

A CRITICAL STUDY OF DISCOURSE AND INTERACTION IN THE AUSTRALIAN MIGRATION REVIEW TRIBUNAL (MRT)

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LIST OF ABBREVIATIONS USED

AAT	Australian Administrative Tribunal
Austlii	Australasian Legal Information Institute
IAFL	International Association of Forensic Linguists
MA	Migration Alliance
MARA	Migration Agents Registration Authority
Member(s)	Member of the MRT
MIA	Migration Institute of Australia
MRT	Migration Review Tribunal
NAATI	National Australia Authority of Translators and Interpreters
RRT	Refugee Review Tribunal
The Act	Migration Act 1958 (Cth) (Austl)(unless otherwise stated)
The Regulations or regs	Migration Regulations 1994 (Cth) (Austl)

Abstract

The migration regime in Australia allows the majority of visa applicants (or its sponsors) access to the Migration Review Tribunal (MRT) to have their visa application reviewed in the event that this was rejected by the Department of Immigration. Set up under the Migration Act 1958 (“The Act”), the MRT is a merits review tribunal empowered to consider the visa application afresh and independently and make a decision setting aside or affirming the matter or sending it to the Department of Immigration for re-consideration.

This thesis primarily explores the roles and the discourses of the MRT Member (s) who constitutes the MRT to review and make a new decision and the two other main stakeholders, the visa applicant and the migration agent, who endeavour to convince the Member to decide in their favour. Research by Goffman (1959, 1974 and 1983) on roles, participation framework and interaction, with his classic question of “What’s that it is going on here?”, has provided the conceptual framework for the thesis. The communicative features of the verbal exchanges between the parties and discourses invoked are not only of vital interest for studies of social behaviour in general but are also the key to fact finding during the review process. The second major construct relied on, the institutional order (Sarangi and Roberts, 1999), sheds light on how an institution such as the MRT manages its review process in a fair manner within the framework of the relevant Act. The duties of the MRT as set out in the Act, together with the court’s jurisprudence, impress upon us that the Member of the MRT assumes an enquiry role, such that failure to enquire is likely to constitute a failure to review. However, my own data – drawn from diverse sources including hearing transcripts, MRT decisions, Federal court judgment and interviews with stakeholders - suggest that the Member of the MRT does not only adopt a single enquiring role but also adopts multiple roles such as enquirer and interpreter of law, and the Member’s discourse changes in alignment with the role assumed at that time.

Further, a number of other issues arise in the course of discourse analysis. For example, during the interaction between the Member and the review applicant or the review applicant’s migration agent, the institutional order of proceedings (as governed by the Act) is commonly interrupted when the review applicant’s interest is at stake. Secondly, it was observed that the Member is often faced with important communicative and conceptual challenges in dealing with visa applicants from a different cultural background., For example, the concept of *de facto* may be absent or differently defined in some other cultures. Thus there is a need for Members to be culturally sensitive and alert in constructing questions. Also, there are circumstances where the visa applicant attempts to argue their case vexatiously in order to obtain a visa. Finally, it was observed that while the MRT has absolute power under the Act in deciding a matter, its decisions are in fact subject to judicial “scrutiny” by the federal courts given that the visa review applicant may appeal against the MRT decisions on grounds of jurisdictional error.

The thesis draws on both socio-linguistic and legal expertise in conducting the discourse analysis. It not only describes the review process but also investigates, analytically and critically, the interface of the institutional order and interaction order as this unfolds in the

MRT hearings, and analyses in particular ways in which the Member handles the situation when his or her authority is being challenged – i.e. the strategies used and the various discourses employed. In concluding, the thesis makes suggestion for future research. It also recommends changes in future practices as well as in professional training that might be provided to the participants, including but not limited to Members and migration agents.

STATEMENT OF CANDIDATE

I certify that the work in this thesis entitled 'A Critical Study of Discourse and Interaction in the Australian Migration Review Tribunal (MRT)' has not previously been submitted for a degree nor has it been submitted as part of requirements for a degree to any other university or institution other than Macquarie University.

I also certify that the thesis is an original piece of research and it has been written by me. Any help and assistance that I have received in my research work and the preparation of the thesis have been appropriately acknowledged.

In addition, I certify that all information sources and literature used are indicated in the thesis. The research presented in the thesis was approved by Macquarie University Ethics Review Committee, reference number 5001001002(D) dated 20 May 2011.



Kong Wo Tang (Student ID 88013588)

Dated 7th day of December 2015

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PREFACE

The research reported in this thesis, and the data it is based on, including but not limited to attending hearings, interviews, and discussions with practitioners in the area of migration law, were all collected before the merging of the Australian Migration Review Tribunal (“the MRT”) with the Administrative Appeals Tribunal (“AAT”) in July 2015¹. The MRT together with the Refugee Review Tribunal (“the RRT”) and the Social Security Appeals Tribunal have all now been subsumed in the AAT². However, as far as I am aware, the legislation that empowered the establishment of the MRT and the laws governing its practice and procedure remain the same. Further, the goals of the AAT, with respect to the newly created migration division as described on the AAT website, is the same as those found on the MRT’s superseded website. This statement of goals maintains that: “We aim to make our review process accessible, fair, just, economical, informal and quick.” Moreover, the hearing is still conducted by one Member, unless otherwise stated. It seems reasonable to infer that the merging has been designed purely as a cost-cutting exercise. Whether it will have any big impact on the relevance of the research to be presented below is yet to be seen. In fact, the findings presented below should be applicable beyond the boundary of MRT and should have significant value for all stakeholders in the legal processes involved in migration applications and reviews and indeed for all researchers interested in discourse analysis.

¹ The research reported in this thesis started in December 2009 and completed in January 2015.

² See <http://www.aat.gov.au/>

CHAPTER ONE

Introduction

1.1 Aim and context of this study

This thesis aims to research into the discourse of the participants of the Migration Review Tribunal (the “MRT”), and to explore the roles (or implicit roles) played by the Member of the MRT (“the Member”) in the context of the interaction order (Goffman, 1982) of the MRT and the overarching and influential institutional order (Sarangi and Roberts, 1999) which governs its processes and practices. The thesis also examines the interaction of power, language and institutional goals (Foucault, 1969; Fairclough 2001). Given that the MRT’s investigation is primarily of an inquisitorial nature (Groves, 2011) and the highly likelihood of using a transcript in the event that an appeal of the MRT decision is required, the significance of studying the discourse of the participants is instrumental to the understanding of the power that the parties possess and demonstrate during their interaction at the hearing. Besides, the power displayed by the parties and found in the interaction prove what Bourdieu (1991) has emphasised, namely words needed to be supported by action. The MRT is a body established under Section 394 Part 6 Division 1 of the *Migration Act 1959* (Cth) (“the Act”) with the power to review decisions that are made by the Department of Immigration. Members of the MRT are decision makers who review decisions made by the Department of Immigration and are empowered to set aside or affirm the decisions made by the Department of Immigration or send the decisions back to it to consider in favour of the visa applicants. Visa applicants who make a visa application with the Department of Immigration and are not satisfied with the decision made by that Department may lodge an application with the MRT to have it review the original decision.¹ The decision-making role of the Member is set out in the Act. However, it is argued in the thesis that the Member plays several interactional roles, as observed through careful observation of the discursive practices of the Member during the process of the review application and, particularly, during the hearing. In order to provide readers with a better understanding of the MRT process, and as a starting point of my research, I present below and examine some of the fundamentals and core values of the migration regime, both from a legal and a social point of view.

¹ See Section 349 of the Act.

1.2 Australia as a migration country

Australia has been accepting immigrants since its establishment and the influx of immigrants is the basis of the growth of the nation. Indeed, Australia's economic growth and its becoming one of the developed nations deeply rely on its intake of migrants overseas. As Crock, Saul and Dastyari (2006, p.3) observe:

Ignoring the prior ownership of the indigenous peoples, [Australia] was "created" by colonialists who were consciously aware of the potential in the late 19th century for building a new nation in a certain image. More than 100 years after Federation, Australia's population growth continues to rely heavily on importing human capital.

Without denigrating Australia's commitments and obligations to accept refugees and to acknowledge the refugees' contribution to Australia, it is obvious and apparent that the intake of migrants under a planned migration policy – as opposed to the unplanned influx of refugees from all over the world – was deemed instrumental to the overall development of Australia, both economically and socially. A planned migration policy can allow the government to control the growth of migrant intake in an orderly fashion to suit its economic growth and the needs of the nation. For example, when Australia is in need of certain occupations or there is a lack of a certain kind of skilled workers, so as to cope with the shortage, the government can attract those particular categories of migrants by increasing the quota for the relevant occupations. This is what occurred in the recent resource boom. Alternatively (or concurrently), in terms of granting visas to potential migrants, the government can give more "points"² to those who have the relevant skills, so that applicants with those particular skills can have better opportunities to meet the visa requirements for the subclasses in demand than those who do not.³ Clearly, the importance of a migration program to Australia can hardly be emphasised enough and is institutionally and procedurally recognised.

However, not every visa application is approved, even if the visa applicants think that they have met the visa requirements. In this regard, applicants whose visa applications are refused by the Department of Immigration may seek to have their applications reviewed under the

² Skilled migration applications are assessed and decided on a points system. See <https://www.border.gov.au/Lega/Lega/Form/Immi-FAQs/what-is-the-points-test>

³ Also see "Australia is a world leader of skilled migration" by Catherine Armitage, Sydney Morning Herald dated 9 April 2012 p.5. retrieved from <http://www.smh.com.au/opinion/political-news/australia-a-world-leader-in-skilled-migration-20120408-1wjm0.html>

Migration legislation by the MRT.⁴ It may be appropriate to mention here that, from the applicant's point of view, lodging an application for review provides considerable benefits to the applicants in addition to the opportunity to have the decision made by the Department of Immigration revised or overturned.⁵

Firstly, in addition to reviewing decisions made by the Department of Immigration, the MRT is also seen as a gateway for review applicants to seek ministerial intervention, as the Minister, under Section 417 of the Act (cited immediately below) has powers to substitute a favourable of his own for the one made by the MRT:

Section 417 (1) If the Minister thinks that it is in the public interest to do so, the Minister may substitute for a decision of the Tribunal under section 415 another decision, being a decision that is more favourable to the applicant, whether or not the Tribunal had the power to make that other decision.”

It is a common understanding in the legal (and also migration agents') profession that practitioners who know that their clients are unlikely to persuade the MRT to make a decision in their favour may consider that the only opportunity for them to be granted a visa is for the Minister of Immigration ("the Minister") to exercise his discretionary power under section 417 of the Act.⁶ The Minister makes his or her decision on a case by case basis.⁷

Secondly, lodging a review application with the MRT is also the first step towards seeking recourse through court proceedings. For example, review applicants can seek judicial review of the MRT decisions on the grounds of "jurisdictional error", in the Federal courts such as the Federal Circuit Court (formerly known as the Federal Magistrates Court), the Federal Court and the High Court. Federal courts have original jurisdiction in immigration and

⁴ The review applicants are required to be on-shore (i.e. in Australia) to be eligible for review.

⁵ The writer is a practitioner in migration law.

⁶ The Minister will only consider exercising discretion under the Act if the visa applicant has exhausted all avenues to appeal against the unfavourable decision made by the Department of Immigration.

⁷ The writer has conducted a small enquiry (via questionnaires and discussion) on the view point of migration agents (including lawyers) who agree that they consider MRT is the gateway to ministerial intervention.

emigration matters under Section 51 (xxvii) of the *Commonwealth of Australia Constitution Act*.⁸⁹

Thirdly¹⁰, migration agents may also make use of the MRT proceedings as a strategy to enable their clients (the visa applicants) to prolong their stay in Australia while such applicants are considering other options, so as to avoid being required to leave the country or to be left without a substantive visa.¹¹

However, as this thesis is not directed at researching the migration law *per se*, I shall not discuss here in an in-depth fashion the appeal process of migration matters. Rather I propose to focus on the discourse practices that prevail in the MRT and, in particular, on these as they relate to the processes and procedures of the MRT, while distinguishing between the discourses and roles of the different participants in the MRT hearings. In doing so my analysis will draw on research by leading scholars in the field of discourse analysis, particularly those who have focused on the relationship between law and language, paying particular attention to Foucault (1969, 1981), Goffman (1974, 1981, 1983), Maley (1994), Candlin and Maley (1994, 1997), Hafner (2013).

In this introductory chapter, I provide the rationale, background and context to the study, and at the end of the chapter I outline the structure of the thesis.

1.3 Rationale for conducting the study of discourse of the MRT

There are several reasons that motivated my choice of the MRT as the site for my research.

Firstly, because of the magnitude of the workload and the variety of work that the MRT is undertaking, it would be fair to suggest that the MRT's discursive practices will be both diverse and complex, and hence of particular research interest. Regardless of the fact that review applications that come before the MRT may appear similar, Members when deciding a

⁸ Visa applicants seeking review on decisions made by the Department of Immigration on the grounds of character issues or matters involving deportation will have initiate proceedings at the Administrative Appeals Tribunal ("AAT").

⁹ Retrieved from http://www.austlii.edu.au/au/legis/cth/consol_act/coaca430/

¹⁰ In practice, as each case differs, migration agents will advise their clients with different strategy to remain in Australia while working out the best solution for their clients, and making use of the queuing time for the application to be heard at MRT is always considered as the best option for "buying time". However, it is not appropriate for me to discuss in depth about the use of the MRT process by migration agents as a means to achieve other goals in this thesis.

¹¹ Once a visa applicant lodges a review application at the MRT, a bridging visa is granted to the visa applicant to allow the visa applicant to stay in Australia legally until the review application is decided by the MRT (see section 73 of the Act).

given matter will need to draw upon their legal training and their particular members' resources¹² including "their knowledge of language, representations of the natural and social worlds they inhabit, values, beliefs, assumptions and so on" (Fairclough, 2001, p.20), to review the matter. Further, participants in the MRT hearing endeavour to ensure that, as individuals, they are seen in the best possible light through the way they construct their arguments and "face", during the hearing, to those who are present. More specifically, this refers to what Manning (2000) calls the "production of credibility". As Goffman (1959, p.30) puts it:

While in the presence of others, the individual typically infuses his activity with signs which dramatically highlight and portray confirmatory facts that might otherwise remain unapparent or obscure. For if the individual's activity is to become significant to others, he must mobilize his activity so that it will express during the interaction what he wishes to convey.

Secondly, the significant importance arising from the decisions made by the MRT is a further factor making it a crucial and meaningful site to carry out research both linguistically and socially. Indeed, decisions made by the MRT may affect different stakeholders, including but not limited to the participants of the MRT, the family members of the review applicants, the Department of Immigration and policy makers. It may be true that the decision made by the Member may be conceived of as a normal part of the Member's routine work, but its repercussions upon the visa applicant are understandably profound. It will in a real sense determine the fate of a visa applicant, for example, whether a student can continue his studies in Australia if the student visa is to be cancelled for whatever reasons, whether a partner visa applicant can come to join his or her partner in Australia if the relationship is being considered not genuine, whether a skilled person can come to work in Australia if the qualification is considered irrelevant to the occupation nominated in his/her visa application. This being said, I am also acutely aware that there are visa applicants who will at all costs attempt to stay in Australia, even by way of deceiving the visa system, providing false and misleading information to the Department of Immigration or even by way of illegal activities, for example, fake marriages or bogus employer sponsorship. However, I reiterate here clearly that the salient point of my research is not to convey any judgement on what is right or wrong in a given case (which forms part of the data sets collected and used in the discourse analysis)

¹² See Garfinkel (1967) *Studies in Ethnomethodology*, where the author discusses how members of the same group react in the same situation.

but rather to focus on the accounts as they unfold during the process of the review. By “accounts”, I mean “the rhetorical constructs that are often used to justify, explain or clarify one’s views, arguments and/or communicative actions” (Bhatia, Candlin and Hafner, 2012, p.147) during the MRT hearing (see also Garfinkel, 1967 and Goffman, 1959 with respect to accounts).

In order to give readers some appreciation of the workload of the MRT, I provide here a brief and synoptic account of the types of case received by the MRT (this is a matter which I shall discuss further in a later chapter). According to the Annual Report published by the MRT (2011, p.7), the MRT’s workload is extremely large, involving 89 members, full time and part-time. During 2010-2011, there were 10,315 review applications lodged, an increase by 23.8% as compared to the 8,332 cases lodged in 2009-2010, and as at 30 June 2011, there were 10,786 cases on hand, an increase of 53% as compared with the cases of 7,048 on hand as at 30 June 2010. The latest Annual Report (2012-2013) published by the MRT shows that there are now 144 members and there are 16,164 cases lodged as at 30 June 2013. It is also noted that the MRT has now developed special teams led by a senior member for each team to handle the cases lodged.

As I pointed out at the beginning of this chapter, the MRT provides visa applicants and their sponsors with an opportunity to have their failed applications reviewed. This ensures that the decisions made by the Department of Immigration are scrutinised in a fair manner and in accordance with the migration legislation passed by the Parliament.

Similarly, there is an opportunity that allows parties who are not satisfied with the MRT decisions to appeal to the Federal Circuit Court on points of law. This has the effect of putting MRT under the close scrutiny of the court. As we shall see in later chapters, the court, when determining, for example, whether the MRT has made an incorrect decision in law, will examine, among other matters, submissions of the counsel acting for the visa applicant, the procedures and the decision records in the MRT hearing. For the purpose of the present research, the latter records will allow us to examine “the interface of the professional and the institutional” (Sarangi and Roberts, 1999 p.17) from a discursive point of view.

Finally, undertaking this research provides an opportunity for readers and researchers to understand analyse and appreciate the functions, the roles, the discourse practices and the overall social importance of the MRT in the Australian context. It is hoped that from the

perspective of “practical relevance” (Roberts & Sarangi 1999; Candlin 2006)¹³ the research results will provide some insights into ways of improving the general public’s understanding of the work of the MRT and in assisting the communication of the parties including Members and bona fide review applicants, in particular, those of the unrepresented review applicants during the process.

To take on this challenge I will not only ask the classic question: “What is it that’s going on here?” (Goffman, 1974, p.9), but will also pursue “the will to truth” as described by Foucault (1970):-

Of the three great systems of exclusion which forge discourse – the forbidden speech, the division of madness and the will to truth – I have spoken at greatest length concerning the third. The fact is that it is towards this third system that the other two have been drifting constantly for centuries. (pp.55-56)

1.4 The context of this discourse based study

This thesis and its research concern the discourse and role(s) of the participants of the MRT, and particularly, those of the Member. It seeks to report the processes and procedures of the MRT and the nature of the challenges facing the Member when reviewing a visa application which has been refused by the Department of Immigration. To do so, I am adopting an underpinning theory of social and interactional “frames” and associated participant roles as a basis for my discourse analytical methodology. In particular my research benefits from Bateson’s study (1972 [1954]) of framing as extensively built upon by Goffman (1974) as a means to examine the communicative practices of the Member, and to explore and explain the multiple participant roles that are contingently and strategically adopted by the Member. As this discourse based study relates to the migration law, I will also inevitably have to report some key legal issues or developments relating to the law which surface when participants are negotiating or arguing a point crucial to the matter under review during the hearing (for example, the discussion of “unreasonableness” in the High Court’s decision in *Minister for Immigration and Citizenship v Li* [2013] HCA 18).

In relation to the roles of the Member, I will primarily be asking:

¹³ Roberts and Sarangi (1999:473) define practical relevance as making “a contribution of social and institutional problems.”

- (a) What roles is the Member adopting during the hearing?
- (b) How does his or her role or roles shift from the point of view of discursive practices?
- (c) Under what circumstances does the Member change role?

As the research progressed, the following additional questions were identified dealing with the practical relevance of the research:

1. What kind of professional development training will Members require so as to be better equipped with respect to matters of professional communication during the hearing?
2. What kind of professional development training (in particular professional communication) will the migration agents require so as to better deal with different kinds of visa case, in addition to their migration law training?
3. What help can be provided to unrepresented review applicants if they choose not to (or cannot afford to) have the assistance of a migration agent?

The difficulty faced by the Member is to find out the truth of the matter during the review process before it makes a decision, since it is obliged to take a fresh look at any failed application that comes before it. Pursuant to Section 360 (2) (a), the MRT can make a decision without having to conduct a hearing. If the MRT is not satisfied with the written submissions made by the review applicant then a hearing will be conducted and the visa applicant is invited to give evidence, during which the conduct of the discourse and, as we shall see, the hybrid “inter-discursivity” (Bhatia, 2010; Candlin and Maley, 1997; Candlin, 2006) of the parties will, it is hoped, shed light on what is said or unsaid, and whether it be true or untrue, in the application.¹⁴

Parties who have never attended the MRT might at times feel confused about its functions and may not be able to distinguish the MRT from a court of law, especially as the word “tribunal” is generally used to refer to a tribunal with a judicial function such as the Administrative Appeals Tribunal (AAT) whose members must be experienced legal practitioners and whose President must be a Federal Court judge. The MRT does not have a judicial function as does

¹⁴ Based on my professional experience, finding the truth is a gargantuan task. Even if the MRT decides a case in favour of the review applicant, it does not mean that the truth has been unfolded. There are situations (more often than not unspoken of by practitioners) that as the matter unfolds in later stages, it is found that the visa applicant gave an untrue account of the matter in order to obtain the visa.

an administrative tribunal such as the AAT and its members do not have the mandatory legal qualifications would be required in the AAT. In fact, the MRT is seen as a continuum of the administrative arm of the government in the migration system.

To put in perspective what the MRT is expected to be undertaking, the following comment from the judges of the highest court in Australia will be helpful. In the matter of *Minister for Immigration and Citizenship v. SZIAI* (2009), the High Court in paragraph 29 of the judgment said:-

The duty imposed upon the tribunal by the Migration Act is a duty to review. 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.

I make two observations regarding the roles of the MRT in relation to the above quotation.

Firstly, the MRT primarily has an enquiry role, which puts the MRT in a different context to that of a court of law in that the MRT is functioning in an *inquisitorial* manner in which the Member carries out the investigation during the hearing, whereas a court will hear matters in an *adversarial* manner, in which the prosecutor and the defendant will in turn have the opportunity to put their case before the judge, to examine and cross examine the witnesses and to submit evidence in accordance with the rule of evidence.

Secondly, the enquiry role of the MRT is consistently placed under intense court scrutiny, in that people who are not satisfied with the decisions of the MRT can appeal against the decisions on points of law and can have their matters heard by the court. Accordingly, the MRT, being a merit based tribunal, is placed in a crucial position in the legal pathway within the judiciary system with respect to migration matters.

In fact, the role of the Member of the MRT is not limited to enquiry only. In this thesis I will demonstrate that the MRT Member plays various roles and enacts a number of distinct discourses during the course of a hearing. It is on this basis that the discourse of the MRT becomes as interesting as, if not more interesting than, that of a court of law.

There is a vast literature and voluminous research on courtroom discourse and forensic linguistics written by scholars and practitioners in a variety of more or less related fields. Recent research with a focus on language and communication would include work by Maley (1994), Gibbons (1994), Harris (1994), Walsh (1994), Coulthard (1996), Wagner and Cheng (2011) and Haffer (2013). However, there has been no research undertaken on the discourses of a tribunal setting similar to that of the MRT, whereby the Member enacts a range of roles, including but not limited to the role of enquirer, and whose functions are vital and of high stakes to the stakeholders, among which are the Department of the Immigration, the review applicants themselves and the sponsors of a visa applicant.

In summary (and we shall return to this in more detail in subsequent chapters) the main participants in a typical MRT hearing include the MRT Member, who reviews the application and makes a decision in favour or otherwise of the application, the review applicant, who can be either the visa applicant or the visa sponsor, the registered migration agent (“migration agent”)¹⁵, who represents and advises the review applicant, the tribunal officer, who gives guidance to the parties in relation to the process of the hearing, and the interpreter, if there is a party in the hearing who needs interpreting service, and any witness(es), who attend the hearing to give evidence at the request of the review applicant. As the MRT Member is the decision maker who conducts the hearing, this research will focus in particular on the discourse of that Member, taking into account, however, the other participants and their contributions to the discourse of the tribunal.

It will be shown that it is the discursive practices of the MRT member in relation to a particular frame which constitutes the moment that brings out the different roles played by the MRT member. To be more specific, it has been observed during numerous attendances of the MRT hearing that the discourse of the MRT member changes subtly and strategically in response to the needs of the circumstances of the review application and contingent upon the progress of the interaction with the review applicant or his/her migration agent. This change of discursive practice unnoticeably or unintentionally changes the communicative role of the Member, for example, from an enquirer to an investigator (see discussion of role in Goffman, 1959 and 1981; Sarangi, 2010). The point being that, the change of role and the change of frame are interrelated and the change of role would be easily overlooked if the discursive practices were not considered in the context of the frame in question, and the frame referred

¹⁵ In general, I will use migration agent as a short form unless stated otherwise.

herein is (a situation that is) “built up in accordance with principles of organization which govern events – at least social ones – and our subjective involvement in them” (Goffman, 1974, pp.10-11) , and the change of role could occur with, or without the member’s notice or particular action (also see Bourdieu, 1991).

Although the MRT is empowered by the Act and has statutory power to decide a case, its practice and procedure are quite different to those of a court which is bound by the law of evidence.

Section 353 of the Act makes it clear that the MRT tribunal has its liberty on how to run a case:

Section 353 (2) The Tribunal, in reviewing a decision:

- (a) is not bound by technicalities, legal forms or rules of evidence; and
- (b) shall act according to substantial justice and the merits of the case.

The above statutory power provides the MRT Member with a great extent of freedom to conduct a hearing and this may, in my view, contribute to the multiple roles played, and the modes of discourse employed by the presiding Member. In this regard, the Member can ask questions freely and does not need to be concerned whether the way the question is put to the participants in the hearing would constitute a breach of the rule of evidence that is applicable in a courtroom. The informal setting of the MRT hearing also allows the participants to undertake actions that may not be allowed in a formal court hearing. For example, in order to investigate the matter under review, the Member can ask leading questions¹⁶; in order to persuade the Member to decide the matter in his favour, a review applicant can provide answers in an informal manner that may involve hearsay evidence¹⁷. More importantly, the informal setting of the hearing allows, if not encourages, the review applicant to decide whether he wishes to be self-represented or engage the service of a migration agent. In Chapters 6, 7 and 8 which are directed at the analysis of MRT discourse (about discourse analysis in the thesis), I draw on the data collected to demonstrate the distinctive features of the discourse between the Member and the review applicant, and between the Member and the

¹⁶ Section 42 (3) of the *Evidence Act 1995* (NSW).

¹⁷ Section 59 of the *Evidence Act 1995* (NSW) excludes hearsay evidence.

migration agent. One of the key features observed is that when the Member is speaking to a review applicant, the Member's discourse is less formally couched whereas when the Member is speaking to a migration agent (particularly if the migration agent is a legal practitioner), the discourse takes on a more formal legal character, similar to the kind of discourse practised in a courtroom.

In addition, since the inquisitorial function of the MRT is similar to that of the continental court system (i.e. the system of continental European law) as opposed to the adversarial manner of hearing of a common law court, it is likely that the discourse of the MRT may show similarities to the so-called "inquisitorial" discourse to be found in the continental courtroom when it conducts its hearing. One of the challenging aspects of the research, then, is that we need to understand how the MRT is expected to perform its inquisitorial function so we can be better equipped to analyse the discursive practice of the MRT Member more appropriately.

To this end, in order to have a better and clearer understanding of the discourse practices in the MRT, it is both useful and indeed vital to have a general understanding of the difference between the continental law and the common law systems, especially from a discursive point of view.

The explanation of the two legal systems is best left with the legal professional and in particular by a judge. Justice Devlin (1979, p.54) summarises the distinctions between the inquisitorial system and the adversarial system in the following succinct manner:

The essential difference between the two systems – there are many incidental ones – is apparent from their names: the one is a trial of strength and the other is an enquiry. The question in the first is: are the shoulders of the party upon whom is laid the burden of proof, the plaintiff or the prosecution as the case may be, strong enough to carry and discharge it? In the second the question is: what is the truth of the matter? In the first the judge or jury are arbiters; they do not pose questions and seek answers; they weigh such material as is put before them, but they have no responsibility for seeing that it is complete. In the second the judge is in charge of the inquiry from the start; he will of course permit the parties to make out their cases and may rely on them to do so, but it is for him to say what it is that he wants to know.

It is obvious to any observer that the MRT functions more like a civil code (continental) court in the inquisitorial system than a common law court in the adversarial system. Having said that, this is not to be taken to imply that the MRT is not influenced by the common law court's decisions. In fact the common law court's decisions have affected many MRT's decisions, and, it is more often than not that the common law's point of view or precedent is cited as the basis of the MRT's interpreting of law.

To conclude this introduction, I should mention that in this thesis I will specifically be drawing on Maley's research and insights in the area of law and language (Maley, 1994). Maley identifies legal discourse as being at once verbose and highly specialised and distinctive. She further points out that "[t]here is not one legal discourse but a set of related legal discourses" (1994, p.13). In saying this, she defines judicial discourse as the discourse of judicial decisions, noting that it can either be spoken or written, and which is reasonably flexible and varied, but nonetheless revolves around terms with recognisably legal determinate meanings. With respect to courtroom discourse, Maley defines it as the discourse used by judges, counsels, court officials, witnesses and other participants, which is an interactive language and courteous and in a mode of address. The language of the MRT could well be described in these terms.

1.5 Outline of the thesis

To conclude this chapter, I introduce the outline of the thesis in the following manner. Chapter 2 considers and compares legal discourse and other law-related discourses. In the first part of the chapter, I draw on a wide range of literature to elaborate the theory of frame and framework about discourse, with the intention to provide basis for the analysis of the discourses of the MRT. Drawing on the work conducted by leading scholars (Berger and Luckmann, 1967; Sarangi and Roberts, 1999; Goffman, 1983), the discussion also introduces the twin concepts of institutional order and interaction order as a preliminary to their further development in a later chapter. The second part of the chapter discusses and compares the MRT discourse with that of the courtroom, that of mediation and that of arbitration focusing on participants, language use, hearing procedure, authority and power of the hearing, and linguistic practices. By comparing the MRT discourse with these other law-related discourses, I endeavour to provide readers with an informed and in-depth introduction and access to the wide range of knowledge with respect to the discursive practices and constructs that involve the relationships between language and law.

Chapter 3 gives an account of the status of the MRT in the Australian legal system. This chapter provides the background history of the MRT, the detailed function of the MRT, the qualifications and work of the Members, the workload of the MRT and the jurisdiction of the MRT. The chapter also provides a general account of the practice and procedure of the MRT. I also provide a comparison of the MRT with another tribunal that has similar functions to that of the MRT but which handles refugee matters, namely the Refugee Review Tribunal (RRT). The members of the MRT are also the members of the RRT. I also consider the different processes and procedures of the MRT and the RRT.

Chapter 4 explains the theoretical framework of the research that the thesis is reporting as well as the methodology employed. The chapter discusses the crucial concept of a participation framework (notably drawing on Goffman, 1974, 1981; and Levinson, 2000), and the types of roles typically involved in this, and more generally the concept of interdiscursivity, a concept that is central to understanding the discursive practices of the MRT (Candlin, 2006). Chapter 4 also examines the relationship, within the context of the MRT, of the two constraining “orders” – the institutional order and the interaction order (first introduced in Chapter 2). Having benefitted from noted scholars on institutional orders (Berger and Luckmann, 1967; Sarangi and Roberts, 1999; Roberts, 2010) and on frames and interaction order (Bateson, 1972; Goffman 1983), I also set the ground work for discourse analysis in later chapters by giving a detailed account of the roles and discursive practices of the participants who are normally present in the MRT hearing.

Chapter 5 outlines the data to be used in discourse analysis in subsequent chapters. Briefly, there are five data sets, namely: (a) transcripts of hearings (data set 1); (b) MRT decisions published in the website of Austria¹⁸ (data set 2); (c) Judgement of court cases where visa applicants appeal to the court regarding MRT decisions on point of law (data set 3); (d) accounts of personal attendances at the MRT, together with an interview with a former Federal Court judge and the results of a limited set of questionnaires directed at practitioners (data set 4); and finally (e) official and unofficial commentary on the MRT, for example, comments made by legal experts or seminar papers with respect to MRT (data set 5).¹⁹

¹⁸ The website is called <http://www.austlii.edu.au/>

¹⁹ For legal reasons, the MRT has refused access to audio files of the hearing record. To rectify the shortcomings of being criticised for using inadequate or filtered data, I have collected and used data collected from various sources to provide a diverse and reliable commentary on the discourse analysis.

In Chapters 6, 7 and 8, I present my detailed analyses of the data sets described in Chapter 5. To provide a strong evidence to support my claim in the thesis, the discussion and analysis are presented concurrently, which may be viewed as unconventional.

Chapter 6 recapitulates the salient features of MRT discourse and highlights comparisons and contrasts between the MRT discourse and other law-related discourses. It moves on to discuss the complex roles of the Member and provides samples from the data sets to support my findings. The chapter identifies and describes the main communicative roles – i.e. the participant roles – commonly adopted by the Member in a review hearing, in particular the three key roles of interpreter of law, enquirer and counsellor/advisor. In terms of discourse analysis, this chapter captures the changes of footing of the Member, as he/she shifts from one role to another, concurrently with changes of discourse modes and frames. Chapter 7 continues and builds on the analysis of participant roles in the previous chapter and expands the discourse analysis by using a different data set to complement the transcript. A section in Chapter 7 highlights the importance of role-distancing in professional discourse whereby the Member employ the skills of role-distancing to block the review applicant's attempt to seek advice from the Member and dodge answering the questions asked.

Chapter 8 discusses some linguistic notions that arise from the discourse analysis and then goes on to encompass issues of language and power (Foucault, 1969; Fairclough 2001) which arise in the review process. I also examine how participants negotiate and utilise discursive strategy constructs to achieve different goals. During the said process, I observe that the Member exercises his institutional power when using the linguistic tool of recontextualisation (Linell, 1991 and 1998) to report and then justify his/her decision or to make a point in response to a question asked. The chapter argues that, although the Member is the decision maker with considerable power conferred by the Act, other participants in fact also have important types of implied and tacit power by way of appeals of MRT decisions on the ground of judicial error to the federal courts.

Chapter 9 is the concluding chapter. Here I briefly recapitulate and synthesise the theoretical and empirical strands of the thesis and then offer some suggestions for future research, improved practice and training. With improvements in the modalities of MRT communication in mind, I express my hope to have shed light on ways to make the review process easier to understand and to access for applicants in the MRT. While the institutional order greatly influences the discourse modes of the Member, I suggest that a wider range of training and

professional development, including, but not limited to, cultural understanding, may be helpful in widening and sharpening the decision makers' awareness and sensitivities when dealing with applicants of diverse ethnic backgrounds, languages and cultures. I draw on my experience and the research findings reported in this thesis to suggest that a chamber magistrate style similar to that available to the public in the local courts could well be established in the MRT so as to help unrepresented applicants handle the review process more effectively. I further suggest that it would be of considerable benefit to have a MRT Member or Members involved in future research.

Chapter 2

Discourse, legal discourse and other professional discourses

2.1 Introduction

Chapter 1 provides us with a snapshot of the review work undertaken by the MRT, wherein we can see that Members of the MRT are regularly required to make decisions upon the cases before them. As required by law, in each review case, the duty imposed upon the Member before concluding the matter and making a new decision is to make “obvious” enquiries as “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” (per French CJ in *Minister for Immigration and Citizenship v. SZIAI*, (2009) HCA para 25).

On that basis, it is fair to expect that much of the Members’ discourse at the MRT will focus on how questions are constructed, so as to unfold the facts that may help (or hinder) the review applicant’s case and in any case assist the Members to make a decision. Meanwhile, the responses provided by the applicants to the Members’ questioning are an equally important component of the review process. Accordingly, it would be reasonable to expect that an analysis of the Member and the applicants’ discourse will offer an opportunity for us to explore “what it is that’s going on here?” (Goffman (1974, p.25).

In the present chapter, I will focus on identifying and illustrating the main features of MRT discourse. Each profession has its own modes of discourse, the analysis of which requires the researcher to become familiar with the expert knowledge of members of the profession under study. But, before proceeding, something needs to be said about the concept of discourse itself and the broad analytical approach known as discourse analysis, and to say just how the communicative practices of the MRT can be framed and explained using this approach.

As Fairclough (1992) observes, “Discourse is a difficult concept largely because there are so many conflicting and overlapping definitions formulated from various theoretical and disciplinary standpoints” (p.3). For example, while we generally agree that “ much discourse at work revolves around how decision making gets done and how problems are resolved” (Sarangi and Roberts 1999, p. 34) and that in this context the discourse of MRT can also be argued as a kind of decision based discourse, we also need to be mindful that some professions, such as that of professional mediators, are required to display impartiality and neutrality and avoid making decisions (Greatbatch and Dingwall, 1999) while conducting mediation. Hence, it is uncommon, if not highly unlikely, to find in the mediation discourse that mediators are making a decision for the participating parties.

In Section 2 below, I will discuss the concepts of discourse and discourse analysis in a general way before moving on to consider two key constructs of the thesis, namely that of the interaction order and the institutional order. I have found both of these, and in particular their interrelationships, to be crucial to the discourse-oriented study of MRT practices. I will argue, for example, that the interaction order can engage critically with the institutional order when a participant’s interest is at stake during the MRT hearing. To expand on this, I will illustrate the relevant features of the MRT discourse, comparing and contrasting it with other legal discourses, such as courtroom discourse, mediation discourse and arbitration discourse.

However, in Section 2, as a starting point, I will discuss in more detail the work of those scholars (notably Foucault and Goffman) that the thesis relies on for the basic framework for analysing various explanatory concepts, such as role and power that are fundamental to the communicative practices – i.e. the discourse – of the MRT.

2.2 Discourse – philosophical and sociological perspectives

Approaching discourse from a social and philosophical perspective, Foucault defines discourse as a formation of signs. For Foucault (1972, p.121), “discourse is constituted by a group of sequences of signs, in so far as they are statements, that is, in so far as they can be assigned particular modalities of existence” and “discourse can be defined as the group of statements that belong to a single system of formation”. Foucault (1972) speaks about “discursive formations” and when he explains what he means by statements (*énoncés*):

To describe statements, to describe the enunciative function of which they are the bearers, to analyse the conditions in which this function operates, to cover the different domains that this function presupposes and the way in which those domains are articulated, is to undertake to uncover what might be called the discursive formation. (pp.129-130).

A discursive formation is a very complicated notion. According to Foucault, it is the principle of redistribution and dispersion of statements from a single formation. A single discursive formation can encompass discourses such as disparate as clinical discourse and legal discourse.

Building on his explanation of discursive formation, Foucault (1972) defines a discursive practice as “a body of anonymous, historical rules, always determined in the time and space that have defined a given period, and for a given social, economic, geographic, or linguistic area, the condition of operation of the enunciative function.” (p.131)

For Foucault, the study of statements in discursive practice provides the basis of understanding of discourses. He sets out four hypotheses in studying discursive formations which I endeavour to summarise as follows:

- (a) First hypothesis – statements different in form, and dispersed in time, form a group if they refer to one and the same object.

(b) Second hypothesis – to define a group of relations between statements by their form and type of connexion. He uses medical knowledge as an example and says that:

[M]edicine no longer consisted of a group of traditions, observations, and heterogeneous practices but a corpus of knowledge that presupposed the same way of looking at things... medicine was organized as a series of descriptive statements. (p.37)

(c) Third hypothesis – he queries that “might it not be possible to establish groups of statements, by determining the system of permanent and coherent concepts involved?”
(p. 38)

(d) Fourth hypothesis – he suggests to regroup the statements, describe their interconnections, and account for the unitary forms under which they are presented: the identity and persistence of themes.

It seems here that Foucault is suggesting that we should not treat a statement between the “speaker” and the “hearer” independently, rather we should consider the ways in which the expressed statements conform to a norm in the manner in which those members of that particular group express themselves.

To take the aforesaid point further, the way or manner or relationship in which such statements are delivered may become a convention that governs the nature of such statements and the meanings accorded to them by members of the community of a particular profession or field in which they are engaged. More specifically, according to Foucault as we indicate above, such statements may be viewed as the key to studying the relationship between utterances, social institutions and social processes. Against this backdrop, we can broaden our vision to treat the MRT discourse as the ensemble of statements that constitute the MRT is as a social institution and the review as a social process.

In this regard, the inter-relationships between the discourse and the institution can also help us to understand the link between discursive practices and social and institutional/professional practices (Candlin and Crichton, 2011; Cicourel, 1992 and 1999; Gumperz, 1999). While Foucault focuses on the construct of the statement, his approach may be criticised for being both too abstract and lacking realisation in texts and their accompanying textual analysis (Fairclough, 1992). Fairclough argues that texts and text analysis are a more illuminating way to analyse social practice than the position taken by Foucault, although broadly agreeing with its premises in terms of the linkage between discourse and the social order. In Fairclough's view, discourse is regarded as a form of language that is used as a form of social practice, rather than a purely individual activity or a reflex of situational variables.

We may also note that the definitions of discourse or discursive practice offered by leading linguistic scholars (see Candlin, 1997; Fairclough, 1992; Gee, Hull and Lankshear, 1996; Roberts, 2011; Scollon and Scollon, 2001) may differ in significant detail while in general being in agreement that discursive practice viewed as a social practice – i.e. as social actions – is vital to the understanding of how a member of the group speaks or expresses his views.

There is no doubt that every participant in a conversation regardless of the scenario or setting intends to be heard and received in the manner he wishes to by other participants present. For example, in a MRT hearing, the work visa review applicant wishes the Member to agree that his qualification is relevant to the occupation nominated for the purpose of the visa application. Likewise, the Member intends that the participants in a hearing abide by his directions to provide the necessary document within a fixed time frame (See further discussion in Chapters 6 and 7).

In this aspect, while Foucault provides a philosophical and social approach to the role and function of statements, Goffman (1959) provides a sociologically grounded point of view as to how people are expected to react:

When an individual enters the presence of others, they commonly seek to acquire information about him or to bring into play information about him already possessed. They will be interested in his general socio-economic status, his conception of self, his attitude towards them, his competence, his trustworthiness etc. (p. 1)

Accordingly, this identification of social practice with discursive practice will act to bring out into the social world what the speaker intends hearers to understand, and how they may see him as he wishes to be seen.

That being said, I am also aware that in addition to their textualised discursive practices, the appearance and manner of the participants (speakers or hearers) may also exercise considerable influence on the impression they provide to others. For example, we can observe that defendants in criminal matters normally dress up neatly if not formally and look remorseful when they appear in court proceedings in order, in part at least, to seek to gain the judge's and the jury's sympathy. Although for the purpose of this research, I am not focusing on such matters of impression management (see the research on this area, for example, Spencer Oatey and Franklin, 2009 about how these elements affect the impression of others) as my focus will be on discourse analysis and discursive practices; however, it may be useful as background information to describe briefly below the rituals of the MRT, so as to broaden the readers' understanding of the process and procedure in the MRT.

2.3 Linguistic approaches to discourse

The manner that a person comes into the social scene, as Goffman describes above, has also been discussed by Gee who observes that people who enter into a social scene in the

presence of others are in fact intended to be recognised, which he labels as “recognition work” (Gee, 2011, p.11). He further says people want to make known to others who they are and what they are doing, which can be conscious or non-conscious. This intention of being recognised is not only found in social settings but is in fact also commonly found in institutional setting. Most of the time, institutions endeavour to make known to the members of the public who they are and what power they have at the first encounter or at the commencement of the procedure, and the MRT is no exception.

The “recognition work” described by Gee (2011) can readily be observed in a MRT hearing when the Member presiding the hearing walks into the hearing room and commences the hearing. Prior to the Member’s entering into the hearing room, the tribunal officer will formally announce the entrance of the Member and invite participants to stand up. At the outset, the Member makes it very clear to all those who are present who he/she is and what he/she is doing in his opening speech; and through the interaction between the participants and the Member, the hearing will unfold the issues that the Member is required to decide in the review process. These rituals, which are similar to those in court proceedings but in a less formal manner, serve to highlight the status of the MRT and the authority that the Member possesses in the hearing. Both the status and the authority of the Member are intended to be recognised by the participants present in the hearing so as to demonstrate to the participants that this is the forum with the appropriate jurisdiction to decide their review applications.

Social practices and their linguistic realisation are inseparable (Caldas-Coulthard and Coulthard, 1996; Sarangi and Roberts, 1999; Sarangi, 2010) and it is this marriage of the two or the combination of the two that makes discourse analysis interesting and, at times, difficult to research upon. Accordingly, in order to take on the challenge of undertaking such discourse analysis, researchers need to understand both the linguistic worlds and the social worlds of their sites of engagement.

Against this backdrop, it is useful to examine Candlin's views on discourse. Candlin (1997) provides a definition of the discourse (quoted below) whereby he explains the tightly knit relationship between social formation and discourse:

[D]iscourse is a means of talking and writing about and acting upon worlds, a means which both constructs and is constructed by a set of social practices within these worlds, and in so doing both reproduces and constructs afresh particular social-discursive practices, constrained or encouraged by more macro movements in the overarching social formation. (p.viii)

Candlin's definition assists us to recognise the sophisticated relationship or, in legal terms, the causation relationship of discourse and social formation which are crucial when researchers undertake discourse-based research. In a similar manner, Wodak (2000) has drawn our attention to the complexity of discourse:

'Discourse' is understood as a complex bundle of simultaneous and sequential interrelated linguistic acts which manifest themselves within and across the social fields of action as thematically interrelated semiotic (oral or written) tokens (i.e. texts) that belong to specific semiotic types (genres). (pp.188-189).

Given these positions, discourse analysis offers a means by which we may explore and recognise the conventions governing the social practices and discursive practices; and on that basis, we may further argue that an understanding of the prevailing conventions of such practices, both social and discursive, will enable us to formulate ways to enhance communication in the particular social field under study by means of professional development programs (a matter which will be discussed in the last chapter of the thesis).

2.4 The Interaction Order and the Institutional Order

Central to my research into the discursive practices of the MRT are the twin constructs of the interaction order (notably Goffman, 1983; Drew and Wootton, 1988) and the institutional order (see here notably Berger and Luckmann, 1967; Sarangi and Roberts, 1999; Candlin and Sarangi, 2011) and the relationships between them (Sarangi and Roberts, 1999).

Berger and Luckmann (1967) provide a useful account of the institutional order and its complexities, which they describe as follows:

It is the sum totals of 'what everybody knows about a social world, an assemblage of maxims, morals, proverbial nuggets of wisdom, values and beliefs, myths, and so forth the theoretical integration of which requires considerable intellectual fortitude in itself, as the long line of heroic integrators from Homer to the latest sociological system-builders testifies. On the pre-theoretical level, however, every institution has a body of transmitted recipe knowledge, that is, knowledge that supplies the institutionally appropriate rules of conduct. (p. 65)

Based on Berger and Luckmann's observations, I argue that the consensus or common knowledge shared among members in an institution more often than not creates and forms a kind of orderliness to be observed by the members of the institution, noticeable both within and beyond the institution. Such orderliness is the basis of the institutional order. In fact, the institutional order so formed not only displays to the public the way the institution operates, but also stands out as a symbol of that institution. When Foucault (1981) comments on the control over the production of discourse and says that each discipline has rules governing that discipline's discourse, in my view, he is in fact talking about the kind of orderliness similar to the orderliness conveyed by Berger and Luckmann in respect of the institutional order. These observations strongly support the argument that the relationship of discourse and the institution is the key to the institutional order under study. Sarangi and Roberts (1999) point out that professional knowledge and identities are constituted in interaction within an over-arching institutional order (see also Sarangi and Candlin, 2011).

However, the interaction order is more versatile than the institutional order in the sense that a party's interaction or social interaction that constitutes the interaction order can sometimes be unpredictable, especially during the heat of exchanges. To be more specific, when each participant in a social situation interacts with the other participant(s) in each other's presence, the linguistic realisation from the interaction can be quite unpredictable because both parties

are faced with considerable uncertainty as to what the other party may ask or reply in response to their previous question asked. To put it in the context of an institutional site of engagement such as the MRT, the interaction order may in certain circumstances interfere with or run counter to the interactions that may be predicted by our understanding of the institutional order. For example, when a participant considers that his interests are at stake and he wishes to voice his concern, exercising such a question as part of the interaction order would naturally interfere (if not upset) the rules governing the institutional order, for example, the permitted patterns of turns taking in that context and site. The interaction order has become a widely researched area since Goffman's seminal speech to the Sociology Society²⁰ where Goffman (1983) emphasised the importance of exploring social practices and invited researchers to examine the face-to-face domain of everyday interactions, or in his term, 'the interaction order':

Social interaction can be identified narrowly as that which uniquely transpires in social situation, that is, environments in which two or more individuals are physically in one another's response presence... My concern over the years has been to promote acceptance of this face-to-face domain as an analytically viable one – a domain which might be titled, for want of any happy name, the interaction order – a domain whose preferred method is microanalysis. (p. 2)

In sum, there will be two or more participants in any social situation during which particular social interactions among them may be identified. Any such social situation in broad terms, especially in the professional organisational context will involve a given institution within which such situations may be encompassed. In any given (social situation) site of engagement, participants play different roles impacting on the social interaction in question can also be the result of the role played by the participants. The relationship between role and

²⁰ See the research work contributed by leading scholars in the collection edited by Paul Drew and Anthony Wootton, Drew and Wootton (1988)) following Goffman's president speech in the American Sociology Society Meeting in 1982 (reported in the society's journal in 1983)

associated discourse is at times not clear-cut. For example, the Member during the MRT hearing is required to introduce the function of the MRT hearing at the commencement of the hearing. He/she does so because his/her role as a Member of the MRT requires him/her to perform in such a manner. From an alternative perspective, when he/she briefs the public about the role of the MRT, he/she occupies the role of interpreter of law and as in other circumstances, he may occupy the role of advisor or investigator and his discourse may have to change in order to match his role.

To take the discussion of the relationship of role and discourse a step further, it seems that there is no easy answer to the question of whether a speaker is required to speak in the manner prescribed by his role or whether, due to the need of the circumstances, he speaks in such a way as to fit in and achieve his goals (Gee, 2010, p.11, describes it as a “chicken and egg” situation). In many instances, it is observed that the role of the participants and the discourse the participants delivered jointly constitute the conventions governing the way that the participants should behave. These kinds of discourse practices may in fact be legally based or embedded within some practical needs. For example, in a police interview, the police officer usually will read out a statement of caution to the suspect at the commencement of the interview. Failure to warn the suspect before taking the statement may render the statement inadmissible. In a doctor-patient consultation, a doctor may remind the patient to take the medication before food. Failure to do so may expose the doctor to a medical negligence claim should a patient suffer a serious reaction for not taking the medication before food and it is subsequently proved that the cause of such a reaction is due to the absence of medical advice by the consulting doctor. In a courtroom hearing, the presiding judge may warn the jury to disregard what the witness has said because the rule of hearsay applies. Failure to do so may cause disruption of the hearing such as discontinuance/dismissal of court proceedings.

The aforesaid highlights the importance of both the interaction order and the institutional order. It is evident from the examples given that the interaction order and the institutional order are interrelated. Indeed, “all institutions are made up of shared habitual practices (i.e. interaction orders), which can be understood with reference to their own history and tradition” (Sarangi and Roberts, 1999, p.3). This observation made by Sarangi and Roberts in fact complements the remarks made by Berger and Luckmann cited above. In effect, a member of a work community or profession, when carrying out his work (following the precepts of the institution order), will consciously or unconsciously call upon his social experience when interacting with others (i.e. when engaged in the interaction order).

Turning to the MRT, social experience has in fact assisted the participants (including participants representing the institution) to deal with critical situations in an institution setting. For example, in one of the MRT hearings I attended, the Member, after listening to the explanation of the review applicant who was an Asian student, about 18 years old, and accompanied by his aunt, advised the applicant to get a Certificate of Enrolment (COE) and settle his differences with his parents about the type of school he was going to attend, as his student visa would have to be cancelled if there was no COE. In this case, the Member has departed from her role as an interpreter of law (or a decision maker) and assumed the role of an advisor. It is evident that the Member drew from her social experience and her knowledge of the world to advise the review applicant to comply with the visa requirements first and resolve his other issues later, as she would be bound by the legislation to affirm whatever the Department of Immigration decided if the review applicant failed to provide the COE, which would in this case most likely be a decision to cancel the applicant’s student visa. It seems clear that this kind of empirical experience of the social world provides us with some important understanding of the work the MRT is doing, That is, while carrying out its review

work pursuant to the legislation, the MRT is willing to act in a reasonable and supportive manner which requires the Members to draw on their social and cultural skills.

Indeed, Sarangi highlights the importance of such data by pointing out that “an examination of professional role-performance at the interactional level is capable of offering interesting theoretical and empirical insights”(Sarangi, 2010, pp. 27-28). In this research, I will show that the interaction order at times challenges/interferes with the institutional order. For example, in an MRT hearing, migration agents are not supposed to speak during the hearing unless invited by the presiding Member, but at times it is found that the migration agent begins to speak in response to something the Member says during the hearing and without the Member’s invitation. This is because the migration agent finds that his client’s interest is at risk and he feels obliged to speak out to protect his client’s interests. To support this point I will, in particular in Chapters 6 and 7, provide discourse data to demonstrate the said circumstances stated above, but in the meantime, I will discuss succinctly certain issues surrounding institutional discourse and professional discourse.

2.5. Discourse – institutional and professional modes of talk

Institutions and professions are closely related. Sarangi and Roberts (1999) distinguish the two by pointing out that the concept of profession originates from the idea of a vocation where a body of professed knowledge is required, whereas institution “is an orderly arrangement of things which involves regulations, efficient systems and very different kinds of knowledge from that of professional” (Sarangi & Roberts, 1999, p.14). In the example cited by Sarangi and Roberts, if a hospital is an institution, then the doctors and nurses represent the professions within that institution, hence these two concepts are closely interrelated. In terms of linguistic practices, Sarangi and Roberts (1999) distinguish institutional discourse from professional discourse. They define professional discourse (p.15)

as “what the professionals routinely do as a way of accomplishing their duties and responsibilities” with linguistic features which are not only durable but also legitimate and authoritative. On the other hand, institutional discourse as defined by Sarangi and Roberts (1999) comprises features which are “attributed to institutional practice, either manifestly and covertly”. This distinction is reflected in the concept that Bourdieu (1991) has labelled as “habitus”, which is a set of linguistic and non-linguistic practices and conventions that professionals follow. For example, legal practitioners learn to master their professional skills by applying the knowledge they learnt in law schools through their training in the College of Law²¹ as well as in their professional practice.

To this end, Foucault (1981) comments that institutions are essential to our understanding of institutional discourse as he points out those institutions try to control the order of discourse.

In sum, Sarangi and Roberts (1999) suggest that professional discourse is related to how the professionals discharge their duties and responsibilities whereas institutional discourse is always regulated and backed by a set of rules or guidelines. In the legal context, a typical example can be found in courtroom discourse where the judge represents the institution and the counsel represents the legal professionals. Although the judge himself is also a member of the profession, the judge in a courtroom represents the court itself. Likewise, Members of the MRT perform their duties as the representative of an institution namely the MRT.

Sarangi and Candlin (2003, p.116) provide another very relevant account of discourse, which draws our attention to the factors contributing to it:

Discourse is conventionally defined as meaning making above the utterance level, including what lies behind the utterance, e.g., participants’ role-relationships and their motives/accountability as well as wider institutional/professional and socio-political underpinnings.

²¹ College of Law is one of the service providers in New South Wales providing mandatory practical legal training to law graduates who wish to practise law.

In this regard, it is true that we often feel surprised about the meaning behind the utterance (level) and the way in which the discourse is presented. For the sake of the present research, prior to discussing the key differences of the MRT discourse in relation to other legal discourses, I will touch on the topics of interdiscursivity and hybridity of discourse as they comprise two of the crucial sub-themes of this thesis and play a significant role in the discourses to be analysed.

2.5.1 Interdiscursivity and hybridity of discourse

In my daily interactions at work, I see that more and more professionals are using a mixed mode of languages to deal with their clients. In linguistics terms, we can refer to this phenomenon as “interdiscursivity” and “hybridity.”²² Interdiscursivity (Candlin and Maley 1997) and hybridity (Sarangi and Roberts 1999) are often found (i.e. are often employed by participants in an encounter) within both the interaction order and the institutional order of professional communication. Professionals such as medical practitioners, counsellors and legal practitioners, are often faced with challenges that exceed their professional duties (or that are in legal terms, *ultra vires*, i.e. beyond their authority or power).

