Migration Amendment (Protection and Other Measures) Bill 2014

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Law and Bills Digest Section

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Portfolio: Immigration and Border Protection
Commencement: Various commencement dates as set out in clause 2 of the Bill.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation
When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.
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Purpose of the Bill

The purpose of the Migration Amendment (Protection and Other Measures) Bill 2014 (the Bill) is to amend the Migration Act 1958\(^1\) (the Act) to, most significantly:

- clarify that it is the non-citizen and not the Minister who has the responsibility to specify all particulars of a protection claim and provide sufficient evidence to substantiate such claims (Schedule 1)
- create grounds to refuse a protection visa application when an applicant refuses or fails to establish their identity, nationality or citizenship, and does not have a reasonable explanation for doing so (Schedule 1)
- create grounds to refuse a protection visa application when an applicant provides bogus documents to establish their identity or either destroys or discards identity evidence, or has caused that evidence to be destroyed or discarded (Schedule 1)
- clarify that a family member of a protection visa holder cannot be granted a protection visa on the basis of being a family member if they apply after the initial visa has been granted (Schedule 1)
- provide that the Refugee Review Tribunal (RRT) must draw an unfavourable inference with regard to the credibility of claims or evidence that are raised for the first time before it if the review applicant has no reasonable explanation to justify why those claims and evidence were not raised before the primary decision was made by the Department (Schedule 1)
- clarify Australia’s interpretation of the likelihood of harm and the types of harm necessary to engage Australia’s non-refoulement obligations which will apply to certain ‘protection obligation’ determinations made under the Act, the regulations, administrative processes and so forth, irrespective of whether the assessment is conducted as a result of a visa application (Schedule 2)
- change the test for assessing complementary protection claims and raise the requisite threshold for return (Schedule 2)
- broaden the operation of the statutory bar that precludes unauthorised maritime arrivals (UMAs) from lodging valid visa applications by providing that UMAs who have been granted a bridging visa or a prescribed temporary visa will also be precluded from applying for a visa (Schedule 3)
- broaden the powers of the Principal Member of the Migration Review Tribunal (MRT) and the RRT to issue ‘practice directions’ to applicants and their representatives (including migration agents and legal practitioners) about the procedures they are to follow in relation to proceedings (Schedule 4)
- broaden the powers of the Principal Member of the MRT and RRT to issue ‘guidance decisions’ which Members of the Tribunal must comply with unless satisfied that the facts or circumstances of the decision under review is clearly distinguishable from the guidance decision (Schedule 4)
- enable a Tribunal Member to provide an oral (as opposed to a written) statement of reasons when they make an oral decision (Schedule 4) and
- enable the MRT and RRT to dismiss an application where an applicant fails to appear before the Tribunal after being invited to attend (Schedule 4).

Committee consideration

**Senate Legal and Constitutional Affairs Legislation Committee**

The Bill has been referred to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry and report by 22 September 2014. At time of writing no submissions had been received. Details of the inquiry are at the inquiry webpage.\(^2\)

**Senate Standing Committee for the Scrutiny of Bills**

At time of writing, the Senate Standing Committee for the Scrutiny of Bills had not commented on this Bill.

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Policy position of non-government parties/independents

On the same day as the Bill was introduced, ABC News reported that the Australian Labor Party and the Australian Greens were concerned that the Bill shifts the goal posts:

Labor is seeking a briefing from the Immigration Department on the legislation. A spokesperson for Labor's immigration spokesman Richard Marles says the Opposition would be “extremely concerned if the Government attempts to use complex legislation to sneak through shifting the goal posts on what determines refugee status”.

Greens immigration spokeswoman Sarah Hanson-Young says the proposed changes misunderstand the actions of asylum seekers. "Forcing them to have to prove that they have over 50 per cent chance of people killed or tortured, otherwise they will be sent home, they won't be given protection," she said. "That is incredibly ideological and grubby dog whistling. This is about allowing the Government to deport more refugees back home to danger."

Senator Hanson-Young says the bill will result in more asylum seekers lives being put at risk. "This is a mean, dangerous law from the Government," she said.

The position of the other non-government parties and independents are not currently known.

Position of major interest groups

The Refugee Council of Australia (RCOA) has expressed alarm that under this Bill people fleeing torture or other forms of serious harm will have to prove that there is a greater than 50 per cent chance of them being harmed to avoid being returned to their home country. The RCOA is also opposed to the changes it says 'would also allow the Government to deny a Protection Visa to people who refuse or fail to establish their identity without a reasonable explanation'. The RCOA asserts that:

Making these kinds of presumptions is unfair and out of touch with realities of forced displacement. When people are fleeing persecution, many are not able to obtain or travel safely with their own identity documents, as doing so could allow them to be identified by the very people from whom they are fleeing.

The Refugee Advice and Casework Service (RACS), and legal academics and commentators have similarly expressed concern over the majority of the proposed changes in the Bill. For instance, Professor Jane McAdam (UNSW) and Kerry Murphy (ANU) have stated that ‘overall, the Bill degrades refugee protection under Australian law. It is designed to reduce adherence to Australia’s international legal obligations and make it easier to refuse refugees on technical grounds...This Bill underscores that the driving force in Australian refugee law will be punishment, not protection’. Their particular observations are discussed in greater detail below.

Financial implications

The Explanatory Memorandum notes that the financial impact of the Bill is low and that any costs will be met from within the existing resources of the Department.

Statement of Compatibility with Human Rights

The Statement of Compatibility with Human Rights can be found at Attachment A of the Explanatory Memorandum to the Bill. As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible.

At time of writing, the Parliamentary Joint Committee on Human Rights had not reported on the Bill.

Key issues and provisions

Schedule 1 — Protection status determination process

Non-citizen’s responsibility in relation to protection claims

Item 1 inserts proposed section 5AAA into the Act. This section clarifies that the burden is to rest solely with the non-citizen to firstly, specify all particulars of their claim that they are a person to whom Australia has protection obligations and secondly, to provide sufficient evidence to establish such claims. This burden is imposed on the non-citizen who claims to be a person in respect of whom Australia has protection obligations under the 1951 Convention Relating to the Status of Refugees8 (1951 Refugee Convention), the 1966 International Covenant on Civil and Political Rights9 (ICCPR) and the 1984 Convention Against Torture10 (CAT).

