Chapter 3. Primary Decision-Making Procedures under the Migration Act 1958 and Migration Regulations 1994

This chapter will examine decision-making procedures for primary decisions and the role of policy in the Department and the Tribunals. This chapter also includes two appendices, outlining two significant new pieces of legislation – the Migration Amendment (Character and General Visa Cancellation) Act 2014 and the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014.

Part 1 – Decision-making at the primary level

Visa application procedures

The reasons why the Migration Act 1958 was amended with effect from 1 September 1994 to set out a detailed ‘code of procedure’ rather than relying on the common law principles of natural justice were examined in Chapter 2. The ‘code of procedure’ for making primary (Departmental) decisions can be found in Part 2, Division 3, Subdivision AB of the Act. Subdivision AB consists of ss 51–64 of the Act, which are entitled as follows:

51A. Exhaustive statement of natural justice hearing rule
52. Communication with Minister
54. Minister must have regard to all information in application
55. Further information may be given
56. Further information may be sought
57. Certain information must be given to applicant
58. Invitation to give further information or comments
59. Interviews

1 The Act usually refers to the ‘Minister’ as the decision maker. Subsection 496(1) provides that ‘[t]he Minister may, by writing signed by him or her, delegate to a person any of the Minister’s powers under this Act’. In practice, unless the Act specifically refers powers to the Minister personally, those powers are delegated to Departmental officers.
60. Medical examination

61. Prescribed periods

62. Failure to receive information not require action

63. When decision about visa may be made

64. Notice that visa application charge is payable

Until 2014, Subdivision AB applied only to visa applications made within Australia at the primary level. Different provisions of the Act apply to matters such as cancellations (see, for example, Subdivisions C and D of Part 2, Division 3 of the Act) and requests for Ministerial intervention.

Some of these provisions can be dealt with quite quickly.

- Section 52 requires that an applicant for a visa communicate with the Minister (through his or her delegates in the Department) in writing.
- Section 54 requires the Minister to consider all information that is actually before him or her in relation to the visa application when making the decision. Importantly, when read with s 55, it becomes clear that this includes information that was received after a time limit imposed by the Minister, but which the Minister has in fact received prior to making the decision.
- Subsection 55(1) permits an applicant to send further information to the Minister, prior to a decision being made, as he or she sees fit. Subsection 55(2) provides that the Minister is not required to delay making a decision past any deadline given to the applicant simply because the applicant may intend to provide further information.
- Section 56 allows the Minister to seek further information from the applicant. If the information is received prior to a decision being made, the Minister must consider it.
- Section 59 provides that an applicant must make ‘every reasonable effort to be available for, and attend, an interview’, and that the Minister does not have to request a face-to-face interview – a phone interview, for example, may suffice.
- Section 60 permits the Minister to require an applicant to attend a medical examination.
- Section 62 provides that if the Minister invites an applicant to provide information and it is not received by the deadline, he or she does not have to make any additional effort to obtain the information.
- Section 64 deals with notices of demand for a second stage of the Visa Application Charge (VAC).
Section 57

Section 57 of the Act is the ‘adverse information’ provision, and amounts to a codification of the principle expressed in Kioa v West. That is, s 57 requires the Department to disclose to the applicant any and all information that it holds that could be a reason to refuse the application, and allow the applicant to comment on it.

The kind of information that must be disclosed is set out in s 57(1), which provides as follows:

In this section, relevant information means information (other than non-disclosable information) that the Minister considers:

(a) would be the reason, or a part of the reason, for refusing to grant a visa; and

(b) is specifically about the applicant or another person and is not just about a class of persons of which the applicant or other person is a member; and

(c) was not given by the applicant for the purpose of the application.

That is, the information must be adverse, be specific to the applicant in some way, and not information provided by the applicant themselves. The usual kind of information that is covered by s 57(1)(b) is information that relates to the conditions in a country, which would be most frequently relevant in an application for a protection visa.

Application of Section 57

Until 2014, s 57(3) placed an important limitation on the application of s 57 to visa applications. This subsection provided as follows:

This section does not apply in relation to an application for a visa unless:

(a) the visa can be granted when the applicant is in the migration zone; and

(b) this Act provides, under Part 5 or 7, for an application for review of a decision to refuse to grant the visa.

That is, s 57 did not apply to a visa application unless the application could be granted while the applicant is in Australia, and was subject to merits review in the case of refusal.

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3 See for example Wu v Minister for Immigration and Multicultural and Indigenous Affairs (2003) FCA 1249 at paragraphs 22 and 23.
Subsection 57(3) was raised squarely in the High Court case of *Saeed v Minister for Immigration and Citizenship*. Saeed concerned an application for a subclass 175 (Skilled – Independent) visa outside Australia. As there was no Australian sponsor involved in the application, Ms Saeed was not entitled to merits review of any refusal decision, meaning that s 57(3) had the effect that s 57 did not apply to her.

Ms Saeed’s visa was refused on the basis that some of her employer references were regarded by the Department as fraudulent. This information was never put to Ms Saeed, and the first time she heard of the Department’s suspicions was in the refusal letter. She retained counsel in Australia and applied for review in the High Court, in its original jurisdiction under s 75(v) of the Constitution. The Minister argued that s 57(3) meant that s 57 did not apply to Ms Saeed, and that the Department therefore had no obligation to inform her of its suspicions prior to the decision. The High Court agreed that s 57 did not apply, but found that the common law rules of natural justice did apply. The ‘exclusive statement’ provision in s 51A of the Act did not assist the Minister, because Ms Saeed was not covered by s 57 at all. Therefore, the Department should have followed the *Kioa* principle, and informed her of the adverse information and given her the opportunity to comment prior to making a decision.

In response, Parliament passed the *Migration Legislation Amendment Bill (No. 1) 2014*. Schedule 6, Part 1, Clause 2 of the Bill repealed s 57(3). The result is that the *Saeed* ruling has been reversed, and both onshore and offshore applications are now subject to s 57.

**Non-disclosable information**

Another potentially controversial element of s 57 is the provision that ‘non-disclosable information’ is not to be disclosed. This term is defined in s 5(1) of the Act as follows:

‘non-disclosable information’ means information or matter:

(a) whose disclosure would, in the Minister’s opinion, be contrary to the national interest because it would:

(i) prejudice the security, defence or international relations of Australia; or

(ii) involve the disclosure of deliberations or decisions of the Cabinet or of a committee of the Cabinet; or

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5 ‘Bogus documents’ in the wording of s 103 of the Act.
(b) whose disclosure would, in the Minister’s opinion, be contrary to the public interest for a reason which could form the basis of a claim by the Crown in right of the Commonwealth in judicial proceedings; or

(c) whose disclosure would found an action by a person, other than the Commonwealth, for breach of confidence;

and includes any document containing, or any record of, such information or matter.

It is a recognised principle of administrative law that a decision maker does not have to disclose the exact document containing adverse information, or every single detail of that information. It is sufficient that the ‘substance’ or ‘gist’ of the information is disclosed to the applicant. In some cases it could be positively dangerous to disclose, for example, the name of a complainant to an applicant. However, the obligation to provide the substance of adverse information is still strong. For example, in *VEAL v Minister for Immigration and Multicultural and Indigenous Affairs* the High Court found that the applicant should have been given the substance of an anonymous ‘dob-in’ letter, even when the MRT had expressly disavowed any reliance on it.

Of all the provisions of the definition of ‘non-disclosable information’, probably only subparagraph (a)(ii) is clear and unambiguous. Terms such as ‘security interests’ of Australia obviously refer to something of exceptional magnitude, but the exact scope of subparagraph (a)(i) has yet to be tested by the courts.

Paragraph (b) of the definition appears to have been litigated very rarely, if at all. The Department’s LEGEND database states simply that information is non-disclosable if disclosure would ‘in the Minister’s opinion, be contrary to the public interest’, which does not appear to be an accurate summary of paragraph (b). It is likely that we will have to wait for further elucidation from the courts.

The scope of the equitable duty for breach of confidence, referred to in paragraph (c) of the definition, was summed up by Gummow J in *Corrs Pavey Whiting and Byrne v Collector of Customs (Vic)* as follows:

> It is now settled that in order to make out a case for protection in equity of allegedly confidential information, a plaintiff must satisfy certain criteria. The plaintiff: (i) must be able to identify with specificity, and not merely in global terms, that which is said to be the information in

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7 (2005) 222 ALR 411.
8 It is notable that in *Minister for Immigration and Multicultural Affairs v Jia* (2001) 205 CLR 507 that the High Court gave the Minister exceptional latitude in determining what was in the ‘national interest’, almost to the point of finding the issue to be non-justiciable.
question; and must also be able to show that (ii) the information has the necessary quality of confidentiality (and is not, for example, common or public knowledge); (iii) the information was received by the defendant in such circumstances as to import an obligation of confidence; and (iv) there is actual or threatened misuse of that information: *Saltman Engineering Co Ltd v Campbell Engineering Co* (1948) 65 RPC 203 at 215; *Commonwealth v John Fairfax and Sons Ltd* (1980) 147 CLR 39 at 50-51; *O’Brien v Komesaroff* (1982) 150 CLR 310 at 326-328. It may also be necessary, as Megarry J thought probably was the case (*Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 at 48), and as Mason J (as he then was) accepted in the Fairfax decision was the case (at least for confidences reposed within government), that unauthorised use would be to the detriment of the plaintiff.

In other words, it appears that to found an action for breach of confidence, the information must be specific, have a ‘quality of confidentiality’ (meaning that by its nature it should not be readily disclosed), given in a confidential manner (e.g. a private letter rather than a Facebook post), and there is some kind of threat to the confidentiality of the information.\(^\text{10}\) In particular, it will be a rare situation where the identity of an informant is not ‘non-discloseable information’.\(^\text{11}\)

### Sections 58 and 61

Section 58 of the Act permits the Minister to ask an applicant for further information under s 56, or to make comment on adverse information under s 57, and impose time limits on responding. The Minister may require the applicant to respond by writing, phone or at a face-to-face interview. The time period for responding must be specified in the invitation. Section 58 also permits regulations to be made prescribing the time in which an applicant must respond to an invitation, and these prescribed periods are set out in Regulation 2.15 of the *Migration Regulations 1994*.

Section 61 deals with other prescribed time periods, relating to matters such as time limits in which applications for visas of specified classes must be made. No regulations appear to have been made under this section.

### Section 63

This section is entitled ‘When decision about visa may be made’. Subsection 63(2) relates to invitations to give information under s 56, and s 63(3) relates to invitations to comment on adverse information under s 57. Both subsections

\(^{10}\) A somewhat more generous (to the government) interpretation has been given by the High Court in *MIAC v Kumar* (2009) HCA 10; 238 CLR 448.

provide that the Minister may not proceed to a decision after giving such an invitation until the information is received, the applicant informs the Minister that he or she does not have or will not provide the information, or the deadline has passed. Subsection 63(4) deals with requests for the payment of a second stage VAC, and provides that a decision must not be made until the VAC is paid, the applicant informs the Minister that he or she cannot or will not pay it, or the deadline imposed for payment passes.

**Decision-making and notification**

Section 65 of the Act provides, in effect, if the Minister is satisfied that if an applicant meets all criteria for the grant of a visa it must be granted, and otherwise must be refused. The Minister’s satisfaction depends on the submission of evidence by an applicant that they do in fact meet all legislative criteria for the grant of a visa.

Section 66 deals with notification of decisions. Subsection 66(1) refers to notification of decisions by prescribed means, a provision which has been broadly superseded by the insertion into the Act of ss 494A–494D, which are now the main provisions dealing with notification of primary decisions. The most important of these provisions are ss 494B and 494C, the former of which specifies the means by which the Minister can give a document to a person, and the latter providing details of when a document is taken to have been received by the recipient. For example, s 494B(4) provides that the Minister may send a document (including a decision record) to a person by means of pre-paid post to the last address provided by the person for receiving documents, provided that the document is sent within three working days of the date of the document. Subsection 494C(4) then provides as follows:

- If the Minister gives a document to a person by the method in subsection 494B(4) (which involves dispatching the document by pre-paid post or by other prepaid means), the person is taken to have received the document:
  
  (a) if the document was dispatched from a place in Australia to an address in Australia – 7 working days (in the place of that address) after the date of the document; or
  
  (b) in any other case – 21 days after the date of the document.

The purpose of deemed notification provisions is obvious – to ensure that an applicant cannot avoid service of an adverse decision, and therefore avoid

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12 By means of the *Migration Legislation Amendment (Electronic Transactions and Methods of Notification) Act 2001*. 

