Article

Federal Law Review
2024, Vol. 52(1) 51–74
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DOI: 10.1177/0067205X231213120
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Reviewing Review: Administrative Justice and the Immigration Assessment Authority

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Abstract

The Immigration Assessment Authority ('IAA') provides the final merits review mechanism for people seeking asylum by boat in Australia. For fast-track applicants, the outcome of IAA review is incredibly significant, with consequences ranging from resettlement in Australia, removal to an applicant's country of origin or indefinite immigration detention in harsh conditions. Eight years since its introduction, this article asks whether the IAA has realised the goal of promoting efficient review whilst meeting other important administrative objectives. The article takes a novel approach, applying a pre-formulated theory of administrative justice to analyse whether the IAA has balanced administrative justice properties. In so doing, this article offers a unique lens to critically reflect on the role of the IAA and whether, once its mandate is ended, this new model of review should be abandoned or revived for future merits review of asylum claims.

Accepted 22 May 2023

I Introduction

Since the early 1990s, successive Australian governments have taken an increasingly securitised approach towards people seeking asylum by boat and restricted avenues for entry and resettlement in Australia.[1] This article analyses the Immigration Assessment Authority ('IAA') as one strand in the elaborate web of restrictive migration reforms. The IAA commenced operation in 2015 as a

1. These practices include the introduction of mandatory immigration detention for all people arriving by boat in Australia without a valid visa, offshore processing, bars on permanent residency, the introduction of temporary protection and boat turn-backs with enhanced screening on water: see University of New South Wales' Andrew and Renata Kaldor Centre for International Refugee Law, *Australia's Refugee Policy: An Overview* (Factsheet, 17 July 2020).

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https://doi.org/10.1177/0067205X231213120 Published online by Cambridge University Press

means of providing limited review of fast-track refugee status determinations ('RSDs') for people who sought asylum by boat in Australia between 13 August 2012 and 1 January 2014.[2] RSDs are conducted by government officials who determine whether a person seeking asylum is owed protection or complementary protection on humanitarian grounds.[3] Since 2015, all RSD fast-track decisions have been automatically reviewed by the IAA. Eight years since its first review, this article asks whether the IAA has been successful in delivering its aim of efficient outcomes whilst balancing the tensions between other administrative justice properties. It also considers the efficacy of this form of limited review: should it be expanded across the administrative system or dissolved upon the final case review? In so doing, the article provides a critical insight into the law, policy and practice of the IAA.

The fast-track process has received some attention across law, policy, politics, medicine and psychology disciplines. Townsend and Kerwin considered the way in which the legislative framework of the IAA aimed to shift away from the 'vision splendid', the merits review principles that have been in place since the 1970s.[4] They considered how the courts have interpreted the IAA statutory scheme in a way that references long-standing merits practices.[5] Other scholars have analysed the fast-track framework in terms of the treatment of vulnerable people, the difficulties in obtaining credibility assessments, poor access to legal services and the lack of mental health care provided to people seeking asylum throughout the RSD process and review.[6] This article builds on this Australian literature by considering the law, policy and practice of IAA review through the lens of a pre-formulated normative theory of administrative justice, defined in the *Australian Law Journal*, a peer-reviewed journal focusing on major issues in the Australian legal system and edited by the Honorable Justice Francois Kunc.[7]

Administrative justice is often avoided as a normative framework due to its uncertain nature.[8] This paper takes a critical approach to the dismissal of the concept of administrative justice on its purported uncertainty. The emerging concept of administrative justice, being neither a common law principle nor statutory rule and remaining wholly unexplored to date in Australian administrative case law, provides a lens for normative insight. Administrative

2. Australian Government, 'What We Do', *Immigration Assessment Authority* (Web Page, 13 April 2016) <http://www.iaa.gov.au/about/what-we-do>.
3. A person is a refugee if, owing to a 'well-founded fear of persecution', they are unable or unwilling to return to their country of nationality: *Migration Act 1958* (Cth) s 5H ('*Migration Act*'). Persons may also be able to seek complementary protection in accordance with section 36(2)(aa) of the Act.
4. Joel Townsend and Holly Kerwin, 'Erasing the Vision Splendid? Unpacking the Formative Responses of the Federal Courts to the Fast Track Processing Regime and the "Limited Review" of the Immigration Assessment Authority' (2021) 49(2) *Federal Law Review* 185, 185–187.
5. Ibid 204–5.
6. See Emily McDonald and Maria O'Sullivan, 'Protecting Vulnerable Refugees: Procedural Fairness in the Australian Fast Track Regime' (2018) 41(3) *University of New South Wales Law Journal* 1003; Mary Anne Kenny and Nicholas Procter, 'The Fast Track Refugee Assessment Process and the Mental Health of Vulnerable Asylum Seekers' (2016) 23(1) *Psychiatry, Psychology & Law* 62; Nicholas Procter, Mary Anne Kenny, Heather Eaton and Carol Grech, 'Lethal Hopelessness: Understanding and Responding to Asylum Seeker Distress and Mental Deterioration' (2019) 27(1) *International Journal of Mental Health Nursing* 448; Refugee Advice and Casework Service, Submission No S108 to the Law Council of Australia's Justice Project' (9 October 2017); Australian Law Reform Commission, *Traditional Rights and Freedoms — Encroachments by Commonwealth Laws* (Report No 129, 2016).
7. Amy Elton, 'Towards a Normative Standard of Administrative Justice; Themes and Principled Tensions' (2021) 95(12) *Australian Law Journal* 964, 976–8.
8. As an example, at the 1999 AIAL conference which prioritised the concept of administrative justice 'no speaker offered a detailed or perhaps even workable definition of administrative justice': Matthew Groves, 'Administrative Justice in Australian Administrative Law' (2011) 66 *Australian Institute of Administrative Law Forum* 18.

https://doi.org/10.1177/0067205X231213120 Published online by Cambridge University Press

justice will inevitably lie somewhere between serving the interests of the state and the interests of the individual.[9] In applying a pre-formulated theory of administrative justice that accounts for the principled tensions between administrative justice properties, this paper will explore how these principled tensions should be balanced in a way that delivers administrative justice.

Section I gives an overview of the role of the IAA and briefly outlines the theory of administrative justice that will be applied in this article.[10] This theory of administrative justice is based on substantive rule of law foundations and is therefore suitable to analysing Australian administrative law.[11] Pursuant to this theory of administrative justice, this article considers four administrative justice themes: the proper exercise of power, equal treatment, due process and access to administrative processes.[12] It argues that administrative justice properties ought to be balanced in the particularly specialised context of refugee review determinations[13] and examines the principled tensions that must be balanced to meet administrative justice requirements.

The remainder of this article applies this theory of administrative justice to specific aspects of IAA law, policy and practice.[14] The article evaluates the extent to which administrative justice properties are balanced appropriately in this unique fast-track review. Unfortunately, the slow speed of scholarly research and the relative infancy of the IAA means that only a limited number of authors have explored the implications for justice. Therefore, this article relies on accounts of legal advocacy groups. The lack of external review and audit of IAA practices made some of these assessments difficult, but the contribution of the Administrative Appeals Tribunal's ('AAT') Annual Reports, which include a Chapter on the IAA, has aided in this analysis.[15]

Case notes from 2019 IAA decisions have also been analysed and are referred to throughout this article.[16] These decisions are recent and are numerous enough to reveal themes and patterns across decision-making. A total of 48 decisions were analysed with

9. Creyke and McMillan describe this tension as 'conflicting (and legitimate) interests': see Robin Creyke and John McMillan, 'Administrative Justice — The Concept Emerges' in Robin Creyke and John McMillan (eds), *Administrative Justice — The Core and the Fringe* (Australian Institute of Administrative Law, 2000).

10. Elton (n 7) 977–8.

11. Ibid.

12. Ibid.

13. 'Specialised' in that the merits review function involves 'the evaluation of complex evidence and credibility issues': Susan Kneebone, 'The Refugee Review Tribunal and the Assessment of Credibility: An Inquistorial Role?' 1998 5(2) *Australian Journal of Administrative Law* 78, 82.

14. This paper only considers the Immigration Assessment Authority through the lens of administrative justice. It does not consider the Administrative Appeals Tribunal's Migration & Refugee Division. Nor does this research extend to 501 character assessments. For a thoughtful analysis of these assessments, see Peter Billings, 'Getting Rid of Risky Foreigners: Promoting Community Protection at the Expense of Administrative Justice' (2019) 47(2) *Federal Law Review* 231.

15. Administrative Appeals Tribunal, 'Chapter 5 Immigration Assessment Authority', *Annual Report 2016–17* (Report, 25 September 2017) 57–9; Administrative Appeals Tribunal, 'Chapter 5 Immigration Assessment Authority', *Annual Report 2017–18* (Report, 2 October 2018) 65–7; Administrative Appeals Tribunal, 'Chapter 5 Immigration Assessment Authority', *Annual Report 2018–19* (Report, 25 September 2019) 69–71; Administrative Appeals Tribunal, 'Chapter 5 Immigration Assessment Authority', *Annual Report 2019–20* (Report, 24 September 2020) 65–7; Administrative Appeals Tribunal, 'Chapter 4 Immigration Assessment Authority', *Annual Report 2020–21* (Report, 24 September 2021) 85–91.

16. The case study was based on decisions from 01 January 2019 to 30 March 2019. During this time, 66 decisions were published online from a total of 546 decisions: See Australian Government, 'Caseload Report Summary 2018–2019', *Immigration Assessment Authority* (Web Page, 2019) <http://www.iaa.gov.au/IAA/media/IAA/Statistics/IAACaseloadReport2018-19YTD.pdf>.

https://doi.org/10.1177/0067205X231213120 Published online by Cambridge University Press

respect to categories such as gender, country of origin, the treatment of existing and new evidence, the outcome of review and reasons for decisions. These cases reveal some patterns and anomalies in decision-making. This article also includes reference to an emerging body of case law that relates directly to the operation of the IAA, and in particular, the bringing of new information, legal unreasonableness and apprehended bias. This article supplements these IAA reviews and appeals with reports from internal and external oversight bodies. In so doing, this article considers whether the IAA promotes principled tensions between administrative justice properties or whether the present fast-track review mechanism reflects an imbalance. It aims to provide an axis between strict legal doctrine and normative administrative justice properties, explaining the effect of legislation and policy on administrative justice.

