The more it changes, the more it stays the same: reflections from two decades of judicial review in the Federal Circuit and Family Court and its predecessors

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In Australia, there has been controversy and debate over migration law and policy for over 30 years. That debate on most levels has been largely uninformed. For instance, public perceptions of asylum seekers and refugees are generally negative. Those perceptions are greatly influenced by a misunderstanding of basic issues and by the spreading of misinformation, sometimes for political or media purposes. Our political leaders like to be seen to be 'tough' on asylum seekers who arrive undocumented by sea but, at the same time, they feel the need to take a humane approach to the treatment of refugees. This Janus-faced approach reflects the bifurcation of policy and administration in migration, which has led to major structural inefficiencies and disconnections.

In particular, it has led to a struggle between the executive and judicial branches of government to determine the degree to which decisions of the executive can be subjected to judicial scrutiny. This article analyses that contest over time — in particular, the past two decades, and the role played by the Federal Magistrates Court and, latterly, the Federal Circuit Court and Federal Circuit and Family Court.

Policies — past and present

Immigration law became a federal responsibility in 1901, but between then and 1989 the power of primary decision-makers was generally expressed and largely discretionary. During the 1980s, there was a growing concern about the arbitrary and inconsistent nature of migration decisions. In 1989 the *Migration Act 1958* (Cth) was amended to codify the criteria for the various Australian visas and entry permits. The legislation also provided for merits review by a tribunal of primary decisions on a semi-independent basis within the structure of the executive government.

The Migration Act and *Migration Regulations 1994* set out the criteria for a protection visa (subclass 866). Subsection 36(2) of the Migration Act provides that 'a criterion for a Protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister for Immigration and Citizenship (the Minister) is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol'.[1] That basic criterion was modified by s 91R of the Migration Act.

The most controversial part of the humanitarian program has been that relating to asylum seekers arriving in the offshore excised territories. The controversy has centred upon the steps taken by Parliament and the executive government to contain and deter irregular maritime arrivals and to attempt to exclude judicial scrutiny.[2] In the aftermath of the *Tampa*

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1 *Migration Act 1958* (Cth), s 36(2)(a).

2 Mary Crock and Daniel Ghezelbash, 'Due Process and Rule of Law as Human Rights: The High Court and the 'Offshore' Processing of Asylum Seekers' (2011) 18 *Australian Journal of Administrative Law* 101.

affair, six Acts[3] were enacted to limit the access of future unauthorised boat arrivals to mainland refugee status determination procedures. Four strategies were adopted to achieve the government's objective of deterring irregular maritime arrivals:

- The Minister was empowered to declare certain territories to be excised offshore places, and as such not part of Australia's 'migration zone'.
- A new category of 'offshore entry person' was created to catch all asylum seekers landing on an excised territory without a valid visa or other authority.
- The Migration Act was amended to enable the transfer of offshore entry persons to a declared country.
- Section 46A(1) was introduced to explicitly bar offshore entry persons from making an application for a visa to enter Australia, unless the Minister exercises the public interest discretion under s 46A(2) to lift the bar.[4]

Under the legislative changes made, asylum seekers who entered Australia at an excised offshore place were deemed not to have entered the Australian migration zone for the purpose of applying for a visa. They were barred from applying for any visa by s 46A of the Migration Act. Although asylum seekers arriving in an excised offshore territory were unable to lodge visa applications under Australian law, they were able to seek asylum and have their claims processed under an ostensibly non-statutory refugee status assessment. If the person was found to be a refugee, the case was referred to the Minister, who decided whether it was in the public interest to allow the person to apply for an onshore protection visa.

The peculiarities of this process were subjected to judicial scrutiny by the High Court in *Plaintiff M61/2010E v Commonwealth; Plaintiff M69 of 2010 v Commonwealth.*[5] Each applicant alleged that they were not afforded procedural fairness during either the original refugee status assessment or the subsequent independent merits review. Each claimed further that errors of law were made by the assessors by not applying relevant provisions of the Migration Act in determining their claims.[6] The plaintiffs argued that the primary decision-makers and the independent reviewers were officers of the Commonwealth for the purpose of s 75(v) of the *Constitution*:[7]

> The Court accepted that the power being exercised was statutory, through the Minister's consideration of whether to exercise his power under s 46A(2) or s 195A(2) of the Migration Act. The Court found that the Minister's practice and the published policies governing the RSA and IMR processes indicate that the Minister had made a decision to tie the nonreviewable, non-compellable discretions conferred by ss 46A and 195A to the assessment and review outcomes.[8]

3 Ibid 104. These acts were *Border Protection (Validation and Enforcement Powers) Act 2001* (Cth); *Migration Amendment (Excision from Migration Zone) Act 2001* (Cth); *Migration Amendment (Excision from Migration Zone) (Consequential Provisions) Act 2001* (Cth); *Migration Legislation Amendment Act (No 1) 2001* (Cth); *Migration Legislation Amendment Act (No 5) 2001* (Cth); *Migration Amendment Act (No 6) 2001* (Cth).
4 Crock and Ghezelbash (n 2) 104.
5 (2010) 243 CLR 319.
6 Ibid 106.
7 *Australian Constitution* s 75(v).
8 Crock and Ghezelbash (n 2) 107.

The High Court did not just declare the processes in the two cases to have been flawed by reason of a failure to observe the rules of procedural fairness. The Court also made it clear that the decision-makers were bound by other aspects of Australian law. Crock and Ghezelbash, in 'Due Process and Rule of Law as Human Rights', argue that the outcome of this decision could see offshore entry applicants having an easier avenue for a court to declare unlawful the ruling made on their case and that legislative attempts by the government to undermine various elements of the rule of law have provided a judicial opportunity to affirm the rights of the people to whom the legislation is directed.[9]

Aspects of judicial review — the privative clause

What then, of the rights of asylum seekers entering Australia regularly? They too have been the subject of the struggle between the executive and the judiciary to confine or expand the role of the courts. As explained in detail below, during the 1990s the Migration Act was amended to confine the grounds upon which judicial review could be sought. In particular, the legislation attempted to exclude the common law principles of procedural fairness. The courts — in particular, the Federal Court — responded by inventively creating new grounds of review — in particular, the now discarded principle of 'legitimate expectations'. This struggle between the executive and the judiciary culminated in the enactment of a privative clause (s 474) in 2001.

The inherent contradiction of the privative clause

The essential paradox which makes privative clauses so challenging to public lawyers was expressed by Griffith CJ more than a century ago: 'A grant of limited jurisdiction coupled with a declaration that the jurisdiction shall not be challenged seems to me a contradiction in terms.'[10] It appears inimical, in the light of the essential role of s 75(v) in the maintenance of the rule of law, for Parliament to enact powers which are intrinsically limited and conditional and yet prevent the courts from ensuring that those conditions are fulfilled and limits are not transgressed. One would imagine that courts would invalidate many such provisions. Indeed, that was the approach taken in *Bodruddaza v Minister for Immigration and Multicultural Affairs*[11] ('*Bodruddaza*'), where the High Court found invalid a provision of the Migration Act which, by imposing time limits upon applications for relief in the High Court's original s 75(v) jurisdiction, would have rendered late applications incompetent. However, for most of the time since federation, Australian administrative law before *Plaintiff S157 v Commonwealth*[12] ('*Plaintiff S157*') took a different approach to privative clauses, which rendered their construction and application a difficult and technical exercise for courts at the 'coalface' of judicial review.

