The Law Handbook

YOUR PRACTICAL GUIDE TO THE LAW IN NEW SOUTH WALES

15th EDITION

THOMSON REUTERS

REDFERN LEGAL CENTRE PUBLISHING

Published in Sydney
by Thomson Reuters (Professional) Australia Limited
ABN 64 058 914 668

19 Harris Street, Pyrmont NSW 2009
First edition published by Redfern Legal Centre as *The Legal Resources Book (NSW)* in 1978.
First published as *The Law Handbook* in 1983
Second edition 1986
Third edition 1988
Fourth edition 1991
Fifth edition 1995
Sixth edition 1997
Seventh edition 1999
Eighth edition 2002
Ninth edition 2004
Tenth edition 2007
Eleventh edition 2009
Twelfth edition 2012
Thirteenth edition 2014
Fourteenth edition 2016
Fifteenth edition 2019

Note to readers: While every effort has been made to ensure the information in this book is as up to date and as accurate as possible, the law is complex and constantly changing and readers are advised to seek expert advice when faced with specific problems. *The Law Handbook* is intended as a guide to the law and should not be used as a substitute for legal advice.

ISBN: 9780455243689

This edition is up to date as of 1 October 2019.

The Law Handbook is part of a family of legal resource books published in other states:
Vic: *The Law Handbook* by Fitzroy Legal Service, ph: (03) 9419 3744
SA: *Law Handbook* by the Legal Services Commission of South Australia, ph: (08) 8111 5555
Qld: *The Queensland Law Handbook* by Caxton Legal Centre, ph: (07) 3214 6333
Tas: *Tasmanian Law Handbook* by Hobart Community Legal Service, ph: (03) 6223 2500
NT: *The Northern Territory Law Handbook* by Northern Territory Legal Aid Commission, Australasian Legal Information Institute and Darwin Community Legal Services, ph: (08) 8982 1111

Editor: Newgen Digitalworks
Product Developer: Karen Knowles

Printed by: Ligare Pty Ltd, Riverwood, NSW

This book has been printed on paper certified by the Programme for the Endorsement of Forest Certification (PEFC). PEFC is committed to sustainable forest management through third party forest certification of responsibly managed forests.

28

Immigration and Refugee Law

Kerry Murphy – Solicitor and Registered Migration Agent,
Accredited Specialist in Immigration Law

[28.10] Australia is a multicultural and diverse community strengthened by the permanent migration of family members, refugees, humanitarian entrants and skilled migrants, and the entry of hundreds of thousands of temporary entrants each year. Migration law deals with non-citizens seeking to enter Australia as a temporary or permanent resident. Australian citizens generally have the right to travel to and from Australia without restriction. Migration is about the way non-citizens can travel to, enter and stay in Australia. Migration law is found in the *Migration Act 1958* (Cth) and the *Migration Regulations 1994* (Cth) and policy.

Substantial amendments to Australian migration law were made by the Australian parliament in 1994 with the intention of reducing flexibility and discretion in migration decision-making in favour of a system that was codified to ensure certainty and clear visa criteria. Since then, there has been a significant re-introduction of the use of personal discretion exercised by the Minister for Home Affairs, and an increase in discretions held by delegates of the minister that are not reviewable by the merits review tribunals, combined with a narrowing of legislative criteria. The result is that current migration law is codified – setting out strict visa criteria but rarely giving an individual the ability in law to present compassionate and compelling circumstances relevant to their own circumstances. If a person doesn't meet legislative requirements for a visa then, in the absence of ministerial discretion, there will be no visa entitling stay in Australia.

Immigration law is extremely complex and changes frequently, so before acting on the basis of the information in this chapter it is essential to check with a registered migration agent working with a community organisation or in the private profession.

Visas

[28.20] Who needs a visa?

Australian citizens have an absolute right to enter and remain in Australia. All non-citizens, including New Zealand citizens, need a *visa*, either temporary or permanent, to travel to, enter and stay in Australia.

New Zealanders

New Zealand citizens, who satisfy health and character requirements, are entitled to live and work in Australia. With some exceptions, New Zealanders are issued with a visa on arrival in Australia, although in some circumstances they should apply for a visa before arriving.

A New Zealand citizen must apply for a visa before travelling to Australia if:

- they have been previously refused entry to another country on certain grounds; or
- they have been imprisoned for more than a year; or
- they are considered a danger to national security.

New Zealand citizens may also be refused entry if they have uncontrolled tuberculosis and refuse to sign an undertaking to visit a Commonwealth medical officer within seven days of arrival.

New Zealand citizens who were living in Australia on 26 February 2001 might be entitled to a special status that is equivalent to Australian permanent resident status. That is, they are entitled to sponsor family members for permanent residence, receive social security payments and apply for Australian citizenship. New Zealand citizens who arrived in Australia on or after 27 February 2001 are entitled to live in Australia indefinitely but they must apply for Australian permanent residence if they wish to sponsor relatives, receive some social security payments or ultimately apply for Australian citizenship.

Others granted a visa on arrival

Other people granted visas on arrival include eVisitors (those citizens of countries with a reciprocal arrangement with Australia to the effect that visas are applied for and granted electronically), airline crew and residents of Norfolk Island. Sometimes a border visa is issued where it appears that the entrant has a right to apply for a further visa in Australia.

People who must apply before arrival

Everyone else must be granted a visa *before* they travel to Australia. Sometimes this visa can be in

the form of an electronic travel authority that is technically issued on arrival to Australia. Visas are no longer put into a passport but are stored electronically. It is possible to check your visa and the conditions by registering with the Visa Entitlement Verification Online (VEVO) website (https://immi.homeaffairs.gov.au/visas/already-have-a-visa/check-visa-details-and-conditions/check-conditions-online/visa-holders)

[28.30] Applying for a visa

Applicants for visas are required to apply in a way set out in the *Migration Act* and *Regulations*.

Formal requirements

Generally, a valid application requires the completion of an appropriate form and payment of the visa application charge. Many visas are now lodged online. If you pay the application fee by credit card, a surcharge applies.

In some cases, applicants must satisfy other requirements before the application is considered to be a valid application. For example, sometimes the applicant must be in a specific place at the time of application or at the time of decision. In some cases, the application must be posted to a specific address in Australia.

With some exceptions, most applications for permanent entry made outside Australia must usually be lodged at the nearest Australian overseas post (embassy, consulate or high commission) to their place of residence. The exceptions are that sponsored applicants for refugee status or humanitarian entry and some applicants applying on the basis of their skills and qualifications may be required to lodge the application in Australia for processing. Some applications, such as partner visas, may be lodged online or in paper format at an office of Immigration.

Not all overseas posts deal with all kinds of visas. Sometimes a visa applicant will have their visa processed at a post some distance from their country of origin. If the applicant is outside their country of usual residence, the application will be forwarded to their country of usual residence for visa processing. You should check the Department of Home Affairs website for details about the types of visas processed at different Embassy or Consulate offices.

Many visa applications may be made by people in Australia. See [28.120] for information about these.

Assessment

Once the application is accepted as being valid by the Department of Home Affairs, the applicant must satisfy all the specific criteria for that visa. These are discussed later in this chapter. Generally, the applicant must also pass the health test and satisfy any other public interest criteria such as health or character requirements (see [28.60]).

How long does it take?

Depending on the kind of visa, quality of application, availability of Australian government resources and availability of the visa, the assessment process may take months, or even years.

Registration of migration agents

Migration agent registration was introduced in 1992 to protect people from unscrupulous migration advisers. Before that time, the industry was unregulated. In 1998, the Migration Agents Registration Authority (MARA) was given responsibility under the *Migration Act* to register and regulate migration agents.

Regardless of whether fees are charged, those who provide advice about visa applications or sponsorship or assist in the preparation of visa applications must be registered. Anyone who provides advice without being registered faces severe penalties of up to $60,000 in fines and/or 10 years' imprisonment.

Federal and state public servants, the electoral office staff of members of parliament, and lawyers providing assistance solely in connection with court proceedings do not have to be registered.

The authority accepts complaints about migration agents and can caution an agent, suspend or cancel an agent's registration, or deregister an agent.

From 1 July 2009, the Office of the Migration Agents Registration Authority regulates the migration advice profession. The then Minister for Immigration and Border Protection (now Minister for Home Affairs) appointed an advisory board to support the new office. The minister announced these changes with the intention of improving consumer confidence in the migration agent profession by dealing with complaints in a more timely way. The new regulatory body is supported by the Department of Home Affairs. A proposal to exempt practicing lawyers from registration as a migration agent is under consideration at the time of writing.

Applications for permanent residence

[28.40] Migration as a family

Most people applying for a visa to come to Australia (primary visa applicants) may include members of their family unit in their application.

What is a family unit?

Family unit is defined in the *Migration Regulations*. A person is a member of a visa applicant's (family head) family unit if they are a:

- spouse;
- de facto partner or same-sex partner;
- dependent child;
- dependent child of a dependent child.

The family unit may also include a relative of the family head or their spouse such as a parent, brother, or sister (or step-relative of the same degree) who:

- has never married, or is widowed, divorced or separated;
- is usually resident in the household; and
- is dependent on the family head.

Who should be included in the application?

All the members of an applicant's immediate family (ie, their spouse, de facto or same-sex partner, their dependent children and any other dependent relatives in their household) should be included in the application.

What if a member fails the entry criteria?

The whole application is usually refused if any member of the family fails to meet the health or public interest criteria.

Applications that include a child

If a visa application (for either permanent or temporary residence) involves a person under 18, the department must be satisfied that:

- the law of the child's home country permits the child to be removed to Australia;
- any person with a legal interest in the child's place of residence consents to the grant of the visa; and
- the grant of the visa is consistent with any child order defined under the *Family Law Act 1975* (Cth) (an order for residence, contact or care, or a state child order).

The department must also be satisfied that there is no compelling reason to believe that the grant of the visa would not be in the child's best interests.

[28.50] Migrant categories

Australia's migration intake is divided into Migration (for skilled, family and special eligibility entrants) and Humanitarian (for refugees and others with a humanitarian need). The Migration program has three streams:

- family (47,732 places in 2019/2020);
- skilled (108,682 places);
- special eligibility (236 places).

The Humanitarian program is divided into refugees from overseas and humanitarian visas:

- refugees and special humanitarian visas, including grants of refugee status in Australia (18,750 places).

[28.60] Entry criteria

Applicants for migration must meet health and public interest criteria, including good character criteria.

Health criteria

All applicants for permanent visas are subject to health testing. All members of the family must pass the health test. For most visa categories, if one person in the family unit fails the test, all members fail. This is the "one fails, all fail" rule.

Applicants for protection visas in Australia

Applicants for protection visas (assessed against the Refugees Convention definition in Australian law) who are already in Australia are medically tested but need not actually pass the health test for the visa to be granted. An applicant who has a health problem will be offered treatment and may have to sign an undertaking to comply with medical treatment.

When an applicant will fail the health test

Applicants or family members will fail on health criteria if they have:

- active tuberculosis; or
- another communicable disease that is a threat to public health.

They may also fail the health criteria if they have a disease or condition that would:

- make the person likely to need health care or community services; or
- cause the person to meet the medical criteria for the provision of a community service (which includes an Australian social security payment); or
- result in significant cost to the Australian community in health care or community services; or
- prejudice access to health care or community services for Australian citizens or residents.

