

Fast track decision-making by the Immigration Assessment Authority:
the State of Play¹

1. This paper considers fast track decision-making undertaken by the Immigration Assessment Authority (**the IAA** or **Authority**). Part 1 reviews key provisions of the *Migration Act 1958* (Cth) (**the Act**). Part 2 describes the construction given to these provisions by the Federal Circuit Court of Australia and the Federal Court of Australia. The IAA's operation will be compared with cognate provisions of the Act which apply to the Migration and Refugee Law Division of the Administrative Appeals Tribunal (**the AAT**). Part 3 identifies some noteworthy questions awaiting judicial resolution.

The IAA - background to its establishment

2. Unauthorised maritime arrivals (**UMAs**) are excluded from applying through orthodox channels for a protection visa or a Safe Haven Enterprise visa (**SHEV**) to enable them to remain in Australia under the *Convention relating to the Status of Refugees* [1954] ATS No 5 (as amended) or pursuant to the 'complementary protection' provisions of the Act.
3. However, the Minister for Immigration and Border Protection (**the Minister**) has a discretion to grant such visas to a UMA if the Minister "thinks that it is the public interest to do so."²
4. *The Migration & Maritime Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth)³ established a fast track assessment process (**FTAP**) for UMAs for whom the Minister has lifted the bar.⁴ This legislation also established the IAA, which is an independent office within the Migration and Refugee Division of the

¹ Correct as at 1 September 2017. This paper was presented as part of a continuing legal education seminar entitled "Decision Making and Reason Writing" conducted by Legalwise on 14 September 2017 in Sydney, Australia. This paper focuses on the procedural aspects of decision-making by the IAA. It does not address substantive matters such as when jurisdictional error is established or any specific questions of refugee law. In general terms, jurisdictional error occurs when decision-makers fail to exercise the decision-making tasks entrusted to them by legislation. The IAA considers whether referred applicants meet the definition of refugee (see ss 5H(1), 36(2)(a), the Act) as well as his or her claims to complementary protection (s 36(2)(aa), the Act).

² s 46A(2), the Act. This process is described as "lifting the bar".

³ *The Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) relevantly inserted Part 7AA into the Act. The amendments commenced on 18 April 2015. A simplified outline of Part 7AA appears in s 473BA, the Act.

⁴ The general scheme of the Act with respect to the powers to grant or refuse a visa remain intact: applications must be considered and dealt with by the Minister (or a delegate) pursuant to s 47 until the Minister (or the delegate) ultimately determines whether or not to grant a visa under s 65: *AIB16 v Minister for Immigration* [2017] FCCA 231 at [10].

AAT.⁵ The FTAP seeks to provide a limited, efficient and quick means of processing protection visa applications made by those UMAs who arrived in Australia on or after 13 August 2012 and before 1 January 2014 and who have not been taken to a regional processing country.

5. Decisions to refuse to grant these applicants protection visas are known as “fast track reviewable decisions”.⁶ Applicants are known as “fast track review applicants”.⁷ Fast track decisions made in relation to some applicants are excluded from the fast track review process.⁸

6. The Minister for Immigration and Border Protection has said:

The fast-track assessment process introduced by schedule 4 of this bill will efficiently and effectively respond to unmeritorious claims for asylum and will replace access to the Refugee Review Tribunal with access to a new model of review, the Immigration Assessment Authority – to be known as the IAA. These measures are specifically aimed at addressing the backlog of IMAs – some 30,000 – and will ensure their cases progress towards timely immigration outcomes, either positive or negative.⁹

7. The Minister also explained that:

However, it is the government’s policy that, if fast-tracked applicants present unmeritorious claims or have protection elsewhere, their cases will be channelled towards a direct immigration outcome rather than accessing the broader merits review process to prolong their stay in Australia. Such fast-track applicants will be known as ‘excluded fast-track review applicants’ and will not have access to those broader forms of merits review.

The IAA will be established as a separate office of the Refugee Review Tribunal. Eligible fast-track review applicants will have their refusal cases

⁵ s 473JA and Division 8 of Part 7AA, the Act. “The amending legislation was clearly intended to provide a system of fast track review from the delegate’s determination being a distinction from the process of the former Refugee Review Tribunal in matters of procedure albeit not in ultimate function”: *DYS16 v Minister for Immigration* [2017] FCCA 1975 at [33]. The IAA consists of the President of the Administrative Appeals Tribunal, the head of the Migration and Refugee Division of the Tribunal, the Senior Reviewer and other Reviewers. The President and the Division head are responsible for the IAA’s overall administration and operation. A Senior Reviewer is appointed by the President or the Division head. The Senior Reviewers and other Reviewers are engaged under the *Public Service Act 1999* (Cth). The legislation does not specify the professional qualifications of reviewers: *Minister for Immigration and Border Protection v AMA16* [2017] FCAFC 136 per Griffiths J at [56].

⁶ Defined in s 5(1), the Act.

⁷ Defined in s 5(1), the Act.

⁸ These applicants are known as “excluded fast track review applicants”.

⁹ Explanatory Memorandum to the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth).

automatically referred to the Immigration Assessment Authority and will not have to apply for a review by it. The IAAs primary function will be to conduct a review ‘on the papers’, only considering the material which was before my department when it made its refusal decision under section 65 of the Migration Act.¹⁰

8. Such an approach has consequences for those applicants who do not present all of their claims at first instance:

The new approach to review will discourage asylum seekers who attempt to exploit the current review process by presenting manufactured claims or evidence to bolster their original unsuccessful claims only after they learn why they were found not to be refugees by the Department. This behaviour has on numerous occasions led to considerable delay while new claims are processed.

Overview of the legislative scheme

9. The operation of the IAA is governed by Part 7AA of the Act. Division 2 of Part 7AA sets out the procedure for referring fast track reviewable decisions to the IAA. Fast track reviewable decisions must be referred by the Minister to the IAA for review as soon as reasonably practicable after a decision by a delegate has been made.¹¹ The IAA must review those fast track reviewable decision referred to it.¹²
10. The Secretary of the Department of Immigration and Border Protection must give to the IAA certain material in respect of that decision at the same time as, or as soon as reasonably practicable after, a referral.¹³ This material is:
- (i) a statement that sets out the findings of fact made by the decision-maker, refers to the evidence on which those findings were based, and gives the reasons for the decision;
 - (ii) material provided by the ‘referred applicant’¹⁴ to the decision-maker before the decision was made;

¹⁰ Second Reading Speech to the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth).

¹¹ s 473CA, the Act. A delegate’s decision must be reviewed by the IAA without an applicant making any application for review. Decisions to refuse to grant protection visas to fast track applicants are generally not otherwise reviewable under the Act, although some decisions are reviewable by the AAT.

¹² s 473CC(1), the Act.

¹³ s 473CB, the Act.

¹⁴ Being an applicant for a protection visa in respect of whom a fast track reviewable decision has been referred to the IAA under s 473CA: s 473BB.

- (iii) any other material that is in the Secretary’s possession or control and considered by the Secretary (at the time the decision is referred to the IAA) to be relevant to the review; and
 - (iv) the applicant’s contact details.
11. Division 3 of Part 7AA of the Act addresses the manner in which the IAA conducts reviews. Division 3, together with ss.473GA and 473GB, are taken to be an exhaustive statement of the requirements of the natural justice hearing rule “in relation to reviews conducted by the [IAA]”.¹⁵
 12. The IAA does not ordinarily hold hearings with referred applicants. Subject to Part 7AA, the IAA must review a fast track reviewable decision referred to it on the papers, that is, by considering the review material provided to it under s 473CB ‘without accepting or requesting new information’ and ‘without interviewing the referred applicant’.¹⁶
 13. The IAA can ‘get any documents or information (**new information**)’ that ‘were not before the Minister when the Minister made the decision under section 65’ and ‘the [IAA] considers may be relevant’.¹⁷ This power is discretionary. The IAA ‘does not have a duty to get, request or accept any new information whether the [IAA] is requested to do so by a referred applicant or by any other person, or in any other circumstances.’¹⁸
 14. ‘New information’ can only be considered by the IAA if certain requirements are first satisfied. For the purposes of making a decision in relation to a fast track reviewable decision, the IAA must not consider any new information unless:
 - (i) the IAA is satisfied that there are exceptional circumstances to justify considering the new information; and
 - (ii) the referred applicant satisfies the IAA that, in relation to any new information given, or proposed to be given, to the IAA by the referred applicant, the new information:

¹⁵ s 473DA(1), the Act. This formulation is broader than comparable provisions in the Act such as ss 357A(1) and 422B(1). Consider, for example, reviews by the AAT under Part 7, the Act. Division 4 of Part 7 is an exhaustive statement of the natural justice hearing rule ‘in relation to the matters it deals with’: s 422B(1), the Act. This formulation suggests some scope for the operation of common law principles of natural justice which are able to operate consistently with Division 4 of Part 7: *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23. By contrast, s 473DA(1) is not so qualified, and has been found to operate to exclude the common law natural justice hearing rule from conditioning the conduct of IAA reviews.