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compliance action. Note that applications for review must be made within a specified time after notification of a decision,\(^{13}\) which means that, although failure to notify an applicant of a decision does not invalidate the decision itself,\(^ {14}\) it will have the effect that an applicant’s period in which to apply for review will not start to run until he or she has been correctly notified. In some cases, large numbers of notifications have been found to be defective, meaning that some applicants have been able to remain in Australia for years before having to lodge an application for merits review.\(^ {15}\)

Finally, s 66(2) imposes a duty on the Minister to provide reasons for a refusal decision in relation to applications that are subject to merits review. This subsection provides as follows:

Notification of a decision to refuse an application for a visa must:

(a) if the grant of the visa was refused because the applicant did not satisfy a criterion for the visa – specify that criterion; and

(b) if the grant of the visa was refused because a provision of this Act or the regulations prevented the grant of the visa – specify that provision; and

(c) unless subsection (3) applies to the application – give written reasons (other than nondisclosable information) why the criterion was not satisfied or the provision prevented the grant of the visa; and

(a) if the applicant has a right to have the decision reviewed under Part 5 or 7 or section 500 – state:

(i) that the decision can be reviewed; and

(ii) the time in which the application for review may be made; and

(iii) who can apply for the review; and

(iv) where the application for review can be made.

Subsection 66(3) has the effect that if a visa cannot be granted onshore, and cannot be reviewed by the MRT or RRT, reasons for a refusal need not be provided.

Subsection 66(2) has, perhaps surprisingly, not been the subject of litigation. However, the ‘reason for reasons’ is that a person affected by an adverse decision

\(^{13}\) For the Migration Review Tribunal, see s 347(1)(a) of the Act and Regulation 4.10 of the Regulations.

\(^{14}\) See s 66(4) of the Act.

\(^{15}\) See as one example Srey v Minister for Immigration and Multicultural and Indigenous Affairs (2003) FCA 1292.
will not know whether there are grounds for review without reasons for that decision. In Beale v Government Insurance Office of NSW, Meagher JA stated that: 16

Perhaps the primary reason for an obligation on courts to provide reasons is the fact that a party seeking an appeal may generally only appeal where the trial judge has made an error of law. The absence of reasons or insufficient reasons may not allow an appeal court to determine whether the trial judge's verdict was or was not based on an error of law or an appealable error.

That is, the Minister's reasons must be adequate for the purpose of deciding whether to pursue review of that decision.

Cancellation procedures

Cancellation procedures are distributed throughout the Act, and differ according to the cancellation power being employed. The examination of cancellation procedures will therefore be necessarily brief, but it should be noted that:

• Since the repeal of s 20 of the Education Services (Overseas Students) Act 2000 in 2013 there is now nothing that can trigger an automatic cancellation of a student visa under Subdivision GB of the Act. An essential prerequisite for such cancellation was that an s 20 ESOS Act notice was issued to a student – see s 137J of the Act.

• Nearly all cancellations are discretionary, meaning that even if the grounds for cancellation exist, the Minister does not have to cancel the visa in most cases. However, s 116(3) of the Act provides that '[i]f the Minister may cancel a visa under subsection (1), the Minister must do so if there exist prescribed circumstances in which a visa must be cancelled’, and these circumstances are set out in subregulation 2.43(2) of the Regulations. However, even mandatory cancellations require the Minister to make a decision – they are not automatic.

• Finally, most cancellation powers cannot be exercised until the Minister gives the visa holder an opportunity to comment on whether a cancellation ground exists, or why, if a ground does exist, the visa should not be cancelled regardless. However, there are a number of ‘cancel first and ask questions later’ provisions in the Act, these being ss 128, 133A(3), 133C(3), 134A–134B and 501(3).

16 (1997) 48 NSWLR 430 at 441, cited with approval by SZKLO v Minister for Immigration and Citizenship (2008) FCA 735 at paragraph 19. The ‘reason for reasons’ provided by these cases are similar to those provided by the Supreme Court of Canada in Newfoundland and Labrador Nurses’ Union v Newfoundland and Labrador (Treasury Board) (2011) SCC 62.
The cancellation powers in s 501 of the Act will be discussed in the part of this chapter dealing with that section.

Subdivision C

The key provision of Subdivision C of Part 2 Division 3 of the Act is s 109, which provides for cancellation of a visa if any of the grounds of 'non-compliance' in ss 101–105 are made out. In short, ss 101–105 of the Act apply to provision of incorrect information to the Department, whether in a visa application (s 101), a passenger card (s 102) or by means of a 'bogus document' (s 103). A non-citizen is also required to give particulars of changes of circumstances (s 104) or previously provided incorrect information to the Department (s 105). Failure to comply with these requirements permits the Minister to give a Notice of Intention to Consider Cancellation (NOICC) to the visa holder. The visa holder may then dispute that there are grounds for cancellation, or admit non-compliance and argue that the visa should not be cancelled in any event (ss 107 and 108). The NOICC must be specific in setting out claimed non-compliance – Zhong v Minister for Immigration and Citizenship17 found that '[i]t is not enough to generically claim that the visa holder has breached a section of the Act without giving particulars of the facts and circumstances which are said to give rise to the possible breach of the particular section'. The Minister may then decide whether to cancel the visa under s 109.

Section 109 is unique amongst the general cancellation powers in that there are legislative criteria that the Minister must consider before cancelling a visa under that section. Regulation 2.41 lists a large number of factors that the Minister must consider, some of the more important being the nature of the correct information or genuine document (paragraphs 2.41(a) and (b)), the circumstances in which the non-compliance occurred (paragraph 2.41(d)), and the immigration history and general character of the visa holder (paragraphs 2.41(f)–(j)). It is important to note that the Minister must consider all of the factors in Regulation 2.41 before making a cancellation decision.18

Subdivisions D and E

Subdivision D of Part 2 Division 3 of the Act is, rather unimaginatively, entitled 'Visas may be cancelled on certain grounds'. The key provision is s 116(1), which provides as follows:

Subject to subsections (2) and (3), the Minister may cancel a visa if he or she is satisfied that:

17 (2008) FCA 507 at paragraph 80.

(a) the decision to grant the visa was based, wholly or partly, on a particular fact or circumstance that is no longer the case or that no longer exists; or

(aa) the decision to grant the visa was based, wholly or partly, on the existence of a particular fact or circumstance, and that fact or circumstance did not exist; or

(b) its holder has not complied with a condition of the visa; or

(c) another person required to comply with a condition of the visa has not complied with that condition; or

(d) if its holder has not entered Australia or has so entered but has not been immigration cleared – it would be liable to be cancelled under Subdivision C (incorrect information given by holder) if its holder had so entered and been immigration cleared; or

(e) the presence of its holder in Australia is or may be, or would or might be, a risk to:

   (i) the health, safety or good order of the Australian community or a segment of the Australian community; or

   (ii) the health or safety of an individual or individuals; or

(f) the visa should not have been granted because the application for it or its grant was in contravention of this Act or of another law of the Commonwealth; or

(fa) in the case of a student visa:

   (i) its holder is not, or is likely not to be, a genuine student; or

   (ii) its holder has engaged, is engaging, or is likely to engage, while in Australia, in conduct (including omissions) not contemplated by the visa; or

(g) a prescribed ground for cancelling a visa applies to the holder.

The ‘prescribed grounds’ are set out in subregulation 2.43(1) and are too numerous to list here. Subsection 116(3) provides that ‘[i]f the Minister may cancel a visa under subsection (1), the Minister must do so if there exist prescribed circumstances in which a visa must be cancelled’, and these mandatory cancellation grounds are set out in subregulation 2.43(2) as follows:

• If the visa held by the non-citizen in question is a subclass 050, 070, 200, 201, 202, 203, 204, 449, 785, 786 or 866, the visa must be cancelled if ‘the
holder of the visa is a person whose presence in Australia may be directly or indirectly associated with the proliferation of weapons of mass destruction’.

- If the non-citizen holds any other visa, the mandatory cancellation grounds are:
  - the holder of the visa is a person whose presence in Australia may be directly or indirectly associated with the proliferation of weapons of mass destruction or is otherwise contrary to Australia’s foreign policy interests; or
  - the person has been ‘declared’ under the Autonomous Sanctions Regulations 2011; or
  - the person that has been assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security.

It can therefore been seen that cancellation is only mandatory in very particular and serious circumstances. Note, however, that s 116(3) cancellation is not automatic, meaning that the processes described below must still be followed. All other grounds under s 116 are discretionary.

The process for cancelling a visa under s 116 is set out in Subdivision E of the Act, and is very similar to s 109. A NOICC must first be served on the visa holder, as required by s 119, detailing the grounds under which cancellation is being considered, and inviting the visa holder to respond. The visa holder may argue either that the alleged ground does not exist, or concede that the alleged ground exists but argue that the visa should not be cancelled regardless (the latter of which will be pointless if mandatory cancellation under s 116(3) is being considered). The Minister may not make a decision until the visa holder responds to the notice, informs the Minister that he or she does not intend to respond, or the time given for responding expires (s 124). The Minister must then notify the visa holder of his or her decision in accordance with s 127 and Regulation 2.55.

It is important to note that a permanent visa may not be cancelled under s 116 if the holder is in Australia, and was immigration cleared on his or her last entry – see s 117(2) of the Act. However, a permanent visa holder who is not in Australia can have their visa cancelled under s 128.

**Subdivision F**

Subdivision F of Division 3, Part 2 of the Act is linked to Subdivision D, but the processes for cancellation are substantially different. Section 128 of the Act provides as follows:
If:

(a) the Minister is satisfied that:

(i) there is a ground for cancelling a visa under section 116; and

(ii) it is appropriate to cancel in accordance with this Subdivision; and

(b) the non-citizen is outside Australia;

the Minister may, without notice to the holder of the visa, cancel the visa.

That is, a visa may be cancelled under s 128 without prior notice to a visa holder. The only conditions on such cancellation are that the visa holder falls within a ground specified in s 116, that he or she is outside Australia, and that s 128 cancellation is ‘appropriate’. Exactly what ‘appropriate’ is intended to mean in unclear, but in *Singh v Minister for Immigration*,19 the Federal Magistrates Court (as it was then known) found that cancellation under s 128 was not appropriate because the Department could, if it had permitted the visa holders to re-enter Australia, have begun cancellation proceedings under s 109. That is, cancellation under s 128 will not be appropriate if another ground of cancellation, which requires prior notice in the form of a NOICC, is available.20

While a visa can be cancelled under s 128 without prior notice to the former holder, the cancellation can be revoked at the request of the applicant. Section 129 requires the Minister to notify the former visa holder of an s 128 cancellation, and as part of that notice, invite the former holder to argue that there were no grounds for the cancellation, or that the Minister should not have cancelled the visa regardless. If a response is received within a prescribed time, the Minister must then make a decision as to whether to revoke the cancellation (s 131). If the cancellation is revoked, the former holder is taken to have been granted that visa on the date of revocation (s 133(1)). In other words, revocation is not retrospective in effect.

The ‘prescribed periods’ for the purposes of s 129 are set out in Regulation 2.46, a provision that is worth setting out in full:

(a) if the former holder of the visa is outside Australia when he or she is given a notice of the cancellation – 28 days;

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20 Note, however, a very different approach in *Hu v MIMIA* (2004) FCAFC 63, in which it was found that it is up to the applicant to demonstrate that the decision maker failed to consider a relevant matter, or took an irrelevant factor into account, in deciding whether to use the s 128 power as opposed to s 116, for example.
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(b) if he or she is in Australia when he or she is given notice of the cancellation:

(i) if he or she wishes the cancellation to be reconsidered while he or she is in Australia – 5 minutes; or

(ii) if he or she wishes the cancellation to be reconsidered while he or she is outside Australia, and he or she departs Australia as soon as possible after being given a notice of the cancellation – 28 days;

beginning when the former holder of the visa is given a notice of the cancellation.

Paragraph 2.46(b)(i), which sees the former visa holder given a grand total of five minutes to make a case for revocation of their cancellation, applies as follows. Assume that a visa holder has their visa cancelled under s 128 while outside Australia. They then attempt to return to Australia prior to receiving this notice. This means that the first that the former holder will hear of the cancellation is when they are refused immigration clearance on the basis that they do not hold a visa that is in effect. If the former holder wishes to make a case for revocation while remaining in Australia, they have only five minutes to do so. The obvious intention of this provision is to encourage (or even force) the former holder to depart Australia and seek to have the cancellation revoked from overseas.21

Section 140

Section 140 deals with ‘consequential cancellation’ – that is, cancellation of a visa held by person B where person A’s visa has already been cancelled, and person B relied on person A in some way for the grant of their visa. Section 140 provides as follows:

(1) If a person’s visa is cancelled under ss 109 (incorrect information), 116 (general power to cancel), 128 (when holder outside Australia), 133A (Minister’s personal powers to cancel visas on section 109 grounds), 133C (Minister’s personal powers to cancel visas on section 116 grounds) or 137J (student visas), a visa held by another person because of being a member of the family unit of the person is also cancelled.

