Chapter 4. Merits Review of Migration Decisions

Part 1 – History of merits review of migration decisions in Australia

Beginnings – the Administrative Appeals Tribunal (AAT)

Unlike judicial review, which has a history dating back at least as far as Henry II of England, merits review, in Australia, began in the 1970s. The first Australian body to have jurisdiction in relation to review of migration decisions was the Administrative Appeals Tribunal (AAT), which was brought into being by the Administrative Appeals Tribunal Act 1975 (‘the AAT Act’) and commenced operations in 1977. Some of the very early AAT decisions on migration cases, such as Re Becker and Minister for Immigration and Ethnic Affairs and, in particular, Re Drake and Minister for Immigration and Ethnic Affairs are still good authority on the nature of merits review and the role of a review body. However, until 1992 the AAT did not have the power to make a final determination on a criminal deportation matter – instead it could only make a recommendation that an applicant not be deported. However, it is interesting to note that the Minister went against an AAT recommendation on only two occasions prior to 1986. Today, the AAT retains jurisdiction in migration matters only in the areas of criminal deportation (which is now rarely applied), refusals and cancellations made by delegates under s 501 of the Act, cancellation of business visas under s 134 of the Act, citizenship matters and regulation of the migration agents’ profession.

1 (1977) 1 ALD 158.
2 (1979) 2 ALD 634.
3 See s 180A of the Migration Act 1958 as it stood prior to 1992, and s 43(1)(c)(ii) of the AAT Act. This was one of very few areas of law in which the AAT could not make a conclusive and determinative decision.
5 Paragraph 500(1)(a) of the Migration Act 1958.
6 Paragraph 500(1)(b) of the Migration Act 1958.
7 Section 136 of the Migration Act 1958.
8 Section 52 of the Australian Citizenship Act 2007.
Internal review

The first review mechanisms specifically for immigration decisions were purely administrative in nature, and not based in legislation. Crock and Berg describe the first review body, the Immigration Review Panels (IRPs), as follows:9

Formal review of the merits of certain general migration decisions was instituted in January 1982 with the creation of the quasi-independent [IRPs], which also operated as a recommendatory body for the Minister. There was no statutory basis for any of these non-statutory review bodies or the work they performed. Cases were reviewed on paper10 and applicants could neither correspond with these bodies nor adduce oral evidence, although the IRPs could, at their discretion, take evidence if they regarded such steps as essential for their deliberations.

Crock and Berg also point out that, like the MIRO,11 the IRPs were criticised for their lack of independence from government. In 1985, the Administrative Review Council (ARC) estimated that around 88 per cent of IRP decisions affirmed the original decision.12

The IRPs became a source of controversy in the late 1980s, when the Ombudsman investigated the legality of a $240 review fee imposed in 1987.13 The Minister was forced to concede that the fee, which again lacked any legislative authority, was being collected illegally.14 The government’s response was to require applicants who were unsuccessful at first instance to reapply and have the new applications be considered under the Regulation Second Application Scheme, which acted, confusingly enough, as if it was a merits review body.15 This situation was obviously untenable in the longer term.

The Migration Review Office (MIRO) and Immigration Review Tribunal (IRT)

As noted in in previous chapters the Migration Amendment Act 1989 (‘the MAA 1989’) introduced statutory merits review by an independent tribunal, created by the Act. Paragraph 2 of the Explanatory Memorandum (EM) to the MAA 1989 provided as follows:

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9 Supra n4 at paragraph 18.10.
10 In other words, without any oral hearing of the applicant.
11 See Chapter 2.
15 Crock and Berg, supra n4 at paragraph 18.12.
The Act is to be amended to provide for a statutory two-tier system of review of prescribed immigration decisions. The first tier of review will be conducted by specially authorised review officers within a unit in the Department of Immigration, Local Government and Ethnic Affairs (the Department) followed by appeals to an external review body called the Immigration Review Tribunal (IRT). The present jurisdiction of the Administrative Appeals Tribunal in criminal deportation matters will not be affected. The IRT will operate independently of the Department and will have as its objective providing a mechanism of review that is fair, just, economical and quick.

Note the phrase ‘fair, just, economical and quick’ in the EM.

Unlike the IRPs, both the MIRO and the IRT were backed by legislation, having been introduced by the MAA 1989. Michael Chaaya described the roles of the MIRO and IRT as follows in 1997:\textsuperscript{16}

A. Migration Internal Review Office

MIRO is currently a unit within the Department of Immigration and Multicultural Affairs designed as the first tier of merits review of certain migration decisions. Under Part 5, Division 2 of the Migration Act 1958 MIRO officers stand in the position of the original decision maker and re-assess the application to see whether they think it was the correct or preferable decision (subsection 341(1))\textsuperscript{17}. In making a review determination, a MIRO officer can decide to either affirm the decision; vary the decision; remit the matter for reconsideration; or set the decision aside (subsection 341(2)). If the decision is affirmed, the applicant is advised of the reasons for the decision and whether any further merits review is available at the IRT level (section 343). It is also important to note that the use of MIRO by aggrieved applicants comes at a cost of $500.00. The objective of MIRO is to provide internal merits review which is fair, just, easily understandable, quick and cost efficient.

B. Immigration Review Tribunal (IRT)

The IRT is the second tier of the migration merits review system which conducts independent final merits review of certain decisions. These include decisions made by MIRO, or certain visa cancellation decisions


\textsuperscript{17} These references are to the section numbers after renumbering by the Migration Reform Act 1992, which came into effect on 1 September 1994.
and decisions to keep non-citizens in immigration detention. The IRT’s statutory objective is to provide a mechanism of review that is fair, just, economical, informal and quick (section 353). In pursuit of this objective, the Tribunal adopts informal and non-legalistic review procedures which are not bound by the rules of evidence, legal forms or technicalities associated with the traditional adversarial hearing. An application fee of $850.00 is required to commence an IRT application. In making its decision, the IRT has determinative powers and thus may affirm a decision under review; remit the matter for reconsideration; vary a decision; or set it aside and substitute a new decision (subsection 349(2)). Applicants to the IRT do not have a legal right to be represented by a lawyer or advocate but are able to seek advice in order to prepare their application.

Despite the criticisms levelled at the MIRO in particular, the IRT and the MIRO were welcome developments in so far as they gave legislative backing to review of immigration decisions. For the first time, applicants had a right to reasons for decisions and, in most cases before the IRT, an oral hearing. However, there were some restrictions on the jurisdiction of the MIRO and IRT, as Crock and Berg explain.

The legislation governing IRT review was unusual in the curious mix of procedural discretion and substantive constraints of the law governing the grant of visas. In spite of broad powers given to the tribunal to determine its own procedures, its ability to decide appeals ‘according to substantial justice and the merits of a case’ was subject always to the legislation governing its decision-making. Neither the MIRO nor IRT could go outside the terms of the Act or Regulations. Under what was s 118(3), the tribunal was forbidden from ‘purporting to grant an entry permit on humanitarian grounds’. Section 116 ensured that the tribunal had no discretion to extend the time for hearing appeals and could not consider appeals lodged out of time. The apparent obligation to grant applicants a hearing where a ‘favourable’ decision could not be made on the papers under s 129 could also be illusory as the phrase ‘decision favourable to the applicant’ was defined to include decisions mandated by the legislation.

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18 Which is now of course mandatory – see s 189 of the Migration Act.
19 See Chapter 2.
20 Crock and Berg, supra n4 at paragraph 18.16.
21 Compare this to the current, highly prescriptive, Parts 5 and 7 of the Migration Act 1958.
22 Section 349 of the Act, prior to 1 July 1999. It could be argued that if the MIRO and IRT could go outside the Act, they would not be exercising a review function, but an entirely new power.
Many of these provisions criticised by Crock and Berg remain in the current Parts 5 and 7 of the Act.

MIRO was effectively abolished in 1999, when the IRT and MIRO were merged to form the Migration Review Tribunal (MRT). This was done by means of the *Migration Legislation Amendment Act (No 1) 1998*, which came into effect on 1 June 1999.

**The Refugee Review Tribunal (RRT)**

One important legislative change that came about prior to the coming into effect of the *Migration Reform Act 1992* (‘the MRA’) was the creation of the Refugee Review Tribunal (RRT) as an independent body to review all decisions relating to applications for refugee status. The RRT commenced operations on 1 July 1993, and when a decision was made to defer the commencement of the MRA until 1 September 1994, the provisions relating to the RRT were exempt from the deferral.\(^{23}\)

Prior to the creation of the RRT, review of refugee decisions was carried out by an informally constituted body, the Refugee Status Review Committee (RSRC), which was similar in many ways to the IRPs. Savitri Taylor described the working of the RSRC as follows:\(^{24}\)

> The Refugee Status Review Committee (RSRC) was a body which failed to be independent in any relevant sense. A community representative nominated by the Refugee Council of Australia (RCOA) was a member of the RSRC, together with representatives of the Department of Foreign Affairs and Trade (DFAT), the Attorney-General’s Department and DIEA. A representative of UNHCR attended meetings in an advisory capacity …

> Not only were three-quarters of the RSRC’s membership representatives of the executive government, the DIEA representative on an RSRC panel was also the person who chaired the panel. This arrangement meant that a representative from the very department that made the primary-stage decision was in a position to control the discussions of the RSRC as well as being in a position to vote on the recommendation to be made to the Minister’s delegate … [T]he RSRC held its meetings in the absence of the claimant and certainly never gave the claimant an oral hearing …

> It appears that, at RSRC meetings, genuine and lengthy discussion took place on points of disagreement. The discussion was genuine in

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23 See the *Migration Laws Amendment Act 1993*.

the sense that members were known to go into a meeting sometimes without a clear view as to what the recommendation should be and to form a view as a consequence of the discussion or to go into a meeting with a particular view of a case only to change their view in the light of additional information or different perspectives provided by other members of the group or the UNHCR representative. On the other hand, the DIEA representative would, one imagines, have internalised the same organisational values as the primary decision maker and would probably also have felt subtly pressured to vindicate the primary decision.