¹⁶ s 473DB(1), the Act.

¹⁷ s 473DC(1), the Act.

¹⁸ s 473DC(2), the Act.

- a. was not, and could not have been, provided to the Minister before the Minister made the decision under s 65; or
 - b. is credible personal information which was not previously known and, had it been known, may have affected the consideration of the referred applicant's claims.¹⁹
15. Division 5 of Part 7AA contains provisions relating to the IAA's exercise of its powers and functions. The IAA, in carrying out its functions under the Act, is to pursue the objective of 'providing a mechanism of limited review that is efficient, quick, free of bias and consistent with Division 3 (conduct of review).'²⁰ The evident legislative intention is to establish a form of review that is limited in scope and efficient. In reviewing a decision, the IAA 'is not bound by technicalities, legal forms or rules of evidence.'²¹
16. As will be seen below, the nature of the fast track system envisaged under Part 7AA has several significant consequences for applicants. For example, the IAA is under no obligation to offer an interview to a referred applicant. The IAA does not appear to be required to give to a referred applicant particulars of any information that the IAA considers would be the reason, or a part of the reason, for affirming the decision under review.²² The Federal Court in *DBE16 v Minister for Immigration and Border Protection* [2017] FCA 942 confirmed (at [65]) that there is no obligation on the IAA to give any notice to a referred applicant that it may make a particular finding and to invite comment on this possibility, either in writing or at an interview. However, it observed that good and reliable decision-making might be enhanced if an IAA reviewer adopted this course and sought comment.²³
17. Once the IAA makes a decision on a review under Part 7AA of the Act, it must give a written statement which:
- (i) sets out the IAA's decision on the review;
 - (ii) sets out the reasons for the decision; and
 - (iii) records the day and time the statement is made.²⁴

¹⁹ s 473DD, the Act.

²⁰ s 473FA(1), the Act.

²¹ s 473FA(2), the Act.

²² There is no equivalent to s 424A in Part 7AA of the Act.

²³ The Court commented that the IAA's ability to do so was governed by the constraints imposed by ss 473DC and 473DD of the Act.

²⁴ s 473EA, the Act.

18. The IAA is then obliged to return to the Secretary any document that the Secretary had provided to it in relation to the review. It must also give the Secretary a copy of any other document that contains evidence or material on which the IAA's findings of fact were based.²⁵
19. The IAA must also notify the referred applicant of its decision on a review by giving a copy of the written statement to the person within 14 days after the day on which the decision is taken to have been made.²⁶
20. The IAA is subject to certain disclosure obligations.²⁷ It may also give directions restricting the disclosure of information.
21. As for the possible outcomes of a review, the IAA may either affirm the decision, or remit the decision for reconsideration in accordance with such directions or recommendations as are permitted by regulation.²⁸

Notification requirements

22. Practitioners must be mindful of certain notification requirements in relation to the giving of documents which apply in the context of a review conducted by the IAA. There are specific requirements for giving and receiving documents. Section 473HB sets out the methods by which the IAA gives documents to a person other than the Secretary for the purposes of Part 7AA or the Migration Regulations 1994 (Cth) that require or permit the IAA to give a document to a person. It also states that the IAA must do so by one of the methods specified in that section.
23. A document may be given by:
 - a Reviewer, a person authorised in writing by the Senior Reviewer, or a person mentioned in s 473JE(2) handing the document to the recipient; or
 - a Reviewer or a person mentioned in s 473JE(2) transmitting the document by email to the last email address of the recipient provided to the Authority.
24. Section 473HD of the Act specifies the time at which a document is taken to have been received by a person other than the Secretary.²⁹ If a document is given by hand by the method in s 473HB(3), then the person is taken to have received it when it is handed to

²⁵ s 473EA(4), the Act.

²⁶ s 473EB(1), the Act.

²⁷ s 473DE(1), the Act. These are similar to those imposed on the AAT by virtue of ss 359A and 424A of the Act.

²⁸ s 473CC(2), the Act.

²⁹ Section 473HD of the Act applies if the IAA gives a document to a person other than the Secretary by one of the methods specified in s 473HB (including in a case covered by s 473HA).

him or her. If the document is given by email by the method in s 473HB(6), then the person is taken to have received it at the end of the day on which the document is transmitted.

25. Practitioners should also note the time periods in which applicants are required to give information or comments.³⁰ Furthermore, even if the IAA specifies the wrong period for a response to an invitation to Comment, there may not be any jurisdictional consequence of such an error.³¹

The IAA before the courts – a review of caselaw to date

26. In some important respects the IAA undertakes decision-making in a manner which is entirely consistent with decision-making undertaken by other administrative tribunals responsible for granting or refusing protection visas. The IAA makes a series of factual findings in order to assess an applicant's circumstances against the refugee criteria found in ss 5H and 5J of the Act. When reviewing a decision, the IAA is not bound by technicalities, legal forms or rules of evidence.³² Those claims made by an applicant before a Departmental delegate must be considered by the IAA.³³ The IAA is under no obligation to refer in its decision to every piece of evidence or every contention made by an applicant.³⁴ It is open to the IAA to have regard to independent country information, and the choice and assessment of country information is a factual matter for it.³⁵ The weight to be given to evidence is also a matter for the IAA alone.³⁶ And if a particular matter has not been addressed in a decision-maker's reasons, then it may ordinarily be inferred by a reviewing court that this is because the decision-maker

³⁰ For example, r 4.42 of the *Migration Regulations 1994* (Cth) is prescribed for the purposes of s 473DF(2) of the Act. For a referred applicant in immigration detention, the period for giving information or comments in response to an invitation given by the IAA to the applicant is 3 working days after the applicant is notified of the invitation.

³¹ In *DZU16 v Minister for Immigration & Anor* [2017] FCCA 851 at [64]-[66], the obligation under s 473DE(1) was found not to be engaged in relation to the information because it was country information that is not specifically about an applicant and is just about a class of persons of which the applicant is a member. Such information is excluded from the IAA's disclosure obligation under s 473DE(1) by reason of subparagraph (3)(a) in the same way that country information is excluded from the materially identical obligation of the AAT under ss 359A and 424A. Also note that s 473DE does not state that an invitation must be given by a method specified in ss 473HB or 473HC or a method prescribed for the purposes of giving documents to a person in immigration detention.

³² s 473FA(2), the Act.

³³ *CVK16 v Minister for Immigration & Anor* [2017] FCCA 235 at [46].

³⁴ *CXZ16 v Minister for Immigration & Anor* [2017] FCCA 264 at [27].

³⁵ *CDR16 v Minister for Immigration & Anor* [2016] FCCA 2759 at [43].

³⁶ *Ibid*, at [61].

formed the view that the matter was not material to his or her decision.³⁷ Such matters are orthodox and uncontroversial. However, there are additional aspects which ought to be noted.

The Federal Circuit Court of Australia has jurisdiction to review IAA decisions

27. The Federal Circuit Court of Australia (FCCA) has jurisdiction under s 476 of the Act to entertain reviews of decisions of the IAA made pursuant to s 473CC(2), being ‘migration decisions’ as defined in s 5(1) of the Act.³⁸
28. An application for judicial review of an IAA decision must be made within 35 days of the date of the decision.³⁹ However, the FCCA can grant an extension of time where appropriate, and if satisfied that it is necessary to do so in the interests of the administration of justice.⁴⁰
29. The FCCA cannot review the merits of an IAA decision.⁴¹
30. Where jurisdictional error occurs, the scheme of the Act is such that a court grants appropriate relief, and it is not for the IAA to revoke its own decision and purport to freshly exercise power under Part 7AA of the Act.⁴² The IAA is considered *functus officio* once the steps under s 473EA of the Act have occurred. In one case, the IAA concluded that there had been a failure to conduct a review in accordance with Part 7AA of the Act on account of an earlier denial of procedural fairness such that its previous decision was liable to be set aside for jurisdictional error. Although this was an efficient and quick method for dealing with the circumstance, the IAA was held to have no power to make a second decision.

