Handbook of ART Legal Procedure

Chapter 2, Part 2: Part 5 Migration Act - Statutory duty to disclose adverse information

PART 5 MIGRATION ACT

STATUTORY DUTY TO DISCLOSE ADVERSE INFORMATION

STATUTORY DUTY TO DISCLOSE ADVERSE INFORMATION[1]

1. Introduction

Section 359A of the *Migration Act 1958* (Cth) (the Migration Act) imposes a statutory obligation on the Tribunal when conducting a review under Part 5 of the Migration Act, to give applicants 'particulars' of certain information which is adverse (in the sense that it would be the reason or a part of the reason for affirming the decision under review) and to invite them to comment on it. For the purposes of pt 5 of the Migration Act, references to 'the applicant' mean the person who has made the application for review.[2]

1.1 Amendments made by the *Administrative Review Tribunal (Consequential and Transitional Provisions No. (1)) Act 2024* (Cth)

Section 359A was significantly amended by the *Administrative Review Tribunal (Consequential and Transitional Provisions No. (1)) Act 2024* (Cth) (the C&T No.1 Act). These amendments apply to all review applications before the Tribunal on or after 14 October 2024, whether the application for review was made before, on, or after 14 October 2024.[3] . These changes were intended 'to enable the Tribunal to undertake a flexible conduct of review, proportionate to the matters before it.'[4] Some of the major changes included:

- repealing provisions relating to putting adverse information at the hearing (ss 359AA and 424AA), consequently s 359A(3) was also repealed as it referred to s 359AA;
- removing the provision in relation to prescribed periods to comment on adverse information and removing provisions relating to extensions of time of that prescribed period; [5]
- repealing s 359C which set out the consequences for the applicant failing to comment on s 359A information;[6]
- adding s 359A(4A) which was inserted to clarify the relationship between s 359A obligations and common law natural justice obligations;

[1] Unless otherwise specified, all references to legislation are to the *Migration Act 1958* (Cth) (the Migration Act) and *Migration Regulations 1994* (Cth) (the Regulations) currently in force, and all references and hyperlinks to commentaries are to materials prepared by Legal Services.
[2] *SZPZH v MIAC* [2011] FMCA 407 at [25]; upheld on appeal in *SZPZH v MIAC* [2011] FCA 960.
[3] For review applications which were lodged prior to 14 October 2024 but not finally determined, item 24(4), Schedule 16 of the C&T No.1 Act.
[4] Revised Explanatory Memorandum to the *Administrative Review Tribunal (Consequential and Transitional Provisions No. (1)) Bill 2024* (Cth) , at 90.
[5] S 359B of the Migration Act which contained requirements as to what the written invitation must include was repealed by the C&T No.1 Act. Accordingly, there is no longer a prescribed period or specific provision in relation to extending the time for response.
[6] Previous the repeal of s 359C if an applicant did not respond within the prescribed period or the time as extended, the applicant would lose their right to a hearing.

- adding more exclusions to s 359A(4) for information that was included, or referred to, in the primary decision[7] and information that is prescribed by regulation for the purposes of s 359A(4);[8]
- removing the reference to 'in writing' from s 359A;[9]
- removing "or respond to" from s 359A(1)(c) so that an applicant must 'comment on' the information rather than having the ability to either comment on *or* respond to the information;[10] and
- repealing pt 7 of the Migration Act and consequently s 424A and s 424AA of pt 7 were repealed. These sections were the pt 7 equivalent to s 359A.

2. The nature of the statutory obligation

The obligation to disclose information that would be the reason, or part of the reason, for affirming the decision under review, contained in s 359A, may be discharged orally at the hearing or in writing.

2.1 Disclosing adverse information: s 359A

Where s 359A applies, the Tribunal is required by s 359A(1) to:

- give to the review applicant clear particulars of information that the Tribunal considers would be the reason, or a part of the reason, for affirming the primary decision; [11]
- ensure, as far as is reasonably practicable, that the review applicant understands why the information is relevant to the review, and the consequences of it being relied on in affirming the primary decision;[12] and
- invite the review applicant to comment on it.

The Tribunal is also required by s 359A(2), if the information is given in writing, to:

- give the information and invitation to the review applicant by one of the methods specified in s 379A; or
- if the review applicant is in immigration detention, by a method prescribed for the purposes of giving documents to such a person.[13]

[7] s 359A(4)(d).
[8] s 359A(4)(e). At the date of publication no information has been prescribed.
[9] Before the amendments, s 359A read "Information and invitation given in writing by Tribunal". The ability to give the information orally was in s 359AA which was repealed by the C&T No.1 Act.
[10] According to the revised EM, this was done to make it clear that comments, including considered remarks or observations are invited and required, not merely a non-engaging answer or reply to the invitation, at 91
[11] The word, 'clear', was inserted by the *Migration Amendment (Review Provisions) Act 2007* (Cth) and applies to review applications lodged on or after 29 June 2007.
[12] The words, 'and the consequences of it being relied on in affirming the decision that is under review', was inserted by the *Migration Amendment (Review Provisions) Act 2007* (Cth) and apply to applications lodged on or after 29 June 2007.
[13] reg 5.02.

Where information is given to the review applicant in writing pursuant to s 359A, there is no requirement that the written invitation be given prior to the hearing.[14]

Section 359A(4) exempts certain categories of information from this requirement, namely:

- information which is not specifically about the review applicant, or another person, and is just about a class of persons of which the review applicant, or another person, is a member; or
- information given by the review applicant for the purpose of the application; or
- written information that the applicant gave during the process that led to the decision under review;[15] or
- non-disclosable information; or
- information that was included, or referred to, in the written statement of the decision that is under review; or
- information that is prescribed by regulation for the purposes of this paragraph.

Section 359A(5) specifically excludes from the general requirement to give adverse information, decisions which are taken to be affirmed under s 368C(6), i.e. confirmation of a dismissal decision. It includes dismissal decisions made under s 99, 100 or 101 of the ART Act.

Each of these aspects are discussed in more detail below.

2.2 Non-compliance with the statutory obligation to disclose adverse information

The Tribunal must comply with its statutory obligations, including those in s 359A. If it does not comply, it may result in jurisdictional error even if that error is not material to the outcome of the review. For example, in *MICMSMA v Antoon*[16] the Federal Court held that any breach of s 359A constitutes a jurisdictional error, with the result that the Tribunal's decision is invalid.[17]

[14] *Mfula v MIBP* [2016] FCCA 161 at [12].
[15] For review applications made on, or after, 29 June 2007.
[16] *MICMSMA v Antoon* [2023] FCA 717. An application for special leave to appeal in the High Court was refused on the basis it was not a suitable vehicle to consider the points of principle raised: *Antoon v MICMSMA* [2023] HCASL 172. Although the Court in *Antoon* was considering s 359A as it was before the 14 October 2024 amendments, it still remains relevant as the obligation on the Tribunal remains.
[17] *MICMSMA v Antoon* [2023] FCA 717 at [92]. The Court considered itself bound by *SAAP v MIMIA* [2005] HCA 24 which remains authority for the proposition that a failure to comply with s 359A constitutes a jurisdictional error that results in the invalidity of the Tribunal's decision. However, the Court declined to grant relief because the error was not material to the outcome of the Tribunal's review (at [147]). The judgment overturned the lower court judgment of *Antoon v MICMSMA* [2021] FedCFamC2G 224 at [55]–[57], in which the Court also applied existing authority in *SAAP v MIMIA* [2005] HCA 24 and *DYI16 v MICMSMA* [2021] FCA 612 which held that compliance with ss 359A is mandatory. While the primary judge found that nothing the applicants could have said or written in response would have affected the Tribunal's consideration and would have made no difference to the overall outcome, the primary judge erred because they did not consider whether to withhold relief before remitting the matter for reconsideration. An application for special leave to appeal in the High Court was refused on the basis it was not a suitable vehicle to consider the points of principle raised: *Antoon v MICMSMA* [2023] HCASL 172. Similar to the Federal Court judgment of *MICMSMA v Antoon*, in *Rekha v MICMSMA* [2022] FCA 956 at [17]–[20], the Court held that the Tribunal had erred, in a Student visa cancellation matter, by not putting the appellant's PRISMS record under s 359A which showed that they were not currently enrolled in a course, but that at [21]– [24] the breach was not material to the outcome of the Tribunal's decision. Accordingly, the Court did not grant relief and upheld the Tribunal's decision. At the hearing, the Tribunal had considered that the appellant's lack of current enrolment

However, the Court held that Tribunal decision should not be quashed (that is, relief should be withheld) on the basis that the breach of s 359A was immaterial to the outcome because, even if the Tribunal has complied with s 359A, it would not have made a difference to the outcome. This overturned the lower court's judgment which had quashed the Tribunal decision on the basis that the breach of s 359A was a jurisdictional error. The Federal Court held that the lower court erred in failing to consider whether relief should be withheld.[18] Therefore, while a breach of s 359A will result in a jurisdictional error, if a court determines that the breach was a technical one and would not have made a difference to the outcome, or there would be no utility in remitting the matter, the Tribunal decision may not be quashed.[19]

3. Information that would be the reason, or part of the reason, for affirming the decision

To fall within the ambit of s 359A, the information must be 'information' of a particular kind, and it must be the 'reason or part of the reason for affirming the decision under review'.

Generally speaking, the term 'information' is to be given its ordinary meaning, namely 'that of which one is informed' or 'knowledge communicated or received concerning some fact or circumstance'.[20] 'Information' need not be contained in a written document. A photograph may suffice.[21] Whether or not information is 'the reason, or a part of the reason' for affirming the primary decision depends on the criteria for the making of that decision in the first place.[22]

3.1 Thought processes

Thought processes, subjective appraisals and determinations of the Tribunal do not constitute 'information' and therefore do not fall within the scope of s 359A.[23] The Tribunal is also not

(obtained from PRISMS) was relevant to the discretion to cancel the visa because if the visa cancellation was set aside and the visa was reinstated, they would be in immediate breach of condition 8516 to continue to be a person who would satisfy the primary criteria (including, to be enrolled in a course). Not putting this information to the appellant meant the Tribunal had failed to comply with s 359A. However, the Tribunal's error was not material to the outcome as the Tribunal had relied only upon historical breaches of visa conditions when exercising its discretion to cancel the visa.

[18] *MICMSMA v Antoon* [2023] FCA 717 at [147].

[19] See e.g., *MICMSMA v Antoon* [2023] FCA 717 at [126] where the Court refers to the breach being, in all the circumstances, no more than a technical breach, which formed part of its reasoning to withhold relief, and not quash the Tribunal decision. See also *Singh v MICMA* [2024] FedCFamC2G 18 at [94] and [98]–[102], a matter concerning an Employer Nomination (Class EN) (Subclass 186) visa application refusal, where the Court found jurisdictional error in the Tribunal's failure to comply with s 359A in relation to its own records that there was no application for review of a nomination refusal connected with the visa application, but held there would be no utility in remitting the matter, as the Tribunal would have no choice but to again find the applicant did not meet the criterion that the visa applicant be the subject of an approved nomination. The Court found that it was appropriate to withhold relief on that basis. Cf *Dau v MICMA* [2024] FedCFamC2G 413, which concerned Subclass 820/801 Partner visa applications, in which the Court held the Tribunal breached s 359A in relation to an anonymous allegation on the Department's file (the first jurisdictional error), and the sponsor's oral evidence about the cancellation of the visa applicant's Student visa being the reason they married when they did (the second jurisdictional error). The Court would have withheld relief in relation to the first jurisdictional error, as the Tribunal could not have made a more favourable finding than stating it did not place weight on that information, but remitted the matter for reconsideration on the basis that compliance with s 359A for the sponsor's oral evidence may cause a different Tribunal to take a different view of the materials, and new evidence and arguments could be made: at [91]–[97].

[20] *SZASX v MIMIA* [2004] FMCA 680 at [18]. The Court's findings were undisturbed on appeal: *SZASX v MIMIA* [2005] FCA 68 (application for special leave to appeal dismissed: SZASX v MIMIA [2005] HCATrans 946).

[21] *SZESF v MIMA* [2007] FCA 6.

[22] *SZBYR v MIAC* (2007) 235 ALR 609 at [17].

[23] *Tin v MIMA* [2000] FCA 1109 at [54], *SZEEU v MIMIA* (2006) 150 FCR 214 at [206]–[207]. See also *Paul v MIMIA* (2001) FCR 396 at [95]; *VAF v MIMA* (2004) 206 ALR 471 at [24]; and *SZASX v MIMIA* [2004] FMCA 680 at [19]. The Court's findings were

required to reveal its thought processes or any of its provisional views on the merits of the application. For example:

- In *MIAC v SZHXF*, the Court found that the statement that the Tribunal placed 'great weight' on advice provided to it by a particular source because that source had been found in the past to be careful and reliable was not 'information' for the purposes of s 424A [s 359A].[24] The views of the Tribunal as to the reliability of certain information or sources of information were found to be part of the evaluation or appraisal of the evidence itself and properly characterised as part of the Tribunal's reasoning or thought processes.[25]

- In *SZGIY v MIAC*, it was held that the Tribunal's drawing of an inference, from the date of the applicant's arrival in Australia and the date of her visa application, that the applicant had delayed in applying for protection was more appropriately described as part of the Tribunal's reasoning process than as 'information' for the purposes of s 424A(1) [s 359A(1)].[26]

- In *MIAC v Brar*, the Court found that the inclusion of an inference or intermediate or final finding of fact in a s 359A letter would not lead to a conclusion that the Tribunal had not complied with s 359A.[27]

- In *VAAM v MIMA*, it was held that the Tribunal's perception of lack of detail and specificity in the applicant's earlier statements did not constitute 'information'.[28]

In *MZZZW v MIBP*[29] the Full Federal Court found that the Tribunal's adopting of substantial parts of the first Tribunal's decision (specifically, the reasons for decision) was 'information' for the purpose of s 424A [s 359A] as it would have been a reason or part of the reason for the decision to affirm the delegate's decision and it would be more than mere disclosure of a proposed and prospective reasoning process. The Court's finding appears to be an expansion of the term 'information'.[30] Even if the Tribunal puts findings of the previous Tribunal and its proposed reliance on those findings to an applicant under s 359A, the Tribunal is still required

undisturbed on appeal: *SZASX v MIMIA* [2005] FCA 68. See also *NBKT v MIMA* (2006) 156 FCR 419 at [30]; *SZECF v MIMIA* (2005) 89 ALD 242; *SZBDF v MIMIA* (2005) 148 FCR 302 and *SZSOG v MIAC* [2014] FCCA 769 at [108]; upheld on appeal: *SZSOG v MIBP* [2014] FCA 1053 at [29]. In *VAAM v MIMA* [2002] FCAFC 120, the Full Federal Court held that the Tribunal's perception of lack of detail and specificity in the applicant's earlier statements did not constitute 'information'. See also *Applicant S301/2003 v MIMA* [2006] FCAFC 155 at [19] in which the Court, applying *WAGP v MIMIA* (2002) 124 FCR 276, held that the word 'information' did not encompass a failure to mention a matter to the Tribunal. In *SXSB v MIAC* [2007] FCA 319 at [22], the Court found that differences between the applicant's evidence at a first and second Tribunal hearing were not 'information', but that it was 'no more than an inference which the Tribunal drew from the way in which material, which is no doubt information, was provided to it'. In *SZBJH v MIAC* (2009) 231 FLR 148 at [119], the Court found that the Tribunal's view of the contents of a forged letter was not 'information'. In *SZSWV v MIBP* [2013] FCCA 2146 the Court found that information in the applicant's student visa application which conflicted with his claimed history of harm in Nepal was not in its terms a rejection, denial or undermining of the applicant's claims to be a person owed protection obligations, but was more in the nature of inconsistencies in his evidence, and as such was not 'information' that enlivened any obligation under s 424AA [s 359A]. The Court's findings were undisturbed on appeal: *SZSWV v MIBP* [2014] FCA 513.

[24] *MIAC v SZHXF* (2008) 166 FCR 298 at [13].

[25] *MIAC v SZHXF* (2008) 166 FCR 298 at [20]. See also *SZSCU v MIBP* [2013] FCCA 2261, where the Court found that information about the qualifications and experience of the authors of certain country information was not 'information' for the purposes of s 424A [s 359A], as it was a part of the Tribunal's evaluation or appraisal of the country information.

[26] *SZGIY v MIAC* [2008] FCAFC 68 at [27].

[27] *MIAC v Brar* [2012] FCAFC 30 at [73].

[28] *VAAM v MIMA* [2002] FCAFC 120.

[29] *MZZZW v MIBP* [2015] FCAFC 133 at [92]–[93].

[30] Note that if a Tribunal were to put to an applicant the findings of an earlier Tribunal under s 359A, it would generally also need to put the applicant on notice of its proposal to adopt those findings, as part of the Tribunal's explanation of the 'relevance and consequences' of it relying on the information.

to assess the evidence before it afresh in order to conduct a review (as required by s 348). Reliance upon the reasoning of a previous Tribunal may in some instances undermine a finding that the Tribunal has completed its task of conducting a review.

3.2 Inconsistencies, omissions, gaps

Inconsistencies, defects or a lack of detail or specificity in evidence identified by the Tribunal in weighing up the evidence are also not, of themselves, 'information' for the purposes of s 359A(1).[31] The High Court in *SZBYR v MIAC* held:

> *However broadly 'information' be defined, its meaning in this context is related to the existence of* ***evidentiary material*** *or documentation, not the existence of doubts, inconsistencies or the absence of evidence… the relevant 'information' was not to be found in inconsistencies or disbelief as opposed to the text of statutory declaration itself (emphasis added).*[32]

This position was reiterated in *MIAC v SZGUR*, where the High Court concluded that the existence of 'inconsistencies' and 'contradictions' in an applicant's testimony and written submissions to the Tribunal was not 'information' of the kind to which s 424A [s 359A] is directed.[33] A similar view had been previously expressed in *WAGP v MIMIA* said in regard to the equivalent provision s 359A(1):

> *A conclusion on the part of the [Tribunal] that there is an inconsistency between two pieces of information is not, of itself, 'information' for the purposes of s 424A(1). It is no more than an observation made by the [Tribunal] in dealing with a conflict between information given by the appellant, and a claim made by him in support of his application (i.e. his assertion that he had received repeated ultimatums to leave Iran).*[34]

Subsequently, in *SZTGV v MIBP*[35] the Full Federal Court, after detailed consideration of a number of Federal Court judgments as well as the High Court judgments of *SZBYR v MIAC*[36] and *MIAC v SZLFX*,[37] unanimously confirmed that 'information' is related to the existence of evidentiary material or documentation and not the existence of doubts, inconsistencies or an absence of evidence. What had *not* been said at a compliance interview, the assertion of a forensic principle that if the applicant's version were true then he would have mentioned it at that time, and a deduction by the Tribunal that because it was not mentioned at that time the account was false was found not to constitute information within the meaning of s 424A

[31] *SZBYR v MIAC* (2007) 235 ALR 609 at [18]. The Court endorsed the views of Finn and Stone JJ in *VAF v MIMIA* (2004) 206 ALR 471 at [24] and cases there cited. See also *A125 of 2003 v MIAC* (2007) 163 FCR 285; *SZGSI v MIAC* (2007) 160 FCR 506; *SZKFQ v MIAC* [2007] FCA 1432 at [24]; *SZEZI v MIMIA* [2005] FCA 1195; *SZGIY v MIAC* [2008] FCAFC 68 at [29]; *SZMAY v MIAC* [2008] FMCA 808 at [38]; *SZLSM v MIAC* (2009) 176 FCR 539 at [32] and *SZSOG v MIAC* [2014] FCCA 769 at [113]; upheld on appeal in *SZSOG v MIBP* [2014] FCA 1053 at [34]. In *SZMWT v MIAC* (2009) 109 ALD 473 at [29], the Court found that omissions the delegate noted in the protection visa application were not 'information'.
[32] *SZBYR v MIAC* (2007) 235 ALR 609 at [18].
[33] *MIAC v SZGUR* (2011) 273 ALR 223 at [9], [77]. See also *SZSRG v MIBP* [2014] FCCA 173. Upheld on appeal in *SZSRG v MIBP* [2014] FCA 550 at [8]–[9].
[34] *WAGP of 2002 v MIMIA* (2002) 124 FCR 276 at [33].
[35] *SZTGV v MIBP* (2015) 318 ALR 450. Note, this matter concerned three appeals from judgments dismissing applications for judicial review of Tribunal decisions which affirmed refusals to grant protection visas. As each appeal raised similar issues about the operation of ss 424A and 424AA [s 359A], they were heard together.
[36] *SZBYR v MIAC* (2007) 235 ALR 609.
[37] *MIAC v SZLFX* (2009) 238 CLR 507.