9 Ibid 112.
10 *Baxter v NSW Clickers' Association* (1909) 10 CLR 114, 131, quoted by Gleeson CJ in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 484 [10].
11 (2007) 228 CLR 651.
12 (2003) 211 CLR 476.

The Hickman *approach*

Dixon J (as his Honour then was) in *R v Hickman; Ex parte Fox*[13] ('*Hickman*') considered a privative clause, reg 17 of the *National Security (Coal Mining Industry) Employment Regulations*, which provided that the decision of a local reference board (a body constituted under the Regulations) 'shall not be challenged, appealed against, quashed or called into question, or be subject to prohibition, mandamus or injunction, in any court on any account whatever'. Dixon J adopted an approach which strove to allow some operation to the privative clause through a process later described by Gleeson CJ as 'attempted reconciliation':[14]

> In considering the interpretation of a legislative instrument containing provisions which would contradict one another if to each were attached the full meaning and implications which considered alone it would have, an attempt should be made to reconcile them.[15]

Significantly, Dixon J quoted Starke J in *Australian Coal and Shale Employees Federation v Aberfield Coal Mining Co Ltd*[16] that '[t]o confine the meaning of those words to acts done lawfully and within the jurisdiction of the tribunal ignores the clear, distinct and unmistakable intent of the regulation'.[17] Dixon J's construction, giving a qualified effect to the privative clause, became known as the '*Hickman* formula' or '*Hickman* provisos':

> Such a clause is interpreted as meaning that no decision which is in fact given by the body concerned shall be invalidated on the ground that it has not conformed to the requirements governing its proceedings or the exercise of its authority or has not confined its acts within the limits laid down by the instrument giving it authority, *provided always that its decision is a bona fide attempt to exercise its power, that it relates to the subject matter of the legislation, and that it is reasonably capable of reference to the power given to the body*.[18]

This process of statutory interpretation was later expanded upon by Dixon J in *R v Murray; Ex parte Proctor*[19] ('*Murray*') as involving a 'second step' which requires consideration of 'whether particular limitations on power and specific requirements as to the manner in which the tribunal … shall exercise its power are so expressed that they must be taken to mean that observance of the limitations and compliance with the requirements are essential to valid action'.[20] This later concept, alternatively expressed as breach of an 'inviolable requirement', would particularly bedevil the Federal Magistrates Court as it later picked its way through the legal consequences of a purported privative clause. The orthodox understanding of this approach to privative clauses was confirmed by the High Court in *Darling Casino Ltd v NSW Casino Control Authority*[21] as operating to expand the validity of purported exercises of power by its repository, subject to the qualifications expressed in *Hickman*.

13 (1945) 70 CLR 598.
14 *Plaintiff S157* (n 10) 487 [17].
15 *Hickman* (n 13) 616.
16 (1942) 66 CLR 161.
17 Ibid 615. This approach seems impossible to reconcile with the majority's construction of the privative clause in issue.
18 Ibid 615 (emphasis added).
19 (1949) 77 CLR 387, 399.
20 See Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters, 7th ed, 2021) 1146–1147.
21 (1997) 191 CLR 602, 630, per Gaudron and Gummow JJ, quoting with approval Brennan J in *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168, 194.

Restricting judicial review: Part 8 of the Migration Act

As noted above, this was the legal context in which the government waged its campaign to restrict judicial review of migration decisions. It was a bipartisan campaign. The former Part 8 of the Migration Act, introduced through the *Migration Reform Act 1992* (Cth), had attempted to do this by purporting to remove the availability of certain grounds of review. For instance, s 476(2) provided that 'a breach of the rules of natural justice occurred in the making of the decision' or 'the decision involved an exercise of power that is so unreasonable that no reasonable person could have so exercised the power' were 'not grounds upon which [a judicial review] application may be made' under s 476(1). The effectiveness of the attempted ousting of procedural fairness and *Wednesbury* unreasonableness was the subject of controversy and is beyond the scope of this article. The Full Federal Court decision in *Eshetu v Minister for Immigration and Multicultural Affairs*[22] held that other provisions of the Migration Act were 'sufficient to confer enforceable statutory rights equivalent to those provided at common law by the principle of natural justice'.[23] Although this decision was later overturned by the High Court,[24] it prompted an escalatory reform of the Migration Act.

Restricting judicial review: the 2001 reforms

The then Parliamentary Secretary to the Minister for Immigration and Multicultural Affairs, Senator Patterson, in the second reading speech for the Migration Legislation Amendment (Judicial Review) Bill 1998, stated that Part 8 of the Migration Act had failed to achieve its objective of 'reduc[ing] the volume of cases before the courts'.[25] She outlined that there had been nearly 800 applications for judicial review of migration decisions in the Federal Court in 1997–98 and that, in the same financial year, the cost of migration litigation for the department had amounted to nearly $9.5 million. Ministerial successors would come to envy that volume, as some 6,555 applications were filed in the Federal Circuit Court[26] and there were 746 appellate filings in the Federal Court (inclusive of appeals both from the Federal Circuit Court and from the Federal Court's original jurisdiction) in the 2019–20 financial year alone.[27] The second reading speech in the Senate provides a good summary of multiple governments' view that the volume of judicial review applications was 'unacceptable given the extensive merits review rights in the migration legislation and the cost of that amount of litigation which is ultimately born by the Australian taxpayer', that litigation was being used as a means of extending applicants' stay in Australia, and that it led, 'for those in detention, to a significantly longer period of detention'.[28] As a result, the government proposed to introduce a new privative clause to restrict access to judicial review, noting, however, that it should not do so by 'closing off' the Federal Court's jurisdiction, as that would overwhelm the High Court with applications under its s 75(v) jurisdiction, as was already occurring, and prevent the High Court from performing its functions. Significantly, the government acknowledged the constitutional impossibility of closing off this s 75(v) jurisdiction and explicitly intended

22 (1997) 71 FCR 300.
23 Ibid 320 (Burchett J).
24 *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611.
25 Commonwealth, *Parliamentary Debates*, Senate, 2 December 1998, 1026 (Parliamentary Secretary to the Minister for Immigration and Multicultural Affairs).
26 Federal Circuit Court of Australia, *Annual report 2019–20*, 2.
27 Ibid 23.
28 Commonwealth (n 25).

the new privative clause to be interpreted subject to the *Hickman* principle. The Bills Digest noted some constitutional difficulties with the bill, raising concerns about proposed time limits for judicial review, which were ultimately vindicated by the decision in *Bodruddaza*.[29] However, the proposed privative clause (s 474) was ultimately passed into law by the *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth) and came into force on 2 October 2001 as follows:

> ***474 Decisions under Act are final***
>
> 1. A privative clause decision:
>
> (a) is final and conclusive; and
>
> (b) must not be challenged, appealed against, reviewed, quashed or called in question in any court; and
>
> (c) is not subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.
>
> …
>
> 2. In this section:
>
> privative clause decision means a decision of an administrative character made, proposed to be made, or required to be made, as the case may be, under this Act or under a regulation or other instrument made under this Act (whether in the exercise of a discretion or not), other than a decision referred to in subsection (4) or (5).

