Immigration

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Introduction

The main law governing immigration in Australia is the *Migration Act 1958* (Cth) (Migration Act), the *Migration Regulations 1994* (Cth) (Migration Regulations), delegated legislation and ministerial directions, and policy such as the Procedures Advice Manual 3 (PAM 3). The Department of Home Affairs (DHA) website offers a wide range of information about the migration process.

Immigration is a constantly changing area of law and the following information is only a general and simplified overview at a specified time, and it is possible it may have changed. Migration advice from a qualified professional should be obtained that is specific to an individual's circumstances. Only registered migration agents can give immigration assistance and advice. Lawyers also have to be registered as migration agents to give immigration assistance.

The Need for a Visa

Non-citizens entering Australia are required to have a visa, which is a permit that can allow either a temporary or permanent stay. Visas are issued by DHA.

An authorised officer may grant a visa to a person for a single journey, a specific number of journeys or for any number of journeys to or from Australia while the visa remains in force.

An application for a visa should be made before a person arrives in Australia. A person is unlikely to be granted a visa on arrival. A non-citizen who enters Australia without a visa and who is not immigration cleared, who overstays a visa or who becomes unlawful in some other way, is an unlawful non-citizen (s 14(1) Migration Act) and may be removed from Australia (ss 189, 198 Migration Act).

Visa Criteria for Temporary and Permanent Visas

There are many different temporary and permanent visas under the Migration Regulations. Each visa belongs to a class and a subclass.

A temporary visa is issued for a finite period of time or until a specified event occurs for example the DHA making a decision on an application for a permanent visa.

A person who is not an Australian citizen must have a permanent visa if they wish to live here permanently (s 30(1) Migration Act). A permanent visa will be issued when it has been established that the person concerned can meet the criteria.

A person who is granted a permanent visa and has then been through immigration clearance becomes a permanent resident of Australia. Such a person will have most of the rights of an Australian citizen, except for the right to vote (there are some exceptions for certain British subjects) and to hold public office. Social security payments are generally not available within the first two years of entry (except for special benefits).

If a non-citizen leaves the country, even temporarily, their current visa ceases to be in effect (i.e. they have no automatic right to return) unless the visa specifically authorises re-entry or

multiple travel (s 79 Migration Act). Australian permanent residents going abroad must therefore ensure that they possess a Resident Return Visa prior to departure. If the visa expires while out of the country, they may apply for a Resident Return Visa at any Australian consulate or embassy. This can be a difficult process and is best avoided.

The criteria that must be satisfied before a visa can be granted are set out in the Migration Act and Migration Regulations. Schedule 1 of the Migration Regulations sets out criteria that apply to all visas in a particular class of visas, and sch 2 sets out the criteria that apply to a specific subclass of visa. Schedule 2 includes primary and secondary criteria. The main applicant must satisfy the primary criteria. Secondary criteria allow for other people to be included in the visa application of the main applicant in certain circumstances (e.g. an applicant for a partner visa may be able to include their child as a secondary applicant on their own application).

Schedule 2 of the Migration Regulations also distinguishes between criteria that must be met at the time an application is made and criteria that must be met at the time that a decision is made. In addition, sch 2 includes the public interest and other criteria that must be satisfied for that particular visa. Public interest criteria (sch 4 Migration Regulations) can include requirements that an applicant hold a valid passport or meet specific health and character requirements.

Policy providing guidance on how visa criteria should be applied is set out in the PAM 3. Written directions by the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (minister) made under s 499 of the Migration Act also have the force of law and provide further guidance.

Submitting a Visa Application

How and where to apply

A visa application must be made on the correct application form or online portal to be valid. Schedule 1 of the Migration Regulations lists the required form for each visa class. A sponsorship form may also be required. The forms can be found on the DHA website. Increasingly, applications are lodged via online application portals.

Whenever a visa application is received by the DHA, a file number will be allocated to it, and this file number should be quoted whenever a person contacts the DHA.

Fees

Most visas require the payment of a visa application charge. This charge will not be refunded if the application is unsuccessful. However, if the application is invalid (see s 46 of the Migration Act for requirements for a valid visa), the DHA cannot consider it and the fee will be refunded in full.

The DHA usually change fees on the first of July of each year. Whilst the DHA website offers a visa pricing estimator, relevant sch 1 criteria set out current fees for primary and secondary applicants.

Processing times

Approximate processing times are available on the DHA website and on various Australian Embassy and High Commission websites. A person can contact DHA to enquire about processing. They can also contact their local Commonwealth member of parliament to make enquiries, and the Global Feedback Unit of DHA or Commonwealth Ombudsman if they believe there has been unreasonable delay in the processing of an application.

Identity and integrity requirements

Identity and integrity requirements are increasingly a focus for DHA. An applicant must not provide bogus documents, or information that is false or misleading in a material document with their visa application. If a visa application is refused because an applicant or any of the members of the family unit provide bogus documents or information that is false or misleading in a material particular, a three-year ban will apply to most further visa applications.

In these circumstances, reasons must be provided as to why the visa should be granted. These reasons must either be:

- compelling circumstances affecting Australia or
- compelling or compassionate reasons affecting an Australian citizen, permanent resident or eligible New Zealand citizen.

If a visa is refused because the applicant's identity could not be established (under public interest criterion 4020), a ten-year ban on most further visa applications will apply.

A visa will be refused even if false or misleading information or bogus documents were supplied unintentionally or unknowingly. In many cases, a visa refusal on the basis of public interest criterion 4020 is reviewable by the Administrative Appeals Tribunal (AAT).

Visitor Visas

Visitor visas are available to applicants seeking to visit Australia for a short period for holidays, tourism, recreation, business activities or to see family and friends. Visitor visas do not allow work in Australia.

Common criteria for visitor visas

All visitor visas share the criterion that the applicant genuinely intends to stay temporarily in Australia for the purpose for which the visa is granted. This is often referred to as the 'genuine visitor' requirement. The DHA considers a number of issues that relate to whether the applicant is at risk of overstaying when assessing if this criterion is met.

Visitor visas are refused where applicants clearly do not intend bona fide (i.e. in good faith) visits in accordance with their type of visa. Sometimes a special condition is put on a visitor visa (i.e. condition 8503—no further stay). This condition (which is mandatory for sponsored visitor visas) means it is very difficult but not impossible to apply for, and be granted, permanent residence after entry for a temporary stay.

Possession of a Visitor Visa generally ensures that immigration clearance is granted on arrival. However, a significant number of people per year are turned around at Australian airports, because they are not considered to be genuine visitors.

Where a person wishes to visit a close relative in Australia but has difficulty satisfying the genuine visitor requirements, it is often better to apply for a Sponsored Family Stream or Tourist Stream. This is more likely to be granted given that the Australian relative/sponsor usually has to pay a bond to ensure that the visa holder leaves the country.

Extending a visit

Once a visa is granted and a visitor enters Australia, they may want to apply for extensions of stay. This may be possible where the applicant meets the criteria for a further visitor visa. It is important to note where the applicant needs to be at the time of the application. Of the visas for visitors described here, only the Tourist Stream and the Medical Treatment Visa allow for applications to be made while the applicant remains in Australia. In addition, those visas require that exceptional circumstances exist in order for an extension of stay of 12 consecutive months or more within Australia to be authorised.

It is not possible to apply for a further visitor visa in Australia if the former visitor visa had a 'no further stay' (8503 or similar) condition attached, unless that condition is waived (s 41(2) Migration Act). This condition can only be waived if events of a compassionate and compelling nature that are beyond the control of the visa holder have occurred since the former visa was granted, and these circumstances necessitate a further stay in Australia. A waiver request should be lodged on a Form 1447.

Subclasses of visitor visas

There are four subclasses of visitor visas:

- eVisitor (subclass 651)
- Visitor Visa (subclass 600)
- Electronic Travel Authority (visitor) (subclass 601)
- Medical Treatment Visa (subclass 602).

eVisitor

An eVisitor (subclass 651) is an electronically stored 12-month authority for visits to Australia for tourism or business purposes for up to three months on each arrival. The eVisitor is available to passport holders from the European Union and a number of other European countries. An eVisitor is linked to the passport number an applicant has given in an application, so a visa holder must use the same passport to travel to Australia. If a visa holder gets a new passport, the details of the new passport must be given to DHA. An eVisitor comes into effect as soon as it is granted. If an applicant is holding any other visa to Australia, an eVisitor replaces this visa.

To be eligible to obtain an eVisitor, an applicant must:

- be outside Australia
- hold an eVisitor-eligible passport (see DHA website)
- meet character requirements.

The application can be made at the DHA website and an ImmiAccount must be created to lodge and application.

Visitor Visa

A Visitor Visa (subclass 600) is a temporary visa allowing a stay in Australia of up to three, six or twelve months. This visa has five streams:

- Tourist Stream
- Sponsored Family Stream
- Business Visitor Stream
- Approved Destination Status Stream
- Frequent Traveller Stream.

A person can lodge an application for a Visitor Visa online. An application can be made from outside Australia, or from inside Australia if the person holds a substantive visa that does not have a 'no further stay' condition (8503) attached.

An application for a Visitor Visa must be accompanied by the required documents. A document checklist is available from the DHA website. That website also includes information about the application forms that need to be filled out for the different streams of the Visitor Visa.

Tourist Stream

A person can apply for this visa if they are intending to visit an Australian citizen or permanent resident who is their parent, spouse, de facto partner, child or sibling, or to travel to Australia for recreational purposes. An application can be made onshore or offshore, but the applicant must be in the same place at the time of making the application and at the time a decision is made on the application.

