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RESEARCH ARTICLE

Reaching Reasonable Satisfaction: A Constructive Requirement for Protection Interviews?

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Abstract

This paper examines the role of interviews in Australian protection visa decision-making, arguing that while not a statutory requirement, interviews are often constructively required to ensure procedural fairness and achieve reasonable satisfaction. The analysis explores the evolution of departmental policy from an initial presumption favouring interviews to a more exceptionalist approach driven by administrative efficiency. It argues that this shift creates tension with the underlying legal framework and risks legal error. Analysis of key cases such as *Plaintiff S157/2002, Saeed*, and *Chen*, alongside departmental policy, suggests that failure to make obvious inquiries or engage with applicants directly, particularly regarding credibility, can constitute jurisdictional error. The paper calls for balanced procedures that identify when interviews are necessary while maintaining efficient processing.

I. Introduction

Conducting a narrative interview is the main mechanism by which refugee processing states around the world explore the applicant's claims and examine credibility.[1] The United Nations High Commissioner for Refugees (UNHCR) emphasises personal interviews as central to fair refugee status determination.[2] This global practice reflects recognition that protection claims often involve complex narratives, credibility assessments, and vulnerable applicants.[3]

[1]European Migration Network, *Accurate, Timely, Interoperable? Data Management in the Asylum Procedure* (EMN Study, June 2021) 18.

[2]United Nations High Commissioner for Refugees, *Procedural Standards for Refugee Status Determination under UNHCR's Mandate* (UNHCR, 26 August 2020) 15, ch 4.3.1.

[3]United Nations High Commissioner for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (UN Doc HCR/1P/4/Eng/REV.4, February 2019)* 42–5 ('*UNHCR Handbook*').

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The shortcomings of interview as a mechanism for inquiry in the refugee status determination process has been analysed across a wide body of interdisciplinary scholarship,[4] particularly the well-established flaws of judging an applicant's 'demeanour' as a subjective metric of credibility.[5] Still, conducted appropriately, interview remains one of the most effective and efficient mechanisms for gathering information and testing the credibility of narrative when documentary evidence is limited.[6]

However, increasing application volumes and administrative pressures have led to questioning whether interviews are always procedurally necessary. The 2023 Nixon Review into visa exploitation found the median processing time for a Protection visa was over two years.[7] Consequently the 'backlog' of cases awaiting decision grew to 28,324 at the end of the 2022-23 financial year,[8] prompting government to commence a $160m reform program in October 2023.[9]

That reform program would shift the focus of Protection decision-making to a 'last in, first out' processing model, increasing the efficiency of processing for new cases before working through the existing case backlog.[10] The Department of Home Affairs now states that 'big changes' to the Protection process have resulted in faster processing times: "Most new applications are now decided almost 8 times faster compared to recent years."[11] Academic observers have expressed reservations that this speed appears to have been found by finalising decisions 'without an interview or opportunity to put forward further information about their case.'[12]

The increased pressure to address the backlog of Protection visa applications creates tension between administrative efficiency and procedural fairness obligations impacting the reasonableness of decisions.

[4]This scholarship has been carefully and comprehensively analysed in Anthea Vogl, *Judging Refugees: Narrative and Oral Testimony in Refugee Status Determination* (Cambridge University Press, 2024) 1–22 ('*Judging Refugees*').

[5]Jill Hunter et al, 'Asylum Adjudication, Mental Health and Credibility Evaluation' (2013) 41(3) *Federal Law Review* 471, 481–3.

[6]Department of Home Affairs (Cth), *Procedural Instruction: The Protection Visa Processing Guidelines* (30 October 2024) 69 [11.1.2] ('*The 2024 PVPG*').

[7]Christine Nixon, *Rapid Review into the Exploitation of Australia's Visa System* (Report, 31 March 2023) 24–5.

[8]Department of Home Affairs (Cth), *Monthly Update: Onshore Protection (Subclass 866) Visa Processing – June 2023* (Report, June 2023) 4 ('*PPVP June 2023*').

[9]Andrew Giles, Minister for Home Affairs, 'Restoring Integrity to Our Protection System', (Media Release, 5 October 2023) <https://minister.homeaffairs.gov.au/AndrewGiles/Pages/restoring-integrity-protection-system.aspx>.

[10]Paul Karp, 'Labor to Prioritise New Asylum Seeker Claims as Part of $160m Package to Tackle Backlog', *The Guardian* (online, 4 October 2023) <https://www.theguardian.com/australia-news/2023/oct/05/labor-to-prioritise-new-asylum-seeker-claims-as-part-of-160m-package-to-tackle-backlog>.

[11]Department of Home Affairs (Cth), 'Protection Visas Are for Asylum Seekers', *Immigration and Citizenship* (Web Page, 16 September 2025) <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/protection-866/genuine-asylum-seekers>.

[12]Daniel Ghezelbash and Constantin Hruschka, *A Fair and Fast Asylum Process for Australia: Lessons from Switzerland* (Policy Brief No 16, UNSW Kaldor Centre for International Refugee Law, reissued 10 October 2024) 11.

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This paper examines the doctrinal law and policy guidance surrounding interviews in Australian Protection visa decision-making. In considering the statutory requirements and common law obligations alongside compelling obiter dicta on when interviews may be legally required, the analysis finds that in some circumstances, there will be a constructive requirement to interview protection applicants, despite privative clauses which limit the extent of the hearing rule of procedural fairness.

This finding is further reinforced by a detailed consideration of the Department of Home Affairs' policy guidance to decision-makers over time. This guidance iterates the importance of interview to effective information gathering, but also reflects legitimate concerns about processing efficiency. Taken together, this analysis suggests that attempts to streamline processing through wholesale moves away from interviews risk creating jurisdictional error and practical injustice, particularly given increasing caseloads and processing delays.

II. The Legislative Framework: Powers, Responsibilities and Codification

Processually, protection interviews are provided for under sections 56 and 57 of the *Migration Act 1958* (Cth). These provisions fall under Subdivision AB of the Act, the 'code of procedure for dealing fairly, efficiently and quickly with visa applications,' and particularly the privative clause at section 51A which states:

> ***Section 51A*** *Exhaustive statement of natural justice hearing rule*
> *(1) This Subdivision is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with.*

Section 56 establishes a permissive framework for information gathering, while section 57 mandates the provision of certain adverse information to applicants for comment. Section 58 allows the officer to specify the manner in which additional information or comments may be given, including by interview.

> ***Section 56*** *Further information may be sought*
> *(1) In considering an application for a visa, the Minister may, if he or she wants to, get any information that he or she considers relevant but, if the Minister gets such information, the Minister must have regard to that information in making the decision whether to grant or refuse the visa.*
> *(2) Without limiting subsection (1), the Minister may invite, orally or in writing, the applicant for a visa to give additional information in a specified way.*
> …
>
> ***Section 57*** *Certain information must be given to applicant*
> *(1) In this section,* ***relevant information*** *means information (other than non-disclosable information) that the Minister considers:*
> *(a) would be the reason, or part of the reason for refusing to grant a visa; and*
> *(b) is specifically about the applicant or another person and is not just about a class of persons of which the applicant or other person is a member; and*
> *(c) was not given by the applicant for the purpose of the application.*
> *(2) The Minister must:*

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> *(a) give particulars of the relevant information to the applicant in the way that the Minister considers appropriate in the circumstances; and*
> *(b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to consideration of the application; and*
> *(c) invite the applicant to comment on it.*

It is well established then that there is no statutory requirement to mandatorily undertake an interview with a protection applicant. Indeed, the permissive construction of section 56 provides that there is no statutory obligation to seek further information at all, only that any information obtained must be considered.

