MRD Procedural Law Guide

Part 1 – Pre-Hearing

1. VISA AND RELATED APPLICATIONS

1. VISA AND RELATED APPLICATIONS[1]

1.1 Introduction

1.1.1 This Chapter considers in detail the statutory requirements for making a valid visa application. These matters are addressed by the *Migration Act 1958* (Cth) (the Migration Act), particularly ss 46 and 47, and the *Migration Regulations 1994* (Cth) (the Regulations). The Migration Act identifies the requirements for a valid visa application and the circumstances in which a visa application will be invalid. Further requirements are prescribed by the Regulations including general requirements (reg 2.07), where a visa application can be made (reg 2.10) and the applicable visa application charges, forms and other requirements (Schedule 1).

1.1.2 This Chapter also considers the circumstances in which an invalid visa application can be 'cured' or made valid. It also discusses the Tribunal's role in reviewing a purported decision on an invalid visa application. Applications for related matters, such as sponsorship and nomination, are also considered.

1.1.3 As a general rule, neither the Minister (nor his delegate) nor the Tribunal on review are authorised to make a decision on the *merits* of a visa application which is invalid. However, as discussed below, a primary decision in relation to an invalid visa application may nevertheless be a Part 5-reviewable or a Part 7-reviewable decision notwithstanding that the decision itself is unauthorised or wrong.

1.2 The role of the visa application

1.2.1 A non-citizen who wants a visa must apply for a visa of a particular class.[2]

1.2.2 Under s 47, the Minister (or the Tribunal on review) is to consider a valid application for a visa. The requirement to consider an application for a visa continues until:

- the application is withdrawn
- the Minister grants or refuses to grant the visa, or
- the further consideration is prevented by s 39 (limiting numbers of visa) or s 84 (suspension of consideration) of the Migration Act.[3]

[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Migration Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] s 45.
[3] s 47(2).

1.2.3 To avoid any doubt, the Minister is not to consider an application that is not a valid application.[4] Further, a decision by the Minister that an application is not valid and cannot be considered is not a decision to refuse to grant the visa, and therefore not reviewable by the Tribunal.[5]

1.2.4 Visa applications may be withdrawn by written notice.[6] If withdrawn, the application is taken to be disposed of and, for the purposes of ss 48 and 48A [restrictions on making a further visa application] the Minister is not taken to have 'refused to grant the visa' if the application is withdrawn before refusal.[7] Whether an applicant has withdrawn a visa application is a question of jurisdictional fact and once a withdrawal is made there is no visa application to consider.[8] There is no requirement that an applicant be aware of the consequences of withdrawing their visa application for their withdrawal to be valid.[9]

1.2.5 Visa applications are considered and disposed of in the order considered appropriate by the Minister.[10]

[4] s 47(3).
[5] s 47(4). A decision that an application is not valid will not fall within any of the categories of Part 5 or Part 7 reviewable decisions. See Chapter 4 – Review applications for further discussion.
[6] s 49(1).
[7] ss 49(2)–(3).
[8] *Zeini v MIAC* [2010] FMCA 604 at [12]. The Court in that case found at [15] that, having regard to the questions on the visa application form and the manner of its completion, an applicant had sufficiently communicated an intention to withdraw his application if the associated sponsorship or nomination application failed. See also *Black v MIAC* [2012] FMCA 726 where the Court at [9] and [11] held that written notice given to the Minister by a secondary visa applicant to withdraw her visa application resulted in her application being disposed of as a matter of statutory consequence, and there was no opportunity for any decision to be made by the Minister upon the withdrawing of an application in accordance with s 49(1) that was capable of review by the Court.
[9] See *Gillera v MICMSMA* [2021] FCA 1396 in which the appellant withdrew her visa application prior to a decision being made, but then sought judicial review of what she contended was the Department's 'decision' to accept her withdrawal. The Court held that it did not have jurisdiction because s 49(1) operates as a deeming provision, by which visa applications are taken to be disposed of once written notice is given to the Minister to withdraw the application, and so there was no decision of which to seek judicial review (at [31]–[32]). In *obiter*, the Court rejected the appellant's contention that a genuine intention is required for a withdrawal of a visa application to be valid, noting s 49(1) was drafted to provide administrative certainty (for example, by ensuring a withdrawal was not treated as a visa refusal decision). The Court made these comments in circumstances where the appellant had withdrawn her Partner visa application when her husband ended the relationship by submitting a visa withdrawal form 1446 to the Department. After the withdrawal was accepted, she asked for the acceptance of her withdrawal to be reconsidered on the basis that she didn't understand the consequences of the withdrawal (the Department didn't respond to this correspondence). An application for special leave to appeal to the High Court was refused: *Gillera v MICMSMA* [2022] HCASL 37. In the Federal Circuit Court judgment, *Gillera v MICMSMA* [2020] FCCA 929, at [15]–[16], the Court noted that if the legislature intended for there to be a grace period after lodging the withdrawal, it would have provided for one, and that there are public policy reasons why there shouldn't be such a grace period (as it would introduce uncertainty as to the finality of an application). Note that the principle from *Gillera* appears to be confined to visa applications. See Chapter 24 – Withdrawal of review applications and consequences of death of an applicant for discussion about withdrawal of an application for review in the MRD.
[10] s 51. The Minister makes directions under s 499, from time to time, as to the order of disposal of applications. Note that under reg 2.12M certain applicants specified by the Minister in a legislative instrument may make a request for priority consideration of their visa application. A fee of $1,000, in addition to the visa application charge, must be paid at or before the time the request is made: reg 2.12N. The request must be made using an approved form or in a way specified by the Minister. Nationals of specified countries who hold a passport issued by that country who apply for a Subclass 600 (Visitor) visa in the Tourist or Business Visitor stream may request priority processing. At present, those countries are the People's Republic of China, the Republic of India, and the United Arab Emirates: LIN 21/074.

1.2.6 Under s 65, the Minister, after considering a valid application for a visa, is to grant the visa if satisfied of certain matters or, if not so satisfied, is to refuse the grant of the visa.[11] The matters of which the Minister must be satisfied are:

- that any heath criteria have been met
- any other criteria specified in the Migration Act or prescribed in the Regulations have been met
- the grant is not prevented under any law of the Commonwealth including s 40 (circumstances when granted); s 500A (refusal or cancellation of temporary safe haven visa), and s 501 (refusal or cancellation on character grounds)
- any applicable visa charge has been paid.

1.3 The requirements for making a valid visa application

1.3.1 The requirements for making a valid visa application are specified in the Migration Act, with further requirements being prescribed in the Regulations. The Migration Act and Regulations also specify the circumstances in which a visa application will be invalid, and the persons prevented from making a valid application.

Overview of visa application requirements

1.3.2 The Migration Act specifies the requirements for a valid visa application.[12] Subject to a number of qualifications discussed below, an application for a visa is valid if, and only if, under s 46(1) of the Migration Act:

- it is for a visa of a class specified in the application
- it satisfies the criteria and requirements prescribed in the Regulations (discussed further below)
- any fees or charges required by the Regulations have been paid (discussed further below), and
- it is not prevented by, or invalid under, any other provision of the Migration Act or law of the Commonwealth, including
  - s 46AA (visa applications, and grant of visas, for some Act-based visas)
  - s 46A (visa applications by unauthorised maritime arrivals)

[11] For consideration of whether the doctrine of estoppel could apply in relation to the exercise of the power in s 65, see *O'Donoghue v MIAC (No 4)* [2010] FMCA 513 at [17] and [22] in relation to an undertaking given to the applicant by the Department and *Singh v MIAC* [2011] FMCA 832 where the Court confirmed that no principle of estoppel can excuse an administrator from performing his or her statutory obligations or permit the administrator to act ultra vires.
[12] A visa application has not been 'made' unless all the requirements for a valid application have been satisfied and there is no room for retrospective validation of an invalid application: *Mohammed v MIBP* [2015] FCA 184.

- s 46B (visa applications by transitory persons)
- s 48 (visa refused or cancelled earlier)
- s 48A (protection visa 'bar')
- ss 91E or 91G (CPA[13] and safe third countries)
- s 91K (temporary safe haven visa)
- s 91P (non-citizens with access to protection from third countries)
- s 161 (criminal justice)
- s 164D (enforcement visa)
- s 195 (detainees)
- s 501E (visa refused or cancelled on character grounds).

These provisions are discussed further below.

1.3.3 An application for certain Migration Act based visas (special category, permanent protection, temporary protection, safe haven enterprise, bridging, temporary safe haven and maritime crew visas) will be invalid if there are no specific visa application requirements and no specific criteria prescribed for the grant of the visa.[14] Conversely, if both the Migration Act and Regulations specify requirements that must be met for the making of a visa application of that class, then both must be met.

1.3.4 In addition to the requirements specified in the Migration Act, further requirements for a valid visa application are prescribed in the Regulations. Section 46(3) provides that the Regulations may prescribe the criteria to be satisfied for an application for a specified visa class to be valid.[15] They may also prescribe:

- the circumstances that must exist for the application to be valid[16]

[13] 'CPA' is defined in s 91B(1) as the Comprehensive Plan of Action approved by the International Conference on Indo-Chinese Refugees held at Geneva, Switzerland 13–14 June 1989. A person covered by this Plan or by an agreement between Australia and a safe third country is unable to make a valid application for a protection visa.
[14] s 46AA.
[15] In *Huynh v MIAC* [2012] FMCA 864 the Court rejected an argument that items 1136(3)(ca), 1136(3A) and 1136(3B) of sch 1 to the Regulations were invalid, and, by implication, the entirety of sch 2, because ss 45 and 46 only authorised the Regulations to prescribe application validity criteria by reference to visa classes and did not authorise application validity criteria to be prescribed for individual subclasses. The Court held that, because the Migration Act did not limit the meaning of visa 'class' by defining it, that word comprehended every variety of visa 'class, 'subclass' or other category or classification which could be applied to a visa or group of visas: at [18]–[19]. Undisturbed on appeal: *Huynh v MIAC* (2013) 210 FCR 580. See also *Amodi v MIAC* [2013] FMCA 70, where the Court followed its own reasoning in *Huynh* to reject an argument that items 1229(3)(da) and 1229(3B) of sch 1 to the Regulations were invalid as they contained criteria specific to a particular visa subclass which purported to render applications for the entire class invalid: at [34].
[16] In *Huynh v MIAC* (2013) 210 FCR 580, it was argued that item 1136(3)(ca) of sch 1 to the Regulations was beyond the regulation-making power conferred by s 46(3) and (4) of the Migration Act, as it is concerned with the *intention* of an applicant to apply for a Subclass 886 visa. In dismissing this argument, the Court held that whether a person is seeking a Subclass 886 visa is a question of fact which constitutes a circumstance that must exist for the application to be valid, and is thus plainly authorised by s 46(4)(a): at [15]–[16].

- how the application must be made
- where the application must be made, and
- where the applicant must be when the application is made.[17]

1.3.5 However, ss 46(3) and 46(4) do not require criteria to be prescribed by the Regulations in relation to the validity of visa applications for special category, permanent protection, temporary protection, safe haven enterprise, bridging, temporary safe haven and maritime crew visas.[18]

1.3.6 For the majority of visas where further requirements are prescribed, reg 2.07 sets out the general additional requirements for a visa application to be valid. It provides that the following matters, as further set out in Schedule 1 to the Regulations, are required:

- the approved form (if any) must be completed by the applicant
- the visa application charge (if any) must be paid in relation to the application
- any components that may be applicable to a particular application for the visa are met, and
- any other matters relating to the application, as set out in Schedule 1 must be met.

1.3.7 Schedule 1 may also provide that the form, place, manner or any other matter[19] for making an application may be specified by the Minister in a legislative instrument.[20] Different matters may be specified for different kinds of visa and different classes of applicant.[21]

1.3.8 For all visa classes except protection and refugee and humanitarian visas, Parts 1, 2 and 3 of Schedule 1 set out the relevant form, visa application charge and other requirements for a valid visa application. Part 1 contains the requirements relevant to permanent visas, Part 2 temporary visas (other than bridging visas) and Part 3 bridging visas.

1.3.9 For protection visas and refugee and humanitarian visas, Part 4 of Schedule 1 to the Regulations set out the relevant form, visa application charge and other requirements for a valid application for these visas.

[17] s 46(4).
[18] s 46(5).
[19] reg 2.07(5) was expanded to include 'any other matter' by *Migration Legislation Amendment (2016 Measures No 5) Regulation 2016* (Cth) (F2016L01745). This amendment, which applies for visa applications made on or after 19 November 2016, does not permit the Minister to specify new matters by legislative instrument without a regulation being made as any additional matter to be specified by instrument must first be prescribed in sch 1: items 2–4 of sch 1 of the Explanatory Statement to F2016L01745.
[20] Note to regs 2.07(1), 2.07(5).
[21] reg 2.07(6) as amended by F2016L01745.

1.3.10 The Regulations also identify additional and alternate circumstances required to be satisfied before visa applications for different visa classes can be considered valid (Division 2.2), as well as adding family members (regs 2.08, 2.08A and 2.08B).

1.3.11 Each of these matters is considered in detail below.

Visa application fees and charges

1.3.12 A valid visa application requires that any 'visa application charge' or fee that the Regulations require to be paid at the time has been paid.[22] The amount of the visa application charge is the amount prescribed in relation to the application and cannot exceed the visa application charge limit.[23] The Regulations may make provision for certain matters, including the payment of visa application charges by instalment.[24]

1.3.13 Generally speaking, visa application charges are set out in the relevant item in Schedule 1 for each class of visa, however it should also be noted that many visa classes will often contain different subclasses, each of which may have a different application fee. In those circumstances, the payment of an application fee which is specific to a particular subclass may result in the validity of the visa application being confined to that subclass for which the specific fee was paid, particularly where the fee which was paid was lower than for another of the subclasses within that class of visa.[25] In *Farook v MIBP*, for example, the Court found that, in circumstances which included the applicant having used the form entitled 'General Skilled Migration Application Form' with the further sub-heading 'Skilled Graduate (Temporary) (Class VC, Subclass 485)' and having only paid the lower Subclass 485 application fee and not the higher fee for the Subclass 487, it was clear beyond any doubt that the applicant had applied for a Subclass 485 visa and had unquestionably never applied for a Subclass 487.[26] In these circumstances there was no error in assessing the applicant only against Subclass 485.

1.3.14 The visa application charge is the sum of the amount specified as the first instalment (payable when the application is made) and the second instalment (payable before the visa grant).[27] The first instalment consists of the base application charge or the additional application charge, any subsequent temporary applicant charge, and any non-Internet application charge.[28]

[22] s 46(1)(ba)–(c).
[23] s 45B. The visa application charge limit is determined under the *Migration (Visa Application) Charge Act 1997* (Cth) (No 26 of 1997).
[24] s 45C.
[25] In *Palanisamy v MIBP* [2013] FCCA 1779, the Court found no error in the Tribunal's conclusion that an application for a Class VC visa (which included Subclasses 485 and 487) did not include a valid application for the Subclass 487 where there was no evidence that the fee or sponsorship or nomination required for that subclass had been provided, and neither had the applicant claimed to have done so. See also *Chaddha v MIMA* [2002] FCA 92, where the Court at [27]–[28] expressed the view that, while the payment of a higher application fee might also satisfy the requirement for the payment of a lower application fee in respect of a different subclass, the application of a universal principle that a decision maker was bound to consider any visa in the relevant class was fraught with difficulties and would result in the failure of many applications simply on the ground that the fee paid was insufficient.
[26] *Farook v MIBP* [2014] FCCA 1000 at [16]–[24].
[27] reg 2.12C.
[28] reg 2.12C(1)(a). The visa subclasses for which a subsequent application charge and/or a non-Internet applicant charge are payable are prescribed in a legislative instrument, which are currently IMMI 16/098 and IMMI 16/099 respectively.

1.3.15 The prescribed period within which an applicant must pay the second instalment is 28 days for notices sent within Australia and 70 days in any other case.[29] For visa applications lodged prior to 1 July 2013, applicants are not liable to pay the first instalment in relation to visa applications which are combined with another application under Schedule 1 or regs 2.08, 2.08A or 2.08B and the first instalment has been paid.[30] Applicants are not liable to pay the second instalment where they withdraw their visa application before payment or the application, being finally determined, is refused.[31] The first and second instalment must be refunded in certain circumstances.[32]

1.3.16 The visa application charge in relation to internet applications must be paid by credit card, funds transfer or through the PayPal system.[33] The Regulations also identify who the person is who pays an instalment, when a person is taken to be the legal personal representative of a payer and make provision for the payment of visa application charges and fees in foreign currency.[34]

When a payment is taken to have been made

1.3.17 The Regulations specify the time at which payment of a fee is taken to have been received by the Department in respect of internet applications, but do not expressly identify the time at which a payment for a non-internet application is taken to have been made. For internet applications, the Regulations specify that a payment is taken not to have been received, in the case of a credit card payment, until the payment has been confirmed by the issuer of the credit card;[35] in the case of a funds transfer, until it has been electronically matched to the applicant's internet application form;[36] and in the case of a payment made through the PayPal system, until it has been confirmed by the operator of the PayPal system.[37]

1.3.18 In the case of applications other than internet applications, the Court held in *Butcher v MIMIA* that where an applicant lodges an application providing credit card details for fee payment within the prescribed period, the application will not be invalidated simply because the funds are not accessed within the prescribed period by the Department. It is sufficient if the applicant placed the Department in a position to be

[29] ss 64(2)(a), (c) and reg 2.12D.
[30] reg 2.12E, repealed by *Migration Amendment (Visa Application Charge and Related Matters) Regulation 2013* (Cth) (SLI 2013, No 118).
[31] reg 2.12G.
[32] regs 2.12F, 2.12H. Additional provisions apply in relation to the refund of visa application charges for Resolution of Status (Temporary) (Class UH) visas: reg 2.12J. Note that, reg 2.12J was repealed by *Migration Amendment (Redundant and Other Provisions) Regulation 2014* (Cth) (SLI 2014, No 30) for visa applications made on or after 22 March 2014.
[33] reg 2.12JA.
[34] regs 2.12K, 2.12L, 5.36.
[35] reg 2.12JA(2).
[36] reg 2.12JA(3). In *Cabrera v MICMSMA* [2020] FCA 129 at [37]–[40] the Court held that the purpose of reg 2.12JA is to provide clarity and certainty, and confirmed that, in relation to reg 2.12JA(3), payment is taken not to have been received until the amount transferred by a visa applicant is electronically matched to the applicant's Internet application form. The Court rejected the arguments that mere receipt of payment by the Department is sufficient and also that the purpose of reg 2.12JA(3) is to mark the time at which the payment comes into the hands of the Department. In the circumstances of the case, as the Department matched the payment to the Internet application form two days after the transaction was purportedly made, it had the effect that the visa application was 'made' on the later date. As the visa applicants did not hold a visa on the later date and it was a requirement to make a valid application that they hold a visa, the visa application was found to be invalid.
[37] reg 2.12JA(4).

able to access the funds within the prescribed period and those funds are in fact accessed at a later point in time.[38] Whether the applicant has placed the Department in such a position is a question of fact, and in some limited circumstances it may be necessary to look beyond the application itself to determine whether this has in fact occurred.[39]

1.3.19 In *Khan v MIAC*,[40] a rejected credit card transaction was compared to a dishonoured cheque. The Court noted that although the holder of the cheque may present it again, and the holder of credit card details may use those details again in an attempt to obtain payment, the payment failed when it was dishonoured and it remained for the person seeking to make payment to actually effect that payment. It was not for the holder of the dishonoured cheque or the rejected credit card details to make persistent attempts to obtain payment of an application fee when it was the applicant's responsibility to ensure that the fee was paid. On this authority, if payment by credit card is ineffective it is for the applicant to remedy the deficiency, not the Department.

1.3.20 Furthermore, if the credit card details provided are incorrect, and the correct details are only provided after the period for seeking review (or applying for a visa or paying a visa application fee) has expired, the application may be invalid.[41]

Approved form

1.3.21 Schedule 1 to the Regulations identifies the particular 'approved form' that must be completed to make a valid application for each visa class. Different forms can be approved for different subclasses within the class.[42] The Minister may, from time to time, change the approved form.[43]

[38] *Butcher v MIMIA* [2005] FMCA 880 involved the validity of a visa application by credit card payment. The Court held that the nature of credit card transactions is such that payment is taken to have been made on the date that the application (with sufficient credit card details to enable approval of the credit provider to be obtained) is received, provided that the credit card transaction is subsequently approved. In *Tripathi v MIAC* [2013] FMCA 66 and *Tripathi v MIAC (No 2)* [2013] FMCA 179, a visa application was found to be invalid because the applicant failed to provide a credit card's expiry date. The Court found as it was a mandatory requirement of the credit card provider that expiry dates be provided before payment was processed, the provision of all other details were not as a matter of fact sufficient to enable the Department to obtain payment of the required fee.

[39] See *Vumentala v MIMIA* [2004] FCA 744; *Kaur v MIAC* [2013] FCCA 125. In *Vumentala*, the applicant's migration agent omitted the final 5 digits of her credit card number on the visa application form and Court held that the Department was placed in a position to access the funds as the complete credit card details were contained in a separate visa application that was in the same envelope. In *Kaur*, the applicant's migration agent omitted to include the expiry date of his credit card on the visa application form, and by the time the Department sought to process the payment, the visa applied for was closed to new applications. The Court held that the departmental officer could have interrogated the departmental computer system, found a list of applications lodged by the migration agent and located the relevant paper applications that included the relevant expiry date.

[40] *Khan v MIAC* [2009] FCA 443 at [17]–[18] upholding the reasoning in *Khan v MIAC* [2008] FMCA 1663 at [31].

[41] *Zhang v MIAC* [2007] FMCA 594 at [47].

[42] *Chaddha v MIMA* [2002] FCA 92 at [27]–[28]. In that case, the applicant had applied for a subclass 457 visa using the Form 1066, in accordance with item 1223A(1)(b) of sch 1 to the Regulations, and the Court considered the Tribunal did not have before it an application in the proper form for a Subclass 456 visa where Item 1223A of sch 1 to the Regulations indicated such an application to be made on a different form. This was so despite the Subclass 456 and 457 visas both being subclasses within the Class UC.

[43] See *SZMOX v MIBP* [2018] FCAFC 121 at [27]–[29] where the Full Federal Court endorsed the reasoning (in relation to a Protection (Class XA) visa application) in *BVJ16 v MIBP* [2017] FCA 1205 at [28]–[29] that item 1401 of sch 1 to the Regulations provides that an applicant must complete a Form 866 to make a valid application, but the form itself is not incorporated into the legislation. Rather, Item 1401 leaves the form to be ascertained by identifying the version of Form 866 that has been approved by the Minister at the relevant time. The appellant unsuccessfully argued that only the approved form in place when item 1401 took effect in October 1999 could constitute a valid form and that, as a later form was used, a valid visa application had not been made.

1.3.22 Under reg 1.18, the Minister may approve forms for visa applications in writing. An 'approved form' includes a paper form; a set of questions in an interactive computer program; and a set of questions in a form stored in electronic format.

1.3.23 While Schedule 1 to the Regulations sets out the application form to be used for each class of visa, other regulations specify how the form must be completed. Regulation 2.07 requires that an applicant must complete an approved form, and that it must be completed in accordance with any directions on it. An application that is not made on the approved form or which is not completed in accordance with the instructions will *prima facie* not be valid. Furthermore, an application on an approved form will not be valid if the applicant does not set out his/her address in the form or in a document accompanying the form.[44] Whether full compliance is required in order for an application to be valid is discussed in more detail below.

'Substantial compliance' with the form

1.3.24 The Regulations require an applicant to complete an approved form, and to do so in accordance with any directions on that form.[45] A failure to use the approved form at all would thus appear to preclude a valid application for a visa being made.[46] However, a failure to respond to every question or comply with every direction on a form will not necessarily be fatal to the application's validity.[47] Section 25C of the *Acts Interpretation Act 1901* (Cth) (Acts Interpretation Act) provides that 'Where an Act prescribes a form, then strict compliance with the form is not required and substantial compliance is sufficient'.

1.3.25 Note, however, that s 25C is directed to ameliorating the consequences of a person failing to comply with the prescribed form in circumstances where that person substantially complies with the requirements reflected in that form, and is not directed to a circumstance where a person incorrectly completes a form even if the error on the part of the person completing the form was inadvertent.[48] In *Khondoker v MIAC*, the applicant had incorrectly crossed a box on the visa application form which indicated that he was applying for a Skilled – Independent (Subclass 885) visa when in fact he had meant to apply for a Skilled – Regional Sponsored (Subclass 487) visa. The Federal Court found in that case, s 25C did not permit the

[44] reg 2.07(4).
[45] regs 2.07(1)(a), (3).
[46] See *Wu v MIEA* (1996) 64 FCR 245 at 279 (also reported as *Fang & Ors v MIEA & Anor* (1996) 135 ALR 583 at 617) where the majority doubted that in the context of a protection visa application 'anything short of use being made of a Form 866 could constitute an application. There is no room left by the statute for the concept of a constructive application or substantial compliance with the provisions for a form by conduct falling short of use of the form.'
[47] See *SZMWT v MIAC* [2009] FMCA 254 at [24]–[28], which followed *SZIWV v MIAC* [2008] FCA 1338 at [32]–[37] and held that despite the absence of an effective jurat (signed declaration), the visa application form was substantially completed and the application valid. The Federal Magistrate's decision was overturned on appeal *SZMWT v MIAC* [2009] FCA 559 at [30]–[43] but on the basis that the Tribunal decision was affected by third party fraud. The Federal Court did not challenge the correctness of the Federal Magistrate's finding that the visa application was valid. In *MZYIE v MIAC* [2010] FMCA 994 the Court held that there had been substantial compliance with the protection visa application form in circumstances where the accompanying statutory declaration was not signed or dated.
[48] *Khondoker v MIAC* [2012] FCA 654 at [93].

applicant to convert his visa application into an application for a Subclass 487 visa.[49]

1.3.26 The capacity to substantially comply with the requirements of the form does not extend to all aspects of the form. The obligation in reg 2.07(4) to include an applicant's residential address in the application form or accompanying documentation does not appear to be one which is logically susceptible to substantial compliance.[50]

Forms completed by a person other than the visa applicant

1.3.27 A visa applicant who does not fill in his or her own application form will be taken to have done so if he or she causes it to be filled in or if it is otherwise filled in on his or her behalf.[51] The failure of an applicant to personally fill in or sign an approved form (or any associated declarations) will not invalidate the application if it is otherwise filled in, signed and lodged with the applicant's knowledge and consent.[52]

1.3.28 Visa applications may be lodged on an applicant's behalf so that, even where the applicant claims not to be familiar with its precise contents, they will be legally responsible for that application where they know that the application has been made, or their conduct suggests they are aware it has been made.[53]

1.3.29 In the rare event that the applicant satisfies the Tribunal that the application was completed and lodged without his or her knowledge or consent the application may be invalid.

<u>Applications made on behalf of a minor</u>

1.3.30 Whether a visa application has been validly made on behalf of a minor is to be determined by reference to the circumstances of the particular case. While in most cases the issue will not require an express consideration (because the facts would

[49] *Khondoker v MIAC* [2012] FCA 654. The Court held that where an applicant clearly indicates on a visa application form that he or she is applying for a particular class of visa (and therefore as a matter of fact is found to have applied for that particular visa class), the Minister is required to assess and determine the application on that basis.
[50] The amended reg 2.07(4) only applies to visa applications lodged on or after 1 July 2002: *Migration Amendment Regulations 2002 (No 2)* (Cth) (SR 2002, No 86).
[51] s 98.
[52] See *NAWZ v MIMIA* [2004] FCAFC 199. The Court held that an application filled in and signed by the applicant's agent was not invalid as it substantially complied with the requirements of reg 2.07 being signed by another person with the applicant's knowledge and consent. See also *Spurr v MIAC* [2010] FMCA 996 which held that the present view, following the refusal of an application for special leave to the High Court in *NAWZ v MIMIA* [2005] HCA Trans 853, is that where a visa application has not been signed by the visa applicant, s 98 can cure any resulting defect (at [31]). See also *SZHVJ v MIAC* [2009] FMCA 320 at [33].
[53] *SZJJM v MIAC* [2010] FMCA 465 at [23], [29]. The Court held that the applicant's subsequent conduct, including lodging review applications, attending hearings and pursuing judicial review applications, established that she was legally responsible for it. In *SZMME v MIAC* [2009] FMCA 323, the Court found that despite the applicant's claims that he signed a blank form and was not aware that his application was for a protection visa, application was valid as he signed the application knowing it was a visa application, and was prepared to leave his details to his agent as he wanted a visa that would give him the right to work and live in Australia permanently. See also *Spurr v MIAC* [2010] FMCA 996, where the applicant argued that the visa application lodged with the Department by his migration agent was not the visa application that he had engaged the migration agent to lodge on his behalf and that the signature on that application form was not his own but a forgery. The Court held that the applicant's intention that the relevant visa application be lodged was clearly apparent and that it was done so by his migration agent in accordance with his instructions, despite the form that was actually lodged not being the one he had completed.

support an inference that the minor's application was valid – e.g. in the case of a young child or infant) rare circumstances may arise where the issue requires further consideration. The fact that a person is a minor does not automatically lead to their parents being able to make every decision for them, and the older a child becomes, the more competent he or she becomes in making their own informed decisions.[54]

1.3.31 However, a minor who has had a visa refused will be restricted under ss 48, 48A and 501E from making a further visa application while in Australia even if the previous visa application was made *on behalf of* them, or they did not know about, or understand the nature of, the application because of lack of capacity due to a mental impairment, or that they were a minor at the time the application was made.[55] See below for more details.

Protection visas

1.3.32 It is well accepted that the doctrine of 'substantial compliance', as set out in s 25C of the Acts Interpretation Act, is applicable to the protection visa application form (Form 866).[56] The question of substantial compliance is judged by reference to compliance with Form 866 as a whole, not by reference to the individual parts of the form.[57] Particular regard is to be had to the purpose of the form. One purpose of the form is to elicit the basis on which the person is applying for a protection visa and in the case of a person making protection claims, the nature of those claims. The questions posed in the form are taken to be guidelines to that end.[58]

1.3.33 In the case of applicants for a protection visa who are making their own claims under refugee or complementary protection grounds, the directions in relation to Form 866 instruct applicants to answer all questions and to provide all details about why they are seeking protection. This suggests that an applicant making refugee or complementary claims must provide sufficient information to enable the decision-maker to discern the applicant's fear and the reasons for it.

1.3.34 In *Bal v MIMA,*[59] the applicant had stated in response to the then Question 36 (which asked applicants why they left their country):

> *I have been repeatedly and severely tortured by police because of my political opinion and because I am Kurdish, and because I am a Christian. Detailed statement follows.*

No such statement followed and the applicant answered the remaining questions on the form relating to his claims by merely putting down 'See Q36'. Despite this, the

[54] *Kim v MIMAC* [2013] FCCA 1526 at [23]. In that case, the Court accepted that if the applicant was unable to make an informed decision about whether to apply for a visa her father would be able to apply on her behalf but that, conversely, if the applicant was of sufficient maturity that she could make an informed decision about whether to apply for a visa her parents would have no power to do so unless they were acting on her behalf and with her authorisation to do so (at [15], [19], [23]). On appeal in *MIBP v Kim* [2014] FCAFC 47, as the Full Federal Court was concerned only with the construction and operation of s 48, its reasons provides no guidance as to the question of the validity of visa applications more generally, or review applications, made on behalf of an applicant.
[55] ss 48(1A), 48A(1AA), 501E(1A) as inserted *Migration Legislation Amendment Act (No 1) 2014* (Cth) (No 106, 2014). For s 48 affected applications, this applies to further visa applications made on or after 25 September 2014. For ss 48A and 501E affected applications, this applies to all applications except those where the refusal of the previous visa and the application for the further visa both occurred prior to 25 September 2014.
[56] *Bal v MIMA* (2002) 189 ALR 566; *NAWZ v MIMIA* [2004] FCAFC 199.
[57] *SZGME v* MIAC (2008) 168 FCR 487.
[58] *Bal v MIMA* (2002) 189 ALR 566.
[59] *Bal v MIMA* (2002) 189 ALR 566.

Full Federal Court held that there was substantial compliance because the basis for the applicant's claim for protection was clear from the applicant's response to Question 36. While the form contained only the 'bare bones' of the applicant's claims, and while they were fleshed out later in ways that were not implied in the sparse initial statement, this did not prevent the application from having substantially complied with the requirements of the form.[60]

1.3.35 Similarly, in the case of *Ali Shahabuddin v MIMA,*[61] the applicant had given only basic details about his claim for refugee status in his protection visa application:

> *I was a member of Bangladesh Freedom Party. Due to my political opinion I was ousted from the country. A number of my political leaders are arrested by the Present government. On the name of Mujib's trial, they would hang our leaders. heads/workers like are in deep trouble [sic]. That's why I left my motherland. (A statement would be sent very shortly).*

1.3.36 No supplementary statement was sent to the Department and the applicant did not expressly answer the six 'core' questions on the form at that time (i.e. Why did you leave that country?', 'What do you fear may happen to you if you go back to that country?', 'Who do you think may harm/mistreat you if you go back?', 'Why do you think they will harm/mistreat you if you go back?', 'Do you think the authorities of that country can and will protect you if you go back?', and 'If not, why not?'). Despite this, the Federal Court held that the protection visa application was valid as there was substantial compliance with the form; that is, it could be discerned that the applicant was making a claim that he feared persecution for reasons of political opinion if returned to Bangladesh. The Court held that it was unnecessary to be able to distil an answer to *each* of the six core questions; that these were designed to elicit a person's claims and were *guidelines only*. Alternatively, the Court held that if it *was* so necessary to answer the six questions in order to achieve substantial compliance, the questions on the form could be answered *impliedly* as well as expressly and in this case the applicant had impliedly answered all six questions.

1.3.37 An example of a case in which the Court held that substantial compliance was *not* achieved was *Zanaj v MIMA,*[62] where the applicant had stated she was 'afraid of getting killed' in response to three questions on the protection visa form. The Court held that this was a non-responsive answer to the questions which resulted in the omission of essential information, and therefore the form was not 'completed' in accordance with the requirements.

1.3.38 Similar reasoning can be applied to the validity of applications from members of the family unit of a person making protection claims who do not wish to submit their own claims for protection. See the discussion below as an example.

1.3.39 In the current version of Form 866 (design date of 01/2015) Part B requires details of all persons included in the application, including those seeking Australia's protection obligations and those who are members of the same family unit, and Part

[60] *Bal v MIMA* (2002) 189 ALR 566 at [43].
[61] *Ali Shahabuddin v MIMA* [2001] FCA 273 See also *James v MIMIA* (2002) 125 FCR 463 where the applicant indicated in her application that she feared 'harm that would be done to [her] as a young Tamil girl … in a predominantly Sinhala town' and that she feared harm from the Sri Lankan forces due to ethnicity and political attitudes. Justice Weinberg held that the application was vague and lacking in a number of respects, in particular in that it did not spell out the 'harm' the applicant feared. However, applying the approach adopted in *Bal* and *Shahabuddin*, His Honour found that the level of information provided by the applicant was sufficient for the application to be considered valid as it was sufficiently clear that the applicant's claims related to her Tamil status and had to do with her political opinions.
[62] *Zanaj v MIMA* [2000] FCA 1766.

C requires the details for each person included in the application and indicates a separate Part C must be completed for each person included in the application, whether they are making claims in their own right or not.

1.3.40 In a previous version of Form 866, Part B required details of all persons included in the application, Part C required details from applicants with their own claims for protection and Part D required details from applicants who did not wish to submit their own claims for protection.

1.3.41 It is apparent from this that so far as family members are concerned, the form aims to simply identify those persons claiming to be family members of a person who has submitted claims for protection. Thus, a failure to answer a question on the form that is not critical to this purpose would not necessarily mean that the application is invalid. For example, the failure to name every school or educational institution that the family member has attended would be unlikely to invalidate the application.

1.3.42 Further, a failure to complete, for example, Part D in a previous version of the form or to complete a separate Part C in the current version of the form at all may not mean that the family member has not made a valid application on the basis of family membership. It may, for example, be sufficient if the names of the family members are contained in Part B and an attached statement or letter indicates that they wish to apply for a protection visa on the basis of their family membership to the person claiming protection.[63]

Other visa classes

1.3.43 The doctrine of substantial compliance appears to be also applicable to other visa application forms.[64] What is required is that there exists sufficient indication of the basis of the application. Whether substantial compliance can be invoked so that the application is considered valid will depend on the particular facts of the case.

Oral visa applications

1.3.44 If Schedule 1 to the Regulations authorises oral visa applications by specified persons, such applications may be made by telephone to, or attendance at, an office of Immigration specified by written instrument at the time specified in the instrument.[65]

Where visa applications must be made

1.3.45 For the purposes of making a valid visa application, reg 2.10 generally prescribes where a visa application (other than an internet application) is to be made. The

[63] *SZGME v MIAC* (2008) 168 FCR 487 at [84]–[85] where the information in the signed Part B, a supplementary statement signed by the applicant and the cover letter from her migration agent were held to be sufficient to make clear that the applicant claimed to be a member of the family unit of her daughter who was making refugee claims. Their Honours found that Form 866 was substantially complied with notwithstanding that no Part D (or Part C) was submitted.
[64] In *Wu v MIEA* (1996) 64 FCR 245 at 279 (also reported as *Fang v MIEA* (1996) 135 ALR 583 at 617) the Full Court considered whether the doctrine of substantial compliance applied to Form 866 for a protection visa application but the reasoning appears applicable for other visa application forms in the context of the Migration Act and Regulations. The majority held 'there is room for the application for the substantial compliance principal in relation to the manner in which [the form] is completed by the applicant'.
[65] reg 2.09.

requirements are subject to alternate places being specified in relation to specific visa classes in Schedule 1 or in other regulations.[66]

Applications made outside Australia

1.3.46 For an application made outside Australia, the application must be lodged at a diplomatic, consular or migration office maintained by or on behalf of the Commonwealth outside Australia unless Schedule 1 or another regulation provides otherwise.[67]

Applications made in Australia

1.3.47 In the case of an application made in Australia, it must be made at an office of Immigration in Australia, unless Schedule 1 or another regulation provides otherwise.[68]

What is an 'office of Immigration'?

1.3.48 For visa applications made on or after 18 April 2015 'office of Immigration' includes an office occupied by an officer of Immigration at an airport or a detention centre.[69] This is not an exhaustive definition and some of the case law prior to this time may be imported into the definition.

1.3.49 Prior to 18 April 2015, the term 'an office of Immigration in Australia' was not defined in either the Migration Act or Regulations but it was the subject of judicial consideration by the Full Federal Court in *Chen v MIAC,*[70] where it was held that a GPO Box leased by the Department and held out by it as a place to which postal items could or must be sent was as much a part of the Department's office as a post box which was physically provided at or within Departmental premises. The GPO Box, leased by the Department for the purpose of receiving applications for particular visas was a place for the transaction of business, a place for business, or a place in which the Department's business was carried on, and, having regard to

[66] In relation to where there is a requirement for the visa application to be delivered by courier service, in *Fanani v MICMSMA* [2021] FCA 595 the Court held that courier service would include a delivery organised by an entity such as a law firm pursuant to its arrangements with its clients in appropriate matters and that use of a courier services private company was not necessarily required. In this case, the applicant instructed a solicitor to lodge the visa application in accordance with the requirements of the Instrument and the solicitor instructed his employee to deliver the application (in the capacity as courier) to the physical address outlined in the Instrument. The Court considered that, given the absence of regulation of courier service companies and noted that any person or entity could provide delivery by courier service, there is no obvious or logical reason or purpose, or any reason consistent with words used or the requirements set out in the Instrument, why the words 'delivered by courier service' would be limited by reference to provision by a particular type of entity (such as a private company) or by an entity which provides only courier services (at [56]–[58]; [73]). This judgment overturned *Fanani v MICMSMA* [2020] FCCA 793 in which the Court had held that instructing an employee to deliver the visa application did not satisfy the requirement of delivery by courier service (at [12]–[13]). In relation to the type of prescribed methods, in *Muradzi v MIAC* [2011] FMCA 342 the Court found in circumstances where the applicant attempted to lodge a general skilled migration visa application by facsimile instead of by one of the prescribed methods, being internet, post or courier, that to be a valid application, the visa application must be lodged by one of the prescribed methods. This was upheld on appeal in *Muradzi v MIAC* [2011] FCA 976. Special leave to appeal from the Federal Court judgment was refused on the grounds that there would be no prospects of success: *Muradzi v MIAC* [2012] HCASL 58.

[67] reg 2.10(2).

[68] reg 2.10(2A).

[69] reg 1.03 as amended by *Migration Amendment (2015 Measures No 1) Regulation 2015* (SLI No 34 of 2015).

the nature of the Department's arrangements for applications to be collected from the GPO Box, even if not a standalone office for the purpose of reg 2.10(2A)(b), it was, at least, part of an 'office of Immigration' such that an application received there was an application made at an office of Immigration.[71] The Court's reasoning, accordingly, broadens the circumstances in which it may be said that a visa application has been made within a relevant period.[72]

1.3.50 In *obiter dicta*, the Court also expressed the view that the requirement for an application to be made at an office of Immigration is either satisfied or it is not, with the language used in reg 2.10(2A)(b) not providing any scope for the concept of substantial compliance to apply.[73]

Applications for certain specified visas

1.3.51 Applications other than internet applications made by persons for visas specified by legislative instrument must be made by posting or delivering the application to the post office box address or other address specified in the legislative instrument.[74]

Applications for bridging visas in immigration detention

1.3.52 Written notice of applications for Bridging E (Class WE) and Bridging F (Class WF) visas made by persons in immigration detention must be given to Immigration officers.[75]

Time of making Internet applications

1.3.53 Internet applications are taken to have been made at the time corresponding to the time at which the internet application is made, using Australian Eastern Standard Time or Daylight Saving Time where Daylight Saving Time in the Australian Capital Territory is in effect.[76]

Additional requirements for specific visas

1.3.54 In addition to the general visa application requirements discussed above, and those specified in the relevant items in Schedule 1, the Regulations also prescribe additional requirements for particular visa classes. These are:

[70] *Chen v MIAC* (2013) 216 FCR 241 at [41]–[62].
[71] *Chen v MIAC* (2013) 216 FCR 241 at [51].
[72] See for example student visa applications where the issue is whether the 28 day rule has been met. Note that the Court's reasoning may potentially be relevant to whether a review application has been made for the purposes regs 411 and 4.31 and 4.31AA. See Chapter 4 – Review applications for discussion.
[73] *Chen v MIAC* (2013) 216 FCR 241 at [68]–[70].
[74] reg 2.10AA.
[75] regs 2.10A, 2.10B.
[76] reg 2.10C.

- *Bridging visa applications* – an application for a substantive visa made on certain forms[77] is not a valid application for a Bridging A, C or E visa where the applicant was not in Australia when the application was made or the visa can only be granted if the applicant is outside Australia.[78]

- *Certain applications for Student visas* – an application made on forms 157A, 157A (Internet), 157E or 157G by a person seeking to satisfy the primary criteria must include certain details, including with respect to members of the family unit.[79]

- *Applications for certain substantive visas by persons for whom condition 8503 or 8534 has been waived* – an application for a substantive visa by a person for whom condition 8503 has been waived under reg 2.05(4AA) or for whom condition 8534 has been waived under reg 2.05(5A) is a valid application only if the application is for a General Skilled Migration visa,[80] Subclass 132 (Business Talent) visa, Subclass 186 (Employer Nomination Scheme) visa, Subclass 187 (Regional Sponsored Migration Scheme) visa, Subclass 188 (Business Innovation and Investment (Provisional)) visa, Subclass 191 Permanent Residence (Skilled Regional) visa or Subclass 482 (Temporary Skill Shortage) visa.[81] Where condition 8534 has been waived under reg 2.05(6) before 18 March 2018 in relation to a visa held by a person and the first application for a substantive visa that the person makes after the waiver of the condition is made in Australia, the application is taken to have been validly made only if it is an application for a Subclass 457 visa or Subclass 482 visa.[82]

- *Applications for certain substantive visas by Subclass 173 or 884 holders* – an application for a substantive visa by a person in Australia who has, at any time since last entering Australia, held a Subclass 173 (Contributory Parent (Temporary)) or a 884 (Contributory Aged Parent (Temporary)) visa is a valid application only if the application is for:
  - a Contributory Parent (Migrant) (Class CA) visa
  - a Medical Treatment (Visitor) (Class UB) visa, or
  - a protection visa.[83]

[77] i.e. those mentioned in items 1301(1), 1303(1) or 1305(1) of sch 1 to the Regulations.
[78] reg 2.07A.
[79] reg 2.07AF. For visa applications made on or after 19 November 2016 or a visa granted as a result of such an application, a member of the family unit of an applicant for a Student (Temporary) (Class TU) visa is defined in reg 1.12(6), as amended by *Migration Legislation Amendment (2016 Measures No 4) Regulation 2016* (Cth) (F2016L01696). For visa applications made prior to 19 November 2016, a member of the family unit of an applicant for a Student (Temporary) (Class TU) visa was defined in reg 1.12(2).
[80] General Skilled Migration visa is defined in reg 1.03 as a Subclass 175, 176, 189, 190, 475, 476, 485, 487, 489, 885, 886 or 887 visa.
[81] reg 2.07AG. The Subclass 191 Permanent Residence (Skilled Regional) visa was added to the list of visas in reg 2.07AG by the *Migration Amendment (Subclass 191 Visas—Waiver of Conditions) Regulations 2022* (Cth).
[82] reg 2.07AH.
[83] reg 2.07AI.

- *Applications for Resolution of Status (Class CD) visas* – an application for a Resolution of Status (Class CD) visa, is taken to have been validly made by a person only if the requirements of reg 2.07AQ(3) or item 1127AA of Schedule 1 have been met.[84] These relate to having applied for a protection visa by a certain date, or holding certain temporary protection/humanitarian/safe haven visas or related visas.

Alternate requirements for specific visas

1.3.55 Applications for certain visas will be taken to be validly made if certain prescribed circumstances are met. This is despite any of the requirements in reg 2.07 (i.e. requirements set out in Schedule 1). The affected applications are:

- *Certain temporary business visa applications* – an application for a Temporary Business Entry (Class UC) visa made prior to 23 March 2013 or an application for a Visitor (Class FA) visa in the Business Visitor stream made on or after 23 March 2013 is taken to have been validly made, if the applicant holds a valid passport issued by a designated APEC economy or any valid passport if a permanent Hong Kong resident, has applied for a certain APEC Business Travel Card and that government has provided that application or information contained in that application to Immigration.[85]

- *Electronic Travel Authority visa applications* – an application for an Electronic Travel Authority (Class UD) visa is taken to have been validly made if the applicant demonstrates certain matters in respect of passports and the application was:

  - made in Australia (except in immigration clearance) or outside Australia
  - made in person while in immigration clearance
  - made to a diplomatic, consular or migration office maintained by or on behalf of the Commonwealth outside Australia[86] or an approved agent.[87]

  An application for an Electronic Travel Authority visa made by an eVisitor eligible passport holder is taken not to have been validly made if it is made by electronic transmission using a computer.[88]

- *Applications for Temporary Safe Haven and Temporary (Humanitarian Concern visas* – an application for a Temporary Safe Haven (Class UJ) or Temporary (Humanitarian Concern) (Class UO) visa is taken to have been validly made by a person ('the interviewee') or a member of their family unit where they indicate to an authorised officer that he or she accepts the

[84] reg 2.07AQ.
[85] reg 2.07AA.
[86] As defined in reg 2.06A.
[87] reg 2.07AB.
[88] reg 2.07AB(4).

Australian Government's offer of a temporary stay in Australia and that officer endorses, in writing, the interviewee's acceptance of that offer.[89]

- *Designated Parent visa applications* – an application for a Designated Parent (Migrant) (Class BY) or Designated Parent (Residence) (Class BZ) visa made prior to 22 March 2014 is validly made if the applicant is invited in writing by the Minister to apply and indicates in writing that he or she accepts that invitation.[90]

- *Referred Stay visa applications* – a Referred Stay (Permanent) (Class DH) visa is taken to have been validly made by a person only if certain specific requirements in r 2.07AK have been met.[91]

- *Applications by a contributory parent newborn child* – an application by a contributory parent newborn child for a Subclass 173 (Contributory Parent (Temporary)) visa is a valid application only if the parent holds or held a Subclass 173 visa or a bridging visa, and the last substantive visa held by that parent was a Subclass 173 visa.[92] The same requirements apply in respect of Subclass 884 (Contributory Aged Parent (Temporary)) visas. Despite any provision in Schedule 1, a contributory parent newborn child holding a Subclass 173 or 884 visa and whose parent has applied for a Contributory Parent (Migrant) (Class CA) visa or a Contributory Aged Parent (Residence) (Class DG) visa, and either that application has not been finally determined or the parent has been granted the permanent visa, is taken to have made a combined application for the permanent visa with the parent.[93]

- *Applications for certain visas by certain persons who hold/held a Subclass 447, 451 or 785 visas* – an application for a range of temporary and permanent visas by holders of a Subclass 447 (Secondary Movement Offshore Entry (Temporary)), a Subclass 451 (Secondary Movement Relocation (Temporary)) or a Subclass 785 (Temporary Protection) visa made prior to 23 March 2013, is taken to be a validly made application in certain circumstances.[94] These include that the person has not left Australia, has not been refused a Protection visa on character grounds, and has not been refused a visa, or had a visa cancelled because of arts 1F, 32 or 33(2) of the Refugees Convention.

[89] reg 2.07AC.
[90] reg 2.07AE. Regulation 2.07AE was repealed by SLI 2014, No 30 for visa applications made on or after 22 March 2014.
[91] reg 2.07AK. Class DH is a prescribed class of visa for the purposes of s 46(2). Note that, from 1 July 2009, r 2.07AJ and the Witness Protection (Trafficking) (Temporary) (Class UM) Subclass 787 visa were removed from the Regulations: *Migration Legislation Amendment Regulations 2009 (No 2)* (Cth) (SLI 2009, No 116).
[92] reg 2.07AL.
[93] reg 2.08AA(2).
[94] reg 2.07AO. Regulation 2.07AO was repealed by *Migration Amendment Regulation 2013 (No 1)* (Cth) (SLI 2013, No 32) with effect from 23 March 2013.

Adding family members to existing visa applications

1.3.56 In limited circumstances a newborn child or certain family members may be added to an existing visa application. The Regulations provide for applications by newborn children,[95] adding spouses and dependent children to certain applications for permanent visas[96] and adding dependent children to certain applications for temporary visas.[97] Limited exceptions also exist in respect of fast track applicants to add members of their same family unit to an existing visa application for a Temporary Protection (Class XD) visa or a Safe Haven Enterprise (Class XE) visa.[98]

1.3.57 This section discusses adding applicants to visa applications. See Chapter 4 – Review applications for information on combining review applications before the Tribunal.

Newborn children – reg 2.08

1.3.58 Under reg 2.08, children born to a non-citizen after a visa application is made in respect of the non-citizen, but before it is decided by the primary decision maker, are taken to have applied for a visa of the same class as their non-citizen parent at the time they were born. The child's application is taken to be combined with the non-citizen's application on the basis of being a member of the family unit of the primary applicant. The child must satisfy the criteria to be satisfied at the time of decision. If there is an applicable time of application criterion that the child be sponsored or nominated, that criterion must be satisfied at time of decision.

1.3.59 A child born before the primary (delegate's) decision is made will normally be the subject of the primary decision and may be included in an application for review. However, if the Department was not notified of the birth before the primary decision was made, the child may not, as a matter of fact, be the subject of a decision. The Tribunal will not have jurisdiction in relation to the child if no reviewable decision on the child's application has been made.

1.3.60 If the primary decision does not include the child but the child has sought review, the Tribunal may proceed with the review application and determine that the Tribunal has no jurisdiction to conduct a review as there is no decision to review. Alternatively, the Tribunal may await the Department's decision in relation to the child's deemed application and, if a subsequent review application to the Tribunal is made, the child's review application may be constituted to the Member considering the parents' review application.

[95] reg 2.08.
[96] reg 2.08A.
[97] reg 2.08B.
[98] reg 2.08AAA, inserted by item 1 of sch 2 to F2017L00437. The original applicant must be a fast track applicant, the member of the same family unit seeking to be added must also be a fast track applicant and the original visa application must be in respect of a Temporary Protection or Safe Haven Enterprise visa which has not yet been decided by the Minister. Primary decisions in respect of fast track applicants are not reviewable by the MRD but are reviewable by the IAA.

1.3.61 Children who are born after the primary decision is made, including those born during the course of a review by the Tribunal, are not taken to be included in the parents' visa application.[99] As there would be no deemed visa application for the child and therefore no decision for the child, the Tribunal will not have jurisdiction in respect of the child.[100] Whether a child born after the primary decision is made would need to make a separate visa application would appear to depend on the outcome of the review in relation to their parents' application and the intentions of the parents. For example, if the Tribunal remitted the parents' matter for reconsideration, the Department would again be considering the parents' visa application again, and in those circumstances it appears that reg 2.08 may apply on the basis that the parents' visa application has not yet been decided, and therefore the child may be taken to have applied for the same visa class as their non-citizen parent.[101] However, if the Tribunal was to affirm the decision in respect of the child's parents, there would be no scope for reg 2.08 to operate.

Other children and partners – regs 2.08A, 2.08B

Permanent visas

1.3.62 Regulation 2 08A permits an applicant (the original applicant) for a permanent visa of a class for which Schedule 1 to the Regulations permits combined applications, including Schedule 1 to the Regulations as it applies in relation to a particular class of visa,[102] to apply in writing to have his or her spouse, de facto partner, or dependent child, added to the application. To add a spouse, de facto partner or dependent child under this regulation:

- the request must be in writing
- the request may be done at any time before the application is decided at the primary level
- the request must include a statement that the original applicant claims that the additional applicant is the spouse, de facto partner or dependent child, as the case requires, of the original applicant

[99] reg 2.08(1)(b) is not satisfied.
[100] The Tribunal will not have jurisdiction unless a separate visa application is made for the child, the Department refuses it and review is sought in relation to the refusal decision. However, if a separate visa application is made for the child, for the review applications for parents and child to be combined, it must satisfy reg 4.12 [pt 5] or reg 4.31A[pt 7] (see Chapter 4 – Review Applications for information about combining review applications).
[101] Where the Tribunal remits the application, it is before the delegate for consideration once again such that it is after the application is made but before it is decided for the purpose of reg 2.08(1)(b). This approach is consistent with the Department's policy: Policy - GenGuide A – All Visas – Visa application procedures - Adding family unit members to an application – Adding child born after parent has applied (reg 2.08) - Cases at merits-review stage (reissued 16 November 2016).
[102] reg 2.08A(1)(a) and Note 2. *Migration Legislation Amendment Regulation 2013 (No 3)* (Cth) (SLI 2013, No 146) amended reg 2.08A(1)(a) and inserted Note 2 to ensure that applicants making combined applications under reg 2.08A on or after 1 July 2013 are able to do so even though the visa subclass for which they are intending to make an application has been repealed since the original applicant made their application.

- the additional applicant charge (if any) has been paid in relation to the additional applicant,[103] and ff

- the additional applicant must, at the time of request and payment of the additional application charge (if any), satisfy the relevant Schedule 1 visa application requirements that relate to the whereabouts of an applicant at the time of the application and that apply to a visa of the same class.[104]

1.3.63 If these requirements are met, the additional applicant is taken to have applied for a visa of the same class. The application is taken to have been made on the later of either the Minister receiving the request or the additional applicant charge (if any) being paid.[105] The application is taken to be combined with the original applicant's application and is taken to have been made at the same place as and on the same form as the original application.

1.3.64 The requirements to add a spouse, de facto partner or dependent child in reg 2.08A are objective. That is, they do not require any ascertainment or satisfaction of the delegate as to the claimed relationship.[106] The delegate is not required to first positively determine that the claimed relationship exists before concluding that reg 2.08A permits an applicant to be added. What is required is a request that includes a statement claiming that the additional applicant is a dependent child, or spouse/defacto partner, of the original applicant. The claimed relationship will be assessed when the applicable criteria in schedule 2 of the Regulations is considered.

1.3.65 Regulation 2.08A(2A) also specifies certain permanent visa classes for which visa applications cannot be combined under this Regulation.[107]

Temporary visas

1.3.66 Regulation 2.08B permits the addition of dependent children to applications for certain temporary visas, most notably the provisional Partner and certain Skilled visas. To add a dependent child under this regulation:

- the original applicant must request the addition in writing

- except in very limited circumstances, the request must be made after the visa application was made but before it is decided by the delegate

- the request must include a statement that the original applicant claims the additional applicant is a dependent child of the original applicant

[103] reg 2.08A(1)(d) amended by SLI 2013, No 118 and in effect for visa applications made on or after 1 July 2013.
[104] reg 2.08A(1)(da) inserted by SLI 2013, No 118 for visa applications made on or after 1 July 2013.
[105] reg 2.08A(1)(f)(i) amended by SLI 2013, No 118 for visa applications made on or after 1 July 2013.
[106] *Pham v MICMSMA* [2022] FCA 38 at [38]–[41].
[107] Note that, with effect from 1 July 2012, reg 2.08A(2A) was amended by *Migration Amendment Regulation 2012 (No 2)* (Cth) (SLI 2012, No 82) to specify Class VB as the only permanent visa class for which visa applications cannot be combined under reg 2.08A.

- the additional applicant charge (if any) and the subsequent temporary application charge (if any) have been paid in relation to the dependent child,[108] and

- the additional applicant must meet, at the time of the request and payment of the additional application charge (if any) and the subsequent temporary application charge (if any), the relevant Schedule 1 requirements that relate to the whereabouts of an applicant at the time of the application and that apply to a visa of the same class.[109]

1.3.67 If these requirements are met, the additional applicant is taken to have applied for a visa of the same class. The application is taken to have been made on the later of either the Minister receiving the request or the additional applicant charge (if any) or the subsequent temporary application charge (if any) being paid.[110] The application is taken to be combined with the original applicant's application and is taken to have been made at the same place as and on the same form as the original application.

1.3.68 The requirements to add a dependent child in reg 2.08B are objective. That is, they do not require any ascertainment or satisfaction of the delegate as to the claimed relationship.[111] The delegate is not required to first positively determine that the claimed relationship exists before concluding that reg 2.08B permits an applicant to be added. What is required is a request that includes a statement claiming that the additional applicant is a dependent child of the original applicant. The claimed relationship will be assessed when the applicable criteria in schedule 2 of the Regulations is considered.

Deemed and further applications

1.3.69 Applicants for, or holders of, certain visas are also taken to have made a valid application for other visas provided specific requirements have been met. These are as follows:[112]

- prior to 22 March 2014, a Subclass 450 (Resolution of Status – Family Member (Temporary)) visa holder was taken to have made a valid application for a Resolution of Status (Residence) (Class BL) visa[113]

- an applicant for a Prospective Marriage (Temporary) (Class TO) visa is taken to have applied for Partner (Migrant) (Class BC) and Partner (Provisional)

[108] reg 2.08B(1)(d) amended by SLI 2013, No 118 for visa applications made on or after 1 July 2013.
[109] reg 2.08B(1)(daa) inserted by SLI 2013, No 118 for visa applications made on or after 1 July 2013.
[110] reg 2.08B(1)(f)(i) amended by SLI 2013, No 118 for visa applications made on or after 1 July 2013.
[111] *Pham v MICMSMA* [2022] FCA 38 at [38]–[41]. Note that the judgment considered reg 2.08A, which allows applicants to be added to applications for permanent visas, however, the same reasoning would appear to apply to reg 2.08B and temporary visas.
[112] Under reg 2.08H, inserted by *Migration Amendment (Temporary Protection Visas) Regulation 2013* (Cth) (SLI 2012, No 234), a valid application for a Protection (Class XA) visa that was made, but not finally determined, before 18 October 2013 by certain applicants was taken to also be an application for a Subclass 785 (Temporary Protection) visa. SLI 2012, No 234 was disallowed on 2 December 2013 from 9.46pm with the effect that reg 2.08H and Subclass 785 was repealed from the time of disallowance.
[113] reg 2.08BA. Note that, reg 2.08BA was repealed by SLI 2014, No 30 for visa applications made on or after 22 March 2014.

(Class UF) visas if after the application was made but before it is decided, the applicant validly marries the prospective spouse[114]

- prior to 22 March 2014, a person who held a Subclass 309 (Spouse (Provisional)) or a Subclass 310 (Interdependency (Provisional)) visa before 9 December 2002 on the basis of Ministerial intervention was taken to have applied for a Partner (Migrant) (Class BC) visa if the prescribed form and charge was paid before that date.[115]

Specific circumstances in which a visa application will be invalid

1.3.70 Even if an application satisfies the requirements discussed above, a visa application will still be invalid in certain circumstances. These circumstances are specified in ss 46(1A) and (2A). Under s 46(1A) and subject to certain exceptions, a visa application is invalid if:

- the applicant is in the migration zone
- the applicant has held a visa subject to a specified condition since last entering Australia – a specified condition for these purposes is one specified in s 41(2)(a); that is, a condition that the visa holder will not be entitled to be granted a substantive visa (other than a protection visa or a specified temporary visa) while in Australia [Condition 8503]
- the applicant is applying for a visa of a kind that, under that condition, he/she is not entitled to be granted, and
- the Minister has not waived that condition.[116]

1.3.71 These restrictions do not apply if it is an application for a visa of a prescribed class that is taken to have been validly made under Regulations,[117] *and* if the further restrictions in s 46(2A) do not apply. Under s 46(2A), a visa application will be invalid if:

- the Minister has not waived the operation of s 46(2A), and
- the applicant has been required by an officer to provide one or more personal identifiers under s 257A for the purposes of s 46(2A), and has not complied with the requirement.[118]

[114] reg 2.08E. Where the visa applicant and sponsor marry while a review application is before the Tribunal, see Prospective Marriage (Temporary) (Class TO) visa.
[115] reg 2.08G. Note that, reg 2.08G was repealed by SLI 2014, No 30 for visa applications made on or after 22 March 2014.
[116] See further reg 2.05 and conditions 8534 and 8535 of sch 8 to the Regulations.
[117] s 46(2). The prescribed classes of visa are Temporary Safe Haven and Temporary (Humanitarian Concern) visas (reg 2.07AC); Referred Stay (Permanent) (Class DH) visas (reg 2.07AK); Refugee and Humanitarian (Class XB) visas (reg 2.07AM); Partner visas for certain persons (reg 2.08E); Protection (Class XA) visas (reg 2.08H); Bridging R (Class WR) visas (reg 2.20A) and Bridging F (Class WF) visas (reg 2.20B).
[118] Note that an applicant is taken not to have complied with a requirement to provide one or more personal identifiers unless the one or more personal identifiers are provided by way of one or more identification tests carried out by an authorised officer:

Different validity restrictions apply if, before 16 February 2016, an applicant was required to provide a personal identifier under ss 46, 166, 170, 175 or 188 or reg 2.04, the person has not complied and the period to comply has not yet ended.[119] In these circumstances, a visa application will be invalid under s 46(2A) if:

- prescribed circumstances exist – namely that the application is *not* an applicant for a bridging visa or Referred Stay (Permanent) (Class DH) visa[120]
- the Minister has not waived the operation of s 46(2A)
- the applicant has been required by an officer to provide one or more personal identifiers in relation to the application (for example, a photograph) and has not complied with the requirement.[121]

Restrictions on certain persons making visa applications

1.3.72 As noted above, the Migration Act specifies that certain persons are prevented from making a valid application for a visa. These are:

- certain persons who have had a visa refused or cancelled
- persons covered by the CPA or an agreement relating to safe third countries
- temporary safe haven visa holders
- dual nationals or persons with access to protection from third countries
- criminal justice visa holders
- enforcement visa holders
- detainees
- unauthorised maritime arrivals
- transitory persons.

s 46(2B). However, this requirement does not apply in prescribed circumstances: s 46(2C). As at time of writing, there are no prescribed circumstances.

[119] *Migration Legislation Amendment (2015 Measures No 4) Regulation 2015* (Cth) (SLI 2015, No 242), sch 3, item 5202; *Migration Amendment (Strengthening Biometrics Integrity) Act 2015* (Cth), pt 2, item 55.

[120] Circumstances are prescribed in reg 2.08AB.

[121] s 46(2AA) identifies certain restrictions on the personal identifiers that applicants for certain visas can be required to provide. Additional matters may be prescribed in relation to personal identifiers: s 46(2AC) and reg 2.08AC. Identification tests are addressed in ss 46(2B) and (2C). In *SZMWT v MIAC* (2009) 109 ALD 473 at [42], the Court found that a letter sent to the applicant asking him to attend the Department to sign the application form in front of a JP was not a request for a personal identifier.

Persons who have had visa refused or cancelled – ss 48 and 501

1.3.73 Certain persons who have had a visa refused or cancelled are restricted from making a further visa application or from applying for a further visa while in the migration zone.[122] Different restrictions apply depending upon whether or not the person's visa was refused or cancelled on character grounds.

Visa refused or cancelled other than on character grounds – s 48

1.3.74 The Migration Act prevents persons, who do not hold a substantive visa[123] and who after last entering Australia have had a visa refused[124] or cancelled other than on character grounds,[125] from applying for a further visa while still in the migration zone, unless that further visa is for a limited prescribed class of visa.[126]

1.3.75 The application bar also applies in circumstances where a refused application was taken to have been made by the non-citizen under a provision of the Migration Act or Regulations, and where a cancelled visa was granted because of an application that the non-citizen was taken to have made under a provision of the Migration Act or Regulations.[127]

1.3.76 For visa applications made on or after 25 September 2014, the restriction on making a further visa application applies even if the previous visa application was made on behalf of the applicant, or they did not know about, or understand the nature of, the application because of lack of capacity due to a mental impairment, or that they were a minor at the time the application was made.[128]

1.3.77 For visa applications made prior to 25 September 2014, s 48 will only apply if the applicant had knowledge of the previous visa application. The Court in *MIBP v Kim* held that s 48 is directed to a prior application of which the person had knowledge, rather than an application which merely validly affected the person or from which he or she would have benefited.[129]

[122] Note that for the purposes of s 48, a non-citizen who, while holding a bridging visa, leaves and re-enters the migration zone is taken to have been continuously in the migration zone despite that travel: s 48(3). This means that an applicant cannot avoid the operation of s 48 by departing Australia while holding a bridging visa after a visa refusal and re-entering Australia on a bridging visa. The provision was introduced by *Migration Legislation Amendment Act (No 1) 2008* (Cth) (No 85, 2008), and applies irrespective of whether the relevant travel took place before or after the commencement of the provision: *Naidu v MIBP* [2017] FCCA 2331 at [7]. Also, if an attempt was made to remove a non-citizen from the migration zone under s 198 to another country but the removal was not completed, or the non-citizen is removed to another country but does not enter it and the non-citizen is again in Australia as a direct result of the removal not being completed, the non-citizen is taken to have been continuously in the migration zone despite the attempted removal: ss 48(1B), (2).
[123] A substantive visa is a visa other than a bridging visa or a criminal justice visa: s 5.
[124] Namely, other than a refusal of a bridging visa or a refusal under ss 501A or 501B.
[125] Namely, a visa that was cancelled under ss 109 (incorrect information), 116 (general power to cancel), 133A (Minister's personal powers to cancel visas on s 109 grounds), 133C (Minister's personal powers to cancel visas on s 116 grounds), 134 (business visas), 137J (student visas) or 137Q (regional sponsored employment visas).
[126] s 46(1)(d) as amended by *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) (No 135, 2014) and s 48.
[127] s 48(4) inserted by *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) (No 135, 2014) and applicable to visa applications made before, on or after 16 December 2014.
[128] s 48(1A) as inserted by *Migration Legislation Amendment Act (No 1) 2014* (Cth) (No 106, 2014).
[129] *MIBP v Kim* (2014) 221 FCR 523. Note, this case has no application to s 48A(1) in circumstances where a child who makes an application for a protection visa and previously been included, without his or her knowledge, in an application for a protection visa as a member of a family unit of a relative. Sections 48A and 48 serve different purposes and have a different legislative history: *SZVBN v MIBP* [2015] FCCA 2977 at [67] and [89].

1.3.78 The classes of visas for which a person who is subject to s 48 may apply, are set out in reg 2.12(1). These are:

- Protection visas [subject to s 48A restrictions discussed below]
- Bridging visas (A, B, C, D, E ,F and R)
- Territorial Asylum (Residence) (Class BE)
- Border (Temporary) (Class TA)
- Special Category (Temporary) (Class TY)
- Medical Treatment (Visitor) (Class UB)[130]
- Resolution of Status visas (Class UH,[131] BL[132] and CD)
- Child (Residence) (Class BT)
- Return Pending (Temporary) (Class VA)[133]
- Partner (Temporary) (Class UK and BS)[134]
- Retirement (Temporary) (Class TQ)
- Investor Retirement (Class UY)
- Skilled--Nominated (Permanent) (Class SN)[135]
- Skilled Work Regional (Provisional) (Class PS)[136]
- Skilled Employer Sponsored Regional (Provisional) (Class PE)[137].

Persons who have had visas refused or cancelled on character grounds – s 501E

1.3.79 A person is not allowed to make an application for a visa while still in the migration zone if, at an earlier time during that period, the Minister:

- refused to grant him/her a visa, or

[130] Prior to 23 March 2013 reg 2.12(1)(ca) was qualified by r 2.12(3). That is, an applicant subject to s 48 could only apply for a Medical Treatment (Visitor) (Class UB) if he or she could meet cl 685.212(6) or (7): Repealed by SLI 2013, No 32. In *SZQAN v MIAC* [2011] FMCA 501, the Court applied Allsop J's approach in *MIMIA v Kim* (2004) 141 FCR 315 in holding that for the purposes of s 48(1) the qualification to reg 2.12((1)(ca) in reg 2.12(3) does not create a condition to be satisfied for a visa application to be valid although it does impose an additional criterion to be satisfied for the grant of the visa.
[131] Prior to 22 March 2014 only: SLI 2014, No 30.
[132] Prior to 9 August 2008 only: *Migration Amendment Regulations 2008 (No 5)* (Cth) (SLI 2008, No 168).
[133] Prior to 9 August 2008 only: SLI 2008, No 168.
[134] From 14 September 2009, with some exceptions, applicants who have had applications refused in Australia may apply for partner visas onshore: *Migration Amendment Regulations 2009 (No 10)* (Cth) (SLI 2009, No 229).
[135] reg 2.12(s) inserted by the *Home Affairs Legislation Amendment (2021 Measures No. 2) Regulations 2021* for visa applications made on or after 13 November 2021.
[136] reg 2.12(t) inserted by the *Home Affairs Legislation Amendment (2021 Measures No. 2) Regulations 2021* for visa applications made on or after 13 November 2021.
[137] reg 2.12(u) inserted by the *Home Affairs Legislation Amendment (2021 Measures No. 2) Regulations 2021* for visa applications made on or after 13 November 2021.