This amendment will commence the day after the Act receives Royal Assent. The Statement of Compatibility with Human Rights states that this amendment is ‘consistent with requirements in other resettlement countries, and guidelines from the United Nations High Commissioner for Refugees’.11 Moreover, the Minister notes in his second reading speech that ‘this change will put Australia on a par with like-minded countries including the United States, New Zealand and the United Kingdom’.12

However, the Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status issued by the Office of the United Nations High Commissioner for Refugees (UNHCR), relevantly states that ‘while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner’.13

It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents. Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases, if the applicant’s account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt.14

Thus while the Act does not currently explicitly assign the burden or responsibility to either the applicant or the Minister (or RRT), proposed subsection 5AAA(4) will expressly state that to avoid any doubt, the Minister (but not the RRT) has no obligation or responsibility to specify or assist in specifying any particulars of a claim or establish or assist in establishing a claim.

Proposed section 5AAA appears to sit rather uneasily with existing section 56 of the Act, which enables the Minister to request further information that he or she considers relevant to the assessment of a visa application, and with the practical realities of irregular arrivals, especially those who are isolated (for instance, on Christmas Island or in detention centres) with limited resources. It also sits uneasily with the Government’s decision to remove free legal assistance to asylum seekers (arriving without visas), who under such a scheme would be

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14. Ibid.
entitled to receive assistance in the preparation of their claims and in the retrieval of evidence in support of such claims.15

Consequences for failing to establish identity and for using bogus documents

Item 2 inserts a definition of ‘bogus document’ into existing subsection 5(1) of the Act, which is the interpretation section. This definition is identical to the definition in existing section 97 (which will be repealed by item 12). The Explanatory Memorandum explains that this amendment is needed to ‘broaden the contextual application of the term in the Migration Act’, as the existing definition in section 97 applies only to Subdivision C of Division 3 of Part 2 of the Act, while definitions in subsection 5(1) apply to the Act as a whole.16 Currently, existing section 103 of the Act provides that ‘a non-citizen must not give, present or provide to an officer, an authorised system, the Minister, or a tribunal performing a function or purpose under this Act, a bogus document or cause such a document to be so given, presented or provided’.17 In broad terms, existing section 109 of the Act provides a power to cancel visas where a non-citizen fails to comply with this requirement.

Item 3 is a consequential amendment which clarifies that failure to satisfy amended section 91W, and proposed sections 91WA and 91WB will preclude grant of visa. These sections are discussed in further detail immediately below.

Items 5 to 10 amend existing section 91W, which currently deals with ‘documentary evidence of identity, nationality or citizenship’ and will be re-focused to relate to ‘evidence of identity and bogus documents’. This amendment will expand the operation of section 91W and impose stronger consequences for non-compliance. This section enables the Minister to invite a protection visa applicant to produce documentary evidence of their identity, nationality or citizenship. Under current subsection 91W(2) the Minister may draw any reasonable inference unfavourable to the applicant if the applicant fails, without a reasonable excuse, to provide requested documentary evidence. The amendment will impose a duty on the Minister to refuse an application for a protection visa if a protection visa applicant:

• refuses or fails to comply with the request or produces a bogus document (item 6) and
• does not have a reasonable explanation for refusing or failing to comply with the request or for producing a bogus document (item 7).

Item 8 amends paragraph 91W(2)(d), but retains the obligation in the current provision for the Minister to give the applicant a warning about the consequences of non-compliance at the time of the request being made under subsection 91W(1). The consequence under the amended provision being that the Minister cannot grant a protection visa if there is non-compliance with the request or the applicant produces a bogus document in response to the request. Item 10 inserts proposed subsection 91W(3), which provides that subsection 91W(2) does not apply if the Minister is satisfied that the applicant:

• has a reasonable explanation for refusing or failing to comply with the request or producing the bogus document, and either
• produces documentary evidence of his or her identity, nationality or citizenship, or has taken reasonable steps to produce such evidence.

Item 11 inserts proposed section 91WA which similarly provides that the Minister is obligated to refuse to grant a protection visa if an applicant provides a bogus document as evidence of their identity, nationality or citizenship; or the Minister is satisfied that the applicant has destroyed or disposed of documentary evidence of their identity, nationality or citizenship or has caused such documentary evidence to be destroyed or disposed of.

Proposed subsection 91WA(2) provides that subsection 91WA(1) will not apply if the Minister is satisfied that the applicant has a reasonable explanation for providing the bogus document or for the destruction or disposal of the documentary evidence, and either provides documentary evidence of his or her identity, nationality or

17. Section 103 of the Migration Act.
citizenship; or has taken reasonable steps to provide such evidence. According to the Explanatory Memorandum, ‘the purpose of this amendment is to ensure a protection visa applicant provides documentary evidence of their identity, nationality or citizenship wherever possible to do so and to discourage applicants from providing false identity documents, or destroying or discarding existing, genuine documents’. 18

The Statement of Compatibility with Human Rights relevantly notes that ‘the Government accepts that it may not be possible, in certain circumstances, for applicants to provide such documents, for instance during times of conflict in their home country or where they are stateless. In those cases a reasonable explanation, namely one consistent with generally known facts, will suffice, as long as steps have been taken to produce the evidence’. 19

It further states that in circumstances where section 91W or section 91WA lead to an application being refused, an assessment of Australia’s non-refoulement obligations will still be undertaken:

Where a person is found to engage protection obligations but did not comply with the amended section 91W or new section 91WA, their application for a protection visa would be refused. However, Australia’s non-refoulement obligations would still apply despite the applicant being ineligible for a protection visa. In such cases it is open to the Minister of Immigration and Border Protection to exercise his or her non-compellable powers under the Migration Act 1958 to grant a visa. 20

Professor McAdam emphasises the 1951 Refugee Convention says governments must not penalise asylum seekers who arrive without a passport or visa and that ‘these procedural changes create presumptions against asylum seekers in a complex process that is already weighted in favour of the government. Increasing its complexity by creating more barriers does not improve the process, nor make it more likely to reach a just decision’. 21

Application for protection visa by family members

Item 11 also inserts proposed subsection 91WB, which clarifies that a person cannot be granted a protection visa on the basis of being a ‘member of the same family unit’ of a protection visa applicant unless they apply before the protection visa has been granted to the protection visa applicant. Where a member of the same family unit was not included in a prior protection visa application that resulted in the grant of a visa, that person may apply for a protection visa in their own right to have their protection claims assessed.

