MRD Procedural Law Guide

Part 5 – Miscellaneous

30.PENALTIES

30.PENALTIES[1]

30.1 Introduction

30.1.1 The *Migration Act 1958* (the Migration Act), and the *Administrative Appeals Tribunal Act 1975* (the AAT Act), contain a number of offence provisions relating to the giving of evidence and information to the Tribunal. In practice, these provisions are rarely invoked.

30.2 Refusal to be sworn or to answer questions

30.2.1 Pursuant to ss 371 [Part 5 - migration] and 433 [Part 7 - protection] of the Migration Act, a person appearing before the Tribunal to give evidence will commit an offence if they refuse or fail to:

- take an oath or make an affirmation when required under ss 363 or 427; or
- answer a question that the person is required to answer by the Tribunal.[2]

30.2.2 While ss 371 and 433 refer to a 'witness' appearing before the Tribunal, this would also encompass the review applicants giving evidence at hearing under an invitation sent pursuant to ss 360 [Part 5] and 425 [Part 7].[3]

30.2.3 An offence against ss 371 and 433 is punishable by imprisonment for 12 months or 60 penalty units or both.[4]

30.2.4 The offences under ss 371(2) and 433(2) for refusing to answer a question do not apply if answering the question might tend to incriminate the person.[5] The defendant bears the evidentiary burden to show that answering the question might tend to incriminate themselves.[6] If a person fails to answer a question which they are required to answer, the Member may ascertain the reason for refusal and consider the response. If it is not within the scope of ss 371(3) or 433(2), the person

[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] The Tribunal has no power to initiate prosecutions itself or to punish people for refusing to take an oath or make an affirmation or to answer questions.
[3] The Explanatory Memorandum to the Tribunals Amalgamation 2014 Bill states that the provision as amended is intended to replace the pre 1 July 2015 provisions: at [821]–[823].
[4] ss 371(1)–(2) and 433(1)–(2), as amended by the *Tribunals Amalgamation Act 2015* (Cth) (the Amalgamation Act), from 1 July 2015. For transitional and savings arrangements in relation to offences committed prior to that date, see the Amalgamation Act sch 9.
[5] ss 371(3) and 433(3) as amended by the Amalgamation Act, from 1 July 2015. A defendant bears an evidential burden in this regard: see the *Criminal Code Act 1995* (Cth) (the Criminal Code) s 13.3(3). For offences committed prior to 1 July 2015, the exemption related to having a 'reasonable excuse'. For transitional and savings arrangements for offences committed prior to 1 July 2015 see the Amalgamation Act sch 9.
[6] Note to s 371.

may be advised of the possible consequences and asked to reconsider their position.

30.2.5 Section 62(3) of the AAT Act also provides that a person appearing as a witness before the Tribunal commits an offence if they fail to answer a question that they are required to answer by the Tribunal.[7] An offence against s 62(3) of the AAT Act is punishable by imprisonment for 12 months or 60 penalty units or both. This offence is similar to the offences contained in ss 371 and 433 for failing to answer a question and the penalty is the same. As with ss 371 and 433, the offence does not apply if answering the question might tend to incriminate the person,[8] and the defendant bears the evidentiary burden to show that answering the question might tend to incriminate themselves.[9]

Refusal to answer on the grounds of Legal Professional Privilege

30.2.6 A person appearing before the Tribunal is entitled to rely on legal professional privilege (LPP) when giving oral evidence, insofar as it may lead to self-incrimination.[10]

30.2.7 LPP can arise with respect to legal advice or litigation. It is a common law principle which protects from disclosure communications made confidentially between a client and his or her legal adviser for the purpose of obtaining or giving legal advice or assistance.[11] The principle has been codified in the *Evidence Act 1995* (Cth) (the Evidence Act) when adducing evidence before a federal or ACT court in which it is described in the context of 'client legal privilege'.[12] Although the Evidence Act has no application in Tribunal reviews,[13] the Tribunal is mindful of its obligations when conducting the hearing to inform applicants and any other person appearing before it of their right to claim LPP and their entitlement to decline to answer any questions on that basis.[14] For further information on LPP see Chapter 13 – The Hearing.

[7] The Tribunal has no power to initiate prosecutions itself or to punish people for refusing to answer questions.
[8] s 62(4) of the AAT Act. Although s 62(1) also makes it an offence to refuse to take either an oath or affirmation under s 40 of the AAT Act if required to do so, s 40 of the AAT Act does not apply to proceedings in the MRD in which case s 62(1) will not apply (see AAT Act s 24Z).
[9] Note to s 62 of the AAT Act.
[10] *SZHWY v MIAC* (2007) 159 FCR 1. Followed in *SZHLO v MIAC* [2007] FMCA 1837, in which the Court held that by asking "did you ask him for any advice about migration or visas" the Tribunal had inquired into communication that was privileged under LPP: at [19]. See also *WAAF v MIMIA* [2003] FMCA 36 at [23] and *SZFPA v MIAC* [2008] FMCA 550 in which the Court considered that it was bound to follow the Full Court decision in *SZHWY* but that in the circumstances the Tribunal did not seek to illicit any information that would have been subject to LPP. See also *SZTRY v MIBP* [2015] FCCA 169 at [160]. However the Court in *SZHWY* was considering the issue in the context of the Migration Act as it stood prior to 1 July 2015. That is, when ss 371 and 433 provided that it was not an offence to answer a question if there was a 'reasonable excuse' (which is not the case in the current provision). Lander J at [38] held that unless the Migration Act says otherwise, a party or witness appearing before the Tribunal could claim the benefit of LPP. It is not clear whether the amendments to ss 371 and 433 evidence a contrary intention.
[11] *SZKTQ v MIAC* [2008] FMCA 91 at [39].
[12] *Evidence Act 1995* (Cth) (the Evidence Act) s 118 .
[13] ss 353 and 420, as amended by the Amalgamation Act. See also *SZHWY v MIAC* (2007) 159 FCR at [17].
[14] *SZHWY v MIAC* (2007) 159 FCR 1.

Refusal to answer on the grounds of self-incrimination

30.2.8 Sections 371(3) and 433(3) of the Migration Act, and s 62(4) of the AAT Act, provide that it is not an offence to not answer a question if to do so might tend to incriminate the person. This is a codification of the common law privilege against self-incrimination.

30.2.9 The common law privilege against self-incrimination has also been codified in the Evidence Act with respect to evidence given to a federal or ACT court.[15] As noted above, the Evidence Act is not applicable to Tribunal proceedings, but ss 371 and 433 of the Migration Act, and s 62 of the AAT Act instead directly import the principle against self-incrimination.

30.2.10 The privilege applies where a witness objects to giving particular evidence, or evidence on a particular matter, on the ground that the evidence may tend to prove that the witness has committed an offence against or arising under an Australian law or a law of a foreign country; or that the witness is liable to a civil penalty. Where such an objection is raised, a Court is required to consider whether there are reasonable grounds for the objection. If so, the witness must not be required to give the evidence *unless* the Court is satisfied that the evidence does not tend to prove the commission of an offence or liability to a civil penalty and it is in the interests of justice to do so.

30.2.11 If reviewing a decision that involves criminal, or potentially criminal, conduct that is relevant to the review (for example, where charges have been laid but not yet determined by a court such as in Bridging E visa cancellation matters), the Tribunal may inform the person appearing of the common law privilege against self-incrimination and provide them with an opportunity to claim it.[16]

Interpreters

30.2.12 Interpreters appearing before the Tribunal are required by Tribunal practice to take an oath or to make an affirmation. They swear that they will interpret the proceedings to the best of their skills and abilities and to maintain confidentiality. However, the requirements and penalties for non-compliance under ss 371 and 433 do not apply to interpreters as they are not appearing before the Tribunal to give evidence.

30.3 Failure to comply with summons

30.3.1 Sections 363(3) and 427(3) of the Migration Act empower the Tribunal to require a person to appear before the Tribunal to give evidence, or to produce to the Tribunal

[15] Evidence Act s 128.
[16] These circumstances most often arise when reviewing a Bridging E visa cancellation under s 116(1)(g) and the visa holder is charged with an offence (reg 2.43(1)(p)), the visa holder is under investigation in certain circumstances (reg 2.43(1)(q)), and the

such documents referred to in a summons.[17] Sections 370 and 432 of the Migration Act provide that a person will commit an offence if the person fails to comply with a summons given under ss 363 [Part 5 reviews] or 427 [Part 7 reviews].[18]

30.3.2 Sections 370 and 432 are, however, subject to the absolute prohibition contained in ss 375 and 437 against the production of certain documents to the Tribunal by the Secretary of the Department. Sections 375 and 437 state that irrespective of any other provision in the Migration Act, the Secretary of the Department must not give to the Tribunal a document or information that the Minister certifies in writing would be contrary to the public interest because it would prejudice the security, defence or international relations of Australia; or it discloses the deliberations or decisions of Cabinet or of a committee of the Cabinet.

30.3.3 As with ss 371 or 433 of the Migration Act, the offence of failure to comply with a summons does not apply if compliance might tend to incriminate the person (see discussion above).[19]

30.3.4 The penalty for failing to comply with a summons is 12 months imprisonment or 60 penalty units, or both.[20]

30.4 False or misleading evidence

30.4.1 Section 62A of the AAT Act makes it an offence across all AAT Divisions for a person to give evidence where the person does so knowing that the evidence is false or misleading.[21] The penalty for contravention of this section is imprisonment for 12 months or 60 penalty units, or both.

30.4.2 'False or misleading' evidence is not defined further for the purposes of this section, and should be taken to have its ordinary meaning when considering whether the section has been contravened.[22]

30.5 Contempt of Tribunal

30.5.1 Section 63 of the AAT Act provides for the offence of contempt of Tribunal.[23] A person commits an offence if they engage in conduct that obstructs or hinders the

visa holder is or may be, or would or might be, a risk to the health, safety or good order of the Australian community or an individual (s 116(1)(e)).

[17] Note that the Tribunal has no power to initiate prosecutions itself or to punish people for a failure to comply with summons.

[18] As inserted by the Amalgamation Act, with effect from 1 July 2015. That Act repealed similar provisions in ss 432 and 433, and ss 370 and 371. Those provisions also made it an offence to give intentionally 'false or misleading' evidence, but that offence is not replicated in the post 1 July 2015 provisions. For transitional and savings arrangements in relation to offences committed prior to 1 July 2015, see the Amalgamation Act sch 9.

[19] ss 370(2) and 432(2). A defendant bears an evidential burden in this regard: see s 13.3(3) of the Criminal Code.

[20] ss 370(1) and 432(1).

[21] AAT Act s 62A. Note also that the Tribunal has no power to initiate prosecutions itself or to punish people for providing false or misleading evidence .

[22] The Macquarie Dictionary online defines 'false' to include 'not true or correct; erroneous; deceitful; not genuine' and 'mislead' to include 'guide wrongly, lead astray' (https://www.macquariedictionary.com.au/, accessed 3 November 2022).

[23] Inserted by the Amalgamation Act with effect from 1 July 2015. That Act also repealed similar, but not identical, contempt provisions in the Migration Act that applied to the MRT and RRT: ss 370 and 432. For transitional and saving arrangements

Tribunal or a member of the Tribunal in the performance of Tribunal functions. A person also commits an offence if they engage in conduct that would constitute contempt of court if the Tribunal were a court of record. The penalty for contravention of this section is imprisonment for 12 months or 60 penalty units, or both.

30.5.2 In considering conduct alleged to constitute contempt, the nature and functions of the Tribunal are to be taken into account.[24]

30.5.3 Where migration agents are concerned, contemptuous conduct may be also handled through MARA, and where Australian legal practitioners are concerned, such conduct may be considered by the relevant State or Territory legal professional disciplinary authority. See Chapter 32 – Representatives and the Tribunal for further details. Referrals to these bodies are generally handled by the MRD Executive Support Section and are sent by the Registrar.

30.6 Other penalties

30.6.1 Section 378 of the Migration Act allows the Tribunal, when reviewing migration decisions under Part 5 of the Migration Act, to restrict publication of information and evidence where it is in the public interest to do so. Section 440 allows the Tribunal to restrict both publication and disclosure of information and evidence when reviewing a protection visa decision under Part 7 of the Migration. A contravention of these sections is subject to a penalty of imprisonment for two years. For further discussion see also Chapter 31 – Restrictions on disclosing and publishing information.

relating to offences committed in relation to the MRT and RRT prior to 1 July 2015, see the Amalgamation Act sch 9. The Tribunal has no power to initiate prosecutions itself or punish people for contempt.

[24] See *Saunders v Federal Commissioner of Taxation* (1988) 15 ALD 353 in which the Court held that the Commissioner was entitled to rely upon a coercive power under the AAT Act, which required all relevant material of the tax payer to be lodged with the AAT, to obtain all relevant materials, even though they might be prejudicial to the taxpayer. The Commissioner's actions could have constituted contempt if the intention was to use that material in criminal proceedings against the taxpayer (however that was not the case in this instance). While this case concerned the actions of a government official who was party to the proceedings, it is important to look at the intention of the applicant when considering whether their actions constitute contempt of the Tribunal.

31. RESTRICTIONS ON DISCLOSING AND PUBLISHING INFORMATION

31.RESTRICTIONS ON DISCLOSING AND PUBLISHING INFORMATION [1]

31.1 Introduction

31.1.1 The disclosure and publication of information in relation to AAT reviews in the Migration and Refugee Division (MRD) is subject to a number of restrictions or prohibitions. These may apply because of powers exercised by the Minister for Immigration, or because the Tribunal itself determines that disclosure or publication of material would be contrary to the public interest.

31.1.2 The *Privacy Act 1988* (Cth) (the Privacy Act), *Administrative Appeals Tribunal Act 1975* (Cth) (the AAT Act) and *Migration Act 1958* (Cth) (the Migration Act) also regulate the manner in which information held by the Tribunal can be published or disclosed to third parties.

31.1.3 Persons can also ask the AAT for information under s 362A of the Migration Act (for Part 5 reviews) or the *Freedom of Information Act 1982* (Cth) (the FOI Act). For more information about disclosing information in response to these kinds of requests, see Chapter 36 – Access to documents and the AAT FOI Handbook.

Disclosing information to a representative

31.1.4 Common law principles of agency allow the Tribunal to communicate with a duly authorised agent about matters that are connected with the review application as though the Tribunal were communicating with the applicant himself or herself.[2] However, a person nominated as an 'authorised recipient' for the purposes of receiving documents under the Migration Act, will not necessarily have authority as an agent or representative. Information about an applicant's case should not be verbally communicated to a person who is only an authorised recipient, and who is not also a representative.

[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] For a fuller discussion of the principles of agency, please refer to Chapter 32 – Migration agents and the Tribunal. Nothing in the Migration Act appears to displace the common law principles of agency which would permit the Tribunal to communicate with a person who is acting as a representative or agent for applicant, such as a migration agent, parent or guardian.

31.2 Minister for immigration's power to restrict disclosure

Non-disclosure certificates and notifications – ss 375A, 376 and 438

31.2.1 The Minister for Immigration (or delegate) may place restrictions on material given to the Tribunal by the Department. The Minister does this by certifying, in writing, that disclosure of the material is contrary to the public interest or by notifying the Tribunal that it was given in confidence to the Department. These certificates/notifications are issued under ss 375A, 376 and 438 and are generally known as 'non-disclosure certificates'.[3] Sections 375A, 376 and 438 can apply to 'a document' or information. Delegates may issue one certificate which covers material which is in multiple documents, and are not considered invalid on the basis that they cover multiple documents.[4]

31.2.2 If the material is covered by s 375A, the certificate must include a statement that the document or information must only be disclosed to the Tribunal, and the Tribunal must do all things necessary to ensure that the document or information is not disclosed to anybody except the Tribunal member to whom the case is constituted.[5]

31.2.3 If the material is covered by s 376 or 438, the Tribunal may, if it thinks appropriate after having regard to any advice given to it by the Secretary, disclose the material to the applicant or another person.[6] If the Tribunal exercises its discretion to disclose the material to the applicant, it is not restricted in the manner it may give the material to the applicant. It may do so using the process in s 359A or 424A if the material is information for the purposes of s 359A or 424A, or it may do so by giving the material to the applicant or discussing it with the applicant at the hearing. The Tribunal is not confined by the process in s 359A or 424A in disclosing the material and does not proceed on the basis that this is the only way material may be disclosed under s 376 or 438.[7]

[3] Section 375A certificates and 376 certificates/notifications are issued in relation to Part 5-reviewable decisions and s 438 certificates/notifications are issued in relation to Part 7-reviewable decisions. In these provisions, technically the Minister only certifies to restrict disclosure in the public interest under ss 375A, 376(1)(a) and 438(1)(a). Information given in confidence (ss 376(1)(b) and 438(1)(b)) does not require a certificate, only notification under s 376(2)(a) or 438(2)(a), but notices of this kind are often referred to as 'non-disclosure certificates' as a convenient shorthand.

[4] See s 23(b) of the *Acts Interpretation Act 1901* (Cth) which provides that 'in any Act, .. words in the singular number include the plural and words in the plural number include the singular', and s 2 of the *Acts Interpretation Act 1901* (Cth) which provides that it applies to any Act subject to a contrary intention. As there is no contrary intention in the *Migration Act 1958* (Cth), ss 375A, 376 and 438 should be read to allow for multiple documents to be covered by one certificate/notification.

[5] ss 375A(1)(b), (2)(b).

[6] ss 376(3)(b), 438(3)(b). In *ALF16 v MIBP* [2018] FCCA 1596, the Court held that the Tribunal could exercise its discretion under s 438(3)(b) to disclose information [equivalent to s 376(3)(b) for Part 5 (migration) cases] on more than one occasion during a review: at [88]–[89]. This may arise, for instance, where the Tribunal exercises its discretion to disclose part of the information and subsequently exercises its discretion again to disclose additional information. The Court also held that issuing a direction under s 440 did not foreclose the possibility of the re-exercise of the Tribunal's power under s 438(3)(b) to disclose further information to the applicant during a review: at [89]. This judgment was upheld on appeal in *ALF16 v MIBP* [2019] FCA 1457, however this point was not in contention before the Federal Court.

[7] See *Arhbal v MHA* [2021] FCAFC 220 at [42] where the Court rejected the contention that the Tribunal proceeded on the basis that its discretion to disclose material covered by s 376 was fettered by s 359AA. The Court held that there was no basis to infer that the Tribunal did not understand its discretion under s 376, and that in this instance the Tribunal first considered its discretion in s 376(3)(b) and then determined it was appropriate to disclose that information to the appellant orally using s 359AA. The Tribunal did not consider that it could only communicate the information pursuant to s 359AA. The Court held that the proper inference to draw is that the Tribunal decided pursuant to s 376(3)(b) to impart that information to the appellant in a manner that conformed with s 359AA so that the appellant could benefit from the protections afforded by the requirements of that section.

31.2.4 If the Tribunal, in reviewing a Part 7 (Protection) decision, decides to exercise its discretion and disclose material subject to a valid s 438 certificate, it *must* give a direction under s 440 of the Migration Act restricting publication or disclosure of that material.[8] Jurisdictional error will not arise however from a failure to issue a s 440 direction.[9] There is no equivalent provision in relation to s 376 certificates and Part 5 (Migration) decisions, however, the Tribunal has a general discretion to restrict publication of certain material under s 378 where it is not in the public interest. Section 378 and 440 directions are discussed in more detail below.

31.2.5 The majority of the High Court in *MIBP v SZMTA; CQZ15 v MIBP; BEG15 v MIBP* [2019] HCA 3 held that there is an obligation of procedural fairness to disclose the fact of the non-disclosure certificate/notification to the applicant in the review, however, a breach of that obligation will result in jurisdictional error only where the breach is material (that is, the applicant is deprived of the possibility of a successful outcome).[10]

31.2.6 Before relying upon a non-disclosure certificate, the Tribunal considers whether it has been properly issued, because acting upon an invalid certificate may, in certain circumstances, lead to a jurisdictional error.[11] For example, where a certificate purports to have been issued on the basis that it is not in the public interest for the information to be disclosed, a public interest reason must be properly specified in the certificate.[12] Similarly, where the Minister notifies the Tribunal of information given in confidence, for the notice to be valid, the information must actually have been given in confidence. There is more information about assessing the validity of certificates below.

31.2.7 The Tribunal must also afford procedural fairness to applicants in cases involving non-disclosure certificates, as discussed further below.

31.2.8 The Minister may also issue certificates under ss 375 and 437 which prohibit the Secretary from giving the material to the Tribunal on the basis that it would prejudice the security, defence or international relations of Australia, or disclose Cabinet deliberations or decisions. In those cases, the material subject to the certificate is not given to the Tribunal so they are not discussed further in this guide.

[8] s 438(4). It is unclear whether the Tribunal must itself be satisfied that it is in the public interest that the information not be disclosed or published prior to issuing a s 440 direction but on the plain reading of s 438(4) it appears that the Tribunal is required to issue a s 440 direction (even where it may not be satisfied).
[9] See *CSD16 v MIBP* [2018] FCCA 677 at [38], where the Court held that a failure to follow ss 438(4) and 440 in relation to the disclosure of information covered by an invalid s 438 certificate will not be a jurisdictional error. In *ALF16 v MIBP* [2018] FCCA 1596, the Court held that on each occasion the Tribunal exercises its discretion to disclose any matter to an applicant under s 438(3), a direction must be issued under s 440: at [89]. This judgment was upheld on appeal in *ALF16 v MIBP* [2019] FCA 1457, however this point was not in contention before the Federal Court. However, in *BES17 v MIBP* [2018] FCCA 3587 at [45] the Court stated if the only reason for issuing a s 440 direction is on the basis of an invalid s 438 certificate the direction will also be invalid.
[10] *MIBP v SZMTA; CQZ15 v MIBP; BEG15 v MIBP* [2019] HCA 3 at [2], [29]–[30], [45].
[11] In *MZAFZ v MIBP* [2016] FCA 1081 at [37]–[44] the Court found that for the Tribunal to have acted upon an invalid certificate was not a process according to law and resulted in a jurisdictional error.
[12] See *MZAFZ v MIBP* [2016] FCA 1081 in which the Court held that a s 438 certificate which had been placed on documents on the basis that they contained 'internal working documents' was invalid, as this is not a sufficient basis for public interest immunity either at common law or under statute.

Assessing validity

Disclosure contrary to the public interest – ss 375A, 376(1)(a) and 438(1)(a)

31.2.9 If a certificate was issued because the disclosure of information or documents would be contrary to the public interest, it is necessary for the certificate to specify the reasons why. For ss 376 and 438 certificates, this is any reason specified in the certificate that could form the basis for a claim by the Crown in right of the Commonwealth in a judicial proceeding.[13] For s 375A, it is for any reason which is specified in the certificate, and in some circumstances the Tribunal will need to look at the information covered by the certificate to determine whether the information in fact falls within the stated public interest reasons.[14] Although worded slightly differently to each other, the test for each appears to be one of public interest immunity.[15]

31.2.10 Public interest immunity, generally speaking, operates to restrict the production or dissemination of otherwise relevant evidence in legal proceedings where its disclosure would be against the public interest. Determining whether public interest immunity applies is a balancing exercise between the principles that:[16]

- no harm should be done to the nation or to the public service by the disclosure of the material; and
- the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done.

31.2.11 Where it appears that these two principles conflict, it is necessary to consider which of the two competing principles predominates.[17] There are no exhaustive definitions or lists in considering harm which may be done to the nation or the public service or whether the administration of justice would be frustrated by certain documents or information being withheld. However, some guidance may be derived from the *Evidence Act 1995* (Cth) (the Evidence Act), which provides that a document relates to matters of state (that is, matters which relate to the nation or to the public service) if adducing it in evidence would:[18]

- prejudice the security, defence or international relations of Australia;
- damage relations between the Commonwealth and a State or between two or

[13] ss 376(1)(a)(i) and 438(1)(a)(i). In *MIBP v SZMTA; CQZ15 v MIBP; BEG15 v MIBP* [2019] HCA 3 at [45], [19].
[14] s 375A(1)(a). In *Akter v MIBP* [2018] FCCA 3604 at [58] the Court found the certificate was not valid because the information covered by the certificate did not provide a basis for the stated public interest immunity reasons listed on the certificate. Following *Akter*, it appears that the Tribunal may determine for itself whether the information covered by the certificate could form the basis for a public interest immunity claim for the reason stated in the certificate, which will inform its consideration of whether it is valid.
[15] See *BEG15 v MIBP* [2016] FCCA 2778 at [41] where the Court referred to the wording in s 438 as a reference to 'public interest immunity' and *Singh v MIBP* [2017] FCCA 1331 at [50]–[51] where the Court acknowledged that the wording in ss 375A and 376 was not the same but appeared to proceed on the basis that the s 375A certificate was required to on its face state a 'public interest immunity' reason (whether or not such a claim is ultimately made out).
[16] *Sankey v Whitlam* (1978) 142 CLR 1 at 39.
[17] *Attorney-General (NSW) v Stuart* (1994) 34 NSWLR 667.
[18] *Evidence Act 1995* (Cth) (Evidence Act) s 130(4).

more States;

- prejudice the prevention, investigation or prosecution of an offence;
- prejudice the prevention or investigation of, or the conduct of proceedings for recovery of civil penalties brought with respect to, other contraventions of the law;
- disclose, or enable a person to ascertain, the existence or identity of a confidential source of information relating to the enforcement or administration of a law of the Commonwealth or a State;
- prejudice the proper functioning of the government of the Commonwealth or a State.

31.2.12 The Evidence Act also provides that the following matters may be taken into account in determining whether there is a public interest in disclosing information or preserving secrecy or confidentiality:[19]

- the importance of the information or the document in the proceeding;
- if the proceeding is a criminal proceeding – whether the party seeking to adduce evidence of the information or document is a defendant or the prosecutor;
- the nature of the offence, cause of action or defence to which the information or document relates, and the nature of the subject matter of the proceeding;
- the likely effect of adducing evidence of the information or document, and the means available to limit its publication;
- whether the substance of the information or document has already been published.