- cancelled a visa held by that person
- on character grounds (i.e. under ss 501, 501A or 501B).[138]

1.3.80 This application bar also applies in circumstances where a refused application was taken to have been made by the non-citizen under a provision of the Migration Act or Regulations, and where a cancelled visa was granted because of an application that the non-citizen was taken to have made under a provision of the Migration Act or Regulations.[139]

1.3.81 The restriction on making a further visa application applies even if the previous visa was made on behalf of the applicant, or they did not know about, or understand the nature of, the application because of lack of capacity due to a mental impairment, or that they were a minor at the time the application was made.[140]

1.3.82 This restriction does not apply if:

- *at the time the person is seeking the further visa*, the visa refusal/cancellation was set aside or revoked, or
- if the further visa application is for a protection visa or a prescribed visa.[141] A prescribed visa for these purposes is a Bridging visa R[142]
- before the application time, the Minister had, acting personally, granted a permanent visa to the person[143]
- before the application time, the person was granted a protection visa, a prescribed visa or a permanent visa and the person would, but for this, have been prevented from applying for the visa.[144]

Persons who have had a protection visa refused – s 48A

1.3.83 A non-citizen who has previously made a valid application[145], including where the application was made under a different name[146], for a protection visa where the grant of the visa(s) has been validly refused or a non-citizen who held a protection visa that was cancelled may not, on or after 28 May 2014, make a further

[138] Section 501E inserted by *Migration Legislation Amendment (Strengthening of Provisions relating to Character and Conduct) Act 1998* (Cth) (No 114), and applicable to visa applications made before, on or after 1 June 1999.
[139] s 501E(1B) inserted by *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) (No 135, 2014) and applicable to visa applications made before, on or after 16 December 2014.
[140] s 501E(1A) as inserted by *Migration Legislation Amendment Act (No 1) 2014* (Cth) (No 106, 2014). This amendment applies to all applications except those where the refusal of the previous visa and the application for the further visa both occurred prior to 25 September 2014.
[141] s 501E(2)(b).
[142] reg 2.12AA.
[143] s 501E(3).
[144] s 501E(4).
[145] If the applicant used an approved form when the visa application was made, it does not become invalid because the form on which it was made is subsequently defunct: *SZUSM v MIBP* [2015] FCCA 1202 at [14].
[146] See *BSY15 v MIBP* [2016] FCCA 3042 at [12]. The Court followed *NAWZ v MIMIA* [2004] FCA 160, which held that s 48A barred consideration of a fresh application on behalf of an applicant, even if that application was made under a different name. The Court also held that the focus of s 48A is on the person who purports to make a second application and applies if that person is the same person who made a previous application, no matter by what name or names they use.

application for a protection visa while in the migration zone.[147] Where the visa application was made before 28 May 2014, there are some circumstances where a valid application may be made, as outlined below. There are also circumstances where, if the previous protection visa application was made on a person's behalf, a further application may be made, as outlined below.

1.3.84 This restriction on making a further visa application applies whether or not the previous application has been 'finally determined'. An application has been 'finally determined' when it is no longer subject to any form of review by the Tribunal or the period for a review application to be lodged has ended without such an application having been made and when a decision on the review in respect of the application is taken to have been made under ss 430(2) or 430D(1) of the Migration Act.[148]

1.3.85 The application bar also applies in circumstances where a refused application was taken to have been made by the non-citizen under a provision of the Migration Act or Regulations, and where a cancelled visa was granted because of an application that the non-citizen was taken to have made under a provision of the Migration Act or Regulations.[149]

1.3.86 If the application for a further protection visa was made before 28 May 2014, the operation of s 48A is limited to the making of a further application which duplicates the same essential criterion for the grant of the visa as in the earlier unsuccessful application.[150]

Previous application made on a person's behalf

1.3.87 For visa applications made before 25 September 2014, s 48A did not bar any 'further' protection visa application by a person who lacked capacity to make the earlier application.[151]

1.3.88 For visa applications made on or after 25 September 2014, the restriction on making a further visa application applies even if the previous visa application was made on behalf of the applicant, or they did not know about, or understand the nature of, the application because of lack of capacity due to a mental impairment, or

[147] s 48A. See *SZRWA v MIBP* [2014] FCCA 2924 at [29], upheld on appeal in *SZRWA v MIBP* [2015] FCA 293. See also *AZABF v MIBP* [2015] FCAFC 174 at [25]–[26] where the Court held that the terms of s 48A are unambiguous and prohibit a non-citizen from making a further protection visa application while in the migration zone, irrespective of whether the criterion now relied upon (e.g. s 36(2)(aa)) existed when the earlier application was determined; and *SZFRG v MIBP* [2017] FCA 189 at [20] in which the Court considered that amendments made to s 48A since the decision in *AZABF* were not material and the Court was bound by *AZABF*. At [21], the Court also confirmed that there is no obligation upon the Minister to have informed applicants that the Migration Act was to be amended to prohibit further protection visa applications. See also *SZRSN v MIBP (No 2)* [2014] FCCA 2482 at [10].
[148] ss 5(9) and 5(9A) as inserted by *Migration Amendment Act 2014* (Cth) (No 30, 2014).
[149] s 48A(1D) and (1C).
[150] *SZGIZ v MIAC* (2013) 212 FCR 235 246 at [38].
[151] *SZVBN v MIBP* [2017] FCAFC 90 at [118]. For consideration of what constitutes capacity, see for example *SZVBN v MIBP (No 2)* [2018] FCCA 1097 at [35]–[41] in which the Court held that it is for an applicant to establish that they did not have the requisite legal competence and understanding of their earlier protection visa application. In this instance, the Court found that a 13 year old had the requisite knowledge as she gave evidence of knowing that the earlier application was about remaining in Australia and was aware of the family's difficulties in this regard. Upheld on appeal in *SZVBN v MHA* [2018] FCA 1960.

that they were a minor at the time the application was made.[152] The principle from *SZGIZ*[153] does not apply to limit the operation of s 48A for these applications to barring the making of a further application on the same essential criterion as in the earlier unsuccessful application.[154] This means that, irrespective of the basis upon which the earlier application was made (that is, for example, even if it was made on the basis of the refugee criterion in s 36(2)(a) and the present application is purportedly made on a different basis such as the complementary protection criterion in s 36(2)(aa)), an applicant will be barred from making a further application.

Further application made on or after 28 May 2014

1.3.89 The current version of s 48A prevents a non-citizen who has been refused a protection visa, or held a protection visa that was cancelled, from applying for or having a subsequent protection visa made on their behalf while in the migration zone, irrespective of the grounds or the criteria on which their application would be made; whether or not the grounds or criteria existed earlier; the grounds or the criteria on which their earlier protection visa application was refused; or the grounds on which the cancelled protection visa was granted or the criteria the non-citizen satisfied for the grant of that visa.[155]

1.3.90 For the purposes of s 48A, 'application for a protection visa' means, amongst other things, an application for a visa of a class provided for by s 35A (protection visas – classes of visas),[156] including an application for a visa of a class formerly provided for by s 36(1) (protection visas)[157] that was made before 16 December 2014.[158] This

[152] s 48A(1AA) as inserted by *Migration Legislation Amendment Act (No 1) 2014* (Cth) (No 106, 2014). This amendment applies to all applications except those where the refusal of the previous visa and the application for the further visa both occurred prior to 25 September 2014. This express amendment leaves no room for application of *MIBP v Kim* (2014) 221 FCR 523, where in respect of s 48 the Court had held that it did not apply to an applicant who had no knowledge of a previous application: *SZVBN v MIBP* [2015] FCCA 2977 at [70].

[153] *SZGIZ v MIAC* (2013) 212 FCR 235 at [38]. The Full Federal Court held that the operation of the statutory bar in s 48A was confined to a further application which duplicated the same essential criterion for the grant of the visa as in the earlier unsuccessful application.

[154] Section 48A was amended to apply to applications on behalf of another person by the *Migration Legislation Amendment Act (No 1) 2014* (Cth) (No 106, 2014) with effect from 25 September 2014. The Federal Court confirmed in *MIBP v CTW17* [2019] FCAFC 156 at [37]–[39] that the reasoning and conclusion in *SZGIZ* were displaced by the amendments to s 48A. This judgment overturned the lower court judgment of *CTU17 v MIBP* [2019] FCCA 449, in which the Court held that the operation of the principle in *SZGIZ* for applicants whose original visa applications were made on their behalf (i.e. those that fall within the terms of s 48A(1AA)) was not excluded by the amendments to s 48A. Special leave to appeal from the Federal Court judgment was refused: *CTW17 (By his litigation guardian FFV17) v MIBP* [2020] HCASL 120.

[155] s 48A(1C) as inserted by *Migration Amendment Act 2014* (Cth) (No 30, 2014). The amendment prevents a limited operation of the statutory bar in s 48A based on the reasoning in *SZGIZ v MIAC* (2013) 212 FCR 235. In that case the appellant made an application for a protection visa in 2005 which relied upon the criterion in s 36(2)(a). After the introduction of the criterion in s 36(2)(aa) on 24 March 2012 he made another application relying on that criterion. The Full Federal Court held that when the bar in s 48A(1) is read in conjunction with the definition of 'application for a protection visa' in s 48A(2) the proper effect to be given to the term 'further' in s 48A(1) is that it refers to an application relying upon the *same criterion* as an earlier application. Consequently, the appellant's 2012 application was not invalid at [31]–[33]. The Court in *BYE15 v MIBP* [2015] FCCA 3023 confirmed that s 48A(1C) has the effect that the applicant is precluded from lodging another application for protection in circumstances where the applicant is a non-citizen, in the migration zone who has been refused a protection visa, regardless of the grounds on which the application would be made, irrespective of whether the grounds existed earlier or whether the applicant had claimed earlier to satisfy the criteria: upheld on appeal in *BYE15 v MIBP* [2016] FCA 263.

[156] s 35A was inserted by *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) (No 135, 2014). It provides for three classes of protection visas: a *permanent protection visa* (Class XA), a *temporary protection visa* (Class XD), and a *safe haven enterprise visa* (Class XE).

[157] Visas previously provided for by s 36(1) are now provided for by s 35A(5). Subsection 36(1) was repealed by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) (No 135, 2014).

ensures all applications for a visa, that is, or was, a visa of the class known as protection visas, including temporary protection (Subclass 785) visas and permanent protection (Subclass 866) visas, are captured for the purposes of section 48A. Any visa created in the future which is a visa of the class known as protection visas will also be captured by this.

1.3.91 An 'application for a protection visa' also includes an application for a visa, a criterion for which is that the applicant is a non-citizen who is a refugee;[159] a visa or entry permit for which it is a criterion that the applicant has been determined to be a refugee under the Refugees Convention;[160] an application for a decision that a person is a refugee under the Refugees Convention;[161] and an application falling within s 39 of the *Migration Reform Act 1992* (Cth).[162]

1.3.92 Accordingly, the statutory bar in s 48A applies to prevent a non-citizen, while in the migration zone, who has been refused a protection visa, or held a protection visa that was cancelled, from making a subsequent protection visa application regardless of whether the further protection visa application would be made based on a different criterion to that which formed the basis of a previous unsuccessful protection visa application, or a criterion or grounds that did not exist earlier.

1.3.93 For example, a person who was refused a protection visa having only made claims against the refugee criterion, would not be able to make a further protection visa on reliance of an alternative criterion (e.g. complementary protection, or family membership) on or after 28 May 2014. Persons who have lodged a further protection visa application before this date, however, are not affected. See below for further discussion on this.

<u>Further application made before 28 May 2014</u>

1.3.94 An 'application for a protection visa' was previously defined to include 'a visa, a criterion for which is mentioned in ss 36(2)(a), (aa), (b) or (c)'.[163] Although the intended effect of s 48A, prior to 28 May 2014, was to bar repeat applications by *all* protection visa applicants, irrespective of whether they had sought the visa because of personal claims for protection or as a family member of such a person,[164] s 48A was more narrowly construed by the Full Federal Court in *SZGIZ v MIAC* which confined the effect of it to the making of a further application which duplicated the

[158] s 48A(2)(aa) as amended by *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) (No 135, 2014). Previously s 48A(2)(aa) was amended by *Migration Amendment Act 2014* (Cth) (No 30, 2014). The amendment was specifically to address the issues arising from *SZGIZ v MIAC* (2013) 212 FCR 235 246.
[159] s 48A(2)(aaa) as inserted by *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) (No 135, 2014).
[160] s 48A(2)(a).
[161] s 48A(2)(b), e.g. a decision in relation to a transitory person under s 198C. Note that in *SZGME v MIAC* (2008) 168 FCR 487, the majority judges (Black CJ and Allsop J) found that application for review by the RRT is not 'an application for a decision that the non-citizen is a refugee under the Refugees Convention' for the purposes of s 48A(2)(b): at [21].
[162] s 48A(2)(c).
[163] s 48A(2) as amended by *Migration Amendment (Complementary Protection) Act 2011* (Cth) (No 121, 2011).
[164] Items 3 and 4 of the explanatory memorandum to Migration Legislation Amendment Bill (No 6) 2001 (Cth).

same essential criterion for the grant of the visa as in the earlier unsuccessful application.[165]

1.3.95 That is, s 48A did not prevent a non-citizen who had made a valid application on the basis of the refugee criterion in s 36(2)(a) from making a further application on the basis of the complementary protection criterion in s 36(2)(aa) or the family membership criteria in ss 36(2)(b) or (c) while he or she remained in the migration zone.[166] Similarly, a person who made an application only on the family membership criteria in ss 36(2)(b) or (c) could make a further application with claims against the refugee or complementary protection criteria in their own right.

1.3.96 While a person who previously applied for and was refused a protection visa only on the basis of one of the criteria in s 36(2) is eligible to lodge a further valid application on the basis of one of the other criteria, such a person can only have their later claims assessed against those criteria upon which they had not previously made an application against. For example, where an applicant has made and already been assessed against the refugee criterion, neither the delegate nor the Tribunal has any jurisdiction to consider a further application made on the basis of the complementary protection criterion against the refugee criterion.[167]

1.3.97 In *SZRNJ v MIBP*[168] the Court extended the principle established in *SZGIZ v MIAC*, finding that even where the Tribunal, post 24 March 2012, had considered complementary protection criteria in refusing an application, a further application would not be prevented if the *original application* was not based on complementary protection.[169] The Court also drew a distinction between the delegate's decision and the Tribunal's decision for the purposes of s 48A, finding that from the point an application for a protection visa was refused, the applicant was barred from making another such application while in the migration zone and consequently in the context of a refusal made by a delegate, it was irrelevant for the purposes of s 48A that the Tribunal subsequently affirmed the refusal because the s 48A bar would already be in place by virtue of the delegate's decision. As with *SZGIZ v MIAC*, the Court's reasons suggested that an applicant in circumstances such as this would be precluded from relying upon the refugee criterion in any subsequent 'complementary protection' application.

1.3.98 In *SZTTI v MIBP*[170] in circumstances where the previous application was made before s 36(2)(aa) was introduced but the delegate's decision was made after that date and included consideration of that criterion, the Court found s 48A barred the applicant from making a further protection visa application against s 36(2)(aa). Consistently with *SZGIZ*, the Court's reasoning in relation to the family members suggested that s 48A as in force before 28 May 2014 would not prevent an

[165] *SZGIZ v MIAC* (2013) 212 FCR 235 246 at [38].
[166] *SZGIZ v MIAC* (2013) 212 FCR 235 246 at [43]–[47].
[167] *AMA15 v MIBP* [2015] FCA 1424 at [48]. This judgment overruled a Federal Circuit Court judgment to the contrary in *SZVCH v MIBP* [2015] FCCA 2950 at [26], which was previously also found by another judgment of that Court to be plainly wrong: *SZQTJ v MIBP* [2015] FCCA 3226 at [13] and [16].
[168] *SZRNJ v MIBP* [2014] FMCA 782.
[169] N.B. the previous application and the delegate's decision were both made before s 36(2)(aa) was introduced.
[170] *SZTTI v MIBP* [2015] FCCA 236.

applicant who had relied on family membership from making a further valid application relying on ss 36(2)(a) or (aa) or, conversely an applicant who had relied on the substantive criteria from making a further valid application relying on family membership.

Valid refusal of valid application

1.3.99 Section 48A only applies when there has been a *valid refusal* of a *valid application*.[171] If the primary decision maker receives a further application which is caught by s 48A but proceeds to consider the application, the appropriate action of the Tribunal is to set the delegate's decision aside and substitute a new decision pursuant to s 415(2)(d) that the application was not valid and should not have been considered.[172]

When can a further protection visa application be made after an initial refusal application?

1.3.100 There are a number of circumstances in which a further protection visa application may be made after an initial application has been refused. These are:

- if the non-citizen has left the migration zone after the previous application and has made a subsequent application after re-entering the migration zone
- if, under s 48B, the Minister considers it to be in the public interest to give written notice that s 48A does not apply to a particular person[173]
- if the *further* application for a protection visa was lodged prior to the introduction of s 48A on 18 September 1995[174]
- if the further application for a protection visa was made prior to 28 May 2014, a non-citizen who previously made a valid application on the basis of the refugee criterion in s 36(2)(a) could make a further application on the basis of the complementary protection criterion in s 36(2)(aa) or the family membership criteria in ss 36(2)(b) or (c) and conversely if the previous application was made basis of the family membership criteria in ss 36(2)(b) or (c) a further application with claims against the refugee or complementary protection criteria could be made.[175]

[171] *SZGME v MIAC* (2008) 168 FCR 487 at [7]. Justice Moore in dissent found it more likely that the prohibition covered any application, whether valid or invalid: at [149].
[172] *SZANA v MIMIA* [2004] FCA 1203 at [8] agreeing with Hely J in *SZANA v MIMIA* [2004] FCA 203 at [26] agreeing with Allsop J in *SZANA v MIMIA* [2003] FCA 1407.
[173] This is a non-delegable power: s 48B(2).
[174] *Migration Legislation Amendment Act (No 6) 1995* (Cth) (No 102, 1995).
[175] *SZGIZ v MIAC* (2013) 212 FCR 235 at [43]–[47]. See also *Dranichnikov* v *MIMA* (2001) 109 FCR 397 in respect of s 48A as it was in force prior to 1 October 2001. In that case the Full Federal Court held an application as a family member was not an 'application for a protection visa' for the purposes of s 48A. A person who applied for a protection visa on the basis of being a member of the family unit of a refugee and not as a refugee in his/her own right or vice versa was therefore not applying for the class of protection visas to which the s 48A bar applied as at that time. To overcome the effect of *Dranichnikov v MIMA* (2001) 109 FCR 397 amendments were made to ss 36(2) and 48A, effective 1 October 2001 by *Migration Legislation Amendment Act (No 6) 2001* (Cth) (No 131, 2002) so that any further protection visa applications were caught by the s 48A bar. Following *SZGIZ v MIAC* (2013) 212 FCR 235 however such persons were again able to make further protection visa applications. Amendments were then made to s 48A, in effect from 28 May 2014, to restore the original policy intention to restrict the making

Discretion to not reconsider any information considered in earlier Protection visa application and to take decision to be correct

1.3.101 Generally speaking, where there has been a previous application for a protection visa which was has been finally determined and refused, the Minister or a review body (i.e. the former RRT or the Tribunal), when considering a further protection visa application, is not required to reconsider any information considered in the earlier application and may have regard to, and take to be correct, any decision the Minister or review body made about or because of that information.[176]

1.3.102 The operation of ss 50 and 416 are permissive and do not place an obligation upon the Minister or the review body to accept, or not to accept, the conclusion or the process of reasoning, in whole or in part, of the previous decision.[177]

1.3.103 The Tribunal exercises care when relying on s 416, as it is a discretion which qualifies the duty to review in s 414 and s 425.[178] In *WZATX v MICMSMA* the Court found it undesirable to lay down prescriptive rules in relation to the application of s 416, but noted the following in relation to the operation of s 416:

- The subsequent Tribunal will need to read the reasons of the previous Tribunal with an open mind, including the possibility that the previous Tribunal made an error or that any material findings could be wrong, and also not disregard any new information before it;
- The discretion must be exercised with regard to the evident purpose of s 416(2);
- it is open to a subsequent Tribunal to both consider the information that was before the previous Tribunal and have regard to the previous Tribunal's decision and/or take it to be correct such that it is possible for the Tribunal to exercise the discretion under s 416(2)(a) independently of the discretion under s 416(2)(b).[179]

1.3.104 A subsequent Tribunal is not required to conduct an evaluation of the evidence before the previous Tribunal in light of any new evidence, if to evaluate means to consider the 'old' evidence in order to make dispositive findings of fact on the basis of it. Rather, a subsequent Tribunal is only required to have regard to the

of a further protection visa application, regardless of the basis of the claim for protection: ss 48A(1C) and 48A(2)(aa) as inserted by *Migration Amendment Act 2014* (Cth) (No 30, 2014).

[176] ss 50 and 416 as amended by *Tribunals Amalgamation Act 2015* (Cth) (No 60, 2015). In *SZNOL v MIAC* [2012] FCA 917 the Court found the second Tribunal was only required to have regard to new material that bore upon critical findings made by the first Tribunal and that the second Tribunal did not ignore or fail to consider relevant material before deciding that there was no factual or legal error or flaw in the first Tribunal's reasoning. In such circumstances, it properly exercised its discretion to proceed in accordance with the discretion conferred by s 416.

[177] See *WZATX v MICMSMA* [2020] FCA 1262 at [66]. See *SZSLM v MIBP* [2014] FCCA 1043 at [12]–[16] citing with approval *Nejad v MIMA* [1997] FCA 1284 and *SZNOL v MIAC* [2012] FCA 917. The Court in *SZSLM* rejected an argument that s 416 required the Tribunal to accept the conclusions of a previous Tribunal unless it was satisfied that the previous Tribunal's conclusions were based upon flawed reasoning or an error of law, accepting the permissive character of s 416 and finding that there was nothing in the language of s 416 itself that supported such a construction. This was upheld on appeal in *SZSLM v MIBP* [2014] FCA 945.

[178] *WZATX v MICMSMA* [2020] FCA 1262 at [74].

[179] *WZATX v MICMSMA* [2020] FCA 1262 at [73], [77].

information before the previous Tribunal to the extent necessary to ensure that the discretion under s 416 was informed by relevant circumstances including the nature of the information it was proposing not to consider. If, the subsequent Tribunal does this, it will have exercised the discretion against considering information that was before the previous Tribunal, and no further evaluation will be necessary.[180]

1.3.105 In *AOM15 v MIBP*[181] the Court found on a fair reading of the Tribunal's decision as a whole, that the Tribunal had independently assessed the applicant's credibility consistent with its obligation to review the application before it and did not over rely upon s 416.

Persons covered by the CPA and 'safe third country' agreements – s 91E

1.3.106 A person who is covered by:

- the 'Comprehensive Plan of Action'(CPA), or
- an agreement relating to persons seeking asylum between Australia and a prescribed 'safe third country'

is prevented from making a valid application for a protection visa.[182]

1.3.107 A 'safe third country' in this context means, in relation to a person, a country prescribed by the Regulations as a safe third country in relation to the person or a class of persons of which the person is a member, and he/she has a prescribed connection with that country.[183] A regulation prescribing safe third countries ceases to be in force 2 years after it commences.[184]

1.3.108 Regulation 2.12A prescribed the People's Republic of China (PRC) as a safe third country[185] for the purposes of s 91D but only in relation to persons who entered Australia unlawfully on after 1 January 1996 and as covered by the agreement between Australia and the PRC, is/was a Vietnamese refugee settled in the PRC, or is a close relative or dependent of such a person. Under the regulation, a person

[180] *WZATX v MICMSMA* [2020] FCA 1262 at [75].
[181] *AOM15 v MIBP* [2015] FCCA 2064. Appeal dismissed: *AOM15 v MIBP* [2015] FCA 1285.
[182] ss 91C, 91E. Note the Regulations may exempt persons from the operation of this restriction: s 91C(1)(c). At the time of writing no persons were prescribed as exempt. For the validity of applications subject to the exemption where the application was made before a country is prescribed as a safe third country: see s 91G.
[183] s 91D. The Regulations may provide that a person has a prescribed connection with a country if the person is/was present in the county at a particular time or period; or the person has a right to enter and reside in the country: s 91D(2). There are additional requirements on the Minister if a country is prescribed as a safe third country, to table information about the country before Parliament: s 91D(3).
[184] s 91D(4).
[185] Regulation 2.12A was repealed by the *Migration Legislation Amendment (2016 Measures No 3) Regulation 2016* (Cth) (F2016L01390). Regulation 2.12A provided for the Memorandum of Understanding (MoU) between the Ministry of Ethnic Affairs of Australia (now the Department of Immigration and Border Protection) and the Ministry of Civil Affairs of the People's Republic of China, by setting out the safe third countries and prescribed connection. The MoU ceased to have effect on 14 August 2013, by operation of subsection 91D(4) of the Migration Act. The purpose and effect of the amendment was to repeal the redundant reference to the MoU. Prior to its repeal, *Migration Amendment Regulations 2011 (No 5)* (Cth) (SLI 2011, No 147) amended the Regulations to re-instate the PRC as a prescribed 'safe third country' for certain Vietnamese nationals for the purposes of s 91D. The amending regulations commenced on 15 August 2011 and applied to visa applications made on or after that date as well as those made prior to 15 August 2011 but not finally determined at that date. The previous reg 2.12A lapsed in December 2010 by operation of s 91D (4) and this reinstatement followed the renewal of the 1995 MOU between Australia and the PRC in May 2011 relating to unauthorised arrivals in Australia of Vietnamese refugees settled in the PRC.

had a prescribed connection to the PRC if, before they entered Australia, they or their parent resided in the PRC.

1.3.109 The restrictions on applying for a protection visa may be waived by the Minister personally. The Minister, if he considers in the public interest to do so, may give written notice to the person that the provisions preventing the making of an application do not apply.[186]

Temporary safe haven visa holders – s 91K

1.3.110 Temporary safe haven visa holders or former holders in Australia cannot make a valid application for a visa (other than a safe haven visa).[187] This is known as the s 91K bar. The Minister may give written notice to a person that such prohibition does not apply, if he thinks it is in the public interest to do so.[188] The bar does not apply to unauthorised maritime arrivals or transitory persons (the s 46A bar applies to such persons, discussed below).[189]

1.3.111 The grant of a temporary safe haven visa may be found to be invalid in particular circumstances. If the grant of such a visa to a non-citizen was found to be invalid, the s 91K bar would not apply to them. In *MICMSMA v CBW20* the Court held that the Tribunal was correct to conclude that the grant of the temporary safe haven visa was invalid as the Minister's view that it was in the public interest to grant the temporary safe haven visa proceeded on the basis of an incorrect understanding of the law.[190] The Minister had assumed that CBW20 was an unauthorised maritime arrival based on the method of entry to Australia (via Ashmore and Cartier Islands), however the applicant was affected by the judgment in *DBB16 v MIBP*[191] (discussed below) which held that non-citizens who entered Australia via the Ashmore and Cartier Islands were not unauthorised maritime arrivals. As the Minister had assumed that CBW20 was an unauthorised maritime arrival and subject to the s 46A bar (discussed below), he purported to lift this bar to allow him to apply for a Safe Haven Enterprise Visa.[192] In reliance on the s 46A bar lift, CBW20 applied for a Safe Haven Enterprise Visa, which was refused by a delegate and he then sought review of the delegate's decision under Part 7. The Minister contended that as CBW20 was not an unauthorised maritime arrival and had been

[186] s 91F. The power can only be exercised by the Minister personally, and there is no duty to consider exercising the power, even if specifically requested to do so: ss 91F(2), (6). If the Minister issues such a written notice, it must be tabled, with written reasons, before Parliament: ss 91F(3)–(5).
[187] ss 91J and 91K. These provisions were enacted because Parliament considered that non-citizens (other than unauthorised maritime arrivals or transitory persons) who hold a temporary safe haven visa, or who have not left Australia since ceasing to hold such a visa, should not be allowed to apply for a visa other than another temporary safe haven visa: ss 91H and 91J as amended by *Migration Amendment (Protection and Other Measures) Act 2015* (Cth) (No 35, 2015).
[188] s 91L. The power can only be exercise by the Minister personally, and there is no duty to consider exercising the power, even if specifically requested to do so: s 91L(2), (6). If the Minister issues such a written notice, it must be tabled, with written reasons, before Parliament: s 91L(3)–(5).
[189] s 91J as amended by *Migration Amendment (Protection and Other Measures) Act 2015* (Cth) (No 35, 2015) with effect from 18 April 2015.
[190] *MICMSMA v CBW20* [2021] FCAFC 63 at [57]–[61]. An application for special leave to appeal from the Federal Court judgment was refused: *MICMSMA v CBW20* [2021] HCATrans 217.
[191] *DBB16 v MIBP* [2018] FCAFC 178.
[192] It was assumed the s 46A bar applied to CBW20 and not the s 91K bar because the *Migration Amendment (Protection and Other Measures) Act 2015* (Cth) provided that from 18 April 2015 the s 91K bar does not apply to unauthorised maritime arrivals (which CBW20 was mistakenly considered to be).

granted a temporary safe haven visa, he was subject to the s 91K bar and the Safe Haven Enterprise Visa application was invalid (and the Tribunal should make such a finding). The Court upheld the Tribunal's finding that the grant of the temporary safe haven visa was not valid as a result of the Minster's incorrect assumption that CBW20 was an unauthorised maritime arrival which had underpinned the finding that it was in the public interest to grant him a temporary safe haven visa.[193] The effect of the finding that the temporary safe haven visa grant was invalid was that the s 91K bar did not apply to him and therefore the Safe Haven Enterprise visa application was valid, and the Tribunal was correct to conduct a substantive review of the delegate's decision.

Dual nationals and persons with access third country protection – s 91P

1.3.112 Persons who are nationals of two or more countries cannot make a valid visa application.[194]

1.3.113 Similarly, persons who:

- have a right to re-enter and reside in third country (whether temporary or permanent), and
- have resided in the third country for a continuous period of at least 7 days (or longer as prescribed)

cannot apply for a visa if there is a written Ministerial declaration in effect in relation to the third country.[195]

1.3.114 The declaration is that the specified country provides access to protection processes for asylum seekers, protection to persons to whom it owes protection obligations and meets relevant human rights standards for such person. It can only be made after the Minister has sought advice from UNHCR.[196]

1.3.115 This restriction on dual nationals and certain persons who have third country protection can be waived by the Minister. If the Minister considers it in the public

[193] *MICMSMA v CBW20* [2021] FCAFC 63 at [57]–[61]. An application for special leave to appeal from the Federal Court judgment was refused: *MICMSMA v CBW20* [2021] HCATrans 217.
[194] ss 91N(1) and 91P. See *SZOUA v MIAC* (2012) 199 FCR 448. Nationality for these purposes is a question of fact and is determined solely by reference to the law of that country: s 91N(6). In *CZBJ v MIAC* [2013] FCCA 23, the Court, citing *SZOUA*, found that as s 91N is directed to the bare fact of nationality there is no requirement for persons to acknowledge their nationality of a third country by taking steps to enter or reside in it. The Court also confirmed that it was immaterial that a country may not recognise dual nationality for s 91N to apply, that there was no requirement created by s 91M that the applicant be able to access effective protection in the third country of which they are a national and that there was no discretion involved in the imposition of invalidity by s 91P. In *SZQYM v MIAC; SZQYN v MIAC* (2014) 220 FCR 505 the Court at [46] confirmed that the existence of dual nationality was a 'jurisdictional fact', but also at [57]–[59] that the test to be applied in establishing that fact was on the balance of probabilities. In the circumstances of those cases, the mere fact that two applicants had claimed to be North Korean nationals was not enough to engage the operation of s 91N as it did not establish to the requisite degree that they were also nationals of South Korea. The correct question to have asked was whether, upon the available evidence, the applicants' were nationals according to the law of that country, and where a confident finding regarding the requirements of the nationality law could not be made, it was necessary to find that the preconditions to s 91N and therefore to the application of s 91P had not been made out. See also *SZWCA v MIBP* [2015] FCCA 1249.
[195] ss 91N(2), 91P.
[196] s 91N(3).

interest to do so, they may give written notice that provisions imposing the restriction do not apply for a seven-day period.[197]

Criminal justice visa holders – s 161

1.3.116 Criminal justice entry visa holders cannot make a valid application for a visa other than a protection visa.[198] This restriction also applies to persons whose criminal justice entry visa was cancelled and who remain in Australia.[199]

Enforcement visa holders – s 164D

1.3.117 An enforcement visa holder cannot make a valid application for a visa other than a protection visa while he or she is in Australia.[200] This restriction also applies to former enforcement visa holders who remain in Australia when the visa ceases to be in effect.[201]

Detainees – s 195

1.3.118 A person in immigration detention has a limited time in which to apply for a visa. If a visa is not applied for within the allowed time, the person may only apply for a bridging or protection visa.[202]

1.3.119 The relevant period is either:

- two working days after being advised of certain matters under the Migration Act,[203] or
- if he or she informs an officer in writing within those two working days of his or her intention to apply, within the next five working days after those two working days.[204]

Unauthorised maritime arrivals and transitory persons – ss 46A and 46B

1.3.120 Sections 46A and 46B prevent unauthorised maritime arrivals and transitory persons from making a valid visa application except in limited circumstances.

[197] s 91Q(1). The Minister may consider information that raises the possibility that the person may obtain protection in the third country: s 91(2). The power can only be exercise by the Minister personally, and there is no duty to consider exercising the power, even if specifically requested to do so: ss 91Q(3), (7). If the Minister issues such a written notice, it must be tabled, with written reasons, before Parliament: ss 91Q(4)–(6).
[198] s 161(5).
[199] s 161(6).
[200] s 164D(1).
[201] s 164D(2). An enforcement visa is a temporary visa to travel to, enter and remain in Australia in relation to fisheries and environmental matters: ss 5, 38A and Division 4A.
[202] s 195.
[203] Namely the provisions of ss 195 [When detainee may apply for a visa], 196 [Duration of detention] and 137K [Applying for revocation of cancellation] if the visa has been automatically cancelled under s 137J.
[204] A 'detainee' means a person detained: s 5. Section 194 requires a detainee to be informed of the consequences of detention.

Unauthorised maritime arrivals

1.3.121 An 'unauthorised maritime arrival' who is in Australia and is an unlawful non-citizen or holds a bridging visa, or a temporary protection visa, or a prescribed temporary visa[205] cannot make a valid visa application, unless the Minister waives the restriction (discussed below).[206]

1.3.122 A person is an 'unauthorised maritime arrival' if they entered Australia by sea at either an excised offshore place after the excision of that place or at any other place after 1 June 2013; and they became an unlawful non-citizen because of that entry; and are not an 'excluded maritime arrival' (that is, a New Zealand passport holder, a Norfolk Island residence authority holder; or a prescribed person).[207]

1.3.123 A person 'entered Australia by sea' if they entered the migration zone except on an aircraft that landed in the migration zone; or they entered the migration zone as a result of being found on a ship detained under s 245F (as in force as in force before the commencement of s 69 of the *Maritime Powers Act 2013* (Cth)) and being dealt with under paragraph 245F(9)(a) (as in force before that commencement); or the person entered the migration zone as a result of the exercise of powers under Division 7 or 8 of Part 3 of the *Maritime Powers Act 2013* (Cth); or the person entered the migration zone after being rescued at sea.[208]

1.3.124 Once a person is an 'unauthorised maritime arrival', they do not lose this status by being granted a visa.[209]

1.3.125 If a person arrived in Australia by sea at the Territory of Ashmore and Cartier Islands, they will not be an unauthorised maritime arrival due to this arrival

[205] Temporary Safe Haven visas, Temporary (Humanitarian Concern) visas, pre 2 December 2013 Temporary Protection visas, and Safe Haven Enterprise visas have been prescribed for these purposes: regs 2.11A and 2.11B as inserted and amended by *Migration Amendment (Protection and Other Measures) Regulation 2015* (Cth) (SLI 2015, No 47).

[206] s 46A(1) as amended *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013* (Cth) (No 35, 2013), which came into effect on 1 June 2013. Prior to these amendments, s 46A(1) prevented an 'offshore entry person' from making a valid application for a visa. The concept of 'offshore entry person' has been replaced by 'unauthorised maritime arrival'. In *SZWAP v MIBP* (No 2) [2015] FCCA 541 the Court found that s 46A applies at the time of the determination of whether or not a valid application has been made, and in that case, it was clear that at the time the partner visa was made the applicant was an unauthorised maritime arrival who was in Australia and was an unlawful non-citizen. The Court held that there was no substance in the proposition that s 46A ceased to apply to the applicant by reason of a grant of a protection visa that was later cancelled.

[207] s 5AA as inserted by No 35 of 2013, which commenced on 1 June 2013.

[208] s 5AA(2). Note that in *CHV17 v MIBP* [2021] FCCA 1489 the Court rejected an argument that an applicant had not 'entered Australia by sea' and was not an unauthorised maritime arrival when he was rescued and detained by Australian authorities using a vessel registered in Canberra, and taken to Christmas Island. The Court held that the classification of the applicant as an unauthorised maritime arrival depended on him having 'entered Australia by sea' and that, in turn, depended on him having entered the 'migration zone' which, as defined, could not have included going aboard a vessel to which his account of events at sea refers: [41]. The fact that the applicant was rescued at sea aboard a vessel registered in Canberra did not have the effect of him entering the 'migration zone': at [41], [48]. The applicant 'entered Australia by sea' because he entered the 'migration zone' otherwise than by aircraft at Christmas Island which was an exercised offshore place at the relevant time. The rescue vessel was not part of the 'migration zone' as the definition of 'migration zone' does not comprehend boats or ships except to the extent that they may be resource installations or sea installations: at [49].

[209] In *BXT17 v MHA* [2021] FCAFC 9 at [54]–[55] the Court, having regard to the legislative history that led to introduction of the definition of 'unauthorised maritime arrival', rejected the appellant's argument that a person ceases to be an unauthorised maritime arrival on the grant of a visa. It did not consider that there is any tension in a person being, at the same point in time, both an unauthorised maritime arrival because of the mode in which they came to Australia, and a lawful non-citizen because of the grant of a visa to that person (at [104]–[105]). In reaching this finding, the Court disagreed with Mortimer J's *obiter* comments in *DBE17 v Commonwealth of Australia* (2018) 265 FCR 600 that a person cannot be at the one time an unauthorised maritime arrival and a lawful non-citizen. In *BXT17* the applicant had been granted a bridging visa, and unsuccessfully contended that this meant he was no longer an unauthorised maritime arrival and therefore was not a 'fast track applicant'.

method.[210] However, it appears that if such a person then entered Australia by sea (i.e. entered the migration zone not on an aircraft) by being taken to an 'excised offshore place' (such as Christmas Island) at any time after the excision time for that place, or any other place at any time on or after 1 June 2013,[211] they will be an unauthorised maritime arrival due to that method of entry.[212] Conversely, it appears that if a person who arrived at the Ashmore and Cartier Islands then entered Australia by sea by being taken to an 'excised offshore place' prior to the excision time for that place or by being taken to any other place prior to 1 June 2013, or were taken by aircraft to another place at any time, they will not be an unauthorised maritime arrival.[213]

1.3.126 A non-Australian citizen child born in the migration zone or a regional processing country to a parent who is an unauthorised maritime arrival will also be an unauthorised maritime arrival and will not be able to make a valid visa application.[214]

1.3.127 Section 46A will not however, prevent an unauthorised maritime arrival from applying for a prescribed class of visa if the unauthorised maritime arrival holds or has held a Class XE safe haven enterprise visa and satisfies prescribed employment, educational or social security requirements.[215]

[210] *DBB16 v MIBP* [2018] FCAFC 178 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 as DBB16 had not 'entered Australia by sea' as defined, he was not an unauthorised maritime arrival on the basis of entering Australia via the excised offshore place of Ashmore and Cartier Islands. See also *DBD16 v MIBP* [2018] FCCA 1801 at [55]–[56] and *BQI16 v MIBP* [2018] FCCA 2342 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. In relation to Christmas Island and the power to appoint proclaimed ports, see *GGD18 & Ors v MHA (No 3)* [2019] FCCA 444 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 1901* (Cth). The Court also found at [40], in the alternative, that it would not be material whether the Gazette was a valid proclamation or not as s 5(1) expressly defines an 'excised offshore place' to include the Territory of Christmas Island and accordingly the applicant had entered Australia at an excised offshore place within the meaning of unauthorised maritime arrival. However, this aspect of the Court's reasoning should be treated with caution as the Court also referred to the applicant as having entered Australia 'by land' as opposed to having 'entered Australia by sea' as required by s 5AA. Upheld on appeal in *GGD18 v MICMSMA* [2019] FCA 1463, however the Court did not consider the validity of the appointment of Christmas Island as a proclaimed port in its judgment. An application for special leave to appeal from the Federal Court judgment was refused: *GGD18 v MICMSMA* [2020] HCASL 83.

[211] Section 5AA(1), as inserted by No 35 of 2013, which commenced on 1 June 2013.

[212] This is because a person who arrives at the Ashmore and Cartier Islands has not 'entered Australia by sea' and has not entered the migration zone, but a subsequent entrance by sea at a place which satisfies s 5AA(1)(a) would render a person an unauthorised maritime arrival. Note that *DBB16 v MIBP* [2018] FCAFC 178 dealt with an applicant who arrived at the Western Lagoon within the Ashmore Reef on 7 November 2012 and was then taken to Darwin. Section 5AA(1)(a)(ii), which provides that a person is an unauthorised maritime arrival if they enter Australia at any other place (such as Darwin) at any time on or after the commencement of this section, was not applicable as this section commenced on 1 June 2013.

[213] This is because these methods of entry do not fall within s 5AA(1)(a).

[214] s 5AA as amended by No 135, 2014. The amendment clarifies 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. The amendment commences on 16 December 2014 but has a prospective and retrospective effect. They apply to children born before, on or after 16 December 2014 to a person who is an unauthorised maritime arrival or transitory person before, on or after that date.

[215] s 46A(1A). The visas for which such a person may apply and the relevant requirements are specified in r 2.06AAB and related legislative instruments IMMI15/070, 15/071 and 15/072. The relevant requirements must be satisfied for a period of 42 months (whether or not continuous) while the applicant holds the visa: reg 2.06AAB(2). For visa applications made on or after 19 September 2020 the 42 month period may include any period of time during a 'concession period' (as defined in reg 1.15N) relating to the Covid-19 pandemic that an applicant spent receiving social security benefits (as determined by the Minister), was

1.3.128 The restriction on making a visa application may be waived by the Minister personally if he considers it is in the public interest to allow the person to apply for a *specified class of visa*.[216] The bar may be lifted for an open ended period or a specified period and the specified period may be different for different classes of unauthorised maritime arrivals.[217] A determination to lift the bar may also be revoked or varied by the Minister personally if he considers it is in the public interest to do so.[218]

Transitory persons

1.3.129 A 'transitory person' who is in Australia and is an unlawful non-citizen or holds a bridging visa, or a temporary protection visa, or a prescribed temporary visa cannot make a valid visa application.[219] A 'transitory person' is defined as:

- 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) or under Division 7 or 8 of Part 3 of the *Maritime Powers Act 2013* (Cth)
- a person who, while a non-citizen and between a particular period was transferred by certain ships to another country
- a non-Australian citizen child of a transitory person born in a regional processing centre or in the migration zone. [220]

1.3.130 As is the case for unauthorised maritime arrivals, the restriction on transitory persons making a visa application may be waived by the Minister if he considers it

unemployed, or employed in an essential service (as specified by the Minister): reg 2.06AAB(4) as inserted by the *Migration Amendment (COVID-19 Concessions) Regulations 2020*.

[216] s 46A(2). The power can only be exercised by the Minister personally, and there is no duty to consider exercising the power, even if specifically requested to do so: ss 46A(3), (7). If the Minister issues such a written notice, it must be tabled, with written reasons, before Parliament: ss 46A(4)–(6).

[217] ss 46A(2A)–(2B) inserted by *Migration Amendment (Protection and Other Measures) Act 2015* (Cth) (No 35, 2015).

[218] s 46A(2C) inserted by *Migration Amendment (Protection and Other Measures) Act 2015* (Cth) (No 35, 2015). The power can only be exercised by the Minister personally, and there is no duty to consider exercising the power, even if specifically requested to do so: s 46A(3), (7). If the Minister issues such a written notice, it must be tabled, with written reasons, before Parliament: s 46A(4)–(6). Where the Minister does not comply with the requirement in s 46A(4)(b) to have laid out before each House of the Parliament a statement setting out the reasons for the revocation of the determination to lift the bar, an applicant will be prohibited from challenging the non-compliance by s 16(3) of the *Parliamentary Privileges Act 1987* (Cth): *XAE v MICMSMA* [2022] FedCFamC2G 19 at [30]–[31]. Section 16(3) of the *Parliamentary Privileges Act 1987* (Cth) provides that it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament. However, the Court in *XAE* found that the applicant had been denied procedural fairness, and the decision to revoke the determination was quashed, as the critical issue upon which the revocation was based was not made known to the applicant (at [64]) and a submission on the revocation received by the Department within the specified timeframe was not brought to the Minister's attention (at [84]).

[219] s 46B(1) as amended by *Migration Amendment (Protection and Other Measures) Act 2015* (Cth) (No 35, 2015). Temporary Safe Haven visas, Temporary (Humanitarian Concern) visas, pre 2 December 2013 Temporary Protection visas, and Safe Haven Enterprise visas have been prescribed for these purposes: reg 2.11A and 2.11B as inserted and amended by SLI 2015, No 47.

[220] s 5(1) definition of transitory person as amended by *Migration Amendment (Unauthorised Maritime Arrivals and Other Measures) Act 2013* (Cth) (No 35, 2013) and *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) (No 135, 2014).

is in the public interest to allow the person to apply for a *specified class of visa*.[221] The bar may be lifted for an open ended period or a specified period and the specified period may be different for different classes of transitory persons.[222] A determination to lift the bar may also be revoked or varied by the Minister personally if he considers it is in the public interest to do so.[223]

Conversion of certain visa applications

1.3.131 The Migration Act and Regulations allow for the conversion of certain types of visa applications into another type of visa application. Specifically, s 45AA provides for regulations to be made (conversion regulations) that convert one type of visa application to another.

Conversion regulations

1.3.132 Conversion regulations may be made where a person has made a valid application (*a* pre conversion application) for a particular type of visa (a pre conversion visa) which has not been granted (whether or not a decision has been made), and since making the application, the requirements for making a valid visa application or the visa criteria have changed, or the visa class ceases to exist.[224]

1.3.133 Conversion regulations allow for a pre conversion visa application to be converted to an application for a different class (converted application). Where this occurs, the pre-conversion application is taken never to have been made, and the conversion application is taken to have always been a valid application. Currently, only reg 2.08F, which relates to certain protection visa applications, has been prescribed as a conversion regulation.

Conversion of certain protection visa applications

1.3.134 Regulation 2.08F provides that a pre conversion application for a Protection (Class XA) visa made before 16 December 2014 by prescribed applicants ceases to be an application for that visa class on 16 December 2014 and is taken never to have been a valid application for a Class XA.[225] Instead the application is taken always to have been a valid application for a Temporary Protection (Class XD) visa. The prescribed applicants are those who hold or have ever held certain kinds of visas (Temporary Protection, Temporary Safe Haven, Temporary (Humanitarian

[221] s 46B(2). The power can only be exercised by the Minister personally, and there is no duty to consider exercising the power, even if specifically requested to do so: s 46B(3) and (7). If the Minister issues such a written notice, it must be tabled, with written reasons, before Parliament: ss 46B(4)–(6).
[222] s 46B(2A) and (2B) inserted by *Migration Amendment (Protection and Other Measures) Act 2015* (Cth) (No 35, 2015).
[223] s 46B(2C) inserted by *Migration Amendment (Protection and Other Measures) Act 2015* (Cth) (No 35, 2015). The power can only be exercised by the Minister personally, and there is no duty to consider exercising the power, even if specifically requested to do so: ss 46B(3), (7). If the Minister issues such a written notice, it must be tabled, with written reasons, before Parliament: s 46B(4)–(6).
[224] s 45AA(1).
[225] reg 2.08F.

Concern)), did not hold a visa on last entry into Australia, are unauthorised maritime arrivals, or were not immigration cleared on last entry into Australia.

1.3.135 Protection (Class XA) visa applications were converted on 16 December 2014 if the Minister had not made a decision on the application under s 65 of the Migration Act before that day. In a limited number of cases, delegates of the Minister have purported to make a decision on Protection (Class XA) visa applications after that day and have not recognised that such applications had converted to Protection (Class XD) visa applications. An application for review of such a decision is in relation to an application for a Protection (Class XD) visa and the Tribunal should make a decision on the Class XD visa application, notwithstanding that it effectively becomes the first decision maker.[226]

1.3.136 Where a decision was made before 16 December 2014, including a decision affected by a jurisdictional error, conversion only occurs if the matter is either:

- remitted to the Minister by the Tribunal in accordance with either s 415(2)(c) of the Migration Act or s 43(1)(c) of the AAT Act, or
- a court orders the Minister to reconsider the matter in accordance with the law; declares or concludes (with or without formal declaration) that a decision of the Minister in relation to the matter is invalid, void or of no effect; or quashes the decision of the Minister in relation to the matter.[227]

1.3.137 To avoid doubt, reg 2.08F(4) clarifies that Protection (Class XA) visa applications were converted on 16 December 2014 if the Minister had made a decision prior to that date, but the visa application was awaiting a further decision by the Minister as a result of the following circumstances: the Tribunal (or the former RRT) had remitted the matter to the Minister; or a court had granted a remedy in relation to the matter whether the remedy was a writ of certiorari or mandamus or the issuing of a declaration or injunction, or some combination of these remedies.[228]

1.4 The consequences of an invalid visa application

1.4.1 An invalid visa application cannot be considered.[229] Where the primary decision maker has made a decision *on the merits* of the visa application (i.e. has refused to grant the visa) where the visa application is not valid, the primary decision may be

[226] *BSD17 v MIBP* [2017] FCCA 2888 at [27]–[28].
[227] reg 2.08F(3) as amended by *Migration Amendment (Conversion of Protection Visa Applications) Regulation 2015* (Cth) (SLI 2015, No 164) in effect from 19 September 2015. This amendment addresses the judgment of *Plaintiff S297/2013 v MIBP* (2015) 316 ALR 161, where the High Court held that the then reg 2.08F(3)(a) applied where a decision was in fact made, regardless of whether it was infected by jurisdictional error. Furthermore, as the applicant in that case had sought a writ of mandamus rather than certiorari, the delegate's decision was not quashed and the conversion regulation in the then reg 2.08F(3)(b)(iii), dealing expressly with the quashing of a legally infirm decision, was not triggered. Therefore, the application was not converted into one for a temporary protection visa.
[228] In *BQG17 v MIBP* [2018] FCCA 3617 at [38] the Court confirmed the validity of reg 2.08F and the amendments to the regulation including reg 2.08F(4) as introduced by SLI No 164, 2015.
[229] s 47(3). See *SZANA v MIMIA* [2004] FCA 203 at [26] agreeing with Allsop J in *SZANA v MIMIA* [2003] FCA 1407 at [22] who referred to *Yilmaz v MIMA* (2000) 100 FCR 495 at [19] per Spender J and at [72] per Gyles J.

wrong or unauthorised[230] but may nonetheless be a Part 7-reviewable decision for the purposes of s 411(1)(c) or a Part 5-reviewable decision for the purposes of s 338.[231]

1.4.2 This means that the Tribunal can consider *the review application*, but cannot make a decision on the *merits* of the visa application.[232] The appropriate decision is to set the delegate's decision aside and substitute a new decision pursuant to ss 349(2)(d) / 415(2)(d) of the Migration Act that the application was not valid and cannot be considered.[233]

'Curing' an invalid visa application

1.4.3 In certain circumstances an invalid application may be 'cured'.

How and when an invalid application may be 'cured'

1.4.4 In *Mon Tat Chan v MIAC*[234] the Full Federal Court considered the point at which a valid application for a student visa was made. The applicant in that case had attempted to lodge a student visa application but had not provided satisfactory evidence of either being enrolled or offered a place in a registered full-time course of study as required by item 1222 of Schedule 1 to the Regulations. He later lodged a further application with a confirmation of enrolment and the applicable visa charge, however, by this time it had been more than 28 days since the expiry of his previous student visa and the Tribunal found the applicant was not able to meet a Schedule 2 criterion for the grant of the visa.

1.4.5 The majority in *Mon Tat Chan* found that an application cannot become valid prior to the applicant complying with the provisions of the Migration Act and Regulations that make the application valid.[235] An application for a visa is only valid if it satisfies the criteria and requirements prescribed under s 46. In the circumstances of that case, the majority found that the lodgement of the second application perfected the earlier application, thereby making it a valid application, but it did not become a valid application until the later date.[236]

[230] Note that in *MIMIA v WAIK* (2003) 79 ALD 152, 19 December 2003) the Full Court gave an *ex tempore* judgment holding that the effect of s 69 of the Migration Act was to cure the invalidity of a primary decision made in breach of s 47(3) such that the Tribunal was entitled to review the decision on the merits. Note, however, the comments of Black CJ and Allsop J in *SZGME v MIAC* (2008) 168 FCR 487 at [31] that given the peculiar circumstances in *WAIK* this judgment provides no basis from departing from *MIMA v Li* (2000) 103 FCR 486 at [81] and [82].
[231] s 69. See *Yilmaz v MIMA* (2000) 100 FCR 495; *SZGME v MIAC* (2008) 168 FCR 487; *MIMIA v WAIK* (2003) 79 ALD 152 at [29]–[31]; *SZMWT v MIAC* [2009] FMCA 254 at [32].
[232] *MIMA v Li; MIMA v Kundu* (2000) 103 FCR 486. See also *SZGME v MIAC* (2008) 168 FCR 487 at [30].
[233] *SZANA v MIMIA* [2004] FCA 203 at [26] agreeing with Allsop J in *SZANA v MIMIA* [2003] FCA 1407.
[234] *MIAC v Mon Tat Chan* (2008) 172 FCR 193.
[235] *MIAC v Mon Tat Chan* (2008) 172 FCR 193 at [10], [55].
[236] *MIAC v Mon Tat Chan* (2008) 172 FCR 193 at [10], [51]. In dissent, Moore J found that the process of applying for the visa began on the earlier date and was later completed. The date of application was the earlier date. In *Mohammad v MIAC* [2009] FMCA 434 at [27], the Court applied *Mon Tat Chan* and held that the application would only have become a valid application on the date that all of the evidence was submitted, and until the evidence of enrolment was submitted, the student visa application was invalid. See also *Amodi v MIAC* [2013] FMCA 70 at [26]– [27], where the Court held that an application for a subclass 487 visa, which was invalid on lodgement because a completed and executed sponsorship form (Form 1277) was not in existence, became valid, although not with retrospective effect, upon the completion and execution of the relevant form.

1.4.6 It is clear, therefore, that an incomplete visa application can be cured by provision of the missing information to the Department but will not become valid until all the statutory requirements for a valid application are met.

Can an application be cured after the review application is lodged?

1.4.7 As discussed above, an application which is not valid should not be considered, because to do so would be contrary to s 47(3). Occasionally, however, a case comes before the Tribunal where it becomes apparent, that a decision has been made on an application which does not appear, on the evidence, to be validly made. A question may arise, in such circumstances, as to whether the invalid application can be cured *after* the primary decision has been made and while that decision is being reviewed by the Tribunal.

1.4.8 There is a body of case law establishing that an application for a protection visa that would otherwise be invalid on the basis of a failure to substantially comply with the directions on the form may be 'cured' by subsequent action.

1.4.9 In order for such a defect to be cured, the relevant information must be provided to an office of the Department[237] in accordance with reg 2.10 of the Regulations.[238] This was confirmed by Full Federal Court in *MIMIA v Li; MIMA v Kundu*,[239] which held that in order for the defect to be cured, the relevant information must be provided to an office of the Department rather than the *Tribunal* and that an invalid application cannot be cured by provision of additional information directly to the Tribunal. A different view was taken by Bennett J in *SZECD v MIMIA*,[240] who held that the missing information could complete an invalid application when submitted to the Department *or* the Tribunal. However, the reasoning in *SZECD* was overturned by a majority of the Full Court in *SZGME v MIAC*.[241]

1.4.10 It also appears that the supply of the requisite information to the Department may occur after the primary decision is made but before the Tribunal's decision. The Full Federal Court in *Yilmaz v MIMA*[242] held, by majority, that the application may be completed at a later time, and there was no reason as to why this could not take place in the course of review by the Tribunal. While there had been some doubt

[237] *MIMA v Li; MIMA v Kundu* (2000) 103 FCR 486 and *SZGME v MIAC* (2008) 168 FCR 487.
[238] Regulation 2.10 specifies that if the application for a visa is made outside Australia then it must be made in accordance with the requirements that apply to it under the Regulations, or if there are no specific requirements, then 'at a diplomatic, consular or migration office maintained by or on behalf of the Commonwealth outside Australia' (reg 2.10(2)(b)), or if the application is made in Australia, then it must be made in accordance with the requirements that apply to it under the Regulations, or if there are no specific requirements, then 'at an office of Immigration in Australia' (reg 2.10(2A)(b)).
[239] *MIMA v Kundu* (2000) 103 FCR 486 at [77].
[240] *SZECD v MIMIA* (2006) 150 FCR 53. Justice Bennett relied on authority including *Yilmaz v MIMA* (2000) 100 FCR 495, *Zubair v MIMIA* (2004) 139 FCR 344, *MIMIA v Ahmed* (2005) 143 FCR 314 and *Uddin v MIMIA* (2005) 149 FCR 1 in declining to follow *Li*. This approach is surprising as the Courts in *Zubair*, *Ahmed* and *Uddin* were called upon to consider the slightly different issue of the Tribunal's ability to 'cure', through merits review, defects in a delegate's decision rendered invalid by the delegate's failure to follow statutory procedure. Further, the Court in *Li* distinguished *Yilmaz* on the grounds that it did not directly consider whether the provision of information to the Tribunal as opposed to the Department would have the effect of completing an invalid application.
[241] *SZGME v MIAC* (2008) 168 FCR 487 at [22], [70].
[242] *Yilmaz v MIMA* (2000) 100 FCR 495.

about whether this is consistent with the reasoning in *Li,*[243] the matter was resolved in *SZGME v MIAC*. The majority of the Full Court in *SZGME v MIAC* found that *Yilmaz* and *Li* are consistent[244] but concerned different factual circumstances. *Yilmaz* concerned an application for a visa which was incomplete when the delegate made the primary decision, but was completed by the provision of information both to the Tribunal and to the Department, in accordance with reg 2.10(1)(b). In *Li*, no valid application had ever been lodged because the additional information was only provided to the Tribunal.

1.4.11 Where an invalid protection visa application has been cured by the subsequent provision of information to the Department, the Tribunal must consider and make a decision on the merits of the application.[245]

1.4.12 There has been no case law on whether invalid applications for other types of visas can be cured in the course of a Tribunal review by the provision of missing information to the Department. Nor has there been any consideration of whether a failure to comply with some other requirement for a valid application can be subsequently cured. All of the relevant case law to date has concerned protection visa applications which were invalid owing to a failure to substantially comply with the form.

1.4.13 In practice, it would be rare for this situation to arise, firstly because the Department normally screens out invalid applications, and secondly because the applicant may not be aware that the application was considered invalid and so is unlikely to have supplied the missing information to the Department.

1.5 Applications for sponsorship and nomination

1.5.1 The Migration Act and Regulations also contain provisions relevant to sponsorship and nomination applications. These applications relate to temporary and permanent business visas and temporary work visas.

[243] Although the Court in *MIMA v Li; MIMA v Kundu* (2000) 103 FCR 486 did not consider the issue expressly, it held that reg 2.10(1)(b) required that any additional information provided to 'cure' an invalid application must be given to the Department of Immigration, not the Tribunal. In reaching this conclusion the Court considered that reg 2 10(1)(b) had been drafted on the assumption that an application for a visa is to be considered by the Minister, at least in the first instance (at [72]). Such reasoning does not sit comfortably with that in *Yilmaz*. Nevertheless, while the Court in *Li* distinguished *Yilmaz* on the basis that the additional information was never supplied to an office of the Department of Immigration, it did not express disagreement with it.

[244] *SZGME v MIAC* (2008) 168 FCR 487 at [22].

[245] s 414(1). See *SZANA v MIMIA* [2004] FCA 203 agreeing with Allsop J in *SZANA v MIMIA* [2003] FCA 1407. In this case the applicant lodged a protection visa application on 1 July 1997 and in the sections requiring him to state his reasons for claiming to be a refugee the words 'please see attached' were written. On 10 July 1997 the Minister's delegate refused the application on the grounds that no claims had been set out. On the same day (10 July 1997) the Department received a document from the applicant in Turkish containing sufficient particulars of his claims for protection. The Court held that the application had been cured, even though the primary decision had been made, and that the Tribunal was obliged to address the merits of the application upon review.

1.5.2 The provisions regarding sponsorship and nomination relevant to certain temporary visas are contained in Part 2 Division 3A of the Migration Act and from time to time, apply to the following visa subclasses:[246]

- Subclass 401 (Temporary Work (Long Stay Activity)) visa
- Subclass 402 (Training and Research) visa
- Subclass 403 (Temporary Work (International Relations)) visa in the Seasonal Worker Program stream
- Subclass 407 (Training) visa
- Subclass 408 (Temporary Activity) visa
- Subclass 416 (Special Program) visa
- Subclass 420 (Entertainment) visa
- Subclass 457 (Business (Long Stay) / Temporary Work (Skilled)) visa
- Subclass 488 (Superyacht Crew) visa.

1.5.3 Under these provisions, a person is to make an application for approval as a sponsor in accordance with the Regulations which specify the form that must be completed, the application fee (if any) to be paid and how and where sponsorship applications must be made.[247]

1.5.4 The Regulations also specify certain requirements, including the approved form, the prescribed fee and other information in respect of applications for nomination of an occupation,[248] employer nominations[249] and nominations in respect of temporary work visas.[250]

1.5.5 For further information, see the relevant MRD Legal Services Commentary for the particular Subclass or sponsorship/nomination application.

[246] Prescribed by reg 2.56 as amended by *Migration Amendment (Temporary Activity Visas) Regulation 2016* (Cth) (F2016L01743). The following visa subclass have been repealed, but were prescribed by reg 2.56 prior to the amendments made by F2016L017413: Subclass 411 (Exchange) visa, Subclass 415 (Foreign Government Agency) visa, Subclass 419 (Visiting Academic) visa, Subclass 421 (Sport) visa, Subclass 423 (Media and Film Staff) visa, Subclass 427 (Domestic Worker (Temporary) – Executive) visa, Subclass 428 (Religious Worker) visa, Subclass 442 (Occupational Trainee) visa and Subclass 470 (Professional Development) visa.
[247] s 140F and reg 2.61.
[248] s 140GB(3) and reg 2.73.
[249] reg 5.19.
[250] s 140GB(3) and regs 2.73A–2.73C.

2. NOTIFICATION OF PRIMARY DECISIONS

2. NOTIFICATION OF PRIMARY DECISIONS[1]

2.1 Overview of notification of primary decisions

2.1.1 The *Migration Act 1958* (Cth) (the Migration Act) and *Migration Regulations 1994* (Cth) (the Regulations) specify a number of requirements for the notification of primary decisions. Different notification schemes apply depending upon whether the decision is one to refuse a visa, cancel a visa, not to revoke a cancellation or a non-visa (e.g. sponsorship/nomination) decision. Table 1, at the end of this chapter, summarises the requirements for valid notification of the different types of primary decision reviewable in the Migration and Refugee Division (MRD) of the Tribunal.

2.1.2 A failure to properly notify an applicant does not affect the validity of the primary decision.[2] Compliance by the Minister (or his delegate) with the notification requirements under the Migration Act and Regulations is however, relevant to the determination of whether a valid review application has been made, as time limits for applying for review only commence to run once a person has been validly notified of the primary decision. If the time for applying for review has not commenced, a valid review application can nevertheless still be lodged.[3] For further discussion of the requirements for a valid application for review, see Chapter 4 – Review applications.

2.1.3 Defective notification may result from non-compliance with either the requirements as to the *content* of the notice or the *method* of the notification. Non-compliance with the requirements as to the *method* of the notification may not necessarily result in defective notification if the notice was, in fact, received.[4]

2.1.4 The Minster has no power to vary or revoke a decision after the day and time the record of the decision is made.[5] Accordingly, the Minister is *functus officio*[6] at that relevant time. The time to make a valid review application will not start again if the applicant is given the primary decision again.[7]

[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Migration Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] ss 66(4) (visa refusals); 127(3) (visa cancellations); 137M(3) (non-revocation); 137S(2) (visa cancellation).
[3] See *SZOFE v MIAC* (2010) 185 FCR 129 at [33]–[35].
[4] s 494C(7) and reg 2.55(9). Note these provisions apply to documents given on, or after, 5 December 2008: *Migration Amendment (Notification Review) Act 2008* (No 112, 2008) s 29.
[5] s 67(4). See *DQX16 v MHA* [2019] FCA 1705 at [35]–[36] where the Federal Court upheld the lower court's finding that, for the purposes of s 67 (which provides that a record of the decision must state the day and time of its making), the record made in the Department's Integrated Client Services Environment (ICSE) constituted a record of the day and time of the decision in circumstances where the written reasons prepared for s 66 did not. The record of the decision is distinct from the notification of the decision prepared for s 66 (noting that there is no obligation for the time of the decision to be included in that notice). See also *AEW18 v MHA* [2019] FCA 208.
[6] The expression *functus officio* refers to the state of an administrator or tribunal which has discharged its duty or performed its functions so that nothing further remains to be done: Butterworths Australian Legal Dictionary, 1997.
[7] *MIAC v Abdul Manaf* [2009] FCA 963.

2.2 Decisions to refuse to grant a visa

Notifications

2.2.1 Section 66 of the Migration Act sets out the notification requirements that the Minister must comply with in notifying decisions to refuse to grant a visa. Section 66 specifies both the method and the content of the notification.[8]

Content of the Notice

2.2.2 According to s 66(2), notification of a primary decision to refuse a visa where there is a review right in the MRD of the Tribunal must:

- specify the criterion on which the visa was refused (if that was the basis for the refusal);[9]
- specify the provision of the Migration Act or Regulations, if any, that prevented the grant of the visa (if that was the basis for the refusal);[10]
- give written reasons why the criterion was not satisfied or the provision prevented the grant of the visa;[11]
- state that the decision can be reviewed;[12]
- state the time in which the review application may be made;[13]
- state who can apply for review;[14] and
- state where the review application can be made.[15]

2.2.3 In *DFQ17 v MIBP*[16] the Full Federal Court held that the requirement in s 66(2)(d) to 'state' the information in the relevant subsections requires the notification letter to set out the information in a way which is not only complete, but clear as well. A notification that does not clearly convey the information in s 66(2) will result in an invalid notification so that the prescribed time period in which to apply for review will not have started to run.[17] Whether the content of the notification is sufficiently clear and complete requires assessment in each case (see below).

2.2.4 Where a number of applicants have combined their visa applications, each applicant must be notified of the decision in accordance with s 66(2), although, as discussed below, it is sufficient if such information is contained in the same notice.

[8] In *Brar v MIAC* [2012] FMCA 593, the Court held that the Minister or delegate's subjective intention is not relevant as to whether the conduct postulated under ss 66(1) and 494B is fact complied with. The Minister is obliged to send the notification documents to a person pursuant to s 66(1) of the Migration Act and this is done by one of the methods set out in s 494B. This posits an objective test.
[9] s 66(2)(a).
[10] s 66(2)(b).
[11] s 66(2)(c). Under s 66(3) the requirement in s 66(2)(c) to give written reasons as to why the criterion is not satisfied does not apply if the visa is a visa that cannot be granted while the applicant is in the migration zone and the decision is not reviewable in the MRD of the Tribunal. See *Qu v MIMA* [2001] FCA 1299 at [8].
[12] s 66(2)(d)(i).
[13] s 66(2)(d)(ii).
[14] s 66(2)(d)(iii).
[15] s 66(2)(d)(iv).
[16] *DFQ17 v MIBP* [2019] FCAFC 64 at [58], [1], [67].
[17] *DFQ17 v MIBP* [2019] FCAFC 64 at [47], [62], [1], [67].

2.2.5 A notice given by the Department before, on or after 1 July 2015 which includes a statement about an entitlement to apply for review of a decision to a discontinued Tribunal, is taken to meet any requirement to give a notice about an entitlement to apply for review of the decision to the AAT.[18]

Specifying the criterion on which the visa was refused

2.2.6 The notice must specify the criterion on which the visa was refused, but this does not require that it be correct, or precise. In *Singh v MIAC*[19] the Court considered whether the requirement in s 66(2)(a), to specify the criterion on which the visa was refused, had been met in circumstances where the decision record did not expressly identify the relevant sub-criterion, and quoted a criterion incorrectly in an annexure to the record. The Court held that although the record had not identified the relevant sub-criterion, it had identified the criterion and had used a form of words which effectively identified the sub-criterion under consideration. The incorrect quotation of the criterion in an annexure did not affect the correctness of the citation in the body of the decision record.

