IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No S65 of 2014

BETWEEN:

MINISTER FOR IMMIGRATION, MULTICULTURAL AFFAIRS AND CITIZENSHIP
Appellant

and

SZRNY
First Respondent

REFUGEE REVIEW TRIBUNAL
Second Respondent

APPELLANT'S SUBMISSIONS

Part I: Certification

1. These submissions are in a form suitable for publication on the Internet.

Part II: Issues

2. This appeal raises one issue, which is whether, in circumstances where a person has applied for a visa, the application has been refused by a delegate of the appellant (**Minister**), the visa applicant has sought review of that decision by the second respondent (**Tribunal**) and the Tribunal has made a valid decision affirming the delegate's decision, the visa application is "finally determined", within the meaning of s 5(9) of the *Migration Act 1958* (Cth) (**Act**), when:

   a) as the Minister contends, the delegate's decision is no longer susceptible of being altered by the Tribunal under Part 7 of the Act; or

   b) as the court below determined, all of the core review functions of the Tribunal under Part 7 have been completed, in accordance with the Act.

Part III: Section 78B of the *Judiciary Act 1903* (Cth)

3. The Minister has considered whether any notice should be given under s 78B of the *Judiciary Act 1903* (Cth) and has concluded that no such notice is necessary.

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Part IV: Citations

4. This appeal is from orders made by the Full Court of the Federal Court in *Minister for Immigration, Multicultural Affairs and Citizenship v SZRNY* (2013) 214 FCR 374. That was an appeal from orders made by the Federal Circuit Court in *SZRNY v Minister for Immigration and Citizenship* [2013] FCCA 197.

Part V: Facts

Background

5. The first respondent (**respondent**) is a national of Pakistan. He arrived in Australia on 11 February 2010 on a temporary business visa.

6. On 4 March 2010, the respondent made an application to the Minister's department for a Protection (Class XA) visa (**protection visa**). A delegate of the Minister refused his application. The respondent applied to the Tribunal for review of the decision, but was unsuccessful. He then applied to the then Federal Magistrates Court for judicial review of the Tribunal's decision under s 476 of the Act. By consent, the Court set aside the Tribunal's decision and remitted the matter to the Tribunal for determination according to law.

7. Following a hearing before the Tribunal to which the respondent was invited and in which he participated, the reconstituted Tribunal affirmed the delegate's decision on 12 March 2012. The Tribunal notified the Secretary of its decision on the same day. Also on that day, the Tribunal purported to notify the respondent of its decision by pre-paid post, but did not send a copy of its decision to the respondent's correct address, of which he had advised the Tribunal on 2 February 2012.

8. On 28 May 2012, the Tribunal sent, by pre-paid post, a copy of its decision to the respondent's correct address. In the meantime, on 24 March 2012, the *Migration Amendment (Complementary Protection) Act 2011* (Cth) (**Complementary Protection Act**) commenced. One effect of the Complementary Protection Act was to amend s 36(2) of the Act to insert an alternative criterion for the grant of a protection visa. Item 35 of Sch 1 to the Complementary Protection Act provided that the amendments applied in relation to applications for protection visas that were made on or after 24 March 2012 or that were not "finally determined" (as that expression is defined in s 5(9) of the Act) before 24 March 2012.

Decision of the primary judge

9. On 12 June 2012, the respondent applied to the Federal Circuit Court for judicial review of the reconstituted Tribunal's decision. On 7 May 2013, the primary judge (Judge Barnes) upheld his application, set aside the Tribunal's decision and remitted the matter to the Tribunal for determination according to law.[1]

10. Her Honour held that none of the respondent's claims gave rise to a jurisdictional error in the Tribunal's decision,[2] but upheld his application on the basis that the Tribunal made a jurisdictional error by not considering the complementary protection criterion in s 36(2)(aa) of the Act and/or not inviting him, pursuant to s 425, to appear before the Tribunal to address that criterion, the issues arising in relation to the decision under review having changed between 12 March and 28 May 2012.

11. Her Honour held that the respondent's protection visa application had been finally determined when the Tribunal's decision either "had been communicated to [him] or irrevocable steps had been taken to have that done in accordance with the notification provisions in the Act."[3] Her Honour also held that the Tribunal's "core function of review", an expression that does not appear in the Act, was completed on 28 May 2012, upon the respondent being notified of the decision.[4]

12. Her Honour considered that the judgments of each member of the Full Federal Court in *Minister for Immigration and Citizenship v SZQOY* (2012) 206 FCR 25 supported these conclusions, as their Honours regarded communication of the Tribunal's decision to a review applicant as essential, whether notification were viewed as part of the Tribunal's core function or as an indicator of when the Tribunal's decision was made.[5] In *SZQOY*, Buchanan J had accepted Madgwick J's statement in *Semunigus v Minister for Immigration and Multicultural Affairs* (2000) 96 FCR 533 that "a decision is no decision ... until either it has been communicated to the applicant or irrevocable steps have been taken to have that done."[6] Judge Barnes considered his Honour's acceptance of this statement to be significant. Like *SZQOY*, *Semunigus* was a case where the Tribunal had received a post-hearing submission from the review applicant's representatives after it had communicated its decision to the Registry of the Tribunal, but before it had been sent to the review applicant or the Secretary. The Full Federal Court held that, at the time that it received the review applicant's submissions, the Tribunal

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1 *SZRNY v Minister for Immigration and Citizenship* [2013] FCCA 197 (**Primary Decision**).
2 Primary Decision at [30]-[68].
3 Primary Decision at [134].
4 Primary Decision at [133].
5 Primary Decision at [130].
6 *Semunigus v Minister for Immigration and Multicultural Affairs* (2000) 96 FCR 533 at 547 [103].

had not spent its decision-making power and its decision was not beyond recall.[7] That is not this case.

Decision of the Full Federal Court

13. The Minister appealed from the primary judge's orders on 28 May 2013. A majority of the Full Federal Court (Griffiths and Mortimer JJ) (**Majority**) dismissed his appeal. Justice Buchanan dissented.

14. The Majority held that the delegate's decision "was not finally determined by the Tribunal under Part 7 of the Act until such time as the Tribunal had notified both the applicant and the Secretary as ss 430A(1) and (2) require".[8] It was only when these notification requirements were fulfilled ("notification in accordance with the Act ... and not actual notification") that the visa application had been "finally determined".[9] The Majority gave several reasons for reaching this conclusion.

15. First, their Honours considered that the phrase "any form of review under Part ... 7" in s 5(9) is broadly expressed and invites attention to the question whether notification of the Tribunal's decision forms part of the content and scope of a review under Part 7 of the Act.[10] Their Honours said that it was "difficult to understand" why notification to the review applicant and the Secretary, in accordance with ss 430A(1) and (2), would not be a part of the content and scope of a review under Part 7.[11] Accordingly, the "review" in s 5(9)(a) incorporated the performance of the notification requirements in ss 430A, 441A and 441B, but did not require the performance of every obligation or function in every provision in Part 7.[12]

16. Secondly, the Majority pointed to some observations of each member of the Court in *SZQOY* (Buchanan J at 30 [23], Logan J at 32-33 [39]-[41], and Barker J at 36 [57]) which they considered emphasised the importance of the notification requirements in s 430A.[13] In particular, Logan J and Barker J's comments at 33 [40]-[41] and 36 [57], respectively, "support[ed] a construction of s 5(9)(a) of the Act that regard[ed] the notification provisions in both ss 430A(1) and (2) as critical elements in a review under Part 7." The Majority did not accept the Minister's submission that the delegate's decision was no longer subject to a

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7 *Semunigus v Minister for Immigration and Multicultural Affairs* (2000) 96 FCR 533 at 536 [12] per Spender J, 547 [102]-[105] per Madgwick J.

8 *Minister for Immigration, Multicultural Affairs and Citizenship v SZRNY* (2013) 214 FCR 374 (**Full Court Decision**) at 390 [84].

9 Full Court Decision at 390 [84].

10 Full Court Decision at 390-391 [85].

11 Full Court Decision at 390-391 [85].

12 Full Court Decision at 393 [96]-[97].

13 Full Court Decision at 391-392 [88]-[91].

form of review by the Tribunal at least when the Secretary had been notified of the Tribunal's decision, and that *SZQOY* supported that proposition.[14] Nor did their Honours accept the Minister's submission that, to the extent that *SZQOY* suggested otherwise, it was plainly wrong.[15]

17. Thirdly, the Majority rejected the submission that s 430A(3) suggested that notification of the Tribunal's decision under ss 430A(1) and (2) was not essential to its review function. Their Honours considered that "[i]f [s 430A(3)] has effect, it reaches only so far as a legal consequence which might or might not attach to failures to notify in accordance with ss 441A and 441B, or at all" (at [99]). Their Honours said that neither the text nor context of s 430A(3) "evince[d] any intention to immunise the decision on review in any broader sense", or spoke to when a review was completed.[16]

18. Fourthly, the Majority considered that ss 422 and 422A supported their construction of s 5(9).[17] Their Honours thought that it was significant that, unlike the discretion to reconstitute the Tribunal under s 422A(1), which, by reason of s 422A(2)(a), could not be exercised if the Tribunal had already recorded its decision in writing or given it orally, the duty of the Principal Member of the Tribunal to reconstitute the Tribunal under s 422(1) was not restricted in the same way. The Majority held that the Principal Member would be required to reconstitute the Tribunal under s 422(1) if a member ceased to be a member, even if they had recorded their decision in writing or given their decision orally.[18]

19. Finally, the Majority observed that considerations of administrative efficiency were irrelevant to construing s 5(9)(a) and that, if that provision created any practical problems for the Minister's department, that was due to a deliberate choice by Parliament to use a particular reference point for when a visa application is finally determined.[19] Their Honours ascribed to the Minister a submission that he did not make, namely, that the respondent's construction of s 5(9)(a) should not be accepted because it resulted in "unacceptable uncertainty and inconvenience for the bureaucracy in the administration of the Act".[20] The submission that was put by the Minister was that certain provisions of the Act, such as s 440A, revealed that the legislative scheme would not operate efficiently, or at all, if the respondent's construction were accepted.

