

WHAT PROCEDURAL FAIRNESS DUTIES DO THE MIGRATION REVIEW TRIBUNAL AND REFUGEE REVIEW TRIBUNAL OWE TO VISA APPLICANTS?

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‘there are hours of innocent amusement yet to be had
about the effect of section 422B.’

Hayne J, *MIMIA v WACO* [2004] HCATrans 430

1. INTRODUCTION

The question that this essay seeks to answer can initially be stated simply: what procedural fairness duties do the Migration Review Tribunal (‘MRT’) and Refugee Review Tribunal (‘RRT’) owe to visa applicants? The answer to this question is not so straightforward. This is because it requires an analysis of the interplay between the broad natural justice hearing rule duties that exist at common law and the narrower duties that are set out in the *Migration Act 1958* (Cth) (‘the *Migration Act*’).

The *Migration Act* provides detailed procedures that must be followed when the MRT and RRT are reviewing decisions made by the Minister for Immigration, Multicultural and Indigenous Affairs.¹

In *Re MIMIA; Ex parte Miah*² the High Court held³ that the procedures contained within the *Migration Act* did not constitute an exhaustive code of procedures, as a clear legislative intention to exclude the common law hearing rule could not be found. The focus of this essay is on Parliament’s legislative response to *Miah* and to what extent it has succeeded in excluding the common law hearing rule.

A The Migration Legislation Amendment (Procedural Fairness) Act 2002 (Cth)

Parliament responded to *Miah* with the *Migration Legislation Amendment (Procedural Fairness) Act 2002* (Cth) (‘the *Amendment Act*’). The Explanatory Memorandum for the Bill states:

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In *Re MIMA; Ex parte Miah* ... the High Court held ... that the “code of procedure” ... in Subdivision AB of Division 3 of Part 2 of the Act did not exclude common law natural 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.

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.⁴

Six sections were inserted by the *Amendment Act*.

Sections 51A, 97A, 118A and 127A, inserted at the beginning of Subdivisions AB, C, E and F respectively of Div 3 of Part 2 of the *Migration Act*⁵ all state:

Exhaustive statement of natural justice hearing rule

- (1) This Subdivision is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with.
- (2) Sections 494A to 494D, in so far as they relate to this Subdivision, are taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters they deal with.

Sections 494A to 494D provide methods by which the Minister must serve documents and when a person is taken to have received such documents.

Section 357A, inserted at the beginning of Div 5 of Part 5,⁶ states:

Exhaustive statement of natural justice hearing rule

- (1) This Division is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with.
- (2) Sections 375, 375A and 376 and Division 8A, in so far as they relate to this Division, are taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters they deal with.

Sections 375, 375A and 376 allow the Minister to decide whether information can be disclosed to the MRT. Division 8A of Part 5 provides procedures for the MRT to give or receive review documents.

Section 422B, inserted at the beginning of Div 4 of Part 7⁷ states:

Exhaustive statement of natural justice hearing rule

- (1) This Division is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with.
- (2) Sections 416, 437 and 438 and Division 7A, in so far as they relate to this Division, are taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters they deal with.

Section 416 provides that when a person makes a second application to the RRT, the RRT may, but need not, have regard to information contained in the first application. Sections 437 and 438 regulate the disclosure of certain information. Division 7A of Part 7 provides procedures by which the RRT can give or receive review documents.

For convenience I will refer to ss 51A, 97A, 118A, 127A, 357A and 422B collectively as the 'exhaustive clauses'.

B Problem to be answered

This essay seeks to analyse the effect the Amendment Act has had on the natural justice hearing rule obligations that the MRT and RRT owe to visa applicants. The scope has been limited to the MRT and RRT because these Tribunals represent, for the majority of visa applicants, the final decision-making stage. Although this means that only ss 357A (relating to MRT reviews) and 422B (relating to RRT reviews) are examined, the general principles established apply by analogy to the other exhaustive clauses.

It is clear that a reviewable error occurs when the statute is not complied with⁸ and that no error occurs when both the statute and common law requirements are complied with. However, when the statute is complied with but the common law is not, determining whether the MRT or RRT has fallen into error depends on the operation of ss 357A and 422B. How these sections operate is presently unclear.

Chapter II analyses the three interpretive approaches that have been afforded to the exhaustive clauses, seeking to determine which is most defensible from a statutory construction perspective. I argue that these three interpretations have been mischaracterised as merely being a choice between 'wide' and 'narrow', and that this has resulted in some cases arriving at decisions which the authorities that they rely on would not have arrived at.

Chapter III analyses the extent to which the Amendment Act, once properly construed, has modified the natural justice hearing rule duties owed by the MRT and RRT. A conceptual framework is presented to determine which common law duties are excluded by the exhaustive clauses, and which are still owed. The Chapter also illustrates how the characterisation problem outlined in Chapter II can lead Courts on review into error. Finally, Chapter III demonstrates, as a case study, that the apparently conflicting cases of *MIMIA v Lay Lat*⁹ and *Antipova v MIMIA*¹⁰ were both correctly decided according to the framework that I propose.

This essay concludes that, despite Parliament's apparent intention to codify the natural justice hearing rule, there are still some common law natural justice hearing rule obligations which apply to decisions made by the MRT and RRT. Determining which common law obligations apply depends, to a large extent, on the grammatical wording of the statutory obligations.¹¹ In addition, as a result of the Amendment Act, Courts may be more likely to suffuse the statutory obligations with common law values.¹²

II INTERPRETING THE EXHAUSTIVE CLAUSES

The Courts' focus has centred on the meaning of the phrase 'in relation to the matters it deals with'. As the exhaustive clauses state that particular divisions and subdivisions are exhaustive statements of the natural justice hearing rule in relation to the matters they deal with, it is necessary to determine exactly what the division or subdivision deals with before a Court can establish what the division or subdivision is an exhaustive statement of.

Three different interpretations have arisen. The first (referred to here as the 'whole division approach') holds that the whole division (or subdivision where appropriate) deals with one matter: the natural justice hearing rule. Under this approach, any obligations which exist at common law but are not imposed by the Migration Act are extinguished because the

division, as a single entity, is taken to be an exhaustive statement of the natural justice hearing rule in its entirety.

On the other hand, the second interpretation (referred to here as the ‘exact text approach’), holds that each individual section of the division or subdivision deals with the particular obligation imposed by the exact text of that section, and nothing more.

Between these two approaches, a third interpretation (referred to here as the ‘individual sections approach’) agrees with the exact text approach in holding that it must be the individual sections which are examined rather than the division or subdivision as a whole, but differs from the exact text approach in holding that a section can ‘deal with’ more than just the exact text of the section. Under this approach, analysis must be undertaken to determine exactly what each section deals with, but it may be more general than the exact obligation that the text of the section provides.¹³

This chapter seeks to establish that the individual sections approach should be preferred over the whole division and exact text approaches.

The debate between these interpretations has in some instances been mischaracterised as being merely a choice between a ‘narrow’ and ‘wide’ interpretation of the matters which the sections deal with.¹⁴ The ‘narrow’ cases typically cited are *WAJR v MIMIA*¹⁵ and *Moradian v MIMIA*,¹⁶ the ‘wide’ cases being *NAQF v MIMIA*¹⁷ and *Wu v MIMIA*.¹⁸ Whilst the latter cases are certainly ‘wider’ than the former, this artificial dichotomy does not tell the full story. This is because all four of these authorities adopt either the exact text or individual sections approach: none adopt the whole division approach.

The judges who have ruled in the principal authorities have asked themselves two questions. The first is whether the division is, in and of itself, an exhaustive statement of the natural justice hearing rule, or whether the individual sections must be examined to determine what they deal with. If the whole division is the exhaustive statement, no further enquiry is needed. However, if it is the sections which must be examined, then a second question follows: do the sections deal only with the exact obligations that they provide, or do they deal with something more general? This is the question on which the principal authorities in the Federal Court are currently divided, with *WAJR* and *Moradian* (the ‘narrow’ cases) adopting the exact text approach, and *NAQF* and *Wu* (the ‘wide’ cases) adopting the more general characterisation (the individual sections approach). Several cases, though, have followed what they call the ‘wide’ line of authority but have in fact adopted the whole division approach, notwithstanding that *NAQF* and *Wu* explicitly reject this approach.¹⁹

A Is the whole division exhaustive of the matter it deals with or are the individual sections exhaustive of the matters they deal with?