[s 359A].[38] Similarly information relating to the absence of any threat to an applicant or his family from a drug dealer was also found not to constitute information within the meaning of s 424A [s 359A].[39]

Nonetheless where the Tribunal perceives an inconsistency, omission or other deficiency in the evidence, consideration is given to whether there is some underlying information that may be relied on to support that conclusion.[40] In *Paul v MIMA*, Allsop J observed that the distinction between information gained by the Tribunal and the subjective thought processes of the Tribunal could become a fine one if the subjective thought processes were as they were because of the perceived importance of some piece of knowledge.[41] Those thought processes may reveal the relevance of the material, requiring the Tribunal to give particulars of the information underpinning the thought processes.[42]

While inconsistencies, gaps and omissions are not of themselves 'information' for the purposes of s 359A, there are some circumstances in which they may give rise to the underlying information falling within s 359A(1).

Prior to the High Court's judgment in *SZBYR*, a view was taken in lower courts that where there was a significant failure to mention a claim (i.e. an omission), the fact that the applicant had said so much but not more on a prior occasion, could be 'information' for the purposes of s 359A.[43] In other words, while the perception of an omission could not be information, the Tribunal's knowledge of what the applicant did in fact say, and the fact that it did not include the particular claim, could be regarded as information. This was explained by Allsop J in *SZEEU v MIMIA* in regard to the equivalent provision to s 359A(1)(b):

> *The information is the knowledge imparted to the Tribunal of a prior statement **in a particular form**. The significance given to it by considering it in the light of evidence is the product of mental processes. This significance and those mental processes are not information, but rather, are why the information is relevant for s 424A(1)(b) (emphasis added).*[44]

[38] *SZTGV v MIBP* (2015) 318 ALR 450 at [102], [103].
[39] *SZTGV v MIBP* (2015) 318 ALR 450 at [134].
[40] See *SZJZB v MIAC* [2008] FMCA 848 at [53] where the Court found that while any appraisal of inconsistency between evidence of the applicant and his wife would not constitute information, consideration had to be given to whether any aspect of the evidence given by the wife (as distinct from inconsistencies between her evidence and that of her husband) was such as to give rise to the obligation under s 424A(1) [s 359A(1)]. Whilst at first instance the Court found that the information went to an inconsistency and was not information for the purposes of s 424A [s 359A], the Federal Court on appeal in *SZJZB v MIAC* [2008] FCA 1731 found that the information went to the underlying claim. However, the proposition in the case remains the same- namely that any appraisal of inconsistency between evidence of a husband and wife would not constitute information for the purposes of s 424A [s 359A] except where it goes to the underlying claim.
[41] *Paul v MIMA* (2001) 113 FCR 396 at [95].
[42] *Paul v MIMA* (2001) 113 FCR 396.
[43] In *SZECF v MIMIA* (2005) 89 ALD 242 the Tribunal found the applicant had fabricated a claim on the basis that there was no reference to it in the applicant's detailed statement given to the Department. Justice Allsop held that the relevant information, for the purposes of s 424A [s 359A], was that the applicant has said so much *and no more* in his statement to the Department. His Honour distinguished *NAIH of 2002 v MIMIA* (2002) 124 FCR 223, where Branson J held that the reason for the Tribunal's decision was not any information derived from the written statements in the Protection Visa application but rather the unconvincing nature of the applicant's oral evidence at the hearing in contrast with the persuasive nature of the cohesive account in his earlier written statement. Importantly, in *SZECF*, the Tribunal's conclusion in reliance on the information in the Protection visa application was not simply a lack of satisfaction as to the applicant's claims, but rather that the claim had been fabricated. See also *SZDKK v MIMIA* [2005] FCA 1203, *SZBUS v MIMIA* [2005] FCA 1223; *NAZY v MIMIA* (2005) 87 ALD 357. In *SZIKG v MIAC* [2007] FMCA 337, Raphael FM expressed the view that lack of evidence from internet searches carried out by the Tribunal was 'information' for the purposes of s 424A [s 359A] which did not fall within the exceptions specified in s 424A(3) [s 359(4)]. Essentially the information was the fact that there was no information. The Court's findings were undisturbed on appeal: *SZIKG v MIAC* [2007] FCA 788.
[44] *SZEEU v MIMIA* (2006) 150 FCR 214 at [221].

In *MIAC v A125 of 2003*, the Court noted that the High Court in *SZBYR* did not expressly overrule this reasoning in *SZEEU*, but stated that there was 'real question' as to whether the High Court's description of 'information' had the effect of impliedly overruling at least part of that earlier judgment.[45] Subsequent case law suggests that it may still have application.[46]

It has been suggested that whether omissions or gaps in evidence enliven s 359A obligations will depend on the way they are used by the Tribunal.[47] In *SZGSI v MIAC,* Justice Marshall (with Moore J generally agreeing) endorsed the view of Weinberg J in *NBKS v MIMA* in which his Honour stated in regard to the equivalent provision s 359A:

> *…each case must depend upon its own particular circumstances. There is no reason in principle why an omission (which the Tribunal views as important, and which is plainly adverse to the applicant's case) should be treated any differently, when it comes to s 424A, than a positive statement. This is particularly so when, as the Tribunal's seems to have done here, it treats the omission as though it provides implicit support for a positive assertion that is detrimental to an applicant's case. It makes no difference whether the omission is to be found in a prior statement of an applicant, or as in this case, in a statement provided by a third party.*[48]

The Federal Court in *SZMKR v MIAC* took the view that *NBKS v MIMA* remained good law following *SZBYR v MIAC*[49] and found that as was the case in *NBKS v MIMA*, the absence of evidence from someone who would have been expected to be able to provide such evidence, was treated by the Tribunal as an implicit positive statement, not merely as a gap.[50] The Court held in regard to the equivalent provision s 359A(1):

> *The Tribunal's statement that nothing in the DFAT reports confirmed the appellant's claims that he was a member of the Freedom Party or its joint Secretary in the Narsingdi district from 1994 to 1995 is a conclusion drawn from a reasoning process that relies on a number of implicit positive propositions.[51] …The result is that, because the Tribunal relied on the failure of the informant in Bangladesh to confirm the appellant's membership or office-holding in the Freedom Party as an implicit assertion that the appellant was not a member or office-holder of that party, the Tribunal was obliged to comply with s 424A(1) of the Migration Act in respect of that information.[52]*

[45] *MIAC v A125 of 2003* (2007) 163 FCR 285 at [73].
[46] In *SXSB v MIAC* [2007] FCA 319 at [25], for example, Besanko J noted that 'I have not attempted to express the distinction in precise terms and it seems to me to be a somewhat elusive one.' See e.g., *ARF18 v MICMA* [2023] FedCFamC2G 621 at [32]–[45] where the Court found that information given at hearing by the applicants' son, which was inconsistent with an earlier submission of the son's to the delegate, was information for the purpose of s 424A(1) [s 359A]. The Tribunal referred to the inconsistency when rejecting the applicants' claim. The Court held that 'the effect of the information considered by the Tribunal, taken together, led the Tribunal to express disbelief' as to the claims, and the information played a part in the reasoning of the Tribunal. The Court reasoned that the cumulative effect of the information did not alter the true character of the information as 'information'. The information given by the son at hearing did not fall within the exceptions, as it was not given by the applicants (at [45]). In concluding that it was 'information', the Court relied primarily on authorities prior to *SZBYR*, including *SZEEU*.
[47] *SZGSI v MIAC* (2007) 160 FCR 506 at [6], [43].
[48] *NBKS v MIMA* (2006) 156 FCR 205 at [39]. In *NBKS* the Tribunal had done a search for the applicant's name using internet search engines and found that it did not appear in any context. This 'information' was used to conclude that the chance the applicant's AAT decision would come to the attention of Iranian authorities was remote.
[49] *SZMKR v MIAC* [2010] FCA 340 at [37].
[50] *SZMKR v MIAC* [2010] FCA 340 at [33].
[51] *SZMKR v MIAC* [2010] FCA 340 at [33].
[52] *SZMKR v MIAC* [2010] FCA 340 at [39].

The Full Federal Court's comments in *SZTGV v MIBP*[53] that the reasoning of the High Court in *SZBYR* and *SZLFX* is not readily reconcilable with that of the Full Federal Court in *SZEEU* and *NBKS* in relation to what constitutes 'information' for the purposes of s 424A [s 359A], illustrates the difficulties the Tribunal faces when complying with its obligations under these provisions.[54]

3.3 Information undermining the applicant's claims vs inherently 'neutral' information

In considering whether statements in a statutory declaration, which were found by the Tribunal to be inconsistent with the applicant's oral evidence, were the reason, or a part of the reason, for affirming the decision, the High Court in *SZBYR v MIAC* noted:

> *…Those portions of the statutory declaration did not contain in their terms a rejection, denial or undermining of the appellant's claims to be persons to whom Australia owed protection obligations. Indeed, if their contents were believed, they would, one might have thought, have been a relevant step towards rejecting, not affirming the decision under review.*[55]

Courts applying *SZBYR* have therefore found that information which directly and in its terms contains a rejection, denial or which inherently undermines the review applicant's claims may be subject to s 359A, but information which is on its face neutral will not fall within s 359A(1).[56] Likewise, information that merely assists the Tribunal to make assessments of the applicant's credibility,[57] or in some cases, information which underpins an expert's opinion,[58] does not fall within the purview of s 359A.

[53] *SZTGV v MIBP* [2015] FCAFC 3 at [18].

[54] In *Springs v MICMSMA* [2021] FCA 197 at [23]–[28], while acknowledging and applying the existing authority in *SZBYR v MIAC* (2007) 235 ALR 609, the Federal Court raised its apparent difficulties with the High Court's reasoning in *SZBYR*, including that information must go 'in its terms'(i.e. explicitly, to the criteria) which seemed difficult to reconcile with the words 'or part of the reason' in s 359A. The Court considered that those words 'or part of the reason' indicated that the concept of information must include integers of evidence conceptually below the level of a visa criterion. An application for special leave to appeal to the High Court was refused: *Springs v MICMSMA* [2022] HCATrans 17.

[55] *SZBYR v MIAC* (2007) 235 ALR 609 at [17].

[56] *SZICU v MIAC* (2008) 100 ALD 1 at [26]; *MZXBQ v MIAC* (2008) 166 FCR 483 at [29]; *SZGIY v MIAC* [2008] FCAFC 68 at [23], [25]; *SZMFI v MIAC* [2008] FCA 1894.Information that merely assists the Tribunal to make assessments of the applicant's general credibility or believability does not fall within the purview of ss 424A/424AA [s 359A]: see, for example, *SZNPJ v MIAC* [2010] FMCA 410 at [64]–[66]; upheld on appeal: *SZNPJ v MIAC* [2010] FCA 1233, application for special leave to appeal dismissed: SZNPJ v MIAC [2011] HCASL 47.

[57] *SZNPJ v MIAC* [2010] FMCA 410 at [66] The Court noted the fact that some information might cast doubt on the applicant's credibility, whether generally or in relation to a specific issue, was not to the point. Undisturbed on appeal: *SZNPJ v MIAC* [2010] FCA 1233 application for special leave to appeal dismissed: *SZNPJ v MIAC* [2011] HCASL 47.

[58] *Wu v MIAC* [2011] FMCA 14. The Tribunal sought advice of an independent expert as to whether the applicant had suffered domestic violence, providing him with the applicant's claims and 'confidential documents'. It was held that in the context of referrals to an independent expert under reg 1.23(1B)(b), the Tribunal will not fall foul of s 359A for not providing to an applicant information given to the expert because it is the expert's opinion rather than the information underpinning that opinion that would be the reason for affirming the decision. In contrast, in *Mohsin v MIBP* [2019] FCCA 3731 at [44]–[47] the Court found that the Tribunal had erred by not putting to the applicant dob-in information provided by his sponsor that alleged, among other things, that he was acting in a fraudulent manner to remain in Australia. The Court held that this was information for the purposes of s 359A as it impacted upon the Tribunal's preliminary finding that the applicant had not suffered relevant family violence. As this finding is what bound the Tribunal to refer the applicant to an independent expert under reg 1.23(1)(c), the Court considered it was part of the reason for affirming the decision. Although the Court characterised this as s 359A information, it could also potentially be inferred to be a breach of the Tribunal's s 360 obligation.

The following cases are illustrations of this distinction:

- In *SZICU v MIAC* the relevant 'information' was said to be contained in the applicant's passport, which showed that he left India legally on a passport in his own name. The Court found that that information did not in its terms contain a rejection, denial or undermining of the appellant's claim to be a person owed protection obligations. On that question, the passport was found to be neutral. What was said to undermine the applicant's claims was country information which was not obliged to be disclosed because it fell within s 424A(3)(a) [s 359A (4)(a)].[59]

- In *MZXBQ v MIAC* the Court found that information going to the applicant's general credibility did not fall within s 424A [s 359A]. The Court noted that lack of credibility in itself does not necessarily involve rejection, denial or undermining of an applicant's claims.[60]

- In *SZGIY v MIAC* the Court agreed that information about the appellant's date of arrival in Australia was in itself neutral and so could not fall within s 424A(1) [s 359A(1)], even though the information was used by the Tribunal to conclude that the applicant had delayed in lodging her protection visa application.[61] The Tribunal's use of those dates were part of the Tribunal's reasoning process.

- In *SZJBD v MIAC*,[62] the Court considered whether information about the founding and banning of Falun Gong was information which inherently undermined the applicant's claims to be a Falun Gong practitioner. The Court held that the Tribunal's conclusions that the applicant lacked knowledge of Falun Gong did not involve any 'information' but were part of the Tribunal's thought processes. The factual statements were neutral as they did not tend for or against affirmation or rejection of the decision of the delegate as pieces of information in their own right. They only had that significance when matched with answers given by the applicant.[63] Accordingly, the Tribunal was not obliged to disclose the information under s 424A [s 359A].

- In *Bhandari v MIAC*, the Court found there was nothing in the additional information from the education provider about the circumstances leading to the issue of a non-compliance certificate that amounted to a rejection, denial or undermining of the applicant's claims.[64] Rather there was an absence of information supporting his contentions as to whether there were exceptional circumstances leading to the non-compliance with the visa condition.

- In *Poonia v MIBP*, the Court found that a PRISMS record, which documented an applicant's history of undertaking educational courses, did not constitute or contain a rejection, denial or undermining of the applicant's claims to meet the requirement to be a genuine applicant for entry and stay as a student, which was the criteria in review.[65] The Court held that the

[59] *SZICU v MIAC* (2008) 100 ALD 1 at [26].
[60] *MZXBQ v MIAC* (2008) 166 FCR 483 at [29]. See also *BVE16 v MIBP* [2018] FCA 922 at [43]–[44] in which the Court agreed with *MZXBQ* and held that information which is relevant only to credibility is not information for the purposes of s 424A(1) [s 359A(1)]. It considered that the position is different though where information has a dual character, that is it goes to general credibility but also undermines particular claims.
[61] *SZGIY v MIAC* [2008] FCAFC 68 at [23], [25].
[62] *SZJBD v MIAC* (2009) 179 FCR 109.
[63] *SZJBD v MIAC* (2009) 179 FCR 109 at [104].
[64] *Bhandari v MIAC* [2010] FMCA 369 at [53].
[65] *Poonia v MIBP* [2016] FCCA 908 at [47]. Upheld on appeal: *Poonia v MIBP* [2016] FCA 1120 at [18].

information may be relevant in determining whether the applicant satisfies the relevant criteria, but that does not mean that the PRISMS record, it its terms, undermined the applicant's claim. Rather it would be the Tribunal's deliberations on what the record meant in relation to the applicant's intentions. However, where enrolment in a course is the relevant criteria under review, the PRISMS record may be 'information' for the purposes of s 359A(1).[66]

- In *Almomani v MIBP*, which concerned a Partner (Temporary) (Class UK) (Subclass 820) visa matter, the Court found that inconsistencies in evidence between the appellant and his sponsor as to why their relationship was not registered was not information that would attract the obligation in s 359A. The Tribunal when considering the social aspect of the claimed relationship had doubts as to why the appellant did not persuade the sponsor to register the relationship and whether, at the time, the sponsor was of the opinion that there was not yet a basis for registering the relationship. The Court found that these doubts arose from a synthesis of the evidence arising from the differences perceived in the appellant's and the sponsor's explanations and that the inconsistent information from the sponsor only acquired significance because of this synthesis. The Court held that there is no obligation to give particulars of information that acquires significance only as a result of the Tribunal's subjective synthesis of the evidence.[67]

- In *Le v MICMSMA*, the Court held that the appellant's sponsor's movement records, which disclosed that he was not in Australia for extended periods of time, on their own and without reference to any other material undermined her claim to a genuine and continuing relationship with him, which was relevant to her claim that there were compelling reasons to waive the Schedule 3 criteria. The Court found that the Tribunal should have put the information in the movement records to the appellant under s 359A.[68]

- In *MIMA v Qazizada*, which related to a Subclass 116 Carer visa application, the Court held that information in a department file for a different visa application by the same visa applicant, which indicated that she and her claimed sister shared the same mother and were at least half-sisters, did not say anything in its terms to suggest that the two women were not sisters, relevant to the criterion for the visa that the applicant be the carer of an Australian relative. Consequently, the information was not 'information' to which s 359A applied.[69]

In *Springs v MICMSMA*, the Federal Court highlighted its apparent difficulties with the reasoning in *SZBYR* that the information must 'in its terms' undermine an applicant's claims. The Court reasoned that the idea that information must go 'in its terms' (i.e. explicitly, to the visa criteria) was difficult to reconcile with the words of s 359A that the information can be 'part of the reason' for affirming the decision under review.[70] The Court considered that the wording of s 359A explicitly accepts that information need not resolve the review application in its entirety and that the concept of information must include integers of evidence conceptually

[66] *Poonia v MIBP* [2016] FCCA 908 at [43]. Upheld on appeal: *Poonia v MIBP* [2016] FCA 1120 at [18].
[67] *Almomani v MIBP* [2020] FCA 264 at [47].
[68] *Le v MICMSMA* [2023] FCA 1547 at [31]–[32].
[69] *MIMA v Qazizada* [2024] FCA 989 at [6].
[70] *Springs v MICMSMA* [2021] FCA 197 at [25]. An application for special leave to appeal to the High Court was refused: *Springs v MICMSMA* [2022] HCATrans 17.

below the level of a visa criterion.[71] In the Court's opinion, the consequence of the reasoning in *SZBYR* is that it ignores this aspect of the provision. While the Court in *Springs* applied the existing authority in *SZBYR*, it provides a useful demonstration of the conceptual difficulties associated with determining what is information for the purpose of s 359A(1).