This framework operates alongside section 5AAA, which places primary responsibility on applicants to present their claims.

> ***Section 5AAA*** *Non - citizen's responsibility in relation to protection claims*
> *(1) This section applies in relation to a non - citizen who claims to be a person in respect of whom Australia has protection obligations (however arising).*
> *(2) For the purposes of this Act, it is the responsibility of the non - citizen to specify all particulars of his or her claim to be such a person and to provide sufficient evidence to establish the claim.*
> *(3) The purposes of this Act include:*
> *(a) the purposes of a regulation or other instrument under this Act; and*
> *(b) the purposes of any administrative process that occurs in relation to:*
> *(i) this Act; or*
> *(ii) a regulation or instrument under this Act.*
> *(4) To remove doubt, the Minister does not have any responsibility or obligation to:*
> *(a) specify, or assist in specifying, any particulars of the non - citizen's claim; or*
> *(b) establish, or assist in establishing, the claim.*

The statutory duty then is on the applicant to make their claims for protection and not necessarily on the decision-maker to mandatorily explore the matter before them in any overly inquisitive way. However, despite the endeavour to comprehensively codify the extent of 'fair hearing' under the *Migration Act*, the reality is far more nuanced.

III. Constitutional Requirements and Common Law Principles

In *Plaintiff S157/2002*,[13] the court held that privative clauses do not prevent the review of jurisdictional error by the courts because section 75(v) of the Constitution 'introduces … an entrenched minimum provision of judicial review.'[14] This is significant in the context of codified procedure: while Parliament can manifest the clear intention to limit the fair hearing rule, they cannot limit the courts ability to review and find jurisdictional error arising from the otherwise legitimately statutorily-limited provision of a fair hearing.

[13] *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 ('*Plaintiff S157*').
[14] Ibid 513 [103].

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The case of *Saeed*[15] adds further nuance. In *Saeed*, the court held that the privative clause was valid as limiting the requirements of the hearing rule for onshore protection applicants, however, that the validity of section 51A raises questions as to whether the condition of satisfaction (or non-satisfaction) required to lawfully exercise the refusal power under section 65, can be properly reached.[16]

These cases give rise to the possibility that procedural fairness, though lawfully excludable to some extent, may still serve as a gauge of what is required to reach a 'reasonable' satisfaction. The full Federal Court in *Chen,*[17] for example, established that there is no general rule of fairness requiring all applicants for refugee status to be given an oral interview. However, the Court noted that in particular cases - especially where credibility is at issue or where written submissions would disadvantage the applicant - natural justice might require an oral hearing.[18]

Taking these principles together, we see a complex framework where procedural requirements are ostensibly codified, yet must operate within constitutional constraints and practical requirements for lawful decision-making. The interaction between these provisions shapes both the power and obligation to conduct interviews to seek information.

The question then is not whether the lack of hearing is lawful under statute, but first what level of hearing is required under the circumstances of a particular case, to reach the threshold of satisfaction under section 65 of the *Migration Act*, and second, whether it is possible to reach that level of satisfaction reasonably without according a measure of procedural fairness.[19]

IV. The Impact of Delay on Procedural Requirements

In addition to establishing that there is no general rule of fairness requiring all applicants for refugee status to be given an oral interview, the full Federal Court in *Chen,*[20] noted that in particular cases - especially where credibility is at issue or where written submissions would disadvantage the applicant - natural justice might require an oral hearing.

> *For the reasons already given, we think such an analysis leads to the conclusion that the rules of natural justice do not mandate an oral interview by the decision-maker with every applicant for refugee status, although in particular cases, for example where a real issue of credibility is involved or it is otherwise apparent that an applicant is disadvantaged by being limited to submissions or responses to the*

[15] *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252 ('*Saeed*').

[16] Ibid 269–70 [49]–[52].

[17] *Chen v Minister for Immigration and Ethnic Affairs* (1994) 48 FCR 591 ('*Chen*').

[18] Ibid 602.

[19] *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611, 647–48 [129]–[131] (Crennan and Bell JJ) ('*SZMDS*' or '*Minister for Immigration and Citizenship v SZMDS*').

[20] *Chen* (n 17).

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> *decision-maker in writing, it may be that observance of the fundamental requirements of natural justice can only be satisfied by a determination made upon an oral hearing.*[21]

The court's reasoning in *Chen* indicates that the specific requirements of natural justice are dependent on the individual case. In *Kioa v West*, Mason J states that 'the expression "procedural fairness" … conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case.'[22]

This reasoning is echoed in the later case of *Dietrich*[23] which, though it was in the context of criminal law, held that fairness will very often depend on the individual circumstances of the case.

> *Moreover, notions of fairness are inevitably bound up with prevailing social values. It is because of these matters that the inherent powers of a court to prevent injustice are not confined within closed categories. And it is because of those same matters that, save where clear categories have emerged, the inquiry as to what is fair must be particular and individual.*[24]

Though these cases refer to natural justice in sense of fairness, it serves to recall that procedural restrictions exist to ensure a decision devoid of jurisdictional error. Thus, in ensuring a lawful decision, it is necessary for decision-makers to ensure the hearing is scaled to the case before it.

In *Plaintiff M1/2021*,[25] while the court reiterated that considerations are a matter for the decision-maker, the plurality of the court also stated:

> *What is necessary to comply with the statutory requirement for a valid exercise of power will necessarily depend on the nature, form and content of the representations. The requisite level of engagement – the degree of effort needed by the decision-maker – will vary, among other things, according to the length, clarity and degree of relevance of the representations. The decision-maker is not required to consider claims that are not clearly articulated or which do not clearly arise on the materials before them.*[26]

This opinion indicates that the requisite level of engagement scales with the quality of the initial submission, and perhaps paradoxically, more comprehensive initial statements of claim may create a more substantial obligation for decision-makers to engage. A more detailed submission then cannot be dismissed without an appropriate and commensurate level of consideration.

[21] Ibid 602.

[22] *Kioa v West* (1985) 159 CLR 550, 585 (Mason J).

[23] *Dietrich v The Queen* (1992) 177 CLR 292 ('*Dietrich*').

[24] Ibid 364 (Gaudron J).

[25] *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 275 CLR 582.

[26] Ibid 599 [25] (Kiefel CJ, Keane, Gordon AND Steward JJ).

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This scaling 'obligation to consider' is further complicated by the backlog of cases awaiting first-instance decision-making. The case of *BMF16*[27] establishes that long periods of inactivity where there is otherwise a duty to make a decision may constitute an unreasonable delay. In that case Bromberg J opined that where legislation does not specify time limits, the scheme when considered as a whole–including its purpose, public importance, impact on affected individuals, potential prejudice from delays, and practical administrative constraints–can illuminate the reasonableness of delay.[28]

In the case of Protection assessment, the reasonableness of any delay must balance the serious consequences and risks of harm to applicants, the complexity of refugee determination and investigation requirements, and the practical constraints on administrative resources, while remaining cognisant of the ongoing impact on applicants' lives during processing. Significantly, deficiency of administrative resources is not necessarily considered to be a justification for an unreasonable delay.