When health test requirements can be waived

Requirements relating to cost, access to health care or access to community services may be waived if the applicant is a humanitarian entrant or if:

- the applicant is the spouse, de facto partner, dependent child of an Australian citizen or permanent resident;
- the Minister for Home Affairs is satisfied that:
  - there would be no undue cost to the Australian community; or
  - there would be no undue prejudice to access to health care or community services for an Australian citizen or permanent resident.

The character test in the Migration Act

Applicants may fail the public interest criteria or character test requirement if:

- they have a criminal record or background;
- they have been convicted of a criminal offence while in immigration detention;
- they have an association with a person or group considered to have criminal connections;
- they are considered to be a threat to national security;
- there is a risk that they would:
  - engage in criminal conduct;
  - harass, molest, intimidate or stalk another person;
  - vilify a section of the Australian community;
  - incite discord in the community;
  - endanger the community by involvement in violent activities;
- something about their past or present general conduct should be taken into account as reflecting on their character.

Since December 2014, a mandatory cancellation power exists in s 501(3A) for those who fail the character test and are serving a full time period in a correctional facility. A revocation request may be made and a review of that revocation request is possible if an unfavourable decision is made by a delegate, but not if made by the minister personally.

The character test

The Minister for Home Affairs has issued a Direction (Direction No 79 of 28 February 2019) saying that decision-makers should balance the general conduct of applicants with other factors to determine whether they pass the character test.

General conduct giving rise to a finding that a person does not pass the character test could include:

- continual evasion or non-payment of a debt;
- disregarding payments to be made for family maintenance;
- involvement in organised crime, terrorism, drug related activity, political extremism or white collar crime;
- involvement in crimes against humanity;
- breaches of immigration law, which include:
  - breaching a visa condition;
  - making misleading statements;
  - providing bogus documents.

Direction 79 sets out the criteria to be considered when assessing the discretion to refuse or cancel a visa on character grounds.

Settlement criteria

Some applicants may be refused a visa if it seems likely they would have great difficulty settling in Australia.

In the family stream

The Minister for Home Affairs issued a direction in September 2016 setting out the order of priority for visa applications in the family stream. This is Direction No 80 (22 December 2018), Order for Considering and Disposing of Family Stream Visa Applications.

The types of visas are described and then discussed in [28.80].

Relationship to applicant

Highest priority in the family stream is for visas granted to a sponsor's immediate family – that is, spouses, dependent children, fiancé(e)s, and same sex partners unless the sponsor came to Australia as an unauthorised maritime arrival

(s 5AA – without a visa by boat, and not exempted persons such as New Zealand citizens).

Other applicants for visas in the family stream receive a lower priority. These are visas for contributory parents, parents, aged dependent relatives, remaining relatives and carers.

Status of sponsor

Generally, applications will be processed in order of receipt; however, applicants sponsored by an Australian citizen will be given higher priority than applicants sponsored by permanent residents and eligible New Zealand citizens. Sponsors who are permanent residents but who came to Australia by boat as an unauthorised maritime arrival have the lowest priority.

Applications involving children

Priority is to be given to applications involving people under 18.

Type of visa

Applications for carers will be given higher priority than parent visas, aged dependent relative or remaining relatives, all of which have the same priority.

Within the parent categories, the government accords a higher priority to contributory parents visa applicants over other parent visa applicants.

Special circumstances

The Direction also says that decision-makers are to give due regard to "special circumstances of a compelling or compassionate nature" that may justify an application being moved further up the processing queue, unless the sponsor is a permanent resident who came to Australia as an unauthorised maritime arrival.

In the skilled, temporary business entry and business sponsorship categories

The Minister has issued Direction No 83 (21 December 2018), *Order of Consideration or Disposal of Applications for Visas* under s 91 of the *Migration Act*, about the order of visas granted in these categories, and Direction No 81 (21 December 2018), *Order of Consideration of Certain Skilled Migration Visas*.

Generally, applications are processed in the order they are received.

Applications for state-specific and regional migration and employer sponsorship or nomination will have priority over other kinds of visa applications. Applications in Schedule 1 of the Skilled Occupation List (independent no sponsorship required) have priority over the Schedule 2 list (sponsorship required).

Applications from permanent residents

Citizenship law was amended in 2007 – people who gain Australian permanent resident status from 1 July 2007 are entitled to apply for Australian citizenship after living lawfully in Australia continuously for four years provided that at least the most recent 12 months is as a permanent resident. This change to Australian citizenship law means that eligible people can include time spent as the holder of a temporary visa as counting towards the four-year residence requirement. Different rules apply to people who became permanent residents before 1 July 2007; they had until 1 July 2010 to apply for citizenship and must have been in Australia as a permanent resident for a total of one year in the two years immediately before applying for citizenship and have lived in Australia for a total of two years in the last five years.

While permanent residents may live in Australia indefinitely, if they wish to travel outside Australia and return they should:

- ensure that their initial visa is still current (they are issued for five years); or
- obtain a *resident return visa* preferably before they leave Australia.

Sponsors

Sponsors agree to provide support and settling-in assistance to the sponsored person. Where sponsorship is required in the family stream, it must be given by:

- an Australian citizen or permanent resident;
- an eligible New Zealand citizen (see below); or
- sometimes, an appropriate organisation.

Sponsors who are "usually resident"

For some visas, sponsoring permanent residents must show that they are "usually resident" in Australia. "Usually resident" is not defined in the *Migration Act* or *Regulations* and depends on the facts of an individual case, such as whether the permanent

resident is living in Australia, where they have their home, where they work and whether they intend to live in Australia.

"Settled" sponsors

If a sponsor is required to be "settled", there are additional requirements. "Settled" is defined as "lawfully resident for a reasonable period". A "reasonable period" is not defined, but departmental policy says that a residence of two years will generally demonstrate that a sponsor is settled in Australia but that there may be exceptions and all the circumstances of each individual case should be considered so that a shorter period of residence may be accepted in specific circumstances.

Sponsors in this situation are advised to seek advice about their situation.

Further limitations

There are additional limitations on those seeking to sponsor a partner or remaining relative in the family stream or a sponsored family visitor visa for a temporary entrant. See the specific category for further information.

Formal requirements

Sponsors are required to complete a sponsorship form or a sponsorship declaration. The kind of form will depend on the type of visa application being lodged. Immigration forms are available from the department's website and some applications are now lodged online.

"Eligible New Zealand citizens"

An eligible New Zealand citizen is a New Zealand citizen who:

- was in Australia on 26 February 2001 holding a subclass 444 special category visa; or
- was in Australia holding a subclass 444 visa for not less than one year in the two years before 26 February 2001; or
- has a special certificate issued under the *Social Security Act 1991* (Cth) by Centrelink stating that the person was residing in Australia on a particular date.

More information is available from Centrelink.

[28.70] If the application is successful

Applications from outside Australia

For applications from outside Australia, if the applicant is successful, and the visa grant is not limited by a quota, the applicant is given a permanent migrant visa that will allow travel to Australia. This visa will be activated as a permanent visa on entry to Australia.

Applications from within Australia

Some people can apply for permanent residence from within Australia, although a person's immigration history may stop them doing so (see [28.120]).

[28.80] Types of permanent family visas

The family migration program allows Australian citizens, permanent residents or eligible New Zealand citizens to bring defined members of their family to Australia to live permanently.

Sometimes family members already in Australia are entitled to apply for a visa in the family program.

Some of the main visa categories for family migration are discussed below. Some categories have additional fees and financial requirements (listed at Additional financial requirements for different visa types at [28.80]). There is a planning quota in each financial year for visas granted to family members who are not spouses and children, such as parents.

Generally, applicants sponsored by Australian citizens have priority over those sponsored by permanent residents.

Spouses and de facto spouses

This visa is for people who are married to, or in a de facto relationship with, an Australian citizen, permanent resident or eligible New Zealand citizen (see Eligible New Zealand citizens at [28.60]).

Same-sex couples and their children are "members of the family unit" for visa purposes, in the same way that spouses and opposite sex de facto partners and their children are currently included as members of the family unit.

Same-sex partners of Australian citizens, Australian permanent residents and eligible New Zealand citizens are able to apply for the same partner visa as opposite-sex partners.

Children of opposite-sex and same-sex couples are included as members of the family unit of the primary visa applicant.

For more information, call 131 881 or visit the Department of Home Affairs website.

Qualifications

To qualify for a partner visa, the applicant and their sponsor must:

- both be of Australian marriageable age (18, with certain exceptions);
- have a genuine, continuing and exclusive relationship;
- if married, have been legally married in Australia or their country of origin (except that people in a polygamous marriage will not be granted a visa unless it can be proved that there is an exclusive relationship between applicant and sponsor);
- if de facto, have the relationship registered in the Relationships Register in the relevant State or Territory, or have been living together in a genuine relationship from 12 months before lodging the application, unless there are other compelling reasons to grant the visa.

Same-sex relationships

Migration law was changed in 2009 to give same-sex couples and their families the same rights and entitlements as opposite-sex couples. Same-sex partners of Australian citizens, Australian permanent residents and eligible New Zealand citizens are entitled to apply for the same partner visa as opposite-sex partners. Children of opposite-sex and same-sex partners can be included as members of the family unit of the primary visa applicant. Same-sex marriages are not recognised under Australian law, so a same-sex couples must apply under the de facto provisions.

Application stages

Applicants go through two stages (though only one application is required): first for a provisional two-year visa, and then for a permanent visa.

When a provisional visa has been granted

Once a provisional visa has been granted, the applicant can remain in or travel to Australia and work, and is entitled to benefits under the Medicare scheme.

Two years after the initial application was lodged, the person is assessed against the rules for the permanent visa.

Permanency criteria

The main criteria are whether the relationship between the sponsor and visa applicant is still genuine and continuing.

Permanent visas may be granted in less than two years if the relationship is *long term* at the time of the application. Long term is defined as:

- three years; or
- two years if there are children of the relationship.

If the relationship breaks down

If the relationship breaks down while the person holds a provisional visa they will not get permanent residence, unless they fall within certain exceptions; for example:

- the sponsor has died and they were still in a permanent relationship at the time of death;
- applicant and sponsor have a court order or an agreement in relation to the care of children;
- the applicant has a court order or an agreement in relation to the care of the children and the sponsor is required to pay child support;
- the applicant or the applicant's child has suffered family violence from the sponsor during the relationship.

Fiancé(e)s

Applicants must be outside Australia and engaged to be married to an Australian citizen, permanent resident or eligible New Zealand citizen. They must be legally able to marry in Australia and intend to live in a genuine relationship with their partner. The couple must have physically met and be known to each other personally since they turned 18 and the visa applicant must be aged 18 or over.

The applicant receives a nine-month conditional visa, during which time they are expected to travel to Australia and marry their partner. Once married, the visa applicant should apply for a partner visa and be sponsored by their partner. The visa applicant will then be granted a provisional partner visa. The fee for the partner visa is less than the fee where there is no prior fiancé(e) visa.

After two years the department again assesses the relationship and if satisfied that it is genuine, will grant the permanent resident visa.

Limits on sponsorship of partners

The right to sponsor people as spouses, fiancé(e)s or interdependent partners was changed in November 1996 so that except in compelling circumstances:

- a person may only sponsor a partner twice in a lifetime;
- sponsorships must be at least five years apart.

A compelling circumstance could include a situation where there is a child of the relationship.