It is important to consider whether a tribunal constituted by legislation is in any better position to guarantee independence than a purely administrative body like the RSRC.

The legislation creating the RRT was modelled significantly on that for the IRT. It is notable that there was only ever one tier of merits review for decisions relating to refugee status, as opposed to two for most other kinds of applications. That aside, the powers and the procedural responsibilities of the RRT were very similar to those originally given to the IRT, in that no adverse decision can be made without offering the opportunity for a hearing, hearings are constituted by a single member without a representative of the Department present, and its decisions are judicially reviewable.

The Migration Review Tribunal (MRT) and Codes of Procedure

As noted earlier, the MRT replaced both the MIRO and the IRT with effect from 1 July 1999. Senator Kemp, representing the Minister in the Senate, stated as follows in his second reading speech for the Migration Legislation Amendment Bill (No 1) 1998 on 12 November 1998:

25 Senate Hansard, 12 November 1998 at 213.

Under the changes introduced by this bill, the single tier review will be conducted by a new external review body, the Migration Review Tribunal.

The Migration Review Tribunal will be required to conduct fair, impartial and expeditious review of migration decisions, at lower cost to the Australian taxpayer. This will be achieved through the introduction of more streamlined and flexible review decision-making processes.

The major change brought about by the 1998 Act, however, was the introduction of the codes of procedure for the MRT and RRT. Prior to 1 July 1999, the IRT and
RRT had few express procedural obligations other than requiring the tribunal to offer the applicant a hearing if it could not make a positive decision ‘on the papers’. The conduct of the IRT’s and RRT’s hearings was left up to the tribunals themselves, although reviews were to be conducted according to ‘substantial justice and the merits of the case’,\(^{26}\) and in a manner that was ‘fair, just, informal and quick’.\(^{27}\) The purpose of the codes of procedure was explained by the Minister, Mr Ruddock, in his Second Reading Speech as follows:\(^ {28}\)

The bill also includes certain safeguards for applicants by introducing a code of procedure for both the Migration Review Tribunal and the Refugee Review Tribunal which is similar to that already applying to decisions made by the department. This code includes such matters as the giving of a prescribed notice of the timing for a hearing, and a requirement that applicants be given access to, and time to comment on, adverse material relevant to them.

What is much more likely is that the codes were intended to be a complete and exhaustive statement of the tribunals’ procedural obligations, and thereby displace the common law rules of natural justice. The Minister made this argument in respect of Subdivision AB of the Act in the case of *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah*,\(^ {29}\) only for the High Court to rule that as Subdivision AB did not (at the time) specifically state that the common law rules of natural justice had been replaced, Subdivision AB did not have that effect, and the common law rules continued to exist alongside the code of procedure. The government’s response was the *Migration Legislation Amendment (Procedural Fairness) Act 2002*, which inserted a number of provisions into the Act (most importantly for these purposes ss 51A, 357A and 422B) stating that the relevant part of the Act is an ‘exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with’. The Full Federal Court has ruled that s 422B at least is effective in displacing the common law requirements of natural justice.\(^ {30}\)

The MRT and RRT codes of procedure are now extremely complex, and important provisions such as s 424A (the RRT’s duty to disclose adverse information) have generated huge amounts of litigation.

Finally, the AAT, MRT, RRT and a number of other Commonwealth merits review bodies are scheduled to merge with effect from 1 July 2015.\(^ {31}\) The *Tribunals*

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\(^{26}\) Originally s 166C of the Act for the RRT, now set out in ss 353(1) (MRT) and 420(1) (RRT).

\(^{27}\) Now set out in ss 353(2)(b) (MRT) and 420(2)(b) (RRT) of the Act.

\(^{28}\) House of Representatives Hansard, 2 December 1998 at 1122.

\(^{29}\) (2001) 206 CLR 57.


Amalgamation Bill 2014, before the Senate at the time of writing, proposes the amalgamation of all the Commonwealth tribunals into one, but the procedures of what will become the Migration and Refugee Divisions of the new tribunal will remain mostly unchanged from the procedures for the MRT and RRT.

Part 2 – Nature of merits review

Review tribunals are part of the executive

First and foremost, it is important to note that MRT, RRT and AAT (and other review tribunals such as the Social Security Review Tribunal) are part of the executive and not the judiciary. The nature of judicial power will be discussed in more detail in later chapters, but for now it is sufficient to note that the MRT and RRT are deliberately not constituted as courts, and in fact ss 353(2)(a) and 420(2)(a) make it clear that they are not bound by the rules of evidence.

Unlike a court, the MRT and RRT make the ‘correct and preferable’ decision on an application before them. The tribunals make an entirely new (de novo) decision on the basis of all the evidence before them, including new evidence that may not have been before the Departmental decision maker. The MRT and RRT act on an ‘inquisitorial’ basis, meaning that the presiding member asks questions of the applicant and his or her adviser without hearing from the Minister, as opposed to a court, which with rare exceptions hears both sides of an argument with a judge making the decision.

A good example of the manner in which a merits reviewer is intended to act can be found in the UK case of Huang v Secretary of State for the Home Department. Ms Huang, a failed applicant for humanitarian stay in the UK, applied for review the Home Department’s decision to an ‘adjudicator’, as permitted by s 65 of the Immigration and Asylum Act 1999. That Act permitted a further appeal to the Court of Appeal from the adjudicator’s findings on a question of law. Lord Bingham, writing for the House of Lords, found that the adjudicator, by focusing on whether there was an error in the original decision, did not fulfil their role. His Lordship stated that:

It remains the case that the judge is not the primary decision maker … The appellate immigration authority, deciding an appeal under section 65,
is not reviewing the decision of another decision maker. It is deciding whether or not it is unlawful to refuse leave to enter or remain, and it is doing so on the basis of up to date facts.

That is, the appellate authority had acted in too ‘judicial’ a manner in this case, and should have considered Mrs Huang’s case de novo rather than simply examining the primary decision maker’s decision for any errors. It is a court that is prohibited from engaging in ‘merits review’.

A similar decision was made by the Federal Court of Canada on 22 August 2014. In Huruglica v Minister of Citizenship and Immigration\(^\text{36}\) Phelan J found that the Refugee Appeal Division (RAD) of the Immigration and Refugee Board (IRB) had erred when it found that a decision of the Refugee Protection Division (RPD) refusing the applicant refugee status was not unreasonable and therefore could not be set aside. Phelan J stated as follows at paragraph 47:

> Unlike judicial review, the RAD, pursuant to subsection 111(1)(b),\(^\text{37}\) may substitute the determination which ‘in its opinion, should have been made’. One precondition of exercising this power is that the RAD must conduct an independent assessment of the application in order to arrive at its own opinion. It is not necessary, in order to trigger this remedial power, that the RAD must find error on some standard of review basis.

This has given rise to two significant arguments about the tribunals’ constitution and processes. Firstly, even though a review tribunal is not a court, must it be able to demonstrate its independence from government in order for its decisions to be upheld? Secondly, if the tribunals are supposed to follow an inquisitorial model, what is their duty to make inquiries of their own volition?

### Institutional bias

It has been argued on multiple occasions that the review tribunals are not truly independent of government, and that their decisions are therefore affected by ‘institutional bias’ against applicants. For example, Savitri Taylor, as long ago as 1994, referred to the RRT as ‘a supposedly independent administrative tribunal’\(^\text{38}\), her argument was that the Minister’s ability to issue a conclusive certificate, under what is now s 411(3) of the Act, in a particular case meant that the RRT lacked independence. Interestingly, no such conclusive certificate has

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38 Taylor, supra n24 at 310.
ever been issued, and the mere rumour that such a certificate could be issued in one case led the RRT to refer the matter to the AAT for the only time in its history.39

Another argument that the MRT and RRT lack true independence arises from the way members are appointed and retained. Crock and Berg explain the argument as follows:40

The central problems with the regime, in our view, are the assumptions made that tribunal members are independent of government, and that they are neutral arbiters of the cases brought before them. In practice, tribunal members have been affected by what might be termed loosely ‘politics’ both in the manner of appointment/reappointment and (on occasion) in their decision-making. Where members have been appointed from within the bureaucracy and/or have been appointed on relatively short-term contracts the pressure to toe the government line can be considerable.

The concept of institutional bias within the Department and the tribunals has been around for a long time, but seems to have been used successfully only once. In Mok v Minister for Immigration, Local Government and Ethnic Affairs41 three Cambodian asylum seekers who were refused entry permits by the Department (in the days before the commencement of the RRT) applied for judicial review, primarily on the basis that the Prime Minister, Mr Hawke, had made comments on national television to the effect that Cambodian boat arrivals were not refugees, would not be granted permanent residence in Australia, and that he would act ‘forcefully’ to ensure that applications for refugee status were refused.42 Keely J in the Federal Court found that such statements, despite the efforts of successive immigration ministers to disown them, meant that all of the refusal decisions were affected by apprehended bias.

One other successful claim of institutional bias involved a Departmental officer, but not an immigration decision. Phillips v Disciplinary Appeal Committee of the Merit Protection Review Agency43 involved an appeal against the decision of a committee to discipline Mr Phillips under the Public Service Act in relation to

39 SRPP and Minister for Immigration and Multicultural Affairs [2000] AAT 878. This case involved an applicant who had fled East Timor before independence, and rumours around the Department at the time (personally heard by the author) were that the Minister would issue the first ever s 411(3) certificate to prevent the RRT from hearing the matter. The RRT circumvented the rumoured conclusive certificate by exercising its power under Division 8 of Part 7 of the Act to refer the matter to the AAT, a power that has never been exercised before or since.
40 Supra n4 at paragraph 18.37.
42 Ibid at paragraph 19.
43 (1994) 34 ALD 758.
public comments he made that were critical of the Department. John McMillan, now the Commonwealth Information Commissioner, explains the case as follows:44

Mr Phillips was an officer of the Department who was the subject of a disciplinary inquiry arising from public statements he had made that were critical of the Department. The Court held that the inquiry was flawed by reason of the participation of a Departmental nominee on the inquiry panel, as envisaged by the legislation. Although there was no evidence to suggest actual bias or animosity by the Departmental nominee, it was enough that he came from a Department in which senior officers were evidently troubled by Mr Phillips’s behaviour. The Court reasoned that members of the public would reasonably apprehend bias by supposing that the Departmental nominee had career aspirations and a desire to be granted a public service efficiency bonus, and would thus lean towards the views of his senior officers, to the detriment of Mr Phillips.