> *Clearly, it is not for the court to dictate to the Parliament or the Executive what resources are to be made available in order properly to carry out administrative functions under legislative provisions. Equally clearly, however, the situation cannot be accepted in which the existence of a right created by the Parliament is negatived, or its value set at nought, by a failure to provide the resources necessary to make the right effective.*[29]

Importantly however, delay in making a decision cannot alone form the basis for a ground of review after the decision has ultimately been made.[30] Rather, unreasonable delay provides additional framing on the necessary engagement required by the decision-maker, and a reduction in the bounds of reasonableness of non-inquiry.

This was elucidated in the recent case of *Von Schoeler (No 2)*,[31] in which the full Federal Court held that an unreasonable delay in making a decision requires a demonstrated thorough consideration in the reasons and reasoning provided.[32] The Court argued that comprehensive reasons following substantial delay will address the submission that an arbiter would, 'under pressure, gravitate to the conclusion that was easiest to make and express,'[33] and the appearance of ducking 'more difficult issues and driving toward simple conclusions.'[34]

The intersection between unreasonable delay and reasonable satisfaction is particularly significant in the protection visa context. While the combination of *BMF16* and *Wei Jianxin* establish that administrative constraints cannot justify unreasonable delay, *Plaintiff S157* requires that procedures meet minimum standards of fairness

[27] *BMF16 v Minister for Immigration and Border Protection* [2016] FCA 1530 ('*BMF16*').

[28] Ibid [24]-[26] (Bromberg J).

[29] *Wei Jianxin v Minister for Immigration, Local Government and Ethnic Affairs* [1991] FCA 268 [55] ('*Wei Jianxin*').

[30] *Elias v Commissioner of Taxation* [2002] FCA 1132 [54]-[55].

[31] *Von Schoeler v Allen Taylor and Company Ltd Trading as Boral Timber (No 2)* (2020) 273 FCR 189 ('*Von Schoeler (No 2)*').

[32] Ibid 205–12 [90]-[114].

[33] Ibid 209 [101].

[34] Ibid 211 [113].

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as an 'entrenched minimum provision of judicial review,' which assist in preventing jurisdictional error. Together these create a heightened obligation where delays have occurred.

Read together these principles suggest, first, that the constitutional requirement for jurisdictional review outlined in *Plaintiff S157* may require minimum standards of fairness as a necessary component of reaching the threshold of reasonable satisfaction,[35] and cannot be displaced by administrative pressures that lead to delay;[36] second, where substantial delay has occurred, the decision-maker's obligation to demonstrate satisfaction becomes more acute,[37] and third, the 'reasonableness' of procedures adopted must be assessed not just against administrative efficiency, but also against the requirements for reasonable satisfaction which may include a meaningful opportunity to be heard.[38]

This is particularly evident in *Von Schoeler (No 2)*, where the Court's requirement for demonstrated thorough consideration following delay can be understood as giving practical effect to *Plaintiff S157*'s constitutional minimum for review and the requirements of reasonable satisfaction in *SZMDS*. The obligation to provide comprehensive reasons serves both to demonstrate that minimum requirements for satisfaction have been met and to address concerns about rushed decision-making following delay.

Moreover, this interaction suggests that, in protection assessment, where significant delays have occurred, decision-makers may need to provide additional procedural safeguards - such as interviews - to ensure reasonableness is met in reaching a threshold of satisfaction. Written procedures and 'on-the-paper' assessments alone may be insufficient to demonstrate the thorough consideration required after delay, and the fair hearing rule provides guidance on what is necessary to safeguard against jurisdictional error.

This is because a meaningful opportunity to be heard may necessitate direct engagement where complex issues have developed during the period of delay, or the passage of time without additional information leaves the previous information deficient for comprehensive considerations or insufficient to reasonably reach satisfaction. Further, endeavours to streamline procedures to long-delayed cases heighten the risk of jurisdictional error.

A question remains as to how one can ensure adequate engagement with the case and consideration of the evidence. In this, it serves to remember that adequate engagement and consideration of the evidence to reach a threshold of satisfaction is a dependent result of, firstly, the information provided, and secondly, the information sought.

Section 5AAA places the onus on applicants to specify and establish their claims, and as discussed above, section 56 is a permissive provision rather than a mandatory one. Yet the discretion to exercise the information gathering power of section 56—or to not exercise that power—remains subject to standards of reasonableness.[39] In the

[35] *SZMDS* (n 19) 647–8 [129]-[131] (Crennan and Bell JJ).

[36] *Wei Jianxin* (n 29).

[37] *Von Schoeler (No 2)* (n 31) 211 [113].

[38] *SZMDS* (n 19) 647-8 [130].

[39] *Plaintiff M148/2017 v Minister for Immigration and Border Protection* [2018] HCATrans 109 ('*Plaintiff M148/2017*' or '*Plaintiff M148/2017 v Minister for Immigration and Border Protection*').

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context of Tribunal review, the High Court has held that while there is no general duty to inquire or to invite an applicant to hearing,[40] there may be a jurisdictional error arising from the failure to make an obvious enquiry.

> *It may be that a failure to make an obvious inquiry about a critical fact, the existence of which is easily ascertained, could, in some circumstances, supply a sufficient link to the outcome to constitute a failure to review. If so, such a failure could give rise to jurisdictional error by constructive failure to exercise jurisdiction. It may be that failure to make such an inquiry results in a decision being affected in some other way that manifests itself as jurisdictional error.*[41]

The intersection of these cases: *BMF16, Von Schoeler (No 2)*, and *SZIAI*, create a compelling framework for scoping the reasonableness of satisfaction under section 65 of the Act. Where significant, unreasonable delay exists, there will be a higher standard of consideration required, an increased need to demonstrate active engagement with the evidence, and a greater obligation to make obvious enquiries, all of which may indicate a need to exercise the section 56 power in order to reasonably exercise power under section 65. Though not a question of natural justice in terms of fair hearing, the question becomes whether it is possible to reach the level of satisfaction required to lawfully exercise the refusal power of section 65[42] without according a level of procedural fairness beyond that exhaustively provided for by Subdivision AB of the Act.[43]

V. The Evolution of Departmental Policy: from Presumption to Exception

Because there is no statutory or common law provision mandating interview as a mechanism of seeking further information, the policy guidance provided to decision-makers has traditionally sought to clarify obligations and best practice. The evolution of departmental policy on protection interviews reflects a gradual shift from presumptive interviews to increasing discretion. This evolution can be traced through several key phases: an initial presumptive approach; a period post-legislative reform; the introduction of systematic exemptions; the current shift to a discretionary framework; and the current position of discretion to interview.

a. Initial Presumptive Approach (2014-2015)

The early policy position, reflected in the 2014 Protection Visa Procedures Advice Manual, established a strong presumption favouring interviews. While acknowledging no legislative requirement, the policy directed that "unless there are substantial grounds for not doing so, it is departmental policy that PV applicants be offered an interview." This approach aligned closely with UNHCR guidance and international

[40] *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123, 1125 [1]-[2] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) ('*SZIAI*').

[41] Ibid 1129 [25].

[42] *SZMDS* (n 19) 647–648 [129]-[131] (Crennan and Bell JJ).

[43] Rebecca Heath and Paul Anthony Walker, 'Casenotes: Saeed v Minister for Immigration and Citizenship', ed Rebecca Heath (2010) 18(9) *Australian Journal of Administrative Law* 9, 12.