The Explanatory Memorandum to the Bill notes that this amendment is needed to provide clarity, while the Minister’s second reading speech explains that it ‘clarifies, for example, that a person who marries a protection visa holder years after the time they were granted their visa, will not, and should not, be granted that same visa. Family migration is the appropriate pathway in that case. The change also discourages family members of protection visa holders from arriving in Australia, particularly illegally, expecting to be granted a protection visa on the basis of being a family member’. 22

While noting that the proposed amendment will only affect those family members who subsequently apply for protection from within Australia, RACS has voiced strong opposition to the proposal that the spouses and children of asylum seekers who have already been found to be refugees by an Australian decision-maker must go through their own assessment process as to whether or not they too are refugees:

Where a person has a well-founded fear of persecution on racial, religious, ethnic or political grounds, that person’s spouse or children are also highly likely to face threats of serious harm by those from whom the person accepted to be a refugee was fleeing from. This is because harm to a person’s family is one of the most common threats a person can receive by those perpetrators of serious harm.

Moreover, refugees have a heightened need for family unity. The precariousness of the refugee experience makes family relationships particularly vital as an important anchor in a social world turned upside down. Those who have experienced violence, conflict and the breakdown of social order have a heightened need to make sure that their spouse or children are also protected from that threat of harm. Separating members of a family unit on this basis of

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18. Explanatory Memorandum, Migration Amendment (Protection and Other Measures) Bill 2014, op. cit., p. 12, paragraph 57.
20. Ibid.
the proposed amendment would be contrary to the overarching protection visa framework, which ensures family
unity where family members apply for a protection visa in the same application.  

Consequences for failing to raise all claims and present all evidence to the Department

Item 14 inserts proposed section 423A into the Act. This provision obligates the RRT to draw an inference
unfavourable to the credibility of the claim or evidence if the Tribunal is satisfied that a protection visa applicant
does not have a reasonable explanation why either a claim was not raised, or evidence was not presented,
before Department refused their application. The Explanatory Memorandum notes that the purpose of this
amendment ‘is to ensure that protection visa applicants are forthcoming with all of their claims and evidence as
soon as possible’.

This amendment sits uneasily with the current RRT ‘Guidance on the Assessment of Credibility’ which relevantly
notes that ‘there may be good reasons why new information or claims are presented by applicants at a later
stage in the application process. These reasons may include stress, anxiety, inadequate immigration advice and
uncertainty about the relevance of certain information to an applicant’s claims’.

RACS similarly observes that ‘the RRT regularly makes adverse findings in circumstances in which claims or
evidence are provided in circumstances which cast doubt on their reliability. Requiring the RRT to draw an
adverse inference on credibility as a matter of course unnecessarily fetters the status of the Tribunal as not
bound by technicalities, legal forms or rules of evidence, and bound to act according to substantial justice and
the merits of the case’.

Professor McAdam also notes that this new provision will make it much easier for a decision-maker to refuse
protection, which in turn risks Australia breaching its international obligations. She observes that there may be a
myriad of reasons why all claims may not be made at the outset:

At first blush, this might seem reasonable. Why wouldn’t someone present all the details of their claim upfront? The
problem is that it is very common for people who are afraid – such as asylum seekers fleeing persecution and other
serious human rights violations – not to tell their full story at first, especially if they are victims of torture or trauma.
Post-traumatic stress disorder may impair their ability to recount things lucidly or sequentially. They also may not
appreciate what kind of information is important for their protection claim.

This confusion is compounded for people who do not speak English, have little understanding of Australian law, and
who, since March 31, have no access to free legal assistance. Even if they do have legal assistance, it can take a long
time for trust to be established with their lawyer and for a coherent case to be formulated...

However, the Department asserts in the Statement of Compatibility with Human Rights that a protection visa
applicant has ample opportunity to present claims and supporting evidence before a primary decision is
made—‘claims and evidence may be provided when the application is lodged, during interview, on request from
a decision-maker, or at the applicant’s own initiative at any point before a primary decision has been made’. In
addition, the Department emphasises that the measure does not prevent the later presentation of new claims
and supporting evidence:

The new section 423A does not curtail an applicant’s ability to make or substantiate their claims to protection, but
specifies when a claim is to be made. Where a claim can be made before the review stage, it ought to be made
then. Further, the measure does not prevent the later presentation of new claims and supporting evidence. Rather,
it specifies that they must be accompanied by a reasonable explanation in order to be assessed as credible. It is
acknowledged that genuine claims and supporting evidence may arise in the interval between a primary decision
being made and an application for review being finalised. Before an RRT member is able to assess whether claims
and evidence presented at the review stage are new, they must have regard to all claims and evidence presented,

as is currently the case. However, where new claims and evidence are not accompanied by a reasonable explanation, the RRT will draw an adverse credibility inference regarding those claims or evidence.  

**Item 15** is an application provision which sets out which applications being made under the *Migration Act* will be affected by the proposed changes. Please see the Explanatory Memorandum for further details.

**Schedule 2—Statutory scheme for determining complementary protection claims**

**Background**

**The position in international law**

As explained in the Parliamentary Library’s research paper entitled ‘Complementary protection for asylum seekers: overview of the international and Australian legal frameworks’, the principle of *non-refoulement* is the cornerstone of international refugee protection and is expressed unequivocally in Article 33(1) of the 1951 Refugee Convention, which prohibits a state from expelling or returning a refugee in any manner whatsoever to territories where his/her life or freedom would be threatened for a Convention reason. However, protection against *non-refoulement* is not confined to the 1951 Refugee Convention. In fact, the prohibition is expressed in a range of international (and regional) refugee, human rights, humanitarian, and extradition treaties.

Article 3 of CAT protects individuals from removal to ‘another state where there are substantial grounds for believing that [they] would be in danger of being subjected to torture’. This is a non-derogable provision, which means that no exceptional circumstances (such as war, political instability or any other public emergency) can be used as justification for torture.  

