] FCCA 199 (Judge Heffernan, 8 February 2019) at [54]-[57] where the Court found that the IAA's findings on identity documents were affected by jurisdictional error for illogicality and irrationality because, in the Court's view, the only logical and rational conclusion that could be reached on the reliability of the documents was contrary to the IAA's finding. This judgment is consistent with *MIAC v SZMDS* (2010) 240 CLR 611.
[37] See e.g. *SZQEP v MIAC* [2011] FMCA 548 (Emmett FM, 18 July 2011).
[38] *MZYPB v MIAC* [2012] FMCA 226 (Turner FM, 30 March 2012).
[39] See e.g. *DZACP v MIAC* [2012] FMCA 570 (Driver FM, 7 August 2012),
[40] See e.g. *Revollo v MIAC* [2013] FCCA 154 (Judge Emmett, 2 May 2013) at [38].
[41] See e.g. *SZQHF v MIAC* [2012] FCA 251 (North J, 20 February 2012); *SZRFQ v MIAC* [2021] FMCA 772 (Smith FM, 11 October 2012) at [28]–[29]; *MZZES v MIBP* [2015] FCA 397 (North J, 29 April 2015).
[42] See e.g. *SZTOK v MIBP* [2015] FCA 929 (Buchanan J, 27 August 2015).
[43] *SZONB v MIAC* [2011] FMCA 13 (Nicholls FM, 20 January 2011) at [121].
[44] *SZONB v MIAC* [2011] FMCA 13 (Nicholls FM, 20 January 2011) at [118]-[133].

inconsistent with relevant provisions of the Migration Act or Regulations may lead to an inference that the wrong legal question has been asked.[45]

3.2.21 There is no statutory obligation to set out the procedures that are followed by the IAA in a particular review.[46] However, in some cases the decision record may be the only evidence available to a court of such matters. It is, therefore, advisable to make reference in the decision record to the IAA's compliance with relevant statutory obligations in the absence of any other evidence of the matter on file.

Recording day and time of decision

3.2.22 The IAA's written statement of decision must record the day and time that it is made.[47] A failure to record the day and time that the written statement was made does not affect the validity of the decision.[48] However, the consequence of such a failure will be that, while the decision remains valid, the review will not be finally determined within the meaning of ss.5(9)(c) and 5(9A)(e) of the Act. In which case, the IAA may not be *functus officio*.

Guidance decisions

3.2.23 The President or MRD Division Head 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.[49]

3.2.24 Reviewers must comply with guidance decisions when reviewing a case of the specified kind, unless they are satisfied that the facts or circumstances are clearly distinguishable from the facts or circumstances of the guidance decision.[50] However, non-compliance with a guidance decision does not mean that the IAA's decision is invalid.[51]

Past IAA decisions

3.2.25 The IAA is not obliged to give any weight to another IAA decision[52] or have regard to evidence or material in other decisions, including recent past decisions by the same decision-maker.[53]

3.3 PUBLICATION

3.3.1 The IAA does not have a statutory obligation to publish any decisions. However subject to the operation of ss.473EC(2) and 473GD, the IAA may publish any decision that the President or MRD Division Head thinks is of particular interest.[54]

[45] In *SZQOT v MIAC* [2012] FMCA 84 (Driver FM, 10 February 2012), for example, the Court found it was imperative decision makers dealing with claims of persecution use the same language as employed in the Migration Act.
[46] *MIAC v SZGUR* (2011) 241 CLR 594 per French CJ and Kiefel J (Heydon and Crennan agreeing) at [32] and Gummow J (Heydon and Crennan agreeing) at [69].
[47] s.473EA(1)(c).
[48] s.473EA(5)(a).
[49] s.473FC(1), which describes this as a power of the President; however, all functions of the President may also be exercised by the MRD Division Head: s.473JB(1A). The President can also delegate his powers or functions to the Senior Reviewer: s.473JF.
[50] s.473FC(2).
[51] s.473FC(3).
[52] See e.g. *Bhatt v MIAC* [2012] FMCA 317 (Nicholls FM, 24 April 2012) the Court held in the MRD context that the Tribunal is not a Court operating within the doctrines of binding authority or judicial comity and that it is not obliged, in law, to give any weight to another Tribunal decision that would have, if followed, provided the applicant with the outcome sought.
[53] See e.g. *DZAAS v MIAC* [2012] FCA 828 (Dowsett J, 7 August 2012).
[54] s.473EC(1), which describes this as a function of the President; however, all functions of the President may also be exercised by the MRD Division Head: s.473JB(1A). The President can also delegate his powers or functions to the Senior Reviewer: s.473JF.

3.3.2 A decision which is published must not identify a referred applicant or any relative or other dependent of a referred applicant.[55]

3.3.3 The President or MRD Division Head may, if satisfied that it is in the public interest to do so, direct that any information given to the IAA or the contents of any document produced to the IAA, should not be published or otherwise disclosed, or not published or otherwise disclosed except in a particular manner and to particular persons.[56] A President's direction must be in writing and notified in a way that the President considers appropriate.[57]

3.3.4 A written direction not to publish or disclose material does not remove the IAA's obligation to produce a written decision statement under s.473EA,[58] nor does it prevent a person from communicating to another person material if the first person has knowledge of the material otherwise than because of evidence or information having been given or produced to the IAA.[59]

3.3.5 A person in respect of whom the President has issued a written direction under s.473EA(1) and who contravenes that direction is liable to 2 years imprisonment.[60]

3.4 NOTIFYING THE DECISION AND RETURNING DOCUMENTS TO THE SECRETARY

3.4.1 Within 14 days after the day on which the decision is taken to have been made, the IAA must give a copy of the written statement to the referred applicant by one of the methods specified in s.473HB[61] and the Secretary by one of the methods specified in s.473HC.[62] A failure to properly notify a referred applicant or the Secretary of a decision does not affect the validity of that decision.[63]

3.4.2 After making a written statement of its decision on a review, the IAA must return to the Secretary any documents the Secretary gave the IAA for the review, as well as copies of any other document containing material on which the IAA based its findings of fact. However, a failure to do so does not affect the validity of the decision.[64]

[55] s.473EC(2).
[56] s.473GD(1), which describes this as a function of the President; however, all functions of the President may also be exercised by the MRD Division Head: s.473JB(1A). The President can also delegate his powers or functions to the Senior Reviewer: s.473JF.
[57] s.473GD(2).
[58] s.473GD(3)(a).
[59] s.473GD(3)(b).
[60] s.473GD(4).
[61] s.473EB(1).
[62] s.473EB(2).
[63] s.473EB(3).
[64] s.473EA(5)(b).