Sponsored Family Stream

A person can apply for this visa if they are intending to visit relatives in Australia. To apply for this visa, a person must be sponsored by a family member who is an adult (over 18 years) Australian citizen or permanent resident, who has been settled in Australia for a reasonable period (usually two years). An applicant can also be sponsored by a member of an Australian parliament, a local government mayor or an authorised person representing an Australian government, or Australian state or territory government department or agency. A sponsor cannot sponsor more than one person at the same time, unless the applicants are members of the same family unit. A sponsor might be asked to provide a security bond, which will usually be between $5000 and $15 000 per person. A sponsor must guarantee

that the applicant will leave Australia before their visa expires. If the visa holder overstays, the sponsor is not able to sponsor another visitor in the same visa class for five years. The applicant must be outside Australia when applying for this visa and when a decision is made in relation to the visa.

Business Visitor Stream

This stream is for business people who would like to travel to Australia for a short business visit to undertake negotiations or participate in a conference. The applicant must establish their business background and that they have a good business reason for travel to Australia. An applicant must be outside Australia when they apply for this visa and when the visa is decided. A sponsor is not required.

Approved Destination Status Stream

This stream is for people from the People's Republic of China who are travelling in an organised tour group. The applicant must be a citizen of China and must be in China when they apply for this visa and when the visa is decided. An application must be made through an agent registered under the Approved Destination Status Scheme as part of a group tour following an approved itinerary. A sponsor is not required. This visa has a mandatory 'no further stay' condition (8503) attached.

Frequent Traveller Stream

This visa is for people wanting to travel to Australia as a tourist or to engage in business visitor activities. This visa allows travel and entry to Australia on multiple occasions until a date specified by the minister (which must not be more than 10 years after the date of grant of the visa) and to remain in Australia, after each entry, for three months. The visa applicant must not intend to engage in activities that will have adverse consequences for employment or training opportunities, or conditions of employment for Australian citizens or permanent residents. An application can be made onshore or offshore, but the applicant must be in the same place at the time of making the application and at the time a decision is made on the application.

Electronic Travel Authority

An Electronic Travel Authority (ETA) (subclass 601) allows citizens of certain countries to apply for a visa through their travel agent or at their nearest immigration office outside Australia. Citizens of some countries are able to apply online. An ETA allows for a stay of up to three months, or three months on each arrival if the ETA allows multiple re-entries to Australia over a 12-month period.

An ETA is linked electronically to the applicant's passport. To be eligible to apply for an ETA, an applicant must:

- be outside Australia at the time of making the application and decision and
- hold a citizen passport of an ETA-eligible country.

Medical Treatment Visa

While not strictly a visitor visa, an applicant can apply for a Medical Treatment Visa (subclass 602) if they have a medical condition and want to travel to Australia for a medical consultation or medical treatment. An applicant can also consider applying for this visa if they want to donate an organ. This visa may also be granted to those who want to support the person who is having medical treatment in Australia.

An applicant can apply for a Medical Treatment Visa onshore as well as offshore. This visa is generally granted for three to twelve months. A document checklist on the DHA website outlines the evidence required to be provided with an application for this visa.

Temporary Visas

Temporary residence allows for entry to Australia for a specified period to engage in employment or other pursuits in Australia.

The procedures generally involve sponsorship by the interested party in Australia (although no sponsorship is required for working holiday makers or student visas). Health and character requirements must also be met.

People approved for entry under temporary residence categories may be able to be accompanied by their dependants (e.g. spouse, partner, children). Dependants of temporary residents may usually undertake employment or studies in Australia, depending on the particular temporary residence class.

Adequate means to support

Most temporary visas will require that applicants establish that they have adequate means to support themselves while in Australia. Evidence of funds for some visitor and temporary visa classes should be in the form of passbooks, account statements and letters from banks or other financial institutions. Letters should be on letterhead, dated and signed.

Adequate funds to cover the initial period of stay could vary depending on the:

- proposed length of stay and the extent of travel proposed
- extent to which accommodation and other assistance will be available from relatives and friends in the initial period after arrival.

Temporary residence visas

It covers the following major groups:

- Student Visa
- temporary skilled and work visas
- temporary family visas
- temporary business visas.

Student Visa

There are a number of temporary visas that may be available for those who wish to study in Australia. These are found in class TU. The Student Visa (subclass 500) is the relevant visa for vocational education and training, higher education and postgraduate research where specific criteria are met. Costs associated with student visas are high. The law in this area can be quite complex and is subject to frequent change. Migration advice is recommended.

Post study options

On graduation, students may meet criteria for temporary or permanent skilled visas. Some visa categories are specifically tailored towards students on graduation. In particular, the Temporary Graduate Visa (subclass 485) may allow overseas students who do not meet the points test for a permanent visa to remain in Australia for some time. An application must be lodged within six months of completing studies. This visa has a Graduate Work Stream and a Post-study Work Stream.

Graduate Work Stream

This stream is for graduate international students. A visa in this stream is granted for 18 months for students to gain skilled work experience or improve their English language skills, which might then allow them to secure sufficient points for a general skilled migration visa or gain sponsorship by an Australian employer. Holders of this visa may lodge an expression of interest for a permanent visa at any time if they are able to meet the pass mark on the general skilled migration points test. The pass mark changes from time to time. They are then invited to apply under the SkillSelect system. This visa requires that overseas students:

- are under 50 years of age
- have, in the last six months, completed an eligible qualification(s) as a result of at least two years of study in Australia and
- have the skills and qualifications that meet the Australian standard for an occupation on the Skilled Occupation List.

Post-study Work Stream

An applicant can apply for a visa in this stream if they applied, and were granted, their first student visa to Australia on or after 5 November 2011. For the purposes of applying for a subclass 485 visa under the Post-study Work Stream, only study that results in the conferral of an eligible degree-level qualification will be considered (e.g. Bachelors, Masters or Doctoral degree). To apply for this visa, the applicant must have met the two-year Australian study requirement in the past six months. The visa duration may be up to four years.

The subclass 476 Skilled-recognised Graduate Visa may provide a further temporary visa option to certain engineering graduates (for more information see the DHA website).

Temporary Skilled and Work Visas

Key temporary work visas include:

- Temporary Skill Shortage Visa (subclass 482)

- Skilled Regional (provisional) Visa (subclass 489)
- Skilled Work Regional (provisional) Visa (subclass 491)
- Training Visa (subclass 407)
- Temporary Activity Visa (subclass 408)
- Temporary Work (short-stay activity) Visa (subclass 400)
- Working Holiday Visa (subclass 417)
- Work and Holiday Visa (subclass 462).
- Temporary Work (international relations) Visa (subclass 403)

Temporary Skill Shortage Visa

This visa has three streams:

- Short-term Stream
- Medium-term Stream
- Labour Agreement.

Australian or overseas businesses that are unable to meet their skill needs from the Australian labour market can sponsor skilled overseas workers under the standard business sponsorship arrangement, which is the most common route to sponsor overseas workers.

There are three stages to the Temporary Skill Shortage (TSS) Visa application:

- sponsorship—the employer applies to be approved as a standard business sponsor
- nomination—the employer nominates an occupation for a prospective or existing temporary work visa holder
- visa application—the worker nominated to work in the occupation applies for the visa.

Applicants have to prove that they are being sponsored by an approved Australian or overseas business in connection with a business activity in Australia, the occupation must be the subject of an approved nomination and the occupation must be listed on the Short-term Skilled Occupation List, the Medium and Long-term Strategic Skills List, the Regional Occupation List or be the subject of a Labour Agreement. The applicants will have to be paid market rates for their occupation, and this cannot be less than the Temporary Skilled Migration Income Threshold.

The applicant must prove that they:

- and their occupation are the subject of an approved nomination
- have a genuine intention to perform the occupation and that the position associated with the occupation is genuine
- have the necessary skills and experience to perform the occupation

- meet the English language proficiency (unless exempt)
- have the relevant licence and registration if required.

If there are special market circumstances not covered by standard business sponsorship arrangements, an employer can enter into a Labour Agreement with the Australian Government, which allows for the recruitment of overseas workers.

Short-term Stream

This is for employers who wish to source temporary overseas skilled workers in occupations included on the Short-term Skilled Occupation List for a maximum of two years (or up to four years if an international trade obligation applies).

Medium-term Stream

This is for employers who wish to source highly skilled overseas workers to fill medium-term critical skills in occupations included on the Medium and Long-term Strategic Skills List for up to four years, with eligibility to apply for permanent residence after three years.

Labour Agreement

This is for employers who have entered into a Labour Agreement with DHA to sponsor overseas skilled workers in exceptional cases where standard visa programs are not available, and there is a demonstrated need that cannot be met in the Australian labour market.

Skilled Regional (provisional) Visa

This temporary, points-based visa is for skilled workers who are nominated by a state or territory, or sponsored by an eligible relative living in a designated area in Australia. The visa is valid for four years, and a visa holder must live and work in a specified area. Certain family members can be included in the application. An applicant for this visa must nominate an occupation that matches their skills and qualifications, and is listed on the Skilled Regional Occupation List. The applicant must be invited to apply for the visa after registering an expression of interest with DHA. This visa also allows holders of visa subclasses 495, 496, 475 and 487 to stay in Australia for an additional period. These visas are granted initially for four years and can be extended for another four years.

Skilled Work Regional (provisional) Visa

This visa (subclass 491) is similar to the Skilled Regional (provisional) Visa (subclass 489), but it is an initial five-year visa, not four, and can only be applied for if the DHA invites the person.

Training Visa

The Training Visa (subclass 407) is for people who want to come to Australia to participate in a professional development program or undertake occupational training to enhance their skills in their current occupation, area of tertiary study or field of expertise. This visa covers

three types of occupational training: workplace-based training required for registration; structured workplace-based training to enhance skills in an eligible occupation; and training that promotes capacity building overseas, including overseas qualification, government support and professional development. For workplace-based occupational training (not including professional development), the training program should be a minimum of 30 hours per week and no more than 30% of this training can be classroom-based. The visa is valid for the period of the training or up to two years. Visa applicants must be 18 years or older at the time of DHA making a decision. An applicant can apply for this visa onshore and offshore. However, to make an onshore application, the applicant must not hold a Temporary Work Visa (subclass 401), a Transit Visa (subclass 771) or Special Purpose Visa. The applicant must have an intention to stay in Australia temporarily and must demonstrate a functional level of English.