Under CAT, there must be ‘substantial grounds’ for believing that a person would be in danger of being subjected to torture. According to the UN Committee overseeing implementation of the CAT, ‘the risk of torture must be assessed on grounds that go beyond mere theory or suspicion. However, the risk does not have to meet the test of being highly probable’.

Though the general human rights situation in the country is a relevant consideration ‘a consistent pattern of gross, flagrant or mass violations of human rights’ will not, by itself be sufficient. The definition requires that the person fearing return must individually be at risk of torture if returned and is therefore quite narrow.

Article 6 of the ICCPR protects people’s inherent right to life while Article 7 provides that ‘no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’. Though this provision does not expressly prohibit *refoulement* to such ill-treatment, the UN Human Rights Committee has observed that States Parties to the ICCPR must not remove people in such circumstances. In the view of the Committee:

> The article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed...

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29. Ibid.  
31. See further Article 2 of the Convention Against Torture.  
33. Article 3(2) Convention Against Torture.  
35. The UN agency that monitors implementation of the ICCPR by its States Parties.  
The Human Rights Committee has also articulated the task as involving the making of a decision as to whether there are substantial grounds for believing that, as a necessary and foreseeable consequence of removal, there is a real risk that the person would be subjected to treatment prohibited by Articles 6 and 7 of the ICCPR. 37

What is the current test under the Migration Act?

The current standard is set out in existing paragraph 36(2)(a) as essentially requiring the Minister to be satisfied that Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm. The risk threshold thus draws on both the substantial grounds for believing test under Article 3 of CAT and the real risk of harm as a necessary and foreseeable consequence of removal test that has been developed in relation to the implied non-refoulement obligation arising under the ICCPR.

The Explanatory Memorandum 38 to the 2011 Bill that introduced the current complementary protection statutory framework did not explicitly state that the test to be applied in complementary protection claims would be a higher threshold than the ‘real chance’ test used in the Refugees Convention under Australian law. Nonetheless it did state that ‘a high threshold is required to engage Australia’s non-refoulement obligations under the Covenant and the CAT’ and it elaborated on the ‘real risk’ test in then proposed paragraph 36(2)(aa), which essentially incorporated the position in international law:

This test is reflected in the views of the United Nations Human Rights Committee in its General Comment 31 as to when a non-refoulement obligation will arise under the Covenant. Australia’s non-refoulement obligations under the Covenant and the CAT require that a non-citizen not be removed to a country where there is a real risk they will suffer significant harm. A real risk of significant harm is one where the harm is a necessary and foreseeable consequence of removal. The risk must be assessed on grounds that go beyond mere theory or suspicion but does not have to meet the test of being highly probable. The danger of harm must be personal and present. [Emphasis added]. 39

However, the Department’s policy guidelines at the time the statutory criteria were introduced into the Act did indeed state that the threshold for assessing complementary protection claims was higher than the threshold used in making assessments under the 1951 Refugees Convention. It also noted that the threshold would be met if the risk was ‘probable’ or ‘more likely than not’. However, it also emphasised that decision makers should not refer to the ‘more likely than not’ standard inflexibly and in making decisions should always refer to the test set out in the criterion itself. 40

In the case of Minister for Immigration and Citizenship v SZQRB (2013) ALR 525 (SZQRB decision) the Federal Court was called upon to consider whether the Minister had applied the wrong standard of proof in assessing whether the applicant was owed Australia’s protection obligations. 41 Departmental policy at the time stated that the necessary chance of the harm occurring was balance of probabilities and that the possibility must be more likely than not, which is a higher threshold than the real chance test used in the 1951 Refugees Convention under Australian law. The applicant contended that contrary to the Department’s policy, the proper test was whether there was a ‘real risk’ that if returned to Afghanistan he would be arbitrarily deprived of his life. The full bench of the Court found in the applicant’s favour that the ‘real risk’ test imposes the same standard as the ‘real chance’ test used in the assessment of ‘well-founded fear’ in the Refugee Convention definition. In doing so, the Court rejected the argument that ‘real risk’ was a higher threshold which required that the possibility of harm be more likely than not:

In our opinion, the test is as for s 36(2)(a) and as stated by SZQRB – is there a real chance that SZQRB will suffer significant harm (as that is defined in s 36(2A)) were he to be returned to Afghanistan.

39. Ibid., pp. 3 and 11.
That being the case, the [Department’s ‘International Treaty Obligations Assessment’] ITOA applied the wrong test in considering SZQRB’s entitlement for Australia’s protection obligations under the CAT and ICCPR as defined in s 36(2)(aa) and s 36(2A). The ITOA assessed SZQRB’s claims as against whether it was “more likely than not” that SZQRB would suffer significant harm, which was not the appropriate standard. The “Departmental policy”, if the ITOA was right to describe it that way, was not in accordance with Australian law.

By way of background, it is perhaps interesting to note that their Honours appeared to place emphasis on the fact that in other proceedings, Counsel representing the Minister had not contested submissions that the standard was whether there was a ‘real chance’ of suffering significant harm:

In Minister for Immigration and Citizenship v MZYYL [2012] FCA 147 (“MZYYL”), the question of the appropriate standard was raised by the Minister in his notice of appeal, in circumstances when the Refugee Review Tribunal said that in assessing a non-citizen’s risk of suffering significant harm for the purpose of s 36(2)(aa), the Tribunal should consider whether there is a “real chance”. However, at the hearing, the Minister did not pursue that challenge and accepted in that appeal that the test was whether there is a “real chance”: MZYYL at [31].

SZQRB also argued that the Department had made a similar concession in Santhirarajah v Attorney-General for the Commonwealth of Australia [2012] FCA 940. In that case, which was an extradition case, the Department had advised the Minister that the appropriate test was whether there was a real risk that Mr Santhirarajah would be subject to torture if returned to Sri Lanka, which the Department compared to the United States test of “more likely than not”.