People who were sponsored as partners

A person who was sponsored to Australia as a partner must also wait five years before they can sponsor another partner, unless there are compelling reasons.

"Women at risk"

Women who came to Australia holding a *woman at risk* visa (see [28.220]) may not sponsor a fiancé within five years from the date of that application if:

- the woman was separated or divorced from the fiancé visa applicant at that time; or
- the relationship existed at the time she came to Australia but was not declared to the Department of Home Affairs.

She may sponsor her fiancé if at the time she came to Australia her fiancé was missing or presumed dead, and that information was included in her application form.

If the relationship breaks down

If the relationship breaks down while the person holds the provisional visa, they will not be eligible for the permanent visa unless:

- the applicant's partner has died, and the applicant has close ties with Australia; or
- the applicant has suffered family violence inflicted by the sponsor.

Sponsorship changes have been passed by the Parliament to introduce a two step process. This will require the sponsor to be approved before a visa application can be made. At the time of writing, the new law had not commenced. It may mean an extra fee for the sponsorship application.

Prohibited relationships

People in prohibited relationships (such as a relationship with a parent, grandparent or sibling) will not be accepted for either the spouse or the de facto streams of the partner visa.

Carers

The Government abolished new carer visa applications on 2 June 2014. However, the Senate disallowed the repeal on 25 September 2014.

The carer visa replaced the *special-need relative* visa in 1998. Applicants must show they are the carer of an Australian relative who is an Australian citizen, permanent resident or eligible New Zealand citizen. The Australian relative must produce a certificate showing that:

- they have a "medical condition causing physical, intellectual or sensory impairment of the ability of that person to attend to the practical aspects of daily life";
- because of the medical condition, the person has, and will continue for at least two years to have, a need for direct assistance in attending to the practical aspects of daily life; and
- they will continue to need assistance for two years.

The certificate must be given by doctors at Medibank Health Solutions, or BUPA under arrangements from 28 July 2014 (check the website of the Department of Home Affairs), who are required to rate the Australian relative on the impairment tables used by Centrelink to determine entitlement to the disability support pension.

Applicants must also show that the assistance needed cannot be reasonably provided by any other Australian relative or from welfare, hospital, nursing or community services in Australia.

Dependent children

There are two ways that children can be given visas. They may apply for a child visa if they are inside or outside Australia and under 18. If over 18, they must be able to continue to prove that they are dependent on the sponsoring parent. The visa will only be granted to children who apply before they turn 25.

The second way that children can get a visa is if they are members of the family unit of the main

visa applicant. See [28.40] for more about family unit members.

Children under 18

A child under 18 is dependent if they are:

- the natural or adopted child or stepchild of their sponsor;
- not married or engaged to be married.

Dependent children of people who hold temporary partner visas

This visa allows children of temporary partner visa holders in Australia to be sponsored into Australia by the person who is the sponsor of the temporary visa holder.

Children 18 and over – meaning of dependent

A child aged 18 or more must be proved to be dependent before a visa will be granted.

"Dependent" means having been substantially reliant for financial support to meet basic needs for food, clothing and shelter for at least 12 months, and more reliant on their parent than on any other person. A dependent child over 18 must not be engaged in full-time work. A child over 18 may still be considered dependent if within six months or a reasonable time since completing the equivalent of year 12 in the Australian school system they enrolled in a full-time course leading to a professional, trade or vocational qualification.

Children who are incapacitated

Children over 18 who have a condition that results in them being "incapacitated for work" because of total or partial loss of bodily or mental functions will be considered dependent (in which case they may well fail public health requirements).

Vulnerable child

This permanent visa was introduced in 2008 for vulnerable children under 18 who may have been given up for adoption, abandoned, abused or neglected, and where state or territory government welfare authorities are involved in the welfare of the child.

The child should provide a "letter of support" from a state or territory government welfare authority supporting the child's application for permanent residency, setting out the circumstances of the welfare authority's role in respect of the child, reasons for supporting the application for permanent residency and the nature of the authority's continued involvement in the child's welfare. The letter of support should be on the letterhead of the authority and signed by a manager or director of the authority.

Adopting children from overseas

There are two main ways that children from overseas can be adopted by eligible Australians.

Adoption of overseas children is the responsibility of state and territory adoption agencies and the eligibility requirements for overseas adoptions vary in each state. Generally, welfare agencies do not give approval to adopt an overseas relative. If the adoption agency in the Australian state or territory approves the adoption, an adoption visa may be granted to the child.

Another way for Australian citizens and residents to sponsor a child from overseas is if the adoptive parent has been resident overseas for 12 months at the time of the visa application and adopts the child privately, such as through an overseas adoption agency, in accordance with the laws of the child's home country. In this case, the adoption requirements may be satisfied provided that the residence overseas was not for the purposes of facilitating the adoption and that the adopting parent has full and permanent parental rights and that the relevant authorities in the child's country of origin have approved the adoption and the child's departure to Australia. These adoptions must be in accordance with international law, such as the Hague Convention (see also Adoption in Chapter 7, Children and Young People).

Orphaned relatives

The applicant

Applicants in this visa category must be under 18, unmarried and each parent of the child must be:

- deceased;
- incapable of caring for them; or
- of unknown whereabouts.

The sponsor

The sponsor must be an Australian citizen, permanent resident or eligible New Zealand citizen and a relative of the orphaned child. Eligible relatives include brother or sister, grandparent, aunt, uncle, step-aunt or step-uncle.

The best interests of the child

There must be no compelling reason to believe that the move would not be in the child's best interests and that the law of the child's home country allows the removal of the child and that all people who have a lawful entitlement to determine where the child is to live consent to the grant of the visa.

Parents

Different categories of parent visas are available for parents of Australians. The following two visas have the advantage that the application fees and other financial requirements are significantly less than the fees required in the "contributory parent" visa category (see Financial requirements – parents and contributory parents below). The disadvantage of these visas is that there are strict quotas. At current planning levels, the queue for parent visas is approximately 30 years. Contributory parent visas are taking around 48 months.

Offshore applications – subclass 103

There are no age limits for parents applying for the offshore parent visa.

Applicants in Australia – subclass 804

To make an application in Australia, a parent must be "aged". Since 1 January 2014, all main applicants must be at least 65. Prior to that date, for a female applicant it depended on when she became eligible for the age pension under the *Social Security Act 1991* (Cth).

Financial requirements

The contributory parent visa requires the payment of a significant amount of additional money to cover health costs and the assurance of support bonds. The assurance of support is a contract between a person and the Australian Government that if specified social security payments are paid to the visa holder during the period of the assurance then any money will be repaid by the assurer, first through the bond money and then through recovery provisions (see also Additional financial requirements for different visa types at [28.80]).

The balance of family test

Parents applying for the permanent parent visas must pass the *balance of family* test which requires:

- at least half their children (including step-children) must live lawfully and permanently in Australia; or
- more of their children live lawfully and permanently in Australia than in any other single country.

Parents who fail the balance of family test may be eligible to apply for another type of visa such as:

- one of the visas in the skilled and business category;
- an aged dependent relative visa;
- temporary sponsored parent visa; or
- a temporary retirement visa.

Sponsors

The parent must be sponsored by a child who:

- is an Australian citizen, permanent resident or eligible New Zealand citizen over 18; and
- has been settled as a resident for a reasonable period. Under policy, this is usually two years. If the child sponsor is under 18, the sponsor can be the spouse of the child if the spouse is over 18, a close relative or guardian, or a community organisation.

A temporary parent visa is available and it is the subclass 870 Sponsored Parent Temporary Visa. This is a two step process which first requires an Australian citizen or permanent resident sponsor to be approved to sponsor a parent. The sponsor either individually or combined with their partner must have an income of at least $83,454.80. This amount may increase so it is important to check the current requirements.

If approved, then the sponsor may sponsor up to two parents for the subclass 870 visa. The visa can be granted for three or five years and is multiple entry. The application fee is $1,000 and then a second fee of $4,000 for the three year visa or $9,000 for the five year visa.

Visa holders must have private health insurance and only intend to reside in Australia on a temporary basis. There are a number of conditions which attach to the visa and the breach of these may give rise to a cancellation process.

There is a cap of 15,000 temporary parent visas a year.

Quotas for parents

A total of 7,371 visas were set aside for parents in the 2019/2020 year.

Contributory parents

The contributory parent visa category was introduced in 2003.

To make an application in Australia, a parent must be "aged" which means they must be aged 65 or over.

Visa subclasses

For parents outside Australia, the relevant visas are:

- subclass 143 contributory parent (migrant) visa;
- subclass 173 contributory parent (temporary) visa.

For parents in Australia, the relevant visas are:

- subclass 864 contributory aged parent (residence) visa;
- subclass 884 contributory aged parent (temporary) visa.

Qualifications

Contributory parents must:

- be sponsored by a "settled" Australian citizen, permanent resident or eligible New Zealand citizen;
- pass the balance of family test;
- meet health and other visa requirements.

Financial requirements – parents and contributory parents (at July 2019)

Type of visa	*First instalment*	*Additional applicant aged 18 or over first instalment*	*Additional applicant aged under 18*	*Second instalment*	*Assurance of support bond*
Parent (migrant)	4,350	2,175	1,090	2,065	Two years – $5,000 for the main applicant and $2,000 for other applicants over 18
Aged parent (residence)	4,350	2,175	1,090	2,065	Two years – $5,000 for the main applicant and $2,000 for other applicants over 18
Contributory parent (migrant) if the holder of contributory parent (temporary) visa	365	185	90	19,420	10 years – $10,000 for the main applicant and $4,000 for other applicants over 18
Contributory aged parent (residence)	3,695	1,245	625	43,600	10 years – $10,000 for the main applicant and $4,000 for other applicants over 18
Contributory aged parent (temporary)	2,495	1,245	625	29,130	Nil
Contributory aged parent (residence) if the holder of a contributory aged parent (temporary) visa	325	165	80	19,420	10 years – $10,000 for the main applicant and $4,000 for other applicants over 18

Visas in the contributory parents category require a significant financial contribution in addition to the visa application charge. Each applicant pays a separate fee as set out in the table. The second charge in the contributory parent visas is payable per person.

The temporary visa allows the parent to live in Australia for two years, work and access Medicare. At any stage during the two-year period, the parents may apply for a permanent visa and pay the balance of the second visa application charge. There is no additional payment for dependents under 18.

Assurance of support bonds

For both permanent and temporary visas, there is a requirement that a 10-year assurance of support bond be paid. The amount of the bond is $10,000 for the primary applicant and $4,000 for other applicants over 18.

Temporary visa holders pay the amount of the assurance of support bond during the processing of the permanent visa application.

Aged dependent relative

The visa is for an older relative of eligible sponsors who is dependent on their Australian relative for financial support (see Additional financial requirements for different visa types at [28.80]).

Qualifications

The applicant must:

- be aged (ie, eligible to receive the age pension in Australia, currently 65 for men and around 63.5 for women, whose eligibility age is gradually being increased to 65);
- be single – never married, widowed, divorced or separated from their spouse;
- have been financially, physically or psychologically dependent on their relative for a "reasonable period", usually three years.

Sponsors

The sponsor must be an Australian citizen, permanent resident or eligible New Zealand citizen resident for a "reasonable period", usually two years.

Who is dependent?

"Dependent" means having been substantially reliant for financial support to meet basic needs for food, clothing and shelter for a "reasonable period", and more reliant on their relative than on any other person. Department of Home Affairs policy is that a reasonable period is usually considered to be three years.