II The IAA and a Theory of Administrative Justice

At the outset, it is important to reflect on the agenda of the Australian Government at the time of the IAA's formation. The IAA was introduced to 'tackle the management of the backlog of illegal maritime arrivals, known as IMAs, and bring important enhancements to the integrity of Australia's protection regime'.[17] The new on-the-papers 'limited' review severely restricted the bringing of new information by applicants.[18] The reason for this was described by the former Minister for Immigration and Border Protection:

> This new approach to review will discourage asylum seekers who attempt to exploit the current review process by presenting manufactured claims or evidence to bolster their original unsuccessful claims only after they learn why they were found not to be refugees by the department. This behaviour has on numerous occasions led to considerable delay while new claims are explored.
>
> These measures will support a robust and timely process, better prioritise and assess claims and afford a differentiated approach depending on the characteristics of the claims…[19]

Putting aside issues of the legitimacy of this objective,[20] this article examines whether the establishment of the IAA has streamlined review and provided for fairer decisions by delivering a faster, more systematic approach to quality decision-making. In considering these key ideas, this article takes into account other administrative justice properties that should lie in principled tension to the Australian Government's stated aims.

The selected theory of administrative justice that will be applied in this article was developed from substantive rule of law foundations.[21] The works of several Australian authors,

17. Commonwealth, *Parliamentary Debates*, House of Representatives (25 September 2014) 10545 (Scott Morrison, Minister for Immigration and Border Protection).
18. Ibid.
19. Ibid.
20. The legitimacy of fears that people seeking asylum are manufacturing claims and that there is a need for restrictive action by government is beyond the scope of this article. Authors discussing the legitimacy of harsh measures towards people seeking asylum by boat include Elizabeth Rowe and Erin O'Brien, 'Constructions of Asylum Seekers and Refugees in Australian Political Discourse' in Kelly Richards and Juan Marcellus Tauri (eds), *Crime Justice and Social Democracy: Proceedings of the 2nd International Conference* (Queensland University of Technology, 2013) 201, 173–181; Sharon Pickering and Leanne Weber, 'New Deterrence Scripts in Australia's Rejuvenated Offshore Detention Regime for Asylum Seekers' (2014) 39(4) *Law and Social Inquiry* 1006; Patrick van Berlo, 'Australia's Operation Sovereign Borders: Discourse, Power and Policy from a Crimmigration Perspective' (2015) 34(4) *Refugee Survey Quarterly* 75.
21. See Tom Bingham, 'The Rule of Law' (2007) 66(1) *Cambridge Law Journal* 67.

https://doi.org/10.1177/0067205X231213120 Published online by Cambridge University Press

including but not limited to French, McMillan, Creyke and Groves, were considered to develop a theory that is directly relevant to the Australian legal system.[22] The core of this theory is as follows:[23]

> Administrative justice is comprised of many administrative justice properties that can be grouped into four main themes: the proper exercise of power, equal treatment, due process and access to justice. These themes are not mutually exclusive. In each theme, a balance must be struck between properties in order to account for the principled tensions that exist…

Central to this theory is the idea that administrative justice properties must lie in principled tension. As Creyke and McMillan note, the 'essence of the concept [of administrative justice] is tempered by conflicting (and legitimate) interests'.[24] For example, in ensuring the proper exercise of power, law-makers are expected to meet government aims being the need to process the 'Asylum Seeker Legacy Caseload' and prevent unmeritorious claims.[25] However, in meeting these government aims, law-makers should also be conscious of individual rights.[26] There must be consistency in decision-making but this must be tempered by the need to recognise special circumstances and exercise leniency where appropriate.[27] Quality review demands time and resources but needs to be balanced with efficiency.[28] Access to decisions must be balanced with the need to protect individual privacy and government secrecy.[29]

This theory is summarised in Table 1, adapted from the article 'Towards a Normative Standard of Administrative Justice', published in the *Australian Law Journal* which included Bingham's Rule of Law Theory as the basis for this theory of administrative justice. Table 1 provides the four administrative justice themes that make up this theory and administrative justice properties relevant to each theme and those properties that must lie in principled tension to achieve administrative justice.

Each of these administrative justice themes can be further developed into normative benchmarks that are suitable for analysing the process of IAA review, noting the principled tensions therein.

The proper exercise of power can be considered at two levels. First, in the creation of law and policy regarding IAA review and, secondly, in IAA reviewers' decision-making. In terms of law-making, actions must be lawfully sanctioned and there must be a process of accountability.[31] In the review of claims for asylum, it is expected that a thorough independent review will be conducted. This is because IAA review is the final merits opportunity for applicants to

22. Authors considering administrative justice and similar concepts include Robert French, 'Administrative Justice — Words in Search of Meaning' (Speech, Australian Institute of Administrative Law Annual Conference — National Administrative Law Forum 2010: Delivering Administrative Justice, 22 July 2010); Robert French, 'Administrative Law in Australia: Themes and Values' in Matthew Groves and HP Lee (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007); Groves (n 8); Robin Creyke and John McMillan, 'Accountability in an Administrative State' in Robin Creyke and John McMillan (eds), *Control of Government Action: Text, Cases and Commentary* (LexisNexis Butterworths, 3rd ed, 2012); Robin Creyke 'Administrative Justice — Towards Integrity in Government' (2007) 31(3) *Melbourne University Law Review* 705.
23. Elton (n 7) 977–8.
24. Creyke and McMillan, 'The Concept Emerges' (n 9) 3.
25. Elton (n 7) 968.
26. Ibid 969.
27. Ibid 971.
28. Ibid 972.
29. Ibid 974.
30. Ibid 977.
31. Ibid 967–70.

https://doi.org/10.1177/0067205X231213120 Published online by Cambridge University Press

Table 1. Legal and administrative requirements for quality decision-making and review.[30]

Administrative justice properties	Properties in principled tension
A Proper exercise of power	Maintaining judicial independence
Lawfully sanctioned	Meeting international obligations
Meeting government aims	
Democratic accountability	
B Equal treatment	Flexibility
Consistency	Recognition of special circumstances
Limiting discretion	
Certainty	
Predictability	
Impartiality	
C Due process	Efficiency
Accuracy	Allocation of Resources
Rationality	
Proportionality	
Integrity	
Participation	
D Access to administrative processes	Confidentiality
Accessibility	Secrecy
Intelligibility	
Transparency	
Freedom of political communication	

plead their case. Incorrect decisions could lead to the forced return of refugees to their country of persecution or the indefinite detention of stateless refugees.[32] In other Australian review processes, the general standard expected at a final merits review hearing is a complete review of all information and any relevant additional information.[33] The consequences of review for people seeking asylum are potentially devastating, so it could be expected that expert and careful review would be carried out. Australia also has obligations under international law in accordance with Bingham's substantive rule of law theory.[34] Australia has agreed to comply with many international obligations through ratifying treaties.[35] These obligations, will, at

32. 'What if my Protection Visa Application is Rejected by the IAA?', *Refugee and Immigration Legal Service* (Web Page, 18 July 2022) <https://www.rails.org.au/sites/default/files/2021-01/PVApplicationrefusedbyIAA-InfoPack-15Dec2020_0.pdf>; Chris Honnery, 'The Immigration Assessment Authority and the Erosion of Fairness in Australia's Refugee Framework' *Border Criminologies Blog* (Blog Post, 6 December 2019) <https://blogs.law.ox.ac.uk/research-subject-groups/centre-criminology/centreborder-criminologies/blog/2019/12/immigration>.
33. See, eg, NDIS review through the Administrative Appeals Tribunal where applicants are invited to put forward any new information that they think might be relevant: 'National Disability Insurance Scheme — What happens after lodgement?', *Administrative Appeals Tribunal* (Web Page, 2022) <https://www.aat.gov.au/steps-in-a-review/national-disability-insurance-scheme-ndis/what-happens-after-lodgement>.
34. Bingham (n 21) 77. See also Janina Boughey, 'The Use of Administrative Law to Enforce Human Rights' (2009) 17 *Australian Journal of Administrative Law* 25, 37; Elton (n 7) 970.
35. Treaties must be enacted in good faith in accordance with the *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) arts 26, 31. For a list of treaties to which Australia is subject, see the Australian Treaties Database: 'Australian Treaties Database' *Australian Government Department of Foreign Affairs and Trade* (Web Page, 2022) <https://www.dfat.gov.au/international-relations/treaties/australian-treaties-database>. Treaties cover a broad range of issues from trade and commerce to environmental law to human rights.

https://doi.org/10.1177/0067205X231213120 Published online by Cambridge University Press

times, lie in principled tension with other aims but should be considered crucial, particularly in terms of the recognition of fundamental rights.

The second theme, equal treatment, demands consistency so that there is a measure of certainty and predictability. There is a need to treat 'like cases alike' and 'different cases differently'.[36] In a UK study, Gill, Rotter, Burridge and Allsopp concluded that reviewers must be sensitive to the particular vulnerabilities of individual applicants and take into account factors such as age, gender and past trauma.[37] In the law and policy governing the IAA, a means of considering equality is to compare the IAA review process to other asylum review processes for those arriving at different times and by different modes of arrival.[38] If there is a large, unexplained disparity, it may evidence that the laws and policies governing the IAA do not provide equal substantive outcomes.