1 Case law

In *NAQF v MIMIA*²⁰ the applicant complained that the MRT misled him into not adducing evidence by implying that a visa would be granted and that therefore the only decision to be made related to the conditions of the visa.²¹ Lindgren J held that the applicant was not misled by the MRT’s conduct.²² Given this finding, it was unnecessary to discuss the application of s 357A but Lindgren J chose to because the point was argued at length.²³

The Minister submitted that so long as ‘there can be found at least one provision within Div 5 giving protection of a ‘natural justice hearing rule’ kind’,²⁴ then the ‘matters it deals with’ must be interpreted to mean all procedural aspects of the conduct of reviews.²⁵ His Honour rejected that submission, relying on the fact that Parliament has previously excluded natural justice with unqualified wording (such as s 476(2)(a)) and had not done so in this case.²⁶ His

Honour held that a search must be made within the division for a provision ‘dealing with’ a relevant ‘matter’, but did not identify the full reach of the expression.²⁷

The decision in *NAQF* can be contrasted with cases which have adopted the ‘whole division approach’.²⁸ The most important of these is *MIMIA v Lay Lat*.²⁹

In *Lay Lat* the Minister had refused the visa application on the basis that he was not satisfied that the requirements of reg 131.214 were met.³⁰ Regulation 131.214 requires that an applicant must not be involved in business or investment practices which would not be acceptable in Australia.³¹ The applicant claimed that he was denied procedural fairness because the Minister did not put to him that his application might be refused on those grounds.³²

The Full Court³³ first held that there was no denial of procedural fairness,³⁴ because the applicant had in fact received correspondence from the Department asking for evidence relating to how he accumulated his substantial wealth³⁵ and other evidence before the Court indicated that the applicant appreciated that the issue would be an important one in determining his application.³⁶

The Court further held that, in any event, the Minister did not owe a duty to provide information to the applicant due to the effect of s 51A combined with s 57(3),³⁷ as the applicant was outside of the migration zone when applying for the visa. The Court explicitly rejected the individual sections approach, stating:

Counsel for the respondent submitted that the words “in relation to the matters it deals with” mean that the decision-maker must, in each case, consider whether there is an applicable common law rule of natural justice and then examine the provisions of Subdiv AB to see whether it is expressly dealt with. ... We reject this submission.³⁸

The basis upon which the Court held that the whole division approach should be adopted was that the Explanatory Memorandum for the *Amendment Act* makes it plain that the *Amendment Act* was enacted to overcome the effect of the High Court’s decision in *Miah*,³⁹ stating:

the drafters of the Explanatory Statement and the Minister could hardly have made the intention of the 2002 amendments any clearer. What was intended was that Subdiv AB provide comprehensive procedural codes which contain detailed provisions for procedural fairness but which exclude the common law natural justice hearing rule.⁴⁰

2 *Defending the individual sections approach over the whole division approach*

The strongest argument in favour of the whole division approach is that it appears, from the Explanatory Memorandum which accompanied the Bill⁴¹ that Parliament intended to completely exclude the natural justice hearing rule.⁴² Whilst this is a relevant consideration,⁴³ it is balanced by the principle that:

The words of a Minister must not be substituted for the text of the law. Particularly is this so when the intention stated by the Minister but unexpressed in the law is restrictive of the liberty of the individual. ... The function of the Court is to give effect to the will of Parliament as expressed in the law.⁴⁴

The whole division approach results in all common law natural justice obligations being extinguished. This is inconsistent with the principle of statutory interpretation that ‘an Act will not be construed as taking away an existing right unless its language is reasonably capable of no other construction’.⁴⁵

Several factors prevent the conclusion that the language of the exhaustive clauses is capable of no other construction. First, the phrase ‘in relation to the matters it deals with’

imports a 'more specific limitation on the scope of procedural fairness than might have been achieved by a global reference to the conduct of reviews by the Tribunal'.⁴⁶ Further, 'matters' is expressed in the plural. If Parliament intended that there would only be one matter that the division dealt with (the natural justice hearing rule), it could have omitted the phrase 'in relation to the matters it deals with' entirely. To give effect to the words of this phrase,⁴⁷ the 'matters' must be examined more closely than the whole division approach allows.

B Do the individual sections deal with only the exact text of each section, or with something more general?

This second question is only relevant when the first question⁴⁸ is answered by rejecting the whole division approach. The cases below take as their starting point that it is the individual sections rather than the whole division which must be examined. This point becomes important when analysing the way in which some subsequent cases have misinterpreted these authorities.

1 The principal authorities

An example of the wider interpretation (the individual sections approach) can be found in *Wu v MIMIA*.⁴⁹ The applicant applied twice for a visa.⁵⁰ The Minister, in refusing the second application, placed weight on inconsistencies found between the first and second applications.⁵¹ The issue to be decided was whether the Minister had an obligation to inform the applicant that the two applications would be compared and invite the applicant to comment on this,⁵² it being common ground that s 57 did not apply due to ss 57(3)(a) and 57(3)(b).⁵³ Hely J first held that the common law hearing rule provided an obligation on the Minister to inform the applicant and invite comment.⁵⁴ His Honour then held that s 51A excluded that obligation.⁵⁵ His Honour did not explicitly state what it was that s 57 'dealt with', but gave his reasons as:

The legislature cannot have intended that the common law hearing rule would continue to apply in circumstances where s 57 did not require the provision of information to an applicant...⁵⁶

Implicit in this statement is that s 57 'deals with' the topic of provision of information to an applicant, and so is an exhaustive statement of the procedural fairness requirement to provide information.

A useful contrast to this can be found in *WAJR v MIMIA*.⁵⁷ The RRT found that certain documents which were crucial to the applicant's claim were concocted for the purpose of the application.⁵⁸ The applicant contended that procedural fairness required the Tribunal to put this to the applicant and invite him to comment on it before making its decision.⁵⁹ French J first held that s 424A, which requires the RRT to provide certain information to applicants, did not apply as the formation of a view about evidence by the Tribunal is not 'information' for the purposes of the section.⁶⁰ Secondly, his Honour held that, absent s 422B, there was a common law obligation to provide the applicant with this finding and invite him to comment on it.⁶¹ His Honour then considered whether s 422B excluded this common law obligation. His Honour held that as s 424A did not require the RRT to notify the applicant of this information, the section did not deal with the common law obligation to provide that particular information, and so was not an exhaustive statement of that obligation.⁶² This differs from the outcome in *Wu* because Hely J found, in that case, that s 57 was an exhaustive statement of the entire obligation to provide information to the applicant.

French J's reasoning was upheld in *Moradian v MIMIA*.⁶³ The Minister received adverse information about the applicant but did not inform him or give him a chance to respond.⁶⁴ The information was crucial in the decision-maker's decision to reject the application.⁶⁵

Section 57 imposes obligations on the decision-maker to give particulars of relevant information to the applicant and invite the applicant to respond.⁶⁶ By s 57(3)(a) this does not apply where the visa is one which cannot be granted when the applicant is in the migration zone. As the visa which Moradian was applying for could not be granted whilst he was in the migration zone, the obligations prescribed by s 57 did not apply to the decision-maker.⁶⁷ Gray J held that, absent s 51A, the decision-maker had a common law obligation to provide this information to Moradian.⁶⁸ His Honour held that Moradian's right could only be abrogated by clear words, and that, absent s 51A, there were no clear words which abrogated the right.⁶⁹ His Honour then considered whether s 51A provided such clear words.

Under the exact text approach, the matter which s 57 deals with would be characterised as the right to receive and comment on relevant adverse information with respect to visa applications of a kind which can be granted when the applicant is in the migration zone, due to s 57(3).⁷⁰ On this interpretation, Moradian's situation was not 'dealt with' by s 57, and so s 51A would not abrogate Moradian's pre-existing common law right to receive the adverse information. Under the individual sections approach, s 57 deals with the provision of information in relation to the application of visas.⁷¹ Applying this interpretation extinguishes Moradian's common law right, as s 57 would be exhaustive for visas which can be granted, as well as visas which cannot be granted, whilst the applicant is in the migration zone.

Gray J held that he was not bound by any authority on this question.⁷² Gray J also held that, though he may have been prepared to accept that s 51A was ambiguous, the explanatory memorandum and other secondary material did not resolve the ambiguity.⁷³ For these reasons Gray J returned to the fundamental principle expounded in *Annetts v McCann*⁷⁴ in holding that whilst s 51A may contain 'indirect references, uncertain inferences or equivocal considerations',⁷⁵ there were no 'plain words of necessary intendment'⁷⁶ which excluded the principles of procedural fairness. On this basis Gray J adopted the exact text approach.⁷⁷

2 *Mischaracterisation of these authorities*

In *VXDC v MIMIA*⁷⁸ the applicant claimed that common law procedural fairness required that the RRT notify him in advance of a particular adverse conclusion that it had made.⁷⁹ Heerey J held first that s 424A did not provide such an obligation because 'the Tribunal's finding ... was a conclusion ... on the available evidence; it was not 'information' within the meaning of s 424A'.⁸⁰ Heerey J then considered whether s 422B(1) excluded the common law requirement:

... 422B(1) is saying that Div 4 is dealing with procedures and that the reader will find in the division all the law about the natural justice hearing rule (that being a procedural matter) in the conduct of such reviews.⁸¹

Heerey J continued, stating:

This meaning presents itself as plausible once one accepts, in the words of Lindgren J in *NAQF*, that it is "inconceivable that the legislature meant the displacement of the natural justice hearing rule to be co-extensive with, and not to go beyond, the precise text of the express protections of a procedural fairness kind...⁸²

Lindgren J, however, did not use this proposition in support of the whole division approach, instead adopting the individual sections approach.⁸³ Heerey J determined that:

Parliament cannot have intended that the uncertainties of the common law rules were, in some unspecified way and to some unspecified extent, to survive.⁸⁴

This essay will argue in Chapter III that, though the Minister may not have intended it,⁸⁵ once it is accepted that the correct interpretation is the individual sections approach then it follows that there are some common law rules which survive. Heerey J concluded that on the facts there was no breach of the common law requirement.⁸⁶ However, if on the facts there was a breach, Heerey J's approach would not have found a reviewable error, whereas the individual sections approach does find an error.⁸⁷

A similar approach can be seen in *SZEGT v MIMIA*,⁸⁸ where Edmonds J characterised the debate as being about:

... which of the competing views as to what the concluding words of s 422B(1) – 'in relation to the matters it deals with' – refer to: Whether they are to be confined to the exact text of the procedural fairness requirements to be found in Division 4 or whether they (the words) extend to something wider, such as all procedural aspects of the conduct of reviews by the Tribunal. The confined view is exemplified in the approach of French J in *WAJR* and Gray J in *Moradian* on the one hand, and the wider view is exemplified in the approach of Lindgren J in *NAQF* and Hely J in *Wu* on the other.⁸⁹
[Citations omitted]