31.2.13 For example, taking into account the above principles, public interest immunity might operate to prevent the disclosure of Cabinet deliberations (the relevant public interest being free and fully informed Cabinet debate), police investigative documents (the relevant public interest being to keep police methods confidential and not prejudice investigations),[20] and information provided in confidence where it might reveal the source.[21]

[19] Evidence Act s 130(5).
[20] See *Guo v MIBP* [2016] AATA 897 in which the Tribunal found that there was a very significant public interest in the non-disclosure of information which could identify police informants if individuals who risk providing information to the police could not rely on assurances that their identifies would be kept secret, as this would dissuade individuals from providing information in the future. However, the Tribunal also held that there was a significant public interest in giving the applicant the opportunity to test the information provided to the police given the serious ramifications of the case against him (i.e. visa cancellation). The Tribunal held that it was in the public interest to enable the applicant to cross-examine the Detective who received the information from informants but that there should be robust protection against all realistic prospects that any answer by the Detective to the questions (which may relate to the identity of the informants) might become known to any unauthorised third parties.
[21] See for example *SZTYV v MIBP* [2018] FCCA 64 at [58]–[59] where the Court held that where the disclosure of information would reveal sources of confidential information (in this instance provided to law enforcement officers), public interest immunity has been held to apply. This decision was upheld on appeal in *SZTYV v MIBP* [2018] FCA 1076, however this point was not in

31.2.14 Non-disclosure certificates are commonly issued to prevent or restrict the release of dob-in information given to the Department or their methods used for document examination or identity verification. In these cases, the harm faced by the Department in discouraging people from providing dob-in information or by revealing its investigatory techniques may outweigh the administration of justice being served by their release.[22]

31.2.15 Provided a public interest reason is clearly specified in the certificate with sufficient detail to identify the claimed harm to the nation or public service that its release could lead to, a non-disclosure certificate is generally treated as valid. However, to determine whether the certificate is valid, the Tribunal may have to have regard to the information covered by the certificate to determine whether the information in fact falls within the stated public interest reason, and if it does not, the certificate may not be valid.[23] For example, in *Singh v MIBP* the Federal Court held that a s 375A certificate was invalid and rejected the Minister's submission that the 'validity of the certificate turns on its face' and held that it is not sufficient that the reason stated in the certificate would be a public interest reason but, having regard to the material subject to the certificate, there must be a logical, probative, rational or logical basis for finding that disclosure of that material would be contrary to the public interest.[24] A certificate which does not contain sufficient detail to properly identify a basis of public interest immunity is likely to be invalid and should not be relied upon. In *MZAFZ v MIBP*[25] for example, the Federal Court held that the Tribunal had erred in treating a non-disclosure certificate as valid where the only reasons cited in the certificate as contrary to the public interest were 'internal working documents'. The court held this had never been a sufficient basis for public interest immunity whether at common law or under statute and did not identify the harm that could be done to an agency by their disclosure. At best, the words 'internal working documents' disclosed a reason that could form part of the basis for a claim, but not the basis of the claim itself.[26]

contention before the Court. An application for special leave to the High Court was dismissed: *SZTYV v MIBP* [2018] HCASL 382.

[22] See *Bui v MIBP* [2019] FCCA 3363 at [33]–[39] where the Court held that the risks to a confidential source who provided information if their identity was disclosed meant that the public interest weighed in favour of non-disclosure. In reaching this conclusion, the Court also had regard to the risk of information 'drying up' if informants couldn't have confidence it would remain confidential. It also referred to the fact that the allegations contained in the information had been put to the applicant (but not the source) and she had been given an opportunity to respond. The Court was hearing an application in a case for discovery of material covered by a s 376 non-disclosure certificate.

[23] In *Akter v MIBP* [2018] FCCA 3604 at [58], the Court found the certificate was not valid because the information covered by the certificate did not provide a basis for the stated public interest immunity reasons listed on the certificate.

[24] *Singh v MIBP* [2020] FCA 783 at [55]–[59]. The Court held that the argument that the validity of a non-disclosure certificate turns 'on its face' ignores the principle that the power to issue a certificate must be exercised reasonably, and that the delegate cannot issue such a certificate unless there is a logical probative, rational or logical basis for finding that disclosure would in fact be contrary to the public interest. If there is no such basis, such a certificate could be said to be invalid on the grounds of legal unreasonableness even if, 'on its face', it stated that disclosure was contrary to the public interest. The Court held that a s 375A certificate which, in relation to a Partner visa matter, stated it would be contrary to the public interest for the applicant's and sponsor's Facebook posts to be disclosed to anyone (except the Tribunal) because the applicant and sponsor had not provided them to the Tribunal or Department was not a valid certificate because the reason was not a rational or logical basis to conclude that disclosure would be contrary to the public interest. In coming to this conclusion, the Court noted that the only people to whom the Tribunal was likely to disclose, or had any reason to disclose, the Facebook posts were the authors of those posts, they knew the contents of the posts, the posts were also obviously public in nature and there was no suggestion that the applicant or sponsor intended them to be confidential.

[25] *MZAFZ v MIBP* [2016] FCA 1081.

[26] *MZAFZ v MIBP* [2016] FCA 1081 at [37]. See also *BXD15 v MIBP* [2017] FCA 1209 at [46]–[48] in which the Court criticised the delegate's issuing of a s 438 certificate over departmental checklists (which were referred to before the Court as 'internal working documents') without further explanation The Court held that the certificate was invalid and 'fell well short of the task required' by the delegate under s 438.

31.2.16 Whether a document was given in confidence may also form a public interest ground for the purpose of s 375A. In *Ahmad v MIBP*, the Court found no jurisdictional error in circumstances where the Tribunal did not release internal departmental emails that were subject to a s 375A certificate which indicated that their disclosure other than to the Tribunal would be contrary to the public interest because they contained information provided in confidence and the provider of the information had not consented to disclosure of the information to the applicant.[27]

31.2.17 A non-disclosure certificate issued under s 375A, 376(1)(a) or 438(1)(a) requires a date and the signature of the delegate for it to be valid. The absence of a signature or a date on such a certificate will render it invalid.[28] A non-disclosure certificate/notification will not be invalid because it covers material in multiple documents, rather than material in a single document.[29]

Material given in confidence – s 376(1)(b) and 438(1)(b)

31.2.18 Documents or information may also be subject to a non-disclosure notification if they were given to the Minister or an officer of the Department in circumstances imposing an obligation of confidence.

31.2.19 Whether a document is impressed with the necessary quality of confidence required for s 376(1)(b) or 438(1)(b) is a matter for the Tribunal to decide on its merits.[30] This is unlike certificates issued under ss 375A, 376(1)(a) and 438(1)(a) which require, when determining their validity, that the Minister be satisfied that disclosure is not in the public interest (rather than whether the Tribunal agrees that disclosure is not in the public interest).[31]

31.2.20 For documents or information to have been given in confidence, the information must have the necessary quality of confidentiality. This means the material needs to have been given to the Minister or departmental officer by an external source or third party with the expectation that the material would be treated as confidential and wouldn't be disclosed, and that the information not be public or common knowledge.[32] In exercising its discretion to release the material to the applicant or

[27] *Ahmad v MIBP* [2015] FCCA 1038. The Court held the applicant's challenge to the certificate could not succeed without specific submissions directed to each of the relevant documents and in the absence of argument on what principles or practices applied to the email communications, the Court held that it could not be presumed that such communications were not confidential and that it was at least possible that officials within the Department and its related agencies had an expectation that the email communications will not be made public without their consent.

[28] In *El Jejieh v MHA* (No 2) [2019] FCCA 840 at [23]–[25] the Court held that unsigned and undated s 375A certificate was invalid because s 375A requires more than a 'printed name', but requires a signature (which may be electronic) and a date of the certification. In relation to the date, this is required because a valid delegation in respect of any exercise of power by a delegate under s 496 of the Act to issue a non-disclosure certificate/notification to ascertain whether the particular delegate had the required delegation on the date the certificate/notification was made. While this judgment considered a s 375A certificate, the same principle would appear to apply to certification under s 376(1)(a) and 438(1)(a).

[29] See s 23(b) of the *Acts Interpretation Act 1901* (Cth) which provides that 'in any Act, .. words in the singular number include the plural and words in the plural number include the singular', and s 2 of the *Acts Interpretation Act 1901* (Cth) which provides that it applies to any Act subject to a contrary intention. As there is no contrary intention in the *Migration Act 1958* (Cth), ss 375A, 376 and 438 should be read to allow for multiple documents to be covered by one certificate/notification.

[30] *SZTYV v MIBP* [2018] FCA 1076 at [42]. An application for special leave to the High Court was dismissed: *SZTYV v MIBP* [2018] HCASL 382.

[31] *SZTYV v MIBP* [2018] FCA 1076 at [44]. An application for special leave to the High Court was dismissed: *SZTYV v MIBP* [2018] HCASL 382.

[32] See *SZTYV v MIBP* [2018] FCA 1076 at [42] where the Court considered that, when determining confidentiality, the application of relevant equitable principles concerning the existence of a duty of confidentiality to the facts of the production of a

another person, the Tribunal may consider whether the consequences of its release may have a detrimental effect on an individual.[33] Email communications between departmental officers are unlikely to have the quality of confidence and are not 'given' to the Minister or an officer of the Department in confidence.[34] However, email communications between departmental officers which contain information from third parties given in confidence may satisfy the statutory requirements for ss 376 and 438.

31.2.21 Advice given by the Secretary in relation to why the material was given in confidence will be relevant but should not be taken at face value.[35] The Tribunal may have regard to information contained in the material itself, such as express statements that was given to the Department in confidence or statements which indicate that the material was intended to be kept confidential.

31.2.22 Unlike non-disclosure *certificates* issued under ss 375A, 376(1)(a) and 438(1)(a) which require a date and the signature of the delegate to be valid, it is not clear whether non-disclosure *notifications* issued under ss 376(1)(b) and 438(1)(b) require a date and signature to be valid.[36] However, departmental delegates routinely date and sign notifications.

31.2.23 A non-disclosure certificate/notification will not be invalid because it covers material in multiple documents, rather than in a single document.[37]

What if a certificate appears invalid or a notification is incorrect?

31.2.24 If a certificate appears invalid or the notification appears to be incorrect, depending on the circumstances of the case, the AAT may ask the Minister's delegate to

document or matter are relevant. An application for special leave to the High Court was dismissed: *SZTYV v MIBP* [2018] HCASL 382. On this issue the Court, citing *Optus Networks Pty Ltd v Telstra Corporation Ltd* [2010] 265 ALR 281 at [39]; and *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41, considered that to be satisfied, the information or matter would need to have the necessary quality of confidence and have been received in circumstances importing an obligation of confidence. The information in question must also be identified with specificity.

[33] The potential detrimental effect of the disclosure of the information on an individual or the potential misuse of the information does not appear to be a relevant consideration when determining whether the information has the necessary quality of confidence, but is an element required to make out an action for breach of confidence: *Optus Networks Pty Ltd v Telstra Corporation Ltd* [2010] 265 ALR 281 at [39]; and *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41. As such, the impact on an individual may be taken into account when determining whether to exercise the discretion in s 376(3)(b) or 438(3)(b) to release the information.

[34] See *SZMTA v MIBP* [2017] FCA 1055 at [52]–[54].

[35] *NAVK v MIMA* (2004) 135 FCR 567 at [108] and [111]. See also *SZMTA v MIBP* [2017] FCA 1055 at [48]–[53]. Although stamping copies of a document 'in confidence' may have indicated a departmental officer's view that the information was confidential, that could have been done so without the documents having been 'given' to the Minister or an officer of the Department: at [52].

[36] In *El Jejieh v MHA* (No 2) [2019] FCCA 840 at [23]–[25] the Court held that unsigned and undated s 375A certificate was invalid because s 375A requires more than a 'printed name', but requires a signature (which may be electronic) and a date of the certification. In relation to the date, this is required because a valid delegation in respect of any exercise of power by a delegate under s 496 of the Act to issue a non-disclosure certificate/notification to ascertain whether the particular delegate had the required delegation on the date the certificate/notification was made. While this judgment considered a s 375A certificate, as notification under ss 376(1)(b) and 438(1)(b) does not require certification in writing by the Minister (or delegate) about a public interest reason but instead simply requires that the document in question was given in confidence, it is not apparent whether *El Jejieh* also applies to notifications. As a matter of practice, Departmental delegates routinely date and sign notifications under ss 376(1)(b) and 438(1)(b) (and if this has not been done, the Tribunal may request the Department to provide a signed and dated notification).

[37] See s 23(b) of the *Acts Interpretation Act 1901* (Cth) which provides that 'in any Act, .. words in the singular number include the plural and words in the plural number include the singular', and s 2 of the *Acts Interpretation Act 1901* (Cth) which provides that it applies to any Act subject to a contrary intention. As there is no contrary intention in the *Migration Act 1958* (Cth), ss 375A, 376 and 438 should be read to allow for multiple documents to be covered by one certificate/notification.

reconsider it.[38] The delegate may then decide to revoke it if there is not a valid basis for it, or they may re-issue it after addressing any issues.

Procedural fairness and complying with the procedural code

Disclosing existence of certificate/notification and providing a copy

31.2.25 Procedural fairness requires that the existence of a non-disclosure certificate/notification be disclosed to the applicant,[39] the applicant be provided with an opportunity to make submissions on the validity of the certificate or whether the notification is correct, and it be disclosed to what extent, if any, the material covered by the certificate/notification will be taken into account.[40] If the Tribunal has a discretion whether or not to disclose the protected material (i.e. it is a s 376 or 438 certificate/notification), the applicant is also generally given an opportunity to seek a favourable exercise of that discretion.[41]

31.2.26 If a non-disclosure certificate/notification is revoked, procedural fairness also requires that the applicant be informed about the existence of the certificate (if this didn't occur prior to its revocation) and that it has been revoked.[42] An applicant is also generally given an opportunity to request that they be able to view the material which was previously subject to a certificate and to make submissions on that material.[43]

31.2.27 See the flow charts below for an overview on key steps in how the Tribunal addresses non-disclosure certificate/notification.

31.2.28 The Tribunal's statement of reasons for the decision generally reflects how the Tribunal dealt with the certificate/notification and information subject to it, including where the Tribunal considers the certificate to be invalid or notification to be incorrect.[44] If the information or document protected by a certificate/notification is not disclosed to the applicant on the basis that it is not relevant to the review, the Tribunal generally makes clear in its reasons why the information is not relevant so as to avoid an inference that the Tribunal did not consider the material subject to

[38] In *BIE15 v MIBP* [2016] FCCA 2978, the Court observed in *obiter* that if the Tribunal had jurisdiction to proceed on the basis that a certificate was invalid, it presumably would be obliged to afford procedural fairness to the Minister before deciding whether the certificate was infected by jurisdictional error and had no legal effect: at [60].
[39] In *MIBP v SZMTA; CQZ15 v MIBP; BEG15 v MIBP* [2019] HCA 3 at [2], [29]–[30] and [38] the High Court found that procedural fairness requires the applicant to be informed of the certificate to give the applicant an opportunity to provide submissions and make written arguments in support of their case. See also *MIBP v Singh* [2016] FCAFC 183 at [41]–[52]. Although in *SZVDC v MIBP* [2018] FCAFC 16 at [79] the Court held that, in circumstances where the applicant had expressly declined the invitation to attend a hearing, the applicant must be taken to have waived any right he might otherwise have had to be informed by the Tribunal about the certificate.
[40] *MZAFZ v MIBP* [2016] FCA 1081 at [50].
[41] *MZAFZ v MIBP* [2016] FCA 1081 at [50(d)].
[42] In *Singh v MHA* [2020] FCCA 140 at [27]–[29], the Court followed *SZMTA* in finding that the procedural fairness obligations in respect of non-disclosure certificates would also extend to circumstances where a certificate had been revoked. In this matter, the Court also considered that, as the certificate was revoked after the Tribunal hearing, a further hearing was required to enable the applicant to make submissions on matters which were the subject of the certificate before the decision was handed down. Whether a further hearing is required will turn on the facts of each matter.
[43] *Singh v MHA* [2020] FCCA 140 at [29(b)].
[44] See for example *CRW15 v MIBP* [2017] FCCA 2570 at [16]–[25] where the Court held that the Tribunal's failure to inform the applicant of a s 438 certificate and its contents was a failure to afford procedural fairness in circumstances where the s 438 certificate was invalid and the material subject to it was relevant to the review.

the certificate which led to the applicant losing an opportunity to advance their case.[45]

31.2.29 If the Tribunal does not disclose the existence of a non-disclosure certificate/notification to an applicant, it may not result in a jurisdictional error where there is no practical injustice to the applicant or where the information subject to the certificate is not relevant to the review.[46] This was confirmed by the High Court in *MIBP v SZMTA; CQZ15 v MIBP; BEG15 v MIBP*,[47] where the Court held that there is an obligation of procedural fairness to disclose the fact of the non-disclosure certificate/notification to the applicant in the review. However, the majority held that if the Tribunal breaches that obligation, it will result in a jurisdictional error only where the breach is material to the decision.[48] That is, a breach of the obligation to inform the applicant of a non-disclosure certificate will result in jurisdictional error where the applicant has been deprived the possibility of a successful outcome because the Tribunal's decision could have been different if the certificate had been disclosed. If documents and information covered by a non-disclosure certificate were of such marginal significance or were not relevant to the outcome of the review, non-compliance with the procedural fairness obligation to disclose the existence of a certificate is unlikely to result in jurisdictional error.

31.2.30 In *MZAPC v MIBP*,[49] the Federal Court following the approach of the majority in *MIBP v SZMTA; CQZ15 v MIBP; BEG15 v MIBP*,[50] held that, in relation to a s 438 non-certificate, there is a two-step process taken by the court to determine 'materiality' before jurisdictional error will arise. That is, what an affected applicant must establish for there to be a jurisdictional error is, whether the Tribunal in fact

[45] In *MIBP v SZMTA; CQZ15 v MIBP; BEG15 v MIBP* [2019] HCA 3 at [47] the High Court held that procedural fairness ordinarily requires that an applicant be apprised of an event which results in an alteration to the procedural context in which an opportunity to present evidence and make submissions is afforded.

[46] See for example *MIBP v CQZ15* [2017] FCAFC 194 in which the Full Federal Court unanimously held that it is for an applicant to establish that there has been a loss of opportunity to advance their case due the Tribunal's failure to disclose a s 438 certificate and the material subject to the certificate, and that the reviewing court would have to determine whether the documents subject to a s 438 certificate contained material which, if disclosed, may have affected the outcome. See also *AVO15 v MIBP* [2017] FCA 566 which distinguished *MZAFZ* and *Singh* on the basis that the Tribunal's failure to disclose the existence of a s 438 certificate caused no detriment or lost opportunity for the applicant to advance their case because the protected material was of no relevance, or only passing contextual relevance to the review: at [84]–[91]. The High Court in *MIBP v SZMTA; CQZ15 v MIBP; BEG15 v MIBP* [2019] HCA 3 confirmed this approach by the Full Court in *BEG15.* See also *Zhao v MIBP* [2018] FCCA 998 at [91] in which the Court held that, as the certified information did not bear upon the Tribunal's decision, the failure to disclose the existence of both certificates (in relation to the certified information) did not amount to practical injustice and, consequently, jurisdictional error; see also *BGW17 v MIBP* [2018] FCCA 2488 at [37]–[41] where the Court found the Tribunal erred by not disclosing a s 438 certificate to the applicant or providing them with an opportunity to comment, but ultimately found there was no practical injustice to the applicant and refused to grant relief to him. The Court was not persuaded that disclosing the information could have made a difference to the review.

[47] *MIBP v SZMTA; CQZ15 v MIBP; BEG15 v MIBP* [2019] HCA 3 at [2], [78].

[48] *MIBP v SZMTA; CQZ15 v MIBP; BEG15 v MIBP* [2019] HCA 3 at [29]–[30], [38] and [45]–[49] per Bell, Gageler, and Keane JJ. Note that the minority, Gordon and Nettle JJ at [78]–[79] agreed that there is an obligation of procedural fairness to disclose the non-disclosure certificate/notification to the applicant but that any breach of that obligation amounts to jurisdictional error. Their Honours held that the materiality of the error to the outcome should determine whether the Court grants relief after the jurisdictional error has been made out (and that where the breach is not material, relief would be futile). In *Singh v MIBP* [2020] FCA 783 the Court held that the s 375A certificate, which covered printouts of Facebook posts made by the applicant and his sponsor, was invalid and rejected the Minister's submission that the 'validity of the certificate turns on its face': at [55]–[59]. The Court found the inadequate and insufficient disclosure by the Tribunal of the legal and factual basis upon which the certificate was issued, and the failure to disclose that the documents covered by the certificate were adverse to the applicant's case gave rise to a practical injustice: at [69]. However, as the Tribunal had affirmed the decision on two grounds, and one ground (whether the applicant satisfied PIC 4004) was entirely independent of the finding which required consideration of the Facebook posts (i.e. whether the applicant was in a genuine and continuing relationship with the sponsor) , the Court concluded there was no jurisdictional error because there could not have been a different result even if the Tribunal had adequately disclosed the certificate.

[49] *MZAPC v MIBP* [2019] FCA 24 at [50]. While the judgment concerns a s 438 non-disclosure certificate, the same principle would appear to also apply to s 376 non-disclosure certificates. The High Court dismissed an appeal from the Federal Court: *MZAPC v MIBP* [2021] HCA 17.

took the information subject to the non-disclosure certificate into account (with a presumption that the Tribunal did not have regard to the information if there was no exercise of the discretion in s 438(3)) and that the outcome of the review could have realistically been different if the applicant had an opportunity to make submissions to the Tribunal about that information. The High Court upheld the Federal Court's judgment, with the majority (Kiefel CJ, Gageler, Keane and Gleeson JJ) in a joint judgment, holding that what must first be determined when considering whether the Tribunal's decision is affected by jurisdictional error is the 'basal factual question of how the decision was made in fact' before considering whether the counterfactual question of whether the decision in fact made could have been different if the breach of the procedural fairness obligation had not occurred.[51] The Court also held that the onus of proof in relation to proving the materiality of the error lies with the applicant (plaintiff), who also bears the overall onus of proving jurisdictional error,[52] and that that there was no basis in the evidence to find that the Tribunal took the information covered by the s 438 non-disclosure certificate into account.[53]

31.2.31 The Court however may not always be prepared to draw such an inference about the relevance of information and whether the outcome could have been different (especially, where it is not plainly clear) or may draw its own inference that the material was relevant in circumstances where the Tribunal had an alternative view.[54] As such, it is preferable for the Tribunal to put the existence of a certificate to an applicant and explain in its reasons why information subject to a s 376 or 438 certificate is not relevant to the review.

31.2.32 In *MICMSMA v CQZ15*,[55] the Full Court of the Federal Court considered whether the Tribunal's failure to put the applicant on notice of a non-disclosure certificate meant that the decision was affected by jurisdictional error,[56] but also considered whether the decision was affected by apprehended bias due to the presence of the material subject to the non-disclosure certificate on file. The Court held that there was not a sufficient basis to find that the Tribunal's decision would have been different if it had put the applicant on notice of a non-disclosure certificate and so the decision was not affected by jurisdictional error because of the lack of

[50] *MIBP v SZMTA; CQZ15 v MIBP; BEG15 v MIBP* [2019] HCA 3.
[51] *MZAPC v MIBP* [2021] HCA 17 at [38].
[52] *MZAPC v MIBP* [2021] HCA 17 at [38]–[40].
[53] *MZAPC v MIBP* [2021] HCA 17 at [74]–[76]. Note that the other justices (Gordon and Steward JJ in a joint judgment, and Edelman J separately) also dismissed the appeal and upheld the Federal Court judgment but held that once an error is identified by the applicant (plaintiff), the onus to prove that the error was immaterial to the outcome is on the party who seeks to affirm the validity of the decision (i.e. the Executive) (at [86]–[87] per Gordan and Steward JJ, [155] per Edelman J), but that in this instance the error was immaterial given the Tribunal's rejection of the claims was not based on a credibility finding relying upon the material subject to the non-disclosure certificate (at [151] per Gordon and Steward JJ). Edelman J at [202] reasoned that this was not a question which could realistically be affected by the location of the substantive onus of proof, but the question was simply whether the material subject to the non-disclosure certificate had any effect on the Tribunal's decision (i.e. if it did then the outcome might have been different and if it did not, then it would have not have been different).
[54] See *BTE16 v MIBP* [2019] FCCA 124 at [28] where the Court found the Tribunal denied the applicants procedural fairness by failing to disclose the material covered by a s 438 certificate that undermined the applicants' credibility. The Tribunal found the material was not relevant to the review, however the Court held that as the applicants' credibility was central to the determination of their claims the material was relevant for the purposes of the review.
[55] *MICMSMA v CQZ15* [2021] FCAFC 24. An application for special leave to the High Court was dismissed: *MICMSMA v CQZ15* [2021] HCASL 164.
[56] Given that the High Court in *MIBP v SZMTA; CQZ15 v MIBP; BEG15 v MIBP* [2019] HCA 3 held that there is an obligation of procedural fairness to disclose the existence of the non-disclosure certificate/notification to the applicant.

procedural fairness in relation to the non-disclosure certificate.[57] In reaching this finding, the Court also referred to the Tribunal's finding that it did not have regard to the information subject to the non-disclosure certificate/notification and held that this left 'no room' for the possibility that the Tribunal's decision would have been different.[58] However, the Court went on to hold that the Tribunal's decision was affected by apprehended bias, on the basis that the fair minded layperson might conclude that the Tribunal did not bring an impartial mind to the review, despite the Tribunal's statement that it didn't have regard to the information subject to the non-disclosure certificate.[59] The Court considered that the information was of a kind (i.e. highly prejudicial) that might have subconsciously affected the Tribunal's consideration of the material, and in particular its assessment of the applicant's credit, which may have influenced its approach to the decision.[60] This judgment illustrates the difficulties the Tribunal may face in approaching material subject to non-disclosure certificates, particularly where the material is highly prejudicial to an applicant. The Tribunal's breach of procedural fairness in relation to informing the applicant of the non-disclosure certificate may not be material in the sense it would not have affected the outcome of the review, but the material itself may lead to a conclusion of apprehended bias. In such circumstances, it may be preferrable for the Tribunal to deal directly with the material in its reasons and potentially seek the applicant's comment on it (assuming that the material can be discussed with the applicant and isn't prevented by the non-disclosure certificate itself), however whether this would have overcome the error in *CQZ15* would depend on the nature of the material.