The IAA’s power of review is unaffected by any jurisdictional error in a delegate’s decision

31. The “decision” under “review” referred to in s 473CC(2) of the Act is the decision in fact made by the delegate, regardless of whether that decision is affected by

³⁷ The Minister submitted that there was no good reason why those principles ought not to apply to reviews conducted by the IAA, given the similarities between ss 368(1) and 430(1) on the one hand and s 473EA(1) on the other: *CVS16 v Minister for Immigration & Anor* [2017] FCCA 249 at [25].

³⁸ As with decisions of the AAT made pursuant to ss 349(2) and 415(2) of the Act.

³⁹ s 477(1), the Act. The date of the migration decision for the IAA is the date of the written statement under s 473EA(1): s 477(3)(ca), the Act.

⁴⁰ s 477(2), the Act.

⁴¹ *AJE17 v Minister for Immigration & Anor* [2017] FCCA 1458 at [27].

⁴² *CLV16 v Minister for Immigration & Anor* [2017] FCCA 1200 at [8], [16]. In that case, the IAA’s failure to take submissions and new information into account amounted to a denial of procedural fairness which was not excluded by ss 473DA or 473DC of the Act: at [15].

jurisdictional error.⁴³ The word “review” in s 473CC of the Act has been described as “unadorned”. It is the same word used in respect of the AAT (and formerly in respect of the Migration Review Tribunal and Refugee Review Tribunal) which has power to review certain “decisions”. The words “decision” and “review” are given the same meaning as they have in respect of reviews by these other tribunals.⁴⁴ The power and duty to “review” includes the power to determine afresh the merits of an application, a decision in respect of which was affected by jurisdictional error. There is nothing in the context of s 473CC of the Act to suggest that the word has another meaning.⁴⁵

32. Furthermore, it is not possible for the IAA to determine whether a primary decision-maker fell into jurisdictional error, thereby making a delegate’s decision “no decision at all”.⁴⁶ A determination that a delegate’s decision is affected by jurisdictional error (and therefore a “purported privative clause decision”) is for a Court, exercising jurisdiction pursuant to Chapter 3 of the Constitution. The IAA is not such a Court but is an administrative inquisitorial body.⁴⁷ Accordingly, even if there was some defect in a delegate’s decision, this does not mean that the IAA had no decision to review.

Referral to the IAA

33. Once a delegate is satisfied that an applicant is not an “excluded fast track review applicant”, the matter is automatically referred to the IAA.⁴⁸
34. Questions may arise whether, for the purposes of complying with ss 473CB and 473DB of the Act, the Secretary had provided material to the IAA and the IAA had considered all the relevant material.⁴⁹ With respect to 473CB, it has been contended that the IAA failed to conduct a proper review because the Department failed to supply it with all

⁴³ *DRG16 v Minister for Immigration & Anor* [2017] FCCA 2063 at [68]-[71], [73]. Furthermore, there is no requirement that the decision in question is one made under the Act: s 474(2), the Act; *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476; [2003] HCA 2.

⁴⁴ *Kline v Official Secretary to the Governor General & Anor* [2013] HCA 52; (2013) 249 CLR 645; [2013] HCA 52 at [32].

⁴⁵ Therefore, even if a delegate denied procedural fairness to an applicant, the IAA would have the authority to review a delegate’s decision. Any denial of procedural fairness by a delegate could not vitiate an IAA decision. Jurisdictional error is only revealed if the IAA exceeded the limits of its powers and functions under Part 7AA of the Act or did something which it was not authorised to do: *DDK16 v Minister for Immigration* [2017] FCCA 353 at [40].

⁴⁶ *SZTYD v Minister for Immigration & Anor* [2017] FCCA 1472 at [42]-[43], [47].

⁴⁷ *Abebe v Commonwealth* [1999] HCA 14; (1997) 197 CLR 510; *Re Refugee Tribunal; Ex parte Aala* [2000] HCA 57; (2000) 204 CLR 82; *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S154/2002* [2003] HCA 60; (2003) 201 ALR 437.

⁴⁸ s 473CA, the Act.

⁴⁹ For example, s 473CB(1)(c) of the Act authorised the Secretary to give a legal advice to the IAA: *AMA16 v Minister for Immigration & Ors* [2017] FCCA 303 at [43].

the material in its possession. However, an applicant would have to demonstrate as an essential preliminary evidentiary step that the material actually existed at a relevant time or that there were reasonable prospects of proving that it did.⁵⁰ In any event, any failure by the Secretary to discharge the obligation in s 473CB did not, by that fact alone, infect a reviewing decision-maker's review with jurisdictional error.

35. In one case the IAA was found to have considered review material, notwithstanding that it did not have the actual document before it when it conducted the review.⁵¹ The pertinent parts of that document which would have affected an assessment of the applicant's claims were already before the IAA in the form of reasons given by the Minister's delegate. An interpretation to the effect that all of the material under s 473CB must be present before the IAA can consider review material "would lead to an absurdity". For example, if the last address for service was not before the reviewer, this would not invalidate a review given by the IAA.
36. Section 473CB(1) additionally requires the Secretary to the Minister's Department to form an opinion about the relevance of the material to the review. Even if some error by the Secretary in performing this function occurred, it would not, without something more, result in jurisdictional error.⁵² Furthermore, the IAA is not required to give an applicant an opportunity to respond in relation to considering and making findings upon the material that was provided to the IAA under s 473CB of the Act.⁵³

Apprehended bias arising from the referral of review material

37. As noted above, the Secretary is required to consider, at the time of the referral to the IAA, what material is relevant to the review and the IAA must consider that material in conducting its review.⁵⁴ The IAA, in carrying out its functions under the Act, is to pursue the objective of providing a mechanism of limited review that is efficient, quick,

⁵⁰ *AFK16 v Minister for Immigration & Anor (No.2)* [2016] FCCA 1827 at [29]-[30].

⁵¹ *CRJ16 v Minister for Immigration & Anor* [2017] FCCA 727 at [34]-[37]. The "IAA" in s 473CB of the Act refers to the corporate entity that is the IAA: at [28].

⁵² *SZTYD v Minister for Immigration & Anor* [2017] FCCA 1472 at [66]-[67], citing *SZOIN v Minister for Immigration and Citizenship* [2011] FCAFC 38 at [64] - [66]; *SZYZK v Minister for Immigration and Citizenship* [2010] FCA 651; (2010) 115 ALD 332; *Applicant S1693 of 2003 v Refugee Review Tribunal* [2004] FCA 1512. Caselaw on s 418(3) of the Act was held to provide direction and guidance in dealing with s 473CB(1) of the Act on the basis that these provisions were "relevantly" identical: *WAGP v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] FCAFC 103; (2006) 151 FCR 413 at [64]; *SZOIN v Minister for Immigration and Citizenship* [2011] FCAFC 38; (2011) 191 FCR 123 at [54] - [63], [93].

⁵³ *CWO16 v Minister for Immigration & Anor* [2017] FCCA 599 at [37].

⁵⁴ ss 473CB and 473DB, the Act.

and *free of bias (emphasis added)*.⁵⁵ The interaction between these provisions can provide problematic.