In that case, we did not understand the Minister to argue contrary to Ms Mortimer’s submission that the test in considering whether a non-citizen was entitled to Australia’s protection obligations identified in s 36(2)(aa) was whether there was “a real chance that SZQRB would suffer significant harm” if he were to be returned to Sri Lanka.42

The Minister’s application for special leave to appeal this judgment to the High Court of Australia was refused on 13 December 2013 on the basis that there were insufficient prospects of success.43

Thus, in determining the ‘real risk’ of significant harm under complementary protection grounds decision-makers are now required to adopt the same threshold used in assessing whether an applicant has a well-founded fear of persecution under the Refugees Convention—that is, the ‘real chance’ test. The way in which this test has evolved since its adoption in 1989 is succinctly summarised in the Department’s Procedures Advice Manual (PAM3):

The ‘real chance’ test was established by the High Court in Chan Yee Kin v MIEA [1989] HCA 62 to assess the objective element of a person’s well-founded fear under the Refugees Convention. In discussing what the concept of ‘real chance’ is, the High Court noted that it was not a precise science but rather, was a way of considering a spectrum of possibilities of events occurring that were not remote or far-fetched or measured through specific percentages. For instance, the Court considered a ‘real chance’ to be a substantial chance of persecution, rather than a far-fetched possibility, and has been interpreted by the High Court to require less than a 50 per cent chance of persecution and which can be as low as a 10 per cent chance. [Emphasis added].44

Legal academics and perhaps decision-makers alike were inevitably relieved when the two standards were recognised to be the same. In this context it is relevant to note that the statutory criteria that were eventually adopted in the Migration Amendment (Complementary Protection) Act 2011 were the subject of much debate when first introduced in 2009.45 For instance, commenting on the 2009 Complementary Protection Bill, long-
term advocate for the introduction of a statutory complementary protection regime in Australia, (then) Associate Professor Jane McAdam from the University of NSW noted:

In my view, the Bill makes the Australian system of complementary protection far more complicated, convoluted and introverted than it needs to be. This is because it conflates tests drawn from international and comparative law, formulates them in a manner that risks marginalizing an extensive international jurisprudence on which Australian decision-makers could (and ought to) draw, and in turn risks isolating Australian decision-making at a time when greater harmonization is being sought. It invites decision-makers to ‘re-invent the wheel’, rather than encouraging them to draw on the wealth of jurisprudence that has been developed around these human rights principles internationally. [Emphasis added].

Similarly, Dr Ben Saul from the University of Sydney noted with respect to the 2009 Bill that ‘the criteria for complementary protection are poorly drafted as a result of the inclusion of unnecessary qualifying phrases. Far from creating certainty, the current language would invite needless litigation’. It is difficult to say how many people have sought Australia’s protection under the statutory scheme with the limited statistics available. Nonetheless, according to the Minister, from the time the statutory complementary protection criteria was introduced on 24 March 2012 to 4 December 2013, there had been 57 applications that had satisfied the statutory criteria for grant of a protection visa on complementary protection grounds.

What do other countries do?

Professor Jane McAdam is of the opinion that raising the bar for complementary protection claims so that the risk of harm is assessed on the balance of probabilities ‘is at odds with the test in international law, and higher than that applied in countries such as the United Kingdom and New Zealand’.

In New Zealand the standard of proof in assessing complementary protection claims is ‘substantial grounds for believing’ that the person would be in danger if returned. In the United Kingdom the standard of proof in assessing complementary protection claims is whether ‘substantial grounds have been shown for believing that the person concerned, if returned to the country of return, would face a real risk of suffering serious harm’. As for the European Union, the European Parliament and the Council of the European Union issued a (recast) Directive on 13 December 2011 which stated that the standard of proof in assessing complementary protection claims (or subsidiary protection as it is more commonly known in Europe) is that of ‘real risk of suffering serious harm’.

In Canada, the standard of proof in assessing complementary protection claims arising under the CAT is stipulated as ‘believed on substantial grounds to exist’. According to Jane McAdam, this has been interpreted by the Canadian Federal Court of Appeal to mean ‘more likely than not’ or on the ‘balance of probabilities’. Similarly, in the United States of America, the standard of proof in assessing complementary protection claims

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50. J McAdam and K Murphy, Punishment not protection behind Morrison’s refugee law changes, op. cit.
53. Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), accessed 1 July 2014. Note that the recast Qualification Directive applies to all EU Member states with the exception of Denmark, Ireland and the United Kingdom. Ireland and the United Kingdom continue to be bound by Directive 2004/83/EC (which similarly contains the ‘real risk of suffering serious harm’ standard).
arising under the CAT is stipulated in the Code of Federal Regulations as ‘more likely than not’ (see Regulations 208.16 and 208.17).\(^{56}\)

**Provisions**

**Item 4 of Schedule 2** inserts *proposed section 6A* into the *Migration Act*. This provision will apply to ‘protection obligation’ determinations made under the Act, a regulation or other instrument made under the Act. It will also apply to determinations made under an administrative process that occurs in relation to the Act, a regulation or other instrument made under the Act.\(^{57}\) The Explanatory Memorandum simply states that ‘this provision is intended to apply more broadly and to include all other processes under the Act and the Regulations as well as administrative processes connected with the administration of the *Migration Act*, the Migration Regulations or other instrument made under the *Migration Act*.\(^{58}\) In addition, **item 6** clarifies that these amendments apply irrespective of whether the assessment is conducted as a result of a visa application.

It is relevant to note that if the Government can secure passage of its Migration Amendment (Regaining Control Over Australia’s Protection Obligations) Bill 2013 the statutory regime for assessing complementary protection claims introduced by Labor in 2011 will be repealed.\(^{59}\) See also discussion of **Part 2** below which contains contingent amendments if this Bill is passed.

The insertion of **proposed section 6A** will ‘codify Australia’s interpretation of the likelihood of harm and the types of harm necessary to engage non-refoulement obligations under the CAT and ICCPR’.\(^{60}\) However, unlike the statutory scheme contained in section 36 of the Act, it does not contain provisions that expressly specify the circumstances when a real risk of significant harm will be deemed *not* to exist (as found in existing subsection 36(2B), or the circumstances in which a non-citizen will be deemed ineligible for the grant of visa (as found in existing section 36(2C)), or the circumstances in which Australia will be deemed not to have ‘protection obligations’ in respect of a non-citizen (as found in existing subsections 36(3)—(5A)).