How they “navigate” their way through professional encounters requires well-honed discursive and social skills (see Greatbatch and Dingwall, 1999, regarding the mediator’s maintaining neutrality in a mediation setting). In order to handle different circumstances and unexpected questions when they are dealing with their clients, professionals are consciously or unconsciously calling upon their social and personal skills and experience of the world. For example, a common question that clients like to ask a legal practitioner during a legal conference is: “If you were me, what would you do?” However, the legal practitioner normally needs to distance him/herself from the personal aspects of a case in order to provide

²² I discuss these two terms in more details in the discourse analysis chapter, Chapter 6.

an objective and proper legal advice. So, to answer this personal question, the legal practitioner would have to call upon his/her social skills, together with their legal skills. This kind of situation can also be found in the MRT data which will be discussed in Chapters 6 and 7.

In their research about job interviews, Sarangi and Roberts (1999) observe that discursive hybridity in workforce discourse, and specifically in an interview setting, can be complex and sometimes confusing to the candidates being interviewed, especially when the candidates are required to distinguish the institutional mode and the professional mode in an interview setting that also requires personal experience. In a general sense, some scholars agree that hybridity exists in all linguistic practices in social setting (Chouliaraki and Fairclough, 1999; Duff, 2002; and Candlin, 2006).

Fairclough (1992), when discussing Foucault's idea of discursive formation in discourse analysis, concurs that "Interdiscursivity involves the relations between other discursive formations which according to Foucault constitute the rules of formation of a given discursive formation (1992, p.46)". Building on Fairclough's notion of interdiscursivity, Candlin and Maley (1997, p.212) in their paper about mediation define interdiscursivity as "the use of elements from one discourse and social practice which carry institutional and social meanings from other discourses and other social practices". Nor is the interdiscursivity limited to mediation as a site. Interdiscursivity in fact is commonly found in other workplace discourses, and the MRT discourse in this thesis also demonstrates the features of interdiscursivity as defined by Foucault (1981), Fairclough (1992) and Candlin and Maley (1997) above when the Member interacts with participants such as the review applicant and the migration agent (see example below).

In fact, discursive hybridity is a useful strategy when the profession endeavours to negotiate the way out of a difficult situation, for example, in a profession-client conference with respect to delivering an important message to the client. In the example cited by Candlin (2006), the counsellor while in theory could not give advice to the client (as her job was to counsel not to advise) made use of her interdiscursivity discourse strategy to warn, by means of offering appropriate example, the pregnant woman not to smoke or do things harmful to the unborn baby.

The use of interdiscursivity as a strategy is also found in the MRT discourse. During an MRT hearing about a work visa matter where the review applicant was accompanied by his migration agent²³, the Member asked the review applicant about who his employer was as the migration law requires that the sponsor (employer) should be the same party throughout the whole process, i.e. from the date that the visa application is lodged to the date visa application is decided. Realising that the review applicant was unable to distinguish the legal concept of “business name” and “an incorporated corporation”, the Member said to the review applicant (in the presence of his migration agent) words to the effect, “Your migration agent should be able to clarify it with you. This is why you paid him for assistance.” At this point, the Member switched from his enquiry role - making enquiries about the visa application to an advisory role suggesting to the review applicant to seek advice before answering. This strategy of not giving advice directly to the review applicant not only allowed the review applicant an opportunity to consider his circumstances before answering the Member’s questions but also triggered the migration agent (it is noted that the migration agent is not a lawyer) to ask for adjournment (which the Member allowed) to seek proper legal advice on the issue whether the sponsor (employer) was the same entity on the date the visa application

²³ I was present at the hearing as an audience with my supervisor Professor Candlin.

was lodged and on the date when application was decided. For the benefit of the readers, I am explaining the matter by reference to the concept of sole trader and the corporation below.

It is noted that the review applicant's employer (sponsor) has sold his restaurant business to another party while the review applicant was in his employ. The ownership of the business is crucial because if the business is owned by a corporation, the employer sells his business by transferring the shares of the company to the new shareholder, thus the business is still operated and owned by the same corporation but with different shareholders. However, if the employer is a sole trader and upon the completion of the sale of business, the employer transfers the business name to the new owner, then the new owner is the business name holder, thus even the business name is the same, the employer in the visa application is not the same when the visa application is decided. The reason being the business name itself is not a legal entity, but the holder of the business name is. Bhatia (2010) also attaches great importance in interdiscursivity by suggesting that it is an essential source of knowledge and is vital for professional genres and practices:

In order to develop a comprehensive and evidence-based awareness of the motives and intentions of such disciplinary and professional practices (Swales, 1998), one needs to look closely at the multiple discourses, actions, and voices that play a significant role in the formation of specific discursive practices within relevant institutional and organizational frameworks, in addition to the conventional systems of genres (Bazerman, 1994) often used to fulfil professional objectives of specific disciplinary or discourse communities. This is possible only within the notion of 'interdiscursivity' which is an important function of appropriation of text-external generic resources across professional genres and professional practices. (p. 35)

Given that the MRT as represented by the Member is an institution empowered by the Migration legislation to review failed visa applications and the participants such as migration agents are professionals, interface of institution discourse and the professional discourse can be observed in the interaction of the participants during the hearing. The data in the research illustrates the change of roles of the Member during the interaction with the participants

whereby the change of discourse mode is also observed. In the aforesaid examples in the MRT, I consider interdiscursivity and hybridity can be useful tools and strategies in discourses as well as means to improve professional communication.

That being said, I also need to point out that the institution as represented by the Member in the setting of MRT can also exercise his power by rebutting the participant's interference during the interaction. For example, the Member can bluntly tell the participant (the migration agent) that he has no right to speak during the hearing (See discussion in Chapters 6 and 7). Exercising the power to stop the interference of the participants by the institution can also be found in courtroom discourse. The following is an extract from the data provided by Harris (1994, p.166) whereby the Magistrate in a county court asked the defendant to make arrangement for payment of fines by instalment and the defendant posed a question in the similar manner that I discussed before:

M: Magistrate D: Defendant (Italics added)

M: um – um well it's up to you Mr [H –uh –uh I'm putting it to you

Again - are you um – are you going to make an offer –uh = uh to discharge this debt?

D: *would you in my position?*

M: I – I'm not here to answer questions – you answer my question.

Indeed, the institution as represented by the Magistrate here has absolute power to bluntly reject the participant, especially when the party concerned is a defendant breaching the law and being fined. In the social world, the use of interdiscursivity is a preferred tool to handle an awkward situation by the professionals.

2.6 MRT discourse and legal discourse

MRT discourse has as far as I am aware never before been researched, and to provide a definitive description of it will be quite difficult. There is a large body of literature on the Refugee Review Tribunal but very little or none on the MRT. This section intends to explain

to readers some of the main characteristics of MRT discourse by comparing it with other closely related legal discourses, such as courtroom discourse, arbitration discourse and mediation discourse. In doing so, some of the presentation may seem repetitive as I endeavour to distinguish the MRT discourse by comparing and contrasting it with the characteristics of the other three mentioned discourses.

The basic criteria governing the MRT's conduct are found in section 353 of the Act, which requires the MRT "to act according to substantial justice and the merits of the case" (section 353(2) (b) of the Act). To understand if the MRT has achieved its task as set out by the law, the discourse of the Member and the participants in a MRT hearing can be crucial for us to understand as to how a case is reviewed and whether the Member in a hearing has acted on the basis of "substantial justice" as required by the Act. *Prima facie*, since the MRT is applying the migration law to review the cases before it, it is natural for us to assume that the MRT discourse falls into the realm of legal discourse and relates to the courtroom discourse. But the research herein will reveal something different to what it seemingly is. It will show that the MRT discourse has its unique features, and if we intend to put it in a courtroom discourse context, we may argue that in a way, it has some features similar to those found in the common law (adversarial) courtroom discourse and some in the continental law (inquisitorial) courtroom discourse. As Australia is a common law country, as a starting point, I am going to examine what conventions there are governing legal discourse in a common law system is and what the features of legal discourse are before we move on to identify the features of the MRT discourse below.

2.6.1 Legal discourse

Bourdieu once says that "Legal discourse is a creative speech which brings into existence that which it utters. It is the limit aimed at by all performative utterances – blessings, curses,

orders, wishes or insults.” (Bourdieu, 1992. p. 42). This comment indeed gives a succinct account of the courtroom discourse whereby the parties including but not limited to the counsel and the witness, the plaintiff counsel and the defendant counsel, or even the counsel and the judge interact. Research on courtroom discourse has attracted an extensive array of research interest since the nineteen seventies and as one of the leading scholars in this area comments there are growing interests in the study of interaction between language and law as compared to the situation more than a quarter century ago when such interconnections were rarely presented (Shuy, 2010). There is a vast literature studying the courtroom discourse to date (Atkinson & Drew, 1979; O’Barr, 1982; Conley and O’Barr, 1990; Gibbons, 1994; Tiersma, 2000; Solan and Tiersma, 2005; Rosulek, 2009; Couthard and Johnson, 2010; Harris, 2011; Hobbs, 2011; Van der Houwen, 2013; Snejder, 2014). The legal discourse does not restrict to courtroom discourse. The parameter of studying legal discourse has expanded to include discursive practices and social practices in the interaction of language and law in other associated sites of engagement and domains (see for example the contribution of papers by leading scholars in Gibbons, 1994).

To understand the wide range of legal discourse, we may usefully look at the detailed account given by Maley (1994):

There is not one legal discourse but a set of related legal discourses. Each has a characteristic flavour but each differs according to the situation in which it is used. There is a judicial discourse, the language of judicial decision, either spoken or written, which is reasonably flexible and varied but none the less contains recognisably legal meanings, in predictable patterns of lexicogrammar. These judicial decisions, collected in reports, make up what is known in the English-derived common law system as case law. There is courtroom discourse, used by judges, counsel, court officials, witnesses and other participants. This is interactive language, peppered with ritual courtesies and modes of address, but otherwise perhaps the closest approximation to everyday speech of all public legal discourses. There is the language of legal documents: contracts, regulations, deeds, wills, Acts of Parliament, or statutes, quintessentially legal and formal. And there is the discourse of legal consultation, between lawyer and lawyer, lawyer and client. (p. 12)

Accordingly, we adopt the position in this thesis that we include within the canon of legal discourse other discourses such as those of tribunals or institutions like the MRT, together with the processes of arbitration and mediation as being in substance part of legal discourse (as the focus of these discourses also attributed to the study of the interaction of language and law).

I offer some characterisation of these distinctive legal discourses in what follows

2.6.2 MRT discourse

There are different kinds of tribunals in Australia with different jurisdictions and each tribunal has its own unique process (which I will compare and discuss in Chapter 3) and it is fair to suggest that the discourse of each tribunal interrelates with the process. MRT is a federal tribunal. In a MRT hearing, there is no defence counsel or plaintiff counsel as is in the case of legal proceedings in a courtroom. However, the data collected during this research study do display some of the features similar to those of courtroom discourse, for example, the discursive practices and the tacit linguistic manner and the interaction between the Member and the participants when the Member makes detailed enquiries about the case being reviewed prior to deciding if the visa applicant satisfies the legal requirements of a particular visa have the features of examination and cross-examination conducted by counsels in the courtroom.

Maley's argument above offers more than an illuminating insight on the range of discourses that may be located within legal discourse; it also presents a wider perspective on what can be constituted as legal discourse *per se*. The following are features and practices that can be found in the MRT discourse that fit Maley's expanded definition some of which will be discussed in later chapters of this thesis:-

- (a) Judicial discourse – in both written and spoken forms, is reasonably flexible and varied but the patterns of lexicogrammar carrying the legal meanings are easily identified in established and recognised genres. For example, court reports, case law under the common law system. For the MRT, this kind of discourse can be found in the decisions published by the MRT in Australian Legal Information Institute (commonly known as Austlii available from the website <http://www.austlii.edu.au>).
- (b) Courtroom discourse – used by judges, counsels, court officers, witnesses and other participants in an interactive manner. For the MRT, the substance of the courtroom style of discourse can at times be found in the Members’ discursive interaction with other participants during the hearing.
- (c) Legal documentation – such as acts, regulations, deeds, contracts etc. For the MRT, the Act and the regulation the Members relies on are within this category.
- (d) Legal conferences – such as lawyer and client conferences. For the MRT, the conference between the client and the registered migration agent.

To provide a baseline for the comparisons and inclusions within legal discourse which we will be proposing in relation to the MRT in this thesis, I list below a set of features of courtroom discourse present and observed in the context of common law legal system where the carriage of court proceedings is characteristically adversarial:-

- (a) The language used is verbose and highly specialised and distinctive, “peppered with ritual courtesies and modes of address” (Maley, 1994,p.13).
- (b) The discourse is interactive.
- (c) The counsels for the plaintiff and the defendant abide by the rule of turn-taking when speaking.

- (d) The judge in a court has the authority to maintain direct control of the parties including witnesses in the hearing room (O'Toole, 1994).
- (e) Because of the rule of evidence applies in questioning by counsels, open questions are preferred and counsels are shy from asking leading questions. (*Evidence Act 1995* (Cth) and counterpart legislation in each state and territory).
- (f) Counsels demonstrate linguistic skills “to fragment possible narrative accounts of witnesses, particularly in conjunction with cross-examination, and to subvert the coherence of potentially hostile witnesses from the ‘other side’.” (Harris, 2011 p.280)

To provide some further background against which the particular discourse of the MRT can be set, it is informative to characterise two other types of legal discourse belonging to the legal discourse family, namely discourses of arbitration and of mediation. As some general background, there is a considerable volume of writing on arbitration in particular the recent project on international commercial arbitration emanating from Hong Kong led by, Bhatia, Candlin and Gotti with many distinguished contributors, scholars and practitioners and funded by the Hong Kong Government (see Bhatia, Candlin and Gotti, 2012). Further, there is also a considerable literature on discourses of mediation discourse (Candlin and Maley, 1994, Maley, 1995; Greatbatch and Dingwall, 1999; Hill, 2013). As a caveat, it is unlikely for me to discuss the mediation and arbitration discourse herein comprehensively given that such a topic is a huge topic and both these two professional discourses are well-researched and widely-discussed. I only endeavour to draw references on the main features of these two discourses to demonstrate how MRT discourse differs from them.

2.7 Mediation and arbitration

In recent years, alternative dispute resolution (ADR) has been widely used in lieu of litigation or is required to be used prior to proceedings are instituted in the court. Arbitration and mediation form the basis of alternative dispute resolution and are widely used by disputing parties, with the former more often used in commercial matters and the latter in community centres, family law matters and other legal disputes.

In general, the arbitration and mediation process are opted by the parties voluntarily although in the Family Law regime, parties are required mandatorily to go through a mediation process before commencing proceedings in the Family Court²⁴ and in the commercial world, most contracts today contain a provision that requires the parties to resolve their disputes by seeking alternative resolution prior to commencing court proceedings. In certain circumstances, the government has also taken initiative to facilitate alternative resolution to parties to resolve business disputes, for example franchise agreements²⁵ while in other situation, mediation is mandatory (see section 68 of *Retail Leases Act 1994* (NSW))²⁶.

To distinguish the MRT process from the mediation process and the arbitration process, I here point out that the MRT process is not a process that the review applicant can opt in or out because the MRT is empowered by the Act to review a visa application case which is refused

²⁴ Section 60I(1) of the *Family Law Act 1975* (Cth) states that “The object of this section is to ensure that all persons who have a dispute about matters that may be dealt with by an order under this Part (a Part VII order) make a genuine effort to resolve that dispute by family dispute resolution before the Part VII order is applied for.”

²⁵ The Office of the Franchising Mediation Adviser (OFMA) was established by the Federal Government in 1998. Its website www.franchisingmediationadviser.com.au states that “OFMA has been established under the Franchising Code of Conduct, which regulates the conduct of franchisees and franchisors towards each other and provides a cost-effective dispute resolution solution to the industry. The Franchising Code of Conduct is administered and enforced by the Australian Competition and Consumer Commission (ACCC). Every year, OFMA handles hundreds of enquiries from franchisees and franchisors who want to resolve their dispute quickly and cheaply. OFMA provides two services: Early Intervention; and Mediation.”

²⁶ Section 68 of the *Retail Leases Act 1994* (NSW) stipulates that “Disputes and other matters must be submitted to mediation before proceedings can be taken”.

by the Department of Immigration prior to the case being allowed to go to the court system for appeals.

2.8 Arbitration discourse

In arbitration, the arbitrator is carrying out his work in a pre-designed legal framework, for example, United Nations Commission on International Trade Law (UNCITRAL Model Law).

Arbitrator is acting within the bounds of the procedure of the arbitration law whereas the mediator is not under such constraints. In comparing with the arbitrator, the MRT Members when conducting a hearing is not bound by the rule of evidence, but they have to observe the principle of natural justice whereby the review applicants must be given the opportunity to respond to any issue raised, whether the issue in question is prejudicing the review applicant or otherwise.

From the discourse perspective, Gotti (2010) points out that although arbitration is not as formal as the court, the arbitrator exercises his power in arbitration by allowing or objecting specific questions or objections.

In addition, Gotti points out that the role played by the arbitrator in guaranteeing compliance with the rules of the whole procedure is crucial to the whole arbitration process. In this regard, the procedure of the MRT is unique and is not required to be bound by any specific procedure rules as the MRT Members are at liberty to formulate their own rules during the hearing. This can also support the argument that the discourse of the MRT members is less formal than the arbitrator's discourse.

One of the features of the arbitration discourse is the way it presents an award. It is noted that the award made by the arbitrator can be enforced by court with the appropriate jurisdiction. Accordingly, awards carry significant importance in the process of arbitration. In fact, Bhatia,

Candlin & Hafner (2012) argue that arbitrator makes use of linguistic tools such as “rhetorical structure, use of lexico-grammatical resources, rhetorical strategies” as accounts in the awards in “explaining, justifying, and reasoning the decision arrived at depending upon his functional role as legal expert, fact finder, adjudicator or facilitator” (p.148). Based on the aforesaid, accounts used in the arbitration award in my view is similar to another linguistic tool, reformulation, but in a more detailed sense.

2.9 Mediation discourse

Maley (1995) describes the discourse type of mediation as an informal structure and finds that it normally consists of four phases namely issue identification, generation and evaluation of alternatives, selection of an alternative and development of an implementation plan. She also points out that reformulation is a skill that is commonly found in the mediators’ discourse to control the mediation.

Mediation no doubt has a distinctive discursive practice as it offers to the disputants a new set of process, roles and ideologies, which Candlin and Maley (1994) argue that “part of the distinctiveness of the social and discursive practices of mediation lies in the exploitation of inter-textual elements which link them to both law and therapy” (p. 78).

Mediation is primarily a voluntary process, although there are more matters nowadays, in particular, family law matters that make mediation mandatory before a party can institute court proceedings. However, as mediators have no power to impose any conditions, the parties in mediation have more control in mediation than the participants in MRT matters or parties in arbitration matters. For example, the parties initiate a way to exit their arguments in divorce matters instead of relying upon the mediator’s assistance to exit an argument (Greatbatch and Dingwall, 1997).

To sum up, Table 2.1 (see below) sets out some similarities and differences found in courtroom discourse, arbitration discourse, mediation discourse, and the MRT discourse. The table is not meant to be comprehensive and only intends to give a preliminary understanding of these discourses.

However, it provides a snapshot of the four discourses which in my view constitute the legal discourse jointly and severally. As Table 2.1 reveals, the MRT procedure is meant to be informal (pursuant to section 353 of the Act) which directly contributes to the more flexible style of the MRT discourse. The MRT discourse is in fact legally based and the Migration legislation underpins the Member's discourse. Unlike the courtroom discourse, the Member conducts the hearing on his own and in general does not need to face the challenges of plaintiff counsels or defence counsels like in court proceedings, however, in Chapter 6 and Chapter 7, I will argue and demonstrate that the MRT's performance, or more specifically, the Member's performance, is in substance being scrutinised by the Federal Court and the other participants in the hearing by way of appeals on the grounds of jurisdictional error. Unlike the mediator in a mediation who has to maintain neutral and impartial, the MRT Member needs to make a decision at the conclusion of the hearing, either to affirm the decision made by the Department of Immigration or set aside it (section 349 of the Act), which is the key aspect that the feature of both discourses differ. While the MRT Member is empowered by the Migration legislation, he is not constrained by the rules similar to those faced by the arbitrator in arbitration.

	Courtroom	Arbitration	Mediation	MRT
Participants ²⁷	Judge Plaintiff Plaintiff's Counsel Defendant Defendant's Counsel Court officer	Arbitrator Parties Counsels	Mediator (s) Parties	Member Tribunal Officer Review Applicant Migration Agent
Hearing Procedure	Court rules and rule of evidence apply	For international arbitration, usually UNCITRAL Model Law on Commercial Arbitration applies. For local arbitration, local legislation on arbitration applies	Mediator determines the rule	Rule of evidence does not apply Tribunal can make up the rules (Section 353 of the Act).
Language used or genre	Highly polite and formal*	Formal	Less formal than the courtroom / flexible	Less formal than the courtroom / flexible
Authority and Power of the hearing	Required by law	Contracts normally have a provision requiring parties to resolve disputes by arbitration prior to litigation.	Usually voluntary - Parties may opt in/out for mediation except those under Court order or statutory requirement – for example, court may order parties to go through mediation before litigation is to be commended.	Review to the MRT is the first avenue for visa applicants whose applications are rejected as set out in the Migration Act 1994
Linguistic Practices	Governed by law and convention, namely statute law and common law	Governed by the UNCITRAL Model Law but the trend is towards the harmonization of discourse	Constrained by convention of the profession namely achieving consensus without attribution of blame	MRT can prescribe the rules on the basis of informal, non-technical (Section 353 of the Act)

Table 2.1 – A table comparing the features of courtroom discourse, arbitration discourse, mediation discourse and MRT discourse

²⁷ Interpreters are required when a party or witness requires the assistance of an interpreter. Witness (s) will be called upon when giving evidence.

*See Maley (1994).

2.10 Conclusion

The MRT discourse demonstrates a hybridity of courtroom discourse and other discourses. As introduced in this chapter, the Member occupies multiple roles and the roles and discourse change concurrently, which create an interesting and diverse discourse. I have endeavoured to compare the courtroom discourse, the mediation discourse and the arbitration discourse with the intention to portray the unique features of the MRT discourse, but it needs to point out that the MRT discourse is a versatile and dynamic discourse as each review matter reveals a different picture of people who are affected by the visa application. To capture the whole parameter of the MRT discourse, we need to be ready to dedicate ourselves in understanding the interaction of language and law, which I embark to do in the following chapters.

Chapter 3

The history and set up of the MRT and a comparison of the MRT with other tribunals²⁸

3.1 Introduction

In Chapter 2, I focussed on the features of MRT discourse and argued that the two constructs of the interaction order and institutional order are instrumental to our understanding of the MRT discourse. As noted in Chapter 2, the MRT (as represented by the Member) is an institution empowered by law to review visa application decisions (at the request of visa applicants and/or review applicants) made by the Immigration Department, and in that context we may make observations on how an interaction order interacts with the institutional order.

In this chapter, I show that it is necessary to be aware of the legal framework and structure of the MRT in order to understand how language and law interface within the context and engagement site of the MRT. This chapter not only provides the basic framework for understanding the roles, the discourse and the process of the MRT but, more importantly, also shows how the roles, the discourse and the process severally and/or jointly contribute to the cause of and form the legal basis with respect to judicial review in the federal courts.²⁹

We need to possess adequate background knowledge with respect to the formation of the MRT if we wish to understand the process and procedure in the MRT and the MRT's place in the judicial system. In this regard, I consider that the latter is as crucial as the former in terms of assisting researchers to appreciate how the interaction order and the institutional order are

²⁸ This chapter was written before the merging of the MRT and MRT with the AAT in July 2015. However, as far as I am aware, based on my legal research, as at October 2015, the procedures and processes used in reviewing decisions regarding visa applications have not changed.

²⁹ In the event that the review applicant is not satisfied with the MRT decision, he/she can appeal to the Federal Circuit Court (on the grounds of jurisdictional error) and even to the High Court of Australia.

observed and characterised and, in particular, what roles the participants are occupying during the review process.

Accordingly, this chapter is divided into three main sections: (i) an account of the MRT and its history; (ii) a comparison of the MRT and the Refugee Review Tribunal; and (iii) a comparison of the MRT and the other federal tribunals. Under these three main sections, I also discuss the role of the migration agent and the Member in the MRT review process.

I also make observations (with examples) on some of the relevant clauses of the Act and their linguistic and discursive significance with respect to matters concerning the interaction order and the institutional order. It may be difficult for me to avoid deploying overtly legalese language in parts of this chapter. However, it is my intention to preserve the originality of the legal language to demonstrate how interaction order and institutional order interplay in the context of the MRT site.

3.2 History of the MRT

The MRT was established pursuant to section 394 of the Act³⁰. The setup of MRT has by far been an achievement of the government to respond to public demand for an independent body to review visa applications.³¹

Prior to 1989, people who wanted to have their visa decisions reviewed had limited avenues. They could petition to the then Human Rights Commission, apply to Administrative Appeals Tribunal (AAT), the Federal Court and the High Court for review.

In sum, prior to 1989, the system for the review of migration cases was as follows³²: -

³⁰ Migration Act 1958 and any amendments made in this paper will be called “the Act” unless otherwise specified.

³¹ See Bills Digest No. 90 “Migration Legislation Amendment (Judicial Review) Bill 1998, Parliamentary Library, Parliament of Australia.

³² See http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/bd/bd9899/99bd090 for further details.

- (a) Petition to the Minister of the Immigration Department.
- (b) Application to the Immigration Review Panel, which was a quasi-independent immigration review panel established by Ministerial directive without statutory basis on a limited of cases.
- (c) Application to the then Human Rights Commission on humanitarian grounds; and
- (d) Application to Administrative Appeals Tribunal (AAT), Federal Court and High Court on points of law.

The unsystematic review process had been widely criticised, among which Crock (1998) points out, “The absence of a comprehensive system for the review of migration cases on their merits was responsible (at least in part) for the long-standing perception of the Department as a law unto itself.”(Crock, 1998, p. 250)

In 1989, a two-tier statutory merits review system was introduced for certain immigration decisions. The review bodies were called the Migration Internal Review Office (MIRO) and the Immigration Review Tribunal (IRT). This review process, however, did not take over the AAT's power to review deportation of permanent residents. Since 1993 there has also been a Refugee Review Tribunal (RRT), which hears appeal against decisions to refuse refugee status.

Since the establishment of MRT, applicants who are not satisfied with the decisions made by the Department of Immigration are able to have their cases heard by the following tribunals/courts: -

- (a) Unless otherwise stipulated in the Act, applications for review of most Immigration Department decisions³³ are to be heard by the MRT.
- (b) MRT can refer matters to the AAT.

³³ Protection visa and refugees matters are heard in RRT and are not discussed in this paper.

- (c) Some visa categories are to be heard by the AAT³⁴.
- (d) For certain categories of visas, applicants can appeal to the AAT regarding their MRT decisions.
- (e) In general, applicants can appeal to Federal Circuit Court (formerly known as Federal Magistrates Court) regarding their MRT decisions.
- (f) Applicants can appeal to Federal Court and High Court for decisions made by the MRT, AAT and Federal Circuit Courts as Federal Court and High Court have original jurisdiction under Section 75 of *the Australian Constitution*.

It is important to point out that the Minister for Immigration can at his own discretion make a favourable decision in migration matters and refugee matters on the basis of public interests,³⁵ a process which is commonly known as Ministerial Intervention. There are some pre-conditions that a visa applicant has to fulfil before the Minister will accept the visa applicant's request to intervene, for example, the review applicant has to exhaust all other avenues in having the visa application reviewed³⁶.

3.2.1 Language and law in the MRT

It may be appropriate to mention at this juncture briefly what kind of language, deployed within what genre types, we may anticipate encountering in the MRT. As we can see from the introduction above, the role played by the MRT is different from that of the courts and the AAT, when the MRT exercises its duties in making decisions notwithstanding it is empowered by the Act to review cases. Firstly, Members are not required to be legally qualified or to be a Federal court judge. Secondly, the intention of the legislation is to encourage the MRT to conduct its review in a less formal manner. Thus the discursive

³⁴ See section 500 of the Act.

³⁵ See, for example, Sections 137N, 197AF, 391 of the Act

³⁶ See http://www.immi.gov.au/refugee/ministerial_intervention.htm and http://www.mrt-rtt.gov.au/Files/HTML/TG15_ReferralsForMinisterialInterventionPC-GU.html for further details.

practices are foreseeably going to be less formal as compared with those in a normal courtroom.

The MRT hearing, as explained in what has been set out earlier, is informal (also see further comparison below) in comparison with courtroom hearing. Since the MRT is the gateway to instituting proceedings in the federal court, should the review applicant decide to appeal against the MRT decisions, the MRT is best viewed as the gateway first step towards access to remedies, judicial and non-judicial. For example, the judicial one will be court appeals on the grounds of jurisdictional error and the non-judicial one will be making an appeal to the Minister for Ministerial Intervention. The MRT decisions are published on the website of Austlii and contain full explanations of how decisions are made and on what legal basis.

From the discourse point of view, the decisions published allow us to see how contextualisation is used by the Member to report the facts and the legal basis of the decisions made.³⁷ They also assist us to understand the manner in which the Member will make decisions in certain categories of visa reviews. As Sarangi and Roberts put it: “Contextualisation work is also a means of categorising activities, knowledge, professional identities within a given institutional order” (Sarangi and Roberts, 1999, p. 25). I will discuss the use of contextualisation and re-contextualisation by the MRT as a linguistic discursive device used in setting out the reasoning of behind its decisions in Chapter 8.

Both the discourse in the hearing and the decisions made (in writing) constitute an interface of the interaction order and institutional order. Goffman (1983) in his seminal speech on the interaction order cites five situations where the interaction order can be observed, that is, where “face-to-face” interactions can take place. These five situations include (i) a meeting of persons (one or more persons) labelled under “vehicular entities”; (ii) non face-to-face contact

³⁷ See further discussion in Chapter 8.

between parties including telephone and letter exchange; (iii) formal gatherings where only ratified participants are allowed to interact such as parties in a hearing, trial or legal proceedings; (iv) the platform format where people have the role of an audience, such as a formal meeting, a talk, a musical offering etc.; and (v) finally, celebratory social occasions such as a gathering in honour of an individual.

Based on the above examples, one can easily see that a hearing such as the MRT is one of the gatherings in which Goffman's concept of the interaction order (and its underlying reference in the institutional order as well) can be discerned and exemplified. To put this into the context of language and law, the discourse in a MRT hearing shares some of the features of a legal discourse (courtroom discourse), as MRT is basically an inquisitorial tribunal and questioning or making enquiries and investigation are part of the MRT's job. In this regard, Hobbs (2011) makes the following remarks on the role and function of questions in legal discourse:

Questions play a central role in legal discourse. This is due to the law's requirement that, prior to the entry of judgement, evidence must be presented and the fact of the case determined. (p. 302)

However, it is argued in this thesis that the MRT also possesses its own other unique features, such as the deployment of strategies based on discursive hybridity and on the affordances of interdiscursivity, as discussed in Chapter 2. However, I will also show that the decision record³⁸ displays the dynamic interface of the interaction order and the institutional order, especially during the hearing when the final decision is made. For example, the data shows how an argument typically occurs between the Member and the migration agent or the visa applicant (see discourse analysis in Chapter 6 and Chapter 7).

³⁸ See Chapter 5 for more details about the data terminology and sources.

3.2.2 Future development of the MRT

It may be important and even crucial to mention at this point matters concerning changes to the MRT before I move on to a description of its present structure.

During the attendance of the Senate enquiry on Estates of the Legal and Constitutional Affairs Legislation Committee on 26 May 2014, the Principal Member of the MRT advised the Senators that the government is planning to merge the MRT and RRT with the Administrative Appeals Tribunal (“AAT”), the Social Security Appeals Tribunal and the Classification Review Board (see Hansard Report “Senate – Legal and Constitutional Affairs Legislation Committee, Monday 26 May 2014). The merger took place on July 2015.

3.2.3 Jurisdiction of the MRT

The MRT is a tribunal created by the Act, but it does not have the same judicial power as does a court or a judicial tribunal. The position of the MRT is best understood with reference to the fact sheet called “The Migration Review Tribunal – An overview” posted on the MRT website in 2012:

The Tribunal’s jurisdiction, powers and procedures are set out in the Act and in the Migration Regulations 1994 (the Regulations). The Tribunal does not have any more discretion than the primary decision-maker. The Tribunal must have regard to Government policy and comply with Principal Member Directions and is bound by any directions made by the Minister under section 499 of the Act.³⁹

It may be beneficial here to go to the Act and examine what kind of decisions made by the Immigration Department that the MRT has power to review. Section 338 (1) stipulates that:-

A decision is an MRT-reviewable decision if this section so provides, unless:
(a) the Minister has issued a conclusive certificate under section 339 in relation to the decision or

³⁹ “The Migration Review Tribunal – An overview” M8 published by the Migration Review Tribunal retrieved from mrt-rrt.gov.au dated 1 July 2010.

- (b) the decision is an RRT-reviewable decision⁴⁰; or
- (c) the decision is to refuse to grant, or cancel, a temporary safe haven visa.

Further to section 338, we may need to examine what is constituted by a conclusive certificate is held to entail as it imposes another level of control by the Immigration Department in the sense that the Minister can issue a conclusive certificate to close the review avenue. Section 339 of the Act sets out the limitations imposed by the government to the institution it creates :

The Minister may issue a conclusive certificate in relation to a decision if the Minister believes that:

- (a) It would be contrary to the national interest to change the decision;
or
- (b) It would be contrary to the national interest for the decision to be reviewed.

In other words, the MRT has a broad form of power to review decisions made by the Immigration Department, unless they are under section 339, whereby the Minister can rely on “national interest” to issue a conclusive certificate.

3.2.4 Members of MRT

Part 6 Division 1 of the Act sets out the establishment and membership of the MRT.

The Governor-General can appoint a person to be the Principal Member⁴¹ for a term of 5 years⁴², who is responsible for its overall operation and administration of the MRT⁴³

Unlike Administrative Appeals Tribunal⁴⁴, there are no mandatory requirements for principal member, senior members or members to have legal qualifications.

⁴⁰ RRT is the short form of Refugee Review Tribunal.

⁴¹ Section 396 of the Act.

⁴² Section 398 of the Act.

⁴³ Section 397 of the Act.

⁴⁴ Sections 6 and 7 of the *Administrative Appeals Tribunal Act 1975* (Cth) requires that members have legal qualifications, and judges are to be appointed as presidential members.

As set out in the MRT/RRT annual report (2012-2013), the tribunal currently has a total membership of 144, comprising the Principal Member, a Deputy Principal Member, 12 senior members, 49 full-time members and 81 part-time members. It is noted that in the last annual report, it reveals that 50% of Member have a legal background⁴⁵, but the annual report for 2012-2013 does not provide such information and only states that Members have extensive experience. It is further noted that the previous Principal Member is an experienced lawyer by profession and the current Principal Member was a former Principal Member of the Consumer Trader Tenancy Tribunal.

	Women	Men	Total
Principal	1	0	1
Deputy	1	0	1
Senior	6	6	12
Full-time	22	27	49
Part-time	59	22	81
Total	89	55	144

Table 3.1 – MRT Membership as at 30/6/2013
Source: MRT/RRT Annual report 2012-2013

3.2.5 Power of the Members

This section may overlap with the earlier discussion concerning the jurisdiction of MRT. However, it is added here to elaborate on the powers open to Members to exercise.

⁴⁵ See MRT fact sheet M9 (retrieved from mrt-rrt.gov.au dated August 2012).

The courts have power to grant “remedies” to applicants in matters against “an officer of the Commonwealth” by way of mandamus , prohibition or injunction under the Constitution.⁴⁶ Briefly, mandamus means that the court can direct an officer to do certain action, prohibition means the court can prevent an officer from doing certain action and injunction means the court can stop a current or future action for a period of time. In fact, under the common law, certiorari is also a remedy courts can grant. Certiorari invalidates or nullifies or sets aside a decision and has the effect of remedying non-jurisdictional error on the fact of the record (see Cane and McDonald (2008)). A careful reading of section 349 of the Act suggests that the MRT is to a certain extent granted similar power to what the court has as aforesaid when they decide the review cases.

While the MRT is set up by the Act and its power is as prescribed by the Act, if the Act does not stipulate that MRT has the power to hear a matter or decide a matter, then MRT cannot do so and has to declare itself without jurisdiction. Many migration cases in the previous Federal Magistrates Court and the Federal Court involving the MRT are based on the grounds that MRT declared itself without jurisdiction, hence applicants have to approach the court to ask the court to hear their applications.

Section 349 of the Act stipulates the power of the MRT as follows:

- (1) The Tribunal may, for the purposes of the review of an MRT-reviewable decision, exercise all the powers and discretions that are conferred by this Act on the person who made the decision.
- (2) The Tribunal may:
 - (a) affirm the decision; or
 - (b) vary the decision; or
 - (c) if the decision relates to a prescribed matter-- remit the matter for reconsideration in accordance with such directions or recommendations of the Tribunal as are permitted by the regulations; or

⁴⁶ Section 75(v) of the Constitution.

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

(3) If the Tribunal:

(a) varies the decision; or

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

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

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

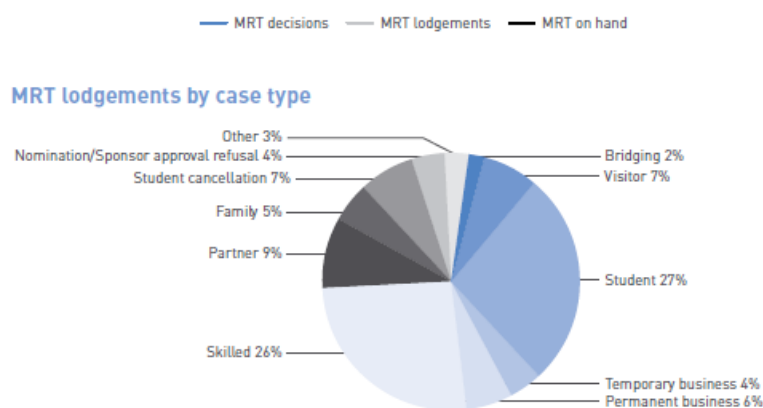
In essence, in a way similar to the fact sheet posted on its website, MRT must carry out its duties within the Act or the regulations and does not have more discretion power than the primary decision maker. Interestingly, the language used in sub-section (3) suggests that MRT is making decisions on behalf of the Minister.

3.2.6 Types of cases that come before the MRT

The research shows that the discourse of the Member is greatly influenced by the Act that empowers them to review the rejected visa applications. In Chapter 6 and Chapter 7, upon careful reading, readers will be able to observe that when the Members requests further details from the review applicants, their line of questioning will reflect the particular visa classes they are reviewing. For example, when the visa application is for a partner visa, the Member will ask questions of a social nature to establish whether the relationship is genuine. The answers to those questions will at the end assist the Member to make a fair decision. This may explain why the discourse analysis reported in this research supports the view that, while MRT discourse is seemingly an inquisitorial discourse, in fact it represents a hybrid discourse having both an inquisitorial (similar to a civil law courtroom discourse) and adversarial components (similar to a common law courtroom discourse).

There is a diverse variety of visa review applications lodged with the MRT in terms of the arguments used as grounds for the review, and these have served to direct research attention.

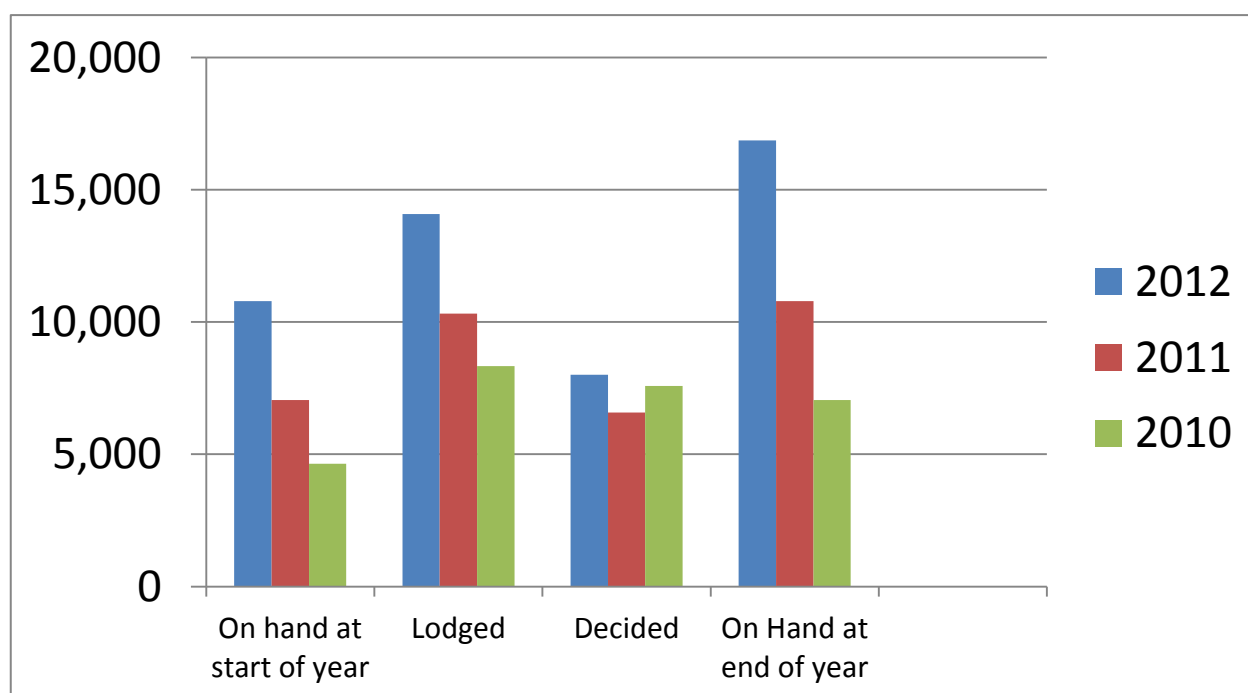
Figure 3.1 – MRT lodgements by case type⁴⁷



The above figure shows the range of cases types before the MRT. As the MRT is the institution responsible for reviewing most of the failed visa applications prior to the applicants initiating legal proceedings against the decisions of the Department of Immigration, the MRT receives a large variety of cases for review. Under each visa class, there are sub-classes, for example Partner class includes sub-class for de-facto relationship, same sex relationship, married couples, fiancé etc. In addition to this complex of case types, the place of origin also bring forth unique issues of each case. It is noted that each case (even if they are under the same type) has its own unique cultural and social issues that may affect the issues to be considered in the review application. For instance, in some countries, getting a divorce is very difficult and time consuming, so it is difficult to understand the circumstances surrounding a partner visa application where the visa applicant still had on record a marriage status when the visa application was lodged.

⁴⁷ MRT-RRT Annual Report 2011-2012, p.22.

Figure 3.2 – MRT Caseload Overview 2010-2012⁴⁸



If the review applicants are not satisfied with the MRT decisions, they can seek judicial review by filing application with the Federal Circuit Court (formerly known as Federal Magistrates Court) under section 476 of the Act. Section 476 (1) states, “Subject to this section, the Federal Circuit Court has the same original jurisdiction in relation to migration decisions as the High Court has under paragraph 75(v) of the Constitution.” The applicants can also rely on paragraph 75 (v) of the Constitution to commence juridical review proceedings at the High Court.

COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT - SECT 75

Original jurisdiction of High Court

In all matters:

- (i) arising under any treaty;
- (ii) affecting consuls or other representatives of other countries;
- (iii) in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party;
- (iv) between States, or between residents of different States, or between a State and a resident of another State;
- (v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;

⁴⁸ MRT-RRT Annual Report 2011-2012

the High Court shall have original jurisdiction.

The MRT has emphasised that the percentage of the cases seeking judicial review account for a very small percentage of the case received by the MRT. The following table shows the number of cases over a recent span of time. Clearly the MRT administrators take pride in their ability to resolve a large volume of cases with limited resources.

Table 3.2 Judicial review applications and outcomes⁴⁹

	MRT			RRT		
	2011-12	2010-11	2009-10	2011-12	2010-11	2009-10
Tribunal decisions	8,011	6,577	7,580	2,804	2,604	2,157
Court applications	254	255	248	660	536	527
% of tribunals decisions	3.2%	3.9%	3.3%	23.5%	20.6%	24.4%
Applications resolved	109	239	245	233	507	520
Decision upheld or otherwise resolved	96	206	166	210	468	476
Set aside by consent or judgement	13	33	79	23	39	44
Set aside decisions as % of judicial applications resolved	11.9%	13.8%	32.2%	9.9%	7.7%	8.5%
Set aside decisions as % of decisions made	0.2%	0.5%	1.0%	0.8%	1.5%	2.0%

Note: The table above shows the number of tribunal decisions made during each financial year that have been the subject of a judicial review application and the judicial review outcome for those cases. The outcome of judicial review applications is reported on completion of all court appeals against a tribunal decision. Previous years' figures are affected if a further court appeal is made in relation to a case previously counted as completed.

3.3 A comparison of the MRT and other tribunals

In this part, I compare the MRT with the RRT to demonstrate the differences (and similarities of the two tribunals). I will also draw on some linguistic differences in the wordings of the clauses of the Act to display the linguistic markers that I hope can serve to provide some insights on the process and procedure of the two tribunals.

⁴⁹ MRT-RRT Annual Report 2011-2012, p.32.

In the later part of this chapter, I will also compare the MRT with other Federal tribunals hoping that by drawing reference and comparison with other tribunals, we are able to distinguish the discourse type between the MRT and such other tribunals.

3.3.1 MRT and RRT – a comparison

MRT is a specialist tribunal dealing with the general migration matters whereas its counterpart the Refugee Review Tribunal (RRT) deals with refugee matters. Both the MRT and the RRT are formed under one piece of legislation (the Migration Act 1958 (“the Act”) and the Migration Regulations 1994 (“the Regulations”). Physically, the two tribunals are under one roof. Members of MRT also hear matters of RRT.

Under the Act, there are different provisions for the establishment of the two tribunals and rules governing their procedures and process⁵⁰. However, in examining some of the crucial sections of the Act stipulating the power of the MRT and RRT (see table below), some interesting issues are identified concerning the wording of the Act, which may have significant influence upon the discursive practices and the process of the MRT.

Firstly, in the sections dealing with methods of operating (section 353 of the Act for MRT and section 420 for RRT), the degree of certainty and the strictness of the obligations imposed upon the tribunal are reflected by the use of the lexico-grammatical marker “shall” for the MRT as opposed to the phrase “is to” for the RRT. It is not known whether, with this wording, the parliament intended to place a greater responsibility on the RRT to carry out the actions prescribed by the Act, or whether the choice of “is to” was made by different draftsmen when the piece of legislation was being drafted and (in all probability) amended numerous times. However, the degree of obligation imposed by the text of the Act on RRT is clearly more direct and more powerful.

⁵⁰ Both MRT and RRT have similar procedures. However, one of the unique differences between the two is MRT allows public attendance but RRT does not.

The next observation to be made refers to the section concerning the constitution of the tribunal. For the MRT, depending on the complexity of the matter, the tribunal in exercising its power can be constituted by one, two or three members; while for the RRT, the number of persons in the tribunal is one member only, and there is no provision for more members to be appointed if the matter is complicated. It seems on the face of it that there could be repercussions for the RRT as some complicated matters may need more than one member to consider the issues involved before making a decision on it.

In relation to the question of how the number of members of the tribunal is decided on or of who is to sit in the tribunal, the Act provides that, for the MRT (section 354 of the Act), the Principal Member can delegate to the Deputy Principal Member or the Senior Member to decide on the number of the Members sitting in a hearing. However, for the RRT (section 421 of the Act), only the Principal Member can decide who is to sit in the hearing. This on the one hand places the duty of deciding who sits in the tribunal solely on the Principal Member of the RRT and on the other hand indicates that RRT cases deserve more attention from the Principal Member.

In order to observe the principles of natural justice, both MRT (section 357A) and RRT (section 422B) use the same wording to set out how natural justice are to be observed.

However, in relation to who can speak during the hearing, there is a considerable difference between the MRT and the RRT. In the MRT, the registered migration agent (who can be a lawyer or a person who has successfully completed a migration law course) attending the hearing is not allowed to speak for the review applicant unless he is invited to. This constraint is set out in section 366A of the Act:

Sec 366A

(1) The applicant is entitled, while appearing before the Tribunal, to have another person (the assistant) present to assist him or her.

(2) The assistant is not entitled to present arguments to the Tribunal, or to address the Tribunal, **unless the Tribunal is satisfied that, because of exceptional circumstances, the assistant should be allowed to do so.** (highlight added)

In the Act, there is no provision that prevents the review applicant from engaging a registered migration agent to assist him or represent him, nor is there any provision that prevents the registered migration agent from speaking during the hearing **save** for the highlighted circumstances. There is no such provision (i.e. restrictions) for the RRT.

The other major difference between the MRT and the RRT is the fact that hearings in the MRT normally permit public attendance (section 365 of the Act) while the RRT hearings are to be held in private (Section 429 of the Act).

Table 3.3 - Similarities and differences of the sections of the Act governing the power, the processes and the procedures of the MRT and the RRT.

	MRT	RRT
Power	<p>MRT can (section 349) :-</p> <ul style="list-style-type: none">(a) affirm the decision; or(b) vary the decision; or(c) if the decision relates to a prescribed matter—remit the matter for reconsideration in accordance with such directions or recommendations of the Tribunal as are permitted by the regulations; or(d) set the decision aside and	<p>RRT can (section 415):-</p> <ul style="list-style-type: none">(a) affirm the decision; or(b) vary the decision; or(c) if the decision relates to a prescribed matter--remit the matter for reconsideration in accordance with such directions or recommendations of the Tribunal as are permitted by the regulations;(d) set the decision aside and

	substitute a new decision.	substitute a new decision.
Operating of tribunal	<p>Section 353:-</p> <p>(1) The Tribunal <i>shall</i>, in carrying out its functions under this Act, pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.</p> <p>(2) The Tribunal, in reviewing a decision:</p> <p>(a) is not bound by technicalities, legal forms or rules of evidence; and</p> <p>(b) <i>shall</i> act according to substantial justice and the merits of the case.</p>	<p>Section 420</p> <p>(1) The Tribunal, in carrying out its functions under this Act, <i>is to</i> pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.</p> <p>(2) The Tribunal, in reviewing a decision:</p> <p>(a) is not bound by technicalities, legal forms or rules of evidence; and</p> <p>(b) <i>must</i> act according to substantial justice and the merits of the case.</p>
<p>Constitution of tribunal</p> <p>In exercising power</p>	<p>Section 354: -</p> <p>(a) a single member;</p> <p>(b) 2 members; or</p> <p>(c) 3 members.</p> <p>(2) The following members may give a written direction about who is to constitute the Tribunal for the purpose of a particular review:</p> <p>(a) the Principal Member;</p> <p>(b) the Deputy Principal Member acting in</p>	<p>Section 421</p> <p>(1) For the purpose of a particular review, the Tribunal is to be constituted, in accordance with a direction under subsection (2), by a single member.</p> <p>(2) The Principal Member may give a written direction about who is to constitute the Tribunal for the purpose of a particular review.</p>

	<p>accordance with guidelines under subsection (3);</p> <p>(c) a Senior Member acting in accordance with guidelines under subsection (3).</p> <p>(3) The Principal Member may give written guidelines to the Deputy Principal Member and the Senior Members for the giving of directions about who is to constitute the Tribunal for the purpose of particular reviews.</p>	
Natural Justice Rule	<p>Section 357A:-</p> <p>(1) This Division is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with.</p> <p>(2) Sections 375, 375A and 376 and Division 8A, in so far as they relate to this Division, are taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters they deal with.</p> <p>(3) In applying this Division, the Tribunal must act in a way that is fair and just.</p>	<p>Section 422B:-</p> <p>(1) This Division is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with.</p> <p>(2) Sections 416, 437 and 438 and Division 7A, in so far as they relate to this Division, are taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters they deal with.</p> <p>(3) In applying this Division, the Tribunal must act in a way that is fair and just.</p>
Restrictions on legal representation during the	Section 366A provides: -	No such provision in the Migration Act in relation to

hearing	<p>Applicant may be assisted by another person while appearing before Tribunal</p> <p>(1) The applicant is entitled, while appearing before the Tribunal, to have another person (the assistant) present to assist him or her.</p> <p>(2) The assistant is not entitled to present arguments to the Tribunal, or to address the Tribunal, unless the Tribunal is satisfied that, because of exceptional circumstances, the assistant should be allowed to do so.</p> <p>(3) Except as provided in this section, the applicant is not entitled, while appearing before the Tribunal, to be represented by another person.</p> <p>(4) This section does not affect the entitlement of the applicant to engage a person to assist or represent him or her otherwise than while appearing before the Tribunal.</p>	Refugee Review Tribunal.
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Highlight added.

The above table suggests that both tribunals appear to have similar power under the Act. However, a careful reading of the wording of the legislation shows that there are in fact subtle differences between the two tribunals. For example, the wording seems to suggest that the Principal Member is taking a more active approach in RRT matters. For example, the Principal Member in the RRT decides which member is to constitute a tribunal to hear a

RRT matter; while, for the MRT, the wording allows the Deputy Member or Senior Members to decide the same matters (according to the guidelines by the Principal Member – section 354 of the Act). Secondly, the advocate (migration agent) is allowed to get quite involved in RRT matters, but in MRT matters, the migration agent can only speak on behalf of the visa applicant if he is invited by the Member presiding the hearing to do so (see section 366 of the Act).

3.4 Some observations with respect to the roles of migration agents and the Member

As the MRT is an inquisitorial tribunal, the restraint imposed by section 366A needs to be reconsidered. Based on my practice experience and general discussion with fellow legal practitioners, it is my view that registered migration agents should be allowed to take a more active role during the hearing to assist the review applicants and the Member. The registered migration agent representing the review applicant is more familiar with the matter before the tribunal and can provide very useful help in assisting the MRT to discover the facts of the matter.

Member may sometimes be occupying roles that can be contradictory. For example, as he is representing an institution whose function is to discharge the law, if he intends to give advice to the review applicant, it is likely that his original decision making role and the advising role may conflict . Further discussion to support this argument will be augmented by data in chapters 6 and 7.

In the next section, I provide a general comparison of tribunals. As this thesis focuses on the MRT, those issues deriving from the RRT will not be discussed further in the following chapters unless they are relevant to this research. What follows is intended to clarify that the MRT was set up under the Act and is a Federal body and that, accordingly, any comparison of the MRT with other institutions has to be examined in the Federal context.

3.5 Federal tribunals

The term “tribunal” sometimes can cause misunderstanding and confusion to people who are not familiar with the Australian legal system. A tribunal is not a court. In fact federal courts are established under the Constitution (chapter 3) on the basis of separation of powers. Further discussions on this legal development can be found in government websites and work by administrative law and constitutional law scholars (see Cane and McDonald, 2008).

Tribunals are set up as a result of the Commonwealth Administrative Review Committee report in 1971 (“the Kerr report”) so as to provide a tribunal which has power to conduct merit reviews in contrast to judicial review. Tribunals are intended to provide a swift, economical and informal forum for applicants who are not satisfied with decisions made by government departments. Further discussions on the differences of the tribunals and the courts will be in later chapters regarding the discourse of MRT and analysis of data.

Currently, there are six tribunals (see <http://australia.gov.au/topics/law-and-justice/courts-and-tribunals>). A summary of the tribunals in the Table below gives the reader a general understanding of other tribunals as compared with the MRT.