21 This scenario is much less likely today given that the Department’s international computer network would prevent most people getting on a plane to Australia if their visa had been cancelled.
(2) If:
(a) A person’s visa is cancelled under ss 109 (incorrect information), 116 (general power to cancel), 128 (when holder outside Australia), 133A (Minister’s personal powers to cancel visas on section 109 grounds), 133C (Minister’s personal powers to cancel visas on section 116 grounds) or 137J (student visas); and
(b) another person to whom subsection (1) does not apply holds a visa only because the person whose visa is cancelled held a visa;

the Minister may, without notice to the other person, cancel the other person’s visa.

(3) If:
(a) a person’s visa (the cancelled visa) is cancelled under any provision of this Act; and
(b) person is a parent of another person; and
(c) the other person holds a particular visa (the other visa), that was granted under s 78 (child born in Australia) because the parent held the cancelled visa;
(d) the other visa is also cancelled.

(4) If:
(a) a visa is cancelled under subsection (1), (2) or (3) because another visa is cancelled; and
(b) the cancellation of the other visa is revoked under s 131, 133F, 137L or 137N;

the cancellation under subsection (1), (2) or (3) is revoked.

There are a number of significant provisions of s 140:

• Subsections 140(1) and (2) apply only to cancellations under the specifically mentioned provisions and not (for example) ss 134, 134Q or 501.
• Cancellation under s 140(1) is automatic. A person falls within s 140(1) if they are a secondary visa holder (a member of the primary visa holder’s family unit), and the primary visa holder’s visa has been cancelled.
• Cancellation under s 140(2) is discretionary, but no prior notice of the cancellation is required. A common situation of a person falling within s 140(2) is if they were granted a partner visa on the basis of being the spouse
or de facto partner of an Australian permanent resident, and that permanent resident’s visa has been cancelled.

- Subsection 140(3) applies only to visas granted to children born in Australia, and is also automatic. Section 78 of the Act provides that a child born in Australia will be taken to hold the same visa as his or her parent(s).

- Subsection 140(4) applies to revocation of cancellations, and is also automatic. In any situation where the primary person successfully seeks revocation of their cancellation, the cancellation of any other persons who were cancelled under ss 140(1)–(3) is also revoked.

It is also worth noting that if a cancellation decision is set aside by a tribunal or a court, the cancellation decision is a legal nullity, the result being that the cancellation is taken never to have occurred. This means that if a primary person successfully seeks review of their cancellation decision, anyone whose visa was cancelled under s 140 as a result of that cancellation will also have their visa restored, as this means that there was no primary cancellation decision on which the s 140 delegate could have based their decision. Further, a person whose visa is cancelled under s 140(2) can make an application for review independent of the primary person under s 338(3) of the Act.

Specialised cancellation powers

There are a number of cancellation powers in the Act that apply only to certain kinds of visas.

Cancellation of business visas – Section 134

Section 134 of the Act applies specifically to ‘business visas’, a term that is defined in s 5(1) of the Act and Regulation 2.50 of the Regulations. Subsection 134(1) provides that the Minister may cancel a business visa if the visa holder has not obtained a substantial ownership interest in an Australian business, is not contributing to the daily management of the business, or does not intend to continue carry out these tasks. Subsection 134(2) then specifies that the Minister must not cancel a business visa if the applicant has made a ‘genuine effort’ to carry out these roles and responsibilities.

Similarly to Regulation 2.41, s 134(3) sets out a number of factors that the Minister must take into account in deciding whether a person has made a ‘genuine effort’ to meet the requirements of a business visa. These include such matters as business plans drawn up by the visa holder, capital transferred into

22 See for example Ruddock v Taylor (2005) 221 ALR 32.
23 See for example Re Liu, Yi Meng (2004) MRTA 1393. In fact such a person must make an independent application, since Regulation 4.12 does not allow combined applications for review of cancellation decisions.
Australia, whether there are any Australian partners in the business, and so on. Subsection 134(4) is a consequential cancellation provision similar to s 140(1) of the Act (although s 134(4) is mandatory and not automatic), but s 134(5) prohibits consequential cancellation if such cancellation would result in ‘extreme hardship’ to such a person. Further, under s 134(9), a business visa can only be cancelled under s 134 if a notice of intention to cancel was given to the holder under s 135 within three years of the date of an onshore grant, or within three years of the visa holder’s entry to Australia in the case of an offshore grant.

Section 135 requires the Minister to notify the visa holder of intended cancellation by means of a NOICC, and must consider any representations made by the visa holder. Uniquely, under s 135(4), if the time specified in the notice ends more than three years after the date of onshore grant or the visa holder’s entry to Australia, the Minister has only 90 days after receiving representations, being informed that no representations will be made, or the time limit to respond passing, to make a cancellation decision – if he or she fails to do so, the visa must not be cancelled. It is significant that cancellation under s 134 (and s 137Q, see below) is not covered by an ‘exhaustive statement of the natural justice hearing rule’ and therefore the common law rules of natural justice apply.

Cancellation of regional sponsored employment visas – Section 137Q

Section 137Q of the Act deals specifically with ‘Regional Sponsored Employment Visas’, which are defined in s 137Q(3) and in Regulation 2.50AA. Subsections 137Q(1) and (2) provide as follows:

Employment does not commence

(1) The Minister may cancel a regional sponsored employment visa held by a person if:

   (a) the Minister is satisfied that the person has not commenced the employment referred to in the relevant employer nomination within the period prescribed by the regulations; and

   (b) the person does not satisfy the Minister that he or she has made a genuine effort to commence that employment within that period.

Employment terminates within 2 years

(2) The Minister may cancel a regional sponsored employment visa held by a person if:

   (a) the Minister is satisfied that:
the person commenced the employment referred to in the relevant employer nomination (whether or not within the period prescribed by the regulations); and

(ii) the employment terminated within the period (the **required employment period**) of 2 years starting on the day the person commenced that employment; and

(b) person does not satisfy the Minister that he or she has made a genuine effort to be engaged in that employment for the required employment period.

Again, it is a key issue whether the person made a ‘genuine effort’ to commence or remain in the relevant regional employment. There is no equivalent of s 134(3) in s 137Q, and this phrase appears not to have been the subject of litigation. The MRT has found, however, that dismissal because of a complaint about unfair working conditions constitutes a ‘genuine effort’ to remain in employment.\(^{24}\) Like an s 134 cancellation, s 137Q cancellation requires a NOICC, provision of time to respond to the NOICC, and notification of the final decision by the Minister (ss 137R and 137S of the Act). There is also a provision for automatic cancellation under s 137T for any visa held by another person because of being a member of the family unit of the person whose visa has been cancelled under s 137Q.

**Notification of cancellation decisions**

Notification of cancellation decisions (whether a NOICC, a notice of cancellation or a response to a request for revocation) is governed not by ss 494A–494D of the Act, but by Regulation 2.55. Regulation 2.55 is structured in a similar manner to those sections, by specifying means of notification and then the time at which a person is taken to have received notice of the document, but with one important difference. Subregulation 2.55(3), when referring to the visa holder’s address, refers to the **last known address** held by the Department, not the last address specifically provided by the visa holder. That is, if a non-citizen provides address A to the Department as an address for service, but the Department becomes aware (by whatever means) that he or she actually resides at address B, the Department must send a refusal notification to address A, but must send a cancellation notice to address B. Other than that, the notification provisions of Regulation 2.55 are very similar to those in ss 494A–494D.

It may be that there is some residual uncertainty about uncertainty as to whether the Minister can choose to use s 494B even in a cancellation case, but there is authority in the Federal Magistrates Court supporting the view that Regulation 2.55

\(^{24}\) *Re 1405726 (2014) MRTA 1915.*

is the appropriate provision. PAM – Notification Requirements paragraph 9.9 also advises that Regulation 2.55 should be used ‘in order for the department to benefit from the deemed receipt provisions’.

Section 501

Section 501 of the Act is entitled ‘Refusal or Cancellation of Visa on Character Grounds’, and as the title suggests, includes both a refusal ground and a cancellation power. It is now almost the sole ground for removing non-citizens with criminal convictions or similar character problems from Australia, and the criminal deportation provisions in ss 200 and 201 of the Act are now very rarely used (and will therefore not be discussed in this chapter). The main reason for this is that s 201 of the Act applies only to permanent residents with less than ten years residence in Australia (not including time spent in prison), but s 501 can apply to any non-citizen.

Specific powers

Powers requiring provision of natural justice

The primary refusal power can be found in s 501(1). It is headed ‘Decision of Minister or Delegate – Natural Justice Applies’ and provides that ‘[t]he Minister may refuse to grant a visa to a person if the person does not satisfy the Minister that the person passes the character test’. Two features are immediately apparent:

• Refusal under s 501(1) requires some sort of prior notice to the visa holder. While the procedures for serving a s 501 NOICC are set out in policy and not legislation, the Act does prevent refusal under s 501(1) without some kind of warning.
• The person must satisfy the Minister that he or she passes the character test. That is, there is an onus of proof of some kind on the applicant to prove their good character. In most cases, the Department will accept a police clearance as evidence of good character, but as will be seen in the discussion of the meaning of the term ‘character test’, this will not always be the case.

Subsection 501(2) falls under the same heading as s 501(1), and provides as follows:

The Minister may cancel a visa that has been granted to a person if:

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(a) the Minister reasonably suspects that the person does not pass the character test; and

(b) the person does not satisfy the Minister that the person passes the character test.

That is, s 501(2) cancellation cannot proceed unless the Minister (or delegate) has a reasonable suspicion that the person does not pass the character test, and cannot proceed to cancel the visa unless the person fails to satisfy him or her that they do in fact pass the test. Again, this involves some sort of communication with the visa holder in order to give them the opportunity to show that they pass the character test.

Unlike the other cancellation powers in the Act, the procedures to be followed under ss 501(1) and (2) are primarily set out in policy, not the legislation. The common law rules of natural justice therefore apply.26 Sending an s 501(1) notice is covered by ss 494B and 494C, while an s 501(2) NOICC is covered by Regulation 2.55. However, the content of such notices is covered by a dedicated chapter of the Procedures Advice Manual (PAM). The PAM states that the following information should be included in a ss 501(1) or (2) notice:27

- advice as to the alleged activities that brings the person within the scope of the character test. For cases based on the person’s substantial criminal record reference to the source document/s (usually criminal history or other official records of conviction) is sufficient;
- the evidence or information that the department has to support this, and the source of this evidence;
- an invitation to comment on the case against them, and present arguments and evidence that the claimed grounds for not passing the character test do not exist and/or that there are other reasons as to why their visa should not be cancelled or visa refused; and
- the manner in which the person/holder is to respond to the NOICR/NOICC, and how long they have to provide the response.

It is also notable that the Minister may refuse or cancel a visa under ss 501(1) or (2) if the person fails the character test. Once again, refusal or cancellation is discretionary. A refusal or cancellation under s 501(1) is reviewable by the Administrative Appeals Tribunal if it is made by a delegate, but not if it is made by the Minister personally – s 500(1)(b).

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Refusal or cancellation without prior notice

Subsection 501(3), on the other hand, permits the Minister, acting personally, to cancel or refuse a visa for failure to meet the character test without prior notice to the non-citizen. Subsection 501(5) clearly provides that the ‘rules of natural justice’ and Subdivision AB of Division 3 Part 2 of the Act do not apply to an s 501(3) decision. Paragraph 501(3)(d) provides that the Minister may only act in this manner if ‘the Minister is satisfied that the refusal or cancellation is in the national interest’, but courts have been historically reluctant to attempt to define this phrase.\(^{28}\) Even *Minister for Immigration and Citizenship v Haneef,\(^{29}\)* a case in which the Full Federal Court was scathingly critical of a s 501(3) cancellation, the court did not take issue with the Minister’s construction of what was in the ‘national interests’ of Australia.

A decision made by the Minister under s 501(3) is not reviewable by the Administrative Appeals Tribunal (AAT), but may be revoked, in accordance with s 501C of the Act. Subsection 501C(3) requires the Minister, after making the decision, to inform the non-citizen of the reasons for the decision, and give him or her the opportunity to argue for revocation of the decision. The decision may only be revoked if ‘the person satisfies the Minister that the person passes the character test’ in accordance with s 501(4)(b) – that is, the Minister has no discretion to revoke the cancellation if the person fails the character test.

Sections 501A–501CA

Section 501A also provides the Minister with a personal power, this time to set aside a positive finding by a Departmental delegate or the AAT and instead refuse or cancel a visa under s 501. Curiously, the Minister can seemingly decide whether or not to provide natural justice to a person in this position – a decision made under s 501A(2) requires the provision of natural justice, and a decision under s 501(3) does not, and there is no other clear delineation between them. Again, the Minister can only make such a determination in the national interest – ss 501A(2)(e) and 501A(3)(d). An s 501A decision may also be revoked under s 501C.