Immigration Assessment Authority Procedural Law Guide

Chapter 4

Notification by the IAA

Current as at 19 September 2019

4. NOTIFICATION BY THE IAA

4.1 METHOD OF DISPATCH OF DOCUMENTS

4.1.1 The notification provisions for the Immigration Assessment Authority (IAA) essentially reflect those of the Migration and Refugee Division (MRD) of the Administrative Appeals Tribunal (the Tribunal), with some minor differences.

Giving documents to a person other than the Secretary

4.1.2 If the *Migration Act 1958* (the Migration Act) or Migration Regulations 1994 (the Regulations) require or permit the IAA to give a document to a person (the 'recipient') other than the Secretary by a method specified in s.473HB, those methods are as follows:

- **by hand to the recipient** - a Reviewer, a person authorised in writing by the Senior Reviewer, or staff[1], handing the document to the recipient;[2]
- **by hand to another person** - a Reviewer, a person authorised in writing by the Senior Reviewer[3], or staff, handing the document to another person who is at the last residential or business address of the recipient provided to the IAA in connection with the review, appears to live there (in the case of a residential address) or work there (in the case of a business address) and appears to be at least 16 years of age;[4]
- **by post -** a Reviewer, or staff, dating the document and dispatching it within 3 working days (in the place of dispatch) of the date of the document, by prepaid post or other prepaid means, to:
  - the last address for service of the recipient provided to the IAA in connection with the review; or
  - the last residential or business address of the recipient provided to the IAA in connection with the review; or
  - if the recipient is a minor – the last address for a carer of the minor provided to the IAA;[5]
- **by fax, email or other electronic means -** a Reviewer, or staff, transmitting the document by fax, email or other electronic means to the last fax number, email address or other electronic address, as the case may be, of the recipient provided to the IAA, or if the recipient is a minor – the last fax number, email address or other electronic address, as the case may be, for a carer of a minor that is provided to the IAA.[6]

4.1.3 If the IAA gives a document to a carer of a minor, the IAA is taken to have given the document to the minor, but is not prevented from giving the minor a copy of the document.[7] A carer to whom the IAA is dispatching or transmitting a document, must be at least 18 years of age and an individual who the IAA reasonably believes has day-to-day care and responsibility for the minor, or works in or for an organisation that has such care and

[1] The Registrar of the Tribunal is required to make available officers of the Tribunal to assist the IAA in the performance of its administrative functions: s.473JE(2).
[2] s.473HB(3).
[3] An authorisation is currently in the process of being made.
[4] s.473HB(4).
[5] s.473HB(5).
[6] s.473HB(6).
[7] s.473HB(7).

responsibility and the individual's duties – whether jointly or alone with another person – involve care and responsibility for the minor.[8]

Address does not need to be provided by the recipient

4.1.4 One substantive difference between the notification provisions of the IAA and the MRD is that the address to which documents must be sent is the last 'provided to the IAA', but not necessarily 'by the recipient'.[9] This includes an address provided to the IAA by the applicant, his or her authorised representative, the Department[10] or potentially a third party.[11]

4.1.5 It reflects the fact that referred applicants may not have notified the IAA directly of their contact details given that all fast track reviewable decisions are reviewed by the IAA upon referral from the Minister, and the IAA's jurisdiction, unlike the MRD, does not require an application for review to be lodged. As part of the referral process there is also an obligation on the Secretary to provide certain contact details.[12] These are not necessarily limited to those that have been specifically provided by the recipient for the purpose of receiving documents. In particular, the Secretary must provide:

- the last address for service, residential or business address, fax number, email address or other electronic address provided to the Minister by the referred applicant for the purpose of receiving documents;
- if the Minister believes that last address for service, residential or business address, fax number, email address or other electronic address provided to the Minister by the referred applicant is no longer correct or has not been provided to the Minister by the referred applicant, an address or number (if any) that the Minister reasonably believes to be correct at the time the decision is referred;
- if the referred applicant is a minor, the last address for service, residential or business address, fax number, email address or other electronic address for a carer of the minor.

Purpose for which address is provided to the IAA

4.1.6 In order to use a residential address, business address or address for service for the purposes of notification, it must be provided to the IAA *in connection with the review.*[13] In contrast, a fax, email or other electronic address need only be *provided to the IAA.*[14] This suggests that a fax or email address may be used by the IAA where it is provided for reasons other than in connection with the review, however in practical terms it would seem unlikely that the IAA would be provided with such an address for another purpose.

[8] s.473HB(2).
[9] Compare s.473HB(4)–(6) to s.441A(3)–(5). See also *DHX17 v MIBP* [2018] FCCA 819 (Judge Vasta, 28 February 2018) at [44]–[47], in which the Court held the IAA was not acting unreasonably when it acted in accordance with its own legislation. The applicant argued that the IAA erred when it sent its notice to the applicant's residential address and not the address for service which was the applicant's representatives. However, the Court held that the representation by the applicant's lawyers was solely for the purposes of the application to the department. Once the delegate made their decision, that representation ceased and it was consistent for all documentation from thereon in to be sent to the applicant's residential address.
[10] The Secretary is required to give to the IAA details about a referred applicant's address(es) in respect of each fast track reviewable decision referred to the IAA: s.473CB. See Part 1 of this Guide for further details.
[11] For example, a new address or change of address may be provided to the IAA by a family member of the applicant, a community based organisation providing non-migration assistance to the applicant, a health care provider or another government department. Confirmation should be sought from the applicant personally if a new address or a change of address is provided by a third party.
[12] s.473CB(1)(d).
[13] See s.473HB(4) and (5).
[14] See s.473HB(6).

4.1.7 The methods of giving a document under s.473HB are intended to operate independently. For example, the IAA is authorised to use the most recent fax number even though it might have been given an even more recent e-mail address.[15]

Giving documents to the Secretary

4.1.8 If the Migration Act or Regulations require or permit the IAA to give a document to the Secretary of the Department[16] by a method specified in s.473HC, the methods are as follows:

- **by hand -** a Reviewer, a person authorised in writing by the Senior Reviewer[17], or staff[18], handing the document to the Secretary or an authorised officer;[19]
- **by post -** a Reviewer, or staff, dating the document and dispatching it within 3 working days (in the date of dispatch) of the date of the document, by post or by other means[20], to an address, notified to the IAA in writing by the Secretary, to which such documents can be dispatched;[21]
- **by fax, email or other electronic means -** a Reviewer, or staff, transmitting the document by fax, email or other electronic means, to the last fax number, email address or other electronic address notified to the IAA in writing by the Secretary for the purpose.[22]

Other methods of giving documents

4.1.9 If the Act or Regulations require or permit the IAA to give a document to a person, and the relevant provision does not state that the document must be given by a method specified in s.473HB or s.473HC or by a method prescribed for a person in immigration detention, the IAA may give the document to the person by any method that it considers appropriate. Such a method may be one specified in s.473HB or s.473HC or prescribed for persons in immigration detention.[23] Even if there are issues resulting from the method selected to give a document to a person, s.473HA(1) has been held to be a broadly permissive provision and cannot found a claim of jurisdictional error on its own.[24]