In *Plaintiff S157*, the High Court turned its attention to s 474 and, in the result, decisively reframed Australian administrative law's assessment of privative clauses. The majority held that 'an administrative decision which involves jurisdictional error is "regarded, in law, as no decision at all".' Therefore, administrative decisions which are infected by jurisdictional error 'because, for example, of a failure to discharge "imperative duties" or to observe "inviolable limitations or restraints"' are not properly understood as decisions made 'under this Act', and are therefore not privative clause decisions for the purpose of s 474.[30] However, *Plaintiff S157* was handed down on 4 February 2003, and the 16 months between the commencement of the 2001 reforms and this decision caused considerable ferment as the Federal Magistrates Court and Federal Court worked through the ramifications of the privative clause.

Attempts to construe the new privative clause

This process of statutory interpretation unsurprisingly yielded divergent results. In *Boakye-Danquah v Minister for Immigration and Multicultural and Indigenous Affairs*,[31] Wilcox J concluded that the privative clause was ineffective to protect decisions affected by jurisdictional error (prefiguring the result of *Plaintiff S157*).[32] However, the bulk of decisions followed the then-prevailing approach of construing the privative clause as subject to the *Hickman* formula, as per the express intention indicated in the second reading speeches and explanatory memorandum. For example, in *Lachmi v Minister for Immigration and*

29 Department of Parliamentary Services (Cth), *Bills Digest* (Digest No 90 of 1998–99, 27 January 1999).
30 *Plaintiff S157* (n 10) 506 [76] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ) (citations omitted).
31 (2002) 116 FCR 557.
32 Ibid 573 [63]–[64].

Multicultural Affairs,[33] Driver FM accepted that the reforms 'imposed far reaching limitations on the power of the Federal Magistrates' Court and the Federal Court to review decisions, while at the same time repealing pre existing restrictions on grounds of review'[34] and that judicial review was only open on one of the bases identified in *Hickman*, discussed above.[35]

In the face of centrifugal divergence of authorities, in *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs*[36] ('*NAAV*') the Full Federal Court attempted to provide clarity as to the proper interpretation of s 474. However, that decision, consisting of five separate opinions running to 676 paragraphs — although on its face confirming the orthodox *Hickman* approach — necessitated difficult parsing in the Federal Magistrates Court to distil the operating ratio in the face of fact-specific review applications. Consistently with the courts' instincts to preserve the maximum possible scope of judicial review, in decisions such as *NAIN v Minister for Immigration*[37] Driver FM referred to French J's list in *NAAV* of seven grounds of review available in the face of the privative clause and found that although only grounds 1–4, 'clearly founded upon' the *Hickman* principle, were approved by all judges in *NAAV*, French J's ground 5 was available in the light of Black CJ and Wilcox J's reasoning in other decisions — namely, that the decision 'was made in breach of an express statutory limit or condition upon a power which, as a matter of construction, notwithstanding s 474, must be observed for the effective exercise of the power'. Driver FM left open the availability of French J's ground 6: namely, that the decision breaches a limitation or condition implied by statute or the common law which must be observed for the effective exercise of the power.[38]

Practical effect of the reforms

The practical effect of the 2001 reforms was to require litigants to reformulate their grounds of attack to fit within the *Hickman* exceptions. During this period, good faith or bona fides — which had been an underdeveloped concept in Australian administrative law — suddenly assumed outsized importance in recognition of Dixon J's statement that a decision which was 'not a *bona fide* attempt to exercise its power' could not be protected by a privative clause. Similarly, various provisions of the Migration Act were now subject to close analysis to determine whether they constituted a requirement 'essential to valid action' as expressed by Dixon J in *Murray*. The following examples serve to illustrate that, faced with procedurally unfair, unreasonable or illogical administrative decisions on one hand, and a restrictive statutory regime of review on the other, the Federal Magistrates Court did not hesitate to create new law by developing and arguably expanding the '*Hickman* exceptions' such that previous grounds of review, such as procedural unfairness or errors in the fact-finding process, could be reframed and brought within the concept of 'lack of good faith'.

33 [2002] FMCA 19.
34 Ibid [9].
35 Ibid [11].
36 (2002) 123 FCR 298.
37 [2002] FMCA 177.
38 Ibid [11]–[12].

NASS: *cumulative factual errors as recklessness*

NASS v Minister for Immigration[39] ('*NASS*'), a decision of Raphael FM, involved a review of a decision to refuse an Iranian citizen protection in Australia. The applicant claimed to have converted to Christianity in Iran and been subjected to arrest, detention, interrogation and torture. The Refugee Review Tribunal made adverse credibility findings against the applicant and was not satisfied that he had converted to Christianity prior to arriving in Australia. Raphael FM noted the applicant counsel's argument on review that the decision was not a bona fide attempt to exercise power, on two bases: 'the actions of the Tribunal in its review of the evidence and findings and the conclusions contained in its reasons for decision amounted to "a concerted, blatant and dishonest attempt to find against the applicant on the basis of lack of credit". Alternatively the applicant submits that "The Tribunal has been so recklessly indifferent to the accuracy or otherwise of its statements that it cannot be said to have made a *bona fide* attempt to exercise its power"'.[40] The federal magistrate proceeded to consider a table prepared by the applicant's representatives of 15 factual errors said to have been made by the Tribunal (by reference to the transcript of the hearing, which was tendered). Raphael FM considered the alleged errors *in seriatim*, accepting that many of them were made, and identifying on his own account two additional errors. For example, error 3 asserted by the applicant was the statement of the Tribunal's reasons that '[the applicant] had never tried to do anything publicly, that he evangelised on his own family'.[41] The transcript revealed that the applicant had said 'what I've learned through experience from my own country is that they never try to do something so publicly, they never … publicise about it and I have evangelised many people including my own father, my family, my friends'.[42] In relation to this error, Raphael FM accepted that the applicant's 'claim to have evangelised was more extensive than that allowed by the Tribunal'.[43]

There was no evidence that the Tribunal had regard to the transcript of the hearing. Raphael FM concluded that, as the Tribunal had made numerous factual errors, which 'contributed to the decision which it made not to accept the applicant's story … by not (at the very least) playing the tape which is always available, it was acting with reckless indifference to the effect of its forgetfulness upon the decision'.[44] This reckless indifference was sufficient to satisfy the federal magistrate that the Tribunal had not 'entered upon its task in a *bona fide* manner' and as such had fallen within the first *Hickman* exception.[45]