Table 3.4: A comparison of MRT with other federal tribunals

Name of Tribunals	Establishment of Tribunals and their power	Qualifications of Presidents/Members	Process and Procedure
<p>The Administrative Appeals Tribunal (AAT)</p> <p>http://www.aat.gov.au/default.htm</p> <p>The AAT has the following divisions: -</p> <p>(i) General Administrative,</p> <p>(ii) Security Appeals,</p> <p>(iii) Taxation Appeals; and</p> <p>(iv) Veterans' Appeals Divisions</p>	<p>The Tribunal was established by the Administrative Appeals Tribunal Act 1975 and commenced operations on 1 July 1976. The Administrative Appeals Tribunal Act and the Administrative Appeals Tribunal Regulations 1976 set out the Tribunal's functions, powers and procedures.</p> <p>The Tribunal does not have a general power to review decisions made under Commonwealth or Norfolk Island legislation. The Tribunal can only review a decision if an Act, regulation or other legislative instrument states that the decision is subject to review by the Tribunal.</p> <p>The Tribunal has jurisdiction to review decisions made under more than 400 Commonwealth Acts and legislative instruments.</p>	<p>President – must be a Federal Court judge</p> <p>Deputy President – must be a legal practitioner with not less than 5 years experiences</p> <p>Senior Member – a legal practitioner with not less than 5 years experiences or special skills</p> <p>Non- presidential member-</p> <p>Must be a legal practitioner or experienced in administrative, industrial relations, financial, commerce, industry or have a degree in economics, commerce</p>	<p>Section 33 of the Administrative Appeals Tribunal Act requires that proceedings of the Tribunal be conducted with as little formality and technicality, and with as much expedition, as the requirements of the Act and a proper consideration of the matters before the Tribunal permit. The Tribunal is not bound by the rules of evidence and can inform itself in any manner it considers appropriate.</p>
<p>Australian Competition Tribunal</p> <p>http://www.competitiontribunal.gov.au</p>	<p>The Australian Competition Tribunal was established under the Trade Practices Act 1965 (Cth) and continues under the Competition and Consumer Act 2010 (Cth) (“the Act”). Prior to 6</p>	<p>President and Deputy Presidents are judges</p> <p>There are nine members and only one is a general counsel of a</p>	<p>-The procedure is subject to the Act</p> <p>- At the discretion of the Tribunal</p> <p>- little formality and technicality</p>

	November 1995, the Tribunal was known as the Trade Practices Tribunal.	corporation and the others include ex-senior government officials, academic in economics, senior executives in finance and banking sectors	- rule of evidence does not apply (Section 103 of the Act)
The Copyright Tribunal of Australia	The Copyright Tribunal of Australia is an independent body established under s 138 of the Copyright Act 1968. The Act and the Copyright (Tribunal Procedure) Regulations set out its membership, functions, powers and procedures.	The President must be a judge of the Federal Court of Australia (s 140(1)). A Deputy President must be, or have been, a judge of a federal court or a State or Territory Supreme Court (s 140(1A)). A member (other than the President or a Deputy President) cannot be appointed unless he or she meets one of the five criteria set out in s 140(2) of the Act.	The Tribunal may, of its own motion, or at the request of a party, refer a question of law arising in proceedings before it for determination to the Federal Court of Australia (s 161). The procedure of the Tribunal is within its discretion, subject to the Act and regulations (s 164(a)). The Tribunal is not bound by the Rules of evidence (s 164(b)). Costs orders may be made by the Tribunal in any proceeding (s 174).
The Defence Force Discipline Appeal Tribunal	The Defence Force Discipline Appeal Tribunal was established under the Defence Force Discipline Appeals Act 1955 and hears and determines appeals from courts martial and Defence Force magistrates in	Members are judges	Defence Force Discipline Appeal Tribunal Regulations 1957 prescribes the rules for proceedings

	respect of service offences by Australian Defence Force personnel.		
<p>The Social Security Appeals Tribunal (“SSAT”)</p> <p>http://www.ssat.gov.au/</p>	<p>The SSAT was originally established in 1975 by the Honorable WG (Bill) Hayden to review appealed decisions made by the then Department of Social Security.</p> <p>It is now a statutory body established under the Social Security (Administration) Act 1999 to conduct merits review of administrative decisions made under the social security law, the family assistance law, paid parental leave law, child support law and various other pieces of legislation. The Social Security (Administration) Act 1999, the A New Tax System (Family Assistance) (Administration) Act 1999, the Paid Parental Leave Act 2010 and the Child Support (Registration and Collection) Act 1988 set out the powers, functions and procedures of the SSAT.</p>	<p>The statute does not require the Members to have legal qualifications. SSAT’s website only describes the members qualifications as people with expertise in law, accounting, medicine or public administration. It is not part of Centrelink. It has the power to change Centrelink decisions, but only according to the law.</p>	<p>Its statutory objective is to provide a mechanism of review that is 'fair, just, economical, informal and quick'.</p> <p>The Social Security (Administration) Act 1999, the A New Tax System (Family Assistance) (Administration) Act 1999, the Paid Parental Leave Act 2010 and the Child Support (Registration and Collection) Act 1988 set out the powers, functions and procedures of the SSAT.</p>

To broaden the parameter of comparing the MRT with other similar tribunals , the above table sets out some of the frameworks of the various federal tribunals that have special functions. It

is not the aim of this thesis to discuss in detail each tribunal's function. However, it can be observed that, other than the Social Security Tribunal, all the heads (president or principal member) of the federal tribunals above are judges or lawyers.

3.6 Conclusion

In this chapter, I have introduced the structure of the MRT and offered some adumbration of the Members' power. I have also cited some selected sections of the Act to stress how the Act is likely to affect the language and discourse of the MRT. A key feature of the MRT is that in addition to its review role, it is (by default) the first institution that a visa applicant can seek remedy from if he/she is not satisfied with the Immigration Department's original decision. I have also highlighted the difference of the MRT with regard to other tribunals with the purpose of showing why the MRT discourse may be different to the discourse of other tribunals or courtroom.

It seems that the MRT plays an extended role in the administration of the government in the migration regime. However, it also acts independently of the Immigration Department to allow visa applicants to have a review of the Immigration's decision. By doing so, the Member's role in fact is both inquisitorial and adversarial and the Member's discourse or mode of discourse is therefore dictated by the role.

In the next chapter, I turn my attention to the participation framework and also discuss in some detail the interaction order and the institutional order by going through a body of literature and some selected data.

Chapter 4

Key analytic concepts

4.1 Introduction

In Chapter 3 I introduced the basic structure of the MRT and cited various parts of the Act as examples to indicate how discourse in the MRT may be affected by the legislation. I argue that to understand MRT discourse, there is a need for a basic understanding of the position of the MRT as the pathway to judicial review both from the legal point of view as well as from the discourse point of view. I further suggest that the role, discourse and processes of the MRT can severally and jointly be the cause of the judicial review. These suggestions are based on my observations of the legislation and the way that the MRT conducts its reviews (in particular, via the hearings), which I have discussed in the last chapter.

This chapter will examine the concept of participation framework (Goffman 1974) and the associated roles of the participants in the MRT hearings. It will also discuss, from a discursive perspective, the widely utilised constructs of a) the institutional order (see Berger and Luckmann 1967, Sarangi and Roberts 1999, Roberts 2010) and b) the interaction order that Goffman (1983) invited researchers to focus on during his speech at the American Sociology Conference in 1983. As a caveat, my discussions on these constructs focus specifically on the sites of engagement and focal themes of the thesis. This chapter will be set out in the following manner.

For the purpose of this thesis, the appropriate starting point is a review of the literature dealing with the key themes of discursive and social roles and the participation framework, themes which constitute the analytic core of the research that I undertake here. By understanding the nature of discursive and social roles and participation framework, we will be able to better understand the norms of the Member's discourse in a MRT hearing and appreciate the social and institutional conventions in general that govern the procedure in a

tribunal hearing with statutory power such as the MRT. I will also discuss the roles of the other participants of the MRT setting out the main duties and roles of each participant to give to the readers a full picture of how the review is conducted. Thereafter I examine the important concepts of the institutional order and the interaction order, in some detail, and consider some of the discussions in the literature that demonstrate the interface of the institutional order and interaction order. My intention in this conceptual chapter is to relate the practice of law with the discursive practices of the MRT in the hope that readers will see that discourse analysis is another very valid way of understanding the practice of law.

With respect to the data used in later chapters to support my claims, it may be apposite for me to briefly explain here that data collection was unavoidably opportunistic. Access to MRT hearings was very unpredictable, often depending on the personality of the sitting Member. It was often impossible to gain permission to attend hearings. However, notwithstanding that it was difficult to have access to MRT hearings and collect firsthand data, I have endeavoured to use only data from visa subclasses that have frequently been the subject of review in the MRT. In that sense my data is representational. Readers may recall Figure 3.1 is a summary of MRT lodgements by case type for the year of 2011-2012. It will be seen that my data discussion is based on cases that are commonly reviewed.

4.2 Frames, the participation framework, and roles

The participation framework referred to herein is based on Goffman's work on frames, participants and participation framework. Goffman (1981:3) observes "When a word is spoken, all those who happen to be in perceptual range of the event will have some sort of participation status relative to it." He further points out that the participation framework provides a very important background to study interaction. Goffman defined *participant*

status, or *participant role*, as the relationship of a member to a given utterance. Thus participants take on a status/role as speaker or hearer in the context of each new utterance.

To put this into the context of the MRT, a MRT Member's institutionally prescribed role is similar to that of a judge in a court, but the interactional roles of the same Member can be multiple, functioning as the occasion warrants as an interpreter of law and/or counsellor, as advocate or adversary, all of which will be discussed in Chapter 6, 7 and 8 in more detail. The multiple roles that a participant occupies during an interaction is reflected in and governed by the language and register that the participant is adopting. As Goffman (citing an event reported by Tannen and Wallat's then forthcoming paper) put it, "a paediatrician may find she must continuously switch code, now addressing her youthful patient in "motherese", now sustaining a conversation-like exchange with the mother, now turning to the video camera to provide her trainee audience with a running account couched in the register of medical reporting" (Goffman, 1981 p.156).

It is important to point out that the turns of a conversation are the units that will provide the frames through which we examine the roles adopted in interactions. Going back to the example above, we can also argue that when the paediatrician speaks to a youthful patient, the circumstances or context have put her into a position where she is actually required to switch codes in order to communicate effectively with the youthful patient. It is at this juncture that the paediatrician occupies multiple roles more or less simultaneously. She may not be just a paediatrician, and depending on the progress of the exchange between the participants (the paediatrician and the youthful patient), the paediatrician may occupy the role of educator or counsellor to the youthful patient.

4.2.1 Frames and frame analysis

Goffman (1974) builds on Bateson's notion of "frame" in his work *Frame Analysis – An Essay on the Organisation of Experience*, which concerns the experiences one has in one's social life. Bateson (1972) uses the term "frame" and its related notion of "context" in the psychological sense where he elaborates the two notions by way of analogy. Bateson (1972) says:

(T)he physical analogy of the picture frame and the more abstract, but still not psychological, analogy of the mathematical set... The first step in defining a psychological frame might be to say that it is (or delimits) a class or set of messages (or meaningful actions)... In many instances, the frame is consciously recognised and even represented in vocabulary ("play", "movie", "interview", "job", "language", etc.). In other cases, there may be no explicit verbal reference to the frame, and the subject may have no consciousness of it. (pp.186-187)

The frame, as Bateson puts it, provides a parameter for messages to be conveyed and these frames can sometimes be identified explicitly by salient wordings. Bateson approaches the notion of frame from the psychological perspective in which he asserts that psychological frames are (i) exclusive, in that they include certain messages and exclude other messages and (ii) are also inclusive, in that they exclude certain messages and include certain messages. Seemingly, these two assertions sound synonymous but we can see they are complimentary when he asks us to consider "The frame around a picture, if we consider this frame as a message intended to order or organize the perception of the viewer, says, "Attend to what is within and do not attend to what is outside (p.187).

To elaborate this point in a more vivid manner, Bateson says:

The picture frame tells the viewer that he is not to use the same sort of thinking in interpreting the picture that he might use in interpreting the wallpaper outside the frame. Or, in terms of the analogy from set theory, the messages enclosed within the imaginary line are defined as members of a class by virtue of their sharing common premises or mutual relevance. (187-188)

It is therefore reasonable to suggest that in the case of the present thesis, the word “hearing” as in “the MRT hearing”, is explicit enough to be recognised as a frame, which sets out, *prima facie*, the parameter of the social interaction of the participants within it. Further, applying this theory of frame analysis to the MRT hearing will allow us to understand the process of the MRT by facilitating the analysis of the discursive practices and social interaction that takes place among the participants in the frame. This process is also crucial to providing to the Members vital information to make a decision on the review application.

Goffman (1974) draws on Bateson’s observation of the behaviour of otters in Fleishacker Zoo in 1952, which showed that otters can distinguish play and fight under one situation and that the two behaviours (fight and play) are similar but not identical:

Just as obviously, the pattern for fighting is not followed fully, but rather is systematically altered in certain respects. Bitinglike behaviour occurs, but no one is seriously bitten... Another point about play is that all those involved in it seem to have a clear appreciation that it is play that is going on (p.41).

In line with Bateson’s mathematical analogy of set and subsets for frames, what Goffman is trying to demonstrate there is that social interaction consists of various frames which all other participants within the frame understand the rules of the game. Applying this theory in the MRT setting, the interaction during the hearing can consist of various frames namely enquiries, investigations, examinations and cross-examinations during which one is able to identify it and its meaning through the analysis of the participants’ social interaction, the discursive practices and the interdiscursivity of the discourse (Linell, 1991; Candlin, 2006).

While there are criticisms of Goffman’s *Frame Analysis*, for example, criticisms about the lack of empirical data or about the inadequacy of the provided examples (See Manning 1992, pp.129-132), and some are concerned about “his commitment to ‘ritual’ and his unwillingness to detach such ‘syntactic’ units from a functionally specific commitment to ritual organization

and the maintenance of face” (Schegloff, 1988, p.95), it is not my intention here to join in these debates. Instead, this chapter focuses on how Goffman and other scholars’ ideas concerning frame analysis are helpful for this research into the discourses of the MRT. This thesis will draw on them as a means of widening the discussion on the MRT process and offering explanations for its procedures and actions. Frame analysis is indeed a key means to conduct studies on social interaction. There is also a considerable body of literature on Goffman’s linguistic perspective on the interaction order, participation role and the institutional order (Levinson 1988, Kendon 1988, Manning 1992, Hartland 1994, Sarangi 2010) and, in particular Levinson (1988) has provided a very comprehensive and valuable study on Goffman’s concepts of participation⁵¹.

When Goffman asks in his famous question: “What is it that’s going on here?” (Goffman, 1974, p.8), he is implying that this is a question that every individual will ask when addressing the matters at hand in any interaction. This question also forms the basis for the concept of “frames” that this chapter is discussing. Indeed many leading scholars from various fields use different ways to look at the issue of context and the relationship between context and action, which researchers can find helpful to assist their understanding and conducting discourse analysis. For example, Scollon asks the questions: “What is the action going on here?” and “How does discourse figure into these actions?”(Scollon, 2001, p.1). He coined the term “mediated discourse” and draws researchers’ attention to five interrelated concepts namely “mediated action, site of engagement, mediational means, practice and nexus of practice” (Scollon, 2001, p.3).

⁵¹ Levinson also criticised about Goffman’s inadequate categories of “Hearer” and “Speaker” for the analysis of participation role.

4.2.2 Participants in the MRT

The main participants in the MRT hearing are the Member, the tribunal officer, the review applicant and the registered migration agent. When the review applicant or any other party in a hearing requires interpreting services, an interpreter will also attend the hearing. Witnesses are at times participants in the hearing, whose role is usually to give evidence in support of the review applicant and his/her case.

Borrowing Goffman's terms *speaker* and *recipient*, each participant in the MRT hearing can be a speaker and a recipient when it is their turn at speaking or receiving. Normally, at the commencement of a hearing, the Member is the *speaker* and the review applicant is the *recipient*. The registered migration agent can be the speaker when he is invited to speak, and he thus becomes a *ratified participant*. The interpreter, where in attendance, is among the ratified participants but as s/he can also on occasion be the *mouthpiece* of the review applicant, he can be said to occupy a *dual* role.

For the sake of easy reference, I provide a table below showing the range of possible roles of the participants in a MRT hearing. There are some other participants who may not be co-present during a hearing but their role is only indirectly influential, for example, the Federal Circuit Court's judges (previously known as Federal Magistrates Court's magistrates). The judges of the Federal Circuit Court frequently rely on the transcript of the MRT hearing as one of the bases to determine whether the MRT has made errors in the decision process if the review applicant is not satisfied with the MRT decision and file an appeal with the Federal Circuit Court. These roles are ratified but they are not included in the interactional dynamics of the MRT.

Table 4.1 : Participants in the MRT and their roles

Participants	Associated roles and functions
Tribunal Officer	<ul style="list-style-type: none"> - Introduces the process of the hearing to review applicants and witnesses - Provides cues to the parties present to stand up upon the arrival of the Member - Assists Members to swear in review applicants, interpreters and witnesses - Announces the end of the conference
Member	<ul style="list-style-type: none"> - Conducts hearing - Examines facts - Queries about evidence put before the MRT - Decides the matter in accordance with the facts of the case - Makes orders in accordance with the power granted to the MRT in the Migration Act - Withdraws from the case on the basis of outside the jurisdiction of the MRT
Review applicant	<ul style="list-style-type: none"> - Presents evidence to support the application - Argues for his case to the Member of his eligibility - Highlights to the Member the evidence the Immigration Department fails to consider - Draws the attention of the Member points that the Immigration ignores - Brings in new evidence to support the case
Registered migration agent	<ul style="list-style-type: none"> - Advises the review applicant - Assists the review applicant to prepare written submission before the hearing - Compiles all evidence for the matter - Provides written response to the MRT as required - Provides further evidence required by the MRT - Arranges witness(es) to appear before the hearing as required - Confers with the review applicant during the hearing - Makes oral submission to the MRT when invited by the Member
Visa applicant	<ul style="list-style-type: none"> - If the visa applicant is a resident of Australia or is an onshore (i.e. inside Australia) visa applicant, then the visa applicant can be the review applicant. Visa applicants who are not residents and are off shore (i.e. outside Australia) are not entitled to apply for a review with the MRT - Provides evidence to the MRT to support the visa application - As witness of the review application when an interview is conducted by the Member over the telephone
Interpreter	<ul style="list-style-type: none"> - Provides interpreting services to the Member, reviews applicant, the witness (es)

	<ul style="list-style-type: none"> - Provides sight translation to the Member, review applicant, the witnesses (es)
Other participants Charity organisations or friends	<ul style="list-style-type: none"> - Presents to provide support to applicants without representation - Gives character reference to the MRT about the visa applicant

Tribunal officer

The tribunal officer appears to play a minor role in the hearing, but in fact any parties attending the hearing who are not familiar with the hearing process or who have not been to the MRT before rely on the tribunal officer's explanation as to how the hearing is convened, how to address the Member and when to speak.

Interpreter

Another participant role in the hearing on whom both the Member and the review applicant rely is that of the interpreter. As the MRT deals with many cases where people are from non-English speaking backgrounds, interpreters are in high demand. The role of the interpreter is very important in a hearing when both parties rely on the interpreting to convey the message to each other. Given that the MRT is focussing on the migration law, the interpreter in a MRT setting is under a similar situation to an interpreter in a court where some legal knowledge is required when interpreting.

Hale (2004) has provided comprehensive discussion about the role of the court interpreter, in which two interesting points are noted. She points out that there are two schools of thoughts about the role of interpreter in a court hearing. One view is that role of the interpreter is more than an interpreter and the interpreter should be acting like an advocate for the non-English

speaking person. The second view is that interpreters should be interpreting verbatim (see further discussion in Hale, 2004, pp. 8-14).

However, interpreting and translation are researched and discussed thoroughly elsewhere (see for example, Ginori & Scimone, 1995; Foley, 2003; Hale, 2004), thus I only intend to cover the topic when it is crucial to our understanding of the MRT process and procedure.

That being said, as an accredited NAATI (National Accreditation Authority of Translators and Interpreters) interpreter and translator and with more than 20 years' interpreting and translation experience, I often find that interpreters need to have a basic understanding of the fact and law involved in the case that they are going to interpret for before they can perform the interpreting job satisfactorily. In addition, good interpreters can assist both parties (the non-English speaking person and the other party) to communicate fluently. Because of their ethnic background, interpreters are in general more aware and sensitive of the cultural issues than the Members or understand the cultural issues better than the Members. More often than not, putting aside the issues of language and interpreting skills, I observe that an interpreter often makes mistakes when the interpreter is not fully familiar with the context of the case. For example, during a MRT hearing where I was present, the interpreter found it difficult to interpret (or follow what it was going on) because the Member was trying to explain to the review applicant about the importance of filing a review application on time which involves the counting of days from the day the decision was made and the day the application was lodged⁵².

The MRT has published an Interpreter Handbook to assist interpreters interpreting at the MRT. However, I note that while the Interpreter Handbook provides a very good introduction of how the MRT and RRT operates, the common legal terms used and the ethical code of

⁵² See discussion in Chapter 7.

conduct that interpreters are required to abide by, it fails to address the issue of understanding the migration law, which in my view is crucial for the interpreters to perform their role.

The status of an interpreter from the discourse point of view is a *ratified* participant; and from the legal point of view, review applicants are entitled to interpreting service. The right to have an interpreter present is prescribed under section 366C of the Act:

(1) A person appearing before the Tribunal to give evidence may request the Tribunal to appoint an interpreter for the purposes of communication between the Tribunal and the person.

(2) The Tribunal must comply with a request made by a person under subsection (1) unless it considers that the person is sufficiently proficient in English.

(3) If the Tribunal considers that a person appearing before it to give evidence is not sufficiently proficient in English, the Tribunal must appoint an interpreter for the purposes of communication between the Tribunal and the person, even though the person has not made a request under subsection (1).

The Member and the review applicant

The Member of the MRT hearing the matter and the review visa applicant (and the visa applicant) are the main participants of the review process. It is observed that during a hearing, the interaction between the review applicant and the Member is the focus. As discussed above, the interaction order can provide us with valuable insights for research and understanding of the process. It is indeed also vital to examine the interplay between the roles of the MRT and the institutional order and the interaction order.

The focus herein is to examine the role performance of the participants of the MRT (mainly focussing on the Member) at the interactional level, which I believe may offer valuable empirical insights. Secondly, the examination of the interplay of the institution order and the interaction order may also demonstrate or assist our understanding of the circumstances that leads to the institution order being interfered.

Migration Agents

Migration agents are *ratified* participants in the MRT hearing in the sense that they are only allowed to speak during the hearing if invited by the Member. However, they are in fact the ones who prepare the submission and advise the review applicant with respect to the review application notwithstanding that they themselves may not be invited to speak during the hearing. In that case the agent is the ‘Author’ of utterances that the applicant as ‘Animator’ may deliver in the course of the hearing – the applicant remains of course the ‘Principal’ (see Goffman, 1981, on *production formats*).

In general, there are two types of qualifications of migration agents, a legal professional and a non-legal professional who has received migration law training and passed the examination. All migration agents in Australia are required to be registered with the Migration Agents Registration Authority (MARA) before they can provide migration advice. This registration requirement applies to both commercial migration agents who charge a fee for migration services and migration agents who either work as a volunteer or with NGOs (Non-government organisations). However, migration agents overseas are not bound by this registration requirement.⁵³ Thus there are concerns that overseas migration agents may not be providing the same level of migration service to the public.

Most of the migration agents are either members of the Migration Institute of Australia (MIA) or Migration Alliance (MA). But unlike other professional bodies such as the Law Society of New South Wales, these two migration profession bodies do not have any power in governing the conduct of the members. The power of regulating the migration profession is in the hands of MARA⁵⁴.

⁵³ Further details, see <https://www.mara.gov.au/>.

⁵⁴ MARA has now been restructured and has become part of the Immigration Department since 2015.

In the review process, the visa review applicants can engage a migration agent (or officially known as RMA i.e. registered migration agent) to assist them to prepare their review application including but not limited to writing a submission, marshalling facts and evidence and advising the review visa applicant. According to the annual report of the MRT (2013, page 21), 64% of the review applicant has engaged the services of migration agents to assist their cases and they achieved a higher setting aside rate than those who had chosen not to engage migration agents. This means engaging a migration agent to assist in a review application in general provides better opportunities for review applicants to achieve a favourable result than not engaging a migration agent (see discussion of Example 1 below with respect to the unrepresented review applicant, in particular, my comments from the discourse and legal perspective).

However, migration agents are not allowed to conduct any examination-in-chief or cross examination in a manner similar to the legal representative in a courtroom. In fact, during the hearing, migration agents are not allowed to speak on behalf of the review applicant unless they are invited by the Member.

Section 366A of the Act provides as follows:

- (1) The applicant is entitled, while appearing before the Tribunal, to have another person (the assistant) present to assist him or her.
- (2) The assistant is not entitled to present arguments to the Tribunal, or to address the Tribunal, unless the Tribunal is satisfied that, because of exceptional circumstances, the assistant should be allowed to do so.
- (3) Except as provided in this section, the applicant is not entitled, while appearing before the Tribunal, to be represented by another person.
- (4) This section does not affect the entitlement of the applicant to engage a person to assist or represent him or her otherwise than while appearing before the Tribunal.

In the previous chapters, I have discussed the nature of the institutional order and the interaction order in a general manner; here I will examine these two constructs in some detail with particular focus on the relevant literature and the procedures and practices within the MRT setting.

4.2.3 The institutional order

Berger and Luckmann (1967) link the construct of role to that of the institutional order in arguing as follows:

The origins of roles lie in the same fundamental process of habitualization and objectivation as the origins of institutions. Roles appear as soon as a common stock of knowledge containing reciprocal typifications of conduct is in process of formation, a process that, as we have seen, is endemic to social interaction and prior to institutionalization proper. (p.74)

They maintain that the institutionalised conduct involves role and “the roles represent the institutional order” (1967, p. 92). Berger and Luckmann explain that the representation takes place on two levels. Firstly, the role that is played out in front of other people *represents itself*. Secondly, “(t)heir linguistic objectifications, from their simple verbal designations to their incorporation in highly complex symbolizations of reality also represent them (that is, make them present) in experience.” (pp.74-75)

In his work on “the order of discourse”, Foucault (1970) argues that institutions assert power in discourse through constraint and control. On this basis, it is reasonable to suggest that institution discourse and the institutional order or process may well be one of the best means to study how institutions can exercise control over the public. Bourdieu (1991) does not tie this process to a particular institution but draws our attention to the fact that there must be a recognized authority given to the person who makes the utterances and sets out social conditions that such process is to be acted upon whereby he says, “The magical efficacy of

these acts of institution is inseparable from the existence of an institution defining the conditions (regarding the agent, the time or place, etc.) which have to be fulfilled for the magic of words to operate” (Bourdieu, 1991 p. 73).

When Bourdieu examines discursive practices, he emphasises “the social-historical conditions underlying the formation of the language which they take... as their object domain, so too they have tended to analyse linguistic expressions in isolation from the specific social conditions in which they are used” (Thompson, 1991, page 7). For the benefit of understanding the role of the participants in the MRT and to understand the “magical efficacy” of linguistic expressions, it is useful to consider the example used by Bourdieu (1991) when he attempts to explain the relationship between the role and institution. He focuses on “the legal act”:

The limiting case of performative utterance is the legal act which, when it is pronounced, as it should be, by someone who has the right to do so, i.e. by an agent acting on behalf of a whole group, can replace action with speech, which will, as they say, have an effect: the judge need say no more than ‘I find you guilty’ because there is a set of agents and institutions which guarantee that the sentence will be executed. (p.75)

In this aspect and in consideration of the MRT’s conduct of hearings, we can appreciate that the institutional discourse carries weight because there is action following what the authority or the person representing the authority is saying to ensure that the authority is exercised via the discourse has to be taken seriously by the recipient. While Berger and Luckmann focus on the role and the linguistic convention governing the role, Bourdieu seems to highlight the importance of social conditions surrounding the institution.

In a more recent paper, Roberts (2011) draws our attention to the relationship between institutions and their associated and involving talk and texts and how the study of such institutional discourse and its realisations may bring forth :

Institutions are held together by talk and texts both to maintain themselves and to exclude those who do not belong. The study of institutional discourses shed light on how organisation work, how 'lay' people and experts interact and how knowledge and power get constructed and circulate within the routines, systems and common sense practices of work-related settings. (p. 81)

In the light of the above theoretical contributions, , it seems reasonable to suggest that the discourse (both text and talk) of the persons who represent the institution can facilitate our understanding of the institution itself. We can also understand in this way how the institution functions, as the said persons abide by the conventions governing the various roles he is permitted to assume. In addition, because of these institutional roles, he is frequently the mouthpiece of the institution and hence represents it and acts to perform or promote its institutional functions.

A review of the literature on institutional discourse and the institutional order provides inspiring and valuable insights for this research. Scholars focus on different sites and aspects of institutional discourse, for example, performative acts in institutions (Bourdieu 1991), the order of discourse and the power of discourse used by institutions (Foucault 1981), the interaction between the interaction order and the institutional order and also the distinction of professional discourse and institutional discourse (Sarangi and Roberts 1991), the technologisation of discourse and its influence on changing workplace culture (Fairclough 1996), the interdiscursivity present in professional discourse (Candlin, 2006), the institutional discourse used in asylum screening (Jacquemet 2011) and a comprehensive review of institutional discourse (Roberts 2011). However, all agree that research on institutional discourse can serve to provide explanations of the processes and interactional practices of the institutions under scrutiny.

4.2.4 The interaction order

A second key construct that governs the discourse of participants within the constraints and conventions of the institutional discourse is that of the interaction order. Such study of the actually occurring instances of the interaction order within the framework of the institutional order and its discourses can provide important clues to understanding the processes and practices of a given institution. Goffman's presidential address entitled "The Interaction Order" (in the 1983 American Sociological Association conference) provides a comprehensive explanation of what the interaction order is all about and why he implores scholars to carry out microanalyses of that order (Goffman, 1983, p.2). The interaction order consists of all the implicit rules that govern social interactions. A social interaction can be narrowly identified as an interaction that occurs in social situation, in which two or more persons are physically in the presence of one another. Goffman refers to the unspoken conventions (or rules) that govern this domain as the interaction order, wherein participants act as though they have a social contract and social consensus to interact in a way acceptable in prescribed social settings (pp. 5-6).

Goffman (1959) has in his earlier work defined interaction as "all the interaction which occurs throughout any one occasion when a given set of individuals are in one another's continuous presence". (p.15)

It is natural to ask what the relevance of Goffman's interaction order is in the setting of the MRT. The following comments made by Drew and Wotton (1988) on Goffman's work on interaction order provide a good starting point:

Goffman's concern then was to investigate the procedures and practices through which people organised, and brought into life, their face-to-face dealings with each other. To investigate this domain required finding means of access to these procedures and, initially, ways of conceptualizing the

resemblances between different occasions. To this end a host of concepts are introduced in his writing for different types of interactional occurrence, some given brief mention in his presidential address - ambulatory units, contacts, conversational encounters, etc. Their merit is that they draw our attention to the orderly ways that people have for distinguishing, for each other, the varied nature of the occasions in which they are engaged. (page 6)

To give an example of the interface of the institutional order and interaction order in the MRT setting, the review applicant is entitled to be assisted by a third party, but the person who assists the review applicant is not allowed to speak during the hearing unless invited by the Member (section 366A of the Act).⁵⁵ However, in practice, it is observed that at times the person assisting the review applicant (who is normally a registered migration agent – lawyer or otherwise) breaches this convention by interfering in the MRT hearing. Such conduct clearly indicates a conflict between the institutional order as embodied by the Member and the interaction order as represented by the actions of the registered migration agent. This violation of the interaction order can be due to the need to correct mistakes, the urgent submission of needy information to the case etc. Indeed, the reason for the review applicants and their legal representatives to interrupt the ‘orderly’ flow of events as prescribed by the institutional order may be the fact that they feel that they have not been given a fair opportunity to present their case or they feel that they are unfairly treated. This may also be an important ‘cue’ (Goffman, 1959) to the Member to suggest he reconsider his role. If the potential issues can be resolved at the MRT hearing, this will fulfil the goal of the MRT in providing a quick and economical way to the review applicants to have their case heard. To summarise here, participants are likely to interrupt the orderly manner of interaction when they see a need to do so, and the proponents of the officially sanctioned institutional order, under such circumstances, may be unable or unwilling to exercise the sanctions of the institutional order and its constraints on the interaction order.

⁵⁵ Goffman (1983) also cites an example of the breach of interaction order that may lead to political intervention (p.12).

4.3 Conclusion

Using frame analysis can deepen our investigation and our discursive analysis of the social interactions between the parties. However, it remains the case that, no matter how closely we observe Goffman's "goings on", at any given time we can only see the part we are focused on. As Cicourel (1992) puts it:

A nagging issue that undoubtedly remains for many readers is the familiar one that an infinite regress can occur whereby the observer presumably must describe "everything" about a context. Such demand is of course impossible to satisfy because no one could claim to have specified all of the local and larger sociocultural aspects of a context. (page 309)

Cicourel has expressed what many researcher including myself have felt. To broaden our understanding and sharpen our insights into the MRT process, this thesis will investigate the data collected based on other means such as contextualisation and also by way of discussing the notion of language and power (Fairclough, 2001) in the MRT setting. I also intend to go beyond description and discussion in the study to suggest some practical solutions to issues unfolded by the analysis at the conclusion of this thesis. In Chapter 6 and Chapter 7, I will provide several more detailed discourse analyses but first, in Chapter 5, I will discuss the nature and composition of the data sets.

Chapter 5

Nature and Sources of the Data

5.1 Introduction

This chapter discusses in detail the nature and sources of the body of data that I am using for research in this thesis. In Chapter 3 and Chapter 4, the concepts and theory that the thesis builds on have been discussed in detail. In this chapter, I endeavour to explain what each data set and its subsets contribute, how each data set stands up on its own and how it complements the others.⁵⁶

This chapter explains the rationale behind the data and materials that I have chosen for study. It is also hoped that this chapter can provide some insights with respect to the process and proceedings of the MRT, and beyond. Tribunals in Australia, in general, play important roles in maintaining law and order by way of reviews and enquiries; another example is the Independent Commission Against Corruption (ICAC) in New South Wales.

It is my view that a combination of various types of data is vital for conducting discourse-based research in tribunals like the MRT. As the MRT is a tribunal with the primary responsibility of reviewing visa applications that have been refused by the Immigration Department, it is natural that there should be a large body of data involving legislation⁵⁷ and case law. However, as the focus of my investigation is on discourse, the interaction order, the institutional order, social interactions and social practices, it is hoped that, through my range of data, readers will gain a multi-perspectival view of what happens in the MRT process and what roles language and discourse play in the administration of the law in this particular setting.

⁵⁶ See explanation in 5.3 of this chapter with respect to some limitations of the data.

⁵⁷ Unless otherwise state, legislation refers to Migration Act 1958 and Migration Regulation 1994 as updated regularly.

As a caveat, some of the data discussed here may not be used for discussion but only used for general background information and some may be used in part. For example, when I discussed matters with fellow migration lawyers and migrations agents, I took the opportunities to ask some general questions about their experience during their interactions with Members and clients at hearings (similar to a questionnaire). Given that the migration lawyers and migration agents did not wish to discuss matters in depth and certainly did not wish me to quote them, out of privacy concerns, I could only use the knowledge acquired in that way in my general discussions. As to the opinions of MRT members given in the public seminars or conference about how a hearing should be conducted, I use their comments to support my discussion in various parts of the thesis.

The unique and difficult circumstances of getting access to the data for analysis do not exonerate me from providing valid, well-based and (to some extent) representational data. Every effort has been made to do so, while sometimes falling short. A side effect is that I frequently return to this issue, resulting in a certain amount of repetition in the thesis. From an investigative perspective, readers may compare or cross reference the data chosen here for analysis and discussion with the statistics provided by the MRT regarding the total lodgements of review application annually (see Chapter 3, figure 3.1 etc.) to make their own judgement if the data is objectively representational.

Each data set has its own inherent significance for the purpose of discussion and analysis. Besides, this chapter also endeavours to address the concern that the data were chosen without a methodological or theoretical framework by providing as many details as possible and explaining as far as possible how the data were obtained, where the readers can verify the data, and why particular data were chosen.

5.1.1 Nature of Data

All of the data used in the thesis is related to visa applications that were initially refused by the Immigration Department. As explained in Chapters 1 and 2, the MRT is the first avenue through which a visa applicant can seek a review of the Immigration Department's decision. If in turn the visa applicant is not satisfied with the MRT's decision, he/she can ask for a judicial review on the grounds of jurisdictional error (a request heard at the Federal Circuit Court). Depending on the nature of the case, it can be further appealed to the highest level of the federal court in Australia, namely the High Court of Australia. The diagram in Figure 5.1 sets out the various avenues available to visa applicants:

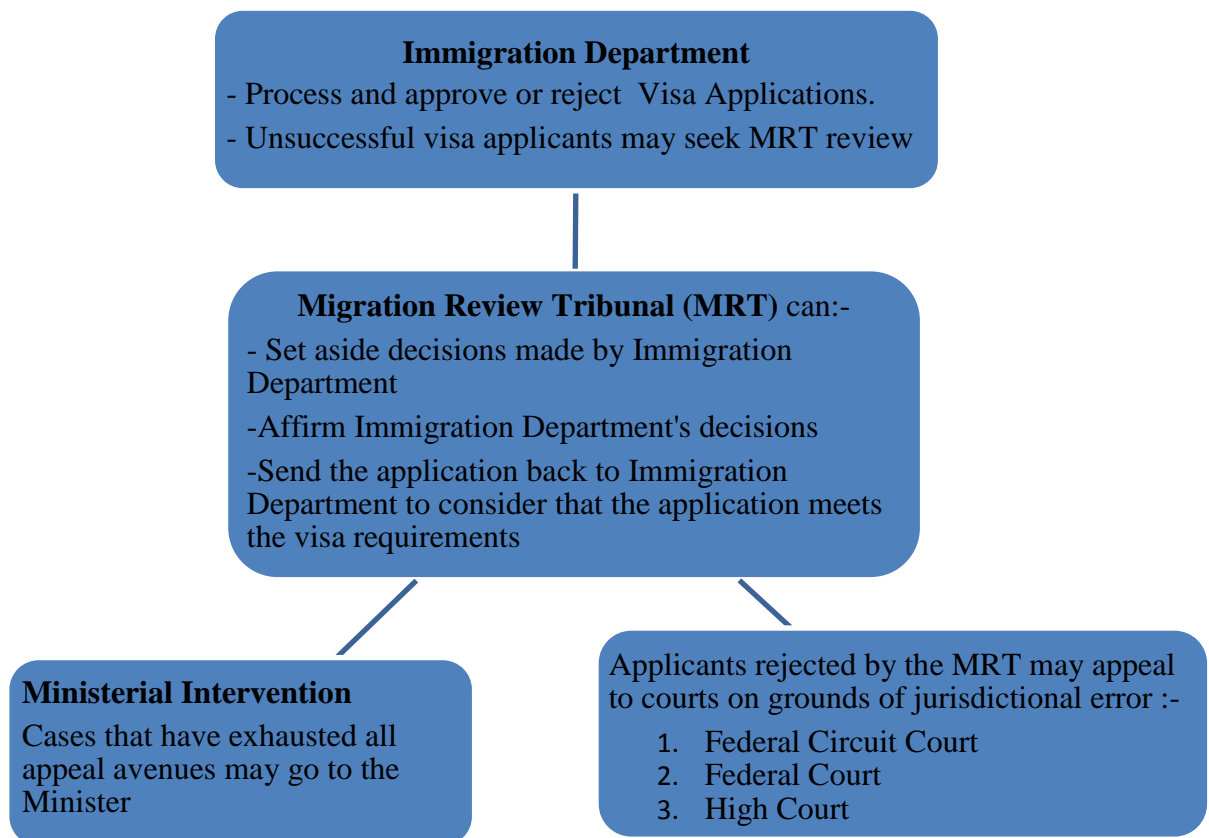


Figure 5.1 – Avenues available to visa applicants

Figure 5.1 provides a snapshot of how refused visa applications get to higher courts. Note that the Minister has the right to make a favourable decision for any visa application.

This chapter is set out in the following manner: I start by examining the categories of data sets used in this research. This is followed by definitions of the terms referred to in the data sets. I then explain the usage of the data sets and its implications citing examples to illustrate the purpose and function of the data before I go through in detail the content of each set and subset of the data. I conclude with a brief summary.

5.2 Data sets used in this research

The data used in this thesis come from a variety of sources that include but are not limited to official information, unofficial information, published legislation and my own practical

observations. It is my belief that these data sets, severally and jointly, constitute a solid base that I can rely on to support my analyses and claims, as made and reported later on in the thesis. Given that all the cases cited have been officially recorded, one of the main merits of the data is that it puts the readers and researchers in the real life setting, and the facts unfolded by the discourse should provide important insights into the ways that the MRT handles a review application.

The following Table sums up the sources of my data: -

Table 5.1 – Sources of research data

Data set⁵⁸	Content
Set 1	MRT hearing transcripts (i) MRT transcript. (ii) MRT Transcript cited in court cases.
Set 2	Decision record published by the MRT
Set 3	Federal court cases (i) Federal Circuit Court (formerly Federal Magistrates Court). (ii) Federal Court. (iii) High Court.
Set 4	Personal observations drawn from:- (i) personal attendance at the MRT hearings; (ii) notes taken during hearings (with transcription of selected exchanges); (iii) interviews; (iv) questionnaires.
Set 5	Other data types include:- (i) commentary on the MRT from MRT members given in seminars, speeches and other sources not set out above; (ii) commentary by other parties, such as judges, practitioners, participants.

⁵⁸ Note: Heading numbering is for convenience only and is not meant to indicate the degree of importance.

The juxtaposition of the above data sets is intended to provide a diverse view of what is happening in the MRT review process, in particular, during the course of the actual hearing. This approach can provide facts as well as opinions from various sources to demonstrate how the events are framed and how decisions are made. The data sets jointly and severally form the basis of my findings and observations, and it is hoped they will be useful to key stakeholders in the process itself – for example, Members and participants in the MRT hearings – as well as for other interested groups such as discourse researchers who are interested in similar areas. It is important to point out that the focus of the research and hence of the findings is on and from the discourse point of view. More specifically, I am examining the data from the discursive and social practice points of view, where the setting is related to migration law in Australia. As a caveat, I have no intention to comment on or criticise the results of the cases discussed herein from the purely legal perspective.

5.3 Definitions of the data sets

The labels of the data sets are for easy reference and the following definitions apply:-

1. MRT transcript in data set 1 consists of two subsets.

Transcript in subset (1) refers to the hearing transcript(s) directly from a hearing. I have access to a transcript, which is the record of the full hearing of a last remaining relative visa subclass, which has been transcribed verbatim.⁵⁹

Transcript in subset (2) refers to the transcripts provided by the MRT to the federal courts. This kind of transcript is provided by the MRT when the review applicants ask the federal courts for a judicial review of a MRT decision on the grounds of

⁵⁹ I have obtained consent from my client(s) to use the data and I am bound by the strict guidelines of the Ethics Committee of the Macquarie University (Approval Number 5201001002D).

jurisdictional errors. During a judicial review, the federal court will normally request a copy of the transcript of the MRT hearing. The federal court may cite only part of the MRT hearing transcript during the court hearing.

2. MRT *decisions* in data set 2 refers to the decisions of the MRT as published on the Australasian Legal Information Institute (Austlii) website. Explanation of what kind of MRT decisions are chosen and published on the website by the MRT is set out further below. It is noted that the word “decision” is used by the MRT and the word “judgment” is used by the courts.

3. Court cases in data set 3 refer to all the MRT related cases that are decided by the federal courts.

4. Data Set 4 consists of a number of subsets: -

(i) “Personal attendances” at the MRT refers to my personal attendance in the capacity (i) as a migration agent and legal practitioner and (ii) as an observer.

With the former, I am able to draw on the data including but not limited to my personal experience. With the latter, I took notes of the MRT hearings I attended as a member of the public audience.⁶⁰

(ii) “Interviews” refers to interview(s) (both officially and unofficially – such as friendly and off the cuff discussions) with participants and interested parties including a judge and Migration agents. I use the information obtained to provide me with a broader understanding of the MRT process and hands on experience.

⁶⁰ I thank my earlier supervisor, Professor Christopher Candlin, who has now sadly passed away, for attending the MRT hearings with me on many occasions. After each hearing he gave me his views, from a discursive practices perspective, and these have been extremely influential in my research.

(iii) “Questionnaires” refers to questionnaires sent to some migration agents who are experienced in the MRT process to provide their opinion and experience with the MRT. Likewise, the answers obtained widen my understanding of some common practices, which have not been acknowledged openly. For example, it is commonly known that another purpose for an appeal to the MRT in fact aims to obtain (or buy) more time for the visa review applicant to decide what he/she should do as their visa applications do not have the merits to succeed.

5. Data set 5 consists of two subsets: -

(i) MRT commentary provided by the Members refers to any comments, publication or opinions by Members of the MRT officially or unofficially regarding the proceedings of the MRT in general.

(ii) MRT commentary provided by other parties refers to any comments or opinions by other parties including but not limited to judges, participants of the MRT proceedings and interested parties regarding the proceedings of the MRT in general.

5.4 Formation and use of the data sets

The power of the MRT in exercising the law under the Migration Act 1994 affects many people’s lives and as such I believe providing a descriptive analysis of the legal process will not be sufficient in explaining “what it is that is going on here?” (to paraphrase Goffman, 1974, p.8) in the MRT. We need to take a step further to understand the social interactions between the parties as advocated by Goffman (1983) and the language role in the process (see Levinson, 1979). Thus the data sets help to demonstrate how the review process is conducted, in particular, to people who have not been to an MRT hearing.

My analyses of the data are, in principle, set out to examine the roles and discourse and interaction order and institutional order. I also compare the different features of the discourse of those review applicants who are represented by migration agents as well as those who represent themselves. This allows me to compare and contrast the social interactions and discourse occurring between the Member and the migration agents (who represent the review applicants) and the review applicants (who represent themselves). This comparison (it may be called an embedded discourse comparison;⁶¹ see Chapter 6) illustrates how the professional discourse of the migration agents influences the discourse of the Member. To elaborate this point a bit further, I am suggesting that the Member is drawing on its members' resources and in particular, legal experience, to deal with migration agents during the exchange. The Member also shifts his footing (Goffman, 1981) to cope with the challenges or forceful submissions made by the migration agents on behalf of their clients. The term *members' resources* is used by Fairclough (2001, p.20) who defines them usefully as that "which people have in their heads and draw upon when they produce or interpret texts – including their knowledge of language, representations of the natural and social worlds they inhabit, values, beliefs, assumptions, and so on."

The exchange between the migration agent (professional discourse) and the MRT Member (professional and institutional discourse) provides some interesting empirical data as to how the Member reacts and interacts discursively when the institutional order is interfered with, as compared with the way the Member deals with the review applicant who is not represented. The relationship between professional discourse and institutional discourse has been widely researched and has been recognised as an important and vital source of research area that can assist us to understand the social process and the institution order (Sarangi and Roberts, 1999; Sarangi, 2010; Roberts, 2011). This is one of the reasons that a research project similar to the

⁶¹ I name it as embedded discourse because it is found within the data set of the main discourse being analysed and has the characteristics in the manner of Bateson's comments about sets and sub-sets in a frame.

one I am now undertaking can be very influential to the understanding (probably also to the change) of the process and procedure.

The notion of power⁶² can be discerned in various circumstances of the MRT review process. The manner in which institutions exercise their power and how that power is imposed upon ordinary people's lives has been widely researched, and there is a substantial body of literature that demonstrates how power is thrust upon people through linguistic practices (O'Barr, 1982; Fairclough, 1989; Bourdieu, 1991; Roberts & Sarangi, 1999; Young & Fitzgerald, 2006; Mayr, 2008). For example, an institution's choice of words "depends on and can help create relationship between participants" (Fairclough, 2001, p.97) and how the authority uses language as a power (Foucault, 1969). It is therefore incumbent upon me to examine how power is exercised and how power is expressed and found in the MRT discourse. The examination of power also draws our attention to how power affects the process and procedure during the review. It is therefore unavoidable that at times the data may overlap. For example, the data used for the discussion of power may also be used to discuss the participation framework and the roles of its participants.

Another function of the data extracts from each set and subset is to illustrate the concepts and the theory that are set down in Chapters 3 and 4 by way of interpreting and explanation (see Drew and Wootton, 1988; Fairclough, 2010).

To this end, the data sets and their subsets are cited, extracted, condensed or expanded for discussion and discourse analysis. However, it is not my intention that each subset or set will be used in the order shown in the table, rather, the data will be used to illustrate a point or points that the thesis is trying to make. It may be sufficient to use one data set to make a point whereas occasionally it may require more than one data set to help illustrate what is argued in

⁶² I am talking about social power and institutional power and not individual power.

the thesis. At times, it may be also necessary to use the data set concurrently with other data sets in order to explain the legal process.

I set out below more details about the data sets.

5.4.1 Data set 1

As pointed out at the beginning of this Chapter, the MRT does not provide any hearing transcripts to the public. However, for the purpose of this thesis, hearing transcripts have been obtained from the sources set out below.

In subset (i) of Data Set 1, I have access to a full case hearing record of the MRT hearing regarding a merit review application of a partner visa application. Partner visa applications are one of the largest review applications received by the MRT⁶³. The transcript consists of valuable information assisting readers and researchers to understand how questions are formulated by the Member and how the law is embedded therein. As pointed out in Chapters 3 and 4, Members are ostensibly restricted to the role of inquisitor but in fact they are adopting several other roles as well. Further, as illustrated by the data, when Members ask questions, their line of questioning is guided by the migration legislation.

The other benefit of using a partner visa review application hearing transcript is that the partner visa subclass requires the Member to consider not only the legal requirements but also a number of social factors, such as the relationship between the visa applicant and the sponsor and how such a relationship is to be proved to satisfy the migration legislation.

In subset (ii), the transcript is from a different source. In brief, MRT review applicants can seek a judicial review of the MRT decisions on jurisdictional errors in the federal courts, including the Federal Circuit Court (formerly known as the Federal Magistrates Court), the

⁶³ See diagram of Chapter 3 (3.2.6) for statistics.

Federal Court and the High Court. This subset consists of federal court cases in which the review applicants appeal to a federal court on the grounds that the MRT has failed to perform its duties and has committed jurisdictional error(s). It is appropriate to point out that there are also cases where the MRT refuses to hear the review applications on the grounds of no jurisdiction.⁶⁴ However, these kind of cases will not be discussed in this thesis.

During a federal court hearing, the federal court judge can request a full copy of the MRT hearing transcript. Under such circumstances, the transcript cited by the federal court judge then becomes a public record and can be drawn upon freely.

The following table shows some of the cases forming data set 3 that the thesis will draw on. The classes of visa application represent some popular visa applications. Readers must be aware that not every case cited below will be discussed or analysed in detail and some of them will be used as background or general sources for the thesis.

Table 5.2 – Some examples of visa reviews heard by the federal courts

Visa classes	Cases citation	Case summary
Child Visa	<i>Saha v Minister for Immigration</i> [2010] FMCA 715	The visa applicant's child visa application was refused by the Immigration Department on the basis that the visa applicant was not deemed to be a child as he was not single.
Partner visa	<i>Tran v Minister for Immigration</i> [2005] FMCA 1926	This is a partner visa application based on domestic violence but the visa applicant's application was refused by the Immigration Department.

⁶⁴ Cases in this category include the review application concerns about character issues of visa applicants which are the jurisdiction of Australian Administrative Tribunals.

		The MRT required the visa applicant to produce a document to substantiate her claims.
Skilled visa	Hui v Minister for Immigration & Anor [2011] FMCA 486	The applicant's visa application was rejected by the Immigration Department on the basis that the occupation nominated was not relevant to her qualification.

5.4.2 Data set 2

Data set 2 consists of various decisions published by the MRT for public access. These decisions are set down in the format of recording the whole case in the reported speech. It is noted that not all MRT decisions are published by the MRT for public access. According to the MRT website, the criteria for publishing cases is based on what is deemed to be of “particular interest” to the public. However, as far as I am aware, the MRT does not elaborate the meaning of “particular interest” on its website or in other MRT publications. Nonetheless, research on the relevant clauses of the Migration Act has been able to provide some indication of the meaning “particular interest”.

Section 369 of the Migration Act 1958 provides that:

Subject to any direction under section 378, the Registrar must ensure the publication of any statements prepared under subsection 368(1) that the Principal Member thinks are of *particular interest*. (Emphasis is added.)

A further reading of the section 378 of the Migration Act 1958 (cited below) suggests that the MRT may direct certain matters not to be published: -

Tribunal may restrict publication of certain matters

- (1) Where the Tribunal is satisfied, in relation to a review, that it is in the public interest that:
- (a) any evidence given before the Tribunal;
 - (b) any information given to the Tribunal; or
 - (c) the contents of any document produced to the Tribunal;
- should not be published, or should not be published except in a particular manner and to particular persons, the Tribunal may give a written direction accordingly.

It is crucial here to point out that the penalty for breaching section 378 is two years imprisonment.⁶⁵ This means that a party is bound by this order if the Member makes such an order in the hearing. This seems to suggest to us that if the MRT decides that a matter is not of public interest, then the decisions will not be published. In other words, it is reasonable to suggest that the Principal Member is empowered to provide guidance to the Registrar as to what are to be considered of “particular interest” and the Registrar is required to publish these cases under the guidance. It is not known what criteria the Principal Member draws upon to base such decisions. However, according to my observation, the published cases are intended to show to the public the typical approach the MRT will take towards an issue of similar nature in a review application, so that stakeholders such as review applicants and migration agents who wish to lodge a review application are given an idea of what their opportunity of convincing the MRT of their argument may be.

In this regard, I cite below an email sent to subscribers of the MRT cases summaries (the writer subscribes to that service) by the Director of Communication dated 10th July 2014:

Dear subscriber,

*From July 2014 Précis, the MRT-RRT decisions bulletin, will be published quarterly in late August, November, February and May. **More focus will be given to presenting MRT and RRT decisions which reflect trends in how the tribunals’ deal with cases.***

Précis will continue to include summaries of a select number of MRT and RRT decisions recently published by the tribunals on the AustLii website,

⁶⁵ Section 378(3) of the Act.

selected summaries of High Court, Federal Court and Federal Circuit Court judgments and legislation updates.

The tribunals will continue to email subscribers when new editions of Précis are published.

If you have any queries about Précis please contact the Publications Team via Publications.Team@mrt-rrt.gov.au.

Chris MacDonald,

Director,

Information, Communication and Coordination

*Emphasis added by the author

5.4.2.1 An example showing MRT decisions published

In the common law system, superior court judgments will be accepted by the inferior courts unless they are subsequently overturned, and these court judgments form a body of precedents that are adopted by the courts over hundreds of years. Although there are no rules or direction for MRT decisions to be treated in a similar fashion, i.e. the decisions published do not have the authority of precedents similar to judgments made in court, it is observed that the decisions do to a certain extent demonstrate and influence how the MRT as an institution will decide a review application which is of similar circumstances and visa classes.

From a discursive perspective, the decisions so published constitute authentic records and are in fact an informative source of data indicating how the institutional order of the MRT is achieved and maintained (See Sarangi and Roberts, 1999). They are also capable of illustrating how the interaction order and institutional order interplay. To illustrate this point, as an example, the crucial part of the case of *0808916 [2010] MRTA 1219* (18 May 2010) (see appendix 1 for the full decision record) is cited as follows (using the same paragraph numbering of the decision published in Austlii). The case is about how a visa applicant attempts to argue that his qualification is closely related to the occupation nominated in his visa application.

22. *The Tribunal advised the applicant that although the Commercial Cookery course may be closely related to his nominated occupation, the Tribunal must also consider whether the Diploma of Tourism is closely related to his nominated occupation of Cook. The Tribunal read out to the applicant the description of a Cook as set out in the Australian Standard Classification of Occupations (ASCO) and indicated that although this list is not exhaustive, it is a guide to the Tribunal when considering this issue. The Tribunal asked the applicant to explain how his studies in tourism are closely related to his nominated occupation of Cook.*

23. *The applicant explained that his Diploma of Tourism course shared the same subjects as the Diploma of Hospitality course, with the exception of the 3 tourism related subjects. The Diploma of Hospitality course is normally 98 weeks but he decided to do the longer Tourism course for 128 weeks as it included other broader subjects.*

24. *The Commercial Cookery course was sufficient to cover the practical aspects of being a cook but it does not deal with the theory of running a restaurant business. The applicant stated that his goal was to run his own restaurant and work as a cook. To open a restaurant he needs to know how (to) run a business, to coach people, deal with customers, work as a team, be a leader, manage finances, how to sell products and do marketing.*

25. *Many of the subjects he did in the tourism course are relevant to this. 'Business and Customer Relationships' was relevant to developing good relations between customers and business owners. 'Computing for Business' was relevant to planning menus and ordering stock. These days, many of these tasks have been computerised and it was important to*

have a basic understanding of computers. 'Managing Finance' gave him an understanding of financial planning and budgeting which was relevant to estimating food requirements, ordering stock and menu planning. 'Managing Operations' would help him manage work operations in the restaurant, plan menus and estimate food requirements. 'Managing People' and 'Workplace Communication' were all relevant to the teamwork environment in the kitchen, preparing food to meet dietary requirements and training other kitchen staff and apprentices."

The above sample text illustrates that during the hearing the MRT Member is trying to explain to the review applicant what the relevant law is about (the Member assumes the role of the *interpreter of law*) and then moves on to invite the review applicant to explain why *he* thinks his qualification of "Diploma of Tourism" is relevant to the occupation he nominated, which was that of "cook". Subsequent to this line of questioning, the review applicant starts to explain and argue why the two, namely the nominated occupation and the qualification, are relevant. He argues, point by point, that the subject he studied is relevant to his proposed occupation.

5.4.2.2 A brief comparison of MRT decision record and arbitration award

The above record of decision is in fact not unique and similar examples can be found in other legal records, such as the arbitral awards in international arbitration. I cite below a part of a summary of arbitral awards (taken from Bhatia, Candlin and Hafner, 2012, p.153)

and invite readers to compare, from a discursive viewpoint, the manner in which it is presented with that of the MRT decision above:

Defendant claims that Swiss law was implicitly chosen from the start. The argument rests on the circumstance that in a previous contract between the

parties and another previous contract between Defendant and a sister company of Claimant, as well as in a subsequent agreement between the parties, there was an express choice of Swiss law, coupled with the choice of Lausanne as the venue for JCC arbitration[...] The omission of any reference to Swiss law in the argument of April 24, 1987 was not explained by Claimant nor noticed by Defendant at the time the contract was concluded. However, Defendant claims that there was a course of dealings between the parties linking arbitration in Lausanne with the choice of Swiss law. It must be assumed that this practice could not be changed without an express choice of a law other than Swiss.