Temporary Activity Visa

This Temporary Activity Visa (subclass 408) is for people who want to come to Australia on a temporary basis to:

- work in the entertainment industry in film, television or live productions in either a performance or behind-the-scenes role such as directing, producing and other production roles
- participate in specific cultural or social activities at the invitation of an Australian organisation for example, conferences, sporting, religious and other community events
- participate in or observe an Australian research project after being invited to do so, or undertake a research activity at an Australian tertiary or research institution related to the person's field of study
- work in a skilled position under a reciprocal staff exchange arrangement to give participants an opportunity to experience another culture, enhance international relations and broaden participants' experience and knowledge
- participate in high-level sports competitions or sports training programs, including by playing, coaching, instructing or adjudicating under contract to an Australian sporting club or organisation
- participate in a special program approved by DHA that provides opportunities for youth exchange, cultural enrichment or community benefits
- do full-time religious work, serving the religious objectives of a religious institution in Australia
- be employed as a superyacht crew member on board a superyacht in Australia
- do full-time domestic work in the household of certain senior foreign executives
- participate in a government-endorsed major event.

This visa requires sponsorship if the applicant plans to stay in Australia for more than three months, or if the application is made in Australia. There is no nomination required. The visa lasts up to two years, except if the applicant is invited by an organisation to participate in a specific event (three months) or if the applicant is participating in Australian government activities (four months).

Following the COVID-19 outbreak, the Temporary Activity Visa was changed to allow temporary visa holders whose visas are about to expire within 28 days, or expired less than 28 days ago, to remain in Australia if they have no other visa options and are unable to depart due to COVID-19 travel restrictions. Visa holders are also allowed to remain in Australia if they have evidence from an employer that they assist in critical sectors including healthcare, disability and aged care, childcare and agriculture that cannot be filled by an Australian citizen or permanent resident during the COVID-19 pandemic.

This visa cannot be lodged if the applicant had a visa refused or cancelled since last entering into Australia. The applicant is required to show they have funds and adequate health insurance to support them and any dependent family members.

Temporary Work (short-stay activity) Visa

This Temporary Work (short-stay activity) Visa (subclass 400) is for people who want to come to Australia on a temporary basis for up to three months (or six months in limited circumstances) for short-term, highly specialised, non-ongoing work or to participate in an event or events on a non-ongoing basis at the invitation of an Australian organisation.

Working Holiday Visa

The aim of the Working Holiday Visa (subclass 417) is to promote international understanding by providing opportunities for young people to gain experience in other countries. The scheme makes it possible for young people, who are resourceful, self-reliant and adaptable and who wish to holiday and travel in Australia, to work to supplement their funds. To be eligible for entry or stay in Australia as a working holiday maker, a person must

- be over 18 years and have not yet turned 31, except for Canadian and Irish citizens who can be up to 35 years old (inclusive)
- be a national of one of the countries with which Australia has a working holiday maker arrangement
- not be accompanied by dependent children during their stay.

In all cases, applicants must:

- lodge an application for a Working Holiday Visa (and pay the prescribed fee)
- satisfy the decision maker that:
    - they have sufficient funds for a return fare and to support themselves in Australia for the initial part of the proposed holiday period

- they will not be accompanied by dependent children at any time during their stay
- the prime intention is to holiday in Australia and that any work performed will be incidental to that purpose and will not exceed six months with the same employer
- they will have reasonable prospects of obtaining temporary employment to supplement holiday funds
- they will depart Australia at the end of the temporary stay.

Working Holiday Visa holders may apply for a second 12-month Working Holiday Visa if they have not previously held more than one Working Holiday Visa and can show that they have worked at least three months in particular approved industries (e.g. plant and animal cultivation; fishing and pearling; tree farming and felling; mining; construction) in a regional area.

Work and Holiday Visa

The Work and Holiday Visa (subclass 462) is for tertiary educated people aged 18 to 30 who are interested in a working holiday of up to 12 months in Australia, but who do not come from one of the countries with whom Australia has a working holiday arrangement. The visa allows applicants to supplement the cost of their holiday through periods of temporary or casual employment.

Temporary Work (international relations) Visa

The Temporary Work (international relations) Visa (subclass 403) has six streams. Two of these streams focus on bringing workers to selected industries where Australian employers cannot source local labour.

The Seasonal Worker Program allows a visa for up to nine months for citizens of and residents in Timor-Leste, Fiji, Kiribati, Nauru, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu or Vanuatu who are invited by an Australian Temporary Activities sponsor.

The Pacific Labour Scheme Stream allows a visa to work in rural and regional Australia for no more than three years invited by a Temporary Activities sponsor. It currently applies to Fiji, Kiribati, Nauru, Papua New Guinea, Samoa, Solomon Islands, Timor-Leste, Tonga, Tuvalu and Vanuatu, and may be expanded to more Pacific Island Countries.

Temporary family visas

Temporary family visas include:

- Sponsored Parent (temporary) Visa (subclass 870), which allow a parent of an Australian Citizen, Australian permanent resident or eligible New Zealand citizen to visit Australia for up to three to five years
- New Zealand Family Relationship Visa (subclass 461), which is a five-year temporary visa for a person who is not a New Zealand citizen but a member of a

family unit of a New Zealand citizen and allows a stay and work in Australia for five years

- Dependent Child Temporary Visa (subclass 445), which is for a dependent child of the Partner Visa applicant until the DHA decides the Permanent Partner Visa application of the parent of the child. Sometimes the child is not included in the parent's Partner Visa application and later, if the parents want to bring the child to Australia, the child can be sponsored for a subclass 445 temporary visa.

Temporary business visa

There are a range of temporary and permanent business visas including business visitor visas, investor and innovation visas. These are discussed under the visitor and permanent visa sections.

Permanent Visas

The Migration Regulations provide many types of permanent entry visas, which can be divided into four major groups:

- family migration visas
- skilled migration visas
- employer-sponsored and business visas
- humanitarian and refugee visas (separate section).

Visitors and temporary residents wishing to change status to another temporary or permanent visa must meet the criteria of that visa set out in sch 2 of the Migration Regulations as well as other applicable criteria. All people who migrate permanently to Australia must, before their entry is approved, pass a full medical examination, and a police and security check. In some circumstances, these requirements may be waived.

Permanent residence is difficult to apply for once a person's temporary visa has expired. Applicants who are in this position (i.e. unlawful non-citizens) should get legal advice about their situation.

Family migration visas

Only certain family members resident overseas can be sponsored to enter Australia by relatives who have permanent residence or citizenship in Australia. Relatives are divided into distinct visa categories, and different tests apply to each category.

Requirement of sponsors of family migration visa

A sponsor must be either an Australian citizen, permanent resident or eligible New Zealand citizen and must usually be aged 18 years or over. In some cases, the sponsor must also have been resident in Australia for a reasonable period. Current DHA policy states that, generally, two years of residence is required in these circumstances. The sponsor must ensure that their relative will have accommodation and sufficient money to look after

themselves for two years after arrival (regs 1.20(2)(a), 1.20(2)(c) Migration Regulations). A form must be signed by the sponsor committing to these obligations including the provision of information and advice to help the migrating relative to settle in Australia.

Assurance of support

For some family migration visas, an assurance of support is mandatory (e.g. aged dependent relative, contributory parent, parent, aged parent, remaining relative). For others it is discretionary (e.g. orphan relative and child, adopted or orphaned relative under 18 at the time of application). An assurance of support is no longer required for a Partner Visa.

An assurance of support means that a person will pay the Commonwealth the amount of any social security payments paid to a visa holder during a specified period (ss 1061ZZGA, 1061ZZGG *Social Security Act 1991* (Cth) (Social Security Act)). The assurance of support is valid for up to 10 years (more often up to four years) from the date of grant of the visa or, if the applicant is outside Australia, from the date that the visa applicant arrives in Australia (s 1061ZZGF Social Security Act). A refundable bond may be required to be paid.

The sponsor does not necessarily have to be the person who supplies the assurance of support for a relative. The assurer must just be someone with sufficient assets or income to be acceptable to the Department of Human Services. However, given the large sums of money involved in sponsoring relatives, it will be fairly rare that a friend of the family will want to sign such a document and pay the money involved up front. Accordingly, assurers need to consider their obligations carefully, as even the refundable bond may not be the limit of liability if a greater amount is paid by the Department of Human Services to the migrating relative during the assurance of support period (one, two, four or ten years depending on the type of visa).

The main permanent visa categories of family migration are:

- Partner Visa (includes de facto and same-sex spouses) (subclasses 300, 309, 100, 801 and 820)
- Child Visa (subclasses 101 and 802) including Orphan Relative Visa (subclasses 117 and 837) and Adoption Visa (subclass 102) (not discussed in detail here)
- other family visas including for aged dependent relatives, remaining relatives and carers (subclasses 114, 115, 116, 835, 836 and 838)
- Parent Visa (subclasses 103, 143, 804 and 864).

Partner Visa

An applicant for a Partner Visa (subclasses 801 and 820 in Australia, subclasses 309 and 100 outside Australia) must be the spouse or de facto partner of the sponsor. Spouses (including same-sex partners) must be married, in a genuine and continuing relationship, live together (or not live permanently separate and apart) and have a mutual commitment to a shared life as a married couple to the exclusion of all others. De facto partners (including same-sex partners) must be in a genuine and continuing relationship, live together (or not

live permanently separate and apart) and have a mutual commitment to a shared life to the exclusion of all others.