3.4 Role of the Tribunal's reasons when determining relevance of the information

The High Court in *SZBYR* also made clear that whether information would be the reason or a part of the reason for affirming the primary decision does not turn on 'the reasoning process of the Tribunal', or 'the Tribunal's published reasons'. The Court found that the use of the future conditional tense ('would be') rather than the indicative, strongly suggested that the operation of s 424A(1)(a) [s 359A(1)(a)] was to be determined in advance, and independently, of the Tribunal's reasoning on the facts of the case.[72]

Following the High Court's decision in *SZBYR v MIAC*, some courts found that even if the Tribunal's decision record made no mention of the information, it could be found to fall within s 359A. In *MZXBQ v MIAC*, the Federal Court, relying on the comments in *SZBYR*, found that it is not correct to determine whether particular information would fall within s 424A [s 359A] by reference to the Tribunal's reasons for decision.[73] Instead, the Court found that consideration should be given to the information's dispositive relevance to the claims advanced by the applicant.[74]

Nevertheless, in *MIAC v SZLFX* the High Court found that there was no evidence or necessary inference that the Tribunal had 'considered' or had any opinion about the information in question, which was contained in a file note on the Tribunal file but not referred to in the Tribunal's decision. As the Tribunal's reasons showed that what counted against the first respondent were internal inconsistencies in his evidence, and did not refer to the information in question, the only inference available was that the Tribunal did not consider the information would be the reason or part of the reason for affirming the decision.[75] The High Court effectively

[71] In *Springs v MICMSMA* [2021] FCA 197 a third party witness for the applicant gave evidence that they were of the opinion that the applicant, who had applied for a Distinguished Talent (Subclass 858) visa, had had an internationally recognised record of outstanding achievement, although the witness also stated that they were not familiar with the applicant or his work prior to his audition. The Court, with some hesitancy, accepted that the information that the witness was not familiar with the applicant did not fall within s 359A(1) as it did not 'in its terms' undermine the visa criteria that the applicant was seeking to satisfy (at [24]). While it implied that the applicant did not have an internationally recognised record, her evidence did not undermine the visa criteria without the requisite thought process of deduction that if she was not familiar with the applicant, then he did not have the requisite internationally recognised record. This required deduction meant her evidence did not 'in its terms' undermine the visa criteria. An application for special leave to appeal to the High Court was refused: *Springs v MICMSMA* [2022] HCATrans 17.

[72] *SZBYR v MIAC* (2007) 235 ALR 609 at [17]. See also *Awadallah v MIBP* [2015] FCCA 3126 at [39] where the Court applied *SZBYR v MIAC* and found that the relevant information fell within s 359A(1) solely on the basis of the hearing record, although it did not ultimately form part of the Tribunal's reasons. *SZBYR* overturned the reasoning in a range of cases preceding the High Court judgment, such as *SZEEU v MIMIA* (2006) 150 FCR 214 at [208]–[215], [155], [165], which indicated that, in determining whether s 359A(1) was engaged, the question was whether the information was at least 'a part' (that is, any part) of the reason for affirming the decision under review, even if only a minor or subsidiary part.

[73] *MZXBQ v MIAC* (2008) 166 FCR 483.

[74] *MZXBQ v MIAC* (2008) 166 FCR 483 at [27]. In *SZRRX v MIAC* [2013] FMCA 84 the Court accepted that third party evidence regarding whether the applicant's girlfriend had become pregnant, or even had had abortions, was not information that the Tribunal considered would be a reason or a part of the reason for affirming the decision under review where the Tribunal's decision record revealed no mention of the pregnancies or abortions and it was the applicant's claim to fear persecution because of his sexual orientation, not because he had a girlfriend who had been pregnant and had three abortions. The basis on which the question of the applicant's sexual orientation was settled was with reference to information that, contrary to his claim to have only had relationships with men, the applicant had had a girlfriend: at [60], [66]–[68].

[75] *MIAC v SZLFX* (2009) 238 CLR 507 at [24]–[26]. *SZLFX* was applied in *SZNBE v MIAC* (2009) 112 ALD 114 at [39]–[40].

upheld the approach taken by the Full Court of the Federal Court in *SZKLG v MIAC* which found, having regard to the word 'considers' in s 424A(1) [s 359A(1)], that the obligation to proceed pursuant to s 424A [s 359A] arises only if *the Tribunal* forms the opinion that particular information would be the reason, or part of the reason, for affirming the relevant decision.[76] The conditional nature of the obligation indicated that the Tribunal must consider the question in advance of its decision, considering the information upon which it would act, should it decide to affirm the relevant decision.

Similarly, in *SZLPJ v MIAC*, the Federal Court found that the question of whether s 424A(1) [s 359A(1)] is engaged requires an examination of the Tribunal's state of mind, not at the time of the Tribunal's decision, but rather at some anterior point, at which the Tribunal turns its mind to the particulars which must be provided.[77] In determining what the Tribunal's state of mind was at that anterior point, the Court accepted that the statement about the Tribunal's present state of mind made when it delivered its reasons for decision was sufficient to permit the drawing of an inference that the same state of mind existed at an earlier time. Accordingly, the Court drew an inference that the Tribunal did not at that earlier time or those earlier times, consider that information about another applicant who had made similar protection claims would be the reason or a part of its reason for affirming the decision that was under review.

In *SZMPT v MIAC*, consistently with the High Court's decision in *MIAC v SZLFX*, the Court was prepared to infer from the complete absence of any mention of the relevant information in the hearing, in the decision record or at any other stage in the course of the review, that the Tribunal did not consider the information to be relevant.[78] The Federal Court observed that it does not follow from *SZBYR v MIAC* that in making an assessment of whether s 424A(1) [s 359A(1)] was engaged, a Court can never have regard to the reasons of the Tribunal. While the Tribunal's reasons are not to be the starting point, the Court, in making its assessment, may draw inferences from the Tribunal's reasons as to whether the Tribunal considered the information to be a reason for affirming the decision.[79]

More recently, in *SZTGV v MIBP*[80] the Full Federal Court, unanimously confirmed that 'information' for the purposes of s 359A does not extend to the 'prospective reasoning process' of the Tribunal, that 'information' must be information that 'would', not 'could' or 'might', be the reason or part of the reason for affirming the decision and that such 'information' necessarily involves a rejection, denial or undermining of the applicant's claims.

[76] *MIAC v SZLFX* (2009) 238 CLR 507 affirming the reasoning of the Full Federal Court in *SZKLG v MIAC* (2007) 164 FCR 578 at [33].
[77] *SZLPJ v MIAC* (2007) 164 FCR 578 at [15]–[16].
[78] *SZMPT v MIAC* [2009] FCA 99. See also *SZMNP v MIAC* [2009] FCA 596 at [52].
[79] See also *SZLJF v MIAC* [2009] FCA 158 at [18] where the Court drew an inference from the Tribunal's reasons for decision, that an adverse conclusion drawn by a previous Tribunal about similar protection claims made by other applicants did not form part of the second Tribunal's thinking In *MZYLC v MIAC* [2011] FMCA 925 the Court held that in all the circumstances and reading the Tribunal's decision as a whole it was clear that the Tribunal had no regard to, and in all probability no awareness of, material about the applicant's identity. Further, even if it had some awareness of this material, it was plain that the Tribunal paid it no regard. The Tribunal's decision was arrived at on the basis of materials to which it had referred to. Upheld on appeal: *MZYLC v MIAC* [2012] FCA 213 at [6]. In *SZQMZ v MIAC* [2012] FCA 1005 the Court at [67] found that the fact the Tribunal did not consider the influence of statements made by the applicant's sister during her application for review upon the applicant's credibility during his own application for review showed that the Tribunal did not consider the issue to be a part of the reason for affirming his decision. Although the Tribunal in the applicant's sister's case doubted her credibility because she did not know critical facts about the applicant's alleged detention, and while the Tribunal ultimately determined in the applicant's case that his claimed detention never occurred, the Tribunal reached that conclusion in relation to the applicant on independent grounds and not based upon any evidence from his sister ([62]–[63]).
[80] *SZTGV v MIBP* (2015) 318 ALR 450. See also *MIBP v SZTJF* [2015] FCA 1052.

Following these authorities, where the Tribunal determines that it would not place weight on particular information that could, if accepted, undermine an applicant's claims, the Tribunal generally takes care to ensure that all the material, including the recording of the hearing, the decision record and review-related correspondence, do not suggest a different attitude in relation to the material. If some material indicated that the Tribunal might have placed weight on the information, it may undermine the position that it had not placed weight on the material, and lead to a finding that the information should have been put to the applicant under s 359A. The following judgments are examples of situations where the Court has found the Tribunal has, and has not, placed weight on information:

- In *SZJOU v MIAC*,[81] the Tribunal stated that it had placed 'little weight' on evidence given by the applicant's wife which undermined his claims. This statement suggested that the Tribunal had placed some weight on the information and the Court found that the information was caught by s 424A [s 359A] after considering objectively whether the information could, at the stage it was given, undermine the applicant's case.[82]

- In contrast, in *SZOMJ v MIAC*, the Federal Magistrates Court, applying *SZLFX*, found it impossible that s 424A [s 359A] applied in circumstances where the Tribunal's decision statement expressly disclaimed giving any weight to particular information, and the Tribunal foreshadowed at hearing with the applicant that it would not be giving weight to the information.[83] The Tribunal had also set out in its reasons why it gave no weight to the information.[84]

- In *Mazumdar v MIAC* the Federal Magistrates Court, also applying *SZLFX*, found that s 359A was not engaged where Tribunal did no more than address the applicant's application for review upon a factual assumption regarding non-compliance with a visa condition which the applicant had invited the Tribunal to adopt. The Court found that the Tribunal's reasoning showed it did not base its decision upon any information inconsistent with the case as presented by the applicant, and that it was the Tribunal's evaluation of the information given by the applicant, and not the PRISMS records which recorded his enrolment as cancelled, which provided the reason for affirming the delegate's decision.[85]

- In *Quadri v MICMSMA*,[86] the Federal Court held that the Tribunal's reasons indicated that its decision was informed, not by the contents of the PRISMS records on the Tribunal file, but by the appellant's own evidence given at the Tribunal hearing that he had discontinued

[81] *SZJOU v MIAC* [2009] FMCA 24.
[82] *SZJOU v MIAC* [2009] FMCA 24 at [21]
[83] *SZOMJ v MIAC* [2010] FMCA 707. The Court stated that an inference that the Tribunal held a state of mind prior to the decision will almost always be drawn from an examination of the reasons subsequently given by the Tribunal, and that if the subsequent reasons show that it arrived at a decision without giving any attention or weight to the adverse information, then usually the Court will be unable to conclude that it answered the description of information giving rise to an obligation under s 424A(1) [s 359A(1)]: at [57].
[84] *SZOMJ v MIAC* [2010] FMCA 707 at [58]–[59]. See also *SZTKN v MIBP* [2014] FCCA 2213, where the Tribunal accepted that an applicant was unaware of the contents of a previous visitor visa application and was therefore unaware that information put forward in that application was 'false'. The Court found the Tribunal had 'made plain' that its adverse credibility finding against the applicant was derived from matters 'extensively set out' earlier in the decision record which contained no reference to the visitor visa application. It held there was no basis to draw an inference the Tribunal considered that the information in the visitor visa application formed part of the reason for affirming the decision under review: at [52]–[54]. Undisturbed on appeal: *SZTKN v MIBP* [2015] FCA 212.
[85] *Mazumdar v MIAC* [2012] FMCA 1170 at [58]–[59]. See also *Poonia v MIBP* [2016] FCCA 908 at [53]–[55], which was upheld on appeal: *Poonia v MIBP* [2016] FCA 1120.
[86] *Quadri v MICMSMA* [2020] FCA 246.

his course of study and his failure to produce any evidence, such as a certificate of enrolment, to indicate that he was currently enrolled in a course of study. The Tribunal referred to the PRISMS records during the hearing but told the appellant it was unnecessary to take him to the PRISMS records because there was nothing in it which was different from what he had informed the Tribunal about his lack of enrolment. In this instance, the Court interpreted the Tribunal's reasons to mean that it did not consider that the information in the PRISMS records would inform its decision or any part of its decision to affirm the decision under review (rather it was the appellant's own evidence that informed its decision).[87]

- In *MZYIA v MIAC*[88] while the Tribunal did not rely on notes of interview from the applicant's student cancellation file, it made specific reference, in its reasons for decision relating to the applicant's protection visa application, to some of the information contained in the notes. The Federal Court held the Tribunal had made use of the information as part of its reasoning in refuting an important aspect of the appellant's claims. The Court found it followed that there was a point at which the Tribunal had reached the state of mind whereby it considered that the information in the notes of interview would be part of the reason for affirming the decision under review.[89]

- In *SZRRN v MIAC*[90] while the Court accepted the Tribunal's statement of reasons referred at length and in detail to the applicant's oral interview with the delegate, in circumstances where the applicant did not appear at the hearing as scheduled and the Tribunal was ultimately not satisfied as to the applicant's claims on the evidence before it, it found the statement of reasons did not disclose with any clarity that the Tribunal was minded to affirm the delegate's decision because of that information in the oral interview. The Tribunal's statement that it missed '*…the opportunity to discuss [those] issues in considerably greater detail*' was not language that suggested the Tribunal had relied on those issues for its decision, rather that there were gaps and defects in the applicant's evidence.

In relation to the scope of operation of s 424A(1) [s 359A)(1)], the Court in *SZTPW v MIBP*[91] held that to engage s 424A(1) [s 359A)(1)], the Tribunal must have had information in its mind as part of a chain of reasoning, the conclusion of which would be the affirmation of the delegate's decision, and that the Tribunal intended to affirm the decision on the basis of that reasoning.

Despite this more recent emphasis on the Tribunal's state of mind, there has been some varying applications of the High Court's interpretation of when s 359A is engaged. In the judgment of the Full Federal Court in *Khan v MIAC* it was held that if the information in question

[87] Quadri v MICMSMA [2020] FCA 246 at [27]. The Court also noted that the appellant's own evidence is not information for the purposes of s 359A because of the exception in s 359A(4).
[88] *MZYIA v MIAC* [2011] FCA 642.
[89] The Court's reasoning suggests that if the Tribunal's decision refers to information obtained from a 3rd party (in this case the Department), in the absence of any indication that it was not considered to be relevant, there is a risk that a Court might infer that the information comes within s 424A [s 359A].
[90] *SZRRN v MIAC* [2013] FMCA 3 at [34]–[48]. Undisturbed on appeal: *SZRRN v MIBP* [2014] FCA 77.
[91] *SZTPW v MIBP* [2015] FCCA 259. Upheld on appeal in *SZTPW v MIBP* [2015] FCA 564 at [24]. See also the related judgment of *SZTPY v MIBP* [2015] FCCA 260. Upheld on appeal in *SZTPY v MIBP* [2015] FCA 565.

is such that it could not have been rejected at the outset as irrelevant, omission of any reference to it in the Tribunal's reasoning will not operate to exclude the obligation under s 359A.[92]

In *MIAC v Saba Bros Tiling Pty Ltd*[93] the Federal Court commented (in *obiter*) that the information, at the time that it is given to the applicant under s 359A, must be rationally capable of being seen as information that would affect the decision under review. If, at the time the invitation is issued, the information is not rationally capable of being seen as information that would affect the decision under review, then the Tribunal's obligation under s 359A may not arise.[94]

To ensure there is a clear understanding of the Tribunal's state of mind, the Tribunal may make a clear and unequivocal statement in the decision record as to why it did or did not consider the information would be the reason, or a part of the reason, for affirming the decision under review.[95]

3.5 Allegation of apprehended bias following compliance with s 359A

An allegation of apprehended bias arising from the Tribunal putting adverse information to the applicant under s 359A will not necessarily be successful where the Tribunal put that information to the applicant using the statutory process and in doing so made clear it hadn't made up its mind about the material at that point in time, and addressed the material in its decision. For example, in *BMT19 v MICMSMA*, the appellant contended that the Tribunal was affected by apprehended bias because it had put adverse information under s 424A [s 359A] about the appellant's convictions and fingerprinting information, and was therefore affected by the information.[96] The Tribunal made clear in its s 424A [s 359A] letter that it had not made up its mind about the information. It went on to find that the information was 'irrelevant and prejudicial' and gave it no weight. The Court rejected the appellant's argument, holding that there would be 'some level of incoherence with the statutory scheme if particulars of information disclosed to a visa applicant pursuant to an obligation of procedural fairness under s 424A [s 359A] would lead the fair-minded lay observer to think that the Tribunal could not thereafter change its mind about the relevance of the information'.[97] The Court concluded that the way the Tribunal dealt with the information was in accordance with its obligations and did not give rise to an apprehension of bias.[98] The Court also noted that the Tribunal member was a

[92] *Khan v MIAC* (2011) 192 FCR 173, where the appellant's sponsoring restaurant sent a letter to the Department indicating that it wished to cancel its sponsorship of the appellant and alleging fraudulent behaviour by him and subsequently informing the department that his employment with them had ceased. Notwithstanding the absence of any reference to the letter in the Tribunal's decision record, the Full Federal Court held that this information was necessarily something which would be part of the reason for affirming the decision of the delegate. The information was relevant in this case and its absence from the Tribunal's reasoning did not exclude the Tribunal's obligation to comply with s 359A.
[93] *MIAC v Saba Bros Tiling Pty Ltd* (2011) 194 FCR 11; [2011] FCA 233.
[94] *MIAC v Saba Bros Tiling Pty Ltd* (2011) 194 FCR 11 at [41]–[43]; [2011] FCA 233. The Tribunal had issued an invitation under s 359A to comment on a sanction barring the applicant from nominating persons in relation to temporary visas for three months. However, the sanction had expired by that time, and as such was no longer relevant to the criteria for the grant of the visa. The Tribunal had, in its reasons, acknowledged that the information was not relevant to the decision.
[95] See also the comments of the High Court in *Applicant VEAL of 2002 v MIMIA* (2005) 225 CLR 88 at [12]: 'The Tribunal said, in its reasons, that it did not act on the letter or the information it contained. That is reason enough to conclude that s 424A [s 359A] was not engaged.'
[96] *BMT19 v MICMSMA* [2022] FCA 328 at [55]–[65].
[97] *BMT19 v MICMSMA* [2022] FCA 328 at [65].
[98] The Tribunal had dealt with the information in the provisional way under s 424A [s 359A] by stating it hadn't made up its mind about the material, stating in its decision the content of the letter and the appellant's response, and also the Tribunal's reasoning on the material.

professional decision-maker, and that a Tribunal member will be expected to be capable by reason of training and experience of separating the relevant from the irrelevant in coming to a decision, such that the fair-minded lay observer would view a professional decision-maker such as a member of the Tribunal differently to a lay decision-maker.[99]

3.6 Legal opinions and legislation

Legal opinions or views on the proper interpretation of a statutory provision are not generally regarded as 'information' for the purposes of s 359A.[100] Legislation and judgments cited in Tribunal decisions have also been held not to constitute 'information'.[101]

4. Exceptions to the obligation

Section 359A(4) provides statutory exceptions to the obligation in s 359A(1). These exceptions are discussed in more detail below, however generally speaking, the Tribunal is not obliged to invite the applicant to comment on information that: is just about a class of persons of which the applicant or another person is a member; the applicant gave for the purposes of the review or during the process that led to the decision that is under review (other than information provided orally to the Department); that is 'non-disclosable information' within the meaning of that definition in s 5 of the Migration Act; that was included, or referred to, in the written statement of the decision under review, or that is prescribed by regulation for the purposes of s 359A(4).[102]

Section 359A(4A) provides that the Tribunal is not required to give particulars of those categories of exempt information before making its decision on the application under s 105 ART Act (to affirm, vary or set aside the primary decision) or s 349 (to remit a matter). This is intended to exhaustively displace the common law natural justice hearing rule by putting it beyond doubt that the Tribunal is not required to put information excluded by s 359A(4) to the applicant at all before making its decision.[103] Section 357A, which is the exhaustive statement of the natural justice hearing rule provides that the 'relevant provisions', which includes s 359A, are taken to be an exhaustive statement of the requirements of the natural justice hearing rule *in relation to the matters they deal with*. Furthermore, to the extent of any inconsistency with s 55 ART Act,[104] s 359A prevails. The Tribunal by complying with s 359A, whether in writing or at a hearing, will have discharged its procedural fairness obligations in relation to 'adverse information'. Note also that s 357A(3) requires the Tribunal in applying s 359A, to act in a way that is fair and just. This is not to be construed as reintroducing the common law, but requires the Tribunal *to apply the statutory provisions* in a way that is fair and just.

