Migration and Refugee Division Commentary

Cancellation of visas

Current as at 19 September 2019

Visa Cancellations - Overview

CONTENTS

Overview

The *Migration Act 1958* (the Act) and Migration Regulations 1994 (the Regulations) contain a range of provisions for cancelling visas in specified circumstances and on specified grounds.[1]

A visa that is cancelled ceases to be in effect on cancellation.[2] If its former holder is in the migration zone and does not hold another visa that is in effect, he or she becomes an unlawful non-citizen.[3]

Some cancellation powers can only be exercised on temporary visas, some only on people who are outside Australia, some require prior notice, and some can only be exercised by the Minister personally. Most are discretionary ('may cancel'), some are mandatory ('must cancel'), and other cancellations occur automatically by operation of law ('is cancelled'). Not all are reviewable – for example, an automatic cancellation is not a decision so it is not reviewable. See Appendix 1 – Cancellation powers table for the cancellation powers available under the Migration Act and key characteristics, including whether they can be reviewed by the AAT.

There are also some powers to revoke visa cancellation decisions.[4] The Minister also has powers to set aside some cancellation-related decisions and related merits review decisions.[5]

Cancellation and revocation powers

General features of cancellation and related powers

The Minister has a range of powers to cancel visas. The various cancellation powers are not limited or otherwise affected by each other.[6] Therefore, if the relevant circumstances exist, the Minister could consider cancelling a visa under more than one power.[7]

There are a number of features or characteristics shared by many (or all) cancellation powers, including:

- Decisions about cancelling visas (or revoking cancellation) are taken to be made when the Minister records the decision, and the Minister cannot change or re-open the decision after that time.[8]

- Cancelling a single visa that is held by more than one person affects all visa holders.[9] Where multiple visa holders are related, cancelling the primary visa holder's visa may result in a consequential cancellation of other related visas.[10]

[1] Most visa cancellation powers are in Subdivisions C-H of Part 2 Division 3 of the Act, with character-related powers in Part 5 Division 2.
[2] s.82(1).
[3] s.15.
[4] See below under 'Other cancellation and revocation powers'
[5] See below under 'Other cancellation and revocation powers'
[6] s.118.
[7] For example, a visitor visa holder may have made an incorrect statement in his or her visa application, and, since arrival in Australia, may have worked without permission in breach of a visa condition. In such circumstances, the cancellation powers in both s.109 (visas based on incorrect information) and s.116 (general visa cancellation power - for breach of condition) may be available.
[8] s.138. The reference to not being able to revoke the decision would give way to express powers for the Minister to revoke a cancellation decision.

- A visa can be cancelled even if it was not validly granted. [11]

A number of powers have specific requirements for advance notice to be given of the cancellation, in particular for visa cancellations under ss.109, 116, 134 and 137Q.[12] In general terms, these provisions require the visa holder to be invited to show that the ground for cancellation doesn't exist or the visa otherwise should not be cancelled. Notice is usually in writing but in some cases might be given orally.[13]

Other cancellation powers specifically provide that the visa may be cancelled 'without notice', but this would not prevent the Minister from notifying the visa holder in advance. Others do not specify any provisions for notice but say that natural justice applies to the cancellation, and the Department's policy indicates they issue a notice of intention to consider cancelling these visas.[14] Other powers specifically say that natural justice does not apply[15]. Most powers require the person whose visa was cancelled to be notified after the decision to cancel their visa.

In some cases, often where the visa cancellation is mandatory or happens without notice, there are associated powers to revoke the visa cancellation. Some powers can only be exercised by the Minister personally. Some of the Minister's powers to cancel visas can be exercised only after a delegate or the Tribunal has made a decision to set aside or revoke a cancellation decision.

Summary information about the various cancellation and revocation powers is in Appendix 1 – Cancellation powers table.

Each of the cancellation and related revocation powers is described below, looking first at MRD reviewable powers, then other cancellation and revocation powers.