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14 Full Court Decision at 392 [92].
15 Full Court Decision at 392 [91].
16 Full Court Decision at 393 [100].
17 Full Court Decision at 394 [102].
18 Full Court Decision at 394 [102].
19 Full Court Decision at 394-395 [103]-[105].
20 Full Court Decision at 394 [103].

20. Justice Buchanan, in dissent, held that the respondent's visa application was no longer subject to a form of review by the Tribunal when the Tribunal sent its decision to the Secretary and to the respondent, albeit to the wrong address, on 12 March 2012.[21] His Honour held that, on that day, the Tribunal's decision-making power was spent and its decision had been put beyond recall.[22] This position did not change merely because the respondent had not been notified of the Tribunal's decision, in accordance with ss 430A(1) and 441A, on 12 March 2012.[23] His Honour considered that s 430A(3) suggested that the Tribunal's decision was valid and final on that day,[24] and that it would be inconsistent with that view to suggest that the delegate's decision remained subject to a form of review (in which case it could be amended).[25]

21. His Honour said that the Court's observations in *SZQOY* did not dictate the outcome of this case, as it concerned the construction of s 5(9) of the Act and not the doctrine of *functus officio*.[26] His Honour correctly noted that, in *SZQOY*, the court was not required to consider whether communication of the Tribunal's decision *at least* to the review applicant was necessary, or communication to *either* the review applicant or the Secretary was necessary, before it could be said that the Tribunal's decision was beyond recall.[27] Justice Buchanan agreed with the Minister's submission that the primary judge had misinterpreted *SZQOY* as requiring communication of the Tribunal's decision to a review applicant before the decision under review could be said no longer to be subject to a form of review under Part 7.[28] However, his Honour did not express a view as to the Minister's submission that *SZQOY* was plainly wrong in so far as it stood for the proposition that the Tribunal will not be *functus officio* in respect of its decision-making power until *at least* the review applicant has been notified of the Tribunal's decision.[29] It was not necessary for the Court to overrule *SZQOY* in order to uphold the Minister's appeal.

Part VI: Argument

Overview

22. The essential elements of the Minister's arguments are as follows:

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21 Full Court Decision at 381 [40].
22 Full Court Decision at 381 [34].
23 Full Court Decision at 381 [40].
24 Full Court Decision at 381 [40].
25 Full Court Decision at 381-382 [41].
26 Full Court Decision at 378 [20]. See also at 381 [36].
27 Full Court Decision at 379 [24]. See also at 379-381 [26], [28], [30], [38].
28 Full Court Decision at 380 [31]-[33].
29 Full Court Decision at 381 [37].

a) the appeal turns upon the correct construction of s 5(9) of the Act and, in particular, the identification of when a delegate's decision on a visa application "... is no longer ... subject to any form of review under Part ... 7";

b) according to its ordinary meaning, a delegate's decision is "subject to" a form of review if it is liable to, open to, or exposed to, a form of review;[30]

c) the only relevant form of review of the delegate's decision (that is, re-examination or reconsideration of that decision) is review by the Tribunal;

d) a delegate's decision is, therefore, no longer subject to a form of review under Part 7 when it is no longer liable or open to be altered in the review undertaken by the Tribunal;

e) hence, the delegate's decision on the visa application is "finally determined" when any power the Tribunal had to change that decision has been spent – one identifies this point in time by a proper understanding of the provisions in Part 7;

f) this clear textual meaning of s 5(9) finds compelling support by the surrounding legislative context.

Text

23. This appeal concerns the construction of s 5(9) of the Act, which provides (emphasis added):

> *For the purposes of this Act, an application under this Act is finally determined when either:*
>
> *(a) a **decision** that has been made in respect of the application is not, or is **no longer**, **subject** to **any form of review** under **Part** 5 or 7; or*
>
> *(b) a decision that has been made in respect of the application was subject to some form of review under Part 5 or 7, but the period within which such a review could be instituted has ended without a review having been instituted as prescribed.*

24. It is clear, and not in contest, that the expression "decision that has been made in respect of the application" refers to a decision of the Minister's delegate. In the present context, it refers to the delegate's decision to refuse to grant a protection visa.[31]

25. Subsection 5(9) deals with three situations:

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30 *Macquarie Dictionary Online.*

31 See paragraph 6 above.

a) where the delegate's decision was never subject to any form of review under Part 5 or 7 - paragraph (a) and the word "not";

b) where the delegate's decision was liable to be reviewed by a tribunal but no application for review was made within the period permitted - paragraph (b); and

c) where the delegate's decision was susceptible to being reviewed, an application for review was made and the delegate's decision is "no longer" subject to any form of review because the Tribunal has made a decision under s 415(2) and thereby spent its decision-making power.[32]

10 The present case concerns the third of these situations.

26. The question posed by s 5(9)(a), then, is: when was the delegate's decision to refuse the protection visa no longer subject to any form of review under Part 7?

27. Contrary to the approach of the Majority, this language does not "invite attention to the question whether the notification of the Tribunal's decision to the review applicant is an element of the content and scope of a Part 7 review".[33] Rather, it draws attention to whether and, if so, when the delegate's decision ceased to be subject to any form of review; that is, ceased to be subject to being altered in a review under Part 7. The Minister contends that this was the central error in the approach of the court below.

20 28. The language in s 5(9)(a) does not require the court to determine whether notification of a decision by the Tribunal is a "critical elemen[t] in a review under Part 7",[34] or is part of the Tribunal's "core function",[35] or "review process"[36] or is "part of the content and scope of a Part 7 review".[37] The focus of the provision is upon whether and, if so, when the delegate's decision ceased to be subject to review under Part 7 (namely, review by the Tribunal). Subsection 5(9)(a) is not concerned with steps that may be required under

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32 Note that most of the Tribunal's decision-making powers result in a final decision on the visa application, such as where the delegate's decision is affirmed, varied or set aside and another decision substituted (ss 415(2)(a), (b) and (d)). However, the Tribunal may also make a decision to remit the matter to the delegate to be reconsidered in accordance with a direction or recommendation (see s 415(2)(c)); this would not preclude further review and, therefore, the visa application would not be finally determined, even though the Tribunal's power to review has been spent.

33 Full Court Decision at 390 [85].

34 Full Court Decision at 392 [91].

35 *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123 at 1127 [18] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; *Minister for Immigration and Citizenship v SZQOY* (2012) 206 FCR 25 at 29 [19] per Buchanan J, 32-33 [37], [39]-[41], 34 [43] per Logan J.

36 *Minister for Immigration and Citizenship v SZQOY* (2012) 206 FCR 25 at 35 [48] per Logan J, 36 [57]-[58] per Barker J.

37 Full Court Decision at 390 [85].

Part 7 that occur at a point in time *after* the Tribunal has ceased to have the power to affect (or further affect[38]) the delegate's decision (because the Tribunal cannot change its own decision on the review if it is valid). The approach of the Majority in the court below ignores the totality of the language in s 5(9) and, in particular, the centrality of the reference to the review being of the decision of the delegate.

29. In the context of the present decision, the question becomes whether and, if so, when the Tribunal ceased to be able to review the delegate's decision to refuse the protection visa. For reasons developed below, the answer to this question is that this occurred on 12 March 2012. The question was not when the Tribunal had undertaken every step required of it under Part 7 or whether those steps should be characterised as being "critical elements" of the processes established under Part 7.

30. The Majority considered that notification to a review applicant under s 430A is a critical element of the review under Part 7 such that, until notification is given "in accordance with the Act", the review under Part 7 is incomplete. (This is so notwithstanding that s 430A(3) should have affected the Court's characterisation of the centrality of the notification requirement or, at least, the significance of a partial failure to comply with it.) From this point, it seems that the Majority was able to infer that a visa application is not "finally determined", where an application for review has been made within time, until the review applicant is notified under the Act. This approach leads to a situation, like the present, where the Tribunal made a *valid* decision on 12 March 2012 but, because it was not notified to the review applicant in accordance with the Act, the visa application was not "finally determined". The Majority declined to consider whether the Tribunal's power to review was spent, but impliedly accepted that the Tribunal was bound to reconsider its decision when the visa criteria subsequently changed. On the same analysis, the Tribunal may also be bound to consider any new claims or fresh evidence advanced on behalf of a review applicant before the application is "finally determined".