Subsection 501(3A) provides as follows:

The Minister must cancel a visa that has been granted to a person if:

(d) the Minister is satisfied that the person does not pass the character test because of the operation of:


\(^{29}\) (2007) FCAFC 203.
(i) (6)(a) (substantial criminal record), on the basis of paragraph (7) (a), (b) or (c); or

(ii) paragraph (6)(e) (sexually based offences involving a child); and

(e) the person is serving a sentence of imprisonment, on a full-time basis in a custodial institution, for an offence against a law of the Commonwealth, a State or a Territory.

Section 501CA requires the Minister (not necessarily acting personally) to notify a person whose visa is cancelled under s 501(3A) of that cancellation and permit them to make submissions as to why the cancellation should be revoked. The revocation power is found in s 501CA(4). However, s 501BA permits the Minister, now acting personally, to set aside a revocation and substitute a decision not to revoke the cancellation.

Sections 501E and 501F

Section 501E of the Act is a provision similar to s 48, in that a person who has a visa cancelled or refused may not make another valid application onshore, other than a Protection Visa or a visa prescribed under s 501E(2)(b). (At present, no visas are prescribed under this paragraph.) Section 501F provides that if a person’s visa is refused or cancelled under s 501, then any undecided visa applications are refused and any other visa held by the non-citizen is also cancelled.

The character test

The term ‘character test’ is defined in s 501(6). This is a lengthy provision, but is worth setting out in full.

For the purposes of this section, a person does not pass the character test if:

(a) the person has a substantial criminal record (as defined by subsection (7)); or

(aa) the person has been convicted of an offence that was committed:

(i) while the person was in immigration detention; or

(ii) during an escape by the person from immigration detention; or

(iii) after the person escaped from immigration detention but before the person was taken into immigration detention again; or

(ab) the person has been convicted of an offence against section 197A; or

(b) the Minister reasonably suspects:
(i) that the person has been or is a member of a group or organisation, or has had or has an association with a group, organisation or person; and

(ii) that the group, organisation or person has been or is involved in criminal conduct; or

(ba) the Minister reasonably suspects that the person has been or is involved in conduct constituting one or more of the following:

(i) an offence under one or more of sections 233A to 234A (people smuggling);

(ii) an offence of trafficking in persons;

(iii) the crime of genocide, a crime against humanity, a war crime, a crime involving torture or slavery or a crime that is otherwise of serious international concern;

whether or not the person, or another person, has been convicted of an offence constituted by the conduct; or

(c) having regard to either or both of the following:

(i) the person’s past and present criminal conduct;

(ii) the person’s past and present general conduct;

the person is not of good character; or

(d) in the event the person were allowed to enter or to remain in Australia, there is a risk that the person would:

(i) engage in criminal conduct in Australia; or

(ii) harass, molest, intimidate or stalk another person in Australia; or

(iii) vilify a segment of the Australian community; or

(iv) incite discord in the Australian community or in a segment of that community; or

(v) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way; or

(e) a court in Australia or a foreign country has:
(i) convicted the person of one or more sexually based offences involving a child; or

(ii) found the person guilty of such an offence, or found a charge against the person proved for such an offence, even if the person was discharged without a conviction; or

(f) the person has, in Australia or a foreign country, been charged with or indicted for one or more of the following:

   (i) the crime of genocide;

   (ii) a crime against humanity;

   (iii) a war crime;

   (iv) a crime involving torture or slavery;

   (v) a crime that is otherwise of serious international concern; or

(g) person has been assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security (within the meaning of section 4 of the Australian Security Intelligence Organisation Act 1979); or

(h) an Interpol notice in relation to the person, from which it is reasonable to infer that the person would present a risk to the Australian community or a segment of that community, is in force.

Otherwise, the person passes the character test.

The term ‘substantial criminal record’ is defined in s 501(7) as follows:

For the purposes of the character test, a person has a substantial criminal record if:

(a) the person has been sentenced to death; or

(b) the person has been sentenced to imprisonment for life; or

(c) the person has been sentenced to a term of imprisonment of 12 months or more; or

(d) the person has been sentenced to 2 or more terms of imprisonment, where the total of those terms is 12 months or more; or

(e) the person has been acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result the person has been detained in a facility or institution; or
(f) the person has:

(i) been found by a court to not be fit to plead, in relation to an offence; and

(ii) the court has nonetheless found that on the evidence available the person committed the offence; and

(iii) as a result, the person has been detained in a facility or institution.

Significant guidance on the interpretation of ss 501(6) and (7) is given in Direction 65, a Ministerial direction made under s 499 of the Act. Direction 65 will be considered in more detail in the section on Departmental policy.

Part 2 – The role of policy in departmental decision-making

Like most administrative decision makers, immigration officers rely on policy to support their understanding of legislation. In practice, many junior Departmental decision makers rely exclusively on the PAMs and other policy instructions to make their decision. Many decision makers in high-volume and low-complexity areas are, or at least were prior to 2007, simply unaware that the Act and Regulations existed, and made their decisions solely on the basis of policy instructions.

It is not an error of law for administrative decision makers to consider and have regard to formally promulgated policy. However, if policy conflicts with legislation, it is of no effect. A Canadian case illustrates this principle well. In Ramoutar v Canada (Minister of Employment and Immigration) decision makers in Citizenship and Immigration Canada (CIC) were faced with a policy document that required officers assessing applications for spouse visas to have evidence ‘beyond reasonable doubt’ that the relationship was genuine before being able to grant a spouse visa. As the Immigration Act contained no such requirement, CIC could not lawfully apply this policy, and the decision in question was therefore set aside by Federal Court of Canada. Even when policy is consistent with legislation, it must not be applied ‘inflexibly’ – instead, decision makers must always be aware of the possibility of an exceptional case where the policy should not be applied. As noted above, junior Departmental officers fall into this trap very frequently.

30 See as one example Green v Daniels (1977) 13 ALR 1.
32 RSC 1985, c 1–2.
33 British Oxygen Co Ltd v Minister of Technology (1971) AC 610; Yong v Minister for Immigration and Multicultural Affairs (2000) FCA 1391.
The Department of Immigration utilises two main kinds of policy documents – directions under s 499 of the Act, and the PAMs. These will now be considered in turn.

Section 499 directions

An s 499 direction is a sort of ‘uber-policy’ direction that takes precedence over all other policy, but not, of course, legislation. Subsection 499(1) provides that ‘[t]he Minister may give written directions to a person or body having functions or powers under this Act if the directions are about: (a) the performance of those functions; or (b) the exercise of those powers’ and s 499(2A) provides that ‘[a] person or body must comply with a direction under subsection (1)’. The reference to ‘a body’ is significant, as this has the effect that a review tribunal must also follow any and all relevant s 499 directions.34

Whether the Minister, acting personally, is himself or herself bound by an s 499 direction is an interesting question. The Minister would appear to be ‘a person’ exercising powers under the Act and Regulations. However, the Federal Court has found, in Misiura v Minister for Immigration and Multicultural Affairs35 and WASB v Minister for Immigration and Citizenship36 that the Minister is not bound by an s 499 direction, although departure from a relevant direction without prior notification to an applicant could amount to a failure to afford procedural fairness.37

Direction 65

The best known, and by some distance the most litigated (when one includes its predecessors), s 499 direction is Direction 65, which is intended to provide guidance on the exercise of powers under ss 501(1) and (2) of the Act. Direction 65, which came into effect on 22 December 2014, is the latest in a series of s 499 directions concerned with the character provisions of the Act, and replaced Direction 55, which had come into effect on 25 July 2012.

Direction 65 itself states that the direction is divided into four parts (inclusive of a Preamble) and two annexes.

Direction 65 provides guidance on both the meaning of the character test, and the factors that must be taken into account in determining whether the

34 See for example Williams v Minister for Immigration and Border Protection (2014) FCA 674 at paragraph 93.
35 (2001) FCA 133.
37 Ibid at paragraph 48.
discretion to refuse or cancel a visa should be exercised. For example, Part A identifies the following as the ‘primary considerations’ in deciding whether to cancel the visa of a non-citizen who fails the character test:

- Protection of the Australian community from criminal or other serious conduct.
- The best interests of minor children in Australia.
- The ‘expectations of the Australian community’.

The first point requires the decision maker to consider the seriousness of the person’s conduct and their risk of recidivism, while the third is concerned with whether the nature of the offence itself would lead Australians to believe that the person should not be permitted to form part of the Australian community. The issue of the best interests of any children requires the decision maker to consider matters such as:

(a) The nature and duration of the relationship between the child and the person.
(b) The extent to which the person is likely to play a positive parental role in the future.
(c) The impact of a person’s prior and future conduct on the child.
(d) The likely effect separation from the person would have on the child.
(e) Other persons who fill the parental role in relation to the child.
(f) Any known views of the child.
(g) Evidence of child abuse or neglect including evidence of physical or emotional trauma arising from the person’s conduct.

The ‘best interests of the child’ criterion is, of course, taken directly from the decision of the High Court in Minister for Immigration and Ethnic Affairs v Teoh,38 which was in turn based on Australia’s ratification of the Convention on the Rights of the Child.

Part A then goes on to identify the following ‘other considerations’ that decision makers must take into account:

- International non-refoulement obligations – examines Australia’s obligations under international instruments such as the Convention on the Status of Refugees and the Convention Against Torture, and requires the decision

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maker to consider whether returning the non-citizen to their home country could breach these obligations.

- Strength, nature and duration of the person’s ties to Australia – this factor requires the decision maker to balance the non-citizen’s ties to Australia with the gravity of their conduct, and in some way determine whether the person is now ‘Australia’s problem’.  

- Impact on Australian business interests – only relevant where ‘visa cancellation would significantly compromise the delivery of a major project or delivery of an important service in Australia’.

- Impact on victims in Australia.

- Extent of impediments if removed – this factor is focused on the impediments that a person may face in their ‘home’ country, such as their age and health, language or cultural barriers, and social or medical support.

Direction 65 also gives guidance on the interpretation of the character test itself, and is most valuable in determining the meaning of possibly subjective provisions of s 501(6) such as those found in s 501(6)(d)(iii), (iv) and (v).

Paragraph (1)(d) of Direction 65 is clearly aimed at individuals such as the Holocaust-denying ‘historian’ David Irving, who was famously refused a visa on multiple occasions in the early 1990s. The note under this paragraph is very likely aimed at radical religious (mainly Muslim) clerics.

Direction 65 is deliberately broad in scope and is intended to catch a wide range of people with controversial or extremist views, although s 501(6)(d)(iii)–(v) of the Act have appear to have been applied infrequently.

Part C of Direction 65 did not appear in earlier versions, because it relates to new s 501(3A) of the Act, which requires the Minister to cancel a visa where the non-citizen has a ‘substantial criminal record’ and is currently imprisoned in Australia. Under s 501CA, such a person may request the Minister to revoke

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39 See for example Nystrom v Minister for Immigration and Multicultural and Indigenous Affairs (2005) FCAFC 121 at paragraph 29.


41 Exact statistics on grounds of s 501 refusals and cancellations are hard to come by. The Departmental 2012–13 Annual Report states as follows at 165:

In 2012–13, the minister or his delegate made 1092 character decisions under section 501. These decisions comprised 65 refusals (20 onshore, 45 offshore), 139 cancellations and 888 cases either not refused or not cancelled. For this latter group, standard practice is for the department to issue formal warnings.

the cancellation. The factors that must be considered in deciding a revocation request are substantially identical to those that must be considered in relation to ss 501(1) and (2).

**Other directions**

It is notable that some s 499 directions are expressly intended to apply to review tribunals. For example, Direction 57, contains a section which relates to order of processing of protection visa applications, and applications for review of Departmental decisions, provides as follows.

The s 499 directions that are in effect as of January 2015 are as follows:

- General Direction No 9 (signed 21/12/1998) – Criminal Deportation
- Direction No 47 of 2010 (signed 04/07/2010) – Required health assessment
- Direction No 49 (signed 05/01/2011) – Order for considering and disposing of visa applications under section 91 of the Migration Act
- Direction No 51 (signed 02/10/2012) – Strip search of immigration detainees
- Direction No 52 (signed 14/10/2011) – Priority processing for standard business sponsors with accredited status
- Direction No 53 (signed 03/11/2011) – Assessing the genuine temporary entrant criterion for student visa applications
- Direction No 54 (signed 25/06/2012) – Order of consideration – Certain skilled migration visas
- Direction No 56 (signed 21/06/2013) – Consideration of Protection Visa applications
- Direction No 57 (signed 25/06/2013) – Order of consideration of Protection Visas
- Direction No 58 (signed 1 August 2013) – Exercise of powers by Fair Work Inspectors
- Direction No 59 – Powers concerning the entry of persons to Immigration Detention Centres
- Direction No 60 – Screening procedures in relation to immigration detainees
- Direction No 61 – Guidelines for considering cancellation of student visas for non-compliance with student visa condition 8202 (or for the review of such cancellation decisions) and for considering revocation of automatic

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42 It is interesting that this direction is still in effect, as criminal deportation is now a very rarely used power.
cancellation of student visas\textsuperscript{43} (or for the review of decisions not to revoke such cancellations)

- Direction No 62 – Order for considering and disposing of Family Stream visa applications
- Direction No 63 – Bridging E visas – Cancellation under section 116(1)(g) – Regulation 2.43(1)(p) or (q)
- Direction No 64 (signed 9/12/2014) – Priority for considering and disposing of applications for specified visas made by persons who reside, or have resided, in an Ebola Virus Disease affected country
- Direction No 65 (signed 22/12/2012) – Visa refusal and cancellation under s 501

It is notable that many s 499 directions deal with the exercise of the few remaining discretionary powers or subjective considerations, such as the ‘genuineness’ of a student visa applicant (no. 53), cancellation and deportation powers (nos 9, 55, 61 and 63), exercise of inspection or search powers (nos 51, 58, 59, 60), or the order in which visa applications are to be processed (nos 49, 54 and 57).