31.2.33 The obligation to disclose to the applicant the existence of a non-disclosure certificate (irrespective of whether it is valid or invalid) or notification (irrespective of whether it is correct or not) may still arise even where the applicant has been provided with a copy of the information subject to non-disclosure certificates/notifications as part of a response to a FOI or s 362A request, in particular where it is unclear how the Tribunal dealt with the information subject to

[57] *MICMSMA v CQZ15* [2021] FCAFC 24 at [80]–[87]. The Court considered that the Tribunal made adverse credit findings, which were for reasons separate and independent from the material covered by the s 438 non-disclosure certificate/notification, such that there was no sufficient evidential basis to find that the Tribunal's decision could have been different if there had not been a breach of procedural fairness in relation to the s 438 certificate/notification. An application for special leave to the High Court was dismissed: *MICMSMA v CQZ15* [2021] HCASL 164.

[58] *MICMSMA v CQZ15* [2021] FCAFC 24 at [86]. However, at [81] the Court noted that if the Tribunal's findings on credibility were 'ill-explained or lacked evident justification', a reviewing Court may infer that the Tribunal had been influenced by the information subject to the s 438 non-disclosure certificate/notification, but this was not such a case given the Tribunal's clear and independent findings on credibility. An application for special leave to the High Court was dismissed: *MICMSMA v CQZ15* [2021] HCASL 164.

[59] *MICMSMA v CQZ15* [2021] FCAFC 24 at [112]–[118]. An application for special leave to the High Court was dismissed: *MICMSMA v CQZ15* [2021] HCASL 164.

[60] *MICMSMA v CQZ15* [2021] FCAFC 24 at [116], [118]. The information was highly prejudicial to the applicant's character and credit. The Court considered that the lay observer would appreciate that the information was relevant only in the sense that it indicated the applicant was not the type of person who should be granted a visa of any sort or the sort of person who should be believed, and that the Tribunal may have been subconsciously influenced by the information and would have found it difficult 'to put out of his or her mind'. An application for special leave to the High Court was dismissed: *MICMSMA v CQZ15* [2021] HCASL 164.

them.[61] However, the obligation may not arise where the Department has already disclosed the certificate/notification to the applicant.[62]

31.2.34 Where the Tribunal exercises its power to dismiss a review application under s 362B(1A)(b) or 426A(1A)(b), or to confirm a dismissal decision, the Tribunal is not required to put to the applicant the existence of a certificate or notification.[63]

Complying with ss 359A and 424A

31.2.35 The obligation to give the applicant clear particulars of information that is adverse to their case may sometimes be in tension with the need to protect material covered by a non-disclosure certificate. Unlike the access to documents provision in s 362A,[64] ss 359A and 424A do not expressly exempt material subject to a non-disclosure certificate. However ss 359A and 424A do not apply to information that is 'non-disclosable information' within the meaning of s 5(1) of the Migration Act, which itself reflects similar public interest and in-confidence tests that apply to non-disclosure certificates.[65] This means that material which satisfies the public interest test or that was given in confidence may still be exempt from ss 359A and 424A, regardless of whether a valid non-disclosure certificate applies or not. As discussed immediately below however, it is often possible to comply with non-disclosure obligations and also with ss 359A and 424A by giving the gist of the relevant information even if the protected material is not disclosed in full.

31.2.36 In *MIBP v Singh*, the Federal Court found that where the obligations in ss 359A and 375A come into conflict, s 375A is the leading provision but that the aims of both ss 375A and 359A can usually be served without conflict.[66] In *Burton v MIMIA*,[67] the Federal Court held that a valid s 375A certificate does not override the obligation to provide *particulars* of information under s 359A(1). His Honour stated that the provision of particulars under s 359A need not reveal the information subject to the s 375A certificate, and need not involve access to any actual document.[68]

[61] See *SZMTA v MIBP* [2017] FCA 1055 at [57]–[60] in which the Court held that, even though the applicant had been given an opportunity to make submissions about the matters in documents subject to an invalid non-disclosure certificate which were adverse to him, the Tribunal had erred in some unspecified way (such as not having regard to information in the identified documents which may have assisted the applicant).
[62] In *Chhor v MIBP* [2017] FCCA 2135 the Court found that the applicant did not lose any opportunity to advance their case in respect of a non-disclosure certificate where the Department had earlier provided access to the certificate, but the Tribunal had not raised the issue with the applicant: at [43]–[44].
[63] See *Singh v MIBP* [2018] FCCA 2063 at [26] where the Court considered, in circumstances where the Tribunal was confirming its decision to dismiss the review application, that the Tribunal's failure to disclose the existence of a s 375A certificate did not result in a jurisdictional error. The Court considered that the documents the subject of the s 375A certificate would have been entirely irrelevant and immaterial to the exercise of the Tribunal's discretion and could not have had any conceivable impact on the outcome of the Tribunal's refusal to reinstate.
[64] See s 362A(1) where the entitlement to access to subject to ss 375A and 376.
[65] ss 359A(4)(c), 424A(3)(c) and the definition of 'non-disclosable information' in s 5(1).
[66] See *MIBP v Singh* [2016] FCAFC 183 at [56]. It was also held that *Davis v MIMIA* [2004] FCA 686 was not correct to the extent it suggested that if there is a s 375A certificate, it has the effect that s 359A never gives rise to an obligation to provide particulars, or that there is no obligation to disclose the existence of the certificate to an applicant. An application for special leave to the High Court was dismissed: *MIBP v Singh* [2017] HCATrans 107.
[67] *Burton v MIMIA* (2005) 149 FCR 20 at [40]–[42]. His Honour noted that if Parliament had intended to make the obligation in s 359A(1) subject to s 375A one would have expected it to have done so but that it had not. Justice Wilcox's reasoning is difficult to apply in circumstances where it is not possible to provide particulars of s 359A information without disclosing information that is subject to a valid s 375A certificate.
[68] In *Burton v MIMIA* (2005) 149 FCR 20 the Court held that the earlier judgment in *Davis v MIMIA* [2004] FCA 686 on this issue was wrongly decided and declined to follow it. As *Burton* was a decision of a single Federal Court judge sitting in the Federal Court's appellate jurisdiction it has greater precedential value than *Davis*, a decision of a single Federal Court judge at first instance and accordingly should be followed.

Therefore, while the material subject to a s 375A certificate cannot be provided to the applicant, the Tribunal must consider how to provide sufficient particulars of the information (such as the gist of the information) to the applicant to comply with its s 359A obligation.

31.2.37 Partial disclosure of adverse information covered by a certificate may be sufficient in some circumstances to discharge the Tribunal's ss 359A/424A obligations. For example, in *Singh v MIBP*,[69] the Tribunal complied with its obligation under s 359A by putting to an applicant for comment the 'substance' of information, being the failure of an alleged former employer of the applicant to identify him when shown a document containing the ten headshot photographs which included the applicant, which directly related to a document that was subject to a valid s 375A certificate. Similarly, in *CEF15 v MICMSMA*,[70] the Court found that the Tribunal discharged its s 424A obligation in relation to material which was subject to a s 438 certificate (an anonymous dob-in) on the basis that there was an evident and intelligible basis for only partially disclosing information. In doing so, the Court agreed that full disclosure of the material covered by the certificate would have revealed the identity of the anonymous informant. By way of a further example, in *Matete v MIAC*,[71] the Tribunal discharged its s 359A obligation by disclosing particulars of adverse fingerprint evidence which was the subject of a s 375A certificate. While the s 375A certificate prevented the disclosure of the fingerprints themselves to the applicant and his representatives, the Tribunal was able disclose the substance of advice that fingerprints held by the New Zealand police were the same as the fingerprints held in Australia in respect of the applicant.

Complying with the hearing obligation – ss 360 / 425

31.2.38 As discussed in Chapter 13 – The hearing, the review applicant must have a genuine and meaningful opportunity to give evidence and present arguments about the issues arising in relation to the review.[72] The interaction between the need to raise dispositive issues in the review and also protect non-disclosable material is unclear and has only received limited judicial consideration.[73] However, true conflict between these provisions is likely to be rare and in most cases discussing at least the gist of protected material at the hearing should be sufficient to put the applicant on notice of the dispositive issues.

[69] *Singh v MIBP* [2014] FCCA 510 at [59], [72]–[73].
[70] *CEF15 v MICMSMA* [2019] FCA 2078 at [27]–[31].
[71] *Matete v MIAC* [2008] FMCA 573 at [32].
[72] ss 360(1) and 425(1).
[73] Although in *MIBP v Singh* [2016] FCAFC 183 the applicant argued that the failure to disclose the existence of a non-disclosure certificate meant the invitation to hearing was not real or meaningful, the Court expressly declined to consider that argument as it had already found that the failure to disclose the existence of the certificate in that case was a denial of procedural fairness: at [61]-[64]. In the unrelated matter of *Singh v MIBP* [2014] FCCA 510, the Court found that the applicant's invitation to hearing was a meaningful one in circumstances where the applicant was on notice of the existence of a s 375A certificate and the Tribunal had provided him with a description of the material that it covered: at [56]–[79].

Access to document requests – s 362A

31.2.39 For reviews under Part 5 of the Migration Act, the review applicant is entitled to have access to written material held by the Tribunal.[74] This entitlement is subject to certain restrictions however, including valid ss 375A and 376 non-disclosure certificates. Material subject to a valid s 375A certificate must not be released under s 362A, while material subject to a s 376 certificate may be released at the Tribunal's discretion. If material is to be withheld from the applicant because of a non-disclosure certificate, as noted above procedural fairness would generally require that the existence of that certificate be disclosed to the applicant and that they be provided with an opportunity to make submissions about the Tribunal's decision not to disclose the material subject to the certificate.[75]

31.2.40 See Chapter 36 – Access to documents for further discussion on the operation of s 362A.

31.3 AAT's power to restrict publication or disclosure

31.3.1 The AAT has the power under ss 378 and 440 to give directions restricting the *publication* of information it receives in relation to a review in the MRD. A direction of this kind would usually be made with a view to restricting publication of the statement of decision and reasons which might otherwise be published under s 66B of the AAT Act (see Chapter 27 – Publication of decisions).

31.3.2 The AAT can also give directions under s 440 restricting the *disclosure* of information it receives in Part 7 (Protection) cases.

31.3.3 A person who contravenes a direction made under s 378 or 440 may be subject to imprisonment for 2 years.[76]

31.3.4 If the Tribunal decides to disclose material subject to a valid s 438 certificate, it *must* give a direction under s 440 of the Migration Act, in relation to the information.[77] If the Tribunal issues a direction under s 440 on the basis of an *invalid* s 438 certificate, the direction will also be invalid.[78]

31.3.5 If a written direction is made that does not in it terms have an expiry date, it remains in effect until it is revoked by the Tribunal. The Tribunal may review a written direction at any time after it has been made and vary or revoke it, and may also make a written direction after it has finalised the review.[79] For example, if the

[74] s 362A(1). No Part 7 equivalent.
[75] *MZAFZ v MIBP* [2016] FCA 1081 at [50].
[76] ss 378, 440.
[77] s 438(4). In *ALF16 v MIBP* [2018] FCCA 1596 , the Court held that on each occasion the Tribunal exercises its discretion to disclose any matter to an applicant under s 438(3), a direction must be issued under s 440: at [89]. This judgment was upheld on appeal in *ALF16 v MIBP* [2019] FCA 1457, however this point was not in contention before the Federal Court.
[78] See *BES17 v MIBP* [2018] FCCA 3587 at [45].
[79] See *Acts Interpretation Act 1901* (Cth) s 33(3). See also *Re Le and Secretary, Department of Education, Science and Training* (2006) 90 ALD 83 at [12]–[15] where the Tribunal held that the AAT's power in s 35(3) of the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act) to make an order prohibiting or restricting the publication of certain material may be exercised after the AAT has made its decision, as it is not limited in its terms to the time at which such an order may be made

Tribunal no longer considers it in the public interest that certain information given to the Tribunal not be published, it can revoke the direction, or may issue one after the review has been finalised if it has become apparent that one should be issued.

31.3.6 Non-publication and non-disclosure directions are dealt with separately below. The AAT is also required to comply with restrictions on disclosure as set out in the Act. See Chapter 27 – Publication of decisions for further information.

Non-publication directions – ss 378 and 440

31.3.7 As noted above, a non-publication direction would normally be used to restrict publication of the Tribunal's written statement of decision and reasons. A statement of reasons must set out the Tribunal's findings on material questions of fact and refer to the evidence or any other material on which the findings were based.[80] Publishing decisions promotes accountability, open justice and the rule of law, as well as promoting public trust and confidence in the Tribunal's decision-making.[81]

31.3.8 Sometimes information in a statement of reasons could do some harm if published to the world at large, e.g. if it is confidential or sensitive. The Tribunal can reduce the risk of this kind of harm by not including this kind of material in its reasons, where the material isn't needed for the cogency of the reasons. This can be done by including less specific information in the decision, such as a year of birth (instead of the full date), the last digit of a passport number (instead of the full number) or a suburb (instead of a full address). There is more about this in the AAT's Guideline on the Disclosure and Non-Disclosure of Personal Information in AAT Decisions (internal only).

31.3.9 Where the Tribunal's reasons need to refer to evidence, information, or the contents of documents the Tribunal has received (so the applicant and Department can understand the reasons), but publishing that material to the world at large could do some harm and it would be in the public interest to not publish the material, the Tribunal can restrict publication by making a written direction under s 378 (for Part 5 reviews) or 440 (for Part 7 reviews) of the Migration Act.[82] The Tribunal can direct that certain material not be published, or should not be published except in a particular manner and to particular persons.

31.3.10 When making a non-publication direction under s 378 (for Part 5 reviews) or 440 (for Part 7 reviews) in one matter, the Tribunal may also need to consider if there are related reviews (e.g. separate reviews concerning members of the same family or reviews concerning the same business) which contain the same or similar

and is separate from the power to review a decision. Following this reasoning, it would appear that the Tribunal can make, vary or revoke directions under ss 378 and 440 after the review is completed, as they are similar to s 35 orders.

[80] Migration Act ss 368, 430; see also the AAT Act s 43(2B).

[81] See discussion of open justice and the rule of law in *Re Le and Secretary, Department of Education, Science and Training* (2006) 90 ALD 83 at [16]–[29]. Although that case was concerned with s 35 of the AAT Act as then in force, many of the principles seem relevant to the MRD, particularly for Part 5 reviews, which are also generally heard in public: s 365 of the Migration Act. One of the AAT's statutory objectives involves promoting public trust and confidence in its decision-making: s 2A(d) of the AAT Act. See also *Re Pochi and Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 33 where Brennan J observed that public proceedings in the AAT were important because 'administration has hitherto been a cloistered process… and its exposure to public scrutiny is calculated to enhance greater public confidence in it.': at 54.

material that will be covered by the direction in the first matter. The Tribunal should generally consider making the same s 378 or 440 direction in the related reviews for consistency and to ensure the material, that cannot be published in the first decision (because the Tribunal has made a s 378 or 440 direction), is not inadvertently published in the related review decisions. When making directions in related matters, the Tribunal will need to be satisfied that the discretion to issue a direction under s 378 or 440 should still be used at the time of making the direction in the related matters.

Public interest

31.3.11 Before making a direction, the Tribunal must be satisfied that it is in the public interest that the material should not be published, or that it should only be published in a particular manner and to particular persons. However, where the Tribunal has exercised its discretion to disclose information subject to a s 438 certificate/notification, s 438(4) provides that a written direction under s 440 is to be issued. In this circumstance it is unclear whether the Tribunal must itself be satisfied that it is in the public interest that the information not be disclosed or published prior to issuing a s 440 direction but on the plain reading of s 438(4) it appears that the Tribunal is required to issue a 440 direction (even where it may not be satisfied). The type of s 440 direction (that is, restricting publication and/or disclosure) appears to be open to the Tribunal to determine.

31.3.12 Deciding what is in the public interest involves a broad discretionary value judgment by reference to wide-ranging undefined factual matters appropriate to the statutory context.[83] It is about what best serves the advancement of the interest or welfare of the public, society, or the nation; in contrast to individual, private or personal interests.[84] For example, public interests might involve public health, defence, national security, the administration of justice, the environment, economics and commerce, transparency in government, or protecting confidentiality.[85]

31.3.13 The public interest often has many facets, features or dimensions, some of which may conflict, and a decision-maker will usually need to balance these competing

[82] Similar powers to restrict publication and disclosure are available in other divisions under s 35 of the AAT Act.
[83] The factual matters that might be relevant cannot be confined, and reasonable minds may differ about what is in the public interest. See e.g. *Sankey v Whitlam* (1978) 142 CLR 1 at 60, *O'Sullivan v Farrer* (1989) 178 CLR 210 at 216; *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423 at [5], [55]; *McKinnon v Secretary, Department of Treasury* (2005) 145 FCR 70 at [8], [19], [47] (referring to *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 381–382), [96], [243] (referring to *Right to Life Assn (NSW) Inc v Secretary, Department of Human Services and Health* (1995) 56 FCR 50 at 59).
[84] *McKinnon v Secretary, Department of Treasury* (2005) 145 FCR 70 at [9]-[10],[13] (citing *Director of Public Prosecutions v Smith* [1991] 1 VR 63 at [75] where the court held that the concept embraced 'standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the well-being of its members'. See also *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473 at 480, 486–487, where the Court held that while the concept is not concerned with an individual interest, the interest need not be that of the 'public as a whole' and could be a section of the public (though the size of that section may affect the weight to be given to that interest). A matter of private right might also be related to public interest: *Sankey v Whitlam* (1978) 142 CLR 1 at 60, referring to *Glasgow Corporation v Central Land Board* (1956) SC (HL) at 25. Personal or prurient interests or mere curiosity are not enough to show that publishing defamatory material is in the public interest: *McKinnon v Secretary, Department of Treasury* (2005) 145 FCR 70 at [130]. Some further cases considering what is meant by the 'public interest' are referred to in Part 6 of the Office of the Australian Information Commissioner's FOI guidelines, version 1.3, December 2016 (https://www.oaic.gov.au/freedom-of-information/foi-guidelines/part-6-conditional-exemptions, accessed 2 April 2020) at [6.4]-[6.6].
[85] *McKinnon v Secretary, Department of Treasury* (2005) 145 FCR 70 at [12], *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473 at 477,

features in deciding what is in the public interest.[86] For example, public interests in transparency may conflict with public interests in maintaining confidentiality.

31.3.14 Non-publication directions under the Migration Act appear to have a statutory purpose similar to confidentiality orders under the AAT Act, that is, to protect the principle of open justice while allowing for exceptions in appropriate cases.[87] Public interest considerations under the FOI Act may also provide some useful guidance, because publishing an AAT decision and releasing a document under FOI both amount to releasing the decision/document to the world, and both have some common purposes in promoting scrutiny and accountability of government: see Part 6 of the FOI Guidelines at [6.17]–[6.22].[88]

31.3.15 In the context of AAT decisions, factors in favour of publishing may include the public interests in open justice, increasing public scrutiny of government decision-making and promoting informed debate on matters of public importance. If material is already publicly available, it may not further the public interest to restrict its publication or disclosure.[89]

31.3.16 Public interest factors against publishing may include where publishing the material could reasonably be expected to:

- prejudice legal proceedings[90]
- expose persons to mental or physical harm[91]
- discourage people from applying for review by the AAT or hamper the AAT's ability get evidence, because people are afraid that sensitive information about them will be published to the world at large[92]

[86] *McKinnon v Secretary, Department of Treasury* (2005) 145 FCR 70 at [9], [12], [13], [18], [46], [231] (referring also to *Re Queensland Electricity Commission; Ex parte Electrical Trades Union of Australia* (1987) 61 ALJR 393 at 395); *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423 at [16] and [55] (c.f. at [130]), *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473 at 485; *Sankey v Whitlam* (1978) 142 CLR 1 at 38-39, 48-49, 56, 62-64, 95-96.

[87] See *Commissioner of Taxation v Pham* (2013) 134 ALD 534 at [32], which was considering orders under s 35 of the AAT Act, but similar considerations would seem to apply. See also *Australian Securities and Investments Commission v Administrative Appeals Tribunal* [2009] FCAFC 185 at [74]–[76] where the Court held that s 35(1) of the AAT Act establishes a norm that Tribunal proceedings be in public and that the Tribunal would need some cogent reason to depart from the ordinary requirement of a public hearing (and issue an order to restrict disclosure). This judgment was cited in *TYGJ and Information Commissioner* [2017] AATA 1689 which was heard in the Freedom of Information Division of the Tribunal. Having regard to the aforementioned principle, the Tribunal determined that allegations of improper conduct against APS employees should be made publicly available but that the names of the particular officers should not be published. The Tribunal considered that this would strike a balance between the principle of openness and the legitimate concerns of the officers concerned. Section 365(1) of the Migration Act similarly establishes that oral evidence in a Part 5 review must be taken in public, subject to where it is in the public interest to be taken in private. Note that for Part 7 reviews, s 429 of the Migration Act provides that reviews must be in private.

[88] In *McKinnon v Secretary, Department of Treasury* (2005) 145 FCR 70, the Court noted that it had long been accepted that releasing a document under freedom of information is releasing it to the world: at [98]. The objects of the *Freedom of Information Act 1982* (Cth) (FOI Act) include to give the Australian community access to information held by Government and to increase scrutiny, discussion, comment and review of Government's activities: s 3. See [6.17]–[6.22] in Part 6 of the Office of the Australian Information Commissioner's FOI guidelines, version 1.3, December 2016 (https://www.oaic.gov.au/freedom-of-information/foi-guidelines/part-6-conditional-exemptions, accessed 19 September 2017). These guidelines are concerned with decisions about whether to release 'conditionally exempt' documents under the public interest test in s 11B of the FOI Act.

[89] *Sankey v Whitlam* (1978) 142 CLR 1 at 45, 64.

[90] E.g. material about unproven criminal charges before trial. For cases considering whether publishing or disclosing information could prejudice ongoing criminal proceedings, see Re Taxpayer and Commissioner of Taxation (2004) 81 ALD 473 and *Commissioner of Taxation v Pham* (2013) 134 ALD 534 at [54]–[59].

[91] E.g. material that could cause psychiatric harm to individuals, or put them at risk of danger from other persons, contrary to public interests in the welfare and safety of the public. For a case concerning the public interests in ensuring the safety of persons, see Re Hunt and Secretary, Department of Education, Employment and Workplace Relations (2009) 111 ALD 175, where the AAT declined to make a confidentiality order as there was no evidence of any threat to any individual.

- unreasonably interfere with a person's privacy, commercial affairs or reputation – though courts have observed that the price of open justice is that allegations about parties are aired in open court and parties must generally accept the embarrassment and reputational damage that may come from being involved in litigation.[93]

31.3.17 There are also legal restrictions on publishing certain kinds of material under various State, Territory and Commonwealth laws, as outlined in the 'Court reporting restrictions' section of the Media and Internet Law and Practice commentary by Thomson Reuters (internal only). These include restrictions on publishing material about juvenile offending, family law, child protection, adoption, sexual offences, family violence, criminal records and national security matters. Whether or not those laws directly apply to the AAT, the existence of these kinds of legal restrictions suggests there is a public interest in not publishing material of this kind.

31.3.18 In most cases, the Tribunal can further the public interest by publishing a decision with a direction that a person be de-identified, which could enable a reader to understand the full reasons without identifying the individual concerned; or by redacting specific information from the published version of the reasons.

31.3.19 However in a small number of cases, it will be in the public interest not to publish the reasons at all, for example because redacting information to protect the public interest would result in the decision being unintelligible or misleading to readers, or because even publishing a de-identified version would cause serious harm to a vulnerable person.

Non-disclosure directions – s 440 (Part 7 reviews only)

31.3.20 As noted above the Tribunal also has the power to give written directions under s 440 restricting the *disclosure* of information it receives in Part 7 (Protection) cases. As is the case with the power to restrict publication discussed above, the Tribunal must be satisfied that it is in the public interest that the information should not be disclosed (except in a particular manner and to particular persons). However, where the Tribunal has exercised its discretion to disclose information subject to a s 438 certificate/notification, s 438(4) provides that a written direction under s 440 is to be issued. In this circumstance it is unclear whether the Tribunal must itself be satisfied that it is in the public interest that the information not be disclosed prior to

[92] See *Re Le and Secretary, Department of Education, Science and Training* (2006) 90 ALD 83 at [10]–[11], referring to *Minister for Immigration and Multicultural and Indigenous Affairs v X* (2005) 147 FCR 243 at [22] and *Johnston v Cameron* (2002) 124 FCR 160 at 180.

[93] In the judicial context, unless otherwise specified in a statute, the usual rule is that a suppression order may only be made where it is 'necessary to secure the administration of justice': see e.g. *Johnston v Cameron* (2002) 124 FCR 160 at [66]-[79], *Rinehart v Welker* (2011) 93 NSWLR 311 at [24]-[40] and *Rinehart v Rinehart* (2014) 320 ALR 195 at [21]-[31]; see further discussion in Media and Internet Law and Practice at [15.190]-[15.200]. The principle of open justice is similarly a feature in the AAT, though the emphasis may differ slightly in this context where the test is a broader one of public interest. Particularly sensitive material that might warrant a suppression or non-publication order might include material about a person's sexual orientation, HIV status or past criminal record. For an example of a case balancing the public interests in open justice and privacy considerations affecting publishing personal information in an AAT decision, see *Re Le and Secretary, Department of Education, Science and Training* (2006) 90 ALD 83 at [30]–[46]. For a case concerning an order to prevent unreasonable disclosure of private financial information, see *Re Sheepskin and Opal Exporters and Export Development Grants Board* (1984) 6 ALD 594.

issuing a s 440 direction but on the plain reading of s 438(4) it appears that the Tribunal is required to issue a direction (even where it may not be satisfied).