4.1.10 If the person to whom the document is to be given is a minor, the IAA may give the document to an individual who is at least 18 years of age if it reasonably believes that the individual has day-to-day care and responsibility for the minor or works in or for an organisation that has such care and responsibility, and the individual's duties – whether jointly or alone with another person – involve care and responsibility for the minor.[25] If a

[15] See Explanatory Memorandum to the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* at p.151.
[16] See definition in s.5(1).
[17] An authorisation is currently in the process of being made.
[18] The Registrar of the Tribunal is required to make available officers of the Tribunal to assist the IAA in the performance of its administrative functions: s.473JE(2).
[19] s.473HC(2).
[20] 'By other means' may include, for example, by courier.
[21] s.473HC(3).
[22] s.473HC(4).
[23] s.473HA(1). There are currently no methods prescribed for persons in immigration detention.
[24] *EUW17 v MIBP* [2019] FCA 744 (Jackson J, 27 May 2019) at [64]. The IAA sent a copy of a Practice Direction (regarding making written submissions to the IAA within 21 days of the matter being referred to the IAA) to the appellant's previous address, in circumstances where he had provided an updated address to the Department. The appellant received the Practice Direction but after the 21 days had passed. The appellant argued unsuccessfully that as s.473HA(1) had been breached, the decision was affected by jurisdictional error. The appellant did not offer evidence of what he would have put in a submission.
[25] s.473HA(2).

document is given to such an individual, the IAA is taken to have given the document to the minor but is not prevented from giving the minor a copy of the document.[26]

4.2 WHEN A DOCUMENT IS TAKEN TO BE RECEIVED

4.2.1 The receipt provisions for the IAA essentially reflect those of the MRD.

Receipt by persons other than the Secretary

4.2.2 If the IAA gives a document to a person other than the Secretary (for example, an applicant or an applicant's authorised recipient) by a method specified in s.473HB (even if it was not required to do so), then the person is taken to have received the document (irrespective of whether the person has in fact received it[27]) as follows:

- **if handed to recipient -** if the document was handed to the person (as per s.473HB(3)) – the person is taken to have received the document when it is handed to the person;[28]
- **if handed to another person -** if the document was handed to another person at a residential or business address (as per s.473HB(4)) – the person is taken to have received the document when it is handed to that other person;[29]
- **if posted -** if the document was dispatched by prepaid post or other prepaid means (as per s.473HB(5)) – the person is taken to have received the document 7 working days (in the place of that address) after the date of the document;[30]
- **if faxed, emailed etc -** if the document is transmitted by fax, email or other electronic means (as per s.473HB(6)) – the person is taken to have received the document at the end of the day on which the document is transmitted.[31]

Receipt by Secretary

4.2.3 If the IAA gives a document to the Secretary by a method specified in s.473HC (even if it was not required to do so), then the Secretary is taken to have received the document as follows:

- **if handed -** if the document was handed to the Secretary or to an authorised officer (as per s.473HC(2)) – the Secretary is taken to have received the document when it is handed to the Secretary / authorised officer;[32]

[26] s.473HA(3).
[27] See for example *MZYSZ v MIAC* [2012] FMCA 390 (Burchardt FM, 23 May 2012) where the Court found that despite an error by the post office in not delivering a particular document, the applicant was deemed to have received it 7 working days after the date of the document as a result of the equivalent provision to s.473HD(4).
[28] s.473HD(2).
[29] s.473HD(3).
[30] s.473HD(4).
[31] s.473HD(5). This provision applies despite ss.14, 14A and 14B of the *Electronic Transactions Act 1999* ('ET Act'): s.473HD(6). According to the Explanatory Memorandum to the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014*, these provisions of the ET Act provide for the time of dispatch, time of receipt, place of dispatch and place of receipt of electronically transmitted documents to be determined by reference to variable factors, such as when the electronic communication leaves or enters an information system, which might never be known by the originator of the information. Therefore, given the need in the migration context for time of receipt of documents to be easily determinable and with certainty for the purposes of establishing, for example, the date on which a bridging visa will cease, it is preferable to expressly provide for deemed receipt and not rely on the default provisions of the ET Act (see pp.153-154).
[32] s.473HE(2)

- **if posted -** if the document was dispatched by post or other means (as per s.473HC(3)) – the Secretary is taken to have received the document 7 working days (in the place of that address) after the date of the document;[33]

- **if faxed, emailed etc -** if the document is transmitted by fax, email or other electronic means (as per s.473HC(4)) – the Secretary is taken to have received the document at the end of the day on which the document is transmitted.[34]

4.3 COMMON ISSUES – METHOD OF DISPATCH AND RECEIPT

4.3.1 The following principles relevant to the dispatch and receipt of documents, likely to be considered applicable to the IAA, can be distilled from the case law relating to the equivalent provisions in the Migration Act applicable to the Department and/or the MRD.

The meaning of 'dispatch' and evidencing it

4.3.2 'Dispatch' means the physical act of sending the document to the relevant address (irrespective of whether it is received at that address); at the very least it is necessary for the envelope to pass from the possession of the agency.[35]

4.3.3 Whether a document has been dispatched *within 3 working days* is a question of fact; although no specific type of evidence is required, probative evidence such as mail register, electronic and physical file records will assist in demonstrating this requirement has been met.[36]

What does transmitting mean?

4.3.4 In the context of transmitting a document by fax, email or other electronic means, 'transmitting' means 'sending', and a person is taken to have received the document at the end of the day on which it is sent.[37]

Does re-notification affect prescribed response periods?

4.3.5 Once a person is properly notified in accordance with one of the methods specified in s.473HB, the prescribed period for response will not recommence if the applicant later receives a copy of the notification.[38]