31. Given that the Tribunal's *valid* decision had been notified to the Secretary, the Majority's analysis does not address the question of whether the Secretary or Minister is bound or entitled to act upon that *valid* decision. If the decision had involved a variation of the decision under review, it would have been a valid decision varying the earlier decision and would have had the force of a decision of the Minister (s 415(3)), yet still be susceptible to further alteration by the Tribunal. The approach of the Majority would require the Minister to verify that a review applicant has been notified in accordance with the Act before

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[38] If the Tribunal's decision had been to, say, vary the delegate's decision, it would then no longer have the power *further* to affect that decision.

being able to act on the basis that the visa application has been finally determined (see, for example, s 336F of the Act).

32. Focusing, as their Honours did, upon the "critical elements" of the provisions contained in Part 7, the Majority did not need to consider whether the Tribunal's decision-making power was spent. It can only be inferred that their Honours concluded that it was not, but the failure to address this issue undermines their analysis. If the Tribunal's power to make a decision had been spent, the Tribunal could not have been obliged to reconsider its decision. This should have been considered at least as a contextual consideration in construing s 5(9). It was not correct to approach the matter as if any limit on the Tribunal's power to revise its decision was irrelevant to the construction of s 5(9).

Further contextual considerations

33. Part 7 contains a number of provisions that indicate the ambit of the Tribunal's review function. These indicate that the Tribunal's function is to review the delegate's decision with a view to making a decision under s 415(2) and recording reasons for that decision under s 430(1) of the Act. The legislation cogently indicates that the review of the delegate's decision has been completed upon the recording of the Tribunal's decision.

34. Section 412 sets out the formal requirements for making a valid application for review. Subsection 414(1) provides that, if a valid application for review has been made under s 412, the Tribunal "must review the decision". That obligation has been described by this Court as the Tribunal's "core function".[39] Subsection 415(1) provides that the Tribunal may, for the purposes of the review, exercise all of the powers and discretions that are conferred on the Minister and his delegates. Pursuant to s 415(2), the Tribunal may affirm, vary, or set aside the decision and substitute for it a different decision. If the Tribunal varies or sets aside the decision and substitutes for it a new decision, then, by reason of s 415(3), the new decision is taken to be a decision of the Minister (save for the purpose of reviewing decisions of the Tribunal).

35. Where the Tribunal makes its decision on a review, it must, pursuant to s 430(1), prepare a written statement that sets out the decision, the reasons for the decision, the findings on any material questions of fact, and refers to the evidence or any other material on which those findings of fact are based. A decision on a review is taken to have been made "on the date of the written statement": s 430(2).

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39 *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123 at 1127 [18] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.

36. Once a decision has been made, the Tribunal is required to notify the review applicant and the Secretary by giving to them copies of its written statement prepared under s 430(1) within 14 days after the day on which the decision is taken to have been made: ss 430A(1), (2). In this way, the Act imposes a positive obligation that arises on the day on which the Tribunal dates its written statement. Accordingly, the Tribunal's notification obligations under s 430A arise only once a decision has been made. It is inconsistent with the legislation to say that a decision is made only when it is notified, which is the effect of the Federal Court's decision in *SZQOY*. As McHugh J held in *Re Minister for Immigration and Multicultural Affairs; Ex parte Durairajasingham* (2000) 74 ALJR 405 at 417 [70], the opening words of s 430(1) "presuppose that the Tribunal has made a decision".

37. Subsection 430A(3) is an important provision. It provides that a failure by the Tribunal to comply with the notification requirements in s 430A does not affect the validity of its decision. This lends considerable support to the notion that notification is to be seen as separate from, and subsequent to, the making of the decision. It also presupposes that a "decision on review" will have been made before any notification and that it can, at that time, have the character of being a *valid* decision (this validity not being affected by any non-compliance with ss 430A(1) and (2)).

38. The recording of a decision under s 430(1) has statutory significance in addition to starting the 14-day period within which notification of the decision is to occur. The following are key examples:

a) A statement prepared under s 430(1) is said to constitute a "record" of the Tribunal's decision: s 414A(1). That provision requires the Tribunal to record its decision within 90 days of the Secretary giving to the Registrar of the Tribunal the documents referred to in s 418(2). This time constraint was designed (along with that in s 65A) to ensure quick decision-making in relation to protection visa applications.

b) Subparagraph 440A(5)(b) requires the Principal Member to give to the Minister a report containing information as to each application for review, including whether or not the Tribunal has "reviewed the decision under s 414 and recorded its decision under s 430" within the period specified in ss 414A(1) and 440A(10). These reports must be tabled in Parliament (s 440A(9)), thereby allowing Parliament to scrutinise the timeliness of the carrying out of reviews by the Tribunal.

c) Where the Tribunal has failed to undertake a review and record its decision within the allotted period, the report must give reasons "why decisions were not reviewed within" the allowed period: s 440A(6)(b). This provides a clear textual basis for concluding that where a decision

has been made and recorded under s 430(1), the Tribunal has completed the review (even if it has not yet undertaken obligations such as notification of the decision to the review applicant and/or the Secretary).

d) Under s 422A(1), the Principal Member has power to direct that a member constituting the Tribunal for a particular review be removed and that another member constitute the Tribunal for the purposes of that review if he or she considers that it is in the interests of efficiency to do so. However, the Principal Member cannot give such a direction once the Tribunal's decision has been recorded in writing: s 422A(2)(a).

10 39. These provisions all support the construction of s 5(9)(a) as being directed to when the Tribunal has made a decision on a review, being a decision made in a manner that precludes alteration of that decision. The Minister contends that this occurs when the Tribunal has "recorded" its decision under s 430(1) (see the title to s 430, and ss 414A(1), 422A(2)(a), 440A(5)(b) and (6)) or, failing that, when the decision that has been made is beyond recall because it has been manifested in a form that has been communicated outside of the Tribunal.

The Tribunal's decision-making power is spent when exercised

40. Numerous authorities support the proposition that, if the Tribunal has made a valid decision on a review, the Tribunal's decision-making power under s 415(2)
20 is spent.[40] It is not clear that the respondent even cavils with this proposition.

41. The Tribunal's power in s 415(2) cannot be re-exercised in circumstances where the Tribunal's original decision is not attended with jurisdictional error.[41] Section 33(1) of the *Acts Interpretation Act 1901* (Cth) does not apply in respect of s 415(2), as the Act evinces the necessary contrary intention.[42]

42. Once the Tribunal has made a valid decision to affirm a decision of the Minister's delegate (by recording and dating its s 430(1) statement), the primary decision will no longer be subject to a form of review under Part 7.[43]

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40 *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (2000) 199 CLR 343 at 355 [30] per Gleeson CJ, McHugh, Gummow and Hayne JJ at 355; *Jayasinghe v Minister for Immigration and Ethnic Affairs* (1997) 76 FCR 301 at 311E-G per Goldberg J; *Uddin v Minister for Immigration and Multicultural Affairs* (1999) 165 ALR 243 at 247 [14] per Hely J; *Singh v Minister for Immigration and Multicultural Affairs* (2001) 109 FCR 18 at 28 [35] per Merkel J; *SZBWJ v Minister for Immigration and Citizenship* (2008) 171 FCR 299 at 305 [19] per Moore J.

41 *SZBWJ v Minister for Immigration and Citizenship* (2008) 171 FCR 299 at 303 [10] per Moore J.

42 *SZBWJ v Minister for Immigration and Citizenship* (2008) 171 FCR 299 at 303 [10], 304-305 [16] per Moore J.

43 *NAGA v Minister for Immigration and Multicultural and Indigenous Affairs* [2003] FCA 224 at [12] per Emmett J; *Mastipour v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2004) 140 FCR 137 at 141 [13] per Mansfield J.

43. In *Minister for Immigration and Multicultural Affairs v Thiyagarajah* (2000) 199 CLR 343, having referred to the fallacy in the notion of "once a refugee always a refugee", Gleeson CJ, McHugh, Gummow and Hayne JJ said (at 355 [29]-[30]) (emphasis added):

> ... ***[T]he Act posits the determination of a particular application at a particular time.*** *The Act contemplates changed circumstances which might found a fresh application, but imposes the limitations found in ss 48A and 48B.*
>
> ***It would be inconsistent with that scheme and contrary to the ordinary reading of Div 2 of Pt 7 of the Act to treat the decision of the Tribunal as provisional in nature. In the situation where the Tribunal had, without reviewable error, disposed of an application for review of the decision of the delegate ..., the Act did not confer upon the Tribunal any authority subsequently to reconsider the decision of the delegate by reason of later changed circumstances.***

44. These remarks are apposite to the present case. The Tribunal "disposed of [the] application for review of the [delegate's decision]" when it made its decision on 12 March 2012 to affirm the delegate's decision. The decision in that form was not, as held by the primary judge, affected by jurisdictional error (that is, it was valid). The power under s 415(2) having been exercised, the power under that section was spent (even though the Tribunal continued to have further obligations and powers in respect of the review application, including the obligation to notify the respondent and the Secretary of the decision that had been made).

When is the Tribunal's decision-making power spent?

45. The remaining question is: when is the Tribunal's decision-making power spent? This is a question of statutory construction.

46. The Minister contends that a number of factors indicate that the Tribunal's power to make a decision under s 415(2), in a case such as the present (where a decision was made after a hearing under s 425), is spent upon the decision being recorded as required by s 430(1) of the Act.

47. First, the provisions summarised above in paragraph 38 give a clear statutory significance to the act of *recording* a decision required under the Act. It is a required step from which other obligations commence (see ss 430(2), 430A(1) and (2)).