In other words, the mere presence of a Departmental officer on the committee, despite the fact that this was permitted by the Public Service Act, was enough to find a reasonable apprehension of bias on the part of the entire committee.

This argument has been unsuccessful otherwise, even in relation to judicial appointments. For example, in Forge v Australian Securities and Investments Commission45 the High Court refused to set aside a judgement of the Supreme Court of NSW despite the presence on the bench of ‘acting judges’, who had been appointed for a period of 12 months. A similar conclusion was reached in Northern Australia Aboriginal Legal Aid Service v Bradley,46 in relation to the appointment of acting magistrates in the Northern Territory. It is therefore not surprising that Australian courts have yet to overturn a finding of the MRT or RRT on the basis that the presiding member’s appointment lacked permanence.

The High Court has also made it clear that administrative tribunal does not have the same independence from government as a court,47 and circumvention of an administrative tribunal’s decision will not necessarily amount to an abuse of power. In Minister for Immigration and Multicultural Affairs v Jia48 the AAT

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47 The Supreme Court of Canada came to the same conclusion in Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch) [2001] 2 SCR 781, despite the existence of s 7 of the Charter of Rights and Freedoms.
had twice (somewhat inexplicably) set aside a decision under s 501 of the Act to refuse Mr Jia a visa. The Minister’s response, after publicly stating on radio that Mr Jia, a convicted rapist, was not a person of good character, was to grant the visa and then cancel it under s 501. Mr Jia argued in the High Court that the Minister could not lawfully circumvent the decision of the AAT in this way, and that the Minister’s decision was affected by both actual and apprehended bias. The High Court unanimously rejected the first two arguments, and Gleeson CJ and Gummow J noted as follows:49

The position of the Minister is substantially different from that of a judge, or quasi-judicial officer, adjudicating in adversarial litigation. It would be wrong to apply to his conduct the standards of detachment which apply to judicial officers or jurors. There is no reason to conclude that the legislature intended to impose such standards upon the Minister, and every reason to conclude otherwise.

If the Minister had attempted to circumvent the decision of a court the outcome may have been different, but the review tribunals are creatures of the executive, and there was therefore no breach of the principle of the separation of powers on the part of the Minister.50

Finally, the institutional bias argument has been run, generally unsuccessfully, overseas. In Sethi v Canada (Minister of Employment and Immigration)51 the applicant ran the argument that because, at the time, members of the Refugee Protection Division were employed on fixed-term contracts, similar to members of the RRT in Australia, any decision made by that body was affected by institutional bias. Mr Sethi was successful at first instance, but the Federal Court of Appeal allowed the Minister’s appeal.52 The Federal Court of Appeal decision has since been upheld in Law Society of Upper Canada v Canada (Minister of Citizenship and Immigration)53 and Ahumada v Canada (Minister of Citizenship and Immigration),54 the latter case noting that ‘the allegation of bias in Sethi would, if successful, have disqualified all the members of the Board and would have had a highly disruptive effect on the administration of the Act’.55 This may be the real reason behind both the Australian and Canadian decisions. It is, however, notable that since the first instance decision in Sethi, members of

49 Ibid at paragraph 102.
50 The High Court in Jia also found by a 4-1 margin that the Minister’s decision was not affected by apprehended bias, Kirby J dissenting.
51 (1988) 2 FC 552 (CA)
54 (2001) 3 FCR 605.
55 Ibid at paragraph 52.
the RPD have been appointed under the *Public Service Employment Act*\(^{56}\) and not on individual short-term contracts, thus giving them a greater degree of independence than is currently enjoyed by members of the RRT.

**The ‘duty to inquire’**

The MRT and RRT have been described by Australian courts on numerous occasions as operating in an ‘inquisitorial’ fashion, as opposed to the ‘adversarial’ approach of the courts. For example, in *Minister for Immigration and Citizenship v SZIAI* the High Court stated as follows:\(^{57}\)

> It has been said in this Court on more than one occasion that proceedings before the Tribunal are inquisitorial, rather than adversarial in their general character. There is no joinder of issues as understood between parties to adversarial litigation. The word ‘inquisitorial’ has been used to indicate that the Tribunal, which can exercise all the powers and discretions of the primary decision maker, is not itself a contradictor to the cause of the applicant for review. Nor does the primary decision maker appear before the Tribunal as a contradictor. The relevant ordinary meaning of ‘inquisitorial’ is ‘having or exercising the function of an inquisitor’, that is to say ‘one whose official duty it is to inquire, examine or investigate’. As applied to the Tribunal ‘inquisitorial’ does not carry that full ordinary meaning. It merely delimits the nature of the Tribunal’s functions. They are to be found in the provisions of the *Migration Act*. The core function, in the words of s 414 of the Act, is to ‘review the decision’, which is the subject of a valid application made to the Tribunal under s 412 of the Act.

While it is true that the words ‘inquire’ or ‘inquisitorial’ do not appear in the *Migration Act*, it is nevertheless peculiar that the High Court has been firm, at least in the 21st century, that the tribunals have no stand-alone duty to inquire into an applicant’s claims. While it is certainly not the role of an administrative tribunal to make an applicant’s case for him or her, one would expect the RRT in particular to take an active role in examining whether an applicant’s claims before it are true or at least plausible. This is in fact what the RRT does – the tribunal historically included a large ‘Country Information Section’ which was staffed by employees whose job it was to examine applicants’ claims against known facts about the country, or at least known facts as reported by government (such as the Australian Department of Foreign Affairs and Trade and the US State Department) and non-government (such as the UNHCR and

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\(^{56}\) SC 2003, c 22.

\(^{57}\) (2009) HCA 39 at paragraph 18.
Amnesty International) agencies. However, the courts have been very reluctant to impose a legal obligation on the tribunals to have recourse to these kinds of resources (although it could be said that Direction 56 under s 499 imposes a legal obligation on the Tribunal to have regard to DFAT advice).

In 1994, Wilcox J in the Federal Court found that a duty to inquire does arise in limited circumstances. In Prasad v Minister for Immigration and Ethnic Affairs his Honour stated as follows:

Where it is obvious that material is readily available which is centrally relevant to the decision to be made … to proceed to a decision without making any attempt to obtain that information may properly be described as an exercise of the decision-making power in a manner so unreasonable that no reasonable person would have so exercised it.

The kinds of situations in which applicants have argued for a duty to inquire to be imposed on the tribunals have varied greatly. In Cabal v Minister for Immigration and Multicultural Affairs the applicant provided a large amount of untranslated material, including entire textbooks, to the RRT without explaining its relevance, and argued that the RRT had a positive duty to translate all the material and consider it in deciding the applicant’s case. The Full Federal Court had little difficulty in determining that the RRT had no such duty. On the other hand, in Sun v Minister for Immigration and Ethnic Affairs the applicant claimed that he had entered Australia after boarding a flight at Port Moresby, where an immigration officer had permitted him to board without a visa. A country research officer was informed by the Department that it could provide an 88-page printout of the passenger lists for Port Moresby airport around the claimed date, but the presiding member, Ms Smidt, then cancelled the request. Ms Smidt’s refusal to obtain the document was found by the Full Federal Court to be evidence of apprehended bias on her part against Mr Sun, and the decision of the RRT was set aside.

The High Court, however, has generally shown very little enthusiasm for creating any kind of duty to inquire. The key decision is probably still Re Minister for Immigration and Multicultural and Indigenous Affairs, Ex parte S134/2002, a case involving the somewhat famous, and certainly very media-savvy, Bakhtiyari family. The full exploits of the family will not be considered.

58 The RRT’s country information section was transferred to the Department with effect from 1 July 2013 – see Part 3 of the MRT and RRT’s Annual Report for 2012–13 (http://www.mrt-rrt.gov.au/AnnualReports/ar1213/part-3.html, extracted 20 October 2014). The report states that ‘Country of origin information services will be provided to the tribunals by the department via a service level agreement that will govern the provision of products and services’.
59 (1985) 6 FCR 155 at 170.
60 (2001) FCA 546.
here, but the father, Ali Reza Bakhtiyari, came to Australia by boat in 2000 and was found to be a refugee from Afghanistan. Mr Bakhtiyari’s wife and five children followed him on a later boat, and were found not to be Afghans, but Pakistanis, and refused protection visas. It is not clear whether the Department was immediately aware of all the familial links, it seems that at least by the time of the RRT hearing both the Department and the RRT knew that Mr and Mrs Bakhtiyari were husband and wife. Despite this, a majority of the High Court found that the RRT committed no error of law by not obtaining and considering Mr Bakhtiyari’s successful application in coming to the adverse decision against the other family members. This is an extraordinary decision, as quite apart from any duty to inquire, this seems like a classic failure to take a relevant consideration into account.

Similarly, in Minister for Immigration and Multicultural and Indigenous Affairs v SGLB, the RRT applicant, a long-term detainee, stated repeatedly at the hearing that he wished to proceed, but nevertheless showed clear signs of severe psychiatric disturbance. The RRT affirmed the Departmental decision, primarily on the basis of inconsistencies in the applicant’s own evidence. Despite his signs of distress, the High Court found that the RRT had no duty to inquire into the applicant’s psychiatric state before making a decision.