Bhatia, Candlin and Hafner analyse the Awards by way of three main headings namely (i) issue reasoning, (ii) conclusion reasoning and (iii) conclusion, which I find are also useful tools to examine data set 2 of MRT decisions. In their paper, Bhatia, Candlin and Hafner provide a succinct analysis of the awards by pointing out that arbitral awards are accounts. In my view, Bhatia, Candlin and Hafner successfully demonstrate how linguists can assist in analysing language and law by using the tool of accounts.

As they point out, “Accounts are rhetorical constructs that are of use to justify, explain or clarify one’s views arguments and/or communicative actions in a specific social or professional context”. (Bhatia, Candlin and Hafner, 2012, 147). They also point out that the construct of “accounts” is not new and has been discussed by other scholars (Garfinkel 1956, 1967; Goffman, 1959).

Goffman observes that “Each participant is allowed to establish the tentative official ruling regarding matters which are vital to him but not immediately important to others, e.g. the rationalizations and justifications by which he accounts for his past activities” (1959, p.9).

When we compare the two examples (the MRT decision and the arbitral award) above, we realise that they have certain commonalities, including the setting out of the facts and the law before ending with a concluding statement or view. To a certain extent both examples assert that their conclusion is based on law not speculation or subjective opinion:

However, when we examine them more closely, we note certain linguistic difference between the two. The MRT case has relied on an objective criterion to reach the conclusion and the language is quite clear from the decision: *“The Tribunal read out to the applicant the description of a Cook as set out in the Australian Standard Classification of Occupations (ASCO) and indicated that, although this list is not exhaustive, it is a guide to the Tribunal when considering this issue.*

On the other hand, the arbitral award seems to rely on past practice and assumption that the past practice is still valid

The omission of any reference to Swiss law in the argument of April 24, 1987 was not explained by Claimant nor noticed by Defendant at the time the contract was concluded. However, Defendant claims that there was a course of dealings between the parties linking arbitration in Lausanne with the choice of Swiss law. It must be assumed that this practice could not be changed without an express choice of a law other than Swiss.

In the course of this thesis, readers will find that similar arguments and discursive practices in the decisions in relation to similar visa classes in data set 2 can also be found in the transcript (data set 2(ii)) for the same visa class review applications lodged with the MRT. We can examine the case of 0808916 [2010] MRTA 1219 and *Tran v Minister for Immigration* [2005] FMCA 1926, and will see how two kinds of data interplay.⁶⁶

⁶⁶ See chapter 6.

From a linguistic viewpoint, a comparison of data set 1 and data set 2 reveals that the syntactic differences (namely direct and indirect speech) and the mode of presentation (namely hearing transcript and decision record) do not affect the substance of the argument of the participants. Through both data set 1 and data set 2, the Members are sharing the stock of knowledge commonly available to them or in their role as a Member. Such stock of knowledge in my view is strongly utilised by Members in order to achieve a consistent approach in the decision making process.

Data set 2 also provides a good opportunity to investigate the interface of professional and institutional interface as suggested by Sarangi and Roberts (1999, p.17):

One useful site to examine the interface of the professional and the institutional is the record-keeping procedure in many institutional settings... Working within institutional constraints, professionals can claim expert knowledge via their record-keeping practices.

Borrowing the term “record” from Sarangi and Roberts, the MRT decisions so published are *the record* of the institution. They set out and make known to the public the boundary of how the MRT hears a matter, and what the relevant points that are taken into account in the review process are, in addition to how decisions are formed.

5.4.3 Data set 3

Data set 3 is drawn from the appeal cases from MRT review decisions to the federal courts. Normally, review applicants who are not satisfied with MRT decisions may appeal their cases at the Federal Circuit Court. However, if the matter is related to constitutional issues, the matter may go directly to the Federal Court.

The difference between data set 2 and data set 3 lies in the manner of presentation of the decisions and judgment. In the MRT, the published decisions have their own unique format,

similar to that of a court judgment but couched in a more technical manner. To clarify this point further, it may be appropriate to briefly describe how the migration law operates. In a visa application, the visa applicant of the relevant subclass visa is required to satisfy the visa requirements, and these are set out under the relevant sections and subsections of the Act and Regulations. The MRT decisions will outline which section or subsection of the Act or Regulations the visa applicants failed to meet. As compared with court judgments, the MRT decisions that are published tend to focus more on the visa applicants' failures to meet the requirements. In a court judgment, the judge may explain the decision by citing what has been discussed or what decisions have been made by other courts, in particular, superior courts.

The MRT is in fact a pathway, possibly the only pathway, for migration matters to be heard by the courts in Australia. Irrespective of the seriousness of a matter or the high profile nature of a matter, for example that of the widely publicised Dr Hanneef case⁶⁷, the first step for the applicant whose visa application is refused is to lodge a visa review application to the MRT for review of the Department of Immigration's decision.

The data from data set 3 allows us to see how judges in the federal courts look at issues arising from a case, i.e. to see whether due process was followed in relation to the review applicant.⁶⁸ To be more specific, when a visa applicant raises an issue in his appeal to a federal court, the judge will decide to either accept or reject the visa applicant's submission. The federal court judge also adjudicates as to whether the Member has made a mistake or not when the Member considered the issue raised during the MRT hearing.

Although the focus of this thesis is on the MRT, using analyses of the discourse and linguistic observations of federal court judges, we are able, at least in part, to understand whether the

⁶⁷ The Dr Hanneef case concerned a medical doctor who worked in a Queensland hospital whose visa was cancelled by the Minister of Immigration given the subject's asserted connection with the London bombing event (date) in which Dr Hanneef's cousin was involved. See *Haneef v Minister for Immigration and Citizenship* [2007] FCA 1273 (21 August 2007).

⁶⁸ See in Chapter 8 how High Court of Australia decides on "reasonableness" in the Li case.

Member has achieved substantial justice as required by law in reviewing the case. In legal terms, the court is concerned about whether natural justice has been observed, i.e. the review applicants are given an opportunity to respond to the issues arising from the visa application, which was the basis of their visa refusal.

5.4.4 Data set 4

To provide another perspective on my research, data are also drawn from my own practical experience of the MRT process. Data set 4 comprises a number of data subsets from various sources including notes taken during my personal attendance at MRT hearings. I also use some responses to my mini survey questionnaires, and interviews with migration agents and lawyers to broaden my views.

The aim of data set 4 is to broaden and expand the understanding of the MRT process. Clearly, there are many different methods of conducting discourse based research⁶⁹ and no study can claim that it was able to cover every aspect of the topic (Cicourel, 1992).

In this regard, I chose to limit my thesis to an exploration of the participation framework of the MRT and the roles taken up by its participants. Data set 4 provides more information to bridge some of the gaps that may come up in the other data sets and subsets.

As explained in Chapter 3, the MRT, like the common law courts, does not allow tape recording during the hearings. Thus, during MRT hearings, it is only possible to take notes of what was said and to set down personal observations. Such a method of collecting data is not uncommon in a courtroom setting when researchers are not allowed to record the hearing process. For example, in the 2013 conference of International Association of Forensic Linguists, Dr Janny Leung advised that at the Hong Kong University there is a Research

⁶⁹ Sarangi and Roberts (eds) (1999), Caldas-Coulthard and Coulthard (eds) (1996).

Grants Council funded project on “Bilingualism and Legal Discourse in Hong Kong” (conducted by Dr Janny Leung), which uses this method to collect data.⁷⁰

Questionnaires were also used to collect data. Some lawyers and non-lawyers who are experienced in the MRT process were invited to participate in the questionnaire survey⁷¹. The questionnaires were designed to invite the participants to provide practitioners’ views on the MRT process. One of the interesting findings is that although review applicants in principle approach the MRT for the purpose of seeking to set aside Immigration Department’s decisions and to reach a more favourable decision from the MRT, some review applicants were in fact making use of the MRT pathway as a means of seeking ministerial intervention. As already noted, the Minister can make a decision favourable to the visa applicant under various circumstances.⁷²

In relation to the matter of interview data, one successful interview conducted for this thesis was with a Federal Court judge (now retired) in relation to his personal opinions on legal issues involving the general expectation of, as well as his own dealings with, MRT hearings.⁷³ By making reference to the discussion within the interview, it is possible to see how legal discourse differs from the discourse in the MRT hearings.

⁷⁰ See <http://www.english.hku.hk/researchrgcfundedprojects.htm>. Retrieved in 2013. Dr Janny Leung when presenting the paper “As good as it gets? Unrepresented litigant and courtroom dynamics: a case study” at the IAFL 2013 explains how the data is collected by note taking and observations.

⁷¹ The questionnaires are used for general reference and understanding in the research.

⁷² For example, section 351 of the Migration Act 1958, “(1) If the Minister thinks that it is in the public interest to do so, the Minister may substitute for a decision of the Tribunal under section 349 another decision, being a decision that is more favourable to the applicant, whether or not the Tribunal had the power to make that other decision.”

⁷³ The interview was conducted by Professor Candlin and me on 28th November 2012.

5.4.5 Data set 5

Data set 5 consists of commentaries from Members and non-Members on the MRT process. These will be drawn upon by way of providing the last piece of the puzzle, so to speak, of a comprehensive perspective of research on MRT proceedings.

Subset (i) of data set 5 draws upon speeches or papers presented by current or past Members during conferences or when they answer queries from attendees of conferences. Senior Members of the MRT occasionally give presentations to practitioners in the MRT setting and these are vital for understanding from the Members what they expect to hear during hearings they preside over.⁷⁴ Through this source of data, we are able to understand the review process from the MRT's perspective. For example, how in the Member's view a review application should be prepared and what the review applicant should highlight to the MRT when they submit their application.

Subset (ii) of data set 5 consists of commentaries from non-MRT parties such as judges of the federal courts and participants. This information provides yet another perspective on how certain highly experienced professional people view the MRT process.

5.5 Some limitations in the research

Due to the difficulties I experienced in obtaining audio files from the MRT, my findings may be subject to criticism for being limited or biased, as some hearing transcripts used here are those provided by the MRT to the federal courts when review applicants appeal to the courts on the grounds of judicial error. This means there may be sampling bias. Additionally, I did not get the whole transcript directly from the MRT. It should be noted that not every federal court case will be provided with a transcript and that a transcript is only provided when

⁷⁴ See for example, paper delivered by Senior Member O'Connell (2014) *Procedural Fairness and the Refugee Tribunal*; Senior Member Nicholls (2014) *Overview of Tribunals*. www.mrt-rrt.gov.au retrieved 2014.

federal courts request a copy of the transcript from the MRT when hearing the appeal. To address the insurmountable difficulty of getting access to MRT transcripts, I am therefore using a wide range of data sets for research as outlined above. In addition, I will also draw on my own practising experience in this area as a legal practitioner and migration agent.

The discourse data used may also be criticised for not being directly from verbal exchanges, as some information was summarised and/or re-contextualised by the institution and the information so published may have been scrutinised if not screened (see Per Linell, 1988, on contextualisation; see also Sarangi and Candlin, 2001, on motivational relevancies). Thus, the data may again be subject to criticism for being biased.

While I would want to address this foreseeable and possible criticism, I intend to leave it to the readers and other researchers to make their own judgment after they have had the opportunity to peruse my findings.

5.6 Conclusion

In this Chapter, I have outlined in detail the kinds of materials and varieties of data that are used in the thesis. As the topic itself not only relates to academic research involving discourse analysis but also focusses on the practice of a tribunal which handles hundreds and thousands of visa review applications each month, it was necessary for me to draw on various data sets to be able to comment on what is actually happening. As pointed out at the start of this chapter, a descriptive approach is not sufficient to give an account of the process at the MRT. In this regard, I hope I have explained clearly why it is vital to use the data sets I have described in this chapter to unfold the discursive practices, and the workings of the interaction order and the institutional order in the course of an MRT hearing, and in addition to make clear the different roles assumed by the Members.

The instances of discourse analysis in the research can be found in various parts of the thesis as the flow of the thesis itself requires elaboration, or claims need to be supported by data and examples. I hope this *unconventional* approach will not confuse, but rather will draw the interest of readers who are not familiar with the topic. As the data are from various sources, I can only use some of them in the analysis while others will constitute my background knowledge when commenting on and analysing the data.

In the next chapter, I will expand my discussion and offer further discourse analyses to cover the wider issues that unfold during the hearings – for example, the legal justification for the conclusion of a review application showing the interface of the interaction order and the institutional order.

Chapter 6

Discussion and Analysis

6.1 Introduction

In Chapter 4, I outlined the concepts and theories of the research on which the analyses in this thesis will be based. In Chapter 5, I set out in detail the composition and sources of the various interrelated data sets, and provided sample data aiming to explain to readers the essential focus of the thesis' themes. I also explained what data are to be used and how they can be drawn upon for the research.

This chapter and the following chapters will present the main analyses of the data from the data sets referred to in chapter 5, aiming for triangulation of the analyses and the results, in light of the theoretical concepts that become relevant,⁷⁵ in order to provide a more comprehensive account of the processes and practices of the MRT and the roles of its primary participants in relation to these.

To this end, through analyses, I will use the data to support the constructs and theories provided by leading discourse scholars (Bhatia, 2011; Goffman, 1974, 1981; Fairclough 1995, 2001, 2010; Maley, 1997; Sarangi & Roberts, 1999), as previously discussed. Discourse analysis is in no way an easy task and, as a new researcher and observer, I have relied on leading scholars' works and words as guidance in undertaking the present research. In particular I have found Cicourel's comments very useful in reminding us of the bounds and limits that analysts may face and how to deal with insurmountable issues:

⁷⁵ The discourse analysis presented in Chapters 6, 7 and 8 combines discussion of data with analytical and theoretical discussion so that readers can appreciate how the two complement each other. This style of discussion and presentation of data may be viewed as unconventional, but it is commonly used in legal literature. I hope it can provide some insight into the interaction of language and law with respect to the present institutional setting and specialised types of professional communication.

Observers or analysts, like participants of speech events, must continually face practical circumstances that are an integral part of all research or everyday living. As researchers, we obviously privilege some aspects of a context while minimizing or ignoring other conditions. The observer is obligated to justify what has been included and what has been excluded according to stated theoretical goals, methodological strategies employed, and the consistency and convincingness of an argument or analysis. (Cicourel, 1992 p.309)

In this chapter, I will start with an introduction of the basic framework of the analysis. First, I will discuss key constructs, including interdiscursivity and hybridity, which are relevant to the MRT discourse. These two constructs are often found in other legal discourses, such as mediation discourse (see Candlin and Maley, 1997). As the research addresses the relationships between the fields of language and law, I will examine the relevancy and distinguish the differences between inquisitorial and adversarial discourse in the legal system before I move onto the issue of participant roles and framework. Throughout this chapter, I will use data referred to in Chapter 5 to support and justify my views and will also analyse the data to illustrate and elucidate how the MRT conducts its review.

Prior to proceeding to the discussion, it is necessary to point out a crucial fact about my presentation. I have repeatedly explained to the readers why my presentation of data discussion may be viewed as unconventional (See section 5.5, conclusion of Chapter 5 and footnote 75 above). However, I need to offer one more explanation so readers will not find the discussion unsystematic or limited. In the absence of other literature on MRT discourse, the data sets used here as the basis of my discussion have also served, among other things, to provide a working definition of MRT discourse. To develop such a definition, and to justify my other claims, by comparing and contrasting, I will have to introduce the work of discourse scholars who have worked and perhaps are still working in similar and/or related discourses in other legal or professional fields. This may create the erroneous impression for some that the literature I rely on is not always strictly relevant.

The second point that I need to draw the readers' attention to is the order of the data presented for discussion. I must emphasise that the order of data being discussed does not reflect its degree of importance and in fact, for analytic purposes, every item of data carries the same degree of importance. In brief, there are three important factors that have affected my choices as well as the order of data for discussion, namely (i) the availability of data; (ii) the percentage of a particular visa applications being the subject of the MRT review; and (iii) the significance of the data in this discourse study. With limited access to data, this seemed to be the best approach open to me.

To elaborate, given that I anticipate that there will be a range of audiences for my work, including readers and stakeholders who may or may not be familiar with the topic and that there has been no similar study in this area before now, my approach has been as follows. Firstly, I introduce MRT discourse starting with a) a simple opening address of the Members and b) an examination of the rituals and questioning techniques of the Members. This is in Chapter 6. This will allow me to go on to explore MRT discourses in the context of cases that involve an appeal to the highest court of Australia, which I do in Chapter 8. Meanwhile, the choice of data takes into consideration the statistics published by the MRT in its annual reports, as referred to in Chapter 3. For example, in Figure 3.1, Family and Partner visa applications combined accounted for 14% of the MRT lodgements by case type, and Skilled visa applications⁷⁶ accounted for 26% in 2011-2012. Among all the subclasses of visa applications that I reviewed, I found the discourses in Family and Partner visa applications are most difficult to comprehend because of the complicated relationships that typically unfold in such cases, often having a huge impact upon family members, and in fact families may split up if their review applications fail. Hence, I spend relatively more time in discussing and

⁷⁶ See discussion of case 0808916 in section 8.3.1.

examining the discourse involved in this type of case.⁷⁷ I hope these notes have clarified the approach to my data in Chapters 6, 7 and 8.

6.2 MRT discourse as part of the legal discourse

Courtroom discourse has been the main focus of research in the field of legal discourse analysis for many years (see O’Barr 1982; Coulthard 1994, Maley 1994; Conley and O’Barr 1998; Harris 2011; Hobbs 2011). It is therefore natural for us to associate legal discourse with courtroom discourse. In fact, some researchers on legal discourse have expanded their field to include other discourses such as mediation discourse (Maley, 1995; Greatbatch and Dingwall, 1997) and arbitration discourse (Bhatia, Candlin & Gotti, 2012). In Chapter 3, I discussed the various types of discourse which the MRT exhibits, and in doing so, pointed out that the MRT discourse is a type of legal discourse displaying similar features to those of the “trial process” as captured by Maley (1994, p.16). Of course, the MRT discourse displays some features of a more general legal discourse, as the MRT itself has its own administrative law function, being a specialist tribunal in migration law. More importantly, the MRT discourse has its own latent features that may only be explored through research that includes both the law and language perspectives. These features can be found in the exchanges between the parties in the MRT hearings as evidenced in the data provided in this thesis.

From the discursive point of view and based on the definition of Gee (1999, p.17) cited below, with respect to the big “D” discourse, where he also discusses “recognised” and “being recognised”, we may regard the MRT discourse as a “capital D” discourse:

I want to argue that the problem of “recognition and being recognized” is very consequential... It involves acting-interacting-thinking-valuing-talking-(sometimes writing-reading) in the “appropriate way” with the “appropriate” props at the “appropriate” times in the “appropriate” places.

⁷⁷ See the discussion of Yu’s case (section 6.3.1), Saha’s case (section 7.4.1), the Antipova case (section 7.4.3) and Tran’s case (section 8.4.3).

Such socially accepted associations among ways of using language, of thinking, valuing, acting, and interacting, in the “right” places and at the “right” times with the “right” objects (associations that can be used to identify oneself as a member of a socially meaningful group or “social network”), I will refer to as “Discourses”, with a capital “D”... “Big D” Discourses are always language *plus* “other stuff”.

In particular, the “other stuff” referred to by Gee in the context of MRT discourse may refer to the features that the Member’s discourse displays, and one of these that I consider essential is the mixture of discourse types during the exchange of the participants in the hearing. Upon careful analysis, this feature can in fact be found in the decisions published by the relevant tribunal or court websites and also in Austlii. In the following paragraphs, I will attempt to expand my discussion on some key discursive practices with the intention of building an overarching discussion and analysis of the MRT discourse.

To be more specific, I consider and argue that MRT discourse is a kind of legal discourse, displaying some unique and hybridised features, particularly with respect to its interdiscursive nature (Bhatia, 2010; Candlin, 2006). I have to remind readers that it is necessary to consider the function of the MRT while we analyse MRT discourse. By now, we are aware that the MRT is basically an inquisitorial tribunal, but on careful examination, it also displays courtroom style discourse. This mixture of discourse type becomes more apparent and inevitable when the role of the Member changes following the change of footing (Goffman, 1981).

To elaborate in another manner, when a person changes his discourse, it is more likely than not that the context requires, if not forces, him to do so, or the role he is assuming requires him to do so. Put in layman’s term, if you are a decision maker, then the discursive practices you exhibit will have the kind of authority that a decision maker has. In the context of the MRT hearing, the discursive format of a question and answer exchange changes the

Member's role, whether the Member is aware of it or not (and whether he likes it or not). As the data illustrates in Chapter 7 below, the Member can change his or her role from that of an enquirer to that of an interpreter of law, and his or her discourse also changes simultaneously from asking questions to interpreting the law during the exchange with the review applicant. This change of roles may be beyond the control of the participating parties and may only come to light when researchers undertake discourse analysis. For example, a question put by the Member to the review applicant to explain the relevance of her qualification and the job nominated in her visa application may bring forth an explanation that is unexpected and something that a reasonable person would not likely have thought of. Thus, it may require the Member to use his discourse skills and strategy to restrain the review applicant from the kind of argument the latter would vigorously pursue. In addition, the Member also shows his authority through linguistics to focus on what he intends to enquire (see examples below).

In approaching the data analysis, it is necessary to take into account theoretical considerations with respect to what the exchanges between the parties reflect. The changes of discourse as observed in the data sets demonstrate how a person's thinking is translated into discourse.

Discourse is a reflection of what one thinks; as Foucault puts it:

[D]iscourse is little more than the gleaming of a truth in the process of being born to its own gaze; and when everything finally can take the form of discourse, when everything can be said and when discourse can be spoken about everything, it is because all things, having manifested and exchanged their meaning, can go back into the silent interiority of their consciousness of self.
(Foucault, 1981, p.67)

While Foucault provides a philosophical perspective on how a discourse "was born", it is also necessary to look at the socio-linguistic viewpoint provided by Goffman when he talks about questions and answers, as questioning is one of the main duties of the MRT. He says:

Whenever persons talk there are very likely to be questions and answers. These utterances are realized at different points in “sequence time”. Notwithstanding the content of their questions, questioners are oriented to what lies just ahead, and depend on what is to come; answerers are oriented to what has just been said, and look backward, not forward. Whatever answers do, they must do this with something already begun.

(Goffman, 1981 p.5)

To depart somewhat from Goffman’s comment above, the Member when formatting questions will take into account the legal requirements that the visa applicant is required to meet. Simultaneously, he also assesses and evaluates the evidence provided by the visa applicant before he makes a decision with respect to the review application. To do so, the Member is required to use his discourse skills and strategies in establishing the facts and explaining the law to the visa applicant. The Member will look at the veracity of the claims submitted by the review applicant to determine whether he should agree or not agree with the review applicant while he is also required to apply the law relevant to the different visa subclasses. Another exception to what Goffman says above and based on the data collected is the case where, in answering questions raised by the Member, the review applicant tends to provide a pre-formulated answer, which may not be relevant to what is asked. However, taking into consideration Foucault’s views, the pre-formulated answer may be viewed as what the review applicant’s consciousness or inner-self believes and subsequently translated into the form of discourse. There is nothing wrong for a review applicant to provide a pre-formulated, if not pre-meditated, reply to a question asked by the Member, but it is necessary to re-phrase or re-format the statement so that the answer is relevant to the question asked. From a legal practitioner’s point of view, when a review applicant client is to be questioned, either in the manner of examination or cross-examination, it is vital to point out to the review applicant the need to focus on what is being asked and not to be preoccupied by what he or she wants or intends to say. Data analysed in this chapter shows that the answer by the review applicant missed the point of the question and failed to address the Member’s concern.

6.2.1 Interdiscursivity and discursive hybridity

The concepts of interdiscursivity and discursive hybridity allow us to examine discourse and professional communication in a multi-perspectival manner (Crichton, 2010; Candlin and Crichton, 2011). Interdiscursivity is not a new concept, and according to Bhatia (2010), it may sometimes be subsumed under intertextuality. Intertextuality is a notion originally coined by Kristeva (1980) who describes it as “any text is constructed of a mosaic of quotations; any text is the absorption and transformation of another” (p.66).⁷⁸ Many leading scholars have indeed discussed and researched interdiscursivity (see for example Foucault, 1981; Fairclough, 1992; Candlin & Maley, 1997; Bhatia, 2010).

Foucault (1989) speaks about an interdiscursive configuration when he highlights the features in the following manner:-

This interdiscursive group is itself, in its group form, related to other types of discourse (with the analysis of representation, the general theory of signs and ‘ideology’ on the one hand; and with mathematics, algebraic analysis, and the attempts to establish a mathesis on the other). They are those internal and external relations that characterize Natural History, the Analysis of Wealth, and General Grammar, as a specific group, and make it possible to recognize in them an *interdiscursive configuration*.
(p.175)

According to Foucault, interdiscursivity can be found in many disciplines and concerns relationships between different discursive formations. We may be unaware of its existence although many professionals practise it, unconsciously or consciously. In other words, if we understand this notion, we may be able to deploy such skills or strategies to fully use the *interdiscursive configuration* in an orderly and explicit fashion. What I mean is, we have all been practising interdiscursivity in professional communication (may it be in legal discourse

⁷⁸ See also Bakhtin (1986).

or medical discourse) in our daily interactions with other participants and have taken it for granted and are unaware of its usefulness in communication.

As Foucault points out, the “interdiscursive group is itself, in its group form, related to the types of discourse”. In this we can draw on the example of mediation discourse that consists of adjudicating and counselling practices as discussed by Candlin and Maley (1997). Clearly, these interdiscursive practices may have become embedded in the professional discourse of the speaker and the participants when they interact; and the practitioners have made use of such interdiscursivity unnoticeably and in a natural manner when their role(s) requires them to do so or when a change of footing is required. As we observed in the previous chapters, similar to other professional discourse, the feature of interdiscursivity is well and truly found in the MRT discourse when the Member is conducting a hearing into a review application.

According to Fairclough (1992), “[i]ntertextuality is basically the property texts have of being full of snatches of other texts, which may be explicitly demarcated or merged in, and which the text may assimilate, contradict, ironically echo, and so forth.” (p.84). In other words, intertextuality may refer to a text that consists of or incorporates texts from other sources by way of condensation, combination or merging, whereby it will at the end form a text in its own right. In this regard, Bhatia (2010, p.35) agrees that “intertextuality refers to the use of prior texts transforming the past into the present often in relatively conventionalized and somewhat standardized ways”.

In contrast, Fairclough (1992, p.47) distinguishes between intertextuality and interdiscursivity when he says: “I shall draw a distinction between ‘intertextuality’, relations between texts, and ‘interdiscursivity’, relations between discursive formations or more loosely between different types of discourse. Interdiscursivity involves the relations between other discursive

formation which according to Foucault constitute the rules of formation of a given discursive formation”.

Following to their research into alternative dispute resolution, Candlin and Maley (1997, p211-212) summarise what they mean by interdiscursivity as follows:

Our chief focus will be on interdiscursivity, which, as we have indicated earlier, we take to be the use of elements in one discourse and social practice which carry institutional and social meanings from other discourses and social practices.

The professional discourse that Candlin and Maley were focusing on was the discursive practices and social practices that are found in mediation discourse. In their research, they illustrate the features of interdiscursivity by highlighting that mediation discourse displays the professional practices of adjudication and counselling (see also Candlin, 2006).

Bhatia (2004, 2010) meanwhile has done substantial research work on interdiscursivity in professional communication and in particular, on legal writing as a textual discourse. He distinguishes the two notions in the following manner: -

To make an initial distinction between these two related concepts we can safely begin by assuming that intertextuality refers to the use of prior texts transforming the past into the present often in relatively conventionalized and somewhat standardized ways. Interdiscursivity, on the other hand, refers to more innovative attempts to create various forms of hybrid and relatively novel constructs by appropriating or exploiting established conventions or resources associated with other genres and practices. Interdiscursivity thus accounts for a variety of discursive processes and professional practices, often resulting in ‘mixing’, ‘embedding’, and ‘bending’ of generic norms in professional contexts.
(Bhatia, 2010, p.35)

Bhatia (2010) gives an example of interdiscursivity by using the annual corporation report issued by listing companies that typically include samples of public relations discourse, accounting discourse and legal discourse, as well as the discourse of economics. Based on the above definition of interdiscursivity, the features of interdiscursivity can also be found in

MRT discourse. For example, when the Member changes his footing and changes his roles during his exchanges with the participating party in the hearing, his discourse has also changed to accommodate the circumstances and the exchange between the parties (see discussion in Chapter 4).

More specifically, Members are required to apply different kinds of discourse during the same hearing as a skill required to resolve legal and social issues presented to them. Similar to Maley and Candlin's research, that shows the mediator's discourse is both adjudicating and counselling, my research here also demonstrates how Members use mixed discourses to deal with difficult issues such as stopping the review applicant dodging the question when asked to explain a relationship (see data analysis below). In this regard, Members have to be vigilant when the review applicant is trying to bring in content that is outside the topic they wish to enquire or attempting to negotiate a way out. This indeed requires Members to have the linguistic skills of employing mixed discourses when they assume different roles or there will be a communication breakdown between the parties. To a certain extent, such skills and strategies have formed the core of the professional communication practices and workplace discourse of the Members.

In his paper entitled "Accounting for Interdiscursivity : Challenges to Professional Expertise", Candlin (2006) makes some critical observations on the complexity of workplace discourses when he says: "It has become something of a commonplace to assert that workplaces are in some sense held together by communicative practices to which they give rise, or even, more boldly, that such communicative practices constitute the work of the workplaces themselves." (page 21).

Indeed, it is more often than not the case that communicative practices are at times the vital part of the work carried out by professionals. For example, when lawyers communicate with

their opposition parties on the basis of “without prejudice”, this communication practice indicates that the information exchanged is not to be used in open court proceedings against the parties concerned. “Without prejudice” as a principle of legal communication practice is in fact a common strategy that allows the parties in disputes to discuss how to settle a matter without or before instituting legal proceedings or during the legal proceedings. The parties will use this strategy to negotiate frankly, bargain or make concessions to settle a dispute in a compromising but no-admissions basis. For the MRT, a common practice, whereby migration agents buy more time for their clients, is the very effective one of seeking adjournment and using the MRT as the bridge to seek the Minister of Immigration’s intervention (commonly known as ministerial intervention) to make a decision in their clients’ favour if all avenues to review or appeal are exhausted.

Another linguistic notion that I have found relevant and useful in this research is that of discursive hybridity. Hybridity, in discourse analysis, refers to the use of more than two genres or discourses in a communicative practice. With respect to hybridity, Sarangi and Candlin (2011) point out that workplaces “are not unitary in their discourse but frequently complex, overlapping and with unclear and often confusing boundaries, manifesting what Sarangi and Roberts (1999) refer to as discursive *hybridity*” (p. 17, italics in the original).

In their research on the hybridity of discursive “modes” in oral examinations, Roberts and Sarangi’s work reveals that participants find it hard to recognise the professional mode and the institutional mode, notwithstanding that they are able to identify the personal experience mode. The following is what Roberts and Sarangi observed about their use of the concept of mode in their research:

A discourse analysis of the videoed interactions between examiners and candidates shows the operation of the three different modes of talk and the relative dominance of the institutional mode overall. The different range of questions and their responses are presented on a cline from relatively more

professional to relatively more institutional. The hybridity and interdiscursivity means that there is not an absolute distinction between the three types.

(Roberts and Sarangi, 1999, p. 488).

Roberts (2011) in her research on job interviews argues that interviews become another hurdle for minority ethnic groups as they fail to distinguish between the professional mode and the institutional mode. In the Member's discourse, my primary focus is not on the mode of discourse, thus I have no intention to discuss this topic in any depth. However, the notions of discursive hybridity and different modes of discourse are useful tools for understanding how the Member deals with issues such as adjournments when confronted by legal practitioners. For example, a question and answer exchange between the Member and the review applicant's migration agent may become a legal argument when the agent cannot provide an answer promptly and insists to ask for more time to respond and seek adjournment.

At this juncture, it is appropriate to commence examining the data of the research and undertaking some analysis of the MRT discourses. As a prelude, I will briefly revisit the topic of the common law court system and civil law court system which I have discussed in detail in previous chapters, in particular Chapter 2 and Chapter 3.

6.2.2 Inquisitorial discourse vs adversarial discourse

The MRT recognises itself as an independent body set up to review decisions made by the Immigration Department and empowered under the Act to carry out such reviews in an inquisitorial capacity in order to make a fresh decision at the request of the review applicant. However, interactions between the Member and Review Applicants or their agents can sometimes be overtly adversarial. In order to distinguish between what is inquisitorial and what is adversarial in MRT discourse, I have compared the common law's adversarial system and the civil court's (also commonly known as the European court) inquisitorial system in

Chapters 2 and 3. Those two chapters provide the basic understanding of the distinction between the two legal systems and their discourses.

The High Court in *Minister for Immigration and Citizenship v SZIAI* (2009) HCA 39 considered the application of the term "inquisitorial" to tribunal proceedings in the following manner (references to an *inquiry*, which I have bolded in the extract, signals the inquisitorial function):

The duty imposed upon the tribunal by the Migration Act is a duty to review. 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.

Irrespective of the officially sanctioned inquisitorial nature of the MRT, the finding of this thesis is that the MRT discourse cannot be treated either as a solely inquisitorial (discourse) or as solely adversarial (discourse).

To recapitulate briefly, the term adversarial discourse refers to the discourse commonly occurring between the defence and the prosecutor in a common law courtroom (see Maley, 1994, for a good introduction of common law courtroom discourse). MRT discourse displays features of both inquisitorial and adversarial discourse modes and in particular exhibits hybridised features when the Member who conducts the hearing shifts his role for the purpose of discovering the facts of the matter. I will use the transcript of a short exchange below to illustrate.

The Member, in reviewing a partner application ("the Nguyen case"), attempts to find out if the marriage is genuine by firstly asking what the review applicant (who is also the sponsor) did when he went to the applicant's hometown (in this instance, the Member's role being an

enquirer). When the Member compared the version of events told by the sponsor and the version of the applicant, the role of the Member changed from an enquirer to an investigator⁷⁹. In sum, the review applicant told the hearing that he went to Vietnam for six months to see his partner (visa applicant). The Member at first queried about the review applicant's trip to Vietnam to visit the visa applicant. The line of questioning include (words to the following effect were said) "What was your wife doing?", "Did you ever do any work for your wife?" But the Member moved on to question why during the six months' time in Vietnam the review applicant did not visit his sister who also lived in Vietnam. Here is what was said:

(numbers refer to Turns; M = Member; RA – Review Applicant):

- | | |
|----|---|
| 1 | Mr: During the last visit, did you visit your sister? |
| 2 | RA: No. |
| 3 | M: During your six months in Vietnam, you didn't visit your sister? |
| 4 | RA: Sister and I have disputes, so I didn't visit her. |
| 5 | M: Dispute before or after? |
| 6 | RA: Before. |
| 7 | M: Is your wife aware of it? |
| 8 | RA: She does. |
| 9 | M: Does she know why? |
| 10 | RA: I didn't tell her the reason. |
| 11 | M: What's your wife's reaction? |
| 12 | RA: My wife tells me to settle it. |

In Turns 1, 3, 5 and 7 we can see that the Member was trying to investigate the matter and to find out why the review applicant during his six months' stay in Vietnam did not visit his sister who also lived in Vietnam. Frame by frame, the Member examined the review applicant's response carefully. By the time the Member got to Turn 9 and 11, we began to understand the strategy the Member was adopting and how skilful the Member was in finding

⁷⁹ The data was by way of note-taking. The hearing took place on 14 February 2014 before Member Dimitriadis at the Sydney Registry at 10:00 am. Professor Candlin and I attended the hearing. The hearing was a video link hearing as the review applicant was in Brisbane. The visa application under review was a partner visa. The review applicant was sponsoring his spouse (the visa applicant) to come to Australia from Vietnam, but the visa application was refused because the delegate of the Immigration Department was not satisfied that the relationship between the review applicant and the visa applicant was genuine.

out the relationship between the Review Applicant and the visa applicant. The purpose of the questioning is two folds, firstly to find out whether the answer provided by the review applicant was true and accurate and secondly, if the partner (here husband and wife) relationship was genuine, the visa applicant would have known about the dispute between the review applicant and his sister. The Member had the opportunity to find out from the visa applicant whether the answers provided by the visa applicant's version corroborated the Review Applicant's statement when he asked the former separately.

It is perhaps helpful to summarise briefly some of the essential characteristics of MRT discourse and the conventions governing the processes and procedures used in it as compared to courtroom discourse:

- (a) Unlike the court, the MRT is not bound by the rules of evidence (section 353(2) of the Act), which directly impacts on the manner of accepting evidence from the participants in the MRT hearing. For example, the MRT can at times accept evidence in the hearing which would otherwise be ruled inadmissible in a court hearing as hearsay. Likewise, the MRT can allow questions which would otherwise not be allowed in a court hearing on the basis that the questions are of leading nature.
- (b) the MRT can set their own practices and procedures (section 353(1) the Act) whereas court procedures are governed by court rules as set out in various legislation.
- (c) the MRT can conduct the hearing in an informal manner (section 353(2) the Act), hence the discourse in the hearings is less formal than the courtroom discourse.

As pointed out earlier, there is a large body of literature relating to courtroom discourse (See Gibbons 1994; Maley 1994; Coulthard 2011; Harris 2011; Hobbs 2011). In general, in courtroom discourse, the counsel, prosecutor and judge speak using interactive language "peppered with ritual courtesies and modes of address" (Maley, 1994 p.13). Because the rules of evidence govern a courtroom hearing, the judge is obliged to rule whether a party has

asked proper questions based on a number of considerations such as relevance and admissibility.

In an MRT hearing, however, there are no such formalities and the Member can decide the rules and allow questions in different formats. Unlike in a court setting where parties involved include the plaintiff, the defendant, the witnesses (as required) and lawyers for both sides, in an MRT hearing, the Member and the review applicant are the two main participants. The Member has absolute control in the hearing, unlike in court proceedings where, for example, in criminal matters, the prosecutor represents the government (Director of Public Prosecutions) and the defence counsel represents the defendant. In civil matters, there is a counsel representing the plaintiff and a counsel representing the respondent. The judge's role in court hearings is to ensure that both parties (plaintiffs and respondents in civil matters and prosecutors and defendants in criminal matters) are treated fairly in conducting their cases and in accordance with the rules of evidence and court rules governing the procedure of the matters before the court (Maley 1984; Danet and Bogoch 1984; Walsh 1984). The distinctive feature of the MRT is that the Member has been given absolute power to decide the case whereas in a court hearing, the judge is more like a referee, ensuring each side has a fair opportunity to put its case. In doing so, the Member has to be conscious about giving the review applicant full opportunities to speak out in favour or his or her case.

6.3 Discourse analysis and observations

In Section 6.3, which comprises the second part of this chapter, I report my observations and analyses of the discourse from the data sets referred to in Chapter 5. The basis of the analysis and observations is the role and participation framework discussed in Chapter 3 and 4. In addition, my observations will also be based on the construct of interdiscursivity as discussed earlier in this chapter.

The roles assumed by the Member while reviewing a matter or during a hearing included but were not limited to: a) interpreter of law (or the person who explains and interprets the migration law), b) enquirer and investigator, c) counsellor and d) advisor.

Bateson (1972) used the term “frame” to describe the way a message was intended to be interpreted by its recipient. This is a topic discussed in Chapter 4. He even emphasised that “the frame is consciously recognized and even represented in vocabulary (“play”, “movie”, “interview”, “interview”, “job”, “language”, etc) and I add in here “the hearing”. To elaborate further, he developed a psychological approach by saying:

- (a) Psychological frames are exclusive, i.e. by including certain messages (or meaningful actions) within a frame, certain other messages are excluded.
- (b) Psychological frames are inclusive, i.e. by excluding certain messages certain others are included. (p.187)

My discourse analysis is as follows. I use the data from data set 1 to introduce how a review application commences. Then, I discuss the legal implications that can be found in the discourse of the Member. More generally, I demonstrate how language interfaces with law.

6.3.1 Example 1

The diagram below depicts in schematic form how a visa application begins its journey and ends up in the MRT and how an MRT case can end up in the common law system:

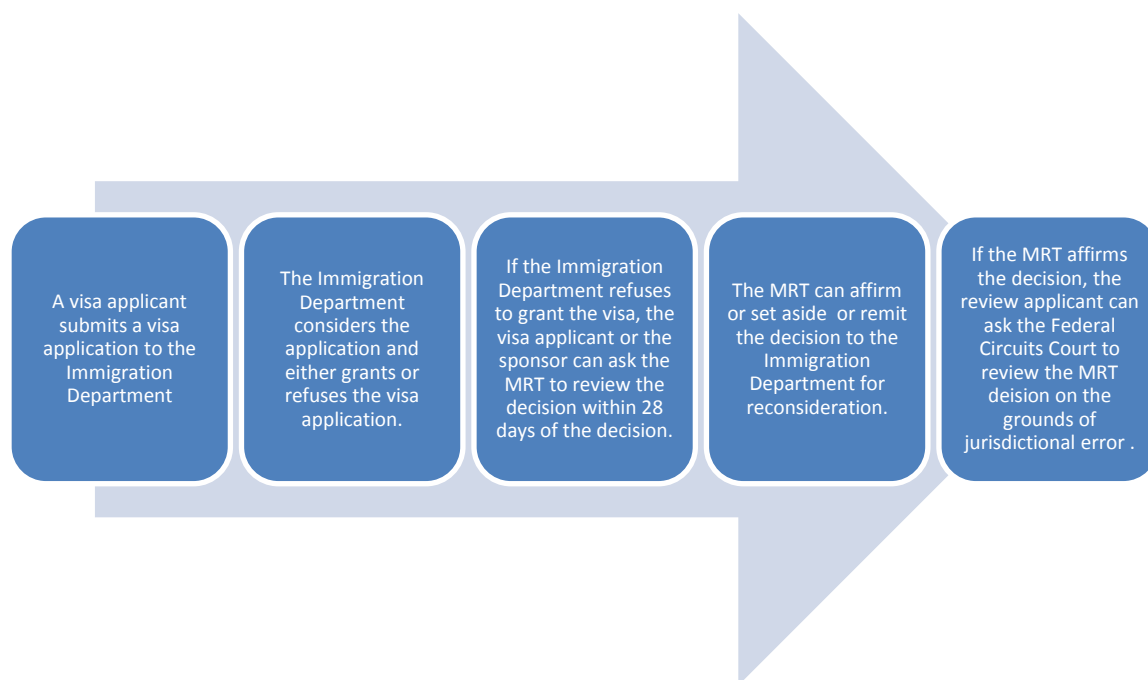


Figure 6.1 – How a visa application proceeds to the court system in Australia

Below, after a few brief paragraphs of background information (in italics), I present the transcript of a stretch of dialogue from data set 1 which provides a good example of how the Member commences a hearing. (The dialogue contains another comment, also in italics. Segments of the dialogue that I wish to highlight are in bold font.)

Background : Ms Y was married with a child. Sometime before the visa application was lodged with the Immigration Department, she divorced. As she was the only family member in China, she was eligible to apply for a visa under the last remaining relative subclass to come to Australia. Her sister was the sponsor.

Upon receipt of her application, the Immigration Department's officer in Shanghai visited her home to verify whether the divorce was genuine. During the visit, the officer located some male clothing in her room which Y claimed belonged to her ex-husband who came to visit their daughter.

The Immigration Department did not believe that the divorce between Y and her husband was genuine and refused her visa application.

Her sister in Australia lodged a review application at the MRT.

- 1 Member: As you are aware the application was refused because the Department was not persuaded that the Visa Applicant's relationship with her former husband had ceased.
I've read your Statutory Declaration but I still... **I'm going**

to just ask you some questions and give you an opportunity to give verbal evidence about what you know about your assistance, divorce and separation from your former husband.

Interval *A few moments later, the Member telephoned overseas to speak to the visa applicant in the following manner:-*

- 2 I have already asked your sister some questions about your situation that are relevant to your visa application. I'm quite *independent* from the Department of Immigration but the Department have sent your file to me so I have read that. As you are aware the Department refused your visa because the Department was not persuaded that you have really separated from your former husband. Now your sister has provided me with quite a lot of additional information including some statements from you concerning your relationship with your former husband. But I just want to ask you a few questions today and **to give you an opportunity to say anything further regarding your visa application.**

Note: Highlight added

By way of further background information, the visa applicant was a divorcee and had a daughter under the age of 18. All the other relatives of the visa applicant were Australian citizens. Under the circumstances, with the sponsor of her sister in Australia, she was eligible for a Remaining Relative visa⁸⁰. However, according to the visa requirements, she would not have been eligible for that visa if she had not divorced her husband as her husband had other family members in China. Before the visa application was decided, the Consulate in Shanghai sent some immigration officials to verify the claim of the visa applicant. When Immigration Department officials paid a site visit at the visa applicant's residence in Shanghai, they found some personal belongings of the visa applicant's ex-husband. Because the visa applicant had divorced but still allowed the ex-husband to stay in her apartment when he came to visit their daughter, the officials became suspicious. In the end, the Immigration Department refused

⁸⁰ See link <http://www.immi.gov.au/Visas/Pages/115.aspx> (Retrieved 2014. The general conditions for subclass 115 Remaining Relative visa can be briefly set out as follows:

You might be eligible for this visa if: (i) you make your application outside Australia (ii) your (and your partner's) only near relatives are settled in Australia and are all Australian citizens, Australian permanent residents or eligible New Zealand citizens; and (iii) one of your near relatives or their partner is prepared to be your sponsor.

the visa application as it was concerned that the divorce was not genuine but was enacted for the purpose of meeting the visa requirements for the visa sub-class of *Remaining Relative visa*⁸¹. The visa applicant's sister (the sponsor) applied for a review of the Immigration Department's decision at the MRT.

In this example, the Member is very careful to ensure that the participants, first the review applicant (who is the sponsor) and later the visa applicant, were respectfully informed of what the matter was about (Turn 1 and Turn 2), what power the Member had, and what the Member was required to do to fulfil the duty to act according to substantial justice and the merits of the case (Turn 2).

We observe that the more pressing need is to give the review applicant and visa applicant an opportunity to put their case before the hearing. In Turn 1, , the formulating of the question and the phrasing of the question demonstrate that the Member is very experienced. The statement is concise and clear about what she wishes to find out, a matter which relates directly to my discussion in Chapter 4 of how events are framed (see here Bateson, 1972 and Goffman, 1981).

If we regard the Member's initial statement as a macro-frame underpinning what the Member is about to ask the review applicant, we can say within the macro-frame there are several associated micro or sub-frames. By way of analysing what is said by the Member, it is possible to explore what the Member said to the review applicant frame by frame. The Member spoke in a very concise way to "give you an opportunity to give evidence" (Turn 1),

⁸¹ See link <http://www.immi.gov.au/Visas/Pages/115.aspx> Retrieved 2014.

The general conditions for subclass 115 Remaining Relative visa can be briefly set out as follows:

You might be eligible for this visa if: (i) you make your application outside Australia (ii) your (and your partner's) only near relatives are settled in Australia and are all Australian citizens, Australian permanent residents or eligible New Zealand citizens; and (iii) one of your near relatives or their partner is prepared to be your sponsor.

thus defining the macro frame, and then, setting up three sub-frames in the same clause, she asked the review applicant to tell her “what you know about your assistance... from your former husband” and “what you know about the divorce ... from your former husband” and “what you know about... separation from your former husband” . The words “assistance”, “divorce”, and “separation” have of course their own very general and unique meanings but they are here ambiguous. *Assistance* can refer to financial assistance and non-financial assistance and will require the visa applicant to explain and justify the assistance she receives from her ex-husband. *Divorce* has the general meaning of “legally dissolve the marriage”⁸² and here has its meaning is as defined in section 48 of the *Family Law Act 1975 (Cth)*, where it effectively means the marriage relationship has irretrievably broken down. The court will issue a divorce decree if the parties have separated for more than 12 months. *Separation* has its specific meaning in the *Family Law Act 1975 (Cth)*. Section 49 of the *Family Law Act 1975 (Cth)* stipulates that separation can be initiated by one party and to accommodate the principal of separation under one roof, the Act also recognise separation notwithstanding that the parties remain in the same residence.⁸³ Although the Member does not need to refer to the *Family Law Act 1975 (Cth)* in this case, it has to consider the fact and decide whether the divorce is genuine. The approach in the Member’s discourse in Turn 1 sets out what the Member intends to find out and how she will find it out. The facts given by the review applicant will then be assessed and verified for the purpose of assisting the Member to make a decision.

Turn two occurs after the Member has telephoned the visa applicant who was overseas. Prior to asking the visa applicant questions, the Member again commenced the formalities by telling the visa applicant (i) what the case is about, (ii) what power the Member has, and (iii)

⁸² Shorter Oxford English Dictionary, 2002, volume 1 page 713 entry 1.

⁸³ In practice, the court will require evidence from a third party to verify or corroborate separation does take place.

what the Member is required to do to act according to substantial justice and merit of the case. (Turn 2). This approach serves three functions. First it assures that the Member has the power to act in this matter. This form and formalities are indeed necessary for a discourse to be successful.⁸⁴ The second point in the discourse is intended to reassure the respondent that what she says will be taken seriously as the Member is empowered to make a decision in the subject matter. Third, the Member further assures the respondent about the criteria for how the case is to be conducted, namely, based on “substantial justice and merit of the case”.

In the next example, I draw the data from a court case (from Data Set 2) , in which a Ms Hui is seeking a judicial review of her independent skilled visa application. Her visa application was refused by the Immigration Department on the basis that the Immigration Department did not consider her qualification relevant to the occupation nominated in her visa application.

While I analyse the data on its own, I also compare and contrast aspects of the discourse and interaction that I identified in Example 1 with those in Example 2. To do so, I may have repeated some of the issues I have already said in Example 1 above. However, I consider this necessary as, through comparison, we are able to have an overall understanding of how the process is conducted and how different Members adopt a different discursive practice to complete the review application.

6.3.2 Example 2

First I reproduce the preamble from the record of *Hui v Minister for Immigration & Anor [2011] FMCA 486* (2 August 2011) below in italics (using the same paragraph numbering):

1. *Ms Hui studied in Australia before applying on 26 August 2005 for a ‘Skilled – Independent Overseas Student’ residence visa Class DD, subclass 880. The decision-making on her application became protracted, and the Department of Immigration had difficulty verifying one of her qualifications, a Certificate III in Hospitality (Commercial Cookery) issued by Sydney International College of Business (“SICB”) dated 23 June 2005. Eventually, a delegate refused the visa on 8 September 2009, on*

⁸⁴ See Editor’s Introduction in Bourdieu, Language & Symbolic Power (1991), p. 20.

the ground that she was not satisfied that Ms Hui had undertaken a course at SICB leading to that qualification. Ms Hui appealed to the Tribunal, which conducted further investigations of this issue. It made a decision on 24 February 2010, which affirmed the delegate's decision. It did so, upon a completely different issue, which had not been addressed by the delegate and was only raised with Ms Hui at the end of the Tribunal's hearing, which occurred on the day before the Tribunal's decision.

2. *Ms Hui now seeks judicial review of the Tribunal's decisions under s.476 of the Migration Act, on grounds which essentially argue that the administrative proceedings were conducted in an unfair manner. She needs an extension of time under s.477(2), since she initially complained to the Prime Minister and the Minister for Immigration, before filing an application in this Court. For the reasons which follow I have decided that I should extend time, but – with some hesitation – I have concluded that the Tribunal's procedures did not give rise to jurisdictional error.*

As a caveat and as a general comment, when I analyse data from Data Set 2, I draw out only what I can use in my own work. What I demonstrate is that the Member's discursive practice in Example 2 displays the features of an inquisitorial discourse but, nevertheless, he distinguishes himself from the Member in Example 1 in subtle ways.

The visa subclass in this data relates to a skilled migration visa. One of the main requirements of the visa is that the visa applicant must nominate an occupation that is within the Immigration Department's gazetted occupation list and evidenced by a qualification relevant to that occupation. According to the background information above, the visa applicant in Example 2 failed to prove that she possessed the qualification for her nominated occupation.

Below I reproduce a key exchange between the Member and the review applicant:

- 1 Member: One of the requirements for the grant of this particular visa is that **I must be satisfied that** each of those two qualifications are relevant for your nominated occupation.
- 2 Review Applicant: Yes, I think they are. Member, do you have the records of my CS registration for my restaurant.
- 3 Member: You have given it to me but what I'd like to hear from you is why you think your MBA is relevant to your occupation of a cook. Just stop there, please.

From Examples 1 and 2, there are commonalities between the language and formalities used. Both members adopt a consistent format in conducting the review. However, the Member in Example 2 uses different linguistic skills in his exchange with the review applicant. I analyse the two sets of data below to show how language and law interact:

(a) Tone of the Member can be found in the Member's discourse

When commencing a hearing, the Member is required to set out the rules and his power. Example 2 is an exchange between a Member and a non-represented review applicant during an MRT hearing. The visa application was originally refused by the Immigration Department on the basis that the qualification of the visa applicant was found to be not related to the occupation nominated in the application. In Example 1 above⁸⁵, the Member attempted to enquire about the visa applicant's relationship with her ex-husband without exercising too much pressure on the review applicant (Turn 1). However, in Turn 1 of Example 2, the Member uses a much stronger linguistic expression, "I must be satisfied that", to effectively demand an explanation from the review applicant by setting up his own "satisfaction" as the sole criterion of success. The authoritative tone of the Member, and the authoritative nature of his assumed role, is displayed by his use of language.

(b) The Member emphasises his position as a representative of the institution

The role of the Member is that of representing the MRT, and he is empowered to exercise the powers and discretion delegated to him under the Act. Section 349 of the Migration Act provides that:-

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

⁸⁵ The review applicant was in fact represented by a lawyer.

In Example 2, the Member does not explicitly spell out the power she has and what she intends to do. However, she makes it clear from the beginning that she has the authority to determine the case by employing the linguistic expression “**I must be satisfied**” (Turn 1). This linguistic strategy can also be interpreted as a warning to the review applicant that, if she is not satisfied, as the Member she has the power to decide either to confirm or set aside the Immigration Department’s decision in the matter before her.

In contrast with Example 2, the Member in Example 1 adopted a very different approach, highlighting her impartiality in (in Turn 2): “I’m quite independent from the Department of Immigration”. The linguistic marker “independent” may be interpreted as an assurance to the review applicant that her review application will be treated fairly and the decision to be made will not be influenced by the Immigration Department.

Further, instead of saying words to the effect that we find in Example 2 (Turn 1): “I must be satisfied”, the Member in Example 1 tried to be more sympathetic in her discourse as shown in Turn 2 above: “But I just want to ask you a few questions today and to give you an opportunity to say anything further regarding your visa application.” The manner the Member presents himself in Example 2 is more like a courtroom discourse where the judge is telling the parties to prove their case. In contrast, Example 1 (in Turn 1 and Turn 2) the Member suggests to the parties that her job is to investigate and the parties should make use of the opportunities to provide answers to substantiate their case.

It is commonly accepted in society that great care is needed when handling family cases. If we accept that it is reasonable for a Member to handle matters that involve sensitive social issues such as family cases with care, we can say that the Member in Example 1 was conscious that the issue between a party and her ex-husband was a complicated one and should be dealt with in a more caring and sympathetic manner. However, in Example 2, the Member was dealing

with a question that could be more objectively answered. The relevance of the qualification and the occupation can be found in the gazetted occupation list.⁸⁶ The Immigration Department also publishes the name of the assessment authority of each occupation.⁸⁷

A distinctive difference in the two data sets is the visa class, which in Example 2 is one of those for skilled migrants as opposed to the family stream in Example 1. With respect to the treatment of different visa categories, according to the MRT's annual report 2013-2014 (p.10), it has introduced special teams to handle different visa review applications. For example, in Sydney, the MRT has a family team, a skilled team and a partner and visitor team. The aim of the specialisation is for caseload management purpose. However, from an applied linguistic point of view, the specialisation can also provide linguistic and social benefits as Members involved in the particular class of visa review application have more experience and expertise in that category.