This decision sits uncomfortably with a strict notion of a lack of good faith as necessitating some element of dishonesty or personal impropriety on the part of a decision-maker. The granular analysis of cumulative factual errors embarked upon by the applicant's representatives and the court is more suggestive of a ground of review that a decision-maker has failed to give 'proper, genuine and realistic consideration' and thus constructively failed to exercise jurisdiction; or alternatively, that factual findings are not open on the evidence (having regard to the transcript). However, the same underlying defect was here reframed

39 [2002] FMCA 350.
40 Ibid [4].
41 Ibid [35].
42 Ibid [5] (table).
43 Ibid [6].
44 Ibid [12].
45 Ibid [13].

as recklessness. In effect, the decision was brought within the *Hickman* exceptions and thus vitiated, while the circumstances in which a lack of good faith might be asserted and substantiated were significantly broadened. This reasoning was endorsed on appeal by Wilcox J, who found that 'if a material misstatement of evidence is sufficiently egregious, or the number of significant errors is sufficiently great, a reviewing court may be compelled to infer that the decision-maker has set out deliberately to distort the evidence or (more likely) has carried out his or her duties in a reckless manner'.[46]

Horodynska: *inviolable limitations and lack of good faith through prejudgment in the exercise of a discretion*

Horodynska v Minister for Immigration[47] ('*Horodynska*') illustrates the hostility of courts to administrative decisions and procedures which are administratively unfair, and the willingness to allow procedural fairness concerns to inform the development of other administrative law concepts such as good faith. In this regard, a parallel can be drawn with the development of unreasonableness in recent years (in particular, the seminal case of *Minister for Immigration and Citizenship v Li*[48] also involved, like *Horodynska*, a refusal to adjourn). *Horodynska* involved the refusal of a temporary business entry visa on the grounds that the nomination from the sponsor, Campari Restaurant, had been refused. A hearing on 22 April 2002 had been adjourned to 29 April 2002 because the applicant had been in detention. In the intervening period, the applicant's adviser sought a further adjournment because the applicant had been traumatised by her detention. A letter from a psychiatrist was provided on 29 April 2002 stating that, in the author's opinion, the applicant was unfit to participate in the hearing. However, the hearing was not adjourned and, as the applicant did not attend, the Tribunal proceeded to make a decision on the papers.

On review, the applicant's representative argued that the decision was 'not a *bona fide* attempt to exercise the powers conferred on the MRT' due to the refusal of the adjournment request.[49] Driver FM considered the circumstances of the request and its refusal. The Minister did not dispute the applicant's assertion on judicial review that the applicant had been detained because of a case of mistaken identity,[50] rendering it 'unsurprising' that she would have been traumatised by the experience.[51] The Tribunal was on notice by letter sent on 24 April 2002 that the applicant would seek an adjournment. A Migration Review Tribunal file note records a telephone conversation early on 29 April 2002 in which the applicant's representative told a Tribunal officer that the psychiatrist's letter would be faxed, but the officer replied that the member had already decided to go ahead with the hearing. The psychiatrist's letter stated:

> I assessed [Ms Horodynska] on 27 April 2002. In my opinion she is unable to present herself before the Migration Review Tribunal on 29 April 2002 due to her current frame of mind. She was detained at the Villawood Centre from 4 April 2002 until 22 April 2002. I will review her condition in two weeks.

46 *Minister for Immigration and Multicultural and Indigenous Affairs v NASS* [2003] FCA 477 [34].
47 [2002] FMCA 240.
48 (2013) 249 CLR 332.
49 *Horodynska* (n 47) [6].
50 Ibid [19].
51 Ibid [22].

At 12.10 pm, the Tribunal replied by fax, stating that the medical report had been reviewed but the member was not satisfied that the hearing should be vacated. The following day, a further letter from the applicant's representative stated that he was unable to obtain instructions from her because of her mental state but that she would attend a hearing when she was fit to do so. The member did not change her position regarding an adjourned hearing and stated as follows the reasons for the decision:

> The Tribunal notes the medical report of [the psychiatrist]. The Tribunal places no weight on this report. The report does not indicate the primary visa applicant suffers from any psychiatric illness or that she is currently receiving any ongoing treatment. The Tribunal is satisfied on balance the primary visa applicant has not provided the Tribunal with satisfactory medical evidence that she suffers from a medical illness rendering her unable to attend the scheduled hearing.[52]

Driver FM found that the Tribunal mistook the terms of the medical report as it indicated on its face that the applicant *would* receive further medical treatment. Furthermore, 'in the face of the clear terms of [the psychiatrist]'s opinion, it is hard to imagine what evidence would have satisfied the presiding member that the applicant was suffering from a medical condition rendering her unable to attend the scheduled hearing' and that, unless explicitly disbelieved, the letter should have been accepted as a proper medical opinion that the applicant was unfit to attend.[53] The treatment of the adjournment request established that the presiding member had a closed mind on that issue by the time the medical opinion was received.[54]

Procedural unfairness alone was not enough to provide a ground of review in the face of the privative clause. In order to determine whether the member made a bona fide attempt to exercise the power, Driver FM considered the statutory context. This included s 353(2)(b), which provided that the Tribunal, in reviewing a decision, 'shall act according to substantial justice and the merits of the case'. In a previous decision also considering the privative clause, Driver FM had referred to s 420(2)(b) (the equivalent provision dealing with Refugee Review Tribunal reviews) as an inviolable limitation on the decision-making power.[55] Driver FM followed the same reasoning in *Horodynska*. The opportunity to attend the hearing was a 'basic right'.[56] The s 353 obligation to act in accordance with natural justice and the merits of the case was 'more than a mere motherhood statement' — it was an 'overarching principle'.[57]

In the event, the same underlying mistake by the Tribunal member — namely, the predetermined view not to adjourn the hearing — provided two conceptual routes through which the privative clause was overcome. First, the consequent breach of s 353(2)(b) was a breach of an inviolable requirement for the valid exercise of power. Second, the prejudgment and failure to act in accordance with natural justice established a lack of good faith in the decision-maker.[58]

52 Ibid [15]
53 Ibid [32].
54 Ibid [34].
55 *WADK v Minister for Immigration* [2002] FMCA 175 [34]–[35].
56 *Horodynska* (n 47) [36].
57 Ibid [40].
58 Ibid [40].