48. There will be a question of fact as to whether, in a given case, a decision has been "recorded" for the purposes of s 430(1) of the Act. Any evidential difficulty in identifying the time when this occurs (and it is not suggested that it

is factually difficult to do[44]) is beside the point. The question is whether the Tribunal has recorded its decision within the ordinary meaning of the word "recorded". This could be established by evidence from the person constituting the Tribunal that the decision had been made and that the reasons have been signed and finalised and are available to be sent out to the parties.

49. Secondly, for the purposes of parliamentary oversight of the Tribunal, the recording of the decision is treated as being equivalent to the point at which the delegate's decision was "reviewed" (s 440A(6)(b)).[45]

50. Thirdly, s 430A(3) is expressed on the assumption that, at the time that a decision has been made and recorded under s 430(1), it can have the character of being valid (assuming no reviewable errors have been made by the Tribunal). In circumstances where a power once validly exercised cannot be re-exercised, this provision strongly indicates that the power under s 415(2) has been spent prior even to the point of notification. Contrary to the reasoning of the Majority at 393 [99]-[100], there is no reason to doubt that s 430A(3) operates to "immunise" (or preserve) the validity of the decision made by the Tribunal even where the Tribunal subsequently has not complied with ss 430A(1) or (2). Further, if it be accepted that the power under s 415(2) is spent at some point in time (which is not apparently disputed), s 430A(3) is a strong indicator that it is spent prior to notification of a decision that has already been made under s 415(2).

51. The above analysis for the identification of when the Tribunal's decision-making power is spent is not consistent with the reasoning in *SZQOY*. That said, the conclusion in that case was reached in circumstances where the Court did not refer to some of the key provisions relied upon above (namely, ss 414A, 430A(3) and 440A(5) and (6)). In the court below, the Minister contended that the reasoning in *SZQOY* was plainly wrong but accepted that it was not necessary for this issue to be determined because the Minister should succeed even on the reasoning in that case.

52. These submissions now turn to demonstrate that, even if the Tribunal's power under s 415(2) was not spent when its decision was recorded, it was spent at least when the s 430(1) statement had been communicated outside of the Tribunal. This proposition, which is sufficient to uphold this appeal, is consistent with the reasoning in *SZQOY*.

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44 See *Minister for Immigration and Citizenship v SZQOY* (2012) 206 FCR 25.

45 Contrary to the Majority's observations at 393 [97], the Minister did not submit below that s 440A relates to the "content and scope of the review" or the "performance of the function and obligation of the relevant Tribunal member to conduct a particular review". Plainly it does not, but it does assist in the construction of s 5(9) and the identification of the point in time at which the Tribunal's decision-making power is spent, in the way described in these submissions.

53. In both *Semunigus*[46] and *SZQOY*,[47] the Full Federal Court endorsed the following statement of principle expressed by Finn J (at first instance) in *Semunigus v Minister for Immigration and Multicultural Affairs* [1999] FCA 422 at [19]:

> *... [T]he making of a decision involves both reaching a conclusion on a matter as a result of a mental process having been engaged in and translating that conclusion into a decision by an overt act of such character as, in the circumstances, gives finality to the conclusion – as precludes the conclusion being revisited by the decision-maker at his or her option before the decision is to be regarded as final.*

54. At [20], Finn J said that what constitutes an overt act will vary depending on the circumstances of each case, but that it may include "communication of [the decision] to another".

55. There is support in the judgments of Buchanan J (in the light of his Honour's clarification of his position in the court below) and Logan J in *SZQOY*, and Finn J, Spender J and Madgwick J in *Semunigus* for the Minister's contention that the Tribunal's decision was beyond recall when it was sent outside of the Tribunal. On this alternative approach, at least by the time that the Tribunal sent a copy of its decision to the Secretary and to the respondent's previous address (12 March 2012), the decision was beyond recall. That is, the decision was no longer "entirely intramural",[48] and the Tribunal's decision had been "communicat[ed] ... to another",[49] "sent out",[50] or "pronounced or such steps [had been] taken towards its pronouncement as would make it embarrassing for the [Tribunal] that the pronouncement of what ha[d] been concluded should not be effectuated".[51] Furthermore, Spender J in *Semunigus* held (at 536 [12]) that a decision of the Tribunal would be beyond recall once sent to "**either** the Minister **or** the applicant" (emphasis added).[52]

56. As indicated in paragraph 12 above, the issue in both *Semunigus* and *SZQOY* was whether the Tribunal wrongly considered that it did not have the power to consider post-hearing submissions sent by the review applicants after it had communicated its decision to the Registry of the Tribunal. As Buchanan J

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46 *Semunigus v Minister for Immigration and Multicultural Affairs* (2000) 96 FCR 533 at 536 [11] per Spender J, 540 [55] per Higgins J, 546-547 [101] per Madgwick J.

47 *Minister for Immigration and Citizenship v SZQOY* (2012) 206 FCR 25 at 30 [25], 31 [29] per Buchanan J, 32 [33]-[34] per Logan J, 35 [50] per Barker J (agreeing with Logan J's reasons).

48 *Minister for Immigration and Citizenship v SZQOY* (2012) 206 FCR 25 at 33 [40] per Logan J.

49 *Semunigus v Minister for Immigration and Multicultural Affairs* [1999] FCA 422 at [20] per Finn J.

50 *Minister for Immigration and Citizenship v SZQOY* (2012) 206 FCR 25 at 33 [40] per Logan J.

51 *Semunigus v Minister for Immigration and Multicultural Affairs* (2000) 96 FCR 533 at 547 [105] per Madgwick J.

52 See also *Singh v Minister for Immigration and Multicultural Affairs* (2001) 109 FCR 18 at 27 [31], 28-29 [38] per Merkel J; *Applicant in V346 of 2000 v Minister for Immigration and Multicultural Affairs* (2001) 111 FCR 536 at 568 [79] per Ryan J.

observed in the court below,[53] *Semunigus* and *SZQOY* dealt with the distinction between internal communication to the Registry, on the one hand, and external communication, on the other. No question arose in either case as to whether notification to one party or both parties would put the Tribunal's decision beyond recall. Statements made by their Honours in those cases that suggest that notification must be effected to the review applicant[54] or to both the review applicant and the Secretary,[55] upon which the Majority relied at 391-392 [88]-[91], need to be read in that context. The Majority did not have due regard to these factual differences between the present case and previous cases. To the extent that the Majority held, at 392 [91], that the Tribunal's decision is not beyond recall (in which case the delegate's decision would still be subject to a form of review [i.e. susceptible of being changed]) even after it has been sent outside of the Tribunal, their Honours erred.

57. Once the Tribunal recorded its s 430(1) statement and sent copies to the Secretary and to the respondent (albeit to his previous residential address), the respondent's visa application was finally determined and the Tribunal no longer had the power to alter its decision. If this were not so, it would follow that the Tribunal could have varied its decision after 12 March 2012 and after the Secretary had been notified of it, notwithstanding that the primary judge held that that decision was not affected by jurisdictional error. The same result would follow even if the Registrar published the decision to the world pursuant to s 431 or if the Principal Member reported to the Minister (and indirectly to Parliament) that the delegate's decision had been reviewed on 12 March 2012.

58. On the Majority's approach, the Tribunal could also vary a valid decision on a review after the person first notified has sought judicial review of the decision in the Federal Circuit Court but prior to the other person being notified in accordance with the Act. This leads to obvious difficulties and raises the question as to what is the status of the original decision being reviewed and what would be the status of the amended decision.

59. The Majority's strong emphasis on compliance with the formal processes of notification in ss 430A, 441A and 441B,[56] and its rejection of actual notification being sufficient to render a visa application finally determined,[57] also poses difficulties in circumstances where, as here, the 14-day period prescribed by

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53 Full Court Decision at 379-380 [24], [26], [28], [30].

54 *Semunigus v Minister for Immigration and Multicultural Affairs* (2000) 96 FCR 533 at 547 [103] per Madgwick J.

55 *Minister for Immigration and Citizenship v SZQOY* (2012) 206 FCR 25 at 32-33 [34], [40] per Logan J, 35-36 [50], [57] per Barker J.

56 Full Court Decision at 390 [84], 393 [98]-[99].

57 When read together, [84] and [99] of the Majority's reasons suggest that actual notification will not be sufficient before it can be said that a decision of the Minister's delegate will no longer be subject to a form of review.

s 430A(1) had elapsed well before the Tribunal sent a copy of its decision to the respondent to his correct residential address. The Majority did not appreciate that it was not possible for the Tribunal to notify the respondent "in accordance with" s 430A(1) as at 28 May 2012. On this view, the Tribunal had not discharged its "core function" of review even after the respondent was actually notified. Nor could it ever be discharged (unless the Tribunal could formally re-make its decision and specify a new date).

60. Contrary to the Majority's reasons at 392 [92], it was not a part of the Minister's case in the court below that notification to the Secretary was "fundamentally different"[58] from notification to the respondent. On the contrary, the Minister's position was (and is) that the respondent's protection visa application would have been finally determined and that the Tribunal's decision would have been put beyond recall even if the respondent been notified of the Tribunal's decision on 12 March 2012 and the Secretary on 28 May 2012.