The Procedures Advice Manual

The second kind of policy document regularly referred to by Departmental officers is the Procedures Advice Manual (PAM). The PAM is a comprehensive document providing advice on the exercise many provisions of the Act and Regulations, and is far too extensive to be the subject of detailed examination here. The PAMs are subordinate to legislation and s 499 directions, but are (with the possible exception of Direction 65) probably the most frequently consulted source of policy.

Like s 499 directions, the PAMs will be most useful to decision makers, and the most controversial, when dealing with the exercise of subjective terms or discretionary powers. To that end, this chapter will consider a particular example of PAM policy – guidance on the interpretation of the term ‘beyond the control of the applicant’ in Condition 8503, as set out in Schedule 8 of the Regulations.

Condition 8503

Section 41 of the Act is entitled ‘Conditions on Visas’. Subsection 41(1) states that the Regulations may provide that visas are subject to specified conditions. Paragraph 41(2)(a) of the Act then provides as follows:

\textsuperscript{43} Note that automatic cancellation of student visas no longer occurs, as s 20 of the Education Services for Overseas Students Act 2000 was repealed in 2013.
(2) Without limiting subsection (1), the regulations may provide that a visa, or visas of a specified class, are subject to:

(a) a condition that, despite anything else in this Act, the holder of the visa will not, after entering Australia, be entitled to be granted a substantive visa (other than a protection visa, or a temporary visa of a specified kind) while he or she remains in Australia.

Condition 8503, set out in Schedule 8 of the Regulations, is an example of a condition described in s 41(2)(a). It provides that ‘[t]he holder will not, after entering Australia, be entitled to be granted a substantive visa, other than a protection visa, while the holder remains in Australia’.44

Section 46 of the Act is entitled ‘Valid Visa Application’. Subsection 46(1A) provides as follows:

Subject to subsection (2), an application for a visa is invalid if:

(a) the applicant is in the migration zone; and

(b) since last entering Australia, the applicant has held a visa subject to a condition described in paragraph 41(2)(a); and

(c) Minister has not waived that condition under subsection 41(2A); and

(d) the application is for a visa of a kind that, under that condition, the applicant is not or was not entitled to be granted.

The effect of s 46(1A) is that a non-citizen who holds a visa that is subject to a s 46(2)(a) condition may not make a valid application for a visa onshore, unless the condition is waived by the Minister. The waiver provision is then set out in s 41(2A) of the Act:45

The Minister may, in prescribed circumstances, by writing, waive a condition of a kind described in paragraph (2)(a) to which a particular visa is subject under regulations made for the purposes of that paragraph or under subsection (3).

The ‘prescribed circumstances’ for the purposes of s 41(2A) are set out in subregulation 2.05(4) of the Regulations, which relevantly provides as follows:

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44 In Sevim v Minister for Immigration & Multicultural Affairs (2001) FCA 1597 the applicant made the argument that Condition 8503 is not the same condition as the condition created by s 41(2)(a), an argument comprehensively rejected by Gray J at paragraph 33.

45 Subsection 41(3) is a provision that permits the Minister to impose conditions, by regulation, on visas, other than the conditions specifically set out in s 46(2).
For subsection 41(2A) of the Act, the circumstances in which the Minister may waive a condition of a kind described in paragraph 41(2)(a) of the Act are that:

(a) since the person was granted the visa that was subject to the condition, compelling and compassionate circumstances have developed:
   (i) over which the person had no control; and
   (ii) that resulted in a major change to the person’s circumstances.

PAM commentary

Section 19 of the PAM chapter entitled ‘Reg 2.05 – Conditions applicable to visas – Waiver of ‘no further application’ conditions’ sets out the following examples on situations in which an individual’s circumstances will be regarded as ‘compelling and compassionate’:

1. Medical unfitness to travel.
2. Death or serious illness of a close family member.
4. War or natural disaster in the visa holder’s home country.
5. Closure of an educational institution or the inability of that institution to continue to provide a course (in the case of a student visa holder).
6. The applicant has Australian government support and certain other factors apply.

Under ‘significant hardship’, the PAM relevantly states as follows:

It is not intended that the following would in themselves constitute such a change in circumstances:

• marriage to an Australian resident
• failure to complete a course
• pregnancy.

Section 20 of the PAM deals with ‘circumstances not beyond the applicant’s control’. The only such situations listed are pregnancy and failure to complete a course (for student visa holders). Pregnancy as an issue is dealt with briefly, as follows:
Pregnancy in itself would not be grounds for a waiver. If the visa holder was pregnant at the time their visa was granted they do not satisfy the ‘changed circumstances’ requirement for a waiver and other visa options should be explored. Women who become pregnant while in Australia would generally need to have evidence that they are unable to leave Australia – see section 19.2 Unfitness to travel.

Is the PAM inconsistent with the Act and Regulations?

There has to be a reasonable argument that the blanket prohibition on decision makers interpreting pregnancy as a situation beyond the control of the expectant mother is *ultra vires* the legislation. This is for the following reasons:\(^{46}\)

- The MRT has at times found that pregnancy is a situation beyond the control of the woman concerned, although not in relation to a Condition 8503 waiver.\(^{47}\)
- The statement that pregnancy is not a situation beyond the control of the mother *after* it occurs implicitly assumes the availability of abortion. However, except for the Australian Capital Territory, there is no such thing as ‘abortion on demand’ in Australia.
- Even where abortion *is* lawful, such an action may be contrary to the religion or conscience of the expectant mother.

Migration series instructions

There was, until 2007, a third source of policy, this being the Migration Series Instructions (MSIs). The MSIs were generally based around a particular issue rather than a particular piece of legislation. For example, one of the better known MSIs was MSI 371, which came into effect on 2 December 2002.\(^{48}\)

MSI 371 was concerned alternative forms of immigration detention, such as hospitals, police stations and residential housing. This MSI was notable for a number of matters:

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\(^{47}\) *Re Young Ok Kim* [2001] MRTA 4412, 26 September 2001; *Re Lu Si Ning* (2003) MRTA 0223, 17 January 2003 (both relating to s 116(3) of the Act and paragraph 2.43(2)(b) of the Regulations). Courts have generally been less sympathetic to this argument – see *Auva’a, in the matter of an application for a Writ of Prohibition and Certiorari and Declaratory and Injunctive Relief against Vanstone* (2003) FCA 1506 and *Emeish v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) FMCA 1308.

\(^{48}\) Australian Human Rights Commission, *‘BZ and AD v Commonwealth of Australia (Department of Immigration and Citizenship)’ – Report into breaches of privacy, arbitrary detention, the right for the child to be treated with humanity and with respect for the inherent dignity of the human person and the failure of the Commonwealth to treat the best interests of the child as a primary consideration’*, (2012) AusHRC 55 at 51.
• It required women and children to be removed from Immigration Detention Centres (IDCs) and relocated to residential housing as soon as practicable.
• It was drafted in the space of a month in response to Parliamentary pressure on the Minister, including from the government’s backbench.

Most of the MSIs were absorbed into the PAMs from 2007 onwards. Interestingly, no trace of MSI 371 appears to remain. There also appears to be no trace of the MSI online.

The purpose of policy and fettering of administrative decision-making

It can be seen that the purpose of departmental policy is to prescribe, or perhaps impose, a particular way of interpreting a subjective consideration or discretionary power, in order to provide some uniformity in the approach of decision makers. Section 499 directions have some kind of legislative backing, and the Act itself requires that decision makers have regard to relevant s 499 directions when making their decisions. As long as a s 499 direction does not conflict with the legislation, there is no dispute that decision makers must abide by it.

The PAMs are in a different situation, as there is no legislative authority for their existence. It is obviously not a good thing for the Department or visa applicants if decision makers can simply adopt any idiosyncratic interpretation of the Act and Regulations that they wish. Australian courts and tribunals do not dispute that consistent interpretation and application of legislation by departments and tribunals is desirable.

However, at what point does a policy become a fetter on an administrative decision maker, noting that it is an individual (or a position within a department, which can only be held by an individual) who is the delegated decision maker, not the department itself? Lord Denning noted as follows in *Sagnata Investments Ltd v Norwich Corporation*:

I take it to be perfectly clear now that an administrative body, including a licensing body, which may have to consider numerous applications of a similar kind, is entitled to lay down a general policy which it proposes to follow in coming to its individual decisions, provided always that

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49 The drafters of MSI 371, of which an author of this text was one, were prohibited by the Minister’s office from referring to ‘long’ or ‘lengthy’ periods of detention. Instead, the linguistic atrocity ‘not short periods of detention’ had to be used.
50 See for example *Re Drake and Minister for Immigration and Ethnic Affairs (No 2) (1979)* 2 ALD 634 at 639.
51 (1971) 2 QB 614 at 626.
it is a reasonable policy which it is fair and just to apply. Once laid
down, the administrative body is entitled to apply the policy in the
individual cases which come before it. The only qualification is that the
administrative body must not apply the policy so rigidly as to reject an
applicant without hearing what he has to say. It must not ‘shut its ears to
an application’. The applicant is entitled to put forward reasons urging
that the policy should be changed, or saying that in any case it should
not be applied to him. But, so long as the administrative body is ready
to hear him and consider what he has to say, it is entitled to apply its
general policy to him as to others.

In two similar cases, the Supreme Court of Canada found that an administrative
decision-making body was entitled to hold meetings of its members to discuss
difficult cases and provide guidance, but the key issue is whether there is any
pressure (formally or informally) on the decision maker to decide an application
contrary to his or her own conscience or interpretation of the law.\textsuperscript{52} If the same
principle was applied in Australia, one would imagine that a large number of
Departmental decisions could be struck down (assuming they were the subject
of judicial review in the first place), as from experience the pressure on junior
decision makers to follow policy is immense, and as previously noted many are
actually unaware of the existence of the legislation.

Like many other matters in administrative law, policy-making is about a balance
– consistency but not uniformity. It would be perfectly proper, for example, for
the PAMs to state that pregnancy should not \textit{normally} be considered a matter
beyond the control of an expectant mother, as this formulation would leave the
doors open for consideration of the exceptional case of conscientious or religious
objection to abortion, for example. The Canadian approach appears to be the
desirable one – evidence of pressure to conform to a certain interpretation
of legislation \textit{at all costs} is evidence of fettering, not merely an approach to
achieving the desirable goal of consistency.

\textsuperscript{52} \textit{International Woodworkers of America, Local 2–69 v Consolidated Bathurst Packaging Ltd} (1990) \textit{1 SCR}
282; \textit{Tremblay v Quebec (Commission des Affaires Sociales)} (1992) \textit{1 SCR} 952.
Appendix 1 – The Migration Amendment (Character and General Visa Cancellation) Act 2014

The Migration Amendment (Character and General Visa Cancellation) Act 2014 (‘the MACGVC Act’) was given Royal Assent on 10 December 2014 and came into effect partly on that day and partly the next day.\(^{53}\) The MACGVC Act makes significant amendments to the visa cancellation and character provisions of the Migration Act 1958.

Amendments to the character test

The amendments to the Migration Act made by the MACGVC Act are intended to strengthen the powers to refuse to grant, or to cancel, a visa on character grounds by inserting additional grounds on which a person will not pass the character test. These include:

- That the Minister reasonably suspects that the person has been or is a member of a group or organisation, or has had or has an association with a group, organisation or person that has been or is involved in criminal conduct, whether or not anyone has been convicted of an offence.
- The Minister reasonably suspects that the person has been or is involved in conduct constituting an offence of people-smuggling or an offence of trafficking in persons as described in the Migration Act, or the crime of genocide, a crime against humanity, a war crime, a crime involving torture or slavery or a crime that is otherwise of serious international concern, whether or not any convictions have resulted.
- A court in Australia or a foreign country has convicted the person of one or more sexually based offences involving a child, or found the person guilty of such an offence, or found a charge against the person proved for such an offence without recording a conviction.
- The person has, in Australia or a foreign country, been charged with or indicted for one or more of the crime of genocide, a crime against humanity, a war crime, a crime involving torture or slavery, or a crime that is otherwise of serious international concern.
- The person has been assessed by the Australian Security Intelligence Organisation (ASIO) to be directly or indirectly a risk to security.