(c) The standard of substantial justice and the merit of the case

Since this thesis is not an example of legal research, it is not appropriate for me to discuss in detail the standards of substantial justice and the merit of the case. However, the linguistic usage and discourse employed in both Example 1 and Example 2 allow us to understand that both Members have endeavoured to allow the review applicant an opportunity to explain his/her case. This may be taken as the standard of substantial justice that the Members are required to achieve. From the legal point of view, the Member is required to observe the rules of procedural fairness "where the fair hearing rule requires that a person who may be adversely affected by a decision be given an opportunity to 'put their case' prior to the decision being made" (Cane and McDonald, 2008, p.128). Section 360 of the Act 1958 also stipulates that "the Tribunal must invite the applicant to appear before the Tribunal to give

⁸⁶ <http://www.immi.gov.au/News/Pages/changes-csol-sol.aspx>

⁸⁷ <http://www.immi.gov.au/Work/Pages/skilled-occupations-lists/csol.aspx>

evidence and present arguments relating to the issues arising in relation to the decision under review”.

In Turn 3 of Example 2, the Member is emphasising what he wants to hear from the review applicant directly: “what I’d like to hear from you is why you think your MBA is relevant to your occupation of a cook.” It is a commonly known fact that justice not only needs to be done, but needs to be seen to be done. Here, the Member is making sure that the review applicant has been given an opportunity to put her case and that rules of procedural fairness are observed and that section 360 of the Act 1958 is complied with.

From the legal perspective, if the decision of the MRT is not in the review applicant’s favour, the review applicant can appeal to the Federal Court on the basis of procedural fairness and at some stage the hearing record will be produced as evidence. Accordingly, the Member is mindful of what she says and needs to state her position in an open hearing so as to create a record that she has given the review applicant the opportunity to put her case.⁸⁸

As pointed out above, unlike the Member in Example 2, the Member in Example 1 does not use a powerful and subtly threatening linguistic expression to emphasise her authority, such as “I must be satisfied” (Example 2, Turn 1), but the participant in the matter was no doubt aware that the Member had the authority to conduct the review and decide the case, when she said: “ I just wanted to ask you a few questions today and to give you an opportunity to say anything further regarding your visa application.” From a legal perspective, the linguistic expressions, “just wanted to ask you... to give you an opportunity to say” clearly illustrate the power the speaker has in reviewing and making a decision on the matter.

This last observation recalls what Bourdieu observed when he said: “...the power of words resides in the fact that they are not pronounced on behalf of the person who is only the ‘carrier’

⁸⁸ For further discussion of the intersection of language and power see Fairclough (2001).

of these words: the authorised spokesperson is only able to use words to act on other agents and, through their action, on things themselves, because his speech concentrates within it the accumulated symbolic capital of the group which has delegated him and of which he is the authorised representative” (Bourdieu 1992, pp. 109-111).

The Member was speaking in a way that is governed by the convention of the institution he represents, and it is through the discourse, the institution implements or enacts the power pursuant to the Act. Such mode of discourse is a kind of institutional discourse that is commonly found when the representative attempts to inquire.⁸⁹ The aforesaid use of language can be taken as an indication that the representative has the authority to ask the question (in here the Member asks the review applicant to explain about his/her case) critical to the case so the Member can make a decision. It is however important to point out that the use of language may also affect the outcome of the enquiry. In the Antipova case⁹⁰, the Member has exercised his authority by ignoring the review applicant and the witness’s request for an opportunity to speak about the case. That case was appealed to the Federal Court on jurisdictional error. The broader implications of the use of language by the Member in that case not only gives rise to unfair treatment of a case but also leads to a communication breakdown between the Member and the review applicant and other participants.

The two data examples have illustrated that both the Members have incorporated the legal discourse in their enquiry and such interdiscursivity appears to have become a standard workplace practice and professional communication of the MRT. To be more specific, the Members constantly remind the review applicants who they are and what they are doing while conducting their enquiries.

⁸⁹ Roberts and Sarangi (1999), p. 480.

⁹⁰ The case will be discussed further in Chapter 8.

6.4 Conclusion

In this Chapter I have discussed some of the more important linguistic constructs relevant to my investigation and have made some analytical observations on two examples from different Data Sets. I have from time to time drawn on insights from leading scholars in discourse related fields to support my analyses. The interface of language and law produce some interesting insights into how the visa review is conducted and how Members formulate questions in their discourse. My discourse analysis briefly touched on the role of the Member. I will in the next chapter make more detailed observations with respect to the role and discourse of the Member. I will also draw from other Data Sets to discuss how decisions are made and how issues of power are negotiated by the participating parties.

Chapter 7

Further data analysis

7.1 Introduction

In the process of analysing the discourse of the MRT, it is interesting and fruitful to examine how the Members demonstrate their linguistic skills, linguistic competence and strategies in handling different kinds of review application. As part of my analytic process, I documented and discussed in Chapter 5 the various data sets that I am using for the discourse analysis. As far as I am aware, the topic of this research has not been explored before, thus I have had to draw from a variety of scholarly sources, including but not limited to those dealing with legal expertise and linguistic expertise as well as the broad literature on language, law and discourse.

In Chapter 6, I cited examples to support my claims concerning the interaction of language, law and discourse in the context of the MRT. To continue where I left off in that chapter, I will now endeavour to provide some further analyses and to support my claims in this research thesis.

In this chapter, I focus on the roles of the Member and make some comparisons between the Member's role, behaviour and courtroom discourse. I analyse the discourse data that I collected to reinforce my findings. Against the backdrop of roles discussed by scholars, data are used to critically analyse the roles of the Member found in the data.

7.2 Roles and discourse

In his paper about self, identity, status and role, Sarangi (2010) points out that all of these elements are crucial to discourse analysis whereby he uses a transcript of a doctor-patient

encounter to illustrate what he describes as the role performance of that particular profession. He also points out that some of these concepts are used interchangeably by other scholars (Sarangi 2010, p. 27). However, for Sarangi these concepts are far from “interchangeable”. For example, the role of a person may not be the same as the person’s status in the society and the role may not be equivalent to the status as each individual in fact assumes a different role in a different setting, or to borrow from the term used by Goffman(1959), “front stage” and “back stage” roles are quite different. The way identity can be defined can be quite complicated as scholars express different approach towards it. For example, identities can be constructed on the basis of the role one plays in an institution (see S. Candlin, 2011 with respect to nurses’ roles and identity and also Scollon and Scollon, 2001, p.284) in relation to intercultural communication when they say “any communicative change is a change in identity whereby they point out the problem of intercultural and inter discourse communication are mainly for expressing particular identities . In this thesis, I am concerned mainly with the concepts of “role” and “identity”, and use the term “role” in the way it was adopted by Goffman.

More specifically, the term “role” is used in this study in an interactional sense similar to that employed by Goffman (1959; 1961) and others (Sarangi, S. and Roberts, C., 1999; Sarangi, S., 2010). It includes the interactional relationship between the Member and the review applicant and/or the review applicant’s migration agent.

Indeed, the role or situated identity of a professional practitioner is sometimes not as clear-cut in a social-professional interaction as we might expect. A major reason for this lies in the fact that role-performance is both complex and unpredictable. Consider the following excerpt from Goffman (1959) who, in describing social performance, uses the carefully differentiated terms “gives” and “gives off” to define two distinct modes of expressiveness of the individual:

The first involves verbal symbols or their substitutes which he uses admittedly and solely to convey the information that he and the others are known to attach to these symbols. This is communication in the tradition and narrow sense. The second involves a wide range of action that others can treat as symptomatic of the actor, the expectation being that the action was performed for reason other than the information conveyed in this way... As we shall have to see, this distinction has an only initial validity. The individual does of course intentionally convey misinformation by means of both of these types of communication, the first involving deceit, the second feigning. (Goffman, 1959, p.2)

Goffman also observes (ibid.) that others who are present to the interaction must accept what the speaker tells them on face value and are unlikely to find out the true value of what is said until after the speaker leaves their presence – if then.

What Sarangi (2010) is endeavouring to do in introducing the concept of “role performance” in a professional setting, and what Goffman indeed is also saying in his book, “The Presentation of Self in Everyday Life” (1959), is to establish that performance and role are closely related, given that both of them concern the minutiae of social interaction. However, they are also distinct and interact in subtle ways.

To expand on Goffman’s quotation above and consider its implications in a legal setting, we often hear the judge or the counsels for the prosecutors/plaintiffs or defendants/respondents during a court hearing expressing their view that a particular witness is not trustworthy or not reliable or that the credibility of the witness is doubtful after the witness has given evidence. It is clear from this that when a person says something, he not only conveys a message or information, but also presents to the listeners or other participants what he wants to be seen to be and what implicit messages he wishes to be conveyed and understood. This of course also happens in the MRT. During the review process, review applicants are trying to convince the Member to decide the matter in their favour, while the Member is required to consider the submission and evidence put to him/her and decide on it according to the law, which may not

be in the review applicants' favour. Their interests and intentions are clearly separate. For example, in the data discussed below, we can see sometimes, the review applicant attempts to find out what the Member wants in order to achieve a favourable result, hence interacting in a fishing expedition manner whereas the Member is maintaining his role as an investigator and interpreter of law.⁹¹

Against this backdrop of role and performance, I set out below the observations I made in analysing the discourse of the Member and the participants.

7.3 Discourse and role(s) of the Member of the MRT

As stated in the previous chapter, the MRT is expected to review or more specifically to ask questions to find out the truth about the review application before affirming or rejecting the Department of Immigration's decision. However, the Member must also balance competing and indeed sometimes conflicting priorities. The statement posted on and retrieved from the MRT/RRT website as at December 2014 sets out the following goals:

In reviewing a decision to refuse or cancel a visa, the tribunals are required to conduct a merits review that is 'independent, fair, just, economical, informal and quick'. We aim to make the correct decision in individual cases, and to influence decision-making through quality and consistency of our decisions.

(Source: <http://www.mrt-rrt.gov.au/>)

These goals are indeed complicated and at times in conflict. Every case under review involves different considerations of the fact and circumstances notwithstanding that the law sets out the requirements in clear terms. Some cases will require Members to spend a substantial amount of time to investigate and to gain an appropriate understanding of the background of the participants in the matter, before the Members are able to make a merit review in an independent, fair and just manner. To do so, the components of the goal of being "economical"

⁹¹ See *Saha v Minister for Immigration & Anor* [2010] FMCA 715

and “quick” may not be achieved or, equally, the goals of being “fair” and “just” may have to be compromised. As far as the data reveals, in practice it is sometimes difficult to be simultaneously “fair and quick” or “fair and economical” in conducting a merits review. For example, in *Antipova v Minister Multicultural and Indigenous Affairs* [2006] FCA 584, the Member gave no time to the review applicant to give her account of events as the Member emphasised that the hearing was taking too much time.

What has been discussed in Chapter 6 suggests that the MRT discourse belongs to the inquisitorial discourse genre. In addition, the goals set out on the MRT website above and the comments made by the High Court in *Minister for Immigration and Citizenship v. SZIAI* [2009] HCA 39 cited jointly and severally also strongly suggest that the Member’s roles are primarily inquisitorial. This view is further reinforced by the provisions of Section 353 of the Act, which also emphasises the Member’s inquisitorial duties. However, my own research suggests that Members are not limited to an inquisitorial role when conducting hearings. Indeed, they adopt multiple roles, such as that of an enquirer or investigator or interpreter of law, and even at times that of a counsellor. These multiple roles were sometimes found to occur in the same hearing.

As far as discourse and roles are concerned, it is suggested that Members perform their multiple roles via their spoken discourse, or talk, during the hearings. Examples will be used to demonstrate this process. A change of participant roles often follows or is followed by a change of footing, i.e. a change in the speaker’s stance towards an addressee (Goffman 1981; see also Aronsson and Rindstedt 2011; Maseide 2011).

It is worth noting here that the multiplicity of roles occupied by the Members (and indeed by every one of us) seem to be universal and does not exist only in a legal setting. Foucault (1972) makes the following observations on the multiple roles of the medical professional:

If, in clinical discourse, the doctor is in turn the sovereign, direct questioner, the observing eye, the touching finger, the organ the deciphers signs, the point at which previously formulated descriptions are integrated, the laboratory technician, it is because a whole group of relations is involved. Relations between the hospital space as a place of assistance, of purified, systematic observation, and of partially proved, partially experimental therapeutics, and a whole group of perceptual codes of the human body – as it is defined by morbid anatomy; relations between the field of immediate observations and the domains of acquired information; relations between the doctor's therapeutic role, his pedagogic role, his role as an intermediary in the diffusion of medical knowledge, and his role as a responsible representative of public health in the social space. (pp.58-59)

Foucault is giving a detailed explanation of the roles that a doctor may play in different settings; or from a converse perspective, the roles that doctors are required to play by that setting, its purposes and its interrelationships. It seems from what Foucault is saying that role is in a way determined in the nature of the interaction among the participants.

Since the interaction is viewed as a determining factor of the role played by the participating party, the definition of “interaction” given by Goffman (1959, p.15) is relevant here. He says, “An interaction may be defined as all the interaction which occurs throughout any one occasion when a given set of individuals are in one another's continuous presence... ” . Goffman is emphasising the importance of interaction in the studies of how we perform in the presence of others and how others understand us during the interaction. In this regard, any participant in an exchange will be subject to the other participant's scrutiny with respect to the statements or questions he/she makes. This situation not only happens in a social setting but also in a legal setting such as the MRT. During a hearing, Members listen to the response by the review applicant and other participants such as the migration agents to verify the veracity of facts as the hearing unfolds. Any remarks made by the Member during the interaction with the participants are also closely watched (or monitored) by the review applicant or his/her migration agent as these remarks may foreshadow whether the decision to be made by the Member is favourable or unfavourable to the review applicant. If the review applicant is able

to understand the message conveyed or embedded in the interaction, the review applicant may be able to prepare a timely and appropriate response to the issues raised therein.

7.4 Data, analysis and discussion

Based on the above discussion of roles and interactions, I will now provide some data examples to support my observations and claims in analysing the MRT discourse.

7.4.1 Example 3

The following exchange between the Tribunal Member and an Applicant is part of the transcript of data set 3 from *Saha v Minister for Immigration & Anor [2010] FMCA 715* (13 September 2010). In order to evaluate the transcript, it is important for the reader to understand the background of the case which I cite below from the judgement directly (using its paragraph numbering).

1. Mr Saha – the applicant – arrived in Australia in June 2002 on a student visa. His student visa expired in July 2003 but he has remained in Australia, covered by a series of bridging visas for most of his subsequent period of residence. A case history is set out in the delegate’s decision, and does not need to be detailed. In short, during the period between 2003 and January 2010 he made further visa applications, engaged in litigation, and made at least one application for Ministerial intervention.

2. On 7 January 2010, he lodged an application for permanent residence in Australia as a child. He did not identify his parents as Australian citizens or permanent residents, but said that they were living in India. He gave his birth date in 1983, showing that he was aged 27 at time of visa application. In relation to the “child’s relationship status”, he ticked the box for “married or in a de facto relationship”, inserted the name of a person, and gave “date of marriage or date de facto relationship began” as a date in August 2008. The visa application also named a different person as the source of Mr Saha’s financial support, but the

relationship of that person to him was not self-evident. Other sources of support were referred to as “friends and family”.

3.A delegate addressed the visa application in a decision made on 14 January 2010, one week after the application was lodged. (Source: Saha v Minister for Immigration & Anor [2010] FMCA 715 paragraph 1 and 2).

Briefly, the visa application under review belongs to a visa subclass called “Child visa (subclass 101). According to the Immigration Department’s website, “A Child visa (subclass 101) allows an eligible parent sponsor his/her child to live in Australia indefinitely. The parent can apply on behalf of a child younger than 18 years of age.

According to the website, the definition of an eligible parent is:

- an Australian citizen;
- the holder of an Australian permanent resident visa; or
- an eligible New Zealand citizen.

The visa application must be lodged outside Australia and the child must be outside Australia when the visa is decided.”⁹²

The *Migration Regulations* (clause 802.214) also set out that the “child visa” applicant can be over 18 years of age if the applicant meets some of the requirements including but not limited to that the applicant (i) is not engaged to be married; and (ii) does not have a spouse or de facto partner; and (iii) has never had a spouse or de facto partner; and (b) the applicant is not engaged in full-time work. For clarification, in the judgement, the term “delegate” refers to the migration officer who has been granted power under the Migration legislation as the delegate of the Minister of Immigration.

M: Member RA: Review Applicant
Numbers refer to Turn

1	M:	Okay. And you are either married or in a de facto relationship?
2	RA	Yes, de facto.

⁹² See <http://www.border.gov.au/Trav/Visa-1/101-> for further details.(Retrieved 2014).

3 M: De facto, from 15 August 2008?
4 RA: That's right.
5 M: With Ms P?
6 RA: Yes, sir.
7 M: So the law says, if the applicant has turned 18, which you have, the
applicant does not have a spouse or de facto partner; you do have a
de facto partner?
8 RA: I do, yes
9 M: So you're excluded from a Child visa because you have a
partner.
10 RA: Well it's not my married or anything.
11 M: Doesn't matter, de facto is a partner under the law. It says either a
spouse, which is someone you're married to, or a de facto partner
12 RA: If she wasn't my de facto, what would have been the difference?
13 M: Well, no doubt, there would be other grounds that you would not
be successful in this visa. But I'm looking at the grounds that the
Department used in their decision to you. So I'm just trying to
show you, there are many things that you have to satisfy, so it's
difficult to know where to start
14 RA: Sure.

The relevant part of the exchange is cited in its entirety above so readers will understand how the issues were raised and discussed. However, for the sake of easy reference, when I discuss and analyse it, I will quote the relevant turns concerned again if necessary.

The roles of hearer and speaker in this dialogue and their turnabout are taken by the Member and the applicant. A change of role of the Member may be triggered by the response of the applicant either (a) in response to the Member's questioning or (b) in reply to a proposition made by the Member that leads to a statement made by the applicant.

The Member is attempting to seek clarification from the applicant about his marital status (Turn 7), while the applicant's replies appear evasive (Turn 10 and 12). The interaction between the parties constitutes an informative procedure designed by the Member to expose the facts of the matter.

The different participant roles assumed by the MRT Member are set out and analysed in the following paragraphs. The presentation is not meant to be comprehensive or exhaustive but

will serve to support the claim that the Member is adopting several different roles during the hearing.

(i) Enquirer

The Member's opening turn (Turn 1) enquiring about the marital status of the Applicant is straightforward and designed to extract from the applicant information the Member already knew, bearing in mind that the Member has been given the full record of the matter by the Immigration Department as part of the review process (see summary above). The questions from Turn 1 to Turn 3 (albeit posed as statements, for confirmation) as well as and answers show how the Member is attempting to elucidate the Applicant's situation in the context of the visa application under review.

(ii) Interpreter of law

The second role of the Member in the example is of that of the role of interpreter of law.

- | | | |
|---|-----|--|
| 7 | M: | So the law says, if the applicant has turned 18, which you have, the applicant does not have a spouse or de facto partner; you do have a de facto partner? |
| 8 | RA: | I do, yes |
| 9 | M: | So you're excluded from a Child visa because you have a partner. |

In Turns 7 to 9, triggered by the response of the Review Applicant in Turn 6, the Member chooses to explain the law to the Review Applicant in an orderly fashion. The linguistic marker "so" in Turn 7 and Turn 9 plays a very significant function incorporating the meanings, for example, "in this regard" for first line of Turn 7 and "as a result" or "consequently" for Turn 9. The approach taken by the Member can be interpreted as an attempt to inform the review applicant (or confronting the review applicant) that unless he can produce evidence to contradict the facts, he is not eligible for the visa under review. The

linguistic marker “so” therefore has the significance of stopping the review applicant being evasive in answering questions put by the Member. It is also used by the Member to signal a shift in his role from the enquirer to the interpreter of law as the Member is providing an analytical response based on the law.

We may also find that the Member’s attitude is quite aggressive. At least, as compared with the questioning skills in Turn 1, the questioning of Turn 7 and confirmation of Turn 9 are more aggressive than in Turn 1. What I mean by “aggressive” is that the questioning or examination is in fact narrowing down the outstanding issues swiftly to the crucial point, i.e. whether the review applicant has met the requirements. There are no more general questions asked with respect to the relationship as the law clearly sets out that no relationship is allowed in this visa subclass application. This change in attitude demonstrates what Goffman (1981) points out as a change of footing:

A change in footing implies a change in the alignment we take up to ourselves and the others present as expressed in the way we manage the production or reception of an utterance. A change in our footing is another way of talking about a change in our frame for events. (p.128)

To be clear, I am not saying or suggesting that the change of role has to occur simultaneously with the change of footing although sometimes it does. The change of footing, however, is often found as a response by the second participant to a statement or questions made by the first participant during an exchange. Goffman’s notion of change of footing helps to realise how a participant handles a situation.

The role of the Member as interpreter of the law is consistent with Example 2 in Chapter 6. Readers may recall in Turn 1 of Example 2 (which is cited again below for easy reference), the Member is explaining to review applicant that the review applicant has to satisfy the legal requirements in order for her review application to be successful.

- 1 Member: One of the requirements for the grant of this particular visa is that **I must be satisfied that** each of those two qualifications are relevant for your nominated occupation.

The Member's role here is that of explaining the law to the review applicant, and as such we may describe his/her role as that of an interpreter of law. The use of the first person singular pronoun "I" here is consistent with the power the law confers on the Member. Indeed the word "I" can be viewed as the equivalent of "the MRT" having regard to section 349 of the Migration Act above.

The Member begins on an official note (see end of Turn 1 above), "I must be satisfied", when she emphasises the importance of the legal requirements that the review applicant needs to fulfil, but then shifts to a less formal tone (see line 6), "I'd like to hear from you". The choice of words does not influence her role as an interpreter of law but sets up a more accommodating environment to allow the review applicant to speak out to support her case.

A change of footing followed by a change of role can also be found in Example 2 (in Chapter 6) when the Member says to the review applicant "...but what I'd like to hear from you is why you think your MBA is relevant to your occupation of a cook." (Turn 3). Upon hearing the review applicant's replies (Turn 2), the Member changes her footing again, from that of an interpreter of law to that of an enquirer by asking the review applicant "why you think your MBA is relevant to your occupation of a cook" (Turn 3). Clearly, the Member wants to hear the review applicant's explanation as to why the review applicant thinks that her qualification of MBA is relevant to her occupation nominated in the visa application. Her use of the words "Just stop there please" at the end of Turn 3 fits in with the way that Bateson views frames as explicitly signalled contexts when he writes, "Attend to what is within and do not attend to what is outside" (Bateson, 1972, p.187). In this case, the Member is emphasising to the review applicant that here she needs to explain the relevancy of the qualification to the visa

application, nothing more. This is also a skill that consists of narrowing the facts of the case at issue and focussing on the relevant parts of a subject matter.

During professional communication with clients or patients, professionals (I am also speaking of my own experience as a legal practitioner) are at times invited to give an answer to questions in a personal capacity. Incidental to the discussion of role, role distancing is a strategy commonly used by professionals in their practice. What I mean by “role distancing” is the way professionals distance themselves from attaching to their clients. For example, when professionals (such as doctors, lawyers etc.) are interacting with their patients/clients, patients/clients may ask them questions like, “If you were me, what would you do?”; under the circumstances, the professionals will endeavour not to get too personally involved in their clients’ situation as such an involvement may affect, if not cloud, their professional judgement. Similarly, like every professional, Members at times will face the same situation, where the participating party will ask for their views. In the discussion below, I show how the Member deals with this awkward situation.

(iii) Role distancing

In Example 3, when the Member tells the applicant that he is not eligible for the Child visa, the applicant appears to be confused with the meaning of “de facto”. An issue of the cultural understanding of the term may have arisen, however, in Turn 11, the Member switches to the interpreter of law role and explains to the applicant that the law covers both a de facto relationship and a married relationship. It may be argued that the Member ignores the review applicant’s understanding of “de facto” or the Member considers that putting the discourse back in the legal setting is vital in the hearing. This is an important move of the Member bearing in mind that the hearing of the case may be side-tracked and more time-consuming should the Member fail to manage the hearing successfully. Clearly, one of the principles of

the establishment of the MRT is to provide a fast and economic forum for the matter to be heard, and the way the Member runs a case will determine how much time will be spent on a matter.

Turn 13 shows how the Member is trying not to get involved in a discussion of some speculative circumstances and avoids the topic of whether the person mentioned in the application is or is not the applicant's "spouse".

The applicant has tried to seek the Member's opinion on the point that if the relationship was not a married relationship, what would have happened. But the Member distances himself from taking on a personal-relational role and maintains his professional MRT Member's persona. In Turn 12, the applicant attempts to discover whether there is any leeway to get around the legal requirements of a Child visa, saying "*If she wasn't my de facto, what would have been the difference?*" Namely if there was no official relationship at all, would he then be eligible for the visa?

The Member blocks this enquiry, alluding to other evidence in the applicant's file, in what might be a considered a somewhat dismissive turn:

- 13 M: Well, no doubt, there would be other grounds that you would not be successful in this visa. But I'm looking at the grounds that the Department used in their decision to you. So I'm just trying to show you, there are many things that you have to satisfy, so it's difficult to know where to start

The Member is aware of the applicant's intended strategy, and to distance himself from it as well as to reiterate the legal position, the Member is reminding the applicant of the purpose of the hearing and the basis of the review of the Immigration Department's decision. This move ends the applicant's intention to enquire further as to how to go around the legal requirements for his visa application.

That being said, it is vital to understand that the exchange also illustrates that the Member is making a decision based on the facts and evidence before him rather than responding to hypothetical questions put to him by the review applicant. This approach is what the Member is required to do by the law.

Professionals often distance themselves or detach themselves from their clients so that they can provide an objective view or decision. But, in here, the better view is in addition to role distancing, the basis of the Member's refusal to answer hypothetical questions is more likely than not to discharge his/her duties in the reviewing process in an appropriate manner. Plainly, to provide an answer on his/her own view on hypothetical questions may constitute or deemed to be acting *ultra vires* and may consequently lead to be relied upon in an application for judicial review by the participants in future.

It is also noted that the review applicant does not really want to seek an advice from the Member. Rather, the review applicant is in fact trying to find out what he has to do or say to the Member in order to get a favourable decision in the matter.

Role distancing is widely recognised as an interactional phenomenon that functions to maintain confidence in a particular social role by demonstrating that one is not irrevocably bound to it (Goffman, 1959). Giddens (1988:260) points out that, "Role distance can be a way of demonstrating supreme confidence in the performance of tasks involved in a particular role. By demonstrating to others that he or she does not fully 'embrace', in Goffman's term, the expectations involved in a role, the individual might actually validate rather than cast doubt upon its authenticity".

In the context of the MRT, the Member is institutionally required to maintain a distance from applicants and their agents, but at times ~~if~~ he or she ~~is~~ feels obliged to play a different role, as

for example in advising the party who needs ~~it~~ that kind of help or ~~to~~ in resolving a some interpersonal dilemma. We will see examples of this below.

The next data analysis centres upon a student visa (Example 4). Student visa applications form a big part of visa applications as there are many overseas students coming to Australia. There are a large number of student visas that are processed by the MRT (see Chapter 3 for statistics).

7.4.2 Example 4

In a nutshell, Example 4 is about an applicant who is a young man and who has just finished high school and is doing a short language course. The Immigration Department refused the applicant's student visa application because the applicant has failed to provide a Certificate of Enrolment (COE) to substantiate that an educational institution has offered him a place to study in Australia as required by law. The applicant explains to the Member that his parent wants him to study in a government school but he prefers to study in a private school.

According to the applicant, the government institutions have a policy that they only issue a COE before a student comes to Australia, but there is no such restrictions for the private schools to do so. The parent worries that private schools are not run properly so refuses to let the student enrol in a private school. In the absence of a COE, the Immigration Department will not issue a student visa, thus the applicant has to return to his home country.

The hearing record to be examined below focusses on how the Member explain to the applicant the consequence of failing to satisfy the visa requirements. It belongs to data set 4, namely personal attendance of hearing. The hearing took place on 2 March 2011 at 3:30 pm before Member Raif at the Sydney Registry of the MRT. For privacy reasons, the review applicant's name is withheld. I attended the hearing in person and took down notes as accurately as I could. The exchange represented below is based on those notes.

M: Member RA: Review Applicant Numbering refers to Turns

- 1 M: Do you have any additional documents you wish to submit?
- 2 RA I finish the course. I got the new certificate...
- 3 M: Have you got a new COE?
- 4 RA: No, I don't have one. I can't enrol because the school said I don't have a student visa.
- 5 M: Have you tried to get a COE?
- 6 RA: My mother would not allow me to enrol in private schools, so I can't get a new COE. My mother only allows me to enrol in a government school or TAFE, but they want a student visa before allowing me to enrol.
- 7 M: You should try to get a COE, and decide later what you want to do.
- 8 RA:
9. M: If you can't provide a new COE, I have no choice but to decide the matter according to the legislation and send it to Immigration Department for further action.

The above example has been selected to show (among other things) that the Member, instead of distancing herself, attempts to provide some kind of advice to the review applicant in a tactful manner. Before coming to that point, I will explore the various roles assumed by the Member during the exchange.

(i) Enquirer and/or Investigator

When the hearing starts, the Member enquires if the Review Applicant has brought with him any further documents to be submitted.

However, the applicant appears either not to understand the question or to be engaged in his own thoughts, providing an irrelevant answer (Turn 2) to the question posed, i.e. one that he considers appropriate. So in Turn 3, the Member rephrases the question and indeed thus changes her role from enquirer to investigator.

However, the response by the applicant in Turn 4 has caused the Member, in Turn 5, to investigate whether the applicant has ever before tried to get a COE. This is a sign of a change of footing. The Member changed again from enquirer to investigator.

(ii) Counsellor/advisor/interpreter of law

The Member has tried different strategies to indicate to the visa applicant what she wants from him, but it seems that, if she maintains this approach, it is very likely that she will not get the message across to him that the matter is indeed very serious. Thus, instead of the role of enquirer/investigator, the Member now chooses another role, that of Advisor/Counsellor, shifting her footing to advise the applicant as to how he could resolve the problem, saying: “You should try to get a COE, and decide later what you want to do” (Turn 7).

The Member realises that words have to be supported by action (and here the action is based on the law). So she warns the visa applicant that “If you can’t provide a new COE, I have no choice but to decide the matter according to the legislation and send it to the Immigration Department for further action.” (Turn 9). This last change of footing shifts her role again, from that of an advisor/counsellor (Turn 7) to that of an interpreter of law (Turn 9).

In Turn 9, the Member has also demonstrated that she is compassionate regarding the dilemma the student is facing and is fully aware that should the student not take her advice, the consequences for him could be very serious.

To elaborate this point further, in Turn 9, the Member resumes her role as an interpreter of law and reminds as well as warns the visa applicant that she is bound by the law and has to make a decision according to the Act if a COE is not provided. At that juncture, she is referring to the fact that if the student fails to meet the requirements of the student visa, the legal consequence will be a serious one.

The change of role followed by the change of footing brings about consequent variations in textualisation. The change of role of the mediator also takes place during a mediation session, as observed by Candlin and Maley (1997) who argue that as a result of shift of footing, “the mediator also acts in different roles, such as leader/negotiator to a facilitator/therapist during a mediation session” (1997, p.211).

In normal legal court proceedings, judges rarely advise the parties what to do as the judge’s role in such as a court hearing is to ensure each party is fairly treated in the courtroom. The approach taken by judges is maintained even if the party in court is not represented. To support this generalisation, the following exchange shows clearly how a Magistrate resists requests for advice from a Defendant (quoted from Harris, 1994, pp. 166-167):

- | | | | |
|---|---------------|--|---|
| | M: Magistrate | D: Defendant | Numbering refers to Turns |
| 1 | M: | again – are you | um – are you going to make an offer – uh –uh to discharge the debt? |
| 2 | D: | would you in my position? | |
| 3 | M: | I – I’m not here to answer questions – you answer my question | |
| 4 | D: | one rule for one – and one for another I presume | |
| 5 | M: | can I have an answer to my question – please | |
| 6 | M: | the question is – are you prepared to make an offer to the court | 8. to discharge – the debt |

The above data is drawn from a magistrate’s court hearing in the UK. The defendant is unable to pay a debt and a judgement order was made against him. The magistrate is trying to arrange for the defendant to repay the debt by instalments (Turn 1). But the defendant takes the question back to the magistrate (Turn 2). The magistrate bluntly tells the defendant that he (the defendant) needs to answer the question himself. This bluntness triggers the defendant’s

rather disrespectful rejoinder in Turn 4 when he says, “one rule for one – and one for another I presume”.

As compared with the approach that the magistrate takes in the above data with the extract in Example 4, the MRT Member has taken a different approach and tactfully given advice to the visa applicant.

However, it was observed that not every Member has the same ability to shift roles, as shown by their discourse. There are instances where Members persist in their questioning or inquisitorial role without taking into account any social or personal factors.

To sum up the discussion of role in this part of the chapter, I draw on one of the Federal Court cases to demonstrate that some Members are more aware of their different roles than others and some are less sensitive to cultural issues than others.

In order to allow the readers to appreciate the roles and discourse moves of the Member in the said case, I will use one extract from the transcript and one extract from the commentary by the judge⁹³ who heard the matter (both extracts are from the same source). By comparing the two, we will be able to understand the predicament the review applicant and the other participating parties are facing. This matter also to certain extent illustrates the relationship between the MRT and the court. In the absence of an appeal avenue in the court system, the review applicant will be unable to access the kind of justice that is available to a party in a court system. From a converse perspective, we can also interpret the said avenue to the court system as a way how MRT cases are scrutinised by the Federal Court.

⁹³ Justice Gray is the presiding judge.

The below data analysis also illustrates that the judgment in its textual form can be a good source of data for reconstructing what happened during the hearing. This form of data together with the exchange between the parties (cited within the judgement) allows the readers to gain insight as to why the judge is criticising the Member concerned and how the Member committed jurisdictional error, which is the basis of the judicial review.

7.4.3 Example 5

Example 5 is from a Federal Court case, *Antipova v Minister for Immigration & Multicultural & Indigenous Affairs* [2006] FCA 584 (19 May 2006) (“Antipova case”)⁹⁴. The exchange between the participants cited here is part of an extract quoted from the transcript used in the court hearing. The commentary are made by the presiding judge, Gray J.

The introduction cited below in italics from the judgement published in Austlii provides a succinct and clear explanation of the issues the Federal Court is asked to decide.

This proceeding involved a detailed examination of the way in which the Migration Review Tribunal (‘the Tribunal’) dealt with the case of the applicant, Ms Antipova, in performing its function of reviewing a decision of a delegate of the respondent, the Minister for Immigration and Multicultural and Indigenous Affairs (‘the Minister’). Counsel for Ms Antipova argued that a great number of aspects of the manner in which the Tribunal conducted the proceeding, and reasoned its decision, gave rise to jurisdictional error on its part. The issues include denial of procedural fairness. Most significantly, it was suggested that the Tribunal denied Ms Antipova procedural fairness by misleading her as to the issues on which it proposed to decide her case, and by cutting short the presentation of her case during the Tribunal’s hearing. There is also a question whether the Tribunal misconstrued a criterion applicable to Ms Antipova’s case. 2. Ms Antipova is a citizen of the Russian Federation. She entered Australia on 21 March 2002 as the holder of a Business (Class UC), subclass 456 visa, valid until 21 June 2002. On 18 June 2002, she applied for a Partner (Temporary) (Class UK) visa, subclass 820 (Spouse) and a Partner (Residence) (Class BS) visa, subclass 801 (Spouse), on the basis of her de facto relationship with an Australian citizen, Michael Charles Petrou. An application of this kind is considered first as an application for a subclass 820 visa. If that visa is granted, then the applicant may be considered later for the grant of a subclass 801 visa, a criterion for which is that the applicant have held a subclass 820 visa for a specified period, usually two years. On 3 January 2003, a delegate of the Minister decided to refuse to

⁹⁴ For the readers’ convenience, a full copy of the judgment is annexed as Appendix 2.

grant a visa. Ms Antipova applied to the Tribunal for review of the delegate's decision. The Tribunal conducted its hearing on 21 October 2003. On 9 December 2003, the Tribunal sent to Ms Antipova its written decision and reasons for decision. The Tribunal affirmed the decision under review, finding that Ms Antipova was not entitled to the grant of either a subclass 820 visa or a subclass 801 visa.

In brief, in the Antipova case, the review applicant is asking the MRT to set aside the Immigration Department's decision in refusing her spouse application. During the hearing, the Member refuses to allow sufficient time for the review applicant to give her account of the story. The Member, among other things, refuses to consider whether her relationship with the visa sponsor is a genuine relationship while she is still in a previous marriage. The Member also fails to consider the cultural issues affecting the relationship. In the following exchange between the Member and the Migration Agent representing the Applicant, the Migration Agent attempts to question the semantic details of the Member's refusal. We can also see that the Member is emphasising the form instead of substance when he hears the matter.

M: Member MA: Migration Agent Numbering refers to Turns.

- | | | |
|---|-----|--|
| 1 | MA: | Can I just ask one question? Is the issue today whether or not they lived together for 12 months or whether they were involved together for 12 month? |
| 2 | M: | No, cohabitation as husband and wife. That's the requirement of the regs and when I say "husband and wife" I mean in a relationship like husband and wife. |
| 3 | MA: | Okay, but as far as that if you (indistinct) every day, you spend every day together for 12 months prior to the application. |
| 4 | M: | No, because that's covered by the not – living apart on a permanent basis or whatever the wording is. |
| 5 | MA: | Yes. |
| 6 | M: | So people go on holidays and all that sort of jazz, but for a de facto relationship to be acceptable under the regs it has to be like a marriage relationship. There has to be all the evidence to support that. |

In the above exchange, the Member suggests that he is simply following the law (*regs* is the short form for Migration Regulations), while the Migration Agent is trying to ask

the Member whether the issue the Member is concerned about is whether or not they “lived together for 12 months” or “were involved together for 12 month” (line 2-3 in Turn 1). In Turn 3, the Member demonstrates that he is not concerned with the definitional issues raised by the Migration Agent and insists that he will follow what the Migration Regulations explicitly state. The Member has also refused to listen to the account given by the review applicant as set out in the court record shown below (Paragraph numbering is per the numbering of judgement published on Austlii.⁹⁵).

The court record gives the following summary (as paragraph 23) followed by a record of the verbal interaction that ensued at that point. The identity of the speakers is clear from what they say (paragraph numbering are per judgment).

23. *The subject occupies almost 18 pages out of almost 27 of the transcript of Ms Antipova ’s oral evidence to the Tribunal. In the course of those pages, there are revealed at least a dozen occasions on which the Tribunal member interrupted Ms Antipova ’s answers to questions, either asking a further question, or seeking to discourage her from giving as much detail as Ms Antipova obviously wished to give. For instance, when Ms Antipova was describing an incident in which her former husband struck her and attempted to strangle her whilst they were in his car together, the Tribunal member interrupted, asking:*

24. *‘So how did this resolve itself, this situation?’*

Ms Antipova attempted to answer, but the Tribunal member asked:

‘So how did it finish? Just tell me how it finished?’

25 *Shortly afterwards, when Ms Antipova was attempting to explain the interaction between herself, her former husband and Mr Petrou, the Tribunal member interrupted, saying:*

‘Just tell me what happened next.’

26 *Again, when Ms Antipova was trying to give an account of the breakdown of her relationship with her former husband, the Tribunal member said:*

⁹⁵ *Antipova v Minister for Immigration & Multicultural & Indigenous Affairs* [2006] FCA 584.

'Sorry, I don't need the day-by-day description but can you give me an understanding of when your relationship with Grigori started failing and when you decided to leave him, whether it was before or after the marriage.'

27

Shortly afterwards, when Ms Antipova was recounting what her former husband said to her, the Tribunal member interrupted again, saying: Just tell me what happened next.'

(Highlight added)

In the above example, the Member has not taken into consideration the submission of the migration agent nor the account given by the review applicant (See Turn 1-6 of the exchange between the Member and the migration agent above and paragraphs 24-27 of the court record cited above).

The basis of the case of the appeal is that the Member fails to proceed the review hearing in a fair manner hence the grounds for jurisdictional error.

From the discursive practices point of view, the Member's role seems to be very restricted as he just wants to move on with the case and does not wish to listen to anything that is not set out in the *regs*.

In comparing the Antipova case and the student visa case (Example 4), we can tell from the language used in questioning by the relevant Member that the Member in the Antipova case is rather dominating and less accommodating.

The judge in Antipova case has already outlined his reasons in the judgement criticising the Member's inappropriate manner in handling the case. As a researcher, we may take a step further to consider the whole matter from a different perspective. As we are aware, the establishment of the MRT is to provide an alternative solution to institute court proceedings so that it is cheaper and quicker for the review applicant to seek a review of its application. This indeed would require the Member to be more flexible to decide a matter within the legislative framework. In other words, the

Member has a wide discretion to make a decision and can take into consideration of the cultural background and other factors that are incidental to the decision process. The legal standard imposed on the MRT is to make a decision on the review application in “substantial justice and the merits of the case” (section 353 of the Act).

⁹⁶The Antipova case is a good example that the Member can be more flexible and make a decision not bound by the form. The law requires the Member to make a decision to achieve substantial justice, thus such discretion can be exercised.

7.5 Conclusion

The roles of the Member have been discussed in details in this chapter. The findings show that Members occupy different roles either as required by the situation arise during the hearing or in response to the questions or statements made by the review applicants, and their discourse mode also changes as a consequence. That being said, when comparing with other professional discourses such as mediation discourse and medical discourse, I notice that it is common and necessary for professional communication to consist of mixed languages or discourse types.

In Chapter 8, I will discuss recontextualisation and the relationship of language and power. Both of these linguistic notions are relevant to this research and can be viewed as a sub-theme of the thesis.

⁹⁶ See further discussion in chapter 8 with respect to how the High Court sets out the standard of substantial justice to the MRT.

Chapter 8

Recontextualisation and power in MRT discourse

8.1 Introduction

In previous chapters I have discussed in some detail the roles of the participants in the MRT hearings and the inquisitorial nature of the review process. During the discourse analyses in chapters 6 and 7, it came to my attention that there was a need to address some other important linguistic issues. These other linguistic issues, together with the relationship of language and the law, arise from the analysis and can be treated as the sub-themes of the thesis. Accordingly, prior to concluding my thesis in the next chapter, I am going to examine, fairly succinctly, how questions are asked, how the underlying principle of natural justice can be seen in exchanges of the participants in the MRT, and how to use the discourse-linguistic concept of recontextualisation to examine the MRT's decision records for the purpose of understanding the review process from another perspective. Following that, I will explore the issue of language and power (Fairclough, 2001; Bourdieu, 1992; Cheng and Wagner, 2011) as it appears in exchanges between the parties in the MRT.

Unlike the discussion in chapters 6 and 7, in addition to the conventional exchange data, this chapter will use the less visited data of Decision Records⁹⁷ and views expressed in journals by legal professionals⁹⁸ to enrich the empirical grounding of my discourse-analytic findings and to highlight their significance. This chapter illustrates how words can be translated into action in the review process. I can boldly claim that the academic exercise of this research can benefit stakeholders when dealing with the review application in the MRT either to better prepare applications or widen views on issues from different visa applications.

⁹⁷ See definition of data set 2 in Chapter 5.

⁹⁸ See definition of data set 5 in Chapter 5.

8.2 Language as the means to discover the facts

From a linguistic perspective, questions and answers form a type of language activity. Levinson (1979) uses classroom as well as courtroom examples to demonstrate how answers are often obtained. Levinson makes a crucial comment with respect to both courtroom and classroom questions and answers. He points out that: “There is a parallel here to the way in which in the courtroom questions were used to extract answers that would amount to a specific argument” (p. 388). He states that the difference between the two contexts (courtroom and classroom) are such that in the adversarial context of a courtroom, one party’s gains are the other party’s losses, whereas in the collaborative context of a classroom, both parties stand to lose or gain together. He further emphasises the explicitness of courtroom discourse and the rarity of indirect speech in courtroom discourse: “the questions in the courtroom for example are not easily understood as other kinds of speech acts masquerading in question form” (ibid, p. 392).

Questions and answers can also be viewed as elements in a language game. The interaction of the MRT Members and the review applicants corresponds to the concept of the language game as described by Wittgenstein (1974) in the following:

If you do not keep the multiplicity of language-games in view you will perhaps be inclined to ask questions like: “What is a question?” – Is it the statement that I do not know such-and-such, or the statement that I wish the other person would tell me...? Or is it the description of my mental state of uncertainty? (p. 1.24)

Both Levinson and Wittgenstein are looking at the way questions and answers are played out as a language activity or language game, although the former is coming from a linguistic perspective while the latter is coming from a philosophical perspective. Questioning skills have always been crucial in finding out the answers in contested matters. Sometimes, the

answers that ensue can fail to satisfy the enquirer and instead, open up more questions to be asked. Furthermore, sometimes, question for various reasons produce miscommunication between the participants, as both parties may have different things in mind when the exchange takes place. It is therefore preferable, in the first place, to phrase or structure the questions in a tactful and appropriate manner in order to achieve the fact-finding goal and such kind of linguistic skills are highly sought after in professional communication.

From a linguistic point of view, and as regards the MRT review process, there is always an expectation that the Member, during a hearing, will enquire about and attempt to verify the information that she or he requires in order to make a decision. The importance of the interrogative function of language in seeking and verifying information prior to making a decision has been highlighted by Harris (2011, p.277) when discussing the same topic in the context of criminal trials and police matters. She points out, “The role of language in eliciting, establishing, presenting, and ultimately assessing the validity of evidence in both police interviews and criminal trials is a crucial one.”

As noted above, these kinds of questioning skills are also crucial for the Members to enable them to review the visa application. As noted earlier, the Member is not bound by the rules of evidence⁹⁹, so he does not need to be concerned if the answer is not admissible or not allowed due to the leading nature of the question, all of which would be objected to by the plaintiff/defence counsel or ruled inadmissible by the judge in a court hearing.

The way the Member asks questions or obtains answers from the Applicant, often about things he already knows, is to allow the applicant an opportunity to confirm or deny the fact put to him, often as statements, in an open hearing. For example, in the case of Saha (see Chapter 7), the Member repeatedly asks about the review applicant’s relationship with Ms P

⁹⁹ See section 353 of the Act.

(Turns 5 and 6) before explaining the law to the review applicant his/her findings in the matter. This is strictly speaking unnecessary given that the Member has already received all the papers and the review applicant's file from the Department of Immigration during the hearing and is fully aware of the review applicant's relationship status. But if we take into consideration of section 360 (1) of the Act which stipulates that "[t]he Tribunal must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review", we understand why the Member is inviting the review applicant to respond. To take it a step further, with respect to what the Act says, asking questions in an open hearing allows the review applicant to confirm what is on record. It also allows him/her an opportunity to give his/her version of an event or to reject and rectify the facts put to him/her. In addition, the Member has a duty to provide such an opportunity to the review applicant and this has to be done on record to avoid being found in breach of section 360 as well as the rule of natural justice¹⁰⁰.

More importantly, the record of the hearing¹⁰¹ is also more likely than not to become the basis of appeal to the Federal Circuit Court should the review applicant be dissatisfied with the decision of the MRT. Most applicants who appeal against the MRT decisions at the Federal Circuit Court rely on the transcript of their cases as evidence to allege that a jurisdictional error has been committed.

It should be mentioned here that the skills employed by the Member in the hearings are in fact commonly found in expert practitioners in various types of courtroom discourse, such as examination, cross-examination and re-examination (see O'Barr 1982; Maley 1994; Ross, D. QC 2007; College of Law Practice Paper, Volume 4, 2015). Skills in formulating questions and especially eliciting confirmation are also commonly used and crucial in other types of

¹⁰⁰ This is in line with the commonly accepted view that justice has to be seen done.

¹⁰¹ Each review applicant is provided with a hearing record in a CD format at the end of the hearing.

legal or quasi-legal discourse. For example, Candlin and Maley (1997) make the following observation about mediation discourse:

Formulation responses share the feature that they do not simply acknowledge information or seek information. Most frequently, they seek confirmation, that is, a further response from the disputant that the proposition contained in the mediator's response/utterance is correct. They are both retrospective and prospective in effect and serve to promote the cohesion and coherence of the interaction. (p.80).

Questioning skills are also important in advocacy and vital for the judge to make a decision. Hobbs (2011) points out that "Questions play a central role in legal discourse. This is due to the law's requirement that, prior to the entry of judgment, evidence must be presented and the facts of the case determined." (p. 302)

Similarly, Members in hearings are required to hear what the review applicant has to say and evaluate what is submitted before making a decision. The Member in the role of an enquirer (or investigator) does exactly what the literature highlights in asking questions for the purpose of evaluating whether the review applicant is telling the truth.

8.2.1 Example 6

In section 6.2.2, I used some data from the Nguyen case (see footnote 79 with respect to the source of the case) to compare inquisitorial discourse with adversarial discourse. The Nguyen case can also provide some insights to support the way questions are able to help uncover the facts of the case, as discussed in section 8.1 above.

Accordingly, I here revisit that case and use the data below again to highlight and discuss succinctly some key question types. To recapitulate, the Nguyen case was a partner application. The visa applicant was in Vietnam, and the visa application was refused by the Immigration Department. The Review Applicant, who was the husband of the visa applicant

(the wife), sought a MRT review and the Member was trying to find out if the marriage was genuine. The below excerpt focussed on a recent trip the Review applicant had made to Vietnam. The Review Applicant spent six months in Vietnam but did not visit his own sister who also lived in Vietnam while he was there. The questions asked by the Member were to shed light on whether the wife knew about the husband's feud with his sister.

M: Member RA: Review Applicant

- | | |
|----|---|
| 1 | M: During the last visit, did you visit your sister? |
| 2 | RA: No. |
| 3 | M: During your six months in Vietnam, you didn't visit your sister? |
| 4 | RA: Sister and I have disputes, so I didn't visit her. |
| 5 | M: Dispute before or after? |
| 6 | RA: Before. |
| 7 | M: Is your wife aware of it? |
| 8 | RA: She does. |
| 9 | M: Does she know why? |
| 10 | RA: I didn't tell her the reason. |
| 11 | M: What's your wife's reaction? |
| 12 | RA: My wife tells me to settle it. |

The above data shows that the Member was trying to find out the facts surrounding why the RA did not visit his sister. The enquiries began, in Turn 1, with a simple, closed question aimed at eliciting a “Yes” or “No” answer. However, the further aim was to build upon the RA's simple “No” to probe for further information by way of subsequent questioning. This technique or strategy is similar to those used when cross-examining in a courtroom hearing, as pointed out by Hobbs (2011). Once the answer has been established, the Member queried why a brother who travelled several thousand miles from Australia to Vietnam, and stayed there for six months, did not visit his own sister who lived there. The facts emerged after a series of further questions posed by the Member to the RA. The RA explained to the Member that a feud had developed between the brother and sister and that this was the reason that he didn't visit his sister. Another question was posed to the RA focusing on “when” the disputes

had occurred. It was at that point that the questioning focused on whether the RA's wife had been aware of the disputes. The relevant question, as with the first question, asked for a "yes" or "no" answer but in fact aimed to seek more information, not just a simple confirmation. It is clear that the chain of questioning had the final aim of finding out if the RA's wife had any knowledge of the dispute and what kind of reaction she had to it. This way of formulating and linking questions not only seeks information and confirmation, but also acts to produce discursive "cohesion and coherence" in the interaction (Candlin and Maley, 1997:80). It renders the dialogue "goal-oriented" (Heydon, 2005:73). In hindsight, we can understand that the aim of the language activity here is to allow the Member to assess whether the RA's relationship with his wife was genuine by examining, among other things, the knowledge that a husband shared with his wife.

8.3 Context and recontextualisation

One of the commonly used discourse strategies in the MRT context is to recapitulate, in written form, all that has previously transpired with regard to a particular visa application and to summarise why the application was refused. This is exemplified by the documents called Decision Records. From a discourse-linguistic perspective, giving an account of an event typically involves recontextualisation, i.e. its reframing for different purposes and audiences (see Bhatia, Candlin and Gotti, 2012, with respect to the term "accounts", and Linell, 1998, with respect to recontextualisation). Linell at one point defines recontextualization as "the dynamic transfer-and-transformation of something from one discourse/text-in-context (being in reality a matrix or field of contexts) to another" (Ibid: pp.144-145). The Decision Record published by the MRT in Austlii¹⁰² contains many good examples of recontextualisation of the kind that concerns us here. Specifically, the face-to-face proceedings of the review are

¹⁰² The MRT publishes the outcomes of review applications on the internet and call each a "Decision Record".

reformulated using highly abstract legal terminology that legitimises decisions by presenting them in the language of an institution and, in effect, makes them seem unassailable.

In his early paper about recontextualization, Linell (1998) discusses recontextualizations in interprofessional discourse and professional-lay discourse. He notes that “no discourse (or text) is conceivable without relevant contexts”, but also makes the following very relevant comments:

Contexts have a characteristically ambiguous nature; they are partly outside of the discourse or text, but at the same time the discourses and their relevant contexts constitute each other. All this means that discourses and their contexts presupposes and imply each other, and that a piece of discourse cannot be taken out of a given matrix of contexts without changing its interpretations, or its potential of being interpreted in specific ways. (p.144)

Indeed, this double-sided concept of context is important for understanding discourse and no discourse can stand alone apart from its context (Duranti & Goodwin, 1992). The importance of understanding the context may best be illustrated by what I have observed in an MRT hearing which I attended.¹⁰³ One of the participants, the interpreter, was observed to have come to a halt in interpreting for her client during a heated exchange between the other two participants at the hearing, the migration agent (who is a lawyer) and the Member. The migration agent and the Member disagreed about the deadline set by the Act, namely whether the review applicant could be considered to have submitted a valid review application within the deadline set by the statute. The view on when the date of notification takes effect is crucial to determining whether the review applicant has lodged a valid application within the statutory deadline. The law normally provides a time frame of 28 days from the date of notification, but it may change because of the time required for serving the notice to the visa applicant. Without knowledge of the context, the interpreter would not be able to understand

¹⁰³ I was present at the hearing that took place on 19 May 2011 at 11:00 am at the Sydney MRT hearing room.

the chain of events that followed from the failure of submitting the application for review by the deadline and the failure of MRT's notification of the invalid application. The context in this scenario encompasses two major understandings. First, from the Member's point of view, the time to submit an application as set out by the legislation; and second, from the migration agent's point of view, the time started from the date of the correspondence issued by the MRT to the review applicant informing the review applicant's rights to seek a review.

In the above scenario, the role of the interpreter is difficult and the skills demanded of her are sophisticated in the sense that there is enormous pressure on her to fully grasp the meaning of the relevant section of the Act and then interpret it to the review applicant. She has to ensure that the review applicant fully understands the process of the hearing and the constraints of the Act, which eventually will determine the review applicant's fate whether he will be asked to leave Australia voluntarily, face deportation or be allowed to stay in Australia.

To take it a step further, during the same MRT hearing, it was observed that the other two participants were using recontextualization to complement their formulation of a particular point or to support the arguments they intended to submit or to prove their case.

Skills of recontextualization can be found in many ways and in many disciplines. There are also various linguistic skills that are incidental to recontextualization. For example, in the professional work of interpreters and translators, they are at times required to read a document and provide a verbal translation immediately (also known as sight translation), and they often need to apply the skills of paraphrasing, but aimed at a different audience. Another example is in providing subtitles to a foreign movie, subtitlers are required to use skills of condensation, rewording or expansion to provide the audience with a brief translation of what was said, so that members of the audience will be able to understand not only what was said but also the cultural premises on which the action is based.

As Decision Records are one of the data sources for this thesis and recontextualisation is a key analytic notion, it behoves me to discuss its function from the linguistic perspective. I cite the following MRT case of 0808916 [2010] MRTA 1219 (“the 0808916 case”)¹⁰⁴ as an example to show how recontextualization can be used.

8.3.1 Example 7

This example is in connection with an application for a skilled visa. The visa applicant intends to use his/her occupation to fulfil the eligibility to apply for a visa to stay in Australia permanently. The following excerpt (italics) is cited directly from the Decision Record.

This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Skilled (Residence) (Class VB) visa under s.65 of the Migration Act 1958 (the Act).

The applicant applied to the Department of Immigration and Citizenship for a Skilled (Residence) (Class VB) visa on 14 August 2008. The delegate decided to refuse to grant the visa on 12 December 2008 and notified the applicant of the decision and his review rights by letter dated 12 December 2008.

The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.886.211 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because each course he had undertaken to satisfy the ‘2 year study requirement’ was not a registered course and was not closely related to his nominated skilled occupation. The applicant applied to the Tribunal on 19 December 2008 for review of the delegate’s decision.

The full decision is quite lengthy. Accordingly, I have provided a full copy of it as Appendix A. Below I have extracted some segments of the decision (which is not meant to be comprehensive) to assist my discussion.

In this case, numbered 0808916, the structure of the decision record is systematic and straightforward. First the decision is stated, then the reasons for the application for review

¹⁰⁴ Readers may wish to compare example 2 in Chapter 6 whereby I use a transcript of the same skilled visa case for discourse analysis. Here 080916 is using a different genre in reporting the case, i.e. the Decision Record.

(para 1-5)¹⁰⁵; this is followed by the topic of the relevant law in which the Member interprets the law for the case under review, supported by facts and evidence submitted (para 6-32); and lastly, it concludes by giving findings and reasons (33-53). Paragraph 54 at the end repeats the statement of decision made at the beginning.