*NAQF*⁹⁰ and *Wu*,⁹¹ however, rejected the proposition that the words 'in relation to the matters it deals with' refer to 'all procedural aspects of the conduct of review by the Tribunal'. Nevertheless, Edmonds J appears to have chosen the 'whole division approach',⁹² relying on authorities which only support the 'individual sections approach'.⁹³ He was saved from making a decision that was inconsistent with the authorities that he cited only because he decided that the common law procedural fairness requirement that the applicant alleged was breached (the 'duty to enquire') did not exist at law.⁹⁴

To illustrate how this approach can result in inconsistent decisions, assume for a moment that the 'duty to enquire' does exist as a principle of common law procedural fairness (though at law it does not). The approach that Edmonds J took was that as Division 4 is an exhaustive statement of the natural justice hearing rule in relation to all procedural aspects of the conduct of reviews by the Tribunal, therefore the 'duty to enquire' that exists only as a common law principle is extinguished.⁹⁵ According to the authorities which Edmonds J cites as supporting the wider view, however, the individual sections of Div 4 should be examined to determine whether there is any section which deals with the 'duty to enquire'. If there is not, then the duty to enquire is not excluded by any of the sections within Div 4. Chapter III of this essay deals more specifically with how mischaracterising the authorities in this way can result in decisions being made which are not supported by the authorities. At the very least, characterising the competing interpretations as falling into the categories of 'wide' and 'narrow' has resulted in situations where the questions that the Court needs to ask itself become clouded.

3 *Defending the individual sections approach over the exact text approach*

If the principle that an Act should not be construed to take away existing rights unless no other construction is reasonably capable can be used to justify the individual sections approach over the whole division approach,⁹⁶ why should it not be used to justify the exact text approach over the individual sections approach? Gray J in *Moradian*,⁹⁷ citing *Annetts v McCann*,⁹⁸ held in favour of the exact text approach for this very reason.⁹⁹ The exact text approach, however, suffers from an equally fatal flaw, namely that it is inconsistent with the principle of statutory interpretation that an 'interpretation ... [that has] no practical utility ... should be avoided if the relevant words can bear a useful meaning, consistent with the purposes and objects of the ... Act'.¹⁰⁰

In *AA Pty Ltd v Australia Crime Commission*,¹⁰¹ Finkelstein J held that s 59(7) of the *Australian Crime Commission Act 2002* (Cth) ('the ACC Act') did not give power to the Australian Crime Commission ('the ACC') to disseminate information to the Australian

Taxation Office ('the ATO'). Section 59(7)¹⁰² gives the ACC power to disseminate information to a 'law enforcement agency', which is defined in s 4 of the ACC Act as being either the Australian Federal Police, a Police Force of a State, or an 'authority or person responsible for the enforcement of the laws of the Commonwealth or the States'. Finkelstein J held that the use of the definite article, 'the', in '*the* laws of the Commonwealth or the States' meant that the agency, to be defined as a law enforcement agency, must be responsible for enforcing all of the laws of the Commonwealth or the States, rather than only some of them.¹⁰³ Because the ATO is responsible for only some of them then it is not a law enforcement agency.¹⁰⁴

The Full Court overturned this finding.¹⁰⁵ One of the grounds on which they rejected the proposition that 'the laws' meant 'all of the laws' was that counsel for AA Pty Ltd could not point to any authority or person within Australia, apart from the Australian Federal Police and Police Forces of the States, which has responsibility for enforcing all of the laws of the Commonwealth or the States.¹⁰⁶ As the Australian Federal Police and the Police Forces of the States are already included as the first two limbs within the definition of 'law enforcement agency', the construction held by Finkelstein J had the result that the third aspect of the definition does not have 'any work to do'. The interpretation proposed by the respondents would have no practical utility'.¹⁰⁷

The exact text approach suffers from the same defect. French J in *WAJR*¹⁰⁸ and Gray J in *Moradian*¹⁰⁹ held that ss 424A and 57 only dealt with the specific obligation to provide information that those sections imposed. Under this approach, the sections do not deal with any obligation to provide information that is not required by the sections. This means that under the exact text approach, no common law obligation to provide information will ever be exhausted by the exhaustive clauses. This becomes apparent by recalling that the exhaustive clauses only come into operation when the decision-maker or Tribunal complies with the statute but breaches a common law requirement. In every such circumstance, by definition there will not be a statutory provision which provides the common law obligation, and so the common law obligation will not be extinguished. The result of this is that the exhaustive clauses are rendered nugatory, as they do not actually exhaust anything. This must be avoided if, on the language of the statute, it reasonably can be. The individual sections approach does avoid it, by allowing the sections to deal with matters more general than the precise obligations that the sections impose.

III APPLYING THE INTERPRETATION TO DISCOVER THE RESULTS

This Chapter examines the most common circumstances where the MRT and RRT breach common law requirements but comply with the statutory obligations¹¹⁰ and analyses which of these common law requirements still apply to the MRT and RRT.¹¹¹ Through this analysis this chapter seeks to establish some guiding principles for determining which common law requirements are excluded and which ones still apply.

In doing so, this Chapter illustrates the different results that can occur depending on which interpretive approach is used. As the exhaustive clauses only come into operation when the statute is complied with but the common law is not, those situations will never result in the whole division approach finding a reviewable error. This is because the whole division approach results in the division itself exhausting the natural justice hearing rule in its entirety. By identifying the situations where the individual sections approach does and does not exclude the common law hearing rule, this chapter illustrates the mistakes that can occur if Courts do not distinguish between the approaches in the way that Chapter II argues they should.

This Chapter is organised into five parts: Part A analyses the common law obligation to disclose the case against the applicant, Part B analyses the common law obligation to give

an applicant the opportunity to respond to the case against himself/herself and put forward his/her own case, and Part C extracts the guiding principles which are established by the analysis contained in Parts A and B. Part D illustrates the different results that occur depending on which interpretive approach is used, and Part E concludes by demonstrating that the Courts in *Lay Lat* and *Antipova* both produced the results that this framework predicts.

A Disclosure of the case against the applicant

The rule that applicants are entitled to know the case against them in advance developed as a common law requirement because Courts recognised that the opportunity to put forward one's own case will not constitute a fair hearing if the person who is affected by the decision does not know the case against him/her.¹¹²

1 The statutory requirements

The MRT and RRT's statutory requirements to disclose information to the applicant are primarily prescribed by ss 359A (for the MRT) and 424A (for the RRT). These sections require the MRT and RRT to 'give to the applicant ... particulars of any information that the Tribunal considers would be the reason, or part of the reason, for affirming the decision that is under review',¹¹³ 'ensure ... that the applicant understands why it is relevant to the review',¹¹⁴ and 'invite the applicant to comment on it'.¹¹⁵ Both of these sections state that they do not apply to information:

- (a) that is not specifically about the applicant or another person and is just about a class of person of which the applicant or other person is a member; or
- (b) that the applicant gave for the purpose of the application; or
- (c) that is non-disclosable information.¹¹⁶

2 Common law requirements

The following three obligations that are examined are obligations which are not imposed by the Migration Act but have been, prior to operation of the exhaustive clauses, imposed by Courts upon the Tribunal on the basis of the common law natural justice hearing rule. The aim is to discover which of these survive the operation of the exhaustive clauses.

(a) Information not specifically about the applicant

As ss 359A and 424A do not apply to information that is not specifically about the applicant, there is no statutory obligation to provide this information to the applicant. The common law, though, in certain situations does impose such an obligation.

In *VAAC v MIMIA*,¹¹⁷ the RRT wrote a letter to the Afghan Consul asking it questions relevant to the review, and received a reply.¹¹⁸ The RRT did not disclose the letter or reply to the applicant.¹¹⁹ The Full Court¹²⁰ held that whilst this did not constitute a breach of s 424A,¹²¹ it did constitute a breach of the wider natural justice obligations.¹²² The reason it did not breach s 424A was that it fell within the exception provided by s 424A(3)(a), as the information was not specifically about the applicant.¹²³ The Court held that the RRT still had an obligation beyond the statutory requirements to provide the applicant with copies of the documents.¹²⁴

Another example is information that is known as 'country information'. *Miah*,¹²⁵ the case which instigated the Amendment Act, concerned whether the RRT had an obligation to disclose information about recent elections in the applicant's country. The High Court held

that whilst no obligation was prescribed by the Migration Act to disclose the information, an obligation did arise under the common law hearing rule.¹²⁶

To determine whether the exhaustive clauses exclude this common law rule, what must be considered is whether ss 359A and 424A 'deal with' the common law hearing rule obligation to provide such information to the applicant.

It is possible to argue that ss 359A and 424A only deal with the Tribunals' obligation to provide information that does not fall under one of the exceptions. Supporting this argument is the fact that the three exceptions are prefaced with the phrase: 'This section does not apply to information ...' This is an explicit statement that the section has no application to information of the type provided in the three exceptions. On this argument, the sections are not interpreted as saying that 'the Tribunal does not have to provide information which is not about the applicant', but rather the sections are taken to say: 'this section is silent as to the question of whether the Tribunal has to provide information which is not about the applicant'. As they are silent with respect to that question, it appears that the sections do not deal with the Tribunals' obligation to disclose information of the type which it received in VAAC.¹²⁷

The contrary argument is that because the sections provide that some types of information, but not others, must be provided to the applicant, then they deal with the question of whether each type of information must be provided. Parliament, through the enactment of ss 359A and 424A, has specifically turned its mind to the information contained in the exceptions. The sections, in simplified form, state that 'information which is part of the reason for decision must be provided to the applicant, except information which is not specifically about the applicant'. From this perspective, it appears that the sections deal both with the obligation (that is imposed) to provide information which is specifically about the applicant, and with the obligation (that is not imposed) to provide information which is not specifically about the applicant.