38. In one case the FCCA found that a decision of the IAA was vitiated by apprehended bias.⁵⁶ The IAA had been provided with extraneous and highly prejudicial information – that an applicant had been charged with indecent assault - which was plainly irrelevant to a review of a delegate’s decision not to grant a protection visa.
39. The Minister appealed.⁵⁷ Griffiths J of the Full Federal Court reasoned that s 473CB requires the Secretary to focus on whether he or she considers particular material to be relevant to the review at the time when the decision is referred to the IAA and not on the broader question whether material might be relevant to the review. It was open to the IAA in arriving at its own decision on the referral to take a different view from the Secretary as to the relevance of the material, but the statement of reasons in this case was silent. A fair-minded lay observer, acting reasonably, might apprehend that the IAA may have been affected by the prejudicial material, even subconsciously.⁵⁸
40. As to the options available to the IAA in these circumstances, some attention was given to whether the IAA could disclose the relevant material to a referred applicant and invite a response.⁵⁹ The Minister contended that the only source of power for the IAA to take that course was s 473DC, which relates to the obtaining of “new information”. The Minister submitted that there no implied power of disclosure in s 473FA notwithstanding the express reference in that provision to “bias”. Griffiths J considered it unnecessary to resolve this complex issue.⁶⁰

The IAA’s consideration of “new information”

⁵⁵ s 473FA, the Act.

⁵⁶ *AMA16 v Minister for Immigration and Border Protection & Ors* [2017] FCCA 303.

⁵⁷ The Minister moreover asserted that the primary judge had denied him procedural fairness by finding that the Secretary had given Departmental communications to the IAA without statutory warrant when that issue had not been raised by the judicial review applicant below and no relief had been sought by him in respect of that matter. Griffiths J held that it was open to the primary judge to conclude that there was no statutory warrant for the Secretary to provide the Departmental communications to the IAA: *Minister for Immigration and Border Protection v AMA16* [2017] FCAFC 136 at [59]. The Minister had himself submitted that these communications had lawfully been included by the Secretary in the review material provided to the IAA, and the IAA was required by s 473DB(1) of the Act to consider such material. However, Charlesworth J took the view (at [99]) that it was unnecessary for the primary judge to find that the Secretary had no statutory warrant to provide the IAA with the Departmental communications in order to conclude that the IAA’s decision was affected by an apprehension of bias.

⁵⁸ *Minister for Immigration and Border Protection v AMA16* [2017] FCAFC 136 at [78]. Dowsett J at [2] considered that the reference to bias in s 473FA of the Act referred to actual bias and not the apprehension of bias.

⁵⁹ *Ibid*, at [83] per Griffiths J.

⁶⁰ *Ibid*, at [84]. It was not to be assumed that an apprehension of bias would have been avoided had disclosure been made: at [100].

41. The IAA is required to review a delegate’s decision by considering material provided by the Department under s 473CB(1) of the Act without accepting or requesting “new information” and without interviewing an applicant referred to it.⁶¹ However, the IAA is authorised to “get” relevant information which had not been before the Minister or the Minister’s delegate and the IAA can at its discretion invite a person to give “new information”. “New information” means documents or information that were not before the Minister when the Minister made the decision under s 65 and the IAA considers may be relevant.⁶²
42. Section 473DC of the Act is concerned with information bearing on the substantive merits of a decision under review and should not be read as circumscribing the IAA’s discretion to invite and consider submissions concerning the IAA’s procedures or the limits of its jurisdiction.⁶³ Section 473DC(3) of the Act has moreover been found to be a discretionary power.⁶⁴
43. The word “document”, as it appears in s 473DC(1) of the Act, needs to be given a sensible construction. As an ordinary English word it should be given its ordinary meaning. It cannot merely be a reference to a piece of paper (or some other format) devoid of content; rather, it refers to something written which provides evidence or information or serves as a record. If that were not so, a duplicate or reproduction in a new format of a document that was before the Minister that is given to the IAA would be characterised as new information even though it also formed a part of the review material.⁶⁵
44. Does new “information” include an applicant’s “claims”? A Federal Circuit Court has concluded that it is artificial to distinguish between “claims” and “information”.⁶⁶ While a “claim” is simply an expression of fear of return to another country for some

⁶¹ s 473DB, the Act.

⁶² s 473DC(1), the Act.

⁶³ *Minister for Immigration and Border Protection v AMA16* [2017] FCAFC 136 per Charlesworth J at [101].

⁶⁴ *DGZ16 v Minister for Immigration & Anor* [2017] FCCA 623 at [105]. There had been no request from the applicant for the IAA to exercise the power in that case.

⁶⁵ This would be an absurd result: *ABJ17 v Minister for Immigration & Anor* [2017] FCCA 1240 at [40]. Therefore a faithful English translation of a document that was before the delegate in a foreign language is not “new information” for the purposes of s 473DC(1). An English translation is merely in a different language to the original, thereby making it comprehensible; but that does not add to the information in the original document. The information was before the Minister’s delegate, but the translation rendered the information intelligible without altering in any way its content. The original document was given to the delegate before a decision was made under s 65 of the Act. That alone was sufficient to support the IAA’s decision to treat the English translation as not constituting “new information”. The IAA simply had regard to a document that comprised a part of the review material as it was required to do by s 473DB(1) of the Act (at [36], [38], [43]-[45]).

⁶⁶ *CVK16 v Minister for Immigration & Anor* [2017] FCCA 235 at [44]-[45].

reason, a “claim” does not exist in a vacuum. It only carries with it meaning capable of consideration when accompanied by asserted facts and circumstances. Those facts and circumstances are undoubtedly “information” for the purposes of ss 473DC and 473DD of the Act. Parliament’s intention in enacting these provisions was to restrict applicants to material put before the delegate, save in exceptional circumstances. These provisions must be read in their context. The IAA does not review delegates’ decisions in the same way as the AAT. It cannot substitute its own decision; it can only affirm the decision or remit the case for further consideration. Further, the IAA’s function is not to deal with review applications but to review adverse decisions referred to it by the Minister’s Department. The IAA does not stand in the shoes of the original decision-maker in the same way as the AAT. Given the limited statutory function of the IAA, it would be very odd if it could consider new claims as a general rule. I return to this topic below.

45. By virtue of s 473DC(2) of the Act, the IAA does not have a duty to get, request or accept, any new information, whether requested to do so by an applicant, any other person, or in any other circumstances.⁶⁷ Although the IAA has the legislative mandate to accept new information in exceptional circumstances, it is not obliged to receive such information.⁶⁸ But should the IAA invite an applicant to be heard in relation to a particular issue ? It might be unnecessary for the IAA to address in its reasons the discretionary consideration arising under s 473DC of the Act.⁶⁹ Nevertheless, the exercise of that power can still be challenged on the ground of legal unreasonableness depending on the particular circumstances of the case.
46. For the purposes of making a decision in relation to a fast track reviewable decision, the IAA must not consider any new information unless:
 - (a) the IAA is satisfied that there are exceptional circumstances to justify considering the new information; and
 - (b) the referred applicant satisfies the IAA that, in relation to any new information given, or proposed to be given, to the IAA by the referred applicant, the new information:

⁶⁷ *EAP16 v Minister for Immigration & Anor* [2017] FCCA 2040 at [39].

⁶⁸ *DBU16 & Ors v Minister for Immigration & Anor* [2017] FCCA 1221 at [40].

⁶⁹ *BZN16 v Minister for Immigration & Anor* [2017] FCCA 1067 at [38]-[39]. In that case the applicant was on notice of a particular issue from the delegate’s decision. The applicant’s submissions also made reference to the issue. There was no request for any exercise of power under s 473DC of the Act. See also *BWF16 v Minister for Immigration & Anor* [2017] FCCA 1080, where the Court observed (at [36]) that no submission had been put inviting the IAA to exercise its powers under s 473DC of the Act.

- (i) was not, and could not have been, provided to the Minister before the Minister made the decision under section 65; or
- (ii) is credible personal information which was not previously known and, had it been known, may have affected the consideration of the referred applicant's claims.⁷⁰
47. The term “new information” where it appears in s 473DD of the Act carries the same meaning as supplied by s 473DC(1).⁷¹
48. The requirements of s 473DD(a) and (b) are cumulative but may nevertheless overlap to some extent. The IAA's satisfaction that new information could not have been provided to the Minister at the time of the s 65 decision may contribute to its satisfaction that there are exceptional circumstances to justify considering the new information. So too is the IAA's satisfaction that the new information is credible personal information which had not previously been known. The IAA could be expected to consider such matters when considering whether the circumstances are exceptional. However, the matters which might contribute to a finding that the circumstances are exceptional can extend beyond those specified matters.⁷²
49. Section 473DD(b)(ii) does not specify expressly the person or persons by whom the information was previously unknown. One interpretation proffered by the Minister – that s 473DD(b)(ii) only applied to information “which was not previously known” to an applicant – has been rejected.⁷³ Section 473DD(b)(i) and (ii) should be understood as referring to different kinds of new information: subpara (b)(i) requires a factual enquiry as to whether or not the new information could have been presented to the Minister whereas subpara (b)(ii) requires an evaluation of the significance of the new information in the context of an applicant's claims more generally.
50. It has been contended that the IAA's failure to ask the questions posed by s 473DD of the Act does not affect the exercise of its decision-making power under s 473CC. If the IAA's exercise of power is unaffected, then jurisdictional error cannot result. It has been inferred from the IAA's failure to refer to documents in its reasons that it

⁷⁰ s 473DD, the Act.