[99] *BMT19 v MICMSMA* [2022] FCA 328 at [65].
[100] *Carlos v MIMIA* (2001) 113 FCR 456 in which the Court held that advice merely reiterates the facts of the case and comments on the legal issues. Applied in *Reynolds v MIAC* (2010) 237 FLR 7 at [146].
[101] *SZASX v MIMIA* [2004] FMCA 680 at [23]. The Court's findings were undisturbed on appeal: *SZASX v MIMA* [2005] FCA 68. An application for special leave to appeal was also dismissed: *SZASX v MIMIA* [2005] HCATrans 946.
[102] At the date of publication, no exclusions have been prescribed. Sections 359A(4)(d) and (e) are exemptions added by the C&T No. 1 Act 2024.
[103] Revised EM to the C&T No.1 Bill, at [625].
[104] This provision details the right of the applicant to present their case.

4.1 Information just about a class of persons

The requirement to provide particulars of information does not apply to information that 'is not specifically about the applicant or another person and is just about a class of persons of which the applicant or other person is a member'.[105]

The majority in *MIMIA v NAMW* held that the reference in s 424A(3)(a) [s 359A(4)(a)] to a class of persons is not another criterion to be met, but is designed to underline the specificity required by precluding any argument that reference to a class could be taken as a reference to all individuals (including for example, an applicant) falling within it.[106] The majority considered that this interpretation gave effect to the intention of the legislature when s 424A [s 359A] was enacted.[107]

One kind of information which may fall within this exception is general country information,[108] although it is clear that not *all* country information would be exempted. Country information about a specific person, if it is the reason or a part of the reason for affirming the decision under review, will need to be disclosed unless another exception applies. For example, in *Schwallie v MIMA,* the Federal Court found that s 424A [s 359A] was applicable to country information about a former government minister for whom the applicant claimed to have worked.[109]

In *SZRDX v MIAC*, the Federal Magistrates Court considered the term 'person' for the purposes of s 424A(3)(a) [s 359A(4)(a)] and rejected an argument that it included the Republic of India and, by extension, a body politic or corporate. The Court held that as the paragraph refers to information that is not specifically about the applicant 'or another person', the context and particularly the use of the word 'other' indicated that 'person' was intended to mean a natural person.[110] However, a contrary approach was taken in *BBX17 v MIBP* in which the Federal Circuit Court held that a company was a 'person' for the purpose of s 424A(3)(a) [s 359A(4)(a)]. The Court rejected the Minister's argument that information about a company (specifically its corporate structure and activities) was information about a class of persons, namely the

[105] s 359A(4)(a).
[106] *MIMIA v NAMW* (2004) 140 FCR 572 at [138]. See also *SZQSP v MIAC* [2012] FMCA 890 where the Court, following *NAMW*, observed that s 424A(3)(a) [s 359A(4)(a)] did not posit separate criteria but, essentially, the reference to 'class of person' required the information not to be 'specifically about the applicant', and that the double negative at s 424A(3) [s 359A(3)] and s 424A(3)(a) [s 359A(4)(a)] meant that the obligation in s 424A(1) [s 359A(1)] was subjected to the exemption of 'general' country information, that is, that it is not *in personam* information at [50].
[107] *MIMIA v NAMW* (2004) 140 FCR 572, at [139]. Justices Merkel and Hely noted at [130] that although the Explanatory Memorandum made it quite clear that the information that must be provided under s 424A [s 359A] was intended to be equivalent to the information required to be given under s 57, s 424A [s 359A] is drafted differently and requires that particulars of the information described in s 424A(1) [s 359A(1)] be provided unless they are excluded under s 424A(3) [s 359A(4)]. In their view that exclusionary approach resulted in the literal meaning of ss 424A(1) and (3)(a) [s 359A(1) and (4)(a)] not being equivalent to s 57(1)(b) because a literal interpretation of s 424A(3)(a) [s 359A(4)(a)] requires that both of the two criteria stipulated in the sub-section be met for the exclusion to apply. After reviewing relevant authorities, their Honours held that having regard to the intention of the legislature, which was for s 424A [s 359A] to replicate the effect of s 57(1), it was open to the Court to depart from the literal meaning of s 424A(3)(a) [s 359A(4)(a)]: at [132]–[139].
[108] *W252/01A v MIMA* [2002] FCA 50; *NACL v RRT* [2002] FCA 643; *Tharairasa v MIMA* (2000) 98 FCR 281; *NARV v MIMIA* (2004) 203 ALR 494 at [54]; *SZNIU v MIAC* [2009] FMCA 573 at [22]. See also *VHAJ v MIMIA* (2004) 75 ALD 609 at [50], [71]. In *SZJJD v MIAC* [2008] FCAFC 93 at [13] the Court found that country information which was obtained by the Tribunal as a result of an enquiry prompted by the applicant's claims did not mean the information was about the applicant. Rather the information was about groups of persons (unionists, leftists, activists and members of the Movimiento de Participación Popular) of which the applicant was a member. Similarly, in *MIAC v SZLSP* (2010) 187 FCR 362 at [27], Kenny J found that a text about Falun Gong practices that was relied on by the Tribunal in evaluating the applicant's knowledge was excluded from the Tribunal's s 424A [s 359A] disclosure obligations despite not being identified.
[109] *Schwallie v MIMA* [2001] FCA 417 at [24].
[110] *SZRDX v MIAC* [2012] FMCA 838 at [26]–[28].

employees of the company which included the applicant.[111] The Court did not consider the earlier authority of *SZRDX*.

In *SZRZX v MIAC*[112] the Federal Circuit Court found that the results of an internet search for a particular hospital, which showed that the hospital didn't exist, fell within the ambit of s 424A(3)(a) [s 359A(4)(a)]. The applicants had submitted discharge slips from the particular hospital in support of their claims. The information for the purposes of s 424A(1) [s 359A)(1)] was that there was no record of the particular hospital. Due to the exception in s 424A(3)(a) [s 359A(4)(a)] the Tribunal was not required to disclose it pursuant to s 424A [s 359A].[113]

A decision maker's own personal knowledge or experience may constitute 'country information' and fall within the exception. In *DDX16 v MIBP*[114] the Federal Court considered a Tribunal member's comment at hearing that he had holidayed safely with family in Beirut and other parts of Lebanon. The Court held that the information revealed by the Member during the hearing was 'country information' which concerned the security of persons living in those places and accordingly fell within the s 424(3)(a) [s 359A(4)(a)] exception.[115]

If the information which the Tribunal considers is the reason, or a part of the reason, for affirming the decision only obliquely or tangentially refers to a specific person, it may still fall within the exception.[116] In *MIAC v SZHXF*, a Full Court of the Federal Court found that references to religious leaders or figures such as Mirza Ghulam Ahmad, Jesus Christ and the prophet Muhammad, were not information specifically about another person and so fell within the exception in s 424A(3)(a) [s 359A(4)(a)].[117] The references to these figures and material about how they were perceived by the Ahmadi faith, were said to be information about how others perceive those figures and the role that such a perception plays in the lives of those who

[111] *BBX17 v MIBP* [2019] FCCA 59 at [43].
[112] *SZRZX v MIAC* [2013] FCCA 54.
[113] Note that the Court did not consider the decision of the Full Federal Court in *NBKS v MIMIA* [2006] FCAFC 174. However that case would appear to be distinguishable in that the internet search in *SZRZX v MIAC* was not specifically about the applicant, or about any particular person. In contrast in *Shrestha v MHA* [2019] FCCA 1782 at [69]–[70] the Court found that the results of the Tribunal's internet search for a non-existent accounting firm which had vouched that the applicant was employed as claimed, did not fall within the exception in s 359A(4)(a) (equivalent provision as considered in *SZRZX*). The Court acknowledged that the internet search information was not specifically about the applicant but as it supported the proposition that the information provided by the accountants specifically about the applicant's employment was false, it did not fall within the exception. The Court also confirmed that it was 'information' for the purposes of s 359A(1) because it was about a state of affairs (i.e. that the accounting firm where the applicant had purported to work did not exist in the external world, and this would be a part of the reason for affirming the decision).
[114] *DDX16 v MIBP* [2018] FCA 838. An application for special leave to appeal to the High Court was dismissed: *DDX16 v MIBP* [2018] HCASAL 250.
[115] *DDX16 v MIBP* [2018] FCA 838 at [49]. An application for special leave to appeal to the High Court was dismissed: *DDX16 v MIBP* [2018] HCASAL 250.
[116] See *SZCCA v MIAC* [2008] FMCA 1362 at [29]–[30]. In that case, the Tribunal rejected claims about the applicant's political activities in Bangladesh by reference to independent evidence that the BNP was in power from 1979 until General Ershad seized power in March 1982, that General Ershad remained in power until 1990 and that he formed the Jatiya Party in 1986. See also *MZYPL v MIAC* [2012] FMCA 563, where the Tribunal used information from Google Maps and other internet searches (an article from The Guardian and information from blog sites) to assess the applicant's credibility. The Court found that the information did not enliven s 424A(1)(a) [s 359A(1)(a)] as it was exempt under s 424A(3)(a) [s 359A(4)(a)]. In respect of the Google Maps and the blog site information, the Court found that it was clearly not related to the applicant or any other person. In relation to the information from The Guardian, the Court found that the information related to an unnamed detainee at a prison camp, and was not about the applicant or any other person with direct association or relevance to the applicant. See also *SZVCZ v MIBP* [2016] FCCA 2840 where the Tribunal referred to 'Pakistan's most prominent leaders' having attended Christian schools, and then referred to leaders such as the current Prime Minister and two out of Pakistan's five provincial governors. The Court found that the Tribunal had referred to these individuals as examples of members of a class of persons. On this basis, the reference was not specifically about the individual leaders in question and would fall within the exception in s 424A(3)(a) [s 359A(4)(a)]. Upheld on appeal: *SZVCZ v MIBP* [2017] FCAFC 130 at [5], [67, [69], where the Court held that the information in question was clearly information that was not specifically about the appellant or another person, but was referred to as examples of 'prominent leaders'.
[117] *MIAC v SZHXF* (2008) 166 FCR 298.

hold it.[118] Further, in *ANN15 v MIBP* the Federal Circuit Court found that information about a Presidential candidate fell within the exception in s 424A(3)(a) [s 359A(4)(a)] because the Tribunal's reasons indicated that the candidate's significance was not in his achievement as an individual but was an example of the success of the political party.[119]

4.2 Information given by the applicant for the purpose of the application

Section 359A does not apply to information that the applicant for review gave for the purpose of the application.[120] There are two elements to consider when determining whether information comes within this exception: (a) whether the information is given by 'the applicant'; and (b) whether it was 'given for the purposes of the application'.

4.2.1 Is the information given by 'the applicant for review'?

For information to fall within the exception contained in s 359A(4)(b), it must be information given to the Tribunal by the *review* applicant or his/her agent on his/her behalf.[121] This includes information given by a migration agent acting under the applicant's instructions,[122] an 'advisor' or friend acting with the consent or authority of the applicant,[123] or a parent in their role as guardian for an applicant child.[124] However, it may not include information which is given by a third party to the Tribunal which incidentally passes through the review applicant's hands as a mere conduit.[125]

Whether such information is given by the relevant person is a question of fact. In *Khan v MIAC,*[126] the applicant claimed that the Tribunal had failed to give him particulars of the attendance record issued by the education provider pursuant to s 359A. Although the attendance record was not provided to the Tribunal by the review applicant, the Court held that the gravamen of the information contained in the attendance record, being his attendance rate of less than 30%, had been separately provided by the applicant at the hearing.[127] In *Le v*

[118] *MIAC v SZHXF* (2008) 166 FCR 298 at [22]. This reasoning was considered by a differently constituted Full Court in *SZJBD v MIAC* (2009) 179 FCR 109. The information in that case concerned the dates Falun Gong was founded and subsequently banned in China and the date that a warrant for the arrest of Master Li Hongzhi was issued. The majority judges thought *SZHXF* was indistinguishable. The majority reasoning in *SZJBD* sits conformably with *NBKC v MIAC* [2008] FMCA 1043 in relation to the Tribunal's reference to country information, including the reference to Li Hongzhi. The Court applied *SZHXF* but also found that the Tribunal relied on the applicant's own answers and its conclusion that her knowledge of Falun Gong was incommensurate with her claims. The Tribunal's appraisal of the evidence was not 'information' for the purposes of s 424A(1) [s 359A(1)].
[119] *ANN15 v MIBP* [2018] FCCA 2345 at [15].
[120] ss 359A(4)(b)
[121] *SZEEU v MIMIA* (2006) 150 FCR 214.
[122] *SZIOQ v MIAC* [2007] FMCA 1292 at [16].
[123] *SZGSG v MIAC* [2008] FMCA 452.
[124] *SZLND v MIAC* [2008] FMCA 1047.
[125] In *SZOMT v MIAC* [2011] FMCA 3 at [29], documents obtained with the assistance of the review applicant's spouse were found to have been given for s 424A(3)(b) [s 359A(4)(b)] purposes because it was the review applicant who relied on them to support his claims and who provided them to the Tribunal. The Court commented that there may be circumstances in which information is given by a third party to the Tribunal which incidentally passes through an applicant's hands as a mere conduit but this was not such a case.
[126] *Khan v MIAC* [2009] FMCA 1185.
[127] *Khan v MIAC* [2009] FMCA 1185 at [22]. Also of note is *SZGQF v MIAC* [2008] FMCA 1042 at [32] where the Court took the view that the use of a NAATI translation obtained by the Tribunal of a Chinese language document submitted by the applicant did not invoke s 424A [s 359A] because the information in the document was provided by the applicant. In *SZQKO v MIAC* [2011] FMCA 821, the applicant claimed at hearing his name appeared on a Falun Gong website. On invitation by the Tribunal the applicant provided details of three websites, stating that he could not recall in which one he was named. On investigating these sites, the Tribunal concluded the applicant was not named in any of them. The Court found that as the applicant directed the Tribunal to search these websites, this was 'information' given by him and therefore it fell within the exemptions under s 424A(3)(b) [s 359A(4)(b)] and the Tribunal was not required to put the absence of his name from these sites to him for comment.

MIAC,[128] the Court considered *Khan* and the earlier judgment of *Khergamwala v MIAC*[129] and found that there is a fine technical distinction between cases where the Tribunal relies on information obtained from a third party, and cases where it relies on the applicant's agreement or acceptance of such information. It was made clear that in the former category of cases, the Tribunal must comply with s 359A whereas in the latter category, the provision will not be engaged.[130]

A further MOC opinion that has been provided to the Tribunal will not engage this exemption as it is the Tribunal who obtains the opinion, not the review applicant even if it is the applicant who is required to pay the relevant fees.[131]

Evidence from a visa applicant who is not the review applicant

Information from a visa applicant, who is not also the review applicant, will not usually fall within this exception. This situation can commonly arise in reviews under pt 5 of the Migration Act involving offshore visa applications. In such cases, the Migration Act generally requires that an Australian sponsor, nominator or relative be the *review* applicant. However, the Tribunal will, in most cases, be required to consider whether the *visa* applicant satisfies certain regulatory criteria. The case law suggests that if the Tribunal takes *oral* evidence from the visa applicant, and that information would be the reason, or a part of the reason for affirming the delegate's decision, it would not fall within the exception and must be disclosed to the review applicant unless another exception applies.[132]

The exception would apply if *written* evidence from the visa applicant is provided to the Tribunal by the review applicant or his or her agent. For example, if the visa applicant completes a statutory declaration and this is submitted to the Tribunal by the review applicant, it may be said to be 'given by the applicant for review'.[133] However, if the same statutory declaration was forwarded directly to the Tribunal by the visa applicant, it would not fall within this exception.