The third theme, due process, requires accuracy, rationality, proportionality, integrity and participation. The version of due process adopted in this article avoids the narrow definition of natural justice that has been statutorily diminished from its common law origins, particularly in the area of migration law.[39] In Thomas' study of asylum appeals in the UK, he prioritised four issues: the propensity to produce accurate decisions, the fairness of the procedures by which decisions are made, resource allocation and timeliness.[40] These are equally relevant to the Australian context and are sound benchmarks for an analysis of the law and policy establishing the IAA and IAA reviewers' decision-making. Tensions arise between providing quality decisions and maintaining efficiency and cost-effectiveness. Notably, the need for efficiency and timeliness were the reason for the introduction of the scheme.[41]

The fourth theme, access, requires that administrative institutions are made available and that administrative law and policy are intelligible. Physical or electronic access to the IAA is important. As many people seeking asylum are from non-English-speaking backgrounds, it is important that information and reasons for decisions are appropriately translated and communicated. IAA review decisions have strong public interest implications with outcomes leading to potential deportation for unsuccessful applicants. Under this theme, transparency and free political communication must be balanced with the properties of confidentiality and secrecy.

III Administrative Justice Themes and the IAA

The remainder of this article evaluates the law and policy governing the IAA and IAA decision-making through the lens of this theory of administrative justice. Each of these themes will be explored in turn to determine whether, in its eighth year, the IAA is appropriately balancing administrative justice properties.

36. Benjamin Johnson and Richard Jordan, 'Why Should like Cases be Treated Alike: A Formal Model of Aristotelian Justice' (Working Paper, Princeton University and Baylor University, 1 March 2017) <https://scholar.princeton.edu/sites/default/files/benjohnson/files/like_cases.pdf>.
37. See Nick Gill, Rebecca Rotter, Andrew Burridge and Jennifer Allsopp, 'The Limits of Procedural Discretion: Unequal Treatment and Vulnerability in Britain's Asylum Appeals' (2018) 27(1) *Social & Legal Studies* 49.
38. The former body for reviewing claims for asylum was the Refugee Review Tribunal: RefWorld, 'Australia: Refugee Review Tribunal' *UNHCR* (Web Page, 2022) <https://www.refworld.org/publisher,AUS_RRT,,,50ffbce513c,,0.html>.
39. Elton (n 7) 972.
40. Robert Thomas, *Administrative Justice and Asylum Appeals: A Study of Tribunal Adjudication* (Hart Publishing, 1st ed, 2011) 12.
41. *Parliamentary Debates* (Scott Morrison) (n 17) 10545.

https://doi.org/10.1177/0067205X231213120 Published online by Cambridge University Press

A *The Proper Exercise of Power*

For administrative justice to be achieved, law-makers and decision-makers must act within the law. There must be appropriate avenues for scrutiny to hold law-makers and decision-makers to account, including scrutiny over potential human rights implications. These requirements stem from rule of law principles that make up the foundation of this theory of administrative justice.[42]

The IAA was established through lawful parliamentary procedures. The legislature has wide scope to deal with 'aliens' under the *Australian Constitution*.[43] This means that the types of laws that can be passed relating to persons without Australian citizenship are relatively unfettered. The Australian government played off fears of the public in delivering a majority-view for harsh treatment of people seeking asylum by boat in Australia.[44] The establishment of a limited review system for people seeking asylum by boat was certainly popular with bi-partisan support for harsh measures towards people seeking such asylum.[45]

1 Accountability of the Legislature in Establishing the IAA. The Senate Review by the Legal and Constitutional Affairs Committee was a potential stumbling block to the legislative passage of the Bill. The operation of Part 7AA which provides the IAA's mandate cannot easily be reconciled with Australia's human rights obligations, as noted in countless submissions to the Legal and Constitutional Affairs Committee.[46] The law upon which IAA review is based recognises the right to seek asylum under the *Refugee Convention* by enabling persons meeting certain criteria to seek asylum if the merits of their case are proven at review.[47] However, the fast-track reforms amended the *Migration Act* to remove most

42. Substantive rule of law theory is drawn from Bingham (n 21).
43. *Australian Constitution* s 51(xix).
44. The popularity in Australia for harsh treatment of people seeking asylum has been evident in Lowy Institute Polling since 2008. See Kelsey Munro and Alex Oliver, 'Polls apart: how Australian views have changed on "boat people"' *The Interpreter: Lowy Institute* (Web Page, 19 February 2019) <https://www.lowyinstitute.org/the-interpreter/polls-apart-how-australian-views-have-changed-boat-people>.
45. Janet Phillips, 'A Comparison of Coalition and Labor Government Asylum Policies in Australia Since 2001' (Research Paper, Parliamentary Library, Parliament of Australia, 2 February 2017).
46. See, eg, Human Rights Law Centre, Submission No 166 to Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* (31 October 2014); Castan Centre for Human Rights Law, Submission No 137 to Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* (2014); Amnesty International, Submission No 170 to Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* (7 November 2014); Law Council of Australia, Submission No 129 to Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* (5 November 2014); Australian Red Cross, Submission No 164 to Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* (2014); Refugee and Immigration Legal Centre, Submission No 165 to Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* (11 November 2014); Institute of International Law and Humanities, Melbourne Law School and the Andrew & Renata Kaldor Centre for International Refugee Law, UNSW, Submission No 167 to Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* (31 October 2014); Refugee Advice and Casework Service, Submission No 134 to Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* (31 October 2014).
47. *Migration Act* (n 3) s 5H(1).

https://doi.org/10.1177/0067205X231213120 Published online by Cambridge University Press

references to the *Refugee Convention* and to change the definition of 'refugee' to be more restrictive.[48] According to the UNHCR, the legislative reforms 'narrow the personal scope of the refugee definition, and lead to a restrictive application of rights to Convention refugees'.[49] This narrowed definition means that a person who is a 'refugee' under the *Refugee Convention* may not be found to meet Australia's protection obligations and risk being returned to a place of persecution, subsequently breaching Australia's non-refoulement obligations under the *Refugee Convention*.[50] From the outset, the new IAA was tied to a restrictive definition of 'persecution' that applies across all migration decisions and review in Australia and risks individuals who are refugees according to international law being returned to countries of persecution or indefinitely detained.

Nonetheless, the Legal and Constitutional Affairs Committee chose to prioritise the need to clear the backlog of protection visa applications.[51] The Committee recommended the new procedures be reviewed after three years.[52] The Callinan Report briefly mentioned the IAA and did not address human rights implications, despite wide concerns raised in submissions.[53] These decisions placed Australia's human rights obligations on a back seat while prioritising the need to meet aims of expediency and efficiency.

Government aims must be given due consideration but must be appropriately balanced with Australia's international human rights obligations so that there is a principled tension between the two administrative justice properties. In considering the weight to be apportioned to the administrative justice properties, Crock and Bones have noted that Australia has never faced a 'mass influx' of people seeking asylum and the normal status determination procedures were not 'overwhelmed' at the time of the introduction of the 2014 amendments.[54] The serious consequences of potential refoulement indicate that considerable weight should be given to upholding Australia's human rights obligations.[55] This balance has not been struck.

2 *IAA Reviewers and the Proper Exercise of Power: Independent Actors or Public Servants?* The resulting legislation upon which the IAA was formed and by which it now operates is tightly restricted. A relatively small team of IAA reviewers[56] is employed by the public service to deliver review of government decisions independently whilst working within a legislative framework where natural justice is defined.[57]

48. Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (Cth).
49. United Nations High Commissioner for Refugees, Submission No 138 to Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* (31 October 2014) 4. This is only one of several human rights concerns raised in the Submission.
50. *Convention Relating to the Status of Refugees*, opened for signature 28 July 1951, 189 UNTS 150 (entered into force 22 April 1954), art 33 ('*Refugee Convention*').
51. Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into the Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014* (Report, 24 November 2014) [3.71].
52. Ibid [3.76] Recommendation 2.
53. Ian David Francis Callinan AC, *Review: Section 4 of the Tribunals Amalgamation Act* (Report, 23 July 2019) [1.25] <https://www.ag.gov.au/sites/default/files/2020-03/report-statutory-review-aat.pdf>.
54. Mary Crock and Kate Bones, 'Australian Exceptionalism: Temporary Protection and the Rights of Refugees' (2015) 16(2) *Melbourne Journal of International Law* 1, 19.
55. For an interesting analysis of Australia's amendments to the Migration Act regarding indefinite detention and non-refoulement, see Lillian Robb, 'There was an old lady who swallowed a fly: progressively more troubling amendments to the Australian Migration Act' (2022) 28(2–3) *Australian Journal of Human Rights* 329.
56. On 30 June 2022, there were 29 IAA Reviewers, with 8 members of the AAT available to assist the IAA to perform its functions: Administrative Appeals Tribunal, *Annual Report 2020–2021* (Report, 24 September 2021), 85.
57. *Migration Act* (n 3) s 473DA provides an exhaustive statement of the natural justice hearing rule.

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The strict legislative requirements of IAA review are established through the *Migration Act 1958* Part 7AA and the IAA must follow Practice Directions issued by the Administrative Appeals Tribunal.[58] IAA reviewers communicate with applicants, conduct face-to-face hearings, consider new information and provide reasons for decisions in a manner shaped by legislation and Practice Directions.[59] Where information can only be brought by the applicant in extremely limited situations,[60] but all information provided by the Secretary must be considered,[61] there is little room for IAA reviewers to exercise their judgment and independence in the same way that other tribunals operate.[62]

Despite this fact, the IAA maintains that it is independent of the Department and the Minister.[63] Questions have been raised around the nature of this independence, particularly as IAA reviewers are employed through the Australian Public Service.[64] Many of the experienced members of the Refugee Review Tribunal ('RRT') were not moved across to the IAA (including those who were statutory appointees to the RRT and therefore could not move across); a likely political push away from the former merits review body that was perceived to be too lenient.[65] Phillips and Spinks noted that Refugee Review Tribunal members were appointed by the Governor-General and had 'typically worked in a relevant profession or have had extensive experience at senior levels in the private or public sectors'.[66] The Refugee Council of Australia voiced concerns that short term appointments, review on-the-papers and the exclusion of late evidence make the IAA less independent than it should be and erode public trust and confidence.[67]

Questions about the impartiality of the IAA have also been raised. The IAA is a separate office of the AAT Migration and Refugee Division[68] that has been criticised for the rise in appointments based on political affiliations and a lack of transparency in the appointment of members to senior positions.[69] The