31.3.21 While the public interest factors discussed above in relation to non-publication directions may also be relevant to non-disclosure directions, different considerations may also apply because non-publication directions are concerned with restricting publication to the world at large, whereas non-disclosure directions can be more restrictive, preventing any further disclosure (beyond specified individuals).

31.3.22 Given the potentially very restrictive nature of non-disclosure directions, they are made carefully, recognising that material may need to be disclosed to lawyers for legal advice or to a court for the purposes of judicial review.[94] In practice, it would appear to be rare for the Tribunal to have to issue a non-disclosure direction, given that applicants are not identified in published decisions in Part 7 cases.[95] The need for a direction of this kind is most likely to arise where the Tribunal discloses information that is subject to a s 438 non-disclosure certificate, in which case the Tribunal must make a s 440 direction.[96] However, if the Tribunal issues a direction under s 440 on the basis of an *invalid* s 438 certificate, the direction will also be invalid.[97]

31.4 Other restrictions on disclosing information to third parties

Privacy Act

31.4.1 The Tribunal is subject to obligations arising under the Privacy Act. The Privacy Act regulates the collection, storage, use and disclosure of 'personal information'. The Privacy Act identifies, in 13 'Australian Privacy Principles' (APPs),[98] the general obligations of APP entities (organisations or agencies, including federal government departments and statutory bodies such as the Tribunal) in handling personal information.

31.4.2 The APPs deal with soliciting and collecting personal information, including notification requirements when personal information is collected. In summary, the Tribunal is required to only solicit and collect personal information that is reasonably necessary for, or directly related to, one or more of its functions or activities. If it receives unsolicited personal information which it could not have collected under the APPs, it must generally destroy the information. The Tribunal is also required to notify individuals of their personal information which it collects, or take reasonable steps to do so. For detailed information about the APPs, see the APP Guidelines.[99]

[94] Incorporating exceptions in the terms of the direction allowing the information to be disclosed for these kinds of purposes can avoid additional work at a later stage in dealing with applications to revoke or vary a direction on the basis that a person needs to disclose it for such a purpose and does not want to breach the direction.
[95] s 431.
[96] s 438(4).
[97] See *BES17 v MIBP* [2018] FCCA 3587 at [45] the Court found if the only reason for issuing a s 440 direction is on the basis of an invalid s 438 certificate the direction will also be invalid.
[98] The Australian Privacy Principles are contained in the *Privacy Act 1988* (Cth) (Privacy Act) s 14 and sch 1.
[99] See http://www.oaic.gov.au/privacy/applying-privacy-law/app-guidelines/. Other APPs relate to open and transparent management of personal information; anonymity and pseudonymity; collection of solicited personal information; dealing with

31.4.3 The disclosure of personal information is governed by APP 6, which is discussed in more detail below after considering the key definitions of 'personal information' and 'sensitive information'.

Meaning of 'personal information'

31.4.4 'Personal information is defined as:

> *information or an opinion about an identified individual, or an individual who is reasonably identifiable:*
>
> *(a) whether the information or opinion is true or not and*
>
> *(b) whether the information or opinion is recorded in a material form or not.*[100]

31.4.5 What constitutes personal information will vary, depending on whether an individual can be identified or is reasonably identifiable in the particular circumstances. Common examples of personal information include an individual's name, signature, address, telephone number, date of birth, medical records, bank account details, employment details and commentary or opinion about a person.

31.4.6 The personal information of one individual may also be personal information of another individual. For example, a marriage certificate that contains personal information of both parties to a marriage, and a vocational reference that includes personal information about both the author and the subject of the reference.

31.4.7 Moreover, personal information 'about' an individual may be broader than the item of information that identifies them. For example, a vocational reference or assessment may comment on a person's career, performance, attitudes and aptitude. Similarly, the views expressed by the author of the reference may also be personal information about the author.

31.4.8 Personal information that has been de-identified will no longer be personal information. Personal information is de-identified if the information is no longer about an identifiable individual or an individual who is reasonably identifiable.[101]

'Sensitive information'

31.4.9 'Sensitive information' is a subset of personal information and is defined as information or an opinion (that is also personal information) about an individual's racial or ethnic origin, political opinions, membership of a political association, religious beliefs or affiliations, philosophical beliefs, membership of a professional or trade association, membership of a trade union, sexual orientation or practices,

---

unsolicited personal information; notification of the collection of personal information; direct marketing; cross-border disclosure of personal information; adoption, use or disclosure of government related identifiers; quality of personal information; security of personal information; access to personal information; and correction of personal information.

[100] Privacy Act s 6.

criminal record, health information, genetic information and certain biometric information.[102]

Disclosing personal information – APP 6

31.4.10 Under APP 6, the Tribunal may only disclose personal information for a purpose for which it was collected (known as the 'primary purpose'), or for a secondary purpose if an exception applies. The exceptions include where:

- the individual has consented to the secondary disclosure;[103]
- the individual would reasonably expect the APP entity to disclose their personal information for the secondary purpose, and that purpose is related to the primary purpose of collection, or, in the case of sensitive information, directly related to the primary purpose;
- the secondary disclosure is required or authorised by or under an Australian law or a court/tribunal order;
- a permitted general situation exists in relation to the secondary disclosure – there are seven permitted general situations, including, where disclosure is necessary in order for an APP entity to take appropriate action in relation to suspected unlawful activity or serious misconduct that relates to the entity's functions or activities;[104]
- the APP entity reasonably believes that the secondary disclosure is reasonably necessary for one or more enforcement related activities conducted by, or on behalf of, an enforcement body; or
- the APP entity is an agency (other than an enforcement body) and discloses biometric information or biometric templates to an enforcement body, and the disclosure is conducted in accordance with guidelines made by the Information Commissioner for the purposes of APP 6.3.

31.4.11 Accordingly, if the Tribunal collects personal information for a particular purpose (the primary purpose, which in the MRD would normally be to review a decision about whether or not somebody is entitled to a visa), it must not disclose the information for another purpose, unless one of those exceptions applies.[105] It is important when determining whether disclosure is permissible under the Privacy Act to consider the circumstances in which the information was obtained, the circumstances in which it is being disclosed and the persons/bodies to whom it is being disclosed. Failure to do so may result in a breach of the Privacy Act.

---

[101] Privacy Act s 6.
[102] Privacy Act s 6.
[103] The Privacy Act defines 'consent' to include 'implied consent' and 'express consent': s 6. The APP Guidelines, issued by the Information Commissioner, provide that implied consent arises where consent may reasonably be inferred in the circumstances from the conduct of the individual and the APP entity: see http://www.oaic.gov.au/privacy/applying-privacy-law/app-guidelines/.
[104] For further examples, the Privacy Act s 16A.
[105] APP 6.

31.4.12 In certain circumstances the release of a visa applicant's personal information to an applicant for review (e.g. a person who is a visa applicant's sponsor or nominator) may be considered to fall within APP 6.2(a), which allows for disclosure where an individual would reasonably expect the APP entity to use or disclose their personal information for the secondary purpose, and that purpose is related to the primary purpose of collection, or, in the case of sensitive information, directly related to the primary purpose.[106]

AAT Act – protected information under s 66

31.4.13 Section 66 of the AAT Act provides that an 'entrusted person' must not be required to produce a 'protected document' or disclose 'protected information' to a court and, if the document or information relates to a Part 7 (Protection) reviewable decision, to a parliament, except in so far as necessary for carrying into effect the provisions of the AAT Act, or another Act that confers powers on the Tribunal, such as the Migration Act.[107] The provisions about courts mean that the AAT may be able to resist a subpoena or summons issued to it by a court relating to MRD proceedings, if it is not related to the purpose of the AAT Act or the Migration Act.

Migration Act – other restrictions on publication and disclosure

Information received by the MRT or RRT before 1 July 2015

31.4.14 For information received by the former Migration Review Tribunal or Refugee Review Tribunal before 1 July 2015, ss 377 [MRT] and 439 [RRT] of the Migration Act provided for a general prohibition on the disclosure of information received about a person except for the purposes of the Migration Act. There was also a prohibition similar to s 66 of the AAT Act, preventing courts from compelling the production of documents for non-Migration Act purposes. Although those provisions were repealed with effect from 1 July 2015, transitional and saving arrangements mean that those provisions continue to apply after 1 July 2015 in relation to information or documents obtained before that date.[108]

Information identifying protection visa (and related) applicants

31.4.15 Sections 431 and 501K of the Migration Act also prohibit the AAT from publishing information about certain persons who have applied for protection visas and

[106] APP 6.2(a). In contrast, in *Maman v MIAC* [2011] FMCA 426 the Court found that, as the applicant's former spouse was not likely to have been aware that her letter to the Department was of a type that was usually passed to the visa applicant, disclosure of the letter was not permissible. This was undisturbed on appeal: *MIAC v Maman* (2012) 200 FCR 30.
[107] An 'entrusted person' is a current or former Tribunal Member, a current or former Tribunal officer, a current or former member of staff of the Tribunal or a person engaged by the Tribunal to provide interpreting services in a proceeding. A 'protected document' or 'protected information' is protected for the purposes of s 66 if it concerns a person and was obtained by an 'entrusted person' in the course of their duties. 'Court' in this context is not limited to a judicial court, but includes any tribunal, authority or person having the power to require production of documents or the answering of questions. 'Parliament' includes any Commonwealth, State or Territory House of Parliament and any committee of such.
[108] *Tribunals Amalgamation Act 2015* (Cth) sch 9 item 15BB. Additionally, s 66A of the AAT Act appears to allow these provisions to continue to apply to information received by the MRT or RRT before 1 July 2015.

protection-related bridging visas, and their relatives. These restrictions are discussed in Chapter 27 – Publication of decisions.

Identifying information and obligations under Part 4A

31.4.16 Part 4A of the Migration Act prohibits disclosure of 'identifying information' in certain circumstances. Identifying information refers to personal identifiers (such as fingerprints, iris scans, photographs, recordings, signatures) and related information.[109]

31.4.17 It an offence to disclose (or cause the disclosure of) identifying information unless the disclosure is permitted under s 336E(2), or the disclosure is necessary to prevent or lessen a serious and imminent threat to a person's life or health.[110] Subsection 336E(2) permits disclosure for a range of purposes, including where it is for the purpose of the Migration Act, required by or under a law, for the purposes of a court or Tribunal proceeding relating to the person to whom the identifying information relates, or for various enforcement and integrity purposes.[111]

31.4.18 The majority of disclosures of identifying information by Tribunal members or officers are likely to be for the purpose of AAT proceedings relating to a person to whom the identifying information relates, and would therefore be permitted under s 336E(2)(f). However, disclosure of identifying information relating to persons other than the persons to whom the proceedings relate may not be permitted unless it is for a Migration Act purpose (e.g. a s 359A or 424A invitation or a s 362A request) or required by law (e.g. in response to an FOI request), or falls within another exception.

[109] The term 'identifying information' is defined in s 336A and includes any 'personal identifier' (defined in s 5A(1)) obtained by the Department for one or more of the purposes referred to in s 5A(3) (which relate to matters concerning integrity and lawfulness), or information or analysis derived from those which could be used to discover a particular person's identity or get information about them. Any personal identifiers provided by a person directly to the Tribunal or to the Department for purposes other than those listed in s 5A(3), will not be 'identifying information' for the purposes of the Act, as that information was not 'obtained by the Department' as defined.
[110] s 336E(1), (1A).
[111] See e.g. ss 336E(2)(ba), (eb), (f), (ea), (ga).

31.5 FLOWCHART – DEALING WITH RELEVANCE OF INFORMATION SUBJECT TO A NON-DISCLOSURE CERTIFICATE/NOTIFICATION

Section 375A certificate – *public interest* – Tribunal must do all things necessary to ensure the material is not disclosed (Part 5 only).
Section 376/438 certificate/notification – *public interest or given in confidence* – Tribunal may disclose the material.

Is the information relevant to the review?

i.e. does the information impact the applicant's case in any way (either positively or negatively)

Yes, relevant – the information subject to the certificate/notification is either positive or negative to the applicant.

The applicant should be advised that there is a non-disclosure certificate/notification on file (this can be done prior to the hearing by way of a letter or at the hearing). The Tribunal can give the applicant a copy of the certificate/notification (provided the certificate/notification itself does not reveal the information subject to it).

Not relevant – the information subject to the certificate/notification does not impact the applicant in any way.

The applicant should be advised of the existence of the certificate/notification, and why the information is not relevant to the review (at the hearing).

The decision record should state why the information isn't relevant to the decision (so as to avoid an inference the Tribunal relied on the information in any way).

Positive

If the information is positive to the applicant, the Tribunal should inform the applicant why this is the case.

If the information is positive and not subject to a valid s 375A certificate, the applicant can be given a copy of the material (subject to any restrictions in the Privacy Act). The applicant should be invited to make any submissions on the material.

The decision record should make clear how the Tribunal dealt with the information, including the procedural steps taken.

If the Tribunal made a determination on the validity of the certificate/notification, this should be noted in the decision record.

Negative

If the Tribunal considers the material negative to the applicant, procedural fairness will generally require the material to be discussed with the applicant, noting the following:

- If valid s 375A certificate - the Tribunal *cannot* give or disclose the material to the applicant (subject to the adverse information provisions). If the Tribunal considers such a certificate valid, the applicant should be invited to make submissions on the validity of the certificate.
- If valid ss 376/438 certificate/notification - the Tribunal can exercise its discretion to give or disclose the material to the applicant (subject to any restrictions in the Privacy Act). If the Tribunal proposes not to give or disclose the material, the Tribunal should invite the applicant to make submissions on the validity of the certificate/notification **and** the exercise of the discretion. It will not be necessary to come to a concluded view on the validity of the certificate/notification if the Tribunal gives or discloses the material to the applicant. This is because it can do this either by exercising its discretion or by providing it as material not subject to a valid certificate/notification.
- If certificate/notification is not valid - the Tribunal is not restricted from giving or disclosing the material to the applicant (subject to the Privacy Act).

Please see next page for information on determining the validity of a certificate/notification.

The decision record should set out: how the Tribunal dealt with the information including the procedural steps taken; and the Tribunal's determination on the validity of the certificate/notification (if made). In relation to a valid ss 376/438 certificate/notification, the decision record should also include the reasons for exercising the discretion to give or disclose the material.

The information should also be considered against the adverse information provisions.

Adverse information provisions

If the information is adverse (ss 359A/424A), particulars of the information must be given to an applicant unless:

- a valid s 375A certificate prevents its release (unless statutory obligations can be balanced by giving the 'gist' of the adverse information); or
- an exception under s 359A(4)/424A(3) applies, including where the material is 'non-disclosable information' (s 5 of Migration Act). If disclosure would be contrary to public interest or breach confidence, the exceptions in ss 359A(4)(c)/ 424A(3)(c) will apply. A valid certificate is not required in order for information to fall under ss 5 and 359A/424A.

Is the certificate valid or is the notification correct?

Section 375A certificate: Member to determine if certificate states a valid ground of public interest immunity.

Section 376/438 certificate/notification: Member to determine, in relation to a certificate, if it states a valid ground of public interest immunity or, in relation to notification, if the material was given to the Minister in confidence.

- *Public interest immunity* – e.g. disclosure would reveal the identity of an informer or ongoing investigation. Only describing the material (e.g. 'internal working documents') not sufficient. A valid certificate must explain how the disclosure of the information would not be in the public interest.
- *Given in confidence* – e.g. to an officer of the Department in circumstances imposing an obligation of confidence.

32. REPRESENTATIVES AND THE TRIBUNAL

32. REPRESENTATIVES AND THE TRIBUNAL[1]

32.1 IMMIGRATION ASSISTANCE

32.1.1 Section 280 of the *Migration Act 1958* (Cth) (the Migration Act) prohibits persons who are not registered migration agents from giving 'immigration assistance'. This prohibition is subject to limited exceptions which are outlined below.

What is immigration assistance?

32.1.2 'Immigration assistance' is defined in s 276(1) as using or purporting to use knowledge of or experience in migration procedure to assist a visa applicant or cancellation review applicant by:

- preparing or helping to prepare the application; or
- advising the applicant about the application; or
- preparing for, or representing the applicant in, proceedings before a court, or 'review authority' in relation to the application.[2]

32.1.3 A person also gives 'immigration assistance' if they use or purports to use knowledge of, or experience in, migration procedure to assist another person by:

- preparing, or helping to prepare, a sponsorship or nomination form;[3]
- advising the person about sponsoring or nominating another person;[4]
- representing the person in proceedings before a court or 'review authority' that relate to a visa for which he or she was sponsoring or nominating the visa applicant;[5]
- preparing, helping to prepare, or advising the person about a request to the Minister to exercise power to substitute a more favourable decision of the

[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 276(1). 'Cancellation review applicant' means an applicant for: review of a decision to cancel a visa held by the applicant; revocation under s 137L; or review of a decision under s 13L not to revoke a cancellation: s 275. 'Review authority' means the Tribunal reviewing decision under Part 5 (migration) or Part 7 (protection) of the Migration Act in its Migration and Refugee Division, or the Immigration Assessment Authority: s 275. It does not include the Tribunal reviewing other decisions under the Migration Act, in its General Division (i.e. reviews conducted under s 138 or s 500). Section 275 was amended from 1 July 2015 by the *Tribunals Amalgamation Act 2015* (Cth) (Amalgamation Act).
[3] s 276(2)(a).
[4] s 276(2)(b).
[5] s 276(2)(c).

Tribunal under ss 351, [migration] 417 [protection], or 501J [character], or to exercise a power under ss 195A, 197AB or 197AD;[6]

- preparing, or helping to prepare, a representation to the Minister to exercise the Minister's power under s 501C(4) or 501CA(4) (revocation of decisions to refuse or cancel visas on character grounds), or they advise in relation to making such a representation.[7]

What is not immigration assistance?

32.1.4 A person does not give 'immigration assistance' if they merely:

- do clerical work to prepare (or help prepare) an application or other document; or
- provide translation or interpretation services to help prepare an application or other document; or
- advise another person that the other person must apply for a visa; or
- pass on to another person information produced by a third person, without giving substantial comment on or explanation of the information.[8]

Who can give immigration assistance?

32.1.5 In addition to registered migration agents, the following persons are not prohibited from giving 'immigration assistance':

- parliamentarians;[9]
- an Australian legal practitioner in connection with legal practice;[10]
- officials, if the assistance is in the course of his/her duties as an official;[11]
- individuals preparing a request to the Minister to substitute a more favourable decision under ss 351, 417 or 501J, as long as they do not receive a fee or other reward;[12]

[6] s 276(2A).
[7] s 276(2B). As amended by the *Migration Amendment (Regulation of Migration Agents) Act 2020* and applies to assistance given or representations made on or after 11 August 2020.
[8] s 276(3). For additional instances of circumstances where 'immigration assistance' is not given, see also Migration Agents Regulations ss 3C and 3F.
[9] s 280(2).
[10] s 280(3). As amended by the *Migration Amendment (Regulation of Migration Agents) Act 2020*. The amended section commenced on 22 March 2021. Prior to this amendment, Australian legal practitioners were not prohibited from giving 'immigration legal assistance' but could not give 'immigration assistance' on the basis of being an Australian legal practitioner. See further discussion below.
[11] s 280(4).
[12] s 280(5).

- close family members – that is, a spouse, child, adopted child, parent or sibling;[13]
- members of a diplomatic mission, consular post; or an office of an international organisation in the course of their duties in those positions;[14]
- persons nominating or sponsoring a visa applicant for the purposes of the regulations.[15]

32.2 Regulation of immigration assistance

Regulation of migration agents and MARA

32.2.1 All persons acting as migration agents in Australia must be registered with the Migration Agents Registration Authority (MARA).[16] MARA is defined to mean the Migration Institute of Australia Limited, if an appointment under s 315 of the Migration Act is in force, or if there is no such appointment, the Minister.[17] At present, there is no instrument of appointment and MARA is a discrete office attached to the Department.

32.2.2 MARA is responsible for processing applications for registration, monitoring the conduct of registered migration agents, handling complaints and imposing disciplinary sanctions against registered agents for breaches of the MARA Code of Conduct (the Code of Conduct) and the Migration Act. MARA is also responsible for informing the appropriate prosecuting authorities about apparent offences against relevant sections of the Migration Act; and monitoring the adequacy of the Code of Conduct. A public record of all registered migration agents is maintained by MARA and is available online or in printed form.[18]

32.2.3 Migration agents are bound by the Code of Conduct.[19] From 1 March 2022, the Code of Conduct is set out in an instrument contained in the *Migration (Migration*

[13] s 280(5A). 'Close family member' is defined in Migration Agents Regulations reg 3H.
[14] s 280(6). 'Member of a diplomatic post' is defined in s 280(7) as a person who is a member of a mission for the purposes of the *Diplomatic Privileges and Immunities Act 1967* (Cth).'Member of a consular post' is defined in s 280(7) as a person who is a member of a consular post for the purpose of the *Consular Privileges and Immunities Act 1972* (Cth). 'Member of an office of an international organisation is defined in s 280(7) as the holder of an office in, an employee of, or a voluntary worker for, a body that, under s 3 of the *International Organisations (Privileges and Immunities) Act 1963* (Cth), is an international organisation within the meaning of that Act.
[15] ss 280(5B) and (5C).
[16] s 286. Note that ss 290, 290A, 291, 292, 293 and 294 of the Migration Act prohibit the registration of persons who do not meet certain criteria relating to integrity, professional development and other matters.
[17] s 275. Under s 315, the Minister may make a written instrument appointing the MIA as MARA.
[18]The online register is available through a search engine on the MARA website at:https://www.mara.gov.au/search-the-register-of-migration-agents/.
[19] s 314(2).

Agents Code of Conduct) Regulations 2021 (Cth).[20] Prior to this date it was set out in Schedule 2 of the *Migration Agents Regulations 1998* (Cth).[21]

32.2.4 The current Code of Conduct covers matters such as standards of professional conduct and ethical conduct, agents' obligations to clients, duties to Australia's immigration system, fees and charges for clients, record keeping and management, and financial duties. The Code of Conduct is not an exhaustive statement of the duties of migration agents under Commonwealth law, and is not intended to apply to the exclusion of a law of a State or Territory that imposes duties on a migration agent to the extent that the law is capable of operating concurrently with the Code.[22]

32.2.5 A breach of the Code of Conduct may lead to the taking by MARA of appropriate disciplinary action.[23] Where misconduct by a migration agent is established under the Code of Conduct, MARA has the authority to caution the agent or to cancel or suspend their registration.[24] In addition, MARA may request information and the migration agent must respond promptly to the request, dealing with the each matter raised in the request.[25] It may also require a registered migration agent to: make a statutory declaration in answer to questions in writing by MARA; to appear before an individual specified by MARA and to answer questions; or to provide MARA with specified documents or records relevant to the agent's continued registration.[26] For more information on MARA, see www.mara.gov.au.

32.2.6 A migration agent's state of mind, such as an intention to commit fraud or act unlawfully, is not necessary to establish a breach of the Code of Conduct and s 314 of the Migration Act, which mandates that a migration agent must conduct themselves in accordance with the Code of Conduct.[27]

Regulation of Australian legal practitioners providing immigration assistance

Australian legal practitioners providing immigration assistance from 22 March 2021

32.2.7 From 22 March 2021, Australian legal practitioners may provide immigration assistance in connection with legal practice without being required to register as a migration agent. Australian legal practitioner is defined as 'a lawyer who holds a practising certificate (whether restricted or unrestricted) granted under a law of a State or Territory.'[28] It does not include those who are admitted but do not hold a

[20] *Migration (Migration Agents Code of Conduct) Regulations 2021* (Cth) s 4. Note that there are transitional provisions which provide that the Code of Conduct in effect from 1 March 2022 applies to some conduct undertaken prior to the commencement of the new Code: *Migration (Migration Agents Code of Conduct) Regulations 2021* (Cth) pt 5 div 1.
[21] The *Migration (Migration Agents Code of Conduct) Consequential Amendments Regulations 2021* (Cth) sch 2 item 5 repealed sch 2 of the *Migration Agents Regulations 1998* (Cth), effective from 1 March 2022.
[22] *Migration (Migration Agents Code of Conduct) Regulations 2021* (Cth) s 6.
[23] ss 303(1)(h), 316(1)(d).
[24] s 303(1).
[25] *Migration (Migration Agents Code of Conduct) Regulations 2021* (Cth) div 6, item 32.
[26] s 308.
[27] *Awon v MIBP* [2015] FCA 846 at [29].
[28] s 275.

practicing certificate and those who are eligible to practice under the law of a country other than Australia.

32.2.8 Immigration assistance provided by an Australian legal practitioner must be in connection with legal practice.[29] 'Legal practice' is defined as 'the provision of legal services regulated by a law of a State or Territory'.[30] The connection with legal practice is intended to establish the oversight of the conduct of an Australian legal practitioner under relevant State and Territory laws, such that the giving of immigration assistance, as well as any conduct associated with the giving of advice relating to immigration, is regulated by State and Territory legal professional bodies if the conduct is attributable to activities done by the practitioner in connection with his or her practice as a lawyer.[31]

32.2.9 Only restricted legal practitioners who are eligible can register as a migration agent with MARA.[32] Eligibility for restricted legal practitioners is set out in s 278A, and generally provides that a person who is a restricted legal practitioner is 'eligible' until either the end of the eligible period (defined in s 278A(3))[33] or a longer period as extended under this section[34] or when the person becomes an unrestricted legal practitioner.[35] The effect of s 278A is that a restricted legal practitioner may also be registered as a migration agent during the eligible period, so that they can provide unsupervised immigration assistance in their capacity as a registered migration agent, despite the requirement for their legal practice to be supervised as a restricted legal practitioner.