Stating that the decision can be reviewed

2.2.7 If the applicant has a right to have the decision reviewed, the notice must state that it can be reviewed.[20] Where a decision is reviewable only if a particular condition is met (such as where the applicant is the subject of an approved nomination, or there is a review of a nomination refusal, at a particular point in time), there is no obligation to advise an applicant of those specific requirements when stating that the decision can be reviewed.[21]

Stating the time in which the review application may be made

2.2.8 The obligation in s 66(2)(d)(ii) to state the time in which the review application may be made requires that it be conveyed in a complete and clear manner.[22] While it does not require specification of the actual date by which an application must be lodged, it must provide complete information that clearly discloses to the review

[18] See item 15AE of sch 9 to the *Tribunals Amalgamation Act 2015* (Cth) (Amalgamation Act).
[19] *Singh v MIAC* [2010] FMCA 1000.
[20] s 66(2)(d)(i).
[21] *Yambao v MICMA* [2022] FedCFamC2G 704 at [33]. The applicant had sought of review of a decision to refuse a Subclass 457 visa. The notice accompanying the refusal decision stated that the applicant was entitled to apply for merits review of the decision but did not set out the effect of s 338(2)(d) and reg 4.02. In the applicant's case, s 338(2)(d) and reg 4.02 required that at the time the review application was lodged, he needed to be the subject of an approved nomination or a pending nomination, or there needed to be a review application of a nomination refusal in respect of the applicant. None of these were met and the Tribunal found that it did not have jurisdiction. The Court held that there was no proper basis for reading into s 66(2)(d) an enlarged obligation on the Minister to advise potential review applications of the requirements of s 338(2)(d) and reg 4.02. The Court noted at [34] that it was for the applicant to seek advice and understand the effect of the reason for the refusal, and how that might impact any review. In contrast to *Yambao* where the notification did not set out the specific requirements of s 338(9), the Court in *Nguyen Huy* (BRG164/2021; oral decision) considered a notification for a Subclass 461 visa refusal which included erroneous information stating that the applicant could seek review of the decision only if they had an approved sponsor, or the sponsor was seeking merits review of a sponsorship refusal decision. There is no requirement for a Subclass 461 visa for there to be an approved sponsor. The Court held that the applicant was not notified in accordance with s 66(2). The Court, relying on *MHA v Parata* [2021] FCAFC 46 held that the notification was defective, and the prescribed period had not started to run. The Court acknowledged that the defect in the notification had not affected the applicant from applying for review, and it was the applicant's inadvertence that she did not pay the prescribed fee.
[22] *DFQ17 v MIBP* [2019] FCAFC 64.

applicant when the review application has to be lodged.[23] It is not necessary that the notification include the terms of s 494B of the Migration Act, or that if posted, an explanation of the requirement that it be dispatched within 3 working days of the letter.[24]

2.2.9 An explanation of the way in which the time is calculated and how it is set out in the notification letter may affect whether the information is clearly conveyed. In *DFQ17 v MIBP*[25] the Full Federal Court found a notification letter failed to state the information in s 66(2)(d)(ii) about the time in which a review application may be made, in circumstances where the information was set out across three pages under different headings in the letter (the date of the notification, the time the appellant was taken to have received the notification and the prescribed period).[26] The Court concluded the notification letter was defective as it was 'piecemeal, entirely obscure and completely incomprehensible', with the result that it failed to convey that any review application had to be made by the relevant date.[27] In *BMY18 v MHA*[28] the Full Federal Court considered the validity of a number of types of notification letters in light of the problems identified in *DFQ17 v MIBP.* It expanded upon *DFQ17 v MIBP* and found that a notification letter will be defective where, irrespective of whether it was sent by post or email, the information about the time the applicant is taken to have received the notification is separated from information about the prescribed period and is under the heading 'Financial or case worker assistance' or 'Receiving this letter'.[29]

2.2.10 In *ALN19 v MICMSMA*,[30] the Federal Court considered a notification in which the information about when the applicant was taken to have received the notification was located at the top of the third page without a hearing, which followed on from information about the location of Tribunal registries under the heading 'Registries of the Administrative Appeals Tribunal'. The Court held that this type of notification did not convey the information in 'a unified and coherent manner', and was therefore invalid. The Court considered that there appeared to be three headings on the second page of the letter as each heading was in bolded font. These headings were 'Lodging an application for merits review', 'Online' and 'Registries of the Administrative Appeals Tribunal'. The Court concluded that the connection between

[23] *Cao v MIAC* (2009) 176 FCR 396. Also see, *Cao v MIAC* [2009] FMCA 70; *SZNFB v MIAC* [2009] FMCA 514; *Khan v MIAC* [2007] FMCA 419; *Milon v MIAC* [2009] FMCA 85; and *Benissa v MIAC* [2010] FMCA 657.
[24] *Milon v MIAC* [2009] FMCA 85 at [18], [25].
[25] *DFQ17 v MIBP* [2019] FCAFC 64.
[26] The notification was sent by post. In order to determine the time in which to lodge a review application the appellant was required to note three separate pieces of information namely the date of the notification letter; the date of deemed receipt i.e. that she was taken to have received the letter 7 *working* days *after* the date of that letter; and that the review application had to made within 28 *calendar* days commencing *on* the day of deemed receipt, therefore requiring double-counting of 14 February 2017 (day of deemed receipt) in order to calculate that 13 March 2017 was the last day to lodge the review application.
[27] *DFQ17 v MIBP* [2019] FCAFC 64 at [62].
[28] *BMY18 v MHA* [2019] FCAFC 189. In *CAV18 v MHA* [2020] FCA 173 at [41], [47] the Court found that the notification letter was indistinguishable from that in *BMY18* and was bound to follow that judgment.
[29] *BMY18 v MHA* [2019] FCAFC 189 at [35]–[38]. However, in *Singh v MIBP* [2020] FCAFC 31 at [15] the Court held that a statement under the heading, 'Receiving this Letter' was clear and relevant and the wording of the heading was clearly referable to the words 'taken to receive this letter' under the heading 'Review rights', such that the letter was not defective as a result of the use of the 'Receiving this Letter' heading. An application for special leave to the High Court was dismissed*: Singh v MIBP* [2020] HCASL 164.
[30] *ALN19 v MICMSMA* [2019] FCA 1592 at [40]–[43]. Note that the Court considered that the type of notification in this matter could be distinguished from the valid notification in *Ali v MHA* [2019] FCA 1102. In *Ali* the deemed receipt information was considered to be under the bolded heading 'Lodging an application for merits review' (the 'Registries of the Administrative Appeals Tribunal' appeared above the deemed receipt information but the heading was underlined and not bolded).

the first heading, 'Lodging an application for merits review', which was an appropriate heading, and the sentence at the top of the third page was obscure.[31]

2.2.11 In respect of valid notifications, *BMY18 v MHA* confirmed that where all the information required to determine the time period to make a review application (i.e. the prescribed period and when the applicant is taken to have received the notification) is contained under an appropriately titled heading such as 'Review Rights', the notification will be valid (irrespective of whether it was sent by post or email for both Part 5 and Part 7 matters).[32] The Court also confirmed the approach taken in *Ali v MHA*[33] that a notification letter will be valid if the information about when the notification is taken to have been received is under the heading 'Lodging an Application for Review', even where it is separated from the prescribed period information.[34]

2.2.12 In *Singh v MIBP*[35] the Court considered a notification where the information about when the letter was taken to have been received was under the heading, 'Receiving this Letter' on a separate page to information about review rights and found that the heading was clear and relevant and therefore satisfied the requirement in s 66(2)(d)(ii) to state the time in which the review application may be made.

2.2.13 In relation to notification of a cancellation of a protection visa where the applicant is in immigration detention on the day of notification, to be a valid notification it must clearly convey that the prescribed period of seven working days commences on the day the applicant is notified of the decision or, if that day is not a working day, that it commences on the first working day after the day the applicant is notified.[36] In *ALN19 v MICMSMA*,[37] the Court held that this information is not clearly conveyed where the following text is used: *'As you are in immigration detention, the prescribed timeframe commences on the day on which you were notified of this decision, and ends at the end of seven working days (beginning with the first working day that occurs on or after that day).'* The Court considered that the fact that the identified seven day period commenced on the day of notification in this particular matter, and ended on the sixth working day after notification, was not clearly conveyed.[38] In reaching its conclusion, the Court reasoned that the language used was confusing because in the parentheses the subject of the verb 'beginning' was not identified and no specific day was identified in the reference to the first working day that occurs on or after that day.[39] The Court also concluded that the

[31] *ALN19 v MICMSMA* [2019] FCA 1592 at [40].
[32] *BMY18 v MHA* [2019] FCAFC 189 at [17]–[19].
[33] In *Ali v MHA* [2019] FCA 1102 at [24]–[25] and [29]–[30] the Federal Court found that the Tribunal was correct to find that it did not have jurisdiction and a notification for a Part 5-reviewable decision which was sent by email and included information to determine the time period to lodge a review application in three separate places in the departmental notification complied with s 66(2)(d)(ii) and was valid. The information required to calculate the time by which a review application had to be lodged was the date of the notification on the first page, information about the prescribed period under 'review rights' on the first page and information about when the notification was taken to have been received under the heading 'lodging an application for merits review' on the third page.
[34] *BMY18 v MHA* [2019] FCAFC 189 at [36].
[35] *Singh v MIBP* [2020] FCAFC 31 at [15]. An application for special leave to the High Court was dismissed*: Singh v MIBP* [2020] HCASL 164.
[36] reg 4.31.
[37] *ALN19 v MICMSMA* [2019] FCA 1592 at [48]–[54].
[38] *ALN19 v MICMSMA* [2019] FCA 1592 at [52].
[39] *ALN19 v MICMSMA* [2019] FCA 1592 at [51].

letter was drafted in a manner that allowed for uncertainty as to whether it would be handed to the appellant in immigration detention on a working day.[40]

2.2.14 A notification that lacks clarity in stating the time within which a review application must be lodged will not be a valid notification under the Act and the prescribed period for applying for review will not have started to run.

Stating the person who can apply for the review

2.2.15 The obligation in s 66(2)(d)(iii) to state who can apply for review only requires that the notice identify the person or persons who can apply for review, and does not require further information about the circumstances in which the person can make an application or the characteristics of that person (such as whether or not they are required to be in the migration zone at the time of making the review application).[41] The information must also be clearly and completely conveyed.[42]

Stating where the review application may be made - relevant Tribunal addresses

2.2.16 The obligation in s 66(2)(d)(iv) to state where an application for review can be made does not necessarily require the notice to specify all possible places at which that application could be made.[43] Rather, it depends upon the individual circumstances of the case as to whether there has been compliance with this obligation if only some of the places are included in the notification.[44] The obligation does not require that the applicant be informed of the physical location in which they must be to make that application (that is, whether they can lodge an application for review while offshore), but only requires that the notice include the places at which an application can be made.[45]

2.2.17 In *SZOFE v MIAC*, Emmett J held that s 66(2)(d)(iv) only required the notification to state the place an application can be made where, in all the circumstances of the case, it is convenient and adequate for the purposes of the particular applicant.[46] In the alternative, his Honour held that even if s 66 did require all places to be included, any failure to comply strictly with that requirement would not necessarily render the review application invalid without consideration of the extent and consequences of the departure.[47] This view was shared by Buchanan and Nicholas JJ who considered that there could not be an adequate assessment of whether the requirements of s 66 had been breached, or of whether the jurisdiction of the Tribunal was engaged, without some examination of the consequences of the alleged non-compliance.[48]

[40] *ALN19 v MICMSMA* [2019] FCA 1592 at [53].
[41] *Gandhi v MIBP* [2016] FCCA 2986 at [26]. The applicants argued that ss 66(2)(d)(iii) and (iv) when read together required the Minister to notify them that they were required to be in the migration zone to apply for review of the decision, and that they had been denied procedural fairness as the notification did not include this information. The Court rejected this argument and held that a plain reading of the provision does not require such information to be included.
[42] *DFQ17 v MIBP* [2019] FCAFC 64.
[43] *SZOFE v MIAC* (2010) 185 FCR 129 which rejected the view in *Hasan v MIAC* (2010) 184 FCR 523 that all places where a review application may be made must be included in the primary notification of decision.
[44] *SZOFE v MIAC* (2010) 185 FCR 129.
[45] *Gandhi v MIBP* [2016] FCCA 2986 at [28].
[46] *SZOFE v MIAC* (2010) 185 FCR 129 at [27]–[28].
[47] *SZOFE v MIAC* (2010) 185 FCR 129 at [30].
[48] *SZOFE v MIAC* (2010) 185 FCR 129 at [67]–[68].

2.2.18 In *SZOFE v MIAC,* the Court found that there was nothing unfair or inconvenient about telling the applicant, who resided in Sydney, that an application for review could be lodged in Sydney or Melbourne. The applicant suffered no injustice because the notification failed to also state an application could be made in Perth, Brisbane or Adelaide. The Court noted that it was conceivable that if a potential applicant in Queensland, South Australia, or Western Australia were denied an effective or adequate opportunity to lodge a review application because the primary notification only specified an address in Sydney or Melbourne, there may be a failure to comply with s 66(2)(d)(iv); however, whether or not that was so would depend upon all the circumstances of the cases.[49]

Must all the information be contained in the notification letter itself?

2.2.19 It is not necessary that all the information required by s 66 be contained in the notification letter itself. In some circumstances it will be sufficient if the requisite information is contained in an enclosed brochure, such as the Tribunal's 'M10' brochure, or in the attached decision record. For example, inclusion of the brochure providing addresses where a review application may be lodged would be sufficient to satisfy the requirement in s 66(2)(d)(iv), provided there is evidence of that fact. A notation on the decision notification letter as to the enclosure of the brochure, and evidence from the Department as to the usual practice of including the brochure may be sufficient.[50] In *Haque v MIAC (No 3)* the Court found that, on the totality of evidence, the brochure had been included with the decision notification letter and that compliance with s 66(2)(d)(iv) could be inferred because the decision letter stated that the leaflet was enclosed and provided information on 'how to lodge a review application' which included relevant addresses, there was credible evidence from the departmental officer as to 'usual practice' and the applicant could not establish that he had not in fact received the letter. [51]

2.2.20 Similarly, the requirement in s 66(2)(a) that the notification must specify the criterion on which the visa was refused will be met if the criterion is specified in the accompanying decision statement of reasons.[52]

[49] *SZOFE v MIAC* (2010) 185 FCR 129 at [32], [68]. The reasoning in *SZOFE* was followed in *SZOJO v MIAC* [2010] FMCA 555 at [21]. The notification was found not to be defective in circumstances where the brochure enclosed with it identified the Tribunal's Sydney address, the applicant had provided a Sydney address for postal communications and was residing there when delivery was attempted. Similarly, in *SZNOY v MIAC* [2010] FMCA 510 at [60]–[61], the Court found, following *SZOFE*, that the failure of the notification letter to identify all registry addresses did not deprive an applicant of an effective and adequate opportunity to apply for review where his residential and postal addresses in Sydney remained unchanged, the letter was dispatched to his Sydney postal address and the review application was lodged at the Sydney registry. However, in light of *DFQ17 v MIBP* [2019] FCAFC 64 at [52] where the Full Court held that the requirement in s 66(2)(d) to 'state' the information in the relevant subsections requires the provision of *complete* information, it is open to argument that not including *all* possible places where a review application can be lodged may be considered as less than complete. However, *DFQ17 v MIBP* did not identify the boundaries of what might be treated as providing complete information in the context of s 66(2)(d)(iv), nor did it consider *SZOFE*, accordingly, in the absence of further judicial consideration on this point, *SZOFE* still appears to be the leading authority on this issue.

[50] For the general proposition that a brochure will be sufficient see, *Nguyen v MIAC* [2009] FMCA 933 at [23]; *SZOJO v MIAC* [2010] FMCA 555 at [22].

[51] *Haque v MIAC (No 3)* [2010] FCA 772 at [44]. In that case, the Court distinguished an earlier judgment, *Zhan v MIAC* (2003) 128 FCR 469, in which a brochure was inadvertently not sent.

[52] This was confirmed in *Benissa v MIAC* [2010] FMCA 657 at [58].

Decision record and notification letter need not be signed

2.2.21 There is no requirement for a decision of a delegate or a notification letter giving notice of a delegate's decision to be signed.[53] In *Sherpa v MIAC* Court found that by placing his name and position number on both documents, the Minister's delegate demonstrated that he was the author of the document and had duly adopted the decision as his own.[54]

2.2.22 Similarly, in *Singh v MIAC* the Court found that the absence of a signature on the decision record did not invalidate the notification of the decision and that even if a signature had been required, the applicant did not suffer any adverse consequences from the lack of a signature.[55] The Court found that the letter in that case, which was signed, adopted the decision record, which was unsigned, by reference to that record, and that the signature on the letter served to satisfy any formal requirement (if any such requirement could be said to exist) that the notification be signed.

The effect of non-compliance with content requirements

2.2.23 If the notice does not contain all of the s 66 elements, it will not be regarded as valid and the time to apply for review will not commence to run.[56] However, judicial authority has suggested that not all failures to comply strictly with s 66 will amount to error such as to invalidate the notification.

2.2.24 In *MIAC v SZIZO*, the High Court considered the consequence of a failure to follow procedural steps set out by the Migration Act, in the context of notification by the Tribunal of a hearing invitation. The Court held that those procedural steps are designed to ensure that an applicant for review is enabled to properly advance his or her case at the hearing, and that a failure to comply with them will require consideration of whether, in the events that occurred, the applicant was denied natural justice.[57] This principle has also been extended to some of the requirements of s 66. In *SZOFE v MIAC,* Justices Buchanan and Nicholas held that there cannot be adequate assessment of whether the requirements of s 66 have been breached without some examination of the consequences of the alleged non-compliance, which need to be assessed in each particular case.[58]

[53] *Sherpa v MIAC* [2010] FMCA 664 at [22]–[28].
[54] *Sherpa v MIAC* [2010] FMCA 664 at [22]–[28].
[55] *Singh v MIAC* [2010] FMCA 1000 at [21]–[23].
[56] *DFQ17 v MIBP* [2019] FCAFC 64 at [62] where the Court held that where a notification did not state a matter in s 66(2)(d)(ii), it was not in dispute that this meant time to make a review application had not commenced. See also *Sikora v MIMIA* [2005] FMCA 515. In that case notification of the primary decision was transmitted by fax in accordance with s 494B(5) of the Migration Act. The authorised recipient did not receive the documentation in full. Only the letter notifying the applicant of the refusal to grant his visa and the decision explaining the reasons for the refusal were successfully transmitted. The entire package, which included the brochure outlining where the application for review could be made, was sent in the ordinary mail a couple of days later. The Court relied on *Zhan v MIMIA* (2003) 128 FCR 469 to find that on the date of the notification by fax there was no notification which included the brochure as required by s 66(2)(d)(iv) of the Migration Act. This meant that time had not begun to run against the applicant under s 347(1)(b) of the Migration Act. In *Maroun v MIAC* [2009] FCA 1284, the Court at [21] made obiter comments that not every breach of s 66(2)(d)(iv), no matter how trivial, would operate to invalidate a notice. However, this should be treated with caution as the weight of authority above suggests that if a decision notice does not satisfy all elements of s 66(2)(d) time for review will not commence to run against the applicant.
[57] *MIAC v SZIZO* (2009) 238 CLR 627 at [36].
[58] *SZOFE v MIAC* (2010) 185 FCR 129.

2.2.25 The principle of 'practical injustice' has been directly applied to:

- *the requirement in ss 66(2)(a) to specify the criterion on which the visa was refused.* In *Singh v MIAC,*[59] the delegate had not directly identified which specific aspect of the criterion in cl.572.223 the applicant had failed to satisfy, and an attachment to the record erroneously quoted cl.573.223. The Court held that the fact that the delegate had not expressed his decision with the level of clarity that the applicant submitted was necessary is of no importance unless such a failure had practical consequences for the applicant in the sense of denying him an effective or adequate opportunity to make an application for review.[60] The Court's comments appear to extend the principle in *SZOFE* such that even if there *was* a failure to comply with s 66(2)(a), it would not invalidate the notification unless there was some practical consequence to the applicant.
- *the requirement in s 66(2)(d)(ii) to specify the time in which the review application may be made.* In *Benissa v MIAC*[61] the decision notice calculated the last day for making a review application to be one day more than what the prescribed period should have been, but the applicant nonetheless applied within time. The Court applied the reasoning in *SZOFE* and found that nothing turned on any possible error of one day in calculation of the period specified in the notification.[62]
- *the requirement in s 66(2)(d)(iv) to specify where a review application can be made.* In *SZOFE v MIAC,*[63] notification of the primary decision had included only the addresses for the Sydney and Melbourne registries of the then RRT. The applicant lived in Sydney, and had in fact made an application for review in Sydney. The Full Federal Court held that there was no practical consequence, unfairness or inconvenience arising from the delegate's failure to inform her of all possible places that an application for review may be made.[64] Whether a failure to list all possible places that an application can be made will constitute a failure to comply with s 66(2)(d)(iv) will depend upon the circumstances of the case.[65] See discussion above.
- *any possible requirement that a decision letter or notification be signed*. In *Singh v MIAC*[66] the applicant claimed that notification was invalid because the decision record had not been signed. The Court held that even if there were a requirement to sign a decision letter or notification either at common law or in the Migration Act, in determining whether or not the Tribunal's decision was affected by jurisdictional error, the principal question was whether any inadequacy in the notification affected the Tribunal's decision that it lacked jurisdiction. That would involve examination of the practical consequences of non-compliance, such as whether the lack of signature caused an applicant to lodge a review application

[59] *Singh v MIAC* [2010] FMCA 1000.
[60] *Singh v MIAC* [2010] FMCA 1000 at [37].
[61] *Benissa v MIAC* [2010] FMCA 657.
[62] *Benissa v MIAC* [2010] FMCA 657 at [42]–[45].
[63] *SZOFE v MIAC* (2010) 185 FCR 129.
[64] *SZOFE v MIAC* (2010) 185 FCR 129 at [32], [65], [68].
[65] *SZOFE v MIAC* (2010) 185 FCR 129 at [67]–[68], [30], [32].
[66] *Singh v MIAC* [2010] FMCA 1000.

out of time. The Court found that there was no evidence that the absence of a signature had caused any practical consequence for the applicant.

Lodgement of a review application prior to the commencement of the relevant period

2.2.26 If the time for applying for review has not commenced a valid review application can nevertheless still be lodged.[67] In *SZOFE v MIAC,* Emmett J held that the jurisdiction of the Tribunal was not conditional upon a valid application being lodged only during the period commencing once a valid notification had been received. The making of an application for review before being notified in accordance with s 66(2) did not have the consequence that the Tribunal had no jurisdiction to entertain the application for review. His Honour considered that the Parliament could not have intended that a valid application that was physically within the registry of the Tribunal before time commenced to run should be treated as ineffective simply because it was received by the registry before the commencement of the relevant period.[68] Fixing a time before an application can be made could operate unjustly and unfairly.[69]

2.2.27 In the same case, Buchanan and Nicholas JJ found it unnecessary to determine the issue but in *obiter* comments, and in contrast to Emmett J, accepted that the Regulations appeared to establish an envelope of time *within* which the review application must be made.[70] Nevertheless their Honours noted that lodging an application before the time of deemed receipt of the notification would not necessarily be ineffective. Rather, to determine whether the Tribunal's jurisdiction was engaged, it was necessary to examine the practical consequences of the 'early' lodgement (i.e. before notification was legally effected).[71] In the present case, their Honours found that the review application would not have been ineffective, even if it had been lodged before the applicant was validly notified of the decision as there was no adverse consequence visited upon the applicant.[72]

Second notification of primary decision

2.2.28 Once a decision has been correctly notified in accordance with the Migration Act, that exhausts the Minister's obligations under the legislation, and the time limit will commence to run. If the applicant is given the primary decision again or purportedly 'renotified' in these circumstances, the time to make a valid review application will not start again.[73] Any further 'notifications' would not be notifications under the statute and would have no legal consequences.[74]

[67] *SZOFE v MIAC* (2010) 185 FCR 129; cf *Hasan v MIAC* (2010) 184 FCR 523, now considered to be overruled by *SZOFE*.
[68] *SZOFE v MIAC* (2010) 185 FCR 129 at [35].
[69] *SZOFE v MIAC* (2010) 185 FCR 129 at [34].
[70] *SZOFE v MIAC* (2010) 185 FCR 129 at [62] and in agreement with North J in *Hasan v MIAC* (2010) 184 FCR 523.
[71] *SZOFE v MIAC* (2010) 185 FCR 129 at [67].
[72] *SZOFE v MIAC* (2010) 185 FCR 129 at [69]. Their Honours noted it was difficult to envisage circumstances where the alternate conclusion was justified.
[73] *MIAC v Abdul Manaf* (2009) 113 ALD 88. See also *Zhang v MIAC* (2007) 161 FCR 419 at [25]; *Nguyen v MIAC* [2009] FMCA 933 at [40]; *Singh v MIAC* (2010) 239 FLR 387 at [61]; *Nemuseso v MIAC* [2010] FMCA 957; *MZYIE v MIAC* [2010] FMCA 994; *Li v MIAC* [2011] FMCA 12 at [104], [112]; *SZOPD v MIAC* [2011] FMCA 178; *Patel v MIAC* [2011] FMCA 223; *Patel v MIAC* [2012] FMCA 565 at [28]–[31]. Contrast with the earlier view in *H v MIMA* (2002) 118 FCR 153 at [9], where the Court suggested that on one view, a second notification could not be ignored, and could bring into operation a second timetable for applying for review. This was not however conclusively expressed and the Court also suggested a contrasting position as viable. This view was rejected by the Federal Court in *Abdul Manaf*, and should not be followed. Although more recently in

Method of Notification

2.2.29 Section 66(1) of the Migration Act and reg 2.16(3) of the Regulations require the Minister to notify the applicant of a decision to refuse a visa by one of the methods specified in s 494B of the Migration Act.

2.2.30 The methods specified under s 494B are:

- *handing the document to the recipient* - the Minister or an authorised officer handing the document to the applicant;[75]
- *handing the document to another person* - the Minister or an authorised officer handing the document to another person at the applicant's last residential or business address.[76] That other person must appear to live or work at the address and must appear to be over 16 years of age.
- *posting the document* - the Minister dating the document and dispatching it by prepaid post or by other prepaid means within 3 working days (in the place of dispatch) of the date of the document to the last address for service or last residential or business address provided by the recipient to the Minister for the purposes of receiving documents.[77]
- *faxing, emailing the document* - the Minister transmitting the document by fax, or e-mail, or other electronic means to the last fax number, e-mail address, or other electronic address provided to the Minister for the purposes of receiving documents.[78] Note that for notifications given prior to 5 December 2008, this method required the email address or fax number to be provided 'by the recipient'.[79]
- *by way of an online account* - the Minister making the document available by way of an online account of the recipient established for the purposes relating to the Migration Act or Regulations.[80]

2.2.31 Where a combined application for a visa has been made, each applicant must be notified of the delegate's decision on his or her visa application.[81] However,

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ASE15 v MIBP [2015] FCCA 2581 the Court considered *H* to be binding and 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 with the Full Federal Court finding that there were no facts upon which to fairly 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 s66 were possible. Further, in so far as there was any duty on the part of the Minister to afford procedural fairness to the applicants, for example to point out in subsequent communication the need for them to apply for review within the time period, such a duty was satisfied in the circumstances of that case by the Minister's delegate having resent the valid notification letter.

[74] *MIAC v Abdul Manaf* (2009) 113 ALD 88 and *Zhang v MIAC* (2007) 161 FCR 419.

[75] s 494B(2).

[76] s 494B(3).

[77] s 494B(4).

[78] s 494B(5).

[79] The words 'by the recipient' were removed by the *Migration Amendment (Notification Review) Act* 2008 (Cth).

[80] s 494B(5A). This provision was inserted by sch 2 of the *Home Affairs Legislation Amendment (Miscellaneous Measures) Act 2019* (Cth) (Home Affairs Legislation Amendment Act) (the amending Act) and commenced on 1 September 2019.

[81] *MZXGM v MIMA* [2006] FMCA 1723 and *MZXGL v MIMA* [2006] FMCA 1724. These two cases relate to sisters who lodged separate protection visa applications. Their brother also lodged his own protection visa application, identifying *MZXGL* and *MZXGM* as members of his family unit. All three siblings nominated the same authorised recipient. The delegate first informed the authorised recipient that *MZXGL* and *MZXGM*'s claims of dependency on their brother were not accepted. Then in three separate decisions, the delegate refused to grant protection visas to each of the applicants and their brother. The delegate sent a single letter to the authorised recipient refusing the visas but referring simply to the review rights of the recipient's 'client'. The Court found that this letter did not constitute valid notification in accordance with the Migration Act because it did not notify each visa applicant and was not a clear indication as to the requirement that each of the three individuals referred to in the joint letter

s 52(3C) of the Migration Act provides that notifications given to any of them about the application are taken to be given to each of them.[82]

2.2.32 Regulation 5.02 deals with service of documents on a person in immigration detention.[83] As s 66(1) and reg 2.16 do not draw a distinction between applicants in immigration detention and those who are not, it is unclear how those provisions interact with reg 5.02. However, to the extent that the method in reg 5.02 is consistent with at least one of the methods in s 494B, in most cases this will not be an issue. There is some uncertainty over the operation of reg 5.02 where an applicant has appointed an authorised recipient.[84]

Time of Receipt of Notification

2.2.33 If the applicant (or their authorised recipient, which is discussed below) is notified of the primary decision by one of the s 494B methods, s 494C provides that the decision will be *taken* to have been received as follows:

- if the decision is *handed to the applicant* - the applicant is taken to have received the document when it is handed to the applicant;[85]
- if the decision is *handed to another person* at the applicant's last residential or business address (meeting the age and other requirements) - the applicant is taken to have received the document when it is handed to that person;[86]
- if the decision is dated and *sent by prepaid post* or other prepaid means - the applicant is taken to have received the document 7 working days (in the place of the address) after the date of the document if dispatched from a place within Australia to an address within Australia[87] or after 21 calendar days in all other cases;[88]
- if the decision is sent by *fax, e-mail or other electronic means* - the applicant is taken to have received the document at the end of the day on which the document is transmitted;[89]

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could, and indeed were required to, each individually make an application to the Tribunal for the decision to be reviewed. See also *Khan v MIAC* [2007] FMCA 419.

[82] See also *Chiu v MHA* [2018] FCA 1774 at [36]. The appellant contended that as he had been joined to his mother's visa application at a later date pursuant to reg 2.08A, s 52(3C) did not apply as they had not applied "together". The Court held that despite the temporal difference in their applications, the dependency of the appellant's visa application on his mother's must mean that they had applied for their visas "together", particularly in light of the terms of reg 2.08A(1)(f)(ii) which treats the addition of the secondary applicant as being combined with the application of the original applicant, and taken to have been made at the same place as, and on the same form as, the application of the original applicant. An application for special leave to the High Court was dismissed: *Chiu v MHA* [2019] HCASL 122.

[83] A document to be served on a person in immigration detention may be served by giving it to the person himself or herself, or to another person authorised by him or her to receive documents on his or her behalf. A person is not in immigration detention if the person is in criminal detention: see *Sillars v MICMSMA* [2020] FCA 1313 at [38]; upheld on appeal in *Sillars v MICMSMA* [2021] FCAFC 174 at [37]–[40]. An application for special leave to the High Court was dismissed*: MICMSMA v Sillars* [2022] HCASL 9. A person is in criminal detention for the purposes of the Regulations if they are serving a term of imprisonment following conviction for an offence or in prison on remand: reg 1.09.

[84] It is unclear how reg 5.02 interacts with s 494D where the applicant has an authorised recipient. For further discussion see discussion below.

[85] s 494C(2).

[86] s 494C(3).

[87] s 494C(4)(a).

[88] s 494C(4)(b).

[89] s 494C(5).

- if the decision is made available by *way of an online account of the recipient* - the applicant is taken to have received the document at the end of the day on which it is made available.[90]

2.3 Decisions to cancel visas

2.3.1 Separate notification schemes from those detailed above apply to primary decisions to cancel a visa. Specifically:

- Regulation 2.42 sets out the notification requirements imposed on the Minister in relation to decisions to cancel a visa under s 109 of the Migration Act. It requires the notice to be in writing and specifies the content of that notice.
- Section 127 of the Migration Act and reg 2.45 sets out the notification requirements imposed on the Minister in relation to decisions to cancel a visa under s 116 of the Migration Act.[91] It provides for a prescribed method of notification and the content of the notice.
- Section 137S of the Migration Act sets out the requirements for notification of decisions to cancel regional sponsored employment visas (cancellation under s 137Q).
- Regulation 2.55 sets out the methods by which the Minister must give the holder or former holder of a visa (other than a person in immigration detention,[92] or where the holder has an authorised recipient) a document relating to cancellation.[93]

Content of Notice

2.3.2 The content requirements vary for decisions to cancel visas and are not always as onerous as those for visa refusals.

2.3.3 For s 109 cancellations, reg 2.42 merely requires that the notification be in writing and set out the ground for cancellation.[94]

2.3.4 For s 116 cancellations, s 127 states that notification of the primary decision to cancel a visa where there is a review right in the MRD of the Tribunal must:

- specify the ground for the cancellation;

[90] s 494C(6). This provision was inserted by sch 2 of the *Home Affairs Legislation Amendment Act* and commenced on 1 September 2019.
[91] In *Butt v MIBP* [2014] FCA 1354 the Federal Court confirmed that s 127 and reg 2.55 (and not ss 494B and 494C) are the applicable notification and deemed receipt provisions in relation to notification of cancellation decisions.
[92] A person is not in immigration detention if the person is in criminal detention: see *Sillars v MICMSMA* [2020] FCA 1313 at [38]; upheld on appeal in *Sillars v MICMSMA* [2021] FCAFC 174 at [37]–[40]. An application for special leave to the High Court was dismissed*: MICMSMA v Sillars* [2022] HCASL 9. A person is in criminal detention for the purposes of the Regulations if they are serving a term of imprisonment following conviction for an offence or in prison on remand: reg 1.09.
[93] See *Silva v MIAC* [2012] FMCA 1233 where the Court held there was no scope for the operation of s 29 of the *Acts Interpretation Act 1901* (Cth) (Acts Interpretation Act), which provides a general presumption as to time of service, in the face of reg 2.55 at [12].
[94] Nevertheless, it appears to be Departmental practice to include information regarding where and when the review application may be made. While it is Departmental practice, a notice which does not contain this information would not appear to be invalid. The Court in *EVE21 v MICMSMA* [2022] FedCFamC2G 729 at [56] held that s 127 does not apply to a decision to cancel a visa under s 109. This is consistent with s 119(4), which relates to the requirements for a notice of proposed cancellation. Section 119(4) provides that the other provisions of Subdivision E (which includes s 127) do not apply to a cancellation under a provision other than s 116 or to which Subdivision F applies. Section 109 is in Subdivision C.

- state whether the decision is reviewable under Part 5 or Part 7;[95]
- state the time in which the review application may be made;[96]
- state who can apply for review; and
- state where the review application can be made.[97] It is not necessary that all addresses be specified in the notice.[98]

The notification must be in writing.[99]

2.3.5 In relation to the requirement in s 127(2)(b) to specify whether the decision is reviewable under Part 5 or Part 7, in *MHA v Parata* the Court held that a notice which did not set out which Part of the Migration Act provided for review of the particular decision did not comply with s 127(2)(b).[100] The notice stated that the decision was reviewable at the Administrative Appeals Tribunal (but did not provide further detail about the relevant Part). In reaching this conclusion, the Court considered that the purpose of including a requirement to state which of the alternate (i.e. Part 5 or Part 7) regimes applies is evident, as it provides a prospective applicant with broad guidance as to which provisions of the Act govern the manner of applying and supplements the more specific statements under s 127(2)(c). The Court reasoned that if Parliament had intended the notification to only refer to AAT, it could have used those words, but it did not.[101] The consequence of such a finding was that the notice was invalid, and that a notification that does not comply with the requirements in s 127(2) cannot operate as a notification for the purposes of s 347(1)(b) such that the time period to seek review had not started to run.[102] The Court also held that whether the Tribunal had jurisdiction depends on the existence of a jurisdictional fact, not on an assessment of the materiality of the consequences of a non-compliance notification.[103] An application for special leave to the High Court was dismissed.[104] In *Lestari v*

[95] In *MHA v Parata* [2021] FCAFC 46 the Court held that a notice which did not set out which Part of the Migration Act provided for review of the particular decision did not comply with s 127(2)(b) (at [40], [106]).
[96] See *DFQ17 v MIBP* [2019] FCAFC 64 where the Full Federal Court held that the requirement in s 66(2)(d)(ii) to 'state' the time in which the application for review may be made, requires that information to be conveyed in a complete and clear manner and a failure to do so will result in an invalid notification. In *Arshad v MICMSMA* [2020] FCA 283 at [13]–[15] the Court, in considering a s 116 cancellation notification, applied the reasoning in *DFQ17 v MIBP* [2019] FCAFC 64 but distinguished the matter on basis that the notification was not defective as the information was contained under one heading 'review rights' and was 'clear and complete' such that it informed the applicant of the time in which the application for review may be made.
[97] See s 127(2).
[98] *SZOFE v MIAC* (2010) 185 FCR 129.While *SZOFE* involved consideration of the notification requirements of s 66(2)(d)(iv) (visa refusals),as the terms of s 66(2)(d) are indistinguishable from s 127(2) (s 116 visa cancellations), the reasoning would be equally applicable to notifications of decisions to cancel a visa under s 116.
[99] See s 127(1) and reg 2.45.
[100] *MHA v Parata* [2021] FCAFC 46 at [40], [106]. *Parata* was followed in *AZF21 v MICMSMA* [2021] FCCA 2008 in which the applicant sought judicial review of the Tribunal's no jurisdiction decision almost two years after the decision was made. The Minister conceded that the notification did not comply with the requirement to specify the Part of the Migration Act it was reviewable under. The Court held at [25] that it was necessary in the interests of justice to extend the time period to seek judicial review and that if such an order was not made, there would be an erroneous failure by the Tribunal to review the decision.
[101] *MHA v Parata* [2021] FCAFC 46 at [40].
[102] *MHA v Parata* [2021] FCAFC 46 at [75]–[81], [103].
[103] *MHA v Parata* [2021] FCAFC 46 at [74]. See also *Nguyen Huy* (BRG164/2021; oral decision) where the Court held that the applicant was not notified in accordance with s 66(2) because the notification erroneously stated that, for a Subclass 461 visa, that the applicant could seek review of the decision if they had an approved sponsor, or the sponsor was seeking merits review of a sponsorship refusal decision. There is no such requirement for a Subclass 461 visa. The Court, relying on *MHA v Parata* [2021] FCAFC 46 held that the notification was defective, and the prescribed period had not started to run. The Court acknowledged that the defect in the notification had not affected the applicant from applying for review, and it was the applicant's inadvertence that she did not pay the prescribed fee.
[104] *MICMSMA v Parata* [2021] HCATrans 218.

MICMSMA, the Federal Circuit and Family Court held that *Parata* is not authority for the proposition that the exact words of s 127 must be replicated for the notification to be valid, and that *Parata* is not that inflexible, rather what is required is that each notification is clear and provides each applicant with certainty about their review rights.[105] In this instance, the Court was considering a notification sent prior to the amalgamation of the MRT-RRT into the Administrative Appeals Tribunal. The notification stated that the decision was reviewable by the Migration Review Tribunal (MRT). At the relevant time, the Migration Act referenced decisions under Part 5 as 'MRT-reviewable decisions'. The Court held that there was no ambiguity in the notification, noting that 'context matters' and that Mr Parata was not provided with clarity as he was not made aware which division of the AAT to apply in, whereas for Ms Lestari it was clear that at the time the notification was sent she could only apply for review by the MRT.[106]

2.3.6 In relation to notification of a cancellation of a protection visa where the applicant is in immigration detention on the day of notification, to be a valid notification it must clearly convey that the prescribed period of seven working days commences on the day the applicant is notified of the decision or, if that day is not a working day, that it commences on the first working day after the day the applicant is notified.[107] In *ALN19 v MICMSMA*,[108] the Court held that this information is not clearly conveyed where the following text is used: *'As you are in immigration detention, the prescribed timeframe commences on the day on which you were notified of this decision, and ends at the end of seven working days (beginning with the first working day that occurs on or after that day).'* The Court considered that the fact that the identified seven day period commenced on the day of notification in this particular matter, and ended on the sixth working day after notification, was not clearly conveyed.[109] In reaching its conclusion, the Court reasoned that the language used was confusing because in the parentheses the subject of the verb 'beginning' was not identified and no specific day was identified in the reference to the first working day that occurs on or after that day.[110] The Court also concluded that the letter was drafted in a manner that allowed for uncertainty as to whether it would be handed to the appellant in immigration detention on a working day.[111]

2.3.7 Where the decision is to cancel a regional sponsored employment visa under s 137Q,[112] s 137S states that the Minister must give written notice of the decision and the notice must:

- specify the reasons for the cancellation; and
- state whether the decision is reviewable under Part 5,[113] and if so state:

[105] *Lestari v MICMSMA* [2021] FedCFamC2G 373 at [87].
[106] *Lestari v MICMSMA* [2021] FedCFamC2G 373 at [88]–[89].
[107] reg 4.31.
[108] *ALN19 v MICMSMA* [2019] FCA 1592 at [48]–[54].
[109] *ALN19 v MICMSMA* [2019] FCA 1592 at [52].
[110] *ALN19 v MICMSMA* [2019] FCA 1592 at [51].
[111] *ALN19 v MICMSMA* [2019] FCA 1592 at [53].
[112] Regional sponsored employment visa means a visa of a kind that is included in a class of visas that has the words 'Employer Nomination' in its title and is prescribed by the Regulations for the purposes of the definition in the Migration Act: s 137Q(3). Subclasses 119, 187 and 857 are prescribed: reg 2.50AA.

- the period in which an application can be made;[114]
- who can apply for review; and
- where the review application can be made.[115] It is not necessary that all addresses be specified in the notice.[116]

2.3.8 The requirement in s 127 and s 137S to 'state' the information in the relevant subsections requires the notification letter to convey the information in a complete and clear manner. A notification that fails to do so will result in an invalid notification, so that the prescribed time period in which to apply for review will not have started to run.[117] Whether the content of the notification is sufficiently clear requires assessment in each case.

Method of Notification

2.3.9 In respect of decisions reviewable under Part 5 (migration) and Part 7 (protection) of the Migration Act to cancel visas (including regional employment sponsored visas), reg 2.55[118] purports to require that for a visa holder or former visa holder not in immigration detention, the Minister must give the notification of the decision to cancel the visa in one of the ways specified. However, in *EVE21 v MICMSMA* the Federal Circuit and Family Court declared that reg 2.55 is invalid on the ground that it is inconsistent with ss 494A, 494B and 494C (the 'general provisions').[119] The Court acknowledged that s 504(1)(e) empowers the making of Regulations in relation to the giving of documents.[120] It identified that there are relevant differences between reg 2.55 and the general provisions in the Migration Act which also deal with the giving of documents. The Court reasoned that the general provisions would permit the Minister to give the document by use of a s 494A method (i.e. a method the Minister considers appropriate including a s 494B method), but reg 2.55 would require the Minister to give the document by one of the reg 2.55 methods.[121] Given that reg 2.55 is subordinate to the general provisions, the Court held that it is invalid

[113] Note that in *MHA v Parata* [2021] FCAFC 46, the Court in considering s 127(2)(b), held that a notice which did not set out which Part of the Migration Act provided for review of the particular decision did not comply with s 127(2)(b) (at [40], [106]). Given s 137S(1)(b) provides that the notice must 'state whether or not the decision to cancel the visa is reviewable under Part 5', it appears that if the principle from *Parata* is applied to s 137S, a notification which does not refer to the decision being reviewable under Part 5 would also be invalid. An application for special leave to the High Court was dismissed*: MICMSMA v Parata* [2021] HCATrans 218.

[114] In *DFQ17 v MIBP* [2019] FCAFC 64, the Full Federal Court held that the requirement in s 66(2)(d)(ii) to 'state' the time in which the application for review may be made, requires that information to be conveyed in a complete and clear manner and a failure to do so will result in an invalid notification. While *DFQ17* involved consideration of the notification requirement in s 66(2)(d)(ii), its reasoning would be equally applicable to the similarly worded notification requirement in s 137S(1)(c).

[115] s 137S.

[116] *SZOFE v MIAC* (2010) 185 FCR 129. While *SZOFE* involved consideration of the notification requirements of s 66(2)(d)(iv) (visa refusals), as the terms of s 66(2)(d) are indistinguishable from s 137S(1), the reasoning would be equally applicable to notifications of decisions to cancel a regional sponsored employment visa.

[117] *DFQ17 v MIBP* [2019] FCAFC 64, While *DFQ17* involved consideration of the notification requirements in s 66(2) (visa refusals), as the terms of s 66(2)(d) are similarly worded to s 127(2)(c) and s 137S(1)(c), the reasoning would be equally applicable to notifications of decision to cancel under s 116 and s 137Q.

[118] Regulation 2.55 was inserted into the Regulations by *Migration Amendment Regulations 2001 (No 6)* (SR 2001 No. 206), effective 10 August 2001.

[119] *EVE21 v MICMSMA* [2022] FedCFamC2G 729 at [84]. The Minister has appealed the Federal Circuit and Family Court's judgment in *EVE21* to the Federal Court.

[120] *EVE21 v MICMSMA* [2022] FedCFamC2G 729 at [81]. The Minister has appealed the Federal Circuit and Family Court's judgment in *EVE21* to the Federal Court.

[121] *EVE21 v MICMSMA* [2022] FedCFamC2G 729 at [85]–[86]. The Minister has appealed the Federal Circuit and Family Court's judgment in *EVE21* to the Federal Court.

to the extent of inconsistencies with the general provisions as a regulation which purports to render invalid that which a provision of the enabling statue or provision permits cannot stand with the provision. The Minister has appealed the Federal Circuit and Family Court's judgment in *EVE21* to the Federal Court.

2.3.10 In practice, if the Minister purported to notify using a method in reg 2.55 and that method is also a method in s 494B, valid notification will have occurred by operation of s 494B. If a method in s 494B has been used, the time of receipt of notification provisions in s 494C will apply. Therefore, in light of *EVE21*, it will be necessary to determine whether a s 494B method has been used (discussed above).

2.3.11 The methods specified in invalid reg 2.55 are:

- by handing it to the visa holder personally;[122] or
- by *handing it to another person* who is at the visa holder's last residential or business address known to the Minister who appears to live or work there and appears to be at least 16 years of age;[123] or
- by dating it, and then dispatching it within 3 working days (in the place of dispatch) of the date of the document by *prepaid post* to the visa holder's last residential address, business address or post box address known to the Minister;[124] or
- by transmitting the notice by *fax, email or other electronic means* to the visa holder's last fax number, email address or other electronic address known to the Minister.[125]

2.3.12 There are two significant differences between s 494B and reg 2.55. One difference is that for valid notification under s 494B, the document (notice) must have been sent to the last residential address, business address *provided by the recipient for the purposes of receiving documents* or handed to a person who appears to live or work at the last residential or business address *provided to the Minister by the recipient for the purposes of receiving documents*; or alternatively to the last fax number, email address, or other electronic means address *provided to the Minister for the purposes of receiving documents*, whereas in reg 2.55 notification could have been sent to the last residential address, business address, fax number, email address, or other electronic means address *known to the Minister* or handed to a person who appears to live or work at the last residential or business address *known to the Minister*. An address for the purpose of reg 2.55 does not need to have been provided to the Minister whereas this is a requirement for s 494B. The other difference is that s 494B does not explicitly refer to posting the notification to a

[122] reg 2.55(3)(a).
[123] reg 2.55(3)(b).
[124] reg 2.55(3)(c). Note however that a notice sent to an address that the Minister believes to be that of a person but where that person has never actually resided there at the time of the notice being dispatched will not comply with the Regulations., even if the Minister's belief was based on reasonable grounds: see *Lu v MIMIA* (2004) 135 FCR 450 at [29]–[32]; *MIMIA v George* [2004] FCAFC 276 at [36]–[37]. Also note that where an applicant is in prison, the prison can be treated as a 'residential address': see *Sillars v MICMSMA* [2020] FCA 1313 at [50]–[60]. The judgment was upheld on appeal in *Sillars v MICMSMA* [2021] FCAFC 174, although whether the prison was a 'residential address' was not raised in the appeal. An application for special leave to the High Court was dismissed*: MICMSMA v Sillars* [2022] HCASL 9.
[125] reg 2.55(3)(d).

post box address whereas reg 2.55 refers to sending the document to such an address.

2.3.13 Where notification is sent to an address which was not provided by the former visa holder, or was handed to someone at an address not provided by the former visa holder, but was sent to an address last known to the Minister or handed to someone at an address last known to the Minister, following *EVE21*, while notification may have occurred (in the sense that the applicant has received it),[126] the deemed receipt provisions will not apply[127] such that the prescribed period in which to seek review would not appear to start to run.[128]

2.3.14 This is conflicting authority on notification of cancellations (except where the former visa holder or visa holder is in immigration detention) by way of an authorised recipient. As *EVE21* held that reg 2.55 is invalid, and that ss 494A, 494B and 494C would apply, the authorised recipient provision in s 494D would also appear to apply. In contrast to *EVE21*, the Federal Circuit Court in *EIA18 v MHA*[129] (which preceded *EVE21*) held in *obiter* that it is arguable that the only way the Minister can give notice of a cancellation is in a manner prescribed by reg 2.55, and that there is no work for the authorised recipient provision (s 494D) to do.[130] The Court concluded that there is no method of notification specified.[131] However, in the subsequent judgment of *MICMSMA v Lyu*[132] in contrast to *EIA18* the Federal Circuit Court proceeded on the basis that the Minister could fulfil the statutory obligation to send a NOICC by transmitting it by email to the authorised recipient.[133] Prior to *EIA18* and *Lyu*, it appeared to be the case that reg 2.55 did not apply where a visa holder or former visa holder has nominated an authorised recipient,[134] and for such persons there was no method specified and s 494A of the Migration Act provided

[126] s 494A provides that the Minister may give the document by any method that they consider appropriate (which may be one of the methods mention in s 494B or reg 5.02).
[127] s 494C(1) provides that the section applies if the Minister gives a document to a person by one of the methods specified in s 494B.
[128] *EVE21 v MICMSMA* [2022] FedCFamC2G 729 at [93]. The Minister has appealed the Federal Circuit and Family Court's judgment in *EVE21* to the Federal Court.
[129] *EIA18 v MHA* [2021] FCCA 613 at [66]–[67].
[130] Following the Court's statement in *EIA18*, where a notification of cancellation is addressed to a purported authorised recipient and sent to the address of that purported authorised recipient rather than the former visa holder, it would appear that it would not comply with the requirements of reg 2.55 and may not be valid (such that the prescribed period to lodge a review application would not start to run). However, such a position would be inconsistent with *MICMSMA v Lyu* [2021] FCCA 1604. *EIA18* was also considered by the General Division of the AAT in *Nguyen and MICMSA (Migration)* [2022] AATA 448 at [41]–[42]. The Tribunal found the Court's finding in *EIA18* that reg 2.55 is the only way that the delegate can give notice of a cancellation to be incorrect. The Tribunal considered that reg 2.55 deals with how service is to be effected and s 494D operates independently and deals with upon whom (in the manner prescribed by reg 2.55) service can be effected.
[131] This is because reg 2.55, which sets out the methods for the giving of documents relating to proposed cancellation, cancellation or revocation of cancellation, applies only to the giving of a document to a holder or former holder of a visa: reg 2.55(1)(a); *Singh v MIAC* (2011) 190 FCR 552 at [55].
[132] *MICMSMA v Lyu* [2021] FCCA 1604. On appeal in *Lyu v MICMSMA* [2022] FCA 1258 at [57] the Court confirmed that s 494D required the Minister in this case to give the document to the authorised recipient, instead of the visa holders. However, the Court allowed the appeal on the basis that the person the NOICC was sent to had not been appointed as the authorised recipient for this purpose as the covering email accompanying the Form 956A confirmed the person was being appointed in relation to a business monitoring survey only (and therefore had not been appointed under s 494D for the purpose of sending the NOICC).
[133] reg 2.55(3)(d), s 494D.
[134] *Singh v MIAC* (2011) 190 FCR 552 at [55], noting that reg 2.55 is concerned with the giving of documents to a person who actually holds, or held, a visa and that it is not possible to read the provisions of reg 2.55 and s 494B as supplementing each other.

that the Minister may give the notification by any method that he or she considers appropriate, including a method under s 494B.[135]

2.3.15 Following *EVE21*, *EIA18* and *Lyu*, it is not clear as to how notification is to occur when there is an authorised recipient. Given that *Lyu* was a judicial review application brought by the Minister in the Federal Circuit Court and on appeal the Federal Court upheld the position that a NOICC may be sent to an authorised recipient appointed under s 494D,[136] it is indicative of the Department's position that an authorised recipient can be appointed in relation to a cancellation matter and valid notification occurs by giving the document to the authorised recipient.[137]

2.3.16 For persons in immigration detention, the notice is to be served by giving it to the visa holder him or herself, or another person authorised by him or her to receive documents on his or her behalf.[138]

2.3.17 If notification is given in one of the ways provided for, that is sufficient compliance by the Minister with the legislation.[139] However, for persons in prison, it has been suggested that it may not be reasonable to rely on notification by email to a general email address for the prison where the person is being held.[140] It may also not be

[135] Note that s 494B is not an exhaustive statement of the methods by which the Minister may give notification to an authorised recipient under s 424A in cases of visa cancellation: *Singh v MIAC* (2011) 190 FCR 552 at [42].
[136] *Lyu v MICMSMA* [2022] FCA 1258 at [57].
[137] See also *Nguyen and MICMSA (Migration)* [2022] AATA 448 at [41]–[42] in which the General Division of the AAT considered the Court's finding in *EIA18 v MHA* [2021] FCCA 613 that reg 2.55 is the only way that the delegate can give notice of a cancellation and therefore there is no work for s 494D to do. The Tribunal found the Court's reasoning to be incorrect and in *obiter*. The Tribunal considered that reg 2.55 deals with how service is to be effected and s 494D operates independently and deals with upon whom (in the manner prescribed by reg 2.55) service can be effected.
[138] reg 5.02. Regulation 2.55 does not apply to persons in immigration detention: reg 2.55(2)(b). A person is not in immigration detention if the person is in criminal detention: see *Sillars v MICMSMA* [2020] FCA 1313 at [38]; upheld on appeal in *Sillars v MICMSMA* [2021] FCAFC 174 at [37]–[40]. An application for special leave to the High Court was dismissed*: MICMSMA v Sillars* [2022] HCASL 9. A person is in criminal detention for the purposes of the Regulations if they are serving a term of imprisonment following conviction for an offence or in prison on remand: reg 1.09.
[139] *Zhang v MIAC* (2007) 161 FCR 419 at [31]. However, note that in *Young v MHA (No 2)* [2020] FCCA 3077 the Court proceeded on the basis that that reg 2.55(3) involves a discretion on the part of the Minister to select the method of notification, and as such the Court considered whether the Minister's notification by fax of the cancellation of the applicant's visa under s 116 of the Migration Act was legally unreasonable. In reasoning that reg 2.55(3) gives rise to a discretion, the Court held at [35]–[36] that reg 2.55(3) does not provide a single method as to how the Minister is to deliver the relevant notification, rather the Minister is confronted with a suite of options and the Minister *'must'* give the document in one of the ways specified and therefore there is a discretion as to which method of notification is selected. The Court concluded that the decision to notify the applicant by fax was not unreasonable (at [40]). In reaching this conclusion, the Court took into account that the Minister had earlier used the fax number to send the notification of intention to cancel the visa and the applicant had responded acknowledging receipt, which confirmed he was able to receive correspondence using the fax number and also communicate back, and that the Minister did not have any knowledge of the circumstances said to have affected the applicant at the time he received the notification of the decision to cancel the visa. The Court did not expand upon what factors the delegate is to take into account when selecting which method in reg 2.55(3) to use.
[140] *Parata v MHA* [2020] FCCA 1582 at [32]. The delegate sent the notice of cancellation decision to an email address for the prison where the former visa holder was being held, and requested that a corrections officer hand deliver the notice to him and also obtain a signature from him to acknowledge receipt. The Tribunal relied upon the delivery of the notice by hand (reg 2.55(3)(a)) to find that the applicant had been notified, rather than by email (reg 2.55(3)(d)). The Court held that the Tribunal was 'wise' to rely on personal delivery rather than email, because it was inclined to find that the use of email was legally unreasonable when notifying a prisoner via a justice department email address where the prescribed period to lodge a review application is seven days. The Court considered that there would likely be a delay before the prisoner would receive the email. On appeal, however, in *MHA v Parata* [2021] FCAFC 46 at [30] the Court noted that the primary judge's conclusion that time had started to run when the notification was handed to the former visa holder in prison does not appear to accommodate the earlier conclusion that the notice itself was not valid (because it did not comply with s 127(2)(b)), such that the time had not commenced to run at all. The Full Federal Court did not consider this point further. An application for special leave to the High Court was dismissed*: MICMSMA v Parata* [2021] HCATrans 218. See also *MIBP v EFX17* [2021] HCA 9 where the Court, in considering whether a person who was in prison had been validly notified of a mandatory character-based cancellation decision and the time period in which to make representations about the revocation of that decision, held that as the notification did not crystallise the period in which the person could make representations, it was not valid. The notice incorrectly stated that the former visa holder was taken to have received the notice at the end of the day the email was transmitted (the notice was handed to him). The Court did not consider reg 2.55(9). While this judgment did not concern a Part 5 or Part 7 reviewable decision, if a notification under, for example s 127 does not contain the required information to enable calculation of the period to seek review (e.g. where the notification states it was given by email, but it was given by hand, even though the time of receipt would be the same), a Court may have regard to *EFX17* and find it to be invalid.

reasonable to rely on notification to a post box address for a prison where the person is being held.[141]

Time of Receipt of Notification

2.3.18 Time of receipt of notification depends upon the method of notification. Given that in *EVE21 v MICMSMA* the Federal Circuit and Family Court declared that reg 2.55 is invalid on the ground that it is inconsistent with ss 494A, 494B and 494C (the 'general provisions'),[142] the deemed receipt periods under reg 2.55 would not apply. The time of receipt of notification will therefore depend on whether a s 494B method was used. If it was, the deemed receipt periods in s 494C will apply (see above).

2.3.19 By way of reference only, for notifications of decisions to cancel visas to the visa holder or former visa holder not in immigration detention the following deemed receipt periods are listed under invalid reg 2.55:[143]

- if the notice was *handed to the person* - the person is taken to have received it when it was handed to him or her;[144]
- if the notice was *handed to another person* at a residential address or business address - the person is taken to have received it when it is handed to the other person;[145]
- if *posted* within 3 working days *within Australia* - the person is taken to have received it within 7 working days (in the place of the address) of the date of the document;[146]
- if *posted* within 3 working days *otherwise than within Australia* - 21 days after the date of the document;[147]
- if *faxed, emailed* or sent by other electronic means - the person is taken to have received it at the end of the day on which the document was transmitted.[148]

2.4 Decisions not to revoke an automatic visa cancellation

2.4.1 A separate notification scheme from those detailed above applies to primary decisions under s 137L not to revoke an automatic cancellation of a visa under s 137J. This notification scheme is now largely of historical interest given the effective cessation of the revocation process.

2.4.2 Section 137M of the Migration Act sets out the notification requirements for the Minister in relation to these types of decisions. It specifies that notice must be in

[141] *EVE21 v MICMSMA* [2022] FedCFamC2G 729 at [60]. The Court, *in obiter*, noted that it is difficult to characterise the post box address of a correctional facility as the post box address of each of the facility's inmates, and that it may argued that it can only be the post box address of one person, namely, correctional facility, and not of the applicant and each of the inmates of the facility.
[142] *EVE21 v MICMSMA* [2022] FedCFamC2G 729 at [84]. The Minister has appealed the Federal Circuit and Family Court's judgment in *EVE21* to the Federal Court.
[143] reg 2.55 was inserted into the Regulations by SR 2001 No. 206.
[144] reg 2.55(5).
[145] reg 2.55(6).
[146] reg 2.55(7)(a).
[147] reg 2.55(7)(b).
[148] reg 2.55(8).

writing and the required content of the notification. Regulation 2.55 prescribes the method of notification, except where the applicant has notified the Minister of an authorised recipient in relation to the cancellation or is in immigration detention. Where the applicant has nominated an authorised recipient, decisions not to revoke an automatic cancellation are sent pursuant to s 494A of the Migration Act. Regulation 5.02 prescribes the method of notification where the applicant is in immigration detention.

2.5 Other Decisions

2.5.1 The Tribunal has power to review a range of non-visa decisions, including decisions as to the assessed points test score for skilled visa applicants,[149] decisions relating to sponsorships and nominations,[150] and decisions made under s 197D(2) that an unlawful non-citizen is no longer a person in respect of whom a protection finding within the meaning of s 197C(4), (5), (6) or (7) would be made.[151] The legislation specifies different notification requirements to those specified above for visa refusals, visa cancellations and non-revocation of automatic visa cancellations. Where, however, the notification requirements are similarly worded to s 66 to 'state' the required information (for example, to 'state the time in which the application for review may be made'), the reasoning in *DFQ17 v MIBP*[152] and *BMY18 v MIBP*[153] (discussed above) would apply equally to those provisions and that information must be conveyed in a complete and clear manner. A summary of the relevant notification requirements can be found in Table 1 below.

Notification where no specific method is identified

2.5.2 Where no specific *method* of notification of the decision is identified in the legislation, s 494A of the Migration Act provides that the Minister may give the notification by any method that he or she considers appropriate. This may include one of the methods mentioned in s 494B of the Migration Act, but not necessarily. However, if the decision relates to a person in immigration detention, r 5.02 applies.

2.5.3 Where s 494A applies and the Minister gives the person notification of the primary decision by one of the methods mentioned in s 494B, the 'deeming' provisions for time of receipt in s 494C will also apply.[154]

2.5.4 Where s 494A applies and the Minister has considered it appropriate to give the person the notification by a method *other than* one mentioned in s 494B, the provisions in s 494C will not apply. This might occur, for example, if no address 'for the purposes of receiving documents' has been given, or if the Minister chooses to give the notification to another person who is not the person who is the subject of the decision or a person mentioned in s 494B(3). If, in such circumstances the notification is given by post, s 29(1) of the *Acts Interpretation Act 1901* (Cth)

[149] See ss 93 and 338(8).
[150] See s 338(9) and reg 4.02(4).
[151] s 411(1)(e) as inserted by the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (Cth).
[152] *DFQ17 v MIBP* [2019] FCAFC 64.
[153] *BMY18 v MHA* [2019] FCAFC 189.
[154] s 494C(1).

operates so that the notification is deemed received on the date when the letter would be delivered 'in the ordinary course of the post' unless the contrary is shown.

2.5.5 If the notification has been transmitted by electronic means, but the Minister did not purport to use the method in s 494B(5),[155] regs 2.55(3)(d), 2.55(3A)(d) and 2.55(3A)(f) ss 14, 14A and 14B of the *Electronic Transactions Act 1999* (Cth) (ETA) will apply. Unless otherwise agreed, the time of receipt of the electronic communication is the time when the electronic communication becomes capable of being retrieved by the addressee at an electronic address designated by the addressee,[156] or at another electronic address of the addressee when it is capable of being retrieved at that address and the addressee has become aware that the electronic communication has been sent to that that address.[157]

2.6 Common issues - method of dispatch and receipt

2.6.1 Chapter 8 – Notification by the Tribunal contains further discussion of the issues that may arise in connection with Tribunal obligations relating to the dispatch and receipt of documents. For the most part case law from the Tribunal context is applicable in the context of primary decisions.

Prepaid post dispatched within 3 working days

What constitutes prepaid post?

2.6.2 The term 'prepaid post' is not defined in the Migration Act or Regulations but encompasses registered mail, express post and ordinary mail for the purposes of s 494B, each being a service for the sending of documents offered by Australia Post requiring payment before the service is provided.[158]

Meaning of 'dispatched'

2.6.3 For documents sent by prepaid post, s 494B requires that it be dispatched within 3 working days of the date of the document. 'Dispatch' means the physical act of sending the document to the relevant address (irrespective of whether it is subsequently received at that address).[159] That is, a requirement to take steps that would ordinarily have the effect of getting the notification to the intended recipient.[160] However, it means more than preparing a letter for postage and placing

[155] For instance, where the Minister has an email or fax number but it was not provided for the purpose of receiving documents.
[156] s 14A(1)(a) of the *Electronic Transactions Act 1999* (Cth) (ETA). For the purposes of this section, unless otherwise agreed, it is to be assumed that the electronic communication is capable of being retrieved by the addressee when it reaches the addressee's electronic address: s 14A(2).
[157] ETA, s 14A(1)(b). For the purposes of this section, unless otherwise agreed, it is to be assumed that the electronic communication is capable of being retrieved by the addressee when it reaches the addressee's electronic address: s 14A(2).
[158] See *On v MIBP* [2016] FCCA 481 at [15]. The Court considered that s 494B(4) does not exhaustively specify the postal services the Minister may use to dispatch a document, or the organisations that provide such services. The Court held that the postal services would at the very least include those provided by Australia Post that fall within the description 'prepaid post' and any other service for the sending of documents for which Australia Post requires payment before it provides the service.
[159] *SZOBI v MIAC (No 2)* [2010] FCAFC 151 at [19]. Stone and Jagot JJ rejected the appellant's argument that a direction on the envelope to return it to a specified address 'if not delivered within 7 days' was a condition or direction affecting the act of dispatch. See also *On v MIBP* [2016] FCCA 481 at [14], in which the Court considered the Oxford English Dictionary definition of 'dispatch' which is to 'send off to a destination or for a purpose', such that the dispatching of a document by the Minister means the Minister's sending off of a document.
[160] *SZOBI v MIAC (No 2)* [2010] FCAFC 151 at [30].

it in the 'mail basket trolley'.[161] At the very least, it is necessary for the envelope to pass from the possession of the agency.[162]

2.6.4 Evidence such as a registered post sticker has been found to be evidence of dispatch.[163]

Within 3 working days

2.6.5 Whether a document has been dispatched within 3 working days is a question of fact. While no specific type of evidence is required to ascertain that a document has been dispatched, probative evidence such as the Department's electronic and/or file records, will assist to demonstrate that the Department has dated a document and dispatched it within 3 working days.

2.6.6 For example, in *Han v MIAC,* the Court found that while there was evidence that the Departmental notification letter had been dated and dispatched by post, there was no evidence to confirm that it had been dispatched within 3 working days of the date of the document.[164]

2.6.7 In contrast, in *Zhang v MIMA,* testimony that a letter was received in the mail room and sent by registered mail was sufficient to satisfy the Court that the letter was dispatched to the applicant by prepaid post within three working days of the date of the document.[165]

2.6.8 Similarly, in *Bataju v MIBP,* testimony of usual practice and a dispatch log satisfied the Court that the letter was dispatched to the applicant by prepaid post within three working days of the date of the document.[166]

Time of receipt

2.6.9 If a notice is sent in accordance with s 494B, the 'deemed receipt' provisions, namely ss 494C(4) and 494C(5), in the Migration Act operate whether or not the recipient *actually* received the notice.[167] It is not a rebuttable presumption that may be disproved by evidence to the contrary.[168] As the Full Federal Court noted in *Tay v MIAC*:

> *[Section 494C] must be construed in a statutory context of similarly detailed provisions concerning the methods by which the Minister may give documents to a person when this is a requirement (s 494B) and when it is*

[161] *Han v MIAC* [2007] FMCA 246 at [27]–[28].
[162] *Han v MIAC* [2007] FMCA 246 at [27]–[28].
[163] See *Maroun v MIAC* [2009] FMCA 535 at [26]–[36] where the applicant claimed there was no evidence that the letter was 'dispatched'. The Court also found there was evidence the letter had been dispatched within the prescribed period, being 3 working days, in the form of evidence from the Department regarding its usual practice. In that case, however, the evidence included markings on a returned envelope that the Court found were more likely to be from Australia Post than the Department. See also *Gharti-Chhetri v MIAC* [2009] FMCA 375 and *SZNQO v MIAC* [2009] FMCA 694 at [91].
[164] *Han v MIAC* [2007] FMCA 246.
[165] *Zhang v MIMA* (2007) 210 FLR 268 at [23]–[24].Undisturbed on appeal: *Zhang v MIAC* (2007) 161 FCR 419.
[166] *Bataju v MIBP* [2014] FCCA 2922.
[167] *Murphy v MIMIA* (2004) 135 FCR 550 at [68]–[71], confirming that s 29 of the Acts Interpretation Act, which provides a document is be delivered in the ordinary course of post unless the contrary is proved, did not apply in circumstances where a notice was sent in accordance with s 494B as s 494C manifested a contrary intention. Cited with approval in *Xie v MIMIA* [2005] FCAFC 172. *Xie* was subsequently followed in *Tay v MIAC* (2010) 183 FCR 163 at [19]. See also *SZBMF v MIMIA* (2005) 147 FCR 485; *MIAC v Manaf* [2009] FCA 963; *SZLXG v MIAC* [2008] FMCA 442; *SZMYQ v MIAC* [2009] FMCA 55; *Gharti-Chhetri v MIAC* [2009] FMCA 375 at [25]; *Kaur v MIAC* [2010] FMCA 85 at [27].
[168] *Tay v MIAC* (2010) 183 FCR 163 at [19]–[26].

> *not required (s 494A) and the identification of the authorised recipient of documents (s 494D).These provisions all evidence concern that there should be certainty in the transfer of documents from the Minister both as to the method and as to the time of delivery.*[169]

2.6.10 There is also no obligation on the Minister to make continuous attempts at delivery throughout either the period between dispatch and deemed receipt or the period between deemed receipt and the day by which the applicant must lodge any application for review.[170]

Transmitting by fax, email, other electronic means

Meaning of 'by transmitting'

2.6.11 Where the Department uses the method in s 494B(5) to give a document, the notification will need to be 'transmitted' to the last fax number, e-mail address or other electronic address provided to the Minister for the purposes of receiving documents.

2.6.12 'By transmitting' means 'by sending' and a person is taken to have received the document at the end of the day on which it is sent.[171]This applies equally to the sending of documents by fax. In *Shah v MIAC,* 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.[172]

Transmitting by fax

2.6.13 Service of a document by fax is effective if the document is forwarded to the fax number nominated.[173] The Court in *SZIPL v MIAC* noted:

> *The Tribunal may not know the location of the facsimile machine to which the facsimile number is allocated, nor will it know whether the facsimile has been read by any person. However, those considerations are irrelevant since the obligation of the Tribunal is to forward the document by facsimile to the fax number nominated ….If the evidence establishes that the document forwarded by transmission has been successfully transmitted to that number, the statutory obligation under s 441A(5) is satisfied'.*[174]

[169] *Tay v MIAC* (2010) 183 FCR 163 at [19].
[170] *SZOBI v MIAC (No 2)* [2010] FCAFC 151 at [20].
[171] *Sainju v MIAC* (2010) 185 FCR 86 at [56]–[57] in relation to email notification provisions for visa cancellation decisions, but the reasoning is equally applicable to email notifications by the Department. See also *Singh v MIBP* [2015] FCA 220 at [31]–[32] applying the reasoning in *Sainju*. See also *Enam v MIBP* [2014] FCCA 230 at [17]–[20]. Although in *Singh v MIBP* [2015] FCCA 2531 the Court found that a fax must be *received* in order to be *transmitted,* this judgment should be treated with caution as it inconsistent with established Federal Court authority in *Sainju v MIAC* [2010] FCA 461 and *Singh v MIBP* [2015] FCA 220.
[172] *Shah v MIAC* [2011] FMCA 18 at [36]. In that case, the Court concluded that if the Tribunal has faxed a document, s 379C(5) will deem that document to have been received at the end of the day on which it was sent. This reasoning applies equally to s 494B(5) and reg 2.55(3)(d).
[173] *SZIPL v MIAC* (2009) 112 ALD 468 at [29].
[174] *SZIPL v MIAC* (2009) 112 ALD 468 at [29].

Transmitting by email

2.6.14 A document is transmitted via email if it is transmitted from the relevant server.[175] If an email is returned as undeliverable or it is not received by the recipient, it does not appear that it will affect whether it has been transmitted as successful delivery is not required for transmission to occur.[176] An email is not sent to an office, or a computer terminal in an office, rather an email is sent to a mail server of the relevant internet service provider and can then be downloaded and accessed by a computer terminal in an office.[177]

2.6.15 Section 494B(5) is not prescriptive of the precise form of the address or the addressee of the 'covering email'. What is required to comply with the giving of a notice to a recipient by email is to transmit it by email to the last email address provided.[178] For example, the Court in *Brar v MIAC* held that there is no error in circumstances where the salutation in a covering email is incorrectly addressed if the decision and notification letter are actually sent to the email address provided for the purpose of receiving documents.