58. *Migration Act* (n 3) Part 7AA; Immigration Assessment Authority, *Practice Direction 1 and Practice Direction 2* (Online) <https://www.iaa.gov.au/about/practice-directions>.
59. See, eg, Immigration Assessment Authority, *Practice Direction 1 and Practice Direction 2*; *Migration Act* (n 3) ss 473DB, 473DC.
60. *Migration Act* (n 3) s 473DD.
61. Ibid s 473CB; *MIBP v AMA16* [2017] FCAFC 136, [73]–[74].
62. This is discussed in more detail below.
63. 'What we do', *Immigration Assessment Authority* (Web Page, 18 July 2022) <https://www.iaa.gov.au/about/what-we-do>.
64. For critical opinion regarding the IAA's employment by the public service, see Commonwealth, *Parliamentary Debates*, Senate (30 August 2021) 5475 (Lidia Thorpe), dissenting to the *Courts and Tribunals Legislation Amendment (2021 Measures No 1) Bill*. Senator Thorpe stated that 'IAA reviewers are not independent decision-makers; they are public servants. They are responsible for implementing the policies of the executive government. It is incredibly inappropriate to give IAA reviewers the protection afforded to independent judicial officers…': at 5475.
65. Law Institute of Victoria, Submission No 7 to Senate Standing Committees on Legal and Constitutional Affairs, *Inquiry into the Courts and Tribunals Legislation Amendment (2021 Measures No 1) Bill 2021* (15 July 2021) 1.
66. Department of Parliamentary Services (Cth), *Bills Digest* (Digest No 40 of 2014–15, 23 October 2014).
67. Refugee Council of Australia, Submission No 16 to Senate Legal and Constitutional Affairs Committee, *The Performance and Integrity of Australia's Administrative Review System* (24 November 2021).
68. Australian Government, Immigration Assessment Authority 'About' (Web Page, 8 February 2019) <https://www.iaa.gov.au/about>.
69. See the recent Discussion Paper by Debra Wilkinson and Elizabeth Morison, 'Cronyism in Appointments to the AAT: An Empirical Analysis' The Australia Institute (Discussion Paper, The Australia Institute, May 2022) <https://australiainstitute.org.au/wp-content/uploads/2022/05/P1167-Cronyism-in-appointments-to-the-AAT-Web21-copy.pdf>. See summary of submissions to the Senate Legal and Constitutional Affairs References Committee, *The Performance and Integrity of Australia's Administrative Review System*, (Interim Report, March 2022) <https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024867/toc_pdf/TheperformanceandintegrityofAustralia'sadministrativereviewsystem.pdf;fileType=application%2Fpdf>. Particular concerns that have been raised include the short tenure of positions and the lack of legal qualifications of many appointees.

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Australian government has recently announced that it will be abolishing the AAT for these reasons; however, any details of the new federal merits review body are yet to be disclosed.[70]

IAA reviewers now have the same immunity as judges from civil liability which would prevent people from bringing claims of misfeasance, even when IAA Reviewers act in bad faith.[71] According to the Law Institute of Victoria, this is unjustified because it will 'reduce scrutiny and oversight of the IAA without justification or consideration of the appropriateness of the proposed immunity'.[72] As Senator Thorpe has noted: 'IAA reviewers do not take an oath, are not required to declare conflicts of interests and are not paid independently of the executive government'.[73] The new immunity of IAA reviewers only serves to reduce oversight and does not bring greater independence.

Judicial review of IAA decisions can be sought through the Federal Circuit and Family Court of Australia or through the High Court's original jurisdiction.[74] If there is jurisdictional error, the court can grant appropriate relief.[75] This does not allow for review on the merits but it does provide a measure of accountability in terms of the correct application of the law. The courts have provided a check-and-balance on the exercise of power by the IAA to ensure that reviewers' actions and reasoning fall within the scope of Part 7AA.[76] It is noted that this form of review is not automatic and involves some risk for applicants who will be required to bear the costs if their case is unsuccessful.[77] While theoretically available, judicial review may not be a practical option. Furthermore, judicial review will only test the legality of a decision, not the appropriateness of fact-finding. Matters are heard before a single IAA reviewer and there are no internal or external merits review mechanisms that applicants can access.[78] These limits to review may meet the Australian government's aim of discouraging unmeritorious claims[79] by making merits review of an IAA decision impossible. However, it also means that there is limited accountability over the IAA, exemplified by the new immunity granted to IAA reviewers.

In terms of this theme of administrative justice, the legislature validly created laws that accorded with popular attitudes towards the harsh treatment of people seeking asylum by boat. The establishment of the IAA placed government aims of reducing the 'legacy caseload' at the forefront.[80] However, the important administrative justice principle of meeting international standards was unrealised. Given the seriousness of consequences for refugees' human rights and Australia's

70. Jake Evans, '"Politicised" Administrative Appeals Tribunal Abolished, After Attorney-General Declares its Reputation Ruined' *ABC News* (online, 16 December 2022) <https://www.abc.net.au/news/2022-12-16/administrative-appeals-tribunal-abolished-by-attorney-general/101781300>.
71. Asylum Seeker Resource Centre, Submission No 5 to the Senate Legal and Constitutional Affairs Committee, *Inquiry into the Courts and Tribunals Legislation Amendment (2021 Measures No 1) Bill 2021* (15 July 2021), 6. The new law was passed, amending the *Administrative Appeals Tribunal Act 1975* (Cth) s 60.
72. Law Institute of Victoria, Submission 7 to Senate Legal and Constitutional Affairs Committee, *Inquiry into the Courts and Tribunals Legislation Amendment (2021 Measures No.1) Bill 2021* (15 July 2021) 1.
73. *Parliamentary Debates* (Lidia Thorpe) (n 64) 5475.
74. *Migration Act* (n 3) s 476.
75. Stephen Tully, 'Fast Track Decision Making by the Immigration Assessment Authority: the State of Play' (Speech, 'Decision Making and Reason Writing' Seminar Series, Legalwise, Sydney, Australia, 4 September 2017) <https://static1.squarespace.com/static/538e6312e4b03cefc2a8a0c3/t/59b88dff8dd041ada30792fb/1505267204603/Legalwise+Article+Sept+17+Tully.pdf>.
76. See below under the third theme 'Due Process' for a discussion of the review of the legality of decisions.
77. Refugee and Immigration Legal Service, 'What if my Protection Visa Application is Rejected by the IAA?' (Information Pack, October 2020) 2 <https://www.rails.org.au/sites/default/files/202101/PVApplicationrefusedbyIAA-InfoPack-15Dec2020_0.pdf>.
78. The Migration and Refugee Division ('MRD') of the AAT is similarly the final merits review option for applicants; however, it is noted that the MRD does not provide a 'limited' form of review as the final merits review, like the IAA.
79. *Parliamentary Debates* (Scott Morrison) (n 17) 10545, 10547
80. See ibid 10550.

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human rights reputation, it must be questioned whether the IAA's establishment by the legislature could balance these differing aims and responsibilities particularly in this context where the system of review that was already in place was not overwhelmed by a mass influx of asylum claims. The close connection between the Australian government and the IAA also brings into question concerns about independence and impartiality that are intimately connected with its formation as a statutory review body. Immunity akin to judicial immunity, single decision-makers, no internal merits review and burdensome costs for applicants seeking judicial review limit the accountability of IAA reviewers and mean that there is an inadequate check on the exercise of power by this body.

B *Equal Treatment*

Alongside accountability considerations, administrative justice demands that equal treatment be balanced with the need to retain flexibility by considering individual circumstances. Equal treatment is difficult to measure on a case-by-case basis because every review is unique. However, in procedural aspects of the review process issues of equal treatment are more readily apparent. The statutory framework is designed to provide expedited review whereby every applicant is subject to the same rules. Many actions of IAA reviewers are mandated, particularly in terms of timeframes, options to request and consider evidence,[81] the forms in which evidence can be accepted and what is included in information provided to the applicant and reasons for decisions.[82] These restrictions mean that IAA reviewers are constrained to act in a consistent manner. This can bring a level of predictability in that those facing the process will be treated the same as others.

However, the mandatory considerations and narrow scope for discretion must be balanced with the need to recognise individual circumstances and remain flexible. Unlike most merits review enquiries, the IAA is limited in the evidence that it can accept from the applicant. Any new evidence brought before the IAA must be 'credible personal information' and can only be presented where exceptional circumstances exist.[83] This limitation extends to all new information brought before the IAA.[84] This includes updated claims, written reports or other documentation supporting an applicant's case. Across the sample study of 2019 published cases, applicants in 28 reviews sought to bring new information. However, due to the tight circumstances in which such information is allowed, only seven cases ultimately included consideration of new information.[85] In several instances, a lack of compliance with Practice Direction 1,[86] which related to the presentation of

81. The Reviewer 'must' consider all information from the Secretary: *Migration Act* (n 3) s 473CB.
82. See *Migration Act* (n 3) ss 473DC, 473DD, 473EA; Immigration Assessment Authority, *Practice Direction for Applicants, Representatives and Authorised Recipients* (Web Page, 1 May 2020) <https://www.iaa.gov.au/IAA/media/IAA/Files/PracticeDirections/Practice-Direction-1-Applicants-Representatives-and-Authorised-Recipients.pdf > ('*Practice Direction 1*'); Immigration Assessment Authority, *Practice Direction: The giving of information to the Immigration Assessment Authority by the Secretary of the Department of Immigration and Border Protection* (Web Page, 22 September 2016) <https://www.iaa.gov.au/IAA/media/IAA/Files/PracticeDirections/Practice-Direction-2-The-giving-of-information-to-the-IAA-by-the-Secretary.pdf>.
83. *Migration Act* (n 3) s 433DD(ii).
84. Ibid s 433DD.
85. IAA18/05824 (10 January 2019) J McLeod; IAA18/05681 (21 January 2019) S Ryan; IAA18/06117 (30 January 2019) K Allen; IAA18/05304 (31 January 2019) T Hennessy; IAA18/06148 (4 February 2019) C Wilson; IAA18/06037 (6 February 2019) M Wei; IAA18/05761 (26 February 2019) J Stuckey; IAA18/06156 (8 March 2019). In several of these cases, the new information considered was not brought forward by the applicant but was rather new country information from the Department of Foreign Affairs, specifically related to particular asylum claims.
86. Immigration Assessment Authority, *Practice Direction for Applicants, Representatives and Authorised Recipients* (17 December 2018). This Practice Direction was revoked and replaced with the *Practice Direction for Applicants, Representatives and Authorised Recipients* (n 82) in May 2020.

https://doi.org/10.1177/0067205X231213120 Published online by Cambridge University Press

information, contributed to new evidence being ruled out.[87] The preclusion of new information except in exceptional circumstances severely limits the discretion of the reviewer to take into consideration special circumstances and to exercise flexibility around the rules of evidence.[88] Further to this, IAA reviewers are sent country information from the Secretary which they must rely on in reviewing decisions.[89] The heavy reliance on country information over the consideration of individual circumstances and acknowledgment of varied lived experiences diminishes the flexibility of the IAA and does not account for the fluidity of in-country situations.