The following hypothetical can assist in illustrating this second argument. Suppose that the sections are worded differently, and instead state that 'information which is part of the reason for decision and is specifically about the applicant must be provided to the applicant'. Whilst this hypothetical wording imposes the same positive obligation on the Tribunals, the question of what the hypothetical sections deal with is not as clear. It could be said that they impose the obligation on the Tribunals by only 'dealing with' the 'matter' of the Tribunals' obligation to provide information that is specifically about the applicant, and that Parliament has not turned its mind to the 'matter' of the Tribunals' obligation to provide information that is not specifically about the applicant. Conversely, it could be argued that on this hypothetical wording Parliament has evinced an intention to 'cover the field',¹²⁸ and so the hypothetical sections deal with the Tribunals' obligation to provide both types of information. The sections as they are actually worded, however, make the answer clearer. By explicitly addressing information which is not specifically about the applicant, the sections can be taken to deal with both obligations.

Finally, it is not critical that the sections state 'this section does not apply to information ... that is not specifically about the applicant' instead of words to the effect of 'the Tribunal has no obligation to provide information that is not specifically about the applicant'. The latter wording appears to put the matter beyond doubt, unequivocally stating that there is no such obligation.¹²⁹ As for the former wording, whilst by itself it does not remove any obligation, it now must be read alongside, and in the context of, the exhaustive clauses.¹³⁰ Reading s 359A in the context of s 357A, and s 424A in the context of s 422B, makes it likely that the obligation to provide information to the applicant that is not specifically about the applicant, as it exists at common law, is extinguished.

(b) Non-disclosable information

Another exception contained in ss 359A and 424A is that those sections do not apply to information which is 'non-disclosable information'. The definition of 'non-disclosable information' in s 5 of the Migration Act includes 'information ... whose disclosure would found an action by a person, other than the Commonwealth, for breach of confidence'.

The common law obligation to disclose information to an applicant, absent the exhaustive clauses, can still exist even where the Tribunal is presented with confidential information.¹³¹ This has recently been confirmed by the High Court in *VEAL v MIMIA*.¹³² In that case, the RRT received an unsolicited letter making adverse allegations about the applicant.¹³³ The letter was received after the hearing but before the RRT gave its decision.¹³⁴ The author of the letter requested that the letter be kept confidential.¹³⁵ The RRT did not disclose the content of the letter to the applicant and stated in its reasons that it had no regard to the letter.¹³⁶ The unanimous joint judgment¹³⁷ held that whilst the applicant should not have been allowed to see the letter, he should have been told 'the substance of the allegations'.¹³⁸

The operation of the exhaustive clauses will exclude this obligation for the same reasons as discussed above in relation to information which is not specifically about the applicant.¹³⁹ Non-disclosable information is expressed as an exception to ss 359A and 424A in the same way as 'information not specifically about the applicant' is, and so the arguments are analogous.

(c) 'Surprising conclusions'

At common law, the MRT and RRT have obligations to disclose to an applicant any adverse conclusions which the applicant would not reasonably have been aware that the Tribunal was considering (referred to here as 'surprising conclusions'). Whilst a decision-maker is not obliged to disclose all of his/her mental processes,¹⁴⁰ a breach of procedural fairness can be found where an adverse conclusion is reached which the applicant was not given an opportunity to comment on.

This obligation is often breached when a Tribunal does not inform an applicant that it suspects that a document is not genuine. In *WAEJ v MIMIA*,¹⁴¹ the applicant submitted an email to the RRT in support of his claim.¹⁴² The RRT stated in its reasons that the document did not appear to be genuine.¹⁴³ The Full Court¹⁴⁴ held that if the RRT suspected that the document was not authentic, then the common law principles of natural justice required the RRT to express this concern to the applicant and afford the applicant a chance to respond to it.¹⁴⁵

Absent the exhaustive clauses, the obligations outlined here exist only at common law. This is because 'the information to which s 424A(1) (and by analogy, s 359A) applies has been distinguished from the subjective thought processes, assessments or views of the RRT'.¹⁴⁶ Sections 359A and 424A can be taken, then, to deal with information that must be given to the applicant but not opinions formed by the Tribunal about that information. Such opinions are not explicitly excluded (in the way that 'information not specifically about the applicant' and 'non-disclosable information' are) but instead simply do not fall within the obligation which has been created by ss 359A and 424A. This makes it likely that Parliament cannot be taken to have turned its mind to the obligation to provide such opinions, and so therefore these sections do not deal with this obligation. The situation would be different if the sections explicitly stated that the sections did not apply to preliminary opinions of the Tribunal, or the weight that the Tribunal intends to place on certain information. Under the actual wording of the sections, though, the common law right still exists as it is not exhausted by ss 359A and 424A.

It is also possible that the statutory provisions may be interpreted to impose wider obligations as a result of the Amendment Act. In *MIMIA v Awan*,¹⁴⁷ the Full Court had to determine whether a breach of s 359A constituted jurisdictional error (and so could still be reviewed despite the privative clause, s 474). The Court found that one of the factors which confirmed the view that a breach of s 359A did constitute jurisdictional error was that because Parliament had now indicated that the section was to be an exhaustive statement of the natural justice hearing rule (by the Amendment Act), that indicated that Parliament intended a breach of s 359A to constitute a breach of an inviolable limitation.¹⁴⁸ Gray ACJ stated:

The amendment ... lends support to the ... rationale for viewing s 359A as an application of the principles of natural justice.¹⁴⁹

The emphasis is still on Parliament's intention. But the argument is that one can discover Parliament's intention as to the meaning of sections in Part 5 Div 5 and Part 7 Div 4 of the *Migration Act* by reference to the *Amendment Act*. If this reasoning continues, it is quite possible that courts will more strictly enforce the Tribunal's statutory obligation under ss 359A(1)(b) and 424A(1)(b) to 'ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review'. At present, this phrase has not been interpreted to mean that the Tribunal must disclose its opinions and conclusions that it is considering. However, if courts now know, as a result of the *Amendment Act*, that Parliament intends this to be the exhaustive statement of the natural justice hearing rule, then courts may interpret the phrase 'why it is relevant to the review' to mean that 'surprising conclusions' must also be explained, because these are essential to explaining to an applicant the relevance of certain information. If this eventuates, then the common law obligation will be 'exhausted' by ss 359A and 424A. It will not matter, though, because the common law obligation will have informed the meaning of the statutory obligation. It will live on in a different guise.

Regardless of whether it remains as a common law obligation or is included in an expanded interpretation of the statutory obligations, it is likely that the Tribunal's obligation to give notice of 'surprising conclusions' will remain.

B The applicant's opportunity to respond to the case against himself/herself and to put forward his/her own case

The common law natural justice hearing rule obligations with respect to the conduct of the hearing depend upon what is necessary, in the circumstances, for the person who is affected by the decision to receive 'fairness', or 'avoid practical injustice'.¹⁵⁰

1 The statutory requirements

The following is a summary of the statutory requirements in relation to an applicant's right to respond to the case against him/her and to put forward his/her own case.

An applicant is entitled to submit written arguments to the MRT¹⁵¹ and the RRT.¹⁵² If the Tribunal does not consider that it should decide the review in the applicant's favour on the basis of the material before it, then the applicant is entitled to appear before the Tribunal to give evidence.¹⁵³ The notice of invitation to appear must be given to the applicant in a certain way and include certain details.¹⁵⁴ If the applicant does not attend the hearing the Tribunal may make a decision based on the written submissions.¹⁵⁵ Applicants may request the Tribunal to call witnesses but although the Tribunal is required to consider that request it is not required to comply with the request.¹⁵⁶ During the hearing, an applicant is entitled to an interpreter,¹⁵⁷ but is not entitled to be represented,¹⁵⁸ or to examine or cross-examine any other person appearing before the Tribunal to give evidence.¹⁵⁹ A hearing before the MRT

must, unless certain conditions are satisfied, be in public¹⁶⁰ and a hearing before the RRT must be in private.¹⁶¹

A request by the applicant under ss 361, 362 or 426 must genuinely be considered by the Tribunal, as opposed to merely superficially. In *MIMA v Maltsin*,¹⁶² the MRT member announced at the beginning of the hearing that although the case involved many complex issues, the hearing had to end in two hours due to another commitment that the member had at 4pm.¹⁶³ Many of the witnesses were rushed through their evidence by the member, and some witnesses were not heard because time had run out.¹⁶⁴ The Full Court held the MRT breached its obligation under s 361(3) to consider the applicant's request to call witnesses.¹⁶⁵

Determining what the Tribunal has to do to discharge its duty under the Migration Act to provide the applicant with an oral hearing is often examined with reference to common law principles of natural justice. In *MIMIA v WAFJ*¹⁶⁶ the applicant applied for a protection visa under s 36 of the Migration Act. The Minister denied the request. On review by the RRT, during the oral hearing the Tribunal member was rude and sarcastic to the applicant and continually interrupted him while he was talking.¹⁶⁷ The Full Court¹⁶⁸ held that:

Such sarcasm and rudeness was unnecessary and unfair. ... the respondent was denied a fair hearing and, therefore, ... the review conducted by the Tribunal was not carried out according to law.¹⁶⁹

Lee J referred to the judgment of Hill J in *NAQS v MIMIA*¹⁷⁰ which states:

The Act does not contemplate that the Tribunal will merely engage in a pretence. ... What happened in the present case is, in my view, so extreme that the only conclusion open to me is that the Tribunal did not conduct a review at all. It interrupted the applicant and did not permit the applicant to give explanations. It refused the applicant the opportunity of calling witnesses.¹⁷¹

The conclusion reached was that the hearing did not comply with the statutory provisions.¹⁷² This was determined, however, by reference to common law principles. The Tribunals were found in *WAFJ* and *NAQS* to have, at the very least, not complied with s 425(1), which states:

The Tribunal must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review.