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best practice, recognising interviews as crucial for credibility assessment and fact-finding. For example, the Protection Visa Procedures Advice Manual (PVPAM) issued 23 August 2014 provides the following:

> *Although there is no legislative requirement that a PV applicant be interviewed by a decision maker, unless there are substantial grounds for not doing so, it is departmental policy that PV applicants be offered an interview.*
>
> *Decision makers should be clear as to the purpose of the interview. They should focus their questions on specific issues pertaining to the applicant's claims, particularly those issues that are critical to the decision. Questions should be succinct and to the point. The interview should:*
>
> - *explore claims/information raised*
> - *focus on specific issues that require clarification, and*
> - *provide an avenue for natural justice by enabling the applicant to respond to any adverse information and by giving them an opportunity for their claims to be heard.*[44]

And:

> *The interview process is non-adversarial and decision makers are to explore claims and to satisfy themselves as to whether the applicant is a person to whom Australia has protection obligations.*[45]

This approach parallels that of the UNHCR in their own discussions which state:

> *As the applicant's own testimony is in many cases the primary if not the only source of evidence available, the personal interview is also crucial in enabling the determining authority to*
>
> - *Identify what facts are material to the applicant's claim;*
> - *Gather, as far as possible, from the applicant all the necessary information related to those material facts; and*
> - *Probe the credibility of the applicant's statements with regard to material facts.*[46]

This initial policy position reflects several significant principles: First, the strong presumption in favour of interviews aligned with international practice recommendations and recognising the unique challenges of protection decision-making. Second, the non-adversarial characterisation of interviews acknowledged their purpose to fact-find

[44]Department of Immigration and Border Protection (Cth), *The Protection Visa Procedures Advice Manual* (23 August 2014) [42] ('*The 2014 PVPAM*').

[45]Ibid [44.1].

[46]United Nations High Commissioner for Refugees, *Expert Roundtable Summary of Deliberations on Credibility Assessment in Asylum Procedures, Budapest, Hungary* (5 May 2015) [66].

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rather than interrogate. Third, the policy effectively created a default position requiring justification for not interviewing, rather than requiring justification for conducting interviews. This approach implicitly recognises that interviews often constitute the most effective means of reaching reasonable satisfaction under section 65.

b. Post-Legislative Reform Period (2015-2016)

In 2015, Parliament passed the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth) and the *Migration Amendment (Protection and Other Measures) Act 2015* (Cth) which codified Australia's interpretation of the Refugee Convention into domestic law. The substance of the Guidelines however remained, stating:

> *The most effective way of exploring a PV applicant's claims and providing relevant information for comment is by interview, although there is no legislative requirement for a PV applicant to be interviewed by a decision maker. Therefore, unless there are substantial grounds for not doing so, it is departmental policy for PV applicants to be offered an interview.*
>
> *During the interview the decision maker should:*
>
> - *explore the claims and information raised, particularly those issues that are critical to the application decision, and*
> - *provide an avenue for procedural fairness by enabling the applicant to respond to any adverse information, and by giving them an opportunity for their claims to be heard.*[47]

And:

> *The interview process is non-adversarial and is for the purpose of exploring the applicant's claims and providing them with relevant information for comment, not for making any findings or decisions in relation to the application.*[48]

The maintenance of presumptive interviewing despite major legislative reform is significant. It suggests recognition that even within a codified statutory assessment framework, interviews remained central to effective protection decision-making. The emphasis on interviews as 'the most effective way' of exploring claims acknowledged the practical limitations of paper-based assessment, particularly for credibility issues.

c. Introduction of Systematic Exemptions (2016-2017)

Following this, we start to see a shift in the policy guidance which develops strict guidance around when interviews are not required for a fair hearing. For example, in the Common Processing Guidelines (CPG) document issued 1 July 2016, it states:

[47] Department of Immigration and Border Protection (Cth), *The Protection Visa Common Processing Guidelines* (26 February 2015) 89 [41] ('*The 2015 CPG*').

[48] Ibid [43].

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> *There is no legislative requirement for PV applicants to be interviewed. In the majority of cases, an interview will be the most effective way of exploring an applicant's claims and providing them with relevant information for comment. In certain circumstances, a decision maker may decide that an interview is not required and that a decision can be made on the information provided in the application.*[49]

Under the following section titled 'Deciding not to interview', the document provides guidelines on when it may be appropriate not to interview an applicant. The CPG documents adds systematic exemptions when the applicant is from either a country that is a signatory to the Refugee Convention, the International Covenant on Civil and Political Rights and the Convention Against Torture and are considered to be generally safe and politically stable, or a country with a post-review refusal rate of 90 per cent or more over the last two years. In both cases, the applicant's claims must also be unsupported by country information. Where the applicant's country of origin is not included in the exempt categories, the guidelines state the applicant must either be interviewed or offered an interview and not respond.[50]

The introduction of country-based exemptions marks a significant moment in policy evolution. This systematic approach to identifying cases where interviews might not be required represented the first major departure from presumptive interviewing. However, the framework raises several concerns in regard to the broader legal requirements for individualised consideration. First, country-based exemptions increase the risk of overlooking individual circumstances that might necessitate interviews regardless of country of origin. Second, using post-review refusal rates as a criterion could create self-fulfilling outcomes. Third, the framework potentially fetters decision-maker discretion by creating presumptions based on broad categories rather than individual circumstances. This shift coincided with rising application numbers, suggesting an embryonic imbalance between administrative efficiency and individualised assessment.

In the Protection Visa Processing Guidelines issued 12 May 2017, we see even more equivocation. Under the heading 'If applicants should be interviewed,' it states:

> *Section 58(1) of the Act provides that an interview may be held for the purposes of inviting an applicant to submit information under s56 or comment on information under s57. In most cases, an interview will be the most effective way of seeking information from applicants or giving them the opportunity to comment on relevant information.*
>
> *There is no requirement under the Act for PV applicants to be interviewed and, in certain circumstances, an interview may not be required before a decision is made. However, in the following circumstances, the applicant must be given the opportunity to attend an interview:*
>
> - *Where the applicant is a Fast Track applicant.*

[49]Department of Immigration and Border Protection (Cth), *Protection Visas Common Processing Guidelines* (1 July 2016) ['Policy on Interviewing'] ('*The 2016 CPG*').

[50]Ibid ['Deciding not to interview'].

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- *Before granting a PV.*
- *Before making a decision to refuse based solely on issues relating to the applicant's credibility.*[51]

In the 2018 revision, the document states:

> *An interview is one of the mechanisms available to decision makers to explore and gather information about PV applicants' protection claims and identity, and provide procedural fairness to applicants.*
>
> *Under the Code of Procedure in the Act, an interview is one method of communication with an applicant that a decision maker can choose when they invite an applicant to:*
>
> - *provide additional information about their application (s56), or*
> - *comment on 'relevant' information that would be the reason, or part of the reason, for refusing the applicant a visa or deciding the applicant is an excluded fast track review applicant (s57).*
>
> *Under s58, a decision maker can invite an applicant to respond to a request to provide additional information or comment on relevant information in writing, at an interview or by phone. Because s58 provides a discretionary power to decision makers to choose how an applicant should communicate with the Department, decision makers should ensure they exercise this power reasonably. This means that decision makers should consider what information they require from an applicant and what would be an appropriate method for the applicant to provide that information to the Department.*[52]

And:

> *Where an application can be decided on the information available to the Department, including information provided in the application and country information, the decision may be made without interviewing the applicant.*
>
> *However, as a matter of policy, decision makers should conduct an interview in the following circumstances:*
>
> - *cases where there are concerns about the credibility of the applicant's claims that may affect the decision (for example, cases where a decision maker needs to explore the veracity of protection claims that are based on an applicant's innate characteristics, such as religious beliefs and sexual identity)*
> - *complex and sensitive cases, such as cases involving multiple complex claims needing further investigation with the applicant*

[51] Department of Immigration and Border Protection (Cth), *The Protection Visa Processing Guidelines* (12 May 2017) [4.24] ('*The 2017 PVPG*').