8.3.2 Looking at a MRT decision from a recontextualisation perspective

I am going to use case no. 0808916 (“the case”) to demonstrate that, by using the lens of recontextualisation to analyse a Decision Record, it is possible to understand better what has happened in a hearing room and the discourse used by the parties – notwithstanding the fact that the transcript is unavailable.

It may be argued that the basis of such data could be biased as the Decision Record is prepared by the authorities and may not reflect the exchange between the parties as objectively as it should, hence it may not be appropriate to use it as a data for analysis. However, the Decision Record is a public and legally valid record of what has happened at a given time in the tribunal. It therefore carries its own weight in any kind of research. The use of linguistic concepts such as recontextualization in researching these documents may help to reveal how the discourse and the discursive formations reflected therein have been transformed. The study of Decision Record may also help future review applicants to prepare their cases, including counter arguments to similar points to those raised, given that the MRT has indicated (see email from MRT’s McDonald in chapter 5) that Decision Record published publicly represents the approach adopted by the MRT in dealing with similar visa review applications.

My decision to take the Decision Record as an object of study is supported by the work of other researchers, such as Bhatia, Candlin and Gotti, (2012) who analysed Arbitration Awards

¹⁰⁵ For easy reference, the paragraph numbering used here is identical to the same used in the Decision Record referred to herein.

and Sarangi and Roberts (1999) who focused on record-keeping (following Garfinkel, 1967, and his comments on good organisational reasons for bad clinic records).

In view of the foregoing discussion, it is obvious that there are pros and cons to using the Decision Record as a research data. I consider that when using this kind of data, care should be exercised in determining whether the matter or point of view can be verified. In this regard, I invite readers to make their own judgement by comparing this Decision Record with example 2 in Chapter 6, as both cases are reviewing the same visa subclass and similar issues are raised. (I note, however, that the example cited is from a transcript.)

I am citing selected parts of the Decision Record in question below to reflect the kind of discourse that characterises it and to show how it helps us to understand what happened during the hearing.

First, in paragraph 28¹⁰⁶, when the migration agent made a submission on behalf of the applicant, the Decision Record states (I highlight the key words in bold):

The applicant's representative **submitted** that the two courses were closely related. He **urged** the Tribunal to avoid **a narrow approach** that a cook is only involved with food preparation. (Highlight added).

It is clear that the migration agent was trying to frame the matter in a particular context to convince the Member that the two different courses (i.e. courses of study) are in fact closely related, although prima facie they are not. Firstly, the word “**submitted**” is used to indicate that the migration agent has put forward arguments on behalf of the review applicant to the effect that the two courses, seemingly unrelated, are in fact closely related. The linguistic term “**urged**” and the expression “**a narrow approach**” indicate that the migration agent was making great efforts to convince the Member to go beyond a narrow interpretation of “relevancy” and decide the matter in favour of his client.

¹⁰⁶ I am using the paragraph numbering of the Decision Record as published.

In paragraph 29, further details are set out:

The representative stated that he intended to submit a report from John Hart, the CEO of Restaurant and Catering Australia that **addressed** these issues. He stated that Mr Hart had given evidence in MRT case number 0808711 (differently constituted). (Bolding added).

The above extract shows that some events have transpired, and one of the events actually took part in another hearing, which the Member attempts to make use of to justify his decision in paragraph 43. More specifically, the Member has listened to the witness (John Hart)'s evidence after the representative¹⁰⁷ called upon the witness to give evidence¹⁰⁸ – in legal parlance, to “**address**” the issues raised.

In paragraph 43, the Member, after considering the evidence and argument, made a decision in the following manner:

The Tribunal does not accept the argument that simply because two courses are closely related to each other, that they are both closely related to the nominated occupation. **What is required by clause 886.211** is the relevance of the academic qualifications – in this case, the Diploma of Tourism – to the nominated occupation of a cook. It is not the similarities of the two courses.

From a discursive perspective, the Member is summarising and recontextualising what was argued earlier by the visa applicant. As Linell observed: “a co-conversationalist may locally recontextualize aspects of somebody’s prior contribution by providing a response or a follow-up question that implies a new perspective on the topic or a redefinition of the communicative project” (ibid, p.146). Here the Member has chosen to foreground the issue of relevance (to an intended occupation), while dismissing the argument based on similarity (of the two courses). He/she justifies his/her ruling and precludes further argumentation by citing the relevant clause.

¹⁰⁷ The Decision Record of this case uses “representative” in lieu of “migration agent”.

¹⁰⁸ John Hart gave evidence by way of recording and it was played in the hearing.

The above extract also shows that the Member's role is in some respects similar to a judge in a courtroom, where he listens to the arguments made by the migration agent, considers the evidence put forward and applies the law to conclude the matter, as when he says: “**What is required by clause 886.211** is the relevance of the academic qualifications – in this case, the Diploma of Tourism– to the nominated occupation of a cook.”

Although the discourse of the migration agent is reported in summary form, the language still indicates that intense argumentation occurred. For example, “he **urged** the Tribunal to avoid a narrow approach...” (paragraph 28). However, in the end, the Member exercises his jurisdictional power and rejects the argument by saying: “The Tribunal **does not accept** the argument...” (paragraph 43).

In sum, a Decision Record is an illuminating way of representing what has happened in a hearing and using the concepts of contextualisation and recontextualisation helps us to understand the power of re-representation.

The remaining part of this chapter is dedicated to a discussion of insights regarding language and power flowing from a discourse analysis in earlier chapters.

8.4 Language and power

MRT is an institution created in the wake of the Kerr Report¹⁰⁹. To be more specific, the setup of the MRT is to allow the visa applicants to have an avenue to look at the lawfulness of a government decision by an independent institution in a quick and economical way (in contrast to taking the matter to court). When the Member is reviewing a matter, the data shows that the unequal power relationship is reflected in the discourse between the parties. In this part of the chapter, I discuss how the Member exercises and enacts his power to deal with

¹⁰⁹

<http://www.arc.ag.gov.au/Aboutus/Pages/OverviewoftheCommonwealthSystemofAdminReview.aspx>
See also Chapter 1 with respect to the history of the MRT.

some issues arising from the review process such as adjournment, and how the migration agent negotiates an issue to reach a decision in his favour. One of the rationales for discussing it here is to show that participants in the review process may achieve the goal of a reasonable outcome of substantial fairness without going to court, which is a more costly and time-consuming alternative.

The relation between power and language has been well researched by scholars, notably Foucault (1981) and Fairclough (2001). In the context of language and law and power, the more recent study conducted by Wagner and Cheng (2011) is very helpful to understand this complex subject in the context of courtroom discourse.

Foucault (1989) illuminates the unequal status of a ratified professional like the MRT Member when he asks who is qualified to speak with power in a given discourse:

...who is speaking? Who, among the totality of speaking individuals, is accorded to use this sort of language (*langage*)? Who is qualified to do so? Who derives from it his own special quality, his prestige, and from whom, in return, does he receive if not the assurance, at least, the presumption that what he says is true? What is the status of the individuals who- alone – have the right, sanctioned by law or tradition, judicially defined or spontaneously accepted, to proffer such a discourse? (p.55)

While Foucault here sets out questions asking us to deliberate on the basis of the discourse rights and power that an individual possesses, Fairclough (2001) emphasises social factors in his view of the subject. Both of these views are relevant to my research. Individuals are at risk in the MRT, and the Member, being the representative of the MRT, is not only empowered by his position within a social-institutional structure but is also required to deal with many pressing social issues during the course of a visa review.

Fairclough distinguishes the power in discourse from the power behind discourse. He makes the observations that power in discourse is concerned with “discourse as a place where relations of power are actually exercised and enacted” while power behind discourse is

concerned with “how orders of discourse, as dimensions of the social orders of social institutions or societies, are themselves shaped and constituted by relations of power...” (Fairclough, 2001:36). In simple terms, the power in discourse depends on the exercise of communicative skills by the individual, while power behind discourse is the power of social institutions to shape what is said. He uses the exchange between a doctor and a medical student during a medical consultation to show how power exists *in* the discourse when the participants are unequal, i.e. have unequal status. In this example he points out that the doctor’s interruptions of the student were based simply on his intention to control the contributions of the student. With respect to power behind discourse, Fairclough cites media discourse as an area that the hidden power of media discourse dominates when journalists report news to the public (Ibid, p.41).

Although MRT discourse is not the same as courtroom discourse (as discussed in the early chapters, MRT discourse is a mixture of inquisitorial discourse and adversarial discourse), Wagner and Cheng provide interesting parallels for looking at the roles played by the Member when the Member interprets and administers the law during the review process. I quote: “Courtroom discourse serves as an instrument of institutional empowerment and control” (Wagner and Cheng, 2011, p.4). MRT discourse functions in exactly the same way.

In the MRT, the power of the MRT Member’s discourse is institutionally determined given that the Act provides him/her with the power to set aside or affirm a matter that the Department of Immigration decided adversely or send it back to the Department of Immigration to re-consider. However, as we shall see, the other participants including the migration agents and the visa review applicants also possess hidden power, that is, their discourse also has certain institutional warrants. In the following section I give examples of the exercise of power in discourse and interaction in a variety of professional contexts before focusing on MRT discourse.

8.4.1 The power of the Member

The Member is a decision maker who has absolute power within the process of review as granted to him by the migration legislation. Similar to the judge in a civil law court, whose role is mainly inquisitorial, the Member decides what to ask and what to query before making a decision. In contrast, the adversarial process in law courts primarily relies on the plaintiff (or prosecutor) to prove the case while the respondent (or defendant) defends their case. Many scholars have conducted in-depth research concerning the differences between the two systems (see Gibbons, 1994; Maley, 1994; Wagner, 2002 *inter alia*). Some scholars comment that in the adversarial system an enactment of scripts¹¹⁰ is preferred as defence lawyers seldom (if not never) ask any question that they do not know the answer to, whereas the inquisitorial system allows for surprises in the sense that the answers may not be expected by the parties (see Hannken-Illjes & Ors, 2006).¹¹¹ In other words, the focal point in an adversarial system consists of the way that counsel for the parties argue for and defend their case whereas the focal point in the inquisitorial legal system rests on the manner of the judge in questioning the parties and investigating the issues.

In a subtle way, in the inquisitorial legal system, the focus is on how the judge asks questions and what kind of questions he asks when he conducts the investigations during the hearing. This kind of discursive practice can also be found in an MRT hearing. In an MRT hearing, the Member endeavours to explore and verify the facts of the case before he makes a decision. Of course, during the hearing, the review applicant will try to convince the Member that he should decide the matter in his/her favour. It is true that MRT Members have been granted

¹¹⁰ In general, before a witness gives evidence in a court case, an affidavit has been prepared and signed by the witness, and the affidavit will be filed with the court and served upon the parties of the case before the hearing commences. Enactment of script means counsel will question the witness with respect to the issues sworn in the affidavit.

¹¹¹ Drawing on my own practical experience, I am reluctant to agree with the comment that the adversarial system is script based. I find that counsel normally constrains their questions to those issues sworn of affirmed in the affidavit of the witness if the witness is asked to give evidence.

power under the migration legislation and are the only “gatekeeper[s]” (Ribeiro, 1996) who have the authority to make decisions during the process. This role of gatekeeping more often than not creates tension in the discourse between the Member and the participants, especially the review applicant and the migration agent.

Similar tension is evident in Roberts and Sarangi’s research on interviews with overseas candidates for General Practitioner status in the UK with respect to the expectations of both the examiners (interviewers) and the candidates (interviewees). Roberts and Sarangi observe that “The modes of talk of gatekeeping discourse both reflect and construct this tension. Candidates are expected to know the examiners’ expectations and any discursively produced uncomfortable moments can rapidly feed into negative judgements” (1999, p.479).

In the MRT context, the tension between the Member and the migration agent occurs normally when the visa applicant’s interest is at stake or when the migration agent is eager to correct or make a point which is crucial to the outcome of the review application. This tension is an expected outcome in any proceedings when two parties are on opposing sides. Here, the issue is whether substantial justice is achieved or seen to be achieved. I.e. one party (the Member) is administering laws which may affect the other party’s interests whereas the other party’s migration agent is safeguarding his/her client’s interests.

With respect to observed language and power relations between the parties in the hearing, while the law grants the Member great power, it also prescribes that if the Member fails to observe due process, the review applicant may request the Federal Circuit Court to review the decision made by the MRT, normally on the ground of jurisdictional error (see section 353 (2)(b) of the Act 1958). In this regard, we may say that the MRT’s performance is scrutinised

by the federal courts.¹¹² While the basis for appeal is limited, it can still provide the visa applicant with the opportunity to achieve a fair hearing. Under the circumstances, the MRT is placed in the hierarchy of the court system and its position is similar to a lower court where its decisions can be appealed to the upper court on point of law.

With respect to seeking a judicial review at the Federal Circuit Court, generally when a review applicant institutes legal proceedings, the evidence produced by the review applicant consists of MRT transcripts and hearing records to prove that there was a jurisdictional error in the decision or in the process of the MRT hearing.

In discourse research, a record is a useful site to examine the interface of professional and institutional discourse (Sarangi and Roberts, 1999). In the MRT context, it enables potential scrutiny by the Federal Circuit Court. When a MRT review applicant lodges an application to the Federal Circuit Court to seek judicial review on the basis of jurisdictional error, the judge will examine in detail the transcripts or relevant part of the transcripts as submitted by the visa applicant on what the MRT Member has done and said when the Member hears the case. Under the circumstances, the record becomes more than a record itself and has become the means for an upper court to scrutinise the lower court (here the MRT)'s performance. The Federal Circuit Court among other things will consider the questions raised by the Member on record to ascertain whether the MRT has conducted the hearing in a reasonable and fair manner as required by law.

The record (or more precisely, the transcript) reflects what took place during the hearing. In an MRT hearing, each participant has his/her own role and their roles are reflected by their discourse. They can be the Member, the review applicant, the legal advisor or the tribunal officers, and their discourse reflect that they all act primarily in accordance with the norms or

¹¹² Federal courts include Federal Circuit Court of Australia (also known as Federal Circuit Court), Federal Court of Australia and High Court of Australia. For appeals of MRT cases, the first federal court to hear those cases is the Federal Circuit Court.

conventions set out by the MRT.¹¹³ To ensure the hearing is conducted in a fair and orderly manner, participants have to observe these conventions and every participant is aware of the limitations. Here the Member adopts the role of “gatekeeper” who has the authority to make decisions.

We may compare such a situation to that of a medical encounter and its accompanying discourse. Ribeiro’s (1996) research into medical discourse in a psychiatric setting indicates that the patient is required to participate within the terms of the frame proposed by the doctor for fear of being evaluated as incompetent from a psychiatric point of view. In other words, the participants mentioned in Ribeiro’s research are mindful of following the rules of the evaluation and of not upsetting the gatekeeper in order to pass the evaluation. Contrasting this context and argument with that of the MRT hearing, and drawing here on my professional experience, some migration agents are unwilling to upset the Member while arguing the case for their clients. Here the approach, the strategies, and the discourse adopted may be based on the agents’ fear of harm being caused to their clients’ case if they pursue their point too vigorously.¹¹⁴

Due process is very important in the MRT. Failure to observe due process in an MRT hearing provides a strong basis for the review applicants to appeal decisions. In common law court proceedings, the judge has a duty to ensure that the hearing is conducted in a fair manner. In comparing the MRT setting and that of the common law court, in an MRT hearing, the review applicant can choose to be represented by a migration agent, while the Department of Immigration is not represented. Normally a single Member conducts the hearing. In contrast, in the common law court, both parties are represented (usually) and the judge has to hear both

¹¹³ The MRT can set rules of hearing. See section 353 of the Migration Act.

¹¹⁴ In the Antipova case (see Chapter 7), upon careful reading of the transcript, it is observed that the migration agent representing the visa applicant did not pursue vigorously to insist that the Member allowed time for his client to give a full account of her case.

parties' examination in chief, cross examination and re-examination. In this regard, the judge will look closely at the way counsel question their witnesses to ensure that due process does not succumb to rhetorical deceit (Heffer, 2013).

In a courtroom hearing, research shows that counsels are eloquent and possess good rhetorical skills to conduct the proceedings in their favour. Maley (1994) in her study (see the example data extract below) points out that the counsel for the defendant during the cross-examination attempts to prevent the witness from giving a reply, which, according to Maley (1994, p.36), is a common interactional strategy adopted by criminal lawyers to manipulate the case in their favour. The following is reproduced directly from Maley (I adopt the same paragraph and line numbering). Briefly, the defence Counsel was cross-examining the witness. The defence Counsel was negotiating a way to get the answer he wanted and nothing more. My focus here is on the linguistic skills involved in asking a question and confirming a statement, and the power relationships revealed in the discourse.

- Counsel: You say that their own intelligence was sufficient to let them know how important you were even before you spoke to them?
- Witness: They had been following me ...
- Counsel: Is that right or not?
- His Honour: Just a moment, Mr B. I am allowing the witness to answer that question.
- Counsel: With respect, Your Honour...
- His Honour: I am allowing him to answer it.
- (p.37)

The Counsel in the above exchange intended to establish the witness's importance to and relationship with the Australian Federal Police (AFP). Interestingly, the manner in which the Counsel approached the question was to seek confirmation of his assertion (see line 4) instead of seeking information by means of open questions (as should have been done). However, the

judge was aware of the relevance of the question¹¹⁵ and intervened (see line 5) allowing the witness to provide his account of the story. The counsel objected (see line 7) but the judge overruled (see line 8).

As noted above, this example also demonstrates that when a witness is prevented from speaking out, in order to ensure a fair trial and due process, the judge can intervene to allow the witness to continue giving his account of story, in particular when s/he deems that the answer is somehow relevant.¹¹⁶¹¹⁷

At a discourse level, the exchange in Maley's example highlights a further point, that of the exercise of *power in discourse*, as Fairclough calls it. The exercise of power in discourse is typically evident in the discourse of other professions and in other institutional settings. It is also instrumental in understanding the discourse of the MRT. The exercise of power in the context of professional interactions enables a speaker to enact coercive functions according to his/her official role and/or professional status. I turn to the case of mediators in arbitration disputes. Anesa (2012) in her study of Italian arbitration practices shows how the arbitrators exercised their institutional power to determine the arbitration proceedings, clarify questions raised and ensure that answers were relevant to the matters in hand. In a similar way, we can observe the exercise of power in the mediation context. Unlike an arbitrator, however, a mediator does not make an order or pronounce a decision. It is common understanding that in any mediation, the parties have to decide what it is they want to achieve, with the mediator occupying the role of a moderator or facilitator. Nonetheless, the mediator does exercise power through his discourse as Maley (1995) and Dingwall (1988) demonstrate.

¹¹⁵ The answer that the witness wished to give is no doubt: "They knew of my involvement because they had been following me." (p.37)

¹¹⁶ There are more to be discussed with respect to the judge's power. As this is a linguistic research, I am not going to discuss the judge's limitation or power further in here.

¹¹⁷ My approach of discourse analysis was not meant to be a challenge to Maley's. I am simply using the same piece of data to make the point that discourse analysis is quite subjective and the same data can be looked at from different perspectives.

Maley (1995) points out why mediators need to exercise power:

Their need to control the mediation session in order to bring it to a successful outcome is in considerable tension with stated goals of the profession: to be neutral, impartial, and simply a facilitator. Their ideology requires that the parties be empowered, but they themselves need power in order to control the process satisfactorily.
(p.108)

8.4.2 The power of the other participants

Then exercise of such power in various institutional settings may be rendered visible as it were, through the analysis of such institutional discourse. This is also the case with the discourse of the MRT. We need to note, however, that the MRT Member is not the *only* participant who has such power. In fact, we may claim that all participants, to different degrees, possess and on occasion exercise power. There is no doubt that Members are empowered by the migration law so they can function in the MRT hearings and so their power is explicit. The other participants can also exercise power during the visa review process, but this power is similar to what Fairclough describes as power behind discourse, which I call an implied power or embedded power.

To be more precise, for a review applicant, such implied power arises from the rights to take the matter to the federal courts for appeal (see section 476 of the Migration Act 1958). For the migration agents, such implied power derives from their professional role and status as migration agents. As such they possess the knowledge to challenge the Member in the event that the Member misses a crucial point or disregards his/her submission crucial to the review application (see *Minister for Immigration and Citizenship v Li* [2013] HCA 18).

If we examine the MRT discourse data in Example 7 below closely, we can also observe how issues of power underpin interactions in discourse. The background to the case, taken from *Tran v Minister for Immigration* [2005] FMCA 1926 (22 November 2005), is given first, in italics. The focus of Example 7 is on an exchange between the review applicant's migration

agent (MA) and the MRT Member, where the former is seeking an extension of time to be able to provide an important document to prove the review applicant suffered from domestic violence. It is clearly within the Member's power to grant or not to grant an extension of time, and although initially unwilling to do so, she/he responds to MA's "special pleading" by agreeing to wait an additional seven days. Upon careful reading and consideration of Example 7, several issues can be identified from the exchanges between the Member and the migration agent. Firstly, the matter involves an important document that is vital to substantiate the claim by the visa applicant that domestic violence occurred. This document can affect the decision of the Member and can have great impact on the visa applicant's eligibility of a visa. Secondly, this is the second time the matter was before the MRT, but the review applicant still failed to produce the said document notwithstanding that extra time was given to the review applicant to provide it. The MRT would not allow a matter to procrastinate and in particular, on unsubstantiated grounds. Clearly if the Member is inclined to grant an extension, he would on one hand need to provide a reasonable of time for the review applicant to carry out her investigation and on the other hand he would need to set a time frame upon the matter to complete. As to the migration agent, the promise made to get the letter was quite vague but during the exchange, he strongly argued for another opportunity for the applicant to try to procure the document, a plea which it seems the Member could not ignore.

A further analysis of Example 7 is set out below.

8.4.3 Example 8

The applicant is a citizen of Vietnam. She lodged an application for a permanent residence visa on spouse grounds with the Department of Immigration & Multicultural & Indigenous Affairs ("the Department") on 26 October 2001 pursuant to the Migration Act 1958 (Cth) ("the Migration").

The applicant applied for both a permanent visa, Partner (Residence) (Class BS) visa, and a temporary visa, Partner (Temporary) (Class UK) visa, to permit the applicant to stay until a decision is made on the permanent visa.

Number: Turn

M: Member

MA: Migration Agent

- 1 M I have asked for documentary evidence that she is a competent person as defined in the regulations. That she is a member of the Australian Association of Social Workers or is recognised by that Association as a person who is eligible to be a member of that association, is performing the duties of a social worker. At the moment I don't have documentary evidence of that. That's all I am trying to say about it.
- 2 MA Yes, can the Tribunal give me time to try and –
- 3 M Well, you've had plenty of time plus you've received an extension of time.
- 4 MA Yes, I have but I will try to ask her to give that qualification.
- 5 M But you have asked for that and that is specifically what I've asked for.
- 6 MA But she refused to give it to me, member.
- 7 M Well, how is that going to assist by me giving further time. You've had since, what, January, I sent that letter.
- 8 MA Yes, well, she has refused to give it to me and then she went on leave and I could not locate her member so I am now going to come back to her and say, look, it's crucial for my client's case. I tried to ask her to give that. There's also one issue.
- 9 M No, I'm sorry, as I said to you, you don't have the right to make submissions at the hearing.
- 10 MA All right, that's fine.
- 11 M I am not going to give you any more, you've had opportunities to put everything in writing that you wanted to. We had detailed submissions earlier but not in relation to this. Look, I will allow you and with no further extensions, I will allow you seven days to provide that information but I will not give you a further extension after that.
- 12 MA Yes, thank you.
- 13 M All right, and specifically the information that has been sought and I am just letting you know that you will need to be certified copies.
- 14 MA Yes.
- 15 M All right, I'm going to finish the hearing now. I'm going to call the hearing attendant.

In the above Example 8, the MA is attempting to seek an extension of time to hand in the document requested by the Member. It appears that the review applicant had previously failed to submit a letter from a social worker to support her claim that there was indeed a report of domestic violence. In the first hearing, an adjournment was granted to give time to the review applicant to obtain the letter from the social worker to substantiate the applicant's claim of domestic violence. The review applicant then failed to hand in the document as required. During this second hearing, the migration agent sought more time to comply with this requirement.

Here in Turns 2 to 9, the exchange shows that the migration agent repeatedly requests more time to provide the documents, however the Member denies the request with strong reasons and ends with "You don't have the rights to make submissions in the hearing"¹¹⁸ (Turn 9). Prior to Turn 9, the migration agent is trying to argue the case for the review applicant (lines 2, 4, 6 and 8) in a step by step way. In Turn 8, the migration agent is outlining the action he would take if the Member allows another extension of time. But when the Member exercises his authority (based on the power provided to him by the migration legislation) to shut the migration agent out of the negotiation by saying "You don't have the rights to make submissions in the hearing", the migration agent realises that what the Member said is correct. Section 366A with respect to the power of speaking is cited below for easy reference¹¹⁹:

Section 366A

- (1) The applicant is entitled, while appearing before the Tribunal, to have another person (the assistant) present to assist him or her.
- (2) The assistant is not entitled to present arguments to the Tribunal, or to address the Tribunal, unless the Tribunal is satisfied that, because of exceptional circumstances, the assistant should be allowed to do so.

¹¹⁸ Section 366A of the Migration Act 1958.

¹¹⁹ This can to certain extent be interpreted as a sign that the migration agent does not wish to offend the Member.

From a discourse point of view, the migration agent acknowledges that the power in discourse that is exercised and enacted by the Member (as per section 366A of the Act) does not give him rights to make any submission unless allowed by the Member. Accordingly, the migration agent withdraws his argument, saying, “All right. That’s fine.” (Turn 10). In Turn 9, the Member is exercising his authority through the exercise of its attendant power in his contributions to the interaction as reflected in the discourse (Fairclough, 2001). Further, the exchange of the Member and the migration agent also represents an occasion of that institutional discourse characterised as “national, legitimate accounting practices which are authoritatively backed up by a set of rules and regulations governing an institution” as pointed out by Sarangi and Roberts (1999: 15).

From a legal perspective, the migration agent has no prerogative to speak out for the review applicant unless invited by the Member to do so. Equally, the Member is empowered by the law to deny submissions made by the migration agent unless he considers that there are exceptional circumstances. The Member in this case does not discuss whether he considers the circumstances exceptional, but in Turn 11, the Member finally agrees (reluctantly) to adjourn the matter for another seven days with warning to the migration agent that no further adjournment will be allowed.

The final agreement (Turn 11) by the Member can be interpreted as a reflection of the Member’s awareness that a refusal may trigger the review applicant (on advice of the migration agent) to take the matter up to the Federal Circuit Court for appeal on the basis of jurisdictional error. To be more specific, if the Member refuses to allow extra time, the visa applicant may subsequently argue in the court (should the matter be appealed) that the Member failed to allow a fair hearing, which is against the rule of natural justice. While allowing another seven days, the Member is framing his reply with clear indication that if the matter

returns and the migration agent asks for another extension of time, it is more likely than not that the request will be denied. “I will allow you with no further extension” (lines 4 of Turn 11) is further reiterated by “I will not give you a further extension after that (line 5-6 of Turn 11). The linguistic marker of “with no further extension” and “not give you a further extension” provides a forceful indication that that was the last extension available to the review applicant.

The decision made by the Member (in Turn 11) demonstrates that although the migration agent appeared to be losing the argument over several exchanges, the power behind the discourse (or the implied power of the migration agent and the missing voice of the review applicant) caused the decision maker to re-consider the circumstances and to change his initial position by allowing a further extension of time.¹²⁰

8.5 Legal issues impacting on language and power in the MRT

As the focus of this research is on language and the law, it is incumbent to mention briefly the legal perspective regarding issues such as the grant of extensions of time. Whether to grant or not to grant an extension of time is a discretion that the Member is entitled to exercise. We must also recall that the MRT review process is inquisitorial by nature. Nonetheless, the MRT is still bound by common law precedents, which means they are bound by the decisions made by superior courts. To contextualise these matters, I describe a similar case below.

In *Minister for Immigration and Citizenship v Li* [2013] HCA 18 (“Li’s case”), the High Court was asked to consider whether the adjournment should be granted. The background of the case is set out in the Law Journal of the New South Wales Law Society (Sibley, 2013 p.37) as follows:

¹²⁰ We now understand that the Member’s decision in this case is in line with the view adopted by the High Court in the case discussed below.

Ms Li applied for a type of visa which required a successful skills assessment from Trade Recognition Australia (TRA). Initially, Ms Li's application for a visa was refused by a delegate of the Minister for Immigration. She applied for review by the MRT.

After the MRT hearing, Ms Li's migration agent informed the tribunal that her application to TRA was unsuccessful but that the decision was incorrect. The migration agent explained why this was the case and requested that the tribunal not make a decision until after the TRA had reconsidered Ms Li's skills assessment application. The MRT decided not to do so. It informed Ms Li that the MRT "considers that the applicant has been provided with enough opportunities to present her case and is not prepared to delay any further." The tribunal refused Ms Li's application for review. Incidentally, after the MRT decision, Ms Li's migration agent was proved right; Ms Li was granted a skills assessment by the TRA.

The question the High Court considered was whether the MRT should have granted Ms Li the adjournment she sought. All five members of the High Court held that she should have been granted the adjournment.

Without going into the details of the *ratio decidendi* of the above Li's case, it may be appropriate to mention a further common law case that the High Court has also discussed in relation to Li's case, namely, that of *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1KB 223. In that case, the English Court of Appeal accepted that the administrative determinations could be ultra vires if they were unreasonable in the sense that the decision was 'so unreasonable that no reasonable authority could ever have come to it'.¹²¹

In other words, if a decision is so unreasonable that no reasonable authority would have come to that decision, it is more likely than not that the court will come to the applicant's rescue. Indeed the High Court of Australia says: "No reasonable tribunal, seeking to act in a way that is fair and just, and according to substantial justice and the merits of the case, would have

¹²¹ See Cane (2008), p.19 for the summary and comments of the case.

refused the adjournment.”¹²² As a caveat, the principle of “Wednesbury unreasonableness” applies on a case by case basis.

The implied power of the migration agents and other participants is clearly supported by the outcome of the Li’s case. The MRT’s failure to allow an extension in that case was based on the Member’s exercising the power to which the Member is entitled, but the implied power of the review applicant was reflected in her taking the matter to the Federal Circuit Court and subsequently to the High Court. The review applicant may not necessarily win in an appeal but in the absence of the appeal avenue to the Federal Circuit Court, the review applicant would be denied access to the judicial system or an opportunity to have the matter heard by a court. Such an outcome, in this case would have put the review applicant in a bigger predicament as the natural consequence would be that the review applicant would be left without a visa to stay in Australia.

This case has set a standard for the MRT to follow when conducting reviews of similar nature. In essence, a decision has to be reasonable.

8.6 Conclusion

In this chapter, I have discussed the concept of recontextualisation as a tool for understanding and illuminating the discourse of the Decision Record. I also take note of the language and power relationship indicating that the power behind language plays an important role to influence the discourse of the participants. Thus the Member’s performance is to some extent scrutinised by the federal court. Meanwhile, the court through its decisions has set the standard that the MRT should observe. This chapter complements what early chapters have discussed and attempts to provide a multi-perspectival picture of this unique review process.

¹²² Minister for Immigration and Citizenship v Li [2013] HCA 18 at par 124.

The arguments and examples included in this chapter with respect to language and power provide a strong message. The MRT has a responsibility to provide due process for reviewing the visa applications before them. MRT is a bureaucratic institution. Every institution has its own targets to meet, and incurs certain costs in conducting its business. Notwithstanding that there is a goal set out in the legislation for the MRT to achieve, i.e. to provide an economical and fast avenue for review, it is vital that – if the review matter requires substantial time and attention – the same benefits should be provided. Otherwise, review applicants will be forced to seek a further review in the Federal Circuit Court, which may defeat the original intention behind the establishment of the MRT. Likewise, the review applicant has to acknowledge that if the MRT has reviewed their cases in a proper manner, and due process has been observed, they must accept the decision or face higher costs in further appeals. The examples given also substantiate my claim that the role of the Member changes as the hearing progresses.

Chapter 9

Conclusion

In this chapter, I briefly review the research methods employed and the key findings of the research. I also consider what these findings mean and what suggestions I can make for future research and for possible improvements in the legal processes pertaining to visa reviews.

9.1 The research methods employed

I have analysed the data sets of MRT discourse by adopting a basically socio-linguistic approach and by drawing on insights contained in the work of various scholars' work on discourse and interaction (notably Goffman's). It is noted that there are other research methods that scholars adopt while using Goffman's participation role as the tool. But as far as I am aware, there is no steadfast rule that requires a certain method to be used concurrently with the participation role, so long as the method adopted is consistently used throughout the research conducted. For example, Heydon (2005) used participation role in her research on police interviews, but different from my research method as stated above, she used conversation analysis (CA) (see Schegloff 1988) as the basis for her research. It is therefore difficult to argue or compare the use of participation roles in my research with hers as there are some fundamental differences in both researches, such as the subject matter, sources of data and perspectives in discussion. All these differences will affect the outcome of the research.

The research started with examining the role and participation framework of the Member and the other MRT participants. In doing this, inevitably I have discussed some legal processes and concepts, as these were mentioned or implied in my data sets. I have also compared the MRT discourse with other discourse types, such as courtroom discourse, arbitration discourse and mediation discourse. Based on the aforesaid comparisons, I demonstrated, with numerous

examples, which the MRT discourse itself constitutes a distinct discourse type and indeed a separate genre set by itself, within the broader framework of legal discourse.¹²³ My claim is supported by the discourse analyses contained in this thesis (see Chapters 6, 7 and 8). This is to be expected given the unique specialist tribunal status of the MRT (by which I mean it is empowered by the Act and has power in what it decides).

During the research process, it became clear to me that I would need to include data and materials that were as broad and as in-depth as possible to allow readers to appreciate the complex nature of the interactions among discourse, language and law. To this end, I used discourse materials from diverse sources including tribunal records, court records, my own observations in practice and from attending the MRT hearings as an observer, personal interviews, questionnaires and both official and unofficial information sources, as explained in Chapter 5.

9.2 Summary of findings and suggestions

At the outset of the thesis, in chapter 1, three questions were raised to frame the research:

1. What roles does the Member adopt during the hearing?
2. How do the Member's roles shift from the point of view of discursive practices?
3. Under what circumstances does the Member change roles?

Throughout the thesis (especially including but not limited to Chapters 6, 7 and 8), I have explored and reflected in detail on these three questions. In the final analysis, I consider my findings are not restricted to the MRT but are useful for other similar tribunals commissioned to deal with similar specialised matters. They are particularly relevant to situations in which a

¹²³ See Maley (1994) with respect to different kinds of legal discourse. See also O'Toole (1994)'s comments on legal discourse from a lawyer's point of view.

powerful administrator acts in an inquisitorial role vis-à-vis applicants. As a caveat, I do not consider that each of the three above questions can be looked at separately. I consider these questions have been leading my research jointly and severally. Moreover, as far as I am aware, no other empirical research with respect to the discourse or the interaction of language, discourse and law has been carried out on the subject or in the setting of the MRT.

I will now summarise the findings of my research with reference to the three questions above.

9.2.1 What roles does the Member adopt during the hearing?

MRT Members have and have to have the ability to adopt different roles when faced with different problems or issues arising from the case they are conducting the review of. These roles can be that of a counsellor or advisor, an investigator trying to discover the facts behind the veil or a judge interpreting the law. Bourdieu (1991, p.55) comments on the “competence” that a member of a group should possess, and notes that “ [s]peakers lacking the legitimate competence are de facto excluded from the social domains in which this competence is required, or are condemned to silence”. From the discourse perspective, the research reported here shows that MRT Members are to a greater or lesser degree competent in appropriate discourse skills. However, it is also worth noting that some have over-emphasised their claim to authority¹²⁴.

In analysing the data sets, we noted that the Member adopted the role of enquirer and investigator when attempting to find out the facts of a case before making a decision. We also found that the Member in general is required to explain the law as well as to apply it, and that such a role is like that of an interpreter of law and advisor. In one of the sample data sets, the Member was required to give some advice to a young student, and that kind of supportive advice-giving is unlikely to be seen in normal court or mediation sessions.

¹²⁴ see *Antipova v Minister of Immigration* (2006) FCA 584 and my discussion of this case in chapter 7.

9.2.2 How does the Member's role or roles shift from the point of view of discursive practices?

When a person changes their role, their discourse and interactional strategies change.

Goffman describes this circumstance in terms of “footing”:

A change in footing implies a change in the alignment we take up to ourselves and the others present as expressed in the way we manage the production or reception of an utterance (Goffman, 1981p.128)

Based on Goffman's observation above, when confronted with challenges by a participating party, the other party will naturally have to switch to a different discourse of communication. This requires that both the speaker and the hearer possess the ability to pick up on subtle discursive cues and participate in a changed “game”. This phenomenon resonates with Gumperz's concept of “contextualisation cues” (Gumperz 1982), a notion he elaborated when he discussed the need for people involved in an interaction to read a variety of expressive and communicative cues, noting that failure to do so can lead to communication breakdown. This ability, in my view, is more important than the turn-taking competence commonly observed in courts of law and reflects a participant's ability to interact successfully in a high-stakes conversation. Turn taking in a courtroom environment is a set of conventions that the participants abide by in the courtroom whereas the ability to pick up *cues* demands social skills as well as deep knowledge of the context and more or less competing goals.

The Member interacts with the other participants in a hearing and changes his role when there is an interactional need and when the contextualisation cues are recognised. For example, when the visa applicant attempts to argue the relevancy of her occupation to the visa application, she shifts from giving answers in response to the Member's response as a

recipient to arguing her case as an advocate and the Member shifts from an enquirer/investigator to an interpreter of law, explaining what the law requires with respect to her visa category (see Chapter 7)¹²⁵. In addition, their performance demonstrates that parties are able to interact in alignment with the subject of the exchange.

Sometimes, the shift of role is the result of the Member's attempt to maintain his authority. For example, in Example 7, during the interaction between the parties, the migration agent interrupts the flow of talk ordained by the institutional order when he picks up on the fact that when his client's interest is at risk. He now begins arguing for his client. Thus the imperatives of the interaction order interfere with and override the rules of the institutional order. However, in the end, to maintain his authority in the hearing, the Member tells the agent that he has no right to speak for his client at this point.

9.2.3 Under what circumstances does the Member change role?

This question overlaps with the second question. In the discourse analysis presented earlier in this thesis, particularly in Chapter 6 and Chapter 7, it was shown that the Member generally changes roles in the following circumstances: -

- (a) to be in alignment with the circumstances of the case or context;
- (b) in response to the replies or questions raised by the visa applicant or migration agent; and
- (c) in constructing a question to seek further information from the parties.

There may well also be a role change in circumstances where the applicant appears especially vulnerable or out of his/her depth and requires some advice. For example, the student who failed to provide a COE falls into this category (see above). There are other circumstances

¹²⁵ This is also demonstrated in the Saha case where the visa applicant attempted to find out what else can he do to satisfy the visa requirements or whether there was an alternative visa that he would be eligible to apply for. This communicative cue was picked up by the Member who rejected the visa applicant's attempt by bringing the exchange focussed on the current visa case.

where the Member attempts to maintain the institutional order, or more precisely his/her own authority, in the hearing, e.g. by reminding the migration agent that he does not have the right to speak.

9.3 Implications and suggestions

This thesis has focussed on a discourse analysis of the MRT and, being a type of qualitative research, raises some important questions for future investigation. The thesis has opened the door by looking at the discourse practices that take place between the Member and the other participants of the MRT. It will be recalled that in Chapter 1 I set out the following questions to assist me to consider what kind of improvements could be suggested at the end of the study.

9.3.1 What kind of professional development training would Members require so as to be better equipped with respect to matters of professional communication during the hearing?

As we all acknowledge one way or another, seeking the truth is not something that we can easily achieve and sometimes, even despite our best endeavours, what we believe is the truth may turn out to be not what it appears to be. It is common knowledge that, in migration matters, some people are so desperate that they are willing to do whatever it takes to get a visa. For example, they procure fake marriage and false qualification documents. As Goffman (1959, p.2) puts it: “Many crucial facts lie beyond the time and place of interaction or lie concealed within it.” As a decision maker or gate-keeper, the Member is required to make a decision on the facts before him. At the discourse level or more precisely, the professional communication level, this study raises a number of issues that may be worthwhile for the Members to consider in their professional training.¹²⁶

¹²⁶ I am aware that Members of the MRT and RRT attend conferences such as those held by the Australian Institute of Judicial Administration (AIJA <http://aija.org.au/>) or the Law Council of Australia (http://www.lawcouncil.asn.au/lawcouncil/images/ILC_2015_Program_final.pdf) as part of their professional education. My suggestions are based on my observations from the study I undertook herein.

(a) Social and cultural understanding

In *Antipova v Minister for Immigration & Multicultural & Indigenous Affairs [2006]* FCA 584, one of the issues raised in the matter during the review hearing is that the MRT Member failed to listen to Ms Antipova's explanation of her relationship with her sponsor and does not give her an opportunity to explain why she made a partner visa application with another person while she was married to her husband. Since the visa applicants may be from various cultural backgrounds which hold a different concept of de facto relationships and marriage, it is important for the Member to be more aware of and sensitive to cultural factors related to relationships like marriage. Training/education could be provided in these matters.

(b) Substance not form

The second issue, as also illustrated in the Antipova case, is the need to give the applicant an opportunity to speak out. As the Federal Court judge in the Antipova case (Judge Gray) points out: "Although the Tribunal gave Ms Antipova such an invitation in form, because of the manner in which it conducted the hearing, there was no such invitation in reality" (see judgement, paragraph 112). While the Federal Court is not suggesting that the Member was biased, it does remind the Member to open up his or her mind and listen carefully for nuances and implications. Again, this is a capability that could be developed with guidance.

(c) Ability to construct questions

Construction of questions is a skill that goes to the core of fact finding. The migration law is complicated and when the Member is asking a question, its form and/or content sometimes goes beyond the comprehension of the party who is being asked it. If an interpreter is involved, it makes things even harder as the interpreter sometimes is unable to understand the law itself.

The Member is faced with the difficult job of ascertaining the veracity of evidence presented by the visa applicants. At the discourse level and in the criminal context, Harris (2011) has discussed the role of language in eliciting, establishing and presenting the evidence so that the judge can assess the validity of it. In the MRT setting, the Member ideally has to possess the kinds of linguistic skills mentioned by Harris.

Secondly, in many review cases, the court has emphasised that the MRT should make the correct enquiries regarding the case, and failure to do so is likely to be the grounds for appeal of the MRT decisions on jurisdictional error grounds. French CJ in his paper “The Role of the Courts in Migration Law” (delivered to the annual members conference of the MRT and RRT) says that “[e]xamples of jurisdictional error include a mistake of law which causes the decision-maker to identify a wrong issue, ask itself a wrong question, ignore relevant material or rely upon irrelevant material”(2011, p.9).

Thirdly, as the research shows (see section 8.2 above), the way questions are formulated is vital in obtaining information and confirming and enhancing the cohesion and coherence of the interaction. Hence training in formulating questions is an area that Members could well consider.

9.3.2 What kind of professional development training (in particular professional communication) will the migration agents require so as to better deal with different kinds of visa case, in addition to their migration law training?

When I commenced in Chapter 1 with this question in mind, I was already considering that maybe migration agents would require some kind of training in the domain of discourse management and communicative strategies. Indeed, the preparation of a case and the writing of the submission to put forward their case to the MRT require migration agents to be good writers, i.e. to possess good written communications skills, in advocating on behalf of their clients.

According to the Office of Migration Agents Registration Authority (MARA)¹²⁷, migration agents are required to attend Continuing Professional Development (CPD) to ensure “the level of professionalism, knowledge and skill required of registered migration agents is continually improved.” (See <https://www.mara.gov.au/becoming-an-agent/professional-development/>). There are mandatory CPD subjects such as Ethics and Management, while other subjects, which are listed as electives, are up to the individual migration agent’s choice and also depend to some extent on the CPD service provider’s programs. Such elective subjects are focussed on law and procedures relevant to each category or sub-class of visa.

However, as I conducted the study, I began to be aware that migration agents need to broaden their general knowledge considerably, a requirement which probably falls outside the scope of the present study, and I may indeed be subject to the criticism that I do not have the expertise to make this recommendation. As a result, I can only touch on this question so far as the level of my legal expertise permits and as my own personal observations allow.

While migration agents do not have the right to speak for their clients during the hearing unless invited by the Member¹²⁸, they do have an obligation to assist their client during the hearings, and also through consultations or conferences, once they are retained by the latter.

During my attendances at the MRT hearings, I observed that some migration agents are at times confronted with a need for knowledge outside their migration law training. In one particular hearing¹²⁹ which I discussed in Chapter 6, the migration agent (who I assume was not a lawyer) was confused about the correct technical definitions of ‘business name’ and ‘legal entity’, and the Member had to switch his role and step in to suggest to the visa applicant that the migration agent should seek an adjournment in order to seek legal advice.

¹²⁷ MARA has become part of the Department of Immigration since mid-2015.

¹²⁸ Section 366A of the Act.

¹²⁹ Professor Candlin and I were in attendance.

In my meetings with experienced migration law practitioners, I was also told that migration agents when dealing with business visa matters often find it hard to understand specialised concepts and terms, such as accounting principles and terminology (see Jones and McCracken, 2011 with respect to training to professional accountants).

Accordingly, it seems reasonable to suggest that, when migration agents are undertaking training, in addition to practice in writing submissions, if they are non-lawyers, it may be useful for them to consider taking up training in some general principle of law; and for migration agents without commercial training, it may be helpful if they have some general training on commercial subjects, such as accounting.

From a discourse-and-communication point of view, the broadening of knowledge may assist the migration agents to attain “other stuff”¹³⁰ in their use of language.

9.3.3 What help can be provided to unrepresented review applicants if they choose not to (or cannot afford to) have the assistance of a migration agent?

Not all visa applicants are able to afford the assistance of migration agents to help them with their review applications. In considering the social and cultural factors that impact on this lack of access, it has become clear that, while the migration matters involved may be seemingly straightforward, based on the requirements set out in the Act and Regulations, it is at times quite difficult – due to the socio-cultural or socio-economic background of individual visa applicants – to find common ground with the Member or to agree on particular facts as the hearing unfolds.

Two examples discussed earlier (see section 7.4.1, the Saha case and section 7.4.2, the student visa case) demonstrate that there may be a need to provide assistance to review applicants who have no legal representation and/or who are from non-English speaking backgrounds.

¹³⁰ See Gee’s discussion of capital “D” Discourse in *An Introduction to Discourse Analysis* (Routledge 1999).

The review applicants in both the Saha and student cases were from non-English speaking backgrounds and were not represented. Lack legal representation often results in a poor and damaging presentation of the facts by the RA. In the Hui case, discussed in section 6.3.2, the review applicant was trying to argue her case but in fact only expressed her feelings and her subjective viewpoint and she did not present any evidence to support her arguments and claims. She also failed to address the requirements of the law. This is commonly the case in interactions between review applicants and MRT Members, given that the former is not legally trained.

Plainly, to provide fairer access to the review process for visa applicants who cannot afford legal representation, I make the following observations and suggestions:-

(a) Pro-bono system¹³¹

It was observed that some visa applicants are not able to afford to have legal representation or consultation when they come to lodge their review applications with the MRT. Thus a pro-bono system similar to the provision of a duty solicitor or duty barrister attached to the local court may be a good solution. This would allow the potentially unrepresented applicants to have full and fair access to the review system with the advantage of proper advice. From a discourse and/or communicative point of view, this will be even more effective and beneficial if migration law practitioners (including migration agents who are non-lawyers) of different ethnic backgrounds are encouraged to devote time to ensuring the removal of the linguistic and cultural hurdles that often affect visa applicants' submission of their cases.

¹³¹ Many big law firms in Sydney have pro-bono service. See http://www.nationalprobono.org.au/documents/NSW_Pro_Bono_Practices_16_03_07.pdf

(b) Chamber magistrates style service

In New South Wales, the court has a chamber magistrate's service that provides advice to the public¹³². Its function, according to the law link website, is to provide advice and referral. However, it does not represent the party at court.

The number of cases lodged with the MRT each year is voluminous (see Chapter 3 for statistics), so it is suggested that it should establish a service similar to that provided by the chamber magistrates of the local court to assist review applicants in understanding the relevant procedures and requirements prior to the hearing.

9.4 A final word

In conclusion, I trust that this thesis has provided some interesting insights into the complex nature of the interaction of language, discourse and law in the migration review setting, and that these insights will be useful for the consideration of stakeholders who may in the future become involved in changing or improving the way they practice and communicate in MRT type settings. I also hope my work here can provide stakeholders such as migration agents and review applicants, with useful insights, derived from the discourse point of view, as to how they can be better prepared for and respond to the types of complicated issues that tend to arise from a review application and beyond.

¹³² See <http://www.parliament.nsw.gov.au/Prod/parlment/hansart.nsf/V3Key/LC19971125018> with respect to the history of chambers magistrates.

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DECISION RECORD

APPLICANT: Mr Manbir Singh Bajwa

MRT CASE NUMBER: ← 0808916 →

DIAC REFERENCE: BCC2008/15992; BCC2008/41223

TRIBUNAL MEMBER: Suseela Durvasula

DATE: 18 May 2010

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the application for a Skilled (Residence) (Class VB) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 886 (Skilled - Sponsored) visa:

- Clause 886.211 of Schedule 2 to the Regulations

STATEMENT OF DECISION AND REASONS APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicant a Skilled (Residence) (Class VB) visa under [s.65](#) of the [Migration Act 1958](#) (the Act).
2. The applicant applied to the Department of Immigration and Citizenship for a Skilled (Residence) (Class VB) visa on 14 August 2008. The delegate decided to refuse to grant the visa on 12 December 2008 and notified the applicant of the decision and his review rights by letter dated 12 December 2008.
3. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.886.211 of Schedule 2 to the [Migration Regulations 1994](#) (the Regulations) because each course he had undertaken to satisfy the '2 year study requirement' was not a registered course and was not closely related to his nominated skilled occupation.
4. The applicant applied to the Tribunal on 19 December 2008 for review of the delegate's decision.
5. The Tribunal finds that the delegate's decision is an MRT-reviewable decision under s.338(2) of the Act. The Tribunal finds that the applicant has made a valid application for review under s.347 of the Act.

RELEVANT LAW

6. The Skilled (Residence) (Class VB) visa is a permanent visa for: eligible overseas students with Australian qualifications following at least two years study; for holders of certain temporary visas with skills in demand; and for eligible provisional visa holders who have lived for at least two years and worked for at least one year in a Specified Regional Area in Australia. At the time the visa application was lodged, the Skilled (Residence) (Class VB) visa class contained the following subclasses: Subclass 885 (Skilled – Independent), Subclass 886 (Skilled – Sponsored) and Subclass 887 (Skilled – Regional).
7. The applicant has made claims relevant to Subclass 886 and will be assessed accordingly. If the Tribunal finds that the applicant does not satisfy the criteria for this Subclass, the criteria for the other Subclasses will then be considered.
8. The criteria for a Subclass 886 (Skilled - Sponsored) visa are set out in [Part 886](#) (Skilled - Sponsored) of Schedule 2 to the Regulations. The primary criteria must be satisfied by at least one member of the family unit who is an applicant for the visa. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.

886.211

- (1) The applicant meets the requirements of subclause (2), (3) or (4).
- (2) The applicant met the requirements of subitem 1136(4) of Schedule 1, and:
 - (a) the applicant satisfied the 2 year study requirement in the period of 6 months ending immediately before the day on which the application was made; and
 - (b) each degree, diploma or trade qualification used to satisfy the 2 year study requirement is closely related to the applicant's nominated skilled occupation.
- (3) The applicant met the requirements of subitem 1136(5) of Schedule 1, and:
 - (a) if the applicant holds a Subclass 476 (Skilled — Recognised Graduate) visa, the qualification used to obtain that visa is closely related to the applicant's nominated skilled occupation; or
 - (b) if the applicant holds a Subclass 485 (Skilled — Graduate) visa, each degree, diploma or trade qualification used to satisfy the 2 year study requirement to obtain that visa applicant is closely related to the applicant's nominated skilled occupation.
- (4) The applicant met the requirements of subitem 1136(6) of Schedule 1, and:
 - (a) the applicant must have completed the apprenticeship for which the Subclass 471 (Trade Skills Training) visa was granted; and
 - (b) the apprenticeship is closely related to the applicant's nominated skilled occupation.

9. The 'two year study requirement', to which clause 886.211 refers, is defined in [regulation 1.15F](#) as follows:

Reg 1.15F 2 year study requirement

- (1) A person satisfies the 2 year study requirement if the person satisfies the Minister that the person has completed 1 or more degrees, diplomas or trade qualifications for award by an Australian educational institution as a result of a course or courses:
 - (a) that are registered courses; and
 - (b) that were completed in a total of at least 16 calendar months; and
 - (c) that were completed as a result of a total of at least 2 academic years study; and

(d) for which all instruction was conducted in English; and

(e) that the applicant undertook while in Australia as the holder of a visa authorising the applicant to study.

(2) In subregulation (1), degree, diploma and trade qualification have the meanings given in subregulation 2.26A(6).

10. The issue in the present case is whether each qualification used to satisfy the 2 year study requirement is closely related to the applicant's nominated skilled occupation.

11. Departmental policy (PAM3) provides the following guidance on whether 2 courses are closely related:

16 STUDY & NOMINATED OCCUPATION MUST BE CLOSELY RELATED

16.1 Purpose

The intention of the 'closely related' criterion throughout 886.211 is to support the policy objective that skilled migrants be "job-ready" for the Australian labour market and make a positive contribution to the Australian economy and society as soon as possible.

16.2 Closely related

Clause 886.211 provisions require the completed Australian qualification/s (or, for Trade Skills Training visa holders, their completed apprenticeship), to be 'closely related to' the applicant's nominated skilled occupation.

The 'closely related' requirement is to ensure that applicants have qualifications compatible with their nominated skilled occupation. Under policy, the critical factor in determining whether a qualification is closely related to the nominated skilled occupation is *whether the skill set/s underpinning the qualification/s are complementary and can be used in the nominated occupation*, in terms of both subject matter and the level at which those skills were obtained.

Under policy, circumstances of a qualification *not* being 'closely related' to the nominated occupation include where the qualification is not related to the nominated skilled occupation - for example, an applicant's nominated occupation is registered nurse but they satisfied the ***Australian study requirement*** on the basis of having completed a Bachelor of Commerce.

Another instance in which policy does not consider qualifications to be 'closely related' to the nominated occupation is where the level at which the skills were obtained is inconsistent with the level at which the applicant is skilled to work:

Example:

The applicant met the *Australian study requirement* on the basis of having completed a Certificate III in Furniture Making and a Masters of Information Technology. Although basic IT skills are generally applicable to most occupations, the high level skills gained by completing a Masters course is inconsistent with the skills that would be useful on a day to day basis as an entry level tradesperson (for a nominated skilled occupation of cabinet maker, as example).

16.3 Acceptable combinations

The following are examples of acceptable combinations of study and nominated occupation:

- an applicant who nominates Pharmacist as their skilled occupation and completes a Bachelor of Pharmacy in Australia.
- an applicant who nominates Electrical Engineer as their skilled occupation and has completed a Bachelor and Masters of Engineering in Australia.
- an applicant who nominates Pastry Cook as their skilled occupation and has completed a Certificate III in Patisserie and Certificate IV in Commercial Cookery in Australia.
- an applicant who nominates Archivist as their skilled occupation who has completed a Graduate Diploma in Information Management and an Associate Diploma in Computer Science in Australia.
- an applicant who nominates Graphic Designer as their skilled occupation and has completed an Advanced Diploma of Arts in Graphic Design and a Diploma of Business.

EVIDENCE

12. The Tribunal has before it the Departmental and Tribunal files relating to the applicant.

13. The applicant first arrived in Australia on 31 July 2006 as the holder of a Subclass 573 student visa. He was granted a Subclass 485 visa on 3 November 2008. This visa ceased on 3 May 2010. The visa application for a Subclass 886 visa was lodged on 14 August 2008.

14. The applicant nominated the skilled occupation of Cook in his application (ASCO code 4513-11).

15. With the visa application, the applicant provided evidence that he had completed a Certificate III in Commercial Cookery at the Evolution Hospitality Institute ('the Commercial Cookery course') from 3 September 2007 to 26 June 2008, a period of less than 10 calendar months.

16. He also provided evidence that he completed a Diploma of Tourism Marketing and Product Development ('the Diploma of Tourism') at the Windsor Institute from 31 July 2006 to 31 August 2007, a period of 12 calendar months. His academic transcript shows that the subjects he undertook in this course were: 'Business and Customer Relationships', 'Computing for Business', 'Legal Knowledge', 'Managing Finance I and II', 'Managing People I', 'Tourism Destinations', 'Manage Operations', 'Tourism Products and Services I and II', 'Tourism Sales and Marketing' and 'Workplace Communication I and II'.