Time of receipt

2.6.16 Although ss 14, 14A and 14B of the ETA provide default rules for determining the time and place of dispatch and receipt of electronic communications in relation to laws of the Commonwealth, the *Electronic Transactions Regulations 2000* (Cth) excludes the Department's transmission of documents under s 494B(5) from the operation of ss 14, 14A and 14B of the ETA.[179]

[175] See *Tsimperlenios v MIBP* [2018] FCCA 229 at [25]–[62] for detailed discussion on transmitting emails and the type of evidence required to ascertain that an email has been transmitted. The Court noted that an email is transmitted from a computer that is part of a network that is linked to the internet; the transmission of the email consists of the steps by which data that comprises the email leaves the control of the transmitting network, and that it is possible that the transmitting network may send the email but the intended recipient, for reasons that are outside the control of the transmitting network, does not receive it which means that evidence by the intended recipient of an email that he or she did not receive the email is incapable by itself of contradicting or undermining evidence that the email in question was transmitted (at [35], [37]). The Court was satisfied that the Tribunal had successfully transmitted an email including its attachments by reference to a record of the email, the attachments dated on the day the email was recorded to have been transmitted and there being no evidence that other documents were prepared that day for the matter. The Court held that, if that evidence was not sufficient to justify a finding that the email and attachments were transmitted, it would not be satisfied on the balance of probabilities that the Tribunal did not transmit them. See also *Chowdhury v MIBP* [2015] FCCA 2981 at [31]. In that case the applicant argued that as his agent's office was closed on the day his decision was notified, the email notification must have 'bounced back' to the delegate. The Court held that whether the agent's office was closed or not is of no consequence, and that the applicant was taken to have received the notification when the decision was transmitted to the relevant mail server. The Court noted that the applicants had not provided any evidence to indicate there was any difficulty at the migration agent's host internet provider's point of receipt of transmissions, which may indicate that successful delivery was relevant to determining whether the document had been transmitted. Note that in *MICMSMA v Lyu* [2021] FCCA 1604 at [22], [24] the Court expressly considered whether successful delivery was required and, in circumstances where there was evidence that the email had not been delivered to the recipient, held that successful delivery was not required for an email to be transmitted. On appeal in *Lyu v MICMSMA* [2022] FCA 1258 the judgment was overturned as the Court held that the person the document was sent to had not been validly appointed as the authorised recipient under s 494D for the purpose of sending a NOICC; however, at [46]–[47] consistent with the lower court's finding, the Federal Court noted that the fact the email was undelivered did not invalidate service, that the provisions are concerned with the act of transmission rather than actual receipt and that the 'presumption of receipt embodied in the statutory provisions is irrebuttable'.

[176] *MICMSMA v Lyu* [2021] FCCA 1604 at [22], [24], however, on appeal in *Lyu v MICMSMA* [2022] FCA 1258 the judgment was overturned as the Court held that the person the document was sent to had not been validly appointed as the authorised recipient under s 494D for the purpose of sending a NOICC. The Federal Circuit Court's findings may be instructive as to how another Court would approach the question.

[177] *Chowdhury & Ors v MIBP* [2015] FCCA 2981 at [31]–[33].

[178] *Brar v MIAC* [2012] FMCA 593. Although the Court was considering s 494B(5), its reasoning is equally applicable to reg 2.55(3)(d).

[179] Prior to 25 May 2011, s 14 of the ETA dealt with time and place of dispatch and receipt of electronic communications in relation to law of the Commonwealth. Amendments to the ETA by the *Electronic Transactions Amendment Act 2011* (Cth) resulted in the deemed receipt of electronic communication provision being separated out from s 14 and renumbered to s 14A.

2.6.17 Consequently, the deemed receipt provision, namely s 494C(5), prevail and an applicant is taken to have received a document at the end of the day on which the document is transmitted. The 'end' of a day in this context should be given its natural meaning as intending to deem receipt on that day but at its end.[180]

2.6.18 In *Chidbundid v MIAC*[181] where the applicant contented he did not receive notification of his cancellation decision by email as the email was never received on Hotmail's server and expert evidence indicated the cancellation email was held by the Department's server and was transmitted at a later date, the Court held that the deeming provision in reg 2.55(8)[182] operates to deem receipt of an email sent to the last email address known to the Minister regardless of whether or not actual receipt is proved to have occurred, at least where the email enters an information system 'outside the control of the originator'.

2.6.19 Where there is an error in giving a document under s 494B, yet the person nonetheless receives the document, they are taken to have received it at the times prescribed as if the Minister had given the document to the person not in error.[183]

Consent to receive communication by email

2.6.20 Given the operation of the deemed receipt provisions, it appears arguable that an applicant is not required to consent to receive communication by email before the Department elects to use this method (where an e-mail address, or other electronic address provided to the Minister for the purposes of receiving documents).

Calculating the time

Meaning of 'working days'

2.6.21 The calculation of several time periods under the notification and receipt provisions is expressed in terms of working days. Section 5 of the Migration 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. In this regard, it should be noted that public holidays differ between Australian States and Territories.

Section 494C(6) provided that s 494C(5) applied despite s 14 of the ETA, however, no associated amendment was made to the Migration Act to include s 14A of the ETA, resulting in a disconnect between the excluding provisions in the Migration Act and the ETA. To address this unintended disconnect, sch 1 of the *Electronic Transactions Regulations 2000* (Cth) (F2019C00345) was amended from 16 July 2013 by regs 2, 4 and sch 1 of the *Electronic Transactions Amendment (Migration Exemptions) Regulation 2013* (Cth) (SLI No 170, 2013) to include s 494B(5) and regs 2.55(3)(d), 2.55(3A)(d) and 2.55(3A)(f). As it became redundant, s 494C(6) was repealed by *Migration Legislation Amendment Act (No 1) 2014* (Cth) (No 106, 2014) on 25 September 2014.

[180] *SZFKD v MIMIA* [2006] FMCA 49 at [19]. The Court held that 'it is straining the language, and is inconsistent with the intent of the provision, to read it as providing for a deemed receipt also at the start of the day after its transmission': at [19]. In *Calimoso v MIBP* [2016] FCCA 1492 at [9] the Court held that the words 'at the end of the day' have their plain, and ordinary meaning, and that there was 'no scope for a construction that was capable of meaning 'the following day.' Upheld on appeal: *Calimoso v MIBP* [2016] FCA 1335.

[181] *Chidbundid v MIAC* [2012] FMCA 59.

[182] Note that reg 2.55 was deemed invalid in *EVE21 v MICMSMA* [2022] FedCFamC2G 729. However, where transmission was to an email address provided by the recipient to the Minister for the purpose of receiving documents (s 494B((5)), the equivalent deemed receipt provision in s 494C(5) would apply.

[183] Section 494(7).

Calculating the working day period

2.6.22 If the time period relates to the giving of the notification, for example, in the case of correspondence sent by pre-paid post, the 3 working days within which documents must be sent,[184] the working days are to be calculated in relation to the *place of dispatch*.

2.6.23 The calculation of working days for the purposes of determining when notification is deemed to be received is to be done in relation to the *place of receipt*.

2.6.24 It should be noted that the former public service holiday between Christmas and New Year, and similarly any 'holidays' under workplace agreements, would be a 'working day' as it is not a gazetted 'public holiday' under the relevant legislation (or a Saturday or Sunday).[185]

Correct address

2.6.25 Where the Minister is required, or elects, to use one of the methods in s 494B, the notification will, unless it is being handed directly to the recipient, need to be delivered, dispatched or transmitted to an address, fax number or email address 'provided to the Minister … for the purposes of receiving documents'. However, an error in addressing will not necessarily frustrate the deemed receipt provisions if actual receipt can be shown. For further information, see Curing errors made when giving the notification.

2.6.26 In determining whether the correct address was used, the Court has suggested that it may be appropriate for the Tribunal to seek evidence of the address from the original envelope used to deliver the notification. For example in *APV16 v MIBP*,[186] the Court found that, in circumstances where part of the address on the envelope was concealed by a 'return to sender' sticker, it was unfortunate that the lower court Judge and the Tribunal did not make reference to the fact that the address could not be discerned from the envelope or make further enquiries. The Minister submitted the original copy of the envelope in the court proceedings, and the Court was satisfied that, as the sticker was translucent and could be removed to reveal the address, the correct address had been used. The Court held that it would be futile to remit the matter to the Tribunal to determine the jurisdictional fact of whether the envelope was correctly addressed.

2.6.27 Where an applicant is in prison, the Court in *Sillars v MICMSMA* held that the Tribunal did not err in treating the prison as a 'residential address'.[187]

[184] s 494B(4)(a).
[185] *Teresa Pasini Cabal v MIMA* (1999) 91 FCR 309.
[186] *APV16 v MIBP* [2018] FCA 354 at [27]–[29]. The appellant argued that they had not been properly notified as they did not receive the delegate's decision, and that the Tribunal erred by finding otherwise. The Tribunal found that it did not have jurisdiction as the review application was lodged outside the prescribed period.
[187] *Sillars v MICMSMA* [2020] FCA 1313 at [50]–[60] where the Court was considering the address for the purpose of reg 2.55. The judgment was upheld on appeal in *Sillars v MICMSMA* [2021] FCAFC 174, although whether the prison was a 'residential address' was not raised in the appeal. An application for special leave to the High Court was dismissed*: MICMSMA v Sillars* [2022] HCASL 9. Note that the Court in *EVE21 v MICMSMA* [2022] FedCFamC2G 729 declared that reg 2.55 is invalid, however, a prison may be a residential address for the purpose of s 494B if the recipient provided it to the Minister for the purpose of receiving documents.

Must the address be provided in writing?

2.6.28 An address provided orally by a person to the Minister may be relied upon by the Minister for the giving of notifications under s 494B. In *SZNZL v MIAC*,[188] the applicant provided one residential address in his visa application, but subsequently notified the Department orally of a change of residential address. The Department notified the applicant of the decision to refuse the visa to the latter address. The Court held that the effect of s 52(3) of the Migration Act was that ordinarily communications with the Minister by an applicant must be in writing. However the failure to make the communication in writing did not mean that another form of communication, for example, by telephone, was not effective if the Minister in fact received it.[189]

Source of the address

2.6.29 If the notification is handed to another person (s 494B(3)) or dispatched by pre-paid post (s 494B(4)), the address used must have been provided 'by the recipient'. It is not necessary for the applicant to have personally provided the relevant address; it is sufficient if another person acting under the applicant's instructions has done so.[190]

Identifying the relevant address

2.6.30 Whether a person has provided an address to the Minister for the purposes of receiving documents is a question of fact to be determined in each case.

2.6.31 For example, in *DFQ17 v MIBP*[191] the delegate sent the notification letter to a post office box address which the appellant had provided in response to a question in the visa application form requesting a current postal address. The appellant had also provided her current residential address in the form. The majority of the Full Federal Court held that by providing a postal address, the appellant was nominating that she wished to receive official documentation at her postal address and that therefore her post office box was her 'address for service' for the purposes of s 494B(4)(c)(i).

2.6.32 In *SZIHN v MIAC*[192] the delegate sent the decision notification letter to the residential address specified in the application form in response to the question: 'Your current residential address in Australia. Note: a post office box address is not

[188] *SZNZL v MIAC* (2001) 186 FCR 271.
[189] In *Reginald Morris Farrare Jr v MIAC* [2012] FMCA 405 the Court noted that while the applicant may have believed he had made a telephone call to the Department to provide current contact details, that belief was not correct in circumstances where it was otherwise uncorroborated and the only evidence before the Court, being Departmental records, was to the contrary. As a result, the Court found the delegate's letter was sent to the last address for service provided to the Department for the purposes of receiving documents in accordance with s 494B(4).
[190] See, *Jalagam v MIAC* [2008] FMCA 1417, where the Court held that although the applicant had not personally completed or submitted the electronic application form nominating the authorised recipient and address for correspondence, he had nevertheless broadly authorised the giving of such information, and as such was properly notified of the primary decision by sending it to the address contained in that application form. This reasoning was upheld on appeal in *Jalagam v MIAC* [2009] FCA 197.
[191] *DFQ17 v MIBP* [2019] FCAFC 64 at [39]–[40], [67]. This judgment effectively overrides *CWL17 v MIBP* [2017] FCCA 2664 which held, similar to the dissenting view of Rares J in *DFQ17*, that the provision of a postal address in response to the question in the form did not amount to giving an 'address for service'.
[192] *SZIHN v MIAC* [2008] FMCA 153. Upheld on appeal: *SZIHN v MIAC* [2008] FCA 747.

acceptable as a residential address. Failure to give a residential address will result in your application being invalid'. The applicant gave a post office box address as his postal address and contended that the residential address had been provided for the purposes of s 52(3A) which requires an applicant to tell the Minister the address at which he or she intends to live while the application is being processed not for the purpose of receiving documents. The Court rejected that contention and found the Minister had complied with the legislative requirements.[193]

2.6.33 Further, in *Candra v MIAC*[194] the applicant's authorised recipient had provided an email address with the visa application form, which included the statement 'Note: if the visa application is refused, the applicants will be notified by mail'. The decision notification was sent by email to the email address and the Court found no error. On a fair reading of the visa application form and the appointment of a migration agent form, the migration agent's email address was provided to the Minister for the purposes of receiving all documents, including a notification of a visa refusal.

Multiple forms of addresses

2.6.34 Where multiple alternate addresses are provided by an applicant (e.g. an email and residential address), the Minister may use any one of the methods of notification in s 494B.[195] The multiple alternate addresses do not comprise a list to be followed until actual notification has been achieved.[196]

2.6.35 In the case of an applicant who has provided two of the same types of addresses in the application form, the Federal Court has held that the ordinary meaning of the word 'last' in s 494B, does not mean 'single' or 'only', rather, it means 'the most recent at the time in question'.[197] In *Maroun v MIAC,* where the appellant provided, in the visa application, his residential address in Lebanon as well as a residential address in Australia, the Federal Court found that the Australian address was the

[193] However, in *Zangmo v MICMSMA* [2022] FedCFamC2G 25, the Court held that the residential address given by the applicant in her visa application was not an address provided for the purposes of receiving documents, in circumstances where the applicant had provided her migration agent's email address and indicated that 'to be sent to a person acting on … [her] behalf, … [namely] a … migration agent'. In contrast to *SZIHN*, the Court found that her residential address was 'simply her residential address provided because the 187 Visa Application requested residential address details' at [45].
[194] *Candra v MIAC* [2009] FMCA 526.
[195] See *Kim v MIMAC* [2014] FCA 390 at [28]. See also *Dzhakhanhirova v MICMSMA* [2020] FCA 894 where the Court followed *Kim* and held that where the applicant has provided both a residential address and an email address in the visa application form, the Minister is entitled to use either method to notify the applicant of the decision to refuse the visa: at [22]. The Court also rejected an argument that 'correspondence' and 'communicating' in the visa application form should be given a different meaning: at [18]–[19]. By way of background, the appellant in the visa application form had provided her residential address in response to a question about 'correspondence' and answered in the affirmative to a question about whether she agreed to the Department 'communicating' with her by email. The delegate sent the notification by email and the appellant unsuccessfully contended that she should have been notified by post to her address for correspondence. See also *Pathania v MIBP* [2015] FCCA 932 where the Court found the Minister was entitled to notify by post under s 494B in circumstances where the applicant had agreed to email communication and Minister had communicated by email up to that point. Upheld on appeal: *Pathania v MIBP* [2015] FCA 1262. See also *SZKTR v MIAC* [2007] FMCA 1447 in which the applicant had changed his postal address but not his residential address. The Tribunal had corresponded with the applicant at his residential address. The Court held that this method was acceptable under s 441A and that the Tribunal was permitted to use that address rather than a postal address: at [6]. This decision dealt with the Tribunal's prescribed ways of notifying a person under s 441A, which is, relevantly, in substantially the same terms as the methods by which the Minister can notify a person under s 494B. This finding was not disturbed on appeal, *SZKTR v MIAC* [2007] FCA 1767.
[196] *Nemuseso v MIAC* [2010] FMCA 957 at [73].
[197] *Maroun v MIAC* [2009] FCA 1284 at [36]. See also *Singh v MIAC* (2011) 190 FCR 552 at [40], where the Federal Court considered that there was no reason to suppose that the singular reference to 'the last business address' in s 494B(4)(c)(ii) did not include the plural, 'the last business addresses'. See also *Haque v MIAC* [2010] FCA 346 at [64]; *Pun v MIAC* [2011] FMCA 63 at [13], [18]; and *Patel v MIAC* [2012] FMCA 565.

'last' address as the appellant was physically present in Australia at the time of his visa application.[198]

Misstated address

2.6.36 If a misstated address is provided by the applicant and the Minister uses the address for notification, it will not amount to an error in notification.

2.6.37 For example, in *Cheng v MIAC* the Court found that the notice of the delegate's decision was sent to the address provided in the visa application, notwithstanding that it was not in fact the correct address.[199] At the time of dispatch the incorrect address was the last postal and residential address provided to the Department for the applicant and it was open to the delegate to send the notification letter to that address.[200]

2.6.38 Similarly, in *SZQYF v MIAC* the Court held that the incorrect address nominated by the applicant three times in his protection visa application was the address that complied with s 494B.[201] Although the Minister brought to the Court's attention an envelope, which it was believed could have been the envelope in which the protection visa application was sent, and which had the applicant's correct address details, the Court held that an address on the back of an envelope which may or may not have been the envelope containing the relevant documents could not trump the address placed three times in the protection visa application form as being the applicant's address.

Correcting misstated address

2.6.39 There will also be no error in addressing if the decision maker makes a small deviation to correct an obviously misstated address.

2.6.40 For example, in *SZOQY v MIAC*[202] the applicant had provided the incorrect address of 'The Boulevard Street' and the Tribunal sent a hearing invitation to 'The Boulevard', which was the applicant's actual address. The Court held that it would be absurd to conclude that making a minor alteration to the advised address, which had the effect that the address was correctly cited, led to the outcome that the Tribunal had not complied with s 441A(4)(c).[203] Although this decision was in the context of a hearing invitation sent under s 441A(4), it is equally applicable to notifications sent by the Department under s 494B.

2.6.41 This reasoning was applied in *SZRVF v MIAC* where the Court held the Department had complied with s 494B(4), notwithstanding the delegate's addition of the suburb

[198] *Maroun v MIAC* [2009] FCA 1284. See also *Kim v MIMAC* [2014] FCA 390 at [17], [46].
[199] *Cheng v MIAC* (2011) 198 FCR 559 the Court held the Department's letter was sent in accordance with s 494B, that is, to the last residential address provided by the applicant and that there was no merit in the claim that the address was not provided by the applicant but by someone who assisted him with his application form.
[200] However, by way of contrast, in *Yelaswarapu v MIAC* [2012] FMCA 849 the Court found that notification sent to the incomplete address as provided on the visa application did not comply with s 66(1) in circumstances where the complete address was available on the Department's file.
[201] *SZQYF v MIAC* [2012] FMCA 333.
[202] *SZOQY v MIAC* [2011] FMCA 120.
[203] *SZOQY v MIAC* [2011] FMCA 120.

name to the address provided by the applicant, which had identified her suburb only by postcode.[204]

2.6.42 Other examples include:

- *BZADI v MIMAC*[205] - where the applicant provided in his visa application a postal address which contained both a suburb name and the city name of Brisbane, and the Court found that the decision notification complied with s 494B(4), implicitly suggesting that the omission of the superfluous city name of 'Brisbane' in the notification address by the delegate was of no consequence.
- *SZSUF v MIBP*[206] - where the applicant gave her postal suburb as 'Central Sydney' and the delegate sent the decision notification to 'Sydney'. The Court found that the omission of the word 'Central' was not such to amount to a failure to comply with s 494B(4) given that it was superfluous and the correct postal address was 'Sydney'.

Errors in postcode, street number and suburb

2.6.43 Minor errors in the postcode, street number or suburb within a notification may not affect compliance with s 494B.

2.6.44 In *SZKGF v MIAC*, the Full Federal Court observed there were cogent reasons for concluding the postcode is not part of the address and therefore use of an incorrect postcode does not result in non-compliance with the statutory provisions.[207] The Court endorsed the views in *SZLBR v MIAC*, in which the Court found that an address is properly identified by the street name and number, where relevant, and suburb and that the postcode is not an essential part of the identification of that physical location.[208]

2.6.45 The Court in *SZKGF v MIAC* also observed that even if a postcode could be properly regarded as part of the address, use of an incorrect postcode would not necessarily amount to jurisdictional error.[209]

2.6.46 Applying *SZLBR v MIAC* and *SZKGF v MIAC*, the Court in *SZTQW v MIBP* found, in circumstances where the incorrect postcode specified by the applicant was replaced by the correct postcode for his suburb by the delegate, that notification was effective.[210]

2.6.47 The absence of a street number may not, in some circumstances, invalidate an address. In *Chizanne Kavanagh v Deputy Commissioner of Taxation*[211] the Federal Court accepted that 'Woolaston Rd Warrnambool VIC 3280' could constitute an

[204] *SZRVF v MIAC* [2013] FCCA 764. See also *Cheng v MIAC* (2011) 198 FCR 559.
[205] *BZADI v MIMAC* [2013] FCCA 1358.
[206] *SZSUF v MIBP* [2013] FCCA 1963.
[207] *SZKGF v MIAC* [2008] FCAFC 84 at [11]–[12].
[208] *SZLBR v MIAC* (2008) 216 FLR 141. On appeal, a Full Court of the Federal Court agreed that there were cogent reasons for concluding that the postcode is not part of the address: *SZLBR v MIAC* [2008] FCAFC 85. However, in both cases the Court held that if this view were wrong, as there was no practical injustice or inconvenience to the applicant, relief should be declined.
[209] *SZKGF v MIAC* [2008] FCAFC 84 at [12]; see also *SZLBR v MIAC* [2008] FCAFC 85.
[210] *SZTQW v MIBP* [2014] FCCA 2658, upheld on appeal in *SZTQW v MIBP* [2015] FCA 112. See also *SZTPT v MIBP* [2014] FCCA 2960 where the Court found no error in circumstances where the applicant provided an incomplete address for his agent, consisting only of a post office box number, but the Tribunal inserted the suburb and postcode.
[211] *Chizanne Kavanagh v Deputy Commissioner of Taxation* (2007) 157 FCR 551 at [13].

address notwithstanding that no street number was supplied. The Court observed that not all streets or roads, particularly in country areas, have numbered properties in them. The absence of a number adjacent to a street or road name will not necessarily mean that it is not an address. It was sufficient, for the purposes of the *Income Tax Assessment Act 1936* (Cth), that the details supplied appeared to be an address and were regarded by the company's officers as an address.

2.6.48 Minor discrepancies in the address used by the Minister to dispatch notification to may also not affect compliance with s 494B. In *On v MIBP*, the Court held that where the address notified to the Minister by the applicant was not the same as the address communicated to the postal service provider by the delegate, whether or not the document has been dispatched in accordance with s 494B(4) may turn on a number of matters, including the nature and extent of the differences between the addresses. In that case, the Court held that the delegate's incorrect spelling of the applicant's suburb ('Sydneyham') from that provided by the applicant ('Sydenham') was minor and that it would have been plain to any officer of Australia Post that the intended suburb was 'Sydenham', such that the notification still complied with s 494B.[212]

Postal address, address for correspondence and address for service

2.6.49 The expressions 'postal address', 'address for correspondence' and 'address for service' appear to be interchangeable in the context of migration legislation.[213] In *DFQ17 v MIBP*[214] the majority of the Full Federal Court held that a response to a question requesting a postal address amounted to giving an address for service in accordance with s 494B(4)(c)(i). On the majority's interpretation, in cases where a postal address differs from a residential address provided at the same time in the visa application form, it signifies that a person wishes to have correspondence sent to their postal address, unless the visa application form provides to the contrary, or there is subsequent information from the applicant indicating that another address is intended for the service of documents. This view is consistent with Federal Court authority in *SZNJM v MIAC*[215] considering the similarly worded provision in s 441A(4).

2.6.50 Further, the majority of the Full Federal Court in *DFQ17 v MIBP* noted the fact that the visa application form did not ask for an address for service was not relevant to the legal analysis of the expression 'address for service' in s 494B(4)(c)(i).[216]

Addresses provided incidentally

2.6.51 An address provided to the Minister incidentally, for example, in the form of letterhead, may be sufficient for the purposes of s 494B. Similarly, an address

[212] *On v MIBP* [2016] FCCA 481 at [19]–[20].
[213] *SZNJM v MIAC* [2009] FCA 1295 considering s 441A(4) [Tribunal equivalent to s 494B(4)].
[214] *DFQ17 v MIBP* [2017] FCAFC 64 at [38]–[40], [67]. This judgment effectively overrides *CWL17 v MIBP* [2017] FCCA 2664 which held, similar to the dissenting view of Rares J in *DFQ17*, that the provision of a postal address in response to the question in the form did not amount to giving an 'address for service'.
[215] *SZNJM v MIAC* [2009] FCA 1295 at [24].
[216] *DFQ17 v MIBP* [2017] FCAFC 64 at [40], [67].

provided on an incoming passenger card may also be an address provided to the Minister for the purposes of receiving documents in some circumstances.[217]

2.6.52 In *Singh v MIAC*[218] the applicant's authorised recipient wrote to the Department using a letterhead that contained a post office box address. The Department subsequently notified the authorised recipient of the decision to cancel the applicant's visa in a letter sent to the post office box address. The Court held the delegate was entitled to send the relevant notices to the post office box address, as that was one of the last business addresses provided to the Minister by the authorised recipient for the purposes of receiving documents. This decision was upheld by the Full Federal Court in *Singh v MIAC,* although it is unclear whether the Court considered that an address provided incidentally on letterhead was an address provided 'for the purpose of receiving documents' in accordance with s 494B(4)(c)(ii), or whether it was simply an address available to the Minister to use under s 494A.[219]

Correct recipient

2.6.53 Generally speaking, the Migration Act and Regulations require notification to be given to the person who is the subject of the decision, unless that person has appointed an authorised recipient or is a minor and has a 'carer'.

Aliases

2.6.54 Where an applicant has an alias, the Department may notify them by any of their known names used in connection with their application.

2.6.55 In *MIAC v SZMTR*,[220] the visa applicant was named in the visa application as Ms ML. However, the delegate sent the decision notification to Ms ZH, being the name on the passport used by the applicant to enter Australia. The applicant had claimed that the name in the passport was not her real name. The Federal Court held the requirement was to notify the *person*, being a non-citizen, who has applied for a

[217] *Fabillar v MICMSMA* [2021] FCCA 836 at [10]–[14],[17]–[18]. The applicant had made a combined application for a Subclass 820 and 801 visa and included her postal address in the application. The Subclass 820 visa was granted and the grant notice informed the applicant to update her contact details with the Department immediately if they change, as the Department would need to contact her when it was time to process the Subclass 801 visa application. To assist it consider the Subclass 801 application, the Department sent notices to the postal address in the visa application seeking information, however the Department received no response. The Department then sent a letter requesting the updated information to a different address, which the applicant had provided on an incoming passenger card. The delegate sent the refusal notification to the original address. By sending the notice to the original address, the Court held that the delegate did not comply with s 494B(4)(c). The Court noted that there was nothing in the material to suggest that the applicant had ever notified the Department of a change in address for the purpose of receipt of documents but that by sending the document requesting information to the new address, the Department had been given details of the applicant's new address for the sending of correspondence. In reaching this conclusion, the Court noted it was 'unexplained' why the delegate notified the refusal to the original address in circumstances where they had recorded the address from the incoming passenger card as the new address.

[218] *Singh v MIAC* (2010) 239 FLR 287. A similar view had been expressed in the context of notification by the Tribunal in *Von Kraft v MIMA* [2007] FMCA 244 where Barnes FM held that the Tribunal may communicate with an authorised recipient at any 'address for service' or 'business address' in the authorised recipient's letterhead, notwithstanding that the address may be different to that provided by the applicant when nominating the name and address of their authorised recipient. However, the Court's reasoning in that case appears to have been influenced by the previous communication between the Tribunal to the authorised recipient at the address in the letterhead.

[219] *Singh v MIAC* (2011) 190 FCR 552 at [41]–[44].

[220] *MIAC v SZMTR* (2009) 180 FCR 586.

visa, at their correct address, by whatever name they used, and therefore the delegate had sufficiently addressed the envelope for the purposes of s 494B(4).[221]

Errors in name

2.6.56 Generally, a valid notification requires the notice to be addressed to the recipient as described/spelt. However, a minor error or incomplete transcription of the name may not invalidate the notification in every case. In determining whether the person has been correctly identified, it is relevant to take into account whether the person would recognise from the name that the notification is intended for them.

2.6.57 In *Naheem v MIMA*,[222] the applicant's name appeared in a variety of forms on different official documents. On the visa application form the applicant identified his given names as 'Mohamed Naheem' and his surname as 'Naina Mohamed Saibo'. In his application for review, his given names were identified as 'Naina Mohamed Saibo' and his surname as 'Mohamed Naheem'. The delegate's decision notification letter was sent by registered post in an envelope addressed to 'Mr Mohamed N N Mohamed Saibo'. The Court found that the letter was correctly addressed to the applicant and rejected the applicant's claim that he did not know that the letter was addressed to him as the applicant understood English and was aware from other correspondence that the Department abbreviated his name.

2.6.58 In *SZSWF v MIBP*[223] the Court found in circumstances where the notification letter and envelope was addressed to the applicant by one of the forms of name she had used in connection with her visa application the delegate sufficiently addressed the envelope both for the purposes of s 66(1) and s 494B(4), to ensure that the notification letter would come to the attention of the applicant. The Court was of the view that the name appearing on the envelope and letter, being the reversal of the applicant's given and family names, clearly identified the applicant and the order in which it appeared did not give rise to any implication that it was addressed to some other person.

Sending notices 'care of' a recipient

2.6.59 A notification will not be addressed to the correct person if it is addressed to another person 'care of" that person.

2.6.60 For example, in *VEAN of 2002 v MIMIA* a Full Court of the Federal Court held that a notification addressed to an applicant 'care of' his authorised recipient was not correctly addressed to the authorised recipient as required by the Migration Act.[224] However, such an error will not necessarily mean that a person is not taken to have received the notification. If, despite the error in addressing the notice, the authorised recipient nevertheless actually received the notice, he or she is taken to have received it as if the deeming provisions in s 494C applied. The only exception

[221] *MIAC v SZMTR* (2009) 180 FCR 586 at [27], [39]–[40]. The Full Court found that Minister had addressed the envelope for the purposes of ss 66(1) and s 494B(4) to ensure that it would come to the attention of the person who had applied for the visa, and indeed, notification was actually received by the visa applicant.
[222] *Naheem v MIMA* [1999] FCA 1360.
[223] *SZSWF v MIBP* [2015] FCCA 250 at [53].
[224] *VEAN of 2002 v MIMIA* (2003) 133 FCR 570.

to this is if that person can show that he or received the document at a later time, in which case he or she is taken to have received the document at the later time.[225]

Where the applicant is a minor

2.6.61 In certain circumstances, where the person who is the subject of the primary decision is a minor, the Minister may give notification of the decision to a carer of the minor.[226]

2.6.62 A 'carer of the minor' must be at least 18 years of age; and the Minister must reasonably believe that:

- the 'carer' has day to day care and responsibility for the minor;[227] or
- the 'carer' works in or for an organisation that has day to day care and responsibility for the minor, and the carer's duties (either alone or jointly with another person) involve care and responsibility for the minor.[228]

2.6.63 The Minister cannot give notifications by this method if the minor is part of a combined visa application and the decision is to refuse to grant the visa.[229] In these cases, s 52(3C) of the Migration Act operates, such that if the Minister gives a document to one person in a combined application, the Minister is taken to have given the document to all applicants.

2.6.64 Where the minor has an authorised recipient, the Minister must give the notification to the authorised recipient instead of the minor or carer.[230]

2.6.65 If the Minister gives the notification to a carer of the minor, the notification is taken to have been given to the minor.[231] However, the Minister is not prevented from also giving the minor a copy of the document directly.[232]

2.6.66 Notification to a carer of the minor must be given:

- by dating it, and then dispatching it within 3 working days (in the place of dispatch) of the date of the document by prepaid post to the carer of the minor at the last residential address, business address or post box address for the carer of the minor that is known to the Minister;[233] or

[225] The Revised Explanatory Memorandum to the Migration Amendment (Notification Review) Bill 2008 that introduced these provisions states that the amendments were intended, in part, to address technical defects in notification identified in cases such as *VEAN of 2002 v MIMIA* (2003) 133 FCR 570. These provisions apply to documents sent on or after 5 December 2008: *Migration Amendment (Notification Review) Act 2008* (No 112, 2008) s 29.
[226] ss 494A(2), 494B(1A) and reg 2.55(3A). These provisions apply to documents dispatched on, or after, 5 December 2008.
[227] s 494A(2)(a).
[228] ss 494A(2)(b).
[229] ss 494A(3), 494B(1B).
[230] See for example *Khan v MIBP* [2017] FCCA 3112 at [17]–[20] where the Court held that the delegate of the Minister had validly notified applicants, who were minors, by sending the notification by email to their authorised recipient. The Court rejected the argument that, as the applicants were minors, s 494B(5)(e) required the notification to be sent to an email address for a 'carer of the minor that is known to the Minister' rather than their authorised recipient. The Court found that as s 494B(5) and s 494D refer to a 'recipient' (and not the applicant), it is that recipient, who in this case was the authorised recipient appointed under s 494D, to whom the Minister is required to give the notification. Upheld on appeal: *Khan v MIBP* [2018] FCA 627 at [33]. An application for special leave to appeal to the High Court was dismissed: *Khan v MIBP* [2018] HCASL 267.
[231] ss 494A(4) and 494B(7).
[232] ss 494A(4) and 494B(7).
[233] s 494B(4)(c)(iii).

- by transmitting the notice by fax, email or other electronic means to the carer of the minor at the last fax number, e-mail address or other electronic address for the carer of the minor that is known to the Minister.[234]

Language requirements

2.6.67 There is no requirement that the notice of decision be in the applicant's own language. In *Cuong Van Nguyen v RRT* it was held that in the circumstances of that case, notice in English was 'reasonable and appropriate'.[235] It was suggested that 'notice' does not equate with 'knowledge'[236] and that it would be impracticable and inefficient to notify all applicants of the decision in their own language. A recipient in the situation of the appellant would be alerted by the letterhead and form of the letter that it was an official document which called for translation or for the seeking of further information.[237]

2.6.68 More recently, in *SZQBV v MIAC* the Court confirmed that the Tribunal is under no obligation to express its communications in any language other than English.[238] The Court held that it is the responsibility of applicants before the Tribunal to ensure that they understand the communications which pass between it and them, because it is their practical obligation to satisfy the Tribunal that they meet the criteria for the grant of a visa. This reasoning applies equally to the Department.

2.7 Notification to authorised recipient

Nomination of authorised recipient

2.7.1 If a person has given the Minister written notice of the name and address of another person (the authorised recipient) who has been authorised by the applicant to receive documents in connection with specified matters arising under the Migration Act or the Regulations, the Minister must give the authorised recipient any documents in connection with those matters that the Minister would otherwise have given to the applicant.[239] There is a limited exception to this rule (discussed below),

[234] s 494B(5)(e).
[235] *Cuong Van Nguyen v RRT* (1997) 74 FCR 311.
[236] *Cuong Van Nguyen v RRT* (1997) 74 FCR 311. Sundberg J stated at 325: 'A requirement that a person be given notice of something does not demand that the thing be brought home to the person's understanding or knowledge: *Goodyear Tyre and Rubber Co (Great Britain) Ltd v Lancashire Batteries Ltd* [1958] 1 WLR 857 at 863. Notice is not synonymous with knowledge: *Cresta Holdings Ltd v Karlin* [1959] 1 WLR 1055 at 1057.
[237] *Cuong Van Nguyen v RRT* (1997) 74 FCR 311 at 319.
[238] *SZQBV v MIAC* [2011] FMCA 727 at [29].
[239] s 494D. See *Lee v MIAC* (2007) 159 FCR 181 at [38]. In *MIAC v SZKPQ* (2008) 166 FCR 84 the Full Court of the Federal Court agreed that s 494D(1) contemplates that a document addressed to the applicant, which would otherwise be given to that person must be given to the authorised recipient: at [25]. Note that in relation to the notification of cancellations (except where the former visa holder or visa holder is in immigration detention), the Federal Circuit Court in *EIA18 v MHA* [2021] FCCA 613 at [67] held that it is arguable that the only way the Minister can give notice of a cancellation is in a manner prescribed by reg 2.55, and that there is no work for the authorised recipient provision (s 494D) to do, such that notification must be given to the former visa holder themselves and not to a purported authorised recipient. However, in *MICMSMA v Lyu* [2021] FCCA 1604 at [20]–[24], the Federal Circuit Court did not consider *EIA18* and held that, having provided a form 956A (which confirmed the authorised recipient's appointment) to the Department, the operation of s 494D(1) and regs 2.55(1)(a) and (3)(d) impose on the Minister the requirement to give the authorised person any documents instead of the first person. On appeal in *Lyu v MICMSMA* [2022] FCA 1258 at [57] the Court confirmed that s 494D required the Minister to give the document to the authorised recipient, instead of the visa holders. However, the Court allowed the appeal on the basis that the person the NOICC was sent to had not been appointed as the authorised recipient as the covering email accompanying the Form 956A confirmed the person was being appointed in relation to a business monitoring survey only (and therefore had not been appointed under s 494D for the purpose of sending the NOICC).

however, where the matter being notified relates to a cancellation (such as a NOICC or cancellation decision), there is divergent authority on whether it must be sent to the applicant or the authorised recipient (if one has been appointed). See discussion at 2.3.14 (above).

2.7.2 If the Minister gives the document to the authorised recipient, the Minister is taken to have given the document to the applicant.[240] Nomination of an authorised recipient does not preclude *a copy* of the document being given to the applicant as well.[241]

2.7.3 There is no requirement that the authorised recipient give their consent to be the authorised recipient.[242]

2.7.4 Where an applicant is in immigration detention, reg 5.02 provides that the document can be given to *either* the applicant or a person authorised to receive documents on his/her behalf. Although this suggests that notification requirements would be satisfied if correspondence were sent to the applicant rather than his or her authorised recipient if one has been nominated, there is some uncertainty over the interrelationship between reg 5.02 and s 494D.[243]

Exemptions to requirement to notify the authorised recipient

2.7.5 Section 494D(5) exempts the Minister from compliance with the authorised recipient requirements in certain circumstances.[244] These are:

- if the authorised recipient is not a migration agent; and
- the Minister reasonably suspects that the authorised recipient is giving immigration assistance; and
- the Minister gives the person (applicant) notice that he does not intend to give the authorised recipient documents.

2.7.6 The purpose of this provision is to allow the Minister the discretion to refuse to communicate with a nominated authorised recipient where there are concerns, for example, about their character, conduct or professionalism. The discretion does not

[240] s 494D(2).
[241] s 494D(2). See *Lee v MIAC* (2007) 159 FCR 181 at [34], the qualification in s 494D(2) operates where the document has been given to the authorised recipient, not as an alternative to the giving of the document to the authorised recipient.
[242] See *BNZ16 V MIBP* [2018] FCCA 857 at [60].
[243] On one view s 494D, which require a document to be given to the authorised recipient which would otherwise have been given to the applicant, may take precedence over reg 5.02. This is because the relevant provisions in respect of notification in the Migration Act would require the notice to be given in the way specified by the Migration Act, and s 494D cannot be overridden by a regulation unless the Migration Act expressly provides as such. The Department appears to also take this view: Policy –Act – Code of procedure – Notification requirements – General guidance for all notifications – Notifying detainees (reissued 19/11/2016). This means that reg 5.02, in relation to authorised recipients, may only operate for giving documents to applicants in immigration where there is no prescribed method.
[244] The delegate must send correspondence to the authorised recipient unless they exercise the discretion in s 494D(5). For example, in *BNZ16 v MIBP* [2018] FCCA 857 at [30]–[33] and [63] the Court rejected the applicant's submission that it was unreasonable for the delegate to not consider exercising the discretion in s 494D(5) to send correspondence to the applicant himself rather than the authorised recipient where the delegate knew that person was no longer a registered migration agent. The Court held that the delegate was compelled to send the notification to the authorised recipient, such that s 494D(1) prevails over s 494D(5).

appear to be exercised in respect of those persons in Australia who are exempted from registration as an agent (e.g. close family members, parliamentarians, etc.).[245]

Role of the authorised recipient

2.7.7 A person nominated as an authorised recipient is only authorised to receive documents.[246] A person who is an authorised recipient is not prevented from being separately authorised as a representative to do other things on behalf of an applicant but that is a role separate from that of an authorised recipient.[247]

Issues relating to authorised recipients

Determining whether an authorised recipient has been appointed

2.7.8 Whether a person has appointed an authorised recipient is a question of fact.[248] As noted above, s 494D provides that a person (the applicant / former visa holder) may give the name and address[249] of another person to act as an authorised recipient. While the notice of an authorised recipient must be given in writing, a written signature of the person appointing the authorised recipient is not required.[250] It will be sufficient if a person, acting on the authority of the applicant / former visa holder, gives the written notice.

2.7.9 For example, in *Huang v MIAC*[251] the applicant's agent (who was not a registered migration agent) completed a visa application form on the applicant's behalf and nominated himself as authorised recipient, the applicant claimed that he had not authorised his agent to nominate himself as authorised recipient and the Court applied principles of contract law to find that there was an implied actual authority from the circumstances of the agency and that the Department was correct to send the decision notification to the authorised recipient.

2.7.10 The purpose for which the appointment was made will be a relevant consideration in determining whether there is an authorised recipient in the particular circumstances. Section 494D provides that a person may notify the Minister of an authorised recipient 'in connection with matters arising' under the Migration Act. If a person has given notice that he or she has an authorised recipient in connection with a visa application, (e.g. by completing the part relating to the appointment of an authorised recipient on a visa application form), that appointment may not extend,

[245] Revised Explanatory Memorandum to Migration Legislation Amendment Bill (No 1) 2008, p.45 and Policy – Migration Act – General guidance for all notifications – Notifying Authorised Recipients – When documents need not be given to an authorised recipient - s494D(5) (reissued 19/11/2016).
[246] s 494D(1) as amended by *Migration Legislation Amendment Act (No 1) 2014* (No 106, 2014).
[247] In *Jalagam v MIAC* (2008) 221 FLR 202, the Court found nothing in the authorised recipient provisions to exclude the 'normal presumption that Parliament intends to allow a person to act for the purposes of a statutory provision through an agent.' This reasoning was upheld on appeal in *Jalagam v MIAC* [2009] FCA 197.
[248] For example, see *Fahme v MIBP* [2016] FCCA 3032 at [27]–[28] where the Court held that a Migration Agent was validly appointed as an authorised recipient in a form 956 where, under the heading 'declaration by client', the box was ticked to signify that the person named in Part B no longer acts as the agent, the box to tick to appoint an agent as detailed in Part A was not ticked but the details of the migration agent were completed in Part A and Part B was blank. The Court held that it was clear that the incorrect box was ticked and the intention was to appoint the agent. Upheld on appeal: *Fahme v MIBP* [2017] FCA 614.
[249] Note that a s 494D notice may include more than one address and the address may be a business, residential address and an e-mail address: *MZZDJ v MIBP* (2013) 216 FCR 153 at [30].
[250] *Jalagam v MIAC* [2008] FMCA 1417. This finding was not disturbed on appeal: *Jalagam v MIAC* [2009] FCA 197.
[251] *Huang v MIAC* [2011] FMCA 271.

for example, to cancellation matters arising under the Migration Act or Regulations.[252]

2.7.11 An authorised recipient will usually be appointed using a departmental form, such as a Form 956 or Form 956A. Surrounding correspondence, such as the covering email accompanying the form or to which the form is attached, may restrict or clarify the scope of the appointment. For example, in *Lyu v MICMSMA*,[253] the Federal Court held that a person nominated in a Form 956A had not been appointed as an authorised recipient for the purpose of notifying a NOICC in circumstances where the email accompanying the Form 956A stated that the person had been authorised by the appellant to receive correspondence on their behalf for the purpose of a business monitoring survey. The Form 956A itself did not include the same information on the appointment. The version of Form 956A used contained a declaration that the person named in question 14 was appointed to receive all documents relating to the matter indicated in question 12, but the answer to question 12 was left blank. Question 12 asked '*Are you appointing an authorised recipient in relation to an application process, a cancellation or another matter (eg a sponsorship monitoring and sanction activity …, or only one stage of a two stage visa application, or ministerial intervention)?*' The Court noted the fact that this business monitoring survey limitation was not mentioned in the Form 956A at question 12 does not negate the express authorisation that was given in the covering email for the form, and that it was 'not surprising' that question 12 was left blank as business monitoring survey did not fit within any of the given categories.[254] The Court reasoned that any oversight (if any) in leaving question 12 blank was cured by the specification in the covering email of the extent of the appointment as authorised recipient (which did not extend to the NOICC).[255]

2.7.12 In Singh v MIAC,[256] the applicant provided on his visa application form his address for correspondence and also agreed to the Department communicating with him by fax, email or other electronic means, and provided a mobile telephone number and email address accordingly. The applicant also appointed an authorised recipient to receive correspondence, but the relevant Form 956 indicated that the authorised recipient was instructed only to submit the application. In light of this ambiguity, the Court found that the applicant had been correctly notified of the primary decision

[252] In *SZKHR v MIAC* [2008] FMCA 138, the Court found that the applicant had not appointed an authorised recipient in circumstances where the Form 1231 did not identify to which application the notification related. See also *SZFQY v MIAC* [2008] FMCA 261. In *Singh v MIAC* [2010] FMCA 931, the applicant appointed an authorised recipient using Form 956 as a person to whom correspondence was to be sent. The relevant Form 956 indicated, however, that the authorised recipient was instructed only to submit the application. This may be compared with *SZRQB v MIAC* [2012] FMCA 889 where the Court found that, in circumstances where an applicant had completed a Form 866B, being the prescribed form required for a protection visa application, and had indicated that all written communication about his application should be sent to his agent, and where the applicant had also nominated his agent in a Form 956, not being a prescribed form, in which he could have, but did not, place any limit on the agent's authority, the only reasonable inference to draw was that the applicant's agent was authorised to receive all written communications about his protection visa application at [40].
[253] *Lyu v MICMSMA* [2022] FCA 1258 at [63]–[81].
[254] *Lyu v MICMSMA* [2022] FCA 1258 at [70].
[255] *Lyu v MICMSMA* [2022] FCA 1258 at [71]. The Court held that the primary judge was incorrect to find that the person had been appointed as an authorised recipient for the purpose of the NOICC on the basis that the purported limitation in the covering email provided with the Form 956A was insufficient to operate in such a manner as to limit the express authorisation contained within the form itself. The covering email itself was sufficient, and the Court noted that the declaration in the Form 956A is worded with the intent of s 494D in mind, which is that the authorised recipient is appointed to receive documents 'in connection with specified matters'. The declaration, consistent with s 494D, did not seek to provide a general authorisation for the representative to receive all documents for any migration matter: at [73]).
[256] *Singh v MIAC* [2010] FMCA 931 at [22]–[23].

when the Department sent the notification to him at his postal address rather than that of the authorised recipient. Similarly, in *Nguyen v MICMSMA*,[257] the Court found that the version of Form 956 completed by the applicant did not constitute the written notice s 494D(1) requires for an authorised recipient to be validly appointed. In that case, which was a cancellation matter, the Form 956 incorrectly referred to the applicant as a 'visa applicant', not a former visa holder whose visa had been cancelled; the form also identified her migration agent as relevantly acting in relation to 'all immigration matters' arising from 'an application process', and not in relation a 'cancellation process'. The Court held that the extent of authority which the Form 956 confers is to be determined by reference to the terms of that form. As the applicant indicated her migration agent was her authorised recipient in relation only to 'an application process', and since the Form 956 was not a notice which, by its terms, gave authority to the migration agent to receive documents instead of the applicant, that form was not written notice for the purposes of s 494D(1).

Must an authorised recipient be a natural person?

2.7.13 The case law suggests that an authorised recipient must be a natural person[258] rather than a firm or organisation. A person also cannot have more than one authorised recipient at any time.[259]

Must the authorisation take a particular form?

2.7.14 There is no requirement that the appointment of an authorised recipient be in any particular form.[260] Any notice in writing meeting the elements of s 494D(1) will suffice.

2.7.15 The courts may scrutinise the documentary evidence to determine whether an applicant has appointed an authorised recipient. In *SZKHR v MIMIA*[261] the Department notified the applicants of the primary decision by letter addressed to a Mr Khan on the basis that he had been nominated as their authorised recipient. The Tribunal relied on Form 1231 to find that the applicants had nominated an authorised recipient under s 494D of the Migration Act. Although Mr Khan's details were provided and the applicants signed the form indicating they 'authorise all written communications about the above application be sent to the nominated person', the applicants' details were not filled out and there was no evidence that the form related to a particular visa application. The Court found that as 'the above application' was not identified in any way, the authority was meaningless.

[257] *Nguyen v MICMSMA* [2022] FCA 1034. Upheld on appeal in *MIMCMA v Nguyen* [2022] FCAFC 200, in which the Court at [27] held there was 'no express or definite or explicit or categorical or particular mention of authorisation to receive documents' in connection with the cancellation. The Court reasoned that if 'the notice is equivocal and not clear in express terms that it extends from [the] application process to an application or request as part of the process to have revoked a cancellation of a visa, it is not a notice of the latter application or request that satisfies s 494D(1)'. The Court considered a superseded version of Form 956. The current version now includes the option for an applicant to appoint the person referred to in the form as their authorised recipient. If this option is selected and provided that the relevant type of assistance is recorded in the form, it appears open for the Tribunal to find the person has been validly appointed as the authorised recipient.
[258] See *Li v MIMA* (1999) 94 FCR 219 at [40] in relation to former s 53(4) and *SZJSP v MIAC* [2007] FCA 1925 at [18].
[259] s 494D(3).
[260] *Jalagam v MIAC* [2009] FCA 197.
[261] *SZKHR v MIMIA* [2008] FMCA 138.

Can an authorised recipient be appointed orally?

2.7.16 An appointment of a person as an authorised recipient must be in writing.

Withdrawing or varying an authorised recipient and varying an address

Who can withdraw/vary the appointment of a person?

2.7.17 An applicant or a person acting on the applicant's instructions, but not the authorised recipient acting unilaterally/alone (i.e. without instructions), may withdraw or vary the appointment of a person under s 494D(1) as an authorised recipient.[262]

What constitutes a withdrawal/variation of appointment?

2.7.18 The subject of a withdrawal or variation under s 494D(3) is the s 494D(1) written notice itself.[263] In *MZZDJ v MIBP*[264] the Full Federal Court in considering s 494D(1) as it was prior to 25 September 2014, held that the Tribunal had jurisdiction to conduct a review, finding on the facts that the appellant's migration agent orally varied, on behalf of the appellant, the written notice which had been given under s 494D(1) of the Migration Act. The Court rejected the Minister's submission that all the migration agent did by her oral statements was to express a preference to be notified in one of the ways contemplated by s 494B. The Court found that the oral variation was effective to alter the manner in which the Minister's delegate was required to notify the appellant's migration agent of the visa refusal decision and to render ineffective a purported notification under s 66(1) by the Minister's delegate.

2.7.19 Section 494D(3) contemplates two different types of conduct: withdrawal and variation. A withdrawal operates on the entire written notice given under s 494D(1) and consequently the written notice ceases to have effect.[265] A withdrawal can be made by the applicant or a person acting on instruction. An authorised recipient cannot unilaterally (i.e. acting without instructions) withdraw the appointment of a person as an authorised recipient under s 494D(3).

2.7.20 With a variation, the written notice given under s 494D(1) remains in effect, but part of its content is altered.[266] Variation under s 494D(3) can be permanent or temporary, it can be oral, and it can only be made by the applicant or the agent of the applicant where that person is acting within the authority given to him or her by the applicant, and not outside it.[267] An authorised recipient, who is merely the person authorised to receive documents and not also the agent of the applicant, cannot unilaterally vary the appointment of a person as an authorised recipient under s 494D(3).

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[262] s 494D(3) as amended by *Migration Legislation Amendment Act (No 1) 2014* (No 106, 2014). The amendments apply if the notice of the authorised recipient was given before, on or after 25 September 2014.
[263] *MZZDJ v MIBP* (2013) 216 FCR 153at [31].
[264] *MZZDJ v MIBP* (2013) 216 FCR 153.
[265] *MZZDJ v MIBP* (2013) 216 FCR 153 at [31].
[266] *MZZDJ v MIBP* (2013) 216 FCR 153 at [32].
[267] *MZZDJ v MIBP* (2013) 216 FCR 153 at [33], [35].

2.7.21 The s 494D(1) notice may be varied by removing an address, where there is more than one address, as well as by substituting a different address.[268] Whether a s 494D(1) notice has been varied so as to remove or change a previously notified address, or whether an applicant is simply expressing a preference for the use of a particular address, will depend on the circumstances.[269]

2.7.22 Accordingly, when considering whether a s 494D(1) notice has been withdrawn or varied under s 494D(3) for the purpose of determining whether a primary decision has been correctly notified, the Tribunal considers any conduct that may amount to a withdrawal or variation of a s 494D(1) notice, including any removal or change of address.[270]

Is an oral variation/withdrawal acceptable?

2.7.23 Unlike the appointment of an authorised recipient which must be in writing, the Migration Act is silent on how a withdrawal or variation of the notice of an authorised recipient may take place. In these circumstances, the Courts have accepted that an applicant, or a person acting on their instructions, may withdraw or vary their notice of an authorised recipient orally[271] or implicitly through their conduct.[272] An express, or written statement is not required.

2.7.24 While it is clear that a variation or withdrawal may be made orally, it is less clear whether a *variation* to appoint a different person as authorised recipient may be made orally or whether it should be in writing. While this may be regarded as a variation of a s 494D(1) notice, it is arguable that this is a withdrawal of a previous s 494D(1) notice and the appointment of a new person under s 494D(1).

Who can vary an authorised recipient's address?

2.7.25 An authorised recipient, whether or not they are also an agent of the applicant, can however give notice of a variation in their address under s 494D(3A).[273] This avoids the Department having to send correspondence to an outdated address merely because it was the authorised recipient, rather than the applicant or someone acting on instructions, who had notified of a change in address.

[268] *MZZDJ v MIBP* (2013) 216 FCR 153 at [56].
[269] Note, the Court in *MZZDJ v MIBP* (2013) 216 FCR 153 confirmed previous authority that s 494B does not allow an applicant to express a preference for which address should be used; however on the particular facts, it rejected the Minister's submission that that was all the authorised recipient had done. If an address has not been removed by a variation, it would remain open, on previous authorities, for the Minister to use any one of the methods of notification in ss 494B. See also *Bui v MIBP* [2015] FCCA 1931 where the Court found that the Tribunal led itself into error and thereby deprived itself of jurisdiction because it failed to give any consideration to a relevant piece of evidence about a changed email address.
[270] In *SZTMZ v MIBP* [2014] FCCA 2957 the Court found no evidence of any express withdrawal of the authorised recipient's authority and was of the view that the evidence before it, namely change of the applicant's new residential and postal address, did not support an inference that she had withdrawn the authorisation of the agent to act as her authorised recipient.
[271] *MZZDJ v MIBP* (2013) 216 FCR 153.
[272] In *Nawaz v MIAC* [2013] FCCA 545 the applicant was interviewed by Departmental officers who advised him they were investigating his authorised recipient for fraud, and that if he wished he could withdraw her as his authorised recipient. Although he was provided with a form for this purpose, as he did not fill out and return the form before the delegate's decision was made, the delegate notified the applicant via his authorised recipient. The Court held it was sufficiently clear from the interview that the applicant no longer wanted his authorised recipient to remain. Applying *SZLWE v MIAC* [2008] FCA 1343, the Court accepted that this constituted a withdrawal of the applicant's authorised recipient and the delegate's decision should have been sent to the applicant at [54] and [58].
[273] s 494D (3A) inserted by *Migration Legislation Amendment Act (No 1) 2014* (No 106, 2014). The amendments apply if the notice of the authorised recipient was given before, on or after 25 September 2014.

Appointment, variation or withdrawal on the applicant's behalf

2.7.26 While only *the applicant* (or someone acting as his/her agent, which may be the authorised recipient themselves) may notify the Department of the appointment, variation or withdrawal of an authorised recipient there is no requirement that they do so personally, or sign a written notice themselves. If there is any doubt as to whether a third person has authority to appoint, vary or withdraw an authorised recipient on the applicant's behalf, the Tribunal may seek clarification from the applicant directly. This might arise, for example, if a migration agent informs the Department that he or she has ceased to act for the applicant and should therefore no longer receive correspondence as authorised recipient.

2.7.27 There is no provision however for an authorised recipient to unilaterally (i.e. without instructions) withdraw their own nomination as an authorised recipient. Even if an authorised recipient notifies the Minister that he or she no longer acts for the applicant, the Minister must give the notification to the authorised recipient unless the *applicant* has withdrawn or varied the nomination of that recipient.[274]

Addressing correspondence to an authorised recipient

2.7.28 In the case of correspondence 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. If the envelope is correctly addressed, it is irrelevant whether the address block on the document itself is correctly addressed to the authorised recipient.[275]

2.7.29 A similar approach would appear to apply to documents sent by email. Provided that the email was sent to the authorised recipient's correct email address, there will be no error where the body of the email is addressed to the visa applicant rather than the authorised recipient.[276]

2.7.30 For correspondence sent by post to an authorised recipient at their business address, it is insufficient to address the envelope simply to the firm at which the authorised recipient is employed.[277] In fact, as the firm itself is not the 'authorised recipient' and the name of the firm would not be considered part of the 'address', it

[274] *Guan v MIAC* [2010] FMCA 802 at [24]–[27]. In that case the Court was considering an authorised recipient appointed under s 379G(3), but the reasoning is equally applicable to an authorised recipient appointed under s 494D.
[275] *MIAC v SZKPQ* (2008) 166 FCR 84 at [22]. Note that a different view was expressed by Besanko J (with which Moore J agreed) in the earlier judgment of *SZFOH v MIAC* (2007) 159 FCR 199.
[276] In *Brar v MIAC* [2012] FMCA 593, the Court applied the reasoning of Emmett J in *MIAC v SZKPQ* (2008) 166 FCR 84 to find that s 494B(5) was not prescriptive of the precise form of the address or the addressee of the 'covering email'. In this case a copy of the decision record and notification letter was sent to the email address provided by the second authorised recipient. However, the salutation in the 'covering email' was addressed to the first authorised recipient. The Court held that there would be no error in notification of the primary decision in circumstances where the salutation in the covering email is incorrectly addressed if the decision and notification letter are actually sent to the email address provided for the purpose of receiving documents.
[277] In *SZJSP v MIAC* [2007] FCA 1925, which overturned the reasoning in *SZBLY v MIMIA* [2005] FMCA 922. See *SZCCZ v MIMA* [2006] FMCA 506, where the Court found that, following *Chen v MIMIA* [2005] FMCA 1000 and *VEAN v MIMIA* (2003) 133 FCR 570, strict compliance was required in addressing a letter to the authorised recipient. In that case the applicant had provided only the name of a migration agent on the form and the Tribunal had sent the letter addressed to the company of which the migration agent was the principal. An appeal in this matter was dismissed: *SZCCZ v MIAC* [2007] FCA 1089. The reasoning in these cases applies equally to notification by a delegate.

is not strictly necessary to include the name of the authorised recipient's firm (if any) on the envelope at all.[278]

2.7.31 If the envelope is addressed to the applicant *care of* the authorised recipient's address, the Minister will not have given the document to the authorised recipient and prima facie, the applicant will not have been validly notified of the invitation or notice.[279]

2.7.32 The document will also not be given to the authorised recipient if it is sent in an envelope with the correct address but addressed to a person other than the authorised recipient.

2.7.33 However, if the Minister makes a mistake such as those outlined above, the applicant will still be taken to have been validly notified if the authorised recipient nonetheless receives the notification. See below.

When is a document sent to an authorised recipient received?

2.7.34 The deeming of receipt of notification to authorised recipients occurs in the same way as for notifications given directly to an applicant or former visa holder, as outlined above. When considering whether an application has been lodged within the prescribed period, the Tribunal will therefore need to consider whether the applicant had appointed an authorised recipient, and if so, when the authorised recipient is taken to have received the delegate's decision. If the primary decision-maker failed to correctly give notification to a properly appointed authorised recipient, the decision may not have been validly notified in accordance with the Migration Act or Regulations and the time limit for applying for review may not have commenced.[280]

2.7.35 However, if such an error was made and the authorised recipient nonetheless received the notification, then the authorised recipient (and therefore the applicant/visa holder) is taken to have received the notification at the time he or she would have been taken to have received it under the deeming provisions in s 494C.[281] The only exception to this is if the authorised recipient can show that he

[278] See *SZMKJ v MIAC* [2008] FMCA 1228, where the Court commented at [11] '…the name of the organisation at which the authorised recipient worked was immaterial to the lawful dispatch of the hearing invitation'. See also *Chintala v MIMA* [2006] FMCA 999 where the authorised recipient's firm was incorrectly cited in the address but the authorised recipient himself was correctly identified. The Court found the error was not critical to the Tribunal's compliance with its obligations to give the invitation to the applicant's authorised recipient at his identified address for service. The reasoning in these cases applies equally to notification by a delegate.

[279] *VEAN v MIMIA* (2003) 133 FCR 570; *Lee v MIMA* (2007) 159 FCR 181.

[280] *In MIAC v SZIZO* (2009) 238 CLR 627, the High Court found that the Tribunal had not made a 'jurisdictional error' in failing to give a hearing invitation to the authorised recipient, in circumstances where the authorised recipient was the applicant's daughter (who was also an applicant), the invitation was received, the applicants attended the hearing and suffered no disadvantage. Note, however, that the Court was considering a different question (that is whether the Tribunal decision was affected by jurisdictional error) to that which arises when determining whether the time limits for applying for review have commenced. The time limits commence when a person is taken to receive a notification of the primary decision which complies with the requirements set out in the Migration Act. Note also that this is a type of error which, for notifications on or after 5 December 2008, may be 'cured' by s 441C(7) (the Tribunal equivalent of s 494C(7)). See also *Lee v MIAC* (2007) 159 FCR 181 where the Full Federal Court held that s 379G (equivalent to s 494D) was a mandatory provision which required the Tribunal to send correspondence to the 'authorised recipient' instead of the applicant, although it was not precluded from sending the applicant a copy. Note that the Court in Lee expressly declined to follow *Makhu v MIMIA* [2004] FCA 221 where the Court held that the nomination by the applicant of his migration agent as authorised recipient did not require that the notice must only be given to the applicant by being addressed to and sent to the authorised recipient. It was enough that it was sent to the applicant in accordance with s 379A(4).

[281] s 494C(7). This provision was introduced by the *Migration Amendment (Notification Review) Act 2008* (No. 112, 2008) and applies to documents given, dispatched or transmitted on, or after 5 December 2008: s. 29.

or she actually received it at a later time, in which case he or she is taken to have received it at that later time.

2.7.36 Chapter 8 – Notification by the Tribunal contains further discussion of the issues that may arise in connection with the appointment of and notification to authorised recipients. For the most part, the case law on the operation of ss 379G and 441G is applicable in the context of primary decisions.

2.8 Curing errors made when giving the notification

2.8.1 For notifications given, dispatched or transmitted, s 494C(7) provides that if the Minister makes an error whilst purporting to give the notice to a person in accordance with one of the methods in s 494B (for example, by sending it to an incorrect address), *and* the person nevertheless receives the document then the person is taken to have received it as if the deeming provisions in s 494C apply. The only exception to this is that if a person can show that he or she received the document at a later time, then he or she is taken to have received the document at the later time.[282] The trigger for the application of s 494C(7) is the Minister's error, rather than any error made by an applicant.[283]

2.8.2 An error in the *content* of the notice (e.g. specification of an incorrect period in which to lodge a review application) cannot be cured by s 494C(7).[284]

2.9 Effect of invalid notification of primary decisions

2.9.1 A failure to properly notify an applicant does not affect the validity of the primary decision.[285] However, if the notice does not comply with the legislative requirements outlined below, it may affect the *validity of the notification*. Time periods for review do not commence until there has been valid notification of the primary decision.

2.9.2 Defective notification may result from non-compliance with requirements as to the *content* of the notice, or from non-compliance with the requirements as to the *method* of notification.

2.9.3 A notice given by the Department before, on or after 1 July 2015 which includes a statement about an entitlement to apply for review of a decision to a discontinued Tribunal, is taken to meet any requirement to give a notice about an entitlement to apply for review of the decision to the AAT.[286]

[282] s 494C(7). The subsection does not apply retrospectively: *SZOPH v MIAC* [2010] FMCA 989 at [13].
[283] *SZOPH v MIAC* [2010] FMCA 989 at [13].
[284] See e.g. *MHA v Parata* [2021] FCAFC 46 at [80]–[81] in which the Court held that where a notice purportedly given under s 127 was invalid (as it did not comply with s 127(2)(b)), it was 'undesirable' that the test for validity should turn on an enquiry based on developments subsequent to the notification. As the notice was invalid, the time to lodge an application for review had not started to run. An application for special leave to the High Court was dismissed*: MICMSMA v Parata* [2021] HCATrans 218. See also *MIBP v EFX17* [2021] HCA 9 where the Court, in considering whether a person had been validly notified of a mandatory character-based cancellation decision and the time period in which to make representations about the revocation of the decision, held that as the notification did not crystallise the period in which the person could make representations, it was not valid. The notice incorrectly stated that the former visa holder was taken to have received the notice at the end of the day the email was transmitted (the notice was handed to him while he was in prison). While this judgment did not concern a Part 5 or Part 7 reviewable decision, if a notification under, for example s 66 or s 127 does not contain the required information to enable calculation of the period to seek review (e.g. where the notification states it was given by email, but it was given by hand, even though the time of receipt would be the same), a Court may have regard to *EFX17*.
[285] s 66(4) (visa refusals), s 127(3) (visa cancellations), 137M(3) (non-revocation), 137S(2) (visa cancellation).
[286] See item 15AE of sch 9 to the Amalgamation Act.

2.9.4 Non-compliance with the requirements as to the *method* of notification will not necessarily result in defective notification.[287] See discussion above.

[287] s 494C(7). This provision was introduced by the *Migration Amendment (Notification Review) Act 2008* (No. 112, 2008) and apply to documents given, dispatched or transmitted on, or after 5 December 2008: s. 29.

2.10 Table 1 - Requirements for valid notification of primary decision

Decision Type	Required Content	Required Method[288]
Decision to refuse a visa[289]	• to the applicant • specify criterion or provision upon which visa was refused • give written reasons • that the decision is reviewable • time in which the review application may be made • who can apply for review • where the review application can be made *ss 66(1)&(2)*	• by method in s 494B: ○ by dating & dispatching by **prepaid post** or other prepaid means within 3 working days, to last residential address/business address/address for service provided by the recipient to the Minister for the purposes of receiving documents ○ by **hand** to recipient or by hand to person at last residential or business address ○ by **fax, email or other electronic means** to last address/number provided to the Minister *for receiving documents* ○ by **online account** of the recipient established for the purposes relating to the Migration Act or Regulations *s 66(1), reg 2.16(3), s 494B*
Decision to cancel a visa under s 116	• to the visa holder • specify the ground upon which the visa was cancelled • that the decision is reviewable under Part 5 or Part 7 • time in which the review application may be made • who can apply for review • where the review application can be made *ss 127(1)&(2)*	• by method in s 494B: ○ by dating & dispatching by **prepaid post** or other prepaid means within 3 working days, to last residential address/business address/address for service provided by the recipient to the Minister for the purposes of receiving documents ○ by hand to recipient or by hand to person at last residential or business address ○ by fax, email or other electronic means to last address/number provided to the Minister for receiving documents ○ by online account of the recipient established for the purposes relating to the Migration Act or Regulations • if the visa holder appears to have appointed an authorised recipient, see 2.3.14 (above) for discussion on whether the Minister is required to send the notification to the authorised recipient *s 127(1), reg 2.45, s 494B*
Decision to cancel a visa under s 109	• to the former holder of the visa • set out the ground for cancellation *regs 2.42(1)&(2)*	• by method in s 494B: ○ by dating & dispatching by **prepaid post** or other prepaid means within 3 working days, to last residential address/business address/address for service provided by the recipient to the Minister for the purposes of receiving documents ○ by hand to recipient or by hand to person at last residential or business address ○ by fax, email or other electronic means to last address/number

[288] For persons in immigration detention the required method of notification is set out in reg 5.02.
[289] After 10 August 2001.

Decision Type	Required Content	Required Method[288]
		provided to the Minister for receiving documents ○ by online account of the recipient established for the purposes relating to the Migration Act or Regulations • if the visa holder appears to have appointed an authorised recipient, see 2.3.14 (above) for discussion on whether the Minister is required to send the notification to the authorised recipient *reg 2.42(1), s 494B*
Decision to cancel a regional sponsored employment visa (s 137Q)	• to the visa holder • specify the reason for cancellation • specify whether reviewable under Part 5[290] • if reviewable: • period within which review application can be made • who can apply for review • where the review application can be made *s 137S(1)*	• by method in s 494B: ○ by dating & dispatching by **prepaid post** or other prepaid means within 3 working days, to last residential address/business address/address for service provided by the recipient to the Minister for the purposes of receiving documents ○ by hand to recipient or by hand to person at last residential or business address ○ by fax, email or other electronic means to last address/number provided to the Minister for receiving documents ○ by online account of the recipient established for the purposes relating to the Migration Act or Regulations • if the visa holder appears to have appointed an authorised recipient, see 2.3.14 (above) for discussion on whether the Minister is required to send the notification to the authorised recipient *ss 137S(1), 494B*
Decision not to revoke a visa cancellation (s 137L)	• to the non-citizen whose visa has been cancelled under s 137J • specify grounds for decision • that decision is reviewable (if app in migration zone) • time in which the review application may be made • who may apply for review • where the review application may be made *s 137M*	• by method in s 494B: ○ by dating & dispatching by **prepaid post** or other prepaid means within 3 working days, to last residential address/business address/address for service provided by the recipient to the Minister for the purposes of receiving documents ○ by hand to recipient or by hand to person at last residential or business address ○ by fax, email or other electronic means to last address/number provided to the Minister for receiving documents ○ by online account of the recipient established for the purposes relating to the Migration Act or Regulations • if the visa holder appears to have appointed an authorised recipient, see 2.3.14 (above) for discussion on whether the Minister is required to send the notification to the authorised recipient *ss 137M(1), 494B*

[290] Note that in *MHA v Parata* [2021] FCAFC 46, the Court in considering s 127(2)(b), held that a notice which did not set out which Part of the Migration Act provided for review of the particular decision did not comply with s 127(2)(b) (at [40], [106]). Given s 137S(1)(b) provides that the notice must 'state whether or not the decision to cancel the visa is reviewable under Part 5', it appears that if the principle from *Parata* is applied to s 137S, a notification which does not refer to the decision being reviewable under Part 5 would also be invalid.