A Prospective Marriage Visa (subclass 300) allows for temporary entry of fiancées, who must marry within nine months of arrival in Australia, and then apply for an onshore partner visa (subclasses 820, 801). Partners are initially granted temporary residence (subclasses 801 or 309), which they must maintain for two years before a Permanent Spouse Visa will be granted, unless they have a long-term partner relationship or, for an offshore partner visa, are sponsored by the holder of a Permanent Humanitarian Visa. The relationship must be genuine and continuing until the date of decision whether to grant the permanent visa, unless:

- the Australian partner has died and the widow or widower would have continued with the relationship if the partner had not died
- the relationship has ceased during the two-year period, but the applicant has custody or joint custody of at least one child, in respect of whom a court has granted joint custody or access, or a residence order or contact order to the Australian party, or the Australian party is subject to a formal maintenance obligation under the *Family Law Act 1975* (Cth)
- the relationship has ceased during the minimum two-year period of temporary residence and there was family violence by the Australian partner during that relationship (the family violence provisions).

In order to satisfy the family violence provision, the delegate must be satisfied that:

- both the applicant and sponsor had a genuine commitment to a long-term relationship and
- family violence (as defined in reg 1.21 Migration Regulations) occurred in the course of the relationship. Family violence can be demonstrated through either judicial evidence (most commonly a final Domestic Violence Protection Order from a Magistrates Court) or non-judicial evidence (reg 1.23 Migration Regulations). A Ministerial Instrument mandates the types of non-judicial evidence required from an applicant to demonstrate family violence (reg 1.24 Migration Regulations; IMMI 12/116, 22 November 2012). If the non-judicial evidence does not satisfy the delegate that relevant family violence has occurred, the delegate must seek the opinion of an independent expert and are then bound by that expert's opinion.

Child Visa

There are a number of onshore and offshore visa options that relate to the children of Australian citizens and permanent residents. These are set out in class BT (onshore) and AH (offshore). An applicant for a visa in this class must:

- be a dependent biological child or stepchild of an Australian citizen or permanent resident (certain adopted children also qualify) (subclasses 101 and 802)

- have been adopted overseas by an Australian citizen or permanent resident who had been residing overseas for more than 12 months at the time of the visa application (subclass 102 for further requirements)
- be an orphan relative (i.e. an orphan under 18 years who does not have a spouse or de facto partner and is a relative of an Australian citizen or resident). Relative has a specific definition which includes the siblings, nieces and nephews of the Australian citizen or relative (reg 1.03 Migration Regulations). An applicant can still be an orphan even if both parents are alive but their whereabouts are unknown, or they are permanently incapacitated and thereby unable to care for the child (subclasses 117 and 837, reg 1.14 Migration Regulations).

Applicants for a Dependent Child Visa or Orphan Relative Visa must not have a spouse or de facto partner (regs 1.03–1.14 Migration Regulations). A dependent child must also not be engaged to be married (reg 1.03 Migration Regulations).

In some circumstances, the applicant must be under 18 years of age at the time of the application. This is the case for all applications for an Orphan Relative Visa, for applications by stepchildren applying for a Child Visa and for all adopted children applying for an Adoption Visa.

An applicant for a Dependent Child Visa who is 18 years or older must be dependent or be incapacitated for work because of a physical or mental impairment (reg 1.03 Migration Regulations). 'Dependent' is defined in reg 1.05A (Migration Regulation) to mean someone who is '… wholly or substantially dependent on another person for financial support, for food, clothing and shelter' (except for certain refugee visas which allow for psychological and physical dependence).

Further criteria apply and are set out in the relevant subclasses.

Other family visas

To receive a visa in the Other Family Visa class, an applicant must be the relative of a settled Australian citizen or permanent resident who has nominated the applicant and who is usually resident in Australia. The applicant must also be one of the following:

- an aged dependent relative (subclasses 114 and 838). An aged dependent relative must not have a spouse or de facto partner, must be currently dependent on the sponsor and must have been dependent on the sponsor for a reasonable period. The relative must also be old enough to be granted an age pension under the Social Security Act (reg 1.03 Migration Regulations)
- a remaining relative (subclasses 115 and 835). A remaining relative and their spouse must have no parents, siblings or non-dependent children who are not usually resident in Australia as a permanent resident or citizen. The sponsor must be the parent or sibling (including stepsibling) of the applicant (reg 1.15 Migration Regulations)

- a carer (subclasses 116 and 836). A carer must be a person willing and able to give substantial continuing assistance to an Australian relative who has a medical condition that impairs their ability to attend to the practical aspects of daily life. The Australian relative's impairment must be rated in an examination by a Commonwealth medical officer to be at least 30 as shown under the Social Security Impairment Ratings Tables (reg 1.15AA(1)(c) Migration Regulations). The need for assistance must be likely to continue for at least two years. Also, it must be proved that no other relative or health, community or welfare service in Australia is reasonably able to provide the Australian relative with the necessary assistance (reg 1.15AA Migration Regulations).

There are currently substantial waiting periods before visas of the above subclasses may be granted. The DHA website should be consulted for up-to-date information.

Parent Visa

Applications for a parent of an Australian permanent resident or citizen to migrate to Australia will involve significant costs and/or substantial waiting times. Sponsors and applicants should seek immigration advice to identify whether this is a realistic option for their family.

Visas available for parents include subclasses 103 Parent Visa, 143 Contributory Parent Visa and 173 Contributory Parent (temporary) visa. Parents must be sponsored by their child, or by an eligible relative or community organisation if the child is under 18. Parents must also pass the 'balance of family test' (at least half of their children live permanently in Australia, or more of their children live permanently in Australia than in any one other country). Holders or former holders of an Investor Retirement Visa (subclass 405) or a Retirement Visa (subclass 410) do not have to meet the balance of family test. The applicant must not have held another substantive visa other than a subclass 405 or 410 in the intervening period.

The Sponsored Parent (temporary) Visa (subclass 870) is a three to five-year visa, allowing an Australian citizen, Australian permanent resident or eligible New Zealand citizen to sponsor a biological or adoptive parent or a stepparent who is still in a married/de facto relationship with a biological parent of the sponsor. The sponsor must meet a minimum household income threshold and pay any outstanding public health debts incurred by their parent in Australia.

Skilled migration visas

Permanent visa options are also available on the basis of an applicant's skills.

Key skilled permanent visas include:

- Skilled Independent Visa (permanent) (subclass 189)
- Skilled Nominated Visa (permanent) (subclass 190).

Applicants for unsponsored skilled migration cannot apply for an appropriate skilled migrant visa unless they have made an online offer to the DHA.

The online offer is not a visa application, it is an indication that an applicant would like to be considered for a skilled visa. To submit an online offer, an applicant needs to include a range of information such as basic personal information, the nominated occupation, work experience, study and education, level of English, details of a skills assessment related to the nominated occupation, and business and investment experience.

Only those occupations on the Skilled Occupation List will be considered. Whether a SkillSelect offer will be made will depend upon how many applicants for each skilled occupation have already been selected in the migrant program year. If the allocated number in a particular occupation has been reached, no offer will be made.

An applicant is required to complete an online offer and receive an invitation before an application can be made.

Skilled Independent Visa (permanent)

This points-based visa is for skilled workers who are not sponsored by an employer, a state or territory, or a family member. A visa holder can live and work permanently anywhere in Australia. Certain family members can be included in the application. To be able to lodge a valid application for this visa, an applicant must first submit an expression of interest through SkillSelect. An applicant can do this onshore or offshore.

An applicant must meet the following basic requirements:

- be invited to apply
- be younger than 45 years of age at the time invited to apply
- nominate an occupation that matches their skills and qualifications and is on the Skilled Occupation List (sch 1 reg 1137 Migration Regulations)
- have their skills assessed by the relevant assessing authority as suitable for their nominated occupation
- have at least competent English
- score sufficient points on the points test (sch 6D Migration Regulations)
- meet health and character requirements.

Skilled Nominated Visa (permanent)

This points-based visa is for skilled workers who are nominated by a state or territory. The visa holder must stay in the state or territory that nominated them for at least two years. After this, a visa holder can live and work permanently anywhere in Australia. Certain family members can be included in the application. An applicant for this visa must nominate an occupation that matches their skills and qualifications and is on the Skilled Occupation List, and must be invited to apply for the visa after making an expression of interest through SkillSelect.

Employer-sponsored and business visas

- Employer Nomination Scheme Visa (subclass 186)
- Regional Sponsored Migration Scheme Visa (subclass 187)
- Business Innovation and Investment Visa (provisional) (subclass 188) and (permanent) (subclass 888)
- Distinguished Talent Visa (subclass 858).

Employer Nomination Scheme Visa

This visa is for skilled workers from outside Australia or skilled temporary residents who live and work in Australia whose employer wishes to sponsor them for permanent residence. It has three streams:

- Temporary Residence Transition Stream for some subclass 482 and subclass 457 visa holders, who have usually worked full time for their employer in the same position for which they were nominated for three out of the previous four years (subclass 482), or two out of the three previous years (subclass 457) before the nomination is made
- Direct Entry Stream for people who have never, or only briefly, worked in the Australian labour market
- Labour Agreement Stream for people sponsored by an employer through a labour or regional migration agreement.

Regional Sponsored Migration Scheme Visa

This visa is for skilled workers from outside Australia or skilled temporary residents who live and work in regional Australia whose employer wishes to sponsor them for permanent residence. At the time of application, the nominated worker must be under 45, have appropriate English language skills and meet health and character requirements. The visa has two streams:

- Temporary Residence Transition Stream for holders of subclass 482, 457 or associated bridging visas, who have worked full time for their employer in the same position for which they were nominated for three out of the previous four years (subclass 482), or two out of the three previous years (subclass 457) before the nomination is made
- Direct Entry Stream for people who have never, or only briefly, worked in the Australian labour market.