Equality of treatment can also be considered through a different lens: by analysing the consistency between decisions of the IAA and former review by the Refugee Review Tribunal ('RRT'), particularly with regard to the number of reviews finding in favour of the applicant. Assuming government procedures have been broadly consistent over the past 20 years, it could be expected that the rates of remittal or set aside would be similar between the IAA and RRT. However, the rate of remittal or set aside by the RRT averaged 26.67 per cent from 2012 to 2015, compared to the remittal rate of the IAA at 13.6 per cent for 2015–2020. This suggests that the RRT was therefore considerably more likely to find in favour of the applicant than the IAA. This is further exacerbated because cases of unauthorised maritime arrivals ('UMAs') are statistically more likely to be remitted and made up only part of the cohort of those making asylum claims at the RRT.[90] The RRT rates of remittal or set aside would be even higher if only including reviews of claims made by people seeking asylum by boat.[91] This difference is quite significant and suggests that the IAA is less likely to make an assessment that an individual is a refugee than the former RRT. Table 2 compares statistics from annual reports from the former RRT and IAA and reflects this disparity.[94]

Annual reports of the former RRT were more extensive than that of the IAA which is why the above data appears incomplete.[95] This makes it difficult to compare consistency across factors such as the percentage of applicants who were represented or the percentage of cases with a hearing. Due to the requirements of Part 7AA for on-the-papers hearings and the lack of funding available for legal representation, it is likely that the statistics for the IAA would be inconsistent with the former method of review and reveal a sharp inequality in procedures formerly afforded by the RRT.[96]

87. IAA18/06112 (17 January 2019) S MacKenzie; IAA18/05304 (31 January 2019) T Hennessy; IAA18/06162 (6 March 2019) M Simmons.
88. Note also that the *Migration Act* (n 3) s 473FA(2) states that Tribunal is not bound by the rules of evidence.
89. If new country information is available, the Secretary has a choice of whether to include it: *DYU17 v Minister for Immigration & Border Protection* [2019] FCCA 824, [21], [29].
90. See Administrative Appeals Tribunal, *Annual Report 2012–2013* (Report, 2013) 21 <https://www.aat.gov.au/aat/files/MRDAnnualReports/MRTRRTAR201213.pdf>. The report noted that the 2012–2013 remit rate was 'significantly higher' than the previous year and that this was 'directly related to the unauthorised maritime arrival caseload for which the set-aside rate was higher (65 per cent).
91. See ibid.
92. Migration Review Tribunal and Refugee Review Tribunal, *Annual Report 2014–2015* (Report, 29 September 2015) vi <https://www.aat.gov.au/aat/files/MRDAnnualReports/ar1415/pdf/mrt-rrt_2014-15.pdf>.
93. Administrative Appeals Tribunal, *Annual Report 2020-21* (Report, 24 September 2021) 86 <https://www.aat.gov.au/AAT/media/AAT/Files/Reports/AR202021/AR2020%e2%80%9321.pdf>.
94. Note that statistics for a single period vary across different reporting years, presumably as more accurate data was compiled. Where there is an anomoly in statistics, the most recent data is taken to be correct.
95. Also, note that those subject to enhanced screening are not included in the IAA statistics. If these people were afforded review by the IAA, the statistics may be different.
96. *Migration Act* (n 3) ss 472DB(1)(b), 473DD.

https://doi.org/10.1177/0067205X231213120 Published online by Cambridge University Press

Table 2. Comparison of the Refugee Review Tribunal and the Immigration Assessment Authority.

	Refugee Review Tribunal decisions (all refugee status determinations where merits review was sought, not just UMAs)			Immigration Assessment Authority 2015–2021 UMAs only (all fast-track applicants)					
	2012–2013	2013–2014	2014–2015	2015–2016	2016–2017	2017–2018	2018–2019	2019–2020	2020–2021
Number of decisions	3,757	3,585	4983	130	1604	2481	2382	1731	788[c]
Three Primary Countries of Reference (UMA applications only)	Sri Lanka (42 per cent) Afghanistan (33 per cent) Iran (11 per cent)	Sri Lanka (50 per cent) Afghanistan (21 per cent) Iran (13 per cent)	Bangladesh (27 per cent) Iran (22 per cent) Sri Lanka (19 per cent)	Sri Lanka (43 per cent) Iran (22 per cent) Afghanistan (12 per cent)	Sri Lanka (53 per cent) Iran 420 (16 per cent) Afghanistan (10 per cent)	Sri Lanka (36 per cent) Iran (29 per cent) Vietnam (7 per cent)	Sri Lanka (34 per cent) Iran (32 per cent) Vietnam 112 (7 per cent)	Sri Lanka (26 per cent) Iran (24 per cent) Pakistan (22 per cent)	Sri Lanka (36 per cent) Iran (32 per cent) Pakistan (11 per cent)
Three Primary Countries of Reference (All Protection Claims)	Sri Lanka (17 per cent) China 14 per cent Afghanistan (12 per cent)	Sri Lanka (24 per cent) China 13 per cent Afghanistan (9 per cent)	China (18 per cent) India (11 per cent) Malaysia (8 per cent)						
Claim Type	UMA 36 per cent	UMA ≈ 45 per cent	UMA ≈ 20 per cent	UMA 100 per cent	UMA 100 per cent	UMA 100 per cent	UMA 100 per cent	UMA 100 per cent	UMA 100 per cent
	2012–2013	2013–2014	2014–2015	2015–2016	2016–2017	2017–2018	2018–2019	2019–2020	2020–2021
Remit for reconsideration/set-aside rate	**(UMA: 65 per cent)** 37 per cent of all cases	22 per cent[b] across all applications	21 per cent[a] across all applications	**UMA 28 per cent (36 cases)**	**UMA 16 per cent (261 cases)**	**UMA 10 per cent (238 cases)**	**UMA 8 per cent (184 cases)**	**UMA 6 per cent (96 cases)**	**UMA 7 per cent (55 cases)**
Cases withdrawn	5 per cent	6 per cent	7 per cent	-	-	-	-	-	-
Average time to decision	159 days across all RRT applications	237 days across all RRT applications	264 days across all RRT applications	5 weeks (median) 35 days	11 weeks (median) 77 days	28 weeks (median) 196 days	12 weeks median	5 weeks median	5 weeks median time to finalise
Cases where hearing was held	≈ 97 per cent across all RRT applications	83 per cent across all RRT applications	70 per cent across all RRT applications	-	-	-	-	-	-

(continued)

https://doi.org/10.1177/0067205X231213120 Published online by Cambridge University Press

Table 2. (continued)

	Refugee Review Tribunal decisions (all refugee status determinations where merits review was sought, not just UMAs)			Immigration Assessment Authority 2015–2021 UMAs only (all fast-track applicants)					
	2012–2013	2013–2014	2014–2015	2015–2016	2016–2017	2017–2018	2018–2019	2019–2020	2020–2021
Client represented	64 per cent with all UMAs offered representation through IAAAS	62 per cent across all RRT applications	68 per cent across all RRT applications	-	-	-	-	-	-
Hearings with interpreters	89 per cent across all RRT applications	85 per cent across all RRT applications	90 per cent across all RRT applications	-	-	-	-	-	-
Court appeals lodged (across all courts)	949	1,101	1,489	46	1,056	1,970	1,956	1407	688
Appeals finalised	720	237	265	1	53	309	945	840	523
Cases where decision set aside/remitted	109 (15 per cent across all RRT claims)	29 (12 per cent across all RRT claims)	37 (14 per cent across all RRT claims)	1 case (100 per cent)	19 cases (35.8 per cent)	100 cases (32.4 per cent)	445 (47.1 per cent)	262 (31.1 per cent)	158 cases (30.2 per cent)

[a]Excludes 1,198 RRT cases that were remitted to the Department for reconsideration following the disallowance of clause 866.222 of Schedule 2 to the Migration Regulations 1994. Few UMA applications were processed (only 648 cases lodged).[92]
[b]Ministerial Direction requiring RRT to prioritise applications other than UMA meant the UMA caseload dropped significantly.
[c]The AAT report stated this was due to COVID.[93]

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McDonald and O'Sullivan have noted a similar lower rate of applicant success at the IAA when comparing it with other AAT asylum reviews.[97] McDonald and O'Sullivan found that the AAT set-aside rate in relation to Afghan applicants was 63 to 81 per cent, compared to the IAA set-aside rate of 19 to 24 per cent.[98] This statistic shows that the IAA and the AAT had significantly different rates of applicant success despite the fact that these cases were reviewed concurrently. It provides further evidence that the IAA is less likely to find in favour of the applicant.

The Australian government established the IAA to generate a statutorily consistent approach to review procedures whilst affording 'a differentiated approach depending on the characteristics of the claims'.[99] When comparing statistics for those arriving to Australia at different times and by different means, there is striking inequality of treatment. Both the former RRT and the AAT (when hearing migration matters) have much higher rates of applicant success on review than the IAA.[100] This raises the question whether people who have been persecuted are being returned home following the IAA review process who would not otherwise be subject to return.