However, in SZIAI, the High Court may have shown a willingness to return to the Prasad approach. While the High Court’s comments on the duty to inquire were strictly obiter, as the court expressly stated that it did not need to resolve the issue to decide the case, the majority stated as follows:

Although decisions in the Federal Court concerned with a failure to make obvious inquiries have led to references to a ‘duty to inquire’, that term is apt to direct consideration away from the question whether the decision which is under review is vitiated by jurisdictional error. The duty imposed upon the Tribunal by the Migration Act is a duty to review. It may be that a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a failure to review. If so, such a failure could give rise to jurisdictional error by constructive failure to exercise jurisdiction. It may be that failure to make such an inquiry results in a decision being affected in some other way that manifests itself as jurisdictional error.

Commentators have been split on the effect of SZIAI. On one hand, Crock and Berg state that ‘the case underscores once again that the High Court has shown
no enthusiasm to develop even the smallest requirement that the tribunals should be duty-bound to institute their own inquiries’. 65 However, Mark Smyth66 opines that since SZIAI was decided, the Federal Court has effectively reverted to the Prasad approach, citing a number of Federal Court judgements in support.67 It would seem that further High Court authority will be required to shed further light on this matter.

Part 3 – Tribunal processes

As previously noted, the MRT and RRT have very detailed ‘codes of procedures’ that must be followed in making their decisions. These codes are very similar but not identical.

The main difference between Parts 5 and 7 of the Act, so far as procedures are concerned, is that ss 366A–366D expressly limit the right of a MRT applicant to be represented at a hearing, but no such limitations exist for RRT hearings. Also there is no equivalent of s 363A in Part 7, which again appears to be intended to limit a person’s right of representation before the MRT. The difference appears to be a recognition that claims for refugee status are extremely complex, as well as emotional, and that an applicant seeking review of a protection visa decision is more likely to need assistance at the hearing than a MRT applicant. This is not to say that hearings related to, say, a refusal of a partner visa are not also complex and potentially emotionally draining, but they do not have the potential life-and-death consequences of a RRT hearing.68

It is simply impossible in this chapter to examine in detail all of the procedural. It is sufficient to note two things – the reason for the ‘exhaustive statement’ provisions in ss 357A and 422B of the Act, and the vast volume of law surrounding the ‘disclosure of adverse information’ provisions in ss 359A and 424A.

65 Crock and Berg, supra n4 at paragraph 18.130.
68 There are some interesting comments on who is allowed to be present at an RRT hearing, given the requirement in s 429 that the hearing be in private, in SZAYW (2006) HCA 49, especially at [21]–[29].
Chapter 4. Merits Review of Migration Decisions

The Migration Legislation Amendment (Procedural Fairness) Act 2002

The Migration Legislation Amendment (Procedural Fairness) Act 2002 (‘the MLAPF Act’) was an attempt to ensure that the various ‘codes of procedure’ set out in the Act for dealing with visa or review applications were in fact an exhaustive statement of natural justice requirements under the Act. The MLAPF Act was a response to the High Court’s decision in Re Minister for Immigration and Multicultural Affairs; Ex parte Miah,69 which had found that Subdivision AB of the Act, despite setting out a ‘Code of Procedure’ for dealing with visa applications, did not exclude the common law rules of procedural fairness. Gleeson CJ and Hayne J noted as follows:70

[95] The only indication of the matters which are to inform the decision of the Minister whether or not to seek submissions or further information from the applicant is to be found in the heading to subdiv AB, namely ‘dealing fairly, efficiently and quickly with visa applications’. That being so, those powers are to be exercised to ensure procedural fairness, albeit in a manner that is quick and efficient. Accordingly, the obligation to accord procedural fairness is not excluded by subdiv AB.

[96] Once it is accepted that the Minister’s power to invite submissions or further information is to be exercised to ensure procedural fairness, the fact that the Act confers a right of review by the Refugee Review Tribunal becomes irrelevant. The existence of a right of review cannot deprive the provisions of subdiv AB of the meaning and effect which the heading to that subdivision directs.

Most relevantly, the MLAPF Act inserted new sections 359A and 422B into the Act, which deal with reviews by the MRT and RRT respectively. Subsections 359A(1) and 422B(1) are identical, and provide that ‘[t]his Division is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with’. As will be seen, ss 359A and 422B have not been particularly effective. The EM to the Bill expressly referred to the Miah decision as follows:

[3] In Re MIMA; Ex parte Miah [2001] HCA 22 the High Court held, by a narrow majority, that the ‘code of procedure’ for dealing fairly, efficiently and quickly with visa applications in Subdivision AB of Division 3 of Part 2 of the Act did not exclude common law natural

70 Ibid at paragraphs 95 and 96.
justice requirements. The majority considered that such exclusion would require a clear legislative intention and that there was no such clear intention in the Act.

[4] The purpose of this Bill is to provide a clear legislative statement that the ‘codes of procedure’ identified in the Bill are an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters they deal with.

The MLAPF Bill received Royal Assent on 3 July 2002 and came into effect on the following day.71

If the purpose of the MLAPF Act was to ensure that the MRT’s and RRT’s procedural obligations would be met by mechanically complying with Parts 5 and 7 respectively, this has not proven to be the case. The courts have continued to imply a duty to exercise those procedural powers fairly. For example, in SZFDE v Minister for Immigration and Citizenship72 the RRT, as required by s 425, invited the applicant to a hearing, which the applicant declined. The RRT affirmed the Departmental decision. It transpired that the applicant was acting with the ‘assistance’ of one Mr Hussain, who no longer held a lawyer’s practising certificate or registration as a migration agent, despite claiming to be both. Mr Hussain had advised the applicant not to attend the RRT hearing, it seems partly to avoid the RRT discovering his (unlawful) involvement with the application, and stated that he would seek Ministerial intervention under s 417 instead. Mr Hussain’s actions were found to represent a fraud on the RRT, and that despite it acting in good faith at all times, the RRT had been prevented from exercising its role to review the Departmental decision. The RRT’s decision was therefore set aside, and the applicant presumably engaged a properly registered migration agent for the new RRT hearing.73

Further, in light of the unanimous High Court decision of SZBEL v Minister for Immigration and Multicultural Affairs74 it is now settled that ss 360 and 425 incorporate common law natural justice requirements in addition to dealing with the right to a hearing. The High Court held in that case that s 425 requires the RRT to provide an applicant with the opportunity to give evidence and present arguments in relation to issues arising in relation to the decision under review, and the failure to notify applicant of issues that the tribunal considers determinative but were not considered dispositive by the delegate constitutes jurisdictional error. This interpretation effectively provides a separate common

72 (2007) 237 ALR 64.
73 For a thorough examination of this case, see Zac Chami, ‘Fraud In Administrative Law and The Right To A Fair Hearing’, (2010) 61 Australian Institute of Administrative Law Forum 5.
law obligation for the tribunals in addition to those under ss 359A and 424A, and also allows common law obligations to remain alive, regardless of the MLAPF Act.

Perhaps even more significantly, the Full Federal Court found in *Minister for Immigration and Citizenship v Li*75 that a refusal to adjourn a MRT hearing amounted to a jurisdictional error, despite the existence of s 359A. The Court stated as follows at paragraph 29:

> Consideration of the statutory context in which s 353 and s 357A(3) appear does not negate the proposition that an unreasonable refusal of an adjournment can constitute jurisdictional error on the part of the MRT. The MRT’s ‘core function’ is to review an MRT reviewable decision such as that made in respect of, the respondent, Ms Li: s 348. In so doing, it must invite her to appear: s 360. The appearance afforded by the MRT to an applicant by that invitation must be meaningful, not perfunctory, or it will be no appearance at all. The MRT is given power to adjourn proceedings from time to time: s 363(1)(b) of the Act. An unreasonable refusal of an adjournment of the proceeding will not just deny a meaningful appearance to an applicant. It will mean that the MRT has not discharged its core statutory function of reviewing the decision. This failure constitutes jurisdictional error for the purposes of s 75(v) of the Constitution.

The decision of the Full Federal Court was upheld on appeal by the High Court.76 The High Court had nothing at all to say about s 359A, and affirmed the decision primarily on the basis of a breach of s 363 by the MRT. The High Court also made some interesting comments on the ground of ‘unreasonableness’, and seems to have moved Australian law forward from the ‘Wednesbury unreasonableness’77 which had hitherto dominated.

The notion that, by failing to comply with the requirements of natural justice, the MRT or RRT would not in fact offer a hearing and would fail to fulfill their core function, resurfaced in *SZJSS v Minister for Immigration and Citizenship*.78 The Full Federal Court in this case simply ignored s 422B, and found that apprehended bias on behalf the decision maker had the effect that the RRT had constructively failed to exercise its jurisdiction and effectively failed to

75 (2012) FCAFC 74.
76 Minister for Immigration and Citizenship v Li (2013) HCA 18.
77 Referring to *Associated Provisional Picture Houses Limited v Wednesbury Corporation* (1948) 1 KB 223.
78 (2009) FCA 1577 at paragraph 64.
provide the applicant with a hearing. On appeal, the High Court also did not address s 422B – instead, it assumed that apprehended bias would amount to a jurisdictional error but found none existed in the case at hand.

Sections 359A and 424A

The High Court has generally struck down attempts by lower courts, at least prior to *S157 v Commonwealth* (the ‘privative clause case’) to restore the common law rules of procedural fairness to tribunal decision-making by the ‘back door’. For example, in *Minister for Immigration and Multicultural Affairs v Eshetu* the High Court found that ss 353 and 420 of the Act were exhortatory provisions, and did not import a common law duty of procedural fairness, overruling a number of Federal Court decisions. A similar attempt to imply a common law duty of procedural fairness into ss 368 and 430 was also struck down by the High Court in *Minister for Immigration and Multicultural Affairs v Yusuf*.