Business Innovation and Investment Visa: provisional and permanent

An applicant for this provisional visa (subclass 188) must be invited to apply after having made an expression of interest and being nominated by an eligible government organisation. The visa has seven streams:

- The Business Innovation Stream is for people with business skills who want to establish, develop and manage a new or existing business in Australia. Applicants must be nominated by the government of an Australian state or territory.
- The Investor Stream is for people who want to make a designated investment (at least AUD 1.5 million) in an Australian state or territory, and want to maintain business and investment activity in Australia after the original investment has matured. They must be nominated by a state or territory government.
- The Significant Investor Stream requires, among other things, an investment of at least AUD 5 million into complying significant investment and maintenance of business and investment activity in Australia. Applicants must be nominated by a state or territory government or Austrade.
- The Premium Investor Stream is for people who are willing to invest at least AUD 15 million into complying premium investments in Australia, and want to maintain business and investment activity in Australia. Applicants must be nominated by Austrade on behalf of the Australian government.
- The Entrepreneur Stream is for people who have a funding agreement from a third party for at least AUD 200 000 to undertake a complying entrepreneur activity that is proposed to lead to either the commercialisation of a product or service in Australia or the development of a business in Australia. Applicants must be nominated by the government of an Australian state or territory.

The permanent visa (subclass 888) can be applied for once an applicant has met specific requirements relating to the purpose of the grant of their temporary visa.

Distinguished Talent Visa

The Global Talent Independent Program is designed to attract the best talent from around the world in targeted sectors. Under this program the Distinguished Talent Visa (subclass 124, offshore and 858, onshore) are available to an applicant who has an internationally recognised record of exceptional and outstanding achievement in one of the following areas:

- a profession, academia and research, mainly in targeted advanced technology and manufacturing sectors
- a sport or the arts

and

- is still prominent in the area
- can demonstrate superior ability to others in their field
- has a record of sustained achievement that is unlikely to diminish in the future
- would be an asset to the Australian community as a whole
- has employment or can establish a viable business in Australia

- produces a nomination testifying to their achievement and standing in the area

and is nominated by an eligible person or organisation with a national reputation in their field who is either:

- an Australian citizen
- an Australian permanent resident
- an eligible New Zealand citizen
- an Australian organisation and has a national reputation in relation to the area.

The Points Test Applicable to Certain Visas

A points test exists for skilled sponsored migrants and independent migrants, and is set out in full in sch 6D of the Migration Regulations.

The points test is a mechanism used to help select skilled migrants who offer the most in terms of economic benefit to Australia. As part of the SkillSelect process, potential visa applicants will be tested in evidence and given a nominal score as part of the selection process. The points test focuses on:

- English level
- extensive skilled employment
- high-level qualifications obtained in Australia and overseas
- targeted age ranges.

Points are not awarded for specific occupations, although all applicants must still nominate an occupation on the Consolidated Sponsored Occupation List and have their skills assessed in their nominated occupation.

The pass mark for points-tested skilled migration visas invited through SkillSelect is 65 points from 1 July 2018. The points test applies to applicants for the following visas:

- Skilled Regional Visa (provisional) (subclass 489)
- Skilled Independent Visa (permanent) (subclass 189)
- Skilled Nominated Visa (permanent) (subclass 190).

To apply for one of the above visas, applicants need to satisfy the following threshold requirements:

- lodge an expression of interest on the SkillSelect online portal and receive an invitation to apply
- be under 50 years of age at the time of applying for a visa
- meet the threshold English language requirement of competent English

- nominate and hold a skilled assessment for an occupation listed on the Skilled Occupation List at the time of lodging their expression of interest.

For the purpose of awarding points, the DHA considers skilled employment in the nominated occupation or a closely related occupation.

Generally, applicants will be able to request an opinion about their skilled employment claims from the relevant assessing authority when seeking their skills assessment. Applicants should contact the relevant assessing authority for further information about this process.

Refugee and Humanitarian Visas

The DHA administers an onshore and offshore refugee and humanitarian program.

The refugee and humanitarian program is a highly political area of immigration law. Law and policy changes are frequent, and applicants, migration agents and legal representatives should ensure that they have access to up-to-date sources of law.

Fast-track assessment process

People who arrived by boat without a visa between 13 August 2012 and 1 January 2014 and who were not taken to Nauru or Papua New Guinea for offshore processing are described as 'fast-track applicants'. Unlike asylum seekers who arrive with a valid visa and who have access to the ordinary refugee status determination processes, fast-track applicants have access to a limited form of review by the Immigration Assessment Authority (IAA).

A referral to the IAA for a review will be automatic; however, the authority will only consider information that was available to the original decision maker. New information will only be allowed in exceptional circumstances.

Onshore protection visas

There are three types of protection visas that can be granted onshore to people who are recognised as refugees in Australia:

- Permanent Protection Visa (subclass 866)
- Temporary Protection Visa (subclass 785)
- Safe Haven Enterprise Visa (subclass 790).

'Unauthorised maritime arrivals' (asylum seekers who arrive by boat) may be removed from Australia to a country designated by the Minister for Home Affairs as a regional processing country. Government policy is that asylum seekers who arrive in Australia by boat will never be settled in Australia. In recent years, some of these asylum seekers were sent to Papua New Guinea and Nauru on the basis of regional settlement arrangements. Many others have had their claims for protection processed in Australia.

Permanent Protection Visa

A person who arrives in Australia as a valid visa holder may be able to make an application for a Permanent Protection Visa (class XA, subclass 866).

The core criterion for the grant of this visa is that the minister is satisfied that the applicant is a person to whom Australia has protection obligations (s 36(2) Migration Act). Those protection obligations are now codified in the Migration Act, and arise from the United Nations Convention Relating to the Status of Refugees as amended by the 1967 Protocol Relating to the Status of Refugees, as well as from other international instruments as reflected in complementary protection provisions.

Article 1A(2) of the United Nations Convention Relating to the Status of Refugees states a refugee is a person who

> … owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality, and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

Section 5H of the Migration Act defines a refugee as a person who

- in a case where the person has a nationality—is outside the country of their nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail themselves of the protection of that country
- in a case where the person does not have a nationality—is outside the country of their former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.

Section 36(2)(a) of the Migration Act states that criteria for a protection visa are that the applicant satisfies the minister that Australia has protection obligations because they are a refugee, or that there are substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm (s 36(2)(aa) Migration Act).

The applicant must also meet criteria that relate to the inability or unwillingness of the authorities in the country to which they fear returning, to protect them from the relevant harm, as well as criteria that consider whether the applicant could safely relocate within that country and whether it would be reasonable to expect them to do so (s 36(2B) Migration Act).

Section 36(2C) of the Migration Act sets out grounds upon which an applicant can be excluded from protection:

- The applicant committed a crime against peace, a war crime or a crime against humanity, as defined by international instruments prescribed by the Migration Regulations.
- The applicant committed a serious non-political crime before entering Australia.
- The applicant has been guilty of acts contrary to the purposes and principles of the UN.

Complementary protection can also be denied if the minister considers that the applicant:

- is a danger to Australia's security
- has been convicted by a final judgment of a particularly serious crime
- is a danger to the Australian community.

In short, to be recognised as a refugee under Australian law, a person must demonstrate that there is a well-founded fear (s 5J Migration Act) that they will be seriously harmed (s 5J(5) Migration Act) in their country of origin because of their:

- race
- religion
- nationality
- political opinion
- membership of a particular social group or a combination of the above grounds.

In order to be recognised as a person owed complementary protection by Australia, a person must prove that as a necessary and foreseeable consequence of their removal to their country of origin, they would face a real risk of one or more of the following forms of significant harm:

- arbitrary deprivation of life
- the death penalty
- torture
- cruel or inhuman treatment or punishment
- degrading treatment or punishment.

In addition to demonstrating that they meet one or more of the grounds for protection, they must also pass the relevant identity, health and character checks.

A person will be barred from applying for permanent protection if they:

- entered Australia without a valid visa and/or were not immigration cleared (i.e. an offshore entry person, an unauthorised maritime arrival or unauthorised air arrival)
- have previously been refused a protection visa since their last arrival to Australia

- have had a protection visa cancelled since their last arrival to Australia
- are a national of two or more countries
- have protection in a prescribed safe third country
- have ever held a Temporary Safe Haven Visa.

A good guide to refugee law can be found on the AAT website.

Currently, merits review to the Migration and Refugee Division of the AAT is available to unsuccessful applicants for a subclass 866 protection visa. Judicial review is available to all protection applicants through application to the Federal Circuit Court or High Court.

Temporary Protection Visa

A Temporary Protection Visa (subclass 785) can be granted to a person who arrived unauthorised by sea for up to three years if claims for protection are established. Holders are entitled to Medicare, work rights and some study rights. There is no right to family reunification, and after three years they will have to establish claims for protection to qualify for a further Temporary Protection Visa. The same legal principles for establishing a claim for protection applicable to a Permanent Protection Visa apply to Temporary Protection Visa applicants.

Safe Haven Enterprise Visa

As with the Temporary Protection Visa applications, a Safe Haven Enterprise Visa (subclass 790) can be granted to people who arrived unauthorised by sea for up to five years if claims for protection are established, and who express an intention to work or study in a regional area of Australia while accessing minimal social security benefits.

Safe Haven Enterprise Visa holders are entitled to Medicare, work and some study. There is no right to family reunification, and after five years they will have to again establish claims for protection. Depending on satisfaction of visa criteria, they will be eligible for a further Safe Haven Enterprise or Temporary Protection Visa.

If an applicant has held a Safe Haven Enterprise Visa and for at least three and a half years and have:

- lived in certain regional areas of Australia
- have not accessed certain Centrelink payments and
- have worked or studied full time at certain education institutions,

they may also be eligible to apply for certain substantive visas, including specific permanent visas listed in Migration Regulations (reg 2.06AAB).