MRD-reviewable cancellation powers

s.109 – Incorrect information

A visa may be cancelled under s.109 where the Minister is satisfied that there has been non-compliance by the visa holder with one or more obligations which are broadly about giving correct information and continuing to update information when it is not correct.[16]

When considering whether to cancel under s.109, the decision maker must first decide whether there has been non-compliance by the visa holder in the way described in the notice of intention to consider cancellation, issued under s.107.[17] The decision is therefore restricted to considering the particular provision(s) set out in the notice and whether there was non-compliance in the way described, and if so, whether the visa should be cancelled. In considering whether the discretion to cancel the visa

[9] s.139.
[10] See e.g. the consequential cancellation powers in ss.134, 134F, 137T, 140.
[11] See e.g. *Meng v MIAC* [2007] FMCA 173 (Lloyd-Jones FM, 23 February 2007) where it was observed that the cancellation powers in Division 3 of the Act are applicable to all visas, including visas where the decision to grant the visa was, or may have been, affected by a jurisdictional error: [16]-[18], [34].
[12] The notification provisions are in ss.107, 119, 135 and 137R respectively.
[13] See, e.g., s.119(2) and (3) which provide that the Minister may notify in a way that he considers appropriate, including orally, if there is no prescribed way. No way of notifying is prescribed for s.119.
[14] See e.g. Policy – MIGRATION ACT > Character and security instructions > s501 – The character test, visa refusal and visa cancellation – 3. Procedural instruction – 3.3 Natural justice
[15] E.g. s.501BA(3). In *Ibrahim v MHA* [2019] FCAFC 89 (White, Perry, Charlesworth JJ, 30 May 2019), the Court held (at [63]) that the Assistant Minister proceeding on the basis that he could not provide the appellant with an opportunity to be heard because s. s.501BA(3) precluded him from doing so was to misunderstand the nature of the power being exercised. He should have understood that it was open to him to invite submissions from the appellant if he chose.
[16] See Subdivision C of Division 3 of Part 2 of the Act.
[17] s.108(b).

should be exercised the decision maker must have regard to the prescribed circumstances in r.2.41 of the Regulations and relevant policy.

For more information about visa cancellation under s.109 see the MRD Legal Services Commentary Visa Cancellation under s.109.

The Minister also has personal public interest powers relating to s.109 cancellations – see below.

s.116 – General and prescribed cancellation grounds

A visa may be cancelled under s.116 if a ground for cancellation in s.116 is made out.[18] This includes the prescribed grounds in r.2.43, as s.116(1)(g) provides for cancellation on these prescribed grounds.

The grounds for cancellation broadly relate to:

- the integrity of the visa grant process, such as that circumstances for the grant never existed[19]
- achieving the objectives of the visa program and ensuring compliance, such as where a person has not complied with a visa condition[20], or, for student visas, the person is not a genuine student[21]
- law enforcement and community protection, such as where the person may be a risk to the health, safety or good order of the Australian community, or the health or safety of individuals,[22] or has been convicted or charged with an offence.[23]

In most circumstances, cancellation under s.116 is discretionary, but a visa *must* be cancelled in prescribed circumstances which are generally concerned with risks to Australia's foreign relations or national security.[24]

For more information about visa cancellation under s.116 see the MRD Legal Services commentaries Cancellation under s.116 - General and Cancellation under s.116 - Student Visas.

The Minister also has personal public interest powers relating to s.116 cancellations – see below.

s.134F – Consequential cancellation following s.134B security cancellation

Section 134F provides that the Minister may, without notice, cancel a person's visa if the person held the visa only because another person held a visa, and that other person's visa has been cancelled under s.134B (emergency cancellation on security grounds) and that cancellation has not been revoked under s.134C.

s.137Q – Regional sponsored employment visa cancellation

Section 137Q allows the Minister to cancel a regional sponsored employment visa if satisfied that the visa holder has not commenced the employment referred to in the relevant employer nomination within the prescribed period, or made a genuine effort to do so, or the employment terminates within two years and the holder does not satisfy the Minister that he or she has made a genuine effort to be

[18] The provisions dealing with cancellation under s.116 are in Subdivision D of Division 3 of Part 2 of the Act.
[19] s.116(1)(aa).
[20] s.116(1)(b).
[21] s.116(1)(fa).
[22] s.116(1)(e).
[23] s.116(1)(g), r.2.43(1)(oa), r.2.43(1)(p).
[24] s.116(3), r.2.43(2).

