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MINISTERIAL DISCRETIONS

The Migration Act contains several provisions that enable the Minister to intervene, following a decision of a merits review tribunal, to substitute the tribunal decision with a decision that is more favourable to the applicant, where the Minister believes it is in the public interest to do so. Usually this has been to grant a visa to an applicant who has not met the statutory criteria for the grant of the visa subject to the review.

The main provisions are:

- section 351 - following an MRT decision;
- section 417 - following an RRT decision; and
- section 501J - following an AAT protection visa character decision.

The Minister also has other personal non-compellable public interest powers under the Act.

- section 195A – the Minister may grant a detainee a visa.
- section 197AB – the Minister may make a ‘residence determination’ to the effect that a person who is or may be detained under s189 of the Act may reside at a place other than an immigration detention centre;
- section 197AD – the Minister may revoke or vary a ‘residence determination’; and

The main features of these non-compellable public interest powers are:

- the Minister may intervene where the Minister believes it is in the public interest to do so;
- the powers can not be delegated – only the Minister may exercise these powers;
- the Minister can not be compelled to consider whether or not to exercise these powers;
- in exercising these powers the Minister is not bound by the statutory criteria in the Regulations, nor is he or she bound by the visa processing procedural requirements in the Migration Act; and
- where the Minister exercises any of these powers, he or she must cause to be laid before each House of the Parliament a statement setting out the reasons for the Minister’s decision.

Ministers have issued guidelines to illustrate the types of circumstances where they considered it may be in the public interest to consider to intervene. These have included:

- compelling individual circumstances, such as the person having strong family ties in Australia;
- the applicant would meet criteria for a visa, but is barred from making a further application while in Australia;
- the applicant does not meet the statutory criteria due to a deficiency in those criteria; or
- the applicant's removal from Australia may affect Australia's international obligations.
- There is difficulty in removing the person from Australia.

DIAC officers assess all protection visa cases following an RRT decision and draw the Minister's attention to those that raise issues covered by the Minister's intervention guidelines. The actual decision whether to consider the exercise of the powers or whether to grant the visa, must be made by the Minister personally. DIMIA employees also assess requests for intervention against the guidelines and submit reports to the Minister on the requests.

There are additional powers in the Act that only the Minister may exercise personally. Some examples of these powers are:

- lifting bars on the making of valid visa applications (for example section 48B referred to above);
- section 137N – the Minister may revoke the automatic cancellation of a student visa;
- making decisions to refuse or cancel visas on character grounds, where it is in the national interest to do so, and the person is not given a *prior opportunity* to comment on a proposed decision (sections 501(3) and (4)); and
- setting aside certain character related decisions (section 501A, 501B and 501C).