Decision Type	Required Content	Required Method[288]
Points test assessed score (s 93 and s 94(3)(a))	• the decision of the Minister • the reason for the decision • that the decision can be reviewed • time in which a review application may be made • who can apply for review • whether the review application can be made *reg 2.28(2)*	• to the applicant • in writing • any method the Minister considers appropriate (may include method in s 494B) *reg 2.28(1), s 494A*
Decision under s 197D(2) that an unlawful non-citizen is no longer a person in respect of whom a protection finding within the meaning of s 197C(4), (5), (6) or (7) would be made	• to the non-citizen • the decision • give reasons (other than non-disclosable information) • that the decision is reviewable under Part 7 • period within which a review application may be made • who can apply for review • where the review application can be made *s 197D(4)*	• any method Minister considers appropriate (may include method in s 494B) *ss 197D(4), 494A*
Decision relating to requiring a security (s 269)[291]	Nil	• any method Minister considers appropriate (may include method in s 494B) *s 494A*
Decision to refuse approval of employer nominated position (reg 5.19(1B)) (pre- 1/07/12)	• to the employer • copy of written refusal • statement of reasons • written statement that decision is reviewable *reg 5.19(1D)*	• any method Minister considers appropriate (may include method in s 494B) *reg 5.19(1B), s 494A*
Decision to refuse approval of employer nominated position (reg 5.19(3)-(5)) (post 1/07/12)	• to the nominator • copy of written refusal • statement of reasons • written statement that decision is a Part-5 reviewable decision *reg 5.19(15)*[292]	• any method Minister considers appropriate (may include method in s 494B) *s 494A*

[291] However, note that a decision under s 269 is only reviewable under Part 5 (migration) if it is connected to a visa refusal: s 338(9) and reg 4.02(4)(f). Notification requirements attach to the visa refusal decision and are set out above.

[292] Note that prior to *Migration Legislation Amendment (Temporary Skill Shortage Visa and Complementary Reforms) Regulations 2018* (Cth) (F2018L00262) which commenced on 18 March 2018, the required content requirements were in reg 5.19(6). Note that in *MHA v Parata* [2021] FCAFC 46, the Court in considering s 127(2)(b), held that a notice which did not set out which Part of the Migration Act provided for review of the particular decision did not comply with s 127(2)(b) (at [40], [106]). Given reg 5.19(15)(b)(ii) provides that the Minister must give the nominator a written statement that the decision is a Part 5-reviewable decision, it appears that if the principle from *Parata* is applied to reg 5.19(15), a notification which does not refer to the decision being a Part -5 reviewable decision would also be invalid.

Decision Type	Required Content	Required Method[288]
Decision to refuse a person's application for approval as a sponsor in relation to one or more classes of sponsor[293] (s 140E(1)) (post 14/09/09)	• to applicant for approval as a sponsor • within a reasonable period • written copy of refusal attached • statement of reasons for refusal attached *reg 2.62(1)*	• if the application was made using approved form 1196 (Internet), notification may be in an electronic form • in every other case, any method Minister considers appropriate (may include method in s 494B) *regs 2.62(1)&(2), s 494A*
Decision to refuse to approve a nomination (s 140GB(2)) (post 14/09/09)	• to applicant for approval of a nomination • within a reasonable period • written copy of refusal attached • statement of reasons for refusal attached *reg 2.74(1)*	• if the application was made using approved form 1196 (Internet), notification may be in an electronic form • in every other case, any method Minister considers appropriate (may include method in s 494B) *regs 2.74(1)&(2), s 494A*
Decision to take 1 or more actions to cancel a sponsor's approval or to bar a sponsor (s 140M) (post 14/09/09)	• to the person who is or was an approved work sponsor • the decision taken by the Minister, including the effect of the decision • the grounds for making the decision • that the decision can be reviewed • the time in which the application for review may be made • who can apply for the review • where the application for review may be made • if an action is to bar the person: (i) details of how the person can apply for a waiver of the bar; and (ii) the address to which a request for a waiver, if made, must be sent. *reg 2.98(1)*	• any method Minister considers appropriate (may include method in s 494B) *reg 2.98(1), s 494A*
Decision not to vary a term specified in an approval (s 140GA(2)) (post 14/09/09)	• to applicant for a variation of a term of an approval • within a reasonable period • written copy of decision not to vary attached • statement of reasons for decision attached *reg 2.69(1)*	• if the application was made using approved form 1196 (Internet), notification may be in an electronic form • in every other case, any method Minister considers appropriate (may include method in s 494B) *regs 2.69(1)&(2), s 494A*

[293] The prescribed classes of sponsor in reg 2.58 are a standard business sponsor; professional development sponsor; ; special program sponsor; entertainment sponsor; a superyacht crew sponsor; a long stay activity sponsor; and a training and research sponsor. Note, that prior to 22 March 2014, the prescribed classes of sponsor in reg 2.58 also included exchange sponsor; foreign government agency sponsor; visiting academic sponsor; sport sponsor; domestic worker sponsor; religious worker sponsor; occupational trainee sponsor however these were repealed by *Migration Amendment (Redundant and Other Provisions) Regulation 2014* (Cth) (SLI 2014, No 30) for visa applications made on or after that date.

3. POWERS AND FUNCTIONS OF THE TRIBUNAL

3. POWERS AND FUNCTIONS OF THE TRIBUNAL[1]

3.1 Introduction

3.1.1 The Tribunal exercises powers conferred on it in seven separate Divisions.[2] The Divisions include the Migration and Refugee Division (MRD).[3] The Tribunal's powers in relation to a proceeding before the Tribunal are to be exercised in the Division prescribed for the proceeding, or if no Division is prescribed, the Division that the President directs.[4] The jurisdiction of the MRD is limited to reviewing decisions under Parts 5 and 7 of the *Migration Act 1958* (Cth) (the Migration Act).[5]

3.1.2 Part 5 provides for the review of Part 5-reviewable decisions [migration]. These include decisions to refuse or cancel migration visas; sponsorship and nomination-related decisions;[6] and decisions in relation to 'assessed scores' under s 93 where there has been no visa refusal or cancellation.[7] Part 7 provides for the review of Part 7-reviewable decisions [protection].[8] These are decisions to refuse or cancel protection visas. Other migration matters within the Tribunal's jurisdiction (such as the refusal or cancellation of visas under s 501), are reviewed in the Tribunal's General Division.[9]

3.1.3 In reviewing a matter under Part 5 or 7, the Tribunal makes a 'decision on a review'.[10] This includes affirming or varying a decision, setting aside and substituting a new decision; remitting a matter for reconsideration; or confirming a decision to dismiss the application.[11]

3.1.4 In making a decision on the review the Tribunal complies with any guidance decision (including one made by the former Migration Review Tribunal (MRT) or Refugee Review Tribunal (RRT)) specified in a Direction by the President or Division Head of the MRD for a particular Part 5 or Part 7 reviewable decision,

[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Migration Act) and the *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] s 17A of the *Administrative Appeals Act 1975* (Cth) (the AAT Act). Further Divisions may be prescribed by regulation.
[3] AAT Act s 17A(b).
[4] AAT Act s 17B(1).
[5] See ss 336N [pt 5] and 409 [pt 7] of the Migration Act, ss 17A and 17B of AAT Act and President's Direction – Allocation of Business to Divisions of the AAT.
[6] s 338(9), reg 4.02(4).
[7] s 338(8).
[8] ss 336M [pt 5], 408 [pt 7].
[9] ss 336M, 408.
[10] See definition of 'decision on a review' in ss 337 and 410 as amended by the *Migration Amendment (Protection and Other Measures) Act 2015* (Cth) (No 35, 2015). See *Saharan v MIBP* [2016] FCA 1431 at [19], where the Court stated that the Tribunal's function is to consider the review application freshly, sitting in place of the Minister's delegate and exercising for that purpose all of the powers and discretions of the Minister's delegate. The Court held that a decision made by the Tribunal overtakes the Minister's delegate's decision, in the sense that it replaces the decision of the Minister's delegate.
[11] ss 337, 410 as amended by the *Migration Amendment (Protection and Other Measures) Act 2015* (Cth) (No 35, 2015).

unless the Tribunal is satisfied that the facts or circumstances of the decision under review are clearly distinguishable from the facts or circumstances of the guidance decision.[12] However, non-compliance with a guidance decision will not make the Tribunal's decision on a review an invalid decision.[13]

3.2 Part 5-reviewable decisions

3.2.1 Section 338 defines which decisions are 'Part 5-reviewable decisions'. As a guide, a Part 5-reviewable decision is generally one involving a refusal or cancellation of a visa onshore,[14] or an offshore refusal where there is a link to Australia, such as through a sponsor (such as an Australian business or employer or a family member); and related decisions such as refusal or cancellation of business sponsorship approval, or decisions relating to an assessed score or requiring a security.

3.2.2 The following decisions are **not** Part 5-reviewable decisions:

- Part 7-reviewable decisions[15]
- decisions in relation to which the Minister has issued a conclusive certificate under s 339[16]
- decisions to refuse or cancel a temporary safe haven visa[17]
- fast track decisions[18]
- decisions to refuse or cancel a visa under s 501 (character test)[19]
- decisions to cancel a visa under s 501(3A) (character grounds – substantial criminal record or child sexual offence)[20]
- decisions to refuse to grant, or to cancel a protection visa on the basis of ss 5H(2), 36(1B), 36(1C), 36(2C)(a), 36(2C)(a)–(b) or because of an

[12] ss 353B, 420B as inserted by the *Migration Amendment (Protection and Other Measures) Act 2015* (Cth) (No 35, 2015) and amended by the *Tribunals Amalgamation Act 2015* (Cth) (No 60, 2015) (the Amalgamation Act). See sch 9, item 15CD of the Amalgamation Act.
[13] ss 353B(3) and 420B(3).
[14] A decision to cancel a visa where the decision to grant that visa was affected by jurisdictional error (i.e. it shouldn't have been granted but had legal effect by force of s 68(1)) is a Part-5 reviewable decision: *BLF20 v MICMSMA* [2020] FCCA 878 at [159]–[162].
[15] s 338(1)(b). Part 7-reviewable decisions are explained in s 411.
[16] s 338(1)(a).
[17] s 338(1)(c). Temporary safe haven visas are created by s 37A. See also ss 91H–91L and 500A and sch 1, item 1223B of the Regulations.
[18] s 338(1)(d). Such decisions are generally reviewable by the Immigration Assessment Authority (IAA). Additionally, some decisions to refuse to grant a protection visa to fast track applicants are reviewable by the Tribunal in its General Division, in the circumstances mentioned in paragraph (a), or subparagraph (b)(i) or (iii) of the definition of *fast track decision* in s 5(1): see note to s 500(1).
[19] s 500(1)(b), (4)(b). Such decisions are reviewable by the Tribunal in its General Division where not made by the Minister personally, or in the Security Division if the decision relates to an adverse or qualified security assessment under *Australian Security Intelligence Organisation Act 1979* (Cth) (ASIO Act): see President's Direction – Allocation of Business to Divisions of the AAT made under s 17B of the AAT Act.
[20] s 500(4A)(c). Such decisions are not reviewable by the Tribunal.

assessment by the Australian Security Intelligence Organisation (ASIO) that a person is directly or indirectly a risk to security[21]

- decisions under s 501CA(4) not to revoke a decision to cancel a visa under s 501(3A)[22]
- decisions of the Minister under s 501BA to set aside, an original decision made by a delegate of the Minister or the Tribunal under s 501CA, and cancel a visa[23]
- decisions to deport non-citizens in specified circumstances[24]
- decisions to cancel specified business visas under s 134(1),[25] and
- decisions that a visa application is invalid and cannot be considered.[26]

Tribunal's powers with respect to Part 5-reviewable decisions

3.2.3 The Tribunal's review powers under Part 5 are triggered when an application is properly made for review of a Part 5-reviewable decision.[27] However the Tribunal must not review, or continue to review, a decision if the Minister has issued a conclusive certificate under s 339.[28] For the purposes of the review of a Part 5-reviewable decision, the Tribunal may exercise all the powers and discretions that are conferred by the Migration Act on the person who made the decision.[29]

3.2.4 In reviewing a Part 5-reviewable decision the Tribunal may:

- affirm the decision (i.e. agree with the decision)[30]
- vary the decision[31]
- if the decision relates to prescribed matter – remit the matter for reconsideration in accordance with such directions or recommendations of the Tribunal as are permitted by the Regulations[32]

[21] ss 500(1)(c), (4)(c), (4A)(a)–(b), 411(1)(c)–(d). Such decisions are reviewable by the Tribunal either in its General Division or Security Division (if an adverse or qualified security assessment under ASIO Act).
[22] s 500(1)(ba). Such decisions are reviewable by the Tribunal in its General Division.
[23] s 501BA was inserted by the *Migration (Character and General Visa Cancellation) Act 2014* (Cth) (No 129, 2014). Such decisions are not reviewable by the Tribunal.
[24] ss 500(1)(a), 500(4)(a). In general, such decisions are reviewable by the Tribunal in its General Division.
[25] s 136. Such decisions are reviewable by the Tribunal in its General Division.
[26] s 47(4).
[27] s 348(1).
[28] s 348(2).
[29] s 349(1). See also *MIAC v SZKTI* (2009) 238 CLR 489 and *MIAC v SZNAV* [2009] FCAFC 109.
[30] s 349(2)(a).
[31] s 349(2)(b).
[32] s 349(2)(c), reg 4.15. The reference to 'entry permit' in reg 4.15(1) is a reference to entry permits as provided for in the Migration Act and the Regulations before 1 September 1994. Decisions to refuse entry permits rarely if ever come before the Tribunal. The remittal power is not available in relation to all Part 5-reviewable decisions. For example, it would not apply to decisions relating to cancellation or non-revocation, or sponsorship approval. In *Poudyal v MIMIA* [2005] FMCA 265 it was considered that the remittal power under s 349(2)(c) is a supplementary power designed to be used when a Tribunal considers it appropriate and administratively efficient in the circumstances to allow the primary administrator, rather than itself, to complete the administrative process involved.

- set the decision aside and substitute a new decision[33] or
- if the applicant fails to appear at a scheduled hearing – exercise a power under s 362B in relation to the dismissal or reinstatement of an application.[34]

3.2.5 These are the extent of the Tribunal's powers on review. Once it has before it a valid application for review, the Tribunal must conduct the review and make one of the orders specified above.[35]

3.2.6 In the vast majority of reviews of visa refusals, the Tribunal either affirms the primary decision or remits the matter for reconsideration with a direction that the applicant satisfies a criterion or criteria for the grant of the visa.

3.2.7 A common circumstance in which the Tribunal sets a decision aside and substitutes a new decision is in cancellation cases, where the remittal power is not available. The Tribunal may set aside the cancellation decision and substitute a decision not to cancel the visa. Where a visa has been refused after consideration of a visa application which the Tribunal finds to be invalid, the Tribunal has no choice but to set the refusal decision aside and substitute a decision that the visa application is invalid and cannot be considered.[36] Similarly, if a visa was refused on the basis that a second instalment of the visa application charge had not been paid as required by Schedule 1 and s 65(1)(a)(iv), it is not open to the Tribunal to remit the application with a direction that the visa application charge has been paid. It may however, set aside and substitute a new decision that the visa be granted (subject to being satisfied other criteria have been satisfied), or alternatively it may find the visa charge has been paid and remit the matter on the basis that a Schedule 2 criterion has been met.

3.2.8 The power to vary the decision may arise in s 93 points test assessments and sponsorship bar cases.

3.2.9 If a decision to grant a visa is affected by jurisdictional error (such that it should not have been granted), and that visa is then cancelled by a delegate, the Tribunal has the power to affirm or set aside the cancellation decision.[37]

[33] s 349(2)(d).
[34] s 349(2)(e) as inserted by *Migration Amendment (Protection and Other Measures) Act 2015* (Cth) (No 35, 2015).
[35] *Applicant S1494/2003 v MIAC* [2010] FMCA 834 at [46]. In that case, the applicant lodged a valid application for review of a decision to refuse a child visa. He claimed that the then MRT erred by failing to recognise that he was in fact seeking a protection visa and the then MRT should have transferred the matter to the then RRT. The Court held that the then MRT was obliged to exercise its jurisdiction and could not order the matter to be transferred to the then RRT.
[36] ss 47(3)–(4), 65(1), 349(1).
[37] *BLF20 v MICMSMA* [2020] FCCA 878. The Court held that provisions of the Migration Act give a decision to grant a visa legal effect even if it was affected by jurisdictional error, such that a delegate could exercise the powers of cancellation in relation to a visa granted in error (at [159]). Assuming a valid review application is made, the Tribunal would have jurisdiction to review the delegate's decision to cancel the visa (which had been granted in error) and would have the powers conferred upon it under the Migration Act (at [160]). In reaching this conclusion, the Court noted that while an administrative decision affected by jurisdictional error is in law no decision at all, the legal and factual consequences of such a decision depend upon the particular statutory context of the decision (at [132]). In this instance, it is s 68(1), which provides that a visa is in effect as soon as it is granted, which gives a decision to grant a visa legal effect.

The remittal power

3.2.10 The prescribed matters and permissible directions or recommendations for the purposes of the remittal power are set out in reg 4.15 of the *Migration Regulations 1994* (Cth) (the Regulations).

Permissible direction and recommendations

3.2.11 In relation to an application for a visa or entry permit, the only permissible direction is that the applicant must be taken to have satisfied a specified criterion for the visa or entry permit;[38] or, in the case of an application for a prospective marriage visa where the applicant and sponsor marry after the delegate's decision was made and before the review is completed, and the applicant notifies the Tribunal of the marriage, the only permissible direction is that the application is also taken to be an application for a Partner (Migrant) (Class BC) visa and a Partner (Provisional) (Class UF) visa, made on the day the application is remitted.[39] It is not open to the Tribunal to remit an application with a direction that the visa application be withdrawn.[40]

3.2.12 In relation to the requiring of a security, the only permissible direction is that the primary decision-maker must indicate to the applicant that a condition specified by the Tribunal will be imposed on the visa if it is granted, and require a security for compliance with the condition (whether or not a security has already been required).[41]

3.2.13 A permissible remittal direction made by the Tribunal is binding on the Minister to comply with the direction. In *Plaintiff M174/2016 v MIBP*[42] the High Court held that the power conferred on the Immigration Assessment Authority (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 case applies to the Tribunal as the permissible direction power for the IAA under reg 4.43(1) is consistent with the wording under the Act for Part 5 and Part 7 reviews.[43]

3.2.14 There are no permissible recommendations prescribed.

[38] reg 4.15(1)(b);
[39] regs 2.08E(2A)–(2B), 4.15(4) as amended by the Amalgamation Act.
[40] See *Luwandri v MICMSMA* [2020] FCCA 3003 at [33]–[41] in which the Court rejected the applicant's contention that the Tribunal should have remitted the application with a direction that the visa application be withdrawn (so that they could lodge a new visa application), in circumstances where the applicant failed to meet a time of application requirement. The Court held that the direction sought by the applicant was not one which directed 'that the applicant must be taken to have satisfied a ... criterion' and accordingly was not a permissible direction per reg 4.15(1)(b).
[41] reg 4.15(3) as amended by the Amalgamation Act.
[42] *Plaintiff M174/2016 v MIBP* (2018) 264 CLR 217 at [19].
[43] The wording for Part 5, Part 7 and IAA reviews refers to the power of the Tribunal (or IAA) to make permissible directions that 'must be taken to have satisfied a specified criterion'; regs 4.15(1), 4.33(2).

The scope of the remittal power

3.2.15 The scope of the remittal power was considered by a Full Court of the Federal Court in *MIAC v Dhanoa*.[44] The Court confirmed that the Tribunal has no general power to remit without a permissible direction or recommendation. If there is no permissible direction or recommendation that can be made, the Tribunal's powers do not include remittal. In this regard, the judgment overturned the reasoning of the Federal Magistrates Court in *Dhanoa v MIAC*,[45] and took the same approach as that taken in *Perkit v MIAC*.[46]

3.2.16 The Full Court in *Dhanoa* also considered how the reference to a 'specified criterion' in reg 4.15(1)(b) should be construed. The majority held that it refers to the prescribed criteria for a class of visa as identified in s 31(3) and reg 2.03(1). Section 31(3) provides that the Regulations may prescribe criteria for a visa or visas of a specified class. Regulation 2.03(1) provides that for the purposes of s 31(3), and subject to regs 2.03A and 2.03AA the prescribed criteria for the grant of a visa of a particular class are:

- the primary criteria set out in a relevant Part of Schedule 2 to the Regulations, and
- any secondary criteria set out in a relevant Part of Schedule 2 to the Regulations.[47]

3.2.17 Regulation 2.03(2) states that if a criterion in Schedule 2 refers to a criterion in Schedule 3, 4, or 5 by number, a criterion so referred to must be satisfied by an applicant as if it were set out at length in the Schedule 2 criterion. Accordingly, for the purposes of reg 4.15(1)(b), it is permissible to remit with a direction that a Schedule 2 criterion or a Schedule 3, 4, or 5 criterion referred to in Schedule 2 is met.[48] However, it is not permissible to remit with a direction that an item in another Schedule, such as 5A, 6B or 6C is met.

3.2.18 The Tribunal takes care in expressing its remittal direction so that the direction relates only to the criterion it considered. Where a remittal direction is too broad such that it covers criteria other than those considered by the Tribunal and is not

[44] *MIAC v Dhanoa* (2009) 180 FCR 510.
[45] *Dhanoa v MIAC* (2009) 109 ALD 373. In this case, the delegate found that the applicant achieved 110 points under the points test in sch 6A and therefore did not meet the qualifying score of 120 for the purposes of cl 880.222 of sch 2 to the Regulations. The applicant claimed he was willing to invest at least $100,000 in a designated security for at least 12 months to qualify for 5 bonus points under item 6A81(a). However, the delegate only awarded the applicant 15 rather than 20 points for the English component, meaning that he did not meet the 115 point requirement to initiate a request for capital investment. The Tribunal accepted later evidence that the applicant had English test results sufficient for the award of 20 points, but found that the applicant had not made a deposit of $100,000 in a designated security. The applicant argued that it was open to the Tribunal to remit the matter to the Department with a direction that another prescribed criterion, being the English component, had been met.
[46] *Perkit v MIAC* (2009) 109 ALD 361.
[47] However, if one or more criteria are set out in a Subdivision of a Part of sch 2 as a 'stream', the primary and secondary criteria to be met are those in the stream and any common criteria, and the visa may be granted upon satisfaction of such criteria: reg 2.03(1A).
[48] See also *MICMSMA v Bui* [2022] FedCFamC2G 242 which impliedly accepted the Minister's position that the Tribunal may make a direction that a public interest criterion (PIC) in sch 4 is satisfied for the purpose of the relevant sch 2 criterion.

supported by the necessary findings, the Tribunal may exceed its jurisdiction.[49] In *MICMSMA v Bui*, the Tribunal found that the applicant has satisfied cl 820.223 which contained seven public interest criteria in Schedule 4 (all of which needed to be met to satisfy cl 820.223). This meant that the applicant was taken to have met all seven public interest criteria. However, the Tribunal had only considered, and made findings on, one public interest criterion. The Court found that, as the Tribunal had failed to consider the balance of the criteria required for the visa to be granted, there was a clear error of law on the basis that the decision was not authorised by the Migration Act or Regulation and the Tribunal had exceeded its jurisdiction.[50]

3.2.19 The Federal Circuit and Family Court confirmed in *MICMSMA v Bui* that a direction in relation to reg 2.03AA is a permissible direction.[51] Regulation 2.03AA(2) provides that if the Minister has requested a statement (however described) provided by an appropriate authority in a country where the person resides, or has resided, that provides evidence about whether or not the person has a criminal history (e.g. a police clearance certificate), or a completed approved form 80, that the person has provided the documents or information. If the applicant provides the documents or information requested by the delegate to the Tribunal and the failure to provide it was the only reason for the delegate's refusal, it appears open to the Tribunal to remit the matter to the delegate with a direction that reg 2.03AA(2) is satisfied.

3.2.20 If the Tribunal finds, or becomes aware, that an applicant does not satisfy a prescribed criterion for the grant of a visa, it would generally not be open to remit the matter with a direction that he or she does meet a different criterion.[52] This is because s 65(1)(b) requires the Minister (or on review, the Tribunal) to refuse to grant the visa if not satisfied that the health or other prescribed criteria for the visa are met.

3.2.21 As noted above, the Tribunal generally affirms a decision where it is not satisfied that a criterion for the grant of the visa is met (including where that criterion was not the reason for the delegate's decision). However, where the delegate refused the visa on PIC 4020, it may not be open to the Tribunal to affirm the decision on a different criterion if it has not first considered PIC 4020 and whether to remit the matter on the basis that PIC 4020 is satisfied. At first instance, the Federal Circuit Court in *Hossain v MICMSMA* held that once the Tribunal determines that a criterion for grant of the visa is not satisfied, the only course of action would be for the Tribunal to affirm the decision (s 349(2)(a)) and to end its consideration there

[49] *MICMSMA v Bui* [2022] FedCFamC2G 242 at [9], [13]. The judgment concerned an appeal brought by the Minister in relation to a Tribunal decision in which it had remitted with a direction that cl 820.223 without considering all the relevant public interest criteria contained within that clause.
[50] *MICMSMA v Bui* [2022] FedCFamC2G 242 at [8]–[9], [13]. The matter concerned whether the applicant had provided a police clearance certificate from Vietnam for the purpose of reg 2.03AA(2) and consequently whether the applicant satisfied PIC 4001 (related to the character test). The Court agreed with the Minister's submission that the Tribunal should have found reg 2.03AA(2) was met and remitted with a direction to that effect. The Tribunal however had found that PIC 4001 was satisfied and remitted with a direction on cl 820.223 which contained PIC 4001 and six other public interest criteria. The Court agreed that if reg 2.03AA(2) is satisfied (by the provision of the police clearance certificate), that PIC 4001 is not necessarily itself satisfied but that the certificate may inform the assessment of whether PIC 4001 is satisfied.
[51] *MICMSMA v Bui* [2022] FedCFamC2G 242 at [10], [13].
[52] Note that there is an exception to this general principle where the refusal was on PIC4020 which is discussed in the paragraph below.

without further review of the delegate's reasons for refusing the visa (which may relate to a different criterion, in this case PIC 4020).[53] On appeal, however, the Federal Court remitted the matter to the Tribunal by consent.[54] The Federal Court accepted that the Tribunal had the power to remit the application with the direction that PIC 4020(1) was satisfied (even where another criterion was not satisfied), and that the Tribunal, in making a finding of fact about PIC 4020, had incorrectly considered the bar in PIC 4020(2) would be overcome. Given the Tribunal's misunderstanding about PIC 4020(2), the Court reasoned that the Tribunal did not consider whether to exercise the power to remit or misunderstood the scope of the power. This error was material as it could have deprived the applicant of a possible favourable outcome in relation to the PIC 4020(2) as the three-year bar in PIC 4020(2) had not yet expired. Accordingly, in circumstances where PIC 4020(1) was the reason for the delegate's refusal, the period of the bar has not expired and the applicant expressly requests the Tribunal to consider PIC 4020, it may not be open for the Tribunal to affirm the decision on a different criterion without considering whether PIC 4020(1) is met and whether the matter should be remitted to the Department for reconsideration (if it is met). If the applicant does not expressly request that the Tribunal consider PIC 4020(1) and another criterion (which was not considered by the delegate) is not satisfied, it may be open to the Tribunal to affirm the decision on the other criterion (subject to the Tribunal satisfying its procedural obligations if the other criterion raises a new issue).

3.2.22 When the Tribunal uses the remittal power, it is in effect setting aside the primary decision but instead of substituting its own decision, it has elected to remit the matter for reconsideration with a permissible direction or recommendation.[55] Accordingly, the applicant still has to satisfy the other prescribed criteria for the visa, including health, character and public interest criteria, before the visa may be granted.

3.2.23 While the Tribunal has power to make a direction in relation to all of the relevant prescribed criteria, in practice it generally only considers the criterion or criteria in dispute, that is, the ones which formed the basis of the primary decision to refuse the visa. Matters relating to health and character (where these were not in dispute) are almost always determined by the Department upon remittal.

[53] In circumstances where the delegate has refused the visa application because they were not satisfied PIC4020(1) was met, but the Tribunal is satisfied PIC4020(1) is met and another criterion is not satisfied, the Federal Circuit Court in *Hossain v MICMSMA* [2021[FCCA 247 held that the Tribunal should affirm the decision on the other criterion and not engage in further consideration about the reasons for the delegate's refusal, and to engage in further consideration would mean the Tribunal would arguably step outside the bounds of its powers. The consequence of such an approach would appears to be that, if an applicant has been refused a visa by the delegate because of a failure to satisfy PIC4020(1), they may be subject to the three-year bar in PIC4020(2) for subsequent visa applications even where the Tribunal affirmed the decision on a basis other than PIC4020(1): see e.g. *Josan v MIBP* [2016] FCCA 493 at [52]–[58], where the Court appeared to consider that the relevant three-year period runs from the the date of the delegate's decision even where the Tribunal affirms the decision. This interpretation appears to turn on the wording of PIC4020(2) as the Tribunal affirms decisions of the delegate but does not generally refuse to grant visas. However, on appeal the Federal Court remitted the matter by consent ([redacted]).

[54] See consent orders in the matter of [redacted]. The Department's policy (see Policy – Migration Regulations – Schedules – [Sch 4 4020] Public Interest Criterion 4020 – The Integrity PIC – 6.12 AAT Administrative Appeals Tribunal – 6.12.1 PIC4020 non-grant periods and the AAT (reissued 01/01/2018)), provides that the non-grant period (i.e. the bar in PIC4020(2)) applies where the delegate has refused on PIC4020(1) or (2A) unless the AAT decides to set aside and substitute the decision, under s 349(2)(d), finding that the applicant meets PIC4020 criteria. The consent orders in [redacted] would therefore appear to be inconsistent with the Department's policy as the Court orders envisage the Tribunal using its remittal power rather than setting aside and substituting the decision.

Remittal directions for secondary visa applicants

3.2.24 Often, the Tribunal will be asked to review decisions refusing two or more members of a family unit a visa. Typically, there will be a single primary decision record that refuses one visa applicant on a primary visa criterion and one or more other visa applicants on a secondary visa criterion. Although these multiple decisions may be contained in a single decision record and combined in the one review, the Tribunal is still reviewing separate primary decisions. While this doesn't present an issue if the decisions under review are all affirmed, it may sometimes be difficult to make a permissible remittal direction on a secondary visa criterion even if the Tribunal is satisfied that a primary visa criterion is met.

3.2.25 For example, if a parent and dependent child apply for a Partner (Subclass 309) visa which is refused because the parent does not meet cl 309.212, because the child would not be a member of the family unit of a person *who satisfies the primary criteria* they would not meet cl 309.311. Although it would be open for the Tribunal to find cl 309.212 was met and remit with that direction, unless *all the primary criteria* were met the Tribunal could not remit with a permissible direction that cl 309.311 was also met. Because the Tribunal's general practice is to limit its review to the criterion/criteria in dispute, often it is not practicable (or sometimes possible) for findings on all the primary criteria to be made. This could produce an absurd result if the basis for the secondary applicant being refused no longer existed, but the Tribunal was unable to remit that matter back to the delegate for reconsideration with a permissible direction. In practice, this often means remitting the primary visa applicant's application but remaining silent about the secondary applicant. This approach is problematic because the lack of any express decision or direction can make it difficult to determine whether the Tribunal has properly exercised its review function in respect of them.

3.2.26 To address this, the Tribunal may instead make clear in the body of its decision that it considers that the secondary visa applicants should be reconsidered in light of its findings about the primary visa applicant. A decision could then be made to remit the application for the visa for reconsideration with the direction that one visa applicant satisfies a particular criterion – e.g. that the first named visa applicant satisfies cl 309.212. This way it is clear that the Tribunal's decision is in respect of all the visa applicants and also contains a permissible remittal direction.

3.3 Part 7-reviewable decisions

3.3.1 Section 411 defines which decisions are 'Part 7-reviewable decisions'.

3.3.2 The Part 7-reviewable decisions are:

- decisions to refuse to grant a protection visa (subject to exceptions below)

[55] *MIAC v Dhanoa* (2009) 180 FCR 510.

- decisions to cancel a protection visa (subject to exceptions below)
- decisions made prior to 1 September 1994, that a non-citizen is not a refugee under the Refugees Convention as amended by the Refugees Protocol
- decisions, made prior to 1 September 1994, to refuse to grant or to cancel a visa or an entry permit, a criterion for which is that the person has been determined to be a refugee under the Refugees Convention as amended by the Refugees Protocol.

3.3.3 Decisions to refuse to grant, or to cancel a protection visa,[56] are the decisions most often reviewed by the Tribunal.

3.3.4 The following decisions are **not** Part 7-reviewable decisions:

- any decision to cancel a protection visa that is made personally by the Minister[57]
- decisions made in relation to a non-citizen who is not present in the migration zone at the time of the primary decision[58]
- decisions in relation to which the Minister has issued a conclusive certificate under s 411(3)[59]
- fast track decisions[60]
- decisions that a protection visa application is not valid and cannot be considered[61]
- decisions to deport non-citizens in specified circumstances[62]
- decisions to refuse or cancel a visa under s 501 (character test)[63]
- decisions to cancel a visa under s 501(3A) (character grounds – substantial criminal record or child sexual offence)[64]

[56] A decision to cancel a visa where the decision to grant that visa was affected by jurisdictional error (e.g. it shouldn't have been granted but had legal effect by force of s 68(1)) is a Part-5 reviewable decision: *BLF20 v MICMSMA* [2020] FCCA 878 at [159]–[162].
[57] s 411(2)(aa).
[58] s 411(2)(a). 'Migration zone' is defined in s 5(1) to mean the area consisting of the States, the Territories, Australian resource installations and Australian sea installations.
[59] s 411(2)(b).
[60] s 411(2)(c). With some exceptions, these decisions are reviewable by the IAA. Some decisions to refuse to grant a protection visa to fast track applicants are reviewable by the Tribunal in its General Division, in the circumstances mentioned in paragraph (a), or subparagraph (b)(i) or (iii) of the definition of *fast track decision* in s 5(1): see note to s 500(1).
[61] See s 47(4) and also *SZJHT v MIAC* [2010] FMCA 1005 where the Court confirmed that the Tribunal was correct to determine that it had no jurisdiction to review an administrative decision made by an officer of the Department that a protection visa application was subject to s 48A and therefore invalid: at [15]–[18].
[62] ss 500(1)(a), (4)(a). In general, such decisions are reviewable by the Tribunal in its General Division. Note that deportation decisions are not among the Part 7-reviewable decisions specified in s 411.
[63] ss 500(1)(b), (4)(b). Such decisions are reviewable by the Tribunal in its General Division where not made by the Minister personally or in the Security Division if the decision relates to an adverse or qualified security assessment under the ASIO Act): see President's Direction – Allocation of Business to Divisions of the AAT made under s 17B of the AAT Act.

- decisions to refuse to grant, or to cancel a protection visa on the basis of ss 5H(2), 36(1B), 36(1C), 36(2C)(a), 36(2C)(a)-(b) or because of an assessment by ASIO that a person is directly or indirectly a risk to security[65]

- decisions of a delegate of the Minister under s 501CA(4) not to revoke a decision to cancel a visa under s 501(3A)[66]

- decisions of the Minister under s 501BA to set aside, an original decision made by a delegate of the Minister or the Tribunal under s 501CA, and cancel a visa.[67]

Tribunal's powers with respect to Part 7-reviewable decisions

3.3.5 The Tribunal's review powers under Part 7 are triggered when a valid application is made for review of a Part 7-reviewable decision.[68] However the Tribunal must not review, or continue to review, a decision if the Minister has issued a conclusive certificate under s 411(3).[69] For the purposes of the review of a Part 7-reviewable decision, the Tribunal may exercise all the powers and discretions that are conferred by the Migration Act on the person who made the decision.[70]

3.3.6 In reviewing a Part 7-reviewable decision, s 415(2) empowers the Tribunal to:

- affirm the decision (i.e. agree with the decision)[71]

- vary the decision[72]

- if the decision relates to an application for a protection visa, remit the matter for reconsideration in accordance with such directions or recommendations as are permitted by the regulations[73]

- set the decision aside and substitute a new decision[74] or

- if the applicant fails to appear at a scheduled hearing – exercise a power under s 426A in relation to the dismissal or reinstatement of an application.[75]

[64] s 500(4A)(c). Such decisions are not reviewable by the Tribunal.
[65] ss 500(1)(c), (4)(c), (4A)(a), (4A)(b), 411(1)(c)–(d). Such decisions are reviewable by the Tribunal either in its General Division or in its Security Division (if an adverse or qualified security assessment under ASIO Act).
[66] s 500(1)(ba). Such decisions are reviewable by the Tribunal in its General Division.
[67] s 501BA was inserted by *Migration (Character and General Visa Cancellation) Act 2014* (Cth) (No 129, 2014). Such decisions are not reviewable by the Tribunal.
[68] s 414(1).
[69] s 414(2).
[70] s 415(1). See *MIAC v SZKTI* (2009) 238 CLR 489 and *MIAC v SZNAV* [2009] FCAFC 109.
[71] s 415(2)(a).
[72] s 415(2)(b).
[73] s 415(2)(c), reg 4.33(1). The remittal power is not available in relation to all Part 7-reviewable decisions. For example, it would not apply to review of cancellation decisions.
[74] s 415(2)(d).
[75] s 415(2)(e) as inserted by *Migration Amendment (Protection and Other Measures) Act 2015* (Cth) (No 35, 2015).

3.3.7 These are the extent of the Tribunal's powers on review. Once it has before it a valid application for review, the Tribunal must conduct the review and make one of the orders specified above.[76]

3.3.8 In the vast majority of reviews of protection visa refusals, the Tribunal either affirms the primary decision or remits the matter for reconsideration with the direction that the applicant satisfies a criterion or criteria for the grant of the visa.

3.3.9 In certain circumstances the Tribunal may set the decision aside and substitute a new decision.[77] For example, generally in cancellation cases, the Tribunal may set aside the cancellation decision, and substitute a decision not to cancel the visa. Where a protection visa is refused after consideration of an invalid protection visa application, the Tribunal has no choice but to set the refusal decision aside and substitute a decision that the protection visa application is invalid and cannot be considered. Generally, it cannot set aside and substitute a decision that the protection visa be granted. This is because there are certain criteria for a protection visa that the Tribunal is precluded from determining.

3.3.10 In *Daher v MIEA*[78] the Full Federal Court considered the operation of s 411 as it pertained to the Tribunal's jurisdiction to consider art 1F of the Refugees Convention. The Court held that if the Tribunal's jurisdiction did not include the power to review a decision to refuse to grant a protection visa relying on art 1F, then it followed that the Tribunal could also not adjudicate on matters where art 1F had not formed the basis of the primary decision.

3.3.11 Following this reasoning, as ss 411(1)(c) and 411(1)(d) restrict the Tribunal's jurisdiction to review a decision to refuse or cancel a protection visa (other than those made by relying upon s 5H(2), 36(1B) or (1C), an assessment by ASIO that the holder of a visa is directly or indirectly a risk to security, s 36(2C)(a) or (b)), in those cases where the primary decision was not based on these provisions, the Tribunal would also appear to be prevented from adjudicating on these issues or making a direction that the applicant satisfies these provisions of the Migration Act.

[76] *Applicant S1494/2003 v MIAC* [2010] FMCA 834 at [46]. In that case, the applicant lodged a valid application for review of a decision to refuse a child visa. He claimed that the then MRT erred by failing to recognise that he was in fact seeking protection visas and should have transferred the matter to the then RRT. The Court held that the then MRT was obliged to exercise its jurisdiction and could not order the matter to be transferred to the then RRT.
[77] s 415(2)(d).
[78] *Daher v MIEA* (1997) 77 FCR 107. See also *GWRV v MICMSMA* [2022] FCA 602 at [23]–[24]. The Court followed *Daher* to hold that 'if any part of the decision on the application for a protection visa relied upon the Serious Crime Exclusion provisions [in ss 5H(2), 36(1C), 36(2C)(a) and 36(2C)(b)] then review must be sought in the General Division' and that 'the jurisdiction of the General Division is confined to reviewing the decision to refuse the application for a protection visa to the extent that reliance was placed by the decision maker upon the Serious Crime Exclusion'. In *GWRV*, there had been an earlier review in the MRD in which the applicant sought review of a decision to refuse the visa application on the basis that they were not a refugee. The MRD had remitted the matter to the delegate for reconsideration with a direction that the applicant is a refugee within the meaning of s 5H(1). Upon reconsideration, the delegate then found that the Serious Crime Exclusion applied to the refugee claim, and found that there was not a real risk of significant harm as a necessary consequence of being removed to their country (effectively finding that the applicant was not owed complementary protection). The delegate further observed that even if the relevant criterion was enlivened the Serious Crime Exclusion was 'mirrored' in its application to complementary protection and it would apply. On review in the General Division, the Tribunal considered the Serious Crime Exclusion in relation to the refugee criterion and affirmed the decision. The Court held at [26] that the Tribunal was obliged to also consider the Serious Crime Exception as it applied to complementary protection. However, the Court held that the Tribunal's omission was not material to the outcome because, if complementary protection been considered then the finding concerning the Serious Crime Exclusion would have applied to that criterion, and there was no jurisdictional error.

Accordingly, it would not be open for the Tribunal to make the necessary findings to enable a direction that the visa be granted.

3.3.12 While the Tribunal also has the power to vary the decision[79] this power would only rarely, if ever, have any relevance to Part 7 reviews.

3.3.13 While unlikely to occur within the context of Protection visas, if a decision to grant a visa is affected by jurisdictional error (such that it should not have been granted), and that visa is then cancelled by a delegate, the Tribunal has the power to affirm or set aside the cancellation.[80]

The remittal power

3.3.14 For the purposes of the remittal power, the permissible directions or recommendations are set out in reg 4.33. A permissible remittal direction made by the Tribunal is binding on the Minister to comply with the direction. In *Plaintiff M174/2016 v MIBP*[81] 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 case applies to the Tribunal as the permissible direction power for the IAA under reg 4.43(1) is consistent with the wording under the Act for Part 5 and Part 7 reviews.[82]

Permissible directions - pre 16 December 2014 applications

3.3.15 The only permissible directions for protection visa applications made prior to 16 December 2014 are that:

- the applicant must be taken to have satisfied a specified criterion for the visa[83]
- the applicant satisfies each matter, specified in the direction, that relates to establishing whether the applicant is a person to whom Australia has

[79] s 415(2)(b).
[80] *BLF20 v MICMSMA* [2020] FCCA 878. The Court held that provisions of the Migration Act give a decision to grant a visa legal effect even if it was affected by jurisdictional error, such that a delegate could exercise the powers of cancellation in relation to a visa granted in error (at [159]). Assuming a valid review application is made, the Tribunal would have jurisdiction to review the delegate's decision to cancel the visa and would have the powers conferred upon it under the Migration Act (at [160]). In reaching this conclusion, the Court noted that while an administrative decision affected by jurisdictional error is in law no decision at all, the legal and factual consequences of such a decision depend upon the particular statutory context of the decision (at [132]). In this instance, it is s 68(1), which provides that a visa is in effect as soon as it is granted, which gives a decision to grant a visa legal effect.
[81] *Plaintiff M174/2016 v MIBP* (2018) 264 CLR 217 at [19].
[82] The wording for Part 5, Part 7 and IAA reviews refers to the power of the Tribunal (or IAA) for permissible directions that 'must be taken to have satisfied a specified criterion'; regs 4.15(1), 4.33(2).
[83] reg 4.33(2), as amended by *Migration Legislation Amendment (2015 Measures No 2) Regulation 2015* (Cth) (SLI 2015, No 103). The criteria for the grant of a protection visa are set out in s 36 of the Migration Act and sch 2 to the Regulations. For further discussion about the meaning of 'specified criterion', see *MIAC v Dhanoa* (2009) 180 FCR 510 and the discussion above.

protection obligations under the Refugees Convention and the Refugees Protocol[84] or

- the applicant satisfies each matter, specified in the direction, that relates to establishing whether the applicant is a person to whom Australia has protection obligations because there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm.[85]

3.3.16 However, it is not permissible to direct that:

- the applicant satisfies a matter specified in art 1F of the Refugees Convention[86]
- the applicant satisfies a matter that relates to establishing whether there are serious reasons for considering that the applicant has committed a crime against peace, war crime, crime against humanity, a serious non-political crime outside Australia, or is guilty of acts contrary to the purposes and principles of the UN,[87] or
- the applicant satisfies a matter that relates to establishing whether there are reasonable grounds that the applicant is a danger to Australia's security or is a danger to the Australian community (having been convicted by judgment of a particularly serious crime).[88]

Permissible directions - post 16 December 2014 applications

3.3.17 For protection visa applications made on or after 16 December 2014, the permissible directions are that:

- the applicant must be taken to have satisfied a specified criterion for the visa[89]
- the applicant is a refugee within the meaning of s 5H(1)[90]
- s 36(3) does not apply to the applicant[91]

[84] reg 4.33(3)(a).
[85] reg 4.33(4)(a) inserted by *Migration Legislation Amendment Regulation 2012* (No 1) (Cth) (SLI 2012, No 35).
[86] reg 4.33(3)(b). This was inserted to give effect to *Daher v MIEA* (1997) 77 FCR 107 where the Court held the Tribunal cannot consider or adjudicate upon art 1F (which relates to the commission of certain types of crime, or acts contrary to the purposes and principles of the United Nations). If the primary decision relied on art 1F, the Tribunal has no jurisdiction to review the decision at all: ss 500(1)(b), (4)(c).
[87] reg 4.33(4)(b).
[88] reg 4.33(4)(c).
[89] reg 4.33(2). The criteria for the grant of a protection visa are set out in s 36 of the Migration Act and sch 2 to the Regulations. For further discussion about the meaning of 'specified criterion', see *MIAC v Dhanoa* (2009) 180 FCR 510 and the discussion above.
[90] reg 4.33(3)(a), inserted by *Migration Amendment (Resolving the Asylum Legacy Caseload) Regulation 2015* (Cth) (SLI 2015, No 48).
[91] reg 4.33(3)(aa), inserted by SLI 2015, No 48.

- the applicant satisfies each matter, specified in the direction, that relates to establishing whether the applicant is a person to whom Australia has protection obligations because there are substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm,[92] or

- the grant of the visa is not prevented by ss 91W, 91WA or 91WB.[93]

3.3.18 It is not a permissible direction that s 5H(1) applies to the applicant, or s 5H(1) does not apply to the applicant because of s 5H(2), or the applicant satisfies, or does not satisfy, the criterion in s 36(1C).[94]

3.3.19 It is also not a permissible direction that the applicant satisfies a matter that relates to establishing whether there are serious reasons for considering that:

- the applicant has committed a crime against peace, a war crime or a crime against humanity, as defined by an international instrument mentioned in reg 2.03B[95]

- the applicant committed a serious non-political crime before entering Australia[96]

- the applicant has been guilty of acts contrary to the purposes and principles of the United Nations,[97] or

- the applicant satisfies a matter that relates to establishing whether there are reasonable grounds that the applicant is a danger to Australia's security or is a danger to the Australian community (having been convicted by judgment of a particularly serious crime, including a crime that consists of the commission of a serious Australian offence or serious foreign offence).[98]

3.3.20 Due to what appears to be a drafting error, the amendments to the permissible direction in reg 4.33(3) for visa applications made on or after 16 December 2014, apply to the review of a *primary decision made* on or after 18 April 2015 (rather than a Tribunal decision made on or after 18 April 2015). If remitting a matter where the visa application was made on after 16 December 2014 but the primary decision was made before 18 April 2015, it is recommended that the permissible direction in reg 4.33(2) be used, namely that the person satisfies s 36(2)(a) or (2)(aa) as relevant.

[92] reg 4.33(4)(a) inserted by SLI 2012, No 35.
[93] reg 4.33(5) as inserted by *Migration Amendment (Protection and Other Measures) Regulation 2015* (Cth) (No 47, 2015).
[94] reg 4.33(3)(b) as inserted by SLI 2015, No 48.
[95] reg 4.33(4)(b)(i) inserted by SLI 2012, No 35.
[96] reg 4.33(4)(b)(ii) inserted by SLI 2012, No 35.
[97] reg 4.33(4)(b)(iii) inserted by SLI 2012, No 35.
[98] reg 4.33(4)(c) inserted by SLI 2012, No 35.

3.3.21 A permissible remittal direction made by the Tribunal is binding on the Minister to comply with the direction. In *Plaintiff M174/2016 v MIBP*[99] 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 case applies to the Tribunal as the permissible direction power for the IAA under reg 4.43(1) is consistent with the wording under the Act for Part 5 and Part 7 reviews.[100]

Permissible recommendations

3.3.22 There are no permissible recommendations prescribed.

The criterion in dispute

3.3.23 When a matter is remitted for reconsideration, the applicant generally still has to satisfy other criteria, including health, character and other public interest criteria, before a protection visa may be issued. While the Tribunal has power to make a determination in relation to all of the relevant criteria, in practice it generally only considers the criterion or criteria in dispute, that is, the ones which formed the basis of the primary decision to refuse the visa (usually the protection criterion in s 36(2)). Matters relating to health and character are almost always determined by the Department upon remittal.

Section 36A – Making a record of protection obligations

3.3.24 It appears that the requirement in s 36A(1) to consider, and make a record of, protection obligations applies only to the Minister or their delegate when considering a protection visa application, and does not apply to the Tribunal when conducting a review, regardless of whether or not the Minister or their delegate has complied with s 36A(1).

3.3.25 Section 36A(1)[101] provides that, in considering a valid application for a protection visa, the Minister must consider and make a record of whether he or she is satisfied of any of the following:

- that the non-citizen satisfies s 36(2)(a) (i.e. is a refugee) and s 36(1C) (i.e. is not a danger to Australia's national security or, having been convicted by a final judgment of a particularly serious crime, is a danger to the Australian community);
- that the non-citizen satisfies the criterion in s 36(2)(aa) (i.e. the complementary protection criterion);

[99] *Plaintiff M174/2016 v MIBP* (2018) 264 CLR 217 at [19].
[100] The wording for Part 5, Part 7 and IAA reviews refers to the power of the Tribunal (or IAA) for permissible directions that 'must be taken to have satisfied a specified criterion'; regs 4.15(1), 4.33(2).
[101] Section 36A was introduced by the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (Cth) (No 35 of 2021) (C2021A00035), with effect from 25 May 2021.

- the non-citizen satisfies s 36(2)(a) but does not satisfy s 36(1C); and would satisfy s 36(2)(aa) except that the non-citizen satisfies s 36(2)(a).

3.3.26 This requirement does not appear to apply to the Tribunal because s 36A(1) requires consideration of s 36(2)(a), s 36(2)(aa) and, where s 36(2)(a) is satisfied, s 36(1C). Under the bifurcated system of review within the Tribunal, when undertaking a review of a protection visa refusal, the MRD cannot consider or adjudicate upon s 36(1C), and the General Division cannot consider or adjudicate upon ss 36(2)(a) and 36(2)(aa). Accordingly it would not be possible for either Division to fully comply with the obligations under s 36A(1).[102] Further, s 36A(2)(a) requires the record under s 36A(1) to be made 'before deciding whether to grant or refuse to grant the visa'. Although the Tribunal may exercise all the powers and discretions conferred upon the original decision-maker, its task in considering a review application is not, in itself, an exercise of a power to grant or refuse to grant a visa.[103] It therefore appears from the wording of s 36A(2)(a) that the obligations under s 36A(1) are intended to apply only to the Minister or their delegate at the primary level. This is reinforced by the fact that s 36A does not otherwise appear to be linked to the decision-making power under s 65, and does not otherwise form a separate decision point that is ordinarily reviewable by the Tribunal (in either Division).

3.3.27 Even if it was the case that the Tribunal was required to consider s 36A but failed to do so, it is difficult to see such a failure materially affecting the Tribunal's consideration of s 36(2)(a) or (aa) (in the MRD), or s 5H(2), 36(1C) or 36(2C) (in the General Division) so as to result in a jurisdictional error.[104]

3.4 Curing defects in the primary decision

3.4.1 From time to time a review applicant may claim, or the Tribunal may otherwise become aware of, a defect or denial of natural justice in the primary decision. For example, the s 119 Notice of Intention to Consider Cancellation for a visa cancellation under s 116 may not have been properly given; or an invitation to give further information under s 56 may have been sent to the wrong address and not received by the applicant.

[102] See ss 409(2), 411(1)(c) and 500(4)(c). In *SLGS v MICMSMA* [2022] FCA 1055, the Federal Court found that s 36A did not apply to a review conducted in the Tribunal's General Division because the decision under review was not caught by the operation of item 4(1) in sch 1 to C2021A00035. Item 4 of sch 1 to C2021A00035 provides that: s 36A, other than paragraphs 36A(2)(a), (b) and (c) applies in relation to application for visas made but not decided before 25 May 2021; s 36A applies in relation to applications for visas made on or after 25 May 2021; and a reference in s 197C to a protection finding within the meaning of subsection 197C(5) or (6) is a reference to a protection finding made before or after 25 May 2021.In finding that s 36A did not apply, the Court referred to the bifurcated system of review in which the MRD considers the criteria in ss 36(2)(a) and (aa) but the General Division conducts reviews in relation to ss 5H(2) and 36(2C): at [81] (albeit that the Court did not expressly refer to s 36(1C)).

[103] *SLGS v MICMSMA* [2022] FCA 1055 at [78]. Although the Court in *SLGS* was considering the operation of item 4(1) in sch 1 to C2021A00035, this reasoning appears applicable to the wording used in s 36A(2)(a). The use of the word 'decided' instead of the defined term of 'finally determined' in item 4 of sch 1 to C2021A00035 was one of the matters which led to the Court finding that the Tribunal was not required to make a record under s 36A in the circumstances of the case (at [75]–[81]).

[104] See *SLGS v MICMSMA* [2022] FCA 1055 at [87].

3.4.2 Section 69 provides that a failure by the Minister to comply with Part 2 Division 3 Subdivisions AA or AB or s494D does not mean that a decision to grant or refuse to grant a visa is not a valid decision but only means that the decision might have been the wrong one and might be set aside if reviewed. Courts have held that the Tribunal is able to review such decisions (provided they are either Part 5 or Part 7 reviewable and the subject of a valid application for review), and in doing so may 'cure' the defect in the primary decision.[105]

3.4.3 In *Zubair v MIMIA*, the Court observed that the term 'decision' is not defined in the Migration Act. Further, there is no textual suggestion that the expression 'MRT-reviewable decision' or by implication 'RRT-reviewable decision' (now Part 5-reviewable decision and Part 7-reviewable decision) should be restricted in some way so as to refer only to decisions which have been made by a delegate after full compliance with the mandatory procedural prescriptions of the Migration Act.[106] The Court found there was no reason why the Tribunal should not have the power (or obligation) to review a decision properly brought before it where the delegate may have failed to comply with a statutory procedural requirement, or in some other way may have committed an error of law. It is not the role of the Tribunal to cull out primary decisions which involve a jurisdictional error on the part of the primary decision-maker.[107] The Tribunal should be concerned with whether a reviewable decision has 'in fact' been made for the purposes of accepting jurisdiction, not the legal effect of such a decision.

3.4.4 Where the defect in the primary decision arose from misconception of the substantive power, the Tribunal remains bound to apply the laws defining the power of the primary decision-maker, and it may only substitute a decision which could have been made within confines of the decision-maker's power. For example, if upon review, the Tribunal found that an application for a visa was invalid, it would not have power to consider the application and grant or refuse the visa.[108]

3.4.5 A decision made without substantive power can be distinguished from a decision made within power but which is affected by legal error such as a failure to follow a mandatory statutory procedure or a misapplication of the law. For example, if the primary decision-maker had a valid application for a visa before it, he or she would have power pursuant to ss 47 and 65 to consider the application and, if not satisfied that the applicant met the criteria for the grant of the visa, refuse to grant the visa. In the course of considering the application, the primary decision-maker might misconstrue a criterion for the grant of the visa contained in Schedule 2 or make some other error, such as ignoring relevant material. The Tribunal upon review of that decision would have the power to consider the application, but could, by the

[105] See *Plaintiff M174/2016 v MIBP* (2018) 264 CLR 217 at [52], [70]. 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 confirming the view for the Tribunal. See also *Zubair v MIMIA* (2004) 139 FCR 344 particularly at [32], citing *Twist v Randwick Municipal Council* (1976) 136 CLR 106 at 116, which was followed in *Fang v MIMIA* [2004] FCA 1387 at [35]; *Bao v MIMIA* [2004] FMCA 1044 at [33]–[39]; and *Lin v MIAC* (2008) 218 FLR 177 at [57].
[106] *Zubair v MIMIA* (2004) 139 FCR 344.
[107] *Zubair v MIMIA* (2004) 139 FCR 344 at [28].
[108] ss 47, 65. See *SZGME v MIAC* (2008) 168 FCR 487.

completion of a full merits review in accordance with statutory procedures 'cure' the legal error in the primary decision.

3.4.6 In *Lin v MIAC,* the Federal Magistrates Court took the view that the Tribunal could cure a defect in the primary decision without specifically addressing the particular error in the delegate's decision. As long as the Tribunal properly conducts the review which it is empowered and obliged to conduct and, after a full merits review authorised by the Migration Act and the Regulations, affirms the delegate's decision, the review would cure the delegate's decision of any defect.[109]

3.4.7 The Court in *Lin* also considered the point in time at which the defects may be said to be 'cured'. Referring to the powers in s 349 [s 415 for Part 7 matters] the Court noted the distinction between the various options available to the Tribunal in disposing of the review. It drew an inference that when affirming a decision, the Tribunal is not making a new decision but the conduct of the review operates to make good that which was affected in the delegate's decision. That is, the delegate's decision remains the operative decision as of its date.[110] In contrast, where the Tribunal varies or sets aside and substitutes a new decision pursuant to s 349 a new decision is made.[111]

Power of the Tribunal where delegate lacked delegation

3.4.8 There are numerous authorities holding that a merits review tribunal has no greater or different *substantive* powers than the primary decision-maker.[112] However, the primary decision-maker should be understood to refer to an individual who has been validly delegated the power to make the decision (and not the actual decision-maker who may have lacked the required delegation). For instance, in *MHA v CSH18*, the Full Federal Court held that, in circumstances where the delegate of the Minister purported to cancel the applicants' protection visas without a valid delegation of power of cancellation from the Minister, the Tribunal had the power, pursuant to s 415(1) [s 349(1) for Part 5 matters] to exercise all the powers and discretions which would have been conferred on the person who made the decision if the instrument of delegation had been effective. The Court also held that, even if its finding on s 415(1) was incorrect, the powers on review (i.e. those in s 415(2) [s 349(2) for Part 5 matters] to affirm, vary, remit the matter for reconsideration in accordance with a direction/recommendation or set the decision aside and substitute a new decision) are distinct powers from s 415(1), which means they are not limited by whether the delegate had been validly delegated the power to make

[109] *Lin v MIAC* (2008) 218 FLR 177 at [36].
[110] *Lin v MIAC* (2008) 218 FLR 177 at [62]. See also *Daher v MIEA* (1996) 141 ALR 311 at 313 and *Kim v MIAC* (2008) 167 FCR 578 per Tamberlin J at [23] with whom Besanko J agreed at [42].
[111] *Lin v MIAC* (2008) 218 FLR 177 at [61].
[112] *Re Shortis and Secretary, Department of Community Services and Health* (1991) 13 AAR 544 at 548; *Re Uniway Pty Ltd and Chief Executive Officer of Customs* (1999) 29 AAR 289 at 295; *Re Western Australian International Education Marketing Group (Inc) and Australian Trade Commission* (2003) 77 ALD 192 at [46]; *Re Donald and ASIC* (2001) 64 ALD 717 at [28] and on appeal in the Full Court (2003) 77 ALD 449 at [30], [59].

the decision (although these powers are not unlimited, and do not extend to making a decision that is not authorised by the Act or Regulations).[113]

Power of Tribunal where the delegate had already made their decision and didn't have power to make second decision

3.4.9 In rare circumstances, the primary decision-maker may appear to revisit their decision and make a new decision, or erroneously make a second decision without reference to the first decision. Where this occurs, the second decision may be considered a nullity in law.[114]

3.5 The scope of the review

3.5.1 The Tribunal may, for the purposes of a review, exercise all the powers and discretions that are conferred by the Migration Act on the person who made the primary decision.[115] Courts have on occasion described this as the Tribunal 'standing in the shoes' of the primary decision-maker.[116] It had been previously thought that, in the context of the Migration Act, this aphorism related only to the *substantive* decision-making powers and discretions conferred on the primary decision-maker and not the decision-maker's *procedural* powers and discretions.

3.5.2 The words and context of various provisions in the Migration Act indicate that particular procedural powers may be exercised by 'the Minister' or 'the Tribunal'. The provisions of Parts 5 and 7, read in context, clearly relate to the Tribunal.[117] Similarly, the provisions of Part 2 Division 3 Subdivision AB, read in context, only apply in relation to dealings with 'visa applications' and were not, therefore,

[113] *MHA v CSH18* (2019) 269 FCR 206 at [63]–[65] and [80]–[81]. This judgment overturned *CSH18 v MHA* [2018] FCCA 3226; *MHA v AAT & Ors* [2018] FCCA 3229 which held that, while the purported decisions were Part 7-reviewable decisions, the Tribunal's power on review of the purported decisions was limited to setting aside those decisions. It found that the Tribunal did not have the power to affirm the cancellation decisions because to do so would be to exercise a power that the decision-maker did not have. This reasoning is consistent with existing authority in *MIMA v Li; MIMA v Kundu* (2000) 103 FCR 486 which held that the Tribunal's power on review is limited to those of the individual who made the decision.

[114] See e.g. the consent orders in [redacted] where the primary decision-maker made a decision on a Bridging E visa application and then purported to make a second decision nine days later without referring to the earlier decision. Both decisions refused the application. The applicant sought review of the second decision (but not the first). The Tribunal reviewed the second decision and the applicant sought judicial review. The Minister conceded that the decision of the Tribunal was outside jurisdiction. This was because the primary decision-maker, having made the first decision, was *functus officio* and therefore the second decision was a nullity in law. According to the consent orders, the Tribunal's power was confined to finding that the second decision was of no legal effect because of the operative first decision (*Re Brian Lawlor Automotive Pty Ltd and Collector of Customs (NSW)* (1978) 41 FLR 338 at 345-346). Notwithstanding this concession, the matter was not remitted to the Tribunal as it was considered futile, given the only lawful outcome would be for the Tribunal to set aside the second decision as a nullity. The consent orders did not consider the possibility of the Tribunal considering whether the applicant had intended to seek review of the first decision and whether the review application was in fact made in relation to the first decision (assuming that the review application was made within the prescribed period for the notification of the first decision). The consent orders also did not consider whether in setting aside the second decision, the Tribunal would also have needed to substitute a new decision. The power to set aside a decision is set out in s 349(2)(d) and is a power to 'set the decision aside and substitute a new decision'. It can be inferred that Minister was of the view that the new decision could be confined to finding that the primary decision-maker's decision was of no legal effect given the circumstances.

[115] ss 349, 415.

[116] *MIMIA v VSAF of 2003* [2005] FCAFC 73 at [16]; *Re MIMA; Ex parte Miah* (2001) 206 CLR 57. See also *CCR16 v MIBP* [2017] FCCA 2790 at [46] where the Court, citing *SAAZ v Minister for Immigration* [2002] FCA 791, characterised a hearing before the Tribunal as a hearing *de novo* and the review which the Tribunal is to undertake is one involving its standing in the shoes of the delegate in considering afresh the visa application.

[117] ss 337, 410.

regarded as powers exercisable by the Tribunal.[118] Where the cancellation of a visa was being considered, the case law suggested that the Tribunal had no power, for example, to issue its own s 107 or 119 notices.[119] Rather, it was thought the Tribunal must operate within its own procedural framework in Parts 5 and 7 of the Migration Act.

3.5.3 However, the High Court in *MIAC v SZKTI*, found that because ss 349(1) [Part 5] and 415(1) [Part 7] confer on the Tribunal 'all the powers and discretions' conferred on the primary decision-maker, those powers, both substantive and procedural, are exercisable by the Tribunal.[120] The High Court's reasoning also suggests that the Tribunal may choose to elect to use one procedural power over another. While there are potential difficulties given discrepancies in the procedural frameworks,[121] they would not arise and there would be no practical difference if the Tribunal 'elects' to use its own procedural powers. It is of note that nothing in the High Court's reasoning, nor the language of s 349 or 415, which suggests that the Tribunal must also comply with the primary decision-maker's procedural *obligations*, such as the obligation to disclose potentially adverse information.

3.5.4 With regard to the substantive issues in a review, it is necessary in any particular case to determine what the reviewable decision is[122] and the boundaries of that decision.[123] This is to be found by examining the terms of the power purportedly exercised, its statutory context, the terms of the reasons, the form of the decision and the material before the decision-maker.[124]

3.5.5 It is well established that in reviewing a decision to refuse to grant a visa for which a valid application has been made, pursuant to s 65, the central question for the Tribunal is whether, at the time the Tribunal makes its decision, it is satisfied that the criteria prescribed by the Migration Act and the Regulations for the particular class of visa are met.[125] Where the prescribed criteria require the Tribunal to be satisfied of matters at the 'time of decision', the relevant point in time will generally be the time of the Tribunal's decision (not the delegate's decision).[126]

[118] Note that in *SZFCE v MIAC* [2008] FCA 966, the Federal Court relied on s 415 as authorising the Tribunal to communicate with the applicants in accordance with s 52(3C) (or s 53(8) as it then stood). Subsection 52(3C) appears in pt 2 div 3 subdiv AB and so on the reasoning of the Full Court in *MIAC v Sok* (2008) 165 FCR 586 was ostensibly a power only exercisable by the Minister or his delegate in dealing with a visa application before the Department. As such, the reasoning in *SZFCE* was approached with caution.

[119] See *SZEEM v MIMIA* [2005] FMCA 27. Although the Tribunal's power to issue a s 107 notice was not expressly considered, it is implicit in Smith FM's reasoning that it would not be open to the Tribunal to issue its own s 107 notice, nor would it be open to the Tribunal to cure deficiencies in the s 107 notice using its own procedural fairness provisions. It is similarly implicit from the reasoning in *Zubair v MIMIA* (2004) 139 FCR 344 at [35] that the Tribunal could not issue a s 119 notice. See also *MIMIA v Ahmed* (2005) 143 FCR 314 at [41] and *Cowle v MIMA* [2000] FCA 49 at [19].

[120] *MIAC v SZKTI* (2009) 238 CLR 489 at [33]. See also *MIAC v SZNAV* [2009] FCAFC 109 at [21]. The Courts found in the context of the Tribunal's power to obtain information that it could exercise the procedural powers found in s 56, which was previously thought to have only applied to the handling of primary 'visa applications' by the Minister or his delegate.

[121] For example, the prescribed periods of response to a formal written invitation to a person to provide information vary depending on whether ss 56, 359(2) or 424(2) is being used.

[122] *Secretary DSS v Riley* (1987) 17 FCR 99 at 105; *Power v Comcare* (1998) 89 FCR 514 at 525; *MIMIA v Ahmed* (2005) 143 FCR 314.

[123] *MIMIA v Ahmed* (2005) 143 FCR 314 at [36].

[124] *MIMIA v Ahmed* (2005) 143 FCR 314 at [38].

[125] *MIMIA v VSAF of 2003* [2005] FCAFC 73 at [16]; *MIMA; Ex parte Miah* (2001) 206 CLR 57; *SZGME v MIAC* (2008) 168 FCR 487 at [18]; *MIMA v 'A'* (1999) 91 FCR 435; *Yilmaz v MIMA* (2000) 100 FCR 495; *Sok v MIAC* (2008) 238 CLR 251 at [25].

[126] *Yu v MICMSMA* [2020] FCA 209. The Court had regard to the Schedule 2 criteria applicable to the visa application in question (a Subclass 890 Business owner visa) and held that they did not indicate that 'criteria to be satisfied at the time of

3.5.6 In practice, the Tribunal usually limits its consideration to those criteria considered by the delegate. This approach is advocated by President's Direction – Conducting Migration and Refugee Reviews in the interests of facilitating accessible, fair, just, economical, informal, quick and proportionate conduct of reviews. If the Tribunal finds that any of the mandatory prescribed criteria for the grant of the visa are not met, s 65 compels a decision that the visa not be granted. In such cases, the Tribunal may affirm the decision to refuse to grant the visa without considering the other prescribed criteria for the visa (including any other criteria that may have been considered by the delegate, provided it gives the applicant an opportunity to address the issues arising in the review under ss 360 or 425).[127] If, however, the Tribunal is considering making a favourable decision on the review, it ensures that it considers for itself any criteria identified by the delegate as having not been met. A failure to do so could result in a failure to conduct a review pursuant to ss 348 [Part 5] or 414 [Part 7].

3.5.7 The Tribunal's powers on review are not limited by an intention that an applicant is entitled to two complete considerations of the merits of their application.[128] For instance, where the delegate has refused the visa on a criterion that doesn't require consideration of the entirety of the applicant's claims, it is open to the Tribunal to conduct a review by considering another criterion which involves an assessment of the merits of the claims. In *AWN16 v MIBP* the appellant contended that, as the delegate had refused the application on a clause which did not require consideration of their claims for protection and the clause was subsequently disallowed by Parliament after the delegate made their decision, the Tribunal should

decision' was intended to focus on the time of the delegate's decision and that 'time of decision' means the time the relevant decision-maker makes the decision, whether the decision-maker is the delegate or the Tribunal (at [59]–[61]). The Court reiterated that a Tribunal conducting merits review 'stands in the shoes' of the decision-maker and is to make the correct or preferable decision at the time of its decision on the material before it (at [73]).