Post-*Yusuf* cases have concentrated primarily on the wording of Parts 5 and 7 themselves, and found that any deviation from the strict wording of those provisions amounts to a jurisdictional error. This has been particularly the case in the interpretation of ss 359A and 424A of the Act, although recent decisions such as *Minister for Immigration and Citizenship v SZIZO* may indicate that the High Court is now prepared to take a more purposive approach to the construction of Parts 5 and 7. Judges themselves have recognised the lack of flexibility in Parts 5 and 7 of the Act, including Weinberg J in *SZEEU v Minister for Immigration and Multicultural Affairs*.

With great respect, I doubt that the legislature ever contemplated that s 424A would give rise to the difficulties that it has, or lead to the results that it does. The problems that have arisen stem directly from the attempt to codify, and prescribe exhaustively, the requirements of natural justice, without having given adequate attention to the need to maintain some flexibility in this area. This desire to set out by way of a highly prescriptive code those requirements was no doubt well-intentioned, and perhaps motivated by a concern to promote consistency. However, the achievement of consistency (assuming that this goal can be attained) comes at a price. As is demonstrated by the outcome of at least some

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79 Ibid at paragraph 64.
82 (1999) 197 CLR 611.
83 (2001) 206 CLR 323.
84 (2009) 238 CLR 627.
of these appeals, codification in this area can lead to complexity, and a
degree of confusion, resulting in unnecessary and unwarranted delay
and expense. To put the matter colloquially, and to paraphrase, ‘the
cake may not be worth the candle’.

**Breach of ss 359A or 424A is a Jurisdictional Error**

Unsurprisingly, a breach of ss 359A or 424A of the Act has been found by the
courts to be a jurisdictional error, meaning that a breach of those provisions
leaves the decision liable to be set aside by a court despite the existence of
the privative clause in s 474 of the Act. In SAAP, the Hayne J stated that
‘whether [that process] would be judged to be necessary or even desirable in the
circumstances of a particular case, to give procedural fairness to that applicant,
is not to the point … [t]he Act prescribes what is to be done in every case’. But
what obligations do ss 359A and 424A place on the respective tribunals?

**Sections 359A and 424A apply to information taken into account in the decision**

Sections 359A and 424A apply only to information that is at least a reason
for affirming the decision under review. For example, in *VEAL v Minister for
Immigration and Multicultural and Indigenous Affairs* the RRT had received a
classic ‘dob-in’ letter claiming that the applicant had committed human rights
abuses in his home country. The RRT stated in its reasons that it had been unable
to test the claims made in the letter and therefore gave it ‘no weight’. The High
Court found that this reasoning meant that s 424A did not apply.

As for s 424A, it is enough to notice that that provision is directed
to ‘information that the Tribunal considers would be the reason, or
a part of the reason, for affirming the decision that is under review’. The Tribunal said, in its reasons, that it did not act on the letter or the
information it contained. That is reason enough to conclude that s 424A
was not engaged.

The same reasoning was applied to s 359A in *Minister for Immigration and
Citizenship v Kumar*, although in that case the MRT had considered the dob-in

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87 *S157 v Commonwealth*, supra n77.
88 Supra n86 at paragraph 208.
90 Ibid at paragraph 5.
91 Ibid at paragraph 12.
letter. The decision under review in VEAL was set aside in this pre-s 422B case because the RRT, at common law, should nevertheless have provided the applicant with the substance of the allegations.

**Sections 359A and 424A do not apply to information provided by the applicant**

Paragraphs 359A(4)(b) and 424A(4)(b) each provide that the respective section does not apply to information ‘that the applicant gave for the purpose of the application for review’. The obvious intention of this provision is to prevent the tribunal from having regurgitate information it received from the applicant back to the applicant and ask for the applicant’s comments on it. The courts have taken a fairly strict line on these provisions. For example, information provided by one family member cannot be used to decide an application lodged by another family member without seeking the second family member’s comment, even when the cases were heard together. Further, until ss 359A(4)(ba) and 424A(4)(ba) were inserted by means of the *Migration Amendment (Review Processes) Act 2007*, which came into effect on 29 June 2007, information provided to the Department in the primary decision-making process that could result in an adverse decision also had to be provided to the applicant by the tribunals.

**Sections 359A and 424A do not apply to every step in the Tribunals’ reasoning**

It is clear on the face of ss 359A and 424A that the Tribunals are not required to disclose every single step of their reasoning process, but only information that could lead to a decision adverse to the applicant. For example, in *NAOX v Minister for Immigration and Citizenship* the RRT had received information from another ‘dob-in’ letter that the applicants were not a same-sex couple as they claimed, but actually cousins. The RRT member had conducted Google searches relating to a claim by the applicants that there was a fatwa against homosexuals in Bangladesh, and also the meaning of the words ‘cousins’ and ‘second cousins’. The results of the first search but not the second were put to the applicants under s 424A. Ormiston FM found that the RRT was not required to disclose the Google search terms and results in relation to the second search to the applicants, because the information sought and obtained was not personal to them.

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96 (2008) FMCA 1467.
On the other hand, in *SZEEU*\(^{97}\) one of the main reasons for the RRT’s decision to affirm the Departmental decision was that the applicant claimed to be an active member of the Awami League in Bangladesh, but had not had any involvement with the Australian branch of the League. This was despite the fact that the applicant’s migration agent, a Mr Haque, was himself a prominent member of the Australian Awami League and could easily have put his client in contact with them. The RRT found as follows:\(^{98}\)

The claims of political association and involvement are vague and unconvincing. Whilst he knows of political party members and people who stood for election and who won I do not accept that his level of explanation of what he did for the party displayed an actual involvement. Apart from this he states that he has made no contact with the Awami League in Australia though had heard about them. This is somewhat strange in itself as it is known to the Tribunal that the applicant’s adviser – Mr. Sirajul Haque – plays a prominent role in the Awami League association in Australia. I consider it reasonable to assume that if the applicant had wanted to make contact with his claimed political party he could easily have done so. The fact that he has not further indicates that he was not involved.

The Minister argued that the reasons for the RRT’s decision were that *SZEEU*’s evidence was ‘vague and unconvincing’, and that he had not joined in any Awami League activities in Australia. The fact that Mr Haque had contacts in the League was a ‘side comment’ and not a reason for the decision. However, Moore J found that:\(^{99}\)

What the Tribunal was saying was that not only did the appellant not engage in activities associated with AL in Australia, but also that he had an immediate and direct opportunity of doing so because of his association with Mr Haque. The Tribunal said that had the appellant wanted to make contact with the AL it could easily have done so. The reason why it spoke of the ease with which the appellant could have made contact, was its knowledge about Mr Haque. In my opinion, that was information that the Tribunal should have provided particulars of under s 424A.

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\(^{97}\) Supra n85.

\(^{98}\) Ibid at paragraph 84.

\(^{99}\) Ibid at paragraph 88.
Sections 359A and 424A do not apply to matters such as the overall credibility of the applicant (as opposed to specific third-party information that contradicts one or more claims). In Minister for Immigration and Citizenship v SZGUR the High Court found as follows:\textsuperscript{100}

[8] The ‘information’ upon which the Tribunal invited comment, was the existence of ‘contradictions and inconsistencies’ between what SZGUR had stated orally and in writing to the Tribunal, variously constituted, during the iterations of the review process. The contradictions and inconsistencies, which were elaborated at some length in the letter, related to SZGUR’s claimed involvement with the Communist Party of Nepal, whether he and his family had gone into hiding in Nepal, whether he had been helped to leave the country and his claim that two colleagues had been executed by the Nepalese Army.

[9] Despite the language of the Tribunal’s letter, the existence of ‘inconsistencies’ and ‘contradictions’ in an applicant’s testimony and written submissions to the Tribunal is not ‘information’ of the kind to which s 424A is directed. As was explained by the plurality in SZBYR v Minister for Immigration and Citizenship, the term ‘information’ in s 424A does not extend to the Tribunal’s ‘subjective appraisals, thought processes or determinations’\textsuperscript{101} Their Honours said:

However broadly ‘information’ be defined its meaning in this context is related to the existence of evidentiary material or documentation, not the existence of doubts, inconsistencies or the absence of evidence.

The exclusion of this class of information from the obligation imposed by s 424A is consistent with limits on the procedural fairness hearing rule at common law. Procedural fairness requires a decision maker to identify for the person affected any critical issue not apparent from the nature of the decision or the terms of the statutory power. The decision maker must also advise of any adverse conclusion which would not obviously be open on the known material. However, a decision maker is not otherwise required to expose his or her thought processes or provisional views for comment before making the decision.\textsuperscript{102}

In other words, if the MRT or RRT notes contradictions or internal inconsistencies in an applicant’s evidence, ss 359A and 424A do not oblige the tribunal to inform the applicant of such prior to a decision being made. Sections 359A and 424A

\textsuperscript{100} Supra n67 at paragraphs 8 and 9.

\textsuperscript{101} (2007) 81 ALJR 1190 at 1196.

\textsuperscript{102} Commissioner for Australian Capital Territory Revenue v Alphafone Pty Ltd (1994) 49 FCR 576 at 591–92.
relate to specific information that contradicts or casts doubt on an applicant’s case, not the applicant’s own consistency and demeanour. Nor does it require the tribunal to disclose every step in its reasoning in determining that a piece of information is in fact adverse to the applicant. These sections require only the disclosure of adverse and objective evidence.

Relaxation of the strict compliance approach?

Although the courts have generally imposed a very strict obligation on the MRT and RRT to conform precisely to the codes of procedure, the High Court’s decision in *SZIZO*\(^{103}\) indicates a possible relaxation to this approach. In *SZIZO*, the appellants – husband, wife and four children – had been refused protection visas. When applying for review to the RRT, the husband nominated his eldest daughter (one of the applicants) to be his authorised recipient. Section 441G the *Migration Act* provides that ‘the Tribunal must give the authorised recipient, instead of the applicant, any document that it would otherwise have given to the applicant’. However, despite the requirement in that provision, the Tribunal corresponded only with the applicant father about the hearing. The husband, wife and four children appeared before the Tribunal and the husband, wife and eldest daughter (who was also the authorised recipient) gave evidence.