**Item 5** repeals existing paragraph 36(2)(aa), which contains the existing threshold for assessing complementary protection claims. This test essentially required the Minister to be satisfied that Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm. However, this item will not come into effect if the *Migration Amendment (Regaining Control over Australia’s Protection Obligations) Act 2014* commences before this Bill, as that Act will remove paragraph 36(2)(aa) from the *Migration Act*.

The new test to be inserted into paragraph 36(2)(aa) will simply provide that the Minister can only be satisfied that Australia has protection obligations in respect of a non-citizen if the Minister considers that it is more likely than not that the non-citizen will suffer significant harm if the non-citizen is removed from Australia to a receiving country. This new test removes other aspects of the old test which operated in conjunction with the ‘real risk’ test. No longer does the Minister have to have ‘substantial grounds for believing’ that as a necessary and foreseeable consequence of the non-citizen being removed, there is a ‘real risk’ the non-citizen will suffer significant harm. Under the new simplified test, the Minister must simply ‘consider’ it ‘more likely than not’ that the non-citizen will suffer significant harm. **Proposed subsection 6A(2)** inserts the new assessment threshold (in identical terms) into **proposed section 6A**.

As previously mentioned, this amendment is in direct response to the SZQRB decision which found that the threshold to be applied in assessing complementary protection claims is ‘real chance’ of significant harm, the same threshold that applies to the assessment of claims under the 1951 Refugees Convention.

The Government contends that this amendment is necessary to restore the risk threshold for complementary protection to the higher threshold that was intended when the complementary protection framework was

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57. Proposed subsection 6A(4) defines ‘protection obligations’ in proposed section 6A to mean any obligation that may arise because Australia is a party to ICCPR or CAT.
inserted into the *Migration Act* in 2011. The Explanatory Memorandum also clarifies that the Government’s position is that the risk threshold applicable to the non-refoulement obligations under the CAT and ICCPR is ‘more likely than not’, which means there needs to more than fifty percent chance that a person would suffer significant harm in the receiving country.

While the Government acknowledges there is a divergence of views, it asserts that applying the risk threshold of ‘more likely than not’ is considered to be an acceptable position which is open to Australia under international law:

> While there is some difference of opinion in international fora and amongst the various national implementations of these obligations, applying the risk threshold of ‘more likely than not’ is considered to be an acceptable position which is open to Australia under international law. The ‘more likely than not’ threshold reflects the Government’s interpretation of Australia’s obligations. As courts have applied a lower risk threshold that is inconsistent with this interpretation of Australia’s obligations, it is necessary to give express legislative effect to this interpretation.

Legal commentators have expressed concern that the amendments will replace the well-established ‘real chance’ test currently used for assessing refugee status with the new ‘more likely than not’ test. Though *proposed subsection 6A(4)* confines ‘protection obligations’ in section 6A to obligations that may arise under CAT and ICCPR, it is not clear why the title of the provision does not similarly make it clear that the section only relates to ‘certain international instruments’ as the title of Schedule 2 to this Bill does. This ambiguity is perhaps compounded by the wording of *proposed subsection 6A(1)* which broadly states that the section applies for the purposes of determining whether Australia has ‘protection obligations’ in relation to a non-citizen in Australia under the Act and Regulations, which on its face would include asylum seekers. However, the Explanatory Memorandum asserts that the amendments are not intended to apply to assessments of protection obligations under the 1951 Refugees Convention, which accords with the manner in which the reach of *proposed section 6A* is limited by the restricted definition of ‘protection obligation’ in subsection 6A(4).

**Item 3** amends the definition of ‘receiving country’ in the interpretation section (subsection 5(1)) of the Act. The ‘receiving country’ provides the reference point for the assessment of the risk of harm in complementary protection cases. This definition will be amended to clarify that if the non-citizen has no country of nationality, the receiving country is a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to that country. Interestingly, there is no requirement that the determination of habitual residence be made by reference to the law of the relevant country, rather ‘by a range of factors such as the length of stay in the country and cultural, family and other ties to the community’. According to the Explanatory Memorandum to the Migration Amendment (Complementary Protection) Bill 2011, it was intended that such an assessment would be undertaken in relation to the destination country to which the non-citizen would be removed from Australia. However, according to the Explanatory Memorandum to this Bill, the intention of these amendments is to prevent a finding being made that there is no receiving country, as the result of that would be that the person could not meet the protection visa criterion, or could not be found to engage protection obligations, which is detrimental to the applicant and not the intended operation of the provision.

**Part 2** contains contingent amendments that will only commence if the Government can secure passage of its Migration Amendment (Regaining Control Over Australia’s Protection Obligations) Bill 2013. As mentioned in the *Bills Digest* for this Bill, this was the Coalition’s first immigration Bill to be introduced after regaining power in late 2013 and it sought to essentially repeal the statutory regime for assessing complementary protection claims introduced by the former Labor Government in 2011. At this time it was a little unclear how the Coalition proposed to assess complementary protection claims in the future. Prior to the introduction of the

64. Ibid., p. 17.
66. Ibid.
statutory scheme, complementary protection claims were assessed by the Ministerial Intervention Unit and prior to departure through the Department’s administrative pre-removal procedure. Both were non-statutory administrative processes. When introducing this Bill on 4 December 2013, Immigration Minister Scott Morrison stated that ‘it is the Government’s intention to re-establish the consideration of complementary protection issues within an administrative process similar to that which was undertaken prior to the enactment of the complementary protection legislation’. 69 However, this Bill will reinstate the very definitions (in identical terms) that if passed, the Migration Amendment (Regaining Control Over Australia’s Protection Obligations) Bill 2014 will repeal. The Explanatory Memorandum simply notes that these definitions are ‘necessary for new section 6A to operate effectively’. 70 The definitions to be reinstated into the Act include ‘cruel or inhuman treatment or punishment’, ‘degrading treatment or punishment’, ‘significant harm’, and ‘torture’.