[127] See e.g. *Hui v MIAC (No 2)* [2011] FCA 1364 in which the Court upheld the lower court's decision (*Hui v MIAC* [2011] FMCA 486) which had found that the Tribunal was empowered to address, and to determine, the applicant's eligibility for the visa by reference to a visa criterion which had not been addressed by the primary decision-maker. Once, the Tribunal had determined the applicant did not meet that criterion, it was legally unnecessary to address any other criterion: at [18]–[21], [28]. An application for special leave to appeal from the FCA judgment was refused: *Hui v MIAC* [2012] HCASL 70. See also. *Jin v MIAC* [2009] FMCA 540. In that case, the delegate refused to grant a Subclass 457 visa as the applicant failed to meet cl 457.223(4)(e). The Tribunal put the applicant on notice that if he could not meet cl 457.223(4)(a) or (b) the Tribunal would proceed to affirm the decision without considering cl 457.223(4)(e). The Tribunal affirmed the decision on the basis that the applicant did not meet cl 457.223(4)(b). The Court upheld the Tribunal decision, confirming that there was no obligation on the Tribunal to decide the case on the same basis as that dealt with by the delegate. Note that in relation to a matter in the General Division of the AAT concerning a decision to cancel a visa on the basis of s 501, the Court in *MICMSMA v CPJ16* [2019] FCA 2033 held that the Tribunal did not make a jurisdictional error when it refused to expand the issues in review to include consideration of an alternative ground of refusal. This judgment does not appear to affect reviews of visa refusals in the MRD. In *CPJ16*, the delegate refused the visa under s 501(1) on the basis that the applicant did not pass s 501(6)(d)(i) of the character test. Before the Tribunal, the Minister applied to include in the review that the applicant also did not pass another limb of the character test, s 501(6)(c). The Tribunal refused the Minister's application on the basis that it was to determine the same question as before the original decision-maker and the delegate had made no reference to s 501(6)(c). The Court was of the opinion that the Tribunal's task in making the correct or preferable decision must be connected to the grounds of the decision to exercise 'the statutory power the subject of the review, as exposed in the statement of the delegate's findings and reasons, so that the character of the review can be shaped by that consideration' (at [66]) and that the delegate's invitation to the applicant to satisfy him on the sole matter of concern, namely s 501(6)(d)(i), confined the scope of the review under s 43(1) of the AAT Act to that ground. In reviews of visa refusals under Parts 5 and 7 in the MRD, the central question for the Tribunal is whether, at the time the Tribunal makes its decision, the visa applicant is entitled to the grant of the visa. Consequently, the Tribunal, having all the powers and discretions conferred on the original decision-maker under s 349(1) [pt 5] or.415(1) [pt 7], can consider whether any criterion for grant of the visa is not satisfied, even if it was not considered by the delegate, provided it meets its procedural fairness obligations: *Sok v MIAC* (2008) 238 CLR 251, *SZGME v MIAC* (2008) 168 FCR 487, *Hui v MIAC (No. 2)* [2011] FCA 1364. These authorities were based on s.65(1)(a)(ii), which concerns whether prescribed criteria for a visa have been satisfied, and so are not affected by the judgment in *CPJ16* which appears limited to whether grant of the visa is prevented by s 501 or any other provision of the Migration Act under s 65(1)(a)(iii).

[128] *AWN16 v MIBP* [2020] FCA 1095 at [13].

have remitted the matter to the delegate so that the delegate could consider the appellant's claims.[129] The Court rejected this contention, and held that s 415(2) [s 349(2)] provides no textual basis to support such a limitation on the Tribunal's power to determine the appropriate course to take, and there is no requirement that before the Tribunal adopts a decision to conduct a *de novo* review the delegate must first have made substantive findings.[130]

3.5.8 Generally speaking, where the Tribunal is considering a decision to cancel a visa, the Tribunal must consider all the matters required to be considered by the Migration Act and the Regulations prior to such a decision being made.[131] For example, upon reviewing a decision to cancel a visa under s 109, the Tribunal must, under s 108 consider any response to the s 107 notice issued by the delegate and decide whether there was non-compliance with the Migration Act in the way described in the notice. If so satisfied, the Tribunal must have regard to the circumstances prescribed for the purposes of s 109.

[129] *AWN16 v MIBP* [2020] FCA 1095 at [7]–[12]. The delegate refused the visa application on cl 866.222 which required the Minister to be satisfied that, amongst other things, a visa applicant was not an 'unauthorised maritime arrival'. The delegate did not consider the applicant's claims for protections within ss 36(2)(a) and 36(2)(aa). Clause 866.222 was in effect at the time the delegate made their decision but had been disallowed by the time the Tribunal made its decision. The Tribunal conducted an 'extensive merits review' of the application before affirming the delegate's decision to not grant a protection visa at [7].
[130] *AWN16 v MIBP* [2020] FCA 1095 at [13].
[131] For discussion about the Tribunal's power to consider grounds for cancellation not considered by the delegate see the MRD Legal Services Commentary Cancellation of Visas Under s 116.

4. REVIEW APPLICATIONS

4. REVIEW APPLICATIONS[1]

4.1 Introduction

4.1.1 This Chapter gives an overview of the requirements for making a valid application for review in the Migration and Refugee Division (MRD) of the Tribunal. It may be read together with Chapter 2 – Notification of primary decisions, which discusses the law relating to the notification of primary decisions.

4.1.2 The *Migration Act 1958* (Cth) (the Migration Act) and *Migration Regulations 1994* (Cth) (the Regulations) set out a number of requirements which must be met in order for an application for review to be properly or validly made. The Tribunal has no power or 'jurisdiction' to review a decision under Part 5 or Part 7 of the Migration Act unless an application which meets the legislative requirements has been made. The requirements for a valid Part 5 [migration] review application are set out in ss 338[2] and 347 of the Migration Act and regs 4.02 and 4.10 of the Regulations. The requirements for a valid Part 7 [protection] review application are set out in ss 411[3] and 412 of the Migration Act and regs 4.31, 4.31A and 4.31AA of the Regulations.

4.2 Requirements for a valid Part 5 review application

4.2.1 According to s 347 of the Migration Act, an application for a Part 5 review must:

- relate to a 'Part 5-reviewable' decision;[4]
- be made in the 'approved form';[5]
- be given to the Tribunal within the prescribed period;[6]
- be accompanied by the prescribed fee (if any);[7]
- be made by a person ('the review applicant') with standing to apply.[8]

In addition, for visa refusals and cancellations occurring in the migration zone, the review applicant must be physically present in the migration zone when the review

[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Migration Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] Under s 338(1) a decision is not a Part 5-reviewable decision if the Minister has issued a conclusive certificate under s 339, the decision is a Part 7-reviewable decision or is a decision to refuse to grant, or to cancel, a temporary safe haven visa or is a fast track decision.
[3] Under s 411(2) a decision is not a Part 7-reviewable decision if it is a decision to cancel a protection visa made personally by the Minister, the Minister has issued a conclusive certificate under s 411(3), the decision is made in relation to a non-citizen who is not present in the migration zone at the time of the primary decision, or the decision is a fast track decision.
[4] s 347(1),as amended by the *Tribunals Amalgamation Act 2015* (Cth) (Amalgamation Act).
[5] s 347(1)(a).
[6] s 347(1)(b), reg 4.10.
[7] s 347(1)(c), reg 4.13.
[8] s 347(2), reg 4.02(5).

application is made.[9] In some cases, the review application can only be lodged by an applicant who was in the migration zone at the time of the primary decision *and* at the time of lodgment of the review application.[10]

4.2.2 The prescribed period for lodgement of the review application and the person who may apply for review may vary depending on the type of decision sought to be reviewed. Table 1 at the end of this Chapter sets out the prescribed periods for lodgement, the proper review applicant and required location of the review applicant for the different categories of Part 5-reviewable decisions.

Part 5-reviewable decisions

4.2.3 For an application for a Part 5 review to be properly made, it must be for review of a 'Part 5-reviewable decision'.[11] 'Part 5-reviewable decision' is defined in s 338 of the Migration Act. There are 10 broad categories of decisions, covering decisions to refuse a visa, decisions to cancel a visa, decisions not to revoke a visa cancellation, decisions relating to sponsorship and nomination and 'points test' decisions. The existence of a Part 5-reviewable decision does not turn on the validity of the primary decision,[12] and so the Tribunal has jurisdiction to review purported decisions of a delegate.[13] However, a decision that a visa application is not valid is not a Part 5-reviewable decision.[14]

4.2.4 In order for there to be a valid application for review, a decision must in fact be in existence. An application for review cannot be made in anticipation of a primary decision, which will be Part 5-reviewable, once it is made.[15] Accordingly, if an applicant makes an application for review before the primary decision is made, it will not be a valid application at that time. However, if the applicant subsequently provides the Tribunal with a copy of the delegate's decision or notifies the Tribunal the decision has been made, an application for review may be made at the time the applicant provides the Tribunal with a copy of the decision or notifies the Tribunal that the decision has been made.[16]

4.2.5 If a decision or purported decision is reviewable, notwithstanding any legal invalidity in the delegate's decision, once a valid application for review to the Tribunal is

[9] s 347(3).
[10] s 347(3A).
[11] s 347(1).
[12] *Singh v MIAC* [2010] FMCA 1000.
[13] *Collector of Customs v Brian Lawlor Automotive Pty Limited* (1979) 24 ALR 307 and *MIMA v Yusuf* (2001) 180 ALR 1.
[14] This is because a decision by the Minister that an application is not valid is not a decision to refuse to grant the visa: s 47(4). See for example *SZVCB v MIBP* [2015] FCCA 1172 where the then RRT erred in conducting a review of a delegate's decision that an applicant had not made a valid application for a protection visa: at [21]–[25]. See also *Dharmesh v MIAC* [2009] FMCA 442.
[15] In *SZMBM v MIAC* [2008] FMCA 529, the applicant applied to the Tribunal before the delegate's decision on his visa application had been made. The Court found that there was no provision in the Migration Act giving the Tribunal jurisdiction to review decisions that may be made in the future. The delegate made their decision subsequent to the applicant lodging a review application with the Tribunal. The Court acknowledged that it would have been open to the applicant to bring the decision to the Tribunal's attention, but this did not happen at [4].
[16] See *SZMBM v MIAC* [2008] FMCA 529 at [4]. Note that the other requirements for a valid review application would need to be satisfied such as payment of the prescribed fee and that the correct person with standing has applied for review.

made the delegate becomes *functus officio* and the Tribunal can review the decision.[17]

Approved form

4.2.6 An application for review of a Part 5-reviewable decision must be in the approved form or in a form which substantially complies with the approved form.[18] The expression 'approved form' is defined in s 5 of the Migration Act as a form approved by the Minister in writing. Under s 495 of the Migration Act, the Minister may, in writing, approve a form for the purposes of a provision in the Migration Act in which the expression 'approved form' is used. The power to approve forms has been delegated to the President in accordance with s 496 of the Migration Act.[19] For applications made on or after 1 July 2013, there are no requirements prescribed in the Regulations as to what content the form must include.[20] However, the application for review form for certain detainees must include certain information for the applicant.[21]

4.2.7 For the purposes of s 347, the current Instrument of Approval[22] specifies the following as approved forms:

- 'M1' or 'eM1'[23] for applicants not in detention;
- 'M2' or 'eM2'[24] for applicants in immigration detention;
- the form transmitted to the Tribunal using the online application system.

4.2.8 However not using the approved form above may still result in a valid application being made if it is made in a form which substantially complies. For further discussion of the principles of 'substantial compliance' see below.

Time limits

4.2.9 Section 347(1)(b) requires that an application for review be given to the Tribunal within the relevant prescribed period. However, even if the time for applying for review has not commenced (which is the case when an applicant hasn't been validly notified of the primary decision), a valid review application can nevertheless

[17] *Sherpa v MIAC* [2010] FMCA 664.
[18] Migration Act s 347(1)(a); *Acts Interpretation Act 1901* (Cth) (Acts Interpretation Act) s 25C and *MZAIC v MIBP* [2016] FCAFC 25.
[19] Instrument of Delegation 2015 (DEL 15/090), 30 June 2015.
[20] For review applications made before 1 July 2013, the Regulations required a Part 5 review application form to set out the name and address of the review applicant; a brief statement of the capacity in which the person applicant applies for review; details of the decision to which the application relates; the name and address of the visa applicant (where the review applicant is not the visa applicant; and the review application relates to a visa refusal or points test assessed score): reg 4.10(4).
[21] For decisions reviewable under s 338(4), i.e. persons in detention as a result of a decision to refuse or cancel a visa, the form must include a statement advising the applicant that they can ask to appear before the AAT and ask the AAT to get oral evidence from specified persons: s 347(4).
[22] Instrument of Approval – Approvals of application for review forms for the Migration and Refugee Division dated 1 July 2015.
[23] As generated by printing the online application form.
[24] As generated by printing the online application form.

still be lodged if there is a Part 5-reviewable decision.[25] The Tribunal does not have the power to extend the time limits (see discussion below).

4.2.10 The relevant periods are prescribed in reg 4.10 of the Regulations and differ depending on the type of Part 5-reviewable decision and whether or not the person is in immigration detention.[26]

4.2.11 The time limits for applications for review of each type of Part 5-reviewable decision are as follows:

- 21 calendar days after the day on which notification of the primary decision is received - if the decision is to refuse an onshore visa (i.e. Part 5-reviewable decisions under s 338(2) and (7A)) or is a prescribed Part 5-reviewable decisions under s 338(9).[27] Different periods may apply for certain bridging visa decisions (see below).

- 7 working days after the day on which notification of the primary decision is received - if the decision is to cancel a visa onshore or not to revoke a visa cancellation onshore (i.e. Part 5-reviewable decisions under s 338(3) and (3A)).[28] Again, different periods may apply for certain bridging visa decisions (see below).

- 70 calendar days after the day on which notification is received - if the decision is to refuse an offshore visa (Part 5-reviewable decisions under s 338(5), (6), (7) or (8)).[29]

- 2 working days after the day on which notification is received - if the applicant is in immigration detention, and the decision is to refuse or cancel a bridging visa, where a security is involved and/or where the refusal or cancellation has resulted in the applicant's detention.[30]

- 7 working days after the day on which notification is received - for all other cases involving detainees.[31]

4.2.12 When calculating time for these purposes the relevant period does not include the day on which the calculation is said to begin.[32]

4.2.13 Some of the prescribed periods are expressed in terms of *working* days while others are *calendar* days. Section 5 of the Migration Act defines a working day in

[25] *SZOFE v MIAC* (2010) 185 FCR 129; cf *Hasan v MIAC* (2010) 184 FCR 523, now considered to be overruled by *SZOFE*.
[26] Note that in *Mohamed v MIAC* [2008] FMCA 1633 the Court found that the prescribed periods for applying for review only applied to Part 5-reviewable decisions. It would be wrong, therefore, to treat an application for review as invalid because it was out of time if, in fact, the decision was not Part 5-reviewable. The Tribunal's 'No jurisdiction – no reviewable decision' template should be used in these circumstances.
[27] regs 4.10(1)(a), (d).
[28] reg 4.10(1)(b).
[29] reg 4.10(1)(c).
[30] reg 4.10(2)(a) and (aa).
[31] reg 4.10(2)(b).
[32] Acts Interpretation Act Item 6 s 36(1), as it applies from 27 December 2011.

relation to a place, as any day that is not a Sunday, Saturday or public holiday in that place.[33]

4.2.14 If the last day of the time period within which the applicant can lodge an application to the Tribunal falls on a Saturday, a Sunday or a holiday, the applicant has until the end of the next day that is not a Saturday, a Sunday or a holiday to lodge his or her application.[34] The term 'holiday' is defined for these purposes to mean either a day that is a public holiday in the place in which the application is lodged, or the day on which the office where the application is lodged is closed for the whole day (for example, the public service holiday between Christmas and New Year).[35] Public holidays differ between Australian States and Territories. Further, the public service holiday between Christmas and New Year is not a gazetted 'public holiday' under the relevant legislation (or a Saturday or Sunday).[36] However, as a result of amendments to s 36 of the *Acts Interpretation Act 1901* (Cth) (Acts Interpretation Act), which commenced on 27 December 2011, it can be defined as a 'holiday'.[37]

4.2.15 To determine when an applicant is notified of a primary decision, see Chapter 2 – Notification of primary decisions. Following *DFQ17 v MIBP*[38] a number of departmental notifications may be held to be invalid, which means that the time period to seek review will not have commenced. Further information is in Chapter 2 – Notification of primary decisions.

Prescribed fee

4.2.16 The review application must be accompanied by the prescribed fee (if any).[39] Except for decisions to refuse or cancel a bridging visa which result in the detention of the applicant, all applications are subject to a fee. If the application is not accompanied by the prescribed fee, or an application for a fee waiver[40] or an application for a fee reduction[41], the application will not be valid.[42]

[33] *Teresa Pasini Cabal v MIMA* (1999) 91 FCR 309.
[34] Acts Interpretation Act s 36(2), as applies from 27 December 2011.
[35] Acts Interpretation Act s 36(3), as applies from 27 December 2011.
[36] In *SZOXA v MIAC* [2011] FMCA 298 the Court noted as its registry was closed on a day not because it was a public holiday, a bank holiday or a Saturday or a Sunday (as referred to in the pre December 2011 version of s 36(2) of the Acts Interpretation Act, this raised the question of how to proceed in circumstances where the applicant would have been physically prevented from filing or attempting to file his judicial review application within time. While this question was ultimately unresolved, the Court noted that in this electronic age, facsimile communication or electronic filing would have overcome such a problem. Amendments to s 36 of the Acts Interpretation Act which commenced on 27 December 2011, now resolve this issue with regard to the public service holiday between Christmas and New Year.
[37] Acts Interpretation Act s 36(3), as applies from 27 December 2011.
[38] *DFQ17 v MIBP* [2019] FCAFC 64 at [62]. The Full Federal Court found a notification letter that was posted, failed to state the information in s 66(2)(d)(ii) about the time in which a review application may be made, in circumstances where the information was set out across three pages under different headings in the letter (the date of the notification, the time the appellant was taken to have received the notification and the prescribed period). The Court concluded the notification letter was defective as it was 'piecemeal, entirely obscure and completely incomprehensible', with the result that it failed to convey that any review application had to be made by the relevant date.
[39] s 347(1)(c), reg 4.13. See also *Khan v MIAC* (2008) 222 FLR 197. Where a fee waiver/fee reduction application has been refused, payment must be made within a 'reasonable period' from the time when the applicant is notified of the refusal: *Patel v MIAC* (2009) 108 ALD 151.
[40] For applications lodged prior to 1 July 2011.
[41] For applications lodged on or after 1 July 2011.
[42] *Akpata v MIMIA* [2004] FCA 913, *Taylor v MIMIA* [2005] FMCA 281, *Hamad v MIMIA* [2006] FMCA 1510, *Zhang v MIAC* (2007) 210 FLR 268.

4.2.17 For a full discussion of the fee payment and waiver requirements, see Chapter 5 – Fees for review.

Who may apply? (Standing)

4.2.18 Section 347(2) sets out who may apply to the Tribunal for review of a decision under Part 5; that is, who has 'standing'. It specifies who has the right to seek review in relation to each category of Part 5-reviewable decision in s 338. The person who has the right to a review is not always the visa applicant (as outlined immediately below).[43]

4.2.19 The standing requirements for each type of Part 5-reviewable decision are:

- For Part 5-reviewable decisions to refuse or cancel a visa, or not to revoke an automatic cancellation, in the migration zone, including those where the applicant is in detention as the result of the refusal of a bridging visa (i.e. decisions under ss 338(2), (3), (3A), (4) or (7A)), the application for review may only be made by the non-citizen who was the subject of the decision.[44]

- For Part 5-reviewable decisions to refuse a visa application made offshore or an assessed points test score for an offshore application (i.e. decisions under s 338(5) or (8)), the application for review may only be made by the visa applicant's sponsor or nominator.[45]

- For Part 5-reviewable decisions involving offshore refusals of visitor visa applications or resident return visa applications (i.e. decisions under ss 338(6) or (7)), only a specified Australian relative may lodge an application for review.[46]

- If the Part 5-reviewable decision is one prescribed for the purposes of s 338(9), reg 4.02 sets out who must lodge the application for review in relation to each category of prescribed reviewable decision.[47]

4.2.20 It is a question of fact for the Tribunal in each case as to who has applied for review, having regard to all the evidence, including the application form.[48] While the review applicant themselves need not complete the form, there must be the

[43] In *Huynh v MIBP* [2015] FCCA 34, the Court noted that the only reference to a 'review applicant' in Divisions 1-8 of Part 5 of the Migration Act is in s 358, that these Divisions otherwise refer to 'an applicant' and that the terms 'applicant' and 'review applicant' are intended by Parliament to be synonymous. This aspect of the reasoning was not overturned on appeal in *Huynh v MIBP* [2015] FCA 701, with the Court agreeing that the visa applicant was not 'the applicant' for the purposes of ss 359A and 360 at [63]. See also Chapter 12 - Review of files and duty to invite the applicant to a hearing for further details.
[44] s 347(2)(a).
[45] s 347(2)(b).
[46] s 347(2)(c).
[47] s 347(2)(d) and reg 4.02(5).
[48] In *Hassan v MIBP* [2015] FCCA 894, the Court held that an application for review had been lodged by the correct person with standing (in this case the visa applicant), notwithstanding that the sponsor had been identified as the review applicant in questions 3 and 5 of Part A of the M1 form. As all of the visa applicant's details were contained elsewhere in the application form, and, significantly, the visa applicant had signed the formal declaration at the end of the M1 form identifying them as the person seeking review, the Court found, as a question of jurisdictional fact, that the review applicant was the visa applicant (at [14], [19]-[23]).

requisite intention by the person with standing to apply.[49] Another person, acting on the review applicant's behalf, may in some circumstances physically complete and sign the form.[50]

4.2.21 While the Tribunal may have regard to the details of the person applying for review in the review application form, it may not be determinative of who the person seeking review is. In *Le v MIBP*[51], the Federal Court adopted a broad interpretation of this evidence in the applicant's favour to find that the correct person had applied for review and that the Tribunal's jurisdiction had been engaged. The matter concerned the refusal of a Subclass 820 (Partner) (Temporary) visa, which meant that the person with standing was the visa applicant. However, on the review application form lodged with the Tribunal, the sponsor's details were listed under the heading 'details of person applying for review' and the visa applicant's details were listed under 'primary visa applicant'. In response to a query from a Tribunal officer about who was seeking review of the decision, the representative also incorrectly claimed that the sponsor had the right to seek review. The Tribunal found that it did not have a valid review application before it, as the person with standing (i.e. the visa applicant) had not applied for review. The Federal Court disagreed and found that the visa applicant had sought review of the decision. It held that the information in the boxes on the review application form was not determinative, and that the person listed as applying for review (i.e. the sponsor) was doing so on behalf of the person described as the 'primary visa applicant'.[52] The Court emphasised the need to evaluate the substance of the information conveyed in a review application and held that '*the door to the Tribunal's statutory review function is not to be closed simply because the [applicant's] agent filled out the form in the way they did when all the other information and attachments make it clear that only the [applicant] could enliven the Tribunal's jurisdiction*'.[53]

Location of review applicant

4.2.22 Depending upon the type of Part 5 reviewable decision, there may be additional requirements as to the location of the review applicant at the time of primary decision, time of making the review application, or both.

[49] In *SZMME v MIAC* [2009] FMCA 323, the Court held there was no valid application for review where the applicant claimed his agent made an application without his knowledge and denied the signature on the application was his.
[50] *Jalagam v MIAC* [2009] FCA 197. This case concerned the validity of a visa application, but the principles are equally applicable to review applications. See also *Zaki v MIBP* [2015] FCCA 2575 where the Court accepted unchallenged evidence given to the Court by the applicant's sponsor and corroborated by the applicant that she was acting on the applicant's behalf when she lodged the online review application in which she named herself as the review applicant.
[51] *Le v MIBP* [2019] FCA 427.
[52] *Le v MIBP* [2019] FCA 427 at [84]–[85]. By way of contrast, the Court in *Haider v MICMSMA* [2020] FCCA 1113 at [45]–[48], distinguished *Le v MIBP* [2019] FCA 427 in the context of a Subclass 457 matter, where the nominator applied for review when the visa applicant was the correct person with standing and the Tribunal found it did not have jurisdiction. The Court found that there were several factors which distinguished the matter from *Li:* the review application had identified the decision for review as 'refusal of nominated activity or position'; the type of applicant was an 'organisation'; the sponsor's details were under 'organisation details'; and the 'sponsor or nominator' was identified as having the capacity to apply for review. The only information in the review application that related to the visa applicant was the corresponding Department file number and the attached delegate's decision. This was in contrast to *Le*, where in the review application the correct person was named as the primary visa applicant, and the decision to be reviewed was correctly identified. In *Haider*, the visa applicant had made a 'subsequent application' with himself as the review applicant but as this was made after the prescribed period ended, the Court held that there was no jurisdictional error in the Tribunal's approach: at [52]–[53].
[53] *Le v MIBP* [2019] FCA 427 at [88].

At time of lodgement of review application

4.2.23 For Part 5-reviewable decisions that are covered by ss 338(2), (3), (3A) or (4), that is, decisions to refuse or cancel a visa, or not to revoke a cancellation under s 137L in the migration zone, the review applicant must be physically present in the migration zone at the time that the review application is made.[54] If the review applicant is not physically present at the time the application is made, it will not be a valid application as it will not satisfy the requirement in s 347(3) and the application is not perfected by the review applicant later entering the migration zone during the relevant prescribed period.[55] For the other types of Part 5-reviewable decisions, there is no such requirement.

4.2.24 In *Gajjar v MIBP*, the Court considered the meaning of 'migration zone' and 'made' for the purposes of s 347(3). The Court held that an applicant must be physically present in the migration zone at the moment an application for review is made and there is no valid application for review of a Part 5-reviewable decision under s 347(3) where a review applicant is flying to Australia at that moment.[56] The Court found the application had been 'made' at the moment the review applicant satisfied the criteria in s 347(1) and, while the review applicant was flying to Australia when that had occurred, the term 'migration zone' in s 5(1) was limited to the surface of Australia's land and sea and did not include the airspace above it.[57]

4.2.25 In *Tahere v MHA*, the Court indicated that if a person is refused immigration clearance upon entry into Australia, this will not support a conclusion that a person is not in the 'migration zone'.[58]

[54] s 347(3).
[55] *Lamichhane v MICMSMA* [2022] FedCFamC2G 251 at [40], [50]–[55]. The day after the applicant was notified by the delegate of the decision to refuse his visa, he departed Australia and did not return to Australia until the last day of the prescribed period to make a review application to the Tribunal. While he was overseas, he lodged a review application with the Tribunal. On the last day of the prescribed period (which was the same day the applicant returned to Australia), the Tribunal sent a natural justice letter to the applicant, noting that he was not physically present in the migration zone at the time the review application was lodged and that he would need to be in the migration zone to make a valid review application. The Court noted that it was 'less than ideal' that the applicant was put on notice by the Tribunal of the issue with the validity of his review application on the last day of the prescribed period. However, the Court also noted that, despite being in Australia on the last day of the prescribed period and having been put on notice of the issue, he did not lodge another review application. The Court proceeded on the basis that the review application was made when the application form was lodged with the Tribunal and payment was made, and the requirement to be physically present in the migration zone needed to be met at that moment. The Court did not consider whether the review application could be 'perfected' by the applicant's entry into the migration zone at a later point of the prescribed period but proceeded on the basis that a new review application would have needed to be lodged once he was in the migration zone.
[56] *Gajjar v MIBP* [2013] FCCA 1859 at [81]. In *Xia v MICMSMA* [2021] FCCA 1944 the Court followed *Gajjar* to find that the Tribunal was correct to find that it did not have jurisdiction in respect of a review application for a s 338(7A) reviewable decision because the review applicant was not in the migration zone at the time of the delegate's decision or at the time the review application was made and therefore s 347(3A) was not satisfied. At [24]–[26], the Court rejected the applicant's argument that the Court would have jurisdiction to review the delegate's (primary) decision as the decision is provided for in s 476(4)(a) as a 'primary decision'. The Federal Circuit Court does not have jurisdiction in respect of primary decisions: s 476(2). The Court reasoned that 'primary decision' in s 476(4)(a) refers to a decision of a delegate which was procedurally able to be reviewed under Part 5 or 7 at the time that it had been handed down, irrespective of whether a valid review application was made or whether the 'benefit of review has been lost by the conscious and deliberate act or omission of an applicant in placing themselves outside the migration zone at the respective times'.
[57] *Gajjar v MIBP* [2013] FCCA 1859 at [81].
[58] *Tahere v MHA* [2018] FCCA 3505 at [18]. The Court said in *obiter* that it had difficulty with the Tribunal's conclusion that if a person is not immigration cleared, they are not in the migration zone. The Court remarked that it was not aware of a provision in the Migration Act where it is said that a person who is not immigration cleared and is placed into immigration detention is not in the migration zone. However, the Court found that the Tribunal was ultimately correct to conclude that it did not have jurisdiction as the decision was not reviewable under s 338(2) because the applicant had been refused immigration clearance which meant that the requirement in s 338(2)(c) was not satisfied.

At time of primary decision and time of lodgment of review application

4.2.26 For Part 5-reviewable decisions that are covered by s 338(7A) that is, decisions to refuse a visa in the migration zone to a non-citizen who applied for the visa outside the migration zone (e.g. Subclass 100 visa refusals), the review applicant must have been in the migration zone when the visa was refused *and* at the time that the review application was lodged.[59]

Combining review applications

4.2.27 The Regulations permit review applications to be combined in certain circumstances.

When can review applications be combined

4.2.28 Regulation 4.12 sets out the circumstances under which Part 5 review applications may be combined. These are:

- visa applications combined at primary level - if 2 or more review applicants have combined their visa applications in Australia at primary level as permitted by Schedule 1 to the Regulations, regs 2.08, 2.08A or 2.08B (discussed below) and the Minister's decisions to refuse the visas in respect of those applicants are Part 5-reviewable, the review applications may be combined by the visa applicants who were refused the visas.[60] This regulation is only applicable where the visa applicants are also the review applicants at it specifically provides that it is the applicants who have been refused the visa[61] who can combine their applications for review (and not another type of review applicant such as a sponsor or relative). Therefore, it does not extend, for example, to decisions reviewable under s 338(9) where a sponsor or nominator has standing to apply for review because the sponsor or nominator is not the person who has been refused the visa. In these instances, separate review applications would need to be lodged by the sponsor or nominator.

- visa applicants nominated/sponsored by same person - where a person (the nominator/sponsor) has nominated or sponsored two or more members of a family unit in relation to primary visa applications of a type covered by s 338(5), and the Minister's decisions to refuse the visas in respect of those applicants are Part 5-reviewable, the nominator/sponsor can make a combined application for review of those decisions.[62] Note that while the visa applicants must be members of the same family unit, the nominator/sponsor does not need to be part of the same family unit.[63] See the MRD Legal

[59] ss 338(7A), 347(3A).
[60] reg 4.12(2).
[61] reg 4.12(2)(b)
[62] reg 4.12(4).
[63] On determining whether a person meets threshold application requirements, see generally *MIMIA v Kim* (2004) 141 FCR 315. The Court at [20] stated that matters that require subjective consideration are not likely to be considered at the threshold

Services commentary: Member of the Family Unit for discussion of this definition.

- combining bridging visa refusal with security decision - where a person applies for review of a decision requiring a security in connection with a bridging visa application and the decision refusing to grant that bridging visa, review of both decisions may be combined.[64]

- relative may combine certain review applications - where two or more applicants for visas of a type falling within either ss 338(6) or (7) combined their visa applications at primary stage in a way permitted by Schedule 1, regs 2.08, 2.08A or 2.08B, and the Minister's decisions to refuse the visas in respect of those applications are Part 5-reviewable, the Australian parent, spouse, de facto partner, child, brother or sister may make a combined application for review of those decisions.[65] Decisions falling within these categories are typically former resident visas (s 338(6) and sponsored visitor visas (s 338(7)).[66]

4.2.29 Aside from security decisions, the Regulations only permit the combining of review applications in circumstances where the decisions under review are visa refusals.

Other requirements for combining review applications

4.2.30 The combined application for review must be made within the prescribed period for each decision. Only one fee is payable where an application is validly combined.[67] If review applications have not been validly combined, fees will be payable in respect of each review application. If only one fee has been paid in these circumstances, it will be necessary to determine the application for which the fee has been paid.[68]

4.2.31 If the Tribunal has before it applications for review of two or more Part 5-reviewable decisions in respect of the *same* person, the Tribunal may combine those reviews.[69]

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of determining that an application is valid but rather when considering the visa application itself suggesting a detailed consideration of matters such the elements of family membership, may not be appropriate.

[64] reg 4.12(5).

[65] reg 4.12(6). 'De facto partner' was inserted into reg 4.12(6) by the *Migration Amendment Regulations 2009* (No 7) (Cth) (SLI 2009, No 144) to reflect changes to ss 338(6) and (7) amongst the relevant list of relatives made by the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws - General Law Reform) Act 2008* (Cth).

[66] In *MIBP v Bakker* [2014] FCCA 755, the visa applicants had lodged separate resident return visa applications, and one review application was lodged by their Australian resident children. The Court found the Tribunal did not have jurisdiction to review the delegate's decision in relation to the second named visa applicant, as one of the preconditions for reg 4.12 to apply, which the applicants could not meet, was that they had a combined primary application permitted by Schedule 1 or regs 2.08, 2.08A or 2.08B of the Regulations. As there was no joint primary application, the applicants could not lodge a combined application for review.

[67] reg 4.13(3).

[68] In *Singh v MIAC* [2010] FMCA 988, the husband and wife applicants had lodged separate visa applications and then purported to combine their applications for review paying only one application fee. The Tribunal had explained to the applicants that it only had jurisdiction to deal with one applicant and the applicants had indicated that the Tribunal should proceed on the basis that the review application related to the husband. The Tribunal accordingly determined that the application fee had been paid only in respect to his application and that it had no jurisdiction with respect to the wife. The Court held that as the applicants had separate passports and the applications had not been combined at the primary level, the review application had been impermissibly combined and that it was necessary for each applicant to pay a separate application fee. As only one fee had been paid, the Tribunal only had jurisdiction in respect of one of the applicants. The Court held that the approach taken by the Tribunal was open to it.

[69] s 363(2). The Part 7 equivalent provision is mandatory, not discretionary: s 427(2).

Separate review applications

4.2.32 Notwithstanding that a combined application for review may be made in respect of 2 or more Part 5-reviewable decisions, the relevant parties may choose to make separate review applications. If family members lodge separate review applications, the Tribunal may consider conducting concurrent reviews. If the Tribunal proposes to conduct a combined hearing it generally obtains each applicant's informed consent and give each applicant an opportunity to present evidence or make submissions alone.

Combining visa applications

4.2.33 Schedule 1 to the Regulations sets out the requirements for a valid visa application and generally allows a visa application by a person claiming to be a member of the family unit of a person who is an applicant for a visa to be made at the same time and place as and combined with, the application by that person. See the MRD Legal Services commentary: Member of the Family Unit for discussion of this definition. However, the Schedule 1 requirements for some visa classes allow combined visa applications only in restricted circumstances and some do not include a requirement that the visa applications be made at the same place as the primary person.[70] The Tribunal confirms that the Schedule 1 requirements for the relevant visa class are met before concluding that the review applications may be combined. For a discussion of the effect of regs 2.08, 2.08A and 2.08B see 'Adding family members to the application' below.

4.2.34 When determining whether visa applications were combined at the primary level, in addition to determining whether the Schedule 1 requirements for combining the visa applications are met, it is important to ascertain whether the visa applications were combined 'in Australia'.[71] For visa applications to have been combined 'in Australia' in a way permitted by Schedule 1 to the Regulations, those applications will generally have to have been made 'in Australia'. When visa applications are lodged online, they may be made 'in Australia' irrespective of the physical location of the visa applicants. This is because s 14B(1) of the *Electronic Transactions Act 1999* (Cth) (ETA) provides that for the purposes of a law of the Commonwealth, unless otherwise agreed an electronic communication is taken to have been received at the place where the addressee has its place of business. It is not until a visa application is received by the Department, in the sense of it taking physical possession of it, that it can be said to have been 'made'.[72] As an application is not made until it is received by the Department, then by operation of s 14B, unless otherwise agreed by the parties, an internet application is made when it is taken to have been received at the relevant office of Immigration in Australia. Therefore, for visa applications lodged online, the physical location of the visa applicants will not generally be determinative of where the applications were made.

[70] See, for example, sch 1, item 1114B(3)(e) in relation to Employer Nomination (Permanent) (Class EN) visas.
[71] reg 4.12(2).
[72] *Mohammed v MIBP* [2014] FCCA 139 at [29].

4.3 Requirements for a valid Part 7 review application

4.3.1 An application for review of a Part 7-reviewable decision will be valid if it complies with s 412.[73] That is, if it:

- concerns a Part 7-reviewable decision;[74]
- is made by the non-citizen who is the subject of the primary decision;[75]
- the non-citizen is physically present in the migration zone (see definition in s 5) at the time of application;[76]
- is in the approved form;[77]
- is given to the Tribunal within the prescribed period.[78]

4.3.2 A fee for a Part 7 review is prescribed.[79] However that fee is only payable within 7 days after the Tribunal's decision is taken to be received by the applicant, and is only payable in certain circumstances.[80] For further discussion, see Chapter 5 – Fees for review. Table 1, at the end of this chapter, sets out the prescribed periods for lodgement, standing to apply for review and required location for Part 7 reviews.

Part 7-reviewable decisions

4.3.3 For an application for review to be valid under Part 7, it must be for review of a 'Part 7-reviewable decision'.[81] 'Part 7-reviewable decision' is defined in s 411 of the Act and includes decisions to refuse or cancel a protection visa (subject to exceptions below).[82] Certain decisions relating to refugee status made prior to 1 September 1994 are also Part 7-reviewable. A decision under s 197D(2) that an unlawful non-citizen is no longer a person in respect of whom a protection finding within the meaning of s 197C(4), (5), (6) or (7) would be made is also a 'Part 7-reviewable decision'.[83]

[73] In *SZRLH v MIAC* [2013] FCA 384 the Court noted that although the Migration Act does not define 'valid application', it is clear that for an application to be 'valid' it must comply with the requirements of s 412 of the Act: at [14]. An application for special leave to appeal from this judgment to the High Court was dismissed: *SZRLH v MIAC* [2013] HCASL 151.
[74] s 412(1), as amended by the Amalgamation Act.
[75] s 412(2).
[76] s 412(3); note that s 5(1) of the Act excises certain places and installations from the migration zone while s 46A limits the ability of persons who unlawfully enter at such places to make valid visa applications.
[77] s 412(1)(a).
[78] s 412(1)(b), reg 4.31(2). See *Chand v MIMA* (2000) 106 FCR 140.
[79] s 412(1)(c) and r 4.31B.
[80] regs 4.31B and 4.31C.
[81] s 412(1), as amended by the Amalgamation Act.
[82] In *MHA v CLR15* [2019] FCAFC 45 at [35]–[36] the Court confirmed that the Tribunal requires a Part 7-reviewable decision for its jurisdiction to be engaged and that in the absence of such a decision, the Tribunal has no jurisdiction to conduct a review. The Court rejected the applicant's argument that the Tribunal had jurisdiction in respect of a visa application (which had not been determined by a delegate). The Tribunal requires a decision of a delegate. See also *SZRSX v MIAC* [2013] FMCA 72 at [17] in which the Court found that in the absence of a decision by the delegate in relation to the applicant's former husband, the Tribunal was correct in finding that it lacked any jurisdiction to review the application in relation to him. In that case, the applicant's husband was originally included in the visa application as a member of the applicant's family unit but had been subsequently removed from the application.
[83] s 411(1)(e) as inserted by the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021* (Cth).

4.3.4 In order for there to be a valid application for review, a decision must in fact be in existence. An application for review cannot be made in anticipation of a primary decision, which will be Part 7-reviewable, once it is made.[84] Accordingly, if an applicant makes an application for review before the primary decision is made, it will not be a valid application at that time. However, if the applicant subsequently provides the Tribunal with a copy of the delegate's decision or notifies the Tribunal the decision has been made, an application for review may be made at the time the applicant provides the Tribunal with a copy of the decision or notifies the Tribunal that the decision has been made.[85]

4.3.5 The following decisions are not reviewable decisions:

- a decision to cancel a protection visa that is made personally by the Minister;[86]
- a decision made in respect of a non-citizen who is not physically present in the migration zone at the time of the primary decision;[87]
- a decision in relation to which the Minister has issued a conclusive certificate under s 411(3);[88]
- a fast track decision;[89]
- decisions to deport non-citizens in specified circumstances;[90]
- decisions to refuse or cancel a visa under s 501 (character test);[91]
- decisions to cancel a visa under s 501(3A) (character grounds - substantial criminal record or child sexual offence);[92]
- decisions to refuse to grant, or to cancel a protection visa on the basis of ss 5H(2), 36(1B), 36(1C), 36(2C)(a), 36(2C)(a) (b) or because of an assessment by ASIO that a person is directly or indirectly a risk to security;[93]

[84] In *SZMBM v MIAC* [2008] FMCA 529, the applicant applied to the Tribunal before the delegate's decision on his visa application had been made. The Court found that there was no provision in the Migration Act giving the Tribunal jurisdiction to review decisions that may be made in the future. The delegate made their decision subsequent to the applicant lodging a review application with the Tribunal. The Court acknowledged that it would have been open to the applicant to bring the decision to the Tribunal's attention, but this did not happen at [4].
[85] See *SZMBM v MIAC* [2008] FMCA 529 at [4]. Note that the other requirements for a valid review application would need to be satisfied.
[86] s 411(2)(aa).
[87] s 411(2)(a).
[88] s 411(2)(b).
[89] s 411(2)(c). With some exceptions, these decisions are reviewable by the IAA. Some decisions to refuse to grant a protection visa to fast track applicants are reviewable by the Tribunal in its General Division, in the circumstances mentioned in paragraph (a), or subparagraph (b)(i) or (iii), of the definition of fast track decision in s 5(1): see note to s 500(1).
[90] s 500(1)(a) and (4)(a). In general, such decisions are reviewable by the Tribunal in its General Division. Note that deportation decisions are not among the Part 7-reviewable decisions specified in s 411.
[91] s 500(1)(b) and (4)(b). Such decisions are reviewable by the Tribunal in its General Division where not made by the Minister personally or in the Security Division if the decisions relates to an adverse or qualified security assessment under *Australian Security Intelligence Organisation Act 1979* (Cth) (ASIO Act): see President's Direction - Allocation of Business to Divisions of the AAT made under s 17B of the AAT Act.
[92] s 500(4A)(c). Such decisions are not reviewable by the Tribunal.
[93] ss 500(1)(c), (4)(c), (4A)(a), (4A)(b), 411(1)(c) and (d). Such decisions are reviewable by the Tribunal either in its General Division or in its Security Division (if an adverse or qualified security assessment under ASIO Act).

- decisions of a delegate of the Minister under s 501CA(4) not to revoke a decision to cancel a visa under s 501(3A);[94]
- decisions of the Minister under s 501BA to set aside, an original decision made by a delegate of the Minister or the Tribunal under s 501CA, and cancel a visa;[95]
- a decision by the delegate that the visa application is not valid.[96]

Approved form

4.3.6 An application for review of a Part 7-reviewable decision must be in the approved form or in a form which substantially complies.[97] The expression 'approved form' is defined in s 5 of the Migration Act as a form approved by the Minister in writing. Under s 495 of the Migration Act, the Minister may, in writing, approve a form for the purposes of a provision in the Migration Act in which the expression 'approved form' is used. The power to approve forms has been delegated to the President in accordance with s 496 of the Act.[98]

4.3.7 For the purposes of s 412, the current Instrument of Approval[99] specifies the following as approved forms:

- 'R1' or 'eR1'[100]; and
- the form transmitted to the Tribunal using the online application system.

4.3.8 However not using the approved form above may still result in an application being valid if the application has been made in a form which substantially complies. For further discussion of the principles of 'substantial compliance' see below.

Time limits

4.3.9 Section 412(1)(b) requires that an application for review be given to the Tribunal *within* the prescribed period. However, this does not prevent a review application from being lodged before the prescribed period has commenced (which is the case when an applicant hasn't been validly notified of the primary decision), provided

[94] s 500(1)(ba). Such decisions are reviewable by the Tribunal in its General Division.
[95] s 501BA was inserted by *Migration (Character and General Visa Cancellation) Act 2014* (Cth). Such decisions are not reviewable by the Tribunal.
[95] s 414(1).
[96] s 411(1) requires that the decision be one to *refuse* the visa application. A decision that the visa application is not valid is not a decision to refuse the visa: s 47(4). See for example *SZVCB v MIBP* [2015] FCCA 1172 where the Tribunal erred in conducting a review of a delegate's decision that an applicant had not made a valid application for a protection visa (at [21]–[25]) as that was not a Part 7-reviewable decision within the meaning of s 411. See also, *SZQTS v MIAC* [2012] FMCA 468 at [14]. Note however, that if the delegate purports to refuse the visa, despite the visa application being invalid, the decision will be Part 7-reviewable. For further information, see Chapter 2 – Notification of primary decisions.
[97] Migration Act s 412(1)(a); Acts Interpretation Act s 25C and *MZAIC v MIBP* [2016] FCAFC 25.
[98] Instrument of Delegation 2015 (DEL 15/090), 30 June 2015.
[99] Instrument of Approval – Approvals of application for review forms for the Migration and Refugee Division dated 1 July 2015.
[100] As generated by printing the online application form.

there is still a Part 7-reviewable decision in existence at the time of applying.[101] The Tribunal does not have the power to extend the time limits (see discussion below).

4.3.10 The periods for lodging a review application with the Tribunal are prescribed in reg 4.31. The time limits are different for applicants in immigration detention and applicants who are not in immigration detention. Except for applications for review to the Tribunal that were filed prior to 1 September 1994, the following time limits apply:

- if the applicant is in immigration detention on the day they are notified, the period in which they must apply for review is 7 working days, commencing on:
  - the day the applicant is notified of the decision; or
  - if that day is not a working day, the first working day after that day
- if the applicant is not in immigration detention on the day of being notified of the decision, the period in which they must apply for review is 28 days, commencing on the day they are notified of the decision.[102]

4.3.11 The prescribed period commences to run on the day the decision is notified and requires that the first and last days also be included (unless the applicant is in detention and they were not notified on a working day).[103] The Court in *DZAFH v MIBP*[104] held that the words of the legislative scheme were unequivocal and that the Tribunal had been wrong not to include the day of notification in the prescribed period.[105]

4.3.12 Some of the prescribed periods are expressed in terms of *working* days while others are *calendar* days. Section 5 of the Migration 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.[106]

4.3.13 If the last day of the time period within which the applicant can lodge an application to the Tribunal falls on a Saturday, a Sunday or a holiday, the applicant has until the end of the next day that is not a Saturday, a Sunday or a holiday to lodge his or her application.[107] The term 'holiday' is defined for these purposes to mean either a day that is a public holiday in the place in which the application is lodged, or the day on which the office where the application is lodged is closed for the whole day (for

[101] *SZOFE v MIAC* (2010) 185 FCR 129; cf *Hasan v MIAC* (2010) 184 FCR 523, now considered to be overruled by *SZOFE*.
[102] s 412(1)(b) and reg 4.31.
[103] *DZAFH v MIBP* [2017] FCCA 387 at [45]–[46]; upheld on appeal in *DZAFH v MIBP* [2017] FCA 984 which is now the leading authority on s 412(1)(b) and reg 4.31 and requires that the day of notification be included. Special leave to appeal from this judgment to the High Court was refused: *DZAFH v MIBP* [2017] HCASL 288.
[104] *DZAFH v MIBP* [2017] FCCA 387 at [43]–[45].
[105] Prior to the judgment in *DZAFH*, the Tribunal had not included the day of notification as the first day of the prescribed period for Part 7 reviewable decisions. Calculating the prescribed period by not including the day of notification had been considered more beneficial to the applicant and consistent with the earlier comments in *SZGMS v MIMIA* [2005] FMCA 1861 that had considered, but not decided, whether the words 'commencing on the day' under pre 1 July 2013 version of reg 4.31(2) includes the day on which the applicant was notified of the decision. The Court in *SZGMS* expressed the view that in light of the ambiguity it was probably appropriate to take an approach that is beneficial to the applicant.
[106] *Teresa Pasini Cabal v MIMA* (1999) 91 FCR 309.
[107] Acts Interpretation Act s 36(2), as applies from 27 December 2011.

example, the public service holiday between Christmas and New Year).[108] Public holidays differ between Australian States and Territories. Further, the public service holiday between Christmas and New Year is not a gazetted 'public holiday' under the relevant legislation (or a Saturday or Sunday).[109] However, as a result of amendments to s 36 of the Acts Interpretation Act, which commenced on 27 December 2011, it can be defined as a 'holiday'.[110]

4.3.14 To determine when an applicant is notified of a primary decision, see Chapter 2 – Notification of primary decisions. Note that following *DFQ17 v MIBP*,[111] a number of departmental notifications may be held to be invalid, which means that the time period to seek review will not have commenced. Further information is in Chapter 2– Notification of primary decisions.

Who may apply? (Standing)

4.3.15 Unlike Part 5 reviews, only the non-citizen who was the subject of the primary decision can seek review under Part 7.[112] While the non-citizen themselves need not complete the form, there must be the requisite intention by that person to apply.[113] Another person, acting on the non-citizen's behalf, may physically complete and sign the form.[114]

[108] Acts Interpretation Act s 36(3), as applies from 27 December 2011.
[109] In *SZOXA v MIAC* [2011] FMCA 298 the Court noted as its registry was closed on a day not because it was a public holiday, a bank holiday or a Saturday or a Sunday (as referred to in the pre December 2011 version of s 36(2) of the Acts Interpretation Act, this raised the question of how to proceed in circumstances where the applicant would have been physically prevented from filing or attempting to file his judicial review application within time. While this question was ultimately unresolved, the Court noted that in this electronic age, facsimile communication or electronic filing would have overcome such a problem. Amendments to s 36 of the Acts Interpretation Act which commenced on 27 December 2011, now resolve this issue with regard to the public service holiday between Christmas and New Year.
[110] Acts Interpretation Act s 36(3), as applies from 27 December 2011.
[111] *DFQ17 v MIBP* [2019] FCAFC 64 at [62]. The Full Federal Court found a notification letter that was posted, failed to state the information in s 66(2)(d)(ii) about the time in which a review application may be made, in circumstances where the information was set out across three pages under different headings in the letter (the date of the notification, the time the appellant was taken to have received the notification and the prescribed period). The Court concluded the notification letter was defective as it was 'piecemeal, entirely obscure and completely incomprehensible', with the result that it failed to convey that any review application had to be made by the relevant date.
[112] s 412(2).
[113] In *SZMME v MIAC* [2009] FMCA 323, the Court held there was no valid application for review where the applicant claimed his agent made an application without his knowledge and denied the signature on the application was his. For Part 5-reviewable decisions, the Courts have taken an expansive approach and have found the details in the review application form are not determinative. For example, see *Le v MIBP* [2019] FCA 427 at [84]–[85] where the Court held that an application for review of a Part 5-reviewable decision had been lodged by the correct person with standing (in this case the visa applicant), even though the sponsor was listed as the review applicant and the representative incorrectly maintained that the sponsor had standing. The Court held that the information in the boxes on the review application form was not determinative, and that the person listed as applying for review (i.e. the sponsor) was doing so on behalf of the person described as the 'primary visa applicant'. See also *Hassan v MIBP* [2015] FCCA 894 at [14], [19]–[23], where the Court also held that an application for review of a Part 5-reviewable decision had been lodged by the correct person with standing (in this case also the visa applicant), notwithstanding that the sponsor had been identified as the review applicant in questions 3 and 5 of Part A of the M1 form. All of the visa applicant's details were contained elsewhere in the application form, and, significantly, the visa applicant had signed the formal declaration at the end of the M1 form identifying them as the person seeking review, the Court found, as a question of jurisdictional fact, that the review applicant was the visa applicant.
[114] *Jalagam v MIAC* [2009] FCA 197. This case concerned the validity of a visa application, but the principles are equally applicable to review applications. See also *Zaki v MIBP* [2015] FCCA 2575 where the Court accepted unchallenged evidence given to the Court by the applicant's sponsor and corroborated by the applicant that she was acting on the applicant's behalf when she lodged the online review application in which she named herself as the review applicant.

Location of review applicant

4.3.16 For the review application to be valid under Part 7, the review applicant must be physically present in the migration zone when the application for review is made.[115]

4.3.17 In *Gajjar v MIBP*, the Court considered the meaning of 'migration zone' and 'made' for the purposes of s 347(3) [s 412(3) Part 7]. The Court held that an applicant must be physically present in the migration zone at the moment an application for review is made and there is no valid application for review where a review applicant is flying to Australia at that moment.[116] The Court found the application had been 'made' at the moment the review applicant satisfied the criteria in s 347(1) [s 412(1) Part 7] and, while the review applicant was flying to Australia when that had occurred, the term 'migration zone' in s 5(1) was limited to the surface of Australia's land and sea and did not include the airspace above it.[117]

Combining review applications

4.3.18 Applicants can combine applications for review of two or more Part 7-reviewable decisions not to grant protection visas where the applications were combined at the primary level pursuant to Schedule 1, regs 2.08, 2.08A or 2.08B of the Regulations.[118] Each person who wishes to be included in the combined review application must apply to the Tribunal within the prescribed period.

4.3.19 Schedule 1 to the Regulations allows a visa application by a person claiming to be a member of the family unit of another person who is an applicant for a protection visa to be made at the same time and place as and combined with, the application by that person.[119] For a discussion of the effect of regs 2.08, 2.08A and 2.08B see 'Adding family members to the application' below and for discussion of the definition 'member of the family unit' see the MRD Legal Services commentary: Member of the Family Unit.

4.3.20 While members of a family unit who have combined their visa applications in any of these ways are able to combine their review applications, a family member who is the subject of a protection visa refusal decision by a delegate of the Minister may also choose to apply to the Tribunal in his/her own right.

[115] s 412(3).
[116] *Gajjar v MIBP* [2013] FCCA 1859 at [81]. In *Xia v MICMSMA* [2021] FCCA 1944 the Court followed *Gajjar* to find that the Tribunal was correct to find that it did not have jurisdiction in respect of a review application for a s 338(7A) reviewable decision because the review applicant was not in the migration zone at the time of the delegate's decision or at the time the review application was made and therefore s 347(3A) was not satisfied. At [24]–[26], the Court rejected the applicant's argument that the Court would have jurisdiction to review the delegate's (primary) decision as the decision is provided for in s 476(4)(a) as a 'primary decision'. The Federal Circuit Court does not have jurisdiction in respect of primary decisions: s 476(2). The Court reasoned that 'primary decision' in s 476(4)(a) refers to a decision of a delegate which was procedurally able to be reviewed under Part 5 or 7 at the time that it had been handed down, irrespective of whether a valid review application was made or whether the 'benefit of review has been lost by the conscious and deliberate act or omission of an applicant in placing themselves outside the migration zone at the respective times'.
[117] *Gajjar v MIBP* [2013] FCCA 1859 at [81].
[118] reg 4.31A.
[119] Regulations sch 1 item 1401(3)(c).

4.3.21 Even if the family members lodge separate review applications, the Tribunal is not precluded by the Migration Act or Regulations from conducting concurrent reviews and producing one document which contains its decisions and reasons for decision in relation to each applicant. However, members generally obtain each applicant's informed consent and, if conducting a combined hearing, give each applicant an opportunity to present evidence or make submissions alone.

4.3.22 If the Tribunal has before it applications for review of two or more Part 7-reviewable decisions in respect of the *same* person, the Tribunal must combine those reviews.[120]

4.4 How and when is a review application given to the Tribunal?

4.4.1 The Regulations specify how and when an application for review under Parts 5 and 7 is given to and received by the Tribunal. The methods vary slightly for applications made prior to 1 July 2015, and those made after that date.

Review applications made on or after 1 July 2015

4.4.2 For applications for review made on or after 1 July 2015 in respect of a Part 5 or 7 reviewable decision, regs 4.11(1) and 4.31AA(1) provide that it may be given by:

- leaving it with an officer at a registry of the Tribunal, or with a person specified in a direction given by the President of the Tribunal under s 18B of the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act) ;
- sending it by pre-paid post to a registry of the Tribunal;
- having it delivered by post, or by hand, to an address specified in a s 18B direction;
- faxing it to a fax number specified in a s 18B direction; or
- transmitting it to a registry of the Tribunal by other electronic means specified in a s 18B direction.[121]

4.4.3 The Regulations also specify when an application for review is received. This depends on the method by which the application was given to the Tribunal:

- if left with an officer at a registry of the Tribunal, or with a person specified in a s 18B direction, or if sent by pre-paid post to a registry of the Tribunal, the application is taken to have been received at the time the Tribunal receives it;[122]

[120] s 427(2). The Part 5 equivalent provision is not mandatory, rather it is discretionary: s 363(2).
[121] regs 4.11(1) and 4.31AA(1), as amended by *Migration Legislation Amendment (2015 Measures No 2) Regulations 2015* (Cth) (SLI 2015, No 103).
[122] regs 4.11(2), 4.31AA(2).

- if delivered by post, or given by hand to an address specified in a s 18B direction, the application is taken to have been received at the time it is received at the relevant address;[123]

- if faxed to a fax number specified in a s 18B direction, it is taken to have been received at the time it is received at the relevant fax number;[124]

- if transmitted to a registry of the Tribunal by other electronic means specified in a s 18B direction, it is taken to have been received at the time the Tribunal receives it.[125]

Review applications made prior to 1 July 2015

4.4.4 Methods for giving a review application prior to 1 July 2015 differ slightly depending on when the primary decision was made.

Primary decision made on or after 1 July 2013

4.4.5 For review application prior to 1 July 2015, where the primary decision was made on or after 1 July 2013, the then regs 4.11(1) and 4.31AA(1) provided that it may be given by:

- leaving it with an officer at a registry of the Tribunal, or with a person specified in a direction given by the Principal Member under ss 353A [Part 5] and 420A [Part 7] of the Migration Act;

- sending it by pre-paid post to a registry of the Tribunal;

- having it delivered by post, or by hand, to an address specified in a direction given by the Principal Member under ss 353A and 420A of the Migration Act;

- faxing it to a fax number specified in a direction given by the Principal Member under ss 353A and 420A of the Migration Act; or

- transmitting it to a registry of the Tribunal by other electronic means specified in a direction given by the Principal Member under ss 353A and 420A of the Migration Act.

4.4.6 Principal Member Direction 09 specified addresses, fax numbers and the online application system for the purposes of regs 4.11 and 4.31AA.

[123] regs 4.11(3), 4.31AA(3).
[124] regs 4.11(4), 4.31AA(4).
[125] regs 4.11(5), 4.31AA(5).

4.4.7 When an application was taken to be given under these provisions depends upon the method by which it is given:

- if left with an officer at a registry of the Tribunal, or with a person specified in a s 353A/420A direction, or if sent by pre-paid post to a registry, it is taken to have been received at the time the Tribunal received it;[126]
- if delivered by post or by hand to an address specified in a s 353A/420A direction, it is taken to have been received at the time it was received at the relevant address;[127]
- if faxed to a fax number specified in a s 353A/420A direction, it is taken to have been received at the time it was received at the relevant fax number;[128]
- if transmitted by other electronic means specified in a s 353A/420A direction, it is taken to have been received at the time the Tribunal received it.[129]

Primary decision made before 1 July 2013

4.4.8 For review applications made prior to 1 July 2015, where the primary decision was made prior to 1 July 2013, the then regs 4.11 and 4.31(3) provided that it may be given by:

- posting it to a registry;
- leaving it at a registry in a box designated for lodgment of applications;
- leaving it with a person employed at a registry and authorised to receive such documents; or
- faxing it to a registry

4.4.9 For a Part 5-reviewable decision, the Regulations permitted a review application to also be transmitted to the registry by other electronic means specified in a direction given by the Principal Member under s 353A.[130] There was however, no such direction for the purposes of reg 4.11. There was also no equivalent provision for a Part 7-reviewable decision that allowed electronic lodgement (other than by fax) of a review application. Accordingly it was not possible for persons to lodge a valid review application by electronic means other than fax.

4.4.10 For Part 5 applicants who were in immigration detention at the time of making the review application, an additional means of lodgement was available by way of giving the application to an immigration officer at a detention centre or airport, at

[126] regs 4.11(2), 4.31AA(2).
[127] regs 4.11(3), 4.31AA(3).
[128] regs 4.11(4), 4.31AA(4).
[129] regs 4.11(5), 4.31AA(5).
[130] reg 4.11(a)(i)(E), inserted by *Migration Amendment Regulations* 2001 (Cth) (No 7) (SR 2001 No 239), Item [24], commencing on 1 November 2001.

least 1 working day before the expiry of the otherwise prescribed period in which an application for review must be made.[131]

Common issues

4.4.4 The act of posting or faxing an application does not equate with lodgment. The application must be physically received at a registry of the Tribunal for lodgment to have taken place.[132] The reference to a Tribunal registry is reference to the Tribunal's registry office or premises. For these purposes, Tribunal registries are located in Sydney, Melbourne, Adelaide, Brisbane, Canberra, Hobart and Perth.[133]

What is a 'registry' for the purposes of applications sent by pre-paid post?

4.4.5 An application is 'given to' the Tribunal when it is physically delivered to the registry of the Tribunal. The Full Federal Court in *Chen v MIAC*[134] found that a General Post Office Box specified for the lodgement of business visa applications was 'an office of Immigration' for the purposes reg 2.10(2A)(b) and accordingly that an application received in the General Post Office Box was an application made at 'an office of Immigration'. This broadens the circumstances in which it may be said that a visa application has been made within a relevant period and aspects of the Court's reasoning suggests that this may also be relevant to the question of when a review application has been made for the purposes of regs 4.11 and 4.31AA. While the Court's consideration was confined to the meaning of 'office of Immigration', and its particular statutory context., more recently, the Federal Circuit Court in *BRG15 v MIBP*[135] relied upon the judgment in *Chen v MIAC* to find that, where there is sufficient evidence to establish that an application for review had been delivered to the Tribunal's PO Box within the relevant period, there is valid delivery within the meaning of reg 4.31AA(1)(c).[136] This judgment turned heavily on the evidence from Australia Post showing that the letter was marked 'delivered' within the relevant period, and the Court's finding that the PO Box was part of the Tribunal. As the Court did not explicitly consider the Federal Court judgment in *Pomare v MIAC*,[137] which drew a distinction between a PO Box and a Registry of the Tribunal, and did not provide reasons for the finding that a PO Box is the property of and part of the Tribunal, it is not clear how future Courts will consider this issue. However, where

[131] reg 4.11(a)(ii).
[132] regs 4.10(5) and (6) [MRT] and 4.31(4) [RRT] (Pre 1 July 2013) and regs 4.11(2), (3), (4) and (5) [MRT/Part 5] and reg 4.31AA(2), (3), (4) and (5) [RRT/Part 7] (Post 1 July 2013). *Hong Ye v MIMIA* (1998) 153 ALR 327 at [330] and *Angus Fire Armour Australia Pty Ltd v Collector of Customs (NSW)* (1988) 19 FCR 477 at [488]-[489].
[133] Prior to 1 July 2015, MRT and RRT registries were located in Sydney and Melbourne, with registry services also being provided in Adelaide, Brisbane and Perth through a service agreement with the then AAT.
[134] *Chen v MIAC* [2013] FCAFC 133 at [41]–[62].
[135] *BRG15 v MIBP* [2016] FCCA 2586 at [23]–[24].
[136] reg 4.31AA(1)(c), as relevantly in force at the time the review application was made, required that an application for review by the Tribunal of an RRT-reviewable decision must be given to the Tribunal by having it delivered by post, or by hand, to an address specified in a direction given by the Principal Member. Case law previously suggested that an application is not lodged when it is received at the Tribunal's locked bag or Post Office Box. In *Pomare v MIAC* (2008) 167 FCR 494 the Court noted that the Minister had correctly conceded that an application would not be received by the Tribunal and therefore would not be made to the Tribunal when it reached a General Office Box address. If an applicant led evidence to support an inference that an application reached the nominated post office box, it would nonetheless be open to the Minister to defeat the application by proving that the application was not in fact received in the registry office of the Tribunal.
[137] *Pomare v MIAC* (2008) 167 FCR 494.

there is a dispute over whether a review application was received by the Tribunal and there is strong evidence, such as an electronic tracking receipt from Australia Post, that a review application was delivered to the Tribunal, the Tribunal generally attempts to determine whether or not it was actually received by the Tribunal and what occurred to the postal item.

When is an application received electronically?

4.4.11 An application is 'given to' the Tribunal when it is physically delivered which, in respect of an electronic transmission, means that it must be capable of being retrieved by the Tribunal.[138] In *Liu v MIBP*, the Court held an application was not 'given to' the Tribunal within the prescribed period because it was not received by the Tribunal's facsimile server and was not capable of retrieval within that period.[139] In *Russell v MHA*, in relation to a review application to the General Division of the AAT, the Court held that electronic communication only becomes capable of being retrieved by the addressee when it is electronically received by the addressee at the electronic address specified.[140] In this particular case the appellant's application for review failed to be delivered (and therefore wasn't capable of being retrieved) because the size of the file attached to the email was too big and was rejected by the mail server.

4.5 Substantial compliance with the application form

4.5.1 As set out above, it is an essential requirement for lodging a valid review application under Parts 5 and 7 that it be made in the approved form. Where a form other than the approved form is used, or the approved form is used but is incorrectly or incompletely filled in, the application may still be valid having regard to the principles of substantial compliance.

4.5.2 Section 25C of the Acts Interpretation Act provides that 'Where an Act prescribes a form, then strict compliance with the form is not required and substantial compliance is sufficient'.[141] Although the Migration Act does not 'prescribe' a form for Part 5 or Part 7 review applications, it does refer to an 'approved form'. The current approved forms for Part 5 reviews and Part 7 reviews are set out above.

4.5.3 Section 25C of the Acts Interpretation Act applies to the making of an application in the approved form, with the Full Federal Court in *MZAIC v MIBP* holding that the

[138] *Liu v MIBP* [2013] FCCA 2208. See also *Gajjar v MIBP* [2013] FCCA 1859. Although the Court in *Liu* was considering the time at which an application was 'made' for the purposes of s 347, the Court's reasoning is relevant to question of when a review application has been made for the purposes of regs 4.11 and 4.31AA.
[139] Upheld on appeal: *Liu v MIBP* [2014] FCA 469. See also *SZSKX v MIBP* [2014] FCCA 157. In that case facsimile records indicated the applicant's agent had successfully faxed a review application to the facsimile number of the Tribunal registry, but the Tribunal had not received it. The Court found the Tribunal's evidence of non-receipt of the facsimile transmission was credible and as such sufficient to displace the presumption in s 161(1) of the *Evidence Act 1995* (Cth) that the facsimile had been received by the Tribunal at the time that the agent's records indicated the facsimile transmission had concluded.
[140] *Russell v MHA* [2019] FCAFC 110 at [20]–[27]. The Court acknowledged the unfortunate situation of the appellant being deprived of an opportunity to have a merits review of her application. In reaching its conclusion, the Court had regard to s 14A(1) of the *Electronic Transactions Act 1999* (Cth).

correct question to be asked was whether the application for review was made in, or substantially in, the approved form.[142] In that case, the applicant had applied using a superseded version of the approved form with the only material difference between the form used and the one approved at the time of his application being the addition of a request for passport details in the later form. The Court held that the purpose of the application form was to indicate that the visa applicant invoked the jurisdiction of the Tribunal and that, in the circumstances of that case, the application made (which identified who the applicant was and the decision to be challenged and also included a copy of the decision notification letter from the Department which included the applicant's name, date of birth, client ID, application ID and file number) substantially achieved that.[143] The Court also observed that the question in this case could only be answered by comparing what was submitted in the form used, with what was required by the approved form or forms at the time of the application to the Tribunal.[144]

4.5.4 Although the reasoning of the Full Federal Court in *MZAIC* applies to the use of a superseded version of an approved form, the extent to which it applies beyond those facts is presently unclear. This is because the majority of a differently constituted Full Federal Court in the earlier case of *SZJDS v MIAC* held that the purpose and structure of each approved form was different, each form was designed to elicit different information relevant to its circumstances, and that not using the particular form approved for its class or type of application was a failure to properly make an application for review.[145] Whilst *SZJDS* was expressly overruled in *MZAIC* to the extent that it had held s 25C of the Acts Interpretation Act could not apply to s 412(1)(a) of the Migration Act, the majority in *MZAIC* did not expressly overrule the remainder of *SZJDS* or hold that it was plainly wrong overall. The extent to which *SZJDS* still represents the current law regarding forms approved for different categories of applicant following *MZAIC* is therefore unclear and may be resolved by further judicial consideration.

4.5.5 A broad view however suggests that the use of a form other than the one specifically approved for the particular class or type of application being made will

[141] Subject to a contrary intention, the Acts Interpretation Act applies to all legislative instruments, notifiable instruments and other instruments: Acts Interpretation Act s 2.
[142] *MZAIC v MIBP* [2016] FCAFC 25 at [51]–[52], [58], [135]. The Full Federal Court held that the Tribunal erred in finding that it lacked jurisdiction because the applicant had applied using a superseded version of the R1 form instead of the version approved at the time he was applying for review. In considering whether s 25C of the Acts Interpretation Act applied to s 412(1)(a) of the Migration Act, the majority expressly disagreed with paragraphs [26]-[28] of the Full Federal Court's reasoning in *SZJDS v MIAC* [2012] FCAFC 27 and distinguished that case on the basis of *SZJDS* being about an applicant who was not within the particular class of applicant for review contemplated by the form that had been used. This was in contrast to *MZAIC* in which the applicant had only used an older version of the correct form approved for applicants of his class (at [24], [25], [134]). Justice Buchanan, in a concurring but separate judgment, expressly overruled *SZJDS* in its entirety, noting that the appeal in *MZAIC* had been constituted to a Full Court of five judges because it was proposed by the applicant to argue the correctness of that case (at [73], [74], [93], [135]).
[143] *MZAIC v MIBP* [2016] FCAFC 25 at [58], [135].
[144] *MZAIC v MIBP* [2016] FCAFC 25 at [22].
[145] *SZJDS v MIAC* [2012] FCAFC 27. See Rares and Cowdroy JJ at [31]–[33] where they held that the M2 form (for applicants in detention) used by the applicant had no status for the purpose of enlivening the Tribunal's jurisdiction in respect of the delegate's decision to cancel his visa because he was not an applicant in detention at the time he was applying, and that the Tribunal was correct to treat that as being the incorrect form. However, this case was primarily about the notification and the authorised recipient provisions and was not specifically about the use of approved forms as was the later Full Federal Court case of *MZAIC v MIBP* [2016] FCAFC 25.

not, in of itself, invalidate the application. Rather, it will be necessary to consider whether the application was made in a form which substantially complies.

4.5.6 Similarly, the partial failure to complete or fill in an approved form in accordance with its stated directions will not, of itself, render the application invalid and it would be necessary to consider whether the application, as made, still contained the information necessary to properly invoke the Tribunal's jurisdiction and set in train the process of review.[146]

4.5.7 The concept of 'substantial compliance' only applies in relation to matters which are capable of degrees of non-compliance.[147] For example, it would not apply to the prescribed period in which a review application must be lodged.