[33] s.473HE(3).
[34] s.473HE(4). This provision applies despite ss.14, 14A and 14B of the *Electronic Transactions Act 1999*: s.473HE(5).
[35] See *SZOBI v MIAC (No. 2)* [2010] FCAFC 151 (Stone, Jagot and Bromberg JJ, 16 December 2010) per Stone and Jagot JJ at [19] and Bromberg J at [30]; *Han v MIAC* [2007] FMCA 246 (Jarrett FM, 5 March 2007) at [27]-[28]. See also *On v MIBP* [2016] FCCA 481 (Judge Manousaridis, 11 March 2016) at [14], in which the Court applied the Oxford English Dictionary definition of 'dispatch' being to 'send off to a destination or for a purpose', such that the dispatching of a document means the sending off of a document.
[36] See for example *Bataju v MIBP* [2014] FCCA 2922 (Judge Nicholls, 12 December 2014), where the Court was satisfied that a document was dispatched within 3 working days on the basis of testimony of usual mail procedures and a dispatch log.
[37] *Sainju v MIAC* (2010) 185 FCR 86 at [56]–[57]. See also *Shah v MIAC* [2011] FMCA 18 (Cameron FM, 16 February 2011), where the Court applied ss.147 and 161 of the *Evidence Act 1995* (Cth) to find that, in the absence of conclusive evidence that the Tribunal's fax had not been received by the applicant's agent's fax machine, the fax had in fact been sent when the transmission logs recorded it as having been sent.
[38] *Zhang v MIAC* [2007] FCAFC 151 (Finn, Kenny and Greenwood JJ, 17 September 2007) and *MIAC v Manaf* (2009) 111 ALD 437. Although the Court at first instance in *ASE15 v MIBP* [2015] FCCA 2581 (Judge Street, 17 September 2015) found there could be more than one valid notification of a primary decision, this judgment was overturned on appeal in *MIBP v ASE15* [2016] FCAFC 37 (North, Barker and Mortimer JJ, 11 March 2016) with the Full Federal Court finding that there were no facts upon which to base the finding that the Minister had withdrawn the earlier notification and had intended to give a second or additional notification (at [32]). As no second notification was intended to have been given by the Minister the Court found it was unnecessary to consider whether two separate notifications for the purposes of s.66 was possible.

Is the IAA required to send documents to a new address given to the Department?

4.3.6 New addresses or changes of address must be provided to the IAA once the matter has been referred to the IAA.

4.3.7 If the applicant or his/her representative advises the Department of a new address or a change of address subsequent to the matter being referred to the IAA, the IAA is not required to use that address and is only required to send correspondence to the last address provided to the IAA.[39]

Does an address have to be provided in writing?

4.3.8 There is no statutory requirement that an address used for notification be provided in writing. An address (or change of address) may be provided to the IAA orally or in writing, however for evidentiary purposes it is advisable to ask for confirmation in writing.[40]

Address provided in connection with judicial review proceedings

4.3.9 A residential address, business address or address for service provided in the context of judicial review proceedings to the Department, Court or solicitors acting only for the Minister will not amount to provision of an address to the IAA by an applicant in connection with the review for the purposes of ss.473HB(4) and (5).[41] In contrast, fax or email addresses provided to the IAA need not be provided 'in connection with the review'.[42]

4.3.10 Where an applicant has provided an address in connection with a particular review prior to judicial review, the address provided ought to remain valid upon remittal of that fast track review application, given that the review upon remittal is a continuation of the review initiated by the referral from the Minister.[43]

Multiple addresses

4.3.11 If an applicant or the Department has provided the IAA with an address for service as well as a residential or business address, or electronic address, in connection with the review, there will be compliance with the Migration Act if the IAA sends correspondence to *any* one of those addresses.[44]

Addresses provided incidentally

4.3.12 An address provided incidentally, for example in the form of letterhead, may in some circumstances be sufficient for notification purposes.[45]

Misstated addresses, errors in addressing and aliases

4.3.13 If a misstated address is provided by the applicant and the IAA uses that address for notification it will not amount to an error.[46]

[39] *SZKHY v MIAC* [2008] FCA 206 (Graham J, 25 February 2008).
[40] *SZNZL v MIAC* (2010) 186 FCR 271 at [37].
[41] *SZGLD v MIAC* [2009] FMCA 667 (Barnes FM, 22 July 2009) at [42]-[43]. This is also the case where the address is provided to the IAA through an agent or intermediary acting for the IAA (e.g. a solicitor), as the address has not been provided 'in connection with the review': *SZGLD* at [53].
[42] See s.473HB(6).
[43] *SZEPZ v MIMA* (2006) 159 FCR 291.
[44] See for example, *SZKTR v MIAC* [2007] FMCA 1447 (Driver FM, 21 August 2007) at [6] and undisturbed on appeal in [2007] FCA 1767 (Marshall J, 20 November 2007).
[45] *Singh v MIAC* (2010) 239 FLR 287and *Von Kraft v MIMA* [2007] FMCA 244 (Barnes FM, 15 March 2007).

4.3.14 Likewise there may be no error in notification if the IAA makes a small deviation to correct an obviously misstated address.[47]

4.3.15 On the weight of current authority, a reference to an incorrect postcode will not invalidate a notification.[48]

4.3.16 A minor error or incomplete transcription of the name of the recipient may not invalidate the notification in every case.[49]

4.3.17 A notification will not be addressed to the correct person if it is addressed to a person (e.g. an applicant) 'care of' another person (e.g. an authorised recipient).[50]

4.3.18 There is no error in circumstances where the salutation in a covering email is incorrectly addressed if the document is actually sent to the email address last provided to the IAA.[51]

4.3.19 Where a referred applicant has an alias, the IAA may notify them by any of their known names used in connection with their review.[52]

4.3.20 A failure to comply with addressing requirements may not *necessarily* result in jurisdictional error, or the applicant not being notified for the purposes of the Migration Act, if the applicant or authorised recipient nonetheless receives the document or a copy of it (see below).

Notifications in English

4.3.21 The IAA is under no obligation to express its communications in any language other than English.[53]

Calculating time

4.3.22 The calculation of several time periods under the notification and receipt provisions is expressed in terms of working days. As noted above, in some circumstances documents must be dispatched within 3 working days of the date of the document, and in other circumstances documents are taken to have been received 7 working days after the date of the document. Section 5 of the Act defines a 'working day' in relation to a place, as any day that is not a Sunday, Saturday or public holiday in that place. When calculating time for these purposes the relevant period does not include the day on which the calculation is said to begin.[54]

4.3.23 If the last day of the prescribed period to respond to IAA correspondence falls on a Saturday, a Sunday or a holiday the recipient has until the end of the next day that is not a Saturday, a Sunday or a 'holiday' to respond.[55] The term 'holiday' is defined for these purposes to mean either a day that is a public holiday in the place in which the correspondence is due to be received, or a day on which the place or office where the

[46] See for example, *Cheng v MIAC* (2011) 198 FCR 559.
[47] See for example, *SZOQY v MIAC* [2011] FMCA 120 (Cameron FM, 9 March 2011).
[48] *SZKGF v MIAC* [2008] FCAFC 84 (Stone, Jacobsen and Edmonds JJ, 27 May 2008) at [11]-[12]; *SZLBR v MIAC* [2008] FCAFC 85 (Stone, Jacobson and Edmonds JJ, 27 May 2008).
[49] *Naheem v MIMA* [1999] FCA 1360 (Sundberg J, 1 October 1999).
[50] *VEAN of 2002 v MIMIA* (2003) 133 FCR 570. However, this principle is subject to the operation of s.473HD(7) if the authorised recipient nonetheless receives the document or a copy of it.
[51] *Brar v MIAC* [2012] FMCA 593 (Nicholls FM, 2 August 2012).
[52] *MIAC v SZMTR* (2009) 180 FCR 586 at [27] and [39]-[40].
[53] *SZQBV v MIAC* [2011] FMCA 727 (Cameron FM, 20 September 2011) at [29].
[54] Item 6, s.36(1), *Acts Interpretation Act 1901.*
[55] s.36(2), *Acts Interpretation Act 1901.*

correspondence is due to be received is closed for the whole day (for example, the public service holiday between Christmas and New Year).[56]

4.4 GIVING DOCUMENTS TO THE IAA

4.4.1 If a person is required or permitted to give a document or thing to the IAA in relation to the review of a fast track reviewable decision, the person must do so by a method set out in Practice Directions issued by the President[57] or if a method is set out in the Regulations – by that method.[58] Practice Direction for Applicants, Representatives and Authorised Recipients specifies documents should be emailed or posted to the IAA. No other method is currently set out in the Regulations.