⁷¹ *CDZ16 v Minister for Immigration and Border Protection* [2017] FCA 967 at [8].

⁷² *BVZ16 v Minister for Immigration and Border Protection* [2017] FCA 958 at [9]. In that case the IAA had concluded that an applicant's explanations for late disclosure did not amount to exceptional circumstances so as to justify considering new information. The IAA was found (at [34]-[37]) to have failed to discharge the review task imposed by s 473DB(1) of the Act by only considering s 473DD(a) and not s 473DD(b). Furthermore, because s 473DD(b) is expressed in alternatives, an applicant being unable to satisfy s 473DD(b)(i) did not foreclose him or her from being able to satisfy s 473DD(b)(ii).

⁷³ *BVZ16 v Minister for Immigration and Border Protection* [2017] FCA 958 at [50]-[51], [57]-[58].

considered them not to be material to its decision.⁷⁴ It is unnecessary for the IAA to set out all of an applicant's circumstances in considering whether to exercise the power under s 473DD of the Act.⁷⁵ It is also considered unnecessary for the IAA to advert to any of the considerations specified in s 473DD if it finds that information is not relevant because the need to consider material is predicated upon the existence of "new information" as defined.⁷⁶

51. Section 473DE(3)(a) of the Act has been described as a cognate provision to s 424A(3)(a) of the Act.⁷⁷ This has been held to be a reasonable conclusion given the similar language used in both subsections and the similar role played by each in their respective statutory context.⁷⁸ "Information" for the purposes of that section must constitute a "rejection, denial or undermining" of an applicant's claims. "Information" does not include the IAA's reasoning process which identifies a "gap" in the evidence before it. Thus country information does not have to be given to a referred applicant.⁷⁹

"Exceptional circumstances" for considering "new information"

52. As noted above, by virtue of s 473DD of the Act, the IAA is not permitted to consider new information unless there are exceptional circumstances justifying consideration. Section 473DD therefore has two limbs: firstly, whether the circumstances are exceptional and, secondly, do they justify consideration.⁸⁰
53. In *Maan v Minister for Immigration and Citizenship* [2009] FCAFC 150; (2009) 179 FCR 581, a Full Court of the Federal Court cited with approval a passage from the judgment of Lord Bingham of Cornhill CJ in *R v Kelly* [1999] UKHL 4; [2000] QB 198 at [51] as follows:

We must construe "exceptional" as an ordinary, familiar English adjective, and not as a term of art. It describes a circumstance which is such as to form an exception, which is out of the ordinary course, or unusual, or special, or

⁷⁴ *CVS16 v Minister for Immigration & Anor* [2017] FCCA 249 at [32], [38] (citing s 473EA(1), the Act and s 25D, *Acts Interpretation Act 1901* (Cth)).

⁷⁵ *CHF16 & Anor v Minister for Immigration & Anor* [2017] FCCA 405 at [65].

⁷⁶ *CDZ16 v Minister for Immigration and Border Protection* [2017] FCA 967 at [10].

⁷⁷ *AFK16 v Minister for Immigration and Border Protection (No 2)* [2016] FCCA 1827 at [31].

⁷⁸ *SZTYD v Minister for Immigration & Anor* [2017] FCCA 1472 at [89], [97]-[98], [102]. That case held that the IAA's reference to "new information" was about the character of an event (a data breach by the Department) as it applied to all persons and not just the applicant. Therefore s 473DE(3)(a) of the Act operated to exclude this "new information" from the operation of s 473DE(1). The fact that the IAA subsequently made findings about the applicant's own situation did not alter the nature and character of that new information.

⁷⁹ *AFK16 v Minister for Immigration & Anor (No.2)* [2016] FCCA 1827 at [31].

⁸⁰ *DYS16 v Minister for Immigration & Anor* [2017] FCCA 1975 at [18].

uncommon. To be exceptional a circumstance need not be unique, or unprecedented, or very rare; but it cannot be one that is regularly, or routinely, or normally encountered.

54. The term ‘exceptional circumstances’ is not defined in the Act, thereby leaving some discretion of interpretation to the particular IAA decision-maker.⁸¹ What are exceptional circumstances in a given case, and whether certain facts as found by the IAA fall within that phrase - there being different conclusions reasonably open to the IAA - are questions of fact for it, since the statutory phrase is a simple, non-technical one that is used in its ordinary English sense.⁸²
55. The Federal Court of Australia has stated that the proper construction of the term “exceptional circumstances” in s 473DD should take account of the context in which the term is used.⁸³ The scheme of Part 7AA of the Act is to provide a means of “fast track” review of the refusal of certain applications for a protection visa. Protection visa applicants are expected to present all their claims and all available evidence to the Minister in relation to the decision under s 65. Furthermore, account must be taken of the reference to exceptional circumstances being such as to “justify” consideration of the new material.⁸⁴ Account should moreover be taken of the purpose of the IAA decision: namely, to affirm the refusal of the visa or to remit for reconsideration in accordance with such directions or recommendations as are permitted by regulation (s 473CC of the Act). This suggests that exceptional circumstances will be those which are out of the ordinary course and which will justify the new information being considered even though it had not been provided to the Minister at the time of the s 65 decision. A variety of matters may be capable of bearing upon those circumstances.⁸⁵
56. Finally, it can be open to the IAA to find that certain country information is not relevant to an applicant’s claims and exclude it from consideration.⁸⁶

⁸¹ *DYS16 v Minister for Immigration & Anor* [2017] FCCA 1975 at [32].

⁸² *BNN16 v Minister for Immigration & Anor* [2017] FCCA 145 at [29].

⁸³ *BVZ16 v Minister for Immigration and Border Protection* [2017] FCA 958 at [42].

⁸⁴ *Ibid* at [43].

⁸⁵ The IAA was found to have constructively failed to exercise its jurisdiction in that case because its reasoning reflected an inappropriately narrow understanding of the reach of the term “exceptional circumstances”. The IAA’s reasoning demonstrated that it had confined its consideration to evaluating the appellant’s explanation for not having provided the information earlier (at [46]-[48]).

⁸⁶ For example, the IAA’s exercise of statutory discretion did not miscarry in *BMQ16 v Minister for Immigration & Anor* [2017] FCCA 150 (at [81]). The IAA reasoned that it could and should receive certain new information which bore directly on the applicant’s claims and generally supported a particular proposition about country conditions. However, the IAA did not find it to be an exceptional circumstance that other country information did not have any direct bearing on the applicant’s claims. The basis upon which the IAA distinguished between the various documents was found to be reasonable and clearly open to it on the material before it.

The IAA conducts a de novo review

57. The IAA is required to undertake a review of a delegate’s decision but of a “limited” nature. Although the IAA is obliged, by s 473CC of the Act, to “review” a delegate’s decision under s 65, the powers conferred on the IAA to conduct a review are more limited than those conferred on the AAT by ss 348 and 414.⁸⁷
58. It has been contended, for example, that the IAA exceeded its jurisdiction under s 473CC of the Act because it made its own factual findings and therefore did not conduct a “limited” review. However, the FCCA has concluded that the obligation imposed upon the IAA is the same as that for the AAT.⁸⁸ That is, the type of review envisaged by Part 7AA of the Act is not different in nature from that conferred upon the AAT, other than in procedural terms. In exercising its jurisdiction to review any decision referred to it, the IAA’s obligation is to reach the correct or preferable conclusion on the basis of the material referred to it. The IAA’s role is not confined to a desk-top evaluation of the delegate’s reasoning. Rather, its review must be substantive in nature. Thus the IAA is not automatically prevented from making a credibility finding in discharging its jurisdiction to arrive at the correct or proper outcome. The IAA is empowered to affirm a decision for different reasons to that which informed the original decision-maker.
59. Under Part 7AA, it is therefore open to the IAA to make findings different from those made by a delegate.⁸⁹ Furthermore, s 473DA of the Act excludes any common law obligation to invite an applicant to respond to adverse findings that the IAA might make on the material before it. No denial of natural justice arises from the mere fact that the IAA made different findings to those made by the delegate. The Part 7AA merits review system appears to operate on the understanding that a reviewer reconsiders all facts and so may make factual findings different to those of the original decision-maker. There is nothing in Part 7AA that suggests that the IAA is unable to make findings adverse to an applicant where the delegate made a finding favourable to that applicant in relation to the same issue.⁹⁰

⁸⁷ *DZU16 v Minister for Immigration & Anor* [2017] FCCA 851 at [35].