Other onshore protection

Territorial asylum (subclass 800) is also commonly referred to as ‘political asylum’ and is granted by instrument by the Minister for Foreign Affairs. There is no application form. It is a visa option that may be relevant for diplomats, or consular or foreign government employees

who are in Australia. Territorial asylum is different from refugee status and is rarely granted. Most requests for territorial asylum have been processed as requests for protection.

From time to time, the government also utilises temporary humanitarian visas such as the Humanitarian Stay (temporary) Visa (subclass 449). This visa requires an initial invitation from an Australian Government official and that the applicant be in grave fear for their personal safety because of displacement or the likelihood of displacement. The Temporary (Humanitarian Concern) Visa (subclass 786) is only available to holders of a subclass 449 visa. Holders of these visas are barred from applying for permanent protection.

The subclass 852 Witness Protection (Trafficking) (permanent) Visa allows a person to stay in Australia after giving evidence against a trafficker. If the Attorney-General certifies that the person has made a contribution to the prosecution of a trafficker, and the minister is satisfied that the person's life would be in danger upon return to their home country, this visa can be granted in the same way that a protection visa is granted to a refugee.

Offshore protection visas

Australia has one class of visas in the offshore humanitarian program, the Refugee and Humanitarian visa (class XB). The class XB visa covers two groups of people:

- refugees—people who are subject to persecution and have been identified in conjunction with the United Nations High Commissioner for Refugees as in need of resettlement
- people involved in the special humanitarian program—for those who have experienced or fear substantial discrimination amounting to a gross violation of their human rights and who have strong support from an Australian citizen or resident, or a community group in Australia (proposer).

Holders of all permanent refugee and humanitarian visas granted offshore in the previous five years can propose immediate family members in the same subclass without having to establish that the applicant faces persecution or discrimination.

Holders of permanent onshore protection visas may or may not be able to propose immediate family through this avenue, depending on the applicant's age when they arrived in Australia and whether or not they arrived in Australia by sea. There are no review rights for offshore refugee and special humanitarian applications.

The following refugee and humanitarian visas issued offshore through the humanitarian program are permanent:

- Refugee Visa (subclass 200)
- In-country Special Humanitarian Visa (subclass 201)
- Global Special Humanitarian Visa (subclass 202)
- Emergency Rescue Visa (subclass 203)
- Woman at Risk Visa (subclass 204).

Refugee Visa

The Refugee Visa (subclass 200) is for people who are subject to persecution in their home country and are outside of their home country and in need of resettlement. The majority of applicants who are considered under this category are identified by the United Nations High Commissioner for Refugees and referred to the Australian Government for resettlement consideration.

In-country Special Humanitarian Visa

This visa (subclass 201) offers resettlement to people who have suffered persecution in their country of nationality or usual residence, and who have not been able to leave that country to seek refuge elsewhere. It is for those living in their home country and subject to persecution in their home country. This visa is not often granted.

Global Special Humanitarian Visa

The Global Special Humanitarian Visa (subclass 202) is for people who, while not being refugees, are subject to substantial discrimination and human rights abuses in their home country and are outside their home country. People who wish to be considered for this visa must be proposed for entry by an Australian citizen or permanent resident over the age of 18, an eligible New Zealand citizen or an organisation operating in Australia.

Emergency Rescue Visa

The Emergency Rescue Visa (subclass 203) offers an accelerated processing arrangement for people who satisfy refugee criteria and whose lives or freedom depend on urgent resettlement. It is for those subject to persecution in their home country and assessed to be in a situation such that delays due to normal processing could put their life or freedom in danger. It is a rarely used visa category.

Woman at Risk Visa

The Woman at Risk Visa (subclass 204) is for women outside Australia, living outside of their home country, without the protection of a male relative and in danger of victimisation, harassment or serious abuse because of their gender. The United Nations High Commissioner for Refugees would usually refer cases to the Australian Government for resettlement.

Visa Cancellation on Character Grounds

The power to cancel a visa on character grounds is found in s 501 of the Migration Act. Section 501 gives a decision maker the power to cancel a person's Australian visa (or to refuse to grant a visa) where that person does not pass the character test. The decision maker can be either the minister or a Department of Home Affairs officer.

Under s 501A of the Migration Act, the minister has the power to set aside a decision of a delegate or a tribunal not to refuse or cancel a visa. If the minister exercises the power, then the visa holder will be given prior notice. However, if the minister is satisfied it is in the public

interest to set aside the decision without notice, then the rules of natural justice and the code of procedure set out in pt 2 div 3 sub-div AB of the Migration Act do not apply.

A person does not pass the character test if they:

- have a substantial criminal record
- have escaped immigration detention or committed an offence while in immigration detention
- have an association with an individual, group or organisation that is suspected of being involved in criminal conduct
- are not of good character having regard to past, criminal and general conduct
- are at significant risk of engaging in future unacceptable conduct (s 501(6) Migration Act).

In deciding whether to cancel a non-citizen's visa, the primary considerations are protection of the Australian community from criminal or other serious conduct, best interests of minor children in Australia and expectations of the Australian community. The DHA also considers the:

- international non-refoulement obligations
- strength, nature and duration of ties
- impact on Australian business interests
- impact on victims
- extent of impediments if removed (s 499 Migration Act, Ministerial Direction No. 79).

People in prison who have been sentenced to 12 months or more at any time, or been convicted of a sexual offence involving a child, must have their visa cancelled. They then have 28 days to request the decision to cancel to be revoked. If DHA refuses the request then the person has nine days to apply to the AAT to review the decision.

Useful information on character cancellation is provided on the Refugee and Immigration Legal Service (RAILS) and Prisoners Legal Service websites.

Removal or Deportation of Unlawful Non-citizens

Unlawful non-citizens are subject to detention and removal from Australia under ss 189 and 198 of the Migration Act. All persons without Australian citizenship who have entered Australia or arrived in Australia, intending to enter either for a temporary or permanent stay, are non-citizens. Where a non-citizen does not hold a valid visa, that non-citizen is unlawful and therefore subject to detention and removal.

Non-citizens may become unlawful in a number of ways including by over-staying a temporary visa, by breaching a visa condition and having their visa cancelled (ss 109, 116, 128 Migration Act), or by virtue of consequential cancellation (i.e. they were a dependant of

a visa holder whose visa has been cancelled (s 140 Migration Act)). People who provide false or incomplete information in a visa application or on a passenger card, or provide a bogus document to the DHA or the AAT may also later have their visa cancelled when the irregularity is detected (ss 101–109 Migration Act). A visa can also be cancelled on the basis of character (s 501 Migration Act). There are a number of other provisions for cancellation in the Migration Act (see ss 109, 113, 116, 128, 133A, 134B, 137J, 140, 500A, 501A, 501B).

Bridging visa option for unlawful non-citizens of Australia

An unlawful non-citizen who has been detained may apply for a bridging visa which, if granted, has the effect of releasing them from detention (s 196(1)(c) Migration Act). A successful application for a bridging visa can also prevent a person from becoming an unlawful non-citizen and being detained on that basis.

Where an eligible non-citizen in immigration detention applies for a bridging visa (class WE and WF), and the minister does not make a decision within a prescribed time period to either grant or refuse it, the non-citizen is taken to have been granted a bridging visa at the end of that period and must be released from detention (s 75(1) Migration Act, reg 2.24 Migration Regulations). The prescribed time period is between two and ninety days depending on the circumstances.

A person refused a bridging visa may have a right to seek review of the decision to the AAT. The AAT must decide the application within seven working days, or longer by agreement with the applicant.

Bridging visas keep a non-citizen lawful until a substantive visa is granted. Bridging visas cannot be applied for in immigration clearance (i.e. at the airport or port of arrival).

Procedure before a person is deported or removed

There is a very big difference between the legal frameworks that apply to a removal and a deportation. Deportations are rarely effected. Most people are subject to removal and elect to leave voluntarily.

An officer must detain a person whom they know, or reasonably suspect, to be an unlawful non-citizen (s 189 Migration Act). There is no obligation to bring a person detained as an unlawful non-citizen before a court. Such a person must be kept in immigration detention (including community detention) until they are either removed from Australia under ss 189 and 198 of the Migration Act or granted a visa.

Once a person is detained under this section, an officer must ensure that the person is made aware of the fact that they may apply for a visa within two working days (ss 194, 195(1)(a) Migration Act). If the detainee informs an officer in writing within those two working days of their intention to apply, a further five working days are allowed (s 195(1)(b) Migration Act). A person applying for a visa outside these time limits is severely restricted in the type of visa they can apply for (s 195(2) Migration Act). In any event, if no visa is granted, the person must be removed from Australia.

Where a person is in immigration detention, they must be afforded all reasonable facilities for obtaining legal advice or taking legal proceedings (s 256 Migration Act).

A person who believes that they may be an unlawful non-citizen or otherwise subject to deportation should obtain legal advice.

Deportation or removal at the expiration of a prison sentence

Where a permanent resident is serving a term of imprisonment, the execution of a deportation order will usually be delayed until the deportee has served the applicable term of imprisonment. Should the date of deportation not coincide with the date of release, a person, on being released, may be held in immigration detention (s 253 Migration Act). If deportation is being considered and the period of immigration detention appears likely to be prolonged, a person may be released from immigration detention on conditions such as that they report regularly to the DHA and notify of any change of address (s 253(9) Migration Act).

The DHA policy states that consideration of cancellation of a visa on character grounds should be delayed until 12 to 18 months before the visa holder's earliest expected date of release from prison (s 501 Migration Act). Once a visa has been cancelled, the person becomes an unlawful non-citizen who is subject to immigration detention and removal.