Remaining relative

The visa is for visa applicants who have no "near relatives" other than those usually resident in Australia as Australian citizens, permanent residents or eligible New Zealand citizens. Since the Senate disallowed the repeal of the Remaining Relative Visa on 25 September 2014, the Department announced the average queue time for new applications is 56 years.

See Additional financial requirements for different visa types at [28.80].

Qualifications

A remaining relative is the sister or brother (including step-sister or step-brother), adult child or step-child of the Australian sponsor. A parent does not meet the definition of "remaining relative". To meet the definition of "remaining relative", the visa applicant and their spouse must not have any "near relatives" at all outside Australia. Near relatives are parent, brother, sister or child. Therefore an applicant or their spouse with any of these categories of relative outside Australia will not satisfy the remaining relative definition.

If the applicant is married, their spouse must also qualify under this category.

Sponsors

The sponsor must be a settled Australian citizen, permanent resident or eligible New Zealand citizen who has not already sponsored a relative as a remaining relative.

A remaining relative visa will not be granted if the sponsor was sponsored as a remaining relative or if they have previously sponsored or nominated another relative for such a visa.

New Zealand citizens

New Zealand citizens may be able to sponsor family members to Australia for a temporary visa (the *New Zealand citizen family relationship (temporary) visa*).

Additional financial requirements for different visa types

There are financial requirements for some types of visa beyond the initial visa application fee.

Carer

- assurance of support bond (see below) ($5,000 for applicant, $1,500 for each family member over 18);
- second instalment of visa application charge ($2,065 each, unless the minister is satisfied that payment may cause financial hardship).

Orphaned unmarried relative

An assurance of support agreement must be completed. There is no requirement that a bond be paid.

Parent

- assurance of support bond ($3,500 for main applicant, $1,500 for each family member over 18);
- second instalment of visa application charge ($2,065 each).

Contributory parent

- assurance of support bond ($10,000 for main applicant, $4,000 for other dependent applicants over 18);
- second instalment of visa application charge (for each applicant over 18). Payment may be staggered (see Financial requirements – parents and contributory parents above).

Aged dependent relative

- assurance of support bond ($5,000 for main applicant, $2,000 for each family member over 18);
- second instalment of visa application charge ($2,065 each).

Remaining relative

- assurance of support bond ($3,500 for main applicant, $1,500 for each family member over 18);
- second instalment of visa application charge ($2,065 each).

Assurance of support

Certain applicants for permanent residence must have assurance of support from an Australian citizen or permanent resident. This is a legally enforceable obligation for two years following the grant of permanent residence.

The person signing the assurance undertakes to provide financial support to the new resident and repay any money paid by Centrelink for most allowances and payments.

There are two kinds of assurance of support: a required assurance and a discretionary assurance. If the assurance is required, the applicant must find an assurer who meets a minimum financial requirement and is able to deposit $5,000 for a main applicant over 18 and $2,000 for other applicants over 18. The bond must be lodged for a two-year period. If there is no call for particular kinds of social security payments during the two-year period, the money will be refunded to the assurer.

Anyone may take on the role of assurer. There is no requirement that the person be the sponsor. Note, however, the specific requirements for the contributory parents scheme (see Financial requirements – parents and contributory parents above).

Cap and queue

The aged dependent relative, carer and remaining relative visa categories are limited to a certain number of visa grants every year, this is called the "cap". Like the parent visa, it means that others will have to wait. The result is that the average waiting period for remaining relative is now 54 years, for aged dependent relative visas 16 years, and four years for carer visas. These periods can change from year to year so it is important to get advice about current waiting periods.

Contact the Welfare Rights Centre for specific advice about social security payments under the assurance of support scheme or waiver of the assurance of support bond. Contact a registered migration agent for advice about other issues.

[28.90] General skilled migration and business entry

There are a range of visas in the general skilled migration and business skills categories. These visas are designed to facilitate the independent entry of highly skilled and qualified people to migrate permanently to Australia. There have been a number of changes in this area and different rules may have applied when a person made an application. The changes are complex and it is important to get advice so you can understand how you are affected. Information about these visas is available through the Department of Home Affairs website.

Applicants in the skilled categories must first lodge an Expression of Interest (EOI) with

Immigration and then can apply for a visa if invited to do so. It is not possible to lodge a permanent skills visa without an EOI. A brief mention of particularly popular skilled and business visas follows below.

Skilled-sponsored – points test

The applicant must be a parent, adult child, brother, sister, nephew or niece of the sponsor. A person can also be sponsored by a state or territory. Each state and territory has its own list of skills and occupations for which it will consider sponsorship, so these lists can be checked from the links on the Department of Home Affairs website.

Qualifications must be assessed before the person lodges their application.

The points test

The points test applies to skilled independent and skilled sponsored applicants. Points are awarded for:

- an occupation on the Skilled Occupation List;
- age;
- English language ability;
- specific work experience;
- relevant Australian or overseas work experience;
- relevant Australian or overseas qualifications;
- regional Australia study;
- partner skills;
- state/territory nomination; and
- designated language.

The pass mark for this test changes from time to time. It favours skilled and well-qualified applicants under 45 who have good English language skills.

Skilled independent

The points test

A points test similar to that applied for the skilled Australian-sponsored category applies (there is no sponsorship requirement). The test favours young, English-speaking professionals and some trades people.

Only occupations listed on the Skilled Occupation List qualify.

An age limit of 45 applies and applicants must be proficient in English. Maximum points for English are now for those with a variety of English language tests. An example is an IELTS (International English Language Testing System) score of eight in each category.

Applicants must have recent work experience or have completed an Australian qualification after at least two years full-time study in Australia.

Skilled migration – regional sponsored (provisional visas)

There are two temporary visas that allow Australian citizens, permanent residents or eligible New Zealand citizens who are "usually resident" in designated areas to sponsor a skilled relative. These visas are first issued for a three-year period and then, if the applicant continues to meet the visa criteria, a permanent visa will be granted.

These are:

- skilled – regional sponsored (provisional visa);
- skilled – designated area sponsorship for skilled – regional sponsored visas.

What is a designated area?

Designated areas are nominated by state and territory governments. The parts of Australia not designated include Sydney, Newcastle, Wollongong, Melbourne, Perth and Brisbane. This can change so it is important to check the most recent information on the Department of Home Affairs website.

Sponsors

Eligible relatives who are usually resident in a designated area can sponsor. The designated areas for the sponsors are different from those for states and territory sponsorship, so this needs to be checked carefully. These relatives are parents, brothers and sisters, uncles and aunts, nieces and nephews, non-dependent children, grandparents and first cousins.

Review rights (see [28.230])

From 1 November 2019, a new temporary regional visa will be available. These will be:

- Skilled Employer Sponsored Regional (Provisional) visa: for people sponsored by an employer in regional Australia;
- Skilled Work Regional (Provisional) visa: for people who are nominated by a State or Territory government or sponsored by an eligible family member to live and work in regional Australia.

Full details will become available in late 2019.

Skilled Australian-sponsored overseas student

Students are eligible to apply for the *skilled Australian-sponsored overseas student visa*. The criteria are similar to those for the skilled Australian-sponsored visa (see Skilled-sponsored – points test at [28.90]). The applicant must be the sponsor's parent, adult child, brother, sister, uncle or aunt, nephew or niece.

There are extremely strict requirements about making a valid visa application for this visa. Any breach of these requirements will mean that the application is not valid and cannot be considered.

Graduate-skilled temporary visas

Because of strict time criteria, some students may choose to apply for a *graduate-skilled temporary visa* before completing requirements for the permanent visa.

[28.100] Business migration

Some business skills migrants are granted a *business skills (provisional) temporary visa* that is valid for up to four years. After they have satisfied visa requirements with evidence about business and/or investment activity, they may be eligible for a permanent visa.

Some business entrants are entitled to a permanent visa immediately if they have high level business skills and have approval from a state or territory government. People who wish to establish a business in Australia but not become permanent residents may apply for temporary residence based on skills or investment capital.

Details of sponsorship requirements for these categories may be obtained from the Department of Home Affairs.

The visa criteria vary, but all applicants must meet health and character requirements.

If a person is nominated for employment, they are generally required to provide a letter of appointment from their prospective employer.

Categories in the business migration program are discussed below.

Business talent

This permanent visa is for high-calibre business people with:

- a substantial ownership interest in a qualifying business;
- significant assets;
- a realistic commitment to establishing or participating in a business.

They must be sponsored by a state or territory government.

If aged over 55 years, they must have support from a sponsoring state or territory that their business is of exceptional benefit to the state or territory.

Business owner (temporary)

These visas are for business people with:

- a successful business career;
- significant assets;
- a genuine commitment to establishing or participating in a business.

Senior executive

This is a temporary visa for senior executives with significant assets who:

- have had a position of responsibility for strategic policy development of a business;
- have significant assets and a genuine commitment to establishing or participating in a business.

Investor (temporary)

These visas are for investors or business people with:

- a good business record;
- significant assets;
- genuine commitment to maintain business and investment in Australia.

Business skills (residence) visas

These visas give permanent residence to applicants who held the temporary business owner, senior executive and investor visas. Applicants may be sponsored by state or territory governments.

Business owner

This permanent visa is for people who hold a business skills (provisional) visa with:

- an ownership interest in an Australian business;
- significant assets;
- a good business background in Australia.

A person must have been in Australia for one year in the previous two years before applying for this visa.

Investor

This is a permanent visa for people who have:

- held an investor (provisional) visa for at least two of the four years before the application is made; and
- lived in Australia for two out of the previous four years.

[28.110] Labour agreements

These visas allow an Australian employer or industry group to employ a number of skilled workers or workers where a genuine labour shortage can be demonstrated. They may be temporary or permanent.

The employer nomination scheme

Applicants under this scheme must be nominated by an Australian employer to fill a permanent, full-time position requiring a highly skilled worker. The employee may be overseas or already resident in Australia.

Sponsors must:

- offer Australian standard wages and conditions;
- demonstrate that they have a commitment to training Australian workers.

The applicant must show they have suitable qualifications and experience for the position.

Regional sponsored migration scheme

This permanent visa allows employers in regional Australia to sponsor employees to live and work in regional areas where there is a labour shortage.

Distinguished talent

This visa is for people who are of distinguished talent and have an exceptional record of achievement in their occupation or profession. The visa category is for people internationally recognised in the professions, arts, sports, research or academia. Applicants for this visa must be nominated by an approved person or organisation.

Review rights (see [28.230])

Visa applications made in Australia

[28.120] Unlawful non-citizens

Everyone, except Australian citizens, needs a visa to be lawful in Australia. If a person does not have a visa that is in effect, they are known as an "unlawful non-citizen".

Generally, an unlawful non-citizen may leave Australia at any time but they may only return to Australia if granted a visa.

Becoming an unlawful non-citizen

People can become unlawful in a number of ways. For example:

- they might overstay their visa;
- their visa may be cancelled; or
- they may come into Australia without a visa.

What can happen to unlawful non-citizens?

An unlawful non-citizen may be detained, held in a detention centre or sometimes a jail, and removed from Australia. All unlawful non-citizens must be detained by the Department of Home Affairs unless they are granted a bridging visa.