⁸⁸ *BMB16 v Minister for Immigration & Anor* [2017] FCCA 203 at [97]-[99], [103].

⁸⁹ *CLL16 v Minister for Immigration & Anor* [2017] FCCA 491 at [46].

⁹⁰ *DBE16 v Minister for Immigration and Border Protection* [2017] FCA 942 at [59].

60. In exercising its functions under s 473FA of the Act, the IAA is not bound by a delegate's findings and, when conducting a review, it is open to the IAA to make findings that are reasonably open on the material before it. There is no obligation arising at common law under which the IAA must give an applicant a chance to respond to a concern in departing from a delegate's finding. There is no obligation on the IAA under s 473DC(3) of the Act to exercise the power to invite a person orally or in writing to give it new information in circumstances where the IAA is departing from a delegate's finding.⁹¹ Put another way, there is no requirement as a matter of procedural fairness on the IAA to exercise its powers under s 473DC(3) of the Act when departing from a delegate's findings or reasons.⁹²
61. Nevertheless, there is a danger of describing the IAA's decision-making function in terms of having to determine what is the correct or preferable decision.⁹³ The circumstances in which the IAA is entitled to have regard to material which is not included in the "review material" referred to it by the Secretary is severely limited by the legislative provisions concerning "new information". The IAA is not vested with a power to exercise all of the powers that were available to the primary decision-maker. The IAA is moreover confined by s 473CC(2) to either affirming the primary decision or remitting the decision for reconsideration in accordance with such directions or recommendations of the IAA as are permitted by regulation.

Procedural fairness

62. The procedural fairness obligations of the IAA must be informed by the statutory framework within which it operates.⁹⁴ Division 3 of Part 7AA of the Act addresses the conduct of a review. Subdivision A thereof identifies the natural justice requirements.

⁹¹ The power under s 473DC(3) is discretionary and the failure to exercise that discretion does not give rise to any jurisdictional error: *CID16 v Minister for Immigration & Anor* [2017] FCCA 485 at [32]-[33]. Furthermore, the IAA sent to the applicant a letter acknowledging the referral, identified the procedure to be followed in relation to the conduct of the review and provided the applicant with an opportunity to give submissions and new information. This opportunity complied with the obligations of procedural fairness to the extent not excluded by s 473DA.

⁹² *DGZ16 v Minister for Immigration & Anor* [2017] FCCA 623 at [113]. This does not prevent applicant from requesting that the IAA do so.

⁹³ *Minister for Immigration and Border Protection v AMA16* [2017] FCAFC 136 per Griffiths J at [92]. Charlesworth J at [98] preferred to express no opinion about whether the IAA's function is to make what is the "correct or preferable decision". The issue was reserved for consideration in matters where it assumed more importance.

⁹⁴ *AHB17 v Minister for Immigration & Anor* [2017] FCCA 1863 at [24].

63. Significantly, the principles of common law procedural fairness do not apply to reviews conducted by the IAA. Section 473DA provides that Division 3, together with ss 473GA and 473GB, is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to reviews conducted by the IAA. Section 473DA(1) is intended to and does exclude the common law natural justice hearing rule from reviews conducted by the IAA.⁹⁵ Section 473DA(1) supplies the “plain words of necessary intendment” to exclude the fair hearing rule from the provisions in Part 7AA.⁹⁶ Subsection 473DA(1) is couched in broader terms than ss 357A(1) and 422B(1) of the Act and operates to exclude the common law natural justice hearing rule from conditioning the conduct of reviews before the IAA.⁹⁷ So, unlike s 422B(2) of the Act, which does not “cover off or exclude” certain procedural fairness obligations,⁹⁸ s 473DA(1) does. Thus there are no gaps in s 473DA(1) of the Act for the general law rules of procedural fairness to fill.⁹⁹ The codification of the natural justice hearing rule by s 473DA(1) of the Act is apparently complete and exhaustive in relation to reviews conducted by the IAA.¹⁰⁰
64. The IAA also has limited procedural fairness obligations.¹⁰¹ This conclusion follows from the scheme of Part 7AA, the proper construction of s 473DA and the limited powers given to the IAA to receive and consider new information,¹⁰² and the obligations under ss 473DE and 473DF of the Act. The IAA is required to review a delegate’s decision without accepting or requesting new information and without interviewing a referred applicant.¹⁰³ The IAA is under no obligation to request or accept new information.¹⁰⁴ Nor is the IAA bound to give an applicant notice or a further opportunity to respond to findings proposed to be made by it that depart from findings made by a delegate.¹⁰⁵

⁹⁵ *AFK16 v Minister for Immigration & Anor* [2016] FCCA 1826 at [12].

⁹⁶ *DZU16 v Minister for Immigration & Anor* [2017] FCCA 851 at [83]; *AMA16 v Minister for Immigration & Ors* [2017] FCCA 303 at [18]-[20].

⁹⁷ *CDR16 v Minister for Immigration & Anor* [2016] FCCA 2759 at [34].

⁹⁸ Section 422B(1) of the Act, which applies to the AAT, provides that “This Division is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with.”

⁹⁹ *CMR16 v Minister for Immigration & Anor* [2017] FCCA 1715 at [26].

¹⁰⁰ *DBE16 v Minister for Immigration & Anor* [2017] FCCA 487 at [56].

¹⁰¹ *BBO16 v Minister for Immigration and Border Protection* [2017] FCA 212 at [56].

¹⁰² ss 473DC, 473DD, the Act. Section 473DC provides that the IAA has no duty to obtain any new information, and will not err by failing to invite an applicant to a hearing or in taking no steps to obtain new information: *CMR16 v Minister for Immigration & Anor* [2017] FCCA 1715 at [20].

¹⁰³ s 473DB(1), the Act.

¹⁰⁴ s 473DC(2), the Act.

¹⁰⁵ *CID16 v Minister for Immigration & Anor* [2017] FCCA 485 at [31].

65. To the extent that this process followed by the IAA is procedurally unfair, the IAA is authorised by the statutory procedural code under which it operates.¹⁰⁶ There is nothing in the IAA's procedural code requiring it to disclose new information that it had obtained or to seek comment on it.
66. Furthermore, there is no duty on the IAA to make enquiries to ensure that an applicant can participate in the review process in Division 3 of Part 7AA.¹⁰⁷ It can make its decision at any time after referral.¹⁰⁸
67. There is also nothing in Part 7AA of the Act which entitles an applicant to an oral interview before the IAA. It is clear from the legislation inserting Part 7AA into the Act that Parliament did not intend that an applicant would generally be entitled to attend an interview before the IAA, even where the IAA rejects the credibility of that applicant's claim.¹⁰⁹ This intention is derived from s 473DB(1) of the Act to the effect that reviews are to be conducted on the papers without interviewing an applicant, and in light of ss 473DC and 473DD of the Act. By reason of s 473DC(2), the IAA has no duty in any circumstance to invite an applicant to give new information at an oral interview or in writing such that a failure to do so would deny procedural fairness.¹¹⁰ Should an applicant take up the opportunity to provide further material, then the IAA would then have to decide whether it was able to consider the material pursuant to s 473DD of the Act.¹¹¹ The IAA also has a discretion, under ss 473DC(1) and/or (3) of the Act, to invite an applicant to an interview to give new information. But if the IAA was compelled to invite an applicant to an interview merely because his or her credibility is called into question, the result would be the IAA generally coming under an obligation to issue an invitation, as adverse credit findings are made in the majority of cases coming before the courts. That would not only be inconsistent with the text of s 473DC(2), but would defeat the purpose of the FTAP.¹¹²
68. Section 473DA(2) of the Act makes it clear that nothing in Part 7AA requires the IAA to give to an applicant material that was before the delegate at the time the delegate made the decision.¹¹³ Furthermore, if the IAA does not consider any new information,

¹⁰⁶ *DZU16 v Minister for Immigration & Anor* [2017] FCCA 851 at [85].