[52] Department of Home Affairs (Cth), *The Protection Visa Processing Guidelines* (30 April 2018) [4.23] ('*The 2018 PVPG*').

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- *before making a decision to refuse an application made by a fast track applicant*
- *before making a decision to refuse a TPV/SHEV application of an applicant who was previously found to engage Australia's protection obligations*
- *before granting a permanent PV.*[53]

The 2019 and 2020 revisions used the same wording.[54] There was no revision in 2021.

d. Shift to Discretionary Framework (2018–2023)

In 2022 and 2023, the creeping shift becomes more overt, stating:

> *Assessing whether a PV applicant engages Australia's protection obligations requires the decision maker to consider their claims and evidence or other information in light of relevant information before the Department. An interview, if conducted, may give an applicant the opportunity to provide further information or evidence to support their claims.*
>
> *An interview may also be an effective method for exploring claims with the applicant, particularly those that may be critical to the decision, as well as any concerns regarding their identity or credibility. If the interview is conducted in person, it also provides opportunity for examining the applicant's original documents.*
>
> *An interview is one of the methods in s58(1) of the Act available to officers for inviting applicants to:*
>
> - *provide additional information about their application (under s56), or*
> - *comment on 'relevant' information that would be the reason, or part of the reason, for refusing the applicant a visa or deciding the applicant is an excluded fast track review applicant (under s57).*
>
> *Under s58(1), an invitation to an applicant to provide additional information or comment on relevant information must specify whether the information or comments may be provided in writing, at an interview or by telephone. Note, however, there is no requirement under any section in the Act for officers to interview a PV applicant before making a decision. This means that whether applicants should be invited to an interview is a matter of policy rather than law.*[55]

The 2022–2023 policy revisions mark a decisive shift toward discretionary interview practice. Moving away from the structured approach of earlier iterations, the guidance

[53] Ibid [4.23.1].

[54] Department of Home Affairs (Cth), *The Protection Visa Processing Guidelines* (5 May 2019) ('*The 2019 PVPG*'); Department of Home Affairs (Cth), *The Protection Visa Processing Guidelines* (23 August 2020) ('*The 2020 PVPG*').

[55] Department of Home Affairs (Cth), *The Protection Visa Processing Guidelines* (30 October 2022) [11.1.1] ('*The 2022 PVPG*'); Department of Home Affairs (Cth), *The Protection Visa Processing Guidelines* (1 January 2023) [11.1.1] ('*The 2023 PVPG*').

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emphasises that '…whether applicants should be invited to an interview is a matter of policy rather than law'.[56] While maintaining that interviews 'may be an effective method' for exploring claims and testing credibility, the language notably shifts from prescriptive to permissive.[57]

This represents more than just a continuation of the gradual policy evolution—it fundamentally reframes the role of interviews in protection assessment. The shift from 'most effective way' to 'may be an effective method' signals a significant departure from earlier recognition of interviews' unique value in protection decision-making.[58] While purporting to enhance decision-maker discretion, the framework paradoxically risks constraining it by creating an administrative culture where interviews must be actively justified rather than being seen as a standard tool for effective assessment.

e. Current Position (2024)

The most recent version, issued 30 October 2024, states:

> *Assessing whether a PV applicant engages Australia's protection obligations requires an officer to consider all of the claims, evidence and other information in the application in light of information before the Department that is relevant. An interview may give an applicant the opportunity to provide further information or evidence to support their claims.*
> *Whether an applicant should be invited to an interview is a matter to be decided by officers on each individual application. An applicant or their representative may request an interview and, while the request and their reasons for making the request should be considered by the officer, the decision on whether or not to grant an interview remains with the officer.*[59]

And:

> *In determining whether it is more appropriate to invite an applicant to an interview or to invite an applicant to provide a response in writing, officers should consider the individual circumstances of each application. An interview may be appropriate in the following circumstances:*
>
> - *if the officer believes that interviewing the applicant would be the most efficient and/or effective method for them to obtain the additional information or comments they need in assessing the claims or making a decision on the PV application; or*
> - *if the application includes claims that could, in light of relevant country information, result in an indicatively positive protection obligations assessment but the officer considers it is not possible to verify the credibility of the claims through a written response from the applicant; or*

[56] Ibid.
[57] Ibid.
[58] XXXX.
[59] Department of Home Affairs (Cth), 'The 2024 PVPG' (n 6) 68–9 [11.1.1].

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- *if the officer has concerns about the credibility of the applicant or their claims they may wish to observe the applicant's demeanour in an interview, such as their manner of responding to questions including spontaneity; or*
- *if the application is for a subsequent TPV or SHEV and:*
  - a 'protection finding' (within the meaning of subsection 197C) has already been made in relation to the applicant, and
  - the applicant has not made new claims, and
  - *the pathway is indicatively negative based on the claims and current country information.*[60]

The current position represents a near-culmination of this policy evolution—a shift from presumptive interview to the requirement for a clear need for one. While maintaining recognition that interviews may be necessary for credibility assessment and complex claims, the framework fundamentally alters the default position. Decision-makers must now actively justify conducting interviews rather than justify not conducting them. This reversal raises significant questions about the priorities of public administration. The policy's emphasis on efficiency and streamlined processing, while understandable given caseload pressures, creates potential tension with the requirements for reasonable satisfaction under section 65, particularly in cases involving credibility issues or vulnerable applicants.

The documents themselves contain no reasoning for the shift in policy approach. However, they do appear to align with changes in the number of applications for protection lodged with the Department of Home Affairs, and its predecessor, the Department of Immigration and Border Protection. In 2013–2014, 9,646 non-IMA applicants lodged a Protection visa application, itself an increase of 14 per cent over 2012–2013.[61] By 2018–2019, the number of lodgements for non-IMA applications was 24,566.[62] In the 2023–2024 year, the figure was 25,210, returning to similar levels as prior to the COVID-19 pandemic. Table 1 below shows a compilation of available open-source data tracking Protection lodgements, finalisations, grants, and backlogs. All data relates to Onshore Protection applications and excludes Irregular Maritime Arrivals and the offshore humanitarian program.

The data reveals complex patterns in the relationship between lodgement volumes and grant rates that warrant careful interpretation. While lodgement numbers have fluctuated dramatically, reaching a peak of 27,931 in 2017–2018 before declining during the pandemic and then rising again to 25,210 in 2023–2024, grant numbers have remained relatively stable, typically ranging between 1,400 and 2,000 annually until a recent increase to 3,250 in 2023–2024.

However, this stability in grant rates should not be interpreted solely as evidence of processing capacity constraints. The protection visa program operates within Australia's broader managed migration framework, which includes planning levels set

[60] Ibid 69 [11.1.2].