• An Interpol notice in relation to the person is in force (from which it is reasonable to infer that the person would present a risk to the Australian community or a segment of that community).

It would appear that many of these grounds had already been covered by s 501. Someone who has been charged with or is suspected of involvement in crimes against humanity, for example, would fall within ss 501(6)(c)(ii) or possibly 501(6)(d)(iv), regardless of whether they have been convicted of any offence. In the fairly unlikely event that a person charged with a sexual offence against a child escapes conviction despite the facts of the case being proved, they could also fall within s 501(6)(c)(ii).

The real change may be to the ‘association’ requirement, which is found in an amended s 501(6)(b). The amended s 501(6)(b) provides as follows:

The Minister reasonably suspects:

(i) that the person has been or is a member of a group or organisation, or has had or has an association with a group, organisation or person; and

(ii) that the group, organisation or person has been or is involved in criminal conduct.

That is, mere membership of certain groups would suffice for the Minister to find that the person is not of good character. In some cases, this may not be a problem – if a person is a member of a criminal gang, for example, they are highly unlikely to be of good character. However, what about membership of organisations such as the Liberation Tigers of Tamil Eelam (LTTE), a group that has humanitarian and paramilitary wings? The Supreme Court of Canada has recently moved away from the view that mere membership of a group can reflect on an applicant’s character, and has instead found that examination of individual circumstances is always required.54 This amendment seems designed to head off such a finding in Australia. Paragraph 41 of Schedule 1 of the Explanatory Memorandum (EM) makes this quite clear by stating that ‘[t]here is no requirement that there be a demonstration of special knowledge of, or participation in, the suspected criminal conduct by the visa applicant or visa holder’.

Other character-related amendments

• Providing that in the event that a person were allowed to enter or to remain in Australia, there is a risk (as opposed to a significant risk) that the person

would engage in any of the conduct referred to in subparagraphs 501(6)(d)(i)–(v) of the Migration Act;

○ This is a potentially problematic amendment. What is a ‘significant risk’? Paragraph 46 of Schedule 1 of the EM states that the intention of this amendment is ‘that the level of risk required is more than a minimal or trivial likelihood of risk, without requiring the decision maker to prove that it amounts to a significant risk’, but the Act simply refers to a ‘risk’, which could be interpreted as ‘more than zero risk’. Such an interpretation could be used to exclude nearly anyone.

• Providing that a person has a substantial criminal record (and so does not pass the character test) if the person has been sentenced to two or more terms of imprisonment where the total of those terms is 12 months (rather than two years or more, as is currently the case).

• Providing that a person has a substantial criminal record (and so does not pass the character test) if a court has found the person unfit to plead in relation to an offence but the court has found that the person committed the offence, and as a result the person has been detained in facility or institution. This amendment seems to be already covered by the definition of ‘substantial criminal record’ in s 501(7)(e) of the Act. However, paragraph 67 of Schedule 1 of the EM states that ‘[s] 501(7)(e) has been found to be inadequate as it does not capture a person who has received, for example, an indicative or non-punitive order of imprisonment or detention, and consequently has not been ‘acquitted’ of the offence’.

• Clarifying that if a person has been sentenced to two or more terms of imprisonment to be served concurrently (whether in whole or in part), the whole of each term is to be counted in working out the total of the terms.

• Clarifying that for the purposes of the character test, a sentence or a conviction imposed on a person is only to be disregarded if both the person has been pardoned in relation to the conviction concerned, and the effect of that pardon is that the person is taken never to have been convicted of the offence.

This is an odd amendment, as a pardon rarely has the effect that the person has never been convicted. This was an important point in the Lorenzo Ervin litigation in 1997, when a US citizen who had received an executive pardon after serving 20 years of a life sentence for hijacking was nevertheless regarded as having a substantial criminal record.55

55 Re Minister for Immigration and Multicultural Affairs Ex parte Ervin (1997) HCATrans 213 (10 July 1997) and HCATrans 214 (11 July 1997). Ervin ultimately did not go to trial, as the Minister withdrew the cancellation of his visa.
• Inserting a new mandatory ground for the cancellation without notice of a visa under s 501 of the Migration Act that will apply where:
  ○ the person is serving a full-time sentence of imprisonment for an offence against the law of the Commonwealth, a State or a Territory; and
  ○ the Minister is satisfied that the person has a substantial criminal record.

And clarifying that a decision to cancel a visa under this new mandatory ground for cancellation is not a decision that is reviewable by the Administrative Appeals Tribunal.

• Providing that where this new power to cancel a visa is exercised, the Minister, acting personally, or a delegate of the Minister may revoke the cancellation if satisfied that the person passes the character test or there is another reason why the cancellation should be revoked (new s 501CA);

This provision is similar to the cancellation without notice and revocation provisions that currently exist in ss 501(3)–(5) and 501C. A mandatory character cancellation provision is uncommon in Australian law, and mandatory character cancellation without prior notice is unprecedented. Anyone serving a sentence of 12 months more must have their visa cancelled, under new s 501(3A), and will not receive prior notice of this cancellation. While many people in this situation will be serving time for very serious offences, it is not hard to envisage situations where mandatory cancellation is undesirable, whether because there are some kind of mitigating circumstances in relation to their imprisonment, or because they are Australian in all but name (a Nystrom56-type situation).

• Providing that decisions of a delegate of the Minister not to revoke the cancellation of a visa of a non-citizen who is in prison is a decision that is reviewable by the Administrative Appeals Tribunal.

• Providing that where the cancellation of the visa of a person in prison has been revoked by a delegate of the Minister or the AAT, the Minister may, acting personally, set aside that revocation decision and cancel the visa if satisfied that the person does not pass the character test and the cancellation of the visa is in the national interest.

This power of the Minister is similar to the powers that currently exist in s 501A. One wonders what the point of giving a delegate or the AAT the power to set aside a refusal to revoke a cancellation is, if the Minister can just turn around and revoke that revocation.

56 Supra n38.
• Clarifying that a decision under s 65 of the *Migration Act* to refuse to grant a protection visa on character grounds is a decision that is reviewable by the AAT.

• Inserting a new power for the Minister to require the head of an agency of a State or Territory to disclose to the Minister personal information about a person whose visa may be cancelled under s 501 of the *Migration Act*, subject to certain specified exceptions.

• Clarifying that a person who holds a permanent visa that was granted by the Minister acting personally is not excluded from entering Australia or being in Australia under s 503 of the *Migration Act*.

• Clarifying that the prohibition in s 501E of the *Migration Act* on making an application for a visa (which applies to a person in respect of whom a decision was made under ss 501, 501A or 501B) does not apply to a person who was granted a permanent visa by the Minister acting personally.

**Non-character matters**

Finally, the MACGVC Act makes a number of amendments not relating to character provisions, including the following:

• Clarifying that the Minister may cancel a visa under s 116(1)(a) of the *Migration Act* in circumstances where a decision to grant the visa was based, wholly or partly, on a particular fact or circumstance that did not exist (as well as where the decision was based on a particular fact or circumstance that no longer exists). This has been done by inserting s 116(1)(aa), which applies where a fact or circumstance *never* existed.

This will be another amendment acclaimed by law students. Paragraph 116(1)(a) is currently interpreted as meaning that the Minister may only cancel a visa under this provision if a particular fact *no longer* exists, not that it *never* existed.

• Clarifying that the Minister may cancel a visa under s 116(1)(e) of the *Migration Act* if the presence of its holder in Australia is or may be, or would or might be, a risk to the health, safety or good order of the Australian community or a segment of the Australian community, or the health or safety of an individual or individuals.

• Inserting into s 116 of the *Migration Act* a new ground for cancellation of a visa if the Minister is not satisfied as to the visa holder’s identity.

• Inserting into section 116 of the *Migration Act* a new ground for cancellation of a visa if the Minister is satisfied that incorrect information (that is not covered by Subdivision C of Division 3 of Part 2) was given by or on behalf of the visa holder to the Department and the incorrect information was taken into account in or in connection with making a decision that enabled the
person to make a valid application for a visa or a decision to grant a visa to the person.

Paragraph 20 of Schedule 2 of the EM explains this new s 116(1AB) as follows:

The purpose of new subsection 116(1AB) of the Migration Act is to provide that incorrect information must not be given to the Department at any time, not just where the information is provided as part of a person’s visa application as required in Subdivision C of Division 3 of Part 2 of the Migration Act. For example, the new cancellation ground would apply where incorrect information is given which informs the grant of a visa which does not require an application to be made or which is granted through ministerial intervention, or incorrect information given during an administrative process in relation to the Migration Act for the purpose of responding to Australia’s international obligations to the person under a relevant International Instrument.

Clarifying that s 117(2) of the Migration Act (which prevents the Minister from cancelling a permanent visa where the visa holder is in the migration zone and was immigration cleared on last entering Australia) does not apply to the new grounds for cancellation of a visa in s 116 set out above; This amendment will not be popular with law students, or Departmental decision makers. Subsection 117(2) was originally quite clear, that s 116 cannot be used to cancel a permanent visa onshore. It will now become a very complex piece of legislation.

Inserting a new Subdivision into Division 3 of Part 2 of the Migration Act that contains new personal powers of the Minister to cancel visas on the grounds in ss 109 and 116 of the Migration Act where a decision was made not to cancel the visa on those grounds and the Minister is satisfied that those grounds exist and that it would be in the public interest to cancel the visa (new ss 133A and 133C of new Subdivision FA).

This is astonishing. Whether one is in favour of provisions like ss 501A or not, there is at least some objective reason for them. When one looks at AAT decisions like Le Geng Jia and Minister of Immigration and Multicultural Affairs,57 in which the AAT found that a convicted rapist was a person of good character by blaming the victim for her rape, one can come to the conclusion that ‘something had to be done’ about the AAT’s interpretation of the character provisions of the Act. Further, people who are subject to s 501 cancellation are frequently a ‘threat’ of some kind to the Australian community. However, there is simply no evidence that provisions like the new ss 133A and 133C are necessary. The Minister even has the choice as to

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57 (1996) AAT 236.
whether the non-citizen should receive prior notification of the cancellation – see ss 133A(1) and (3). Even the EM can offer little justification for these provisions, stating as follows in paragraph 42 of Schedule 2:

Ultimately, the community holds the Minister responsible for decisions within his portfolio, even where those decisions have resulted from merits review. Therefore, it is appropriate that the Minister have the power to be the final decision maker in the public interest.

If we are going to accept this argument, then all applications should be decided personally by the Minister and all merits review should be abolished. Who knows, we might be swamped by people working illegally or getting details of their passenger cards incorrect otherwise.

- Inserting a provision whereby the Minister may revoke a decision made by the Minister personally to cancel a visa under new Subdivision FA of Division 3 of Part 2 of the *Migration Act* if the Minister is satisfied that the ground for cancelling the visa does not exist.
  
  Again, this is similar to the existing ss 501(3) and 501C.

- Clarifying that a decision that was made personally by the Minister to cancel a visa under ss 109, 116 or 140(2) of the *Migration Act* is not reviewable by the MRT.

- Providing that a decision to cancel a visa that is made under new ss 133A or 133C of the *Migration Act* is not reviewable by the MRT.

- Clarifying that any decision to cancel a protection visa that is made personally by the Minister is not reviewable by the RRT.

  Given that ‘it is appropriate that the Minister have the power to be the final decision maker in the public interest’, it is hardly surprising that merits review of decisions made under ss 109, 116 (by the Minister personally), 133A or 133C are not merits reviewable. The provision that a personal protection visa cancellation by the Minister is also not reviewable (new s 411(2)(aa) of the Act) is just a logical extension of this concept.

- Clarifying that a decision of a delegate of the Minister to cancel a bridging visa held by a non-citizen who is in immigration detention because of that cancellation is reviewable by the MRT.

  This appears to have always been the intention in any event.
Appendix 2 – The Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014

The Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014 (‘the MMPLA Act’) was introduced into the House of Representatives on 25 September 2014 and passed by the House on 22 October 2014. It was then introduced into the Senate on 28 October 2014 and passed, after some amendments, on 4 December 2014.58 The Bill received Royal Assent on 15 December, and commenced in accordance with s 2 of the MMPLA Act. The proclamation referred to in that section does not appear to have yet been made.