If that sentence were to be read literally, it appears that the Tribunals in *WAFJ* and *NAQS* did everything they were required to do. The Courts found, though, that the Tribunals' conduct did not *fairly* give the applicant an opportunity to give evidence and present arguments.¹⁷³

This is an important observation because, as discussed above in relation to 'surprising conclusions',¹⁷⁴ the expansion of the statutory obligations achieved by analysing them in the context of the common law obligations may become more common as a result of Parliament's statement that the statutory provisions are an exhaustive statement of the natural justice hearing rule. This means that there will be obligations, such as the 'surprising conclusions' obligation and the obligation outlined here to 'not merely engage in a pretence', which find their genesis in the common law but will nonetheless survive the operation of the exhaustive clauses by being understood by courts as being necessary for the proper operation of Part 5 Div 5 and Part 7 Div 4 of the Migration Act.

2 *The common law requirements*

Two common law natural justice requirements relating to the conduct of an oral hearing are examined here. The question of whether an oral hearing is necessary at all is not examined

because it is unusual for this to be an issue under the *Migration Act*. This is due to the fact that ss 360 (for the MRT) and 425 (for the RRT) provide an applicant with the right to appear before the Tribunal. The more critical questions arise when considering how the hearing must be conducted.

(a) What happens when the Tribunal causes an applicant to wrongly believe that it accepts a particular argument, has read a particular document, or will contact a particular person?

There are a multitude of different ways in which the Tribunal's conduct at the hearing can result in an applicant not being given a fair opportunity to present his/her case or respond to the case against him/her.

The first of these is where the Tribunal gives the applicant the impression that the Tribunal accepts one or more of the applicant's arguments. The result can be that the applicant, believing the argument has been accepted, does not present it as fully as he/she would if he/she knew that the matter was in dispute. In *NAAG of 2002 v MIMIA*,¹⁷⁵ the applicant had applied for a protection visa. An important part of her claim was that she had been raped whilst in detention in Iran and that the reason she was raped was because she opposed the ruling regime.¹⁷⁶ During the hearing, she experienced difficulty in giving evidence about this through her male interpreter (she had requested a female interpreter).¹⁷⁷ The RRT member told the applicant that she need not continue as 'at this stage I have no intention of asking you any questions about what happened to you in detention'.¹⁷⁸ The applicant asked whether that meant that her claims 'were acceptable'.¹⁷⁹ The RRT member said to her:

At this stage they are acceptable. ... If I did have any concerns later I will write to you and give you an opportunity to respond in writing. But at this stage I'm prepared to accept what you say happened.¹⁸⁰

The RRT, in deciding the case against the applicant, stated in its reasons that whilst it was satisfied that the applicant was raped, it was not satisfied that she was raped due to the fact that she opposed the ruling regime.¹⁸¹ The RRT, in relation to the sexual assault, stated:

... the Tribunal finds that this was a deeply unfortunate but ad hoc, opportunistic act by the person in question, not indicative of how her participation in the demonstration was regarded.¹⁸²

The Full Court¹⁸³ held that the RRT had an obligation to give the applicant an opportunity to respond to this, because the Tribunal member stated that the RRT would write to the applicant if it had any concerns about the evidence given about the rape.¹⁸⁴ The Court stated:

The Tribunal, however, deprived the appellant of the opportunity of giving oral evidence about the full circumstances of the rape, and thereby deprived her of the opportunity to place her case fully before it. The appellant might have made submissions, designed to focus the mind of the Tribunal on the political aspects of the rape.¹⁸⁵

*MIMIA v S154*¹⁸⁶ provides a useful contrast to this. The Tribunal member of the RRT, immediately after the applicant had made a certain claim, stated to the applicant: 'Ok. I don't need to ask you any further question about that particular incident'.¹⁸⁷ The High Court¹⁸⁸ held that whilst a lawyer might consider that to mean that the RRT had accepted the claim, the relevant question is what the applicant would have interpreted the statement to mean.¹⁸⁹ By examining the transcript of the hearing the Court found that the applicant did not take it to mean that the RRT accepted the claim, and in fact later gave more evidence relating to the claim.¹⁹⁰ This meant that the applicant was not denied an opportunity to present her case.¹⁹¹

A denial of natural justice can also occur when the Tribunal wrongly represents to the applicant that it has a certain document or documents.¹⁹² This can cause the applicant to not put forward the evidence contained in the documents because he/she does not think that

it is necessary. If he/she knew the truth (that the Tribunal does not in fact have the documents) then he/she could have made submissions relating to the information contained in the documents. This representation can deny an applicant the opportunity to fairly put forward his/her case.

A final example of this type of common law hearing rule is where the Tribunal indicates that it will contact the applicant or another person after the hearing and then does not. Again, the key consideration is whether this conduct denied the applicant the opportunity to fairly present his/her case. In *NAFF of 2002 v MIMIA*,¹⁹³ the RRT stated at the end of the hearing that it would write a letter to the applicant containing questions about inconsistencies in the applicant's evidence, giving the applicant a chance to respond to these concerns.¹⁹⁴ The RRT did not write such a letter to the applicant and instead dismissed the application.¹⁹⁵ The High Court interpreted the Tribunal member's comments to mean that at the end of the hearing, she did not think that the requirements of s 425 had been complied with.¹⁹⁶ If she later changed her mind, she needed to write to the applicant telling him that he would no longer have the opportunity that he had been promised.¹⁹⁷

A useful contrast to this case is *Re MIMIA; Ex parte Lam*¹⁹⁸ where the Department wrote to Mr Lam asking for the contact details of his children's carer so that it could contact the carer.¹⁹⁹ The Department received the contact details, but did not contact the carer.²⁰⁰ The Department cancelled Mr Lam's visa.²⁰¹ The High Court held that Mr Lam was not denied an opportunity to put forward any arguments and so no breach of natural justice was caused by the Department's actions.²⁰²

All of these common law natural justice obligations are likely to remain. This is because there are no sections in Part 5 Div 5 or Part 7 Div 4 which deal with unexpected actions of this type by the Tribunal. The divisions address and regulate the ordinary course of a hearing. There are, however, a large number of unexpected things that the Tribunal can do to prevent the applicant from having a fair opportunity to present his/her case. Three of these have formed the foundation for the immediately preceding discussion. This type of conduct by the Tribunal is not considered by the Migration Act because it is not conduct which should occur in the ordinary course of a hearing, but occurs because Tribunal members, like all humans, are fallible.

It is useful to recall the discussion throughout this Chapter regarding how the provisions in Part 5 Div 5 and Part 7 Div 4 of the Migration Act have begun to, and may continue to, be interpreted as statutory enactments of the common law, thereby providing broader obligations than their plain words indicate.²⁰³ In order to comply with ss 360 or 425, the Tribunal is likely to be required not simply to invite the applicant to appear before it to give evidence and present arguments, but to do so fairly (as was the case in *WAFJ*²⁰⁴ and *NAQF*,²⁰⁵ discussed above).²⁰⁶ If this continues, then ss 360 and 425 will deal with matters of the type discussed in the immediately preceding passages, and so will exhaust those common law requirements. The requirements will still exist, though, as implied in the statutory requirements.

(b) Is legal representation required at an oral hearing?

In *WABZ v MIMIA*²⁰⁷ the Full Court²⁰⁸ considered whether the applicant was denied procedural fairness because the RRT refused to allow her solicitor to represent her at the hearing.²⁰⁹ Their Honours first held that at common law the applicant had a natural justice hearing rule right to a solicitor to represent her.²¹⁰ Their Honours then considered what effect s 427(6) of the *Migration Act* had on that common law right.²¹¹ French and Lee JJ stated:

An applicant so appearing is 'not entitled ... to be represented before the Tribunal by any other person'. But that is a statement about entitlements. It does not exclude the rules of procedural fairness insofar as they may require representation in the circumstances of a particular case.²¹²

The common law right to legal representation, where it exists, is likely to be excluded by the exhaustive clauses. This is because ss 366A and 427(6), which provide that an applicant is not entitled to be represented, specifically deal with the question of an applicant's entitlement to representation. Absent the exhaustive clauses, it is open to interpret these sections as merely stating that 'this Act does not create a positive obligation on the Tribunal to allow an applicant to be represented, but any common law obligation may exist' as the Full Court did in *WABZ*. However, when they are read in the context of the exhaustive clauses, as they now must be, it is clear that Parliament's intention must be taken as excluding an applicant's right at common law to representation at the hearing, whatever the circumstances.

C Guiding principles

From the analysis undertaken in this Chapter, there are certain guiding principles that can be extracted. Consider a fact situation where, absent the exhaustive clauses, the statute is complied with but a common law natural justice hearing rule obligation is not. It is these situations which will be affected by the operation of the exhaustive clauses. The two questions which need to be asked are:

- (1) since Parliament has enacted the Amendment Act stating that the division is an exhaustive statement of the natural justice hearing rule, can we now interpret what was previously only a breach of a common law natural justice hearing rule obligation as a breach of a particular section in the division?
- (2) if the answer to question (1) is no, then is there any section in the division which 'deals with' a topic that includes the particular common law obligation that has not been complied with?