¹⁰⁷ *CMR16 v Minister for Immigration & Anor* [2017] FCCA 1715 at [20].

¹⁰⁸ *Ibid*, at [20].

¹⁰⁹ *DCG16 v Minister for Immigration & Anor* [2017] FCCA 285 at [35]-[36].

¹¹⁰ *DBE16 v Minister for Immigration & Anor* [2017] FCCA 487 at [51].

¹¹¹ *Ibid*, at [54].

¹¹² *DBA16 v Minister for Immigration & Anor* [2017] FCCA 320 at [46].

¹¹³ *DBE16 v Minister for Immigration & Anor* [2017] FCCA 487 at [50].

then there is no obligation on the IAA to put the particulars of any information to the applicant for comment in accordance with s 473DE of the Act.¹¹⁴

69. The IAA, in contrast to the AAT, is under no obligation to reveal to an applicant new “issues” that may be dispositive to the review.¹¹⁵ Unlike the AAT, the IAA is not required to hold hearings where an applicant may appear before it.¹¹⁶ Furthermore, Division 3 of Part 7AA does not require the IAA to invite an applicant to “give evidence and present arguments relating to the issues arising in relation to the decision under review” as does s 425 of the Act with respect to the AAT.¹¹⁷
70. It may be apparent from the delegate’s reasons that the essential and significant issues on which a review would turn had previously been framed by the delegate.¹¹⁸ Thus, even if an applicant was able to establish that some disclosure was called for, it may not be called for on the facts of the particular case. In addition, an IAA’s decision may not be based upon any adverse information requiring disclosure by the IAA under its code of procedure.
71. That said, the IAA is not prohibited by its procedural code from augmenting its statutory procedures where necessary in order to alert applicants to new issues arising before it of which applicants were previously unaware.¹¹⁹ Good administration mandates the disclosure of new issues arising in the course of the IAA’s consideration, and an abundance of caution in making such disclosures does not constitute a jurisdictional error.
72. Interestingly, the Court in *CRY16 v Minister for Immigration & Anor* [2017] FCCA 1549 found (at [16]) that an applicant had not been accorded a reasonable opportunity to be heard.¹²⁰ The IAA had not acted reasonably in the relevant sense.¹²¹ The Court reasoned that it is difficult for applicants to make submissions and lead evidence about

¹¹⁴ Ibid, at [55].

¹¹⁵ Ibid at [101]. Thus the principles in *SZBEL v Minister for Immigration* (2006) 228 CLR 152; [2006] HCA 63 (*SZBEL*) do not apply to reviews under Part 7AA of the Act. The Federal Circuit Court of Australia has accepted this proposition in, for example, *AFK16 v Minister for Immigration & Anor* [2016] FCCA 1826 at [11]- [12]; *AMA16 v Minister for Immigration & Ors* [2017] FCCA 303 at [21].

¹¹⁶ ss 473DB, 473DC, the Act.

¹¹⁷ *DJO16 v Minister for Immigration & Anor* [2017] FCCA 944 at [33].

¹¹⁸ *DBB16 v Minister for Immigration & Anor* [2017] FCCA 375 at [26].

¹¹⁹ *DBE16 v Minister for Immigration & Anor* [2017] FCCA 487 at [66]. See also *DZU16 v Minister for Immigration & Anor* [2017] FCCA 851 at [102].

¹²⁰ The Court first identified the principles underpinning *SZBEL* as applied in *SZQPY v Minister for Immigration and Border Protection* [2013] FCA 1133. It then noted that the rules of procedural fairness do not apply to the IAA, save to the extent provided for in the statute. Finally, it cited *DZU16 v Minister for Immigration & Anor* [2017] FCCA 851 at [120] for the proposition that the IAA’s statutory discretions must be exercised reasonably.

¹²¹ See *Minister for Immigration v Li* (2013) 249 CLR 332 and subsequent Federal Court authorities.

the impracticability of relocation to a particular location or city without first knowing that location or city. Although the processes set out in the Act did not admit of the same degree of procedural fairness as a Supreme Court trial - and nor would that be expected in an administrative process - the provisions nonetheless provide for an applicant to be heard on the issues.¹²² The scheme proceeds on the basis that this would generally occur before the delegate and for a process in the IAA that is loosely analogous to an appeal court rather than a de novo hearing (such as the process before the AAT). The fundamental importance of a hearing on the dispositive issues meant that at some point the IAA must turn its mind to whether the applicant should be given an effective opportunity to address a potentially dispositive issue if that issue has not previously been raised. In that event the two options open to the IAA were to either consider exercising its discretions under ss 473DC and 473DD of the Act to seek out further information, or to consider setting aside the delegate's decision and remitting the matter to determine afresh (similar to the way in which a Full Court would with respect to a trial judge's judgment if there were not findings of fact with respect to an issue that became relevant as a result of a Full Court decision).¹²³

73. Although the IAA is entitled to complete a review without alerting an applicant to new issues (or inviting submissions) or new information (to which s 473DE does not apply), this is subject to the restraints of procedural fairness and reasonableness.¹²⁴ The particular facts of a case may mean that there has been an unreasonable failure by the IAA to consider the exercise of powers conferred upon it. In the noteworthy decision of *DZU16 v Minister for Immigration & Anor* [2017] FCCA 851, the Court there said that the discretion in s 473DC(3) of the Act exists to be exercised in an appropriate case, in aid of the objective of making the correct or preferable decision.¹²⁵ Where an applicant could not have known of the dispositive issue without being informed, and where there is a power to inform him or her of it and seek relevant information or comment, the failure to exercise or consider exercising the relevant power to inform him or her of the issue lacked an evident and intelligible justification, in addition to having resulted in an unfair procedure. It was unreasonable for the IAA not to consider giving the applicant an effective opportunity to address the dispositive issue.

¹²² *CRY16 v Minister for Immigration & Anor* [2017] FCCA 1549 at [18].

¹²³ *Ibid*, at [19].

¹²⁴ *DZU16 v Minister for Immigration & Anor* [2017] FCCA 851 at [81].

¹²⁵ *Ibid*, at [121]-[122], [124].

Jurisdictional error resulted from multiple errors: one in identifying the relevant statutory provision,¹²⁶ calculating the statutory response time, unreasonableness in insisting on a particular form or timeframe of response, and unreasonably denying an applicant the opportunity to respond consistently with the provisions of Part 7AA of the Act.¹²⁷ But like many challenges based on procedural fairness, this particular outcome resulted from the circumstances of that case and is distinguishable.¹²⁸

74. Section 473GD of the Act permits the IAA, in its own discretion, to disclose the contents of a document to a referred applicant, provided that the IAA also gives an appropriate written statement to the applicant. It has been contended that this legislative scheme meant that Parliament had abrogated the common law entitlement to claim public interest immunity for any document that the Secretary provided to the IAA. The legislative scheme has been held not to do so.¹²⁹

The (in)validity of non-disclosure certificates

75. Several courts have found that procedural fairness has been denied in circumstances where a certificate prevents a decision-maker from disclosing certain information to an applicant and that non-disclosure certificate has subsequently been found to have been invalidly issued.¹³⁰ That particular principle, however, has been persistently distinguished as having no application to reviews conducted by the IAA under Part 7AA of the Act.¹³¹ The IAA operates under a significantly different statutory regime.

¹²⁶ Although the IAA thought that by sending a letter it was acting under s 473DE of the Act it should have acted or considered acting pursuant to s 473DC(3). The letter raised an issue about relocation which was fundamental to the review.

¹²⁷ It was considered unreasonable for the IAA to fail to consider proceeding under s 473DC(3), to proceed incorrectly under s 473DE, to impose an incorrect deadline for a response, and to fail to correct its error in relation to time when informed by the applicant of the day on which the invitation to comment had been received.