Evidence from an applicant's witness

Oral evidence given by a witness called by a review applicant does not appear to fall within the exception in s 359A(4)(b). In *SZEWL v MIAC*, Rares J firmly expressed the view that information given orally by a witness, other than an applicant for review, cannot be information

[128] *Le v MIAC* [2010] FMCA 460.
[129] *Khergamwala v MIAC* [2007] FMCA 690.
[130] *Le v MIAC* [2010] FMCA 460 at [10]. See also *Mazumdar v MIAC* [2012] FMCA 1170 where the Federal Magistrates Court at [60]–[62] suggested, in *obiter*, that an applicant's acceptance of PRISMS records indicating that his enrolment had ceased characterised those records as information falling within ss 359A(4)(b) in circumstances where the applicant had already given evidence to both the delegate and the Tribunal that he was not in fact enrolled at the relevant time.
[131] *Antoon v MICMSMA* [2021] FedCFamC2G 224 at [43]. This judgment was overturned on appeal, however, the Court did not consider the point about whether it engaged the exception: *MICMSMA v Antoon* [2023] FCA 717.
[132] *SZECG v MIMIA* [2006] FCA 733. Although the Court in that case considered evidence of a witness, the reasoning would be applicable where the 'witness' is the visa applicant. The decision of Branson J in *SZECG* confirmed the *obiter* comments of Lee J (Tamberlin J agreeing) in *Applicant M164 of 2002 v MIMIA* [2006] FCAFC 16 that the exemption in s 424A(3)(b) [s 359A(4)(b)] does not apply to oral advice given by witnesses called by an applicant. See also *SZCNG v MIMIA* (2006) 230 ALR 555 at [64], and the comments of Kenny and Lander JJ in *MIMIA v Maltsin* (2005) 88 ALD 304 at [36] that '*it is the Tribunal not the applicant who 'obtains' or 'acquires' the evidence for the purposes of the review, whether or not that evidence is volunteered or compulsorily acquired'*. Note, however, that there exists a competing line of authority which suggests that where the witness evidence is called by the review applicant the exception would apply. See for example, *SZAQI v MIMA* [2006] FCA 1653 at [24]; *VBAM of 2002 v MIMA* [2003] FCA 504 at [44]; *SZIAT v* MIAC [2008] FCA 766 at [39]; *Chan v MIMIA* [2006] FMCA 1841 at [82] and *SZFYW v MIAC* [2008] FMCA 813 at [61].
[133] *SZCNG v MIAC* (2008) 230 ALR 555 at [48].

that the applicant gave for the purposes of the application for review and that the Tribunal erred in not putting adverse information from a witness to the applicant.[134] In reaching this position, Rares J considered that information given by a witness, from whom the applicant has requested the Tribunal take evidence, cannot be considered to be information given by the applicant to the Tribunal because it is the Tribunal who calls witnesses (not the applicant) and that 'self-evidently, the witness gave the information' and 'any other construction of the section would make no sense'.[135] The same view (that evidence given by a witness is not likely to be information given by the applicant) was expressed by Branson J in *SZECG v MIMIA*,[136] which confirmed the *obiter* comments of Lee J (Tamberlin J agreeing) in *Applicant M164 of 2002 v MIMIA*.[137] There exists a line of authority which predates *SZEWL* and suggests that where the witness evidence is called by or at the request of the review applicant and taken with his or her consent the exception would apply.[138] However, the Federal Magistrates Court in a more recent judgment considering this issue, *Garcevic v MIAC*,[139] found 'much force' in the reasoning of Rares J in *SZEWL* and followed the position that oral evidence provided by a witness, who in this instance was put forward as a possible witness by the applicant to appear at the hearing, did not fall within the exception in s 359A(4)(b). Therefore, a more conservative and cautious approach to treating oral evidence from a witness, irrespective of whether the applicant requested the Tribunal to take evidence from that witness, would be to follow *SZEWL* and consider that the exception in s 359A(4)(b) does not apply to such evidence.

It is generally accepted that *written* evidence or a prepared statement of a witness which is submitted by a review applicant or his or her agent to the Tribunal, in circumstances where the review applicant must be taken to have advance knowledge of the precise contents of such evidence, would come within the exemption.[140]

[134] *SZEWL v MIAC* (2009) 174 FCR 498 at [44].
[135] *SZEWL v MIAC* (2009) 174 FCR 498 at [45].
[136] *SZECG v MIMIA* [2006] FCA 733 at [19]–[23].
[137] *Applicant M164 of 2002 v MIMIA* [2006] FCAFC 16 at [99]–[102]. See also *SZCNG v MIMIA* (2006) 230 ALR 555 at [64], and the comments of Kenny and Lander JJ in *MIMIA v Maltsin* (2005) 88 ALD 304 at [36] that *it is the Tribunal not the applicant who "obtains" or "acquires" the evidence for the purposes of the review, whether or not that evidence is volunteered or compulsorily acquired.* In *SZHRD v MIMIA* [2006] FMCA 551 at [22]–[23] the Court held that evidence taken by the Tribunal over the telephone could not be regarded as evidence provided by a witness called or sought by the applicant to bring the information within s 424A(3)(b) [s 359A(4)(b)] when it was obtained in the absence of the applicant and which was not known by the applicant even though the applicant initially may have provided the statement by the witness to the Tribunal with an invitation to confirm it.
[138] *SZAQI v MIMA* [2006] FCA 1653 at [24]; *VBAM of 2002 v MIMA* [2003] FCA 504 at [44]; *SZIAT v MIAC* [2008] FCA 766 at [39]; *Chan v MIMIA* [2006] FMCA 1841 at [82]; *SZFYW v MIAC* [2008] FCA 1259 at [18]–[19]; and *SZLNU v MIAC* [2008] FMCA 1200 at [38]–[39]. See also the *obiter* comments in *SZECG v MIMIA* [2006] FCA 733 at [23] where Branson J also considered that specific information given by a witness at the request of an applicant may be information given by the applicant (e.g. where the applicant requests a witness to give specific information on a particular topic at the hearing such as evidence about the political affiliation of a particular person). However, her Honour doubted that s 424A(3)(b) [s 359A(4)(b)] discloses an intention that every piece of information that the Tribunal gleans from evidence of a witness called at the request of the applicant would fall within the exception and was not required to reach a concluded view on this question.
[139] *Garcevic v MIAC* [2012] FMCA 931 at [32]. See also [29]–[31] for a summary of authorities.
[140] *SZCNG v MIMIA* (2006) 230 ALR 555 at [48]. See also *Halkic v MIMA* [2006] FMCA 1646, *SZILK v MIMA* [2006] FMCA 1318, *SZFYW v MIAC* [2008] FMCA 813 at [57] and *SZMXN v MIAC* [2009] FMCA 509 at [25] where information in the form of factual allegations made to a psychologist and contained in his report, fell within the exception in s 424A(3)(b) [s 359A(4)(b)] as the report was supplied by the applicant to the Tribunal. Compare *MZXJA v MIAC* [2007] FMCA 375 where the Court held that a psychiatrist's report attached to a response to a s 424A [s 359A] letter by the adviser did not fall within the exception in s 424(3)(b) [s 359A(4)(b)] as it was information not from the applicant but from the psychiatrist and thus was not information given by the applicant. However, this judgment appears contrary to the weight of authority which indicates such information would fall within the exception in s 424A(3)(b) [s 359A(4)(b)].

Evidence from a parent/guardian

Evidence given by a parent or guardian, on behalf of an infant child, is distinguished from that given by a witness. In those circumstances, the evidence is taken to be given by the infant and would come within the exception.[141]

Evidence from review co-applicants

Where multiple review applicants make a combined application for review, each applicant individually has the benefit of s 359A and adverse material emanating from a co-applicant is not treated differently from adverse material from a non-applicant witness.[142] That is, information given to the Tribunal by one review applicant may have to be given to another co-applicant under s 359A if it is part of the reason for affirming the decision relating to the co-applicant. However, a single invitation issued to all applicants will generally suffice.[143]

4.2.2 Is the information 'given for the purposes of the application'?

The exception in s 359A(4)(b) extends only to information given for the purposes of the *review* application.[144] There is no distinction between information given to the Tribunal which is central or peripheral, important or tangential to an application for review.[145] For example, documents provided to confirm identity may be tangential to an application for review but would still be given for the purposes of the review application. For the exception to apply, the applicant should have given the information to the Tribunal voluntarily, and not at the Tribunal's demand.[146]

[141] See *SZLSM v MIAC* (2009) 176 FCR 539. See also *SZEAM v MIMIA* [2005] FMCA 1367.
[142] *SZGSI v MIAC* (2007) 160 FCR 506 at [51]. Justice Marshall expressly acknowledged that he no longer adhered to the contrary view expressed in *MZWMQ v MIMIA* [2005] FCA 1263 (followed in *SZBYH v MIMIA* (2005) 196 FLR 309 or that of Young J in *Applicant M47/2004 v MIMIA* [2006] FCA 176). *MZWMQ* had been followed in *SZGTH v MIMA* [2006] FCA 1801 and in *SZCNG v MIMIA* (2006) 230 ALR 555. The Full Court's view in *SZGSI* effectively follows comments made in *obiter* by the Full Court in *SZBWJ v MIMIA* [2006] FCAFC 13, to the effect that where visa applications are made by members of a family unit under s 36(2)(b), that family member is making a separate application. Consequently, the Court suggested that where a secondary applicant who is a member of a family unit provides evidence to the Tribunal, that information is not given for the purpose of the application under s 424A(3)(b) [s 359A(4)(b)]. Similarly, in the case of *MZXGB and MZXGC v MIAC* [2007] FCA 392, the Court held that even though the applicant wife had consented to the Tribunal using the evidence the applicant husband had already provided in his separate application for review in assessing her claims, that information obtained from the applicant husband at his hearing was not information given by the applicant wife in her separate application for review. The Court noted that as the applicant wife was not present at the hearing, she could not have known what information she was consenting to the Tribunal using. *SZGSI* was distinguished in *SZCOV v MIAC* [2008] FMCA 1171 on the basis that the evidence from the other applicant did not constitute a rejection, denial or undermining of the applicant's claims: at [71]–[75].
[143] *SZKDP v MIAC* [2007] FCA 1487 at [36]–[38]. See also *SZKDB v MIAC* [2007] FMCA 1036 at [30] and *SZIHI v MIAC* [2007] FMCA 1332 at [9].
[144] In *Kaur v MIBP* [2015] FCCA 3037 at [20] the Court found that a delegate's decision provided via the online lodgement system was given for the purposes of the review application.
[145] See *Alsaidat v MICMSMA* [2022] FedCFamC2G 381 at [20] where the Court held that 'application for review' in the construction of ss 359A(4)(b) means the set of actions that consist of, or which are or may be associated with, the making of an application for review under s 347 and does not distinguish between actions which are central or peripheral, important or tangential to an application for review. In this instance, in a Partner visa matter the applicant had provided an address on a consent form for a s 362A request and an ID card at the hearing which had the same address. The address on the consent form and ID card was different from the address the applicant claimed to live at with the sponsor. The Tribunal relied on the difference in address to find that the applicant and sponsor did not live together. The Court was satisfied that the applicant had given the address details (in the consent form and ID card) to the Tribunal and that the Tribunal was not required to put it to the applicant under s 359A .
[146] See *Alsaidat v MICMSMA* [2022] FedCFamC2G 381 at [26] where the Court held that the applicant had provided an address in a consent form for a s 362A request (before 14 October 2024, s 362A requests were made to the Tribunal rather than the Department) and on an ID card on his own initiative, and therefore they were given for the purposes of the review. The Court reasoned that the Tribunal did not require the applicant to request his agent have access to documents under s 362A (which is where the address was first given), nor was there evidence the Tribunal demanded the applicant prove his identity by submitting the ID card, it being open to the applicant to prove his identity by some other way.

The exception does not include information given in the visa application.[147] Nor does it cover any other application the applicant may have made to the Tribunal. For example, an application for a fee waiver does not come within the exemption,[148] nor would information given in connection with an application for review of a different decision.

An additional exception, that contained in s 359A(4)(ba), operates to exempt *written* information given by the review applicant during the process that led to the decision under review. See below for further discussion.

'Adoption' or 'republication' of prior statements

If information is given *directly* to the Tribunal by the review applicant, it will clearly fall within this exception.

A review applicant may also *indirectly* give the Tribunal information by referring to it to bring it within the exception in s 359A(4)(b). An applicant can be said to have 'given' information to the Tribunal for the purposes of the review application by 'adopting', 'incorporating' or 'republishing' the information.[149]

There is nothing in the text of s 359A(4)(b) which supports any distinction between information proffered by an applicant to the Tribunal of the applicant's own volition or elicited from an applicant by the answering of the Tribunal's questions.[150] Nevertheless, not every answer by an applicant to a question from the Tribunal will involve the applicant giving information to the Tribunal. The nature of the information, the question asked and the answer will all be relevant to determining whether these provisions are engaged.[151] The question is ultimately one of fact.

There is also no principle that complex information or information about controversial facts cannot be given by an applicant to the Tribunal by a mere affirmation in response to a question by the Tribunal.[152] The complexity or simplicity of the information and whether the information relates to a controversial or undisputed fact are circumstances that inform the answer to the question of whether s 359A(4)(b) will be engaged.[153]

In *NBKT v MIMA*,[154] a Full Court of the Federal Court found that it was possible for an applicant to adopt a prior statement in oral evidence at a Tribunal hearing. However, the Court emphasised the importance of giving careful consideration to the nature of the information and

[147] *MIMA v Al Shamry* (2001) 110 FCR 27 followed in *SZEEU v MIMIA* (2006) 150 FCR 214.
[148] Information provided to the Tribunal as part of a fee waiver application is not information provided for the purpose of the review application, and if the Tribunal wishes to use any information provided in such an application as part of the reason to affirm the delegate's decision, the s 359A obligation arises: *Rokolati v MIMIA* (2006) 203 FLR 258 .
[149] See *MIAC v You* [2008] FCA 241 at [13]. In *Bhandari v MIAC* [2010] FMCA 369 at [32]–[35], the Court found that evidence of an education provider's certification, was information given to the Tribunal by the applicant as it was referred to in the delegate's decision and was therefore outside the obligation in s 359A(1). In *CAR15 v MIBP* [2019] FCAFC 155 at [70]–[72] the Full Court in comments made in *obiter* noted that, in circumstances where, the appellant had made extensive references to the previous Tribunal decision (following remittal by a Court of the review application) in submissions to both the delegate and the Tribunal, the exceptions in ss 424A(3)(b) and (ba) [s 359A(4)(b) and (ba)] applied to the previous Tribunal decision. This was because the appellant had in effect 'given' the previous Tribunal decision to both the delegate and Tribunal (despite not giving the complete decision record). The Court did not reach a conclusion on whether the previous Tribunal decision was in effect information for the purposes of s 424A(1) [s 359A(1)].
[150] *SZTGV v MIBP* (2015) 318 ALR 450 at [24].
[151] *SZTGV v MIBP* (2015) 318 ALR 450 at [24].
[152] *SZTGV v MIBP* (2015) 318 ALR 450 at [25].
[153] *SZTGV v MIBP* (2015) 318 ALR 450 at [25].
[154] *NBKT v MIMA* (2006) 156 FCR 419.

the circumstances in which it is communicated to, or elicited by, the Tribunal. The Court found that an applicant must do more than merely affirm the accuracy of a previous statement,[155] but artificial distinctions should not be drawn between information provided by way of 'evidence in chief' and answers to questions posed by the Tribunal.[156]

Prior to *NBKT*, a number of cases had suggested that information would only be 'given' for the purposes of the review application if it was volunteered or given without prompting.[157] However, in *SZDPY v MIMA*,[158] Kenny J rejected the appellant's contention that the information in question was not subject to the exemption in s 424A(3)(b) [s 359A(4)(b)] because it had been given in response to questions in the nature of 'cross examination' by the Tribunal.[159] Her Honour held that the Tribunal's questions were specific and arose, naturally enough, from the appellant's visa application, and the appellant gave direct answers.

Similarly, Allsop J in *SZHFC v MIMIA* said in regard to the equivalent provision s 359A(4)(b):

> *If the Tribunal, as here, puts an earlier statement or application to the applicant and asks questions about it, … the answers given to those questions will be information for the purposes of s 424A(3)(b). If the Tribunal then takes that information, that is, for want of a better expression, that raw information or data into account, nothing would prevent the operation of s 424A(3)(b). If, however, the importance placed by the Tribunal on the information previously given to the Department (which may have been repeated in answers to the Tribunal) is not merely the facts disclosed, but arises from the context or circumstances of it being given earlier, then s 424A(3)(b) may not prevent the requirement of a notice under ss 424A(1) and (2).*[160]

The Tribunal's task is to determine whether the applicant has republished the whole or only part of a prior statement. For example:

- In *SZGGT v MIMIA*, Rares J held that the test of what has been republished should be what a reasonable person in the position of observing what is in the review application would understand has been interchanged.[161] The Court found that in that case such a person would

[155] See also *SZHWF v MIAC* [2008] FMCA 1136.
[156] *NBKT v MIMA* (2006) 156 FCR 419 at [59]. Also in S*ZCJD v MIMIA* [2006] FCA 609, Heerey J held that the exception in s 424A(3)(b) [s 359A(4)(b)] would apply to information which is affirmed by an applicant for the purposes of the review, even if the information might also have been obtained by the Tribunal from another source. In *Kanagul v MIBP* [2014] FCCA 1219, Barnes J held at [77]–[78] that the applicant did not 'give' the information, namely two items of evidence from the sponsor, to the Tribunal and the exception in s 359A(4)(b) did not apply because, in contrast to the facts in *NBKT v MIMA*, the applicant did not positively avow or disavow the information when the information was put to him at hearing, the nature of the information was not simply uncontentious factual material and the applicant had not previously provided the information.
[157] *NAZY v MIMIA* (2005) 87 ALD 357; *SZBMI v MIMIA* (2006) 150 FCR 214 at [20], [219], *SZBUU v MIMIA* [2006] FMCA 197 at [74], [77]–[78]. See also *SZCNG v MIMIA* (2006) 230 ALR 555 where the Court found that the mere adoption of a statement of a third party by the applicant during the review process is not such as to result in the information being given by the applicant for the purposes of the review application at [66]. A similar conclusion was reached in *SZGMI v MIMA* [2006] FMCA 284. Compare *SZCJY v MIMIA* [2005] FMCA 1917, in which the applicant expressly referred to his protection visa application in his application to the Tribunal. The exception in s 424A(3)(b) [s 359A(4)(b)] was held to apply in this case. Upheld on appeal in *SZCJY v MIMIA* [2006] FCA 556; and *SZFKL v MIMIA* [2005] FCA 931, where inconsistencies between the claims submitted with the visa application and oral evidence was brought to the applicant's attention at the hearing and he confirmed to the Tribunal that he was satisfied of the accuracy of the information in his visa application. In this case it was held that the information came within s 424A(3)(b) [s 359A(4)(b)]. See also *SZERV v MIMIA* [2005] FCA 1221 at [10]–[11]; *SZDVO v MIMIA* [2005] FMCA 1703 at [25]; and *SZFIM v MIMIA* (2005) 197 FLR 362 at [38] in which the Court held that the provision of the Department of Immigration file number on the review application form did not constitute 'republication' of the visa application for the purposes of the review.
[158] *SZDPY v MIMA* [2006] FCA 627.
[159] *SZDPY v MIMA* [2006] FCA 627 at [36]; approved by the Full Court in *NBKT v MIMA* (2006) 156 FCR 419.
[160] *SZHFC v MIMIA* [2006] FCA 1359.
[161] *SZGGT v MIMIA* [2006] FCA 435 at [36].

have understood the applicant to have been referring only to his earlier explanation as to his circumstances in his country and not to his explanation of his Australian *sur place* claim on which he elaborated in different words. There was no incorporation of the entirety of the information contained in the departmental file and that defect in procedure was not cured by the fact that the Tribunal told the applicant that it would be in receipt of the departmental file.[162]

- In *SZGIY v MIAC*[163] the applicant said in her review application form that the delegate had not read her visa application carefully. A Full Court of the Federal Court found that a reasonable reader would have understood that the applicant was inviting detailed attention to her visa application. Information contained in the visa application about the applicant's date of arrival in Australia was therefore said to be information the applicant gave for the purposes of the review application.[164]

- In *Gajjar v MIAC*[165] the High Court considered what amounted to information 'given by the applicant for the purpose of the application' in s 57(c) [the Department's equivalent to s 359A(4)(b) in the context of IELTS test results and held that by providing an IELTS test reference number in answer to a question on the application form, the applicant has 'given' the information about his/her test results even though the actual results were accessed through a third party.[166]

- In *SZTGV v MIBP*[167] the Full Federal Court found the applicant had elected to provide submissions to the Tribunal dealing with issues set out in the delegate's decision and in so doing, that he gave to the Tribunal information relevant for the purposes of s 424A(1) [s 359A(1)], being his admissions of the falsity of the information he supplied as part of his tourist visa application. As the applicant gave the information to the Tribunal in accordance with s 424A(3)(b) [s 359A(4)(b)], s 424A(1) [s 359A(1)] was found not to apply.