17. The delegate refused the visa on the basis that the applicant did not meet clause 886.211. The delegate found that the applicant's Commercial Cookery course was registered in the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS) for 52 weeks. At the time of the visa application, the Diploma of Tourism was not registered with CRICOS and could not be counted towards the 2 year study requirement. The delegate found that the Diploma of Tourism course was not closely related to the nominated skilled occupation of Cook.

18. On 12 January 2010, the Tribunal wrote to the applicant inviting him to comment on information the Tribunal considered would be the reason or part of the reason for affirming the decision under review. This was the information in the Department's file regarding the applicant's study.

19. The applicant's representative provided information from the CRICOS register that the applicant's Diploma of Tourism course was registered for 78 weeks from 29 January 2003 to 17 February 2009.

20. The applicant appeared before the Tribunal on 25 March 2010 to give evidence and present arguments. The applicant was represented in relation to the review by his registered migration agent.

21. The applicant confirmed that his nominated occupation is Cook and that he had completed qualifications in Tourism and Commercial Cookery. The Tribunal advised the applicant that because neither of those courses was of 2 years duration he would have to rely on both courses in order to satisfy the 2 year study requirement.

22. The Tribunal advised the applicant that although the Commercial Cookery course may be closely related to his nominated occupation, the Tribunal must also consider whether the Diploma of Tourism is closely related to his nominated occupation of Cook. The Tribunal read out to the applicant the description of a Cook as set out in the Australian Standard Classification of Occupations (ASCO) and indicated that although this list is not exhaustive, it is a guide to the Tribunal when considering this issue. The Tribunal asked the applicant to explain how his studies in tourism are closely related to his nominated occupation of Cook.

23. The applicant explained that his Diploma of Tourism course shared the same subjects as the Diploma of Hospitality course, with the exception of the 3 tourism related subjects. The Diploma of Hospitality course is

normally 98 weeks but he decided to do the longer Tourism course for 128 weeks as it included other broader subjects.

24. The Commercial Cookery course was sufficient to cover the practical aspects of being a cook but it does not deal with the theory of running a restaurant business. The applicant stated that his goal was to run his own restaurant and work as a cook. To open a restaurant he needs to know how to run a business, to coach people, deal with customers, work as a team, be a leader, manage finances, how to sell products and do marketing.

25. Many of the subjects he did in the tourism course are relevant to this. 'Business and Customer Relationships' was relevant to developing good relations between customers and business owners. 'Computing for Business' was relevant to planning menus and ordering stock. These days, many of these tasks have been computerised and it was important to have a basic understanding of computers. 'Managing Finance' gave him an understanding of financial planning and budgeting which was relevant to estimating food requirements, ordering stock and menu planning. 'Managing Operations' would help him manage work operations in the restaurant, plan menus and estimate food requirements. 'Managing People' and 'Workplace Communication' were all relevant to the teamwork environment in the kitchen, preparing food to meet dietary requirements and training other kitchen staff and apprentices.

26. The applicant stated that he had been working as a cook in a small restaurant. He often had to run the restaurant if his manager was not there. He had not been able to work for the last year due to an assault causing injury to his arm. However, his intention was to work as a cook and eventually run his own restaurant.

27. He pointed out that the Department had granted his Subclass 485 visa on the basis that his two courses were closely related. It seemed inconsistent that the Department did not accept that now.

28. The applicant's representative submitted that the two courses were closely related. He urged the Tribunal to avoid a narrow approach that a cook is only involved with food preparation. A cook also has to run the restaurant if the boss is not there. Departmental policy supported the fact that the two courses were closely related.

29. The representative stated that he intended to submit a report from John Hart, the CEO of Restaurant and Catering Australia that addressed these issues. He stated that Mr Hart had given evidence in MRT case number 0808711 (differently constituted). The Tribunal gave him 2 weeks to submit this report.

30. The Tribunal listened to a recording of the evidence provided by John Hart in the hearing for MRT case number 0808711 on 4 March 2010. Mr Hart's evidence may be summarised as follows:

Mr Hart told the Tribunal that he was the CEO of 'Restaurant and Catering Australia' and was involved in a number of related organisations dealing with training in the restaurant and catering industry. He said that the basic requirements

for training of a cook are set out in the curriculum for the relevant Certificate III courses. He said that these involved both core and elective units. The elective units can come from various generic business areas, including general management, financial management, recruitment, and OH&S. This was particularly relevant for small business.

He said that, while in large hotels there tended to be a fairly formal structure through which cooks can progress, in smaller businesses, the structures are broader and an individual's skill set needs to be broader. He said that the overwhelming majority of cooks in the hospitality industry work in a small business situation. He said it was the belief of his organisation that the small-business context requires a person to have broader skills and learning. He said that his organisation in the industry was looking at a broader structure aimed at recognizing this broader skill requirement.

There was a general recognition in the industry that many occupations require more generic skills, particularly to practice in a small business context. Many skills relevant to working in a small business are covered in subjects such as Workplace Communications, Apply Health and Safety Practices, Manage Operations, Legal Knowledge, Managing Finance. Job costings and operational budgets are done by everyone in the kitchen context, particularly where the cook has to cost out dishes on a daily basis. Those modules were very relevant to the occupation and are used by a cook on a daily basis.

31. On 1 April 2010 the Tribunal received a report from John Hart. He states:

The qualifications framework also refers to different packaging options (i.e. selecting different elective and units) for different types of cook (i.e. a cook in a large business or a small business) thereby acknowledging that there are different skills requirements for the same job role in different types of businesses;

Qualifications such as those in generic business skills and/or skills such as accounting have a direct and specific application for a range of job roles in the hospitality industry. In the case of occupations such as a cook, particularly in small restaurant businesses, accounting and general business skills are: (a) able to be counted towards a cook's formal qualification; and (b) relevant and required in the job role a cook is required to discharge in the workplace...

The need to [have] business or financial skills are more relevant to the role of a cook in the restaurant sector than in some other job contexts in the hospitality industry (e.g. in a more specialised cookery role in a kitchen brigade in larger enterprise).

32. In a submission the representative stated that in looking at the duties of a cook, the Tribunal is not restricted in its consideration to the generic duties specified in the ASCO dictionary. While these duties must be considered, it is also appropriate to consider the more general duties expected of the applicant as explained by Mr Hart which are consistent with and/or complementary to the duties of a Cook.

FINDINGS AND REASONS

33. The issue in the present case is whether the applicant meets clause 886.211 of Schedule 2. Clause 886.211 requires that the applicant meet the requirements of subclause (2), (3) or (4).

34. The Tribunal finds that the applicant held a Subclass 485 visa at the time of application. Subparagraph 886.211(3)(b) therefore applies to him.

35. The Tribunal is satisfied that the applicant met the requirements of subitem 1136(5) of Schedule 1. He held a Subclass 485 visa. He was granted the visa on the basis of satisfying the primary criteria for the grant of that visa. His nominated occupation of ‘cook’ is an occupation for which at least 50 points are available as specified by the Minister in an instrument in writing for this subparagraph (IMMI 08/004).

36. In order to satisfy subparagraph 886.211(3)(b) the Tribunal must be satisfied that each degree, diploma or trade qualification used to satisfy the 2 year study requirement to obtain the applicant’s Subclass 485 visa is closely related to the applicant’s nominated skilled occupation.

37. The applicant has nominated the occupation of Cook (ASCO 4513-11). He has provided evidence indicating that he completed a Diploma of Tourism Marketing and Product Development at the Windsor Institute from 31 July 2006 to 31 August 2007 and a Certificate III in Commercial Cookery at the Evolution Hospitality Institute from 3 September 2007 to 26 June 2008. The Tribunal accepts that these were both registered courses at the time of application.

38. The ‘2 year study requirement’ is defined in [regulation 1.15F](#). It requires the qualification to have been completed in a total of at least 16 calendar months and as a result of a total of at least 2 years academic study, in registered courses, conducted in English. The applicant must have undertaken the study as the holder of a visa authorising the applicant to study.

39. The Tribunal is satisfied, on the basis of the information before it, that the two courses undertaken by the applicant were registered courses for which all instruction was conducted in English. The Tribunal is satisfied that the applicant undertook those courses while in Australia as the holder of a student visa which authorised him to study.

40. The applicant commenced his Diploma of Tourism course in July 2006 and completed it in August 2007, a period of 12 calendar months. He started his Commercial Cookery course in September 2007 and completed it in June 2008, a period of less than 10 calendar months. On the basis of this information, the Tribunal finds that his courses were completed as a result of at least 2 years of academic study in a total of at least 16 calendar months.

41. On the basis of the applicant’s transcript for the Commercial Cookery course, the Tribunal accepts that the applicant’s Commercial Cookery Certificate III is closely related to the nominated occupation of Cook. However, that course was only completed in a period of 10 calendar months. Therefore, standing alone, it is not sufficient to satisfy the 2 year study

requirement. It is therefore necessary to consider whether or not the applicant's Diploma of Tourism is also closely related to the skilled occupation of Cook.

42. The applicant's claim is that the Diploma of Hospitality Management is embedded within the Diploma of Tourism course. That is, many of the subjects were the same, but the applicant undertook some extra tourism related subjects to broaden his skills. The applicant argues that as the Diploma of Hospitality Management course would be closely related to the occupation of Cook, so too should his Diploma of Tourism.

43. The Tribunal does not accept the argument that simply because two courses are closely related to each other, that they are both closely related to the nominated occupation. What is required by clause 886.211 is the relevance of the academic qualifications – in this case, the Diploma of Tourism – to the nominated occupation of a cook. It is not the similarities of the two courses.

44. In considering whether the applicant's qualifications in Commercial Cookery and Tourism are closely related to his nominated occupation of Cook, the Tribunal has had regard to the tasks of a Cook as set out in ASCO 4513-11. ASCO states that a Cook performs the following tasks:

4513-11 Cook

Prepares, seasons and cooks food in catering and dining establishments.

Skill Level:

The entry requirement for this occupation is an AQF Certificate III or higher qualification.

Tasks Include:

- examines food to ensure quality
- regulates temperatures of ovens, grills and other cooking equipment
- prepares and cooks food
- seasons food during cooking
- portions food, places it in dishes, adds gravies or sauces, and garnishes
- stores food in temperature controlled facilities
- may plan menus and estimate food requirements
- may prepare food to meet special dietary requirements
- may train other kitchen staff and apprentices

45. The Tribunal acknowledges that this list is not exhaustive and that a range of other considerations may be taken into account in assessing both the nature of the qualifications acquired and the demands of the nominated occupation (*Thongsuk v MIAC* [\[2007\] FMCA 655](#)).

46. The Tribunal has also had regard to Departmental policy which states that consideration of this issue involves determining whether the skill set/s underpinning the qualification/s are complementary and can be used in the nominated occupation, in terms of both subject matter and the level at which those skills were obtained.

47. The Tribunal must therefore consider the applicant's particular circumstances, the nature of his occupation as a cook and his stated ambition to work as a cook in his own restaurant.

48. The Tribunal accepts the evidence of Mr Hart, CEO of Restaurant and Catering Australia, that the context of cook's position is important. Cooks who work in small restaurants will require a broader range of skills, such as accounting and general business skills, than those cooks who have a more specialised role in larger establishments. The Tribunal accepts Mr Hart's evidence that elective units for training a cook can include general management, financial management, staffing and occupational health and safety. Job costings and operational budgets are done by everyone in the kitchen context, particularly where the cook has to cost out dishes on a daily basis.

49. The Tribunal is also satisfied that the applicant gave convincing evidence as to how the individual subjects in his Diploma of Tourism course were closely related to the occupation of cook. While the Tribunal does not consider the four tourism subjects to be closely related to the occupation of cook, the Tribunal accepts the applicant's evidence and Mr Hart's evidence as to how the other subjects are closely related. For example, 'Computing for Business', 'Managing Finance' and 'Manage Operations' are relevant to the tasks of planning menus and estimating food requirements, costing menus and ordering stock. 'Manage People' and 'Workplace Communication' are relevant to the tasks of preparing food to meet special dietary requirements and training other kitchen staff and apprentices.

50. The Tribunal accepts the applicant's particular employment circumstances of having worked as a cook in a small restaurant and his career ambition to work as a cook and eventually run his own restaurant. The Tribunal accepts that the applicant would be required to fulfil some of the more managerial functions from time to time when the head chef or manager is away. The skills he acquired in the Diploma of Tourism course are therefore closely related to his occupation in this context. In light of the applicant's circumstances in this particular case and the evidence of Mr Hart, the Tribunal accepts that the applicant's nominated occupation requires more generic business skills that are covered in the Diploma of Tourism course.

51. In this particular case, the Tribunal notes that the applicant was granted a Subclass 485 visa on the basis that Diploma of Tourism course was closely related to his nominated skilled occupation of cook. There is an obvious inconsistency if the Tribunal now found that the Tourism course was not closely related to the occupation of cook.

52. For the reasons set out above, the Tribunal is satisfied that the applicant's Diploma of Tourism course is closely related to his nominated occupation of cook. The Tribunal has earlier found that the Commercial Cookery course he undertook was also closely related to the occupation of cook. The Tribunal therefore finds each diploma or trade qualification used

by the applicant to satisfy the 2 year study requirement to obtain his Subclass 485 is closely related to his nominated skilled occupation of cook.

53. The Tribunal therefore finds that the applicant satisfies paragraph 886.211(3)(b) and in turn satisfies subclause 886.211(3) and clause 886.211 as a whole. The Tribunal will remit the matter to the Department to consider the remaining criteria for the visa.

DECISION

54. The Tribunal remits the application for a Skilled (Residence) (Class VB) visa for reconsideration, with the direction that the applicant meets the following criteria for a Subclass 886 (Skilled - Sponsored) visa:

- Clause 886.211 of Schedule 2 to the Regulations

Suseela Durvasula
Member



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← Antipova → v Minister for Immigration & Multicultural & Indigenous Affairs **[2006] FCA 584 (19 May 2006)**

Last Updated: 19 May 2006

FEDERAL COURT OF AUSTRALIA

← Antipova → v Minister for Immigration & Multicultural & Indigenous Affairs [\[2006\] FCA 584](#)

MIGRATION – visa – spouse visa – whether Migration Review Tribunal complied with requirement to invite applicant to give evidence and present arguments – whether denial of procedural fairness – imposition of time limit on hearing after hearing had begun and without prior warning – frequent interruptions of applicant’s answers to questions and requests to make answers briefer – advice of tribunal sent with invitation to hearing that applicant should take time in answering questions – whether invitation to hearing real and genuine – tribunal disbelieved applicant on issue about which she was attempting to give detailed evidence – whether Tribunal misled applicant about issues on which review would be determined – whether Tribunal misconstrued criteria to be applied – compelling and compassionate circumstances for the grant of the visa – whether confined to circumstances existing at date of application for visa – whether ostensible bias

Constitution s 75(v)

[Judiciary Act 1903](#) (Cth) [s 39B](#)

[Migration Act 1958](#) (Cth) [ss](#)
[51A](#), [348](#), [353](#), [357A](#), [359\(2\)](#), [360](#), [420](#), [422B](#), [425](#), [476](#) (repealed)
[Migration Regulations 1994](#) (Cth) reg 1.15A, Sch 2 items 801, 820, Sch 3
[Migration Regulations 1989](#) (Cth) reg 3A

Boakye-Danquah v Minister for Immigration & Multicultural & Indigenous Affairs [\[2002\] FCA 438](#) [\(2002\) 116 FCR 557](#) distinguished
Nassouh v Minister for Immigration & Multicultural Affairs [\[2000\] FCA 788](#) cited
Minister for Immigration & Multicultural Affairs v Eshetu [1999] HCA 21 (1999) 197 CLR 611 followed
Re Refugee Review Tribunal; Ex parte Aala [\[2000\] HCA 57](#) [\(2000\) 204 CLR 82](#) cited
Plaintiff S157/2002 v Commonwealth [\[2003\] HCA 2](#) (2003) 211 CLR 476 cited
Minister for Immigration & Multicultural & Indigenous Affairs v SCAR [\[2003\] FCAFC 126](#) [\(2003\) 128 FCR 553](#) followed
Mazhar v Minister for Immigration & Multicultural Affairs [\[2000\] FCA 1759](#) [\(2000\) 183 ALR 188](#) followed
WAJR v Minister for Immigration & Multicultural & Indigenous Affairs [\[2004\] FCA 106](#) (2004) 204 ALR 624 considered
M17/2004 v Minister for Immigration & Multicultural & Indigenous Affairs [\[2005\] FCA 86](#) [\(2005\) 85 ALD 597](#) followed
Minister for Immigration & Multicultural Affairs v Cho [\[1999\] FCA 946](#) [\(1999\) 92 FCR 315](#) followed
NALQ v Minister for Immigration & Multicultural & Indigenous Affairs [\[2004\] FCAFC 121](#) cited
Applicant NAEF of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs [\[2003\] FCA 140](#) [\(2003\) 128 FCR 359](#) cited
Minister for Immigration & Multicultural & Indigenous Affairs v WAFJ [\[2004\] FCAFC 5](#) (2004) 137 FCR 30 cited
Minister for Immigration & Multicultural & Indigenous Affairs v Maltsin [\[2005\] FCAFC 118](#) [\(2005\) 88 ALD 304](#) cited
Minister for Immigration & Multicultural Affairs v Lay Lat [2006] FCAFC 61 discussed
VXDC v Minister for Immigration & Multicultural & Indigenous Affairs [\[2005\] FCA 1388](#) [\(2005\) 146 FCR 562](#) not followed
Moradian v Minister for Immigration & Multicultural & Indigenous Affairs [\[2004\] FCA 1590](#) [\(2004\) 142 FCR 170](#) followed
Annetts v McCann [\[1990\] HCA 57](#); [\(1990\) 170 CLR 596](#) followed

Stead v State Government Insurance Commission [\[1986\] HCA 54](#); [\(1986\) 161 CLR 141](#) followed

Neofotistou v Minister for Immigration & Multicultural & Indigenous Affairs [\[2005\] FCA 919](#) [\(2005\) 144 FCR 478](#) followed

Webb v R [\[1994\] HCA 30](#); [\(1994\) 181 CLR 41](#) followed

SAAP v Minister for Immigration & Multicultural & Indigenous Affairs [\[2005\] HCA 24](#) (2005) 215 ALR 162 cited

**NATALIA  ANTIPOVA  v MINISTER FOR IMMIGRATION AND
MULTICULTURAL AND INDIGENOUS AFFAIRS AND MIGRATION
REVIEW TRIBUNAL
VID 1174 of 2003**

GRAY J

19 MAY 2006
MELBOURNE

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY

VID 1174 of 2003

BETWEEN: NATALIA  ANTIPOVA 
APPLICANT

AND: MINISTER FOR IMMIGRATION AND MULTICULTURAL AND
INDIGENOUS AFFAIRS
FIRST RESPONDENT

MIGRATION REVIEW TRIBUNAL
SECOND RESPONDENT

JUDGE: GRAY J

DATE OF ORDER: 19 MAY 2006

WHERE MADE: MELBOURNE

THE COURT ORDERS THAT:

1. The Migration Review Tribunal be joined as the second respondent to the proceeding, and the title to the proceeding be amended accordingly.
2. Service on the second respondent be dispensed with.
3. A writ of certiorari issue, directed to the second respondent, bringing into Court the decision of the second respondent, dated 9 December 2003, affirming a decision of a delegate of the first respondent not to grant to the applicant a Partner (Temporary) (Class UK) visa, subclass 820 (Spouse) and a Partner (Residence) (Class BS) visa, subclass 801 (Spouse), for the purpose of quashing the decision of the second respondent.
4. The decision of the second respondent, dated 9 December 2003, affirming a decision of a delegate of the first respondent not to grant to the applicant a Partner (Temporary) (Class UK) visa, subclass 820 (Spouse) and a Partner (Residence) (Class BS) visa, subclass 801 (Spouse), be quashed.

5. A writ of mandamus issue, directed to the second respondent, requiring it to hear and determine the application of the applicant for review of a decision of a delegate of the first respondent not to grant to the applicant a Partner (Temporary) (Class UK) visa, subclass 820 (Spouse) and a Partner (Residence) (Class BS) visa, subclass 801 (Spouse), according to law.

6. The first respondent pay the applicant's costs of the proceeding.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY

VID 1174 of 2003

BETWEEN: NATALIA  ANTIPOVA 
APPLICANT

AND: MINISTER FOR IMMIGRATION AND MULTICULTURAL AND
INDIGENOUS AFFAIRS

FIRST RESPONDENT

MIGRATION REVIEW TRIBUNAL

SECOND RESPONDENT









JUDGE: GRAY J







DATE: 19 MAY 2006



PLACE: MELBOURNE



REASONS FOR JUDGMENT

The nature and history of the proceeding

1 This proceeding involved a detailed examination of the way in which the Migration Review Tribunal ('the Tribunal') dealt with the case of the applicant, Ms  **Antipova** , in performing its function of reviewing a decision of a delegate of the respondent, the Minister for Immigration and Multicultural and Indigenous Affairs ('the Minister'). Counsel for Ms  **Antipova**  argued that a great number of aspects of the manner in which the Tribunal conducted the proceeding, and reasoned its decision, gave rise to jurisdictional error on its part. The issues include denial of procedural fairness. Most significantly, it was suggested that the Tribunal denied Ms  **Antipova**  procedural fairness by misleading her as to the issues on which it proposed to decide her case, and by cutting short the presentation of her case during the Tribunal's hearing. There is also a question whether the Tribunal misconstrued a criterion applicable to Ms  **Antipova** 's case.

2 Ms  **Antipova**  is a citizen of the Russian Federation. She entered Australia on 21 March 2002 as the holder of a Business (Class UC), subclass 456 visa, valid until 21 June 2002. On 18 June 2002, she applied for a Partner (Temporary) (Class UK) visa, subclass 820 (Spouse) and a Partner (Residence) (Class BS) visa, subclass 801 (Spouse), on the basis of her de facto relationship with an Australian citizen, Michael Charles Petrou. An application of this kind is considered first as an application for a subclass 820 visa. If that visa is granted, then the applicant may be considered later for the grant of a subclass 801 visa, a criterion for which is that the applicant have held a subclass 820 visa for a specified period, usually two years. On 3 January 2003, a delegate of the Minister decided to refuse to grant a visa. Ms  **Antipova**  applied to the Tribunal for review of the delegate's decision. The Tribunal conducted its hearing on 21 October 2003. On 9 December 2003, the Tribunal sent to Ms  **Antipova**  its written decision and reasons for decision. The Tribunal affirmed the decision under review, finding that

Ms  **Antipova**  was not entitled to the grant of either a subclass 820 visa or a subclass 801 visa.

3 In respect of that decision of the Tribunal, Ms  **Antipova**  applied to the Court, seeking relief of the kinds which the Court is empowered to grant in the exercise of the jurisdiction conferred on it by [s 39B](#) of the [Judiciary Act 1903](#) (Cth).

The legislation

4 [Section 353](#) of the [Migration Act 1958](#) (Cth) ('the [Migration Act](#)') provides:

'(1) The Tribunal shall, in carrying out its functions under this Act, pursue the objective of providing a mechanism of review that is fair, just, economical, informal and quick.

(2) The Tribunal, in reviewing a decision:

(a) is not bound by technicalities, legal forms or rules of evidence; and

(b) shall act according to substantial justice and the merits of the case.'

5 [Section 360\(1\)](#) of the [Migration Act](#) provides as follows:

'The Tribunal must invite the applicant to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review.'

6 [Section 360\(2\)](#) provides that [s 360\(1\)](#) does not apply in certain specified circumstances, none of which is applicable to the present case. [Section 360](#) is found in Div 5 of [Pt 5](#) of the [Migration Act](#), which also contains [s 357A](#). [Section 357A\(1\)](#) provides:

'This Division is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with.'

7 Item 820.21 in Sch 2 to the [Migration Regulations 1994](#) (Cth) ('the [Migration Regulations](#)') contains criteria to be satisfied at the time of an application for a subclass 820 visa. By item 820.211(2)(a)(i), one of those criteria is expressed as follows:

‘(2) An applicant meets the requirements of this subclause if:

(a) the applicant is the spouse of a person who:

(i) is an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen’.

8 By item 801.221(2)(a) of Sch 2 to the [Migration Regulations](#), a criterion to be satisfied at the time of the decision whether to grant a subclass 801 visa is that the person applying for it be the holder of a subclass 820 visa.

9 The definition of ‘spouse’, for the purposes of the [Migration Regulations](#) is found in reg 1.15A, which provides relevantly:

‘(1) For the purposes of these Regulations, a person is the spouse of another person if the 2 persons are:

(a) in a married relationship, as described in subregulation (1A); or

(b) in a de facto relationship, as described in subregulation (2).

...

(2) Persons are in a de facto relationship if:

...

(c) the Minister is satisfied that:

(i) they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and

(ii) the relationship between them is genuine and continuing; and

(iii) they:

(A) live together; or

(B) do not live separately and apart on a permanent basis; and

(d) subject to paragraph (e) and subregulation (2A), where either of them is an applicant for a permanent visa, a Partner (Provisional) (Class UF) visa, or a Partner (Temporary) (Class UK) visa – the Minister is satisfied that, for the period of 12 months immediately preceding the date of the application of the party relying on the existence of the relationship:

(i) they had a mutual commitment to a shared life as husband and wife to the exclusion of all others; and

(ii) the relationship between them was genuine and continuing; and

(iii) they had:

(A) been living together; or

(B) not been living separately and apart on a permanent basis; and

...

(2A) Paragraph 2(d) does not apply if:

...

(b) the applicant can establish compelling and compassionate circumstances for the grant of the visa.

(3) In forming an opinion whether 2 persons are in a married relationship, or a de facto relationship, in relation to an application for:

...

(ag) a Partner (Temporary) (Class UK) visa;

the Minister must have regard to all of the circumstances of the relationship, including, in particular:

(a) the financial aspects of the relationship, including:

(i) any joint ownership of real estate or other major assets; and

(ii) any joint liabilities; and

(iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and

(iv) whether one party to the relationship owes any legal obligation in respect of the other; and

(v) the basis of any sharing of day-to-day household expenses;

(b) the nature of the household, including:

(i) any joint responsibility for care and support of children, if any; and

(ii) the parties' living arrangements; and

(iii) any sharing of responsibility for housework;

(c) the social aspects of the relationship, including:

(i) whether the persons represent themselves to other people as being married or in a de facto relationship with each other;

(ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and

(iii) any basis on which the persons plan and undertake joint social activities;

(d) the nature of the persons' commitment to each other, including:

(i) the duration of the relationship; and

(ii) the length of time during which the persons have lived together; and

(iii) the degree of companionship and emotional support that the persons draw from each other; and

(iv) whether the persons see the relationship as a long-term one.

...

(5) If 2 persons have been living together at the same address for 6 months or longer, that fact is to be taken to be strong evidence that the relationship is genuine and continuing, but a relationship of shorter duration is not to be taken not to be genuine and continuing only for that reason.'

Ms ➡ Antipova ➡'s claims

10 Ms ➡ Antipova ➡ and Mr Petrou claimed to have been in a de facto relationship from 18 May 2001. Their relationship began in California, in the United States of America. Ms ➡ Antipova ➡ had gone to California to follow her then fiancé, with whom she had had a long relationship in Russia. At a party in April 2001, she met Mr Petrou, who fell in love with her. Although she was to be married shortly, Ms ➡ Antipova ➡ continued to meet Mr Petrou socially, with other friends she had made through studying English, on a daily basis. She went ahead with her plans to marry. The wedding took place on 30 April 2001. After she married, her husband became violent towards her. She quickly decided that she did not wish to remain with her husband, and preferred to make her life with Mr Petrou. She moved into a house that he shared with others on 18 May 2001.

11 Ms ➡ Antipova ➡ and Mr Petrou supplied to the Tribunal a quantity of material designed to bear out the case as to how long they had lived together. The material included statutory declarations of Mr Petrou's parents. In his statutory declaration of 2 September 2002, Mr Petrou's father said:

'WE SPOKE TO MICHAEL AND NATALIE BEFORE 22ND MAY 2001, THE DATE IS CLEAR BECAUSE IT IS PRIOR TO MICHAELS BIRTHDAY AND TRIP TO GERMANY. MICHAEL INTRODUCED NATALIE TO US AND TOLD US THAT THEY WERE TOGETHER AND INTENDED TO MARRY.'

12 Mr Petrou's mother, in her statutory declaration of 2 September 2002, said:

'I SPOKE TO MICHAEL AND NATALIE BEFORE 22 MAY 2001 WHICH WAS BEFORE MICHAELS BIRTHDAY AND HIS TRIP TO GERMANY. MICHAEL INTRODUCED

NATALIE TO ME AND TOLD ME THAT THEY WERE A COUPLE AND INTENDED TO BE MARRIED.'

13 The couple also provided two letters from Michelle E Downie. The first, dated 15 August 2002, said:

'I am a very close friend of Mr. Michael Petrou of Victoria, Australia. I have known Michael for two years, having met him in June 2000 in San Jose, California. We then shared an apartment in San Jose from April of 2001 to July of 2001.

*I met his fiancé, Natalie (Natalia ↔ **Antipova** →), at a party at our apartment in San Jose in late April 2001 and had contact with the couple until July 2001, when I left California. Natalie came to our apartment multiple times for dinners and coffee and lived with us in our apartment during the month of May. It is very apparent to me that the two were completely in love.'*

14 Ms Downie's second letter, dated 17 August 2003, read as follows:

*'On 15th August 2002 I made a statement in respect to Michael Petrou and his then fiance Natalie ↔ **Antipova** → (now Natalie Petrou). As I stated, I met Michael in about June 2000 and we became, and continue to be, very good friends. We shared a house in San Jose from April 2001 until July 2001, when I left the house to travel and settle in Venezuela. I met Natalie in late April 2001 and Natalie moved in with Michael in May 2001. I left in July 2001 and Natalie was still living with him when I moved out. As I also stated it was clear that they were very much in love, and not surprisingly, they have now married.'*

15 There was also a letter from Zhanna Shpits, which was typed but bore no signature, dated 21 July 2003, which read:

*'I met Natalia ↔ **Antipova** → when she attended classes in April 2001 at the Golden Gate Language School located in Campbell, California, where I teach English.*

We became good friends due to our common language and background. Natalia had a group of friends from the school that included people from many parts of the world.

*I know that Natalia ↔ **Antipova** → and Michael Petrou lived together in a defacto*

relationship from May 18th, 2001, and that Michael departed the USA for a trip to Germany later in May 2001.





The date is accurate because it coincided with semester start in that year and Michael's trip to Germany shortly after.

I visited their home on several occasions including the weekend of the 19 – 20 May 2001 and it was clear that they were sleeping in the same bedroom that weekend. Natalia gave me a tour of the house and I saw the bedroom that they occupied with its adjoining ensuite.



The house had other bedrooms, and other residents occupied these other rooms in a shared house arrangement as was common in the Bay Area at that time.

It is certain that they were in a defacto relationship from that weekend onwards and my fiancé and I spent a lot of time together with both Michael and Natalia going to restaurants and scenic tours around California during the remainder of 2001 and early in 2002 before they left the USA.

Please don't hesitate to contact me if you have any further questions.'

16 Ms  **Antipova**  and Mr Petrou subsequently left the United States and have since married. Mr Petrou has two children by a previous marriage, who have developed a close relationship with him and Ms  **Antipova**  since they arrived in Australia.

The Tribunal hearing

17 By letter dated 24 September 2003, an officer of the Tribunal invited Ms  **Antipova**  to appear before the Tribunal 'to give evidence and present arguments relating to the issues arising in relation to your application for review.' The letter referred to 'the enclosed information sheet, which contains information about the conduct of Tribunal hearings.' Enclosed was a two-page document, entitled 'INFORMATION ABOUT TRIBUNAL HEARINGS'. It contained the following statements:



'You are entitled to appear before the Tribunal to give evidence and present arguments...

There are no set procedures – the presiding Member will guide the proceedings to suit the circumstances of each case. The Members will generally ask questions of each person in turn and provide an opportunity for the applicant to make a statement and present arguments...



Witnesses should take their time in answering questions and the presiding Member may permit them to consult papers or another person before answering.'

18 On 21 October 2003, the hearing commenced. A transcript of the hearing, 46 pages long including the cover page, was placed before the Court by means of a supplementary court book. Shortly after the hearing began, the Tribunal member said:







'Now, the decision-maker at the Immigration Department had some concerns about the genuineness of the relationship, but that was not the reason for the refusal of the visa. The reason was, in my view, that you were unable to satisfy the officer that you had lived together for 12 months, and there was no evidence of any compelling or compassionate circumstances to waive or excuse that requirement. Do you understand the framework that we're working with today?'

19 Ms  **Antipova**  answered in the affirmative. The Tribunal member proceeded:

'I am not going to concern myself about the genuineness of your relationship; I am going to focus only on the 12 months co-habitation period. I'm also going to ask you if there are any compelling or compassionate reasons why I should waive that 12 month requirement if I'm not satisfied that you did live together as husband and wife during that 12 month period. Do you understand I'll be doing that today?'

20 Again, Ms  **Antipova**  answered in the affirmative. The Tribunal member then said:

'So I'm not going to concern myself about the genuineness of the relationship and whether or not you had evidence of joint finances and what you did and all that sort of jazz. In a general sense, I'm only concerned with the 12 month period, and that one issue. Do you understand that?'

21 Again, Ms  **Antipova**  replied in the affirmative. After an exchange between the Tribunal member and Ms  **Antipova**  about whether Mr Petrou's passport was available, and about other documents relating to Ms  **Antipova**  and Mr

Petrou travelling together, the following exchange took place between the migration agent representing Ms  **Antipova**  and the Tribunal member:

[The migration agent]: Can I just ask one question? Is the issue today whether or not they lived together for 12 months or whether they were involved together for 12 month?







[The Tribunal member]: No, cohabitation as husband and wife. That's the requirement of the regs and when I say "husband and wife" I mean in a relationship like husband and wife.

[The migration agent]: Okay, but as far as that if you (indistinct) every day, you spend every day together for 12 months prior to the application.





[The Tribunal member]: No, because that's covered by the not – living apart on a permanent basis or whatever the wording is.





[The migration agent]: Yes.

[The Tribunal member]: So people go on holidays and all that sort of jazz, but for a de facto relationship to be acceptable under the regs it has to be like a marriage relationship. There has to be all the evidence to support that.'

22 The Tribunal member then began questioning Ms  **Antipova**  about the availability of various other documents. After discussion with the migration agent, the Tribunal member said that it would not be necessary for Mr Petrou to leave while she questioned Ms  **Antipova** . The Tribunal member then began questioning Ms  **Antipova**  about the circumstances in which she separated from her first husband and commenced her relationship with Mr Petrou. The third question on that subject was:

'It's a pretty big leap to go from one relationship straight into another. Why did you do that?'



23 The subject occupies almost 18 pages out of almost 27 of the transcript of Ms  **Antipova** 's oral evidence to the Tribunal. In the course of those pages, there are revealed at least a dozen occasions on which the Tribunal member interrupted Ms  **Antipova** 's answers to questions, either asking a further question, or seeking to discourage her from giving as much detail as

Ms  **Antipova**  obviously wished to give. For instance, when Ms  **Antipova**  was describing an incident in which her former husband struck her and attempted to strangle her whilst they were in his car together, the Tribunal member interrupted, asking:



'So how did this resolve itself, this situation?'

24 Ms  **Antipova**  attempted to answer, but the Tribunal member asked:



'So how did it finish? Just tell me how it finished?'

25 Shortly afterwards, when Ms  **Antipova**  was attempting to explain the interaction between herself, her former husband and Mr Petrou, the Tribunal member interrupted, saying:



'Just tell me what happened next.'

26 Again, when Ms  **Antipova**  was trying to give an account of the breakdown of her relationship with her former husband, the Tribunal member said:



'Sorry, I don't need the day-by-day description but can you give me an understanding of when your relationship with Grigori started failing and when you decided to leave him, whether it was before or after the marriage.'

27 Shortly afterwards, when Ms  **Antipova**  was recounting what her former husband said to her, the Tribunal member interrupted again, saying:





'I don't need the conversation, all right? Can you just please tell me when your relationship with Grigori started coming undone, at what point?'



28 Subsequently, when Ms  **Antipova**  was attempting to explain the transfer of her feelings from her former husband to Mr Petrou, the Tribunal member interrupted again, and the following exchange occurred:

[The Tribunal member]: All right. We need to move on because we're running out of time. You've been asked a number of times to provide documentary evidence of you having lived with Mr Petrou from May 2001 and you haven't provided gas accounts, electricity accounts, phone accounts, that sort of thing, and I can understand why that would be in a shared house where you'd just moved in as one of many. I understand that.

*[Ms  **Antipova** ]: I moved in, I didn't have much (indistinct)*

[The Tribunal member]: *Hold on, please. We're running out of time so just let's keep it simple.'*

29 After the subject of the hearing had moved from the start of the relationship to the circumstances of the marriage between Ms  **Antipova**  and Mr Petrou, the Tribunal member raised the question of the availability of documents relating to Mr Petrou's divorce from his former wife. Ms  **Antipova** 's migration agent said that he would look for those documents. The Tribunal member then said:

'Ms  Antipova , we are running out of time and if you want me to hear from Mr Petrou we need to get going and get moving with this.'

30 Shortly after that exchange, the Tribunal called on Mr Petrou to give evidence. The following exchange occurred:

'[Mr Petrou]: I'd like to discuss firstly the issue of timing.

[The Tribunal member]: The issue of?

[Mr Petrou]: How come we've got such a short time to discuss our information?

[The Tribunal member]: Say it again please?

[Mr Petrou]: Why is there such a short time to go through things that are so important to us? How come we're on such a clock?



[The Tribunal member]: Because the hearings are scheduled for an hour and a half and there was no indication from your migration agent that any longer was required and believe me, we get through a great deal more than this generally in the time.

[Mr Petrou]: Well, you know, I'm a bit concerned that obviously we're not getting all the information across and I'm concerned that you're running a clock very tightly and we're not going to have an opportunity - - -

[The Tribunal member]: Well, I have to and you're wasting the time we have left so I suggest we get on with it.'



31 Towards the end of the hearing, the Tribunal member said:



'All right, we do have to finish up. Another hearing is coming in after us. Anything finally either of you would like to say?'











32 Mr Petrou and Ms  **Antipova**  then made further statements and the Tribunal member said:

'All right. We do have to finish now.'





The Tribunal's reasons



33 In its reasons for decision, the Tribunal identified the issue before it as whether Ms  **Antipova**  was Mr Petrou's spouse at the time of the application for a visa. The Tribunal went through the requirements of reg 1.15A(3) of the [Migration Regulations](#), discussing the requirements of the separate paragraphs of that subregulation under separate headings.



34 In relation to the financial aspects of the relationship, at [51] of its reasons for decision, the Tribunal found that there was no evidence that the parties combined their financial affairs in the 12 months prior to the time of application, or that they shared assets or liabilities. The Tribunal accepted that Mr Petrou was the only lessee of a house that was shared with others, so it would have been impractical for him to include Ms  **Antipova** 's name on accounts for household expenses.



35 Under the heading 'Nature of the household', at [52] – [58], the Tribunal dealt with the issue of the date from which Ms  **Antipova**  and Mr Petrou had begun to cohabit. The Tribunal noted that there would have been sufficient bedrooms in the house occupied by Mr Petrou and four others for Ms  **Antipova**  to have had her own room. It referred to the fact that the first letter from Ms Downie did not indicate whether Ms  **Antipova**  and Mr Petrou were living in separate bedrooms or sharing Mr Petrou's room. It found that Ms Downie's two letters were inconsistent, in that the first said that Ms  **Antipova**  was a member of the household during the month of May, but the second said that Ms  **Antipova**  moved in with Mr Petrou in May 2001 and remained with him until Ms Downie left in July 2001. The Tribunal was not persuaded that it ought to prefer the second letter as being the correct account of events, and said at [54] that it:

'gives it no more weight that [sic] the earlier letter.'

36 The Tribunal found that Ms Downie's letters were not conclusive evidence that Ms  **Antipova**  and Mr Petrou lived as de facto spouses from 18 May 2001. The Tribunal gave the letter from Ms Shpits 'very little weight', as it was not signed. The Tribunal referred to the absence of documentary evidence that Ms  **Antipova**  lived at Mr Petrou's home and that she and Mr Petrou travelled together in America.





37 Under the heading 'Social aspects of the relationship', at [59], the Tribunal referred again to the letters from Ms Downie and Ms Shpits and to the statutory declarations from Mr Petrou's parents. It noted that Mr Petrou's family did not indicate that he and Ms  **Antipova**  were living together in America.

38 Under the heading 'Nature of the persons' commitment to each other', at [60] – [64], the Tribunal expressed a finding that Ms  **Antipova**  and Mr Petrou met in April 2001 and married on 2 March 2003. It said, 'The Tribunal accepts that they share a degree of companionship and support and that they see the relationship as being long term.' It then discussed the question whether, in the period of 12 months prior to 18 June 2002, when the visa application was made, the parties saw the relationship between them as being long-term and shared companionship and support throughout.





39 The Tribunal obviously had difficulty accepting that Ms  **Antipova**  had formed the view that she wished to be in a permanent relationship with Mr Petrou before she proceeded to marry her first husband. At [62], it said:





'The...applicant stated that she wanted a permanent relationship with [Mr Petrou] when she first met him in April 2001, although she was then living in a long-term de-facto relationship with her former spouse. Two weeks after meeting [Mr Petrou] the...applicant married her former husband and lived as his spouse until 18 May 2001, when she claims to have moved into [Mr Petrou]'s home in a de-facto relationship. Although the...applicant has claimed that her former husband became violent towards her in the second week of their marriage, and that he kidnapped and violently assaulted her on the day that she moved in with [Mr Petrou], there is no claim before the Tribunal that she entered the marriage with her former husband because of threats, intimidation or physical violence from him. The...applicant has not provided a logical or convincing explanation for proceeding with that marriage if she was, as stated, already in love with [Mr Petrou] and wanting a permanent relationship with him. The Tribunal can not reconcile the...applicant's claim to have been committed to a relationship with [Mr Petrou] at the same time that she was entering into marriage with another man. Further,

the Tribunal does not accept that, if the parties drew a significant level of companionship and support from each other at that time, the review applicant would have withheld information about her recent marriage from [Mr Petrou] until the day before she commenced a de-facto relationship with him. The Tribunal also notes that the...applicant was continuing to have a physical relationship with her former husband at a time when she said she wanted a permanent relationship with [Mr Petrou].’





40 At [63], the Tribunal said that it was not satisfied that Ms  **Antipova**  was committed to a long-term relationship with Mr Petrou when she left her first husband and moved into Mr Petrou’s home. The Tribunal accepted that Ms  **Antipova**  moved into Mr Petrou’s home on 18 May 2001, but was not satisfied that she did so as his de facto spouse. It found that she:

‘opportunistically left an unhappy marriage at a time when she was able to enjoy the support and protection of [Mr Petrou], to enable her to make the break as easily as possible, in a country in which she had few friends and no family to support her.’

41 The Tribunal accepted that Mr Petrou appeared to have developed a ‘strong, and perhaps overwhelming, affection’ for Ms  **Antipova**  shortly after they met, but it did not accept that Ms  **Antipova**  ‘genuinely reciprocated those feelings or was committed to a long term relationship with him at the time she moved into his house.’ The Tribunal did not accept that they lived together as husband and wife from 18 May 2001.

42 At [64], the Tribunal said that it was unable to make a finding whether Ms  **Antipova**  continued to live in Mr Petrou’s home from 18 May 2001 and unable to make a finding as to when she entered into a de facto relationship with him. It only found that, at some point after she moved into Mr Petrou’s home, she became committed to a long-term relationship with him. Because Mr Petrou travelled to Germany for several weeks shortly after Ms  **Antipova**  moved into his house, the Tribunal found at [65] that:

‘there would have been little opportunity for a genuine and mutual commitment to the relationship to develop between the parties prior to 18 June 2001, and is unable to make a finding as to when that mutual commitment developed.’

43 Under the heading ‘Other matters’, at [66] – [72], the Tribunal discussed further the issue of the commencement of a de facto relationship, apparently for the purpose of determining whether the requirement of reg 1.15A(2)(d)(i) of the [Migration Regulations](#), was satisfied. After discussing aspects of the evidence, the Tribunal found that the evidence given by Ms  **Antipova**  and Mr Petrou in support of the application was ‘not entirely credible’ and that some aspects of Ms  **Antipova** ’s account of the development of her relationship with Mr Petrou ‘were also lacking in plausibility.’ At [71], the Tribunal found that, in order to remain together in Australia, the two had:

‘attempted to rewrite history to satisfy the requirements of the regulations.’

44 The Tribunal expressed its conclusions on the matter at [72] as follows:



‘Taking into account all of the evidence before it, the Tribunal is not satisfied that the review applicant and [Mr Petrou] had a mutual commitment to a shared life as husband and wife to the exclusion of all others for the whole of the twelve months prior to the date of application. The Tribunal accepts that there was a developing relationship between the parties during the relevant period prior to the date of application, but is not satisfied that the relationship between them was a genuine and continuing spousal relationship for the entire period. The Tribunal is also not satisfied that the parties were living together as husband and wife throughout the relevant period.’

45 The Tribunal then turned its attention to the question of compassionate and compelling circumstances, for the purpose of determining whether reg 1.15A(2A) of the [Migration Regulations](#) was applicable. At [74], it referred to *Boakye-Danquah v Minister for Immigration & Multicultural & Indigenous Affairs* [2002] FCA 438 (2002) 116 FCR 557. In that case, the Court was dealing with an earlier version of item 820.211 in Sch 2 to the [Migration Regulations](#), in which there was a requirement to satisfy several criteria found in Sch 3, ‘unless the Minister is satisfied that there are compelling reasons for not applying those criteria.’ Relying on an explanatory memorandum issued by the Minister at the time when this provision had been inserted into the [Migration Regulations](#), which described the provision as a ‘waiver provision’, Wilcox J held at [33] that it was clear that the ‘compelling circumstances’ criterion was intended to be satisfied at the time of application for a visa, not at the time of decision, because item 820.211 in its entirety was required to be satisfied at the time of application. Discussing the effect of this case at [76] of its reasons, the Tribunal said:



‘The Tribunal notes that the Court in Boakye-Danquah was not concerned about whether compassionate and compelling circumstances applied to justify a waiver of the 12 month cohabitation requirement. However, the Court clearly stated that the relevant criterion in that case was concerned with "the circumstances in which the application is made". The 12 month cohabitation requirement is also clearly concerned with the circumstances in which the application is made. This requirement may only be waived if there are circumstances sufficiently compassionate and compelling which would justify the parties having lodged the visa application before they had lived together in a spousal relationship for a sufficient period to satisfy the definition of spouse under [regulation 1.15A](#). If the Tribunal was to take into account compassionate and compelling circumstances which apply only at the time of the decision it would be, in effect, making a determination in relation a [sic] time of application requirement by reference to facts which did not yet exist at the time of application. Such a determination would entirely undermine the two-stage assessment process which underpins the regulations. That is, an assessment of relevant factors which exist at the time of application and a later assessment of factors which exist at the time of decision.’











46 At [77], the Tribunal purported to apply *Boakye-Danquah* in assessing whether there were compelling and compassionate circumstances justifying what it called ‘the waiver of the 12 month cohabitation requirement at the time of application.’ It expressed a finding that the only circumstances which could properly be taken into account ‘in determining whether to exercise the waiver of the 12 month cohabitation requirement are those circumstances which applied at the time of application.’ After referring to other authority, the Tribunal then said at [81]:



‘Policy provides that, in assessing whether there are compelling and compassionate reasons, officers are to take into account the circumstances which the Minister considers to be compelling and compassionate which includes, but is not limited to, applicants who have a dependent child of the relationship. The parties should be given the opportunity to present information as to why they consider there are compelling and compassionate reasons to waive the one year pre-existing cohabitation requirement. However, it is the policy intention that an assessment that the parties’ relationship is genuine would not, in the absence of a dependent child of the relationship, be sufficiently compelling to justify not applying [regulation 1.15A\(2\)\(d\)](#) requirements.’







47 At [82], the Tribunal found that there were no dependent children of the relationship, and that there was no evidence that the parties were affected by extreme hardship at the time of application or that they would suffer irreparable prejudice if the 12-month cohabitation period were not waived. It referred to the relationship between Mr Petrou and the two children of his former marriage and to the fact that he had lived away from them for some time. It took the view that Mr Petrou would be able to prepare his children psychologically for his departure from Australia to be with Ms  Antipova . The Tribunal found that it was not satisfied that a close relationship existed between Mr Petrou and his children at the time of application and was not satisfied that the relationship amounted to compassionate and compelling circumstances at that time. It was also not satisfied that the current needs of Mr Petrou's children were sufficiently compelling to justify a waiver of the 12-month cohabitation requirement, even if it could properly take those circumstances into account.





Ms Antipova 's case









48 Three documents filed on behalf of Ms  Antipova , and oral submissions of her counsel at the hearing of the proceeding, disclosed a great variety of approaches to the case put on her behalf. Some of the points raised can be dealt with very briefly, whereas others require a more detailed examination. The three documents are the amended application, filed on 8 June 2004, contentions of fact and law, also filed on 8 June 2004, and contentions in response to the respondent's supplementary contentions, filed on 2 May 2005.

49 Ms  Antipova  contended that the Tribunal's reasoning manifested a misconstruction of, incorrect understanding of, or imposition of an impermissible gloss on, the statutory criteria for a subclass 820 visa or a subclass 801 visa, particularly the definition of 'spouse'. This alleged error was said to have been demonstrated by the Tribunal finding: that there was no evidence of combined financial affairs of Ms  Antipova  and Mr Petrou in the 12 months prior to the date of application; that Ms  Antipova  and Mr Petrou had no shared assets or liabilities, nor a joint bank account; that the documentary evidence provided by Ms  Antipova  was relevant but not conclusive of a de facto relationship during the 12 months; and implicitly that Ms  Antipova  had not been living in a de facto relationship with Mr Petrou for 12 months. The same error was alleged to have been shown by the Tribunal giving little weight to statements and letters from friends and statutory declarations from members of Mr Petrou's family. It was also said to have been revealed by the Tribunal's finding that there were no compelling and compassionate circumstances for the grant of the visa, for the

purpose of which the Tribunal limited its inquiry to the relationship between Mr Petrou and his children, and did not consider Ms  **Antipova** ’s own relationship with those children.

50 Allied with the alleged error in failing to apply the correct criteria was the allegation that the Tribunal failed to take into account relevant considerations and took into account irrelevant considerations. It was said that the Tribunal failed to consider the mandatory elements of reg 1.15A(3)(a)-(d) of the [Migration Regulations](#). In particular, it was said that the Tribunal: failed to consider the joint burden on Ms  **Antipova**  and Mr Petrou of debt incurred in respect of legal expenses, loans and university fees; focused only on the question whether Ms  **Antipova**  and Mr Petrou had a joint bank account; failed to take account of the opinion of friends and family members as to whether the relationship was genuine, concentrating instead on whether friends and family could give evidence as to the couple’s living arrangements; and failed to consider evidence of joint social activities, making no reference to travel itineraries, air tickets and copy passports, tendered by Ms  **Antipova** .

51 It was also argued that the Tribunal failed to take account of relevant considerations because it: ignored Ms Downie’s explanation of the meaning of her first letter; made no reference to a letter from Asiye Karagoz, a friend of Mr Petrou who provided a statement as to Mr Petrou’s expressed intentions with respect to Ms  **Antipova**  in May 2002; refused to give weight to the letter of Ms Shpits on the ground that it was unsigned, thereby demonstrating that the Tribunal allowed itself to be bound by technicalities, in contravention of [s 353\(2\)\(a\)](#) of the [Migration Act](#); and ignored evidence that Mr Petrou had undergone surgery for the reversal of a previous vasectomy, which was advanced as evidence of his intention, and that of Ms  **Antipova** , that they would have children of their own.

52 Further, Ms  **Antipova**  claimed that the Tribunal took into account irrelevant considerations. It was said that the Tribunal did this by forming a view, based on the history of travel undertaken by Ms  **Antipova**  and Mr Petrou, that they had greater financial resources than they claimed, and therefore could have had a joint bank account or significant joint assets. It was said that this reasoning involved reliance on irrelevant material and conjecture. Another irrelevant consideration was said to have been the fact that Ms  **Antipova**  continued to have a physical relationship with her fiancé after meeting Mr Petrou and proceeded to marry her fiancé. These facts were said to be irrelevant because the Tribunal was required to consider the relationship between Ms  **Antipova**  and Mr Petrou, not her relationship with any other person.









Ms **Antipova** also said that the Tribunal wrongly speculated about why Ms **Antipova** withheld from Mr Petrou information about her recent marriage until she left her husband and moved in with Mr Petrou, because this was irrelevant to her intention, and that of Mr Petrou, as to their relationship.













53 One of the major aspects of Ms **Antipova**'s case was the allegation that the Tribunal denied her procedural fairness. This was put in three ways. First, it was argued that the imposition of a time limit on the hearing, and the significant number of interruptions of Ms **Antipova**'s evidence by the Tribunal member, deprived Ms **Antipova** of the opportunity to give evidence and present arguments relating to the issues arising in relation to the decision under review. To the extent to which [s 357A\(1\)](#) of the [Migration Act](#) might be thought to prevent Ms **Antipova** relying on the ordinary principles of procedural fairness, reliance was placed on [s 360\(1\)](#). It was said that, because Ms **Antipova** was not given a proper opportunity to give evidence and present arguments, the Tribunal had failed to comply with its statutory obligation to invite Ms **Antipova** to appear before it for a hearing of the kind contemplated by that subsection. Second, it was contended that the Tribunal misled Ms **Antipova** about the issue to be decided, by telling her at the outset of the hearing that it was not concerned with the genuineness of the relationship, and thereafter made a finding against Ms **Antipova** that the relationship had not been genuine during the 12 months prior to the application for a visa. Third, Ms **Antipova** said that the Tribunal failed to inform her that it did not propose to give any weight to the letter from Ms Shpits, because it was unsigned, and to give Ms **Antipova** an opportunity to make submissions on that issue.



54 There were other issues raised on behalf of Ms **Antipova**. Her counsel argued that the Tribunal's conduct of the hearing was such that a reasonable bystander would have concluded that it was not going to grant Ms **Antipova** a visa, and was thereby ostensibly biased against Ms **Antipova**. It was said that, in breach of its obligation pursuant to [s 353\(1\)](#) of the [Migration Act](#), the Tribunal failed to conduct a mechanism of review that was fair and just. It was contended that, in breach of its duty pursuant to [s 353\(2\)\(b\)](#) of the [Migration Act](#), the Tribunal failed to act in accordance with substantial justice and the merits of the case. It was argued that the Tribunal had wrongly assumed that it had a discretion to limit its inquiry to the question of satisfaction of the criteria at the date of application, and did not consider satisfaction of the criteria at the date of decision, thereby not making a bona fide attempt to perform its duty to review a decision, conferred on it by [s 348\(1\)](#) of the [Migration Act](#). Finally, it was said that the Tribunal failed to give genuine and realistic consideration to the issues raised by the review of the decision





of the Minister's delegate, as demonstrated by its treatment of the evidence of friends and family and its failure to apply reg 1.15A(5) of the [Migration Regulations](#).











The Tribunal's approach

55 In many respects, Ms  **Antipova** 's attack on the Tribunal's reasoning is easily demonstrated to be unsustainable. The Tribunal's task was to determine whether Ms  **Antipova**  met the criteria in item 820 of Sch 2 to the [Migration Regulations](#). It was not open to the Tribunal to choose which criteria to apply; it was bound by all of them and, if Ms  **Antipova**  failed to meet any one of them, the Tribunal could not grant her a visa. The first step in the Tribunal's reasoning, inevitably, was to apply the criteria to be satisfied at the time of application. If Ms  **Antipova**  failed to satisfy those criteria, she was not entitled to the visa she sought, and there would be no point in the Tribunal proceeding to determine whether she satisfied any other criterion. By approaching the matter in this way, the Tribunal was not exercising any discretion to limit its inquiry. It was performing its task.