The MMPLA Act has imposed far-reaching changes to the Migration Act and the Maritime Powers Act 2013 in relation to the treatment and processing of applicants for refugee status in Australia. In effect, the intention of the Bill is to remove any domestic effect of the Convention on the Status of Refugees, and replace all references to the Convention in the Migration Act with a statutory definition of ‘refugee’. The MMPLA Act also reintroduces Temporary Protection Visas (TPVs), creates a new Safe Haven Enterprise Visa (SHEV), introduces a new ‘fast track’ procedure to the RRT, and amends the powers of officers to apprehend suspected intended unauthorised arrivals and sea and take them to countries with which Australia has arrangements for refugee processing.

Removal of reference to the convention

One crucial effect of the MMPLA Act is to remove all references to the Convention on the Status of Refugees from the Migration Act. The term ‘refugee’ is now defined in new s 5H of the Act as follows:

(1) For the purposes of the application of this Act and the regulations to a particular person in Australia, the person is a refugee if the person:

(a) in a case where the person has a nationality – is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or

(b) in a case where the person does not have a nationality – is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

(2) Subsection (1) does not apply if the Minister has serious reasons for considering that:

(a) the person has committed a crime against peace, a war crime or a crime against humanity, as defined by international instruments prescribed by the regulations; or

(b) the person committed a serious non-political crime before entering Australia; or

(c) the person has been guilty of acts contrary to the purposes and principles of the United Nations.

The terms ‘well-founded fear of persecution’ is defined in new s 5J, while ‘membership of a particular social group’ is defined in ss 5K and 5L. The term ‘particularly serious crime’ is defined in s 5M. Significantly, a ‘well-founded fear of persecution’ requires that the risk of persecution apply across all areas of the person’s home country. As noted in the Explanatory Memorandum (EM) to the MMPLA Act, the implication of this amendment is that asylum seekers will not be eligible for protection in Australia if they can safely and legally relocate to a ‘safe part’ of their home country upon return.59

It is immediately obvious that the new s 5H reproduces Articles 1A(2) and 1F of the Convention to a significant extent. What then is the purpose of removing references to the Convention? Paragraph 1167 of the Explanatory Memorandum to the MMPLA Act states that ‘[n]ew subsection 5H(1) is intended to codify Article 1A(2) of the Refugees Convention, as interpreted in Australian case law, into Part 1 of the Migration Act’, which may mean that the purpose of the amendment is to ‘freeze’ the law at the date the Act comes into effect, and prevent courts from applying any future overseas developments in Australia.

‘Internal flight’

As noted above, one major change to the way in which refugee status will be interpreted in Australia relates to the ‘internal flight alternative’, or ‘internal relocation principle’. Very broadly, this principle means that an asylum seeker should first seek protection within their own country, prior to seeking refugee

59 New s 5J(1)(c) of the Act, paragraph 1181 of the EM to the MMPLA Act. The EM can be found at: http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5346.
status overseas. A classic example of a case where the internal relocation principle was applied was *Singh (Manjit) v Minister for Immigration and Multicultural Affairs*,60 in which the applicant was a suspected member of a Sikh separatist group in Punjab. The Punjab government had given the chief of police, one KPS Gill, more or less free rein to crush such groups, resulting in severe persecution of suspected members in Punjab. Gill had no authority in the rest of India, and Mr Singh was therefore regarded as being safe elsewhere in India. However, Australian courts had frequently found that relocation must be ‘reasonable’, in the sense that the applicant would actually be able to make a life for themselves outside their previous region of residence.

The MMPLA Act removes the ‘reasonableness of relocation’ requirement. Paragraphs 1182 and 1183 of the EM provide as follows:

1182. Although the internal relocation principle is not explicitly provided for in the Refugees Convention, in the decision of *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18 (SZATV), the High Court has held that the text of the Refugees Convention supports the internal relocation principle and is part of Australian law. The High Court has further found that if it is reasonable for an asylum seeker to relocate to another part of their country of nationality, then their fear of persecution is not well-founded and they will not meet the definition of a refugee in the Refugees Convention. Australia has applied the internal relocation principle consistent with this interpretation.

1183. While the Government will continue to adopt the internal relocation principle in the new statutory framework relating to refugees, it is the Government’s intention that the principle will no longer encompass the consideration of whether the relocation is reasonable in light of the individual circumstances of the person. The Government considers that in interpreting the reasonableness element into the internal relocation principle, Australian case law has broadened the scope of the principle to take into account the practical realities of relocation. For example, as a result of cases such as *SZATV* and *Randhawa v MILGEA* (1994) 52 FCR 437, when assessing internal relocation options, decision makers are now required to consider aspects such a potential diminishment in quality of life or financial hardship which may result from the relocation. As such aspects fall short of the type of harm which amounts to persecution, the Government considers these to be irrelevant to the assessment of a well-founded fear of persecution. For these reasons, it is the Government’s intention that new paragraph 5J(1)(c) not be read down by reference to such notions of reasonableness’.  

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60 (2000) FCA 705.
New s 5J(1)(c) of the Act is most likely a direct response to the recent High Court decision in Minister for Immigration and Border Protection v SZSCA,\(^{61}\) in which the court found that a member of a particular social group does not have to fundamentally change their behavior if they relocate within a country. That is, if ‘internal protection’ comes at the price of fundamental change to their lives and livelihoods, it is not in fact protection and the applicant can still avail themselves of refugee status. This shows that the MMPLA Act does not merely ‘freeze’ Australian refugee law, but fundamentally changes it in some areas.

**Temporary protection visas**

The MMPLA Act makes a number of amendments to the Migration Act (and, somewhat unusually, the Migration Regulations 1994) to reintroduce TPVs to the legislative scheme. New s 35A provides for classes of visas called ‘permanent protection visas’ (s 35A(2) of the Act) and ‘temporary protection visas’ (s 35A(3)). New Item 1403 of Schedule 1 of the Regulations sets out the validity criteria for a TPV application, and the following new paragraph 1401(3)(d) is added to Item 1401:

An application by a person for a Protection (Class XA) visa is valid only if the person:

(i) does not hold, and has not ever held, a Subclass 785 (Temporary Protection) visa, including such a visa granted before 2 December 2013; and

(ii) does not hold, and has not ever held, a Temporary Safe Haven (Class UJ) visa; and

(iii) does not hold, and has not ever held, a Temporary (Humanitarian Concern) (Class UO) visa; and

(iv) held a visa that was in effect on the person’s last entry into Australia; and

(v) is not an unauthorised maritime arrival; and

(vi) was immigration cleared on the person’s last entry into Australia.

The Schedule 2 criteria for TPVs are set out in new Part 785, while Part 866 is amended to remove any reference to the Refugees Convention.

The most striking part of the reintroduction of TPVs is that certain visa applications that are undecided at the date that the MMPLA Act comes into

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\(^{61}\) (2014) HCA 45.
effect will be ‘converted’ into TPV applications. New s 45AA(1) provides that an undecided and valid application may be converted into a new kind of application, and s 45AA(3) provides as follows:

For the purposes of this Act, a regulation (a conversion regulation) may provide that, despite anything else in this Act, the pre-conversion application for the pre-conversion visa:

(a) is taken not to be, and never to have been, a valid application for the pre-conversion visa; and

(b) is taken to be, and always to have been, a valid application (a converted application) for a visa of a different class (specified by the conversion regulation) made by the applicant for the pre-conversion visa.

New Regulation 2.08F is a ‘conversion regulation’, and subregulations 2.08F(1) and (2) provide as follows:

(1) For section 45AA of the Act, despite anything else in the Act, a valid application (a pre-conversion application) for a Protection (Class XA) visa made before the commencement of this regulation by an applicant prescribed by subregulation (2) is, immediately after this regulation starts to apply in relation to the application under subregulation (3):

(a) taken not to be, and never to have been, a valid application for a Protection (Class XA) visa; and

(b) taken to be, and always to have been, a valid application for a Temporary Protection (Class XD) visa, made by the prescribed applicant.

(2) The following are prescribed applicants:

(a) an applicant who holds, or has ever held, any of the following visas:

(i) a Subclass 785 (Temporary Protection) visa granted before 2 December 2013;

(ii) a Temporary Safe Haven (Class UJ) visa;

(iii) a Temporary (Humanitarian Concern) (Class UO) visa;

(b) an applicant who did not hold a visa that was in effect on the applicant’s last entry into Australia;
(c) an applicant who is an unauthorised maritime arrival;

(d) an applicant who was not immigration cleared on the applicant’s last entry into Australia.

The retrospective intent of Regulation 2.08F can clearly be seen in subregulation 2.08F(3):

This regulation starts to apply in relation to a pre-conversion application immediately after the occurrence of whichever of the following events is applicable to the application:

(a) if, before the commencement of this regulation, the Minister had not made a decision in relation to the pre-conversion application under section 65 of the Act—the commencement of this regulation;

(b) in a case in which the Minister had made such a decision before the commencement of this regulation—one of the following events, if the event occurs on or after the commencement of this regulation:

(i) the Refugee Review Tribunal remits a matter in relation to the pre-conversion application in accordance with paragraph 415(2)(c) of the Act;

(ii) the Administrative Appeals Tribunal remits a matter in relation to the pre-conversion application in accordance with paragraph 43(1A)(c) of the Administrative Appeals Tribunal Act 1975 (as substituted in relation to an RRT-reviewable decision by section 452 of the Act);

(iii) a court quashes a decision of the Minister in relation to the pre-conversion application and orders the Minister to reconsider the application in accordance with the law.

That is, if an applicant applies for a Protection Visa prior to the MMPLA Act coming into effect, is refused, this decision is affirmed by the RRT or AAT, and the applicant is successful at judicial review, the remitted application will be dealt with as an application for a TPV and not a permanent visa. This kind of retrospectivity appears to be unprecedented in Australia.

The government’s repeated attempts to reintroduce TPVs make no sense in terms of ‘stopping the boats’ – in that sense, they simply do not work. Given that
TPVs first came into effect at the end of October 1999, it is preferable to compare the figures for 2000 against those for 2001 to see whether the introduction of TPVs had any impact on the number of unauthorised boat arrivals or asylum-seekers in Australia. The following table also looks at the years 1992 and 1993, the former being the year that Division 4B was inserted into the Migration Act.

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>1992</th>
<th>1993</th>
<th>% Change</th>
<th>2000</th>
<th>2001</th>
<th>% Change</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia (unauthorised boat arrivals)</td>
<td>216</td>
<td>81</td>
<td>-266.67</td>
<td>2,939</td>
<td>5,516</td>
<td>+187.68</td>
</tr>
<tr>
<td>Australia (asylum claims)</td>
<td>6,000</td>
<td>7,500</td>
<td>+12.50</td>
<td>13,000</td>
<td>12,000</td>
<td>-8.33</td>
</tr>
<tr>
<td>Total OECD</td>
<td>2,650,000</td>
<td>2,500,000</td>
<td>-1.06</td>
<td>1,755,000</td>
<td>1,700,000</td>
<td>-3.23</td>
</tr>
</tbody>
</table>


*** Ibid at 16 and 76.

Australia saw a huge increase in the number of UMA’s in 2001 from 2000, despite modest falls in the number of asylum applications in both Australia and the OECD.

Mary Crock and Daniel Ghezelbash have argued that the Pacific Solution was the direct or at least most substantial cause of the significant reduction in unauthorised boat arrivals from 2002, but that immigration detention and TPVs had no impact.62 Why is this the case? One explanation was given by the then ALP shadow Minister for Immigration, Mr Burke, who directly blamed the TPV regime for the drowning of 353 mostly women and children asylum seekers in the SIEV X disaster of 2001, claiming that ‘the reason (the women and children) went to a people smuggler and found themselves on SIEV X was that dad wasn’t able to be reunited with them’.63 The reintroduction of TPVs only makes sense as a form of punishment of unauthorised boat arrivals.

‘Fast-track’ RRT processing

The MMPLA Act introduces a form of ‘fast-track’ processing by a body to be referred to as the Immigration Assessment Authority (IAA). A number of new definitions are inserted into s.5(1) of the Act, and it is convenient to start with the terms ‘fast-track applicant’ and ‘fast-track decision’:


63 ‘Border Policies Caused Deaths, says Labor’, The Age, 17 October 2006. See also Crock and Ghezelbash, supra n63 at 262.
fast track applicant means:

(a) a person:

(i) who is an unauthorised maritime arrival and who entered Australia on or after 13 August 2012; and

(ii) to whom the Minister has given a written notice under subsection 46A(2) determining that subsection 46A(1) does not apply to an application by the person for a protection visa; and

(iii) who has made a valid application for a protection visa in accordance with the determination; or

(b) a person who is, or who is included in a class of persons who are, specified by legislative instrument made under paragraph (1AA)(b).

fast track decision means a decision to refuse to grant a protection visa to a fast track applicant, other than a decision to refuse to grant such a visa:

(c) because the Minister or a delegate of the Minister is not satisfied that the applicant passes the character test under section 501; or

(d) relying on:

(i) subsection 5H(2); or

(ii) subsection 36(1B) or (1C); or

(iii) paragraph 36(2C)(a) or (b).