Even if a person can be said to have 'republished' information so as to bring it within the exception in s 359A(4)(b), following the High Court judgment in *SZBYR v MIAC*,[168] the Tribunal considers whether the information given in its original form must be disclosed. Accordingly, if the Tribunal does not consider its decision, or any part of its decision, was informed by the information in its original form, and rather its decision was informed by the applicant's provision of that information, it may not need to be disclosed under ss 359A. This will arise if the Tribunal clearly does not rely on the original information and instead relies only on the information that has been republished by the applicant, and this information would be exempted from disclosure on the basis of the exception in s 359A(4)(b).[169] Further, it is possible that an applicant's reproduction of information and the exception in s 359A(4)(b) operate to disengage the

[162] *SZGGT v MIMIA* [2006] FCA 435 at [50]–[51].
[163] *SZGIY v MIAC* [2008] FCAFC 68.
[164] *SZGIY v MIAC* [2008] FCAFC 68 at [24].
[165] *Gajjar v MIAC* (2010) 240 CLR 590.
[166] The Court's reasoning would appear to be equally applicable in similar situations for the purposes of s 359A(4) and arguably also to ss 359A(4)(b) more broadly, at least where the purpose of the answers provided on the application form is apparent, and the applicant is aware of the particulars and evidentiary purpose, or relevance, of the associated information in question. However, it is important to note that the Court was considering s 57 and a specific factual scenario.
[167] *SZTGV v MIBP* (2015) 318 ALR 450.
[168] *SZBYR v MIAC* (2007) 235 ALR 609.
[169] See for example *Quadri v MICMSMA* [2020] FCA 246 at [27] where, in the context of PRISMS records for a student refusal, the Court held that s 359A was not engaged because the Tribunal's reasons indicated that its decision was informed not by the contents of the PRISMS records, but by the appellant's own evidence that he had discontinued his course of study, and the appellant's own evidence is not information for the purposes of s 359A: s 359A(4).

presently existing obligation in s 359A(1) with regard to the original information.[170] Whether the obligation under s 359A is engaged will turn on the Tribunal's reasons for its decision, the factual circumstances of the matter and the content of the reproduced information.

4.3 Information given by the applicant, in writing, during the process that led to the decision under review

Written information given by the review applicant during the process that led to the decision under review is not information that must be given to an applicant under s 359A. Such information would include information given for the purposes of the visa application, or sponsorship application, or in the course of the visa cancellation process.[171] Written information given in connection with an earlier application, or cancellation, would not fall within the exemption.[172]

This exemption does not extend to information given orally to the Department.[173] Recordings of interviews with departmental officers or written records of interviews or telephone conversations, for example, would not be exempt.

It is only information given by the *review* applicant that is exempted. Written information given by another visa applicant, sponsor, nominator, witness, third party or information obtained independently or generated by the Department would not be exempted. Similarly, information generated by the Tribunal itself, such as a decision on a related application, would not be exempted.[174]

4.4 Non-disclosable information

Information which meets the definition of 'non-disclosable' information under s 5 of the Migration Act is explicitly exempted from the obligation in s 359A. 'Non-disclosable information' as defined in s 5(1) of the Migration Act includes information 'whose disclosure would found an

[170] See for example *Naikar v MIBP* [2019] FCA 502 at [36]–[38] which rejected the finding at first instance in *Naikar v MIBP* [2018] FCCA 2689 at [100] which had held that once the obligation in s 359A(1) is engaged, it would be contrary to the objects and purposes of the Migration Act to read the exception in s 359A(4)(b) as disengaging what is a presently existing mandatory obligation. The Federal Court held that the Tribunal was correct to find that based on the appellant's concession about his criminal history at hearing, it was unnecessary to put the same information from his criminal history which was on the file to the appellant under ss 359A. The Court went on to find that even if the Tribunal had failed to comply with s 359A, the error would not have been material as the appellant had not complied with the evidentiary requirements for a non-judicially determined claim of family violence.

[171] See *ADA15 v MIBP* [2016] FCCA 291 at [5] where the Court held that the visa application was quintessentially part of the process that led to the decision under review, such that information contained within the visa application did not need to be given to the applicant under s 424A [s 359A]. Upheld on appeal: *ADA15 v MIBP* [2016] FCA 634.

[172] See *SZMOO v MIAC* [2008] FMCA 1581 at [36] where the Court rejected an assertion by the Minister's representative that information in earlier visitor visa applications could fall within s 424A(3)(b) or 424A(3)(ba) [ss 359A(4)(b) or 359A(4)(ba)] in relation to an application for review of a decision on a protection visa application.

[173] See, for example, *FRA17 v MICMA* [2022] FedCFamC2G 999 at [26] where the Court held that oral evidence given by one of the applicants to the delegate that he had no problems on account of his religion in his home country on its terms undermined both his claim and his wife's claim to be at risk on account of their religion, and that it was information that was required to be put to the applicant and his wife under s 424A [s 359A]. The information given orally to the delegate did not fall within an exception to s 424A [s 359A]. At [19] the Court noted that a copy of the delegate's decision (which referred to the applicant's concession to the delegate) had not been provided to the Tribunal and so the exception in s 424A(3)(b) [s 359A(4)(b)], which covers information the applicant gave for the purposes of the application for review, was not enlivened.

[174] See, for example, *Singh v MIAC* [2010] FMCA 813 at [42]–[46] where the Court held in a case involving related visa refusal and sponsorship refusal review applications that s 359A imposed an obligation on the Tribunal to put to the applicants the information that it had affirmed the delegate's decision in relation to the application by the sponsor.

action by a person, other than the Commonwealth, for breach of confidence' and information or matters whose disclosure may be contrary to the national or public interest.

4.4.1 Dob-ins

The proper application of this exception was considered by the High Court in *MIAC v Kumar*[175] in the context of dob-in material provided to the Tribunal. The High Court observed that the definition of 'non-disclosable information' invites attention to the body of doctrine in private law concerned with the protection of confidential information, but expressed the need for caution in translating into public law such private law concepts. The translation must accommodate the scope and purpose of the Migration Act.[176]

The Court found that s 359A is designed to afford, to applicants, a measure of procedural fairness and, to informants, protection, lest without that protection, information be withheld and the Tribunal be denied material which assists the performance of its functions.[177] The preservation of the informant's disclosures in that case tended to advance, not obstruct, the operation of the Migration Act. Accordingly, it was sufficient compliance with s 359A(1) for the Tribunal to inform the applicant that it had received information, in confidence, which stated that his marriage was contrived for the sole purpose of his migration to Australia, and inviting his response without disclosing the identity of the informant.[178]

It flows from the judgment in *MIAC v Kumar*, that it is appropriate for the Tribunal to have some regard to private law principles in determining whether the disclosure by the Tribunal of information would found an action by a person for breach of confidence. But the mere fact that the private law would not protect some information, will not necessarily deny to that information the character of 'non-disclosable information', if the protection of that information would advance the operation of the Migration Act.

The judgment in *MIAC v Kumar* offers little practical guidance as to how to apply the definition of 'non-disclosable information' and it is not possible to define with precision the categories of information that will be caught by it. However, the requirements for an action for breach of confidence may be summarised as follows:[179]

- a plaintiff must be able to identify with specificity, and not merely in global terms, that which is said to be the information in question;
- the information must have the necessary quality of confidentiality (and is not, for example, common or public knowledge);

[175] *MIAC v Kumar* (2009) 238 CLR 448.
[176] *MIAC v Kumar* (2009) 238 CLR 448 at [19]–[21].
[177] *MIAC v Kumar* (2009) 238 CLR 448 at [23].
[178] *MIAC v Kumar* (2009) 238 CLR 448 at [34]. In *WZANC (No 2) v MIAC* [2012] FMCA 504 the Court applied *Kumar* and found that sufficient particulars of the confidential information were provided to applicant to enable him to properly answer allegations that he was a Sunni Muslim and not an Ahmadi as claimed, and it was not necessary for the Tribunal to disclose the informant's identity. Upheld on appeal in *WZANC v MIAC* [2012] FCA 1461. See also *Lam v MIAC* [2009] FMCA 1231 at [67] although the Court held that the failure on the part of the Tribunal to provide the applicant with a specific allegation that the review applicant and visa applicant had married gave rise to a breach of s 359A as the applicant should have been provided with clear particulars of all of the information that the informant provided: at [77].
[179] *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434.

- the information must have been received by the defendant in such circumstances as to import an obligation of confidence;[180]
- actual or threatened misuse of that information must have occurred; and
- it is a possible requirement that the unauthorised use would need to be to the detriment of the plaintiff.

When presented with this issue, the Tribunal considers whether the information in question is in fact confidential, or properly the subject of a national or public interest claim. In *Singh v MIBP*[181] the Court in *obiter* noted that the identity of an informer was the type of information that would ordinarily be the subject of public interest immunity, and the statutory regime provided for the Tribunal to act in a way that is fair and just accommodated preserving appropriate public interest immunity in accordance with the provisions of ss 375A and 376. The Court commented that the disclosure of an informant would ordinarily not be appropriate and would require special circumstances that outweighed the important public interest in protecting informants.

If the information clearly cannot be characterised as non-disclosable information, the Tribunal discloses particulars of the information to the review applicant in accordance with s 359A(1).[182]

If the information *may* be characterised as 'non-disclosable', consideration is given to whether it is possible to nonetheless disclose the substance or gist of the matter. This approach assists in affording the applicant procedural fairness while at the same time protecting any relevant public interest, including the interest in protecting informants.[183]

If sensitive information is released to an applicant or adviser, the Tribunal may consider making a written direction under s 70 ART Act that the information not be published or disclosed.

4.4.2 Other restrictions on disclosure – ss 375A, 376, and 503A

Sections 375A, 376, and 503A of the Migration Act place restrictions on the disclosure of information by the Tribunal.

Sections 375A, 376 and restrictions

Under s 375A the Minister (or their delegate) may certify that certain information is only to be disclosed to the Tribunal.

[180] Note that in *Park v MIAC* [2009] FMCA 7 the Court found that information obtained from an informant in circumstances where that person neither sought nor was offered the protection of confidentiality was not imparted in circumstances importing an obligation of confidence: at [25]. However it is not clear that this reasoning has survived the High Court's decision in *MIAC v Kumar* (2009) 238 CLR 448; see also *Lam v MIAC* [2009] FMCA 1231, where the Court considered at [56] whether, in the circumstances, it was not an unreasonable inference to be asked to be drawn that the request for confidentiality was implicit where the call was anonymous and made to the 'dob-in' line at the Department but no specific request for confidentiality was made.
[181] *Singh v MIBP* [2015] FCCA 3095 at [14]–[15].
[182] A failure to address this question may have the effect of denying the applicant procedural fairness: see *NAVK v MIMA* (2004) 135 FCR 567 at [108].
[183] *NAVK v MIMA* (2004) 135 FCR 567 at [107].

The effect of such a certification is that the Tribunal is prohibited from disclosing the document and/or information in it to the applicant. In *MIBP v Singh*, the Federal Court found that where the obligations in ss 359A and 375A come into conflict, s 375A is the leading provision but that the aims of both ss 375A and 359A can usually be served without conflict.[184] In *Burton v MIMIA*, Wilcox J held that a valid s 375A certificate does not override the obligation to provide *particulars* of information under s 359A(1).[185] In doing so the Tribunal is **not** required to disclose specific documents that it may have in its possession; rather the obligation is to disclose only enough of the substance of the claim that may be the reason or part of the reason for affirming the decision so that the applicant can seek to answer the claim.[186] In *Burton*, Wilcox J also commented that the 'provision of particulars about information need not reveal the information itself, and certainly need not involve access to any particular document'.

In practice, it may be difficult in some circumstances to comply with s 359A without disclosing the information which is the subject of a s 375A certificate. There may be cases in which the Tribunal can do no more than provide information already disclosed by repeating what is set out in the delegate's decision.[187] However, the fact that information is summarised or paraphrased will not necessarily mean that it is not clearly particularised.[188]

If the Tribunal concludes that a s 375A certificate is invalid or has been wrongly issued, it cannot rely on it to prevent disclosure of the material under s 359A.

The Tribunal has a discretion regarding disclosure in respect of documents or information that is certified under s 376 , and as such it is generally more straightforward to comply with both ss 376 and 359A.[189]

Section 503A restrictions

Under s 503A, confidential information that has been communicated to an 'authorised migration officer' by a gazetted agency, which is relevant to the exercise of a power under s 501, 501A, 501B or 501C, must not be divulged or communicated to another person except in limited circumstances. 'Authorised migration officer' in this context means a Commonwealth officer whose duties consist of, or include, the performance of functions, or the exercise of powers, under the Migration Act.[190] Department and Tribunal officers fall within this definition. Gazetted

[184] See *MIBP v Singh* [2016] FCAFC 183 at [56]. It was also held that *Davis v MIMIA* [2004] FCA 686 was not correct to the extent it suggested that if there is a s 375A certificate, it has the effect that s 359A never gives rise to an obligation to provide particulars, or that there is no obligation to disclose the existence of the certificate to an applicant. An application for special leave to the High Court was dismissed: *MIBP v Singh* [2017] HCATrans 107.

[185] *Burton v MIMIA* (2005) 149 FCR 20 at [40]–[42]. Wilcox J noted that if Parliament had intended to make the obligation in s 359A(1) subject to s 375A one would have expected it to have done so but that it had not.

[186] *NATL v MIMIA* [2003] FCAFC 112 at [14]; *SZGUP v MIMA* [2006] FMCA 1130 at [34].

[187] In *Shah v MIAC* [2011] FMCA 18 at [57] the court commented that given that the Tribunal was unable to provide to the applicant any information contained in a statement (subject to a s 375A certificate) which had not already been disclosed, it could do no better than to repeat information from the statement which the delegate had considered dispositive and refer to information which the applicant had provided as indicating the context in which the evidence in the statement had significance.

[188] *Shah v MIAC* [2011] FMCA 18 at [57].

[189] See *WZANC (No 2) v MIAC* [2012] FMCA 504 where the Court found no error in the Tribunal putting the gist of confidential information to the applicant under s 424A [s 359A], but not the identity of the informant, in circumstances where a notice had not been given by the Secretary under s 438(2) [s 376(2)] to the Tribunal. The Court held that, even if there was a technical breach of s 438(2) [s 376(2)] by reason of the Secretary's failure to notify the Tribunal of the confidential information, there was not, and could not have been, any practical injustice arising from the Secretary's failure or the Tribunal's failure to provide the informant's identity. What happened was what the Tribunal would have been entitled to do had notice under s 438(2) [s 376(2)] been given by the Secretary to the Tribunal. Upheld on appeal in *WZANC v MIAC* [2012] FCA 1461.

[190] s 503A(9). 'Commonwealth officer' has the same meaning as in s 70 of the *Crimes Act 1914* (Cth): s 503A(9).

Agency means, in the case of an Australian law enforcement or intelligence body, a body specified in a Gazette Notice; or in the case of a foreign law enforcement body, a foreign country specified in the Gazette Notice; or a war crimes tribunal established by or under international arrangements or international law.[191] A wide range of agencies have been gazetted for this purpose.

The Minister may declare in writing that the information may be disclosed to a specified tribunal.[192] However, a member must not divulge or communicate the information[193] and must not be required to divulge or communicate the information to, or give the information in evidence before, the Federal Court or Federal Magistrates Court.[194]

5. Procedural requirements and issues

5.1 Giving 'particulars'

Section 359A(1)(a) requires the Tribunal to give the applicant particulars of the relevant information.

This involves the applicant being supplied with sufficient particulars to enable them to meaningfully comment on the information.[195] In *SZMKR v MIAC,*[196] for example, the Court was considering an omission which was found to be information for the purposes of s 424A [s 359A] and held that merely passing on the full text of the reports from DFAT failed to comply with s 424A(1) [s 359A(1)] as this did not convey to the applicant the implicit assertion on which the Tribunal relied. The applicant's response to the letter was also seen to demonstrate that he was unaware he had to deal with the proposition arising from the omission in the material.

Where the context or cumulative consideration of the adverse information would be the reason for affirming the review, the significance of the information might only be conveyed by providing the entirety of the adverse information to the applicant for comment. For example:

- In *Bani Hani v MIBP*[197] the Court held that it was not sufficient to comply with s 359A to only give extracts of the sponsor's detailed letters to the Department regarding the withdrawal and reinstatement of her sponsorship of the applicant for a Partner visa. It was clear from the Tribunal's reasons that the information it considered would be part of the reason for affirming the decision was contained in those letters and extended beyond the given extracts. The Court found that the Tribunal treated all of the sponsor's letters as her evidence and that the entirety of the letters needed to be provided so as to give the applicant a meaningful opportunity to comment.

[191] s 503A(9). The applicable Gazette Notice is Notice Under Section 503A of the Migration Act 1958 - 2016/028, GAZ 16/001, dated 22 March 2016.
[192] s 503A(3).
[193] s 503(4A).
[194] s 503A(5A).
[195] *Nader v MIMA* (2000) 101 FCR 352.
[196] *SZMKR v MIAC* [2010] FCA 340.
[197] *Bani Hani v MIBP* [2016] FCCA 483.

- In *SZGUJ v MIAC*[198] the Court held that despite a general suggestion in the s 424A [s 359A] invitation that the Tribunal had concerns about letters submitted because of identical letterhead, s 424A(1)(a) [s 359A)(1)] required particulars of each of the documents which might be found to have used that letterhead. The Court found that the sufficiency of a s 424A [s 359A] invitation should be found by reference to its content when considered in its context of contemporaneous circumstances, and not by hindsight reference to the response of its recipient.

- In *Khan v MIAC*[199] the applicant's sponsor wrote to the Department requesting cancellation of the sponsorship due to his 'fraudulent behaviour' and advised that his employment had ceased. There was no mention in the Tribunal's decision record of the accusations of fraud. The Full Federal Court unanimously held that if information in question is such that it could not have been rejected at the outset as irrelevant, omission of any reference to that information in the Tribunal's reasoning will not operate to exclude the obligation under s 359A. Accordingly, the Tribunal fell into error by not providing the applicant with 'clear particulars' of the contents of the sponsor's letter.

- In *Vyas v MIAC*[200] the Court found that the Tribunal fell into error as the particulars provided by it were not sufficient for the applicant to understand and usefully respond to an allegation of fraud, which was the unstated basis of the Tribunal's invitation to comment. The Court held that the applicant needed to understand that the information or inference she was being asked to respond to was that her IELTS test results had been fabricated and not simply that someone had examined the test and had formed a subjective opinion that she did not merit the test results that she had in fact achieved.