The Full Federal Court had held that the breach of the requirement in s 441G constituted a jurisdictional error. The Court considered that the provisions in the Act purporting to exhaustively set out the RRT’s procedural requirements, including s 422B, suggested ‘that Parliament intended that there be strict adherence to each of the procedural steps leading up to the hearing’\(^{104}\). This result was reached despite the fact that there had been no unfairness or prejudice to the appellants and there would not have been a contravention of common law procedural fairness requirements. As in *SAAP*,\(^{105}\) there was a breach here of a statutory requirement and that breach resulted in the decision being affected by jurisdictional error.

However, the High Court rejected that conclusion. *SAAP*, it was said, was decided before the introduction of s 422B into the Act, and the scope of s 424A would now have to be interpreted in light of s 422B. The Court then drew a distinction between, on the one hand, core procedural fairness provisions and, on the other hand, provisions which are merely facilitative of a fair hearing. Section 441G fell into the second category, as it is a procedural step that goes to the ‘manner’ of giving notice. By contrast, s 424A(1) sets out the obligation

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103 Supra n84.
104 *SZIZO v Minister for Immigration and Citizenship* [2008] FCAFC 122 at paragraph 87.
105 Supra n86.
to give particulars of adverse information and s 425 sets out the obligation to invite the applicant to give evidence and present arguments. These are both core procedural fairness provisions.

For the High Court, as far as s 441G was concerned, while compliance with the statutory requirements might have been intended by Parliament to discharge the Tribunal’s obligations, a failure to comply need not result in jurisdictional error. Instead, such a determination requires a consideration of the ‘extent and consequences of the departure’. The consequences here were not sufficient to give rise to invalidity, as there was no injustice and the applicants received timely and effective notice of the hearing. It remains to be seen whether the High Court will continue on the path of finding ‘core’ and ‘non-core’ procedural requirements in the Act.

Part 4 – Ministerial intervention

The Minister has the power in some situations to exercise a non-compellable discretion, such as to permit an ‘unauthorised maritime arrival’ to make an application for a visa under s 46A of the Act. The Minister also has particular power to substitute a ‘more favourable’ decision for that of the MRT or RRT.

Sections 351 and 417 of the Act are substantially identical, and provide these intervention powers.

A number of important features can be seen from these provisions:

• The intervention power applies only when an applicant has made an unsuccessful application for review to the MRT or RRT.
• The power to substitute a decision may only be exercised by the Minister personally. The Act says nothing about the means by which cases may be brought to the Minister’s attention.
• Ministerial intervention is clearly meant to be exceptional – it may only be done in the ‘public interest’ (ss 351(1) and 417(1)), and details of its exercise are to be provided to Parliament (ss 351(4)–(6) and 417(4)–(6)).
• The Minister has no duty to consider the exercise of his or her power in any particular case. That is, the Minister is not obliged to make a decision on each and every request for intervention – he or she may simply ignore any or all requests.

106 Supra n84 at paragraph 35.
107 See Chapter 2 for more examples.
108 Note that there is also an intervention power in 501J in respect of AAT decisions in protection visa cases.
Chapter 4. Merits Review of Migration Decisions

History of intervention powers

A limited form of Ministerial intervention was provided for in the *Migration Legislation Amendment Act (No. 2) 1989*, one of a number of Acts that made substantial amendments to the Act in 1989. Originally, the then Minister, Senator Ray, had wanted to exclude almost all elements of Ministerial discretion, but the Opposition parties combined to block a version of the Bill that removed all elements of discretion. The Bill was eventually passed giving the Minister limited powers to intervene on humanitarian grounds. However, Senator Ray continued to have reservations about the exercise of discretion, noting as follows in his Second Reading Speech to the Bill:

> I have only one objection to ministerial discretion. It is a remaining objection and one I will probably always have. What I do not like about it is access. Who has access to a Minister? Can a Minister personally decide every immigration case? The answer is always no. Those who tend to get access to a Minister are members of parliament and other prominent people around the country. I worry for those who do not have access and whether they are being treated equally by not having access to a Minister.

This has continued to be a common ground of objection to Ministerial intervention powers.

The Ministerial intervention powers have remained basically the same since the *Migration Reform Act 1992* came into effect on 1 September 1994, except to amend section references from the IRT to the MRT. The Explanatory Memorandum for the Migration Reform Bill 1992 stated as follows at paragraph 302 in relation to new s 121 (which became s 351 after the renumbering of the Act):

> This section provides the Minister with an extraordinary power to substitute a new decision for a decision of the IRT, whether or not the IRT could have made the new decision, when the Minister considers it in the public interest to do so. The new decision must be more favourable to the applicant than the decision of the IRT which is being substituted.

Note the use of the word ‘extraordinary’. However, the use of the intervention powers seems to have become less extraordinary over time. Consolidated

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statistics on the use of the Ministerial intervention power are hard to come by, but the Senate Select Committee on Ministerial Discretion in Migration Matters published the following statistics in March 2004:112

The increasing numbers are obvious, and the large jump from 1997–98 to 1998–99 is of particular interest. In this table, ‘humanitarian’ intervention includes Ministerial intervention under ss 417, 454 (referrals from the RRT to AAT) and 501J. These increased from 309 in 1996–97 to 4,489 in 2002–03. Whilst ‘non-humanitarian’ intervention covers ss 345 (the old MIRO intervention power), 351 and 391 (referrals from the MRT to AAT). The humanitarian powers in relation to referrals have never been used.

Compare this to the most recent publicly available statistics, those for the second half of 2012113 where total requests for intervention have dropped to 2,869 in 2012–13. This statistics identify the Minister’s public interest powers, s 417, s 351, s 48B and ‘other powers’. Between 2011–12 the ‘other powers’ figure dropped from 2,852 requests to 76. The large change in the ‘other powers’ figure is explained by the Department as follows:114

‘Other powers’ includes 195A, s 345, s 391, s 454 and s 501J. The 2011–12 figures include the Minister’s use of the s 195A power to grant a Bridging Visa E (BVE) to allow IMAs to live in the community while their claims for protection are being considered. At 30 June 2012, 2741 BVEs had been granted to eligible IMAs115 under s 195A. This type of visa grant is no longer included in this publication.

When one notes that exercises of power under ss 345, 391, 454 and 501J will be few and far between, it appears that has been a significant fall in s 417 requests since 2003, and a smaller though still noticeable fall in s 351 requests. Even on 2012 figures, however, Ministerial intervention does not appear to be an ‘extraordinary’ event.

Ministerial intervention in practice

The Minister does not in practice examine every request for ss 351 and 417 intervention that is sent to him or her. Instead, the Minister has published guidelines on the exercise of these powers, which are set out at the end of this

112 Supra n109 at paragraph 3.9.
114 Ibid.
115 Illegal Maritime Arrivals.

chapter. A dedicated unit within the Minister’s office examines all requests, and then those staff members forward for the Minister’s attention those that they regard as falling within the guidelines.

This, unsurprisingly, has led to litigation. In *Ozmanian v Minister for Immigration and Ethnic Affairs* the applicant argued that this process effectively resulted in Ministerial staff members exercising the Minister’s powers, or at least the power to refuse to intervene, under ss 351 and 417. As the decision-making power in those sections is reserved for the Minister personally, any decision made by a staff member not to refer a matter to the Minister was made unlawfully. The process in dealing with the request was set out in some detail as follows:

[39] The application under s 417 was immediately referred by the Minister’s office to the Department. Ms Donna Fraser, as case officer, was given the task of assessing the application.

[40] Ms Fraser considered the written application, the annexures to it, Ms Carlson’s file note concerning the failure of the applicant’s case before the RRT to fall within the guidelines and the applicant’s DORS file …

[42] After considering all of the foregoing matters Ms Fraser concluded that the matter did not warrant referral to the Minister personally …

[44] Ms Fraser proceeded to draft a response to the applicant’s s 417 application for signature by the Minister’s Senior Adviser. The draft Minute and draft response were then sent by her to her departmental supervisor, Mr Noel Barnsley, who in turn signed the Minute and approved the draft response. I infer from the evidence that the relevant departmental officers expected that, in the usual course, the ministerial officers would act on the departmental recommendation without making their own independent enquiries.

[45] The relevant material was then sent to the Minister’s office for consideration by Mr John Richardson, a ministerial adviser. After considering the matter he had no disagreement with the conclusion reached within the Department that the matter did not fall within the Minister’s guidelines. His evidence was that, had he considered the matter a borderline one or otherwise had a different view to that of the Department, he would have either required further information or raised the matter with the Minister personally.

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117 Ibid at paragraphs 39 to 49.
118 Ms Carlson was a Departmental Officer who was a member of the Determination of Refugee Status (DORS) unit. The Department at that time reviewed all unsuccessful RRT applications to determine whether the applicant fell within the s 417 guidelines.
[46] Mr Richardson then passed the material on to Ms Bronwyn McNaughton, the second respondent, who was then the Minister’s Senior Adviser. In accordance with the established general procedures, she signed the letter which had been drafted for her by Ms Fraser. She appeared to do so on the basis that its contents had been considered to be appropriate by the Department and Mr Richardson.

[47] The letter dated 29 November 1994 was signed by Ms McNaughton as ‘Senior Adviser’ and was sent to the solicitor for the applicant on that date.

[48] The document’s letterhead stated it was from the ‘Office of the Minister’. It read as follows:

Thank you for your letter of 4 October 1994 to the Minister for Immigration and Ethnic Affairs, Senator the Hon Nick Bolkus, on behalf of Mr Tosn Ozmanian. Senator Bolkus has asked me to reply on his behalf.