[61] Department of Immigration and Border Protection (Cth), *Asylum Statistics—Australia: Quarterly Tables—June Quarter 2014* (2014) 5.

[62] Department of Home Affairs (Cth), *Onshore Humanitarian Program 2018–19* (30 June 2019).

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Table 1. Protection Visa Applications, Finalisations, Grants, and Backlog (FY2013–2014 to FY2023–2024)[63]

FY	Lodgements	Finalised	Grants	Backlog
2013–2014	9,646	7,569	1,547/2,207[64]	(no data)
2014–2015	8,587	(no data)	2,746	(no data)
2015–2016	(no data)	(no data)	2,003	(no data)
2016–2017	(no data)	7,964	1,711	(no data)
2017–2018	27,931	14,925	1,425	(no data)
2018–2019	24,566	14,700	1,650	(no data)
2019–2020	23,226	16,853	1,650	(no data)
2020–2021	11,684	14,249	1,389	32,989
2021–2022	10,564	15,726	1,762	26,227
2022–2023	18,738	14,752	2,000	28,324
2023–2024	25,210	19,700	3,250	32,636

by government. These planning levels effectively create annual caps on permanent visa grants across different streams, including protection visas. Therefore, the relatively static grant numbers may reflect policy decisions about Australia's humanitarian intake as much as, or more than, administrative processing capacity.

Nevertheless, the persistent and growing backlog—remaining above 26,000 cases even during periods of reduced lodgements—does indicate systemic processing challenges. The maintenance of substantial backlogs through 2023–2024 (32,636 cases) despite increased grant numbers suggests that while grant caps may influence final approval numbers, there are also genuine administrative pressures in processing applications to the point where they are ready for final decision.

These patterns provide important context for understanding the evolution in departmental policy regarding protection interviews. While administrative efficiency is clearly a legitimate consideration, particularly given processing backlogs, the influence of planning levels on grant rates suggests that streamlining procedures may not necessarily lead to increased grants. This raises questions about whether efficiency measures that potentially compromise procedural thoroughness can be justified purely on administrative grounds.

The creeping change in emphasis of policy guidance on protection interviews may reflect an increasing prioritisation of administrative efficiency over traditional procedural practice. While early policies presumed interviews unless substantial grounds existed not to conduct one, later iterations emphasise discretion and streamlined processing. This coincides with the rise in concerns around unmeritorious applications and an abuse of the asylum system to facilitate extended stays for non-citizens.[65]

[63] See Appendix 1 for all data sources contained in Table 1.

[64] Disparity in figures from different source documents.

[65] Refugee Council of Australia, Submission to Department of Home Affairs, Australian Government, *The 'Migration System for Australia's Future* (December 2022) 4; Karp (n 10).

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While there is little legitimate appetite for the abuse or misuse of a system aimed at protecting the most vulnerable, the shift toward efficiency-focused policy creates potential tension between guidance to decision-makers and underlying legal obligations. In the first instance, one must consider whether the policy guidance and shift away from interview fetters the discretion of the decision-maker to conduct inquiries necessary to reach reasonable satisfaction.

It is well established that executive government may develop policy guidelines to assist decision makers, structure discretion, and foster efficient and consistent public administration.[66] It is equally well established that such policy constitutes only a relevant consideration for the decision-maker in their ultimate decision or the conduct of decision-making; guiding policy cannot be applied in a blanket fashion and thus remove the discretion of the delegate. This is true even where the decision-maker is faced with a large number of similar cases; the delegate must remain open to the possibility of 'anyone with something new to say'.[67]

This has been equally reflected in statute, with the *Administrative Decisions (Judicial Review) Act 1977* (Cth) holding express provisions for the application of policy without regard to the merits of the particular case.[68] The expectation of law then is that a failure to consider the merits and requirements of the individual case will constitute a failure to exercise jurisdiction.[69]

To act without consistency is suggestive of 'an arbitrariness which is incompatible with commonly accepted notions of justice.'[70] But to treat matters as consistent without regard to individual particularity, is equally unjust, unfair, and irrational.[71] This again reflects a tension in legal stability and efficient public administration. When tension resolves into conflict however, the exercise of efficiency is expected to be consistent with individual justice.[72] Indeed, the unfettered discretion of the decision-maker exists precisely to resolve this tension and arbitrate for justice to the individual.[73]

This tension between policy evolution and legal requirements raises the question: when are interviews effectively required, despite the shift toward discretionary application? While policy has moved steadily from presumptive interviews toward discretionary engagement, the underlying legal framework for protection decision-making remains unchanged. The threshold of reasonable satisfaction under section 65, the constitutional minimums articulated in *Plaintiff S157*, and the practical requirements for credibility assessment established in *Chen* continue to shape the parameters

[66] *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634, 639–640 (Brennan J) *('Re Drake and Minister for Immigration and Ethnic Affairs (No 2)')*.

[67] *British Oxygen Co Ltd v Minister of Technology* [1971] AC 610, 625 (Lord Reid) (*'British Oxygen'*).

[68] *Administrative Decisions (Judicial Review) Act 1977* (Cth) *('ADJR Act')* ss 5(1)(e), 5(2)(f), 6(1)(e), 6(2)(f).

[69] *Rendell v Release on Licence Board* (1987) 10 NSWLR 499.

[70] *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (n 66) 639.

[71] DJ Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Clarendon, 1986) 150–151 *('Discretionary Powers')*.

[72] Commonwealth, *Commonwealth Administrative Review Committee Report* (Parliamentary Paper No 144, 1971) 3 *('Kerr Committee Report')* [12].

[73] Galligan (n 71) 282–284.

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within which that discretion must operate.[74] The evolution of policy guidance thus creates a complex intersection between administrative efficiency and legal effectiveness that requires careful navigation.

VI. When are Interviews Effectively Required? A Practical Framework

This tension becomes particularly acute when considering whether reasonable satisfaction under section 65 can be reached without direct engagement. The permissive construction of section 56 and the primary onus placed on applicants by section 5AAA might suggest that direct engagement is optional. However, as established in *SZMDS*, the threshold of satisfaction must be reached reasonably and on logically probative evidence.[75]

The recent evolution of departmental policy and practice offers revealing insights into when interviews may be constructively required. Notably, the 2023–2024 data shows both increased grant numbers (3,250 compared to historical averages of 1,400 to 2,000) and the most discretionary interview policy language to date. While the government can legitimately streamline procedures for cases tracking toward approval, this same discretion does not extend to cases where refusal is contemplated.

This pattern reinforces the key principles established in cases like *Chen* and *SZIAI*: that while interviews are not universally required, they often become constructively necessary to reach reasonable satisfaction where adverse findings are likely.[76] The ability to reach positive decisions through streamlined procedures does not diminish the need for robust engagement—including interviews—where credibility issues arise or where refusal is contemplated. Indeed, the maintenance of more rigorous procedural requirements for potential refusals reflects proper recognition that reaching reasonable satisfaction to refuse requires demonstrably thorough consideration.

This understanding helps clarify when interviews become constructively required: not because of any universal procedural obligation, but because they often constitute the most effective (and sometimes the only) means of reaching reasonable satisfaction in cases that may lead to refusal. This is particularly true where credibility is at issue or where paper-based assessment alone may not provide sufficient basis for adverse findings.