It is hard to predict how question (1) will be answered in each and every case. From the analysis in this chapter it appears likely that ss 360 and 425 will be interpreted to cover, in general, a fair oral hearing. This means, for example, that if the Tribunal is rude, sarcastic and continually interrupts the applicant,²¹³ or causes an applicant to wrongly believe that it accepts a particular argument,²¹⁴ has read a particular document,²¹⁵ or will contact a particular person,²¹⁶ then this conduct may now be interpreted to be a breach of ss 360 or 425. Similarly, a failure to disclose 'surprising conclusions'²¹⁷ may now constitute breaches of the obligation under ss 359A(1)(b) and 424A(1)(b) to 'ensure, as far as is reasonably practicable, that the applicant understands why [the information that is being disclosed] is relevant to the review'.

If, however, the particular common law obligation breached has not been subsumed in any section in the Migration Act, then an examination must be made as to whether there is a section which 'deals with' a topic that includes the common law obligation. Where the statute provides an identical obligation to the common law obligation that has been breached, then the exhaustive clauses need not be examined: it can immediately be determined that the Tribunal has breached the statute. In examining the exhaustive clauses, then, the two most common situations which we are faced with are, first, where the statute provides an obligation which is similar to, but does not actually subsume, the obligation that has been breached, and second, where the statute states explicitly or by necessary implication that the Tribunal has no obligation to comply with the common law obligation which has been breached.

The first of these situations can be illustrated by re-examining the cases where the Tribunal comes to surprising conclusions, continually interrupts the applicant, or causes the applicant to believe something which is false. It was argued above that these may fall within expanded statutory obligations, in which case they will survive in statutory form. However, if it is decided that they do not fall within an expanded interpretation of the statute, then it is likely that under the individual sections approach the statute does not deal with them, and so the common law obligation remains.

The second of these situations is where a section mentions the common law obligation that has been breached, but does so only to state that the Tribunal does not have such an obligation. There are two ways in which a section can do this. First, it can simply state that the Tribunal has no obligation to do a certain thing. Examples discussed above are ss 366A and 427(6)(a) which provide that an applicant may not be represented before the MRT and RRT. Absent the exhaustive clauses, such a section can be taken simply to say that 'the Tribunal has no obligation to allow the applicant to be represented'. It has been held that, absent the exhaustive clauses, this simply means that the statute does not create that obligation but does not mean that the statute excludes the common law obligation.²¹⁸ When read alongside the exhaustive clauses, however, using the individual sections approach, the section must now be understood as meaning 'the Tribunal has no obligation to allow the applicant to be represented, and this section is an exhaustive statement of the Tribunal's obligation to do so'. This necessarily implies that the common law obligation is excluded.

Second, the common law obligation can be specifically excepted from the obligation created by the statute. The relevant examples discussed above are those concerning information that is not specifically about the applicant and non-disclosable information.²¹⁹ Sections 359A and 424A provide that certain information must be given to the applicant, but the sections create exceptions for information not specifically about the applicant and non-disclosable information. These sections are harder to analyse than ss 366A and 427(6)(a) above, because the 'representation' sections state simply that the applicant is not entitled to representation. Sections 359A and 424A differ in that they state that the sections themselves do not apply to the types of information outlined in the exceptions. This distinction, whilst important, is not critical to the outcome. This is because when read together with the exhaustive clauses, it still should be found, under the individual sections approach, that the sections 'deal with' the obligation to provide the types of information contained in the exceptions.

D The errors which can be caused by not using the 'individual sections' approach

Where a section can be found which, as interpreted, subsumes the common law obligation, then all three approaches will hold that the common law obligation is excluded, but that an identical statutory obligation exists. In this situation, there is no difference in the result of the case no matter which interpretive approach is used.

Where no section can be found which completely subsumes the common law obligation, this essay identifies three different circumstances in which the result will depend, to some extent, on which of the interpretive approaches discussed is applied.

Where a section imposes an obligation which does not include a common law obligation, and makes no mention of that common law obligation, then it cannot be said to 'deal with' a topic that includes that obligation. In these situations, the exact text approach will produce the same result as the individual sections approach (the common law obligation will not be excluded), but the whole division approach will exclude all common law obligations including that one (because under the whole division approach, the entire natural justice hearing rule is exhausted by Part 5 Div 5 and Part 7 Div 4).

Where a section states that the Tribunal has no obligation to do a particular thing, all three approaches produce the same result. Even if a section only 'deals with' the exact text of the section, the exact text of these sections is that the MRT and RRT have no obligation to do the particular thing. And the whole division approach, it has been noted, excludes all common law obligations.

Where a section states that the Tribunal has an obligation which would ordinarily include a particular common law obligation, but this common law obligation is an exception, then both the individual sections and whole division approaches reach the result that the common law obligation is excluded. The exact text approach, however, following Gray J's reasoning in *Moradian*,²²⁰ would find that these sections only 'deal with' the Tribunal's obligation to give information which is specifically about the applicant and is classified as disclosable information. As to the question of whether the Tribunal has an obligation to provide the information outlined in the exceptions, the exact text approach finds that the sections do not exclude the obligations which exist in the common law.

E Applying this analysis to Lay Lat and Antipova

On 12 May 2006, two judgments were delivered by the Full Court of the Federal Court.²²¹ The cases were *MIMIA v Lay Lat*²²² and *SZCIJ v MIMIA*.²²³ Both cases adopted the whole division approach. One may have been excused for thinking that this would put the debate to rest, but exactly a week later Gray J delivered judgment in *Antipova v MIMIA*,²²⁴ adopting the exact text approach and explicitly refusing to follow *Lay Lat* and *SZCIJ*.

Analysing the facts of these cases through the framework proposed by this essay shows that the decisions of *Lay Lat* and *Antipova* are consistent with this proposed framework. The guiding principles summarised in Part C of this chapter produce the same result as the Court in each of these two cases. *SZCIJ*, however, was in my view incorrectly decided.

The facts of *Lay Lat* are set out above in Chapter II, Part A, Division 1 of this essay. Relevantly, in adopting the whole division approach the Court made the following remark:

'The intention to exclude the common law rules in the present case is especially plain when s 51A(1) is read with s 57(3). The Legislature could hardly have intended to provide the full panoply of common law natural justice to visa applicants who are required to be outside Australia when the visa is granted, while conferring a more limited form of statutory protection upon onshore applicants.'²²⁵

This is correct, but it should not lead to the view that procedural fairness must be excluded in all cases. Section 57(3) states:

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

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

The effect of s 57(3) is that the obligation to provide information to applicants outside of the migration zone has been specifically excepted from the obligation created by the statute to provide information to applicants generally. Under the individual sections approach this results in the section 'dealing with' the Minister's obligation to provide information to applicants both inside and outside of the migration zone. Due to s 51A(1), the section is an exhaustive statement of that obligation, and so the Minister is not required to provide information to people outside of the migration zone.

*SZCIJ v MIMIA*²²⁶ relies entirely on the reasoning of *Lay Lat*. The applicant's complaint in *SZCIJ*, however, was that the RRT 'made findings on a number of matters which it did not put to her'.²²⁷ This is characterised above in Part A,²²⁸ Division 2(c) of this chapter as 'surprising conclusions'. The Court in *SZCIJ* found that:

For the reasons given in *Lay Lat* at [59]-[67] we hold that the common law natural justice hearing rule did not apply.²²⁹

It has been argued in this essay that the obligation to disclose 'surprising conclusions' survives the exhaustive clauses, and it is my view that due to the different complaints which were made in *Lay Lat* and *SZC/IJ*, the result from *Lay Lat* cannot be superimposed onto the facts of *SZC/IJ* without a detailed analysis of the sections contained in the Migration Act. My conclusion is only valid, of course, if the individual sections approach is accepted over the whole division approach, and Chapter II of this essay explains why I think it must be.

*Antipova v MIMIA*²³⁰ provides a useful contrast. The applicant claimed that she was denied procedural fairness by the MRT because, first, it imposed a time limit on the hearing and continually interrupted her whilst she was giving evidence, secondly, it misled her about the issue to be decided, and thirdly, it failed to inform her that it did not propose to give any weight to a letter which she had tendered on the basis that it was unsigned.²³¹

Gray J first held that s 360(1) of the Act had not been complied with, as the applicant had not been allowed 'to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review'.²³² His Honour then considered what the situation would be if the MRT's conduct in this case could not be classified as a breach of s 360.²³³ His Honour held that s 357A would not exclude the common law obligations which have been breached by the MRT, stating:

The present case is relatively easy. No provision of Div 5 deals with the imposition of time limits on the hearings of the Tribunal. Unless it be s 360(1), no provision deals with the process by which evidence is adduced at a Tribunal hearing. There is certainly no provision dealing with the 'matter' of a Tribunal member interrupting answers to question. No provision gives the Tribunal member a right to control and censor the evidence given by refusing to hear what the applicant for review wishes to say.²³⁴

One might suggest that s 360 deals with the conduct of the MRT at the hearing, and so is exhaustive of the MRT's procedural fairness obligations with respect to its conduct at the hearing. According to the framework proposed in this essay, however, either s 360 subsumes the common law obligations (in which case the MRT has breached s 360) or s 360 provides an obligation which is similar to, but does not actually include the common law obligations which the MRT breached, in which case s 360 does not deal with those common law obligations. Either way, the obligations survive the exhaustive clauses.

Gray J concludes by addressing the 'observations, which are clearly obiter'²³⁵ made by the Full Court in *Lay Lat* on the effect of s 51A. He states:

The obiter remarks in *Lay Lat* are entitled to great respect, appearing as they do in a considered judgment of a Full Court, but I cannot bring myself to accept that they are correct.