In July 2008, the then Minister for Immigration and Border Protection (now known as the Minister for Home Affairs) announced new detention policies to minimise the necessity of detention. Mandatory detention will continue to apply to people who arrive in Australia without authorisation, such as asylum seekers (because of health, identity and security risks to the community), unlawful non-citizens who are of unacceptable risk to the community and non-citizens who repeatedly fail to adhere to visa conditions.

Get advice!

Unlawful non-citizens are encouraged to seek advice from a registered migration agent about exploring options for visa applications or making arrangements to leave Australia.

Exclusion periods

Whether they are detained or not, unlawful non-citizens who leave Australia after they have been unlawful for more than 28 days may face an exclusion period of up to three years, depending

on the kind of visa they apply for, before being entitled to make another application to come to Australia.

Generally, if the person leaves voluntarily there is no exclusion period, except for applications for certain temporary visas, where a three-year exclusion period may apply. Even if a person is excluded, they may be allowed to re-enter if they can show compelling reasons which affect Australia or an Australian citizen.

Unlawful non-citizens who can apply for a visa

Sometimes unlawful non-citizens in Australia may be eligible to apply for a visa. There are very strict rules about applications in this category. Generally, the person will have to satisfy extra visa criteria because they are unlawful, such as:

- making the visa application within a certain time of becoming unlawful; or
- showing that there are compelling reasons justifying the grant of the visa.

Providing there is no limitation on making the application:

- applicants for the spouse, de facto or interdependent visa may apply if they have been unlawful for any length of time where they can show compelling circumstances. However, periods of being unlawful may be found to be against a person, who may not then meet the compelling requirement.

Compelling circumstances

Since November 2009, it has been possible to lodge an onshore partner application even if you had some other application (not a partner visa) refused previously. Section 48 of the *Migration Act* read with reg 2.12 of the *Migration Regulations* provides a list of types of applications that can be lodged even where a previous application was refused onshore. The list is not large, and currently includes visas such as protection, partner and bridging visas. However, partner visas will still have to meet the compelling circumstances requirements of Schedule 3. Examples of compelling circumstances for spouses and de facto partners are where the relationship is of more than two years duration or there are children of the relationship. Policy changes mean that if you have been unlawful then you may not meet the Schedule 3 waiver provision in the onshore partner subclass.

When there are additional rules

If a person holds a bridging visa or is unlawful and has been already refused a visa (or had a visa cancelled), there are extra rules that may prevent the making of a valid visa application for any but a very limited set of visas.

If a person's last substantive visa had a condition on it saying "no further stay", no application can be made in Australia (with the exception of an application for a protection visa) unless the condition is waived. This prohibition continues to apply even if a visa has ceased.

People in these situations are strongly encouraged to seek legal advice promptly.

Who may be eligible for a visa?

People who have been refused a visa or had a visa cancelled since last entering Australia are restricted in the applications they can make.

Very few unlawful non-citizens can obtain permanent resident status. Those who may be eligible are:

- refugees who have not made an earlier application for protection;
- applicants for territorial asylum;
- people over 50 or members of their family who applied for a permanent visa in Australia and were refused on health grounds, who may be eligible to apply for a temporary medical treatment visa;
- partner visa applicants who have not previously applied for a partner visa which was refused.

People who are unlawful and have not been refused a visa or had a visa cancelled may be eligible for various visas. This may apply to:

- spouse, de facto or same-sex partners of Australian citizens, permanent residents or eligible New Zealand citizens;
- family members of Australian citizens, permanent residents or eligible New Zealand citizens;
- people holding a border visa (a mixed visa including temporary visas for spouses of Australian citizens, permanent residents or eligible New Zealand citizens);
- people who may be eligible for a resident return visa;
- former student visa holders in some circumstances;
- people who may be eligible for a visitor visa;
- dependent children of Australian citizens, permanent residents or eligible New Zealand citizens;
- applicants for any bridging visa;
- child visa applicants.

Review rights (see [28.230])

What a person can do if they are detained

An unlawful non-citizen who is detained should immediately contact a registered migration agent, a community legal centre or Legal Aid NSW. This must be done as soon as possible, preferably on the day of detention. Applications for some further visas may generally be made within a very limited time after being detained. The adviser may suggest applying for a bridging visa class E as soon as possible.

If immediate advice is not obtained, an unlawful non-citizen may miss the opportunity to regularise their status.

Time limits

After notification by the department of their entitlements to make applications within a certain time, unlawful non-citizens who are detained have only two working days to lodge an application for residency, or to request an additional five days to lodge an application.

An unlawful non-citizen who meets any of the criteria for residency listed in Who may be eligible for a visa? at [28.120] should therefore lodge an application immediately if possible.

Applications for protection visas may be made at any time (provided a previous application has not been made), but this should not be done lightly (see [28.220]).

People who do not meet residency criteria

Unlawful non-citizens who do not meet any of the criteria for residency should consider leaving voluntarily to avoid removal from Australia by the department.

Unlawfuls non-citizens who are removed are liable for the cost of travel out of Australia. People in this situation may also face an exclusion period before they can reapply to come to Australia. In certain compelling and compassionate circumstances, the exclusion period may be waived.

[28.130] Family applications in Australia

Generally, people who want to live in Australia are expected to apply to migrate from their country of origin. Some people, however, can "change their status" while in Australia temporarily and apply for visas that confer residency or lead to permanent residence.

Such people must meet family unit, health and public interest criteria (see [28.60]), and most must hold visas.

Qualifications

People who apply for permanent residence from within Australia must generally satisfy the same minimum visa requirements as offshore applicants (see [28.80]). For information about the entitlements of applicants who are unlawful or who hold a bridging visa, see [28.120].

Categories

The categories under which people can apply are:

- spouse and de facto spouse of Australian citizens and permanent residents;
- orphan unmarried relative under 18;
- contributory aged parent of a citizen or resident;
- dependent children of citizens or residents;
- skilled and business applicants, who must meet criteria for business skills, employer nomination, students or New Zealand citizens in Australia.

Visa numbers for all categories except spouse and children may be limited.

Review rights (see [28.230])

[28.140] Requests for ministerial discretion

Anyone in Australia whose application has been rejected by the Administrative Appeals Tribunal Migration and Refugee Division may write to the Minister for Home Affairs asking to have a visa issued in the "public interest" – which may be on strong compassionate or humanitarian grounds.

The minister has a discretion to issue a visa, but will only do so in exceptional circumstances. The Minister cannot be compelled to make a decision. If the minister decides to exercise this discretion, the visa considered most appropriate will be issued.

Guidelines

In determining whether there are unique and exceptional circumstances justifying the variance

of a decision by a merits review tribunal in the public interest, the Minister for Home Affairs has issued policy guidelines to departmental staff about the exercise of ministerial discretion. These can change so it is important to check the latest version. At the time of writing, policy considerations include:

- the personal and particular circumstances of a person, especially whether there is a significant threat to their personal security, human rights or human dignity should they return to their country of origin;
- circumstances that may trigger Australia's obligations as a party to the International Covenant on Civil and Political Rights (ICCPR), including a recognition of the primacy of the family;
- circumstances that may bring Australia's obligations as a party to the Convention on the Rights of the Child (CROC) into consideration;
- unforeseen or unintended consequences of the legislation;
- circumstances where the application of the law leads to unfair or unreasonable results;
- where there are strong compassionate circumstances such that a failure to recognise them would result in irreparable harm and continuing hardship to an Australian citizen or an Australian family unit (where at least one member of the family is an Australian citizen or Australian permanent resident);
- circumstances where exceptional economic, scientific, cultural or other benefit to Australia would result from the visa applicant being permitted to remain in Australia;
- the length of time the person has been present in Australia (including time spent in detention) and their level of integration into the Australian community;
- compassionate circumstances regarding the age and/or health and/or psychological state of the person such that a failure to recognise them would result in irreparable harm and continuing hardship to the person; or
- where the department has determined that the person, through circumstances outside their control, is unable to be returned to their country/countries of citizenship or usual residence.

Making a request for ministerial intervention

Requests for ministerial discretion can only be assessed after a decision is made by the Administrative Appeals Tribunal.

There is no form or application process for ministerial consideration. Applicants should write to the Minister for Home Affairs at Parliament House, Canberra. Applicants are encouraged to seek migration advice about this process, especially about their immediate visa status. If a request is made to the minister, it is good practice to tell Immigration Compliance about such a request.

Since 1 July 2009, permission to work will generally be granted where the applicant had permission to work on their visa at the time of the ministerial request and had remained lawful since their last substantive visa ceased. Otherwise permission to work will not be given while the applicant is waiting for a response. People are only entitled to a bridging visa for their first ministerial request. Second and further requests to the minister will not entitle the applicant to a bridging visa. This might mean that the person is detained, pending removal from Australia unless they are able to meet some other criteria for the grant of a bridging visa.

The minister only exercises this discretion in a very limited number of cases, and there is no further review or appeal mechanism.

Temporary visas

[28.150] Tourists and family visitors

All visitors must prove that they have a genuine intention to visit Australia temporarily.

Some visitors have a *risk factor* attached to their application. The risk factor may operate on the basis of statistical profiling, and should not be used as the sole basis on which to refuse a visa application. Applicants with a risk factor must show that there is very little likelihood that they will overstay their visa.

Visitors, students and temporary residents are given temporary visas that allow them to stay for

a certain period of time. If they want to stay longer, they must apply for an extension.

There are three types of temporary visas:

- visitor visas;
- student and trainee visas;
- temporary residence visas. This category includes temporary workers and working holiday-makers.

People considered at risk of overstaying

Some people who may find it difficult to get a visitor visa because they are considered at risk of overstaying include those who:

- have applied for permanent residence during the previous five years;
- are of a particular nationality, age, sex, marital status or occupation, or applied for a particular class of visa, or in a particular country (contact a community migration advice centre, the legal aid commission or a private migration agent to find out who is considered high risk);
- do not have a job or substantial assets or cannot demonstrate that they have good reasons to return to their home country.

[28.160] Entry criteria

All applicants for temporary entry to Australia must meet health and public interest criteria.

They will fail the public interest test if they have a recent criminal record or are considered a national security risk (for more about these requirements, see [28.60]).

Applicants will also fail the test if it seems likely that:

- they will overstay their visa (eg, because they have done so before); or
- they will breach conditions imposed on their visa, in particular a ban on work.

All temporary entrants must show that they have the funds to support themselves while in Australia.

Applicants will fail the health test if they have tuberculosis or a communicable disease that is a threat to public health.

[28.170] Visitor visas

People who want to visit Australia for a short time for holidays, business, a visit to relatives or friends, pre-arranged medical treatment or any other acceptable reason can apply for a visitor visa at any overseas post.

Some applicants may qualify for an electronic travel authority that can be granted by an approved person or organisation such as an airline.

Electronic travel authorities

Electronic travel authorities (ETAs) are electronically stored visas giving permission for a person to visit Australia for holiday or business purposes. There is no requirement that the travel authority be placed as a label or stamp in a passport. Electronic travel authorities can be applied for through the internet, travel agents and airlines.

Guidelines for visitor visas

Immigration policy sets out factors to consider for the genuine visitor criteria and the requirement that visitors have access to adequate funds for the period of their stay. Commonly, applicants will need to show there are adequate incentives for them to return home (such as employment, family connections), that they have adequate funds to pay for their visit, and that there are no previous breaches of immigration law by them or close family members.

Visitors over 70 years are expected to provide evidence of private health insurance covering their stay in Australia.