32.2.10 Unrestricted legal practitioners and restricted legal practitioners who are not eligible are prohibited from registering as a migration agent with MARA.[36] Where a registered Migration agent becomes a restricted legal practitioner or an unrestricted practitioner, they must notify MARA in writing within 28 days.[37] MARA must cancel the registration if the agent has become an unrestricted legal practitioner or a restricted legal practitioner who is not eligible.[38]

32.2.11 Accordingly, while MARA regulates migration agents it does not regulate the conduct of Australian legal practitioners (who are not registered migration agents) in their provision of immigration assistance nor investigate complaints about Australian

[29] s 280(3).
[30] s 275.
[31] Explanatory Memorandum to Migration Amendment (Regulation of Migration Agents) Bill 2019, p.10.
[32] Unrestricted and restricted refers to whether the practising certificate held by an Australian legal practitioner is subject to a condition requiring the practitioner to undertake supervised legal practice for a specified period, where such a condition was not imposed as a disciplinary measure by an authority responsible for disciplining Australian legal practitioners in a State or Territory: s 275.
[33] While the general prescribed eligible period is 2 years after the person first held a restricted practising certificate, for those who were restricted legal practitioners immediately before 22 March 2021, that period is 2 years after that commencement.
[34] An eligible restricted legal practitioner may have a maximum eligible period of four years if an extension is granted by MARA :s 278A(6).
[35] ss 278A(1) and (2).
[36] s 289B. Registration applications made by an Australian legal practitioner that were not decided by MARA before 22 March 2021, will be considered as if they had been made on or after that date. This means that if an application is made before 22 March 2021 by an unrestricted legal practitioner, the application must be refused under s 289B. If the application is made by a restricted legal practitioner, he/she can register as a migration agent if he/she is eligible at the time of the decision.
[37] s 312(4).
[38] s 302A

legal practitioners (who are not registered migration agents nor were former registered migration agents).

32.2.12 MARA can refer to the relevant State and Territory legal professional disciplinary authorities the conduct of registered migration agents and former registered migration agents who are also Australian legal practitioners, where that conduct occurred while the legal practitioner was a registered migration agent, whether or not it was in connection with legal practice.[39] That is, the MARA may refer the conduct of eligible restricted legal practitioners while they are registered as migration agents, as well as the conduct of legal practitioners who were former registered migration agents (prior to the changes on 21 March 2021), including those whose registration has ended.

32.2.13 Where the MARA refers the conduct of a registered migration agent or a former registered migration agent, it may not take action against the agent under s 303 (to caution an agent or suspend or cancel an agent's registration) or s 311A(1) (to bar a former registered agent from being registered for up to 5 years) on the basis of that conduct.[40] This reflects the policy intention that the referral of the conduct of a former registered migration agent who is also an Australian legal practitioner should not result in the MARA being able to bar the person from being registered if the MARA has referred the agent's conduct to a legal disciplinary authority who in fact has regulatory responsibility for that person's conduct as an Australian legal practitioner.[41]

Lawyers providing immigration assistance prior to 22 March 2021

32.2.14 Prior to 22 March 2021, s 280 of the Migration Act prohibited all legal practitioners from providing immigration assistance unless they were also registered as migration agents. However, legal practitioners who were not registered migration agents were not prevented from giving 'immigration legal assistance.'[42]

32.2.15 Immigration legal assistance' was defined in s 277(1) of the Migration Act, and differed from 'immigration assistance'.[43] A legal practitioner generally provided immigration legal assistance if they acted for, or represented, a visa applicant, a cancellation review applicant or a person who was sponsoring or nominating a visa

[39] s 319(1).
[40] ss 319(2) and (3) of the Act.
[41] Explanatory Memorandum to Migration Amendment (Regulation of Migration Agents) Bill 2019, pp.23–25.
[42] ss 280(1),(3). These sections were amended by the *Migration Amendment (Regulation of Migration Agents) Act 2019* (Cth) for conduct that occurred on or after 22 March 2021. However, s 333A ensures that Division 2 of Part 3 of the Migration Act (which sets out restrictions on giving immigration assistance, making immigration representations, charging fees and advertising) as in force prior to 22 March 2021 continues to apply to conduct that occurred prior to that date, and conduct on or after that day if that conduct is a part or continuation of, or is connected to conduct that occurred before that day. For example, if an Australian legal practitioner provided immigration assistance prior to the commencement of these amendments and was not a registered migration agent at the time, that person will have committed an offence under s 280 of the Migration Act. Also, if that practitioner receives a fee for that immigration assistance after the commencement of the amendments, this would constitute conduct that is a continuation of or connected to conduct that occurred prior to the commencement of the amendments, and would itself be an offence under s 281 as in force at the time. However, if that Australian legal practitioner gave immigration legal assistance then they will not have committed an offence.
[43] s 277 which sets out the definition of immigration legal assistance was repealed by *Migration Amendment (Regulation of Migration Agents) Act 2019* (Cth).

applicant in proceedings before a court in relation to the application; or they gave advice to such an applicant in relation to the application, *other than* advice for the purpose of preparation or lodging of the visa application or review application or in relation to proceedings or a review of a decision before a review authority relating to the application.

32.2.16 Legal practitioners acting in a professional capacity, while they were not prevented from giving 'immigration legal assistance', were prohibited from giving 'immigration assistance' to persons before the Migration and Refugee Division of the Tribunal unless they were formally registered as migration agents with MARA. Certain Legal Aid solicitors were excepted if they come within the exception relating to 'officials' in s 280.[44]

32.2.17 While prior to 22 March 2021 MARA was responsible for monitoring the conduct of and investigating complaints made about lawyers who provided immigration legal assistance, this was removed from its functions from this date. Therefore, any complaints about Australian legal practitioners in relation to their provision of immigration legal assistance (i.e. lawyers who were not registered migration agents and provided immigration legal assistance within the meaning given in s 277), that were on hand and not finalised before 22 March 2021 cannot be investigated by MARA and MARA will ask the complainant to re-lodge the complaint with the relevant legal disciplinary authority.[45]

Legislative sanctions

32.2.18 It is a criminal offence under the Migration Act for persons who are not registered migration agents or who do not fall within the exceptions outlined above to give 'immigration assistance' to an applicant.[46] There are also heavy sanctions for those who make false representations of their status or those who ask for a fee or reward for the giving of 'immigration assistance' when they are not a registered migration agent or Australian legal practitioner.[47] For instance, persons who either directly or indirectly make a false representation that they or another person is a registered migration agent are liable to imprisonment for 2 years[48] and a person who is not a registered migration agent or Australian legal practitioner giving immigration assistance in connection with legal practice who asks for or receives any fee or other reward for giving 'immigration assistance' will be liable for imprisonment for 10 years.[49] There are also offences relating to the advertising of 'immigration

[44] 'Official' is defined in s 275 of the Migration Act to include a person appointed or engaged under the *Public Service Act 1999* (Cth); or a member of the public service of a State or Territory; or a member of the staff of a Parliamentarian. This therefore covers Legal Aid solicitors who are members of State and Territory public services and Commonwealth Legal Aid solicitors who are appointed or engaged under the *Public Service Act 1999* (Cth). In this case, a solicitor from Legal Aid would be considered to be permissibly providing 'immigration assistance'. In *WABZ v MIMA* (2004) 204 ALR 687, the Court held that the exclusion of a Legal Aid solicitor from representing an applicant at a Tribunal hearing on the basis that she was not a registered migration agent was an error of law.
[45] Explanatory Memorandum to Migration Amendment (Regulation of Migration Agents) Bill 2019, pp.22–23.
[46] s 280.
[47] s 281.
[48] s 283.
[49] s 281.

assistance' in relation to a person who is not a registered migration agent or Australian legal practitioner giving immigration assistance in connection with legal practice.[50]

Disclosure of information about migration agents

32.2.19 The Tribunal and the Department may disclose to each other personal information about a registered or inactive migration agent[51] in prescribed circumstances.[52] The circumstances in which the Tribunal may disclose such information to the Department include:

- the agent is currently being investigated for offences under the Migration Act;
- a client of such an agent is being investigated for offences under the Migration Act;
- the Minister is considering referring the agent to MARA for mandatory sanctioning;
- the Department is considering make a complaint about the agent to MARA;
- the agent has been sanctioned by MARA; or
- the agent's personal information is required for the Secretary to collect information about the conduct of agents.[53]

32.2.20 The Tribunal[54] and the Department[55] may pass on personal information disclosed in this way to a professional body[56] of which that agent was or is a member if:

- the information is about the conduct of the migration agent;[57] and
- the Tribunal/Department believes that that conduct may be of concern to the particular professional body.[58]

[50] ss 284, 285.
[51] Broadly speaking, an agent whose registration has expired or has been deregistered or has had their registration cancelled or suspended by MARA will be inactive migration agent for a further period of 2 years: s 306B.
[52] ss 332F, 332G and Migration Agents Regulations regs 9C and 9D. 'Personal information' for the purposes of the relevant Migration Act provisions is given the same meaning as in the *Privacy Act 1988* (Cth) (Privacy Act)*:* s 5(1)*.* Section 6 of the Privacy Act defines 'personal information' as information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.
[53] Migration Agents Regulations reg 9D.
[54] s 332G(3) and Migration Agents Regulations reg 9C(2) .
[55] s 332F(3) and Migration Agents Regulations reg 9D(2).
[56] 'Relevant professional body' is defined as a 'professional body of which the agent is or was a member': Migration Agents Regulations regs 9C(3), 9D(3). The relevant Law Societies would appear to fall within this definition, but the better view appears to be that the MARA is not a 'relevant professional body' because migration agents do not appear to be members of MARA. Note, however, that ss 332F(3) and 332G(3) only apply to information already disclosed to the Tribunal by the Secretary and information disclosed to the Secretary by the Tribunal.
[57] Migration Agents Regulations regs 9C(2)(a), 9D(2)(a).
[58] Migration Agents Regulations regs 9C(2)(b), 9D(2)(b) .

32.2.21 The disclosure of 'identifying information' about a migration agent, is permitted if the disclosure is for the purpose of facilitating or expediting the exercise of powers, or performance of functions, of the MARA.[59]

Procedure for lodging a complaint about a migration agent or Australian legal practitioner

32.2.22 Where the Tribunal believes a registered agent or Australian legal practitioner has engaged in unlawful activity, or misconduct of a serious nature, including breaches of regulatory laws, the matter may be referred to the relevant regulatory authority[60] by the Registrar. If referring a matter to an external agency, the Tribunal ensures it complies with the *Privacy Act 1988* (Cth) and in particular the Australian Privacy Principles (APPs)[61] and any referral protocols of the external agency.

32.2.23 If a concern about a person arises during the course of the hearing, the Member may consider it appropriate to draw the concern to the attention of the person and the applicant and provide them with an opportunity to consider their position. The Member may also consider whether the hearing should proceed, or be adjourned to another date.

32.2.24 Generally, the Tribunal avoids disclosing personal information to external agencies about review applicants and third parties, and limits disclosure of the migration agent's or Australian legal practitioner's personal information to the minimum necessary to initiate their investigation processes. This will generally be limited to the agent's name, registration number (e.g. MARN) and general details about the alleged misconduct to allow the external agency to identify the agent and the grounds of the referral/complaint. Where documents are provided to MARA as examples of agent misconduct (e.g. the agent's written submissions made to the Tribunal), where possible personal information about review applicants and third parties are redacted before being given.

32.2.25 , However, personal information may be disclosed to an external agency where the Tribunal reasonably believes it is reasonably necessary for the Tribunal to take appropriate action in relation to the matter or for the external agency to conduct an

[59] s 336E(2)(ga). 'Identifying information' is defined in s 336A as any personal identifier obtained by the Department for one or more of the purposes listed in s 5A(3) of the Migration Act; any meaningful identifier derived from any such personal identifier; any record of a result of analysing any such personal identifier or any meaningful identifier derived from any such personal identifier; any other information, derived from any such personal identifier, from any meaningful identifier derived from any such personal identifier or from any record of that kind, that could be used to discover a particular person's identity or to get information about a particular person. 'Personal identifier' is defined in s 5A of the Migration Act to include fingerprints, handprints, photographs, audio or video images of a person, iris scans, signature, records of a person's height or weight, or other identifiers that involve undertaking an intimate forensic examination. The Privacy Act would also not prevent disclosure of the agent's personal information in these circumstances as it may be said to be authorised by a law for the purposes of IPP 11.1(b) in s 14 of that Act.

[60] For example, MARA, the department or a State or Territory legal professional body.

[61] Under APP 6, the Tribunal generally must not disclose personal information about an individual for a secondary purpose (investigation by an external agency) where the information was collected for a primary purpose (a visa or review application). However, it may do so where an exception under APP 6 applies, such as where the individual consents to the disclosure, they would reasonably expect it, it is authorised by law, or the Tribunal reasonably believes the disclosure is reasonably necessary for an enforcement related activity conducted by, or on behalf of, an enforcement body. .

enforcement related activity.[62] When disclosing information relating to a Part 7-reviewable decision, a direction under s 440 of the Migration Act preventing further disclosure of that information may be appropriate. For Part 5-reviewable decisions, where there has been a direction issued under s 365(2) of the Migration Act to take evidence is taken in private, a direction under s 378 of the Migration Act may also be appropriate to restrict MARA from publishing the evidence.

32.2.26 Complaints about persons who are acting as migration agents but who are not registered with MARA are referred to the Department.

Contempt of the Tribunal

32.2.27 In some circumstances a migration agent or Australian legal practitioner's conduct during the course of a review, or in particular during a hearing, may be such that it results in the commission of an offence. Under the *Administrative Appeals Tribunal Act 1975* (Cth) it an offence to engage in conduct that obstructs or hinders the Tribunal or a member in the performance of the functions of the Tribunal, or to engage in conduct that would constitute contempt of court if the tribunal were a court of record.[63] For further discussion see Chapter 30 - Penalties.

32.3 Role of representatives in Tribunal reviews

32.3.1 Representatives (including migration agents and Australian legal practitioners) may be involved in many aspects of a Tribunal review including:

- making the application;
- responding to correspondence;
- making submissions to the Tribunal;
- responding to the invitation to the hearing; and
- providing oral submissions on behalf of the review applicant at hearing.[64]

32.3.2 Migration agents who give immigration assistance to a person in respect of a review application in the Migration and Refugee Division, after having agreed to represent

[62] APP 6.2(e). In accordance with APP 6.5, the Tribunal must make a written note of the use or disclosure.
[63] s 63 inserted by the Amalgamation Act. That Act repealed ss 372 and 434 of the Migration Act which provided for similar contempt provisions for the then MRT and RRT respectively. For transitional and savings arrangements see Amalgamation Act sch 9. Commission of such an offence attracts a sanction of 12 months imprisonment.
[64] Note that for a Part 5 review, s 366A provides that an applicant is entitled to have another person present to assist them while appearing before the Tribunal but that the assistant is not entitled to present arguments to the Tribunal, or to address the Tribunal, unless the Tribunal is satisfied that, because of exceptional circumstances, the assistant should be allowed to do so. For Part 7 reviews, s 427(6) provides that a person appearing before the Tribunal to give evidence is not entitled to be represented before the Tribunal by any other person. However, in practice the Tribunal may permit a representative to make submissions at hearing. The Tribunal generally does this to ensure that all of the applicant's evidence and arguments are presented to the Tribunal, as in some circumstances, natural justice or compliance with s 360 or 425 may require that an applicant be allowed to be represented at the hearing. See Chapter 18 – The role of the advisor at the hearing for further information.

the person must notify the Tribunal of that fact on an approved form or by letter which is dated, signed and contains the name of the review applicant and the migration agent's registration number.[65] The notification must be given when the review application is lodged or not later than 28 days after commencing to act on behalf of the review applicant.[66] There is no equivalent requirement in the Migration Act for Australian legal practitioners to notify the Tribunal they have agreed to give immigration assistance to a review applicant. However, to ensure that the Tribunal has relevant information for the conduct of a review, Australian legal practitioners providing immigration assistance are encouraged to complete the form.

General principles of agency

32.3.3 A migration agent or Australian legal practitioner who agrees to represent an applicant will usually be in a relationship of agency with that person under the common law. In a relationship of agency, the agent is given authority to act on behalf of the principal (the review applicant) in relation to a third party (the Tribunal), in a way that binds the principal. The authority to act in a particular way may be conferred expressly, either orally or by writing. An agent or Australian legal practitioner's authority may also be implied from the conduct of the parties or relationship of the parties.[67] Third parties, including the Tribunal, are entitled to assume that an agent has implied usual authority unless they know to the contrary. Agents are subject to a number of common law duties, including duties to act in their principal's best interests and to inform their principal.

32.3.4 The agency relationship between a migration agent and their client is reflected in cl.2.8 of the Code of Conduct, which requires a registered migration agent to:

- within a reasonable time after agreeing to represent a client, confirm the client's instructions in writing to the client;
- act in accordance with the client's instructions;
- keep the client fully informed in writing of the progress of each case or application that the agent undertakes for the client; and

[65] s 312B and Migration Agents Regulations reg 7H.
[66] Migration Agents Regulations reg 7H(2).
[67] See, for example, *Huang v MIAC* [2011] FMCA 271 where the Court observed at [17] that there may be circumstances where particular aspects of an agent's authority are not the subject of express discussion at the time of the appointment, but are found to be implied from the purpose and nature of the agency and the circumstances surrounding the appointment. Where the appointment of the agent to achieve an intended objective is undoubted, it will be appropriate to make the necessary implications which would give practical effectiveness to the intended agency relationship. In that case, the Court applied principles of contract law to determine whether the applicant's agent had implied actual authority to nominate himself as authorised recipient when completing the applicant's visa application. The Court found at [19] that the circumstances required the implication that it was within the scope of the agent's authority to nominate himself as authorised recipient.

- within a reasonable time after the case or application is decided, tell the client in writing of the outcome of the client's case or application.[68]

32.3.5 Applying the common law principles of agency, where a migration agent or Australian legal practitioner notifies the Tribunal that they are acting on behalf of a review applicant in relation to a review, the actions of the agent, such as the lodgement of the review application form or responses to Tribunal correspondence, may be taken to be the actions of the review applicant, unless the migration agent or Australian legal practitioner in fact lacks authority to act in the particular way.[69] The Tribunal would be entitled to assume that a migration agent or Australian legal practitioner has the requisite authority to do things on behalf of an applicant in the ordinary conduct of a review, unless it knows the agent does not. For example, occasionally a migration agent will inform that Tribunal that they have been instructed to lodge the review application, but will not otherwise be acting on the applicant's behalf in connection with the review. In those circumstances, it would be unsafe to communicate with the agent or act on the advice of the agent about the further conduct of the review.

32.3.6 Even if the Tribunal is unaware that an agent or legal practitioner in fact lacks authority to act on behalf of an applicant in a particular way, the actions of the agent or legal practitioner will not bind the review applicant and any reliance on them by the Tribunal could result in jurisdictional error. For example, if an agent or legal practitioner purports to lodge a review application on an applicant's behalf, but it subsequently comes to light that they lacked the authority to do so, the applicant will not be treated as having lodged a review application.[70] Similarly, if an agent or legal practitioner responds to a hearing invitation indicating that the applicant does not wish to appear at a hearing, the Tribunal will not be able to rely on that advice to cancel a scheduled hearing pursuant to ss 360(2)(b) or 425(2)(b), if they in fact lacks the requisite authority.[71]

[68] Australian legal practitioners are subject to similar requirements under their relevant legal regulatory requirements. For example, see rr 7–8 of the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW) for provisions relating to communications with clients and following client instructions.

[69] See, for example, *MIAC v Le* (2007) 242 ALR 455 where the interpreter was required to leave before all of the applicants' witnesses had been heard. The Tribunal advised the applicants' agent in the absence of the interpreter that he could either request a further hearing before he left that day or following receipt of the detailed s 359A letter that it would be sending to him. The agent responded that he did not feel a further hearing would be necessary. No further request for a hearing was made and no further hearing was held. The Federal Court overturned the reasoning of the Federal Magistrates Court at first instance, which had held that the Tribunal had inappropriately sought to transfer its obligations under s 360 to the applicant's agent. Kenny J was not satisfied that the applicant's agent did not convey the offer of hearing to the applicant, or had acted negligently.

[70] In *SZGJO v MIMIA* [2005] FMCA 1349 the applicant was found to have instructed his agent to make a protection visa application on his behalf, even though he was indifferent to the content of the protection claims contained in it. Furthermore, although the applicant did not specifically authorise his agent to sign the protection visa application on his behalf, the authority he gave to his migration agent to make the application was found to extend to signing the application on his behalf. However, the applicant had no knowledge that a review application was lodged with the RRT and the review application was found to be invalid. These findings were upheld on appeal to the Federal Court in *SZGJO v MIMIA* [2006] FCA 363. Also, see *SZMME v MIAC* [2009] FMCA 323 where the applicant signed the visa application and was prepared to leave the details to the migration agent, but did not sign the review application which was, therefore, not valid under s 412.

[71] In *MIMIA v SZFML* (2006) 154 FCR 572, the applicant had initially indicated to the Tribunal that she intended to attend a hearing. When the Tribunal rescheduled the hearing, the migration agent informed the Tribunal both orally and in writing that the respondent did not want to attend. The Federal Magistrates Court at first instance had found that the applicant had not given her express authority to her migration agent to inform the Tribunal that she did not wish to attend the rescheduled hearing. The Full Federal Court on appeal held that the Tribunal was not entitled to treat the respondent as disentitled from the hearing under s 425A(2)(b).

32.3.7 Often it will not be apparent to the Tribunal that an agent or legal practitioner lacks authority to act in a particular way and this information will only come to light in a subsequent judicial review application. However, circumstances may arise which may cause the Tribunal to suspect that they may lack authority. For example, in *MIMIA v SZFML,*[72] the applicant initially indicated that she would attend a hearing. When the hearing was rescheduled, the applicant's migration agent informed the Tribunal that she would not attend. Upon judicial review, the Court accepted the applicant's evidence that she did not in fact instruct her agent to decline the hearing invitation. A Full Court of the Federal Court observed that the Tribunal should have been put upon inquiry by the sudden apparent reversal of the applicant's attitude to participation in a hearing between the hearing as originally scheduled and the rescheduled hearing.

32.3.8 Where the Tribunal suspects that an agent or legal practitioner may lack the requisite authority to act in a particular way, or has no evidence that they have instructions from the applicant, the Tribunal may seek written confirmation of such from the applicant directly. For example, where an applicant has authorised their agent or legal practitioner to lodge the review application, this authority can be taken to extend to signing the application on the applicant's behalf.[73] However, in these circumstances there may be no evidence that the applicant is aware of the application and gave instructions to lodge it. Although the application lodged by the migration agent or Australian legal practitioner may be valid, the Tribunal may seek written confirmation of the instructions from the applicant.

Fraudulent/negligent conduct by a migration agent

32.3.9 The actions of a migration agent or Australian legal practitioner who has been appointed to represent an applicant in connection with a review may ordinarily be taken to be the actions of the applicant, unless the agent in fact lacks authority to act in the particular way. However, if a migration agent or Australian legal practitioner has been given authority by an applicant, but that authority was fraudulently obtained, the fraudulent conduct of the agent may operate to disable the Tribunal from the due discharge of its imperative statutory functions. In *SZSJA v MIBP* the Full Federal Court suggested in *obiter dicta* that the question of whether the actions of a migration agent amounts to fraud is to be judged by 'the standards of ordinary decent migration agents', and that the terms of the *Code of Conduct for Registered Migration Agents* are relevant to, but not determinative of, these standards.[74]

32.3.10 Fraudulent conduct can also be committed by third parties who are not holding themselves out to be migration agents or Australian legal practitioner. An applicant

[72] *MIMIA v SZFML* (2006) 154 FCR 572.
[73] *SZGJO v MIMIA* [2006] FMCA 1349. In *Jalagam v MIAC* [2009] FCA 197, the Federal Court confirmed an applicant does not need to personally sign or submit a notification of authorised recipient provided he or she has given instructions to the person completing the form. See also *SZGRH v MIMIA* [2006] FCA 1408. Although it may theoretically be possible for a migration agent's authority to be limited to lodging the application form itself but not to completing the details in the application, including signing the form.
[74] *SZSJA v MIBP* (2013) ALR 266 at [63]–[64].

can be defrauded by persons described as 'friends' offering assistance of various kinds and the applicant becomes prevented, through no fault of their own, from participating in a Tribunal review process.[75]

Fraudulent conduct affecting the decision

32.3.11 Fraudulent conduct may include giving false information to the Department or Tribunal, not disclosing the applicant is being assisted by a migration agent breaching ss 312A and 312B, giving the applicant an 'untrue' cover story to disguise an agent or legal practitioner's involvement, and not informing the applicant of a hearing or the requirement to provide information leading to a loss of entitlement to appear before the Tribunal.[76]

32.3.12 The Tribunal's decision will not be vitiated where the conduct does not affect the Tribunal's exercise of jurisdiction and its obligations under the Migration Act, the applicant is complicit in the migration agent or Australian legal practitioner's fraudulent conduct, or the conduct is merely negligent.