Further difficulties with the analysis of the Majority

61. It is no part of the Minister's case that the obligation on the Tribunal to notify its decisions under Part 7 is not an *important* obligation. However, its importance does not speak to the question whether a delegate's decision is no longer subject to a form of review, especially not when a failure to notify does not affect the validity of the Tribunal's decision on the review. A failure to notify either the review applicant or the Secretary may have consequences short of the Tribunal's decision being invalid; for example, it would provide a basis for an extension of time within which to seek judicial review under s 477(2) of the Act.

62. The Minister should not be taken to suggest that the Tribunal does not have other obligations to discharge or powers under Part 7 following the making of its decision, apart from its obligation to notify the review applicant and the Secretary in accordance with ss 430A, 441A and 441B. In that sense, a "Part 7 review", to borrow the Majority's general usage, may, in some senses, have continued after 12 March 2012, but not such that the delegate's *decision* was subject to a form of review after that date. The decision on the visa application was valid and final as at 12 March 2012. The consequence of this is that the time at which a primary decision is no longer subject to a form of review and the time at which the Tribunal completes its other duties under Part 7 may be different. That is of no consequence for the purposes of construing s 5(9).

63. The Minister contends that the Majority also erred in so far as they relied upon differences between ss 422 and 422A as favouring their construction of s 5(9), being that a particular review is not finished when the Tribunal has recorded its

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[58] Full Court Decision at 392 [92].

decision under s 430(1).[59] Section 422, which was enacted at the time that the Tribunal was created,[60] provides that, if a member who constitutes the Tribunal for the purpose of a particular review stops being a member or is unavailable for the purpose of the review, the Principal Member must direct another member to constitute the Tribunal "for the purpose of finishing the review". Section 422A, which was enacted approximately six years after s 422,[61] confers power on the Principal Member to direct that a member constituting the Tribunal for a particular review be removed and that another member take their place in certain circumstances, but that such a direction must not be given unless, relevantly, "the Tribunal's decision on the review has not been recorded in writing or given orally": s 422A(2)(a).

64. The fact that there exists an express limitation in s 422A(2)(a) on the reconstitution of the Tribunal, but no such limitation in s 422(1), is of no consequence for the purpose of construing s 5(9)(a). Nor does that limitation suggest that s 422(1) requires the Principal Member to reconstitute the Tribunal after it has recorded its s 430(1) statement simply in order to send out that decision. There are two reasons for this.

65. First, their Honours applied the *expressio unius* principle to ss 422 and 422A without having regard to the fact that those provisions were enacted at different times. The principle should always be applied with even greater caution when comparing sections that have not been added at the same time.[62]

66. Secondly, the Federal Court has construed s 422(1) in such a way that it applies only where a member constituting the Tribunal for the purposes of a particular review stops being a member or otherwise becomes unavailable prior to making a decision on the review.[63] This is a sound construction of s 422(1). On the Majority's construction, however, the Principal Member would be under an obligation to reconstitute the Tribunal for the purpose of having the s 430(1) statement physically dispatched to the review applicant and to the Secretary in accordance with ss 430A(1) and (2). This construction overlooks the fact that the "review" referred to in s 422(1) is the review of the "RRT-reviewable decision", as defined in s 411(1) (that is, the delegate's decision). That review comes to an end upon the Tribunal recording its s 430(1) statement. Once that has occurred, it would be open to the Principal Member to arrange for the decision to be physically dispatched (including by directing registry staff to undertake this function: see s 420A(1)). In addition, in an appropriate case, once a decision has been recorded under s 430(1), the Principal Member is

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59 Full Court Decision at 394 [102].

60 *Migration Reform Act 1992* (Cth), s 32. Section 422 of the Act was previously s 166CB.

61 *Migration Legislation Amendment Act (No 1) 1998* (Cth), Sch 3, item 2.

62 *Construction, Forestry, Mining and Energy Union v Hadgkiss* (2007) 169 FCR 151 at 154-155 [12], [15] per North J.

63 *Abujoudeh v Minister for Immigration and Multicultural Affairs* (2001) 115 FCR 179 at 186 [21] per Ryan J.

bound to ensure that a form of the statement under s 430(1) is published: s 431(1). Further, there is no reason not to construe the obligation to notify established under s 430A as falling on the "Tribunal" as the entity defined in the Act: see ss 410, 457 and 458.[64]

Conclusion

67. The court below misconstrued s 5(9)(a) by focusing upon the "critical" obligations imposed upon the Tribunal under Part 7 and not directing itself to the statutory question, namely, when the delegate's decision was no longer subject to any form of review. This error is sufficient to undermine the entire reasoning of the Majority.

68. This Court should hold that, as at 12 March 2012, the Tribunal's power to make a decision under s 415(2) was spent by the recording of that decision under s 430(1) (or by communicating the statement prepared under s 430(1) outside of the Tribunal), with the result that the delegate's decision from that time was no longer subject to any form of review under Part 7.

Part VII: Authorities

69. The Minister relies upon those authorities set out in the List of Authorities filed with these submissions in accordance with Practice Direction No 1 of 2013.

70. Those provisions in the *Migration Act 1958* (Cth) (as at 12 March 2012) and the *Migration Amendment (Complementary Protection) Act 2011* (Cth) upon which the Minister relies are attached to these submissions.

Part VIII: Orders sought

71. The Minister seeks the following orders:

1. *The name of the appellant be changed to "Minister for Immigration and Border Protection".*
2. *Appeal allowed.*
3. *Set aside order 1 made by the Full Court of the Federal Court of Australia on 11 September 2013, and, in its place, order the following:*

   '1. Appeal allowed.

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64 Compare *Liu v Minister for Immigration and Multicultural Affairs* (2001) 113 FCR 541 at 545 [16], 551-552 [37] per Black CJ, Hill and Weinberg JJ.

2. *Set aside the orders made by the Federal Circuit Court on 7 May 2013 and, in their place, order that the application filed in that court on 12 June 2012 be dismissed.'*

4. *Appellant to pay the reasonable costs of the first respondent in this Court.*

Part IX: Oral argument

72. The appellant estimates that he will require one-and-a-half hours for the presentation of his oral argument.

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Migration Act 1958

Act No. 62 of 1958 as amended

This compilation was prepared on 27 January 2012
taking into account amendments up to Act No. 135 of 2011

Volume 1 includes: Table of Contents
Sections 1–261K

The text of any of those amendments not in force
on that date is appended in the Notes section

The operation of amendments that have been incorporated may be affected by application provisions that are set out in the Notes section

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Sections 262–507
Schedule
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Repeal Table 1
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Note 2
Table A
Renumbering Table 1
Renumbering Table 2

Prepared by the Office of Legislative Drafting and Publishing,
Attorney-General's Department, Canberra

(6) For the purposes of this Act, where a resources installation that has been brought into Australian waters from a place outside the outer limits of Australian waters becomes attached to the Australian seabed:

(a) the installation shall be deemed to have entered Australia at the time when it becomes so attached;

(b) any person on board the installation at the time when it becomes so attached shall be deemed to have travelled to Australia on board that installation, to have entered Australia at that time and to have been brought into Australia at that time.

(7) For the purposes of this Act, where a sea installation that has been brought into Australian waters from a place outside the outer limits of Australian waters is installed in an adjacent area or in a coastal area:

(a) the installation shall be deemed to have entered Australia at the time that it becomes so installed; and

(b) any person on board the installation at the time that it becomes so installed shall be deemed to have travelled to Australia on board that installation, to have entered Australia at that time and to have been brought into Australia at that time.

(8) The Minister may, by notice published in the *Gazette*, declare an area adjacent to the Protected Zone and to the south of the line described in Annex 5 to the Torres Strait Treaty to be an area in the vicinity of the Protected Zone for the purposes of this Act.

(9) For the purposes of this Act, an application under this Act is finally determined when either:

(a) a decision that has been made in respect of the application is not, or is no longer, subject to any form of review under Part 5 or 7; or

(b) a decision that has been made in respect of the application was subject to some form of review under Part 5 or 7, but the period within which such a review could be instituted has ended without a review having been instituted as prescribed.

(3) For the purposes of this section (which applies only in respect of applications made while a non-citizen is in the migration zone), a non-citizen who, while holding a bridging visa, leaves and re-enters the migration zone is taken to have been continuously in the migration zone despite that travel.

48A Non-citizen refused a protection visa may not make further application for protection visa

(1) Subject to section 48B, a non-citizen who, while in the migration zone, has made:

(a) an application for a protection visa, where the grant of the visa has been refused (whether or not the application has been finally determined); or

(b) applications for protection visas, where the grants of the visas have been refused (whether or not the applications have been finally determined);

may not make a further application for a protection visa while in the migration zone.

(1A) For the purposes of this section, a non-citizen who:

(a) has been removed from the migration zone under section 198; and

(b) is again in the migration zone as a result of travel to Australia that is covered by paragraph 42(2A)(d) or (e);

is taken to have been continuously in the migration zone despite the removal referred to in paragraph (a).

Note: Paragraphs 42(2A)(d) and (e) cover limited situations where people are returned to Australia despite their removal under section 198.

(1B) Subject to section 48B, a non-citizen in the migration zone who held a protection visa that was cancelled may not make a further application for a protection visa while in the migration zone.