engaged in the employment for the required period.[25] Section 137T provides for automatic consequential cancellation of associated family member visas.

s.140(2) – Discretionary consequential cancellation

Subsection 140(2) provides a discretionary power to cancel the visa of an associated visa holder where the principal visa holder's visa is cancelled. If a person's visa is cancelled under s.109, 116, 128, 133A, 133C or 137J and another person holds a visa only because the first person held a visa (but not because of being a member of the family unit), then the other person's visa may be cancelled without notice under s.140(2).[26] Subsections 140(1) and (3), which provide for automatic consequential cancellation of visas in certain circumstances, are discussed further below. If a visa is cancelled under s.140(1), (2) or (3) because of another visa cancellation, and that other cancellation is revoked, the s.140 cancellation is automatically revoked.[27]

For more information about visa cancellation under s.140 see the MRD Legal Services Commentary Consequential Cancellations - s.140.

Other cancellation and revocation powers

s.128, s.131 – Offshore cancellation on s.116 grounds & related revocation

Section 128 provides that the Minister may cancel the visa of someone outside Australia if one of the grounds in s.116 (see above) is made out. The Minister may do so without prior notice. Under s.131, the Minister may revoke a s.128 cancellation.

s.133A, s.133C, s.133F – Personal cancellation by Minister on s.109 or s.116 grounds & related revocation

If a delegate or the AAT has made a decision not to cancel a visa under s.109 or s.116, the Minister has the power under s.133A or s.133C respectively to set aside the decision and proceed to cancel the visa if he or she considers the ground for cancellation under s.109 or 116 exists; and the visa holder has not satisfied the Minister that the ground does not exist; and it is in the public interest to cancel the visa.[28] The power can only be exercised by the Minister personally.[29]

In addition, the Minister may personally cancel a visa without notice if satisfied a s.109 or s.116 ground exists and it is in the public interest to do so, even where there has been no decision by a delegate or tribunal that the visa should not be cancelled.[30]

s.134B, s.134C – Emergency cancellation on security grounds& related revocation

Section 134B requires that the Minister *must* cancel a visa held by a person if the person is outside Australia and there is an assessment by ASIO for the purposes of s.134B advising that ASIO suspects the person might be, directly or indirectly, a risk to security within the meaning of s.4 of the ASIO Act and recommending that all visas held by the person be cancelled.

[25] See *Su v MIBP* [2016] FCCA 83 for an example of cancellation under s.137Q(1).
[26] In *Ara v MIBP* [2016] FCCA 2154 the Court held that the words 'only because the person whose visa is cancelled held a visa' in s.140(2)(b) should be understood to mean that the person holds a visa by reason of another person having held a visa as a condition precedent to the grant of the visa. This approach was upheld on appeal in *Ara v MIBP* [2017] FCA 130 at [7].
[27] s.140(4).
[28] s.133A(1) and (3) and s.133C(1) and (3), inserted by *Migration Amendment (Character and General Visa Cancellation) Act 2014* (No.129 of 2014) and amended by the *Tribunals Amalgamation Act 2015* (No. 60 of 2015) from 1 July 2015: *Tribunals Amalgamation Act 2015*, s.2 and Schedule 2, Part 3, Division 5. It also covers the former MRT and RRT.
[29] s.133A(7), s.133C(7)
[30] s.133A(3) and (5) for s.109 grounds and s.133C(3) and (5) for s.116 grounds, as inserted by No.129 of 2014. Sections 133A(5) and 133C(5) were amended by No.60 of 2015 from 1 July 2015: *Tribunals Amalgamation Act 2015*, s.2 and Schedule 2, Part 3, Division 5.

Where a visa has been cancelled under s.134B, it must be revoked under s.134C as soon as reasonably practicable after 28 days from the date of cancellation unless an assessment is made by ASIO before the end of the 28 day period advising that the former visa holder is, directly or indirectly, a risk to security and recommending that the cancellation not be revoked.