You have asked that the Minister exercise his discretion under section 417 of the Migration Act 1958 and grant Mr Ozmanian a visa on humanitarian grounds. Under section 417 of the Act, the Minister may substitute for a decision of the Refugee Review Tribunal (RRT) a decision more favourable to the applicant where he considers it is in the public interest to do so. However, this power is discretionary and the Minister is under no obligation to consider a case. When documents relating to a decided review are returned to the Department from the RRT, the applicant’s claims are examined against the Ministerial Guidelines for Stay in Australia on Humanitarian Grounds as to whether the case is one which the Minister may wish to consider under subsection 417(1) of the Act. As Mr Ozmanian’s case does not fall within the scope of these guidelines, it has not been referred to the Minister for his consideration … Thank you for raising the matter with us.

[49] Although the letter was stated to have been sent at the request of the Minister, it was an agreed fact before me that the Minister had at no stage seen the letter.

Merkel J at first instance found that the decision not to intervene in Mr Ozmanian’s case had been made by Ms McNaughton and not the Minister, and was therefore unlawful.119 However, this ruling was reversed on appeal to the

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119 Supra n116 at paragraph 116.
Full Federal Court by the Minister,\textsuperscript{120} although it could be argued that the Full Court sidestepped the real issue. Sackville J, who wrote the leading judgement, came to the conclusion that s 485 of the Act as it then stood precluded judicial review, at least by the Federal Court, of any exercise of power under s 417, and that therefore the decision, whether it was made by the Minister or Ms McNaughton, was unreviewable.\textsuperscript{121}

This is a strange decision, for two reasons. Firstly, as s 417 clearly stated that the decision could only be made by the Minister, if the decision was in fact made by Ms McNaughton it was simply not a decision under s 417. Whether an s 417 was reviewable under s 485 or not was irrelevant. Secondly, why did the Full Federal Court not address the issue of who made the decision? Mr Ozmanian’s application for special leave to the High Court was refused,\textsuperscript{122} despite the fact that even if the Full Federal Court was correct and an exercise of s 417 was unreviewable in that court, the High Court could review it in its original jurisdiction under s 75 of the Constitution. The special leave decision could be explained by the fact that it was leave to appeal, and not an original application under s 75, but one is still left with the impression that the substantive issues raised by Merkel J were never really addressed on appeal.

The matter was resolved, however, in Bedlington v Chong,\textsuperscript{123} a case involving the Minister’s power in s 48B to waive the s 48A bar. In that case, the Full Federal Court came to the conclusion that the Minister had the power to set out guidelines as to which circumstances he or she wished to intervene, and as long as staff followed those guidelines in making a decision whether to personally refer a matter to the Minster or not, this amounted to a valid exercise of the s 48B power. The same reasoning would apply to ss 351 and 417.

**Criticism of the ministerial intervention powers**

The main criticism levelled at the intervention powers are very much the same as those identified by Senator Ray in 1989 – who gets access to the Minister? Is it possible that some undeserving cases are granted visas because of ‘favours’ done in the past? A number of allegations of this kind were made by the 2004 Senate Select Committee on Ministerial Discretion in Migration Matters, which basically accused Minister Ruddock of allowing his intervention powers to be

\textsuperscript{120} Minister for Immigration and Multicultural Affairs v Ozmanian (1996) 141 ALR 322.
\textsuperscript{121} Ibid at 347.
\textsuperscript{122} Ozmanian v Minister for Immigration M89/1996 (1997) HCATrans 75.
\textsuperscript{123} (1998) FCA 1139.
bought in some circumstances.\textsuperscript{124} The circumstances in which one Francesco Madafferi, an alleged Mafia member, was granted a visa after intervention from Minister Vanstone have also attracted comment.\textsuperscript{125}

Many academics have argued that successive governments have attempted to use the Ministerial intervention powers as a substitute for ‘complementary protection’, or allowing an application for a visa on the basis that the applicant faces severe difficulties in their home country, but fall outside the Refugees Convention. Jane McAdam for example writes as follows:\textsuperscript{126}

\begin{quote}
There has been no mechanism for having claims based on a fear of return to torture, a threat to life, or a risk of cruel, inhuman or degrading treatment or punishment, assessed, except via the ‘public interest’ power of the Minister for Immigration and Citizenship under s 417 of the \textit{Migration Act 1958} (Cth) (known as ministerial intervention). The s 417 process is lengthy and inefficient, accessible only once an unsuccessful appeal has been made to the Refugee Review Tribunal. Furthermore, whether or not a claim is considered, and whether or not a visa to remain in Australia is granted, is wholly discretionary and non-reviewable. The s 417 mechanism is appropriate for purely humanitarian and compassionate cases, but not for those engaging Australia’s \textit{non-refoulement} obligations under international law.
\end{quote}

One reason for the downturn seen in s 417 requests in 2012 may be the passage of the \textit{Migration Amendment (Complementary Protection) Act 2011}, which inserted ‘complementary protection’ provisions into s 36 of the Act. However, the current government has introduced the \textit{Migration Amendment (Regaining Control Over Australia’s Protection Obligations) Bill 2013}, which would once again remove all complementary protection provisions from the Act. It seems that Ministerial intervention powers are not going to be substantially amended any time soon.

\section*{Part 5 – Other review bodies}

A number of other Commonwealth bodies may have an interest in immigration decision-making. Bodies such as the Australian Customs Service (ACS), the Australian Quarantine and Inspection Service (AQIS), and the Australian Fisheries Management Authority (AFMA) all have an interest in immigration

\begin{flushright}
\textsuperscript{124} Supra n105, in particular at paragraphs 6.50–6.53.
\end{flushright}
legislation and policy. The Attorney-General’s Department, primarily the legislative drafting branches of the Office of Parliamentary Counsel (Acts) and Office of Legislative Drafting and Policy (regulations) also frequently work with the Department. However, this section will deal with two Commonwealth bodies that have a clear interest in reviewing immigration decisions – the Ombudsman and the Australian Human Rights Commission (AHRC).

Ombudsman

Powers and functions generally

The office of the Commonwealth Ombudsman was created by the *Ombudsman Act 1976*. The functions of the Ombudsman are set out in s 5(1) of that Act, which provides as follows:

Subject to this Act, the Ombudsman:

(a) shall investigate action, being action that relates to a matter of administration, taken either before or after the commencement of this Act by a Department, or by a prescribed authority, and in respect of which a complaint has been made to the Ombudsman; and

(b) may, of his or her own motion, investigate any action, being action that relates to a matter of administration, taken either before or after the commencement of this Act by a Department or by a prescribed authority; and

(c) with the consent of the Minister, may enter into an arrangement under which the Ombudsman will perform functions of an ombudsman under an ombudsman scheme established in accordance with the conditions of licences or authorities granted under an enactment.

The term ‘administration’ is not defined in the *Ombudsman Act*, and is therefore given a wide interpretation. There is no dispute that the Department of Immigration and Border Protection (as it is currently known) is a ‘Department’ for the purposes of the *Ombudsman Act*. It is clear from s 5(1) that the Ombudsman can investigate a matter either because a complaint has been lodged, or on his or her own motion.

Subsection 5(2) places limits on the Ombudsman’s powers as follows. Most of the restrictions on the Ombudsman’s powers relate to courts or judicial officers, but s 5(2)(a) provides that the Ombudsman may not investigate ‘action taken by a Minister’. This would appear at first glance to prevent the Ombudsman from investigating, for example, a personal decision of the Minister under s 501(3)
to cancel or refuse a visa, or the exercise of the Minister’s intervention powers (discussed in the previous section of this chapter). It appears that the scope of this paragraph has never been judicially tested. Subsection 5(3A) also provides as follows:

For the purposes of the application of this Act to or in relation to the Ombudsman, action taken by a Department or by a prescribed authority shall not be regarded as having been taken by a Minister by reason only that the action was taken by the Department or authority in relation to action that has been, is proposed to be, or may be, taken by a Minister personally.

This appears to mean that the Ombudsman can investigate decisions made personally by a Minister, at least where the action could have been taken by the Department. For example, a s 501 cancellation need not be the subject of a personal decision by the Minister, but a decision under ss 351 or 417 must be. In its submission to the Senate Select Committee on Ministerial Discretion in Migration Matters, the Ombudsman described its power in relation to ss 351 and 417 intervention as follows:

The exercise of that discretion by the Minister cannot be the subject of investigation by the Commonwealth Ombudsman, consistently with s 5(2)(a) of the Ombudsman Act 1976 (Cth) which provides that ‘the Ombudsman is not authorised to investigate … action taken by a Minister’. Section 5(2)(a) does not, however, preclude the Ombudsman from investigating action taken by a Department in relation to a Ministerial decision: see s 5(3A), providing that ‘action taken by a Department …. shall not be regarded as having been taken by a Minister by reason only that the action was taken by the Department … in relation to action that has been … taken by a Minister personally’. Thus, for example, in relation to decisions made by the Minister under ss 351 and 417, the Ombudsman is able to investigate:

- action taken by the Department in identifying cases where the Minister’s powers might be exercised, and in providing a briefing and advice to the Minister;
- (probably) action taken by Ministerial staff related to Ministerial functions; and
- action taken by the Department.

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It is important to note that the Ombudsman has no power to set aside a Departmental decision. Instead, the Ombudsman is to give the relevant Department a report, in the circumstances set out in s 15 of the Ombudsman Act, and may make recommendations. If the Department fails to act on the report, the Ombudsman may inform the Prime Minister of such (s 16), and may send copies to the Speaker of the House of Representatives and the President of the Senate for tabling (s 17). A report tabled in Parliament is protected by Parliamentary privilege.

The best known Ombudsman inquiry in the immigration field was the own motion inquiry into Immigration Detention Centres (IDCs) in 2001, but a similar own motion inquiry into the use of State correctional facilities as places of detention, also in 2001, is a close second.