4.5 AUTHORISED RECIPIENTS

4.5.1 The requirements relating to authorised recipients for the IAA essentially mirror those applicable to the MRD, with one minor difference which is discussed below .

4.5.2 If a fast track reviewable decision in respect of a referred applicant is referred for review, and the referred applicant gives the IAA written notice of the name and address of another person (the 'authorised recipient') authorised by the referred applicant to receive documents in connection with the review, the IAA must give the authorised recipient, instead of the referred applicant, any document that it would otherwise have given to the referred applicant.[59]

4.5.3 If the IAA gives a document to the authorised recipient, the IAA is taken to have given the document to the referred applicant. This does not however prevent the IAA giving a copy of the document to the referred applicant.[60]

4.5.4 The referred applicant may vary or withdraw the notice of the appointment of an authorised recipient at any time, but must not vary the notice so that any more than one person becomes an authorised recipient.[61] The authorised recipient may also vary the notice by varying that address;[62] however the authorised recipient cannot unilaterally vary or withdraw their authorisation to receive documents on behalf of the referred applicant.[63]

4.5.5 The authorised recipient provisions do not apply to the IAA giving documents to, or communicating with, the referred applicant when the referred applicant is appearing at an interview with the IAA.[64]

4.5.6 As the referred applicant has to give notice of the authorised recipient *to the IAA*, an appointment made to another body such as the Department will not meet the legislative requirements for the appointment of an authorised recipient. Furthermore, it is not possible for the appointment of an authorised recipient with the Department (under s.494D) to be

[56] s.36(3), *Acts Interpretation Act 1901.*
[57] Made under s.473FB. These Directions may make provision for a person to give a copy of a document, rather than the document itself, to the IAA: s.473HF(2).
[58] s.473HF(1).
[59] s.473HG(1).
[60] s.473HG(2).
[61] s.473HG(3). This restriction is subject to the Regulations providing otherwise.
[62] s.473HG(4).
[63] *Guan v MIAC* [2010] FMCA 802 (Nicholls FM, 22 October 2010). See also Explanatory Memorandum to the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* at p.155.

treated as an appointment of that person as an authorised recipient before the IAA under s.473HG, or for the appointment of that person to be otherwise 'transferred over' to the IAA upon referral from the Department.[65]

4.5.7 The one difference between the authorised recipient provisions of the IAA and the MRD is that for the MRD they apply regardless of whether a review application is validly made.[66] Given that fast track reviewable decisions are reviewed by the IAA upon referral from the Minister and the IAA does not require an application for review being lodged, any such provision for the IAA is not necessary.

Common issues – authorised recipients

4.5.8 The following principles relevant to authorised recipients, likely to be considered applicable to the IAA, can be distilled from the case law relating to the equivalent provisions applicable to the Department and/or the MRD.

Who can be an authorised recipient?

4.5.9 An authorised recipient must be a natural person rather than a firm or organisation.[67]

How is an appointment made?

4.5.10 The appointment of an authorised recipient may be in any particular form that is in writing.[68]

4.5.11 A written signature of the person appointing the authorised recipient is not required. It is sufficient if a person, acting on the authority of the applicant, gives the written notice.[69]

Withdrawal and variation of the appointment

4.5.12 An applicant, or a person acting on their instructions, may withdraw or vary their notice of an authorised recipient orally[70] or implicitly through their conduct.[71]

4.5.13 A withdrawal operates on the entire written notice given under s.473HG and consequently the written notice ceases to have effect.[72]

4.5.14 In contrast, if the appointment is varied, the written notice given under s.473HG remains in effect, but part of its content is altered.[73]

4.5.15 A variation under s.473HG(3) can be permanent or temporary. It may also be oral or in writing, but it can only be made by the applicant or the agent of the applicant where that person is acting within the scope of their authority.[74]

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[64] s.473HG(5).
[65] Although s.473CB(1)(d)(i) requires the Secretary to give to the IAA details of 'the last address for service provided by the Minister by the referred applicant for the purposes of receiving documents', the concept of 'address for service' relates only to an address, not a person with authority to receive documents. Further, the terms of s.473CB(1)(d) cannot be characterised as effectively 'transferring' the appointment of an authorised recipient before the Department to the IAA.
[66] ss.379G(1A) and 441(1A) as amended by *Migration Legislation Amendment Act (No.1) 2014* (No.106, 2014).
[67] *Li v MIMA* (1999) 94 FCR 219 at [40]; *SZJSP v MIAC* [2007] FCA 1925 (Madgwick J, 22 November 2007) at [18].
[68] s.473HG(1)(b). See also *Jalagam v MIAC* [2009] FCA 197 (Edmonds J, 6 March 2009).
[69] *Jalagam v MIAC* (2008) 221 FLR 202; *Huang v MIAC* [2011] FMCA 271 (Smith FM, 6 May 2011). Most commonly this would arise where an applicant's representative, acting within the scope of his/her authority, appoints him or herself as the applicant's authorised recipient.
[70] *MZZDJ v MIBP* (2013) 216 FCR 153.
[71] *SZLWE v MIAC* [2008] FCA 1343 (Perram J, 19 September 2008); *SZJDS v MIAC* (2012) 201 FCR 1.
[72] *MZZDJ v MIBP* (2013) 216 FCR 153 at [31].
[73] *MZZDJ v MIBP* (2013) 216 FCR 153 at [32].
[74] *MZZDJ v MIBP* (2013) 216 FCR 153 at [33] – [35].

4.5.16 The s.473HG appointment notice may be varied by removing an address, where there is more than one address, as well as by substituting a different address.[75] Whether the notice has been varied so as to remove or change a previously notified address, or whether it is simply the expression of a preference for the use of a particular address, is a factual question and will depend on the circumstances.