32.3.13 In *SZFDE v MIAC*,[77] an agent represented himself to the applicants as a solicitor and registered migration agent and received payment to act for the family with respect to the Tribunal proceedings. The agent advised the applicants not to attend a Tribunal hearing on the basis that the Tribunal was not accepting applications and that the applicants may say something contrary to a future ministerial submission under s 417 of the Migration Act that he would write. The agent's practising certificate as a solicitor and his registration as a migration agent had in fact earlier been cancelled. The applicants did not avail themselves of the opportunity to attend the Tribunal hearing. The High Court found that the Tribunal was disabled from the due discharge of its imperative statutory functions in Division 4 of Part 7 of the Migration Act (s 425(1) inviting an applicant to appear at a hearing and s 426A empowering the Tribunal to make a decision on a review in the absence of an appearance) because of the fraud perpetuated on the Tribunal by the agent as well as upon the applicants. The consequence was that the decision made by the Tribunal was no decision at all and its jurisdiction remained constructively unexercised.[78]

[75] In *Lu v MIAC (No 2)* [2010] FMCA 251 at [19], the Court indicated that there was nothing in *SZFDE v MIAC* (2007) 232 CLR 189 which limited the application of the principles enunciated in that judgment to the acts or omissions of persons holding themselves out to be registered migration agents. This point was not disturbed on appeal: *MIAC v Lu* (2010) 189 FCR 525.
[76] *Jalagam v MIAC* [2009] FCA 197. See also *SZMWT v MIAC* (2009) 109 ALD 473 in which the Court held that the agent's advice to the applicant to 'do nothing' was part of dishonest conduct that led to the applicant being unaware of his opportunity to attend a hearing.
[77] *SZFDE v MIAC* (2007) 232 CLR 189.
[78] *SZFDE v MIAC* (2007) 232 CLR 189. This reasoning overturned the lower court decisions in *MIMA v SZFDE* (2006) 154 FCR 365; *SZGQL v MIMA* [2006] FCA 1420; *SZHKI v MIMIA* [2006] FCA 1517; and *SZHPX v MIMA* [2006] FCA 1445. The reasoning in *SZFDE* was followed in *Kim v MIAC* [2008] FMCA 1553 at [72]–[73], where a migration agent's advice to an applicant that she did not have to attend a hearing was found to be fraudulent, in circumstances where he knowingly gave false information to the applicant, she acted on that information to her detriment by not attending the hearing, and that his actions were dishonest as he had a motive for her not to attend because his registration had been suspended (information which he had withheld from her). See also *SZIVK v MIAC* [2008] FCA 334 where the Federal Court found that the migration agent was fraudulent in the relevant sense in his dealings with the appellant as he falsely indicated in the response to hearing form that the applicant would attend the hearing when the agent knew that could not occur and signed documents on the appellant's behalf without his knowledge, consent or authority and then forged his signature. See also *BLH15 v MIBP* [2016] FCCA 1198 at

32.3.14 In *MIBP v DUA16*; *MHA v CHK16*,[79] the High Court applied existing principles enunciated in *SZFDE v MIAC*, that review for fraud requires a focus upon the manner in which the fraud adversely affected the statutory functions and powers of the relevant review body. It overturned the Full Court of the Federal Court's finding that it was not necessary to identify a particular statutory power that has been stultified or subverted by the fraudulent conduct for the conduct to vitiate a decision.[80] *MIBP v DUA16; MHA v CHK16* concerned an IAA review in which the review applicants' migration agents provided a submissions on their behalf. In the case of *CHK16*, the agent, acting fraudulently, provided submissions where the entirety of the personal circumstances concerned the wrong person. The IAA, unaware of the agent's fraud, noticed that the submissions concerned the wrong person. It had regard to the submissions concerning generic information and legal issues, but disregarded the information concerning the circumstances of the wrong person. The Court held that it was legally unreasonable for the IAA not to ask why the submissions did not relate to CHK16's case once it was understood by the IAA not to relate to CHK16's case.[81] In the case of *DUA16*, the agent, acting fraudulently, provided submissions that contained information relevant to *DUA16*'s application and some information relevant to a different applicant. The IAA, differently constituted and unaware of the fraud, concluded that the latter references were included by mistake and disregarded this information. The Court held that it was not legally unreasonable for the IAA to fail to get new information in light of what it reasonably identified as errors in submissions.[82]

32.3.15 In *SZEEU v MIAC*[83] the applicant sought to raise new claims for the first time at the Tribunal. The applicant indicated that the claims had not been raised previously because his original migration agent did not record his claims accurately; submitted a statement without his knowledge by forging his signature; and advised him not to expand on his answers at the first Tribunal hearing. The Federal Court distinguished the case from *SZFDE* on the basis that the Tribunal was aware of the applicant's complaint about the agent's conduct, and was therefore not an unwitting victim of the agent's fraud. The Tribunal had considered the applicant's complaints and rejected them as untrue. As such, there was no evidence that the Tribunal, as a result of any fraud by the applicant's migration agent, failed to comply with its statutory procedures.

---

[76]–[79] where the Federal Circuit Court held that the Tribunal's review function and exercise of its discretion under s 426A to make a decision on the review, in circumstances where the applicant did not attend the hearing, were disabled by the conduct of the applicant's authorised recipient, who had misled the Tribunal by informing it that the applicant would attend the hearing when in fact she had been unable to contact the applicant and was not in a position to know whether the applicant would attend. The evidence before the Court was that the authorised recipient was unable to contact the applicant because she had fled her home due to fear of her husband and was living in a refuge. The Court concluded that the authorised recipient's conduct constituted both a fraud on the Tribunal, as it was deliberately deprived of information material to its exercise of its discretion under s 426A (i.e. that the applicant was not aware of the hearing date, which may have led to a postponement of the hearing), and also the applicant who was deprived of the opportunity to attend the hearing or seek an alternative hearing date.

[79] *MHA v DUA16; MHA v CHK16* [2020] HCA 46.

[80] *MHA v DUA16; MHA v CHK16* [2020] HCA 46 at [14]–[15], [18], [22]. While this judgment concerned an IAA review, the principle that it is necessary to identify a particular statutory power appears to also apply to Part 5 and 7 reviews in the MRD.

[81] *MHA v DUA16; MHA v CHK16* [2020] HCA 46 at [28]–[32].

[82] *MHA v DUA16; MHA v CHK16* [2020] HCA 46 at [34].

[83] *SZEEU v MIAC* [2008] FCA 269.

32.3.16 Evidence as to a representative's relationship with the applicant and the scope of any authority given to them either expressly or impliedly may be relevant in establishing whether an applicant is complicit in any relevant conduct.[84] In *SZSJA v MIBP*[85] the applicant claimed his migration agent advised the Tribunal he would attend the hearing in circumstances where the agent had inadvertently failed to provide him with the hearing invitation or inform him of the hearing date until after it had passed, and that someone else had signed the response to hearing invitation form without his knowledge or authority. At first instance, the Federal Circuit Court found the applicant at least implicitly agreed to the submission of relevant documents on his behalf even in circumstances where he had no knowledge of their content or import.[86] However, on appeal the Full Federal Court held that as the primary judge did not deal with the appellant's evidence that he did not authorise the agent to put his signature on documents or that his signature was placed on the document without his specific knowledge, the primary judge erred in finding that he had implicitly authorised the agent to 'forge' his signature on the form.[87] While a principal may authorise an agent to sign in his name and, while at least in certain circumstances implied authority would suffice, implied authority must be consistent with express authority.[88] Further, the Court found it was not possible to say that the forgery was irrelevant to the appellant's non-attendance and the Tribunal's dismissal of the application, as the exercise of the Tribunal's discretion under s 426A could have been affected by the appearance of his signature on the form which implied that he was aware of the hearing date and that he would attend the hearing.[89]

Fraud prior to engagement of Tribunal's jurisdiction

32.3.17 In order for the fraudulent conduct of a migration agent or Australian legal practitioner to vitiate a Tribunal decision, it must affect the Tribunal's exercise of jurisdiction and its obligations under the Migration Act.[90] On the weight of current authority, fraud on the Tribunal is not possible before the Tribunal's jurisdiction is engaged.

32.3.18 In *Jalagam v MIAC*[91] the Federal Court considered whether fraudulent conduct by the applicant's migration agent had resulted in his review application being lodged out of time. The Court held there needed to be a causative connection between the fraud and the Tribunal being disabled from the discharge of its imperative statutory functions with respect to the conduct of the review and that there was no such link in that case.

[84] See for example, *Wei v MIBP* [2014] FCCA 753 at [56]–[59].
[85] *SZSJA v MIBP* (2013) 308 ALR 266.
[86] *SZSJA v MIAC* [2013] FCCA 741.
[87] *SZSJA v MIBP* (2013) 308 ALR 266 at [50].
[88] *SZSJA v MIBP* (2013) 308 ALR 266 at [52].
[89] *SZSJA v MIBP* (2013) 308 ALR 266 at [58].
[90] *SZFDE v MIAC* (2007) 232 CLR 189. In *SZFNX v MIAC* [2007] FCA 1980, the Court, applying *SZFDE*, held that the fraud must affect the process prescribed by the Migration Act: at [34].
[91] *Jalagam v MIAC* [2009] FCA 197 at [42].

32.3.19 Similarly, in *Alraheb v MIAC*[92] the Federal Magistrates Court held that a distinction may be drawn between the conduct of a review by the Tribunal once it has entered on the exercise of its jurisdiction to conduct such a review, and the question of whether it has jurisdiction in the first place. The Court found the circumstances of the case before it did not involve any fraud such that the Tribunal's procedural fairness obligations under Division 5 of Part 5 ('Conduct of Review') of the Migration Act could be said to be vitiated by such fraud.

32.3.20 Further, in *SZOVX v MIAC*[93] the Federal Magistrates Court found that even if the applicant's evidence was accepted and even if the agent's conduct was fraudulent, neither of which was ultimately accepted, any fraud prior to the conduct of the review could not vitiate the Tribunal's processes. Similarly, in *SZKGK v MIAC*[94] the Federal Magistrates Court found the alleged fraudulent conduct was conduct relevant to the primary visa application and not to any exercise of the Tribunal's jurisdiction, and as such could not vitiate the conduct of the review. In *SZODB v MIAC*[95]*,* the Federal Magistrates Court also observed that, it was by no means certain that a fraud on the Tribunal was possible before the Tribunal's jurisdiction was engaged.

32.3.21 Although in *SZQVV v MIAC*[96] the Federal Court in *obiter dicta* expressed the view that the principles set out in *SZFDE* were not confined to fraudulent circumstances which arose only after the jurisdiction of the Tribunal was invoked, the Federal Court in *Awon v MIBP*[97] subsequently explicitly disagreed with this, finding that the concept of 'fraud on the Tribunal' cannot operate to re-write strict time limits and give the Tribunal jurisdiction which the statutory provisions denied it. *Awon* provides conclusive judicial authority that fraud on the Tribunal is not possible before the Tribunal's jurisdiction is engaged.

Fraudulent conduct affecting the decision notification

32.3.22 Although the weight of authority indicates the principles in *SZFDE* are confined to fraudulent circumstances which arise after the jurisdiction of the Tribunal has been invoked, there is some limited authority to support the proposition that fraud which affects the method of notification of a primary decision may also affect the exercise of the Tribunal's jurisdiction. In *Lalh v MIAC* the Minister conceded, and the Court accepted, that the Tribunal fell into jurisdictional error in finding the applicant had been properly notified of the delegate's decision, in circumstances where it was accepted that the email address used by the delegate was not the applicant's email

[92] *Alraheb v MIAC* [2009] FMCA 1284 at [87]–[94].
[93] *SZOVX v MIAC* [2011] FMCA 314 at [35]. The Court further held that the agent's conduct after the making of the Tribunal's decision could not assist on the issue of any claimed fraud vitiating the Tribunal's decision once the Tribunal becomes 'functus officio': at [115].
[94] *SZKGK v MIAC* [2008] FMCA 242 at [49]–[51].
[95] *SZODB v MIAC* [2010] FMCA 144 at [8].
[96] *SZQVV v MIAC* [2012] FCA 1471. An application for special leave to appeal to the High Court was dismissed: *SZQVV v MIAC*[2013] HCASL 89.
[97] *Awon v MIBP* [2015] FCA 846.

address, that it was created by the migration agent and that he had not given authority for that address to be used for communication.[98]

32.3.23 While the Tribunal will be bound by a judicial finding on the notification question in any particular case, including by consent remittal, whether notification has been affected by fraud in a particular case is a factual matter that will depend upon the instructions given by the applicant, including whether there is a relevant address for s 494B, although ultimately these are jurisdictional facts for a court to decide.

Fraudulent conduct affecting the visa application

32.3.24 A visa application may not be valid if it is lodged as a result of fraudulent conduct on the part of a third party if there is a fraud on the primary decision maker in the sense that it has prevented, or tended to prevent, that person from carrying out his or her statutory functions.[99] However, depending on the precise nature of an agency relationship, a migration agent or Australian legal practitioner exceeding his or her instructions will not necessarily invalidate a visa application.

32.3.25 In *Gill v MIBP*, the Court found the evidence indicated the applicant had given the agent authority to apply for a visa with work rights, rather than a student visa, and that in the absence of any specific evidence of fraud on the delegate, as opposed to fraud on the applicant, the evidence did not warrant a finding of fraud.[100] Moreover, it was not established that the actions of the agent prevented the delegate from carrying out his statutory functions. This was because the failure of the agent to inform the applicant of the delegate's request for information was of no consequence as he did not in fact have the information requested, and there was no evidence that if the agent had applied for a student visa that he could have met the relevant criteria.

32.3.26 In *Kaur v MIBP*; *Prodduturi v MIBP,*[101] both applicants argued that their visa applications had been lodged as a result of fraudulent conduct on the part of their migration agent and as a result were not valid. In both cases the Tribunal found that the visa applications were valid as an agency relationship had been established and that their agent had acted on their behalf by making the applications. The Court, on

[98] *Lalh v MIAC* [2013] FCCA 76. Note this was a remittal by consent.
[99] See *Maharjan v MIBP* [2017] FCAFC 213 at [113] where the Court held that it is for an applicant to prove that particular conduct of a third party was a fraud perpetuated on the decision-maker, and that the applicant was neither complicit in the fraud nor indifferent to it (for there to be a finding that the applicant was complicit in the migration agent's fraud, the applicant must have been indifferent to that agent acting unlawfully or dishonestly). If an applicant is able to establish these matters, they must then prove that the conduct of the third party stultified the visa application and determination processes for which the Act provides. The Court found that the Federal Circuit Court had erred by not deciding the jurisdictional fact of whether fraud had invalidated the visa application process. Application for special leave to appeal to the High Court refused: *MIBP v Maharjan* [2018] HCATrans 95. See also *Singh v MIBP* [2018] FCAFC 52 at [152] where the Court held that it was reasonably open to the Tribunal to find that the applicant had caused the bogus document to be given to the Department because he was content to have his brother-in-law act as his intermediary. The applicant claimed that his brother-in-law had altered an IELTS test rendering it bogus and provided the document to the migration agent acting on behalf of the applicant. It was also held that in such circumstances it is not necessary to determine whether or not the visa applicant had knowledge of or was complicit in the fraudulent conduct.
[100] *Gill v MIBP* [2013] FCCA 2122 at [54]–[56].
[101] *Kaur v MIBP*; *Prodduturi v MIBP* [2013] FCCA 1805. Note that an appeal from *Prodduturi* was dismissed: *Prodduturi v MIBP* [2015] FCAFC 5 on the basis that, even if the Federal Circuit Court erred in its fact finding (in relation to whether the applicant knew a false statement was being made), there could be no utility in granting relief.

appeal, was not satisfied on the limited evidence before it that the agent acted fraudulently in the preparation and lodgement of the visa applications. The Court further held that even if the agent had exceeded his instructions, this would not have made the applications invalid for the purposes of the Migration Act because of the operation of s 98, which deems an applicant to have filled in an application form if he or she causes it to be filled in or if it is otherwise filled in on his or her behalf. The Court noted that the operation of s 98 is not subject to any express or implied limitation in circumstances where a visa application is associated with or the product of unlawful conduct.[102]

32.3.27 In *Sran v MIBP*, the Court found that an agency agreement for the purpose of lodging a visa application was established, in circumstances where the applicant instructed the agent to make an application on his behalf, a fee was discussed, and the applicant was aware the application was to be made.[103] The Court further found that the applicant's indifference to the detail of the application was such as to make the scope of the authority broad enough to include the provision of false or misleading information to the Department in relation to the applicant's skills assessment. As such, the validity of the visa application was found not to be vitiated by the agent's conduct.

Complicity of applicant in the fraud

32.3.28 The Tribunal decision will not be invalidated if an applicant is complicit in the fraud. Where an applicant knowingly lies to the Tribunal, albeit at the behest of a migration agent or Australian legal practitioner, in order to assist their application, there is no fraud on the Tribunal.[104] Ultimately, whether an applicant can be said to be complicit in the fraud will depend on the facts.

32.3.29 In *Gill v MIBP*,[105] the Full Federal Court held that there is a relevant distinction between an indifference as to how a migration agent, acting lawfully and properly, can achieve a visa applicant's desired outcome and an indifference as to whether that outcome is achieved acting unlawfully or dishonestly. The Court concluded that, in order for there to be a finding that the applicant was complicit in the migration agent's fraud, the applicant must be indifferent to that agent acting unlawfully or dishonestly.[106] In *Kaur v MIBP*,[107] the Full Federal Court found that

[102] In *Kaur v MIBP*; *Prodduturi v MIBP* [2013] FCCA 1805 the Court found that one applicant had given the agent authority to lodge an application for her, even if she was not aware and might not have approved of its content had she been aware of it, and the other applicant was aware that an application was being made on his behalf even if he did not know exactly what it contained. Therefore both applicants were taken to have filled in the application which was lodged on their behalf and no question of validity arose.
[103] *Sran v MIBP* [2014] FCCA 37.
[104] *SZOGK v MIAC* [2010] FMCA 466 at [38]–[40]. In this case, the applicant had told the Tribunal that she had not been baptized and had just become a Christian as her agent advised her that if she claimed otherwise the Tribunal would expect her to know more about the Bible. The applicant knew they were lies but the agent told her to lie to help her protection visa application. The Court held that the applicant could not rely on her own fraud or the fraud of the agent in which she was complicit to establish that the Tribunal decision was invalid.
[105] *Gill v MIBP* [2016] FCAFC 142 at [48], [51].
[106] In *Gill v MIBP* [2016] FCAFC 142, the Court held that it was entirely understandable for a person who did not speak English well and who had no knowledge of the Australian migration system to retain a registered migration agent and to rely upon that agent to take reasonable and proper steps in seeking to obtain the grant of a visa, and that there was nothing to suggest that

indifference, in the context of determining whether the applicant is complicit in the agent's conduct, is 'reckless indifference' (which is close to intention) as to the truth of the agent's representation, which is said to be deliberately false.[108] In *SZLHP v MIAC*,[109] the applicant, through a migration agent, lodged a protection visa application on the basis of a false identity and nationality. The false claims were maintained before the Tribunal and the applicant did not attend the Tribunal hearing because he was afraid that the false identity would be discovered. The Full Federal Court distinguished *SZFDE* on the ground that the applicant in *SZLHP* was a party to the fraud and held that there was no relevant fraud 'on' the Tribunal.[110] Justice Graham concluded that it was clear that the High Court in *SZFDE* saw no scope for judicial review where the applicant for such review colluded in the fraud practised on the administrative decision-maker or review body.[111]

32.3.30 As with fraudulent conduct committed by a migration agent, the Tribunal decision will not be invalidated if an applicant is complicit in fraud conducted by a third party who is not a migration agent. In *MIAC v Lu*[112] the applicant had acted at the behest of a third party (who was not her migration agent) to ignore the Tribunal's invitation to comment and provide information because she intended to achieve an immigration outcome by paying a bribe. The Full Federal Court found that the Tribunal was not disabled from the due discharge of its imperative statutory functions with respect to the conduct of the review by the fraud of a third party, as the applicant, although herself deceived by the third party, was a knowing participant in her own dishonest and fraudulent scheme (bribery of immigration officials).[113] The Court distinguished *SZFDE* on the basis that, in this case, there

---

the applicant's alleged 'indifference' as to how the agent carried out their task extended to authorising the agent to engage in fraud.

[107] *Kaur v MIBP* [2019] FCAFC 53 at [134]–[137].

[108] In *Kaur v MIBP* [2019] FCAFC 53 at [140]–[141], the Court found that the applicant had not acted with reckless indifference to the truth of the claims and material put forward by the migration agent in the visa application form. This was in circumstances where the applicant, after being informed of the false material by the Department, was distraught and sought advice from a new migration agent and relied on that advice to 'wait and see' what decision was made rather than withdrawing the visa application. The Court did not accept that, unless the applicant withdrew their application which would have been contrary to advice of the new migration agent, they should be taken to have been recklessly indifferent to the conduct of their first migration agent.

[109] *SZLHP v MIAC* (2008) 172 FCR 170.

[110] *SZLHP v MIAC* (2008) 172 FCR 170 at [20], [27], [34], [51], [86]. Graham J further held that even if there was such a fraud, the applicant's complicity denied him the right to complain about it, and the unwarranted delay and bad faith of the applicant militated in favour of a refusal of any such relief: at [93]–[94]. Also see *SZHVJ v MIAC* [2009] FMCA 320 where an applicant arrived on a Taiwanese passport, claiming protection from that country, but after he was taken into detention claimed to be a citizen of China. The applicant claimed a fraud by a purported migration agent but Scarlett FM held that "if there was a fraud, it was a fraud in which the applicant was a knowing participant" (at [28]) and dismissed the application. Similarly, in *SZSUU v MIAC* [2013] FCCA 1340 at [44], the Court found, applying *SZLHP*, that even if there was a fraudulent misrepresentation of the applicant's claims by his agent, the applicant's complicity through the course of the Tribunal hearing denied him the right to complain about it.

[111] *SZLHP v MIAC* (2008) 172 FCR 170 at [87]. See also *SZMVU v MIAC* [2008] FMCA 1733 at [16]; *SZHVJ v MIAC* [2009] FMCA 320 at [29]–[32], *SZSUU v MIAC* [2013] FCCA 1340 at [44] and *Zhang v MIBP* [2014] FCCA 2752 at [36], [37], [40] and [41], upheld on appeal in *Zhang v MIBP* [2015] FCA 935. In *Verma v MIBP* [2014] FCCA 1687, the Court found, distinguishing *SZDFE*, that the applicant was at best recklessly indifferent to the contents of the skilled visa application form or was negligent in not checking its contents prior to dispatch by his migration agent, and given this complicity in the deception visited upon the Tribunal, there was not a fraud on the Tribunal.

[112] *MIAC v Lu* (2010) 189 FCR 525.