Where credibility is at issue, or where written submissions alone may disadvantage the applicant, reaching the section 65 threshold through paper-based assessment becomes problematic. The Department's own policy evolution acknowledges this implicitly—even as discretion increases, policy guidance consistently maintains that interviews are 'most effective' for exploring claims and testing credibility.

This is relevant for both the exercise of power relating to satisfaction, and for the reasonableness or non-reasonableness of seeking additional information. A policy which fetters the discretion of the decision-maker to seek further information under section 56—whether by interview or otherwise—gives rise to jurisdictional error. Applying

[74] *Plaintiff S157* (n 13); *Chen* (n 17).

[75] *Minister for Immigration and Citizenship v SZMDS* (n 19) 646 [124] (Crennan and Bell JJ).

[76] *Chen* (n 17); *SZIAI* (n 40).

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a policy without regard to the individual circumstances of the case may cause the decision-maker to fail to regard mandatory considerations.[77]

These requirements are also relevant to the consideration of the backlog of cases. The emphasis on rapid processing may conflict with *Von Schoeler*'s requirement for demonstrated thorough consideration, particularly where delay has occurred.[78] Additionally, country or cohort-based exemptions, like those introduced in the 2016 policy iteration, risk overlooking *Chen*'s emphasis on individual circumstances and specific credibility issues.[79] Finally, paper-based assessment may constrain the ability to make what *SZIAI* termed 'obvious inquiries' about critical facts.[80]

This does not mean that a decision-maker following policy guidance is inherently unlawful. *Plaintiff M148/2017* considered the interview policy in some detail, finding in the circumstances of that case that there was no basis for inflexible application of the policy.[81]

> *The inference is fairly open that the delegate did not conduct an interview with the plaintiff because she was not satisfied that he had established his case for protection. There was no issue as to the credibility of his claims and the obligation under section 57 was not engaged.*[82]

VII. The Tension between Administrative Efficiency and Procedural Justice

The question of protection visa interviews exemplifies a fundamental tension in administrative law between efficient public administration and procedural justice. This tension operates at a level that is simultaneously theoretical and practical.

At its core, this represents a collision between two legitimate administrative law principles: the need for efficient decision-making processes that serve the public interest through timely resolution of cases, and the requirement for procedures that ensure genuine consideration of individual circumstances and fair opportunity to be heard. This tension manifests in three key ways.

First, there is the resource allocation dilemma. While *Wei Jianxin* establishes that resource constraints cannot justify denial of procedural fairness,[83] the reality of finite administrative resources requires some accommodation between ideal process and practical constraints. The challenge lies in determining where this accommodation crosses into jurisdictional error.

Second, there is the standardisation paradox: efficient administration often requires standardised procedures, yet procedural fairness demands individualised consideration. As noted in *British Oxygen*, even where dealing with numerous similar cases,

[77] *Mutton v Ku-ring-gai Municipal Council* [1973] 1 NSWLR 233; (1973) 1 NSWLR 233, 241 (Jacobs P); *R v Australian Broadcasting Tribunal; Ex parte Hardiman* (1980) 144 CLR 13, 34.

[78] *Von Schoeler (No 2)* (n 31).

[79] *Chen* (n 17).

[80] *SZIAI* (n 40).

[81] *Plaintiff M148/2017 v Minister for Immigration and Border Protection* (n 39).

[82] *Plaintiff M148/2017 v Minister for Immigration and Border Protection* (n 39).

[83] *Wei Jianxin* (n 29).

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decision-makers must remain open to 'anyone with something new to say'.[84] This creates inherent tension between systematic processing and individual justice.

Third, there is what might be termed the 'quality-quantity conflict': the pressure to process increasing volumes of applications can conflict with the obligation for thorough consideration established in *Von Schoeler*.[85] This is particularly acute where delay has occurred, creating a compounding effect where the very backlog that drives efficiency measures simultaneously heightens the requirement for demonstrated thorough consideration.

These tensions cannot be resolved through simple prioritisation of one principle over the other. As Brennan J noted in *Drake (No 2)*, while consistency in administration is desirable, it cannot override the fundamental requirement for individual justice.[86] Similarly, as established in *Plaintiff S157*, while Parliament can prescribe efficient procedures, these must still meet standards of reasonableness in the exercise of the power, arguably necessitating a meaningful opportunity to be heard.[87]

This framework helps explain why the shift in interview policy creates legal risk: it prioritises administrative efficiency without adequately accounting for how fair hearing, such as interviews, often serve as the practical mechanism for reaching reasonable satisfaction under section 65 and avoiding jurisdictional error. The challenge is not choosing between efficiency and fairness, but rather designing procedures that achieve both.

Indeed, it has been argued that fairness as a legal process is central to administrative efficiency, as reduced procedural rights lead to longer delays both as applicants seek review and as those reviews are more likely to be successful.[88] In the Australian context, the new *Administrative Review Tribunal Act 2024* (Cth) provides a broad discretion for the Tribunal to determine appropriate procedure for the matter before it.[89] Though the requirement for a hearing is not specified in the Act, section 55 provides a duty on the Tribunal to ensure each party is given a reasonable opportunity to present their case.[90] At section 106, the ART Act also expressly provides that the Tribunal may reach a decision without hearing, however places strict limitations on the circumstances in which the Tribunal may proceed, such as when the parties consent to proceed without a hearing or fails to appear.[91] This implies a baseline understanding that administrative review requires hearing in order to adequately ensure the meaningful opportunity for parties to present their case.

The nature of the Tribunal's function in Australian administrative review, that is, to make the decision the Tribunal itself concluded was the correct or preferable decision

[84] *British Oxygen* (n 67).
[85] *Von Schoeler (No 2)* (n 31).
[86] *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)* (n 66) 639.
[87] *Plaintiff s157* (n 13).
[88] Ghezelbash and Hruschka (n 12) 11.
[89] *Administrative Review Tribunal Act 2024* (Cth) s 49 *('ART Act')*.
[90] Ibid s 55(a).
[91] Ibid s 106.

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after considering the material placed before it,[92] provides a safety net for first-instance decision-making. The statutory impost for a hearing at Tribunal review offers a level of discretion in the process of enquiry that is effectively institutionally unavailable to first-instance decision-makers.

Minimising procedural burdens on first-instance decision-making may increase the efficient throughput of the individual agency, but may cause more consequential costs—both financial and temporal—downstream. The progressive, linear, and interconnected nature of administrative decision-making creates a kind of systemic sensitivity to unilateral procedural change by one component part. A reduced burden or exercise of procedural fairness at the start of the application and decision-making process may impose additional delays and backlogs across the administrative justice system more holistically, including subsequent endeavours to remove those who have exhausted their avenues of appeal.[93] By way of example, in their first Protection jurisdiction caseload summary since being stood up, the Administrative Review Tribunal reported 7,018 lodgements for review in less than five months, with 4,981 reviews finalised, and an active caseload of 43,452 awaiting an outcome.[94] In the 2020-21 financial year, the Administrative Appeals Tribunal received 10,486 lodgements for review and finalised 5,558, with 32,064 active cases awaiting outcome at the end of the reporting period.[95]

Attempts to exhaustively codify procedures have been described by Groves as 'an epic failure,' perhaps best exemplified by the 'heavily-criticised' and 'unsuccessful' Immigration Assessment Authority.[96] The now-abolished IAA was a statutory creation aimed at providing limited review of the decisions to refuse Protection visas to Irregular Maritime Arrival applicants under 'fast track' procedures.[97] In this case, efficiency was ostensibly to be found in an exhaustive statement on the natural justice hearing rule, requiring on-the-papers review, and limiting the circumstances in which new information could be sought, whether through hearing or otherwise.[98] Without in-person hearing the credibility of refugee applicants was unable to be tested by the reviewer and reduced the chances of successful review.[99]

[92] Matthew Groves and Greg Weeks, 'The Unique Jurisdiction of Australian Merits Review Tribunals' in Stephen Thomson, Matthew Groves and Greg Weeks (eds), *Administrative Tribunals in the Common Law World* (Hart Publishing, 1st ed, 2024) 129, 138.