Review rights (see [28.230])

Period of stay

Visitor and tourist visas can be issued for a period of up to 12 months.

Applying for a further visitor visa

Visitors can usually apply for and be given another visitor visa online with the Department of Home Affairs provided they do not have a condition on their existing visa that says "no further stay" and that they still hold a valid visa.

If a "no further stay" condition has been placed on the visa or the person is unlawful, it is very important that confidential and competent advice is obtained as soon as possible. In these circumstances, it is very difficult to get an extension without strong reasons. People are generally only allowed a total stay of 12 months on each visitor visa, including applications for further visitor visas.

Rights in Australia

Right to study

Visitors may enroll and study in any course, including recreational courses, English language, business and computer training courses. Units that are part of a degree, diploma, trade certificate or other award can also be undertaken, provided they are under three months duration.

If the applicant intends to spend more than four weeks in a classroom environment, they may be required to have a chest X-ray.

Rights to social security and Medicare

Visitors are not usually entitled to social security income support or Medicare, with the exception that visitors from several countries including Great Britain, Finland, Ireland, Italy, Malta, the Netherlands, New Zealand and Sweden are eligible for Medicare assistance for immediately necessary medical treatment (but not for pre-arranged treatment) under reciprocal arrangements between Australia and their home governments.

Cancellation of visas

Visitors may have their temporary visa cancelled if they breach any of its conditions (eg, by working or studying without permission).

If their visa is cancelled, they become *unlawful* and they may be subject to exclusion periods of up to three years before they can re-enter Australia.

[28.180] Student visas

The student visa regulations were changed from 1 July 2016, so you should get advice about the new laws as there is a greater emphasis on time of application criteria particularly for those who are unlawful or on bridging visas. There are now two (reduced from eight) visas – one for students and one for guardians of students.

Apart from the reduction in types of student visas the other major change since 1 July is that the Department gives a risk rating to each education provider and country of citizenship to determine the level of financial and English language documentation. There is a useful Checklist Tool at https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-finder/study that guide you to the appropriate student visa category.

Registered courses

Registered courses include a wide range of full fee award and non-award courses offered by primary, secondary and post-secondary institutions.

Registered courses are listed in the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS). The web address is http://cricos.education.gov.au/.

Student Guardian visas can be made by the parent, guardian or a relative of a person holding a student visa to reside in Australia with the student visa holder. If the student visa holder is over 18, exceptional reasons must be provided by the Student Guardian visa applicant. Policy states that such reasons may include religious or cultural grounds or where the student requires a carer on medical grounds.

Rights in Australia

Student visas and student guardian visas have conditions placed on the visa such as the right to work, to a further student visa, and to have their dependents enter and work in Australia.

Permission to work

Permission to work is attached to the grant of the visa.

A student may work 40 hours each fortnight during term time. Students can access visa and work entitlements online through the Department of Home Affairs Visa Entitlement Verification Online (VEVO) system. If the student consents, employers can also access VEVO (see https://immi.homeaffairs.gov.au/visas/already-have-a-visa/check-visa-details-and-conditions/check-conditions-online/visa-holders).

Visa conditions

Students are subject to visa conditions that require satisfaction of course requirements which generally requires at least 80% attendance. Students who do not maintain satisfactory performance may have their visas cancelled automatically or cancelled after further consideration by the Department of Home Affairs.

Students must ensure that they have access to correct advice and that they maintain their study commitments. Visa cancellation may have very serious consequences.

Students and education providers have rights and responsibilities contained in the *Education Services for Overseas Students Act 2000* (Cth), or *ESOS Act*, including the monitoring by providers of the student's attendance and course progress.

Applying for permanent residence

Students may be able to proceed to permanent residence (see [28.90]).

Cancellation of visas

Student visas are cancelled if course requirements are not satisfied, and may be cancelled if visa conditions are breached.

Students who have their visas cancelled in Australia may have a right of review to the Migration and Refugee Division of the Administrative Appeals Tribunal and should seek immediate advice about their legal status.

Review rights (see [28.230])

[28.190] Temporary workers

Working holiday-makers

The *working holiday-maker* and *work and holiday* visas allow people aged from 18–30 to holiday and work for up to six months with each employer in Australia. Work and holiday visas are discussed in Work and holiday at [28.190].

Working holiday-maker visas allow young people to come to Australia to work and travel for 12 months. The visa can be extended for a further year if the working holiday worker undertakes specified seasonal work in regional Australia for three months during the time that they hold their first working holiday visa. All seasonal work performed on or after 1 December 2015 must be paid.

If the applicant is married, in a de facto (including same-sex) relationship, each person must qualify independently.

Applicants with dependent children may not bring the children to Australia with them and must apply using the paper application form rather than on the internet.

Reciprocal agreements (this can change so check the Department of Home Affairs website for updated information, see https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/work-holiday-417)

Australia has reciprocal working holiday arrangements with Belgium, Canada, Republic of Cyprus, Denmark, Estonia, Finland, France, Germany, Hong Kong, Republic of Ireland, Italy, Japan, Republic of Korea, Malta, Netherlands, Norway, Sweden, Taiwan and the United Kingdom.

Applicants holding a passport from most of these countries can apply for their first working holiday visa from any place outside Australia, including, for most applicants, over the internet. Applicants from the Republic of Cyprus, Hong Kong (including the holder of a British national overseas passport), Japan, the Republic of Korea, Malta, or Taiwan must apply in the country where the passport was issued.

Period of stay

Working holiday-makers are given a single entry visa valid for 12 months for their first working holiday visa. If the person works in a specified industry for at least three months during the time of their first working holiday visa, they will be entitled to apply for a further working holiday visa and stay in Australia for an additional 12 months.

Change of status

Working holiday visa holders can apply for another working holiday visa if they satisfy the conditions discussed above. Applicants wishing to stay longer than the period of their working holiday visa may be able to obtain another kind of visa permitting a further stay in Australia.

Applicants who meet the criteria for another kind of temporary visa such as a temporary business entry visa may be able to change their status. There are limited other possibilities for some nationalities so check the options at https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/work-holiday-417.

Rights in Australia

Right to work

Working holiday-makers can work for as long as they like during the period of the visa. However, they can only work for six months with one employer (whether full- or part-time) unless they get written permission from the Department of Home Affairs.

Right to social security
Working holiday-makers are not entitled to social security income support.

Visa cancellation
The visa may be cancelled if the holder breaches any condition attached to it. They then become an *unlawful non-citizen*, and may face exclusion periods before they can re-enter Australia.

There are special rules allowing temporary workers in a number of occupations to stay in Australia. Categories are discussed below.

Work and holiday
The Work and Holiday visa allows young tertiary educated people from specified countries to holiday in Australia and supplement their income through work in Australia. Australia has current agreements with Argentina, Austria, Chile, China, Czech Republic, Greece, Hungary, Indonesia, Israel, Luxembourg, Malaysia, Peru, Poland, Portugal, San Marino, Singapore, Slovak Republic, Slovenia, Spain, Thailand, Turkey, Uruguay the USA and Vietnam. Details may be seen at https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/work-holiday-462.

Applicants for this visa must be between 18 and 30, have a specified kind of academic qualification which varies depending on the country, and functional English.

The visa holder cannot work for more than six months with any one employer, and they can study for up to four months. The visa lasts for 12 months.

Pacific Seasonal Worker Pilot Scheme
The Pacific Seasonal Worker Pilot Scheme commenced operation in 2009. The scheme operates under the Special Program visa and is limited initially to the horticulture industry and is available to citizens from Fiji, Kiribati, Nauru, Papua New Guinea, Samoa, Solomon Islands, Timor-Leste, Tuvalu and Vanuatu. The aim of the scheme is to address shortfalls in the Australian seasonal and harvest industries and therefore to benefit employers and the Australian economy by ensuring a ready supply of labour. The scheme is also intended to benefit the economic development in the worker's country of origin as it is expected that remittances will be sent home. Further, the worker may develop new skills gained through the employment in Australia and use those skills on return. Workers will be able to apply to come back to Australia although they are restricted by policy to seven months out of every 12 months in Australia. Workers are not allowed to apply for any other visa while they are in Australia and they are prohibited from bringing family members with them to Australia. More details are at https://dfat.gov.au/geo/pacific/engagement/pacific-labour-mobility/Pages/default.aspx.

Skilled and business applicants
Skilled and business applicants can apply for short or long-term visas.

Short-term visas available for up to three months are the Electronic Travel Authority (Business Entrant) visa available to passport holders from specified countries, the eVisitor visa available to passport holders from the European Union and other European countries, Business (Short Stay) visa, Sponsored Business Visitor (Short Stay) visa for people who are sponsored, and the APEC Business Travel Card for business people in the Asia–Pacific Economic Cooperation region.

Longer-term visas are the *labour agreement*, *business sponsorship* and *invest Australia supported skills* (IASS) visas.

Labour agreements
Labour agreements are formal contracts between the government (represented by the Department of Home Affairs) and an employer or industry. They allow an employer to recruit a set number of overseas workers without having to individually complete entire visa applications and are often used where there is a labour market or skill shortage.

Agreements may be permanent or temporary.

Business sponsorships
This scheme allows employers to become approved sponsors to employ overseas workers who are appropriately skilled for temporary employment in Australia. A minimum salary must be paid to the employee and the salary must be comparable to average salaries in that occupation. Sponsorship is only possible for a limited number of occupations. For some occupations, only a two year visa will be granted, whereas for others a four year visa is available. There are also requirements for sponsors in terms of training benchmarks and immigration history if any. The area can be quite technical and

is subject to change so advice about the current legal requirements needs to be sought.

The requirements for the Temporary Skill Shortage visa can be found on the website of the Department of Home Affairs at https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/temporary-skill-shortage-482.

Requirements

Sponsored employees must have an occupation that is recognised by the department as being suitable for the scheme.

To qualify, the visa applicant must have complied with previous visa conditions.

A further visa is possible for people who continue to meet all relevant criteria.

Rights in Australia

Work rights

Unless they get permission from the Department of Home Affairs to change, temporary workers can only work at the job for which they were originally sponsored to come to Australia.

Right to bring family

Temporary workers can usually bring their partner and dependent children to Australia with them. Their partner usually has permission to work.

Right to study

Workers or their families can study in Australia, provided the course is non-formal and no more than three months long.

School students

Children of temporary entrants may attend primary or secondary school. Specific advice about visas should be obtained as the rules vary according to the visa type and length of stay. If study for more than three months is intended, applicants may need to apply for a student visa, depending on their visa conditions.

Right to social security payments

Temporary workers are not usually entitled to social security income support or Medicare, though visitors from several countries including Belgium, Finland, Ireland, Italy, Malta, the Netherlands, New Zealand, Norway, Slovenia, Sweden and the United Kingdom may have access to Medicare under reciprocal arrangements between Australia and their home governments. These agreements usually cover emergency and necessary medical treatment only. Further details are at https://www.humanservices.gov.au/individuals/services/medicare/reciprocal-health-care-agreements/visitors-australia/medical-care-visitors-australia#a1.

Cancellation of visas

Temporary workers may have their visa cancelled if they breach any of the conditions attached to it.

If this happens, they become unlawful non-citizens and subject to exclusion periods of up to three years before they can re-enter Australia.

[28.200] Other temporary visas

In addition to visas for tourists and temporary business entry, there are a number of visas for applicants with a specific expertise or personal characteristics.