(2) In this section:

application for a protection visa includes:

(aa) an application for a visa, a criterion for which is that the applicant is a non-citizen in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; and

(ab) an application for a visa, a criterion for which is that the applicant is a non-citizen in Australia who is a member of the same family unit as a non-citizen in Australia:

(i) to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; and

(ii) who holds a protection visa; and

(a) an application for a visa, or entry permit (within the meaning of this Act as in force immediately before 1 September 1994), a criterion for which is that the applicant is a non-citizen who has been determined to be a refugee under the Refugees Convention as amended by the Refugees Protocol; and

(b) an application for a decision that a non-citizen is a refugee under the Refugees Convention as amended by the Refugees Protocol; and

(c) an application covered by paragraph (a) or (b) that is also covered by section 39 of the *Migration Reform Act 1992*.

48B Minister may determine that section 48A does not apply to non-citizen

(1) If the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to a particular non-citizen, determine that section 48A does not apply to prevent an application for a protection visa made by the non-citizen in the period starting when the notice is given and ending at the end of the seventh working day after the day on which the notice is given.

(2) The power under subsection (1) may only be exercised by the Minister personally.

(3) If the Minister makes a determination under subsection (1), he or she is to cause to be laid before each House of the Parliament a statement that:

(a) sets out the determination; and

(b) sets out the reasons for the determination, referring in particular to the Minister's reasons for thinking that his or her actions are in the public interest.

(4) A statement under subsection (3) is not to include:
  (a) the name of the non-citizen; or
  (b) any information that may identify the non-citizen; or
  (c) if the Minister thinks that it would not be in the public interest to publish the name of another person connected in any way with the matter concerned—the name of that other person or any information that may identify that other person.

(5) A statement under subsection (3) is to laid before each House of the Parliament within 15 sitting days of that House after:
  (a) if the determination is made between 1 January and 30 June (inclusive) in a year—1 July in that year; or
  (b) if the determination is made between 1 July and 31 December (inclusive) in a year—1 January in the following year.

(6) The Minister does not have a duty to consider whether to exercise the power under subsection (1) in respect of any non-citizen, whether he or she is requested to do so by the non-citizen or by any other person, or in any other circumstances.

49 Withdrawal of visa application

(1) An applicant for a visa may, by written notice given to the Minister, withdraw the application.

(2) An application that is withdrawn is taken to have been disposed of.

(3) For the purposes of sections 48 and 48A, the Minister is not taken to have refused to grant the visa if the application is withdrawn before the refusal.

(4) Subject to the regulations, fees payable in respect of an application that is withdrawn are not refundable.

50 Only new information to be considered in later protection visa applications

If a non-citizen who has made:
  (a) an application for a protection visa, where the grant of the visa has been refused and the application has been finally determined; or

Part 7—Review of protection visa decisions

Division 1—Interpretation

410 Interpretation

In this Part:

Deputy Principal Member means the Deputy Principal Member of the Tribunal.

member means a member of the Tribunal.

Principal Member means the Principal Member of the Tribunal.

Registrar means the Registrar of the Tribunal.

Tribunal means the Refugee Review Tribunal.

412 Application for review by the Refugee Review Tribunal

(1) An application for review of an RRT-reviewable decision must:
  (a) be made in the approved form; and
  (b) be given to the Tribunal within the period prescribed, being a period ending not later than 28 days after the notification of the decision; and
  (c) be accompanied by the prescribed fee (if any).

(2) An application for review may only be made by the non-citizen who is the subject of the primary decision.

(3) An application for review may only be made by a non-citizen who is physically present in the migration zone when the application for review is made.

(4) Regulations made for the purposes of paragraph (1)(b) may specify different periods in relation to different classes of RRT-reviewable decisions (which may be decisions that relate to non-citizens in a specified place).

413 Refugee Review Tribunal to deal with the backlog of review applications

(1) This section applies to an RRT-reviewable decision covered by paragraph 411(1)(a) or (b) if:
  (a) an application was made before 1 July 1993 for review of the RRT-reviewable decision; and
  (b) if, at the time when the application was made, there were in force regulations dealing with applications for review of such a decision—the application was made in accordance with those regulations; and
  (c) any of the following subparagraphs applies:
    (i) no decision on the review was made before the commencement of this section;
    (ii) all of the following sub-subparagraphs apply:
      (A) a decision (the ***initial review decision***) on the review was made before the commencement of this section;

(C) before the judicial review application is determined by the court, the Minister agrees in writing to reconsider the initial review decision.

(2) A valid application is taken to have been made under section 412 for review of the RRT-reviewable decision.

(3) No action is to be taken to review the RRT-reviewable decision otherwise than under this Part.

(4) This section has effect despite any other provision of this Act or the regulations.

(5) A reference in this section (other than sub-subparagraphs (1)(c)(iv)(B) or (1)(c)(v)(B)) to review does not include a reference to judicial review.

414 Refugee Review Tribunal must review decisions

(1) Subject to subsection (2), if a valid application is made under section 412 for review of an RRT-reviewable decision, the Tribunal must review the decision.

(2) The Tribunal must not review, or continue to review, a decision in relation to which the Minister has issued a conclusive certificate under subsection 411(3).

414A Period within which Refugee Review Tribunal must review decision on protection visas

(1) If an application for review of an RRT-reviewable decision:

(a) was validly made under section 412; or

(b) was remitted by any court to the Refugee Review Tribunal for reconsideration;

then the Refugee Review Tribunal must review the decision under section 414 and record its decision under section 430 within 90 days starting on the day on which the Secretary gave the Registrar the documents that subsection 418(2) requires the Secretary to give to the Registrar.

(2) Failure to comply with this section does not affect the validity of a decision made under section 415 on an application for review of an RRT-reviewable decision.

415 Powers of Refugee Review Tribunal

(1) The Tribunal may, for the purposes of the review of an RRT-reviewable decision, exercise all the powers and discretions that are conferred by this Act on the person who made the decision.

(2) The Tribunal may:

(a) affirm the decision; or

(b) vary the decision; or

(c) if the decision relates to a prescribed matter—remit the matter for reconsideration in accordance with such directions or recommendations of the Tribunal as are permitted by the regulations; or

(d) set the decision aside and substitute a new decision.

(3) If the Tribunal:

(a) varies the decision; or

(b) sets aside the decision and substitutes a new decision;

the decision as varied or substituted is taken (except for the purpose of appeals from decisions of the Tribunal) to be a decision of the Minister.

(4) To avoid doubt, the Tribunal must not, by varying a decision or setting a decision aside and substituting a new decision, purport to make a decision that is not authorised by the Act or the regulations.

416 Only new information to be considered in later applications for review

If a non-citizen who has made:

(a) an application for review of an RRT-reviewable decision that has been determined by the Tribunal or the Administrative Appeals Tribunal; or

(b) applications for reviews of RRT-reviewable decisions that have been determined by the Tribunal or the Administrative Appeals Tribunal;

makes a further application for review of an RRT-reviewable decision, the Tribunal, in considering the further application:

(c) is not required to consider any information considered in the earlier application or an earlier application; and

(2) The Principal Member may give a written direction about who is to constitute the Tribunal for the purpose of a particular review.

422 Reconstitution of Refugee Review Tribunal—unavailability of member

(1) If the member who constitutes the Tribunal for the purposes of a particular review:

(a) stops being a member; or

(b) for any reason, is not available for the purpose of the review at the place where the review is being conducted;

the Principal Member must direct another member to constitute the Tribunal for the purpose of finishing the review.

(2) If a direction is given, the Tribunal as constituted in accordance with the direction is to continue to finish the review and may, for that purpose, have regard to any record of the proceedings of the review made by the Tribunal as previously constituted.

(3) In exercising powers under this section, the Principal Member must have regard to the objective set out in subsection 420(1).

422A Reconstitution of Tribunal for efficient conduct of review

(1) The Principal Member may direct that:

(a) the member constituting the Tribunal for a particular review be removed; and

(b) another member constitute the Tribunal for the purposes of that review;

if the Principal Member thinks the reconstitution is in the interests of achieving the efficient conduct of the review in accordance with the objective set out in subsection 420(1).

(2) However, the Principal Member must not give such a direction unless:

(a) the Tribunal's decision on the review has not been recorded in writing or given orally; and

(b) the Principal Member has consulted:

(i) the member constituting the Tribunal; and

(ii) a Senior Member who is not the member constituting the Tribunal; and

(c) either:

(i) the Principal Member is satisfied that there is insufficient material before the Tribunal for the Tribunal to reach a decision on the review; or

(ii) a period equal to or longer than the period prescribed for the purposes of this subparagraph has elapsed since the Tribunal was constituted.

(3) If a direction under this section is given, the member constituting the Tribunal in accordance with the direction is to continue and finish the review and may, for that purpose, have regard to any record of the proceedings of the review made by the member who previously constituted the Tribunal.

425 Tribunal must invite applicant to appear

(1) 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.

(2) Subsection (1) does not apply if:

(a) the Tribunal considers that it should decide the review in the applicant's favour on the basis of the material before it; or

(b) the applicant consents to the Tribunal deciding the review without the applicant appearing before it; or

(c) subsection 424C(1) or (2) applies to the applicant.

(3) If any of the paragraphs in subsection (2) of this section apply, the applicant is not entitled to appear before the Tribunal.

425A Notice of invitation to appear

(1) If the applicant is invited to appear before the Tribunal, the Tribunal must give the applicant notice of the day on which, and the time and place at which, the applicant is scheduled to appear.