[93] Mireille Paquet and Anna K Boucher, 'Beyond the Queue: The Sources and Politics of Migration Backlogs in Canada and Australia' [2025] *Journal of Immigrant & Refugee Studies* 1, 6.

[94] Administrative Review Tribunal, *Protection Jurisdictional Area Caseload Summary by List Country of Reference* (Summary Report, 28 February 2025) 8.

[95] Administrative Review Tribunal, *MRD Refugee Caseload Summary by Country of Reference* (Summary Report, 30 June 2021) 6.

[96] Matthew Groves, 'The Administrative Review Tribunal: A Big Step in Tribunal Justice, 50 Years in the Making' (2024) 98 *Australian Law Journal* 902, 913–14.

[97] Amy Elton, 'Reviewing Review: Administrative Justice and the Immigration Assessment Authority' (2024) 52(1) *Federal Law Review* 51, 54; Administrative Review Tribunal, 'Former Immigration Assessment Authority', *Former Immigration Assessment Authority* (Web Page, 25 April 2025) <https://www.art.gov.au/immigration-assessment-authority>.

[98] *Migration Act 1958* (Cth) ss 473DA-473DF, as at 13 October 2024, as repealed by *Administrative Review Tribunal (Consequential and Transitional Provisions No. 1) Act 2024* (Cth) sch 2 item 228.

[99] Elton (n 97) 67–8.

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Significantly, courts reviewing the IAA's on-the-papers assessments and limited discretion to seek additional information held that the exercises of power remained subject to reasonableness.[100] Indeed, the courts have commented that such limitations on principles of procedural fairness under the general law called for an 'expansion' of conceptualisations of legal unreasonableness,[101] such that an adverse finding could be based on a false factual foundation and establishing a constructive failure to exercise jurisdiction.[102]

VIII. Conclusion: The Protection Interview in Modern Administrative Practice

While there is no explicit statutory requirement for protection visa interviews, the intersection of legal principles, constitutional minimums, and practical requirements creates a framework where, in particular circumstances, interviews will be the most effective means to seek the information required to reach a reasonable satisfaction. This conclusion emerges from several key considerations:

First, the threshold of satisfaction under section 65 requires decisions to be made reasonably and based on logically probative evidence. Where credibility is at issue - as it frequently is in protection claims - reaching this threshold through paper-based assessment alone becomes problematic at best and impossible at worst. The Department's own consistent acknowledgment that interviews are 'most effective' for exploring claims and testing credibility implicitly recognises this reality.

Second, while section 5AAA places the primary onus on applicants to establish their claims, and Subdivision AB 'exhaustively' codifies the natural justice hearing rule, this cannot override the requirement for fair hearing when its omission gives rise to jurisdictional error. *SZIAI* establishes in obiter that failure to make obvious inquiries about critical facts can constitute jurisdictional error. In many protection cases, these inquiries necessarily involve direct engagement with applicants about their claims and credibility.

Third, the current context of significant processing delays heightens these requirements. Following *Von Schoeler*, substantial delay requires demonstrated thorough consideration in reasons and reasoning. This standard becomes particularly difficult to meet through paper-based assessment alone, especially where credibility is at issue or where written submissions may disadvantage applicants.

Fourth, while administrative efficiency is a legitimate consideration recognised in at common law, it cannot override fundamental fairness requirements. The shift in departmental policy toward greater discretion in conducting interviews, while understandable given processing pressures, risks creating tension with these underlying legal obligations.

Interviews then, while not universally mandatory, will be the most effective means of reaching the threshold of reasonable satisfaction under section 65, particularly where there has been significant delay in processing, where complex credibility issues

[100] *Minister for Immigration and Border Protection v CRY16* (2017) 253 FCR 475, 481 [21]; *DZU16 v Minister for Immigration and Border Protection* (2017) 321 FLR 306, 333–334 [120]-[122].

[101] *CMH16 v Minister for Immigration and Border Protection* (2017) 326 FLR 389, 405 [62].

[102] Ibid 408 [75]-[76].

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exist, where applicants face barriers to written expression, or where information available indicates a necessity for obvious, easily undertaken inquiries about critical facts. There seems little doubt these require engagement with applicants under section 56; the question then becomes whether that requirement extends to direct engagement through interview.

Clear exceptions to the necessity of interview arise from claims that can be accepted on the papers, where credibility is not in issue, where other evidence is comprehensive, or where the applicant has demonstrated a capacity to present their claims effectively in their application. Decision-makers should express wariness in merely accepting the guidance of policy on whether an interview is required.

All of this suggests that while policy guidance has shifted toward greater discretion in whether to interview, the legal framework may constructively require interviews in many protection cases. Government's resources are not infinite and their allocation is rightfully a matter for the executive. While significant bureaucratic and financial focus has been placed on some parts of migration control, these do not address those applicants for protection who are already onshore and introduced to the administrative justice system. Administrative efficiency, while important, cannot justify procedures that risk compromising the ability to reach reasonable satisfaction.

While administrative efficiency may justify systematic changes to protection visa processing, such changes must incorporate mechanisms to identify and appropriately handle cases where practical fairness requires direct engagement through interview. The challenge lies in designing procedures that balance efficiency with maintaining the fundamental requirements of administrative justice.

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Appendix 1. References for Table 1

FY	Lodgements	Finalised	Grants	Backlog
2013–14	9,646[1]	7,569[2]	1,547[3] 2,207[4]	(no data)
2014–15	8,587[5]	(no data)	2,746[6]	(no data)
2015–16	(no data)	(no data)	2,003[7]	(no data)
2016–17	(no data)	7,964[8]	1,711[9]	(no data)
2017–18	27,931[10]	14,925[11]	1,425[12]	(no data)
2018–19	24,566[13]	14,700[14]	1,650[15]	(no data)
2019–20	23,226[16]	16,853[17]	1,650[18]	(no data)
2020–21	11,684[19]	14,249[20]	1,389[21]	32,989[22]
2021–22	10,564[23]	15,726[24]	1,762[25]	26,227[26]
2022–23	18,738[27]	14,752[28]	2,000[29]	28,324[30]
2023–24	25,210[31]	19,700[32]	3,250[33]	32,636[34]

[1]Department of Immigration and Border Protection, *DIBP Annual Report 2013-14* 111.
[2]Department of Immigration and Border Protection (Cth), *Asylum Statistics—Australia: Quarterly Tables—June Quarter 2014* (2014) 7.
[3]Ibid.
[4]Department of Immigration and Border Protection, 'DIBP Annual Report 2013-14' (n 1) 96.
[5]Department of Immigration and Border Protection, *DIBP Annual Report 2014-15* 136.
[6]Ibid 137.
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