4.6 When do the time limits commence?

4.6.1 As indicated above, the time limits for applying for review only commence running when the person is validly notified, in accordance with the Migration Act, of the primary decision.[148] Nevertheless, even if the time for applying for review has not commenced a valid review application can still be lodged.[149]

4.6.2 In *SZOFE v MIAC,* the Federal Court considered that the Parliament could not have intended that a valid application that was physically within the registry of the Tribunal before time commenced to run should be treated as ineffective simply because it was received by the registry before the commencement of the relevant period.[150] Fixing a time before an application can be made could operate unjustly and unfairly.[151] Emmett J held that the jurisdiction of the Tribunal was not conditional upon a valid application being lodged only during the period commencing once a valid notification had been received. Thus, the Tribunal has jurisdiction where an application for review was made before the applicant was notified in accordance with s 66(2) of the Migration Act.

4.6.3 In the same judgment, Buchanan and Nicholas JJ found it unnecessary to determine the issue but in *obiter* comments, and in contrast to Emmett J, accepted that the Regulations appeared to establish an envelope of time *within* which the review application must be made.[152] Nevertheless their Honours noted that lodging an application before the time of deemed receipt of the notification would not necessarily be ineffective. Rather, to determine whether the Tribunal's jurisdiction was engaged, it was necessary to examine the practical consequences of the 'early' lodgement (i.e. before notification was legally effected).[153] In the present case, their

[146] *MZAIC v MIBP* [2016] FCAFC 25 at [51], [58]. The information in that case that the Court found sufficient to invoke the Tribunal's jurisdiction included the applicant's name, date of birth, client ID, applicant ID and Departmental file number.
[147] Compare *Victoria v The Commonwealth* (1975) 134 CLR 81 at 179–180 per Stephen J, discussing the distinction between 'mandatory' and 'directory', and circumstances in which a statutory requirement may be satisfied by partial compliance.
[148] *Chand v MIMA* (2000) 106 FCR 140.
[149] *SZOFE v MIAC* (2010) 185 FCR 129; cf *Hasan v MIAC* (2010) 184 FCR 523, now considered to be overruled by *SZOFE*.
[150] *SZOFE v MIAC* (2010) 185 FCR 129 at [35].
[151] *SZOFE v MIAC* (2010) 185 FCR 129 at [34].
[152] *SZOFE v MIAC* (2010) 185 FCR 129 at [62] and in agreement with North J in *Hasan v MIAC* (2010) 184 FCR 523.
[153] *SZOFE v MIAC* (2010) 185 FCR 129 at [67].

Honours found that the review application would not have been ineffective, even if it had been lodged before the applicant was validly notified of the decision as there was no adverse consequence visited upon the applicant. Their Honours noted it was difficult to envisage circumstances where the alternate conclusion was justified.[154]

4.6.4 Once a decision has been correctly notified in accordance with the Migration Act, that exhausts the Minister's obligations under the legislation, and the time limit will commence to run.[155] If the applicant is given the primary decision again or purportedly 'renotified' in these circumstances, the time to make a valid review application will not start again.[156]

4.6.5 The notification requirements for the different types of decision reviewable by the Tribunals are set out in Chapter 2 – Notification of Primary decisions.

4.7 No power to extend time limits

4.7.1 Once an applicant has been validly notified of the primary decision, the application for review must be lodged with the Tribunal within the relevant prescribed period.[157] The MRD of the Tribunal has no power to extend the time limit.[158] If an application is received outside the time period, the Tribunal has no jurisdiction.[159]

4.7.2 The Tribunal in divisions other than the MRD has the power to extend time limits.[160] The Full Federal Court in *Beni v MIBP* expressly considered the provisions of the AAT Act which permit the other divisions of the Tribunal to extend time limits and held that they do not extend to the MRD and confirmed that the MRD does not have the power to extend time limits.[161] Consequently, where a review application is

[154] *SZOFE v MIAC* (2010) 185 FCR 129 at [69].
[155] See e.g. *Bajwa v MIAC* [2008] FMCA 915 where the Court at [47] declined to exercise its discretion and interpret the Migration Act in a manner beneficial to the applicant, finding that s 347 and reg 4.10 imposed strict time limits for lodging an application for merits review.
[156] *MIAC v Abdul Manaf* (2009) 113 ALD 88 where the Court held that once the Minister notifies the applicant of the decision in accordance with the law, that exhausts the Minister's obligation under s 66. Any further 'notifications' would not be notifications under the statute and would have no legal consequences. See also *Zhang v MIAC* (2007) 161 FCR 419 at [25]; *Nguyen v MIAC* [2009] FMCA 933 at [40]; *Singh v MIAC* (2010) 239 FLR 387 at [61]; *Patel v MIAC* [2012] FMCA 565 at [28]–[31]. Contrast with the earlier view in *H v MIMA* (2002) 118 FCR 153 at [9], in which the Court suggested that on one view, a second notification could not be ignored, and could bring into operation a second timetable for applying for review. This view was rejected by the Federal Court in *Abdul Manaf* and should not be followed.
[157] In *Singh v MIBP* [2015] FCCA 1714 at [22] the Court held jurisdictional error was not established by the fact that the applicant only had a limited time in which to lodge the application for review and had no assistance from a representative in doing so.
[158] *Awon v MIBP* [2015] FCA 846. *Awon* was followed in *Fahme v MIBP* [2017] FCA 614 at [33], where the Federal Court confirmed that fraud on the Tribunal cannot operate to extend a prescribed period or give the Tribunal jurisdiction which the statutory provisions denied it.
[159] *See Lee v MIMA* [2002] FCAFC 305, at [10], [43], [45], [47]; *Haque v MIMIA* [2006] FMCA 55; *Hamad v MIMA* [2006] FMCA 1510 at [13]; *MZNAX v MIMIA* [2004] FCA 1126 at [5], [6]; *SZEBS v MIMIA* [2006] FCA 456 at [11]–[12]; *VOAM v MIMA* [2003] FCA 396; *VAQ v MIMA* [2002] FCA 170.
[160] Sections 29(7)–(10) of the *Administrative Appeals Act 1975* (Cth) (AAT Act) permit the Tribunal to extend the time to apply for review, however, s 29 of the AAT Act does not apply to reviews in the MRD due to s 24Z of the AAT Act. Section 24Z(1) provides that, except for provisions specified in s 24Z(2), Part IV of the AAT Act (which contains s 29) does not apply in relation to a proceeding in the MRD. Section 24Z(2) states that s 25 and 42 apply to a proceeding in the MRD.
[161] *Beni v MIBP* [2018] FCAFC 228 at [64]–[66], [83]. The Full Federal Court held that the Tribunal was correct to conclude that ss 29(7)–(10) of the AAT Act did not apply to the proceeding which was before it by virtue of s 24Z of the AAT Act, such that there is no power for the Tribunal (MRD) to extend the time limit for making a review application. An alternative view was expressed in *Brown v MHA (No 2)* [2018] FCA 1787 where a single judge of the Federal Court held that s 29 of the AAT Act applied to an application for review of a Part 5-reviewable decision, specifically the power conferred upon the Tribunal under ss 29(7) and 29(8) to extend the time for the making of an application to the Tribunal for review of a decision. However, as *Beni*

lodged outside of the relevant prescribed period, the MRD of the Tribunal will not have jurisdiction.

4.7.3 Even where the applicant is not at fault in making a late application, the MRD of the Tribunal does not have the power to extend time limits. In *SZRHA v MIAC*,[162] while the Court accepted the applicant's application was not lodged in time because of negligence on the part of her migration agent, it held the terms of the Migration Act are strict and clear and neither the Tribunal nor the Court have power to allow extra time for the lodgement of a review application. Similarly, in *BET16 v MIBP*,[163] the Court considered the situation of an applicant in immigration detention whose review application was not lodged in time due to unsuccessful attempts by a Serco officer to fax the review application to the Tribunal. The applicant stated that he was reliant upon Serco officers for administrative procedures, such as lodging the review application. The Court found that the applicant was left in the same position as an applicant whose migration agent fails to lodge an application within the required time, and held that the application was out of time, and even if that is harsh and significant injustice arises, the statutory provision allows no interference. In *Haque v MIMIA*,[164] the Court considered whether the doctrine of estoppel could operate to confer power on a statutory body such as the Tribunal in circumstances where the Tribunal misrepresented the time limit for the applicant to make his or her review application. The Court applied the decision of Merkel J in *Wang v MIMIA*[165] and found that the doctrine of estoppel cannot be relied upon as a relief against non-compliance with a requirement that a statute intends to be satisfied. In other words, the time limits are mandatory.

4.8 No power to review same decision again

4.8.1 Where the Tribunal has received a valid application for review of a reviewable decision and carried out its statutory duty to review the decision in a manner free from jurisdictional error,[166] the decision is no longer a reviewable decision.[167] The

v MIBP [2018] FCAFC 228 is a decision of the Full Court (bench of three judges) and expressly considered *Brown v MHA (No 2)* and found it was wrongly decided, it is expected that courts are likely to follow *Beni* and find that the Tribunal has no power to extend time limits (see for e.g. *Fahme v MHA* [2019] FCAFC 41 per Perram J at [22] where His Honour held that there was no reason to depart from the Full Court's conclusions in *Beni*). An application for special leave to appeal from *Beni v MIBP* [2018] FCAFC 228 to the High Court was dismissed: *Beni v MIBP* [2019] HCASL 113. The approach in *Beni*, rather than *Brown*, has since been followed in *FJR18 v MHA* [2019] FCCA 2274 at [19], *BTQ18 v MHA* [2019] FCCA 153 at [12], [16] and *EYX17 v MIBP* [2019] FCCA 2748 at [7], [54] (in this judgment, while not expressly stated, the Court proceeded on the basis that *Beni* should be followed).

[162] *SZRHA v MIAC* [2013] FMCA 131. Upheld on appeal: *SZRHA v MIAC* [2013] FCA 531.

[163] *BET16 v MIBP* [2016] FCCA 3165 at [20].

[164] *Haque v MIMIA* [2006] FMCA 55.

[165] *Wang v MIMA* [1997] 71 FCR 386.

[166] The Tribunal carries out its statutory duty to review the decision if it conducts and completes a review of the decision. This would also appear to include a decision to confirm a dismissal decision, as the decision under review is taken to be affirmed in this circumstance: ss 362B(1F), 426A(1F). However, where the Tribunal in response to an earlier review application found that it did not have jurisdiction to review the decision (see further discussion below) or the applicant withdrew the earlier review application, the Tribunal will not have carried out its statutory duty to review the decision and a subsequent review application in respect of the same decision may engage the Tribunal's jurisdiction provided it satisfies the requirements for a valid review application. Ordinarily subsequent review applications may be made out of time as the prescribed period will have lapsed, however, following *DFQ17 v MIBP* [2019] FCAFC 64 at [62] and *BMY18 v MHA* [2019] FCAFC 189 at [35]–[38], a number of departmental notifications may be held to be invalid, which means that the time period to seek review would not have commenced.

[167] *SZBWJ v MIAC* (2008) 171 FCR 299 at [10]; *SZBRB v MIAC* [2007] FCA 1452 at [21] approving *SZBRB v MIAC* [2007] FMCA 1093 at [30]; *SZMYU v MIAC* [2009] FMCA 117. Note that where a person made an application or purported application

Tribunal has no jurisdiction to review a delegate's decision twice.[168] In the case of a review under Part 7, for example, ss 48A(1), 48B(1), 50, 414 and 416 of the Migration Act evince an intention that the Tribunal is not empowered to conduct a second review of a primary decision in the absence of jurisdictional error.[169]

4.8.2 The Tribunal is entitled to treat the first Tribunal decision as valid, or free from jurisdictional error, in the absence of any finding by a court of invalidity, as administrative decisions are assumed to be valid until they are found by a court to be invalid.[170]

4.8.3 The proposition that the Tribunal cannot accept a second application for review of the same decision has been confirmed in a large number of migration cases involving repeat applications to the Tribunal and the Courts, relating to the same primary decision. It may be observed that many of these applications have been found to be an abuse of process, instituted for the purpose of prolonging the applicant's stay in Australia.[171] It has also been noted that treating the Tribunal as authorised to undertake a second review of the same decision would be contrary to the statutory aim of providing a mechanism of review that is 'fair, just, economical, informal and quick'.[172] Furthermore, where an application was made to the former Migration or Refugee Review Tribunal, an applicant is not permitted to seek review of the same decision by the Migration and Refugee Division of the amalgamated AAT.[173] This is because the statutory duty to review that decision would have been discharged by the former Tribunal (if the Tribunal made its decision prior to the amalgamation of the Tribunals) or by the AAT (if the Tribunal made its decision after amalgamation of the Tribunals or is yet to make a decision), and accordingly, there would be no jurisdiction to conduct a second merits review of the same primary decision (once a decision has been made on the first review application).[174]

4.8.4 If the Tribunal receives an application for review of a reviewable decision and that decision is already the subject of an active review application (i.e. the Tribunal has

for review to the former MRT or RRT prior to 1 July 2015 (when amalgamation of the Tribunals occurred), they may not make an application to the AAT for review of the same decision: Amalgamation Act s 15AD. This was confirmed in *CLA15 v MIBP* [2017] FCCA 2873 at [8]–[9],[12].

[168] *SZEYK v MIAC* [2008] FCA 1940 at [21]; *Jayasinghe v MIEA* (1997) 76 FCR 301; *SZIIV v MIMA* [2006] FMCA 322; *SZASP v MIAC* [2007] FCA 771 at [4]; *SZIIG v MIAC* [2008] FCA 886 at [9]; *SZEBS v MIMIA* [2006] FCA 456 at [9]; *SZGJY v MIAC* [2008] FCA 888; *SZIHQ v MIMA* [2006] FMCA 496; *SZLGL v MIAC* [2008] FMCA 844 at [34].

[169] *SZBWJ v MIAC* (2008) 171 FCR 299 at [10]–[14]. The Court noted that whilst s 33(1) of the Acts Interpretation Act provides that where an Act confers a power or imposes a duty, then unless the contrary intention appears, the power or duty may be performed from time to time, such a contrary intention was to be found in the Migration Act. Note that ss 50 and 416 provide that where there has been a previous application for a protection visa which was has been finally determined and refused, the Minister or a review body (i.e. the former RRT or the Tribunal), when considering a further protection visa application, is not required to reconsider any information considered in the earlier application and may have regard to, and take to be correct, any decision the Minister or review body made about or because of that information. However, their operation is permissive and does not place an obligation to accept, or not to accept, the conclusion or the process of reasoning, in whole or in part, of the previous decision: see *WZATX v MICMSMA* [2020] FCA 1262 at [66] in relation to s 416.

[170] *SZMYU v MIAC* [2009] FMCA 117. The Court agreed with this view, previously expressed in *SZLGL v MIAC* [2008] FMCA 844 at [34].

[171] *SZIIG v MIAC* [2008] FCA 886 at [5], [7]; *SZASP v MIAC* [2007] FCA 771; *SZAQW v MIMA* [2006] FCA 1332; *SZIHQ v MIMA* [2006] FMCA 496; *SZIIV v MIMA* [2006] FMCA 322; *SZCKB v MIMA* [2006] FMCA 804 and *SZBCE v MIMA* [2006] FMCA 1897; *SZMRE v MIAC* [2008] FMCA 1281 at [12].

[172] *SZBWJ v MIAC* (2008) 171 FCR 299 at [16]. This objective is now contained in s 2A(b) of the AAT Act, as amended with effect from 1 July 2015 by the Amalgamation Act.

[173] *Tribunals Amalgamation Act 2015* (Cth) sch 9 subitem 15AD(1).

not yet completed its statutory task for the first review application), the Tribunal will generally not determine that it has no jurisdiction to review the subsequent review application on the basis that the decision is no longer a reviewable decision. This is because it has not yet made a decision on the first review application. In this circumstance, the Tribunal generally awaits the finalisation of the first review application and then determines that it does not have jurisdiction for the subsequent review application because the decision is no longer a reviewable decision (as described above). Alternatively, if the subsequent review application was lodged outside of the prescribed time limit, it is open to the Tribunal to determine that it does not have jurisdiction on the basis that the application was lodged out of time.

4.8.5 Where the Tribunal has determined it had no jurisdiction in relation to a review application, it would not be open for the Tribunal to find it has no jurisdiction in relation to a further review application on the basis of having already reviewed the primary decision.[175] This is because the Tribunal, in previously determining that it did not have jurisdiction, would not have carried out its statutory duty to review the decision. It may be open for the Tribunal to find that it does not have jurisdiction in relation to the further review application for another reason, such as it being lodged out of time.

4.9 Procedures that apply if application for review is invalid

4.9.1 The procedural obligations in Divisions 5 and 6 of Part 5 (Conduct of review and Tribunal decisions) and Divisions 4 and 5 of Part 7 (Conduct of review and Tribunal decisions) of the Migration Act do not apply if the application for review is not valid.[176] For example, there is no obligation on the Tribunal under the Migration Act or otherwise to invite an applicant to a hearing in circumstances where it determines that it has no jurisdiction to determine the application.[177]

4.9.2 Whilst the statutory obligations regarding the provision of adverse information (s 359A/424A) or the opportunity to appear before the Tribunal (s 360/425) do not apply where the review application is not validly made, common law procedural fairness nevertheless may require the 'review applicant' be given an opportunity to comment on the Tribunal's view that the application does not appear to be valid, prior to a decision on the application being made.

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[174] *SZUUU v MICMSMA (No 2)* [2020] FCCA 3354 at [12]–[13]. The Court confirmed that there is no jurisdiction for the AAT to conduct a second merits review of a delegate's decision, in circumstances where the statutory duty to review that decision has already been discharged by the former RRT.

[175] See for example *Hombrebueno v MICMSMA* [2021] FedCFamC2G 335 where the applicant lodged two review applications. In relation to the first, the Tribunal found it did not have jurisdiction because the primary decision was not a Part 5-reviewable decision. In relation to the second, the Tribunal found it did not have jurisdiction because the primary decision had already been the subject of a valid review and the Tribunal had made a decision on the earlier review application. The Minister at [28]–[29] conceded that the Tribunal erred by assuming that its first decision was based on the applicant making a valid review application in relation to a reviewable decision but argued the error was of no consequence as the primary decision was not reviewable in any event. The Court did not deal directly with the conceded error but found at [33] there was no arguable basis that the Tribunal was incorrect in deciding it did not have jurisdiction as the decision was not reviewable.

[176] *SZEYK v MIAC* [2008] FCA 1940; *Dharmesh v MIAC* [2009] FMCA 442 at [6]. Note however that in *Radzi v MIBP* [2014] FCA 626 the Federal Court held that when notifying an applicant of a fee reduction determination under reg 4.13(4), one of the notification methods specified under s 379A must be used. For further information, please see Chapter 5 – Fees for Review.

[177] *SZCOZ v MIAC* [2008] FMCA 1310 at [14]; *SZEYK v MIAC* [2008] FCA 1940 at [34] and *Benissa v MIBP* [2015] FCCA 2868 at [32]–[36].

4.9.3 In providing such an opportunity to comment, the Tribunal generally gives particulars of any information relevant to determining whether the Tribunal has jurisdiction.[178] If the Tribunal fails to include relevant information, it may not satisfy its common law procedural fairness obligations. For example, in *Cao v MIAC* the Court found that information that the primary decision notification had been sent by prepaid post on a particular date was necessary for the review applicant to respond to the issue of whether the application for review was lodged outside the mandatory prescribed time period.[179]

4.9.4 However, a failure to comply with these procedural fairness obligations will not necessarily result in a jurisdictional error if the Tribunal is found not to have jurisdiction to review the relevant decision.[180] For example, in *SZTVE v MIBP*[181] in circumstances where the Court found the Tribunal had no jurisdiction to review a protection visa decision, the Court noted there was no legal obligation to send a letter inviting the applicant to comment on the validity of her review application and that the failure of the applicant to receive the letter or to have the opportunity to comment on that information did not establish jurisdictional error.

4.9.5 Where a combined review application has been made, in some situations the application may be valid in relation to one or more review applicants but not all review applicants (for example, review applicants who were not in the migration zone when the review application was made). In this scenario, an opportunity for the review applicants who have not made a valid application may not have been given prior to the hearing. The Tribunal generally puts those applicants on notice at the hearing that it is the Tribunal's view that a valid review application has not been made in relation to them, and provides them with an opportunity to comment.[182]

4.9.6 There has been some suggestion that the Tribunal does not have any power to deal with a repeat review application (even to the extent of making a 'no jurisdiction' decision) where the Tribunal determined that it had no jurisdiction in respect of the first application.[183] However, in the absence of further judicial consideration, the Tribunal continues dealing with repeat review applications in accordance with current practice.

4.10 Adding family members to the visa application

4.10.1 In certain circumstances it is possible for newborn children, or certain family members to be added to an existing visa application. In such cases, the visa application is taken to be combined at the primary level. Whether a visa application

[178] *Cao v MIAC* [2009] FMCA 70.
[179] *Cao v MIAC* [2009] FMCA 70.
[180] *Cao v MIAC* [2009] FMCA 70.
[181] *SZTVE v MIBP* [2014] FCCA 1640.
[182] See *Singh v MIBP* [2018] FCCA 381 at [46]–[47].
[183] See *SZOPH v MIAC* [2010] FMCA 989 at [8] where the Court commented (in *obiter dicta*) that once the Tribunal had determined that the first review application was out of time, it was *functus officio* and the appropriate course would have been for the applicant to seek judicial review of the Tribunal's first decision, rather than to lodge a second application.

is combined in these circumstances may be relevant to determining whether a review application can be combined by, or in respect of various family members.

Newborn children – reg 2.08

4.10.2 Under reg 2.08, children[184] born to a non-citizen after a primary visa application is made, but before it is decided, are taken to have applied for a visa of the same class as their parent at the time they were born.[185] The child's application is taken to be combined with the non-citizen's application on the basis of being a member of the family unit of the primary applicant. The child must satisfy the criteria to be satisfied at the time of decision. If there is an applicable time of application criterion that the child be sponsored or nominated, that criterion must be satisfied at time of decision.

4.10.3 Children who are born *after* the delegate's decision is made, including those born during the course of a review by the Tribunal, are not taken to be included in the parent's visa application, and will need to lodge a separate visa application.[186]

4.10.4 A child born before the primary decision is made will normally be the subject of the primary decision and may be included in an application for review. However, if the Department was not notified of the birth before the primary decision was made, the child may not, as a matter of fact, be the subject of a decision. The Tribunal will not have jurisdiction in relation to the child if no reviewable decision on the child's application has been made.[187]

4.10.5 Members peruse the Departmental file in these cases to identify if the Department was notified of the birth of the child and whether the primary decision includes the child. If the primary decision does not include the child but the child has sought review, the Tribunal may proceed with the review application and determine that the Tribunal has no jurisdiction to conduct a review as there is no decision to review. Alternatively, the Tribunal may await the Department's decision in relation to the child's deemed application and, if a subsequent review application to the Tribunal is made within the prescribed period for the child's decision, the child's review application may be combined with the parents' existing review application.[188] If the

[184] s 5CA provides a non-exhaustive list of persons who are a child of another person. See also reg 1.14A.
[185] reg 2.08.
[186] In *MIMA v Lim* (2001) 112 FCR 589, the Court took the view that the phrase 'after the application is made but before it is decided' in the former reg 2.08E meant before it is decided by the Minister or his delegate. The judgment is in relation to an applicant having to have married a prospective spouse before a primary decision for a valid application for a Prospective Marriage (Temporary)(Class TO) visa was made. However, it strongly supports the view that children born after a primary decision are not included in their parent's application under the similar reg 2.08. In *Cabal v MIMA* [2000] FCA 1806, French J considered the analogous situation in reg 2.08A regarding the addition of a spouse. His Honour found the Tribunal correctly interpreted the provision by finding that the spouse could only be added prior to the primary decision. Note, however, that reg 2.08(1)(c) provides that the child is 'taken to have applied for a visa at the same time he or she was born'.
[187] In *SZRMC v MIAC* [2012] FMCA 845, the Court found at [30]–[31] that, in the circumstances of where a child born to the first visa applicant was not communicated to the Department, and was therefore not included in, the delegate's decision, while that child was taken to be a second applicant for the visa having been taken to have made a combined visa application with the first applicant at the time they were born, and the Minister was under a continuing obligation to make a decision on that second applicant's claims, the second applicant was not able to make a valid review application to the Tribunal because her protection visa application had not been dealt with by the Minister's delegate.
[188] reg 4.12(2).

child's review application is validly combined with the parents' valid review application, no fee would be payable for the child's review application.[189]

Other children and partners – regs 2.08A, 2.08B

4.10.6 Other children and partners can be added to an existing visa application in certain circumstances. Different rules apply depending upon whether the visa is a permanent or temporary one.

Permanent visas

4.10.7 Regulation 2.08A[190] permits an applicant (the original applicant) for a *permanent* visa of a class for which Schedule 1 to the Regulations permits combined applications to apply in writing to have his or her spouse,[191] de facto partner,[192] or dependent child[193] added to the application.

4.10.8 To add a spouse, de facto partner or dependent child under this regulation:

- the request must be in writing;
- the request may be done at any time before the application is decided at the primary level;
- the request must include a statement that the original applicant claims that the additional applicant is the spouse, de facto partner or dependent child, as the case requires, of the original applicant; and
- the additional applicant must, at the time of request, satisfy the relevant Schedule 1 visa application requirements as to the whereabouts of an applicant at the time of the application.

4.10.9 If these requirements are met, the additional applicant is taken to have applied for a visa of the same class as the original applicant.[194] The application is taken to be combined with the original applicant's application and to have been made when the Minister receives the request, and at the same place and on the same form as the original applicant.[195]

[189] reg 4.13(3).
[190] Note that reg 2.08A was amended by the *Migration Amendment Regulations 2009* (Cth) (No 7) (SLI 2009, No 144) in relation to visa applications made on or after 1 July 2009. In its form prior to the amendments, reg 2.08A permitted the addition of a 'spouse, interdependent partner, dependent child or a dependent child of an interdependent partner' to certain permanent visa applications.
[191] 'Spouse' is defined in s 5F of the Migration Act.
[192] 'De facto partner' is defined in s 5CB of the Migration Act.
[193] See s 5CA and reg 1.03. The definition of 'dependent child' was amended by the *Migration Legislation Amendment (2016 Measures No 4) Regulation 2016* (Cth) (F2016L01696) to include a step-child in relation to visa applications made on or after 19 November 2016 or a visa granted as a result of such an application.
[194] reg 2.08A(1)(e).
[195] reg 2.08A(1)(f).

4.10.10 Regulation 2.08A(2A) also specifies certain permanent visa classes for which visa applications cannot be combined under this Regulation.[196]

Temporary visas

4.10.11 Regulation 2.08B[197] permits the addition of dependent children[198] to applications for certain *temporary* visas, most notably the provisional Partner and certain Skilled and Business visas. To add a dependent child under this regulation:

- the original applicant must request the addition in writing;
- except in very limited circumstances,[199] the request must be made after the visa application was made but before it is decided by the delegate;
- the request must include a statement that the original applicant claims the additional applicant is a dependent child of the original applicant; and
- the additional applicant must meet the relevant Schedule 1 requirements that relate to the whereabouts of an applicant at the time of the application.

Other matters

4.10.12 The Regulations do not allow for the adding of family members other than spouses, de facto partners and dependent children to an existing visa application.

4.10.13 Applicants who are taken to have made a combined visa application pursuant to regs 2.08A or 2.08B may be included in a combined application for review, provided the primary decision on that application is reviewable and the other requirements for a valid review application are met.

4.10.14 In most cases coming before the Tribunal, neither reg 2.08A nor 2.08B is applicable *after* the primary decision is made. There is no applicable provision for adding a spouse, de facto partner, dependent child (or any other family member) to an existing review application.

[196] Note that, with effect from 1 July 2012, reg 2.08A(2A) was amended by *Migration Amendment Regulation* 2012 (Cth) (No 2) (SLI 2012, No 82) to specify Class VB as the only permanent visa class for which visa applications cannot be combined under reg 2.08A.
[197] Note that reg 2.08B was amended by SLI 2009, No 144 in relation to visa applications made on or after 1 July 2009. In its form prior to the amendments, reg 2.08B permitted the addition of a dependent child or the 'dependent child of the interdependent partner' of the original applicant.
[198] The definition of 'dependent child' in reg 1.03 was amended by the SLI 2009, No 144 in relation to visa applications made on or after 1 July 2009. The definition was also amended by the F2016L01696 to include a step-child in relation to visa applications made on or after 19 November 2016 or a visa granted as a result of such an application.
[199] If the request relates to a Resolution of Status (Class UH) visa application made prior to 22 March 2014, the request can also be made after a decision to grant the visa has been made: reg 2.08B(1)(ba). Note that reg 2.08B(1)(ba) was amended by *Migration Amendment (Redundant and Other Provisions) Regulation 2014* (SLI 2014, No 30) with effect from 22 March 2014 to remove reference to Resolution of Status (Class UH) visa applications. There is also an additional requirement for Class UH applications made prior to 22 March 2014 - the Minister must be satisfied that there are compelling and compassionate circumstances for the child to be added: reg 2.08B(1)(da). Note that reg 2.08B(1)(da) was repealed by SLI 2014, No 30 with effect from 22 March 2014.

4.11 Table 1 - Time limits / Standing / Location requirements

Decision Type	Prescribed period for lodgement	Standing to apply for review	Location of review applicant
Part 7 reviews			
All Part 7-reviewable decisions - applicant in detention	within 7 working days commencing on the day of notification if that day is a working day, or if that day is not a working day, the first working day after that day *reg 4.31(1)*	non-citizen who is the subject of the decision *s 412(2)*	migration zone at time of Tribunal application *s 412(3)*
All Part 7-reviewable decisions - applicant NOT in detention	within 28 days commencing on the day of notification *reg 4.31(2)*		
Part 5 reviews			
s 338(2) decision - onshore visa refusal (except bridging visa resulting in detention)	within 21 days after notification *reg 4.10(1)(a)*	non-citizen who is the subject of the decision *s 347(2)(a)*	migration zone at time of Tribunal application *s 347(3)*
s 338(3) decision - onshore visa cancellation (except bridging visa resulting in detention)	within 7 working days after notification *reg 4.10(1)(b)*		
s 338(3A) decision - non revocation of visa cancellation			
s 338(4) decision - bridging visa refusal /cancellation in detention	within 2 working days after notification *reg 4.10(2)(a)*		
s 338(5) decision[200] - offshore sponsored visa refusal	within 70 days after notification *reg 4.10(1)(c)*	sponsor / nominator *s 347(2)(b)*	no requirement
s 338(6) decision - offshore former permanent resident visa refusal		relevant relative *s 347(2)(c)*	
s 338(7) decision - offshore family visitor visa refusal			
s 338(7A) decision - onshore/offshore permanent visa refusal	within 21 days after notification *reg 4.10(1)(a)*	non-citizen who is the subject of the decision *s 347(2)(a)*	migration zone at time of primary decision and Tribunal application *s 347(3A)*

[200] See *Farooq v MIAC* [2008] FMCA 45 (Nicholls FM, 25 January 2008) where the Court declined to adopt an interpretation of s 338(5) which asserted that, because there was an invalid primary 457 application, the visa could not be granted irrespective of where the applicant was located. The applicant argued that as the application was invalid, the visa could not be granted whilst he was in the migration zone, and was therefore a reviewable decision under s 338(5)(a). The Court, at [35] rejected this interpretation noting that s 338(5) does not deal with, or is not directed to, the validity or invalidity of a visa application, but rather is plainly directed to the circumstances relating to the grant of the visa.

s 338(8) decision - points assessment	within 70 days after notification *reg 4.10(1)(c)*	sponsor / nominator *s 347(2)(b)*	no requirement
s 338(9) decision – misc. prescribed decisions	within 21 days after notification *reg 4.10(1)(d)*	person prescribed in reg 4.02(5) *s 347(2)(d)*	

5. FEES FOR REVIEWS

5. FEES FOR REVIEWS[1]

5.1 Introduction

5.1.1 One of the requirements for a valid, or properly made, application for review of both Part 5-reviewable decisions [migration] and Part 7-reviewable decisions [protection] in the Migration and Refugee Division (MRD) of the Tribunal is that the application be accompanied by the prescribed fee, if any.[2]

5.1.2 Regulation 4.13 of the *Migration Regulations 1994* (Cth) (the Regulations) prescribes the fee payable for a Part 5 [migration] reviewable decision. Fees payable are determined by reference to when the review application was made.

Date Review Application made	**Prescribed Fee**
Prior to 1 July 2011	$1400
On or after 1 July 2011 and before 1 July 2013[3]	$1540
On or after 1 July 2013 and before 1 July 2015[4]	$1604
On or after 1 July 2015 and before 1 July 2017[5]	$1673
On or after 1 July 2017 and before 1 July 2018[6]	$1731
On or after 1 July 2018 and before 1 July 2019[7]	$1764
On or after 1 July 2019 and before 1 July 2020[8]	$1787
On or after 1 July 2020 and before 1 July 2021[9]	$1826
On or after 1 July 2021 and before 1 July 2022[10]	$3000

[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Migration Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] ss 347(1)(c) [Part 5], 412(1)(c) [Part 7]. In *Putra v MIAC* [2011] FMCA 498 the Court held that the requirement that an application for review be accompanied by the prescribed fee within the prescribed period is a mandatory provision requiring strict compliance: at [27].
[3] reg 4.13(1). The fee was increased by the *Migration Legislation Amendment Regulations 2011 (No 1)* (Cth) (SLI 2011, No 13) which provided for an ongoing biennial fee increase based on the Consumer Price Index.
[4] regs 4.13A, 4.13B.
[5] regs 4.13A, 4.13B.
[6] regs 4.13A, 4.13B.
[7] reg 4.13(1). The fee was increased by the *Court and Tribunal Legislation Amendment (Fees and Juror Remuneration) Regulations 2018* (Cth) (F2018L00819) which provides for an ongoing annual fee increase based on the Consumer Price Index for all subsequent fee increases (increases from 1 July 2011 to 1 July 2017 were on a biennial basis).
[8] regs 4.13A, 4.13B.
[9] regs 4.13A, 4.13B.

On or after 1 July 2022[11]	$3153

The fee may be waived, reduced or refunded in certain circumstances.[12]

5.1.3 Regulation 4.31B prescribes the fee payable for a Part 7 [protection] reviewable decision. A fee is payable after the decision is made. No fee is payable if the Tribunal remits a matter to which the decision relates with a permissible direction under reg 4.33.[13] Fees payable are determined by reference to when the review application was made.[14]

Date Review Application made	**Prescribed Fee**
Prior to 1 July 2003[15]	$1000
On or after 1 July 2003 and before 1 July 2011[16]	$1400
On or after 1 July 2011 and before 1 July 2013[17]	$1540
On or after 1 July 2013 and before 1 July 2015[18]	$1604
On or after 1 July 2015 and before 1 July 2017[19]	$1673
On or after 1 July 2017 and before 1 July 2018[20]	$1731
On or after 1 July 2018 and before 1 July 2019[21]	$1764

[10] reg 4.13(1). The fee amount was amended to $3000 by the *Migration Amendment (Merits Review) Regulations 2021* (Cth) (F2021L00845) and applies to review applications made on or after 1 July 2021. For the purpose of subsequent fee increases after 2021 (with the first increase occurring on 1 July 2022), the amount of $3000 will be used in the formula in reg 4.13B used to calculate the increase: reg 4.13A(3). As the fee was amended to $3000, no fee increase using the formula in reg 4.13B occurred in 2021: reg 4.13A(2). Both regs 4.13A(2) and (3) were inserted by F2021L00845.
[11] regs 4.13A, 4.13B. Also Government Notices Gazette C2022G00484 14/06/2022.
[12] regs 4.13(4), 4.14. *Migration Amendment Regulations 2011 (No 4)* (Cth) (SLI 2011, No 122) amended reg 4.13(4) to remove the power to waive the application fee for all applications lodged on or after 1 July 2011. Rather, for all applications lodged on and from this date, the Registrar, (and prior to 1 July 2015, the Deputy Registrar or authorised officers) of the Tribunal can reduce the fee payable by 50% in certain circumstances. In *Putra v MIAC* [2011] FMCA 498 the Court held where an application fee has not been paid or waived, the application for review is not valid and the Tribunal lacks jurisdiction: at [27].
[13] reg 4.31B(3) as amended by *Migration Amendment (Resolving the Asylum Legacy Caseload) Regulation 2015* (Cth) (SLI 2015, No 48).
[14] The relevant point in time in reg 4.31B(1) is when the application for review is made. Regulation 4.31BA provides that the fee prescribed by reg 4.31B(1)(c) is increased in accordance with reg 4.31BB (which sets out the formula to determine the increase), on each 1 July. This indicates that reg 4.31(1)(c) can be read as 'if the application for review was made on or after 1 July [*relevant year at time of review application*] – [*fee amount as calculated by reg 4.31BB for that relevant year*]'. These provisions read together appear to indicate that the amount should be 'locked' in as at the time of review application was made (noting that the relevant amount increases annually on 1 July as per reg 4.31BA) rather than calculating the fee by reference to the amount in place at the time the fee becomes payable, which may be some time after the application was made.
[15] reg 4.31B(1)(a). Note that, reg 4.31B(1)(a) was repealed by *Migration Amendment (Redundant and Other Provisions) Regulation 2014* (Cth) (SLI 2014, No 30) for visa applications made on or after 22 March 2014.
[16] reg 4.31B(1)(b). The fee was increased as a result of *Migration Amendment Regulations 2003 (No 4)* (Cth) (SR 2003, No 122). The sunset clause for the fee in these regulations was removed by item [1] of Schedule 6, to the *Migration Amendment Regulations 2005 (No 4)* (Cth) (SLI 2005, No 134). Regulation 4.31B(1) was further amended by SLI 2011, No 13 to provide that this fee is applicable for applications made on or after 1 July 2003 and before 1 July 2011.
[17] reg 4.31B(1)(c).This provision was inserted by SLI 2011, No 13.
[18] regs 4.31BA, 4.31BB.
[19] regs 4.31BA, 4.31BB.
[20] regs 4.31BA, 4.31BB.

On or after 1 July 2019 and before 1 July 2020[22]	$1787
On or after 1 July 2020 and before 1 July 2021[23]	$1826
On or after 1 July 2021 and before 1 July 2022[24]	$1846
On or after 1 July 2022[25]	$1940

This fee may also be waived or refunded in certain circumstances.[26]

5.1.4 From 1 July 2011 until 1 July 2017, the fees for making an application for a Part 5-reviewable [migration] decision and the post decision fee for a Part 7-reviewable [protection] decision increased every two years,[27] and from 1 July 2018, these fees increase every year on the anniversary of 1 July.[28] Fee increases are based on a Consumer Price Index (CPI) formula calculation.[29] However, the fee for making a Part 5-reviewable decision was amended to $3000 for review applications made on or after 1 July 2021,[30] which occurred by operation of the *Migration Amendment (Merits Review) Regulations 2021* (Cth) and not by reference to the CPI.[31] From 1 July 2022, the fee for making a Part 5-reviewable decision is to be increased by reference to the CPI formula, using the amount of $3000 in the formula used to calculate the increase.[32]

5.1.5 The fee for both Part 5 [migration] and Part 7 [protection] reviewable decisions must be paid in Australian dollars.[33]

5.2 In what circumstances are Part 5 review fees payable?

5.2.1 No fee is payable in relation to:

- an application for review by the Tribunal of a decision of a kind referred to in s 338(4) - that is, a decision to refuse a bridging visa of a person who is in immigration detention because of that refusal or a decision of a delegate of

[21] reg 4.31B(1)(c). The fee was increased as a result of F2018L00819 which provides for an ongoing annual fee increase based on the Consumer Price Index for all subsequent fee increases (increases from 1 July 2011 to 1 July 2017 were on a biennial basis).
[22] regs 4.31BA, 4.31BB.
[23] regs 4.31BA, 4.31BB.
[24] regs 4.31BA, 4.31BB.
[25] regs 4.31BA, 4.31BB. Also Government Notices Gazette C2022G00484 14/06/2022.
[26] reg 4.31C.
[27] regs 4.13A, 4.13B, 4.31BA, 4.31BB inserted by *Migration Legislation Amendment Regulation 2013 (No 1)* (Cth) (SLI 2013, No 32).
[28] regs 4.13A, 4.31BA, as amended by F2018L00819.
[29] regs 4.13B, 4.31BB.
[30] reg 4.13(1) as amended by F2021L00845.
[31] reg 4.13A(2) as inserted by F2021L00845.
[32] reg 4.13A(3) as inserted by F2021L00845.
[33] reg 5.36(1). That regulation provides that payment of a fee must be made in a place and in a currency specified by legislative instrument. The current legislative instrument is IMMI 17/119, in effect from 1 January 2018.

the Minister to cancel a bridging visa of a person who is in immigration detention because of that cancellation;[34]

- an application for review *made by a non-citizen who is in immigration detention* where the decision to be reviewed relates to requiring a security and to the refusal to grant a visa where a criteria for the grant of the visa is that the imposed security for compliance with conditions on the visa must be lodged.[35]

5.2.2 Under reg 4.13(3), if a person combines two or more applications for review of Part 5-reviewable decisions by the Tribunal in accordance with reg 4.12, an application fee is payable in respect of only one of those applications.

Payment of Part 5 review fees by credit card

5.2.3 Where an applicant lodges an application providing credit card details for fee payment within the prescribed period, the application will not be invalidated simply because the funds are not accessed within the prescribed period by the Tribunal. It is sufficient if the applicant placed the Tribunal in a position to be able to access the funds within the prescribed period and those funds are in fact accessed at a later point in time.[36] Nor is the credit card holder's signature essential for the processing of a credit card payment and an application will not be invalid simply because the signature has not been provided.[37] However, if the credit card details provided are incorrect, and the correct details are only provided after the prescribed period for seeking review has expired (or not at all), the application may be invalid.[38] Whether the applicant has placed the Tribunal in such a position is a question of fact, and in some circumstances it may be necessary to look beyond the application itself to determine whether this has in fact occurred.[39]

[34] reg 4.13(2)(a).
[35] reg 4.13(2)(b). The person must be in immigration detention and the decision be one covered by reg 4.02(4)(f) - that is, a decision that relates to requiring a security *and* relates to the refusal to grant a visa, being a visa for which the Minister is to have regard to a criterion to the effect that if an authorised officer has required a security for compliance with any conditions that the officer has indicated to the applicant will be imposed on the visa if it is granted, the security has been lodged.
[36] See *Butcher v MIMIA* [2005] FMCA 880 where the Court expressed the view that the nature of credit card transactions is such that payment is taken to have been made on the date that the application (with sufficient credit card details to enable approval of the credit provider to be obtained) is received, provided that the credit card transaction is subsequently approved.
[37] *Pioneer Glass Pty Ltd v MIBP* [2016] FCCA 1 at [33]–[36]. Where the applicant provided their credit card number and expiry date but not their signature or security code, the Tribunal was still held to have been placed in the position to access funds from the credit card. Although it was the Tribunal's policy to require signatures on paper based credit card transactions as a fraud protection policy, that policy could not be an obstacle to the processing of payment. However consistent with the principles in *Kirk v MIMA* (1998) 87 FCR 99, a payment that is processed but subsequently contested by the credit card holder may result in the application for review being invalid (at [36]).
[38] *Zhang v MIAC* (2007) 210 FLR 268 at [47].
[39] See *Vumentala v MIMIA* [2004] FCA 744; *Kaur v MIAC* [2013] FCCA 125. Both of these cases concerned visa applications to the Department however the principles would apply equally to applications for Part 5 reviews to the Tribunal. In *Vumentala*, the applicant's migration agent omitted the final 5 digits of her credit card number on the visa application form and the Court found that the Department was placed in a position to access the funds as the complete credit card details were contained in a separate visa application that was in the same envelope. In *Kaur*, the applicant's migration agent omitted to include the expiry date of his credit card on the visa application form, and by the time the Department sought to process the payment, the visa applied for was closed to new applications. The Court held that the departmental officer could have interrogated the departmental computer system, found a list of applications lodged by the migration agent and located the relevant paper applications that included the relevant expiry date. Whilst this judgment is potentially significant in terms of the steps the Tribunal may be expected to take where credit card details are incomplete, it should be treated with caution given the unusual factual matrix and the fact that it goes beyond *Vumentala*.

5.2.4 If the credit card payment is declined when the card is accessed and the prescribed period for applying for review has not yet expired, it is appropriate for the Tribunal to attempt to contact the applicant to inform him or her, as soon as practical and before the period expires, if possible. However, if an attempt to access the funds is only made after the expiry of the prescribed period and payment is declined, the application may be invalid, unless the rejection of the credit card transaction was an error by the relevant credit provider and it is demonstrated that funds were in fact made available to the Tribunal within the prescribed period.

5.2.5 The Tribunal is not obliged to repeatedly attempt to access the funds using the credit card details if the transaction has been declined. In *Khan v MIAC*[40] a rejected credit card transaction was compared to a dishonoured cheque. Although the holder of the cheque may present it again, and the holder of credit card details may use those details again in an attempt to obtain payment, the payment failed when it was dishonoured and it remains for the person seeking to make payment to actually effect that payment. It is not for the holder of the dishonoured cheque or the rejected credit card details to make persistent attempts to obtain payment of an application fee when it is the applicant's responsibility to ensure that the fee is paid. As a result, if payment by credit card is ineffective it is for the applicant to remedy the deficiency, not the Tribunal.

5.3 When can a Part 5 review fee be waived or reduced?

5.3.1 For applications lodged prior to 1 July 2011, reg 4.13(4) provided that the Registrar, or a Deputy Registrar, or another officer of the then Migration Review Tribunal (MRT) authorised in writing by the Registrar, may determine that the fee on an application for review by the MRT of a decision *should not be paid* if he or she is satisfied that payment of the fee has caused, or is likely to cause, severe financial hardship to the review applicant.[41]

5.3.2 However, for applications made on or after 1 July 2011, the fee cannot be waived. Rather, reg 4.13(4) provides that if the Registrar[42] of the Tribunal is satisfied that payment of the fee has caused, or is likely to cause, severe financial hardship to the review applicant, they may determine that the fee payable is 50% of the prescribed fee.[43] The Registrar has delegated the power to officers at the APS4-SES1 level to make determinations under reg 4.13(4) in relation to fees payable on an application for review.[44] The Tribunal has no power to reduce the fee beyond what is permitted

[40] *Khan v MIAC* [2009] FCA 443 at [17]–[18] upholding the reasoning in *Khan v MIAC* [2008] FMCA 1663 at [31].
[41] reg 4.13(4).
[42] Prior to 1 July 2015, the Registrar, Deputy Registrar or another officer of the MRT authorised in writing by the Registrar had the authority to reduce the application fee under reg 4.13(4). As a result of amendments introduced by *Migration Legislation Amendment (2015 Measures No 2)* (SLI 2015, No 103), from 1 July 2015 only the Registrar of the Tribunal (and his or her delegate) has this authority. Nonetheless, any fee reduction determinations made by a previous Registrar, Deputy Registrar or another officer of the MRT authorised to make such a determination prior to 1 July 2015 remain valid: see sch 9, item 15AC(1)(b) of the *Tribunals Amalgamation Act 2015* (Cth) (Amalgamation Act).
[43] reg 4.13(4) as amended by SLI 2011, No 122 and SLI 2015, No 103.
[44] Made pursuant to s 10A(3) of the *Administrative Appeals Act 1975* (Cth).

by the Regulations.[45] The *Administrative Appeals Tribunal Regulation 2015* (Cth) is not applicable to determining a fee reduction in the MRD.[46]

5.3.3 The considerations in relation to pre 1 July 2011 fee waiver request, and a post 1 July 2011 fee reduction request are essentially the same. This chapter focuses on the post 1 July 2011 legislative scheme.

Form of the request

5.3.4 Neither the *Migration Act 1958* (Cth) (the Migration Act) nor the Regulations prescribe any particular method for lodging an application for a fee reduction request and so an application made in any form may be considered. However, applicants are encouraged to complete the fee reduction application form (M11). To facilitate consideration of an application to reduce the fee, applicants are encouraged to provide evidence such as bank and credit card statements, Centrelink statements, pay slips and utility, medical and other bills.

5.3.5 The fee reduction request and any accompanying documents are separate from the review application. However, it is legitimate for the Tribunal to be cognisant of information contained within a fee reduction application when making its decision on the review.[47] Where the Tribunal wishes to rely on adverse information contained with these requests, it must put that information to the applicant under s 359A (fee reduction applications are not covered by the exception in s 359A(4)(b)).[48]

Request for fee reduction and compliance with review application requirements

5.3.6 A post 1 July 2011 application for review of a Part 5 reviewable decision must be accompanied by at least half of the prescribed fee and a request for fee reduction, and the fee and request must both be received by the Tribunal prior to the expiry of the prescribed period.[49] This is because the current fee reduction regime always

[45] *Parmar v MIBP* [2017] FCCA 2646 at [14].
[46] *Administrative Appeals Tribunal Regulation 2015* (Cth) (SLI 2015, No 94) reg 19. For pre 1 July 2015 (i.e. pre-amalgamation) cases, see *Parmar v MIBP* [2017] FCCA 2646 at [18]–[19] where the Court held that the AAT Regulation was not relevant and does not apply retrospectively to those cases.
[47] *Bodenstein v MIAC* [2009] FCA 50 at [29]. The judgment confirms that information provided in a fee waiver application may be a relevant consideration when considering whether the applicant has net assets to conduct the business. While it only considered fee waiver applications, the reasoning would similarly apply to an application for fee reduction.
[48] *Rokolati v MIMA* [2006] FMCA 898 at [25]–[27] which considered the application of reg 4.13 as it applied prior to 1 July 2011. However, the reasoning is equally applicable to applications for a fee reduction.
[49] See *Grey v MIBP* [2018] FCCA 1564 at [10]–[11], [22]; *Jahangir v MIBP* [2018] FCCA 902 at [27]–[28]. In both cases, the applicant had requested a fee reduction but did not make any payment of at least half the fee prior to the expiry of the prescribed period. The Court held, in both cases, that payment of the prescribed fee or at least 50 per cent of the prescribed fee is a necessary precondition to the invocation of the Tribunal's jurisdiction and must be given to the Tribunal within the prescribed period. See also *Message v MHA* [2018] FCCA 2132 at [24]–[25]. In this case, the applicant claimed that he had not received the Tribunal's notification that it had granted the fee reduction and he did not pay reduced fee within the prescribed period. The Court, following its reasoning in *Grey*, held that irrespective of whether the applicant received the notification, payment of the fee or at least 50 per cent of the fee is a necessary precondition to the invocation of the Tribunal's jurisdiction. See also *Boyjonauth v MICMSMA* [2022] FedCFamC2G 557 at [49]–[50] where the Court followed *Grey* and *Message*. The Court also found that the Tribunal's statement that the applicant had been given a reasonable period to pay the fee since being notified of the authorised officer's decision on their fee reduction request was incorrect as no decision had been made on the request, however this did not amount to a jurisdictional error because once the prescribed period had expired and at least 50

requires that at least 50% of the prescribed fee be paid even where a fee reduction request is approved. This is consistent with the Tribunal's policy that an applicant should either pay the full fee or pay 50% of the fee and lodge a fee reduction request prior to the end of the prescribed period.

5.3.7 Accordingly, an application will not be valid for the purposes of s 347(1)(c) in circumstances where an applicant applies for review and lodges a fee reduction request but does not pay 50% of the prescribed fee prior to the end of the prescribed period for review or where an applicant pay at least 50% of the prescribed fee but does not lodge a fee reduction request prior to the end of the prescribed period for review.

5.3.8 If the fee reduction request is refused, the applicant must pay the remainder of the fee within a 'reasonable time' of the fee reduction request being decided (see discussion below of what is a 'reasonable time').[50]

5.3.9 A review application will be invalid where the required fee, whether reduced or not, is not paid.[51] There is also no legislative basis upon which the Tribunal could enter into an arrangement to accept payment of the fee in instalments.

5.3.10 In addition, where the application for a fee reduction is withdrawn after the prescribed period for lodging the review application has expired and where the required fee was not paid within time there will be no valid application before the Tribunal.

5.3.11 If a review application which is accompanied by a fee reduction request would be invalid for some other reason (for example, because it was lodged out of time, relates to a decision which is not Part 5-reviewable, or because the review applicant lacks standing), it is unnecessary (and arguably not open) for the Tribunal to consider the request.

What is a 'reasonable time'?

5.3.12 In relation to a request to reduce the prescribed fee, what will constitute a 'reasonable time' within which to pay the remainder of the fee (if a fee reduction request is refused), is determined according to the circumstances of each case.[52] In

percent of the fee had not been paid, the Tribunal lacked jurisdiction. The Tribunal's misunderstanding of the circumstances could not assist the applicant.

[50] The 'reasonable' period' standard was established in *Braganza v MIMA* (2001) 109 FCR 364, and applied in *Akpata v MIMIA* [2004] FCA 913, and *Ong v MIAC* [2010] FCA 1259, in relation to the pre 1 July 2011 fee waiver arrangements. In *Tanto v MIAC* [2013] FCCA 282 the Court confirmed that the principles established in *Braganza v MIMIA* [2001] FCA 318 also apply to the fee reduction regime.

[51] *Akpata v MIMIA* [2004] FCA 913. See also *Kirk v MIMA* (1998) 87 FCR 99 at 102, which held that an application was not validly made when the cheque which accompanied the application for review was dishonoured and a subsequent cheque was provided after the expiry of the relevant prescribed period. *Braganza* distinguished *Kirk* on the basis that there was no application for a fee waiver. See also *Hamad v MIAC* [2006] FMCA 1510 at [22]–[23]; *Singh v MIMA* (1999) 92 FCR 557 at [8]; *Butcher v MIMIA* [2005] FMCA 880; and *Zhang v MIAC* (2007) 210 FLR 268 at [47]. The reasoning in these matters would also extend to reg 4.13(4) as amended by the SLI 2011, No 122 and SLI 2015, No 103.

[52] *Patel v MIAC* (2009) 108 ALD 151 at [15].While this matter concerned a pre 1 July 2011 fee waiver application, the reasoning also extends to an application for a post 1 July 2011 fee reduction made under reg 4.13(4): see *Tanto v MIAC* [2013] FCCA 282.

Brundavanam v MIBP,[53] for example, the Court found the Tribunal gave the applicant a reasonable time to pay the fee in circumstances where there was nothing to suggest that the applicant did not receive the letter from the Tribunal advising he had 14 days to make the payment of the prescribed fee and where in any event the Tribunal did not make its decision for another two months. The Tribunal, as a matter of policy, generally regards 14 days as a reasonable period, subject to any submissions to the contrary from the applicant.[54]

5.3.13 In *Begum v MICMSMA,* the Federal Circuit Court found that the Tribunal is not bound by the registrar's decision stipulating a period for payment of the balance of the fee and that, in an appropriate case, the Tribunal could decide that a payment made after the stipulated period was paid within a reasonable time.[55]

5.3.14 From time to time, new information may become available which, while not suggesting any error in the decision, may suggest that an applicant has not been given a reasonable period after being notified of the decision to pay the prescribed fee. For example, the applicant may claim not to have received notice of decision to refuse to reduce the fee. The following cases illustrate that 'reasonableness' must be considered in the individual circumstances of the case:

- In *Patel v MIAC*[56] the Federal Court considered whether an applicant had been afforded a 'reasonable period' where the fee determination had been 'returned to sender'. The Court held that the Tribunal's standard 14 days for payment after the receipt of the fee refusal letter may not be a reasonable period in circumstances where the applicant has not received the letter, and that where such an assertion is made, the Tribunal is required to make a factual determination as to whether the applicant did receive the letter and, if not, to take this into account in determining whether a reasonable time has elapsed.[57]

- In contrast, in *Singh v MIAC*[58] the Federal Magistrates Court found that it was not necessary to consider whether the applicant received the letter notifying him of the fee reduction decision giving him a reasonable period in which to pay the remainder of the fee, as the obligation always remains on an applicant to ensure that the application is accompanied by the prescribed fee. While it is

[53] *Brundavanam v MIBP* [2013] FCCA 2298.
[54] In *Sadeq v MIAC* [2009] FMCA 967, the Court considered 14 days from the date of receipt of the letter to be a reasonable period: at [43]. There had been ongoing correspondence between the Tribunal and the applicant and the Tribunal had previously extended the time to provide further information before making its decision. While this matter was concerned with a fee waiver application, the reasoning extends to an application for a fee reduction.
[55] *Begum v MICMSMA* [2020] FCCA 2391 at [16].
[56] *Patel v MIAC* (2009) 108 ALD 151.
[57] In *Radzi v MIBP* [2014] FCA 626 the Federal Court held that as a fee reduction determination is a 'decision' of the Tribunal as per the then reg 4.40(1), the applicant must be notified by one of the methods in s 379A, and will be deemed to have received notification of it in accordance with the timeframes set out in s 379C. The fact that the applicant did not actually receive the letter and that the Tribunal knew it was not received as it was returned to sender did not invalidate the Tribunal's decision. The Court applied the then "reg 4.40 to the notice of the fee reduction refusal 'decision', without argument, and without discussion. While reg 4.40 might have arguably applied in the context of 'no jurisdiction' decisions, it is not clear that a 'determination' made under reg 4.13(4) is a 'decision' in the relevant sense. The Court also did not consider *Patel* or turn its mind to the question of whether the applicant had a reasonable time in which to pay the remaining fee. Note, reg 4.40 was repealed with effect from 1 July 2015 by SLI 2015, No 103.
[58] *Singh v MIAC* [2012] FMCA 971.

apparent from the Court's reasons that the applicant may not have received the reduction refusal letter, it is not apparent that he ever told the Tribunal that he did not receive it. In these circumstances, there does not appear to be any inconsistency with the decision in *Patel*.

5.3.15 If information is received which indicates the period in which the applicant has been given to pay the fee may not have been 'reasonable', consideration is generally given to granting the applicant a further period to pay the fee. If a decision that the Tribunal lacks jurisdiction has already been made, the new information is generally brought to the relevant Member's attention to enable the Member to determine whether the Tribunal's 'no jurisdiction' decision is affected by jurisdictional error and should be revisited.

Assessment of severe financial hardship

5.3.16 As noted above, the prescribed fee may be reduced by 50% if payment has caused, or is likely to cause, severe financial hardship to the review applicant.[59]

5.3.17 The determination of whether the prescribed fee should be reduced due to severe financial hardship is an administrative decision made by a Tribunal officer.[60] Officers making such determinations take into account all relevant considerations put forward by an applicant in support of the request.

5.3.18 There is little case law on what matters may properly be taken into account in assessing whether there is severe financial hardship for the purpose of reg 4.13(4). The range of relevant considerations will differ depending on the circumstances of the case, including the type of decision being reviewed, the circumstances of the review applicant, and the material available to the Tribunal.

5.3.19 The question to be determined in considering a request to reduce the prescribed fee is whether payment of the fee has caused, or is likely to cause, severe financial hardship to the review applicant. Generally speaking, therefore, it is preferable that only the financial circumstances of the review applicant, and his or her capacity to pay the fee, be considered. However, there may be some cases where the financial position of the third party may be relevant. This may be the case where the review applicant is financially dependent on another person. For example, if the review applicant is a minor and is under the daily care and control of a parent or guardian, the parent or guardian's financial position may be relevant. Similarly, if the review applicant is in a spouse relationship, the financial circumstances of his or her spouse may, depending on the circumstances, be relevant. In *Braganza v Deputy Registrar, Migration Review Tribunal*, Hill J found that the financial position of the review applicant's sister was not an irrelevant consideration, in circumstances

[59] reg 4.13(4) as amended by SLI 2011, No 122 and SLI 2015, No 103.
[60] In *Tanto v MIMAC* [2013] FCA 853 the Federal Court left undisturbed the Federal Circuit Court's finding that the reg 4.13(4) power to make fee reduction decisions is given to specified Tribunal officers and not to Tribunal members, and that such decisions are not reviewable by the Tribunal (*Tanto v MIMAC* [2013] FCCA 282 at [25]–[26])..

where the sister would obtain an advantage from the grant of a special needs visa.[61]

5.3.20 It would be asking the wrong question to consider whether payment of the fee is 'reasonable' in the applicant's circumstances, or whether the criteria for the particular visa which is the subject of the review would generally require an applicant to be in a particular financial position.[62] When requesting information, making decisions or providing reasons for decisions on fee reduction applications, the statutory test in reg 4.13(4) is borne in mind, that is, whether payment of the fee 'has caused' or 'is likely to cause' 'severe financial hardship' to 'the review applicant'.

5.3.21 To provide an applicant with procedural fairness, the Tribunal ensures that an opportunity has been given to comment on any information, of which the applicant is unlikely to already be aware, that is 'credible, relevant and significant' to the request for fee reduction. This may include, for example, information not provided for the purposes of the fee reduction application (such as information extracted from Departmental files) or where an adverse inference drawn from information would not be apparent to an applicant.[63]

5.3.22 There is no obligation on the Tribunal to contact an applicant to see whether an application for a fee reduction is to be made. Nor is there any obligation upon any officer of the Tribunal to consider the exercise of the power to reduce the fee in the absence of any material.[64]

5.3.23 Similarly, there is no obligation on the Tribunal to pursue payment of the fee after the due date, if the fee reduction is not granted.[65]

Can the Tribunal review / reconsider a decision not to reduce the fee?

5.3.24 The Migration Act and Regulations are silent on the issue of whether a fee reduction decision can be reviewed. However, a decision to refuse to reduce the prescribed fee is a privative clause decision pursuant to s 474 of the Migration Act and, on that basis, would be regarded as final and not subject to review unless affected by jurisdictional error.[66] A decision not to reduce the fee may therefore be

[61] *Braganza v Deputy Registrar, Migration Review Tribunal* (2000) 61 ALD 475.
[62] *Atta v MICMSMA* [2019] FCCA 3594 at [23]. In assessing a fee reduction request in relation to a review of a Medical Treatment visa, the Court found that the Tribunal took into account an irrelevant consideration being a generalisation that persons applying for a Medical Treatment visa would ordinarily be in circumstances in which payment of the full fee would not cause severe financial hardship (as the criteria for the visa require the visa holder be in a financial position to meet costs associated with travel and stay in Australia for the duration of the visa). In rejecting the request, the Tribunal was found to have acted unreasonably as it did not confine its consideration to whether payment of the fee would cause or would be likely to cause severe financial hardship to the applicant.
[63] *Kioa v West* (1985) 159 CLR 550 at [629].
[64] *Taylor v MIMIA* [2005] FMCA 281. While this matter pertained to an application for a pre 1 July 2011 fee waiver, the reasoning would equally apply to post 1 July 2011 applications for a reduction of the prescribed fee made.
[65] *Sadeq v MIAC* [2009] FMCA 967 at [36]. Although this matter only considered an application for a pre 1 July 2011 fee waiver, the reasoning would equally apply to post 1 July 2011 applications for a reduction of the prescribed fee.
[66] *Auro v MIMA* (2007) 164 FCR 320 at [12]. See also *Fairy v MIBP (No 2)* [2017] FCCA 3095 at [6] in which the Court held that the Registrar's decision not to waive 50% of the prescribed fee may be amendable to judicial review if that decision was found to be irrational or unreasonable. However, as the Registrar was not party to the proceeding, the Court considered it was

subject to judicial review[67] and relief may be available to an applicant if the decision is attended by jurisdictional error such as a failure to consider relevant material, taking into account irrelevant material, denial of procedural fairness, asking a wrong question or if the decision is so unreasonable no reasonable decision-maker would have made it.[68]

5.3.25 On occasion, it may become apparent that an error has been made in making the fee reduction decision. This includes, for example, where it comes to light that relevant material has not been taken into account. In such circumstances, it may be appropriate to reconsider the request for a fee reduction and, if it is again refused, give the applicant a further period in which to pay the prescribed fee. However, in the absence of anything to suggest error in the making of the fee reduction decision, it would not appear open to the Tribunal to reconsider the decision. Whether the decision should be revisited will be a matter to be determined on a case by case basis, having regard to all the relevant circumstances.

5.3.26 It does not appear open to a Tribunal member to review or overturn a fee reduction decision of a Tribunal officer. [69] As noted above, the determination of whether the prescribed fee should be reduced due to severe financial hardship is an administrative decision made by a Tribunal officer.

5.3.27 The Migration Act and Regulations are also silent on the issue of whether it is open to the Tribunal to consider a further request for reduction of the fee. While there is no specific prohibition, consideration of a further request does not appear to be anticipated by the legislation. If a further request for reduction of the fee did not 'accompany' the application for review, it is arguable that as it was not given within the prescribed period, it cannot be considered.

5.4 Refund of the Part 5 review fee

5.4.1 In the case of Part 5 [general migration] reviews, the application fee may be refunded in certain limited circumstances. These are prescribed in reg 4.14[70] and

inappropriate to say whether, if the Registrar had been a party to the proceeding, it would have had jurisdiction (i.e. on the basis that the decision was affected by jurisdictional error).

[67] In *Tanto v MIMAC* [2013] FCA 853 the Federal Court noted in *obiter* that while not reviewable by the Tribunal, Tribunal officers' decisions under r 4.13(4) may be reviewable in another forum, on a different statutory basis. See also *Atta v MICMSMA* [2019] FCCA 3594 at [15] and *Begum v MICMSMA* [2020] FCCA 2391 at [15].

[68] See *Auro v MIAC* [2008] HCATrans 248.

[69] In *Tanto v MIMAC* [2013] FCA 853 the Federal Court left undisturbed the Federal Circuit Court's finding that the reg 4.13(4) power to make fee reduction decisions is given to specified Tribunal officers and not to Tribunal members, and that such decisions are not reviewable by the Tribunal (*Tanto v MIMAC* [2013] FCCA 282 at [25]–[26]). However, in *obiter* the Court noted that the basis for the Federal Circuit Court's finding the Tribunal should ordinarily have regard to the disposition of the fee reduction decision was difficult to discern (at [30]). Accordingly, the Court's *obiter* comments cast considerable doubt on the Federal Circuit Court's finding that in considering whether a review application is valid the Tribunal should ordinarily take into account what had happened in relation to a fee reduction request, in case there has been an error in that process. Overall, the Court's comments suggest that the role of the Tribunal Member in relation to fee reduction decisions may be more limited than the Federal Circuit Court's reasons suggest. Similarly, in *Begum v MICMSMA* [2020] FCCA 2391 the Court found at [16] that the Tribunal is bound by the outcome of a fee waiver decision validly made, and at [32]–[33] that the Tribunal member was not empowered to determine, or re-determine, the fee reduction request. That was a matter for the officer authorised under reg 4.13(4). The Tribunal member was not empowered to conduct a review of the officer's refusal of the fee reduction request.

[70] reg 4.14 was amended by the SLI 2011, No 122 on 1 July 2011 made substantial changes to the circumstances in which the refund can be granted and the amount which can be refunded. The refund table in reg 4.14 was again amended by F2018L00819 , item 108 to amend the wording in items 1, 5 and 6 of the table from 'mentioned in reg 4.13(1)" to "the applicant

depend on the date on which the application for review was made (i.e. before or post 1 July 2011).

5.4.2 For review applications made on or after 1 July 2011, the relevant circumstances and the amount which must be refunded are:

- in the case of refunds for severe financial hardship, the applicant has paid the prescribed fee and the Registrar[71] has reduced the fee under reg 4.13(4), 50% of the amount the applicant was required to pay by reg 4.13 is to be refunded;[72]
- if the applicant is not entitled to apply for review by the Tribunal, the prescribed fee is to be refunded in full;[73]
- if the decision to which the application relates is not subject to review by the Tribunal, the prescribed fee is to be refunded in full;[74]
- if the Minister has given a conclusive certificate pursuant to s 339 in relation to the decision, the prescribed fee is to be refunded in full;[75]
- if the decision to which the review is set aside or varied, 50% of the amount the applicant was required to pay by reg 4.13 to be refunded. This may be by the Tribunal or the Court but it must be the primary decision that is the subject of the review which is set aside;[76]
- if the application is remitted to the primary decision maker for reconsideration, 50% of the amount the applicant was required to pay by reg 4.13 is to be

was required to pay by regulation 4.13" applying to all decisions of the Tribunal on or after 1 July 2018. This resulted in that an applicant who has paid a reduced fee will receive half of that fee if their matter is remitted, set aside or varied by the Tribunal. This change relates to all Tribunal decisions on refunds on or after 1 July 2018 regardless of the application date.

[71] Prior to 1 July 2015, the refund provision for fee reductions referred to determinations made by the Registrar, a Deputy Registrar or another officer of the Tribunal. As a result of amendments made by SLI 2015, No 103, from 1 July 2015 this refund provision only refers to a fee reduction determination made by the Registrar (or delegate) of the Tribunal. Nonetheless, where the full fee has been paid and a determination to reduce the fee was made by a previous Registrar, Deputy Registrar or another officer of the then MRT authorised to make such a determination prior to 1 July 2015, an obligation remains to refund 50% of the fee after 1 July 2015: see sch 9, item 15AC(1)(b) of the Amalgamation Act.

[72] Regulation 4.14 was amended by F2018L00819, item 108 to amend the wording in items 1, 5 and 6 of the table from 'mentioned in reg 4.13(1)' to 'the applicant was required to pay by regulation 4.13' applying to all decisions on review application made on or after 1 July 2018. While the matter is not beyond doubt, it is probably only open to the Registrar to make a decision to reduce the fee while an 'application' for review is still current (i.e. before a decision on the review is made). However, if such a decision is made, the refund may take place after the completion of the review.

[73] Item 2 of the table in reg 4.14(1). The Item does not specify the circumstances in which an applicant is not entitled to apply for review, but it can be reasonably inferred that it covers situations where the person listed as the review applicant does not have standing or where the prescribed period has lapsed. In these instances the Tribunal does not have jurisdiction.

[74] Item 3 of the table in reg 4.14(1). This Item does not specify the circumstances in which a decision is not subject to review, but it can be reasonably inferred that it covers situations where the decision is not a Part 5-reviewable decision or where the prescribed period has lapsed. In these instances the Tribunal does not have jurisdiction. This Item does not cover situations where an applicant withdraws their valid review application; reg 4.14(2) specifically addresses situations where the fee may be refunded once a valid review application has been made.

[75] Item 4 of the table in reg 4.14(1).

[76] Item 5 of the table in reg 4.14(1). Note: reg 4.14 was amended by the F2018L00819, item 108 to amend the wording in items 1, 5 and 6 of the table from 'mentioned in reg 4.13(1)" to "the applicant was required to pay by reg 4.13" applying to all decisions of the Tribunal on or after 1 July 2018. This resulted in that an applicant who has paid a reduced fee will receive half of that fee if their matter is remitted, set aside or varied by the Tribunal. This change relates to all Tribunal decisions on refunds on or after 1 July 2018 regardless of the application date.

refunded. Again, this may be by the Tribunal or the Court but it must be the *primary* decision that is the subject of the review which is remitted.[77]

5.4.3 In circumstances where the application fee has been reduced by 50% because of severe financial hardship, *and* the decision is set aside, varied or remitted for reconsideration, the refund will be 50% of the amount the applicant was required to pay. That is, the applicant will be refunded half of the reduced amount.