Some visas allow the visa holder to undertake workplace training or upgrade their professional skills.

Training and research

People can come to Australia for occupational training, research or professional development activities provided they are nominated by an approved organisation.

Self-supporting retirees

Applicants must be 55, have no dependents other than a spouse or de facto spouse, invest in State or Territory government bonds, and maintain health insurance cover. They may work up to 40 hours a fortnight. There is no requirement for sponsorship or nomination.

This visa is for people who:

- wish to spend some retirement years in Australia – usually up to four years;
- have no dependents (other than a spouse);
- are able to be self-supporting in Australia without cost to Australia's social and welfare services.

Temporary visas for specific people or occasions

Other temporary visas:

- the Temporary Work International Relations Visa work or undertake an activity in Australia which serves Australia's international relations interests including employees of foreign governments;

- the Temporary Work (Short Stay Activity) visa is for applicants to do short term non-ongoing highly specialised work or to take part in non-ongoing, non renumerated cultural or social events at the invitation of an Australian organisation. Family members of these visa holders do not have permission to work. There is also the possibly to obtain this visa if there are "compelling circumstances affecting Australia's interest". These visas are not sponsored;
- the Temporary Work (Long Stay Activity) visa is for the temporary entry of those people who intend to work in a skilled position in Australia under an exchange agreement between an organisation in Australia and an organisation overseas, sportspersons, religious workers and domestic workers of certain senior executives of overseas organisations or foreign government agencies;
- the Temporary Work (Entertainment) is for people working in the entertainment industry, such as performers, film crews, and support personnel in the entertainment industry. These visas require a sponsor.

The following four were introduced from 19 November 2016:

- Temporary Work (Short Stay Specialist) visa;
- Temporary Work (International Relations) visa;
- Training visa;
- Temporary Work (Entertainment) visa;
- Temporary Activity visa.

[28.210] The Australian human trafficking visa framework

There are two visas for victims including suspected victims of trafficking and slavery and slavery-like practices – the Bridging Visa F and the Referred Stay (Permanent) Visa.

The BVF facilitates the temporary stay of suspected trafficked victims, while the Referred Stay visa enables trafficked victims to remain permanently in Australia. The BVF can be granted to someone who is unlawful and identified by the federal or state/territory police as a suspected victim of trafficking and to trafficked victims who have agreed to participate in a criminal justice process. The first BVF is granted for up to 45 days and can also be granted also to immediate family members. A further BVF may be considered for suspected victims of human trafficking who do not hold a visa (other than the initial BVF) to allow them to remain lawfully in Australia for a further 45 days, bringing the total to 90 days. A further BVF is generally granted to minors and suspected victims of forced marriages if they would otherwise become unlawful.

Bridging Visa F holders and those referred for such visas are entitled to case management services and social support. BVF holders are eligible for Special Benefit and the Adult Migrant Education Program. The Referred Stay (Permanent) Visa is for trafficked victims who would be in danger if they returned to their home country. The (trafficked) person must be identified by the Attorney Generals Department as having made a contribution to, and cooperated closely with, an investigation in relation to another person who was alleged to have engaged in human trafficking, slavery or slavery-like practices. The applicant does not need to have held a BVF before being invited to apply for a Referred Stay visa.

Criminal justice stay visa

If law enforcement officers make a decision to continue to investigate a possible crime, a *Criminal justice stay visa*, which also entitles the holder to social support, will be issued.

Victims of trafficking or slavery may also be able to meet the definition of a refugee or complementary protection, and be entitled to a permanent protection visa (see [28.220]).

Lodging an application

There are specific rules about each particular kind of visa application. The following information is very general. A person interested in a specific visa should check the requirements for that visa with the Department of Home Affairs, or with one of the agencies listed in [28.290]. Many applications are now done online on the Department's Immiaccount. The following mainly relates to paper applications:

1. If sponsorship is needed, the sponsor completes a form from the Department of Home Affairs and (in almost all cases) sends it to the applicant overseas to submit with their application.

2. The applicant completes an application form in English, answering all questions. They can get help to fill it in, but must sign it themselves and should therefore ensure that all information is correct. If an agent is assisting, they must sign the declaration on the form. All documents should be originals or certified copies. If some of the necessary information and documents are unavailable, the applicant can provide additional information up until a decision is made. If the applicant is a minor, the application should be signed by their legal guardian.
3. Copies should be made of all documents lodged. If forms can be lodged in Australia, they are lodged at an appropriate office of the Department of Home Affairs for that particular kind of application (check with the department about where an application should be lodged). Offshore application forms are generally lodged at an Australian embassy, consulate or high commission, but some kinds of visa applications need to be lodged in specified places. Check with the Department of Home Affairs about where to send the application. The applicant pays the fee or attaches the receipt if the fee has already been paid in Australia. Without the fee or receipt, the application is invalid. Applicants in Australia can apply for appropriate health and character testing and send the results to the department. Offshore applicants wait until they are asked for tests (the health test is only valid for 12 months for offshore applicants).
4. The application is assessed. Further information may be sought, which should be given within the time and in the way the department specifies. The applicant should quote their reference and receipt numbers and date of birth as well as name and address when communicating with the department, which will not be responsible for missing letters unless this information is included. A medical examination may be required. If there is a right of appeal, the applicant is notified if the department or overseas post has received information that would result in a refusal. The applicant has a right to respond to this information.
5. People applying in Australia must inform the department of any change in circumstances between the date of application and the date the visa is granted. Overseas applicants must inform the overseas post of any change in circumstances between the date of application and the day on which they enter Australia. If there is a change, they may no longer be eligible for the visa.
6. Unsuccessful applicants receive a letter of refusal, giving reasons for refusal and information on rights of appeal, if any.

Refugees

[28.220] Australia is a signatory to the 1951 United Nations Convention Relating to the Status of Refugees and the 1967 Protocol relating to the Convention. Australia has also signed many other International Treaties however only a few provide what is called a non-refoulement obligation like the Refugee Convention. These are the *International Convention on Civil and Political Rights* (ICCPR), *Convention Against Torture* (CAT) and the *Convention on the Rights of the Child* (CROC).

The Australian Program has onshore visas called a Protection Visa (Temporary, or Permanent) and five offshore visas. Refusal or cancellation of a protection visa onshore gives rise to review rights (see [28.230]) but there is no merits review for the refusal of visas in the offshore subclasses.

The total number of visas issued under the refugee and humanitarian program from 2019/2020 was 18,750 visas – including both onshore and offshore visas.

Refugee law in Australia is complex, and one of the most litigated areas of federal law. As a consequence, there are many important cases and many changes to the *Migration Act* and *Regulations*, which may affect people differently depending on when they made an application. It is not possible to provide a complete overview of all of the variables so it is important to get competent advice. While any registered migration agent can advise in this area, not many have experience of the complexities in this area.

Who is a refugee?

Article 1A of the *Refugees Convention* defines a refugee as 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 as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Australia has enacted a number of provisions in the *Migration Act*. There are also a number of sections in the *Migration Act* which prevent the lodgement of a Protection Visa onshore. The main elements of the refugee definition can be summarised as follows:

- alienage – country of citizenship or former habitual residence;
- well-founded fear of persecution;
- link or nexus to one of the five Convention grounds;
- not be a person excluded from protection.

Each of these elements is separately defined in the Act and you need to address each element.

Protection visas – onshore applications

In order to meet the criteria for the grant of a protection visa, the person must firstly not be barred from applying. If they arrived by boat without a visa, they are known in law as Unauthorised Maritime Arrivals (UMA) and are barred from lodging an application for any visa unless the Minister personally intervenes and allows them to apply. Even those arriving with a visa may be prevented from applying onshore if they have more than one nationality or citizenship.

There are two temporary protection visas and one permanent protection visa. The two temporary protection visas are the subclass 785 Temporary Protection Visa (TPV) and the subclass 790 Safe Haven Enterprise Visa (SHEV). The permanent visa is the subclass 866 Protection Visa.

If you arrive in Australia without a visa, or have previously been granted a TPV or SHEV or certain other temporary humanitarian visas, then you are ineligible to apply for the permanent protection visa. Those on the TPV and SHEV are unable to progress towards a permanent protection visa in any circumstances.

The TPV is a three year visa only and does not permit a holder to sponsor any family members such as spouse or dependent children from offshore. It also does not permit the holder to apply for any other visa, except another TPV or a SHEV, if granted permission.

The SHEV is a five year visa and also does not permit a holder to sponsor any family members such as spouse or dependent children from offshore. There is a possibility of applying for a group of 28 different visas (temporary or permanent but not a protection visa) if the holder has worked or studied in designated areas for 42 months while they held a SHEV. Currently the designated areas include parts of NSW, Victoria, WA and Queensland, and all the ACT, SA Tasmania. The designated areas are by postcode and can be found on the DHA website (see https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/safe-haven-enterprise-790/safe-haven-enterprise-visa-regional-area).

The permanent protection visa does allow a holder to sponsor their family members (spouse and dependent children) and also provides a pathway to Australian Citizenship.

The onshore process is complex and the law that applies differs according to whether you apply a before or from 16 December 2014. All applicants must complete the health and character requirements but a visa will not be refused in the applicant does not pass the health test. However, a failure to meet the character requirements can lead to a refusal or even later to a cancellation of a visa.

Identity documents are very important and if an applicant is unable to present any genuine form of identity after being requested, they may be refused a visa unless they can establish compelling reasons for their failure to provide a genuine identity document.

Applicants may be refused a visa if they have a right to enter and reside in a third country. This maybe because they have a visa for study or work in that other country, or because of international agreements between certain countries such as India and Nepal, or the European Union Countries.

The common criteria for the temporary and permanent visas are that an applicant must meet the definition of a refugee in the *Migration Act* or the definition of Complementary Protection which addresses the non-refoulement obligations of the ICCPR, CAT and CROC as defined in the *Migration Act*. An applicant who is the member of the family unit of someone who meets either of these criteria is also eligible to be granted a visa, if they are onshore and not otherwise precluded from lodging an application.

The forms are the 866 form for the Temporary Protection Visa and the Permanent Protection visa, for the SHEV visa. The same fee of $35 applies to the TPV and SHEV but $40 for the permanent protection visa, unless the person is applying from Immigration detention then there is no fee.

Fast Track applications

Nearly everyone who arrived by boat without a valid visa from 13 August 2012, until 1 January 2014, are subject to the Fast Track system. There are few exceptions to this and you should get advice. This system means that applications while subject to the same visa requirements as the non-fast track applicants for protection visas, have a limited review to the Immigration Appeals Authority (IAA), not to the Administrative Appeals Tribunal (AAT).

There are exclusions from review by the IAA in certain circumstances, and such people are designated as Excluded Fast Track Review Applicants. Such people will not have any form of merits review but they may have review right in the courts on the ground of jurisdictional error (see [28.250]).

With Fast Track review cases heard in the IAA, the reviewer does not need to consider any new information unless it is "exceptional". Also, the IAA does not need to invite an application to a hearing or even interview them at all. This means it is very important for an applicant to present all their claims at the primary stage. There is no equivalent power for ministerial intervention after an IAA case as there is for the AAT case. The only power is in s 195A where the minister can grant a visa if a person is in detention or s 46A for an Unauthorised Maritime Arrival not in detention, but these powers are not compellable nor reviewable.

Children born in Australia to Fast Track applicants will be considered Unauthorised Maritime Arrivals, even though they did not arrive by boat. This means they are prevented from lodging an application for any visa unless the minister grants them permission.