**Item 6** is an application provision. The Explanatory Memorandum provides additional information on which assessments will be affected by the proposed amendments contained in Part 1 of Schedule 2. 71

**Schedule 3—The statutory bars that preclude the making of a visa application**

**The statutory bar for unauthorised maritime arrivals**

**Item 1** repeals existing paragraph 46A(1)(b) of the Act and substitutes it with new paragraph 46A(1)(b). This amendment extends the application of the bar on applying for a visa to UMAs who hold a bridging visa or a temporary visa of a class prescribed for the purposes of this subparagraph. Currently under the Act, the statutory bar only applies to UMAs who are in Australia and who are unlawful-non-citizens (that is, they do not have a visa). This amendment will broaden the scope of the statutory bar to UMAs who are in Australia and have already been granted a bridging or a prescribed temporary visa. This statutory bar will apply unless the Minister makes a determination under subsection 46A(2) that on public interest grounds, the bar will not apply.

The Explanatory Memorandum notes that:

> The reason for broadening section 46A of the Migration Act is to allow for unauthorised maritime arrivals to be granted bridging visas (or other temporary visas) while their asylum claims are being assessed. Extending section 46A to include bridging visas and other temporary visas will support the orderly management of visa applications from unauthorised maritime arrivals and in some cases, their release from detention. 72

**Item 2** will insert proposed subsection 46A(2A), (2B) and (2C). Together, these subsections will provide the Minister with greater flexibility in the way in which the bar will operate. Proposed subsection 46A(2A) will provide that a determination on public interest grounds that the statutory bar will not apply may provide that it has effect only for the period specified in the determination and, if it does so, the determination ceases to have effect at the end of the specified period. Proposed subsection 46A(2B) provides that the period specified in a determination may be different for different classes of UMAs. Proposed subsection 46A(2C) provides that the Minister may, in writing, vary or revoke a determination made under subsection (2) if the Minister thinks that it is in the public interest to do so.

**Item 4** repeals and substitutes new subsection 46A(4) to provide that if the Minister varies or revokes a determination, the same tabling requirements apply as currently apply to the making of a determination.

**Item 5** clarifies that the Minister does not have an obligation to consider whether to exercise the power to lift the bar under subsection 46A(2) or whether to vary or revoke a determination under proposed subsection 46A(2C).

It is relevant to note that proceedings have commenced in the High Court challenging (amongst other things) whether the Minister is bound to determine that subsection 46A(1) of the Act does not apply to an application by the plaintiff for a protection visa. The plaintiff was granted a Temporary Safe Haven Visa (subclass 449) and a Temporary Humanitarian Concern Visa (subclass 786) under section 195A of the Act. This section enables the Minister to grant a detainee a visa whether or not they have applied for one. However, the grant of visa

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70. Explanatory Memorandum, Migration Amendment (Protection and Other Measures) Bill 2014, op. cit., p. 21.
71. Ibid., pp. 19—20.
72. Ibid., p. 24.
enlivened the statutory bar contained in section 91K and the plaintiff is challenging the validity of that exercise of power. The full bench of the High Court is scheduled to hear this matter on 13 August 2014.\textsuperscript{73}

The statutory bar for transitory persons

Items 6-10 will amend existing section 46B by making the identical amendments in items 1 to 5 to the existing statutory bar in section 46B (visa applications by transitory persons). ‘Transitory persons’ are defined in subsection 5(1) most relevantly as ‘a person who was taken to a regional processing country under section 198AD or a person who was taken to a place outside Australia under paragraph 245F(9)(b) of this Act, or paragraph 72(4)(b) of the Maritime Powers Act 2013’.

Changes to eligibility for temporary safe haven visas

Items 11 to 13 amend existing sections 91H and 91J. These provisions currently operate to preclude the holder of a temporary safe haven visa from applying for a visa other than another temporary safe haven visa. These amendments will expressly exclude UMAs and transitory persons from the operation of these provisions. The Explanatory Memorandum explains these amendments as follows:

The amendments in items 11 to 13 of Schedule 3 to the Bill are intended to ensure that visa applications by unauthorised maritime arrivals and transitory persons are only affected by the statutory bars in sections 46A and 46B respectively and not by Subdivision AJ.

These amendments are to streamline the operation of the statutory bars applicable to unauthorised maritime arrivals and transitory persons and in particular in relation to the majority of unauthorised maritime arrivals who are in Australia. Most unauthorised arrivals and some transitory persons who arrived in Australia before 19 July 2013 have been granted a temporary safe haven visa and a Bridging E (Class WE) visa (BVE) under section 195A of the Migration Act and once the amendments to section 46A and section 46B commence would otherwise be subject to two provisions that prevent them from making a valid application for a visa. This is inefficient and administratively complex.

These items make amendments to ensure there will be only one provision that prevents an unauthorised maritime arrival or a transitory person from making a valid application for a visa, simplifying the legal framework and supporting the orderly management of visa applications. [Emphasis added].\textsuperscript{74}

Item 15 is an application and transitional provision for UMAs who hold or have held temporary safe haven visas while item 16 is an application and transitional provision for transitory persons who hold or have held temporary safe haven visas. Most significantly, subitems 15(3) and 16(3) provide that from the commencement of Schedule 3, amended section 46B applies as if temporary safe haven visas, temporary humanitarian concern visas and temporary protection visas were prescribed for the purposes of subparagraph 46A(1)(b)(ii). This means a UMA or transitory person, who is in Australia and holds a temporary safe haven visa, temporary humanitarian concern visa or a temporary protection visa on or after commencement time, will not be able to make a valid application for a visa, unless the Minister has made a determination to allow them to do so.\textsuperscript{75}

Schedule 4—Tribunal processes and administration

Items 1 and 2 make minor technical amendments to existing subsections 5(9) and 5(9A) of the Act to further put beyond doubt when a review of a decision has been ‘finally determined’.

Items 3 to 17 make amendments to the processes and administration of the MRT while items 18 to 32 make identical amendments to the RRT’s processes and administration. This Digest will only provide commentary and analysis on the amendments as they apply to the MRT but they apply equally to the RRT as the amendments replicate those being applied to the MRT.

Item 4 inserts proposed paragraph 349(2)(e) into the Act which will expand the powers of the MRT to include the ability to exercise a power under proposed subsection 362B in relation to the dismissal or re-instatement of an application if an applicant fails to appear before the Tribunal when invited.

\textsuperscript{73} Plaintiff 54/2014 v Minister for Immigration and Border Protection & Anor. See the High Court of Australia website for further information.