WAFJ: *a further case study of procedural unfairness, inviolable limitations and lack of good faith*

WAFJ v Minister for Immigration[59] ('*WAFJ*') illustrates similar reasoning in which Driver FM invalidated a decision of the Refugee Review Tribunal notwithstanding the privative clause. That case involved an Iranian asylum seeker whose protection visa was refused. He claimed that he was persecuted in Iran because of his occupation as a singer. The Tribunal member found that the applicant was not a credible witness and would not be subject to persecution on return to Iran. At issue on review was whether the conduct of the hearing was such as to support a claim of a lack of good faith. After the hearing of the matter, Driver FM approved pro bono representation for the applicant, whose appointed counsel listened to the audio recording of the hearing and subsequently filed submissions and an amended application. This contended that, as well as breaching the hearing rule and displaying apprehended or actual bias, the Tribunal failed to comply with statutory requirements to act in accordance with substantial justice and the merits of the case (s 420(2)(b)) or permit the applicant to give evidence and present arguments (s 425).[60]

Driver FM identified several issues of concern with the conduct of the hearing. First, it was held by video link between Sydney and the Port Hedland Immigration Detention Centre in Western Australia and required the applicant to attend at 7.40 am. It was 'highly unusual' to expect a litigant to attend a court at such an hour, and the administrative proceedings were no less significant. Second, there was construction noise which initially disrupted the proceedings. Third, the applicant was agitated. More significant, however, was the member's behaviour throughout the hearing. He repeatedly interrupted the applicant's answers, telling him to answer questions put rather than reciting prepared material. The applicant 'was questioned in rather laborious detail, more akin to cross-examination in adversarial proceedings' and at one point was told to simply answer 'yes' or 'no'.[61] The member repeatedly expressed disbelief. For instance, in relation to the applicant's statement that he kept to himself when detained, the member stated: 'You are making it unbelievable that you sat for one and a half months without talking, because it seems to me that you love to talk, all the time. I find it impossible to believe.' In the result, Driver FM 'formed the view from the audio record of the proceedings that the presiding member had a pre-determined view of the enquiries that he needed to make'.[62]

Driver FM accepted that the general law grounds of procedural unfairness were unavailable in the light of the privative clause as construed by *NAAV*. However, as in previous decisions, he construed s 420(2)(b) as 'a jurisdictional prerequisite because it establishes a fundamental and overarching principle to guide the RRT in all cases'.[63] Driver FM left open the possibility that s 425 was a similar inviolable precondition to the exercise of power. The manner of the hearing contributed to the agitation of the applicant and, collectively, the defects of the hearing established that it was procedurally unfair. A fair-minded lay observer listening to the audio recording would derive a reasonable apprehension that the member would not bring

59 [2002] FMCA 249.
60 Ibid [8]–[9].
61 Ibid [12].
62 Ibid [18].
63 Ibid [29].

an unprejudiced mind to the matter. This reasonable apprehension of bias was sufficient to establish a breach of s 420(2)(b). In relation to a lack of bona fides, this could 'be established by proof of the breach of a statutory requirement for the conduct of proceedings … whether that requirement be mandatory or merely directory'.[64] As with *Horodynska*, the failure to afford substantial justice established lack of good faith.

The extent to which *Plaintiff S157* simplified the law can be seen on the appeal of this decision.[65] The Full Federal Court was not required to scrutinise the reasoning below to decide whether Driver FM had correctly construed s 474, s 420(2)(b) and the surrounding case law concerning the privative clause and good faith. The presence of jurisdictional error had again become the lodestone. *WAFJ* was therefore affirmed by the majority on the basis that the proceedings had been procedurally unfair and thus the decision was affected by jurisdictional error.

NAIN: *conceptual difficulties in assessing error arising from the privative clause*

NAIN v Minister for Immigration[66] ('*NAIN*') provides a final example of the complexity of statutory interpretation and reasoning forced on the Federal Magistrates Court prior to *Plaintiff S157* by the presence of the privative clause. The applicant was an Indonesian citizen of Chinese extraction who had been refused a protection visa. He contended on review that the Tribunal had applied the wrong test of 'persecution'. The Refugee Review Tribunal had agreed that the applicant had suffered harm during anti-Chinese riots in Indonesia. However, the Tribunal was not satisfied that the applicant's fear of harm was objectively well founded. Taking into account Indonesian Government statements, it found that the government was able to provide effective protection. It was submitted that, by taking into account the *official* position of the Indonesian Government, the member had applied the wrong test. Driver FM considered s 65, which requires a decision-maker to achieve satisfaction on certain criteria before making a decision to grant or refuse a visa and construed this 'satisfaction requirement' as 'an inviolable requirement of the Migration Act that is a condition precedent to a valid exercise of the decision making power'. Therefore, relief may be available notwithstanding the privative clause if error is made in assessing the criteria for the grant of a visa. However, not all jurisdictional errors would be sufficient. What is needed is an error in the nature of 'the application of a part of the Migration Act or Regulations which does not apply, or no longer applies, or a failure to apply a part of the legislative regime which must apply'. For instance, the Tribunal must apply the then statutory test of 'persecution' in s 91R and then, as required by s 36(2), assess protection visa applications by reference to the Refugees Convention and Protocol as clarified by ss 91R and 91S. Misapplying those provisions may be reviewable.[67]

Driver FM concluded that the Tribunal identified the correct test but misunderstood it by misconstruing the Indonesian Government's assurances of security as an ability to provide state protection.[68] In so doing, the Tribunal committed jurisdictional error which would have invalidated the decision but for the privative clause. However, a jurisdictional error

64 Ibid [34].
65 *Minister for Immigration and Multicultural and Indigenous Affairs v WAFJ* (2004) 137 FCR 30.
66 [2002] FMCA 177.
67 Ibid [16].
68 Ibid [23].

of this nature was insufficient in the light of *NAAV* because the Tribunal had applied the necessary elements of the legislative regime which were essential for it to arrive at its s 65 state of satisfaction. Australian administrative law already contained a complex distinction between jurisdictional error and non-jurisdictional error of law on the face of the record.

Decisions such as *NAIN*, brought about by the presence of the privative clause, were pointing to a further embryonic distinction between different species of jurisdictional error.

The uncertain and dynamic evolution of the law in response to the 2001 reforms

It is by no means a foregone conclusion that the expansion of the concept of 'good faith' (or the Federal Magistrates Court's construction of provisions such as s 420(2)(b)) would have continued and solidified. Increasingly, the Federal Court displayed signs of disapproval of the treatment of this concept by practitioners. In *SCAS v Minister for Immigration and Multicultural and Indigenous Affairs*,[69] Heerey, Moore and Kiefel JJ stressed the seriousness of an allegation of a lack of good faith, which 'implies a lack of an honest or genuine attempt to undertake the task and involves a personal attack on the honesty of the decision maker'. They explicitly acknowledged the role of s 474 in creating a 'temptation to attach that label to a wide range of alleged errors of fact and law'. However, practitioners were clearly warned that improperly made allegations of bad faith raised 'serious questions of professional ethics'.[70] Furthermore, a number of Federal Magistrates Court decisions (and single-judge decisions of the Federal Court) which had found a lack of good faith were overturned on appeal. In one case, the Full Federal Court concluded that the tribunal member's questioning did not go beyond 'matters of personal style, which are a matter for the individual member' and was not an attempt to trap the applicant.[71] Heard in the same appeal decision, Driver FM was held in another case to have 'misunderstood the fact-finding process' arising from a tribunal member's examination of lashes on an applicant's body and to have wrongly concluded that the member approached the issue of the applicant's credibility with a closed mind.[72] The Full Court stressed that bad faith could manifest itself in actual bias but that this was distinct from the concept of apprehended bias. There was no such concept as constructive bad faith. It is interesting to speculate whether, had the *Hickman* principle endured, this would have led to deeper changes in the bias rule by means of an erosion of the well-established high threshold for actual bias (contrasted with apprehended bias) as litigants sought to use actual bias as a means to establish a lack of good faith and thus circumvent the privative clause.