Country information research

Refugee cases depend heavily on relevant and recent country information. Much time is spent in reading reports in paper format or online, and the more recent the better, as this is most relevant for a case. Many sources are available, such as Human Rights Watch, Amnesty International, the US State Department, the UK Home Office, as well as the many specialist websites that exist for in refugee and human rights groups. An excellent source is also the UNHCR website Refworld found at www.refworld.org. The website contains up-to-date reports and cases from all over around the world.

Offshore applications

Offshore applications are split into for five different categories:

- refugee (subclass 200 – need to meet the Refugee definition);
- in-country special humanitarian (subclass 201 – a very limited class of people currently being those who have assisted the Australian Defence Forces in Iraq or Afghanistan in roles such as interpreters);
- global special humanitarian (subclass 202 – for those at risk of substantial discrimination amounting to a gross violation of human rights but not necessarily meeting the refugee requirements);
- emergency Rescue (subclass 203 – a limited group of people requiring urgent and compelling resettlement in Australia);
- women At Risk (subclass 204 – a female outside her home country without a male relative for protection who is in danger of victimisation, harassment or serious human rights abuse).

Most visas in this class of visas are issued to those proposed for resettlement by the UNHCR and accepted for resettlement by Australia.

A small number of visas are available in what is known as the Community Support Program. Further details can be found at https://immi.homeaffairs.gov.au/what-we-do/refugee-and-humanitarian-program/community-support-program/how-to-apply. The Scheme provides for the payment of significant application and processing fees for applicants who are supported by family members already in Australia. The number of visas is limited to around 500 in a year and there must be sponsorship by an approved community organisation. These organisations will charge a fee.

Offshore processing in Nauru or Manus Island

Since 19 July 2013, Australia has sent certain people who arrive by boat without a visa to Nauru or Manus Island, in Papua New Guinea for refugee assessment. People in this category will be assessed by the laws of Nauru or Papua New Guinea respectively. Australian law for refugee applications does not apply.

Not everyone who arrived by boat without a visa since 19 July 2013 has been sent to Nauru or Manus Island. This may be due to capacity

in those places or other reasons. People who are brought to Australia from Nauru or Manus Island for medical treatment are prevented from lodging any visa application onshore.

Review rights

[28.230] The Administrative Appeals Tribunal – Migration and Refugee Division

Some applicants who have received an adverse decision from the Department of Home Affairs may have the right of merits review to the Migration and Refugee Division of the Administrative Appeals Tribunal. Very strict time limits apply, which cannot be extended. Different time limits apply depending on whether a visa is refused or cancelled, and where the visa applicant is located.

A review fee of $1,787 must be paid. This may be partly waived if the applicant can show financial hardship. If the case is successful, half the fee is refunded unless the applicant only paid $893.50 due to a partial waiver being granted.

No fee applies in relation to a bridging visa.

Time limits

Applications for review must be made within a strict time limit. What the time limit is will depend on:

- the kind of visa that has been refused;
- the whereabouts of the visa applicant.

It is essential that review applications be lodged within the set limit. The letter from the Department of Home Affairs notifying the person about the decision will have detailed information about time limits and review rights.

The Administrative Appeals Tribunal website (www.aat.gov.au) has information about who can apply for review. Applications can be lodged online, by fax, post or in person. However, as strict time limits apply, it is important to get advice about when you have lodged your review. It is not possible to get an extension of a review time.

[28.240] The Administrative Appeals Tribunal – General Division

The Administrative Appeals Tribunal reviews:

- decisions to refuse or cancel visas on character grounds;
- decisions to deport under the criminal deportation provisions;
- citizenship decisions;
- decisions made under the freedom of information legislation.

The tribunal also reviews decisions made by the Migration Agents Registration Authority (MARA) in relation to migration agents.

Time limits

Applications to the tribunal must be made within a strict time period and this period cannot be extended except in exceptional circumstances for certain applications to the Administrative Appeals Tribunal.

See the tribunal's website (www.aat.gov.au) for more information.

[28.250] Judicial review by the courts

Judicial review is available in very limited circumstances to the Federal Circuit Court, the Federal Court or the High Court. In most cases, appeal is limited to the grounds of a jurisdictional error.

[28.260] Ministerial discretion

The Minister for Home Affairs can make a decision more favourable to an applicant if the applicant has been to a review tribunal (see [28.140]).

[28.270] The Commonwealth Ombudsman

The Commonwealth Ombudsman may examine cases of bad administration.

The Department of Home Affairs has given the Ombudsman special powers to investigate and report in relation to immigration matters.

See www.ombudsman.gov.au for more information.

[28.280] The Australian Human Rights Commission

The Australian Human Rights Commission may investigate any case that seems to involve matters of human rights.

See www.humanrights.gov.au for more information.

Office of the Migration Agents Registration Authority

The Office of the Migration Agents Registration Authority is responsible for registering migration agents and regulating their professional behaviour, and investigates complaints about registered migration agents.

See www.mara.gov.au for more information.

Unregistered advisers

Unregistered advisers may be investigated by the Federal Police.

Contact points

[28.290] If you have a hearing or speech impairment and/or you use a TTY, you can ring any number through the National Relay Service by phoning **133 677** (TTY users, chargeable calls) or **1800 555 677** (TTY users, to call an 1800 number) or **1300 555 727** (Speak and Listen, chargeable calls) or **1800 555 727** (Speak and Listen, to call an 1800 number). For more information, see www.communications.gov.au.

Non-English speakers can contact the Translating and Interpreting Service (TIS National) on **131 450** to use an interpreter over the telephone to ring any number. For more information or to book an interpreter online, see www.tisnational.gov.au.

Migrant resources centres are grouped under a separate heading.

Changes are expected to the websites for many NSW government departments that were not available at the time of printing. See www.service.nsw.gov.au for further details.

Administrative Appeals Tribunal
www.aat.gov.au
ph: 1800 228 333

Amnesty International Australia
www.amnesty.org.au
ph: 1300 300 920 or 8396 7670

The Asylum Seekers Centre
www.asylumseekerscentre.org.au
ph: 9078 1900

Australasian Legal Information Institute (AustLII)
www.austlii.edu.au

Australian Human Rights Commission
www.humanrights.gov.au
ph: 9284 9600
Complaints infoline
ph: 1300 656 419
General enquiries and publications
ph: 1300 369 711

Australian Passport Office
www.passports.gov.au
ph: 131 232

Centrelink Multilingual Service
www.humanservices.gov.au
ph: 131 202

Ethnic Communities' Council of NSW
www.eccnsw.org.au
ph: 9319 0288

Foreign Affairs and Trade, Department of
www.dfat.gov.au
ph: 6261 1111

Gay and Lesbian Immigration Task Force NSW
www.glitf.org.au

Human Rights Watch
www.hrw.org

Immigrant Women's Speakout
www.speakout.org.au
ph: 9635 8022

Immigration Advice and Application Assistance Scheme (IAAAS)
For information on this scheme, see www.ssi.org.au/services/iaaas
www.ssi.org.au/images/IAAAS/iaaas_general_factsheet_english.pdf
IAAAS Service Providers

Immigration Advice and Rights Centre (IARC)
www.iarc.asn.au
IARC advice line
ph: 8234 0799
admin
ph: 8234 0700

Department of Home Affairs
www.homeaffairs.gov.au
ph: 131 881
Citizenship enquiries
ph: 131 880
Client service feedback line
ph: 133 177
Translating and Interpreting Service
ph: 131 450
Employers' Immigration Hotline
ph: 1800 040 070
Immigration Dob-in/Border WatchService
ph: 1800 009 623

Jesuit Refugee Service Australia
www.jrs.org.au
ph: 9356 3888

Legal Aid NSW
www.legalaid.nsw.gov.au
Law Access NSW (free legal helpline)
ph: 1300 888 529
Legal Aid NSW Advice Service
Head Office (Central Sydney)
ph: 9219 5000
Other Metropolitan legal aid services:
Bankstown
ph: 9707 4555
Blacktown
ph: 9621 4800
Burwood
ph: 9747 6155
Campbelltown
ph: 4628 2922
Fairfield
ph: 9727 3777
Liverpool

ph: 9601 1200
Parramatta
ph: 8688 3800 or 9891 1600
Penrith
ph: 4732 3077
Sutherland
ph: 9521 3733
For information on specialist services and regional offices, see Contact points of Chapter 4, Assistance With Legal Problems.

Migration Institute of Australia
www.mia.org.au
ph: 9249 9000

Multicultural NSW
www.multicultural.nsw.gov.au
ph: 8255 6767

Office of the Migration Agents Registration Authority (MARA)
www.mara.gov.au
General Enquiries
ph: 1300 226 272 or 9078 3552
Registered Agents
ph: 1300 660 026 or 9078 3551
MARA oversees registration of migration agents and investigates complaints about them. It does not give migration advice.

Ombudsman, Commonwealth
www.ombudsman.gov.au
ph: 1300 362 072

Refugee Advice and Casework Service
www.racs.org.au
ph: 8355 7227

Refugee Council of Australia
www.refugeecouncil.org.au
ph: 9211 9333

Service for the Treatment and Rehabilitation of Torture and Trauma Survivors (STARRTS)
www.startts.org.au
Head Office
ph: 9646 6700
Auburn
ph: 9646 6666
Blacktown
ph: 9854 7300
Coffs Harbour
ph: 6650 9195
Liverpool
ph: 8778 2000
Newcastle
ph: 4923 7194 or 4923 7190
Wagga Wagga
ph: 6921 4403 or 6971 7640
Wollongong
ph: 9057 7380

United Nations
www.un.org

Welfare Rights Centre (National Welfare Rights Network)
www.welfarerights.org.au
Sydney office
www.welfarerightscentre.org.au
ph: 9211 5300 or 1800 226 028
Wollongong office
www.illawarralegalcentre.org.au
ph: 4276 1939

Migrant Resource Centres

Advance Diversity Services (formerly St George Migrant Resource Centre)
www.advancediversity.org.au
ph: 9597 5455

Auburn Diversity Services
www.adsi.org.au
ph: 8737 5500

Eastern Suburbs, Sydney City, Inner West (Sydney Multicultural Community Services)
www.sydneymcs.org.au
ph: 9663 3922

Ashfield, Bankstown, Burwood, Canada Bay, Canterbury, Marrickville, Strathfield – Metro Assist (formerly Migrant Resource Centre)
www.metromrc.org.au
Head office (Campsie)
ph: 9789 3744
Ashfield
ph: 9798 1700
Condell Park Office
ph: 9790 1766

Community Migrant Resource Centre (Parramatta)
www.cmrc.com.au
ph: 9687 9901

Fairfield Migrant Resource Centre (Cabramatta Community Centre)
www.cabracc.org.au
ph: 9727 0477

Illawarra Multicultural Services
www.ims.org.au
ph: 4229 6855

Liverpool Migrant Resource Centre
www.lmrc.org.au
ph: 8778 1200

Macarthur Diversity Services Initiative
www.mdsi.org.au
ph: 4627 1188

Northern Settlement Services
(Newcastle and Hunter region)
www.nsservices.com.au
ph: 4969 3399

Sydwest Multicultural Services
www.sydwestms.org.au
Blacktown
ph: 9621 6633
Mt Druitt
ph: 9625 0455
Penrith
ph: 9621 6633