Whilst the reasoning in *Lay Lat* and *Antipova* is very different, both cases produce the results which are predicted by the guiding principles outlined in Part C of this chapter.

IV CONCLUSION

Chapter II of this essay argued that the individual sections approach should be preferred over the whole division and exact text approaches. Given this conclusion, Chapter III examined the way in which the exhaustive clauses have modified the obligations of the MRT and RRT to afford procedural fairness to visa applicants.

Certain guidelines have been extracted to determine, under the individual sections approach, whether a section 'deals with' a common law obligation. The courts' willingness to

expand the statutory obligations by reading them in the light of the common law will be critical to how this area of the law develops. If courts prove reluctant to do this, it will be the grammatical wording of the statutory obligations that will determine the outcome of many cases. Under the individual sections approach:

- (1) where a section provides an obligation which is similar to, but does not actually subsume, the common law obligation that has been breached then the section will not deal with that common law obligation and so the obligation will remain;
- (2) where a section states that the Tribunal does not have a particular obligation, then the section does deal with a topic that includes the obligation mentioned and so excludes it; and
- (3) where a section states that the Tribunal has a positive obligation, but explicitly excludes from that positive obligation a particular common law obligation, then the section does deal with a topic that includes that particular common law obligation and so excludes it.

In many cases it can be seen that whether a common law obligation exists depends only on the way that a certain statutory obligation is expressed. For example, ss 359A and 424A currently state that 'information must be disclosed except information not about the applicant'. This means those sections fall into the third category listed above, and so any common law obligation to provide information not about the applicant is excluded. However, if the sections stated that 'information which is about the applicant must be disclosed', then even though that wording creates the same positive obligation on the Tribunal as the actual wording does, this hypothetical wording would place the section in the first category listed above when we consider whether information not about the applicant must be disclosed. It cannot be said with certainty that Parliament has intended, in the hypothetical case, to exclude information not about the applicant and so the section does not 'deal with' that obligation.

This essay has also illustrated that the exact text and whole division approaches can produce different results from the individual sections approach. Where sections are interpreted more broadly to include common law obligations, then the three approaches will produce identical results: the common law obligation will be excluded but the obligation will be subsumed in the statutory obligation. However, in two of the three grammatical wordings listed above in this chapter, one of the exact text and whole division approaches produces a different result from the individual sections approach. In the first, the whole division approach excludes the common law obligation whilst the individual sections and exact text approaches do not. In the second, all three approaches exclude the common law obligation. In the third, the individual sections and whole division approaches exclude the common law obligation whilst the exact text approach does not.

Endnotes

- 1 The procedures that the MRT must follow are contained in Division 5 of Part 5 of the *Migration Act*, and the procedures that the RRT must follow are contained in Division 4 of Part 7 of the *Migration Act*.
- 2 (2001) 206 CLR 57.
- 3 Gaudron, McHugh and Kirby JJ; Gleeson CJ and Hayne J dissenting.
- 4 Explanatory memorandum, Migration Legislation Amendment (Procedural Fairness) Bill 2002 (Cth), [3]-[4].
- 5 These Subdivisions provide procedures which must be followed by the Minister when making a decision on an application for a visa and when cancelling a visa.
- 6 This Division provides procedures to be followed when the MRT is reviewing a decision.
- 7 This Division provides procedures to be followed when the RRT is reviewing a decision.
- 8 See especially *SAAP v MIMIA* (2005) 215 ALR 162.
- 9 [2006] FCAFC 61.
- 10 2006] FCA 584.

- 11 This is analysed in Chapter III of this essay.
- 12 See particularly Chapter III, Part A, Division 2(c) and Chapter III, Part B, Division 1 of this essay.
- 13 This analysis is undertaken in Chapter III.
- 14 See *VXDC v MIMIA* (2005) 146 FCR 562 and *SZEGT v MIMIA* [2005] FCA 1514, discussed below in Chapter II, Part B, Division 2 of this essay.
- 15 (2004) 204 ALR 624 (French J).
- 16 (2004) 142 FCR 170 (Gray J).
- 17 (2003) 130 FCR 456 (Lindgren J).
- 18 (2003) 133 FCR 221 (Hely J).
- 19 See Chapter II, Part B, Division 2 of this essay.
- 20 (2003) 130 FCR 456 (Lindgren J).
- 21 *Ibid*, 458.
- 22 *Ibid*, 466.
- 23 *Ibid*.
- 24 *Ibid*, 467.
- 25 *Ibid*.
- 26 *Ibid*.
- 27 *Ibid*, 475.
- 28 See *VXDC v MIMIA* (2005) 146 FCR 562 and *SZEGT v MIMIA* [2005] FCA 1514, discussed below in Chapter II, Part B, Division 2 of this essay.
- 29 [2006] FCAFC 61.
- 30 *Ibid*, [2].
- 31 *Ibid*.
- 32 *Ibid*, [3].
- 33 (Heerey, Conti and Jacobson JJ).
- 34 *Ibid*, [56].
- 35 *Ibid*, [50]-[53].
- 36 *Ibid*, [46]-[59].
- 37 *Ibid*, [60]-[70].
- 38 *Ibid*, [69]-[70].
- 39 *Ibid*, [64].
- 40 *Ibid*, [65]-[66].
- 41 See Chapter I, Part C, Division 1 of this essay.
- 42 Heerey J stated in *VDXC v MIMIA* (2005) 146 FCR 562, 570: 'Parliament cannot have intended that the uncertainties of the common law rules were, in some unspecified way and to some unspecified extent, to survive.' This judgment is examined more closely below in Chapter II, Part B, Division 2 of this essay.
- 43 Due to ss 15AA and 15AB of the *Acts Interpretation Act 1901* (Cth).
- 44 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 518 (Mason CJ, Wilson and Dawson JJ).
- 45 *Australian Crime Commission v AA Pty Ltd* [2006] FCAFC 30, [33] (Nicholson, Mansfield and Branson JJ); citing: *Sargood Brothers v Commonwealth* (1910) 11 CLR 258, 279 (O'Connor J); and *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 45 ALR 609, 617 (Mason ACJ, Wilson and Dawson JJ). See also *Coco v R* (1994) 179 CLR 427, 436-438 (Mason CJ, Brennan, Gaudron and McHugh JJ).
- 46 *WAJR v MIMIA* (2004) 204 ALR 624, 637 (French J).
- 47 For the principle of statutory construction that all words should be given effect, see particularly *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 382 (McHugh, Gummow, Kirby and Hayne JJ) citing *The Commonwealth v Baume* (1905) 2 CLR 405, 414 (Griffith CJ) and *Chu Kheng Lim v Minister for Immigration Local Government & Ethnic Affairs* (1992) 176 CLR 1, 12-13 (Mason CJ); and see generally the cases cited in D.C. Pearce and R.S. Geddes, *Statutory Interpretation in Australia* (5th Ed, 2001), 36-37.
- 48 Examined in Part A of this Chapter.
- 49 (2003) 133 FCR 221 (Hely J).
- 50 *Ibid*, 223.
- 51 *Ibid*, 226.
- 52 *Ibid*, 227.
- 53 *Ibid*, 226. Section 57 is similar to ss 424A and 357A in specifying that certain relevant information must be disclosed to the applicant. Sections 57(3)(a) and 57(3)(b) provide two conditions which must be satisfied before s 57 is enlivened.
- 54 *Ibid*, 227.
- 55 *Ibid*, 228.
- 56 *Ibid*.
- 57 (2004) 204 ALR 624 (French J).
- 58 *Ibid*, 627-628.
- 59 *Ibid*, 629.
- 60 *Ibid*, 635.
- 61 *Ibid*, 635-637.
- 62 *Ibid*, 637.
- 63 (2004) 142 FCR 170 (Gray J).