4.5.17 As an authorised recipient cannot unilaterally withdraw his or her own nomination as an authorised recipient (i.e. other than under instructions), the IAA must continue to correspond with an authorised recipient even if the authorised recipient has notified the IAA that he or she no longer wishes to receive documents for the applicant.[76]

Addressing correspondence where there is an authorised recipient

4.5.18 Where correspondence is given by prepaid post, the envelope in which the invitation is sent must be addressed to the authorised recipient at the authorised recipient's address. It is irrelevant whether the address block on the document itself is correctly addressed to the authorised recipient.[77]

4.5.19 Where correspondence is given by prepaid post, it is insufficient to address the envelope simply to the firm at which an authorised recipient may be employed.[78]

4.5.20 If the envelope is addressed to the applicant *care of* the authorised recipient's address, the IAA will not have given the document to the authorised recipient and the applicant will not have been validly notified of the invitation or notice.[79]

4.5.21 If the IAA fails to correctly give notification to an authorised recipient, notification may not have occurred in accordance with the Migration Act, even if the IAA also gives notification to the applicant themselves.[80]

4.5.22 A failure to comply with addressing requirements in relation to an authorised recipient may not *necessarily* result in jurisdictional error or the applicant not being notified for the purposes of the Migration Act, if the authorised recipient nonetheless receives the document or a copy of it (see below).

4.6 FAILURE TO COMPLY WITH NOTIFICATION OBLIGATIONS

4.6.1 Under s.473HD(7), if the IAA purports to give a document to a person in accordance with a method specified in s.473HB (even if it was not required to do so) but makes an error in doing so, and the person nonetheless receives the document or a copy of it, then the person is taken to have received the document at the times mentioned in the deeming provisions (s.473HD(2), (3), (4), (5)) as if the IAA had given the document to the person without making an error in doing so. However, if the person can show that they received it at a later time, the person is taken to have received it at that (later) time.[81]

[75] *MZZDJ v MIBP* (2013) 216 FCR 153 at [56].
[76] *Guan v MIAC* [2010] FMCA 802 (Nicholls FM, 22 October 2010) at [24]-[27].
[77] *MIAC v SZKPQ* (2008) 166 FCR 84.
[78] *SZJSP v MIAC* [2007] FCA 1925 (Madgwick J, 22 November 2007).
[79] *VEAN v MIMIA* (2003) 133 FCR 570; *Lee v MIMA* (2007) 159 FCR 181.
[80] Although this may not necessarily result in jurisdictional error - see *MIAC v SZIZO* (2009) 238 CLR 627. Also, if the authorised recipient nonetheless received the document or a copy of the document, then s.473HD(7) would apply.
[81] s.473HD(7).

4.6.2 A failure to comply with the IAA's notification obligations, even when not cured by the operation of s.473HD(7) will not, in every case, result in jurisdictional error invalidating the IAA's decision.

4.6.3 The effect of a failure to comply with statutory notification procedures essentially identical to those of the IAA was considered by the High Court in *MIAC v SZIZO.*[82] In that case, the applicant had appointed his daughter, who was also an applicant before the then Refugee Review Tribunal (RRT), as his authorised recipient. The RRT had sent a hearing invitation to the applicant instead of his authorised recipient, but he received it and attended the hearing. The High Court, on appeal, drew a distinction between the procedural provisions dealing with the manner of giving notice and the provisions in the Migration Act aimed at ensuring a procedurally fair review, such as the obligation to disclose adverse information. The Court held that in circumstances where the applicant was not denied natural justice by reason of the omission, there was no jurisdictional error.

4.6.4 The reasoning of the High Court leaves open the possibility that a failure to comply with the statutory notification procedures could, for example, invalidate an invitation under s.473DC to get new information or an invitation under s.473DE to comment on adverse new information, and result in jurisdictional error, if the error prevented the applicant from properly advancing his or her case or otherwise involved a denial of procedural fairness.[83]

4.6.5 Where s.473HD(7) applies because a referred applicant has in fact received the notice within the normal 'deemed receipt' period, notwithstanding an error, in many cases there will not be a denial of natural justice and, therefore, no jurisdictional error arising from the error. However, if the referred applicant has demonstrated that the notice was received after the normal period, it may be that the notice did not give the required period of notice of an interview or the prescribed period for response to adverse information such that he or she may have been prevented from properly preparing or presenting his or her case. In such circumstances there could potentially be a jurisdictional error for breach of s.473DC or s.473DE notwithstanding the operation of s.473HD(7).

4.6.6 Accordingly, the IAA should always endeavour to strictly comply with the statutory notification provisions. If, in the course of a review, it becomes apparent that there has been a failure to comply with the statutory notification procedures, consideration should be given to whether the error may have resulted in procedural unfairness and whether the notice should be resent. This will be particularly important if there is no evidence that the notice was received or the applicant has not responded to it.

[82] *MIAC v SZIZO* (2009) 238 CLR 627.

[83] Note however, that the High Court in *MIAC v SZIZO* (2009) 238 CLR 627,was considering the notification scheme in the then RRT prior to the enactment of s.441C(7) (the equivalent provision to s.473HD(7)). It is also important to note that the RRT's obligations under s.425 (duty to invite applicant to a hearing) and s.424A (obligation to invite comment or response to adverse information) differ considerably from the IAA's statutory powers to get 'new information' at an interview under s.473DC or to invite comment on adverse 'new information' under s.473DE. See Part 2 of this Guide for further details.

Immigration Assessment Authority Procedural Law Guide

Chapter 5

Restrictions on disclosure of information

Current as at 19 September 2019

5. RESTRICTIONS ON DISCLOSURE OF INFORMATION

5.1 INTRODUCTION

5.1.1 The Immigration Assessment Authority (IAA) is subject to similar Ministerial non-disclosure certificates and restrictions on disclosure of information, as the Migration and Refugee Division (MRD) of the Administrative Appeals Tribunal (the Tribunal) under the *Migration Act 1958* (the Migration Act).

5.1.2 Generally speaking, the IAA should, as a matter of law and practice, take care when handling sensitive or confidential information. There may be possible negative consequences to an applicant, or a relative or other dependent or associate of an applicant, if information pertaining to that person's application for protection is made publicly available. Disclosure of such information could, in itself, form a ground on which the person may be entitled to protection.

5.2 MINISTERIAL CERTIFICATIONS UNDER SECTION 473GA

5.2.1 If the Minister certifies in writing that the disclosure of any matter contained in a document, or the disclosure of information, would be contrary to the public interest because it would prejudice the security, defence or international relations of Australia, or because it would involve the disclosure of deliberations or decisions of the Cabinet or of a committee of the Cabinet, the Secretary of the Department[1] must not give to the IAA that document or information.[2]

5.2.2 No material should be made available to the IAA if it is subject to a s.473GA certificate. If a Reviewer or officer becomes aware that such a document or information is in the possession of the IAA, the Senior Reviewer or MRD Legal Services should be consulted.