[113] *MIAC v Lu* (2010) 189 FCR 525 at [43]. See also *Zhang v MIBP* [2014] FCCA 2752, where the applicant claimed there was a fraud on the Tribunal because in making an unmeritorious student visa application, she acted on the advice of an unregistered migration agent. The Court distinguished *SZFDE* as it found the applicant was complicit in the attempt to rort the visa application process by applying for a visa she knew she could not obtain and applying for merits review to prolong her stay in Australia, and it held the Tribunal's performance of its imperative statutory function would not have had a different result had the application been lodged by a registered migration agent or had the applicant known he was not a registered migration agent. Upheld on appeal: *Zhang v MIBP* [2015] FCA 935.

was no stultification of the Tribunal's obligation to afford natural justice to the applicant because the process it followed was the natural consequence of the applicant's conscious election not to respond to the Tribunal's invitation.[114]

Negligent or inadvertent conduct

32.3.31 A further distinction can be drawn between fraudulent conduct and conduct which is merely negligent or inadvertent. This can be seen in the following examples:

- *MIAC v SZLIX*[115] - the applicant gave as his address for correspondence a P.O. Box. The Tribunal rescheduled the hearing after the applicant turned up to the first scheduled hearing late. The Tribunal sent a second hearing invitation to the applicant at that address, but the applicant failed to attend. Upon judicial review, the applicant gave evidence that the P.O. Box was the address of a friend; that this friend introduced him to a migration agent; that he informed the agent of his new contact address and phone number; and if the agent needed to contact him, he contacted his friend who told the applicant about 'anything they want to know'. The applicant claimed that the friend or agent had failed to tell him about the rescheduled hearing. The Full Court of the Federal Court found that even if it was assumed that the invitation reached the agent there was no substratum of facts which would justify the inference that the agent dishonestly omitted to inform the applicant. That failure could have easily been ascribable to oversight or negligence. The simple fact of a failure to inform or bare negligence or inadvertence will not necessarily be sufficient to give rise to fraud on the Tribunal.[116]

- *SZHVM v MIAC*[117] - the appellant worked as a live-in nanny for her migration agent. The migration agent informed the appellant of the Tribunal hearing and described it as important, but told the appellant that her work as a nanny for his child was 'more important'. The appellant did not attend the Tribunal hearing. The Court found that the agent may have put his interests above the appellant's but that could not amount to a finding of fraud and was more properly characterised as 'bad' advice. Even accepting that the negative response to the invitation was procured by the purported agent's coercion, which might be characterised as duress, this did not amount to material

[114] *MIAC v Lu* (2010) 189 FCR 525 at [38]. See also, *SZQQP v MIAC* [2011] FMCA 803 where an applicant claimed that she paid money to a person (possibly an unregistered migration agent), who did not inform her of the departmental interview or the Tribunal hearing. The Court dismissed the application, holding that the applicant was a knowing participant in any fraud that may have been perpetrated and that she paid no regard to what was being put to the authorities on her behalf.
[115] *MIAC v SZLIX* (2008) 245 ALR 501.
[116] See also *SZIXO v MIAC* [2008] FCA 94, *SZMGX v MIAC* [2009] FCAFC 67 at [22]–[26], *SZGRH v MIMIA* [2006] FCA 1408, *SZLCI v MIAC* [2008] FCA 135, *Jalagam v MIAC* [2008] FMCA 1417 at [64] upheld on appeal *Jalagam v MIAC* [2009] FCA 197 at [47]; *SZJMI v MIAC* (2008) 221 FLR 1 at [53]; *SZMMF v MIAC* [2008] FCA 1882 at [7], *SZQLJ v MIAC* [2011] FMCA 932 at [39] upheld on appeal *SZQLJ v MIAC* [2012] FCA 456, *Singh v MIBP* [2014] FCCA 2867, dismissed on appeal *Singh v MIBP* [2015] FCAFC 151.
[117] *SZHVM v MIAC* (2008) 170 FCR 211.

dishonesty which conveyed a false impression of another to the decision-maker such as to make the conduct cognisable as fraud.[118]

- *SZKPI v MIAC*[119] - the Court considered when the provision of incorrect information by an agent would amount to fraud. The Court found that the provision of an incorrect address for service, which was subsequently used by the Tribunal would, without more, be characterised as 'bare negligence or inadvertence' rather than fraud on the applicant or on the Tribunal. In order for a misrepresentation to be fraudulent it must be a false statement of fact, made by a person who does not believe the truth of the statement or is recklessly indifferent to whether it is true or not, to another with the intention that the person will rely on it. The Court observed that moral culpability or turpitude is vital in fraudulent misrepresentation; mere carelessness is not enough.[120]

- *Cheng v MIAC* - the Court held that without more, a mistake by the agent as to the applicant's address when lodging the applicant's student visa application did not give rise to fraud. Neither did the fact that the agent completed and lodged the visa application without disclosing that he assisted with the form or the fact that the agent impersonated the applicant and called the Department to enquire about his failure to receive correspondence give rise to fraud in the sense considered in *SZFDE v MIAC.*[121]

- *SZHIE v MIAC* - the Federal Court found that the failure of the agent to notify the applicant of the details of the hearing was an innocent failure and not motivated by dishonesty or fraud.[122]

- *Abulokwe v MIAC* - the Court held that the migration agent's delay in providing documents received from the applicant to the Tribunal was not fraudulent.[123]

- *Lutchanah v MIBP* - the Court held that a migration agency's actions in obtaining the applicant's signature on a blank Departmental form 956 (i.e. appointment of an agent) was not fraudulent as, on the evidence before the Court, 'it was done for reasons of expediency rather than deceit'.[124] The Court also held that the alleged conduct of the agency in failing to advise the applicant of correspondence received from the Department during the

[118] See also, *SZLZE v MIAC* [2008] FMCA 560 where the unregistered migration agent's conduct was described as at most, a case of nonfeasance rather than misfeasance. See also, *SZQCW v MIAC* [2011] FMCA 830 where the applicant alleged that his migration agent requested the Tribunal to decide his case on the papers without his instructions and the Court held that in the absence of any supporting evidence such an allegation fell far short of the fraud that would be necessary to be established at [45].
[119] *SZKPI v MIAC* [2008] FMCA 584.
[120] *SZKPI v MIAC* [2008] FMCA 584 at [49].
[121] *Cheng v MIAC* [2011] FMCA 461. On appeal, in *Cheng v MIAC* [2011] FCA 1290 this was upheld, with the Court finding there was insufficient evidence to establish fraud on the part of agent.
[122] *SZHIE v MIAC* [2010] FCA 209 at [50]–[55].
[123] *Abulokwe v MIAC* [2010] FMCA 862 at [28]. See also, *Nayeck v MIAC* [2013] FMCA 81 where the Court found the allegation that the applicant received incorrect advice or the agent provided incorrect information was not made out and the decision was not vitiated.
[124] *Lutchanah v MIBP* [2015] FCCA 550 at [117]. The Court also noted that, in any event, the applicant herself was aware of this conduct and, by signing the form, was complicit in any deception it created on the Department: at [122].

processing of her visa application, and of her visa refusal and review rights, 'could rise no higher than a finding of negligence.[125]

- *SZOGX v MIAC* - the Court found that the claimed delay in receiving documents attributable to a third party making a mail redirection order without the applicant's consent could be described as no more than a mere mishap and not one so redolent of fraud that it should vitiate the Tribunal's decision.[126]

- *Dhanuka v MICMSMA* – the Court held that the migration agent's actions in submitting a bogus document with the visa application, when the applicants had expressly instructed the agent not to include that document in the application, did not amount to the agent exceeding his authority as the authority was to prepare and lodge the visa application. The agent's failure to follow the applicant's instructions amounted to negligence or incompetence.[127]

32.3.32 These cases can be contrasted with *SZMWT v MIAC*,[128] in which the Federal Court held the agent's conduct in forging the applicant's signature on the review application and advising the applicant to do nothing amounted to fraud rather than bad or negligent advice as it induced the applicant to not attend the Tribunal hearing.

32.4 Communicating with representatives

Giving documents

32.4.1 The Migration Act requires the Tribunal to send certain documents to applicants seeking review of a decision under Part 5 or 7, including invitations to comment on relevant adverse information, or to appear before the Tribunal to give evidence and present arguments. The Migration Act contains detailed procedures for giving such documents. Generally speaking, all such documents must be given to the applicant, either by hand, or by email, fax, or prepaid post to the last address provided to the Tribunal by the applicant in connection with the review.[129] The only exception is where the applicant has notified the Tribunal, in writing, of the name and address of a person authorised by the applicant, to receive documents in connection with the review.[130] This person is known as the 'authorised recipient'. If an authorised recipient has been appointed, the Tribunal must give review-related documents to the authorised recipient.

[125] *Lutchanah v MIBP* [2015] FCCA 550 at [126]. The Court emphasised that the failure of the firm to have proper systems to oversee the work of their agents, particularly where an agent left its employ, smacked of incompetence and negligence rather than fraud.
[126] *SZOGX v MIAC* [2010] FMCA 508 at [11].
[127] *Dhanuka v MICMSMA* [2019] FCCA 2849 at [24].
[128] *SZMWT v MIAC* [2009] FCA 559.
[129] See ss 379A, 441A.
[130] ss 379G, 441G.

32.4.2 A migration agent or Australian legal practitioner , for example, may, or may not, also be the applicant's authorised recipient (See Chapter 8 – Notification by the Tribunal). Notwithstanding the agency relationship between an applicant and their migration agent or Australian legal practitioner, unless an applicant specifically notifies the Tribunal in writing that the migration agent or Australian legal practitioner is also the authorised recipient, the Tribunal *must* send review-related documents to the applicant directly.[131]

32.4.3 If the applicant does notify the Tribunal in writing that a migration agent or Australian legal practitioner is their authorised recipient, an issue may arise if the agent or Australian legal practitioner appears to no longer be acting for the applicant but the Tribunal has not been formally advised as such by the applicant or where the agent's registration has been suspended or cancelled by MARA.

32.4.4 In *Le v MIAC* the Full Federal Court held (in relation to equivalent Departmental procedures) that there is nothing to suggest that the requirement to send documents to the authorised recipient comes to an end, until the applicant varies or withdraws a notice given under ss 379G or 441G of the Migration Act.[132] Accordingly, even where a migration agent or Australian legal practitioner no longer appears to be acting for an applicant the Tribunal is still required to send all correspondence to the agent, as authorised recipient, until the applicant notifies the Tribunal otherwise.

32.4.5 An authorised recipient cannot unilaterally withdraw their authorisation to receive documents. A migration agent or Australian legal practitioner who informs the Tribunal that they no longer wish to receive correspondence because they are no longer representing the applicant is not assumed to have withdrawn their appointment of authorised recipient 'on the applicant's behalf'. If the agent or Australian legal practitioner no longer represents the applicant, they may not have instructions or authority to withdraw the appointment of authorised recipient. In *Guan v MIAC*, the Federal Magistrates Court confirmed that the Tribunal must continue to send correspondence to an authorised recipient even where that authorised recipient has notified the Tribunal that they no longer wish to receive documents for the applicant.[133]

32.4.6 Similarly, where the registration of a migration agent is suspended or cancelled by MARA, this does not in itself affect that person's appointment as an authorised recipient. The Tribunal may send a courtesy copy of all documents to an applicant once the Tribunal becomes aware that a migration agent acting as their authorised recipient has had their registration suspended or cancelled. In these circumstances, the Tribunal will generally only cease sending documents to an authorised recipient

[131] Although this does not necessarily require the applicant to have personally signed the authorisation - the applicant may notify the Minister/Tribunal through their agent - see *Jalagam v MIAC* [2008] FMCA 1417. Federal Magistrate Smith noted that there was nothing in s 494D that suggested any intention to exclude the normal presumption that Parliament intends to allow a person to act for the purposes of a statutory provision through an agent at [41]. This was upheld by Edmonds J in *Jalagam v MIAC* [2009] FCA 197.
[132] *Le v MIAC* (2007) 157 FCR 321.
[133] *Guan v MIAC Guan v MIAC* [2010] FMCA 802 at [24]–[27].

where an authorisation from the applicant has been received either appointing another person as an authorised recipient or cancelling the appointment of an authorised recipient.[134]

32.4.7 An applicant, or an agent or Australian legal practitioner of the applicant acting on instructions, may withdraw or vary their notice of an authorised recipient, however, unlike the appointment of an authorised recipient which must be in writing, the Migration Act is silent on how this may take place. In these circumstances, the Courts have accepted that an applicant, or an agent or Australian legal practitioner of the applicant acting on instructions, may withdraw or vary their notice of an authorised recipient orally[135] or implicitly through their conduct,[136] An express, or written statement is not required.

Verbal communications

32.4.8 The provisions in the Migration Act relating to authorised recipients only apply to the giving of documents.

32.4.9 Provided a migration agent or Australian legal practitioner is duly authorised to act for and is in a relationship of agency with the review applicant, the Tribunal is generally permitted[137] to communicate verbally with that agent about matters connected with the review application, as though the Tribunal is communicating directly with the applicant him or herself.

[134] In *Kim v MIAC* [2008] FMCA 1553, the Court expressed the firm view, in *obiter* comments, that migration agents whose registration has been suspended or lawyers who have been struck off should not continue to act as authorised recipients for correspondence from the Tribunal. Without finding any jurisdictional error in the failure to do so, the Court suggested that it would have been appropriate for the Tribunal to ask the applicants if they still wished to retain the agent as their authorised recipient following the suspension of his registration

[135] In *MZZDJ v MIBP* (2013) 216 FCR 153 the Full Federal Court found that the applicant's notice of an authorised recipient to the Department could be varied orally. This would apply equally to the Tribunal. See also *SZLWE v MIAC* [2008] FCA 1343 at [28].

[136] In *SZLWE v MIAC* [2008] FCA 1343 the applicant told the Tribunal at a hearing that he would like correspondence to be sent to him directly following the suspension of his migration agent. The Federal Court found that an authority given to an authorised recipient may be varied or withdrawn at any time: at [26]. See also *SZJDS v MIAC* (2012) 201 FCR 1 which illustrates that the courts will closely scrutinise the documentary evidence to determine whether an applicant has withdrawn or varied an authorised recipient.

[137] See, however, Chapter 31 – Restrictions on disclosing and publishing information for further information.

34. ‘HUMANITARIAN’ REFERRALS

34. 'HUMANITARIAN' REFERRALS[1]

34.1 Introduction

34.1.1 Under ss 351(1) [Part 5 - migration] and 417(1) [Part 7 - protection] of the *Migration Act 1958* (the Migration Act), the Minister may substitute for a decision of the Tribunal in the Migration and Refugee Division a decision that is more favourable to an applicant if the Minister thinks that it is in the public interest.[2] The Minister has the same public interest power under s 501J(1) of the Migration Act to substitute a decision of the Tribunal in the General Division (i.e. a protection visa decision reviewable under s 500 of the Migration Act).

34.1.2 The Minister has issued guidelines explaining, for example, the circumstances in which he or she may wish to consider exercising his or her public interest powers under ss 351, 417 and 501J, how a person may request consideration of the exercise of these powers, and informing officers of the Department when to refer a case to the Minister for consideration.[3]

34.2 Intervention principles

34.2.1 The Minister's guidelines are underpinned by a set of stated principles.[4] These are:

- the general expectation that a person who has not been granted a visa through the statutory process will leave Australia;
- that the intervention process is at the Minister's discretion and is not an extension of the visa process;
- that where a person has a visa pathway open to them, including an offshore pathway, it will not generally be appropriate for the Minister to intervene;
- cases will be viewed unfavourably if the person has not complied with the conditions of a previous visa, has provided false or misleading information to the Department or any other relevant authority (such as an assessing authority) or has been an unlawful non-citizen;

[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 351 and 417; Policy – Migration Act – Ministerial powers – Minister's guidelines on ministerial powers (ss 351,417, and 501J) (reissued 29 March 2016) at [2] states that what is and what is not in the public interest is a matter for the Minister to determine.
[3] Policy – Migration Act – Ministerial powers – Minister's guidelines on ministerial powers (ss 351, 417 and 501J) (reissued 29 March 2016).
[4] Policy – Migration Act – Ministerial powers – Minister's guidelines on ministerial powers (ss 351, 417 and 501J) (reissued 29 March 2016) at [3].

- the person requesting the Minister's intervention will:
  - be a lawful non-citizen if they are in the community at the time of making their request and remain a lawful non-citizen until the request is finalised;
  - cooperate in ensuring their travel documents are available and valid; and
  - continue to engage with the Department and assist with any enquiries, particularly those concerning their identity; and
- the expectation is that a person requesting Ministerial intervention will continue to make arrangements to leave Australia while their request is being progressed and that, if their request is unsuccessful, they will leave Australia.

34.3 Referral to the Minister by the Tribunal

34.3.1 The Minister may only use his or her powers to substitute a decision that is more favourable to the applicant where the Tribunal has first made a substantive decision on the merits of the review. A finding by the Tribunal that it lacks jurisdiction to conduct a review is not a substantive decision on the merits and therefore does not engage the Minister's powers under ss 351, 417 and 501J of the Migration Act.[5]

34.3.2 The applicant may request the Tribunal to refer their matter to the Minister upon the completion of the review or the Tribunal may choose to refer the matter of its own motion. However, the Tribunal has no statutory obligation to consider whether matters should be referred to the Minister for the consideration of his or her public interest powers,[6] and nor is there any statutory power for the Tribunal to make a binding recommendation in this regard. The powers under ss 351, 417 and 501J may only be exercised by the Minister personally[7] and are non-compellable, in the sense that the Minister has no duty to consider whether to exercise the relevant power, whether he or she is requested to do so by the applicant, any other person (including the Tribunal) or in any other circumstances.[8] A decision by the Tribunal to not refer a matter to the Minister does not appear to be a decision which would engage the Federal Circuit Court's jurisdiction, however, a decision of an officer in the Department to not refer the matter to the Minister for consideration may be subject to judicial review on the ground of legal unreasonableness.[9]

[5] In relation to the Minister's powers under ss 351 and 417, the Minister may substitute a decision of the Tribunal made under ss 349 and 415. A finding that the Tribunal lacks jurisdiction is not a decision under ss 349 or 415.
[6] *Mohammed v MIBP* [2017] FCCA 2356 at [29].
[7] ss 351(3), 417(3) and 501J(4).
[8] ss 351(7), 417(7) and 501J(8). See also Policy – Migration Act – Ministerial powers – Minister's guidelines on ministerial powers (ss 351, 417 and 501J) (reissued 29 March 2016) at [2].
[9] *Bhayat v MICMSMA* [2020] FCCA 3259 at [5]. The Court noted that, given the terms of s 351 and in particular s 351(7) which provides that the Minister does not have a duty to consider a request made by the applicant or any other person (such as the Tribunal), a decision to not refer a decision to the Minister is not a decision which engages the Federal Circuit Court's jurisdiction under s 476. The refusal to refer is not a step in a 'migration decision'. However, note that in *Jabbour v Secretary, Department of Home Affairs* [2019] FCA 452 the Federal Court proceeded on the basis that the 'non-statutory administrative action on the part of [an officer in the Department]' (i.e. a decision to not refer a to the Minister, having regard to the Minister's

34.3.3 The current Minister's guidelines require a referral by the Tribunal to first be assessed by the Department. Cases which do not meet the guidelines are finalised without being brought to the Minister's attention irrespective of whether they were referred to the Minister by the Tribunal or not.[10]

34.3.4 The President's Direction - Conducting Migration and Refugee Reviews specifies the appropriate procedure for referring a matter to the Minister for humanitarian consideration. It notes that the Tribunal generally has regard to the Minister's guidelines when considering whether or not a case should be drawn to the attention of the Minister.[11]

34.4 Cases which should and should not be brought to Minister's attention

34.4.1 The Minister's guidelines indicate that the Minister will generally only consider the exercise of the public interest powers in cases which exhibit one or more unique or exceptional circumstance(s).[12] The Minister's guidelines list circumstances which may be unique or exceptional.[13]

34.4.2 Cases which do not meet the guidelines will generally be finalised by the Department without referral to the Minister. The guidelines list circumstances which are not to be brought to the Minister's attention.[14]

34.4.3 The Minister's guidelines also provide that, with very limited exceptions, the Minister does not wish to consider requests for intervention where there has been a previous

Guidelines on which matters to refer) was amenable to judicial review for legal unreasonableness. It concluded that the decision was not affected by any such unreasonableness (at [91]). The Court noted that it was not its task to decide whether or not the applicants' request for Ministerial intervention does or does not fall within the Minister's guidelines for intervention such that the request should be referred to the Minister for consideration according to law (at [117]). See also *Davis v MICMSMA* [2021] FCAFC 213 where, in separate judgments, the Full Court of the Federal Court also held that judicial review could be sought of a departmental officer's decision not to refer a Ministerial intervention request under s 351 to the Minister on the ground of legal unreasonableness. However, the ground of unreasonableness was not made out in this instance. At [36] Kenny J held that 'there should be no continuing doubt that an exercise of executive power (whatever its source) is amenable to judicial review on the unreasonableness ground', and that 'such an exercise of power may be challenged on this ground either because the reasons given by the decision-maker disclose no 'intelligible justification' in the *Li* sense (*MIAC v Li* [2013] HCA 18) or because the outcome is such that the circumstances disclose legal unreasonableness'. The availability of judicial review is however subject to general constitutional and common law constraints and any applicable statutory limitations. The Court distinguished the judgment in *Plaintiff S10/2011 v MIAC* [2012] HCA 31, in which the High Court held that a decision of a delegate to not refer a Ministerial intervention request to the Minister was not subject to the principles of procedural fairness, holding at [34] that while *Plaintiff* S10/2011 'precludes reliance on the procedural fairness ground in relation to the decisions under challenge does not of itself prevent reliance on the unreasonableness ground'. The Court also referred to the difference between the 2009 Guidelines considered in *Plaintiff S10/2011* and the 2016 Guidelines considered in *Davis*, as the 2009 Guidelines provided that Ministerial intervention requests fulling the criteria, and also not fulfilling the criteria, should be bought to the Minister's attention, whereas in the 2016 Guidelines cases not fulfilling the criteria would not be brought to the Minister's attention.

[10] Policy – Migration Act – Ministerial powers – Minister's guidelines on ministerial powers (ss 351, 417 and 501J) (reissued 29 March 2016) at [8].

[11] President's Direction - Conducting Migration and Refugee Reviews at [16.1].

[12] Policy – Migration Act – Ministerial powers – Minister's guidelines on ministerial powers (ss 351, 417 and 501J) (reissued 29 March 2016) at [4].

[13] Policy – Migration Act – Ministerial powers – Minister's guidelines on ministerial powers (ss 351, 417 and s.501J) (reissued 29 March 2016) at [4].

[14] Policy – Migration Act – Ministerial powers – Minister's guidelines on ministerial powers (ss 351,417 and 501J) (reissued 29 March 2016) at [6] and [7].

request made under s 351, 417 or 501J to intervene, whether in respect of the present or any previous visa decision.[15]

[15] Policy – Migration Ministerial powers – Minister's guidelines on ministerial powers (ss 351, 417 and 501J), (reissued 29 March 2016) at [10.2]. However a repeat request may be referred if the Department is satisfied there has been a significant change in circumstances since the previous request(s) which raises new, substantive issues that were not provided before or considered in a previous request; and the Department assess that these new, substantive issues fall within the unique or exceptional circumstances described in [4] of the guidelines.

35.PROTECTION AND IMMUNITY OF MEMBERS AND OTHER PERSONS

35. PROTECTION AND IMMUNITY OF MEMBERS AND OTHER PERSONS[1]

35.1 Introduction

35.1.1 Section 60[2] of the *Administrative Appeals Tribunal Act 1975* (Cth) (the AAT Act) provides protection and immunity for Tribunal members, witnesses, and certain representatives appearing before the Tribunal on behalf of a party in the performance of their duties in those roles.

35.1.2 The principles underpinning judicial immunity and the immunity of witnesses are founded in the finality of judgments.[3] The general principle of finality envisages that controversies, once resolved, are not to be reopened except in a few, narrowly defined, circumstances. Disappointed litigants are generally unable to sue individuals who have given evidence, including where negligence or malicious intention is alleged, so as to encourage contributions from witnesses and fully inform the court or tribunal about the issues in the case. Judicial immunity for judicial acts done within jurisdiction ensures the impartial resolution of disputes, avoids re-agitating decided cases following final judgment other than by appellate processes and the effective performance of functions.[4]

35.2 Protection and immunity of members

35.2.1 A member of the Tribunal, including those assigned to the Migration and Refugee Division (MRD) has, in the performance of his or her duties, 'the same protection and immunity as a Justice of the High Court'.[5]

35.2.2 Pursuant to s 16(2) of the *Evidence Act 1995* (Cth) (the Evidence Act), which applies to the adducing of evidence in federal courts, including the High Court, a person who is or was a judge in a proceeding is not compellable to give evidence about that proceeding unless a court gives leave. Section 129 of the Evidence Act

[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] Note that ss 60(1A)–60(1B) of the *Administrative Appeals Tribunal Act* 1975 (Cth) (AAT Act) also provides protection and immunity for alternative dispute practitioners and officers of the Tribunal (in certain capacities); however, these specific protections and immunities are not applicable to the Migration and Refugee Division of the Tribunal.
[3] *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at [40]
[4] *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at [34], [39]–[42]
[5] AAT Act s 60(1). Prior to 1 July 2015, the same protection was provided for by ss 373(1) and 435(1) of the Migration Act in relation to the MRT and RRT. Those provisions were repealed by the *Tribunals Amalgamation Act 2015 (Cth)* (Amalgamation Act). For transitional and savings arrangements that ensure continuity of protection for actions done prior to 1 July 2015, see the Amalgamation Act sch 9.

generally excludes the giving of evidence of the reasons for a decision, or of the deliberations of a judge in a proceeding. The prohibition also extends to the giving of such evidence by a person who was under the direction or control of the judge (e.g. an associate) in relation to the proceeding, or by tendering as evidence a document that was prepared by a judge or a person under his or her direction or control.

35.2.3 The nature of the immunity afforded to Tribunal members was considered by the High Court in *Herijanto v Refugee Review Tribunal & Ors*, which confirmed that it protected members from disclosure of any aspect of the decision-making process.[6] The protection and privilege contained in the now repealed s 435(1) in relation to the RRT [equivalent to s 60(1)] was found to extend not merely to disclosure by the individual member concerned, but the revelation, by whatever means, of any aspect of his or her decision-making process.[7] As a result, an application for discovery to ascertain when and on what bases the member formed the view that a decision could not be made 'on the papers', including the documents consulted and the contents of the Tribunal's computer systems and computer databases, was dismissed.[8] The immunity under s 60(1) also extends to Tribunal members who are constituted a matter but do not ultimately make the decision on review (which may occur where the member is no longer available and the matter has to be constituted to another member).[9]

35.2.4 In *Muin v RRT; Lie v RRT*, Gleeson CJ found that it would be inconsistent with a member's immunity under a provision such as s 435(1) [equivalent to s 60(1)], to expect the member, in proceedings challenging his or her decision, to go outside the published reasons for the decision and explain the process of research and consideration leading up to the making of the decision. His Honour explained that to do so could endanger the Tribunal's impartiality by assuming the role of protagonist in proceedings challenging its decisions. Similarly, Callinan J observed that the immunity of a Justice of the High Court is conferred on a member of the Tribunal, in order that they be 'free in thought and independent in judgment,' and that this extends to an immunity from disclosing any or all aspects of the decision-making process itself.[10]

35.2.5 These cases were followed in *VWSU v MIMIA*[11] in proceedings relating to a notice to produce served on the Tribunal seeking the production of '*the entire word*

[6] *Herijanto v RRT* (2000) 170 ALR 379 at [16].
[7] *Herijanto v RRT (No 2)* (2000) 170 ALR 575 at [10]. In *Applicant M1014 of 2003 v MIMIA* [2006] FCA 1190, the Court, applying the principles in *Herijanto*, noted that the immunity from disclosure of any aspect of the decision-making process includes whether or not the Tribunal has read, obtained, considered or taken into account particular documents at [14].
[8] *Herijanto v RRT* (2000) 170 ALR 379 at [18]–[23].
[9] See *AVX16 v MICMSMA* [2020] FCCA 945. In this matter, the applicant sought the notes of a previous Tribunal member who was unable to complete the review. Upon reconstitution, the applicant was informed by the new member that they had read the notes made by the previous Tribunal member. The Court, in applying the principle in *Herijanto*, found that the notes were immune from discovery. The Court held that the fact that a Tribunal member is unable to complete a review does not waive the immunity to which that member's notes or preliminary reasoning processes are provided under s 60(1) of the AAT Act: at [31]–[33]. Both members comprised the 'Tribunal' for the purposes of the review: at [32].
[10] *Muin v RRT; Lie v RRT* (2002) 190 ALR 601 at [25], [299]. At [199], Kirby J also commented that it was a sound legal principle that the immunity from civil suit and compulsion to give evidence prevents any adverse inference being drawn from a failure by a member to give evidence.
[11] *VWSU v MIMIA* [2006] FMCA 212.

processing file, or files, in which is or are recorded (in whole or in part) the reasons for decision of the tribunal the subject of this application, including a record of "track changes" embedded in that file or files (if such file or files is in MSWord format) or other audit trail of activity embedded on that file or files'.