The tumult of litigation following s 474 demonstrates the critical role which the Federal Magistrates Court has played in the 'first line' of statutory interpretation and the development of administrative law. It is also an illustration of the way in which the common law of judicial review was forced into new and strained channels of development in the shadow of the legislative attempts to restrict judicial review. Those attempts did not end with the decision

69 [2002] FCAFC 397.

70 Ibid [19].

71 *Minister for Immigration and Multicultural And Indigenous Affairs v SBAN* [2002] FCAFC 431, overturning *WAAG v Minister for Immigration* [2002] FMCA 191 (Raphael FM), although special leave was subsequently granted (*WAAG v Minister for Immigration* [2004] HCATrans 475) and the matter was ultimately remitted to the Refugee Review Tribunal by consent: *WAAG v Minister for Immigration* [2004] HCATrans 655.

72 [2002] FCAFC 431 [46], overturning *WAAK v Minister for Immigration* [2002] FMCA 86.

of the High Court in *Plaintiff S157*. The process of constrictions of rights of judicial review legislatively, and then expansion of them by the courts, has continued.

The continued expansion of migration litigation

The *Migration Litigation Reform Act 2005* enhanced the role of the Federal Circuit Court[73] as a response to reduce 'unmeritorious litigation'. This legislation enforced strict time limits and gave the Federal Circuit Court power to summarily dismiss proceedings where it is satisfied that there are no reasonable prospects of success. The long-term trend in migration litigation was for some years thereafter consistently downward as a consequence of effective case management in the Federal Circuit Court. Over that period, any perceived 'migration benefit' from seeking judicial review was very much reduced. The number of lodgements in the Court went from 1,549 (2007–08) to 1,288 (2008–09) and to a mere 880 (2009–10). There was a small increase in the filings in 2010–11, when 959 applications were filed. In more recent years, the Court's migration applications have increased dramatically. This reflects the addition of offshore entry persons' applications. Professor John McMillan advised the former government on options to improve the efficiency of the judicial review process for irregular maritime arrivals, but no substantial change has resulted.

Judicial review of migration decisions takes up a very large proportion of the Federal Circuit Court's resources. As noted above, some 6,555 judicial review applications were filed in 2019–20 (a 17% increase on the previous year) and most applicants are unrepresented.[74] Case management approaches differ as judicial officers strive to balance the competing demands of justice. Therefore, just as this area of jurisprudence has fleshed out the content of administrative law, it is also generating increasing appellate court analysis of the operation of procedural fairness and the judicial function in inferior courts.

Offshore processing

In March 2012, the then government decided to permit offshore entry persons to apply for protection visas in the same way as those who arrive legally by air. There was a pool of offshore entry persons already in the former system who remained subject to it, but they did not need to be. As Driver FM highlighted in the case of *SZQPA v Minister for Immigration & Anor*:

> [T]he Minister is entitled to exercise his powers under s 46A of the Migration Act without regard to anything in a Reviewer's report and recommendation. The orders made by the [Federal Magistrates] Court prevent the Minister from relying upon the present report and recommendation in considering whether to exercise his power … the [Federal Magistrates] Court's orders do not prevent the Minister from exercising his powers without regard to that report or recommendation.[75]

Unfortunately, between March 2012 and August 2013, many thousands of asylum seekers arrived irregularly by boat, which created a political and policy (but not a practical) crisis. The former Howard government's 'Pacific solution' of processing offshore was reinstated and the legislative provisions supporting it were reinforced. The Migration Act was further amended

73 As the Federal Magistrates Court became in 2013.
74 Federal Circuit Court (n 26) 2, 13.
75 [2012] FMCA 123.

in order to attempt to exclude administrative steps taken in support of that policy from judicial scrutiny, except in the High Court. The then government imposed an entirely new policy in July 2013 which denied protection in Australia to any new irregular maritime arrivals, who would henceforth be sent to Nauru and Manus Island in Papua New Guinea (PNG) to be processed (and, if necessary, resettled) according to Nauru and PNG law. Meanwhile, in August 2012, all onshore processing of refugee claims by irregular maritime arrivals ceased, and by September 2013 there were estimated to be about 30,000 unprocessed asylum seekers in a state of legal limbo in Australia.

Policy developments between 2013 and 2019

In September 2013, the new Coalition government led by Tony Abbott was elected on a platform of change to asylum seeker and refugee policy. Prior to the election, Abbott vowed to 'stop the boats' and viewed people arriving in boats seeking asylum as a direct threat to Australia's sovereignty. There was already little separating the policies of the previous Labor government and the Coalition (both favoured mandatory detention and offshore processing); however, now Abbott wanted to go a few steps further. Within a week of gaining power, he set up Operation Sovereign Borders, which was intended to, and did, deter irregular maritime arrivals. The government sought to introduce new measures designed to deter people from seeking asylum in Australia. Those included a return to temporary protection visas (TPVs), which work on the basis that those who are successful in their claims for protection will only be eligible for temporary protection and will never be allowed to settle permanently in Australia or bring out their families. Those visas last for three years and then must be reassessed on the basis that the refugee continues to fear persecution in their country of origin.

The government was determined to take direct action to stop the boats by turning back boats towards Indonesia and Sri Lanka when it is safe to do so. This 'turn-back' policy has been continued by the newly elected Labor government, demonstrating again the substantial continuity in migration policy approaches over time.

Offshore processing continues to be politically controversial. In February 2019, the Morrison government suffered a defeat on the floor of Parliament with the passing of the so-called 'Medevac Bill', which was proposed by former independent MP Kerryn Phelps. This legislation required the urgent medical transfer to Australia of an asylum seeker in a regional processing country if two independent doctors, having assessed the person remotely or face to face, formed the view that the person required removal to Australia in order to receive appropriate medical or psychiatric treatment. The Minister for Home Affairs was required to make a decision within 72 hours to confirm or refuse transfer. Any refusal on the basis that the Minister reasonably believed that removal was not necessary for appropriate treatment would be reviewed by the Independent Health Advice Panel. If the panel recommended transfer, that must then be approved by the Minister except in limited circumstances relating to security concerns or a substantial criminal record. In December 2019, the re-elected Morrison government secured the repeal of the 'Medevac' transfer provisions. Nearly 200

people had been transferred from offshore processing under those provisions.[76] More than 100 judicial review applications lodged by those transferees were recently before the Federal Circuit Court.

Establishment of the 'fast track review process'

The Migration Act was amended with effect from April 2015 to create a new domestic system for dealing with the protection claims of persons who arrived by boat (that is, the 30,000 people left in legal limbo in 2013). More than 15,000 applications for protection were made in 2016–17 by people who had arrived by boat in preceding years, prior to the imposition by the Minister for Home Affairs of a deadline of 1 October 2017 for the lodgement of a protection application by people in this so-called 'legacy caseload'.