\textsuperscript{74} Explanatory Memorandum, Migration Amendment (Protection and Other Measures) Bill 2014, op. cit., p. 30.

\textsuperscript{75} Ibid., pp. 31–32.
Item 5 expands the operation of existing section 353A, which is the provision that enables the Principal Member to give directions. Proposed paragraph 353A(2)(b) expressly provides that the Principal Member may set out procedures to be followed by applicants and their representatives (such as migration agents) in relation to proceedings before the Tribunal. The Explanatory Memorandum provides no additional explanatory information in relation to this proposed amendment.

Item 7 inserts proposed section 353B into the Act. This amendment will enable the Principal Member to issue a guidance decision which is to be complied with by the Tribunal in reaching a decision on a review of a kind specified in the direction. The Tribunal is required to comply with the guidance decision unless the Tribunal is satisfied that the facts or circumstances of the decision under review are clearly distinguishable from the facts or circumstances of the guidance decision. Significantly though, non-compliance with the guidance decision does not render the Tribunal’s decision invalid. However, it could presumably be a factor that could influence the decision whether to re-appoint a Tribunal Member. The Explanatory Memorandum notes that the amendment is needed to promote consistency in decision making between different Members of the Tribunal. One would think that the practice of following the decisions of the Principal or Senior Members is occurring on an informal basis already but this amendment will make it a statutory obligation. Though this amendment will undeniably enhance consistency in the decision making of the Tribunal there is a risk that it may adversely impact on the ability of Members to assess each particular case on its own merits.

Item 11 amends existing section 362B, which relates to the failure of an applicant to appear before the Tribunal. Currently under the Act, where an applicant is invited (under section 360) to appear before the Tribunal and they fail to appear, the Tribunal may make a decision on the review without taking any further action to allow or enable the applicant to appear before it. This item proposes to insert proposed subsections (1A) to (1G) to give the Tribunal greater flexibility in the way it manages cases when an applicant fails to appear. Together, these provisions provide that the Tribunal can either make a decision on the review or it can make a written statement dismissing the application without any further consideration of the application or information before the Tribunal. If the Tribunal dismisses the application, the applicant has seven days (after receiving the notice of the decision) to apply to the Tribunal to have the application reinstated. The Tribunal can then either reinstate the application if it considers it appropriate to do so or confirm the decision to dismiss the application by written statement under section 368 (which requires the Tribunal to specify the reasons for the decision and so forth). If the Tribunal reinstates the application, the application is taken never to have been dismissed. If the applicant fails to apply for reinstatement, the Tribunal must confirm the decision to dismiss the application under section 368 of the Act. Significantly, if the Tribunal confirms the decision to dismiss the application, the decision under review is taken to be affirmed. The Tribunal is precluded from making oral decisions under proposed subsections 362B(1A), (1C) or (1E).

The Explanatory Memorandum provides no additional explanatory information in relation to this proposed amendment. The Minister’s second reading speech simply notes that this amendment ‘will stop applicants from using the merits review process to delay their departure from Australia’. Nonetheless, this amendment is consistent with the recommendations of Professor Michael Lavarch who recently conducted an inquiry into the increased workload of the MRT and RRT.

Item 12 inserts proposed section 362C into the Act. This provision only applies to ‘non-appearance decisions’, which are decisions by the Tribunal to dismiss an application for failure to appear before the Tribunal under paragraph 362B(1A)(b) and decisions to reinstate an application under paragraph 362B(1C)(a). If the Tribunal makes such a ‘non-appearance decision’ the Tribunal is required to make a written statement setting out the reasons for the decision. In the case of a decision to reinstate an application, the Tribunal is required to also set out the findings on any material questions of fact and refer to the evidence or any other material on which the findings of fact were made. The Tribunal is also required to record the day and time the statement is made. This is important because once such a decision is made, the Tribunal has no power to vary or revoke its decision. However, if the Tribunal fails to record the day and time when the written statement was made the ‘non-appearance decision’ remains valid. The Tribunal’s failure to record the day and time when the written

76. Ibid., p. 36.
78. M Lavarch, Report on the increased workload of the Migration Review Tribunal (MRT) and the Refugee Review Tribunal (RRT), Department of Immigration website, undated, accessed 8 July 2014.
statement was made will also not affect its inability to vary or revoke a ‘non-appearance decision’. In fact, even if the Tribunal does not notify the applicant of the ‘non-appearance decision’ by giving them a copy of the written statement, the Tribunal’s failure in this regard will not affect the validity of the ‘non-appearance decision’.

**Item 17** repeals existing section 368D and substitutes **new section 368D**. Currently, the Tribunal has the power to make an oral decision but it must provide the applicant with a written statement (under existing subsection 368(1)) within 14 days after the decision is made. **Proposed subsection 368D(2)** provides that if the Tribunal makes a decision on a review orally then it can choose to either make a written statement or make an oral statement, both of which must contain certain prescribed information such as the reasons for the decision and the findings on any material questions of fact, and refer to evidence or other material upon which such findings were based. It must also identify the day and time the decision is orally made, though if it fails to do so the decision is not rendered invalid. Neither will other ‘procedural irregularities’ (such as a failure to provide a written statement within 14 days to the applicant upon request) affect the validity of the decision or the inability of the Tribunal to vary or revoke that decision. Under **proposed subsection 368D(3)**, the Tribunal has no power to vary or revoke a decision after the day and time the decision is given orally. An applicant can make a written request (within a period to be prescribed by the Regulations) for an oral statement (made under paragraph 368D(2)(a)) to be provided in writing. The Tribunal must provide them a copy within 14 days.

The Minister’s second reading speech simply notes that this amendment ‘has the potential to significantly reduce the administrative burden on the Tribunals’.79 This amendment is also consistent with the recommendations of Professor Michael Lavarch in the inquiry referred to above.80

**Item 34** is an application provision which sets out which applications to the MRT or RRT will be affected by these proposed changes. Please see the Explanatory Memorandum for further details.81

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80. M Lavarch, Report on the increased workload of the Migration Review Tribunal (MRT) and the Refugee Review Tribunal (RRT), op. cit.
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Migration Amendment (Protection and Other Measures) Bill 2014

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