The fact that information may have been summarised or paraphrased does not mean that it has not been clearly particularised.[201] However, if the Tribunal's summary of relevant information is inaccurate in a significant respect, there is a risk a Court will find there has been a failure to provide 'clear particulars'.[202]

When putting to an applicant particulars of information obtained in another Tribunal review, there is generally no obligation to provide an entire evidentiary record of the information being relied upon from the other Tribunal review, provided that an accurate representation of the information contained in the other file has been clearly particularised.[203] For example, in *Singh v MIBP* the Tribunal put adverse information which included evidence from a witness in another

[198] *SZGUJ v MIAC* [2007] FMCA 134.
[199] *Khan v MIAC* (2011) 192 FCR 173.
[200] *Vyas v MIAC* [2012] FMCA 92.
[201] *Shah v MIAC* [2011] FMCA 18 at [57].
[202] See e.g. *SZONE v MIAC* [2011] FMCA 420 in which the Court found the manner in which the Tribunal recorded that it put information from the Department to the applicant under s 424AA [s 359A] did not accurately reflect the relevant information and the fact that the Tribunal subsequently sent a copy of that information to the applicant's advisor, did not rectify the failure as the information was not put to the applicant under s 424A [s 359A]. By way of contrast in relation to a typographical error, in *SZGSG v MIAC* [2008] FMCA 452 the Court held that notwithstanding the error in the country name in the Tribunal's s 424A [s 359A] letter, the Tribunal did not fail to give correct particulars as the applicant's response to the s 424A [s 359A] letter demonstrated that he clearly understood why the information was relevant to the review and there was no indication that the error confused or in any way misled the applicant when he responded.
[203] *Singh v MIBP* [2021] FCCA 416 at [74]–[75]. Upheld on appeal in *Singh v MICMA* [2022] FCA 1543.

Tribunal matter.[204] The Tribunal had not listened to the evidence of the witness but rather relied upon the reproduction of their evidence in the other Tribunal's decision record. The Court considered that as there was no material difference between what was reproduced in the s 359A letter and what was said by the witness at hearing (having regard to the audio recording of what was said in the other Tribunal review and the decision record for the other review), that the Tribunal had not erred in its approach to discharging its obligation under s 359A.[205] In addition, in relation to conducting a review and considering the material more broadly, the way the Tribunal dealt with the information from the other review, including how it provided it under s 359A and its consideration of the applicant's response, reflected that it had actively engaged with the material and had not adopted the findings from the other Tribunal decision[206][207]

The Tribunal is also not generally required to produce documents to the applicant, or identify the source of the information.[208] However, some circumstances may arise where additional detail, such as the source of the information, is required to be disclosed.[209] For example, this was the case in *SZIJU v MIAC* where the Tribunal relied on an account of a telephone conversation between a Tribunal officer and a former employer of the applicant which was emailed to the member by the officer. The Tribunal's s 424A [s 359A] letter quoted part of the email without revealing the source. The Court found that the withholding of the full contents of the email deprived the applicant of knowledge of some of the particulars of information relied upon by the Tribunal.[210] This can be contrasted however with *Kaur v MIBP* in which the Court found no error in the Tribunal not enclosing copies of documents referred to in its s 359A invitation in circumstances where the applicant had already been provided with copies by the Department and it was clear that those were the documents that the invitation was referring to.[211]

[204] *Singh v MIBP* [2021] FCCA 416 at [30], [36]–[37]. The applicant provided a skills assessment and a letter from a 'Mr K' who confirmed that the applicant had undertaken more than 900 hours of work at Bakers Hut. The Tribunal put adverse information to the applicant; the particulars of the information included that Mr K gave evidence in another Tribunal proceeding (the reference number for that review was given), to the effect that he was aware false Bakers Hut references were circulating, but that only two volunteers completed 900 hours' work experience at his bakery whom he named and the applicant was not one of those named. The judgement was upheld on appeal in *Singh v MICMA* [2022] FCA 1543.

[205] *Singh v MIBP* [2021] FCCA 416 at [75]. In coming to this finding, the Court also considered that the applicant had been on notice of the witness' evidence for a long time, that he had provided detailed submissions about the witness' evidence in the lead up to the hearing, was given the opportunity to answer questions about the evidence at the Tribunal hearing and had had the opportunity to request the Tribunal summon the witness. The judgement was upheld on appeal in *Singh v MICMA* [2022] FCA 1543.

[207] *Singh v MIBP* [2021] FCCA 416 at [59]–[64]. Upheld on appeal in *Singh v MICMA* [2022] FCA 1543.

[208] *MIMIA v SZGMF* [2006] FCAFC 138 at [27]; *Nader v MIMA* (2000) 101 FCR 352; *SXRB v MIMIA* [2006] FCAFC 14; *NATL v MIMIA* [2002] FCA 1398, *SZOMB v MIAC* [2010] FMCA 742 at [22] and *SZOCE v MIAC* [2010] FMCA 1007 at [60] - upheld on appeal: *SZOCE v MIAC* [2011] FCA 133.

[209] In *Nader v MIMA* (2000) 101 FCR 352, it was held that the name of the source of the information was required for the applicant to adequately respond. In *SZKCQ v MIAC* (2008) 170 FCR 236, Buchanan J found that the Tribunal was required by s 424A(1)(a) [s 359A(1)(a)] to disclose the questions asked of the High Commission in Pakistan, as well as the responses received, in circumstances where what was not said in response to the questions was significant to the Tribunal's reasoning. The other members of the Court found this was just a breach of s 424A(1)(b) [s 359A(1)(b)], and it is not clear that Buchanan J's reasoning would be followed by other Courts.

[210] *SZIJU v MIAC* [2008] FMCA 51. Similarly, in *SZJDY v MIAC* [2007] FMCA 1760 the Tribunal was required to provide particulars of the context in which adverse information was obtained by the Tribunal from a third party. See also *Park v MIAC* [2009] FMCA 7 where the Court found that the identity of an informant and detail of the information received by that person should have been disclosed pursuant to s 359A. Note, however, that this finding was contingent on the Court's related finding that such information was not 'non-disclosable information' for the purposes of s 359A(4)(c) and s 5(1) of the Migration Act. This reasoning is probably overtaken by the High Court's subsequent decision in *MIAC v Kumar* (2009) 238 CLR 448.

[211] *Kaur v MIBP* [2016] FCCA 741. The Court at [16] also held that the fact that the applicant had been provided with those documents by the Department two years prior to the Tribunal hearing did not put any extra obligation on the Tribunal in respect of its s 359A invitation.

'Information' cannot necessarily be clinically divorced from the context in which it appears, and how much of the surrounding context must also be disclosed will depend upon the facts and circumstances of each individual case.[212] For example:

- In *MZZVI v MIBP,*[213] the second applicant husband claimed that letters of financial support from his parents in relation to his student visa were not genuine and that his parents had cut him off financially, but the Tribunal found that the letters were genuine. This finding was critical to the Tribunal's disbelief of the primary applicant wife's claims. The Court held that a meaningful opportunity to comment on the information required the Tribunal to provide the applicants with copies of the letters.

- In *DCP17 v MICMSMA* the Court held that the phrase 'clear particulars' is capable of incorporating source documents, and in some circumstances disclosure of source documents may be the only way of giving such particulars.[214] In this matter, the source documents were identity documents (provided by a third party informant) which the Court considered to be critical to the Tribunal's determination of whether the applicant had provided incorrect answers in his Protection visa application. As the genuineness of the documents were both an impetus and a determinative factor in the Tribunal's decision, the Court reasoned that they needed to be provided to the applicant.[215] Without them the applicant was not able to provide direct evidence that disputed their authenticity. For instance, they could not have the documents independently examined and put that information to the Tribunal in response, and therefore were not able to meaningfully respond to the information.[216] This judgment illustrates the type of material (e.g. source documents provided by a third party which form the primary basis for the decision) which may need to be provided to the applicant for clear particulars to be put to the applicant.

- In *BYT20 v MHA* the Court held that while the obligation is to provide 'information', an artificial distinction should not be drawn between a document and the information contained in it such that where photographs are in question, the requirement to give clear particulars may require the photographs themselves to be given to the applicant.[217] An applicant may only be able to meaningfully respond by looking at the photographs in issue and then reviewing or comparing them.[218]

- In *SZNKO v MIAC*[219] the Tribunal had given the appellant particulars of the substance of a letter provided in connection with a different review that was similar to a letter provided by the appellant in support of his claims. The Court held that giving 'clear particulars' would

[212] *SZNKO v MIAC* (2010) 184 FCR 505 at [29].
[213] *MZZVI v MIBP* [2014] FCCA 2538.
[214] *DCP17 v MICMSMA* [2021] FCA 290 at [59].
[215] *DCP17 v MICMSMA* [2021] FCA 290 at [49].
[216] *DCP17 v MICMSMA* [2021] FCA 290 at [51].
[217] *BYT20 v MHA* [2020] FCCA 2191 at [63],[65]. This matter relates to an obligation under s 129(1)(b) to give particulars of information. The Court found at [63] that the obligation in s 129 is analogous to the obligation in s 359A. The applicant had been granted a Protection visa on the basis of being an Afghan national and the delegate cancelled the applicant's subsequent Subclass 155 visa under s 128 (relying on the ground in s 116(1)(d)) on the basis that the correct information was that the applicant was a citizen of Pakistan relying on, in part, a Pakistani Computerised National Identity Card (CNIC) which contained a photograph which bore a strong resemblance to photos of the applicant that the Department held. The s 129 notice did not include the photographs.
[218] *BYT20 v MHA* [2020] FCCA 2191 at [68]. The Court reasoned that 'the person the subject of an allegation that a person has a photograph that they think is a photograph of the other person could only usefully respond by looking at the photographs in issue and comparing them'.
[219] *SZNKO v MIAC* (2010) 184 FCR 505 at [25].

require the Tribunal to also disclose details of who wrote the other letter and its date and that an opportunity to comment would only be a meaningful opportunity if there had been disclosure of such particulars as to enable the appellant to put that other letter into context.

- However, in contrast, in *Sandhu v MIMAC*[220] the Court found the failure of the Tribunal to identify the source of adverse information when giving 'clear particulars' for the purposes of s 359A did not deprive the applicant of the ability to comment meaningfully to the information in question.

Whether the information has been identified with sufficient specificity to satisfy s 359A(1)(a) is a matter of fact, degree and context depending on the circumstances.[221] The test is an objective one for which the surrounding circumstances must be taken into account.[222]

5.2 Explaining the relevance and consequences

In addition, s 359A(1)(b) imposes on the Tribunal an obligation to ensure, as far as is reasonably practicable, that the applicant understands why the adverse information is relevant to the review and that the applicant understands the consequences of the information being relied upon in affirming the decision under review. The Tribunal is required to give an applicant an adequate indication of why the information adversely affects their case such that they are in a position to respond to the invitation to comment.[223] Where the Tribunal is putting more than one piece of information to an applicant at the same time, the Tribunal generally separates the various strands of information and is careful to explain what, in relation to each of them, is the relevance of and would be the consequence of the Tribunal relying on each.[224]

In explaining the relevance and consequences, the Tribunal is not required by s 359A(1)(b) to provide a translation of its letter to an applicant who does not understand English. However, the Tribunal should be careful to use appropriate language and detail, bearing in mind the

[220] *Sandhu v MIMAC* [2013] FCA 842.
[221] *Shah v MIAC* [2011] FMCA 18 at [56], following *MZXKH v MIAC* [2007] FCA 663 at [18]. In *Kaushal v MIAC* [2012] FMCA 1234 the Court found the substance and relevance of the information being put to the applicant by the Tribunal under s 359A was clear in circumstances where matters in dot point format in the s 359A letter relating to the issue of a false work experience claim were read together with the commentary that followed in the letter. The Court further held that the fact that a legislative instrument, IMMI 11/068, had only recently come into operation, and whether TRA was a relevant assessing authority at the time of the delegate's decision, was not information required to be put: at [113].
[222] In *MZYWJ v MIAC* [2012] FMCA 660 the Court held at [23] that a s 424A [s 359A] invitation which erroneously particularised '…a man named Mr Nitin…' instead of Mr Nitan Patel did not result in the letter failing to meet the requirements of s 424A [s 359A] as there had been extensive discussion about Mr Nitan Patel during the hearing; the difference between Mr Nitan Patel and another man was clearly explained later in the letter; and where the applicant in fact responded to the invitation with reference to information regarding Mr Nitan Patel. Upheld on appeal: *MZYWJ v MIAC* [2012] FCA 1384 at [25]. An application for special leave to appeal was dismissed: *MZYWJ v MIAC* [2013] HCASL 68.
[223] See for example *MZYFH v MIAC* (2010) 115 ALD 409 at [60], [62] and [65], where the Tribunal was found to have not met the equivalent obligation in s 424AA(1)(b) [s 359A(1)(b)]. For the Tribunal to simply state that information undermined an applicant's case was too general. Further, telling the applicant that the information 'could' form part of the reason for affirming the decision failed to ensure that he understood the view that the Tribunal had arrived at and misled him as to the gravity of the consequences. It is incumbent on the Tribunal to tell the applicant that the information particularised 'would' be the reason or part of the reason for affirming the decision, unless it is persuaded not to do so by the applicant's response. See also *SZONE v MIAC* [2011] FMCA 420 at [112] where the Court found that the Tribunal did not comply with s 424AA [s 359A] as it put to the applicant that the information 'may be' the reason or part of the reason for affirming the decision under review instead of 'would'. Further, in *Shaikh v MIBP* [2014] FCCA 1011, while finding that the error was not fatal to the Tribunal's decision, the Court noted at [28] that the Tribunal had not properly applied s 359AA [s 359A] by using the words 'likely to be' to convey the relevance and consequence of the information to the applicant. In particular, the Court commented that the words 'likely to be' lacked the imperative sense of 'would be'. This may be compared with *Singh v MIAC* [2012] FMCA 1005 where the Court at [27] held that the Tribunal's use of the word 'will', rather than 'would', was sufficient to ensure that the applicant was aware of the gravity and relevance of the information and the consequence of its acceptance by the Tribunal.
[224] *SZNYL v MIAC* [2010] FCA 1282 at [25], [28].

particular circumstances of the applicant including, for example, any disability.[225] In *SZJOH v MIAC,* the s 359A invitation was criticised by the Federal Court, which noted that it was a letter written to a non-lawyer and a person not fluent or conversant in the English language.[226] The Court commented that at a minimum the letter should have clearly identified the source of the requirements being set forth and either extracted the relevant provisions or annexed a copy of the relevant regulations.[227]

The context of a case (for example, the prominent issues in the case and matters an applicant should be aware of from the delegate's decision record or a notice of intention to consider cancelling a visa), have been found to be relevant in determining the adequacy of the Tribunal's explanation of relevance. In *Louis-Jean v MIAC*[228] the Court considered that although the Tribunal did not expressly state that the information put under s 359A might be used to support a particular conclusion, the issue was prominent in the case and implicit in the delegate's decision record, such that the Tribunal had adequately explained the relevance of the information.

Furthermore, the clarity and detail of information provided pursuant to s 359A(1)(a) may be sufficient to establish compliance with s 359A(1)(b) without giving further explanation. There may be circumstances where the relevance of the information is self-evident from the information itself, even if the Tribunal has not taken independent steps to ensure that an applicant understands why particularised information is relevant to the review.[229]

Sending the text of information relied upon will not generally be sufficient to discharge the Tribunal's obligations.[230] This is because the Tribunal is required to ensure that the written invitation itself adequately explains the relevance and consequences of the information being relied upon.[231] For example. in *SZQQA v MIAC*[232] the Court found the Tribunal erred when it failed to ensure that the applicant had an understanding of the relevance of his younger brother's claim and the consequences of such information being relied on by the Tribunal. The Court held that whilst the inconsistency between the applicant's and his younger brother's evidence was apparent on the face of the information the Tribunal put under s 424A [s 359A], in explaining the relevance of the information the Tribunal only referred to inconsistencies in the applicant's own evidence. It was not clear that the Tribunal was seeking comments on matters other than the inconsistencies in the applicant's own evidence and the fact that the Tribunal discussed the younger brother's evidence with the applicant at the hearing did not

[225] *Elrifai v MIMIA* (2005) 225 ALR 307 at [34]–[44].
[226] *SZJOH v MIAC* [2008] FCA 274.
[227] *SZJOH v MIAC* [2008] FCA 274 at [14].
[228] *Louis-Jean v MIAC* [2010] FMCA 710 at [30], [33]. The Court found that although the Tribunal had not expressly stated in its s 359A letter that the information provided in the letter might be used to support a conclusion that the applicant had behaved deceitfully towards the Department, it was clear that this was what the Tribunal had meant, given that the question of whether the applicant told the truth to the Department, or lied to the Department, was obviously a prominent issue in the case.
[229] See *Shah v MIAC* [2011] FMCA 18 at [67]. The Court in that case observed at [68] that the applicant's response indicated that he was under no misapprehension as to why the information notified to him was relevant to the review. Further, in *Pham v MICMSMA* [2022] FedCFamC2G 487 at [42]–[52] in considering a Partner visa matter the Court found that the Tribunal made an error in not accurately putting to the applicant the consequences and relevance of the information (which related to an allegation that the relationship was contrived) when it purported to use s 359AA [s 359A]. However, in the circumstances it did not amount to a jurisdictional error because it was self-evident why the information was relevant, and there was no evidence that there was anything different that the applicant would have done, or would have said, if there had been strict compliance with s 359AA [s 359A]. The error was that the Tribunal did not state that the information was relevant because it might cast doubt on whether the applicant and sponsor were committed to a genuine and continuing relationship, but only told the applicant of the allegation.
[230] *SZMKR v MIAC* [2010] FCA 340.
[231] *SZQQA v MIAC* [2013] FMCA 231.
[232] *SZQQA v MIAC* [2013] FMCA 231.

obviate the need to comply with the requirement to give written notice in accordance with s 424A [s 359A].

However, a typographical error will not necessarily lead to a conclusion that the relevance and consequences of the information has not been adequately explained.[233] For example, in *Dhiman v MIAC*[234] the Court found that an erroneous reference to cl 485.226 in the Tribunal's s 359A letter was no more than a typographical error and it could be inferred that it was clearly intended to be a reference to cl 485.224. The Court held that the error was a minor and insignificant departure in the context of all of the other information put to the applicant. It did not go to the substance of the information or the relevance of the information or to the practical consequences of reliance on the information which were accurately specified in the s 359A letter.