¹²⁸ Indeed, *DZU16* was distinguished by the same judge in *AJE17 v Minister for Immigration & Anor* [2017] FCCA 1458 at [24]-[25]. In the latter, the IAA did consider conducting an interview because it had been requested to do so. The IAA's reasons for rejecting the request were not unreasonable and there was no new information or issue that might have supported the conduct of an interview. The applicant was simply seeking a further opportunity to address the existing known issue of his credibility.

¹²⁹ The court found a weak case in favour of upholding public interest immunity in an identity assessment form as well as a weak case in favour of that form being disclosed. The competing public interests favoured disclosure, and an order was made for the court to inspect it: *AMA16 v Minister for Immigration & Ors* [2016] FCCA 1966 at [51], [88], [91], [96].

¹³⁰ *MZAFZ v Minister for Immigration and Border Protection* [2016] FCA 1081; (2016) 243 FCR 1, approved in *Minister for Immigration and Border Protection v Singh* [2016] FCAFC 183; (2016) 244 FCR 305 at [39]-[40].

¹³¹ *BVM16 v Minister for Immigration & Anor* [2016] FCCA 3183; *BBS16 v Minister for Immigration & Anor* [2017] FCCA 4, at [79]-[80]; *CMR16 v Minister for Immigration & Anor* [2017] FCCA 1715 at [25]; *AHNI7 v Minister for Immigration & Anor (No.2)* [2017] FCCA 1516 at [37]; *AYF16 v Minister for Immigration & Anor* [2017] FCCA 1487 at [19]-[20]; *BDL16 v Minister for Immigration & Anor* [2017] FCCA 1514 at [28]. Additionally relevant has been (i) the absence of any practical injustice to an applicant; (ii) where the document the subject of the certificate was an identity assessment form, whether an applicant's identity was at issue in the

First, s 473DA(1) of the Act provides that Division 3 of Part 7AA (together with ss 473GA and 473GB) is taken to be an exhaustive statement of the requirements of the natural justice hearing rule “in relation to reviews conducted by the [IAA]”.¹³² Second, “[t]o avoid doubt”, nothing in Part 7AA requires the IAA to give to a referred applicant any material that was before the Minister when the Minister made the decision under s 65 of the Act.¹³³ Third, s 473DE(1) imposes a much more limited obligation of disclosure. As a practical matter, an applicant also has to establish that any information was withheld from the IAA and that its decision was affected by that missing information.¹³⁴

The IAA’s Practice Direction

76. Practitioners ought to be aware of the IAA’s Practice Direction issued under s 473FB of the Act.¹³⁵ Section 473FB(3) does not afford that breach of the practice direction amounts to a jurisdictional error.¹³⁶ Paragraphs [20] and [23] of the direction have been found to reflect the relevant legislation, albeit in a much more readable form.¹³⁷
77. This practice direction has been upheld as not arbitrary, unjust, unfair or legally unreasonable.¹³⁸ In particular, it does not in any way limit the amount of information or documents that might be provided as new information.¹³⁹ It refers to the possibility

review. The Court in *CED16 v Minister for Immigration & Anor* [2017] FCCA 233 held (at [52]) that the IAA did not act on a certificate because its reasons did not refer to an identity assessment form which was irrelevant to an applicant’s claims; and there was no denial of procedural fairness by reason of the applicant not being provided with the certificate in the conduct of the review. Furthermore, there was no error in the IAA failing to disclose the existence of a certificate because, in circumstances where information was not “new information” within the meaning of s 473DE of the Act, it had no power or discretion to do so: *CJG16 v Minister for Immigration & Anor* [2017] FCCA 453 at [64].

¹³² Section 473DA(1) is couched in broader terms than ss 357A(1) and 422B(1) and has been found to operate to exclude the common law natural justice hearing rule from conditioning the conduct of reviews before the IAA: *DZU16 v Minister for Immigration & Anor* [2017] FCCA 851 at [34]. Section 473GB(3) of the Act gives a discretionary power to the IAA and is not one which is the subject of a mandatory obligation of a kind that could give rise to jurisdictional error: *CDZ16 v Minister for Immigration & Anor* [2017] FCCA 356 at [45]-[46].

¹³³ s 473DA(2), the Act. This circumstance is a significant departure from the procedure that applies under Part 5 or Part 7 of the Act. In relation to these parts there is a detailed regime expanded upon in the caselaw about the types of information and the circumstances in which information must be given to applicants. There is no similar statement as that which appears in s 473DA(2) in either Part 5 or Part 7: *BVM16 v Minister for Immigration & Anor* [2016] FCCA 3183 at [26].

¹³⁴ *CCW16 v Minister for Immigration & Anor* [2017] FCCA 2 at [80].

¹³⁵ IAA, *Practice Direction No 1 for Appellants, Representatives and Authorised Recipients* given under s 473FB, Migration Act (6 February 2017).

¹³⁶ *CRW16 v Minister for Immigration & Anor* [2017] FCCA 984 at [66]-[67]. The lack of accreditation for a translator was irrelevant to the review and did not give rise to any identified consequence for the IAA.

¹³⁷ *CRY16 v Minister for Immigration & Anor* [2017] FCCA 1549 at [4].

¹³⁸ The practice direction was signed by Duncan Kerr J as President on 21 April 2016 and the document on its face is a practice direction made under s 473FB of the Act: *DGZ16 v Minister for Immigration & Anor* [2017] FCCA 623 at [38], [82], [97].

¹³⁹ *DGZ16 v Minister for Immigration & Anor* [2017] FCCA 623 at [88].

that longer submissions may be returned to applicants. However, the direction does not state that the IAA will not consider a submission in excess of 5 pages, and it is possible to seek to provide submissions in excess of 5 pages.¹⁴⁰ It is therefore not ultra vires for this reason as being inconsistent with the provisions of the Act, falling outside the scope of the power under s 473FB, or being contrary to the Migration Regulations.¹⁴¹

The IAA's powers of remittal

78. The IAA does not have the power to remit a decision to a delegate with any direction or recommendation it sees fit, but only those that are permitted by regulation.¹⁴² It has been held that the scope of that power is inconsistent with the proposition that, where there is some procedural unfairness in the process before the delegate, the IAA must remit the decision without any direction or recommendation.¹⁴³

Current issues and emerging trends

79. Some presently outstanding questions of interest include:

- The extent to which the natural justice fair hearing rule has been ousted by s 473DA(1) of the Act. This raises important and complex issues of statutory construction. Those issues await a case in which they properly arise for determination and the Federal Court has the benefit of full argument.¹⁴⁴
- A decision of a delegate declining to refer a matter to the IAA could be a separate decision from the decision to refuse the visa that was amenable to judicial review, being a “decision” within the meaning of the Act.¹⁴⁵
- The possibility that the IAA can conduct its “review” without any input from an applicant. This question has been left open.¹⁴⁶
- The courts have proceeded on the assumption that s 473DA(1) of the Act is a valid enactment of the Commonwealth. This issue might be raised in an appropriate case

¹⁴⁰ Ibid, at [90], [96].

¹⁴¹ Ibid, at [93].

¹⁴² s 473CC(2), the Act. Regulation 4.43 of the *Migration Regulations 1994* (Cth) prescribes directions for the purposes of s 473CC(2) of the Act.

¹⁴³ *DRG16 v Minister for Immigration & Anor* [2017] FCCA 2063 at [77]-[78].

¹⁴⁴ *Minister for Immigration and Border Protection v AMA16* [2017] FCAFC 136 per Griffiths J at [94]. It was unnecessary to consider the Minister's Notice of Contention in that case.

¹⁴⁵ *AIB16 v Minister for Immigration* [2017] FCCA 231 at [58]-[59]. The question was not determined in that case because the applicant was found to be an excluded fast track applicant.

¹⁴⁶ *DZU16 v Minister for Immigration & Anor* [2017] FCCA 851 at [69]. The applicant's input had been invited in that case.

if practical injustice resulted from a failure to disclose new issues and the courts were prevented from exploring the legal consequence of the failure to disclose by reason of s 473DA(1).¹⁴⁷

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¹⁴⁷ *DBE16 v Minister for Immigration & Anor* [2017] FCCA 487 at [67].

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