(2) The notice must be given to the applicant:

(a) except where paragraph (b) applies—by one of the methods specified in section 441A; or

(b) if the applicant is in immigration detention—by a method prescribed for the purposes of giving documents to such a person.

(3) The period of notice given must be at least the prescribed period or, if no period is prescribed, a reasonable period.

(4) The notice must contain a statement of the effect of section 426A.

426 Applicant may request Refugee Review Tribunal to call witnesses

(1) In the notice under section 425A, the Tribunal must notify the applicant:

(a) that he or she is invited to appear before the Tribunal to give evidence; and

(b) of the effect of subsection (2) of this section.

Division 5—Decisions of Refugee Review Tribunal

430 Refugee Review Tribunal to record its decisions etc.

(1) Where the Tribunal makes its decision on a review, the Tribunal must prepare a written statement that:

(a) sets out the decision of the Tribunal on the review; and

(b) sets out the reasons for the decision; and

(c) sets out the findings on any material questions of fact; and

(d) refers to the evidence or any other material on which the findings of fact were based.

(2) A decision on a review (other than an oral decision) is taken to have been made on the date of the written statement.

(3) Where the Tribunal has prepared the written statement, the Tribunal must:

(a) return to the Secretary any document that the Secretary has provided in relation to the review; and

(b) give the Secretary a copy of any other document that contains evidence or material on which the findings of fact were based.

430A Notifying parties of Tribunal's decision (decision not given orally)

(1) The Tribunal must notify the applicant of a decision on a review (other than an oral decision) by giving the applicant a copy of the written statement prepared under subsection 430(1). The copy must be given to the applicant:

(a) within 14 days after the day on which the decision is taken to have been made; and

(b) by one of the methods specified in section 441A.

(2) A copy of that statement must also be given to the Secretary:

(a) within 14 days after the day on which the decision is taken to have been made; and

(b) by one of the methods specified in section 441B.

(3) A failure to comply with this section in relation to a decision on a review does not affect the validity of the decision.

430D Notifying parties when Tribunal gives an oral decision

If the Tribunal gives an oral decision on an application for review, the Tribunal must give the applicant and the Secretary a copy of the statement prepared under subsection 430(1) within 14 days after the decision concerned is made. The applicant is taken to be notified of the decision on the day on which the decision is made.

431 Certain Tribunal decisions to be published

(1) Subject to subsection (2), and to any direction under section 440, the Registrar must ensure the publication of any statements prepared under subsection 430(1) that the Principal Member thinks are of particular interest.

(2) The Tribunal must not publish any statement which may identify an applicant or any relative or other dependent of an applicant.

Note: Section 5G may be relevant for determining relationships for the purposes of this subsection.

440A Principal Member's obligation to report to Minister

Principal Member must give periodic reports to Minister

(1) The Principal Member must give a report under this section to the Minister within 45 days after the end of each of the following periods (each of which is a ***reporting period***):

(a) the period that started on 1 July 2005 and ends, or ended, on 31 October 2005; and

(b) each subsequent period of 4 months.

Principal Member must give additional reports to Minister as required

(2) The Minister may give to the Principal Member a notice requiring the Principal Member to give to the Minister a report under this section in addition to the reports required under subsection (1). The notice must specify the period to which the report is to relate (also a ***reporting period***).

(3) The Principal Member must give the report under subsection (2) to the Minister:

(a) within 45 days after the day on which the reporting period ends; or

(b) within 45 days after the day on which the Minister gives the notice to the Principal Member;

whichever is later.

(4) A notice under subsection (2) is not a legislative instrument.

Information that must be included in report

(5) A report under this section relating to a reporting period must include information about each application for a review of an RRT-reviewable decision:

(a) that:

(i) an applicant has validly made under section 412; or

(ii) a court has remitted to the Refugee Review Tribunal for reconsideration; and

(b) for which:

(i) the Refugee Review Tribunal has reviewed the decision under section 414 and has recorded its decision under

section 430 during the reporting period, but has not done so within the decision period; or

(ii) the Refugee Review Tribunal has not reviewed the decision under section 414 and has not recorded its decision under section 430 before or during the reporting period, and the decision period has ended (whether before or during the reporting period).

(6) The report must also include:

(a) the date on which each application was made that:

(i) was validly made under section 412; and

(ii) paragraph (5)(b) applies to; and

(b) the reasons why decisions were not reviewed within the decision period.

Note: The reasons mentioned in paragraph (6)(b) may relate to aspects of processing applications for review that are beyond the Refugee Review Tribunal's control.

Information that must not be included in the report

(7) A report under this section must not include:

(a) the name of any current or former applicant for review of an RRT-reviewable decision; or

(b) any information that may identify such an applicant; or

(c) the name of any other person connected in any way with any application for review of an RRT-reviewable decision made by the applicant mentioned in paragraph (a); or

(d) any information that may identify that other person.

Information that may be included in the report

(8) The report may include any other information that the Principal Member thinks appropriate.

Reports to be tabled in Parliament

(9) The Minister must cause a copy of a report under this section to be tabled in each House of the Parliament within 15 sitting days of that House after the day on which the Minister receives the report from the Principal Member.

Definition

(10) In this section:

decision period for an application for review of an RRT-reviewable decision means the period of 90 days starting on the day on which the Secretary has given to the Registrar the documents required to be given by subsections 418(2) and 418(3).

441 Sittings of the Refugee Review Tribunal

(1) Sittings of the Tribunal are to be held from time to time as required, in such places in Australia as are convenient.

(2) The Tribunal constituted by a member may sit and exercise the powers of the Tribunal even though the Tribunal constituted by another member is at the same time sitting and exercising those powers.

the minor. However, this does not prevent the Tribunal giving the minor a copy of the document.

441A Methods by which Tribunal gives documents to a person other than the Secretary

Coverage of section

(1) For the purposes of provisions of this Part or the regulations that:

(a) require or permit the Tribunal to give a document to a person (the ***recipient***); and

(b) state that the Tribunal must do so by one of the methods specified in this section;

the methods are as follows.

(1A) If a person is a minor, the Tribunal may use the methods mentioned in subsections (4) and (5) to dispatch or transmit, as the case may be, a document to an individual (a ***carer of the minor***):

(a) who is at least 18 years of age; and

(b) who a member, the Registrar or an officer of the Tribunal reasonably believes:

(i) has day-to-day care and responsibility for the minor; or

(ii) works in or for an organisation that has day-to-day care and responsibility for the minor and whose duties, whether alone or jointly with another person, involve care and responsibility for the minor.

Note: If the Tribunal gives an individual a document by the method mentioned in subsection (4) or (5), the individual is taken to have received the document at the time specified in section 441C in respect of that method.

(1B) However, subsection (1A) does not apply if section 441EA (which relates to giving documents in the case of combined applications) applies in relation to the minor.

Giving by hand

(2) One method consists of a member, the Registrar or an officer of the Tribunal, or a person authorised in writing by the Registrar, handing the document to the recipient.

Handing to a person at last residential or business address

(3) Another method consists of a member, the Registrar or an officer of the Tribunal, or a person authorised in writing by the Registrar, handing the document to another person who:

(a) is at the last residential or business address provided to the Tribunal by the recipient in connection with the review; and

(b) appears to live there (in the case of a residential address) or work there (in the case of a business address); and

(c) appears to be at least 16 years of age.

Dispatch by prepaid post or by other prepaid means

(4) Another method consists of a member, the Registrar or an officer of the Tribunal, dating the document, and then dispatching it:

(a) within 3 working days (in the place of dispatch) of the date of the document; and

(b) by prepaid post or by other prepaid means; and

(c) to:

(i) the last address for service provided to the Tribunal by the recipient in connection with the review; or

(ii) the last residential or business address provided to the Tribunal by the recipient in connection with the review; or

(iii) if the recipient is a minor—the last address for a carer of the minor that is known by the member, Registrar or other officer.

Transmission by fax, e-mail or other electronic means

(5) Another method consists of a member, the Registrar or an officer of the Tribunal, transmitting the document by:

(a) fax; or

(b) e-mail; or

(c) other electronic means;

to:

(d) the last fax number, e-mail address or other electronic address, as the case may be, provided to the Tribunal by the recipient in connection with the review; or

(e) if the recipient is a minor—the last fax number, e-mail address or other electronic address, as the case may be, for a

carer of the minor that is known by the member, Registrar or other officer.

Documents given to a carer

(6) If the Tribunal gives a document to a carer of a minor, the Tribunal is taken to have given the document to the minor. However, this does not prevent the Tribunal giving the minor a copy of the document.

441B Methods by which Tribunal gives documents to the Secretary

Coverage of section

(1) For the purposes of provisions of this Part or the regulations that:
  (a) require or permit the Tribunal to give a document to the Secretary; and
  (b) state that the Tribunal must do so by one of the methods specified in this section;
the methods are as follows.

Giving by hand

(2) One method consists of a member, the Registrar or an officer of the Tribunal, or a person authorised in writing by the Registrar, handing the document to the Secretary or to an authorised officer.

Dispatch by post or by other means

(3) Another method consists of a member, the Registrar or an officer of the Tribunal, dating the document, and then dispatching it:
  (a) within 3 working days (in the place of dispatch) of the date of the document; and
  (b) by post or by other means; and
  (c) to an address, notified to the Tribunal in writing by the Secretary, to which such documents can be dispatched.