Further, it is not assumed that because the matter was discussed at the hearing, for example, the applicant already understands the relevance and consequences of the information.[235]

The obligation does not impose a subjective test; that is the Tribunal is not required to ensure that an applicant actually does understand the contents of the letter, or its consequences.[236] What is required of it is to ensure that, as far as is reasonably practicable, this occurs.[237]

Depending on the circumstances, it may be necessary to give the applicant some additional contextual information in order to ensure as far as reasonably practicable that he or she understands the relevance and consequences of it being relied on by the Tribunal. This is particularly likely to be necessary where the information is obtained through the Tribunal's own inquiries. For example, in *SZKCQ v MIAC,* a Full Court unanimously held that s 424A(1)(b) [s 359A(1)(b)] required the Tribunal, in explaining the relevance of information obtained from the High Commission in Pakistan, to put to the applicant not only the responses but also the questions posed.[238] In that case, what the relevant persons had *not* said in response to the particular questions asked was significant in the Tribunal's reasoning.[239] A similar approach

[233] *Dhiman v MIAC* [2012] FMCA 646. Undisturbed on appeal in *Dhiman v MIAC* [2012] FCA 1254 9 (application for special leave to appeal dismissed: *Dhiman v MIAC* [2013] HCASL 25).
[234] *Dhiman v MIAC* [2012] FMCA 646.
[235] See *SZLWA v MIAC* [2008] FMCA 952 at [45]. This may be compared with *SZMTJ v MIAC* (2009) 109 ALD 242 at [55], where the Court made *obiter* comments that the requirement imposed by s 424A(2) [s 359A(2)] only fastens upon s 424A(1)(a) and s 424A(1)(c) [s 359A(1)(a) and 359A (1)(c)], whereas the obligation in s 424A(1)(b) [s 359A(1)(b)] can be discharged both in writing and at the course of discussion at the hearing. While these comments are non-binding, they may be persuasive for lower courts considering a contention that the Tribunal failed to adequately explain the relevance and consequences of adverse information being relied upon by the Tribunal. See also *SZTNL v MIBP* [2015] FCA 463 where the Court followed *SZMTJ v MIAC* in finding that regard may be had to circumstances beyond the content of the s 424A [s 359A] letter when considering compliance with s 424A(1)(b) [s 359A(1)(b)].
[236] *SZNOL v MIAC* [2009] FMCA 721 at [42]. Undisturbed on appeal: *SZNOL v MIAC* [2010] [2010] FCA 574. In *SZOCC v MIAC* [2010] FMCA 282 at [43], the Court noted that this obligation does not compel the Tribunal to continue to make sure that an applicant actually does understand in circumstances where an applicant refuses to accept any such understanding. However, in *Shah v MIAC* [2011] FMCA 18, the Court suggested at [66] that, subject to the condition of practicability, the Tribunal's duty to ensure that an applicant understands the information's relevance imports a subjective element which is not present in s 359A(1)(a). Whether a letter complied with s 359A(1)(b) accordingly required consideration of whether the applicant in fact understood the relevance of the information and, if not, whether the Tribunal had done all that was reasonably practicable to ensure they he or she did. Although in *Thirikwa v MIBP* [2016] FCCA 1501 the Court expressed a view that, it may be incumbent on and reasonably practicable for the Tribunal when utilising s 359AA [s 359A(1)] to ask the applicant directly if they understood why the information was relevant and the consequences of it being relied upon and to seek a response, the reasoning of the Court's decision did not turn upon this view and it appears contrary to the Federal Court in *SZNOL v MIAC* discussed above.
[237] *SZJHJ v MIAC* [2008] FMCA 1044 at [90].
[238] *SZKCQ v MIAC* (2008) 170 FCR 236 .
[239] *SZKCQ v MIAC* (2008) 170 FCR 236 at [3]-[4], [79].

has been taken in the Federal Magistrates Court in *SZJDY v MIAC*[240] and *SZIJU v MIAC*,[241] where the Tribunal was required to give the applicant contextual information, including details of the source or derivation of the adverse information and favourable information to ensure that the relevance of the adverse information was clearly explained.

In the case of invitations given orally, there is some suggestion that correspondence sent after the hearing may assist in ensuring that the applicant understands the relevance and consequences of the information.[242]

The Tribunal is under no obligation to issue a second s 359A invitation where the response to a s 359A is inadequate or incomplete.[243]

5.3 Invitation to comment

Section 359A(1)(c) requires that the applicant be invited to comment on the information.[244]

There is no requirement in the Migration Act to specify the provision under which an invitation is sent.[245] Nor is there any requirement that the notice must be given in a review applicant's native language.[246]

The invitation to comment may be given orally (at hearing) or in writing. Further guidance on each option is given below.

5.3.1 Written invitations

A written invitation under ss 359A(1) must be given to the applicant by one of the methods specified in ss 379A or where the applicant is in immigration detention by one of the methods prescribed for the purposes of giving documents to such a person. This requires the invitation to be in writing.[247]

[240] *SZJDY v MIAC* [2007] FMCA 1760 at [28].
[241] *SZIJU v MIAC* [2008] FMCA 51 at [14]–[15]. See also *SZMCB v MIAC* [2008] FMCA 951. In that case s 424A(1)(b) [s 359A(1)(b)] was found to require that the Tribunal give a fuller description of its possible observations of the applicant's demeanour and probably also a copy of the relevant parts of the tape, in order to explain the relevance of information that the applicant at the department interview 'appeared hesitant', particularly when compared with his oral evidence given at the Tribunal hearing.
[242] In *SZNOL v MIAC* [2009] FMCA 721 the Court considered that a letter sent after the hearing at which the Tribunal invoked s 424AA [s 359A(1)] assisted in compliance with s 424AA(b)(i) [s 359A(1)]. The Court's approach is consistent with *obiter* comments made in *SZMTJ v MIAC* (2009) 109 ALD 242 at [55] suggesting the equivalent obligation in s 424A(1)(b) [s 359A(1)(b)] can be satisfied through a combination of discussion at hearing and the letter itself.
[243] *SZNTE v MIAC* (2009) 113 ALD 522 at [27].
[244] In *Kaur v MIAC* [2012] FMCA 438 the Court applied the decision in *MIAC v Saba Bros Tiling Pty Ltd v MIAC* (2011) 194 FCR 11 to s 359AA [s 359A] to find that the Tribunal failed to invite the applicant to 'respond to' adverse information for s 359AA(b)(ii) [s 359A(1)]. While the Court's reasons make it clear that the question of compliance will depend on the facts, and that the absence of the words 'respond to' from the Tribunal's invitation at the hearing will not, in itself, be fatal, to avoid doubt it will usually be desirable to expressly invite a comment or response. In *Sandhu v MIAC* [2013] FMCA 140 the Court held nothing in *MIAC v Saba Bros Tiling Pty Ltd v MIAC* (2011) 194 FCR 11 supported the applicant's proposition that the Tribunal has to explain to an applicant the meaning of 'comment' or 'respond' and any difference between those terms. Undisturbed on appeal in *Sandhu v MIMAC* [2013] FCA 842.
[245] *Bakshi v MIBP* [2015] FCCA 2092.
[246] *BZAGU v MIBP* [2015] FCA 920 at [18] (application for special leave to appeal dismissed: *BZAGU v MIBP* [2015] HCASL 214).
[247] *SAAP v MIMIA* (2005) 228 CLR 294. McHugh J at [71] stated that the term 'must' in s 424A(1) [359A(1)] compels the Tribunal to provide the information in writing and that this is so, even if the Tribunal puts the information to the applicant at an interview or when the applicant appears before the Tribunal to give evidence and present arguments.

General principles of procedural fairness imply that an invitation can specify:

- the way in which the comments are to be given by the applicant; and
- the period of time within which the comments are to be given; or if to be given at hearing or interview, the time and place the comments are to be given.

The Tribunal member, who is constituted as the Tribunal for the purposes of conducting the review, takes responsibility for the letter and its contents.[248]

The timing of a s 359A letter may depend on whether the information is received before or after the hearing, and also whether apprising the applicant of the information prior to attending the hearing might assist them to be able to respond to the issues which the information may raise.[249] Justices McHugh, Kirby and Hayne in *SAAP v MIMIA* held that s 424A [s 359A] applies before, during and after the applicants appear before the Tribunal.[250] Further, in *SZKLG v MIAC,* a Full Court of the Federal Court confirmed that there is no express statutory basis for inferring any temporal requirements on the giving of an invitation under s 359A.[251] The Court rejected the contention that the Tribunal should have issued its s 424A [s 359A] letter prior to the hearing as the information was available to it at that time.[252]

5.3.2 Oral invitations

If the Tribunal chooses to discharge its statutory obligation under s 359A by inviting the applicant orally at hearing to comment on the information, procedural fairness must still be complied with by the Tribunal, including whether the applicant has had a reasonable opportunity to make submissions and adduce evidence in response to the invitation.[253]

An applicant may request further time to respond to the oral invitation. Whether and how much time is granted is an exercise of the Tribunal's discretion. In considering what period might be reasonable, the Tribunal is to have regard to the general direction in s 357A(3) to act in a way that is 'fair and just'.[254] The Court in *MIBP v SZTJF*[255] found that the period was reasonable in light of the information that was in fact put to the applicant, and not other information that

[248] *SZUCH v MIBP* [2015] FCCA 3030 at [23]. In that case the Court did not take issue with the fact that the letter was signed by a Tribunal officer and not the Tribunal member. Upheld on appeal: *SZUCH v MIBP* [2016] FCA 185 although this issue was not raised in the appeal.
[249] Although note the observations of the Court in *SZDGB v MIMIA* [2006] FMCA 341 at [26] which suggest that the Tribunal should adopt the practice of sending s 424A [s 359A] letters to applicants at the time of hearing invitation if the Tribunal considers that it has adverse information before it which falls within s 424A [s 359A]. This view has not been adopted elsewhere.
[250] *SAAP v MIMIA* (2005) 228 CLR 294 at [60]–[63], [154]–[158], [185]–[202]. The contrary suggestion in *SZHLM v MIAC* [2007] FCA 110 does not appear correct.
[251] *SZKLG v MIAC* (2007) 164 FCR 578 at [34].
[252] *SZKLG v MIAC* (2007) 164 FCR 578 at [32]–[36]. See also *SZIOZ v MIAC* [2007] FCA 1870 at [67]; *SZMUO v MIAC* [2008] FMCA 1671 at [9]–[10] and *Singh v MIBP* [2014] FCCA 1778. In *Singh*, although the Court found that the Tribunal was not required to put information to the applicant in writing prior to the hearing, some of its comments suggest there *may* be circumstances in which the Tribunal's obligation to 'act in a way which is fair and just' (as per s 357A(3)) would require it to disclose certain information before a hearing, but the Court did not consider what those circumstances might be: at [105] and [112].
[253] S 55(1)(c) *Administrative Review Tribunal Act 2024* (Cth).
[254] In *MIAC v SZMOK* (2009) 257 ALR 427 the Full Federal Court found that s 422B(3) [s 357A(3)] was an exhortative provision and does not contain a free standing obligation, but simply draws content from the other provisions of Division 4. See also *SZNPU v MIAC* [2009] FMCA 963 at [70]–[71] and *SZNSI v MIAC* [2009] FMCA 1027 at [65] where the Court commented that if there is a lengthy list of information, caution may direct, in the appropriate circumstances, that a letter should be sent to the applicant under s 424A(1) [s 359A(1)] instead of using the oral power in s 424AA [s 359A].
[255] *MIBP v SZTJF* [2015] FCA 1052 (application for special leave to appeal dismissed: *SZTJF v MIBP* [2016] HCASL 60).

was not directly related to the respondent's claims or her credibility. In *SZLSX v MIAC*,[256] the applicant sought an adjournment of three months to respond to adverse information disclosed orally. The Tribunal declined this request and instead adjourned the hearing for approximately one month. The Court found that the length of time given was reasonable in all the circumstances. Similarly, in *SZMFY v MIAC* the applicant sought additional time to submit documentary proof from India in response to matters raised under s 424AA (s 359A). The Court found no error in the Tribunal's refusal to grant the additional time on the basis that the relevant documentation would have had no bearing on the Tribunal's decision and the applicant did not suffer any practical unfairness.[257]

5.4 Combined applications for review

Where the Tribunal has before it a combined review application, obligations under s 359A may be owed to each applicant in the combined application.[258] In *DZAER v MIBP*,[259] for example, the Court found the Tribunal did not properly provide the applicant wife an opportunity to comment on three pieces of adverse information from a Compliance Client Interview with the applicant husband. The Court noted that the mere fact that the applicant wife was not present during the interview did not necessarily mean that she could not provide meaningful comment on what was said during the interview. By way of another example, in *CJZ21 v MICMA*,[260] the Court found that the Tribunal erred by not putting information given by the applicant wife at hearing to the applicant husband, which undermined the claim that the family were in hiding. .

The Tribunal carefully considers the relevance of any 'adverse information' to each review applicant's claims and the consequence of the Tribunal relying on it and ensures that this is explained in the letter, bearing in mind that these may be different for different applicants in the combined application.

In some cases, such as those where the review applicants have made different claims, the Tribunal may find that it is more convenient to comply with its s 359A obligations by sending separate letters to each applicant. However, this is not *required* by the Migration Act.

The Tribunal may send a single letter to all applicants. In *SZKHV v MIAC*, the Federal Magistrates Court found that the Tribunal complied with its statutory obligations by sending a

[256] *SZLSX v MIAC* [2008] FCA 1357 at [11]–[15]..
[257] *SZMFY v MIAC* [2009] FCA 139 at [19]–[21].
[258] In *SZONZ v MIAC* [2011] FMCA 490 the applicants' submitted that the oral evidence of each applicant constituted 'information' which had to be put to the other applicants for comment. The Court found that, insofar as matters from each applicant that amounted to 'information' which had to be put to the other applicant for the purposes of s 424A [s 359A], those matters were put to each of the applicants at [174]. However, in *SZSOG v MIAC* [2014] FCCA 769, the Court found no basis to distinguish inconsistencies in evidence given by co-applicants from internal inconsistencies in the evidence given personally by one applicant. Such inconsistencies did not constitute 'information', and the Tribunal was not obliged to invite either co-applicant to comment on the evidence from which the inconsistencies arose at [108]. On appeal, the Federal Court confirmed that the Tribunal's conclusion that the accounts of the co-applicants lacked consistency or did not corroborate each other did not amount to a 'rejection, denial or undermining' of either applicant's claims and therefore did not amount to 'information' for the purposes of s 424A(1) [s 359A(1)]: *SZSOG v MIBP* [2014] FCA 1053.
[259] *DZAER v MIBP* [2015] FCA 568.
[260] *CJZ21 v MICMA* [2022] FedCFamC2G 747 at [17]–[19]. The applicant wife gave oral evidence that she had attended the Imanbargah at a time when she, her husband and her child had claimed to be in hiding. They had claimed the applicant wife had foiled a bomb attack and the applicant husband had been assaulted in the street, and so they were fearful of being attacked and so had gone into hiding. The applicant wife's evidence undermined the claim that the family of three (applicant wife, applicant husband and their child) were in hiding, and therefore fearful of attacks. The Tribunal did not comply with s 424A [s 359A] as it did not put the information to the applicant husband.

single letter which was clearly expressed to be an invitation to comment to both review applicants in a combined application.[261] The Court commented that it would be absurd if the Tribunal was required to write a separate letter in respect of each applicant identifying, essentially, the same information in circumstances where the applicants nominated the same authorised recipient and the Tribunal's concern was in respect of the same information.[262]

5.5 Time periods for comment

The time given for the applicant to comment on the s 359A invitation in writing will depend upon the circumstances, including those of the applicant and the nature and extent of the information on which comment is sought. While s 359A is part of the exhaustive statement of the natural justice hearing rule, the absence of minimum periods does not mean that any period will suffice. Section 357A(3) requires the Tribunal, when applying s 359A, to act in a manner that is fair and just. Whilst untested by the Court, it follows that the Tribunal should ensure that the timeframe given to the applicant is reasonable.

It is open to the Tribunal to extend the initial period of time given to an applicant to provide their comment on the information, either on the applicant's request or of its own volition. The extended period of time granted will be dependent on what is reasonable in the circumstances.

5.6 Multi-Member Panels

In reviews where the Tribunal is constituted by more than one Member, different considerations arise in relation to the conduct of the review compared to cases where the Tribunal is constituted by a single member.[263] While there is no judicial consideration of this issue, it is likely that references to 'the Tribunal' in various sections in pt 5 of the Migration Act would generally be construed by a Court as references to each Member constituting the Tribunal for the purposes of the review.

On this construction, a s 359A obligation may arise if any one Member on the panel considers that information before the Tribunal would be the reason, or part of the reason, for affirming the decision under review, even if another Member on the panel takes a different view of the information.

6. Disclosing information that does <u>not</u> fall within s 359A

Section 359A(4A) provides that the Tribunal is not required to give particulars of those categories of exempt information before making its decision on the application under s 105[264] (to affirm, vary or set aside the primary decision) or s 349 (to remit a matter). This is intended to exhaustively displace the common law rules of the natural justice hearing rule by putting it beyond doubt that the Tribunal is not required to put information excluded by s 359A(4) to the

[261] *SZKHV v MIAC* [2009] FMCA 264. An appeal was dismissed: *SZKHV v MIAC* [2009] FCA 823.
[262] *SZKHV v MIAC* [2009] FMCA 264 at [54].
[263] Multi-member panels can be convened by the President of the Tribunal pursuant to ss 37 and s 39 of the Administrative Review Tribunal Act 2024 (Cth).
[264] s 105, Administrative Review Tribunal Act 2024 (Cth).

applicant at all before making its decision.[265] This is reinforced by s 357A which provides that the 'relevant provisions', which include s 359A, are taken to be an exhaustive statement of the requirements of the natural justice hearing rule *in relation to the matters they deal with*, and that to the extent of any inconsistency with s 55[266] (right to present case), s 359A prevails.

An invitation to comment on material which is not 'information' for the purposes of s 359A is not an 'invitation' issued or made under those sections.[267] Nevertheless, the Tribunal may, on occasion, wish to write to the applicant and invite comment on information which would fall within the exceptions in s 359A(4). Such information may include information that the applicant has given the Tribunal at hearing or general country information. While the Tribunal is not *required* to disclose such information in writing, nor is the Tribunal precluded from doing so if it so determines. The Tribunal may, in the exercise of its discretion, invite an applicant for review to make supplementary submissions in relation to apparent inconsistencies, contradictions or weaknesses in his or her case which have been identified by the Tribunal.[268] The High Court has indicated that once the Tribunal proceeds to issue such an invitation, this may amount to a binding indication by the Tribunal that the review process will not be concluded until the applicant has had an opportunity to respond.[269]

This type of material may be incorporated into a s 359A letter or disclosed in a separate letter. The procedural obligations that attach to information falling within s 359A do not apply to information which is exempted by s 359A(4). The Tribunal may purport to disclose orally particulars of information under s 359A but if such information would not in fact be required to be disclosed under those sections or s 359A, no jurisdictional error would arise from the Tribunal's use of the process in these provisions.[270]

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[265] Administrative Review Tribunal (Consequential And Transitional Provisions No.1) Bill 2023 Explanatory Memorandum at [598].
[266] s 55, Administrative Review Tribunal Act 2024 (Cth).
[267] *MIAC v SZGUR* (2011) 273 ALR 223 at [9] per French CJ and Kiefel J and [77] per Gummow J, Heydon and Crennan J agreeing (in respect of perceived inconsistencies and contradictions).
[268] *MIAC v SZGUR* (2011) 273 ALR 223 at [9]. See also *SZLTG v MIAC* [2008] FMCA 835 at [32], *SZJHJ v MIAC* [2008] FMCA 104 at [81] and *SZNZT v MIAC* [2010] FMCA 478 at [126] where the Court found no error in putting to the applicant for comment in writing information which would not fall within s 424A [s 359A].
[269] *MIAC v SZGUR* (2011) 273 ALR 223 at [9].
[270] *SZNLS v MIAC* [2009] FMCA 908 and *SZSBR v MIMAC* [2013] FCCA 847. Upheld on appeal: *SZSBR v MIBP* [2013] FCA 1208.