The ‘Immigration Ombudsman’

Since 2005, the Ombudsman has held the title of ‘Immigration Ombudsman’ (amongst others). This change was brought about by the Migration and Ombudsman Legislation Amendment Act 2005, and came about as a result of the inquiries into the unlawful detention of Cornelia Rau and Vivienne Alvarez, and the unlawful removal from Australia of the latter. Another 2005 Act, the Migration Amendment (Detention Arrangements) Act 2005 (‘the MADAA Act’), inserted Part 8C of the Migration Act, which requires the Ombudsman to regularly inquire into the circumstances of persons held in immigration detention for two years or more. The position of Immigration Ombudsman has been described as follows:

- The Ombudsman can investigate action taken by the Department of Immigration and Citizenship (DIAC) in relation to visa, citizenship, immigration and detention issues. This includes DIAC’s processing of visa and citizenship applications, and visa refusal or cancellation decisions.
- The Ombudsman has a compliance role and undertakes file inspections, site visits and observations of DIAC’s field operations. The Ombudsman monitors

130 The drafting and passage of the MADAA Act was quite extraordinary. The author of the text, Alan Freckelton, was employed in the Detention Services Division of the Department at the time, and the MADAA Bill was introduced into Parliament without, to the author’s awareness, any apparent knowledge of the Department, or the Office of Parliamentary Counsel. It has never been established where the Bill came from, but it seems likely that it was drafted by an external law firm directly for the Minister’s office.
DIAC's functions concerning the location, identification, detention and removal of unlawful non-citizens.

- The Ombudsman regularly visits immigration detention centres and other facilities that are used to accommodate detainees, such as residential housing and alternative places of detention. Immigration detention centres are currently operated by an outsourced service provider engaged by DIAC.

- In the Ombudsman's complaint role, detention-related complaints generally concern internal complaint handling procedures, access to health services, access to internal and external activities and property related matters. The Ombudsman also regularly visits offshore immigration detention centres (e.g. Christmas Island). One of the Ombudsman's roles is to ensure that the refugee assessment process for unlawful non-citizens is conducted in a timely and reasonable manner.

- Under Part 8C of the *Migration Act 1958* (Cth), the Ombudsman assesses, reports on and makes recommendations in relation to persons held in immigration detention for more than two years.

**Part 8C of the *Migration Act***

Under s 486N of the Act, the Secretary must provide the Ombudsman with a report on each immigration detainee, within 21 days of that detainee's 'detention reporting time'. Read together, ss 486L and 486M have the effect that the 'detention reporting time' is the date on which the detainee has been detained for a total of two years, and each six months thereafter. Under s 486O(1), the Ombudsman must 'give the Minister an assessment of the appropriateness of the arrangements for the person's detention' as soon as possible after receiving the relevant s 486N report, and may make recommendations as to the detainee's future detention under ss 486O(2) and (3). Under s 486O(5), the 'assessment must also include a statement, for the purpose of tabling in Parliament, that sets out or paraphrases so much of the content of the assessment as the Commonwealth Ombudsman considers can be tabled without adversely affecting the privacy of any person', and s 486P requires the s 486O(5) summary to be tabled in Parliament. The Ombudsman publishes annual analyses of s 486O reports given in that year.\(^{132}\)

A common criticism of Part 8C is that the Ombudsman lacks the power to take any substantive action, and that the Minister can simply ignore its recommendations, even when specific recommendations are made. The 'Right Now' organisation comments as follows:\(^{133}\)

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Where the Ombudsman does make a substantive recommendation, the Minister responds with comments so laden with misdirection they would fit better in a Kafka novel than they do in a Parliamentary Tabling Statement:

I note the Ombudsman’s recommendation in regard to each of these persons. The Government’s policy is currently being implemented in regard to the detention placement of detainees. Once implemented, and if appropriate, my Department will prepare advice to me, in relation to these persons’ detention placement. (The Hon. Scott Morrison MP, 4 December 2013)

In a similar vein, Civil Liberties Australia has called for the Ombudsman’s s 4860 recommendations to be made binding on the Minister.134

Finally on this point, the increasing Part 8C workload on the Ombudsman has not gone unnoticed either. Right Now comments as follows:135

The Ombudsman is so overstretched that more than a third of reviews were presented in a simplified format. The reason is clear: the number of people in long-term immigration detention has been growing too rapidly to manage. In 2013 there were 686 section 4860 reviews, while in 2012 only 297, in 2011 there were 52 reviews, and in 2010 there were a mere 28.

The Australian Human Rights Commission

General powers and responsibilities

The AHRC has been known by a number of titles, including the Human Rights and Equal Opportunity Commission (HREOC), and was established by the Australian Human Rights Commission Act 1986 (Cth) (‘the AHRC Act’). A lengthy list of functions of the AHRC is set out in s 11 of the AHRC Act, but the most relevant provision is probably s 11(1)(f), which provides that the AHRC may:

- inquire into any act or practice that may be inconsistent with or contrary to any human right, and:

- where the Commission considers it appropriate to do so – to endeavour, by conciliation, to effect a settlement of the matters that gave rise to the inquiry; and

135 Supra n133.
where the Commission is of the opinion that the act or practice is inconsistent with or contrary to any human right, and the Commission has not considered it appropriate to endeavour to effect a settlement of the matters that gave rise to the inquiry or has endeavoured without success to effect such a settlement – to report to the Minister in relation to the inquiry.

The term ‘human right’ is defined in s 3 of the AHRC Act as ‘the rights and freedoms recognised in the Covenant, declared by the Declarations or recognised or declared by any relevant international instrument’. The terms ‘Covenant’, ‘Declarations’ and ‘relevant international instrument’ are in turn defined in s 3 as follows:

‘Covenant’ means the International Covenant on Civil and Political Rights, a copy of the English text of which is set out in Schedule 2, as that International Covenant applies in relation to Australia.

‘Declarations’ means:

the Declaration of the Rights of the Child proclaimed by the General Assembly of the United Nations on 20 November 1959, a copy of the English text of which is set out in Schedule 3;

the Declaration on the Rights of Mentally Retarded Persons proclaimed by the General Assembly of the United Nations on 20 December 1971, a copy of the English text of which is set out in Schedule 4; and

the Declaration on the Rights of Disabled Persons proclaimed by the General Assembly of the United Nations on 9 December 1975, a copy of the English text of which is set out in Schedule 5.

‘relevant international instrument’ means an international instrument in respect of which a declaration under section 47 is in force.

The ‘relevant international instruments’ at present are the Convention on the Rights of Persons with Disabilities, the Convention on the Rights of the Child and the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief.136

Like the Ombudsman, the AHRC has no power to set a government decision or policy aside. Despite the broad wording of s 13 of the AHRC Act, which states that ‘the Commission has power to do all things that are necessary or convenient to be done for or in connection with the performance of its functions’, those

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functions are limited by s 11 to inquiring into and reporting on alleged breaches of human rights. The AHRC may act on a complaint made by a Minister or on the basis of a written complaint by an ‘aggrieved person’ (ss 20(1)(a) and 20(1)(b) of the AHRC Act), or on its own motion (s 20(1)(c) of the AHRC Act). AHRC reports are to be tabled in Parliament (s 46).

AHRC reports into immigration detention

The AHRC has released two substantial reports into Australia’s immigration detention system. A 1998 report entitled ‘Those Who’ve Come Across the Seas: Detention of Unauthorised Arrivals’, cleverly using a line from the national anthem, was held to be ‘damning’ of the conditions in Australian IDCs, although follow-up reports were slightly more complimentary to the Department. An even more comprehensive report into the treatment of children in IDCs was tabled in 2004. The Department devoted an entire ‘task force’ to drafting the government’s response to the draft of this report, The task force spent most of its time criticising errors in the draft HREOC report, such as a misquote of Article 37(b) of the Convention on the Rights of the Child, without addressing any of the substantive issues.

The AHRC is currently conducting another inquiry into the situation of children in immigration detention. The current inquiry is described on the AHRC website as follows:

On 3 February 2014 the President of the Commission, Professor Gillian Triggs, launched an inquiry into children in closed immigration detention. The purpose of this inquiry is to investigate the ways in which life in immigration detention affects the health, well-being and development of children. The inquiry will assess the impact on children by seeking the views of people who were previously detained as children in closed immigration detention and by assessing the current circumstances and responses of children to immigration detention.

138 Peter Mares, Borderline, Reportage 2002 at 87.
140 The author was a member of this task force.
141 One page of the draft quoted Article 37(b) as referring to detention lasting for the shortest possible period of time, instead of the shortest appropriate period of time. This error was rectified in the final version.
The inquiry will investigate what has changed in the ten years since the Commission released *A last resort? The report of the National Inquiry into Children in Immigration Detention* in 2004.

The inquiry received 230 submissions\(^{143}\) and handed down its report on 11 February 2015.\(^ {144}\) The AHRC was scathingly critical of the continuing detention of children in IDCs and similar environments, although the AHRC President, Gillian Triggs did note that ‘[s]ince the Inquiry began in February 2014, most of the 1138 children detained at that time are now in the community or in community detention’.\(^ {145}\) Despite this, around 330 children remained in immigration detention, and Professor Triggs noted that ‘34 per cent of children detained in Australia and Christmas Island have a mental health disorder of such severity that they require psychiatric support’,\(^ {146}\) and that ‘successive governments have failed children by locking them up in immigration detention’.\(^ {147}\)

The Federal government’s reaction to the report was predictably vituperative, with PM Abbott describing the report as a ‘blatantly partisan politicised exercise’,\(^ {148}\) and questioned why the AHRC did not start its inquiry when the number of children in detention reached its peak of around 2000 under the previous government.\(^ {149}\) In response, Professor Triggs denied any bias, and stated that she ‘made the decision to hold the inquiry last February because the release of children had slowed down over the first six months of the new Coalition Government.’\(^ {150}\) It seems that once again no real action will be taken.

The AHRC also regularly receives complaints from individuals in immigration detention. The best known individual report is probably the report on the circumstances of the Shayan Badriae, a child who suffered severe psychiatric harm in immigration detention.\(^ {151}\) The experiences of the Badriae family were explained in depth in the book *The Bitter Shore*.\(^ {152}\)


\(^{145}\) Ibid.

\(^{146}\) Ibid.

\(^{147}\) Ibid.


\(^{149}\) Ibid.

\(^{150}\) Ibid.