Whenever anyone claims that they would be likely to suffer persecution or significant harm if deported to their homeland, these factors must be taken into account in any decision to cancel a visa or deport a permanent resident. A protection visa application may also be able to be lodged, to decide whether the person should be recognised as a refugee and whether they are entitled to Australia's protection under the Migration Act.

As stated above, the minister and DHA delegates have the power under s 501 of the Migration Act to cancel a person's permanent visa, and this power is routinely used in preference to effect removal as opposed to deportation at the expiry of prison sentences.

Removal or deportation costs

Where the Commonwealth makes arrangements for a person to be removed or deported to a place outside Australia, that person is generally required to pay to the Commonwealth an amount equal to the passage money, plus other potential charges (s 210 Migration Act). Departmental officers are also able to seize valuables of people being removed or deported and apply them towards the costs of removal or deportation (s 224 Migration Act).

Consequences of Deportation or Removal

Schedules 4 and 5 of the Migration Regulations set out the various periods for which people deported or removed from Australia are banned from returning. These periods range from permanent bans (e.g. for permanent residents convicted of crimes and either deported under s 200 of the Migration Act or removed after cancellation of their permanent residence on the basis of specific paragraphs of ss 501, 501A or 501B of the Migration Act) to 12 months (e.g. for a spouse removed on the basis of their spouse's conduct).

Non-permanent bans can be waived for the purpose of entry for one specific visa if the minister is satisfied that in the particular case there are compassionate or compelling circumstances justifying such a waiver (schs 4, 5 Migration Regulations). No exclusion periods will apply to those entering as refugee or humanitarian visa holders, or holders of a Carer Partner, Orphan Relative, Child or Adoption visa.

Review of Migration and Refugee Decisions

Merits and/or judicial review are generally available in relation to a migration decision. The AAT's Migration and Refugee Division (MRD) has power to engage in merits review of decisions. The AAT's General Division also has jurisdiction in some migration matters such as character cancellation, business visa cancellation, decisions not to revoke a mandatory cancellation, citizenship refusals and cancellations.

Where the AAT has jurisdiction, it will decide the application exercising the same powers and discretions as the minister's delegate. It will consider the legal validity of the order and also any policies that it considers appropriate. The AAT is not bound by the policies used by the minister, but it is bound by any directions made by the minister under s 499 of the Migration Act.

Migration review hearings

The migration hearings within the MRD must generally take oral evidence in public and prepare a written decision with reasons, but is not required to publicly publish its decisions unless a decision is of particular interest.

The MRD is obliged to provide a mechanism of review that is fair, just, economical, informal and quick (s 353 Migration Act). Hearings are conducted in person, by telephone and via video.

An application for review must be lodged at the MRD on the approved form and with a fee of $1764. Applications can be lodged online, by hand, post or fax. Part of this fee can be waived by the registrar or authorised tribunal officer of the MRD if an applicant can show severe financial hardship. If the MRD remits, sets aside or varies the DHA decision, an applicant is entitled to a refund of half of the MRD fee.

The time limits for lodging an application for review are set out in the Migration Act (s 412) and Migration Regulations (reg 4.31). People in immigration detention have seven working days from the date of notification of an unfavourable decision to lodge an application for review to the MRD. All others have 28 days.

Review of refugee cases are different to other migration cases. Hearings are closed to the public to protect the identity of applicants given the sensitivity of protection cases. No fee is payable up front, however, if the review applicant is unsuccessful, a retrospective $1764 application fee is payable and becomes a debt to the Commonwealth.

The review process for people who arrived by boat and applied for Temporary Protection or Safe Haven Enterprise visas is very different. They are subject to a 'fast-track' process

where a decision to refuse their visa is automatically referred to the Immigration Assessment Authority (IAA) for review. Fast-track applicants have limited review rights. Decisions are usually made 'on the papers'. The IAA does not have to hold a hearing nor consider any new information unless it considers it is exceptional circumstances. New information not known at the time of the DHA decision must be provided to the IAA within 21 days after the decision.

Time limits for lodging a review application

An application for review, together with the appropriate fee, must be received at the MRD before it can be regarded as lodged.

Note that an applicant is deemed to have received notice of a DHA decision (if notified by post) after seven working days, if the person is in Australia, or after 21 days after posting if the person is overseas. Receiving notices by hand, email or fax would normally mean notification is on that day. The time of receipt is crucial because there are time limits under the Migration Regulations for lodging applications for review. These time limits vary depending on the circumstances, and it is essential that relevant time limits be checked in each case. Generally, from the legally assumed date of receipt of the notification of a decision, a person able to lodge an application for review must do so within:

- 21 days for onshore visas
- 70 days for offshore visas.

However, shorter time limits may apply. Immigration detainees have a maximum of seven working days to lodge an application with the MRD, and the time limit is shorter in some circumstances (reg 4.10(2) Migration Regulations). For example, if a person is in immigration detention and is refused a bridging visa, the time limit for lodging a review application is two working days. Prisoners have nine days to seek review of an automatic cancellation of a visa on character grounds. Time limits shorter that 21 days can also apply to those not in immigration detention.

Currently, there is no discretion in the Migration Act or Migration Regulations for these time limits to be waived.

Reviewable decisions

The classes of visas in which there is a right of review are set out in ss 338 and 347 of the Migration Act and reg 4.02 of the Migration Regulations. The basic rule is that most onshore decisions refusing to grant or cancelling visas will be reviewable, but only the visa applicant/holder may apply for review.

A limited form of review is allowed of certain decisions to refuse protection visas to some unauthorised maritime arrivals through referral by the minister to the Immigration Assessment Authority (IAA). A person cannot apply for review directly to the IAA. The IAA does not hold hearings but reviews decisions 'on the papers'. The IAA will only consider new material in exceptional circumstances (pt 7AA Migration Act).

In regard to offshore decisions, any rights of review are confined to some persons in Australia, where that person (or organisation) was, for example, the nominator or sponsor of the person overseas (s 347 Migration Act).

This is a complex and time-critical area and practitioners should carefully check the relevant law.

Processing times for review decisions

Where a person is in immigration detention because of the refusal or cancellation of a bridging visa and lodges an application for review in relation to that refusal or cancellation, the MRD must make its decision within seven working days unless, with the applicant's agreement, this period is extended. In other matters, cases are prioritised for hearing according to published guidelines, and statistics that provide indications of likely MRD case finalisation are available on the AAT website.

Minister's power to substitute a more favourable decision following merits review

Even after the MRD has delivered its decision, the minister retains a power to substitute a more favourable decision if they believe it is in the public interest to do so. This power is non-delegable, non-compellable and non-reviewable. The minister must table a statement regarding each case in parliament. Seeking ministerial discretion is a complex process and it is difficult to succeed.

Review of deportation decisions

Where the minister signs a deportation order against a permanent resident convicted of a crime, the person has a right to appeal on the merits to the Administrative Appeals Tribunal (AAT) (s 500(1)(a) Migration Act).

The AAT is independent of the minister and the DHA, and is obliged to make a fresh decision.

The decision maker must supply a statement of reasons within 28 days of the application being lodged with the AAT. These documents are required to be lodged at the AAT and are usually made available to the person who has applied for review (ss 37, 39 *Administrative Appeals Tribunal Act 1975* (Cth)).

Review of cancellation decisions

If a delegate of the minister has cancelled or refused a permanent visa under s 501 of the Migration Act on character grounds, then very different rules apply.

If the cancellation decision is made personally by the minister, there is no right of appeal to any merits review body such as the AAT, and the person must be detained until removed or granted a visa. The only appeal is to the Federal Court for judicial review (see the *Complaints against Government – Judicial Review* chapter).

If the cancellation decision is made by a DHA delegate, an application for review may be available to the AAT. An onshore applicant has only nine days from the date of notification to seek review (s 500(6B) Migration Act). Any onshore application to the AAT must be accompanied by one of the sets of documents given to the applicant as notice of the decision to cancel the visa. The minister is then obliged to lodge with the AAT all the relevant documents (including non-disclosable information) within 14 days. A hearing cannot be held until at least 14 days after the minister is notified of the application to the AAT. The AAT itself has the power to direct the minister to provide missing documents.

During any hearing, the AAT must not take into account any information presented orally by or for an onshore applicant unless it was set out in a written statement given to the minister at least two working days prior to the hearing (s 500(6H) Migration Act), nor any document unless it was given to the minister at least two working days prior to the hearing (s 500(6J) Migration Act). The minister, however, can keep providing information to the AAT up to the hearing date (s 500(6J) Migration Act). Finally, the AAT must make a decision within 84 days of the day the onshore applicant was notified of the delegate's decision (s 500(6L) Migration Act) or the AAT is deemed to have affirmed the primary decision (i.e. the person is deemed to have lost their case).

The minister's power to overrule Administrative Appeals Tribunal decisions

The minister may overrule a decision of a DHA officer or the AAT not to cancel a visa on the basis of the character test, where the minister is satisfied that cancellation is in the national interest (s 501B Migration Act).

The Role of Federal Courts in Immigration Matters

The Migration Act attempts to impose severe restrictions on judicial review of decisions to the Federal Court, Federal Circuit Court or High Court. Section 474 states that most visa decisions of immigration officers or relevant division of the AAT are to be called privative clause decisions and are final and conclusive, and must not be challenged, appealed against, reviewed, quashed or called into question in any court.

However, the government has not been able to remove the right (s 75(v) *Commonwealth of Australia Constitution Act 1900* (Imp)) of aggrieved applicants to challenge decisions of Commonwealth officers. The High Court has stated that where there is 'jurisdictional error', no lawful decision has been made and the government cannot protect unlawful decisions. The High Court has said it will grant a suitable constitutional writ where a decision is unlawful.

The Federal Circuit Court has the same original jurisdiction in relation to migration decisions as the High Court. The Federal Court has only limited jurisdiction in relation to migration decisions, with its original jurisdiction in this area limited to the specific circumstances outlined in s 476A of the Migration Act.