35.2.6 In setting aside the notice to produce, the Court found that the documents sought to be discovered were intrinsically associated with the decision-making process of the Tribunal and that the applicant was seeking to ascertain whether the second member constituted to his case had before her and used material composed on a word processor by the first member. The Court expressed the view that it is trite law that the Member could not be interrogated to ascertain the validity of the applicant's suspicions that prejudicial written material was prepared by the first Member and that material influenced and infected the second member's decision. It followed that he could not obtain indirectly by the notice what he could not do through interrogation.[12]

35.2.7 The Federal Court, however, in *Springs v MICMSMA* considered it was possible, with a grant of leave under s 16(2) of the Evidence Act, to compel a Tribunal member to give evidence in judicial review proceedings as to if and when they formed an opinion, in relation to s 359A(1), that information would be the reason or part of the reason for affirming the decision under review.[13] The Court considered that s 16(2), which allows for leave to be granted, altered the common law position that judges were not compellable to give evidence about the exercise of their judicial powers,[14] and that s 129(5)(c) of the Evidence Act provides a carve out to the general exclusion in s 129 on the admission of evidence of the reasons for a decision made by a person who is a judge, such that evidence about a member's deliberations may be given.[15] The Court also doubted the correctness of the High Court's *Herijanto* judgments and *Muin* (discussed above) on the basis that the Court's attention in those cases was apparently not drawn to s 16(2).[16]

35.2.8 It is not clear that another court would reach the same conclusion as the Court in *Springs v MICMSMA*. This is because the Court did not consider the application of s 66(3) of the AAT Act which provides that a Tribunal member shall not be required to give evidence to a Court in relation to any proceeding before the Tribunal.[17] The Court also did not consider authorities supporting the view that s 129(5)(c) of the

[12] *VWSU v MIMIA* [2006] FMCA 212 at [24].
[13] *Springs v MICMSMA* [2021] FCA 197 at [40]–[62]. The Court did not consider the information in question to be information for the purposes of s 359A(1) (at [28]), and therefore, despite considering it may be possible to grant leave, did not have to go on to grant leave to compel the Tribunal member to give evidence on their state of mind. An application for special leave to appeal to the High Court was refused: *Springs v MICMSMA* [2022] HCATrans 17.
[14] *Springs v MICMSMA* [2021] FCA 197 at [40]. An application for special leave to appeal to the High Court was refused: *Springs v MICMSMA* [2022] HCATrans 17.
[15] *Springs v MICMSMA* [2021] FCA 197 at [53]. An application for special leave to appeal to the High Court was refused: *Springs v MICMSMA* [2022] HCATrans 17. Section 129(5)(c) provides that s 129 does not apply in a proceeding that is by way of appeal from, or judicial review of, a judgment, decree, order or sentence of a court.
[16] *Springs v MICMSMA* [2021] FCA 197 at [56]. An application for special leave to appeal to the High Court was refused: *Springs v MICMSMA* [2022] HCATrans 17.
[17] It should be noted that s 66(3) of the AAT Act appears under a provision titled 'Confidential information not to be disclosed' and ss 66(1) and (2) concern 'protected documents and information' which is not the subject of s 66(3). While this placement of s 66(3) might suggest it is limited in operation to certain documents and information, the text of s 66(3) is not so confined and refers directly to a member of the Tribunal not being required to give evidence to a court in relation to any proceedings before the Tribunal. Therefore its operation does not appear to be restricted to 'protected documents and information'.

Evidence Act is not to be read as broadly as to allow evidence about thought processes or deliberations of a judge or the production of notes recording such thoughts.[18]

35.2.9 Even if it is accepted that a Court may grant leave under s 16(2) of the Evidence Act for a Tribunal member to give evidence on their state of mind in relation to procedural or evidentiary matters, there may be avenues to resist a grant of leave. For instance, s 192(2) of the Evidence Act provides matters which the Court must take into account in deciding whether to grant leave, such as the impact that granting leave would have on the duration of the hearing, prejudice to a party or a witness, the importance of the evidence, the nature of the proceeding, and the power to adjourn or make another order relating to the evidence.[19] There may also be specific barriers to the Federal Circuit Court granting leave.[20]

35.2.10 The immunity does not extend to actions of members outside the decision-making role.

35.3 Protection and immunity of witnesses

35.3.1 Section 60(3) of the AAT Act provides that a person summoned to attend or appearing before the Tribunal to give evidence has the same protection and is subject to the same liabilities as a witness in proceedings in the High Court.[21]

35.3.2 The nature and scope of the immunity afforded to witnesses was considered in *Commonwealth of Australia v Griffiths.*[22] The immunity protects a person from being sued as a result of evidence the person gives in proceedings and extends to protect persons from being sued in respect of out of court conduct, provided that that conduct is sufficiently connected with the proceedings.[23] The immunity operates even if the evidence given by a witness is false.[24]

35.3.3 There are well recognised exceptions to the immunity of witnesses, including prosecutions for perjury, contempt of court and perverting the course of justice and in the case of any clear statutory provision to the contrary.[25]

[18] See e.g. *Karmas v New South Wales Land and Housing Corporation* [1999] NSWSC 157 at [6]; cited with apparent approval in *Woodhouse v Director of Public Prosecutions* [2015] NSWCA 40 at [39]–[40]. Both authorities appear to accept that the proposition about the compellability of judges but consider that the scope of what a judge may be compelled to give evidence about would be narrow.
[19] *Evidence Act 1995* (Cth) s 192(2),
[20] *Federal Circuit Court Act 1999* (Cth) s 45, which provides that interrogatories and discovery are not allowed in relation to proceedings unless a Judge declares it is appropriate in the interests of the administration of justice to allow it. This appears to place a high threshold on obtaining a such declaration. See also *AVX16 v Minister for Immigration* [2020] FCCA 945 at [47] in relation to reasons refusing an application for discovery of Tribunal notes in relation to a s 424A issue. Similar reasons may be used to resist applications for leave to compel a Tribunal member to give evidence as to their thought processes in relation to a Tribunal review.
[21] Prior to 1 July 2015, the same protection was provided for by ss 373(2) and 435(2) of the Migration Act in relation to the MRT and RRT. Those provisions were repealed by the Amalgamation Act. For transitional and savings arrangements that ensure continuity of protection for actions done prior to 1 July 2015, see the Amalgamation Act sch 9.
[22] *Commonwealth of Australia v Griffiths* (2007) 70 NSWLR 268.
[23] *Commonwealth of Australia v Griffiths* (2007) 70 NSWLR 268 at [42].
[24] *Commonwealth of Australia v Griffiths* (2007) 70 NSWLR 268 at [44].
[25] *Commonwealth of Australia v Griffiths* (2007) 70 NSWLR 268 at [46].

35.3.4 The extent of the immunity and its application beyond evidence given in Court is still subject to debate.[26]

35.4 Protection and immunity of barristers, solicitors or other people appearing on behalf of a party

35.4.1 Section 60(2) provides that a barrister, solicitor or other person appearing before the Tribunal on behalf of a 'party' (such as a representative) has the same protection and immunity as a barrister appearing for a party in proceedings in the High Court.[27]

35.5 Protection and immunity of officers

35.5.1 Section 60(1B) of the AAT Act provides that an officer has, in the performance of *certain duties*, the same protection and immunity as a Justice of the High Court. However, none of these certain duties are exercisable in the Migration and Refugee Division of the Tribunal. As such, the protection and immunity for Tribunal officers under s 60(1B) does not operate for staff performing functions in that Division.

35.5.2 The duties that fall within the immunity of officers are those performed under the following provisions of the AAT Act:

- s 29(9) [extension of time to apply for review];
- s 29AC(2) [notice of application to another person];
- s 33(2)(a) [directions prior to hearing];
- s 40 [powers of tribunal – general];
- s 40A [power to summons];
- s 40B [inspection of documents under summons]; and
- s 69A [taxing of costs].

[26] *Commonwealth of Australia v Griffiths* (2007) 70 NSWLR 268 at [84].
[27] An advocate's immunity extends to work done in court or work done out of court which leads to a decision affecting the conduct of the case in court: *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 at [86]. This principle was applied to the immunity under s 60(2) in *Leerdam & Anor v Noori & Ors* [2009] NSWCA 90 at [145].

36. ACCESS TO DOCUMENTS

36. ACCESS TO DOCUMENTS[1]

36.1 Introduction

36.1.1 The *Migration Act 1958* (Cth) (the Migration Act) provides applicants seeking review of a Part 5-reviewable decision [migration) an entitlement to access written materials given or produced to the Tribunal which is separate and distinct from the right of access available via the *Freedom of Information Act 1982* (Cth) (the FOI Act).

36.1.2 The entitlement to access is contained in s 362A of the Migration Act. It is subject to ss 375A and 376 of the Migration Act,[2] and does not override any of the requirements of the *Privacy Act 1988* (Cth) (the Privacy Act).

36.1.3 There is no equivalent entitlement under the Migration Act for applicants seeking review of a Part 7-reviewable decision [protection].

36.2 Overview of the section 362A entitlement

36.2.1 Subsection 362A(1) of the Migration Act provides that an applicant, or an assistant under s 366A of the Migration Act,[3] are entitled to have access to any written material (or a copy) which is given to, or produced to, the Tribunal for the purposes of the review. It does not, however, prescribe in what form this access must be provided. In accordance with the normal principles of agency, s 362A applications may be made by and on behalf of review applicants by their representatives (see Chapter 32 – Migration agents and the Tribunal).

36.2.2 An applicant's entitlement to access written material under s 362A only arises where the Tribunal has a valid application for review[4] and ceases when the Tribunal has given the applicant a copy of its decision under s 368(1).[5]

[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 362A(1).
[3] Subsection 366A(1) provides that an applicant is entitled, while appearing before the Tribunal, to have another person (the assistant) present to assist him or her.
[4] There would, generally speaking, appear to be no legal entitlement for an applicant to access written material under s 362A where there is a potential jurisdiction issue and a decision on jurisdiction has not yet been made. In these cases, requests for access may be made under FOI instead. An exception may arise where the jurisdiction issue in question involves a fee reduction refusal, in which case an application is generally deemed valid until a reasonable period of time has passed from notification of the decision to refuse to grant the fee reduction (at which point the Tribunal makes a finding it doesn't have jurisdiction due to the non-payment of the remainder of the fee). In addition, where a s 362A request relates specifically to material relevant to the question of jurisdiction, consideration is given as to whether the specific material requested be provided to the applicant to ensure they receive natural justice.
[5] s 362A(3). This appears to be the case even where the 'request' for access is received prior to the applicant being given a copy of the statement (i.e. its decision) required by s 368(1). In this scenario, if access had not been granted prior to the copy of the statement being given, the Tribunal is not required to provide access under s 362A as there is no longer an entitlement to the written material.

36.2.3 Where a court has remitted a review application to the Tribunal (either by judgment or by consent) and an applicant seeks access under s 362A after the remittal, the applicant would be entitled to written material given to, or produced to, the Tribunal prior to the remittal (i.e. material on the Tribunal file which was subject to the remittal) and after the remittal (i.e. the Tribunal file created post remittal). This is because material on both Tribunal files relates to the same review application (the second Tribunal file with a new matter number is created for administrative purposes only) and the entitlement under s 362A relates to material given or produced for the purposes of the review, which would include material on all Tribunal files relating to the same review application.

36.2.4 The 'entitlement' in s 362A gives an applicant a rightful claim to access all material in the Tribunal's possession, subject to any exceptions to the entitlement (see below). Where an applicant makes such a request, the Tribunal has an obligation to ensure that the applicant is given access and in this sense, the obligation under s 362A is a mandatory statutory duty. A failure to fulfil this duty may result in jurisdictional error.[6]

36.2.5 There is no fee or charge payable for access to documents under s 362A.

36.2.6 As access to written materials before the Tribunal is expressed in terms of an 'entitlement', s 362A does not itself constitute an express power. Accordingly, the authority of persons entitled to provide access to written materials under s 362A is governed by Tribunal administrative policies.

36.3 Documents covered by section 362A

36.3.1 Section 362A(1) entitles applicants to access 'any written material, or a copy of any written material, given or produced to the Tribunal for the purposes of the review'.

'Any written material'

36.3.2 The entitlement in s 362A(1) relates to 'any written material' given or produced to the Tribunal. In some circumstances, however, review files contain documents that go beyond written materials such as photographs and audio recordings.

36.3.3 In considering the scope of the entitlement, s 2B of the *Acts Interpretation Act 1901* (Cth) provides that 'writing' includes any mode of representing or reproducing words, figures, drawings or symbols in a visible form. This would suggest that applicants are therefore entitled to access documents containing information that goes beyond written words and including, for example, photographs, drawings and

[6] *Khaira v MICMSMA (No 4)* [2021] FCCA 1716 at [57]. In concluding that the Tribunal had erred in a jurisdictional sense by not providing access to all material held by the Tribunal, the Court held that the question of materiality of such an error did not arise in the circumstances of the particular matter. However, the Court had already found that if all of the material had been disclosed to the applicant, the Tribunal could realistically arrived at a different decision (at [54]). The Tribunal had not provided access to material covered by a non-disclosure certificate which was found to be invalid and therefore did not prevent the applicant from being given access to the material.

such like.[7] While it is less clear whether audio or video recordings are contained within the scope of s 362A(1), Tribunal policy is that access is generally extended to include any relevant materials such as audio tapes and photographs.

'Given or produced to the Tribunal'

36.3.4 Information or documents provided by the Department in relation to the review under s 352 can generally be characterised as 'given or produced' to the Tribunal. Written material from external third parties would also be covered by the first limb of s 362A(1), provided it was for the purposes of the review.

Factual material vs. opinion

36.3.5 While the words 'any written material…given or produced to the Tribunal' suggest that the applicant's entitlement under s 362A(1) is confined only to written material provided to the Tribunal by external parties, and not to documents produced within the Tribunal, the position is somewhat broader. Some internal factual material, but not all, will fall within the scope of s 362A. Non-factual matters, such as opinions, are not subject to s 362A, but information relating to factual matters to be determined during the review are likely to be within the ambit of s 362A(1).

36.3.6 In *Carlos v MIMA,* the Court endorsed the view that '…a [Tribunal] member is not obtaining information from another source when he or she requests and obtains from officers or other members of the Tribunal informed opinions on the legal issues that have arisen in a matter to enable the member conducting the review to form a balanced judgment on the merits of the matter'. Further, 'if the information requested relates to factual matters that were required to be determined by the member then the information provided is appropriately characterised as information given or produced to the member from another source'.[8] This approach 'ensures that the applicant is informed of any factual material that is put before the Tribunal member, whether that material emanates from within the Tribunal or outside it, but it does not require the Tribunal member to disclose to the applicant the nature or content of any advice or assistance the member may receive from persons within the Tribunal in resolving a particular case. An applicant needs to know the former, but not the latter'.[9]

36.3.7 Internally produced documents, such as interpreter booking forms or hearing invitations, that do not contain factual matters to be determined by a member, are unlikely to fall within the definition of material that an applicant can access under this provision.[10]

[7] Note also the broad definition of 'document', which means any record of information, and includes anything from which sounds, images or writings can be reproduced with or without the aid of anything else, in addition to a map, plan, drawing or photograph: *Acts Interpretation Act 1901* (Cth) s 2B.
[8] *Carlos v MIMA* (2001) 113 FCR 456.
[9] *Carlos v MIMA* (2001) 113 FCR 456 at [39].
[10] *Carlos v MIMA* (2001) 113 FCR 456 at [37]–[39].

36.3.8 'Information' contained in written material is distinguished from 'comment' based on the written material. For example, a legal opinion which recounts some facts subject to the advice would generally fall within the class of documents to which the s 362A(1) entitlement does not extend as the written material would be characterised as 'comment' or 'opinion' (rather than information relating to factual matters).[11] This is consistent with the Full Federal Court decision in *Carlos v MIMA*.[12]

36.3.9 Whether written material given or produced to the Tribunal for the purposes of the review is 'factual' in nature is itself a question of fact. The mere inclusion of 'facts' in material does not necessarily mean the material is factual in nature. To this end, s 362A(1) does not require the Tribunal to disclose to the applicant the nature or content of any advice or assistance a member may receive from persons within the Tribunal in resolving a particular case.

36.4 Exceptions to section 362A entitlement

36.4.1 The entitlement to written materials under s 362A is subject to the requirements of the Privacy Act and material that is exempted by Ministerial certification under ss 375A and 376 of the Migration Act.

Section 375A certificates

36.4.2 An applicant's entitlement to written material under s 362A(1) is subject to the Tribunal's obligation under s 375A not to disclose the information certified under that section to any person other than to the Tribunal. If the Tribunal is given a document or information to which s 375A applies, the Tribunal must do all things necessary to ensure that the document or information is not disclosed to any person other than a member of the Tribunal as constituted for the purposes of the particular review.[13]

36.4.3 If material is to be withheld from the applicant because of a non-disclosure certificate, procedural fairness would generally require that the existence of that certificate be disclosed to the applicant and that they be provided with an opportunity to make submissions about the Tribunal's decision that the certificate is valid (which prevents the disclosure of the material).[14] This step is generally performed at the hearing or by way of a letter sent prior to or after the hearing.

[11] *Carlos v MIMA* (2001) 113 FCR 456 at [38]-[39].
[12] '[The legal memorandum] is, as a matter of substance, an informed opinion on legal issues pursuant to the request made by the [Tribunal] Member to his "[c]olleagues", and is therefore more appropriately characterised as written material of the [Tribunal] and therefore not within s 362A, notwithstanding that the particulars of certain information contained in the memorandum were required to be disclosed under s 359A': *Carlos v MIMA* (2001) 113 FCR 456 at [38], endorsing the view of Merkel J in *Carlos v MIMA* (2001) 183 ALR 719 at [45].
[13] s 375A(2)(b).
[14] *MZAFZ v MIBP* [2016] FCA 1081 at [50]. In *MIBP v SZMTA; CQZ15 v MIBP; BEG15 v MIBP* [2019] HCA 3 at [29]–[30] and [38] the High Court found that procedural fairness requires the applicant to be informed of the existence of the certificate, in order to give the applicant an opportunity to make submissions on the certificate. However, a breach of the obligation to notify the applicant of the certificate will only give rise to jurisdictional error where there has been 'practical injustice: the breach must result in a denial of an opportunity to make submissions and that denial must be material to the Tribunal's decision'.

Section 376 certificates

36.4.4 An applicant's entitlement to written material under s 362A(1) is subject to the Tribunal's obligation restricting the disclosure of any matter contained in a document or information under s 376. However, unlike s 375A, information that falls within the ambit of s 376 can be released to the applicant under s 362A where the Tribunal for the purpose of exercising its powers thinks it is appropriate to do so.[15]

36.4.5 A decision to exercise the discretion to disclose material covered by s 376 is made by the Member who has been constituted to the review. Where the file has not been constituted to a Tribunal member, the matter contained in the document or information that is the subject of the s 376 certificate may be referred to a senior member for a decision on whether or not to disclose .

36.4.6 In considering the exercise of the discretion to disclose any matter contained in the document or the information subject to a s 376 certificate, the Tribunal has regard to any advice given by the Secretary of the Department pursuant to s 376(2). The Tribunal may come to the view that it is appropriate to release the material, notwithstanding the Secretary's view that disclosure of the material would be contrary to the public interest. Alternatively, the Tribunal, after considering the exercise of its discretion, may decide not to release the material. If the Tribunal decides not to exercise its discretion to release the material, procedural fairness would generally require that the applicant be provided with an opportunity to make submissions about the Tribunal's decision that the certificate is valid and also its decision to not exercise its discretion to disclose the material.[16] The reasons for not disclosing the material may be included in the decision record.

Consequence of relying on invalid s 375A or 376 certificates

36.4.7 If the Tribunal relies on an invalid s 375A or 376 certificate to prevent disclosure of material to an applicant who has made a s 362A request, the s 362A request will remain outstanding in respect of the material purportedly covered by the certificate. This is because an invalid non-disclosure certificate is not a barrier to providing the material under s 362A.[17] Reliance on an invalid certificate may lead the Tribunal to fail to discharge its obligations under s 362A and lead to jurisdictional error.[18]

36.4.8 Accordingly, where a s 362A request is finalised (i.e. access to material is granted to the applicant) prior to a member considering whether a s 375A or 376 certificate

[15] s 376(3).
[16] *MZAFZ v MIBP* [2016] FCA 1081 at [50]. In *MIBP v SZMTA; CQZ15 v MIBP; BEG15 v MIBP* [2019] HCA 3 at [29]–[30] and [38] the High Court found that procedural fairness requires the applicant to be informed of the existence of the certificate, in order to give the applicant an opportunity to make submissions on the certificate. However, a breach of the obligation to notify the applicant of the certificate will only give rise to jurisdictional error where there has been 'practical injustice: the breach must result in a denial of an opportunity to make submissions and that denial must be material to the Tribunal's decision'.
[17] *Khaira v MICMSMA (No 4)* [2021] FCCA 1716 at [53].
[18] *Khaira v MICMSMA (No 4)* [2021] FCCA 1716 at [54]. The Court also noted that the material not provided to the applicant conceivably could have assisted them in the conduct of their application, and that the obligation under s 362A on the part of the Tribunal coexisted with its obligation to ensure that the hearing conducted by it was fair. The Court concluded that if all of the material covered by the certificates had been disclosed to the applicant, the Tribunal could realistically arrived at a different decision.

is valid, the Member constituted the matter would generally determine whether the certificate is valid and if it is determined not to be valid, the applicant will be given access to the previously withheld material (subject to any other restrictions, such as under the Privacy Act).

Privacy Act

36.4.9 In many cases the information in files before the Tribunal contains the personal information of third parties, such as information about other family members or a potential future employee. Subsection 362A(2) does not authorise the release of information where the release of that information would override the requirements of the Privacy Act. In the context of s 362A, the requirements of the Privacy Act that are most relevant to the Tribunal are the 13 Australian Privacy Principles (APPs).[19]

36.4.10 Section 15 of the Privacy Act states that an APP entity must not do an act, or engage in a practice, that breaches an Australian Privacy Principle (APP). 'APP entity' means an agency or organisation.[20] The Tribunal, being an agency to which s 14 and Schedule 1 to the Privacy Act applies, may therefore only release information under s 362A if it does not breach the APPs contained in Schedule 1 to that Act.

36.4.11 When assessing access under s 362A, the requirements of the Privacy Act are considered where written material the Tribunal intends to release contains personal information about a third party, such as personal information about other family members or a potential future employee.

36.4.12 For further discussion on the application of the APPs and applicable exemptions see Chapter 31 – Restrictions on disclosing and publishing information.

36.5 Processing section 362A 'requests'

Form of the 'request'

36.5.1 An applicant's entitlement to access under s 362A is conditional upon them seeking access. It does not automatically require the Tribunal to give the applicant any material given or produced to it for the purposes of the review without a request first being made.[21]

36.5.2 There is no statutory requirement for a s 362A request to be made in any particular form or manner. Requests can be made orally, for example in a telephone conversation or during a hearing,[22] or in writing, for example within a written

[19] *Privacy Act 1988* (Cth) (Privacy Act) s 14, sch 1.
[20] Privacy Act s 6.
[21] *Singh v MIBP* [2017] FCCA 721 at [28]–[31], which was upheld on appeal: *Singh v MIBP* [2017] FCAFC 220 at [46].
[22] *Sapkota v MIBP* [2016] FCCA 2837. In response to an oral invitation to comment (s 359AA), the applicant's representative's statement that '…*whatever you have, you know, read out from those statements*…' was a request under s 362A for access to

submission or response to a s 359A invitation to comment.[23] While as a matter of policy, it is preferable that requests for access to or copies of documents are made in writing on the Tribunal form M16, requests made in other forms are valid.

36.5.3 No fee is payable in order to obtain access.

36.6 Decisions on access

Form in which access may be granted

36.6.1 The Migration Act does not specify the form in which access under s 362A can be made, but access is usually provided to applicants, or persons authorised by applicants, by way of:

- a copy (or copies) of the written material; and/or
- supervised access to the original written material.[24]

Partial access

36.6.2 While s 362A makes no express provision for partial or qualified access to written material, there may be instances where the partial release of a particular document or information is warranted.

36.6.3 Partial release may be warranted where certification by the Department under s 375A or 376 provides for it specifically (i.e. the certificate only covers part of a document or folio); where the Tribunal exercises its discretion in a manner that allows for partial disclosure of a document under s 376; or where the disclosure would not otherwise override the requirements of the Privacy Act (e.g. where a third party has consented to the partial release of their personal information).

36.7 Withdrawal of a section 362A request

36.7.1 Before a decision is made on a s 362A request, an applicant may decide to withdraw the request. There is no required form for the withdrawal of a s 362A request.

the statements that had just been read out. As the disclosure of the statements to the applicant had taken place at the hearing without any prior notice, it was understandable that a consequent request may be inelegant in its language (at [20]).

[23] *Singh v MIBP* [2015] FCCA 533. The applicant requested access to documents held by the Tribunal, in a s 359A response letter. The Court held that neither the Migration Act nor the Regulations require a s 362A request to be made using the form on the Tribunal's website.

[24] These measures are consistent with s 362A(1).

36.8 Notification of 'decision' on access entitlement

36.8.1 Section 362A does not require that an applicant be notified of the 'decision' on access, or be provided with reasons for that decision. The Tribunal's practice is to notify an applicant when it has granted access, or withheld access, and explain why access has been withheld.

36.9 The relationship between section 362A and the *Freedom of Information Act 1982* (Cth)

36.9.1 The main differences between access under s 362A(1) and access under the FOI Act are:

- The Tribunal cannot impose any charge for s 362A access;
- Section 362A access is not available once the Tribunal has given the applicant a copy of the statement required by s 368(1) (i.e. the Tribunal's written statement of decision) whereas FOI access remains available;[25]
- Section 362A is technically limited to 'written material';
- There are fewer formal requirements in processing s 362A access requests which may result in a quicker processing time and less delay for the applicant;
- The scope of exemptions under the FOI Act is wider than that under s 362A, which is limited to Privacy Act requirements and Ministerial certification; and
- Unlike FOI requests, there are no merits review rights available under s 362A in the Migration Act.

[25] s 362A(3).