‘Fast-track applicants’ are then separated into ‘excluded fast track review applicants’ and ‘fast track review applicants’ as follows:

excluded fast track review applicant means a fast track applicant:

(a) who, in the opinion of the Minister:

(i) is covered by section 91C or 91N; or

(ii) has previously entered Australia and who, while in Australia, made a claim for protection relying on a criterion mentioned in subsection 36(2) in an application that was refused or withdrawn; or

64 Broadly speaking, these sections apply to non-citizens covered by agreements between Australia and safe third countries (s 91C) and those who have a right of residence in safe third countries (s 91N).
(iii) has made a claim for protection in a country other than Australia that was refused by that country; or

(iv) has made a claim for protection in a country other than Australia that was refused by the Office of the United Nations High Commissioner for Refugees in that country; or

(v) makes a manifestly unfounded claim for protection relying on a criterion mentioned in subsection 36(2) in, or in connection with, his or her application; or

(vi) without reasonable explanation provides, gives or presents a bogus document to an officer of the Department or to the Minister (or causes such a document to be so provided, given or presented) in support of his or her application; or

(b) who is, or who is included in a class of persons who are, specified by legislative instrument made under paragraph (1AA)(a).

A ‘fast track review applicant’ is a fast track applicant who is not an excluded fast track review applicant’. The term ‘manifestly unfounded claim’ is not defined in the MMPLA Act, but paragraph 722 of the EM states as follows:

This provision is intended to capture those fast track applicants who have put forward claims that are without any substance (such as having no fear of mistreatment), have no plausible basis (such as where there is no objective evidence supporting the claimed mistreatment) or are based on a deliberate attempt to deceive or abuse Australia’s asylum process in an attempt to avoid removal. It is the Government’s position that such persons should not have access to merits review because the nature of their claims are so lacking in substance that further review would waste resources and unnecessarily delay their finalisation.

New s 411(2)(c) provides that ‘fast track decisions’ are not RRT-reviewable decisions. The MMPLA Act then inserts a new Division 7A, which creates the IAA. It is notable that a ‘fast track review applicant’ does not need to make an application for review to the IAA – instead, s 473CA provides that ‘[t]he Minister must refer a fast track reviewable decision to the Immigration Assessment Authority as soon as reasonably practicable after the decision is made’. Interestingly, the MMPLA does not seem to expressly state that fast track reviewable decisions made in relation to excluded fast track review applicants must not be referred to the IAA, although this is strongly implied by new s 473BC, which states that ‘[t]he Minister may, by legislative instrument,
determine that a specified fast track decision, or a specified class of fast track
decisions, in relation to an excluded fast track review applicant should be
reviewed under this Part’.

Another striking feature of the IAA, especially when compared to the RRT,
is that the IAA must usually make its decisions ‘on the papers’. This is the
requirement of new s 473DB, although s 473DC permits the IAA to make
inquiries, and s 473DD provides that the IAA may consider new information if
it is ‘satisfied that there are exceptional circumstances to justify considering the
new information’. Further, s 473DF permits the IAA to invite an applicant to an
‘interview’ (not a ‘hearing’). It is also notable that s 473DB(2) provides that the
IAA may make a decision on a referred application at any time after the referral.

Paragraph 891 of the EM explains the purpose of s 473DB and following sections
as follows:

The purpose of this amendment is to describe what the limited merits
review function of the IAA entails. The intention is for the IAA to review
a fast track reviewable decision by only considering the review material
provided to the Authority by the Secretary of the Department. The IAA
is not required to accept or request new information or interview the
referred applicant. This is however subject to Subdivision C – Additional
information which sets out the limited circumstances in which the IAA
may consider new information for the purposes of making a decision in
relation to a fast track reviewable decision.

In the meantime, excluded fast track applicants are excluded from any merits
review of their decision at all, and will no doubt go straight to judicial review,
in the High Court in its original jurisdiction. The High Court will find itself
back in a pre-S157\(^65\) situation in relation to such applicants, where the High
Court will find itself as the only court that can hear such applications.

**Safe haven enterprise visas**

The MMPLA Act also introduces a new class of visa, to be known as a ‘Safe
Haven Enterprise Visa’ (SHEV). The legislation relating to SHEVs is appended
to this chapter.

The purpose of a SHEV is described in new s 35A(3B) of the Act as ‘to provide
protection and to encourage enterprise through earning and learning while
strengthening regional Australia’. The Minister’s second reading speech on the
MMPLA Act described the purpose and operation of the SHEV as follows:\(^66\)


\(^66\) House of Representatives Hansard, 25 September 2014 at 10546.
However, consistent with this government’s principles of rewarding enterprise and its belief in a strong regional Australia, a new visa, the Safe Haven Enterprise Visa, will also be created. The Safe Haven Enterprise Visa will be open to applications by those who have been processed under the legacy caseload and are found to be refugees. I stress that that does not relate to people who may seek to come to Australia in the future by this method. They of course are subject to offshore processing and resettlement, as well as our turn-back measures and other arrangements.

The SHEV, as it is known, will be an alternative temporary protection visa to the TPV and encourages enterprise through earning and learning in regional areas. IMAs granted a SHEV will be required to confine themselves to designated region – either a state or territory government or local government area, or an employer in a regional area can request to be designated. This would be identified through a national self-nomination process. No region would be required to compulsorily participate in such a scheme. The visa will be valid for five years and, like the TPV, will not include family reunion or a right to re-enter Australia. SHEV holders will be targeted to designated regions and encouraged to fill regional job vacancies, where they exist, and will have access to the same support arrangement as a TPV holder.

SHEV holders who have worked in regional Australia without requiring access to income support for 3½ years will be able to apply and if they meet eligibility requirements be granted other onshore visas – for example, a family or skilled visa as well as temporary skilled and student visa. However, I stress: they will not be able to apply for a permanent protection visa.

New Item 1404 of Schedule 1 of the Migration Regulations prescribes the validity criteria for a Class XE (SHEV) visa, and paragraph 1404(3)(d) provides that to make a valid application for a SHEV, the applicant must hold or have held a TPV, SHEV, Temporary Safe Haven (TSH) visa or a Temporary Humanitarian Concern (THC) visa, or be an unlawful non-citizen of a specified kind. There is no requirement that an applicant have been granted any of these visas, or entered Australia, prior to any specified date, although subparagraph 1404(3)(d)(i) refers to ‘holds, or has ever held, a Temporary Protection (Class XD) visa or a Subclass 785 (Temporary Protection) visa, including such a visa granted before 2 December 2013’ (author’s emphasis). Sub-item 1404(4) provides that

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67 Illegal Maritime Arrivals.
‘[t]he Minister may, by legislative instrument, specify a regional area for the purposes of these regulations’, but no such instrument has yet been drafted. It remains to be seen whether any such instrument will be made.

Schedule 2 criteria are set out in new Part 790, and clause 790.511 specifies the validity period of a SHEV as follows:

Temporary visa permitting the holder to travel to, enter and remain in Australia until:

(a) if the holder of the temporary visa (the first visa) makes a valid application for another Subclass 790 (Safe Haven Enterprise) visa within 5 years after the grant of the first visa—the day when the application is finally determined or withdrawn; or

(b) in any other case—the end of 5 years from the date of grant of the first visa.

The key provision, however, is probably new Regulation 2.06AAB. Subregulation 2.06AAB(1) sets out a list of visa subclasses for which a SHEV holder or former holder can validly apply. Subregulation 2.06AAB(2) then provides that a SHEV holder of former holder can only make a valid application for a visa specified in subregulation 2.06AAB(1) in the following circumstances:

For the purposes of paragraph 46A(1A)(c) of the Act, an applicant for a visa who currently holds, or has ever held, a safe haven enterprise visa must, for a period or periods totalling 42 months (which need not be continuous) while the visa is (or was) in effect, satisfy one of the following requirements:

(a) the applicant does not receive any social security benefits determined under subregulation (3), and is engaged in employment, as determined under that subregulation, in a regional area specified under subclause 1404(4) of Schedule 1;

(b) the applicant is enrolled in full-time study at an educational institution, as determined under subregulation (3), in a regional area specified under subclause 1404(4) of Schedule 1;

(c) the applicant satisfies a combination of the requirements in paragraph (a) and paragraph (b), at different times.

Subregulation 2.06AAB(3) simply provides that ‘[t]he Minister may, by legislative instrument, make a determination for the purposes of paragraphs (2) (a) and (b)’, and again no such draft legislative instrument has been revealed. It can be seen that unless a notice is made under sub-item 1404(4) of Schedule 1 of
the Regulations, it will be impossible for any applicant to meet the requirements for making a valid application for a SHEV, and this may well be the intention of the government.

**Children born in Australia**

Schedule 6 of the MMPLA Act makes a number of amendments that apply to children born in Australia to unauthorised maritime arrivals. New s 5AA(1A) provides that such children are also taken to be unauthorised maritime arrivals, while new s 5AA(1AA) provides that children born to unauthorised maritime arrivals in offshore processing countries are also unauthorised maritime arrivals. These provisions appear to reflect the existing law as set out in *B9/2014 v Minister for Immigration*\(^68\) (the ‘baby Ferouz’ case), a decision which is under appeal. However, Part 2 of Schedule 6 makes it clear that Schedule 6 is intended to operate retrospectively, a decision which is clearly meant to head off any successful appeal against the *B9/2014* decision.

**Actions taken at sea**

Schedule 1 of the MMPLA Act relates to the ability of officers authorised under the *Maritime Powers Act 2013* to interdict vessels at sea and take them to another country, regardless of whether there is an agreement with the particular country in place. It restricts the court’s capacity to invalidate government actions at sea, provides that the rules of natural justice do not apply to certain key actions, and suspends Australia’s international obligations in the context of powers exercised under the *Maritime Powers Act*. Specifically, the Bill removes the reference in the *Maritime Powers Act* to the limitation of the exercise of powers outside Australia in accordance with international law. Instead, the MMPLA Act provides that such officers are not required to consider Australia’s international obligations (including, for example, the principle of *non-refoulement*), or the international obligations or domestic law of another country in making their decisions.

It is worth pointing out that these provisions do appear to leave the door open for serious violations of the Refugees Convention and the UN Convention on the Laws of the Sea (UNCLOS), amongst other rules of international law. For example, the Refugee Council of Australia, in its submission to the Senate Legal and Constitutional Affairs Committee’s consideration of the MMPLA Act, stated as follows at paragraphs 1.3 and 1.4:\(^69\)

\(^{68}\) (2014) FCCA 2348.

[1.3] These amendments seek to empower the Minister to detain and transfer people on the high seas even though the Australian Government does not have these powers under the law of the sea nor under the various conventions, covenants and international instruments of human rights. On the high seas or within the Exclusive Economic Zone or the contiguous zone, vessels are governed by the principle of freedom of the seas. Only the flag state can intercept and exert jurisdiction on vessels in these zones, except where the vessel is engaged in piracy, the slave trade or is stateless.\textsuperscript{70} As such, interception and detention of vessels in these zones is a violation of the United Nations Convention on the Law of the Sea (UNCLOS). As set out, these amendments would give Australia unbridled power to detain and transfer people on the high seas without consideration of non-refoulement obligations or in breach of its obligations under the law of the sea. Furthermore, the Minister would have the power to detain people and transfer them to another country without the consent of the other country and without an assessment of whether the people being transferred have protection claims against that country.

[1.4] RCOA is particularly troubled by amendments which create the risk of people facing arbitrary and prolonged detention without any scrutiny by Parliament or the courts. Given that the Australian Government would not confirm publicly that it had detained and held 157 asylum seekers in June 2014 until the commencement of a High Court case,\textsuperscript{71} RCOA is worried that people will face prolonged detention or even be refouled without public knowledge. Additionally, as Professor Ben Saul points out, such detention may constitute incommunicado military detention – also described as enforced disappearance – something which is prohibited under the Rome Statute of the International Criminal Court.\textsuperscript{72}

Again, the current government clearly has a mindset against international law. While it is true that international law is often internally contradictory and at times incomprehensible, the UNCLOS and the Refugees Convention are two conventions that are reasonably well-drafted and the UNCLOS in particular has been generally adhered to by its signatories. There appears to be no justification for ignoring it.

\textsuperscript{70} UNCLOS art 110(1). Furthermore, a stateless vessel only allows for the right to visit, and this right does not extend to a right to tow a boat to another part of the sea. See Guy S Goodwin-Gill and Jane McAdam, \textit{The Refugee in International Law} (Oxford University Press, 3rd ed, 2007) 271.

\textsuperscript{71} JARK and Ors v Minister for Immigration and Border Protection and Anor (2014) HCATrans 150; CPCF and Ors v Minister for Immigration and Border Protection and Anor (2014) HCATrans 153.