C *Due Process*

Equality of treatment is tied closely to fairness. This section explores the extent to which the IAA goals of timeliness and efficiency have affected quality decision-making. It notes that the traditional rules against bias have been retained. Finally, this section considers the area of most significant change — the right to be heard — and questions whether legislative variation of this right impedes on fairness.

The common law rule against bias, an integral part of due process, was not altered by the IAA legislative framework providing a standard of quality in decision-making. The objective in the Act includes ensuring decisions are 'free from bias'.[101] Actual or apprehended bias will make decisions unlawful.[102] In *CNY17 v Minister for Immigration and Border Protection*, Nettle and Gordon JJ noted that '[t]he public is entitled to expect that issues determined by judges and other public office holders should be decided, among other things, free of prejudice and without bias'.[103] In that case, a 3–2 majority found that there was apprehended bias because documents relating to a riot in which the appellant was charged were included in the case information put before the IAA by the Secretary and inferences could be drawn from this material that would lead to an apprehension of bias.[104] The IAA reviewer did not state that the information was not considered and did not invite the applicant to comment on the information,[105] which would be 'the best way' of avoiding an apprehension of

97. McDonald and O'Sullivan (n 6) 1024–5. The authors note that some of this discrepancy may be explained by the fact that AAT applicants can seek legal representation regarding their prospects of success prior to making a claim, whereas IAA review is automatic. However, the authors assert that there is a higher rate of refusal in IAA review nonetheless.
98. Ibid 1025.
99. *Parliamentary Debates* (Scott Morrison) (n 17) 10548.
100. This does not indicate that the RRT and AAT always meet standards of administrative justice. These tribunals have received some criticism for failing to get decisions right: Mary Crock, 'The Refugees Convention at 50: Mid-life Crisis or Terminal Inadequacy? An Australian Perspective' in Susan Kneebone (ed), *The Refugees Convention 50 Years On: Globalisation and International Law* (Ashgate, 2003) 47.
101. *Migration Act* (n 3) s 473FA(1). See also s 473DA(1).
102. This is pursuant to jurisdictional error under the *Australian Constitution* s 75(v).
103. (2019) 268 CLR 76, 97 [53] ('*CNY17*') (Nettle and Gordon JJ) quoting *Webb v The Queen* (1994) 181 CLR 41, 53.
104. *CNY17* (n 102) [70]–[102]. Justices Nettle and Gordon delivered joint judgments with Edelman J delivering a separate judgment, Kiefel and Gageler JJ dissenting.
105. Ibid [102].

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bias.[106] In considering apprehended bias, Groves noted that complexity will arise in the subjective assessment of what the 'informed observer' might think, which inevitably leads to inconsistency in opinions between members of the judiciary.[107] Even in light of this complexity, the recognition by the courts that bias and apprehended bias will bring legal error has acted as a stopgap to prevent IAA review in a manner that does not meet basic requirements under this limb of procedural fairness.

However, the same cannot be said for the other limb of procedural fairness, the hearing rule. Upon the introduction of fast-track processing, the long-standing procedural fairness hearing rule at common law was replaced with an exhaustive statement of the natural justice hearing rule.[108] The IAA is generally required to undertake review on-the-papers.[109] Review is almost always conducted without an interview.[110] The Australian government's policy stated that the new fast-track process aimed to resolve cases faster to eliminate 'long periods of idleness and uncertainty that can lead to mental illness, reducing detention and bridging visa costs to the community and allowing people to move on and make decisions about the next stage of their lives'.[111] Limiting review may be one means to ensure claims are processed quickly,[112] but this approach raises several significant issues of fairness.

The Asylum Seeker Resource Centre has noted the issue of a lack of participation in terms of the evaluation of credibility at the IAA stage. The Centre stated that:

> In IAA review, people are not interviewed, are rarely allowed to put forward new information and are limited in their ability to respond to the findings or mistakes made by the [Department of Home Affairs]. The person making the decision does not even meet the person seeking asylum and rarely asks them any questions. … There is a real concern that the errors made at the Department level are subsumed into the decision of reviewers as there is little opportunity for meaningful interaction with the IAA.[113]

None of the sample study of 2019 IAA published decisions involved an interview with the applicant. The lack of physical presence of the applicant effectively prevents the reviewer from re-examining a person's credibility.[114] Credibility issues arose in most of the 2019 sample study cases. There is a strong chance that the inability to participate in a hearing reduces applicants' chances of successful reviews and thus impacts upon fairness. Thomas and Tomlinson's study found in a UK study on social security and immigration that those who opt for oral hearings 'tend to experience

106. Ibid [102].
107. Matthew Groves, 'Clarity and Complexity in the Bias Rule' (2020) 44(2) *Melbourne University Law Review* 565, 594–7. Groves states that this complexity is not necessarily a bad thing, it merely reflects the way that the same material can be viewed in different ways and is suggestive of different perspectives arising from different life experience.
108. *Migration Act* (n 3) s 473DA(1).
109. Ibid s 473DB.
110. Ibid.
111. The Coalition Party, *The Coalition's Policy to Clear Labor's 30,000 Border Failure Backlog* (August 2013) 7.
112. Another means would be to allocate increased resources to the task of review.
113. 'Fair Process: Policy Statement', *Asylum Seeker Resource Centre* (Web Page, 2022) <https://www.asrc.org.au/policies/fair-process/>.
114. Natasha Robinson, '"Fast-Track" Process for Asylum Seekers to Result in Lengthy Delays as Court Challenges Mount', *ABC News* (online, 16 April 2016) <https://www.abc.net.au/news/2016-04-16/fast-track-process-asylum-seekers-lengthy-delays-court-challenge/7331296>.

https://doi.org/10.1177/0067205X231213120 Published online by Cambridge University Press

higher success rates than appellants whose appeals are determined on-the-papers'.[115] Statistics from the Refugee Review Tribunal support this finding.[116]

Court findings of 'legal unreasonableness' have provided a check on the IAA's use of on-the-papers hearings.[117] The courts have found that 'the statutory discretions of the [IAA] must be exercised reasonably',[118] This includes the discretion of whether a hearing should be conducted to bridge informational gaps.[119] Furthermore, the courts have found that there must be a reasonable opportunity to consider the particulars of new information and provide a comment.[120] The courts have interpreted the 'exceptional circumstances' for bringing new information by the applicant broadly.[121] It follows that closing of the traditional path of procedural fairness has led the courts to critically explore the bounds of legal unreasonableness, preserving some common law jurisdiction.[122] This expansion of legal unreasonableness was highlighted in *CMH16 v Minister for Immigration and Border Protection* where Driver J stated that 'the unique character of the reviews conducted by the [IAA] calls for an expansion of [legal unreasonableness] in circumstances where the principles of procedural fairness under the general law have no application and the circumstances are extraordinary'.[123]

The increase in judicial review on the basis of legal unreasonableness means that the IAA is not necessarily delivering on the aims of efficiency and timeliness. In 2014–15, the percentage of cases bought to judicial review from the RRT was 28.5 per cent, compared to 80.4 per cent in 2019–20. These high rates of judicial review and remittal to the IAA are concerning in terms of efficiency because judicial review is notoriously slow and expensive. A similar trend has been noted by Billings in the application of the character test and the use of broad and unfettered powers by Ministers which has led to 'voluminous, complex and evolving case law'.[124] A similar problem has been found in the US and UK with expedited asylum procedures causing an increase in appeals to superior courts which has resulted in 'decreased efficiency and increased costs'.[125] The short time frames for applicants to present their case have not been coupled with faster processing times. In

115. Robert Thomas and Joe Tomlinson, 'Mapping Current Issues in Administrative Justice: Austerity and the "More Bureaucratic Rationality" Approach' (2017) 39(3) *Journal of Social Welfare and Family Law* 380, 385.
116. For example, in 2012–13 the set-aside rate was 47 per cent for represented applicants and 11 per cent for unrepresented Applicants: Migration Review Tribunal and Refugee Review Tribunal, *Annual Report 2012–13* (Report, 2013) 21 <https://www.aat.gov.au/aat/files/MRDAnnualReports/MRTRRTAR201213.pdf>.
117. Townsend and Kerwin (n 4) 14.
118. *Minister for Immigration and Border Protection v CRY16* (2017) 253 FCR 475 [21] ('*CRY16*'), referring to *Minister for Immigration and Border Protection v DZU16* (2017) 321 FLR 306; *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 [72], [94]–[95]. See also *Plaintiff M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217, 227 [21]; *DPI17 v Minister for Home Affairs* (2019) 269 FCR 134, 145.
119. *CRY16* (n 117). See also *ABT17 v Minister for Immigration and Border Protection* (2020) 269 CLR 439, 477 [87] where it was found that 'without providing any sufficient reason to depart from a delegate's finding as to demeanour on interview, an IAA review is bound to accept those findings of the delegate'.
120. See *BMV16 v Minister for Home Affairs* (2018) 261 FCR 476 where the Court found that it was unreasonable to expect an immediate response to new information.
121. Townsend and Kerwin (n 4) 14.
122. Tim Peyton, 'Judicial Review of the Fast-track Asylum Seeker Assessment Process' (2020) 27(1) *Australian Journal of Administrative Law* 20.
123. 326 FLR 389 [62].
124. Billings (n 14) 237.
125. Refugee Advice and Casework Service, Submission No 108 to Law Council of Australia, *The Justice Project* (9 October 2017) 8, referring to Stephen H Legomsky, 'Restructuring Immigration Adjudication' (2010) 59(8) *Duke Law Journal* 1635.

https://doi.org/10.1177/0067205X231213120 Published online by Cambridge University Press

2017–18, the median time to make a decision was 196 days, with 2481 decisions during that time.[126] In 2019–20, this had improved somewhat[127] but a process that is providing only 'limited' review would be expected to at the very least be quicker. The new IAA procedures are less efficient than former RRT review.