- 64 Ibid, 174-176.
- 65 Ibid, 175.
- 66 Ibid, 173.
- 67 Ibid.
- 68 Ibid, 177. His Honour held at p 184 that the obligation had been breached by the Minister.
- 69 Ibid, 177-178.
- 70 Ibid, 178.
- 71 Ibid, 178.
- 72 Ibid, 179-180. He characterised Lindgren J's comments in *NAQF* as obiter because the application was dismissed on other grounds. He did not consider himself bound by the ruling in *Wu* because it did not appear that Hely J had considered a submission of the kind put on behalf of Mr Moradian.
- 73 Ibid, 180-181.
- 74 (1990) 170 CLR 596.
- 75 Ibid, 598 (Mason CJ, Deane and McHugh JJ).
- 76 Ibid.
- 77 (2004) 142 FCR 170, 181.
- 78 (2005) 146 FCR 562.
- 79 Heerey J, at pp 566-567, referred to this common law obligation as 'the second rule of natural justice identified by the Full Court in *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576, 591-592.
- 80 (2005) 146 FCR 562, 567.
- 81 Ibid, 569.
- 82 Ibid, 569-570.
- 83 See above Chapter II, Part B, Division 1 of this essay.
- 84 (2005) 146 FCR 562, 570.
- 85 See the Explanatory Memorandum which accompanied the Bill for the *Amendment Act*, in Chapter I, Part C, Division 1 of this essay.
- 86 Ibid.
- 87 See below Chapter III, Part A, Division 2(c) of this essay.
- 88 [2005] FCA 1514
- 89 Ibid, [29]
- 90 (2003) 130 FCR 456 (Lindgren J).
- 91 (2003) 133 FCR 221 (Hely J).
- 92 [2005] FCA 1514 [29], stating: 'the correct approach to s 422B(1) is that it extends to all procedural aspects of the conduct of reviews by the Tribunal. ... That would be enough to dispose of this ground.'
- 93 Ibid, citing *NAQF* (2003) 130 FCR 456 and *Wu* (2003) 133 FCR 221 as exemplifying the 'wider view'.
- 94 [2005] FCA 1514, [29].
- 95 Ibid.
- 96 As this essay did in Chapter II, Part A, Division 2 above.
- 97 (2004) 142 FCR 170.
- 98 (1990) 170 CLR 596.
- 99 (2004) 142 FCR 170, 181.
- 100 *Australian Crime Commission v AA Pty Ltd* [2006] FCAFC 30, [25] (Nicholson, Mansfield and Bennett JJ); citing *Minister of State for Resources v Dover Fisheries Pty Ltd* (1993) 43 FCR 565, 574.
- 101 (2005) 219 ALR 666.
- 102 Of the *Australia Crime Commission Act 2002* (Cth).
- 103 (2005) 219 ALR 666, 674-675.
- 104 Ibid.
- 105 *Australian Crime Commission v AA Pty Ltd* [2006] FCAFC 30 (Nicholson, Mansfield and Bennett JJ).
- 106 Ibid, [25].
- 107 Ibid, citing *Minister of State for Resources v Dover Fisheries Pty Ltd* (1993) 43 FCR 565, 574 as authority for the proposition that 'such a construction should be avoided if the relevant words can bear a useful meaning, consistent with the purposes and objects of the ... Act'.
- 108 (2004) 204 ALR 624.
- 109 (2004) 142 FCR 170.
- 110 The statutory obligations are Part 5 Div 5 for the MRT and Part 7 Div 4 for the RRT.
- 111 Assuming that the individual sections approach, as argued in Chapter II of this essay, is the correct interpretive approach.
- 112 See generally Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (3rd ed, 2004) 505; and Robin Creyke and John McMillan, *Control of Government Action: Text, Cases & Commentary* (2005) 573-576.
- 113 Sections 359A(1)(a) and 424A(1)(a).
- 114 Sections 359A(1)(b) and 424A(1)(b).
- 115 Sections 359A(1)(c) and 424A(1)(c).
- 116 Sections 359A(4) and 424A(3).
- 117 (2003) 129 FCR 168.
- 118 Ibid, 174-175.

- 119 Ibid.
- 120 (North, Merkel and Weinberg JJ).
- 121 (2003) 129 FCR 168, 175.
- 122 Ibid, 178-179.
- 123 Ibid, 175.
- 124 Ibid, 178.
- 125 (2001) 206 CLR 57.
- 126 Gaudron, McHugh and Kirby JJ in the majority, and Gleeson CJ and Hayne J in dissent.
- 127 (2003) 129 FCR 168.
- 128 Borrowing that phrase from constitutional jurisprudence where an inconsistency between a Commonwealth and State Act needs to be resolved according to s 109 of the Commonwealth Constitution, see generally *Ex parte McLean* (1930) 43 CLR 472, 483-484 (Dixon J).
- 129 This essay discusses this form of wording in Chapter III, Part B, Division 2(b) with respect to ss 366A and 427(6) which deal with whether the Tribunal has an obligation to allow the applicant to be represented at the hearing.
- 130 See *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355, 381 (McHugh, Gummow, Kirby and Hayne JJ) for the proposition that 'the process of construction must always begin by examining the context of the provision that is being construed'. See generally *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 for the principle that sections of a statute need to be read in the context of their surrounding provisions.
- 131 See *NAVK v MIMIA* (2004) 135 FCR 567, 589 (Beaumont, Conti and Crennan JJ).
- 132 (2005) 222 ALR 411.
- 133 Ibid, 412-413.
- 134 Ibid, 412.
- 135 Ibid.
- 136 Ibid, 412-413.
- 137 (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ).
- 138 (2005) 222 ALR 411, 413, 419-420.
- 139 Discussed above in Chapter III, Part A, Division 2(a) of this essay.
- 140 See *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576, 591-592.
- 141 [2003] FCAFC 188.
- 142 Ibid, [50].
- 143 Ibid, [51].
- 144 (Lee, Hill and Marshall JJ).
- 145 [2003] FCAFC 188, [54]. See also *WACO v MIMIA* (2003) 131 FCR 511, 521-525 (Lee, Hill and Carr JJ) for further discussion about this natural justice obligation.
- 146 Dr Caron Beaton-Wells, 'Disclosure of adverse information to applicants under the *Migration Act 1958*' (2004) 11 *Australian Journal of Administrative Law* 61, 64.
- 147 (2003) 131 FCR 1.
- 148 Ibid, 7 (Gray ACJ), 26 (Merkel J).
- 149 Ibid, 7.
- 150 *Re MIMIA; Ex parte Lam* (2004) 214 CLR 1, 14 (Gleeson CJ).
- 151 Section 358.
- 152 Section 423.
- 153 Section 360 for the MRT and s 425 for the RRT.
- 154 Outlined in s 360A for the MRT and s 425A for the RRT.
- 155 Section 362B for the MRT and s 426A for RRT.
- 156 Sections 361 and 362 for MRT and s 426 for RRT.
- 157 Section 366C for the MRT and s 427(7) for the RRT.
- 158 Section 366A for MRT and s 427(6) for RRT.
- 159 Section 366D for MRT and s 427(7) for RRT.
- 160 Section 365.
- 161 Section 429.
- 162 [2005] FCAFC 118 (Spender, Kenny and Lander JJ).
- 163 Ibid, [41].
- 164 Ibid, [42]-[47].
- 165 Ibid, [47].
- 166 (2004) 137 FCR 30.
- 167 Ibid, 52-57.
- 168 Ibid, (Lee and RD Nicholson JJ, French J).
- 169 Ibid, 57 (Lee J).
- 170 [2003] FCA 1137, [16]-[18], [63]-[68] (Hill J).
- 171 Ibid, [64]-[65].
- 172 *MIMIA v WAJF* (2003) (2004) 137 FCR 30, 57; and *NAQS v MIMIA* [2003] FCA 1137, [66].
- 173 Ibid.
- 174 In Chapter III, Part A, Division 2(c) of this essay.

- 175 [2003] FCAFC 135.
 176 Ibid, [39]-[40].
 177 Ibid, [41].
 178 Ibid.
 179 Ibid.
 180 Ibid.
 181 Ibid, [49].
 182 Ibid.
 183 Ibid (Gray, Moore and Weinberg JJ).
 184 Ibid, [53].
 185 Ibid.
 186 (2003) 201 ALR 437.
 187 Ibid, 439.
 188 Ibid (Gleeson CJ, Gummow, Callinan and Heydon JJ; Kirby J dissenting)
 189 Ibid, 444.
 190 Ibid, 445-447.
 191 Ibid, 447.
 192 See generally *Muin v RRT*; *Lie v RRT* (2002) 190 ALR 601; and *Re RRT*; *Ex parte Aala* (2000) 204 CLR 82.
 193 (2004) 221 CLR 1.
 194 Ibid, 6.
 195 Ibid.
 196 Ibid, 11-12.
 197 Ibid.
 198 (2003) 214 CLR 1.
 199 Ibid, 6.
 200 Ibid, 6-7.
 201 Ibid, 8.
 202 See for example the comments of Gleeson CJ at (2003) 214 CLR 1, 14: 'No practical injustice has been shown. The applicant lost no opportunity to advance his case. He did not rely to his disadvantage on the statement of intention.'
 203 See particularly Chapter III, Part A, Division 2(c) of this essay.
 204 (2004) 137 FCR 30.
 205 [2003] FCA 1137.
 206 See Chapter III, Part B, Division 1 of this essay.
 207 (2004) 134 FCR 271.
 208 Ibid (French, Lee and Hill JJ).
 209 Ibid, 247 (French and Lee JJ).
 210 Ibid, 290-291. The fact that this exists as a common law principle does not mean that every breach will result in a reviewable error. The test is still whether not allowing representation resulted in 'unfairness': *SFTB v MIMIA* (2003) 129 FCR 222, 230-231 (Weinberg, Stone and Jacobson JJ).
 211 (2004) 134 FCR 271, 294-295.
 212 Ibid, 294.
 213 *MIMIA v WAFJ* (2004) 137 FCR 30; *NAQS v MIMIA* [2003] FCA 1137.
 214 *NAAG of 2002 v MIMIA* [2003] FCAFC 135; cf *MIMIA v S154* (2003) 201 ALR 437.
 215 *Muin v RRT*; *Lie v RRT* (2002) 190 ALR 601; *Re RRT*; *Ex parte Aala* (2000) 204 CLR 82.
 216 *NAFF of 2002 v MIMIA* (2004) 221 CLR 1; cf *Re MIMIA*; *Ex parte Lam* (2003) 214 CLR 1.
 217 *WAEJ v MIMIA* [2003] FCAFC 188; *WACO v MIMIA* (2003) 131 FCR 511; *Naidu v MIMIA* [2004] FCAFC 184.
 218 See *WABZ v MIMIA* (2004) 134 FCR 271.
 219 Discussed above in Chapter III, Part A, Divisions 2(a) and 2(b) of this essay.
 220 (2004) 142 FCR 170.
 221 Consisting of Heerey, Conti and Jacobson JJ.
 222 [2006] FCAFC 61.
 223 [2006] FCAFC 62.
 224 [2006] FCA 584.
 225 [2006] FCAFC 61, [68].
 226 [2006] FCAFC 62.
 227 Ibid, [4].
 228
 229 Ibid, [8].
 230 [2006] FCA 584.
 231 Ibid, [53].
 232 Ibid, [82].
 233 Ibid, [93].
 234 Ibid.
 235 Ibid, [96].