5.3 MINISTERIAL CERTIFICATIONS/NOTIFICATIONS UNDER SECTION 473GB

5.3.1 Section 473GB allows for the Minister to certify that certain documents *should* not be disclosed by the IAA. It does not however prevent the IAA from giving the documents or information to a referred applicant.

Documents or information subject to section 473GB

5.3.2 This section applies to a document or information if:

- the Minister has certified in writing that the disclosure of the information or any matter contained in the document would be contrary to the public interest for any reason specified (other than a reason set out in s.473GA – see above) that could form the basis for a claim by the Crown in right of the Commonwealth in a judicial proceeding, and that the matter contained in the document or the information should not be disclosed; or

[1] See definition of 'Secretary' in s.5(1) of the *Migration Act 1958.*
[2] s.473GA.

- the document, the matter contained in the document or the information was given to the Minister or an officer of the Department, in confidence.[3]

5.3.3 If the Secretary gives to the IAA a document or information which has been certified, the Secretary must notify the IAA in writing that s.473GB applies. The Secretary may also give the IAA any written advice that the Secretary thinks relevant about the significance of the document or information.[4]

Effect of a section 473GB certificate/notification

5.3.4 If the IAA is notified that s.473GB applies in relation to a document or information given to it, it may have regard to the document or the information for the purpose of the exercise of its powers in relation to a fast track reviewable decision. The IAA may also disclose the document or information to the referred applicant if it thinks it appropriate to do so having regard to any advice given by the Secretary.[5] However, if the IAA discloses any matter to an applicant in this manner, it must give a direction in relation to the information restricting publication or disclosure under s.473GD[6] (see Chapter 3 of this Guide for further information).

5.3.5 If the information or document appears to be covered by s.473GB because it is the subject of a certificate from the Minister, the IAA should satisfy itself that the certificate has been properly given if it is considering withholding the material from the applicant. That is, for example, whether the certificate is in writing and whether a public interest reason is properly specified in the certificate.[7]

5.3.6 If the information or document before the IAA appears to be covered by s.473GB on the basis that it is confidential, the IAA should satisfy itself that information or material has indeed been given 'in confidence' for the purposes of s.473GB(1). Advice given by the Secretary in this regard will be relevant but should not be taken at face value.[8]

5.3.7 Procedural fairness obligations differ depending on whether the certificate had been properly made (i.e. whether it is valid or not) (see below).

Non-disclosure certificates/notifications and procedural fairness obligations

5.3.8 The procedural fairness obligations for the IAA are much narrower than those for the MRD.

5.3.9 Section 473DA of the Act provides that Division 3 of Part 7AA of the Act, together with ss.473GA and 473GB, is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to reviews conducted by the IAA. It further provides that, to avoid doubt, nothing in Part 7AA requires the IAA to give a referred applicant any material that was before the Minister when the Minister made the primary decision.

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[3] s.473GB(1).
[4] s.473GB(2).
[5] s.473GB(3).
[6] s.473GB(4).
[7] In *FKB17 v MIBP* [2018] FCCA 3438 (Judge Wilson, 27 November 2018) at [60] the Court held that a s.473GB certificate which had been issued in respect of a transcript of interview on the basis that it 'would reveal sensitive methodologies and techniques' used by the Department, was invalid as it was not a sufficient public interest reason and, like *MZAFZ v MIBP* (2016) 243 FCR 1, it manifested imprecision and overreach. The Court found that it was not enough for the Minister to merely assert that the techniques were sensitive when none were identified nor any reasons advanced to explain why.
[8] *NAVK v MIMA* (2004) 135 FCR 567 at [108] and [111], in relation to s.438.

5.3.10 Unlike in the MRD, the IAA is not required to disclose the existence of a s.473GB certificate to an applicant.[9] However a failure to disclose a s.473GB certificate and the documents or information subject to it, or a failure to consider the exercise of the discretion to disclose the documents or information subject to a s.473GB certificate, may be legally unreasonable if the documents or information covered by the certificate introduce a new issue not already considered by the delegate.[10]

5.3.11 The Federal Court in *MIBP v BBS16* held that the procedural fairness requirements in relation to s.473GB certificate/notification are exhaustively stated in s.473GB(3), and not the provisions of Division 3 of Part 7AA (which includes the provision relating to new information).[11] This means that the IAA is not required to consider whether a *valid* certificate and related information or documents are 'new information', and whether it should be disclosed to the applicant under s.473DE. In any event, any information or document that was before the Minister when their decision was made, and is subject to a s.473GB certificate/notification, would not constitute 'new information'. In circumstances where the document or information subject to a s.473GB certificate was not before the delegate, it appears that the IAA does not need to put the certificate and related information to the applicant using the provisions relating to new information.[12]

5.3.12 In contrast, the procedural fairness obligations differ for an *invalid* s.473GB non-disclosure certificate. The Federal Court in *CED16 v MIBP* held if a certificate/notification is found to be invalid, the information contained in it would be subject to the requirements of the 'new information' provisions if it was not before the delegate when they made their decision.[13] If

[9] See *MIBP v BBS16* [2017] FCAFC 176 (Kenny, Tracey, Griffiths JJ, 10 November 2017) at [90]-[93] and [100] where the Court 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. Therefore, the IAA does not appear to need to put the certificate to the applicant. 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 (which provided that an applicant must be informed of the existence of a ss.375A, 376 or 438 certificate) 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. This judgment was upheld on appeal: *BVM16 v MIBP* [2018] FCA 381 (Logan J, 9 March 2018) although this issue was not discussed in the judgment.

[10] See *BCQ16 v MIBP* [2018] FCA 365 (Thawley J, 20 March 2018) at [70]-[73] where the Court found that if the IAA did not consider exercising its discretion under s.473GB(3) to disclose material covered by the certificate or if had determined to not disclose the material, it had not acted unreasonably. This was in circumstances where the material in question was before the delegate and it was not shown that the material was so directly relevant to the way the IAA conducted the review. The Court's reasoning suggests that a failure not to consider disclosing material subject to a s.473GB certificate or to refuse disclosing material subject to a s.473GB certificate may be legally unreasonable if the certified documents or information introduce a new issue or something not already considered by the delegate. In *BVD17 v MIBP* [2018] FCAFC 114 (Flick, Markovic and Banks-Smith JJ, 25 July 2018) at [49]-[56], [58]-[59] the Court expressed a view consistent with *BCQ16* in finding that the absence of any reference to the exercise of the discretion under s.473GB(3) in the IAA's reasons does not of itself give rise to an inference that its exercise of the discretion was not considered. It also found that the failure to disclose the material was not legally unreasonable where the IAA drew adverse inferences from that material as the IAA was entitled to rely on the information provided to it by way of the review materials. However, note that special leave to appeal has been granted by the High Court in relation to *BVD17 v MIBP* [2018] FCAFC 114: see High Court Bulletin [2019] HCAB 01 (26 February 2019).