5.4.4 For review applications lodged both prior to and on or after 1 July 2011, the fee may also be refunded if the application for review is withdrawn, but only if it is withdrawn because:

- the visa applicant, or a member of his or her family unit, or the review applicant has died since the visa application was made;[78]
- the visa applicant has been granted a visa of the class applied for, other than because the Minister has reconsidered the primary application and the applicant's score on the reconsideration was more than or equal to the applicable pass mark (i.e. the applicant was placed in the pool and has now been granted the Skilled visa applied for);[79] or
- in relation to a parent visa[80], the applicant has applied for another parent visa (e.g. a contributory parent visa) after lodging the application for review, and wants a decision made on the other parent visa.[81]

5.5 In what circumstances is the Part 7 review fee payable?

5.5.1 The prescribed fee for review of a Part 7 [protection] reviewable decision is payable within 7 calendar days of the time when notification of the Tribunal decision is deemed to be received in accordance with s 441C.[82] Only one fee is payable in respect of review applications that are combined.[83]

5.5.2 An applicant is not liable to pay the fee if the Tribunal remits a matter to which the decision relates with a permissible direction under reg 4.33.[84] In addition, if a fee has been paid and the Tribunal's decision is remitted by a court for further consideration, no further fee is payable.[85]

[77] Item 6 of the table in reg 4.14(1). Note: reg 4.14 was amended by F2018L00819 , item 108 to amend the wording in items 1, 5 and 6 of the table from 'mentioned in reg 4.13(1)' to 'the applicant was required to pay by regulation 4.13' applying to all decisions of the Tribunal on or after 1 July 2018. This resulted in that an applicant who has paid a reduced fee will receive half of that fee if their matter is remitted, set aside or varied by the Tribunal. This change relates to all Tribunal decisions on refunds on or after 1 July 2018 regardless of the application date.
[78] reg 4.14(2)(a).
[79] reg 4.14(2)(b).
[80] 'Parent visa' means a visa of a class that is specified in Schedule 1 using the word 'parent' in the title of the visa: reg 1.03.
[81] reg 4.14(2)(c).
[82] reg 4.31B(2).
[83] reg 4.31B(4).
[84] reg 4.31B(3) as amended by SLI 2015, No 48.
[85] reg 4.31B(3A) inserted by *Migration Legislation Amendment Regulation 2012 (No 1)* (Cth) (SLI 2012, No 35).

5.6 Refund of the Part 7 review fee

5.6.1 The Part 7 [protection] review fee may be refunded in limited circumstances. The fee is to be refunded or waived, as the case requires, where a matter is remitted to the Tribunal for reconsideration by a court and the Tribunal remits the matter to which the decision relates with a permissible direction under reg 4.33.[86] The fee is also to be refunded or waived if the Minister substitutes for the Tribunal decision a more favourable decision under s 417.[87]

5.7 What happens if the Part 7 review fee is not paid?

5.7.1 If the Part 7 [protection] review fee is payable and has not been paid within the seven day period it becomes a debt which the applicant owes to the Commonwealth. An outstanding debt to the Commonwealth may affect a person's ability to obtain another visa. Schedule 4 to the Migration Regulations sets out Public Interest Criteria (PIC) to be satisfied for the grant of a visa, and includes PIC 4004, which states: 'The applicant does not have outstanding debts to the Commonwealth unless the Minister is satisfied that appropriate arrangements have been made for payment.' PIC 4004 applies to many categories of visas and, as a result, persons who have outstanding debts to the Commonwealth may be refused particular types of visa.

5.7.2 An applicant who has failed to pay the fee may make '*appropriate arrangements*' to pay the outstanding debt and thereby satisfy PIC 4004.

5.8 No jurisdiction decisions

5.8.1 Although not expressly stated in the Regulations, the fee would appear to be payable only in respect of a *review* undertaken (i.e. a review following a valid application for review).

5.8.2 In the case of Part 7 [protection] reviews, the prescribed fee is 'a fee for review by the Tribunal of a 'Part 7-reviewable decision'.[88] Where the Tribunal makes a decision that it has no jurisdiction, it is not conducting a review. Accordingly, no fee is payable when the Tribunal determines that it has no jurisdiction.

5.8.3 Similarly, for Part 5 [migration] reviews, the prescribed fee is for 'an application for review'.[89] In Part 5 cases where a fee has been paid and the Tribunal subsequently determines that it has no jurisdiction, reg 4.14 provides that the fee the applicant was required to pay in reg 4.13 is to be refunded if the applicant is not entitled to apply for review[90] or the decision is not subject to review.[91]

[86] reg 4.31C(1)(a) as amended by SLI 2015, No 48.
[87] reg 4.31C(1)(b).
[88] reg 4.31B(1).
[89] reg 4.13(1).
[90] Item 2 of reg 4.14(1).

5.9 Invalid visa applications

5.9.1 From time to time, the Tribunal will determine that the visa application which was the subject of a decision under review was invalid. Provided the purported decision is a Part 5-reviewable or Part 7-reviewable decision and a valid application for review has been lodged, the Tribunal will be required, nonetheless, to review the decision, although it will be required to set the decision aside and substitute a decision that the visa application cannot be considered.[92] As a result, a fee may be payable in relation to the review.[93]

5.10 Refund of fees where Minister has intervened

5.10.1 Section 351 [Part 5] and 417 [Part 7] empower the Minister, where it is in the public interest to do so, to *substitute* for a decision of the Tribunal another more favourable decision. These powers allow the Minster to make a decision regardless of whether the Tribunal had the power to make that decision.

5.10.2 For Part 5 reviews, there is no specific provision for the refund of fees where the Minister has intervened to substitute for a decision of the Tribunal a more favourable decision. Whether the fee can be refunded depends on whether one of the prescribed grounds for refund applies. This may be the case if the Minister determines that the *primary* decision that is the subject of the review is set aside or varied.[94] However, the mere exercise of the power in s 351 does not in itself result in the setting aside or variation of the primary decision. A determination as to whether this has occurred will ordinarily require consideration of the materials pertaining to the Minister's s 351 decision. Unless the Minister has specifically decided that the primary decision considered by the Tribunal should also be set aside or varied, it would not appear that any of the grounds in reg 4.14 apply to permit a refund of the fee.

5.10.3 In relation to Part 7 reviews, reg 4.31C(1)(b) specifically requires the refund or waiver of a fee if the Minister, under s 417, has substituted for the decision of the Tribunal a decision that is favourable to the applicant.

5.11 Can fees be refunded or waived in any other circumstances?

5.11.1 Under the *Public Governance, Performance and Accountability Act 2013* (Cth) (PGPA Act), there is limited scope for a payment in place of a refund to be made.

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[91] Item 3 of reg 4.14(1).
[92] See *Collector of Customs v Brian Lawlor Automotive Pty Limited* (1979) 24 ALR 307 applied in *Alam v MIMIA* (2004) 187 FLR 120. See also *Yilmaz v MIMIA* (2000) 100 FCR 495 at 514. For further information on the invalidity of visa applications, see Chapter 1 – Visa and related applications.
[93] Although the Explanatory Statement to SR 2003, No 122 makes it clear that 'only unsuccessful review applicants' are intended to be liable for the fee and an applicant with an invalid protection visa application succeeds in having the primary decision set aside, they are still unsuccessful review applicants in the substantive sense of not being recognised as a person to whom Australia has protection obligations.
[94] Item 5 of reg 4.14(1).

There are a number of discretionary compensation mechanisms available to non-corporate Commonwealth entities such as the Tribunal. These are:

- payments made under the Scheme for Compensation for Detriment caused by Defective Administration (the CDDA Scheme);[95]
- payments made under s 65 of the PGPA Act (act of grace payments);
- waiver or modification of the terms and conditions of repayment of a debt under s 63 of the PGPA Act; and
- *ex gratia* payments.[96]

5.11.2 The applicant may apply for an act of grace payment, although this may only be approved by the Finance Minister or delegated officers in the Finance portfolio. The power to waive or modify the terms and conditions of the repayment of a debt is not applicable in circumstances where a refund is being sought, as there is no longer a debt or 'amount owing' for the purposes of s 63 of the PGPA Act.

5.12 Refund of fees for combined applications

5.12.1 Only one review application fee is payable in respect of two or more review applications which are combined.[97] Although not specified in the Act or Regulations, it appears that payment of a single fee is intended to apply to review of the combined application as a whole. Where all applications in a combined application meet the criteria for a fee refund, a single refund in the amount provided for by the Regulations is payable.[98]

5.12.2 The situation is less clear where at least one combined application is remitted, set aside or varied but others in the combined application are affirmed. Although on one view a refund would not be payable unless each and every application within a combined application satisfied the refund provisions, this view is difficult to reconcile with the plain wording of the table in reg 4.14(1) which refers to a favourable outcome in 'the decision' or 'the application'. [99] Because combined application are comprised of multiple applications for review, the better view appears to be that as long as at least one decision or application is to be remitted, set aside or varied, the refund provisions will apply. This is irrespective of the fact that other applications in the combined application are to be affirmed.

[95] CDDA payments are made in reliance on the executive power of the Commonwealth under s 61 of the *Constitution*.
[96] *Ex gratia* payments are made in reliance on the executive power of the Commonwealth under s 61 of the *Constitution*.
[97] regs 4.13(3), 4.31B(4).
[98] reg 4.14(1).
[99] Items 5 and 6 of the table in reg 4.14(1).

5.13 To whom should a refund be paid?

5.13.1 No provision of the Migration Act or Regulations specifically identifies to whom a fee refund should be paid. Regulations 4.14 and 4.31C both state that the fee 'is to be refunded' but go no further. However, given that the legislation suggests that the fee is required to be paid by the review applicant (or at least by another person on the review applicant's behalf)[100], in the absence of a contrary indication, it is consistent with the legislation to refund the fee to the review applicant.

5.13.2 The position is more complicated in cases where a combined application has been made. In such cases, only one fee is required to be paid, although two or more review applicants have applied together. In these cases, if the fee has been paid by cheque or credit card, the identity of the payer may be ascertained from the details on the cheque or credit card. If that person was a review applicant, it may be appropriate to refund the fee to that person.

5.13.3 From time to time, migration agents write cheques from their trust accounts for the payment of review application fees on behalf of their clients. However, trust money remains the money of the client which the migration agent holds on his or her behalf for the purpose of covering any costs and disbursements. Where a fee is to be refunded in such cases, it may still be appropriate for the Tribunal to issue a cheque in the name of the client/review applicant.

5.13.4 If a fee is to be refunded because the review applicant has died and there are no surviving review applicants, the Tribunal should attempt to ascertain the identity of the executor or administrator of the review applicant's estate. If upon provision of suitable evidence, including the review applicant's death certificate, and a copy of the will or court order, that person's identity can be verified, the fee may be refunded to the executor or administrator on behalf of the estate.

[100] See ss 347, 412 which identify the person with standing to apply for review and the requirements for making a valid application for review. An inference is open that, as only certain persons may make a valid application for review, the fee, where it is required to be paid, must also be paid by that person (or an agent acting on his or her behalf).

6. CONSTITUTION AND RECONSTITUTION

6. CONSTITUTION AND RECONSTITUTION[1]

6.1 Constitution of a review under Part 5 and Part 7 of the Migration Act

6.1.1 From 1 July 2015 the powers and procedures relating to the constitution of the Tribunal for review are set out in the *Administrative Appeals Tribunal Act 1975* (Cth) (the AAT Act).[2] Such powers rest with the President of the Tribunal, although they have largely been delegated.[3]

6.1.2 Prior to 1 July 2015, the powers and procedures for the constitution of review applications under Part 5 [migration] and Part 7 [protection] of the *Migration Act 1958* (Cth) (the Migration Act) were vested in the Principal Member and were set out in the Migration Act.[4] There were some statutory differences between the constitution requirements for reviews under Parts 5 and 7.[5] However, the processes are now the same under the provisions in the AAT Act.

6.1.3 The President's Direction - Constituting the Tribunal outlines how the Tribunal is to determine which member or members will constitute the Tribunal for the review of a decision or for the purposes of any other proceeding in the Tribunal. It applies to all proceedings in the Tribunal.

6.1.4 Cases are allocated and constituted in accordance with the caseload and constitution policy set out in the President's Direction - Prioritising Cases in the Migration and Refugee Division.

6.2 Constitution process

6.2.1 In a proceeding under Part 5 and Part 7 of the Migration Act, the Tribunal may be constituted by up to three members in accordance with a written direction issued by the President of the Tribunal (or their delegate).[6] However, a review *must* not be constituted by more than three members[7] and cannot have more than one

[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Migration Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Migration and Refugee Division (MRD) Legal Services.
[2] ss 19A, 19B and 19D of the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act) as inserted by the *Tribunals Amalgamation Act 2015* (Cth) (Amalgamation Act).
[3] 'Delegations and Authorisations pursuant to subsection 10A(2) and 59A(1) *Administrative Appeals Tribunal Act 1975*' (27 October 2015) instrument.
[4] The constitution powers under ss 354–357 [Part 5 - migration] and ss 421–422A [Part 7 - protection] of the Migration Act were repealed by the Amalgamation Act. Constitutions prior to 1 July 2015 remain valid: sch 9, items 15AB and 15CB of the Amalgamation Act).
[5] For example, previously for a Part 7-reviewable decision the Tribunal could only be constituted by a single Member, whereas for a Part 5-reviewable decision the Tribunal could be constituted by up to 3 Members.
[6] s 19A(1) of the AAT Act. The President has delegated this power to Deputy Presidents and to Senior Members: see item [6] of sch A to the 'Delegations and Authorisations pursuant to subsections 10A(2) and 59A(1) of the *Administrative Appeals Tribunal Act 1975*' (27 October 2015) instrument.
[7] Unless provided for in another provision of the AAT Act or another enactment: s 19B(1)(a) of the AAT Act.

constituted member who is a judge.[8] Where a matter has been constituted to more than one member, the President may give a written direction specifying which member is to preside.[9]

6.2.2 A non-presidential member may only exercise or participate in the exercise of powers of the Tribunal in the Division to which they are assigned.[10] However, this does not apply to a presidential member, being the President or a Deputy President,[11] who is automatically on every Division of the Tribunal.[12]

6.2.3 Under the terms of the AAT Act, the President is required to be a judge of the Federal Court, while a Deputy President must be either: a judge of the Federal or Family Court; a legal practitioner of 5 years standing; or a person who the Governor General considers has special knowledge or skills relevant to the role.[13]

6.2.4 At any time before the hearing of a proceeding commences[14], the powers of the Tribunal in relation to a proceeding can be exercised by the President or an authorised member.[15]

Requirement for a written direction?

6.2.5 The AAT Act provides that the President or their delegate may give a written direction about members who are to constitute the Tribunal for the purposes of a proceeding.[16] However a written direction may not be required in every case.

6.2.6 In *Cabal v MIMA*, the Federal Court held that, while there is a procedural requirement for a direction to be given, if a direction other than one in writing were given, then the Tribunal's authority to proceed with the review would not be invalidated.[17]

6.2.7 However, if a direction (whether written or otherwise) is given by a person without

[8] Unless provided for in another provision of the AAT Act or another enactment: AAT Act s 19B(1)(b) as amended by item 29 of sch 1 to the *Courts and Tribunals Legislation Amendment (2021 Measures No 1) Act 2022* (Cth).
[9] AAT Act s 19A(1)(b).
[10] s 17C(4) of the AAT Act as inserted by the Amalgamation Act. However, s 17C does not affect the validity of any exercise of powers by the Tribunal: AAT Act s 17J. Therefore, it appears that if a non-presidential member exercises powers in a Division to which they are not assigned, the exercise of that power will not be invalidated because the member was not assigned to that Division (although it may be affected by a jurisdictional error, for example, if the power was exercised unreasonably).
[11] The term 'presidential member' is defined in s 3(1) of the AAT Act to be the President or a Deputy President.
[12] AAT Act s 17C(4).
[13] ss 7(1) and (2) of the AAT Act as inserted by the Amalgamation Act.
[14] The phrase 'hearing of a proceeding' is not defined and is open to interpretation. At its earliest, the hearing of a proceeding may be said to have commenced with the constitution of a matter however a later point may also be arguable, such as with the specific event of the applicant appearing before the Tribunal.
[15] s 19B(2) of the AAT Act. The President has authorised all Deputy Presidents, Senior Members and Members as 'authorised members' under s 19B(2): see item [1] of sch B to the 'Delegations and Authorisations pursuant to subsections 10A(2) and 59A(1) *Administrative Appeals Tribunal Act 1975*' (27 October 2015) instrument. There are exceptions to this provision which are set out in s 19B(3) of the AAT Act. Specifically s 19B(2) will not apply to an exercise of the powers under s 34J of the AAT Act (circumstances in which the hearing may be dispensed with); s 43 of the AAT Act (Tribunal's decision on review); s 59 of the AAT Act (advisory opinions); and if another provision of the AAT Act or other enactment requires or permits a power to be exercised by one or more persons or by the Tribunal constituted in a specified way. It is unlikely that these exceptions would arise in respect of a review of a decision under Part 5 or 7 of the Migration Act.
[16] AAT Act s 19A(1)(a).
[17] *Cabal v MIMA (No 4)* [2000] FCA 1806 at [56]. The Court considered the facultative language in ss 354(2) and 421(2) of the Migration Act as compared with the use of 'shall' and 'must' in ss 355(2) and 422(1) of the Migration Act. While this case considered the now repealed provisions of the Migration Act, given that s 19A(1) of the AAT Act is drafted in similar terms to ss 354(2) and 421(2), it is likely that this reasoning would apply equally to s 19A(1).

the appropriate delegation, the Member purporting to decide the review may lack the jurisdiction to do so, resulting in an invalid decision.[18]

6.2.8 The Tribunal's practice is for a constitution schedule to be drafted by the Caseload Strategy Section which identifies cases requiring constitution and proposing allocations according to priorities and caseload strategy. This is then signed by the President or their delegate and is regarded as a 'written direction' about who is to constitute the Tribunal for the purpose of a review under Part 5 and 7 of the Migration Act.

6.3 Power to reconstitute a review

6.3.1 The President of the Tribunal (or their delegate) has the power to reconstitute a review under Part 5 or Part 7 of the Migration Act.[19] The grounds upon which a matter can be reconstituted are specified in s 19D of the AAT Act and depend on whether or not the hearing of a proceeding has commenced.[20]

Reconstitution before hearing commences

6.3.2 The power to reconstitute a matter where the hearing of a proceeding has not commenced is set out in s 19D(1) of the AAT Act. Under this provision, the President or their delegate may reconstitute a matter at any time and issue a new direction as to who can constitute the Tribunal for the purpose of the proceeding.[21] There are no specified grounds upon which a matter can be reconstituted prior to the hearing of a proceeding commencing. Rather, this provision is broad enough to encompass any reason.

Reconstitution after hearing commences

6.3.3 Section 19D(2) of the AAT Act sets out the reconstitution power in cases where the hearing of a proceeding has commenced, but before the Tribunal has determined the proceeding.[22] In this instance, a matter may be reconstituted in one of four circumstances:

- firstly, where the Member, or one of the Members, who constitutes the

[18] *SZARJ v MIMA* [2004] FMCA 557 at [15]. While this case considered the now repealed provisions of the Migration Act, this reasoning would appear to apply equally to ss 19A–19D of the AAT Act.
[19] The President has delegated the power to reconstitute matters to Deputy Presidents and to Senior Members: see items [8] and [9] of sch A to the 'Delegations and Authorisations pursuant to subsections 10A(2) and 59A(1) *Administrative Appeals Tribunal Act 1975*' (27 October 2015) instrument. However, the power conferred by s 19D(2)(a)(ii) of the AAT Act to direct that a member not take part in a particular proceeding has not been delegated and can only be exercised by the President personally; see column 4 of item [9] of sch A to the instrument of delegation.
[20] s 19D(1) applies before the hearing of a proceeding has commenced; s 19D(2) applies after the hearing of a proceeding has commenced but before the Tribunal has determined the proceeding. The phrase 'hearing of a proceeding' is not defined and is open to interpretation. At its earliest, the hearing of a proceeding may commence with the constitution of a matter however a later point may also be arguable, such as with the specific event of the applicant appearing before the Tribunal.
[21] AAT Act s 19D(1).
[22] AAT Act s 19D(2). This does not apply to a matter under the Security Division of the AAT.

Tribunal stops being a member;[23]

- secondly, where the Member is for any reason unavailable;[24]
- thirdly, where the Member is directed by the President not to take part in the proceeding;[25] and
- finally, in the interests of achieving the expeditious and efficient conduct of the proceeding.[26]

6.3.4 In each of these circumstances, a matter must not be reconstituted unless it is in the interests of justice to do so and each member who will, as a result of the reconstitution, cease to be a member of the Tribunal (as constituted for the purpose of the proceeding) has been consulted where it is reasonably practicable to do so (see discussion below).[27]

6.3.5 Except the power to direct that a member not take part in a review which can only be exercised by the President,[28] the power to reconstitute a matter where the hearing of a proceeding has commenced can be exercised by the President or an authorised member.[29]

6.3.6 There is no express provision allowing for the reconstitution of a matter after a decision has been made on a review. However, as a decision that is affected by jurisdictional error is not a decision at all, there would be no prohibition on reconstitution in such cases.

Reconstitution - unavailability of member

6.3.7 A matter can be reconstituted following commencement of the hearing if the Member stops being a member or, for any reason, is not available for the purpose of the review.[30]

6.3.8 A matter can also be reconstituted under this ground if the Member is directed by the President (or delegate) not to take part in the proceeding, however the President (or delegate) must be satisfied that it is in the interests of justice to give such a direction, and has consulted each Member who as result will cease to be a

[23] AAT Act s 19D(2)(a)(i).
[24] AAT Act s 19D(2)(a)(ii)
[25] s 19D(2)(a)(iii) of the AAT Act. Section 19D(5) further provides that the President must not issue a direction to a member not to take part in a particular matter unless he is satisfied that it is in the interests of justice to do so; and he has consulted the Member concerned where it is reasonably practicable to do so This power can only be exercised by the President personally pursuant to the terms of item [9] of sch A to the 'Delegations and Authorisations pursuant to subsections 10A(2) and 59A(1) *Administrative Appeals Tribunal Act 1975*' (27 October 2015) instrument.
[26] AAT Act s 19D(2)(b).
[27] AAT Act ss 19D(5)–(6) as amended by items 33–34 of sch 1 to the *Courts and Tribunals Legislation Amendment (2021 Measures No 1) Act 2022* (Cth).
[28] See column 4 of item [9] of sch A to the 'Delegations and Authorisations pursuant to subsections 10A(2) and 59A(1) *Administrative Appeals Tribunal Act 1975*' (27 October 2015) instrument.
[29] The President has delegated the power to Deputy Presidents and to Senior Members: see item [9] of sch A to the 'Delegations and Authorisations pursuant to subsections 10A(2) and 59A(1) *Administrative Appeals Tribunal Act 1975*' (27 October 2015) instrument.
[30] AAT Act ss 19D(1), 19D(2)(a)(i)–(ii).

member of the Tribunal as constituted (see discussion below).[31]

6.3.9 A member may generally be regarded as 'not available' for the purposes of reconstitution if, for example, the Member is ill, dies, resigns, takes leave, is unable to travel, makes him or herself unavailable due to a perceived conflict of interest[32] or where the circumstances of the case could give rise to a reasonable apprehension of bias.[33] This premise does not extend to a member who is, by order of a superior court, precluded from being constituted as the Tribunal on a particular review.[34]

Reconstitution - Member directed not to take part

6.3.10 A matter may also be reconstituted where the President has issued a direction that a member not take part in a proceeding.[35] Importantly, the power to issue a direction of this kind has not been delegated and can only be exercised by the President personally.[36]

6.3.11 The President must not issue such a direction unless satisfied it is in the interests of justice to do so and has consulted the Member concerned, where it is reasonably practicable to do so (see discussion below).[37]

6.3.12 In reconstituting a matter on this ground the President must have regard to the Tribunal's objective in s 2A of the AAT Act.[38]

Reconstitution - Expeditious and efficient conduct of a review

6.3.13 Under s 19D(2)(b) the President may reconstitute a matter, in the interests of achieving the expeditious and efficient conduct of the review in accordance with the Tribunal's objectives set out in s 2A of the AAT Act.[39]

6.3.14 Limitations apply to reconstitution under s 19D(2)(b). Specifically, the President (or delegate) must be satisfied that it is in the interests of justice to reconstitute the proceeding; and must consult each Member who as a result ceases to be a member of the Tribunal as constituted where it is reasonably practicable to do so

[31] AAT Act s 19D(6)(a).
[32] s 14 of the AAT Act as inserted by the Amalgamation Act requires Members to disclose any conflict of interest in relation to a proceeding to the parties; and to the President (or if the President is the Member, to the Minister). The Member must not take part in a proceeding or exercise any power in relation to a proceeding unless the parties and the President (or Minister) consents. A conflict of interest is defined in s 14(2) of the AAT Act. Where the President becomes aware of a conflict, they may direct the Member not to take part in the proceeding; or if no such direction is issued, must ensure the Member discloses the conflict to the parties: AAT Act s 14(3).
[33] See for example *SZBLY v MIAC* (2007) 96 ALD 70 at [32] where the Court held that, in circumstances where the Tribunal had affirmed the delegate's decision on credibility grounds but later recalled and reconsidered its decision in response to new information, the matter should have been reconstituted for the second decision. Note this considered the operation of the Tribunal under Part 7 of the Migration Act but the principles are equally applicable to the AAT.
[34] See *obiter dicta* in *MZZZW v MIBP* [2015] FCAFC 133 at [87].
[35] AAT Act s 19D(2)(a)(iii).
[36] See column 4 of item [9] of sch A to the 'Delegations and Authorisations pursuant to subsections 10A(2) and 59A(1) *Administrative Appeals Tribunal Act 1975*' (27 October 2015) instrument.
[37] AAT Act s 19D(5).
[38] As set out in s 2A of the AAT Act: see s 19D(7) of the AAT Act.
[39] AAT Act ss 19D(2)(b),19D(7).

(see discussion below).[40]

Interests of justice and consultation with member concerned

6.3.15 Before directing that a proceeding be reconstituted the President must be satisfied that it is in the interests of justice to do so. In *AZAAA v MIAC* for example, the Court expressed the view that there may be reasons giving rise to jurisdictional error where the justice of the case clearly requires the appointment of another Tribunal member to conduct the review.[41] However this can be contrasted with the then President of the AAT's own views in *1419015 (Migration)*[42] that the correction of errors, subject to rare and exceptional circumstances, must be for the courts and not the President of the AAT. Ultimately whether it is in the interests of justice for a proceeding to be reconstituted will turn upon the particular facts of each case.

6.3.16 In addition to being in the interests of justice, the President must also consult with the Member concerned where it is reasonably practicable to do so.[43] There is no specified process for the consultation, but is to be done in a way which is considered reasonable in all the circumstances.[44]

General requirements

6.3.17 The Tribunal's current practice for reconstituting matters in the Migration and Refugee Division is essentially the same as for constitutions. That is, the President (or his delegate) gives a direction in the form of a signed constitution schedule which has been prepared by the Caseload Strategy Section.

6.3.18 In all cases of reconstitution the President or his delegate has regard to the Tribunal's objective of providing a mechanism of review that is: accessible; fair, just, economical, informal and quick; is proportionate to the importance and complexity of the matter; and which promotes public trust and confidence in the decision-making of the Tribunal.[45]

6.3.19 Where a proceeding has been reconstituted, the new Tribunal must continue the proceeding.[46] In doing so, it *may* have regard to any record of the proceeding

[40] AAT Act s 19D(6)(b).
[41] *AZAAA v MIAC* [2009] FCA 554 at [35]. The Court identified jurisdictional error where the Member had formed an adverse view about the credit of the visa applicant or where the jurisdictional error is based upon a finding of bias in the Member making the initial decision as reasons for which reconstitution would be required. Note this considered the operation of the Tribunal under Part 7 of the Migration Act but the principles are equally applicable to the AAT.
[42] *1419015 (Migration)* [2016] AATA 3075. In this case, the applicant requested the matter be reconstituted by the President based upon an allegation that the Member was unsympathetic and lacked sensitivity during the hearing. In refusing the request, the President held that it would not ordinarily be in the interests of justice for the power in s 19D(2)(a)(iii) to be exercised in respect of alleged conduct that could otherwise be addressed by an application for recusal which, if refused, could be subject to judicial review. It was also in the interests of justice that recusal requests were dealt with publicly as that helped ensure members remained accountable in an open and transparent way for the fairness of the procedures they have adopted (at [27] to [47]).
[43] AAT Act ss 19D(5)–(6).
[44] See for example *1419015 (Migration)* [2016] AATA 3075 at [49]–[54] in which the President detailed his consultation with the presiding Member before deciding whether or not exercise his power in s 19D(2)(a)(iii). The Member in that case agreed to take no further action in the case until seven days after the President's decision was made.
[45] As set out in s 2A of the AAT Act: see s 19D(7) of the AAT Act.
[46] AAT Act s 19D(4).

before the Tribunal as previously constituted, including a record of any evidence taken in the proceeding.[47]

6.3.20 There is no express provision allowing for the reconstitution of a matter after a decision has been made on a review. However, as a decision that is affected by jurisdictional error is not a decision at all, and there would be no prohibition on reconstitution in such a case.

Effect of error in the reconstitution process

6.3.21 Even if the wrong legislative provision is relied upon in reconstituting the Tribunal there will not be a jurisdictional error invalidating the Tribunal decision.

6.3.22 For example, in *SZLQK v MIAC*[48] and *SZFTD v MIAC*,[49] the Court held that the then Principal Member had the power to constitute and reconstitute the Tribunal and that power had been exercised notwithstanding that the constitution schedule referred to the wrong section of the relevant Act (in this case the provisions of the Migration Act which were repealed on 1 July 2015).

6.3.23 Further in *SZFTD v MIAC*, the Court found that it was not crucial to which section the schedule referred. The fact was that the then Principal Member was exercising his power to direct who was to constitute the Tribunal for the purpose of the review. Nothing was done that was beyond power. The direction to constitute the Tribunal was therefore valid.[50]

6.3.24 Similarly, in *SZLQK v MIAC*, the Court held that the sections dealing with the constitution of the Tribunal are not bound up with any of the essential tasks of the Tribunal, or of the processes designed to give procedural fairness to an applicant, and therefore do not go to the Tribunal's jurisdiction.[51]

Reconstitution following court remittal

Source of power to reconstitute on remittal

6.3.25 Under the current statutory regime, a matter may be reconstituted following remittal under s 19A(1) of the AAT Act. Section 19A(1) the AAT Act contains the general power to constitute a matter before the Tribunal and is drafted in broadly equivalent terms to the repealed ss 354/421 of the Migration Act. Judicial authority supports that the general power to constitute a matter can be relied upon to reconstitute a

[47] AAT Act s 19D(4).
[48] *SZLQK v MIAC* (2008) 102 ALD 152.
[49] *SZFTD v MIAC* (2007) 215 FLR 232.
[50] *SZFTD v MIAC* (2007) 215 FLR 232 at [14]. Turner FM found at [21] that the Tribunal was validly constituted following the remittal. Although the judgment indicates that His Honour presumed this to be done under s 422A, in light of earlier references to s 422 in the judgment and his Honour's previous judgment on this issue in *S1607 of 2003 v MIAC* [2007] FMCA 1740, it is possible that this was a typographical error and should be read as a reference to s 422. *SZFTD* was followed in *SZGIC v MIAC* [2008] FMCA 784 at [24]. This issue was not raised on appeal: *SZGIC v MIAC* (2009) 109 ALD 101.
[51] *SZLQK v MIAC* (2008) 102 ALD 152 at [52]. However, the Court did note that different considerations might have arisen if the

matter on Court remittal.[52]

6.3.26 The Tribunal generally makes the basis for reconstitution clear by documenting the power for reconstitution following remittal.[53]

6.3.27 Judgments of the Federal Magistrates Court and Federal Court have considered this issue in the context of reviews under Part 5 and Part 7 of the Migration Act prior to 1 July 2015. The Court has suggested that the powers under the now repealed ss 354/421 [general power to constitute],[54] ss 355/422 [unavailability of member][55] or ss 355A/422A [efficient conduct of reviews under Part 5 and Part 7][56] were the correct source of the power for the reconstitution of the Tribunal following a remittal.

Must the review be reconstituted to a new member on remittal?

6.3.28 There is no absolute rule that a proceeding must be reconstituted to a new member following remittal, although in some circumstances it may be desirable to do so.

6.3.29 In *SZEPZ v MIMA*, a Full Court of the Federal Court observed that, until the Tribunal has made a valid decision on the review that has been initiated by a valid application, it has a duty to perform that particular review.[57] The Court considered that, although an invalid decision by the Tribunal is no decision at all, it did not follow that all steps and procedures taken in arriving at that invalid decision were themselves invalid.[58]

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power under s 421 was utilised to effect a change in the Member where no cause at all could be identified at [52].

[52] In *SZGLL v MIAC* [2008] FMCA 631, the Court considered that, following remittal of a matter by a Court, the Tribunal should be 'constituted' under s 421 and not 'reconstituted' in the s 422 or s 422A sense. In *AZAAA v MIAC* [2009] FCA 554, the Federal Court considered that the constitution power in s 421 was unlimited except by its context and that the Principal Member can exercise the power in s 421 again after a remittal, subject only to circumstances that attract the potential application of ss 422 or 422A, or where the exercise of the power would be seen as interfering with the independent function of the reviewing Member under s 421(1) at [32]–[37]. The Court observed that the original Member does not become 'unavailable' simply because a matter is remitted. See also *AZAAD & AZAAE v MIAC* [2010] FMCA 62 at [30]–[31].

[53] See *obiter dicta* in *MZZZW v MIBP* [2015] FCAFC 133 at [95]. In that case, the Full Federal Court was critical about the lack of evidence relating to the power used by the Tribunal to previously reconstitute the case and indicated that it would be appropriate for reconstitution to be recorded by the Tribunal in a way which enables any reviewing court to discern the power on which the reconstitution was understood to depend.

[54] In *SZGLL v MIAC* [2008] FMCA 631, the Court considered that, following remittal of a matter by a Court, the Tribunal should be 'constituted' under s 421 and not 'reconstituted' in the s 422 or 422A sense. In *AZAAA v MIAC* [2009] FCA 554, the Court considered the constitution power in s 421 was unlimited except by its context and that the power in s 421 can be exercised again after a remittal, subject only to circumstances that attract the potential application of ss 422 or 422A, or where the exercise of the power would be seen as interfering with the independent function of the reviewing Member under s 421(1). The Court observed that the original Member does not become 'unavailable' simply because a matter is remitted. See also *AZAAD & AZAAE v MIAC* [2010] FMCA 62 at [30]–[31].

[55] In *NBMB v MIAC* (2008) 100 ALD 118, the Court suggested a member could be said to be unavailable following remittal by a court. The Court was reinforced in its view by the words 'for any reason' in the relevant provisions. See also *S1607 of 2003 v MIAC* [2007] FMCA 1740 at [30] where this issue was not raised on appeal: *S1925 of 2003 v MIAC* [2008] FCA 246. In *SZEPZ v MIMIA* [2005] FMCA 1614, the Court held that the effect of consent orders was to require or justify a direction reconstituting the Tribunal under s 422 and inferred, on the basis of a presumption of regularity, that a direction had been given under s 422 whereby another Member of the Tribunal was appointed to constitute the Tribunal for the purposes of the review. Accordingly, by force of s 422(2), the second Member of the Tribunal was authorised to continue the review and to exercise his discretion to have regard to any record of the proceedings of the review made by the Tribunal as previously constituted at [19]–[20]. On appeal, the Federal Court was not required to determine whether the Tribunal was properly reconstituted: *SZEPZ v MIMIA* (2006) 159 FCR 291. The judgments of the Full Court in *SZHKA v MIAC* (2008) 172 FCR 1, also appear to assume (without expressly deciding) that the Tribunal was reconstituted after the remittals pursuant to s 422. See Gray J at [22], Gyles J at [32] and Besanko J at [92].

[56] In *SZLQK v MIAC* (2008) 102 ALD 152, the Court found that upon remittal it would be inappropriate for the same Member to constitute the Tribunal, in which case he or she would be 'unavailable' in the s 422 sense, and therefore the correct power to reconstitute the Tribunal would be s 422A as it dealt with reconstitution other than on grounds of unavailability.

[57] *SZEPZ v MIMA* (2006) 159 FCR 291.

[58] *SZEPZ v MIMA* (2006) 159 FCR 291 at [39]. The High Court, upon hearing an application for special leave to appeal from

6.3.30 In *MZXRE v MIAC*, the Full Federal Court agreed that, while it would have been open to the then Principal Member to direct that another member constitute the Tribunal following a remittal, it was not incumbent upon him or her to do so.[59] Justice Graham found that the applicant had no right to have their review application determined by a different Tribunal member.[60]

6.3.31 While not dealing directly with a remittal, in *SZBLY v MIAC* the Court held that, in circumstances where the Tribunal had affirmed the delegate's decision on credibility grounds but later recalled and reconsidered its decision in response to new information, the matter should have been reconstituted for the second decision.[61] It would otherwise be open for a fair minded and informed person to reasonably apprehend that the original Member would not bring an impartial mind to bear in making the second decision.

6.3.32 Even if it is open to the original Member to complete the review following a remittal there may be reasons in some cases why it is undesirable for the original Member to do so. Having previously made an unfavourable decision, a fair minded observer might reasonably apprehend that the Member will not bring an open mind to the finalisation of the review. This will clearly be the case where the original decision was set aside due to actual or apprehended bias. A similar concern arises where the Member previously made adverse credibility findings in relation to the applicant or their witnesses.[62] Such circumstances may cause the Member to be 'not available' for the purposes of the review.

6.3.33 However, re-constitution to the same Member upon remittal from a court where the first review was conducted without a hearing will not of itself give rise to a reasonable apprehension of bias.[63] Rather, what is relevant will be the processes and findings of the first Tribunal.

6.3.34 The remittal orders may occasionally give an indication as to how the review is to be completed. The High Court in *MIMA v Wang* held that, where it was 'necessary to do justice' to a matter, the Full Federal Court had the power to remit a matter to the original Tribunal.[64] However, the majority decided that such an order did not

this decision saw no reason to doubt the correctness of this proposition: *SZEPZ v MIAC* [2008] HCATrans 91 (8 February 2008).

[59] *MZXRE v MIAC* (2009) 176 FCR 552 at [33], [74].

[60] *MZXRE v MIAC* (2009) 176 FCR 552 at [74]. Compare also North and Rares JJ at [5] with *SZHKA v MIAC* (2008) 172 FCR 1 at [37] where, without deciding whether the Tribunal is obliged to conduct a review *de novo* whenever a matter is remitted, Gyles J, with whom Gray J agreed, suggested that, following a remittal, the whole of the relevant decision-making process must take place again. It may be inferred from the majority's observations that the Tribunal should be reconstituted in every case where there is a remittal.

[61] *SZBLY v MIAC* (2007) 96 ALD 70 at [32]. Note this considered the operation of the Tribunal under Part 7 of the Migration Act.

[62] In *MZZXM v MIBP* [2015] FCCA 609, the Court commented at [57] that if the Tribunal had made extensive findings of credibility adverse to the applicant it would at least be prudent to refer the matter to another Member for rehearing on remittal, but in the circumstances of the case, where the Member on remittal considered the applicant's submissions made after the first decision and more recent country information, no reasonable apprehension of bias arose.

[63] In *MZZYD v MIBP* [2014] FCCA 1894, the Tribunal decision was quashed on the basis of a denial of procedural fairness after the applicant did not attend the hearing due to illness. On remittal, the matter was constituted to the same Member. In dismissing the applicant's claim of perceived bias, the Court noted there was no criticism at judicial review in the first instance of the process, findings or behaviour of the Member suggesting bias, and that the applicant had the opportunity at the second hearing to address the lack of evidence upon which the original decision had turned. Upheld on appeal in *MZZYD v MIBP* [2015] FCA 60.

[64] *MIMA v Wang* (2003) 215 CLR 518.

preserve the findings of the original Member that were favourable to the outcome of the application.[65] By contrast, the Full Federal Court in *SZEPZ v MIMA* expressed the view that there must be real doubt as to whether the Federal Magistrates Court could direct how the Tribunal should be constituted, having regard to the express constitution powers conferred by the relevant Act.[66] Nonetheless, orders are still made from time to time that a matter be remitted to a differently constituted Tribunal. The President of the Tribunal (or their delegate) has regard to a Court's view when considering how the Tribunal is to be constituted for the reconsideration.

Progressing court remittals where the remitting judgment is the subject of an appeal

6.3.35 Following a court remittal, the Minister may lodge an appeal of the judgment in a higher court. The Tribunal generally waits for the appeal period to lapse before progressing the matter. If the Minister does appeal the judgment, the Tribunal generally waits for the outcome of the appeal. This is because if the Minister is successful in their appeal, the Tribunal decision may be valid (and operative) such that the Tribunal would not need to be reconstituted. Where a matter remitted by a court is not itself subject to an appeal but is likely to be affected by the appeal of another Tribunal matter, the Tribunal may await the outcome of that appeal before progressing the matter.

6.3.36 Despite the Tribunal's general position to await the outcome of an appeal, there may be circumstances where the Tribunal considers it appropriate (and necessary) to progress a matter where it is subject to an appeal in a court. This may include, for example, where the applicant is in immigration detention or where an applicant seeks to have their matter progressed, and there is no stay on the orders of the Court.[67] The Federal Court in *FAK19 v MICMSMA (No 2)* considered the application of an applicant to have the Tribunal progress their remitted matter.[68] The matter concerned a Tribunal decision in the General Division where the Full Court of the Federal Court had remitted the matter to the Tribunal, granting the applicant relief declaring that the decision of the Tribunal was quashed and that the Tribunal, differently constituted, was to determine the review in accordance with the law. The Minister had then applied for special leave to appeal to the High Court from the judgment and that application had not yet been determined. The Tribunal had issued a direction stating it would only progress the matter based on the outcome of the Minister's special leave application in the High Court.[69] The applicant was in correctional custody but faced the prospect of being taken into immigration detention at the end of his sentence as he did not hold a visa. If, however, the Tribunal made a favourable decision, his visa cancellation would be set aside and

[65] *MIMA v Wang* (2003) 215 CLR 518 at [18], [45], [68]–[78]. Note that the case considered the use of the remittal power of the Federal Court under s 481 of the Migration Act, which has since been repealed, and it is unclear whether the Courts retain any power to direct who is to constitute the Tribunal where relief is granted by writ of mandamus.
[66] *SZEPZ v MIMA* (2006) 159 FCR 291 at [36]. See also *MZXRE v MIAC* (2009) 176 FCR 552 at [5].
[67] The Tribunal would generally progress a matter to ensure that an applicant's time in immigration detention is not prolonged because of the Tribunal's delay.
[68] *FAK19 v MICMSMA (No 2)* [2021] FCA 1571.
[69] *FAK19 v MICMSMA (No 2)* [2021] FCA 1571 at [7]. The directions were made on the basis that a decision of the High Court may nullify any decision of the Tribunal and therefore, the matter did not require prioritisation.

he would be a lawful non-citizen. In finding in favour of the applicant's application to have the matter progressed at the Tribunal without waiting for the special leave application, the Federal Court held that the Tribunal was required to comply with the orders of the Court to determine the application in accordance with the law, and that the applicant had the benefit of orders of a superior court, binding on the Tribunal, that its first decision was affected by jurisdictional error.[70] The Court noted that it was open to the Minister or Tribunal to seek a stay on the orders of the Court to suspend the operation of the orders pending the outcome of the special leave application, but that in the absence of a stay, the orders remained operative and binding on the Tribunal.[71] The Court acknowledged that the Tribunal's efforts in progressing the review on remittal might ultimately prove to be a waste of its resources if the first decision was found to not contain jurisdictional error, and there may be some uncertainty about which decision is the operative decision until the special leave application was determined, but that this is the consequence of not applying for a stay.[72]

6.4 Effect of reconstitution on review proceedings

6.4.1 Where a direction is given to reconstitute the Tribunal, the AAT Act requires the reconstituted Tribunal to continue the proceeding.[73] In completing a reconstituted review, the Tribunal may have regard to any record of the proceeding as previously constituted.[74] This includes any record of evidence taken in the proceeding.[75] This may, for example, extend to an audio recording of a hearing held by a member prior to the reconstitution of the Tribunal, or a written summary of such a hearing made by the previous Tribunal.[76] Where the Tribunal was reconstituted because of the unavailability of the Member, the Court, in *MZXSP v MIAC*, found that 'record' includes a draft decision and accordingly, a reconstituted Tribunal could include verbatim passages from a draft decision prepared by the previous Member so long

[70] *FAK19 v MICMSMA (No 2)* [2021] FCA 1571 at [52]–[55]. The Court held that the finding of non-compliance by the Tribunal was 'plainly open' by reference to the Tribunal's decision not to conduct a substantive hearing until it was known that the orders of the Court were preserved by the High Court, and that the review was required to be conducted at the earliest practicable opportunity but it was not necessary to be more specific than that. Although noting that the original order of the Court was not a writ of mandamus, the Court ordered that the Tribunal make a return to the Court within 42 days as to the determination of the review or show cause as to why it has not been done.
[71] *FAK19 v MICMSMA (No 2)* [2021] FCA 1571 at [55].
[72] *FAK19 v MICMSMA (No 2)* [2021] FCA 1571 at [63]–[64].
[73] s 19D(4) of the AAT Act.
[74] s 19D(4) of the AAT Act. See also *SZEPZ v MIMIA* (2006) 159 FCR 291 at [39] and *MIAC v SZGUR* (2011) 241 CLR 594 at [50], which considered now repealed sections of the Migration Act, such as s 422(2) and 422A(3), which concerned the reconstitution of the Tribunal and were similar in effect to s 19D(4) of the AAT Act, and where the Court noted it appeared to be the better view that the Tribunal was entitled to have regard to such material.
[75] s 19D(4) of the AAT Act. The following judgments considered now repealed sections of the Migration Act, such as ss 355(4) and 355A(3), and ss 422(2) and 422A(3), which concerned the reconstitution of the Tribunal and were similar in effect to s 19D(4) of the AAT Act. In relation to reconstitution other than following remittal (e.g. following retirement or resignation of the Presiding Member), see *Liu v MIMA; Ahmed v MIMA* (2001) 113 FCR 541; *NADG of 2002 v MIMIA* [2002] FCA 893; *SZARJ v MIMIA* [2004] FMCA 557; *SZFAS v MIMA* (2006) 201 FLR 312 at [16]. In relation to reconstitutions following remittal, see *SZHXB v MIMA* (2006) 234 ALR 743 applying *SZEPZ v MIMA* (2006) 159 FCR 291; *SZIBW v MIAC* [2008] FCA 160 and *SZMFJ v MIAC* [2009] FMCA 771, not disturbed on appeal: *SZMFJ v MIAC* (2009) 107 ALD 134. See also *SZHKA v MIAC* (2008) 172 FCR 1 J at [22], *SZGEP v MIAC* [2008] FCA 1798 at [32], and *SZMQS v MIAC* [2008] FMCA 1643 at [19], not disturbed on appeal: *SZMQS v MIAC* [2009] FCA 184, and *MIAC v WZANC* (2010) 119 ALD 275.
[76] *MZXSP v MIAC* [2008] FMCA 374 at [42]; *MZABH v MIBP* [2015] FCCA 1111 at [24].

as it brought an independent mind to the review.[77]

Record of proceedings, including evidence, before previously constituted Tribunal

6.4.2 Although the Tribunal on remittal must reconsider the matter afresh, given the administrative nature of the proceedings, as noted above it is nevertheless entitled to have regard to what has previously taken place at the prior Tribunal hearing.[78] A reconstituted Tribunal has a discretion to have regard to a record of the proceeding before the previously constituted Tribunal (including having regard to a record of evidence).[79]

6.4.3 The extent to which the Tribunal *must* consider such a record of the proceeding or evidence before the previously constituted Tribunal has been the subject of judicial consideration. In relation to a reconstitution following a remittal, the Federal Court in *ANI15 v MIBP* held that it was not apparent that a reconstituted Tribunal was obliged to consider evidence before the previously constituted Tribunal as the hearing of a matter that a court remits proceeds as a hearing *de novo* (that is, it is heard afresh and a decision is made on the evidence presented).[80] However, the Federal Court also noted that even if the Tribunal was obliged to consider the evidence before the previously constituted Tribunal, a statement in the reconstituted Tribunal's decision record that it had not read the previously constituted Tribunal's decision record could not be read as the Tribunal not considering the evidence before the previously constituted Tribunal in circumstances where the evidence before both Tribunals appeared to be similar.[81] In reaching its conclusion on whether the Tribunal has an obligation to consider evidence before the previously constituted Tribunal, the Court did not have to consider the procedural implications of not exercising the discretionary power to have regard to the record of the proceedings in circumstances where it may have led to the Tribunal not considering a claim or evidence that was raised with the previously constituted Tribunal but not the reconstituted Tribunal.

Findings of fact of previous Tribunal

6.4.4 If the Tribunal is reconstituted following a remittal, the reconstituted Tribunal is not

[77] *MZXSP v MIAC* [2008] FMCA 374. In this case, the reconstituted Tribunal sent a further s 424A letter and conducted a further hearing, but only slightly altered the draft decision of the previous Member. In considering whether the reconstituted Tribunal discharged its statutory obligations, the Court found that as it had carefully considered the draft decision and made some amendments after conducting a hearing and sending a further s 424A letter to the applicant, it brought an independent mind to the process, and therefore was entitled to adopt verbatim the reasoning of the previous Member.
[78] *SZHKA v MIAC* (2008) 172 FCR 1 at [37]; *SZLOR v MIAC* [2008] FMCA 1165 at [54].
[79] s 19D(4) of the AAT Act, which provides that the reconstituted Tribunal must continue the proceeding and, for this purpose, it may have regard to any record of the proceeding before the Tribunal as previously constituted (including a record of any evidence taken in the proceeding).
[80] *ANI15 v MIBP* [2020] FCA 798 at [31]. In dismissing an application for special leave to appeal, the High Court found that the application raised insufficient reason to doubt the correctness of the decision of the Federal Court of Australia: *ANI15 v MIBP* [2020] HCASL 207.
[81] *ANI15 v MIBP* [2020] FCA 798 at [32]. The Court noted that the evidence before the previously constituted Tribunal and the reconstituted Tribunal appeared to be similar and therefore there was nothing which could be said to be 'unconsidered' by the reconstituted Tribunal.

bound by any findings on the review made by the Tribunal as previously constituted.[82] The Tribunal must determine the review by dealing with the issues as they present themselves at the time of its determination and according to the facts as the Tribunal finds them to be at that time. However, if the reconstituted Tribunal departs from the facts as found by the previous Tribunal, the Tribunal will generally explain why in the decision record.[83] In some circumstances, such an obligation may be imposed upon the Tribunal by s 368(1) [Part 5] or 430(1) [Part 7].

6.4.5 If a reconstituted Tribunal proposes to adopt some parts of the previous Tribunal's decision, such as its adverse findings on particular claims or the applicant's credibility, the Tribunal's proposal to do that and the material that it proposes to use will generally need to be put to the applicant under ss 359A/424A if the material that it proposes to rely upon amounts to a rejection, denial or undermining of the applicant's claims and would be a reason, or part of a reason, for the Tribunal affirming the decision under review.[84] Even if the Tribunal puts findings of the previous Tribunal and its proposed reliance on those findings to an applicant under s 359A or 424A, the Tribunal still assesses the evidence before it afresh in order to conduct a review (as required by ss 348 [Part 5] and 414 [Part 7]). Reliance upon the reasoning of a previous Tribunal may in some circumstances indicate that the Tribunal has not completed its task of conducting a review.

Procedural requirements under the Migration Act

6.4.6 There is some divergence of opinion in the Federal Court as to what procedures a reconstituted Tribunal is obliged to follow in order to complete the proceeding. In some circumstances, courts have held that the reconstituted Tribunal is simply required to undertake what remains to be done in the review without interrupting the process, picking up and carrying on from the steps that have already been taken. In other cases, the Court has required the reconstituted Tribunal to start the process again. Whether it is necessary to do so depends upon the particular procedure in issue and whether or not the matter was reconstituted following remittal from a court.

Invitations to comment on adverse information

6.4.7 Generally speaking, it is not necessary for a reconstituted Tribunal to resend an invitation under ss 359A [Part 5] and 424A [Part 7] of the Migration Act to comment on adverse information issued by the previously Tribunal. This is the case

[82] *SZFYW v MIAC* [2008] FCA 1259 at [9]; *SZHKA v MIAC* (2008) 172 FCR 1 at [18].
[83] *SZFYW v MIAC* [2008] FCA 1259 at [11]; *Haidari v MIAC* (2008) 104 ALD 74 at [8].
[84] See *MZZZW v MIBP* [2015] FCAFC 133 in which the Full Federal Court found that the Tribunal's proposal to adopt parts of the first Tribunal's decision was 'information' for the purpose of s 424A [s 359A] as it would have been a reason or part of the reason for the decision to affirm the delegate's decision and it would be more than mere disclosure of a proposed and prospective reasoning process. Note that the Court's finding appears to be an expansion of the term 'information'. *MZZZW* was distinguished in *BFE15 v MHA* [2019] FCA 414 at [49]–[51] where the Court held that, in circumstances where the Tribunal referred to the first Tribunal's decision, its summary of facts and reproduced the first Tribunal's reasons, the Tribunal did not impermissibly have regard to the first Tribunal's reasons as the Tribunal gave its own detailed consideration to the applicant's evidence on the issue and formed its own view on the plausibility of the evidence.

regardless of whether or not the matter was reconstituted following remittal by a Court or for some other reason.

6.4.8 In *SZEPZ v MIMA*, a Full Court of the Federal Court found that, where a Tribunal decision has been set aside by a court and the matter remitted for reconsideration owing to a jurisdictional error, it does not follow that all the steps and procedures taken in arriving at that invalid decision are themselves invalid.[85] The Tribunal still has before it the material that was obtained when the decision that had been set aside was made and is obliged to continue and complete the particular review and not to commence a new review.[86] As a consequence, the reconstituted Tribunal in that case was entitled to rely upon a s 424A letter that had been sent by the previous Member.[87]

6.4.9 However, there are limitations. If the obligation under ss 359A/424A has not been properly or fully discharged by the first Tribunal (for example, because a previous letter was sent to the wrong address, did not give the prescribed period of notice or did not adequately particularise the adverse information), the reconstituted Tribunal may be required to send a further invitation. This will also be the case if there is new information that would be the reason or a part of the reason for affirming the delegate's decision, or if the relevance of the adverse information is different than that described in the previous letter.

Hearing obligation

6.4.10 In some circumstances, reconstitution of the Tribunal will require the Tribunal to invite the applicant to a further hearing before it. This is the case where reconstitution is the result of a court remittal. However, under the statutory framework it is not necessarily required where reconstitution is for other reasons (e.g. the unavailability of the original Member due to illness).

6.4.11 The Full Federal Court observed in *Liu v MIMA* that where an applicant has given evidence to a Tribunal Member, reconstitution of the Tribunal generally does not require that the applicant be given another opportunity to appear before it to present arguments and give evidence under s 360 or 425 of the Migration Act.[88] This general proposition would not apply, however, if the hearing obligation was not properly discharged by the first Tribunal (e.g. if relevant issues were not discussed at the initial hearing; if the issues before the reconstituted Tribunal were not the same as those before the first Tribunal; if the interpreting was deficient; or if there is evidence of actual or apprehended bias affecting the first Tribunal). The correctness of *Liu* was subsequently confirmed by the Full Federal Court in *AEK15 v MIBP*

[85] *SZEPZ v MIMA* (2006) 159 FCR 291 at [39]. In hearing an application for special leave to appeal this decision, the High Court found there was insufficient doubt as to the correctness of the reasoning by the Full Court to warrant a grant of special leave: *SZEPZ v MIAC* [2008] HCATrans 91 at [305].
[86] See also *MZXRE v MIAC* (2009) 176 FCR 552 at [5], where North and Rares JJ commented that it would be wrong to suggest that following a remittal whatever had been done by the original Tribunal had to be redone. See also *SZNKR v MIAC* [2010] FMCA 182 at [9].
[87] See also *SZMRA v MIAC* [2008] FMCA 1570 where the Tribunal was held not to have breached s 424A in circumstances where it had relied on a s 424A letter sent by the previous Tribunal and the evidence of the applicant's response to that letter.
[88] *Liu v MIMA; Ahmed v MIMA* (2001) 113 FCR 541.

which held that a new hearing would not always be required in a case reconstituted because of member unavailability and that it was necessary to consider whether, in the particular circumstances of each case, the obligation in ss 360/425 had been fulfilled by the previously constituted Tribunal.[89]

6.4.12 It has also been suggested that it would be inappropriate for the reconstituted Tribunal to make adverse credibility findings based on the applicant's demeanour during an earlier hearing at which the Member was not present.[90] If on the other hand, the reconstituted Tribunal makes an adverse credibility finding only on purely objective grounds, for example, inconsistencies between an applicant's account of certain events and credible country information which was put to the applicant, and no issues of demeanour arise, then a further hearing would not generally be required.[91]

6.4.13 A distinction can be drawn however between cases reconstituted because of member unavailability and those reconstituted following a court remittal. In *SZHKA v MIAC*, a Full Court of the Federal Court was unanimous in holding that, in the circumstances before it, the Tribunal was obliged to hold a further hearing because new issues had arisen for the Member constituting the Tribunal following the remittal.[92] However, Gyles J, with whom Gray J agreed, additionally found that the opportunity to be provided by virtue of s 425 is not provided by an appearance before another Tribunal Member on an earlier occasion.[93] His Honour distinguished *Liu* on the basis that the Court in that case dealt with a reconstitution in circumstances where the original Member had resigned, whereas in the cases at hand, the earlier Tribunal decision had been remitted for reconsideration by a court. The majority's reasoning also suggests that other procedures would have to be repeated by the reconstituted Tribunal. However, as the matter did not need to be decided, those comments are *obiter*.[94] Nevertheless, the judgments of Gyles and Gray JJ appear to be the leading authority on whether a hearing is required in every

[89] *AEK15 v MIBP* [2016] FCAFC 131. Seven months after the a hearing with the first Member, the Tribunal wrote to the applicant advising him that the Member who conducted the hearing was no longer available, another member would finish the review, all the available information and record of hearing would be before that new member, and invited the applicant to contact the Tribunal with any queries. The Court found no error in the reconstituted Tribunal proceeding to make its decision without inviting the applicant to a further hearing, as the applicant had shown no reason why a second hearing invitation before the reconstituted Tribunal was required.

[90] See *SZARJ v MIMIA* [2004] FMCA 557 at [23]–[24]. See also *MIBP v WZARH* [2015] HCA 40, which although not directly applicable to MRD reviews given that it related to common law procedural fairness in the IMR context, provides some further guidance.

[91] In *MIBP v WZARH* [2015] HCA 40, the reasoning of Kiefel, Bell and Keane JJ turned on the fact that the second IMR had rejected a central aspect of the respondent's claim, not just on the basis of inconsistencies in the respondent's account of certain important events, but also the second reviewer's impression of how that account was given. The latter goes to demeanour which can only be properly assessed by personal observation.

[92] *SZHKA v MIAC, SXGOD v MIAC* [2008] FCAFC 138. Other circumstances where a further hearing may be required is where a previous hearing had been affected by apprehended bias or a failure to give the applicant an opportunity to present arguments and give evidence in relation to the issues in the review: see *SZJRH v MIAC* [2007] FMCA 2037 at [22].

[93] This is in contrast to the reasoning in a number of earlier judgments which involved matters that had previously been remitted by the Court for reconsideration: *NBKM v MIAC* [2007] FCA 1413 at [36]; *SZIBW v MIAC* [2008] FCA 160 at [35]; *SBRF v MIAC* (2008) 101 ALD 559 at [24]. In *SZKGF v MIAC* [2008] FCAFC 84, a Full Court indicated that it would be inclined to this view although the matter was unnecessary to decide: at [9]. A more recent Full Federal Court in *AEK15 v MIBP* [2016] FCAFC 131 expressed their view, in *obiter*, that in a case such as *SZHKA*, the Tribunal as reconstituted did not have to start the entire review process from scratch following the remittal. Its duty was to conduct a review under s 414, and it need not proceed on the basis that every step or procedure which had been taken by the previously constituted Tribunal was also invalid (at [51]). However as obiter comments only, *SZHKA* remains the relevant authority that a fresh opportunity to appear must be given in matter on remittal.

[94] cf *MZXRE v MIAC* (2009) 176 FCR 552 at [5], where North and Rares JJ commented that it would be wrong to suggest that following a remittal whatever had been done by the original Tribunal had to be redone.

case where the Tribunal is reconstituted after a remittal.[95]

6.4.14 The majority reasoning in *SZHKA* was relied on in *NBKB v MIAC* to support a conclusion that a second Tribunal member was required to raise with the applicant again any live issues, even if they were put to the applicant and discussed at the hearing before the original Tribunal Member, in order to comply with ss 360/425.[96] This reasoning appears to extend the decision in *SZHKA*, but as a judgment of the Federal Court in its appellate jurisdiction, it is recommended that *NBKB* is followed unless and until it is found to be wrong by another Court at the same or higher level.[97]

Summary

6.4.15 In sum, *SZEPZ* appears to be the leading authority that following a reconstitution, the new Member can rely on a ss 359A/424A invitation sent by the previous Member. The unanimous judgments in *Liu* and *AEK15* also confirm that a further hearing is not required in every case where the Tribunal is reconstituted because the original member is unavailable generally, rather it will depend whether, in the particular circumstances of each case, the obligation under ss 360/425 has been fulfilled by the hearing before the Tribunal as previously constituted.

6.4.16 However, where the previous decision was set aside by a court and the matter remitted, the majority judgments in *SZHKA* indicate that a further opportunity to appear before the new Member must be given in every case unless one of the exceptions in ss 360(2)/425(2) applies.[98] Consistently with *NBKB*, a fresh opportunity to give evidence and present arguments on all live issues arising in the review should be given at a further hearing, even if those issues were raised in an earlier hearing by the previous Member.[99] See further Chapters 10 – Statutory duty to disclose adverse information, Chapter 12 – Review of files and duty to invite applicant to a hearing and Chapter 13 – The hearing.

6.4.17 Whenever a review is reconstituted, the Tribunal is to notify the applicant that the matter has been allocated to a new Member to decide the application.[100]

[95] *SZHKA v MIAC* (2008) 172 FCR 1. Note, however, in *MZXRE v MIAC* [2009] FMCA 99, the Court held the comments of Gyles and Gray JJ do not go so far as to set down a requirement for a new hearing in every remitted matter. His Honour considered that there is a limited class of cases in which the Tribunal would be required to invite the applicant to a further hearing. This includes cases where the decision was set aside for apprehended bias or a breach of procedural fairness, where new issues are raised, and where the matter is reconstituted to a different Member. This reasoning was not required to be considered by the Full Court on appeal: *MZXRE v MIAC* (2009) 176 FCR 552.
[96] *NBKB v MIAC* (2009) 106 ALD 525.
[97] The High Court declined to grant the Minister's special leave application, finding that the Court's approach to s 425 did not appear in the circumstances of the case to disclose any error warranting the grant of special leave: *MIAC v NBKB* [2009] HCATrans 289.
[98] *MZXRE v MIAC* (2009) 176 FCR 552.
[99] Note, however, that the Tribunal may be entitled to rely on the fact that issues were identified to the applicant at an earlier hearing provided it gives the applicant a further opportunity to appear and present arguments on those issues: *SZEUI v MIAC* [2008] FCA 1338 at [11].
[100] *SZARJ v MIMIA* [2004] FMCA 557. The Court observed at [23] that the opportunity to meet with the Member in person to discuss an application was important, especially where credibility is in issue. See also *SZFAS v MIMA* (2006) 201 FLR 312.

Reasons for remittal

6.4.18 It is generally not necessary for a reconstituted Tribunal in its decision to expressly address the reason for remittal.

6.4.19 It was suggested in *SZGUW v MIAC* that upon remittal the Tribunal should make clear on the face of its reasons the jurisdictional error which was identified in the earlier decision and how the Tribunal as presently constituted discharged the relevant obligation.[101] The Court considered that a failure to do so would give rise to an inference that the Tribunal did not properly discharge its obligations.[102] However, the Federal Magistrates Court in applying this judgment held that the Tribunal is under no legal obligation to include in its decision an express explanation as to why the Tribunal did not consider that it had made the same error of jurisdiction which had been identified in the previous decision. It was moreover observed that the judgment of the Federal Court in *SZGUW v MIAC* regarded the absence of discussion as no more than confirmatory of a perceived defect in the reasoning process.[103] Thus a failure to expressly discuss the basis of the remittal is unlikely to amount to jurisdictional error in and of itself.

6.5 Considerations where Tribunal constituted by multi-member panel

6.5.1 Where the Tribunal is constituted by more than one member, different considerations arise in relation to the conduct and finalisation of the review than in cases where the Tribunal is constituted by a single member.

6.5.2 While there is no judicial consideration of this issue, it is likely that references to 'the Tribunal' (being a reference to the AAT) in various sections in Part 5, Division 5 [migration] and Part 7, Division 5 [protection] of the Migration Act would generally be construed by a court as references to each Member constituting the Tribunal for the purposes of the review. On this construction, the obligation under ss 360/425 to put an applicant on notice of an 'issue' in the review extends to what each individual Member considers would be determinative, critical or dispositive of the review. Similarly, a ss 359A/424A obligation may arise if any one Member on the panel considers that information before the Tribunal would be the reason or part of the reason for affirming the decision under review, even if another Member on the panel takes a different view of the information.

6.5.3 Section 42 of the AAT Act provides for the resolution of disagreements between members in cases where a review is constituted to a multi-member panel. Where a matter is constituted by three members, a disagreement is to be settled according

[101] *SZGUW v MIAC* (2009) 108 ALD 108.
[102] *SZGUW v MIAC* (2009) 108 ALD 108, at [21].
[103] *SZGUW v MIAC* [2010] FMCA 145 at [33]–[34]. Undisturbed on appeal: *SZGUW v MIAC* [2010] FCA 475. See also *BRGAN of 2008 v MIAC* (2009) 112 ALD 617, at [57].

to the opinion of the majority.[104] In proceedings constituted by two members, it is the opinion of the presiding Member which settles any disagreement.[105]

6.5.4 The Tribunal's obligation under ss 368/430 to record its decision requires a written statement setting out the decision, the reasons for decision, the findings on any material questions of fact and reference to the evidence or other material on which the findings of fact were based. Where different members on a panel have followed a different process of reasoning or made different factual findings, the decision record would generally be expected to make clear what each member's reasons are, their individual findings and the evidence they consider relevant. This may be done in a single, combined statement, or each member may choose to produce his or her own written statement (which together with the written statements of the other member(s) constitutes the complete decision record).

6.5.5 While there is no requirement for members to insert their signature block on a decision record, it is the Tribunal's practice to use a signature block to record the day and time the decision is made. For a multi-member panel where a joint decision has been written (i.e. one set of findings and reasons), generally only the presiding Member will insert their signature block (although the other Members may also insert their signature block if they so wish).[106]

6.6 Timeliness of decision making

6.6.1 Both the Migration Act and the *Migration Regulations 1994* (Cth) (the Regulations), and Presidential Directions made under the AAT Act impose time standards for certain decisions made in the Migration and Refugee Division (MRD) of the Tribunal.

Timeliness requirements under the Migration Act and Regulations

6.6.2 The Migration Act and the Regulations impose time standards for the finalisation of some types of review.

6.6.3 There are two circumstances in which the Tribunal *must* make a decision within a certain period.

6.6.4 The Tribunal must, within seven working days, make a decision on the cancellation or refusal of a bridging visa of a person who is in detention because of that decision.[107] The Tribunal may, with the agreement of the applicant, extend the

[104] AAT Act s 42(1).
[105] AAT Act s 42(2).
[106] Note that where each Member produces their own findings and reasons, each member may wish to insert their own signature block. However, as signature blocks are not required, the absence of a signature block for any particular member should not lead to an inference that they were not involved in the matter.
[107] s 367(1) specifies that applications for review of bridging visa decisions covered by s 338(4) must have a decision within the prescribed period. Regulation 4.27 specifies that the period is 7 working days from the time the Tribunal receives the application.

period for the purposes of a particular application.[108]

6.6.5 Where the decision on review is a decision made under s 197D(2) that an unlawful non-citizen is no longer a person in respect of whom a protection finding within the meaning of s 197C(4), (5), (6) or (7) would be made, the Tribunal must make its decision, and notify the applicant of the decision, within the prescribed period.[109] The prescribed period starts when the application for review is received by the Tribunal and ends at the end of 120 days, starting on the first working day after the day on which the application is received by the Tribunal.[110] The Tribunal may, with the agreement of the applicant, extend the period for the purposes of a particular application.[111]

6.6.6 For the two circumstances, there is no statutory penalty if the review is not completed within the specified time. The Migration Act and Regulations are silent on the consequences of not completing a bridging visa detention review or review of a decision made under s 197D(2) within the prescribed period.

6.6.7 In addition, the Migration Act and Regulations require that some decisions must be *reviewed immediately* and the Tribunal must give notice of its decision as soon as practicable. These are:

- decisions on close family visit visas;[112]
- decisions to cancel a visa;[113] and
- refusals of substantive visas where the applicant is in immigration detention at the time of the application for review.[114]

Timeliness requirements under Presidential directions

6.6.8 In accordance with s 18B of the AAT Act, the President of the Tribunal may give written directions as to the operation of the Tribunal and the conduct of reviews by the Tribunal.[115] The President's Direction on Prioritising Cases in the Migration and Refugee Division outlines priorities for constituting and processing particular cases by type.

6.6.9 The requirements referred to in the President's Direction are, as far as possible, complied with. However, non-compliance does not mean that the Tribunal's

[108] s 367(2).
[109] s 419(1) specifies that if an application for review of a Part 7-reviewable decision is made under s 412 and the Part 7-reviewable decision is a decision of a kind mentioned in paragraph 411(1)(e) then, subject to subsection (2), the Tribunal must make its decision on review, and notify the applicant of the decision, within the prescribed period. s 419 was inserted by *Migration Amendment (Clarifying International Obligations for Removal) Act 2021 (*Cth).
[110] reg 4.34A.
[111] s 419(2).
[112] reg 4.23, as amended by the Amalgamation Act.
[113] reg 4.24.
[114] reg 4.25.
[115] s 18B of the AAT Act as inserted by the Amalgamation Act with effect from 1 July 2015. This provision also states that the President can issue directions in relation to the procedure of the Tribunal; the arrangement of the Tribunal's business; and the places in which the Tribunal can sit.

decision on a review is an invalid decision.[116] There is no requirement in the direction for particular cases to be finalised within a certain time.

[116] s 18B(2) of the AAT Act as inserted by the Amalgamation Act with effect from 1 July 2015.