56 Crucial to the Tribunal's application of the criteria was the definition of 'spouse' in reg 1.15A of the [Migration Regulations](#). An element of this was the question whether, for a period of 12 months immediately preceding the date of application for a visa, Ms  **Antipova**  and Mr Petrou had 'a mutual commitment to a shared life as husband and wife to the exclusion of all others' and, during that period, 'the relationship between them was genuine and continuing'. Additionally, the Tribunal had to inquire whether, during that 12-month period, Ms  **Antipova**  and Mr Petrou had been living together or, at least, had not been living apart on a permanent basis. It is possible to imagine that, in the majority of cases of this kind, issues of the quality of a relationship in the 12-month period preceding an application for a visa are not of great significance. Ordinarily, people will apply for a visa when they are sure that they meet the criteria for it. It would be an unusual case in which a person applies for a subclass 820 visa on the basis of a relationship that manifestly began within the 12-month period. The present case might have been different, however. The application for a subclass 820 visa was made on 18 June 2002, three days before the expiration of the visa on which Ms  **Antipova**  had entered Australia. The Tribunal might have taken the view that the date of the application had more to do with Ms  **Antipova** 's need to procure a visa, in order to remain in Australia with Mr Petrou, than it did to the ability of Ms  **Antipova**  to satisfy the 12-month criterion. In addition, the case had unusual features. Ms  **Antipova**  and Mr Petrou sought to establish that their entry into a marriage-like relationship occurred on, or soon after, 18 May



2001. They had met only the previous month, and only socially prior to 18 May. At the time they met, Ms  **Antipova**  was engaged to another man, whom she proceeded to marry on 30 April 2001. According to her, her relationship with her husband deteriorated rapidly after the marriage, to the point where she left him. Straight away, she claimed to have entered into a marriage-like relationship with Mr Petrou. Although this story is by no means impossible to accept, the Tribunal cannot be criticised for treating it as a story that needed investigation.



57 To determine whether it was satisfied that Ms  **Antipova** ’s de facto relationship with Mr Petrou had begun before 18 June 2001, the Tribunal had to consider whether the material in support of this proposition did indeed establish it to the requisite degree of probability. There were two aspects to this. One was the question whether the Tribunal accepted that the material itself tended to establish the proposition. The other was whether, in the Tribunal’s view, the surrounding circumstances were such as to make the proposition inherently less likely than it might have been in the absence of those circumstances. The Tribunal had to balance the material and the circumstances and reach a conclusion. This was the exercise of its very function. The Court cannot substitute its own view of the facts for that of the Tribunal. The question of the weight to be given to the statements of friends and family was entirely a matter for the Tribunal, and certainly not one for the Court. It was not the duty of the Tribunal to accept without question everything Ms  **Antipova**  placed before it; there is no such thing as evidence conclusive of a fact, for the purposes of the Tribunal’s performance of its function in the present case.



















58 As part of the fact-finding process, the Tribunal had regard to Ms  **Antipova** ’s relationship with the man she married on 30 April 2001. Plainly, this was a circumstance relevant to her claim that she had wanted a permanent relationship with Mr Petrou from the time she met him, and began such a relationship on 18 May 2001. In examining it, the Tribunal was not considering a relationship between Ms  **Antipova**  and another person, as Ms  **Antipova** ’s written submissions contended. The Tribunal was considering the very relationship it was required to consider, in order to determine whether it met the criteria which the Tribunal was obliged to apply. There was no conjecture involved in the Tribunal’s reasoning on this aspect of the case. It simply compared Ms  **Antipova** ’s own account of her feelings and intentions with her own account of her actions, and found them incompatible. One manifestly relevant aspect of this was the evidence that Ms  **Antipova**  did not tell Mr Petrou that she had recently married when, a few days later, he declared his feelings for her. Another was her evidence that, despite her claim that she wanted a permanent













relationship with Mr Petrou from the time she met him, she continued to have a physical relationship with the man she then proceeded to marry. Another decision-maker might have been more accepting of indecision and the impact of personal or social pressure, but the finding of facts was the task of the particular Tribunal member.





59 In determining whether Ms  **Antipova**  and Mr Petrou had lived together as husband and wife prior to 18 June 2001, the Tribunal looked at all the material Ms  **Antipova**  provided to it. Far from ignoring the letters from Ms Downie, it quoted the essential parts of both of them. In its reasons for decision, the Tribunal devoted a significant amount of time to what it regarded as an inconsistency between the two letters. Another decision-maker might not have regarded this apparent inconsistency as important, or might have found that any ambiguity in the first letter was resolved by the second, but the conclusion that it could not give either letter significant weight, because of its inability to resolve the perceived inconsistency was a finding of fact, and not a matter on which the Court can reverse the decision. Similarly, the Tribunal did not ignore the letter from Ms Shpits. It quoted the substance of the letter, but gave it very little weight, because of the absence of a signature, despite the fact that the letter was the subject of a certificate of a notary of the State of California. Another decision-maker might not have regarded the absence of a signature with such seriousness as the Tribunal did in the circumstances, but the weight it gave to the letter of Ms Shpits was a matter for the Tribunal. Nor did the Tribunal ignore the written statement of Ms Karagoz. It expressly said that it took this statement into account. It is worth pointing out that, in its terms, the statement provides evidence that, in May 2002, when he apparently visited Germany, Mr Petrou made it clear that he was very much in love with Ms  **Antipova**  and wanted to spend his life with her. This information hardly bore on the question whether Mr Petrou and Ms  **Antipova**  had been in a de facto relationship since May of the previous year. Nor did it bear upon whether Ms  **Antipova**  had a commitment to spending her life with Mr Petrou in May the previous year. The Tribunal accepted that Mr Petrou developed a strong, and perhaps overwhelming, affection for Ms  **Antipova**  shortly after they met. It did not accept that Ms  **Antipova**  reciprocated his feelings or was committed to a long-term relationship with him when she moved into his house. The statement of Ms Karagoz threw no light on that issue.



60 In determining whether Ms  **Antipova**  and Mr Petrou had been in a de facto relationship for 12 months or more prior to the visa application, the Tribunal was bound to have regard to all of the matters referred to in reg 1.15A(3) of the [Migration Regulations](#). That subregulation so provides and, as the Tribunal



pointed out at [48] of its reasons, the mandatory nature of the provision was emphasised in *Nassouh v Minister for Immigration & Multicultural Affairs* [2000] FCA 788 at [10]. In conformity with its obligation, the Tribunal discussed in its reasons for decision each of those matters, to the extent to which there was evidence before the Tribunal relating to them. It did so under headings reflecting the requirements of pars (a), (b), (c) and (d) respectively of reg 1.15A(3). This arrangement of the Tribunal's reasons for decision makes it difficult for Ms  **Antipova**  to sustain the argument that the Tribunal failed to consider the mandatory considerations.





61 In its consideration of the financial aspects of the relationship, required by reg 1.15A(3)(a) of the [Migration Regulations](#), the Tribunal first found that there was no evidence that, in the 12-month period it was considering, the parties combined their financial affairs or shared assets or liabilities. It acknowledged that Ms  **Antipova**  had given a reason for the lack of a joint bank account, namely that she and Mr Petrou had little money and there was no need. The Tribunal pointed out that there was no documentary evidence of shared household or daily living expenses in the relevant 12-month period, but appeared to accept that it would have been impractical to have had such evidence, because Mr Petrou was the sole lessee of the six-bedroom house in California in which Ms  **Antipova**  claimed to have lived with him and others. The Tribunal clearly did not focus solely on whether Ms  **Antipova**  and Mr Petrou had a joint bank account, as the submissions on behalf of Ms  **Antipova**  suggested. Nor did it ignore evidence of the joint burden of debt for legal expenses, loans and university fees. To the extent that such a joint burden might have existed, it plainly did not exist during the 12 months preceding the application for a visa. Indeed, as late as 1 September 2003, Ms  **Antipova** 's migration agent (who was also, apparently, a legal practitioner) submitted in writing to the Tribunal the statement that Ms  **Antipova**  and Mr Petrou 'do not have joint financial commitments because of their parlous financial position.' The Tribunal could hardly have made any finding other than the one it made on this aspect of the case. In weighing the credibility of Ms  **Antipova** 's case, the Tribunal was certainly entitled to use material that Ms  **Antipova**  had supplied to it, concerning the travel undertaken by her and Mr Petrou, when testing their assertion that, because they had very little money, they did not open a joint bank account and Ms  **Antipova**  did not apply for a divorce from her former husband. The material was relevant to this issue, and there was no element of conjecture involved in the Tribunal's reliance on it.

62 In considering the social aspects of the relationship during the 12-month period, as required by reg 1.15A(3)(c) of the [Migration Regulations](#), the Tribunal dealt expressly with the material supplied by Ms  **Antipova**  from friends and family. As I have already pointed out, it gave little weight to the statements of Ms Downie, Ms Shpits and Ms Karagoz. It did not reject the statements as evidence that family and friends considered Ms  **Antipova**  and Mr Petrou to be a couple, and thereby used the statements for the purpose for which they were required under the regulation, and for the purpose for which they had been supplied to it. The Tribunal did point out, however, that the statements of Mr Petrou's parents did not bear upon whether Ms  **Antipova**  and Mr Petrou were living together at the relevant time. Since this was the crucial issue, the Tribunal could not be criticised for making this observation, although it did so under the heading dealing with the social aspects of the relationship, rather than under the earlier heading, dealing with the nature of the household, including the living arrangements. The Tribunal did not fail to consider the evidence of travel itineraries, air tickets and passport copies, as Ms  **Antipova**  contended. It detailed every document in its reasons for decision. The material indicated that the parties travelled together in March 2002. Although evidence of later events can sometimes cast light on the nature of a relationship at an earlier time, it is hard to see, and counsel for Ms  **Antipova**  never explained, how the evidence of joint travel in March 2002 could bear upon the nature of the relationship between Ms  **Antipova**  and Mr Petrou in May and June 2001. The Tribunal was not bound to look at this material in relation to the issue of the social aspects of the relationship at the relevant time.

63 The evidence before the Tribunal disclosed that Mr Petrou underwent surgery to reverse a vasectomy in August 2003, and that a proposal that he should do so, in the hope that he and Ms  **Antipova**  could have children of their own, was discussed between Ms  **Antipova**  and him 'at the start of their relationship', and investigated in August 2001. The Tribunal did not ignore this evidence, but mentioned the operation at [25] of its reasons for decision, as having been advanced as 'evidence that they are committed to each other and wish to begin a family together.' Without more detail, it is hard to see how this evidence bore upon whether the de facto relationship began prior to 18 June 2001, which was the crucial issue before the Tribunal.











64 It is clear from this examination of the issues that were before the Tribunal, and the manner in which it dealt with them in its reasons for decision, that a number of the arguments advanced on behalf of Ms  **Antipova**  were not made out. The Tribunal did not misunderstand or misconstrue the criteria it had to apply by reason





of reg 1.15A(3) of the [Migration Regulations](#), and did not apply any impermissible gloss on those criteria. It did not take into account irrelevant matters, nor fail to take into account relevant ones it was bound to take into account. For the most part, the arguments I have dealt with so far were really attempts by counsel for Ms  **Antipova**  to reargue the merits of the case before the Court. As I have said, the facts were entirely the responsibility of the Tribunal, and cannot be agitated in the Court.



65 Similarly, the Tribunal cannot be criticised for failing to apply reg 1.15A(5) of the [Migration Regulations](#). That provision is relevant to the determination of whether a relationship is genuine and continuing. It does not bear at all upon the question whether, during the 12-month period immediately preceding the date of application for a visa, the relevant persons had a mutual commitment to a shared life as husband and wife to the exclusion of all others. This was the issue on which Ms  **Antipova** ’s case turned in the Tribunal. In particular, the Tribunal saw its task as attempting to determine whether it could fix the time of the starting point of a relationship involving such a mutual commitment between Ms  **Antipova**  and Mr Petrou. The fact that they lived together at the same address for more than six months as their relationship advanced, thereby providing strong evidence that the relationship became genuine and continuing, could not assist in determining the starting point of a relationship of which a mutual commitment to a shared life as husband and wife, to the exclusion of all others, was an essential element.

66 The contention that the Tribunal failed to act in accordance with substantial justice and the merits of the case, as it was required to do by [s 353\(2\)\(b\)](#) of the [Migration Act](#), also appears to be an attempt to reargue the merits, and therefore impermissible. In *Minister for Immigration & Multicultural Affairs v Eshetu* [1999] HCA 21 (1999) 197 CLR 611 at [46] – [52] per Gleeson CJ and McHugh J (Hayne J concurring at [158]), [69] – [77] per Gaudron and Kirby JJ, [106] – [109] per Gummow J, and [175] – [179] per Callinan J, the High Court held that [s 420](#) of the [Migration Act](#) was insufficiently specific to constitute a ground for review of a decision under the limited jurisdiction then given to this Court by [s 476](#) of the [Migration Act](#), which has since been repealed. [Section 420](#) makes provisions with respect to the Refugee Review Tribunal in terms identical to those made by [s 353](#) with respect to the Tribunal. For reasons similar to those given in *Eshetu*, [s 353](#) is unlikely to be the source of an obligation, failure to comply with which could be said to constitute jurisdictional error.

Procedural fairness: misleading as to the issue

67 A consideration of whether the Tribunal made a jurisdictional error by misleading Ms  Antipova  about what was in issue requires an examination of further factual matters. On 6 August 2002, Ms  Antipova  and Mr Petrou were interviewed separately by an officer of the Department of Immigration and Multicultural Affairs (subsequently the Department of Immigration and Multicultural and Indigenous Affairs) (in both cases, ‘the Department’). The notes of the interview record that Ms  Antipova  was asked when and where she moved in with Mr Petrou. Her answer was 18 May 2001, and she gave the address of the premises at which Mr Petrou lived in California. The officer asked if she had any other documents that would support this claim, and Ms  Antipova  said that she did not. By letter dated 16 August 2002, the officer referred to a request on 6 August 2002 ‘to provide further evidence of cohabitation within 28 days’ and requested certain specified documents. With a letter dated 6 September 2002, Ms  Antipova ’s migration agent provided the statutory declarations of Mr Petrou’s parents, the statement of Ms Karagoz and a statement of Mr Petrou. With a letter dated 15 October 2002, the migration agent provided the letter of Ms Downie dated 15 August 2002.



68 The decision of the Minister’s delegate to refuse to grant Ms  Antipova  a visa was accompanied by written reasons, dated 3 January 2003. According to those reasons, the delegate found ‘conflicting information about the extent of commitment of this relationship since May 2001’. The delegate found that there was ‘inadequate evidence...to support claims of a de facto marital relationship to have been in existence for at least 12 months prior to the date of application’ for the visa [underlining in original]. It was for this reason that the delegate decided that Ms  Antipova  was not entitled to the visa.

69 By letter dated 5 August 2003, an officer of the Tribunal wrote to Ms  Antipova  in the following terms:

‘Section 359(2) of the Migration Act allows the Tribunal to invite a person to give it additional information that is relevant to the review of a decision.







*Accordingly, the Tribunal now invites you to provide documentary evidence that you were **living in a de facto relationship with your nominator for the period of 12 months prior to the lodgement of the application.** That might include lease agreements, utility accounts (telephone, gas, electricity), correspondence to you at the nominator’s address. Please also provide:*



- *information about the financial aspects of your relationship, including statements/evidence regarding:*
 - * *joint savings and other accounts;*
 - * *financial arrangements entered into by you and the nominator;*
 - * *sharing your day-to-day household expenses or pooling your financial resources;*
 - * *any joint liabilities or joint ownership of major assets;*
- *statements/supporting evidence in regard to the social aspects of your relationship;*
- *statements/evidence in regard to the nature of your household;*
- *statements/evidence in regard to the nature of your and the nominator's commitment to each other'. [Emphasis in the original]*







70 In response, in a letter received by the Tribunal on 1 September 2003, Ms  **Antipova** 's migration agent said:



'We have taken your request to require information and evidence in respect to the existence of the genuine and committed relationship between the parties. That relationship must have been in existence at least 12 months prior to the 18 June 2003. Continuous physical cohabitation for the 12 months is, of course, not the requirement that must be satisfied. It is the existence of the genuine and committed relationship and cohabitation is merely one factor that evidences that relationship.'





71 The letter went on to make submissions, including submissions about evidence of a relationship. With it, the migration agent forwarded a number of documents, including the letter from Ms Downie dated 15 August 2002 (already in the Department's file), the letter from Ms Downie dated 17 August 2003, the letter from Ms Shpits, and the letter and statement of Ms Karagoz (already in the Department's file).









72 There can be little doubt that, at the outset of the Tribunal hearing, Ms  **Antipova**  and her migration agent must have appreciated that the Tribunal was obliged to apply reg 1.15A of the [Migration Regulations](#). In particular, they must have appreciated that the Tribunal had to determine whether the marriage-like relationship, which clearly had come into existence between Ms  **Antipova**  and Mr Petrou, had come into existence early enough to enable Ms  **Antipova**  to satisfy the requirement of the 12-month period referred to in











reg 1.15A(2)(d) at the date of her application for a visa, as required by item 820.211(2)(a) in Sch 2 to the [Migration Regulations](#). Ms  **Antipova**  must have been as prepared as she could be to attempt to satisfy the Tribunal on that issue. The question is whether, by what the Tribunal member said at the start of the hearing, the Tribunal caused her to refrain from putting what she would otherwise have put.

73 There can be little doubt that what the Tribunal member said early in the hearing had the potential to confuse Ms  **Antipova** . The distinction between ‘the genuineness of the relationship’ and ‘the 12 months co-habitation period’ was plainly a false distinction, because reg 1.15A(2)(d)(ii) of the [Migration Regulations](#) required that Ms  **Antipova**  establish that, during the 12-month period, the relationship was ‘genuine and continuing’. The attempt to exclude from consideration not only the genuineness of the relationship, but also ‘evidence of joint finances’, ‘what you did’, and ‘all that sort of jazz’ (whatever that vernacular expression might have been intended to mean to a person whose first language is not English) was plainly something that could not be achieved. [Regulation 1.15A\(3\)\(a\)](#) required the Tribunal to take into account financial aspects of the relationship, including joint ownership of assets, joint liabilities, pooling of financial resources, assumption of legal obligations and sharing of household expenses. What Ms  **Antipova**  and Mr Petrou ‘did’ was also likely to have been relevant to the other mandatory considerations listed in reg 1.15A(3).



74 Confusion aside, it seems clear that the Tribunal member was intending to be helpful. The Tribunal member seems to have intended to make a distinction between the state of the relationship at the time of the Tribunal hearing and the origin of the relationship, so far as it bore upon the need to satisfy the 12-month requirement at the date of the application for a visa. This conclusion is supported by the fact that the Tribunal member mentioned the question of compelling or compassionate circumstances. In case there was any doubt, the Tribunal member explained the distinction she was making, in answer to the questions of Ms  **Antipova** ’s migration agent, a short time after her attempt to outline the distinction at the beginning.

75 Ms  **Antipova**  has not provided to the Court any evidence that she was actually misled by the Tribunal member’s confusing distinction. More importantly, she has not provided any evidence that, in consequence of what the Tribunal member said, she refrained from providing evidence that she would have provided otherwise. As I have said, at the outset of the hearing, Ms  **Antipova**  could have been in no doubt that her application was vulnerable on the issue of whether

her de facto relationship with Mr Petrou had begun at least 12 months before she applied for the visa. That was the issue raised in the Department's request for information before the application for a visa was considered by the Minister's delegate. It was the issue on which Ms  **Antipova**  failed in the view of the Minister's delegate. It was the issue brought to her attention, through her migration agent, by the Tribunal's letter of 5 August 2003. At least the migration agent well understood the nature of the issue, as his letter to the Tribunal in response showed. To the extent that she was able to do so, Ms  **Antipova**  had provided the Tribunal with documentary evidence relevant to that issue before the hearing. In her oral evidence to the Tribunal, she was asked many questions about the circumstances in which she left her former husband and took up with Mr Petrou. Indeed, the bulk of her evidence was taken up with questions from the Tribunal member about those circumstances. The Tribunal also questioned Mr Petrou at length about the circumstances in which his relationship with Ms  **Antipova**  began. Nothing in the transcript of the Tribunal hearing shows Ms  **Antipova**  expressing any surprise that she was being questioned about those circumstances, as a consequence of what the Tribunal member said at the outset of the hearing.

76 Ultimately, Ms  **Antipova**  failed in the Tribunal because of the Tribunal's finding that it was not satisfied that she was committed to a long-term relationship with Mr Petrou when she left her former husband and moved into Mr Petrou's home. The Tribunal was not satisfied that she moved into Mr Petrou's home on 18 May 2001 as his de facto spouse. It did not accept that Ms  **Antipova**  genuinely reciprocated the strong feelings Mr Petrou had for her at the time she moved into his house. The danger of failing on this issue was apparent to Ms  **Antipova**  and her migration agent throughout the proceedings in the Tribunal. Nothing the Tribunal member said in her opening remarks removed any part of that danger. Ms  **Antipova**  has not shown that she was misled as to the issue, or that what the Tribunal member said about the issue influenced her approach to the evidence she provided. Whatever might have been the result in any other case of an attempt, such as the Tribunal member made, to narrow the issues, that attempt did not have the effect of denying procedural fairness to Ms  **Antipova**  in the present case.

Procedural fairness: time limit and interruptions









77 The Tribunal did not warn Ms  **Antipova** , in advance of its hearing, that it intended to impose a time limit on the hearing. Nor did it warn her that she should keep her answers brief, and direct them only to what the Tribunal member thought



was the relevant aspect of what she was saying. The information the Tribunal gave to Ms **Antipova** prior to the hearing was to the opposite effect. The Tribunal's standard-form information sheet, which I have quoted in [17], invited Ms **Antipova** to take her time in answering questions. Nor did the Tribunal member warn Ms **Antipova** at the outset of the hearing that she had a limited time. It was only some way into the hearing that Ms **Antipova** first heard that her time was limited. She learned of this limit in the context of attempting to follow the advice she had been given in advance of the hearing, to take her time answering the Tribunal member's questions. The Tribunal member countermanded this advice.

78 A different, but related, issue was that of interruptions. As I have said in [23], the Tribunal member repeatedly interrupted Ms **Antipova**'s answers, in an attempt to persuade her to make them briefer, with a view to concluding the hearing within what the Tribunal member regarded as the time allocated for the hearing. Again, this practice was not the subject of prior warning and was in contradiction of what Ms **Antipova** had been told by means of the standard-form information sheet. The result of the frequent interruptions, and the attempts of the Tribunal member to persuade Ms **Antipova** to be brief, was that she did not tell the Tribunal all that she could have, and all that she wanted to tell, about her case, particularly about the circumstances in which she left her former husband so soon after marrying him, and came to live with Mr Petrou. This conclusion is obvious from an examination of the transcript of the hearing, particularly the interruptions I have quoted in [23] – [28]. The Tribunal member had revealed her scepticism about the claim that Ms **Antipova** had ended her relationship with her former husband so soon after marrying him, and begun a relationship with Mr Petrou immediately, by the third question on the subject, which I have quoted in [22]. It is understandable that Ms **Antipova** would have been concerned to give detailed evidence about the circumstances in which she changed partners, to convince the Tribunal that her claim was true. She was not allowed to do this.

79 In my view, the Tribunal did not give Ms **Antipova** a fair hearing in these two respects. It sought to impose an arbitrary time limit on her, and it interrupted her to the extent that she was prevented from giving her evidence as she wished to. Counsel for the Minister argued that, like a court, the Tribunal has the power to impose time limits on hearings. Accepting that to be so, in the present case the Tribunal did not exercise that power in a manner that was fair to Ms **Antipova**. Fairness would have required that she be warned, either in the standard-form information sheet or, at the very least, at the outset of the hearing, that her time was limited. Fairness would also have required that the advice given in the standard-form information sheet should have been different, so that it was

not countermanded by the Tribunal's imposition of a time limit, and exhortations to shorten the answers to questions, in order to fit within that time limit. Even when Mr Petrou made his complaint about the imposition of the time limit, which I have quoted in [30], the Tribunal was not dissuaded from its course. If nothing else alerted the Tribunal member to the need to change her approach to the hearing, that complaint should have, especially Mr Petrou's contention that 'obviously we're not getting all the information across'. Instead of abandoning her attempt to adhere strictly to a time limit, the Tribunal member berated Mr Petrou for wasting the time available by making his complaint.

80 It is also clear that Ms  **Antipova**  was disadvantaged in the presentation of her case by the Tribunal's unfairness in both respects. She lost an opportunity to make her case to the Tribunal in the way she wished to make it. The crucial issue was whether the Tribunal would accept what it regarded as the unlikely claim that Ms  **Antipova** , having married on 30 April, after she met Mr Petrou, would have left her husband on 18 May and gone on to begin a de facto relationship with Mr Petrou. It was this issue on which Ms  **Antipova**  had failed at the first stage, the decision of the Minister's delegate. It was the issue identified by the Tribunal in the question I have quoted in [22]. The Tribunal ultimately found that Ms  **Antipova**  failed on this issue. Had she been allowed to go into detail as to the circumstances of her separation from her former husband and her flight to Mr Petrou, she might have been able to persuade the Tribunal not to reject her claim.

81 Denial of procedural fairness, potentially affecting the outcome of a proceeding in the Tribunal, is a jurisdictional error. Ordinarily, it justifies the Court quashing the decision of the Tribunal. See *Re Refugee Review Tribunal; Ex parte Aala* [2000] HCA 57 (2000) 204 CLR 82 and *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2 (2003) 211 CLR 476. The question is whether any provision of the [Migration Act](#) prevents Ms  **Antipova**  from relying on this jurisdictional error in the present case. In particular, the question is whether [s 357A\(1\)](#) of the [Migration Act](#) has that effect.

82 There are two possible answers to this question. The first is that [s 360\(1\)](#) of the [Migration Act](#) requires the Tribunal to invite the applicant 'to appear before the Tribunal to give evidence and present arguments relating to the issues arising in relation to the decision under review.' If the Tribunal has conducted what purports to be a hearing, but has not in truth allowed an applicant to give evidence and present arguments relating to those issues, it has not complied with this statutory obligation. The Tribunal has failed to comply with an essential precondition to making a decision on the applicant's application to review the decision of the





Minister's delegate, and has therefore failed to perform the duty, conferred on it by [s 348](#) of the [Migration Act](#), to review that decision. Its decision is invalid and must be set aside. This is the reasoning followed by the Full Court in *Minister for Immigration & Multicultural & Indigenous Affairs v SCAR* [\[2003\] FCAFC 126\(2003\) 128 FCR 553](#) at [\[33\]](#) – [\[41\]](#), in relation to [s 425\(1\)](#) of the [Migration Act](#), which imposes on the Refugee Review Tribunal an obligation in terms identical with the obligation imposed on the Tribunal by [s 360\(1\)](#). At [\[33\]](#), the Full Court approved the statement of Goldberg J in *Mazhar v Minister for Immigration & Multicultural Affairs* [\[2000\] FCA 1759 \(2000\) 183 ALR 188](#) at [\[31\]](#) that:

'The invitation must not be a hollow shell or an empty gesture.'

83 In the same paragraph, Goldberg J expressed the view that:

'where the applicant appears, but is not able through the conduct of the tribunal to give evidence or present arguments, albeit that the applicant has been invited by the tribunal to appear, then there will be a contravention of [s 425\(1\)](#).'

84 In *SCAR* at [\[38\]](#), the Full Court recognised that compliance with [s 425](#) is a 'precondition to the valid exercise of the Tribunal's jurisdiction', and that failure to comply involves a jurisdictional error. At [\[41\]](#), the Full Court found that the Refugee Review Tribunal in that case had not extended 'a meaningful invitation'.

85 In the present case, because it interrupted her and imposed an arbitrary time limit on her, the Tribunal did not permit Ms  **Antipova**  to give evidence and present arguments as she wished to do. Although there was a semblance of a hearing, and the Tribunal invited Ms  **Antipova**  to it in terms mandated by [s 360\(1\)](#) of the [Migration Act](#), the invitation was not a real and meaningful one, because what she was invited to do was denied to her. The Tribunal failed to observe a precondition of the exercise of the jurisdiction conferred on it. Its decision was made without an invitation to attend a hearing of the kind required, because such a hearing has not yet been conducted.

86 Counsel for the Minister submitted that *SCAR* has been the subject of judicial criticism, and even that it has been not followed. Reference was made to *WAJR v Minister for Immigration & Multicultural & Indigenous Affairs* [\[2004\] FCA 106](#) (2004) 204 ALR 624, in which French J distinguished *SCAR* on the facts at [\[46\]](#). At [\[57\]](#) – [\[59\]](#), his Honour discussed the question whether [s 422B](#) of the [Migration Act](#) operated to preclude the application of the principles of procedural fairness in the context of the failure of the Refugee Review Tribunal to ask any questions at the hearing as to a particular issue on which it later found

adversely to the person seeking a protection visa. In the course of that discussion, his Honour examined whether there had been a failure to comply with [s 425](#) of the [Migration Act](#). In the alternative, his Honour examined the issue on the assumption that [s 425](#) had no application, holding that the denial of procedural fairness in that case amounted to jurisdictional error, notwithstanding [s 422B](#). Nothing that his Honour said in that passage amounted to a criticism of SCAR, or a refusal to follow it. Indeed, at [58], his Honour affirmed the central propositions for which SCAR stands, saying:

'A failure to conduct a hearing of the kind contemplated by [s 425](#) in my opinion would amount to a failure to comply with the obligation imposed by that section upon the tribunal to invite an applicant to participate in such a hearing. That obligation is so central to the conduct of the tribunal process that it necessarily conditions the power to make an adverse decision on review.'

87 In *M17/2004 v Minister for Immigration & Multicultural & Indigenous Affairs* [\[2005\] FCA 86 \(2005\) 85 ALD 597](#), Ryan J also dealt with the alleged failure of the Refugee Review Tribunal to raise at the hearing an issue on which it later found against the person applying for a protection visa. At [58], his Honour accepted that compliance with [s 425](#) was held in SCAR to be a precondition to the valid exercise of the Refugee Review Tribunal's jurisdiction, and that failure to comply would therefore be jurisdictional error. At [59], his Honour quoted from the joint judgment of Tamberlin and Katz JJ in *Minister for Immigration & Multicultural Affairs v Cho* [\[1999\] FCA 946 \(1999\) 92 FCR 315](#) at [29], where their Honours said:

'In considering the extent of the requirements imposed by [s 425](#) it is important to keep in mind that the exercise is essentially one of statutory interpretation...Care must be taken not to confuse the question of the interpretation of [s 425](#) according to its language with a question as to whether the full range of natural justice requirements should be injected into [s 425](#) under the guise of giving content to an obligation to afford an "opportunity to give evidence".'

88 Incidentally, in *Cho* at [33], Tamberlin and Katz JJ also said:

'We do not consider that there is any special significance in the reference to the word "genuine" which would expand the content of [s 425](#) beyond the ordinary and natural meaning of the language used. According to its terms the section simply requires that an opportunity be given to the applicant to appear and give evidence. Obviously if there is no real opportunity given then the section has not been









complied with. This could arise, for example, where relevant evidence is not admitted or misleading statements are made by the decision-maker which discourage an applicant from calling or proceeding with a particular line of evidence.'



89 In *M17/2004*, Ryan J did not refer to this additional passage, although what his Honour said at [61] indicates that he was aware of the requirement for the invitation required by [s 425](#) to be a genuine one. What his Honour there said was:

'I accept the submission advanced on behalf of the Minister that [s 425](#) in its present form requires the Tribunal to issue a genuine invitation to the applicant to appear but does not bear on the procedures to be followed at or after the hearing which results from acceptance of that invitation.'



90 At [62], Ryan J quoted from *NALQ v Minister for Immigration & Multicultural & Indigenous Affairs* [\[2004\] FCAFC 121](#) at [30], a passage in which the Full Court recognised that the invitation required by [s 425](#) must be 'real and meaningful and not just an empty gesture', citing both *SCAR* and *Mazhar*. The Full Court in *NALQ* proceeded to discuss earlier authorities on the nature of the invitation required. At [34], there was a discussion of whether the Full Court in *SCAR* at [37] had misconstrued the judgment of Hely J in *Applicant NAHF of 2002 v Minister for Immigration & Multicultural & Indigenous Affairs* [\[2003\] FCA 140 \(2003\) 128 FCR 359](#), but the Full Court in *NALQ* did not determine this question.



91 This examination of the authorities demonstrates that, far from having been criticised or not followed, *SCAR* is very much in the mainstream of authority. The invitation required by [s 425](#) of the [Migration Act](#) (and, for identical reasons, that required by [s 360](#)), must be real and genuine. As the reasoning of Tamberlin and Katz JJ in *Cho* at [33] demonstrates, it is legitimate to examine what occurred at the hearing, in order to ascertain whether the invitation extended satisfies that requirement. If what took place under the guise of a hearing was not a genuine opportunity for an applicant for review 'to give evidence and present arguments relating to the issues arising in relation to a decision under review', then the invitation required by [s 425](#) (or [s 360](#)) will not have been extended as required. Of course, it is necessary to bear in mind, as Tamberlin and Katz JJ said in *Cho* at [29], that it is not legitimate to regard every want of procedural fairness as nullifying the invitation. It is only defects rendering the proceedings ineffective to fulfil the purpose for which the invitation is required that will have this effect. *SCAR* is therefore binding on me as a single judge. In any event, in my view, it is correctly decided.

92 The next question is whether what took place at the hearing in the present case was so defective as to render the invitation to a hearing other than real and genuine. Manifestly, this was the case. Ms  **Antipova**  was interrupted often in attempting to give evidence, so that what she was attempting to say was cut short. She was invited to give evidence in a form, or to give a version of her evidence, that the Tribunal member found more acceptable because of its brevity. This was not the evidence that Ms  **Antipova**  wanted to give. It was not the evidence that the invitation to the hearing entitled her to give. It was not the evidence that she was encouraged by the material accompanying the invitation to believe she would be permitted to give. The behaviour of the Tribunal member amounted to a refusal to hear the evidence Ms  **Antipova**  wanted to give about a crucial question. There can be no doubt that the question was one of ‘the issues arising in relation to the decision under review’, in the words of [s 360\(1\)](#) of the [Migration Act](#). The invitation purportedly given pursuant to that provision was not perfected, because Ms  **Antipova**  was not allowed to ‘give evidence and present arguments’ relating to that issue.



93 If SCAR is wrongly decided, and [s 360\(1\)](#) of the [Migration Act](#) is not to be given the meaning it bears in my opinion, it is necessary to consider the second answer to the question whether [s 357A](#) of the [Migration Act](#) ousts the right, which Ms  **Antipova**  would have otherwise, to establish that the Tribunal’s unfairness to her constitutes jurisdictional error, entitling her to have the Tribunal’s decision set aside. [Section 357A](#) is a difficult provision to construe. It does not exclude altogether the principles of procedural fairness. There must be some doubt as to whether Parliament could exclude procedural fairness altogether, given that a denial of procedural fairness is a ground for the remedies referred to in s 75(v) of the Constitution. At best, the legislative power extends to regulating procedures, and this is what s 357A attempts to do. It provides that Div 5 of [Pt 5](#) of the [Migration Act](#) is taken to be ‘an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters it deals with’. The provision assumes that there will be aspects of the ‘natural justice hearing rule’ that are not matters dealt with by any provision of Div 5. As the cases so far have shown, identifying a provision dealing with a particular ‘matter’, relating to procedural fairness is not always easy. See, for example, the passages in *WAJR*, to which I have referred in [86]. The present case is relatively easy. No provision of Div 5 deals with the imposition of time limits on the hearings of the Tribunal. Unless it be [s 360\(1\)](#), no provision deals with the process by which evidence is adduced at a Tribunal hearing. There is certainly no provision dealing with the ‘matter’ of a Tribunal member interrupting answers to questions. No provision gives the

Tribunal member a right to control and censor the evidence given, by refusing to hear what the applicant for review wishes to say.

94 In *Minister for Immigration & Multicultural & Indigenous Affairs v WAFJ* [2004] FCAFC 5 (2004) 137 FCR 30, the Full Court dealt with a case in which, on more than one occasion, the Refugee Review Tribunal had interrupted the evidence of an applicant for a protection visa, accused him of misbehaving, asserted that his evidence could not be believed, and treated him rudely and with sarcasm, to the point where he was likely to have become upset, confused and distressed, and to have been deflected from the presentation of his case. By majority, the Full Court upheld a judgment of a federal magistrate, setting aside the Refugee Review Tribunal's decision, by reason of denial of procedural fairness. In *Minister for Immigration & Multicultural & Indigenous Affairs v Maltsin* [2005] FCAFC 118(2005) 88 ALD 304, another Full Court dealt with the case of an applicant for a visa similar to that sought by Ms  **Antipova** . In that case, similarly to this one, the Tribunal announced in the course of the hearing that it did not have sufficient time to hear all the evidence the applicant wished to give. The Tribunal also interrupted the applicant and prevented him from giving details in the course of his evidence. The Tribunal made repeated references to the need to hurry, and to the shortage of available time. It did not hear all the witnesses who had attended for the purpose of giving evidence on behalf of the applicant. The Full Court held that the resulting decision of the Tribunal was the result of jurisdictional error, which involved a denial of procedural fairness.



95 These two cases illustrate that denial of procedural fairness can arise from the manner in which the Tribunal conducts its hearing, particularly the curtailment of the opportunity, which the hearing is intended to afford, for the applicant to give evidence. If the Tribunal attempts to hurry the course of evidence unduly and interrupts frequently, and if the behaviour of the member constituting the Tribunal betrays a lack of interest in what the applicant is saying, a denial of procedural fairness can occur. In the absence of provisions in Div 5 of [Pt 5](#) of the [Migration Act](#) dealing with these matters, [s 357A](#) does not operate to exclude from operation those aspects of procedural fairness, or the natural justice hearing rule as it is called. The Tribunal's jurisdictional error in denying the applicant procedural fairness can be a ground for quashing the Tribunal's decision. The degree to which Ms  **Antipova** 's evidence was interrupted and curtailed in the present case was sufficient to give rise to a denial of procedural fairness, capable of amounting to jurisdictional error if it affected the exercise of the Tribunal's statutory function.









96 Since writing these reasons for judgment, I have become aware of the judgment of the Full Court in *Minister for Immigration & Multicultural Affairs v Lay Lat* [2006] FCAFC 61. That judgment deals with an appeal by the Minister from a judgment of the Federal Magistrates Court, which quashed a decision of a delegate of the Minister to refuse a Business Skills Migrant visa to the respondent to the appeal, a person who had applied from outside Australia for that visa. The issue was whether the respondent had been denied what the Full Court called ‘common law procedural fairness’, because the decision-maker did not draw to the respondent’s attention the point on which the decision against him turned. If the respondent were entitled to succeed on that issue, there was then an issue as to whether a right to procedural fairness was excluded by [s 51A](#) of the [Migration Act](#), a provision in terms similar to both [s 357A](#) and [s 422B](#), but relating to decisions by the Minister or delegates of the Minister. At [46] – [59], the Full Court held that there had been no denial of procedural fairness, because the relevant point was obvious to the respondent. The Full Court then proceeded, at [60] – [70], to make some observations, which are clearly obiter, on the effect of [s 51A](#). Following *VXDC v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCA 1388 (2005) 146 FCR 562, the Full Court expressed the view that [s 51A](#) operates to exclude the ‘common law natural justice hearing rule’ altogether.







97 To the extent to which *Lay Lat* might be taken to be authority on the meaning and effect of [s 357A](#) of the [Migration Act](#), it does not bind me to hold that Ms  **Antipova** ’s only entitlement to procedural fairness is to be found in the meagre provisions of Div 5 of [Pt 5](#) of the [Migration Act](#). In my view, to the extent that it suggests that [s 422B](#) excludes all principles of procedural fairness, other than those found in Div 4 of [Pt 7](#) of the [Migration Act](#), *VXDC* is fundamentally wrong. The obiter remarks in *Lay Lat* are entitled to great respect, appearing as they do in a considered judgment of a Full Court, but I cannot bring myself to accept that they are correct. For the reasons I gave in *Moradian v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 1590 (2004) 142 FCR 170 at [28], I remain of the view that the words ‘in relation to the matters it deals with’, appearing in each of [ss 51A](#), [357A](#) and [422B](#) of the [Migration Act](#) are intended to qualify the words preceding them, and to reduce what would otherwise be the absolute effect of those exclusionary words. If this were not the case, the words ‘in relation to the matters it deals with’ would be otiose, and it is not to be supposed that Parliament intended to enact meaningless, surplus words in a crucial amendment. The words are not the ‘plain words of necessary intentment’ required to exclude the requirements of procedural fairness. See *Annetts v McCann* [1990]

[HCA 57](#); [\(1990\) 170 CLR 596](#) at 598 per Mason CJ, Deane and McHugh JJ, and the authorities there cited. It is highly unlikely that Parliament had in mind all of the myriad ways in which procedural fairness, a concept the content of which is dependent on the circumstances of each case, could arise. The present case forms a good example of what would result if the view expressed in *Lay Lat* were to be followed. Assuming that [s 360\(1\)](#) of the [Migration Act](#) does not have the meaning that it has in my view, the Tribunal could reduce the time of a hearing arbitrarily as much as it chose, interrupt and curtail the evidence of the applicant constantly, and deprive the applicant of any opportunity to put his or her case, and the applicant would have no redress. It is impossible to imagine that Parliament intended such a drastic result.

98 To the extent to which the views expressed in *VXDC* and *Lay Lat* are said to be based on a reading of the explanatory memorandum and the second reading speech relating to the bill by which [ss 51A](#), [357A](#) and [422B](#) were introduced into the [Migration Act](#), I repeat the view I expressed in *Moradian* at [35]. Those documents do not contain statements specific enough to resolve any ambiguity in those provisions, or to disclose a purpose specific enough to warrant a construction of the provisions that would regard them as excluding the entirety of the principle of procedural fairness described as the ‘natural justice hearing rule’.







99 For these reasons, if it is necessary to ask the question whether Ms  **Antipova**  is entitled to succeed on the basis that the Tribunal denied her procedural fairness, by the manner in which it conducted her hearing, I do not regard *VXDC* and *Lay Lat* as requiring me to take a view different from that I have expressed above.

100 It is therefore necessary to see whether the particular denial of procedural fairness made a difference, in the sense referred to in *Stead v State Government Insurance Commission* [\[1986\] HCA 54](#); [\(1986\) 161 CLR 141](#) at 147, ie whether the Tribunal’s error deprived Ms  **Antipova**  ‘of the possibility of a successful outcome.’ In the present case, the answer is plain. The Tribunal disbelieved Ms  **Antipova**  when she said that she was determined to make a life with Mr Petrou from the time she went to live with him on 18 May 2001. To a significant extent, the Tribunal’s reasoning in this respect was based on its refusal to accept Ms  **Antipova** ’s explanation of how she had come to continue with her marriage plans after meeting Mr Petrou, and then abandoned her marriage so soon after she had undertaken it. It was this very question that Ms  **Antipova**  was attempting to answer when the Tribunal member interrupted her, on several occasions, and asked her for a less detailed answer. If the Tribunal had been patient

enough to listen to the detail, it might well have been persuaded to accept what Ms  Antipova  said. In other words, the very point on which Ms  Antipova  lost, because she was disbelieved, is one on which she would have given a fuller explanation, if the Tribunal had permitted her to do so. It cannot be said that the denial of procedural fairness in truncating Ms  Antipova ’s evidence, to fit within a timetable about which she had not been warned, could have made no difference to the outcome of the proceeding.

101 It follows that the performance of the Tribunal’s statutory function was affected by the denial of procedural fairness. The Tribunal’s decision is therefore tainted by jurisdictional error, either because of its failure to comply with [s 360](#) of the [Migration Act](#), or because of a denial of procedural fairness, which [s 357A](#) of the [Migration Act](#) does not exclude from consideration.



Compelling and compassionate circumstances

102 Once the Tribunal had found that Ms  Antipova  and Mr Petrou had not been in a marriage-like relationship for 12 months before Ms  Antipova  applied for her visa, it was necessary for the Tribunal to determine whether reg 1.15A(2A)(b) of the [Migration Regulations](#) applied. The effect of that provision was that the requirements of reg 1.15A(2)(d) (in this case, the requirement of a mutual commitment to a shared life as husband and wife to the exclusion of all others for a period of 12 months immediately preceding the date of the application for a visa) did not apply if Ms  Antipova  could ‘establish compelling and compassionate circumstances for the grant of the visa.’

103 The Tribunal construed this provision as a ‘waiver’ provision, and held that it was required to take into account only those circumstances existing at the date of the application for a visa. In doing so, the Tribunal said that it was following *Boakye-Danquah*. That was a case concerned with criteria for a particular type of visa, found in a schedule to the [Migration Regulations](#), in which the reference to ‘compelling reasons’ appeared in the very criterion required to be satisfied at the time of application for the visa. That provision referred to compelling reasons for not applying certain otherwise applicable criteria. It is not surprising that Wilcox J in that case construed the relevant provision as requiring the compelling reasons to exist at the time of application for the visa.

104 [Regulation 1.15A\(2A\)](#) of the [Migration Regulations](#) is a very different provision. It is found in a separate regulation, providing a definition of the word ‘spouse’, for a variety of purposes, wherever that word is found in the [Migration Regulations](#). It does not call upon a decision-maker to determine ‘whether to

exercise the waiver of the 12 month cohabitation requirement', as the Tribunal characterised it at [77] of its reasons. Rather, reg 1.15A(2A) provides that reg 1.15A(2)(d) does not apply if a specified condition is met. That condition is not that the applicant can establish compelling and compassionate reasons for not applying the criteria referred to in reg 1.15A(2)(d), but that the applicant can establish 'compelling and compassionate circumstances for the grant of the visa.' In other words, the Tribunal is not required to determine whether compelling and compassionate circumstances exist for the waiver or non-application of the 12-month requirement, but whether such circumstances exist for the granting of the visa sought. The focus is not on the criteria to be ousted from consideration, but on the end result. The wording of reg 1.15A(2A) suggests strongly that, at whatever stage of whatever decision-making process the question of special circumstances arises, it is to be determined by reference to whatever circumstances exist at the date of decision. It would be a strange result if the circumstances to be considered differed according to whether the application of the definition of 'spouse' was required to be applied at the time of application of the visa, or at the time of decision, or at some other stage, so that different views might be taken as to whether compelling and compassionate circumstances for the grant of the visa existed at different times. The wording of the provision suggests strongly that this is not the intention.

105 Applying this view does nothing to undermine the two-stage assessment process of determining entitlement to the type of visa Ms  **Antipova**  sought, as the Tribunal suggested at [76] of its reasons. Even assuming the definition in reg 1.15A of the [Migration Regulations](#) to be confined in its application to that type of visa (and subreg (2)(d) in its terms applies to a range of types of visas, including any permanent visa), the two-stage process remains intact. In determining whether the applicant for a visa was the spouse of a nominating person at the date of application for the visa, the decision-maker is required to determine whether, throughout a 12-month period prior to that date, the two persons met the three requirements of reg 1.15A(2)(d), namely mutual commitment, genuine and continuing relationship, and cohabitation. If any of these three requirements should be absent, the decision-maker is then required to consider whether the applicant has established compelling and compassionate reasons for the grant of the visa. If so, reg 1.15A(2)(d) no longer has to be satisfied at the date of application for the visa; it no longer applies. Once understood in this sense, reg 1.15A(2A) can be seen to be compatible with the two-stage process of assessment. On this analysis, there is nothing strange about making a determination about the application of a criterion to

be satisfied at the time of application for a visa by reference to facts not in existence at that time, as the Tribunal thought.

106 In *Neofotistou v Minister for Immigration & Multicultural & Indigenous Affairs* [2005] FCA 919 (2005) 144 FCR 478 at [19] – [28], the Court took a view similar to the one I have expressed, with respect to the provisions of reg 3A of the *Migration Regulations 1989* (Cth). Regulation 3A(2) provided for the specification of a lesser period than the six-month period of cohabitation prior to the date of application for a visa, required by reg 3A(1), if :



‘(a) there are exceptional circumstances affecting the persons; and

(b) there are compelling reasons for specifying that lesser period.’

107 At [24], North J expressed the view that it was not to be expected that a decision-maker would be required to ignore the current state of affairs, unless the legislation expressly required such an exercise to be undertaken. At [25], his Honour referred to the fact that reg 3A(2) was an ameliorating provision, which suggested that it should be given an expansive, rather than a restrictive, meaning. At [26], his Honour regarded any uncertainty arising from applying the assessment on the facts as they exist at the time of the decision, rather than at the time of the application, as insufficient to outweigh the intended ameliorating purpose of the regulation. His Honour did not refer to *Boakye-Danquah*. In many respects, the provision with which North J was dealing in *Neofotistou* was more similar to that with which Wilcox J was dealing in *Boakye-Danquah* than either is to reg 1.15A(2A) of the Migration Regulations. Despite the fact that North J appears to have been unaware of *Boakye-Danquah*, I regard *Neofotistou* as correct, and as supporting the view I take of reg 1.15A(2A). As I have said, *Boakye-Danquah* is distinguishable, because it dealt with a provision very different from reg 1.15A(2A).



108 The Tribunal appears to have been led into error by its misunderstanding of the principle for which *Boakye-Danquah* stood as authority, and by its incorrect characterisation of reg 1.15A(2A) of the Migration Regulations, at [76] of the Tribunal’s reasons, as permitting waiver of the criteria in reg 1.15A(2)(d) ‘if there are circumstances sufficiently compassionate and compelling which would justify the parties having lodged the visa application before they had lived together in a spousal relationship for a sufficient period to satisfy the definition of spouse under regulation 1.15A.’ As I have said in [104], reg 1.15A(2A) did not focus on the circumstances attending the making of the application for a visa, but on the circumstances justifying the granting of the visa. Those circumstances are the ones





the Tribunal was required to take into account in determining whether the criteria in reg 1.15A(2)(d) was applicable.

109 Such an error is capable of amounting to a jurisdictional error if it affected the exercise of the Tribunal's statutory function. In the present case, the issue of compelling and compassionate circumstances turned on Mr Petrou's re-established relationship with his children from a former union, and on Ms  **Antipova** 's emerging relationship with those children. The Tribunal was prepared to take into account the needs of those children in determining whether compelling and compassionate circumstances existed. Having held that it could not take into account the circumstances that existed at the date of decision, the Tribunal nevertheless expressed the view at [82] of its reasons that, even if it could do so, it did not regard the current needs of the children as 'sufficiently compelling to justify a waiver of the 12 month cohabitation requirement'. Despite the incorrect characterisation of the effect of reg 1.15A(2A), it is fair to take this finding to be a finding that there were no compelling and compassionate circumstances, for the purposes of the application of that provision, even if current circumstances were to be considered. The assessment of the circumstances against the standard of 'compelling and compassionate' was a matter for the Tribunal. It does not appear that the Tribunal misunderstood or misapplied the required standard. The result, therefore, is the same as if the Tribunal had not held erroneously that it could not take circumstances at the time of the decision into account. In effect, it did so. Its error did not amount to a jurisdictional error, because it did carry out the task required of it by the legislation.







110 For this reason, the Tribunal's decision cannot be set aside on the basis of its error in construing reg 1.15A(2A) of the Migration Regulations.





Bias



111 Nor does it appear that the Tribunal's decision can be set aside on the ground of bias. The ground was raised, but not argued in detail. The test for ostensible bias as a ground for setting aside a decision of the Tribunal is whether a fair-minded lay observer with knowledge of the material objective facts might entertain a reasonable apprehension that the Tribunal might not bring an impartial and unprejudiced mind to the resolution of the question in issue. See *Webb v R* [1994] HCA 30; (1994) 181 CLR 41 at 67-68 per Deane J. In my view, a fair-minded lay observer, informed as to the material objective facts, who witnessed the Tribunal dealing with Ms  **Antipova** 's case, would have been more likely to conclude that the Tribunal had simply not performed its statutory function very well, rather

than that it would fail to bring an impartial and unprejudiced mind to the resolution of Ms  **Antipova** ’s case. The insistence on imposing a time limit, and the associated interruptions and attempts to shorten the evidence, were indicative of a desire to deal with the matter expeditiously, rather than of a desire to find against Ms  **Antipova** , whatever the evidence might reveal. Nothing about the Tribunal’s reasoning discloses that it approached the case with a closed mind.

Conclusion

112 For the reasons I have given, the Tribunal’s decision is flawed by reason of its jurisdictional error. That error consists of failure to comply with the essential precondition to the exercise of the jurisdiction, provided by [s 360\(1\)](#) of the [Migration Act](#), that the Tribunal invite the applicant to appear before it, to give evidence and present arguments relating to the issues arising in relation to the decision under review. Although the Tribunal gave Ms  **Antipova**  such an invitation in form, because of the manner in which it conducted the hearing, there was no such invitation in reality. Alternatively, the Tribunal denied Ms  **Antipova**  procedural fairness by the manner in which it conducted the hearing, and the denial of procedural fairness is such as to amount to jurisdictional error. Ms  **Antipova**  is entitled to have the decision set aside, and to have the Tribunal rehear her application for review of the decision of the Minister’s delegate.

113 Among the relief Ms  **Antipova**  seeks is a writ of certiorari, for the purpose of quashing the Tribunal’s decision, as well as an order remitting the matter to the Tribunal for determination according to law (in reality, a writ of mandamus, or an order in the nature of mandamus). Relief of these kinds can only be granted against the Tribunal, which is not a party to the proceeding. See *SAAP v Minister for Immigration & Multicultural & Indigenous Affairs* [\[2005\] HCA 24](#)(2005) 215 ALR 162 at [\[43\]](#) per McHugh J, [\[91\]](#) per Gummow J, [\[153\]](#) per Kirby J and [\[180\]](#) per Hayne J. It will therefore be necessary for me to make an order joining the Tribunal as the second respondent to the proceeding. It is safe to assume that the Tribunal would follow the usual practice of submitting to any order that the Court might make, save an order for costs against the Tribunal. Service of the application and associated material on the Tribunal can therefore be dispensed with. A writ of certiorari should issue, directed to the Tribunal, bringing the decision into the Court, for the purpose of quashing it. The decision should be quashed. A writ of mandamus should also issue, directed to the Tribunal, requiring it to hear and determine the application of Ms  **Antipova**  for review of the decision of the Minister according to law.

114 No reason was advanced, and none appears, why the usual order, that costs follow the event, should not be made. The Minister will be ordered to pay Ms  **Antipova** ’s costs of the proceeding.

I certify that the preceding one hundred and fourteen (114) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Gray.

Associate:

Dated: 19 May 2006

Counsel for the applicant: V A Morfuni SC

Solicitor for the applicant: Lily Ong

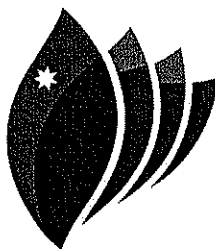
Counsel for the respondent: S Moore

Solicitor for the respondent: Australian Government Solicitor

Date of Hearing: 30 March 2005

Date of Judgment: 19 May 2006

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URL: <http://www.austlii.edu.au/au/cases/cth/FCA/2006/584.html>



20 May 2011

Mr Kong Wo Tang
4 Eustace Parade
Killara NSW 2071

Reference: 5201001002(D)

Dear Mr Tang,

FINAL APPROVAL

Title of project: A discourse analytically-based study of the interactions among the parties and cases before the Migration Review Tribunal

Thank you for your recent correspondence. Your response has addressed the issues raised by the Faculty of Human Sciences Human Research Ethics Sub-Committee and you may now commence your research.

Please be advised that this approval is subject to one condition:

1. This study is not to include participants under 18 years old without obtaining an approved amendment from the Ethics Sub-Committee.

The following personnel are authorised to conduct this research:

Professor Christopher N Candlin – Chief Investigator
Mr Kong Wo Tang – Co-investigator

Please note the following standard requirements of approval:

1. The approval of this project is **conditional** upon your continuing compliance with the *National Statement on Ethical Conduct in Human Research (2007)*.
2. Approval will be for a period of five (5 years) subject to the provision of annual reports. **Your first progress report is due on 1st September 2011.**

If you complete the work earlier than you had planned you must submit a Final Report as soon as the work is completed. If the project has been discontinued or not commenced for any reason, you are also required to submit a Final Report on the project.

Progress Reports and Final Reports are available at the following website:
http://www.research.mq.edu.au/researchers/ethics/human_ethics/forms

3. If the project has run for more than five (5) years you cannot renew approval for the project. You will need to complete and submit a Final Report and submit a new application for the project. (The five year limit on renewal of approvals allows the Sub-Committee to fully re-review research in an environment where legislation, guidelines and requirements are continually changing, for example, new child protection and privacy laws).

HUMAN RESEARCH ETHICS COMMITTEE
MACQUARIE UNIVERSITY

http://www.research.mq.edu.au/researchers/ethics/human_ethics



4. Please notify the Sub-Committee of any amendment to the project.

5. Please notify the Sub-Committee immediately in the event of any adverse effects on participants or of any unforeseen events that might affect continued ethical acceptability of the project.

6. At all times you are responsible for the ethical conduct of your research in accordance with the guidelines established by the University. This information is available at:
<http://www.research.mq.edu.au/policy>

If you will be applying for or have applied for internal or external funding for the above project it is your responsibility to provide Macquarie University's Research Grants Officer with a copy of this letter as soon as possible. The Research Grants Officer will not inform external funding agencies that you have final approval for your project and funds will not be released until the Research Grants Officer has received a copy of this final approval letter.

Yours sincerely,

P.P. [Signature]

A/Prof Mike Jones
Deputy Chair
Faculty of Human Sciences Ethics Review Sub-Committee
Human Research Ethics Committee