[11] *MIBP v BBS16* [2017] FCAFC 176 (Kenny, Tracey, Griffiths JJ, 10 November 2017) at [100]. See also *AYF16 v MIBP* [2018] FCAFC 129 (McKerracher, Murphy and Davies JJ, 14 August 2018) at [33]-[34] where the Court followed *BBS16* that the applicant's procedural fairness entitlements in respect of s.473GB certificate rest solely on the wording in s.473GB(3).

[12] *MIBP v BBS16* [2017] FCAFC 176 (Kenny, Tracey, Griffiths JJ, 10 November 2017) at [87] and [92] where the Court 'strongly doubted' that the reference at the outset of s.473DB(1) to 'subject to this part' was intended to bring in via the back door the possibility of a s.473GB certificate/notification and related information being 'new information'.

[13] *CED16 v MIBP* [2018] FCA 1451 (Derrington J, 25 September 2018) at [47] and [55] where the Court followed *Plaintiff M174/2016 v MIBP* [2018] HCA 16 holding that an invalid non-disclosure certificate would need to be treated as 'new information'. The Court also found that as the information contained in the non-disclosure certificate was 'new information' and it was relied upon, the applicant needed to be given the opportunity required under s.473DE(1)(c) to respond to it. The Court did not further elaborate on why it found the information in the non-disclosure certificate was relevant or how the material engaged s.473DE. Following this judgment, where an invalid s.473GB certification/notification is on file and this was not before the delegate when their decision was made, the IAA should consider whether the certificate/notification and material covered by it satisfies the requirements of s.473DD and if it does, whether it engages the adverse information provisions in s.473DE. See also *CYE17 v MIBP* [2019] FCCA 102 (Judge Smith, 23 January 2019) at [45]-[50] where the Court applied *CED16 v MIBP* [2018] FCA 1451 finding that the IAA erred by not considering the operation of ss.473DD or 473DE in respect of a transcript which was the subject of an invalid s.473GB certificate, where the transcript was 'new information' as it

the information in the certificate/notification has no bearing on the applicant's case, it would be prudent to indicate that this is the case in the decision record so as to avoid an inference being drawn that the IAA's reasoning was in some way affected by the invalid certificate/notification.

5.3.13 Consideration will need to be given to whether information or documents subject to a s.473GB valid certificate/notification, which were not before the delegate, should be disclosed to the applicant using the provision in s.473GB(3) (see above).[14] Whether or not the information or document was before the delegate when they made their decision may be a relevant consideration in deciding whether to disclose any matter contained in the document or information to the applicant.

5.4 DISCLOSURE OF CONFIDENTIAL INFORMATION

5.4.1 The Migration Act imposes confidentiality obligations on the IAA and certain persons working with the IAA.

Scope of the obligation

5.4.2 Under s.473GC strict confidentiality obligations apply to a person who is, or has been, a Reviewer, a person acting as a Reviewer, an officer of the Tribunal assisting the IAA,[15] or a person providing interpreting services in connection with a review by the IAA.[16] The obligations apply to information or a document obtained by such a person in the course of performing functions or duties or exercising powers under the Act if the information or document 'concerns a person'.[17] The obligations mimic those of the former RRT and are stricter than those that currently apply to the AAT.

5.4.3 The categories of persons mentioned above must not make a record of any such information, or divulge or communicate - whether directly or indirectly[18] - to any person any such information, unless this is done for the purposes of the Migration Act, or for the purposes of, or in connection with, the performance of a function or duty or the exercise of a power under the Act.[19]

5.4.4 The categories of persons mentioned above must not be required to produce[20] any such document, or to divulge or communicate any such information to or in a court, tribunal, a House of Parliament, a committee of a House or Houses of Parliament, or any other authority or person having power to require the production of documents or the answering of

was not before the delegate and was relied on by the IAA. The Court held that the s.473GB certificate itself was not considered by the Tribunal to be relevant to the review, referring to s.473DC(1)(b).

[14] *MIBP v BBS16* [2017] FCAFC 176 (Kenny, Tracey, Griffiths JJ, 10 November 2017) at [100] where the Court held that the procedural fairness entitlements in relation to s.473GB certificates/notifications are governed exhaustively in s.473GB(3), and that there is scope for the bias limb of procedural fairness to apply in an appropriate case. See also *BCQ16 v MIBP* [2018] FCA 365 (Thawley J, 20 March 2018) at [72]-[73] where the Court held that the discretion to disclose under s.473GB(3) needs to be exercised reasonably.

[15] The Registrar of the Tribunal must make available officers of the Tribunal to assist the IAA in the performance of its administrative functions: s.473JE(2).

[16] A person who is providing interpreting services in connection with a review by the IAA is taken to be performing a function under the *Migration Act 1958*: s.473GC(7).

[17] s.473GC(1) and (2).

[18] s.473GC(4).

[19] s.473GC(3).

[20] Including 'permit access to': s.473GC(8).

questions, except where it is necessary to do so for the purposes of carrying into effect the provisions of the Act.[21]

5.4.5 These confidentiality provisions do not affect a right that a person has under the *Freedom of Information Act 1982*.[22]

5.4.6 Breach of this confidentiality requirement carries a penalty of imprisonment for 2 years.

Examples of permitted disclosure and prohibited disclosure

5.4.7 Examples of when disclosure of this type of information may be permitted under s.473GC include: the disclosure of adverse information to a referred applicant pursuant to s.473DE; disclosure of information as part of an invitation to give new information under s.473DC; provision of IAA files to the Department for the purposes of preparing the Court Book in an application for judicial review made under Part 8 of the Act; and provision of material to the Migration Agents Registration Authority (MARA) in connection with an investigation of a migration agent.

5.4.8 Examples of disclosures that are unlikely to be permitted under s.473GC include: release of information to police for the purposes of investigation of a criminal offence, to the Family Court for the purposes of family law proceedings and to Centrelink for the purposes of assessing entitlements under social security law.

5.5 OBLIGATIONS REGARDING 'IDENTIFYING INFORMATION' AND UNDER THE *PRIVACY ACT 1988*

5.5.1 Part 4A of the Migration Act contains a number of provisions which regulate the manner in which 'identifying information' may be accessed, disclosed, modified, destroyed and retained.

5.5.2 The IAA is also subject to various restrictions in the collection, storage, use and disclosure of 'personal information' under the *Privacy Act 1988*.

5.5.3 The IAA and the MRD are treated in the same manner for the purposes of Part 4A of the Migration Act and the *Privacy Act 1988*. Please see Chapter 31 of the MRD Procedural Law Guide for details.

[21] s.473GC(5).
[22] s.473GC(6).