Further, ss 477, 477A and 486A of the Migration Act provide that an application for review in relation to a migration decision must be made to the Federal Circuit Court, the Federal Court or the High Court respectively within 35 days of the actual (as opposed to deemed) notification of the decision. That time limit can be extended in the interests of the administration of justice.

The opinion of a barrister specialised in migration law is strongly recommended for any party seeking review of a decision of the AAT to one of the federal courts, as the law of judicial review is extremely complex.

Other avenues for redress

It may be appropriate to file a complaint with the Commonwealth Ombudsman or the Privacy, Race, Sex Discrimination or Human Rights commissioners, if a DHA official's conduct infringes any of the relevant legislation.

Freedom of Information – Access to Documents Held by the Department

According to the *Freedom of Information Act 1982* (Cth) (Freedom of Information Act), access to documents held by the DHA may be sought informally by request to the case officer concerned or formally through the freedom-of-information process.

A formal request must be in writing (Form 424A) to the Freedom of Information Unit of the DHA, stating that the request is made under the Freedom of Information Act. The DHA is required to take all reasonable steps to ensure that a decision is made upon the request as soon as possible, and no later than 30 days after it was received. No application fee or subsequent charges can be charged if the request relates to an applicant's personal information. If it is considered that personal information so obtained is inaccurate or otherwise may mislead the DHA in its actions, a request may be made to change the record.

Migration Agents Registration Scheme

All agents practising in migration law must be registered as migration agents with the Office of Migration Agents Regulation Authority. Lawyers who are not registered as migration agents cannot give immigration assistance (s 276 Migration Act).

If a lawyer who is not a registered migration agent provides immigration assistance, that lawyer commits an offence under s 280 of the Migration Act. Currently the penalty for this offence is $10 800. This is a strict liability offence.

A lawyer can give immigration legal assistance. This relates to advice and representation to a visa applicant or cancellation review applicant regarding proceedings before a court. Advice regarding visa applications and merits review are not immigration legal assistance (s 277 Migration Act).

A Bill is before parliament to end dual regulation for lawyers, which, if passed, will mean that lawyers will not have to register as migration agents and will be entirely regulated by their

own professional bodies. The Queensland Law Society has a list of accredited specialists in immigration law. These solicitors (as well as being registered migration agents) must have at least five years experience in the practice of the law (with three years substantial experience in immigration matters) and must pass the Queensland Law Society examination that tests their knowledge of immigration law.

Australian Citizenship

As provided in s 11A of the *Australian Citizenship Act 2007* (Cth) (Australian Citizenship Act), the most common way a person becomes an Australian citizen is by being born in Australia and by having a parent who is an Australian citizen or a permanent resident at the time of their birth.

There are other, less common, ways of acquiring automatic Australian citizenship under pt 2 div 1 of the Australian Citizenship Act:

- citizenship by being born in Australia and by being a resident in Australia for the next 10 years (s 12)
- citizenship by adoption (s 13)
- citizenship for abandoned children (s 14)
- citizenship by incorporation of territory (s 15).

Citizenship by descent

In certain circumstances a person born outside Australia may apply for citizenship through their parents' status as Australian citizens. At the time of the birth at least one of the parents must be an Australian citizen. To obtain citizenship by descent a person must make an application to become an Australian citizen. The minister can approve or refuse the application.

Citizenship by conferral

Non-citizen children born outside Australia and adopted outside Australia by one or more Australian citizen parents may apply for a grant of citizenship in accordance with the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (s 19B Australian Citizenship Act).

Citizens of other countries who are settled permanently in Australia may apply for and receive Australian citizenship by the process of grant. To be granted citizenship, an applicant has to satisfy a number of statutory requirements (ss 19G–23A Australian Citizenship Act). They should:

1. be a permanent resident
2. be 18 years or over
3. understand the nature of the application

4. generally have been lawfully present in Australia for at least four years including at least 12 months as a permanent resident. Absences of up to 12 months are allowed during the four years, including no more than three months absence during the 12 months immediately before applying. However, if a person was born in Australia or is a former Australian citizen, they need only be present in Australia as a permanent resident for the 12 months immediately before applying (use the residence calculator for the purpose of citizenship applications)
5. be of good character
6. possess a basic knowledge of the English language
7. have an adequate knowledge of Australia and of the responsibilities and privileges of Australian citizenship and, in some circumstances, pass a test (practice citizenship tests are available)
8. if granted Australian citizenship, be likely to live or continue to live in Australia or to maintain a close and continuing association with Australia.

Requirements 3, 6 and 7 are taken to be satisfied where a person successfully completes the citizenship test. Applicants under the age of 18 years or aged 60 years and over, as well as those with a permanent physical or mental incapacity, permanent or substantial loss of hearing, speech or sight, or those who are stateless, do not need to satisfy these requirements.

Exemptions to residence requirements

The above requirements have to be met by most applicants. However, in certain circumstances, specific requirements do not have to be satisfied, and/or there is a discretion for the minister to grant citizenship even where requirements are not satisfied. Hardship and service in the armed forces of Australia are two of the factors that may impact on the residence requirements.

Spouses, widows/widowers or interdependent (same-sex) partners of Australian citizens who are permanent residents, can have periods of time spent overseas as a permanent resident counted towards the required periods of lawful residence in Australia, if the minister is satisfied that the person had a close and continuing association with Australia during those periods (ss 22(9), 22(11) Australian Citizenship Act).

Residence requirements will not be met if time has been spent in prison or in a psychiatric institution unless the minister determines this would be unreasonable (ss 22(1C), 22(5A) Australian Citizenship Act).

Citizenship pledge

A pledge of commitment as a citizen of the Commonwealth of Australia must be made by virtually all applicants aged 16 years or over. It must be made to the minister or a person authorised by the minister (s 27, sch 1 Australian Citizenship Act).

How to apply for citizenship

Citizenship application forms may be obtained from the DHA. Citizenship can also be applied for online through an ImmiAccount. The DHA also publishes a lot of information about the citizenship application process and the documentation needed.

Citizenship rights

People acquiring Australian citizenship are entitled to the same rights as who are citizens by virtue of being born in Australia. These include the right to:

- apply for appointment to any public office or to stand for election as a member of parliament (although holding joint nationality can create serious predicaments in the federal parliament)
- vote at state and Commonwealth elections
- apply for an Australian passport, and to leave and re-enter Australia without needing an authority to return.

Loss of Australian Citizenship

Renunciation of citizenship

Renunciation of Australian citizenship is possible in limited circumstances. An Australian citizen who is 18 years or older and is a national or citizen of a foreign country may make an application to the minister renouncing Australian citizenship. At the time the application is approved by the minister, the person ceases to be an Australian citizen (ss 33(1), 33(8) Australian Citizenship Act).

If the person would become stateless upon renunciation, the minister must not grant approval. If the person is a citizen of a country with whom Australia is at war, the minister may not grant approval (ss 33(4)–33(7) Australian Citizenship Act).

An Australian citizen who was born or is ordinarily resident in a foreign country, and cannot become a national or citizen of that country while remaining an Australian citizen, may also renounce citizenship (s 33(3) Australian Citizenship Act). The minister must not register a declaration renouncing citizenship if it is considered not to be in the interest of Australia (s 33(6) Australian Citizenship Act).

Loss of citizenship by revocation

The minister has power to revoke Australian citizenship of any person who received such citizenship by application and conferral and who, under s 34 of the Australian Citizenship Act, has:

- been convicted of having made a false statement or concealed a material circumstance in connection with their application for citizenship
- obtained the approval to become an Australian citizen as a result of migration-related fraud

- received approval connected with the migration-related fraud of a third party,

and the minister is satisfied that it is against the public interest for that person to continue to be an Australian citizen. The above also extends to fraud connected with the person's entry into Australia or grant of visa where that fraud was material to the person becoming a permanent resident.

Where citizenship is obtained through conferral, the minister may also exercise this power of revocation against a person convicted of any offence and sentenced to at least 12 months imprisonment, provided the offence was committed before the grant of Australian citizenship. The Australian Citizenship Act also provides that where all responsible parents or guardians of a child (i.e. someone aged under 18 years) cease to be Australian citizens, other than by their death, and the child has another citizenship, then the minister may, in writing, revoke the child's Australian citizenship (s 36 Australian Citizenship Act).

Renunciation by conduct

Section 33AA of the Australian Citizenship Act provides that a dual citizen aged 14 or older renounces their Australian citizenship if the person acts inconsistently with their allegiance to Australia by engaging in a range of conduct associated with terrorist offences specified in the Australian Citizenship Act.

The only review options under this provision is judicial review pursuant to s 75 of the *Commonwealth of Australia Constitution Act 1900* (Imp) or s 39B of the *Judiciary Act 1903* (Cth).

Automatic cessation of citizenship

Australian citizens can now swear allegiance to another country and thereby acquire another citizenship by doing a formal act or thing and not lose their Australian citizenship. However, an Australian dual national who serves in the armed forces of a country at war with Australia, ceases thereby to be an Australian citizen. Similarly, an Australian citizen who fights for, or in the service of, a declared terrorist organisation outside of Australia will also cease to be an Australian citizen (s 35 Australian Citizenship Act).

Resumption of citizenship

In some circumstances, a former citizen may resume citizenship that has been lost (ss 29–32 Australian Citizenship Act).

Citizenship appeal rights

An applicant has a right under s 52 of the Australian Citizenship Act to have the AAT review the minister's decision in a range of citizenship decisions, including where the minister:

- refuses an application for citizenship
- refuses to approve the renunciation of Australian citizenship
- cancels an approval prior to the applicant taking the pledge

- revokes a previous grant of citizenship.

Other decisions are only appealable to the High Court in its original jurisdiction or via s 39B of the *Judiciary Act 1903* (Cth).

Legal Notices

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