D *Accessibility*

Turning to the fourth theme of accessibility, IAA review cannot meet the aims of administrative justice if the process is not easily accessible. Initial applications for protection involve complex legal documents, including letters written in English and forms which must be completed in English.[128] The 33-page application form is quite complex.[129] Most often, people seeking asylum by boat have limited English skills and do not understand legal jargon. The Asylum Seeker Resource Centre has noted that the refugee status determination process requires an 'understanding of complex legal concepts, statutory interpretation and the ability to identify, collate and present relevant information' such that people seeking asylum are usually unable to appropriately complete the process without assistance.[130] Barriers such as illiteracy and mental health issues make the process difficult for many people seeking asylum.[131] Physical isolation for those in detention or a lack of access to transport for those in the community means that accessing private lawyers and translation services is difficult or impossible for most fast-track applicants.[132]

Access to legal representation and interpreters is not assumed in the IAA.[133] The following extract from the case *Minister for Immigration and Border Protection v DZU16* included a transcript from conversation between the IAA and an applicant:

> He said he struggles to communicate in his own language let alone writing a response in English. I asked if there was anyone at the detention centre who would be able to help him and he said no. I gave him 2 contact numbers to call to see if they could help him but reminded him, that unfortunately the response is due today... I suggested he could put a request in for an extension but said I was unsure if the legislation allows for this for invitations. If he wishes to ask for an extension, I suggested he do this today but I cant guarantee that it would be granted. The applicant said he cant write an email in English to do this. I said I will case note this conversation but for him to try to explain his circumstances in writing to the IAA. he thanked me for my time and terminated the call.[134]

126. See Table 1 above.
127. See Administrative Appeals Tribunal, *Administrative Appeals Tribunal Annual Report 2019–20* (Report, 24 September 2020) 65–67 <https://www.aat.gov.au/AAT/media/AAT/Files/Reports/AR201920/AAT-Annual-Report-2019-20.pdf>.
128. Asylum Seeker Resource Centre (n 112).
129. For a copy of the form, see 'Application for a Protection Visa' *Department of Home Affairs* (2020) <https://immi.homeaffairs.gov.au/form-listing/forms/866.pdf>.
130. Asylum Seeker Resource Centre (n 112).
131. Ibid.
132. A reduction in welfare support for applicants has made it difficult for applicants to cover the essentials, let alone access to legal and interpretation services: Mary Anne Kenny, Nicholas Procter and Carol Grech, 'Mental Health and Legal Representation for Asylum Seekers in the "Legacy Caseload"' (2016) 8(2) *Cosmopolitan Civil Societies Journal* 4976.
133. Nor is legal representation assumed in the Administrative Appeals Tribunal: Andrew & Renata Kaldor Centre for International Refugee Law, 'Do People Seeking Asylum Receive Legal Assistance?' (Web Page, 4 May 2020) <https://www.kaldorcentre.unsw.edu.au/publication/legal-assistance-asylum-seekers>.
134. *Minister for Immigration and Border Protection v DZU16* (2018) 253 FCR 526, 538 [24] [sic].

https://doi.org/10.1177/0067205X231213120 Published online by Cambridge University Press

This case demonstrates the day-to-day difficulties of applicants in accessing the IAA, particularly when they are in closed detention facilities.

Access to the IAA process is automatic for eligible fast-track applicants.[135] However, the major barrier to accessing justice lies in the extremely limited funding for legal representation. Funding for legal representation is not available at the review stage.[136] According to the Asylum Seeker Resource Centre ('ASRC'), funding cuts affected 80 per cent of people seeking asylum by boat.[137] Prior to the fast-track process, free services were provided for advice and application assistance to all people seeking asylum.[138] However, under fast-track measures only applicants who are unaccompanied minors or 'extremely vulnerable' can access funding.[139]

Funding for assistance with initial refugee status applications significantly improves access to justice for those who are eligible. A KPMG report found that the former funding program was beneficial in providing assistance to vulnerable people and shortening the application process by generating better quality.[140] In a 2015 Refugee Review Tribunal report, it was noted that 'the set-aside rate was 27 per cent for represented applicants and 9 per cent for unrepresented applicants'.[141] The report suggested that the reason for this disparity was likely related to a lack of advice sought by unrepresented applicants about their prospects of success.[142] Extending eligibility for legal representation could significantly improve prospects of success and avoid excess use of judicial review by filtering out frivolous claims and presenting arguments efficiently.[143]

Along with funding cuts for legal representation, the Australian government barred people from submitting applications for asylum and then, when the bar was lifted, set a strict time limit to submission.[144] This meant that many fast-track applicants did not have sufficient time to seek adequate legal advice, imposing an unrelenting strain on pro bono organisations.[145] Pro bono assistants made every effort to submit all applications before the deadline. However, this rush of applications draws into question the thoroughness in preparation of initial cases.

135. Australian Government, 'The Review Process', *Immigration Assessment Authority* (Web Page, 8 February 2019) <https://www.iaa.gov.au/the-review-process>.
136. Immigration Assessment Authority, *Practice Direction for Applicants, Representatives and Authorised Recipients* (Web Document, 1 December 2018) <http://www.iaa.gov.au/IAA/media/IAA/Files/PracticeDirections/Practice-Direction-1-Applicants-Representatives-and-Authorised-Recipients.pdf>.
137. Asylum Seeker Resource Centre (n 112).
138. Rebecca Leabeater and Genevieve Wilks in collaboration with the Refugee Advice and Casework Service, 'Australian Asylum Law: Cuts to Funding a Threat to Access to Justice and a Burden on the System' (2014) 8 *UNSW Law Society Court of Conscience* 30, 31.
139. UNSW Sydney, 'Do People Seeking Asylum Receive Legal Assistance?', *Andrew and Renata Kaldor Centre for International Refugee Law* (Web Page, 4 May 2020) <https://www.kaldorcentre.unsw.edu.au/publication/legal-assistance-asylum-seekers>.
140. KPMG, *Evaluation of Government Funded Assistance* (Evaluation Report, September 2018) 21 <https://www.homeaffairs.gov.au/foi/files/2019/fa-181100194-document-released.PDF>.
141. Migration Review Tribunal and Refugee Review Tribunal, *Annual Report 2014-2015* (Report, 29 September 2015) 22 <https://www.aat.gov.au/aat/files/MRDAnnualReports/MRTRRTAR201415.pdf>.
142. Ibid.
143. Refugee Advice and Casework Service (n 6) 8.
144. These included people who were eligible for PAIS (Primary Application Information Scheme) but had disengaged, had been previously overlooked or had since developed a significant physical or mental health barrier or were detained or incarcerated.
145. 'Fast-tracking Statistics', *Refugee Council of Australia* (Web Page, 12 February 2019) <https://www.refugeecouncil.org.au/fast-tracking-statistics/>. See also 'The Federal Budget: What it Means for Refugees and People Seeking Humanitarian Protection', *Refugee Council of Australia* (Web Page, 3 April 2019) <https://www.refugeecouncil.org.au/federal-budget-summary/>.

https://doi.org/10.1177/0067205X231213120 Published online by Cambridge University Press

The limited assistance at the primary application stage bears heavily on the IAA review stage, particularly because new information is generally not allowed and credibility issues arise when important facts are not included in the initial application.[146] The vulnerabilities faced by people seeking asylum both in the Australian community and in detention compound the need for appropriate representation and translation services from the beginning of the process. In the case of *BMV16 v Minister for Home Affairs*, the Court found the fact that the applicant did not have a representative impacted on whether the applicant would have requested an adjournment in their interview.[147] In another case, the very fact that an appellant was unrepresented caused a miscarriage of justice because the appellant presented evidence that should never have been part of his application.[148] These cases demonstrate the need for a legal representative to be present at the stage of the initial application and on review.

Not only is it important that applicants put information forward appropriately to have their cases heard, they also need to understand the reasons for the decisions made by the IAA.[149] As a matter of public interest, the community also has the right to know the basis on which decisions have been made. Following IAA review, written reasons must be provided.[150] From an analysis of several case studies, reviewers provide reasons for decisions, particularly in relation to the treatment of any new information, factual findings and an assessment of refugee and complementary protection claims.[151] The delegates explain the law in each decision using as simple language as possible.[152] However, legal jargon such as 'well-founded fear', 'persecution', 'real risk of significant harm' and 'complementary protection'[153] would confuse most Australian citizens, let alone someone from a foreign country with limited English language skills. For this reason, the above requirement for interpreters and legal representation in relaying decisions is vital before, during and after IAA review and should have been considered in the establishment of the fast-track process.

In terms of public access, 'selected' decisions are available online.[154] The IAA has the discretion to publish statements of particular interest.[155] The President of the IAA has the power to 'direct that information given to the IAA or contents produced to the IAA should not be published or disclosed except to particular persons in a particular manner where he or she is satisfied that it is in the public interest to do so'.[156] The Minister has power where it would be contrary to the public interest to prevent disclosure of information.[157] Only a portion of decisions are publicly available. For

146. Australian Human Rights Commission, *Lives on Hold: Refugees and Asylum Seekers in the 'Legacy Caseload'* (Report, 2019) 29, 32 <https://humanrights.gov.au/sites/default/files/document/publication/ahrc_lives_on_hold_2019.pdf>.
147. (2018) 261 FCR 476, 501.
148. *AZZ18 v Minister for Home Affairs* (2019) 166 ALD 90.
149. As Billings convincingly argues, 'reasons promote transparency over government decision-making': Billings (n 14) 245 quoting *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 31 ALR 666, 686 (Deane J).
150. *Migration Act* (n 3) s 473EA(1)(b).
151. In all instances, new information is considered first, followed by the applicant's claims, then factual findings in relation to these claims and finally whether the applicant meets the criteria for refugee status or complementary protection obligations. See, eg, IAA19/06277 (5 April 2019); IAA19/06386 (15 March 2019); IAA19/06283; IAA19/06284; IAA19/06285 (14 March 2019).
152. Decisions generally quote the definition of 'refugee' straight from the *Migration Act* (n 3) s 5H(1) and provide a simplified account of the meaning of 'well-founded fear of persecution' in accordance with Section 5J. See, eg, IAA19/06386 (15 March 2019).
153. This terminology was evident across all 2019 cases and is largely unavoidable.
154. Australian Government, 'Decisions', *Immigration Assessment Authority* (Web Page, 2 May 2022) <http://www.iaa.gov.au/about/decisions>.
155. Ibid s 473EC.
156. Ibid s 473GD. This carries a penalty of 2 years imprisonment.
157. Ibid s 473GB.

https://doi.org/10.1177/0067205X231213120 Published online by Cambridge University Press

example, in the 2017–2018 financial year there were 2481 decisions, of which only 175 (ie 7 per cent) were published.[158] In 2019, out of a sample of 546 decided cases, only 66 decisions were published (ie 12 per cent).[159] This means that there cannot be true scrutiny of decisions and raises the possibility of controversial decisions being hidden from the public eye. Whether the decisions that are published are representative of the whole cannot be readily determined.