The 'fast track review process' was introduced by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth). The aim of the process is to provide a limited, efficient and quick form of review of certain decisions refusing protection visas for some applicants, including those who arrived in Australia as unauthorised maritime arrivals on or after 13 August 2012 and before 1 January 2014. Such a reviewable decision is known as a 'fast track reviewable decision'. Part 7AA of the Migration Act establishes a comprehensive scheme of review of fast track reviewable decisions. Division 8 of Part 7AA establishes the Immigration Assessment Authority (IAA) — the body conducting reviews of fast track reviewable decisions.

Division 2 of Part 7AA sets out the procedure for referring fast track reviewable decisions to the IAA. Under s 473CA, the Minister must refer such a decision to the IAA as soon as is reasonably practicable after the decision is made.

Once the Minister has referred a fast track reviewable decision to the IAA, s 473CB requires the Secretary of the department to give to the authority certain material in respect of that decision at the same time as, or as soon as is reasonably practicable after, the referral.

Section 473CC(1) requires the IAA to review a fast track reviewable decision referred to it. Section 473CC(2) provides that the IAA may either affirm the decision or remit the decision for reconsideration in accordance with such directions or recommendations as are permitted by regulation.

Division 3 of Part 7AA deals with the manner in which reviews are to be conducted by the IAA. Section 473DA(1) provides that Division 3 of Part 7AA, together with ss 473GA and 473GB, is taken to be an exhaustive statement of the requirements of the natural justice hearing rule 'in relation to reviews conducted by the Authority'. This provision is couched in broader terms than ss 357A(1) and 422B(1) (which bind the Administrative Appeals Tribunal) and has been found to operate to exclude the common law natural justice hearing rule from conditioning the conduct of reviews before the IAA. The success of the drafters of this provision in removing the common law of procedural fairness can be contrasted with the

76 'Medical transfers from offshore processing to Australia', 15 December 2020, Andrew and Renata Kaldor Centre for International Refugee Law, University of New South Wales <https://www.kaldorcentre.unsw.edu.au/publication/medevac-law-medical-transfers-offshore-detention-australia>.

earlier attempts to oust judicial review for procedural fairness by means of former Part 8 and the privative clause introduced in 2001.

Section 473DB(1) compels the IAA, subject to Part 7AA, to review a fast track reviewable decision referred to it on the papers; that is, by considering the review material provided to the IAA under s 473CB 'without accepting or requesting new information' and 'without interviewing the referred applicant'.

However, s 473DC(1) permits the IAA, subject to Part 7AA, to 'get any documents or information (new information)' that 'were not before the Minister when the Minister made the decision under section 65' and 'the Authority considers may be relevant'. Subsection (2) confirms the discretionary nature of the power in s 473DC(1) by providing that the IAA 'does not have a duty to get, request or accept any new information whether the Authority is requested to do so by a referred applicant or by any other person, or in any other circumstances'.

Further, new information can be considered by the IAA only if the requirements of s 473DD are satisfied. Section 473DD provides that, for the purposes of making a decision in relation to a fast track reviewable decision, the authority must not consider any new information unless:

a. the Authority is satisfied that there are exceptional circumstances to justify considering the new information; and

b. the referred applicant satisfies the Authority that, in relation to any new information given, or proposed to be given, to the Authority by the referred applicant, the new information:

    i. was not, and could not have been, provided to the Minister before the Minister made the decision under s 65; or

    ii. is credible personal information which was not previously known and, had it been known, may have affected the consideration of the referred applicant's claims.

Division 5 of Part 7AA contains provisions relating to the exercise of powers and functions by the IAA. Section 473FA(1) provides that the IAA, in carrying out its functions under the Migration Act, is to pursue the objective of 'providing a mechanism of limited review that is efficient, quick, free of bias and consistent with Division 3 (conduct of review)'. This reinforces the legislature's aim of establishing a form of review that is limited in scope and efficient. Section 473FA(2) provides that, in reviewing a decision, the IAA 'is not bound by technicalities, legal forms or rules of evidence'.

Application of the 'fast track' process

In 2019–20, 1,745 referrals were made to the IAA and 1,731 decisions were made, mostly confirming the decision being reviewed. The vast majority of those decisions have been challenged in the FCC.

Numerous issues have arisen on judicial review concerning IAA decisions, largely because the legislation under which it operates was new and untested, and because the procedural code under which it operates is more restrictive than that binding the Administrative Appeals Tribunal. Critical differences are that the IAA is generally not able to conduct oral hearings and that it is generally not able to receive new information from applicants. Court decisions to date have established that the IAA does not have to observe the common law fair hearing rule but that it must act reasonably. Further, the legislative scheme under which the IAA considers the possible receipt of new information is fraught with difficulty.

As noted above, section 473DA excludes common law procedural fairness in relation to reviews by the IAA under Part 7AA. Unlike other provisions in the Migration Act, this has been held to be effective. However, the powers of the IAA, including the powers to get and accept 'new information' under s 473DC and s 473DD, are subject to the implied condition that they be exercised reasonably, as was affirmed by the High Court in *Plaintiff M174/2016 v Minister for Immigration and Border Protection.*[77] The High Court explained that s 437DC and s 473DD are to be understood in the context of Part 7AA as a whole and, in particular, s 473FA, which provides that the IAA is to 'pursue the objective of providing a mechanism of limited review that is efficient, quick [and] free of bias'.[78] The extent to which any of those objectives are being met is an open question and beyond the scope of this article.

The requirements of s 473DD are cumulative and thus, as a matter of ordinary statutory interpretation, the IAA is prohibited from considering new information unless *both* limbs are satisfied. This provision has become the source of an ever-expanding wave of case law in the Federal Court and Federal Circuit Court.

The saga of s 473DD perhaps began with the decision of White J in *BVZ16 v Minister for Immigration and Border Protection*,[79] which found that the IAA erred in its finding under s 473DD(a) that there were no 'exceptional circumstances' to accept new information from the applicant, in the form of a statement and a GP's letter. The IAA's reasons for doing so focused upon a rejection of the applicant's explanation for the late provision of the information. The decision-maker unduly confined its consideration of 'exceptional circumstances', rather than considering all the relevant circumstances, and thus constructively failed to exercise jurisdiction.

Subsequent decisions of the Full Federal Court, including *Minister for Immigration and Border Protection v CQW17*[80] and *AQU17 v Minister for Immigration*,[81] have confirmed the 'overlapping' nature of ss 473DD(a) and (b): a decision-maker will under most circumstances need to turn his or her mind to the s 473DD(b) factors (and particularly whether the information is credible and its relation to the applicant's claims) in order to properly consider whether the 'exceptional circumstances' limb is satisfied.

77 (2018) 264 CLR 217 [21].
78 Ibid [36].
79 (2017) 254 FCR 221.
80 (2018) 264 FCR 249.
81 [2018] FCAFC 111.