Transmission by fax, e-mail or other electronic means

(4) Another method consists of a member, the Registrar or an officer of the Tribunal, transmitting the document by:
  (a) fax; or

(b) e-mail; or

(c) other electronic means;

to the last fax number, e-mail address or other electronic address notified to the Tribunal in writing by the Secretary for the purpose.

441C When a person other than the Secretary is taken to have received a document from the Tribunal

(1) This section applies if the Tribunal gives a document to a person other than the Secretary by one of the methods specified in section 441A (including in a case covered by section 441AA).

Giving by hand

(2) If the Tribunal gives a document to a person by the method in subsection 441A(2) (which involves handing the document to the person), the person is taken to have received the document when it is handed to the person.

Handing to a person at last residential or business address

(3) If the Tribunal gives a document to a person by the method in subsection 441A(3) (which involves handing the document to another person at a residential or business address), the person is taken to have received the document when it is handed to the other person.

Dispatch by prepaid post or by other prepaid means

(4) If the Tribunal gives a document to a person by the method in subsection 441A(4) (which involves dispatching the document by prepaid post or by other prepaid means), the person is taken to have received the document:

(a) if the document was dispatched from a place in Australia to an address in Australia—7 working days (in the place of that address) after the date of the document; or

(b) in any other case—21 days after the date of the document.

Transmission by fax, e-mail or other electronic means

(5) If the Tribunal gives a document to a person by the method in subsection 441A(5) (which involves transmitting the document by fax, e-mail or other electronic means), the person is taken to have

476B Remittal by the High Court

(1) Subject to subsection (3), the High Court must not remit a matter, or any part of a matter, that relates to a migration decision to any court other than the Federal Magistrates Court.

(2) The High Court must not remit a matter, or any part of a matter, that relates to a migration decision to the Federal Magistrates Court unless that court has jurisdiction in relation to the matter, or that part of the matter, under section 476.

(3) The High Court may remit a matter, or part of a matter, that relates to a migration decision in relation to which the Federal Court has jurisdiction under paragraph 476A(1)(b) or (c) to that court.

(4) Subsection (1) has effect despite section 44 of the *Judiciary Act 1903*.

477 Time limits on applications to the Federal Magistrates Court

(1) An application to the Federal Magistrates Court for a remedy to be granted in exercise of the court's original jurisdiction under section 476 in relation to a migration decision must be made to the court within 35 days of the date of the migration decision.

(2) The Federal Magistrates Court may, by order, extend that 35 day period as the Federal Magistrates Court considers appropriate if:

(a) an application for that order has been made in writing to the Federal Magistrates Court specifying why the applicant considers that it is necessary in the interests of the administration of justice to make the order; and

(b) the Federal Magistrates Court is satisfied that it is necessary in the interests of the administration of justice to make the order.

(3) In this section:

date of the migration decision means:

(a) in the case of a migration decision made under subsection 43(1) of the *Administrative Appeals Tribunal Act 1975*—the date of the written decision under that subsection; or

(b) in the case of a written migration decision made by the Migration Review Tribunal or the Refugee Review

Tribunal—the date of the written statement under subsection 368(1) or 430(1); or

(c) in the case of an oral migration decision made by the Migration Review Tribunal or the Refugee Review Tribunal—the date of the oral decision; or

(d) in any other case—the date of the written notice of the decision or, if no such notice exists, the date that the Court considers appropriate.

(4) For the purposes of subsection (1), the 35 day period begins to run despite a failure to comply with the requirements of any of the provisions mentioned in the definition of ***date of the migration decision*** in subsection (3).

(5) To avoid doubt, for the purposes of subsection (1), the 35 day period begins to run irrespective of the validity of the migration decision.

477A Time limits on applications to the Federal Court

(1) An application to the Federal Court for a remedy to be granted in exercise of the court's original jurisdiction under paragraph 476A(1)(b) or (c) in relation to a migration decision must be made to the court within 35 days of the date of the migration decision.

(2) The Federal Court may, by order, extend that 35 day period as the Federal Court considers appropriate if:

(a) an application for that order has been made in writing to the Federal Court specifying why the applicant considers that it is necessary in the interests of the administration of justice to make the order; and

(b) the Federal Court is satisfied that it is necessary in the interests of the administration of justice to make the order.

(3) In this section:

date of the migration decision has the meaning given by subsection 477(3).

(4) For the purposes of subsection (1), the 35 day period begins to run despite a failure to comply with the requirements of any of the provisions mentioned in the definition of ***date of the migration decision*** in subsection 477(3).

Federal Circuit Court of Australia (Consequential Amendments) Act 2013

No. 13, 2013

An Act to deal with consequential matters in connection with the *Federal Circuit Court of Australia Legislation Amendment Act 2012*, and for other purposes

Note: An electronic version of this Act is available in ComLaw (http://www.comlaw.gov.au/)

327 Saving provision

A thing done by, or in relation to, a Federal Magistrate, as an issuing officer, under the *Law Enforcement Integrity Commissioner Act 2006* before the commencement of this item has effect, after that commencement, as if it had been done by, or in relation to, a Judge of the Federal Circuit Court of Australia, as an issuing officer, under that Act.

Marriage Act 1961

328 Subsection 5(1) (paragraph (a) of the definition of *Judge*)

Omit "Federal Magistrate of the Federal Magistrates Court", substitute "Judge of the Federal Circuit Court of Australia".

329 Subsection 9A(1)

Omit "Federal Magistrate of the Federal Magistrates Court", substitute "Judge of the Federal Circuit Court of Australia".

330 Subsection 92(1)

Omit "Federal Magistrates Court", substitute "Federal Circuit Court of Australia".

Migration Act 1958

331 Subsection 5(1)

Insert:

> ***Federal Circuit Court*** means the Federal Circuit Court of Australia.

332 Section 91X (heading)

Repeal the heading, substitute:

91X Names of applicants for protection visas not to be published by the High Court, Federal Court or Federal Circuit Court

333 Section 476 (heading)

Repeal the heading, substitute:

476 Jurisdiction of the Federal Circuit Court

334 Paragraph 476A(1)(a)

Omit "*Federal Magistrates Act 1999*", substitute "*Federal Circuit Court of Australia Act 1999*".

335 Section 477 (heading)

Repeal the heading, substitute:

477 Time limits on applications to the Federal Circuit Court

336 Section 484 (heading)

Repeal the heading, substitute:

484 Exclusive jurisdiction of High Court, Federal Court and Federal Circuit Court

337 Section 486C (heading)

Repeal the heading, substitute:

486C Persons who may commence or continue proceedings in the Federal Circuit Court or the Federal Court

338 Subsection 486C(3)

Omit "Federal Magistrates Court's", substitute "Federal Circuit Court's".

339 Subsection 486C(3A)

Omit "*Federal Magistrates Act 1999*", substitute "*Federal Circuit Court of Australia Act 1999*".

340 Paragraph 500(6)(d)

Omit "Federal Magistrates Court or a Federal Magistrate", substitute "Federal Circuit Court of Australia or a Judge of that Court".

341 Section 503B (heading)

Repeal the heading, substitute:

Migration Amendment (Complementary Protection) Act 2011

No. 121, 2011

An Act to amend the *Migration Act 1958*, and for related purposes

Note: An electronic version of this Act is available in ComLaw (http://www.comlaw.gov.au/)

ComLaw Authoritative Act C2011A00121

2 Commencement

(1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information

Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.	14 October 2011
2. Schedule 1, items 1 to 17	A single day to be fixed by Proclamation. However, if any of the provision(s) do not commence within the period of 6 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period.	24 March 2012 (*see* F2012L00650)
3. Schedule 1, item 18	Immediately after the commencement of the provision(s) covered by table item 2.	24 March 2012
4. Schedule 1, items 19 and 20	At the same time as the provision(s) covered by table item 2.	24 March 2012
5. Schedule 1, item 21	Immediately after the commencement of the provision(s) covered by table item 2.	24 March 2012
6. Schedule 1, items 22 to 35	At the same time as the provision(s) covered by table item 2.	24 March 2012

Note: This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

(2) Any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule

Add " (other than a decision that was made relying on paragraph 36(2C)(a) or (b))".

32 At the end of paragraph 411(1)(d)

Add " (other than a decision that was made because of paragraph 36(2C)(a) or (b))".

33 Paragraph 500(1)(c)

Repeal the paragraph, substitute:

(c) a decision to refuse to grant a protection visa, or to cancel a protection visa, relying on:

(i) one or more of the following Articles of the Refugees Convention, namely, Article 1F, 32 or 33(2); or

(ii) paragraph 36(2C)(a) or (b) of this Act;

34 Paragraph 500(4)(c)

Repeal the paragraph, substitute:

(c) a decision to refuse to grant a protection visa, or to cancel a protection visa, relying on:

(i) one or more of the following Articles of the Refugees Convention, namely, Article 1F, 32 or 33(2); or

(ii) paragraph 36(2C)(a) or (b) of this Act.

35 Application

The amendments made by this Schedule apply in relation to an application for a protection visa (within the meaning of the *Migration Act 1958*):

(a) that is made on or after the day on which this item commences; or

(b) that is not finally determined (within the meaning of subsection 5(9) of that Act) before the day on which this item commences.