Balancing these transparency issues with the need for confidentiality and secrecy is challenging. Most clients fear their personal information being accessed by those from whom they have fled, so confidentiality is vitally important throughout the IAA review process. Personal identifiers are removed from decisions published online to ensure confidentiality that is particularly important where individuals are returned to their country of origin and may face questioning on the basis of their illegal exit.[160] All cases online are anonymised.[161] This means that individuals are protected from being identified to some extent. There is also a two-year imprisonment penalty where information is disclosed by a present or former reviewer, a person assisting the applicant or an interpreter.[162]

Notably, there was a data breach in 2014, whereby 10,000 asylum seekers' personal information was available online through the Department website for 8 and a half days from 10 February 2014.[163] Public access to personal details was made available at this time and could potentially be viewed by persecutors in countries of origin. The divulging of personal information was raised in several 2019 IAA review proceedings, with some applicants claiming that authorities had searched family homes as a result.[164] However in all instances, it was found that the data breach did not alter protection claims.[165] The data breach does, however, raise serious concerns for the confidentiality of fast-track applicants.

IV Conclusion

The new IAA review procedures were established with the aim of providing a timely and cheap means to finalise refugee status determinations and address the 'Asylum Seeker Legacy Caseload'. In 2018, Callinan stated that the IAA 'is an effective and fair decision-maker in the cases with which it deals. It is an appropriate forum for expedition and fair disposition of cases involving similar and

158. 2481 decisions were finalised in the 2017–2018 financial year and, of these, 175 were published: Immigration Assessment Authority, *2017–2018 Caseload Summary* (Web Document) <http://www.iaa.gov.au/IAA/media/IAA/Statistics/IAACaseloadReport2017-18.pdf>.
159. Immigration Assessment Authority, *Caseload Report Summary 2018-2019* (Web Document) <http://www.iaa.gov.au/IAA/media/IAA/Statistics/IAACaseloadReport2018-19YTD.pdf>.
160. With the exception of a data breach that exposed details of 9250 asylum seekers: Department of Immigration and Border Protection, *Own Motion Investigation Report* (Report, November 2014) <https://www.oaic.gov.au/privacy-law/commissioner-initiated-investigation-reports/dibp-omi>. This was not an IAA error but would likely impact on the confidentiality of people within the process of seeking asylum.
161. *Migration Act* (n 3) s 473EC(2).
162. Ibid s 473GC.
163. Australian Government, '*Department of Immigration and Border Protection: Own Motion Investigation Report*', *Office of the Australian Information Commissioner* (Web Page, November 2014) <https://www.oaic.gov.au/privacy-law/commissioner-initiated-investigation-reports/dibp-omi#findings>.
164. See, eg, IAA18/05830 (12 February 2019).
165. See, eg, IAA18/05612 (16 January 2019) S Mackenzie; IAA18/05897 (1 February 2019) S Mansour, IAA18/05830 (12 February 2019) L Hill; IAA18/05766 (4 March 2019) D Power; IAA19/06277 (5 April 2019).

https://doi.org/10.1177/0067205X231213120 Published online by Cambridge University Press

relatively simple facts. It is also an appropriate kind of forum to deal with "surges" of cases of these kinds'.[166] Yet Callinan's appraisal of the IAA seems somewhat wide of the mark, when considered in the context of a theory of administrative justice that is based on substantive rule of law foundations.

Inevitably, administrative justice demands that consideration be given to different administrative justice properties that do not sit neatly side-by-side. A review system cannot be expedient whilst enabling unlimited review and the bringing of all information before a reviewer. Nonetheless, there is a normative point at which the law and policy of review is developed so administrative justice properties are balanced in principled tension, appropriately meeting the interests of the government and the individual applicant. The design of the IAA is incapable of delivering this balance.

In terms of the first theme of administrative justice, 'The Proper Exercise of Power', the legislation governing the IAA was lawfully sanctioned, met government aims and was backed by popular opinion. However, certain accountability measures failed to ensure that the new laws met Australia's human rights obligations. With no mass influx of asylum seekers at the time of the new review system, the government did not have a strong reason to support a fast-track policy that had the potential to impede on human rights. Further, the legislative framework restricts the IAA reviewer's independence with tightly controlled statutory requirements. There is an imbalance between the government and the applicant's right to bring new information and provide responses. It is difficult to reconcile these factors with the administrative justice requirement of 'independent' review.

Analysis of the administrative justice theme of 'Equal Treatment' delivers an equally bleak assessment. The mandatory language of the statutory scheme and strict timeframes bring a measure of predictability and consistency. However, the scheme fails to appropriately acknowledge individual circumstances. The restriction on applicants in bringing new information only in exceptional circumstances means that individuals have little opportunity to add to their claims made during their initial assessments or explain any discrepancies. Country information is not specific to the lived experiences of the individual applicant but is relied on heavily at review. IAA review also appears to have much lower success rates compared to the former review body, the RRT or parallel decision-making in the AAT.

The third theme 'Due Process' also reveals a concerning lack of principled tension between administrative justice properties, particularly with respect to the accuracy of decision-making. Much higher rates of successful review by the Courts means that any potential efficiency of the IAA is lost in the time and expense of later court proceedings. While the rule against bias and apprehended bias remains in effect, the hearing rule has been statutorily altered. Hearings are generally on-the-papers. The lack of an interview may lower an applicant's chance to prove their case and have the decision overturned on review, particularly given that the credibility of an applicant's claim is an important factor in making determinations. The limited circumstances in which an applicant can bring new information and the narrow time limits to present information or respond exacerbate this unfairness. While this unfairness is alleviated at the extreme end by the doctrine of legal unreasonableness, the rise in Court proceedings that are inefficient and costly call into question whether the introduction of review by the IAA has significantly reduced costs or timeliness of final outcomes. Thus, it is questionable whether the fast-track procedure has had real benefits in terms of timeliness and efficiency.

166. IDF Callinan, *Review: Section 4 of the Tribunals Amalgamation Act* (Report, 23 July 2019) [1.25] <https://www.ag.gov.au/sites/default/files/2020-03/report-statutory-review-aat.pdf>.

https://doi.org/10.1177/0067205X231213120 Published online by Cambridge University Press

A failure to deliver a balance of administrative justice properties is also evident in relation to the fourth theme of accessibility. The Department does not provide review applicants with free legal representation and adequate translation services throughout the application and review process. This has made it difficult for many applicants to appropriately present their claims and understand the review procedures and outcomes. The lack of access to free legal representation in the initial application stage is compounded by the IAA's strict circumstances in which new information can be provided by the applicant at review.

Administrative justice requires the delicate balancing of administrative justice properties to create principled tensions. However, even the primary stated aims of IAA review, being provision of quick review, have not been met. This raises the question whether the true objective of the IAA's establishment was not about achieving administrative justice but rather of giving the perception of a fair and efficient administrative process to the Australian public while failing to meet administrative justice principles necessary to balance the needs of the individual with the needs of the state. The mandatory language in the statutory framework and the legislative procedures and Guidelines that favour the Department over the individual applicant support the idea that the IAA is a façade.

This article serves as a warning to future policymakers to preserve checks-and-balances on merits review and ensure that administrative justice is served through full review. To achieve this, the IAA model should not be replicated. Instead, a return to core traditional legal principles of due process is warranted. Applicants should have the right to a hearing and should be able to include any additional evidence that they consider relevant to support their claim. Future refugee review must include free access to legal representatives and interpreters in the lead up to and during review. Refugees are vulnerable persons with little or no English-speaking capacity and are unlikely to have the knowledge and skills to effectively represent themselves. Many are in closed detention in remote facilities and should be prioritised for free legal representation, particularly where the consequences of assessment and review are so serious. Review should be before more than one reviewer and reviewers need to be able to make decisions truly independent of the Department to minimise the risk or perception of bias or government affiliation. Rather than resourcing appeal cases before the Courts, the Australian government should invest in getting review right the first time.

Many of these concerns for administrative justice are not just applicable to the IAA but also extend to review in the Migration and Refugee Division, and more generally in the AAT.[167] At a time when the Australian government has raised the prospect of the abolition of the AAT in favour of a new federal merits review body,[168] it is certainly timely to closely consider the overarching concept of administrative justice as it applies to Australian administrative law and the need to ensure that administrative justice properties are balanced appropriately to create principled tensions that recognise both government aims and individual rights and freedoms. 'Limited' review should not be repeated. Instead, the new federal merits review body should be established with a theory of administrative justice at its core.

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167. Crock (n 99); Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *The Performance and Integrity of Australia's Administrative Review System* (Report, March 2022) <https://parlinfo.aph.gov.au/parlInfo/download/committees/reportsen/024867/toc_pdf/TheperformanceandintegrityofAustralia'sadministrativereviewsystem.pdf;fileType=application%2Fpdf>.

168. Australian Government, 'A New System of Federal Administrative Review', *Attorney-General's Department* (Web Page, 2022) <https://www.ag.gov.au/legal-system/new-system-federal-administrative-review#:~:text=TheAustralianGovernmenthasannounced,merit%2Dbasedsystemofappointments>.

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