There are different species of jurisdictional error arising from decisions under s 473DD. For instance, just as a failure to consider (b)(i) or (b)(ii) factors can sound in error, an explicit consideration of those factors can reveal error of a different nature, as was evident in *CSR16 v Minister for Immigration and Border Protection*.[82] The IAA rejected new information because it stated, in relation to a new claim to fear harm, 'I am not satisfied that the applicant does have a genuine fear of this kind and I am therefore not satisfied that it is credible personal information'.[83] Bromberg J held that it was only later, at the 'deliberative stage' of the review, that such a finding should have been made. The word 'credible' in s 473DD(b)(ii) refers to information *capable* of being believed, rather than information actually believed by the IAA. Thus, the IAA misconstrued the provision and 'misconceived what the exercise of its statutory power entailed'.[84]

Driver J delved at first instance into the swirling and turbulent waters of s 473DC and s 473DD. For instance, in *ABJ17 v Minister for Immigration & Anor*,[85] the applicant provided to the IAA a translation of a document which had previously been before the primary decision-maker in Farsi. The IAA considered that it was not new information and thus accepted it without applying the statutory test in s 473DD. That decision was attacked by the applicant on judicial review. Driver J held that the IAA was correct, and he posited the view that 'a faithful English translation of a document that was before the delegate in a foreign language is not new information for the purposes of s 473DC(1)'.[86]

An additional layer of complexity has been added by s 473FB, which empowers the IAA to make practice directions in relation to the operations of the IAA and the conduct of reviews by it.[87] Section 473FB(2)(b) permits those directions to set out procedures for the giving of information to the authority, and s 473FB(5) provides that the IAA 'is not required to accept new information or documents from a person … if the person fails to comply with a relevant direction that applies to the person'.

The IAA's Practice Direction No 1, in its May 2016 iteration, provided as follows:

> If you want to give us new information, you must also provide an explanation as to why:
>
> - the information could not have been given to the Department before the decision was made, or
> - the information is credible personal information which was not previously known and may have affected consideration of your claims, had it been known.
>
> Your explanation should be no longer than 5 pages and must accompany any new information you give to us.[88]

The interaction of s 473FB and the IAA's practice direction with the 'new information' test in s 473DD discussed above has been a source of difficulty. In *DHV16 v Minister for*

82 [2018] FCA 474.
83 Ibid [35].
84 Ibid [43].
85 [2017] FCCA 1240.
86 Ibid [36].
87 Section 473FB(1).
88 At [23]–[24].

Immigration and Border Protection,[89] Driver J characterised s 473FB(5) as creating an 'antecedent discretion' which the IAA, in cases where new information does not conform with the requirements of the practice direction, may exercise to refuse to accept that information — 'In other words, the [IAA] has a discretion, enlivened by a failure to comply with a relevant direction, whether to embark upon the consideration of s 473DD at all.'[90] However, he found that the IAA had fallen into error by 'conflating the requirements of s 473DD(b) with the requirements of the Practice Direction made under s 473FB of the Migration Act'.[91] The IAA's reasons identified the purported noncompliance with the practice direction as 'the principal and (perhaps the only) reason why it was not satisfied as to the matters set out in s 473DD(b)' and had thereby rejected the new information. By embarking on the s 473DD analysis, the IAA had 'moved beyond the exercise of [the] antecedent and non-compellable discretion' and misconstrued its statutory task.

By contrast, the IAA's reasoning in *BTQ19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*[92] was subtly but significantly different. The IAA found that the applicant's representative 'had failed to comply with the Practice Direction … by failing to attach a copy or extract of the parts of the new information upon which he relied and, in some instances, by failing fully to source the information or merely to provide hyperlinks'.[93] It therefore refused to accept the new information. It went on to consider in the alternative the requirements of s 473DD in relation to the new information and found that those requirements were in any event not satisfied. Driver J held that the IAA had not fallen into error, as it had not misconstrued its statutory task. It could be 'comfortably inferred' that the IAA had exercised its anterior discretion under s 473FB(5) to refuse the new information, as was open to it, and had gone on to make an alternative finding in relation to the s 473DD(b) test, without conflating the requirements of those provisions.[94] '[U]nlike DHV16, the Authority did not reason that, because the applicant had failed to comply with the Practice Direction, it was not satisfied of the matters in s 473DD(b).'[95]

It is likely that the operation of this antecedent discretion, alongside the already intricate new information test, will continue to be subject to challenge. For instance, in *BDR19 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs*,[96] Driver J found that the IAA had misconstrued the practice direction and thereby fallen into jurisdictional error. Paragraph 30 of the practice direction requires that, if any new information is provided, the applicant must 'attach a copy of that information or an extract of the part(s) of the information' on which the applicant relies.[97] The IAA declined to receive the new information, as it found that the proffered information did not comply with this requirement of the practice direction. It was common ground between the parties that the IAA had misconstrued this aspect of the practice direction, which 'does not require that proposed new information such as country

89 (2018) 331 FLR 204 [96]–[97].
90 Ibid [96]–[97].
91 Ibid [96].
92 [2020] FCCA 1539.
93 Ibid [51].
94 Ibid [53].
95 Ibid [56].
96 [2021] FCCA 501.
97 Ibid [28].

information be extracted as a document that is separate from a written submission'.[98] The extracts in question had been included within the applicant's representative submissions and therefore the practice direction had not been breached. Driver J found that the IAA's error was material, as — had the IAA not wrongly exercised its antecedent discretion under s 473FB(5) — it may have been satisfied that there were 'exceptional circumstances' to accept the new information pursuant to s 473DD. Furthermore, it was 'at least possible that the … information, if added to the other information before the Authority, could have made a difference' to its finding that there was more than a remote possibility that the applicant could be impacted by politically motivated violence. The error was therefore material.[99]

Part 7AA of the Migration Act is an instructive example of the risks inherent in introducing a complex statutory code, characterised by curtailed procedural rights, with the objective of speeding up a review process and eliminating a 'backlog'. As the operation of the new provisions was tested in litigation and the dynamic process of statutory interpretation unfolded, many unintended legal consequences emerged. The IAA, despite its best efforts to grasp its statutory function, has often fallen into error as a consequence.

Conclusion

Australia has reacted to the pressure upon it in relation to migration with many twists and turns of law and policy, which add layer upon layer of structure and complexity. Those layers of structure and complexity have generated many legal challenges which have bedevilled the administration of the Migration Act in relation to visa applicants. The jurisprudence of the Federal Circuit and Family Court and its predecessors has often provided the 'first word' in the difficult task of statutory interpretation following legislative reforms, as can be seen through the new law created in response to the 2001 privative clause reform and the later creation of the fast track review process. The decisions of the Federal Circuit and Family Court of Australia, as clarified or modified by the Federal Court and the High Court, will continue to play a critical role in the dialogue between Parliament and the judiciary and in the preservation of judicial review in its essential function of promoting the rule of law.

98 Ibid [62].
99 Ibid [73]–[79].