As noted above, related visas may be cancelled under s.134F.

s.134 – Business visa cancellation

Subsection 134(1) provides that the Minister may cancel certain business visas if he or she is satisfied that the holder has not obtained the required ownership interest or actively participated at the required level in an eligible business in Australia, or does not intend to do either. Under s.134(3A), the Minister may cancel an investment-linked visa if a person ceases to hold the relevant investment within 3 years of visa grant. Under s.134(4), the Minister must cancel a business visa held because of a family member's business visa, if the family member's visa is cancelled under s.134(1) or (3A), unless cancellation would result in extreme hardship.[31]

s.137J, s.137L, s.137N – Automatic student visa cancellation & related revocation

Before 13 April 2013, s.20 of the *Education Services for Overseas Students Act 2000* (ESOS Act) required education providers to send an accepted student of the provider a written notice if the student had breached a prescribed condition of a student visa, which commenced the automatic cancellation process under s.137J. Under s.137J, a student visa was automatically cancelled if a student visa holder did not contact the Department within 28 days of the s.20 notice. The Minister was able to revoke the cancellation upon application,[32] or without an application if exercising the power personally.[33] Automatic cancellation of student visas under s.137J effectively ceased from 13 April 2013.[34]

s.137T – Automatic consequential cancellation (regional sponsored employment visas)

Section 137T provides for automatic consequential cancellation of visas held by family members of people whose visas have been cancelled under s.137Q (regional sponsored employment visa cancellations – see above).

s.140(1) and (3) – Automatic consequential cancellation (various visas)

Section 140 provides the mechanism for cancelling related visas where the primary visa holder's visa is cancelled under s.109, 116, 128, 133A, 133C or 137J or in the case of a visa granted under s.78 (child born in Australia), where the parent's visa is cancelled under *any* provision of the Act.

Section 140(1) and (3) provide for cancellation of visas by operation of law. Under s.140(1), if a person's visa is cancelled under s.109, 116, 128, 133A, 133C or 137J, a visa held by another person because of being a 'member of the family unit' of the person is also cancelled. Under s.140(3), children's visas granted under s.78 are cancelled if the parent's visa is cancelled. Discretionary consequential cancellation under s.140(2) is discussed above. If a visa is cancelled under s.140 as a consequence of another visa cancellation, and that other cancellation is revoked, the s.140

[31] s.134(5)
[32] s.137L
[33] s.137N
[34] The *Migration Legislation Amendment (Student Visas) Act 2012* (No.192, 2012) Schedule 1, item [5] inserted s.20(4A) into the ESOS Act, which provides that a registered provider must not send a notice under s.20(1) of the ESOS Act on or after the day that subsection commenced, being 13 April 2013, so there are no longer any reviews of decisions not to revoke an automatic cancellation under s.137L.

cancellation is automatically revoked.[35] See the MRD Legal Services Commentary Consequential Cancellations - s.140 for more information.

s.164 – Automatic criminal justice visa cancellation

Section 164 provides that a criminal justice visa is automatically cancelled when the criminal justice certificate associated with its grant is cancelled or expires, and that the Minister must make a record of the visa cancellation.

s.500A – Temporary safe haven visa cancellation

Under s.500A(1), the Minister may cancel a temporary safe haven visa on grounds relating to criminality, character, security, or international relations. Under s.500A(3), the Minister may cancel if the holder has been sentenced to death, or to imprisonment for 12 months or more, or for certain offences relating to immigration detention. These are personal powers of the Minister.[36] Under s.500A(13), immediate family members' temporary safe haven visas are automatically cancelled when a visa is cancelled under s.500A(1) or (3).

s.501, 501A, s.501B, s.501BA, s.501C, s.501CA – Character cancellations & related revocations & ministerial powers

Section 501(2) empowers the Minister to cancel a visa on character grounds. Under s.501(3A), the Minister must cancel a visa, in relation to a substantial criminal record or child sex offence, if its holder is in prison. A s.501(3A) cancellation may be revoked under s.501CA(3).

Sections 501(3), 501A(2) and (3), 501B(2) and 501BA(2) are personal powers of the Minister to cancel on character grounds in the national interest. Cancellations under s.501(3) or s.501A(3) may be revoked under s.501C(4).

AAT jurisdiction

Summary information about the AAT's jurisdiction to review visa cancellation decisions is in Appendix 1 – Cancellation powers table.

The AAT has jurisdiction if a valid application is made for review of a Part 5-reviewable decision or a Part 7-reviewable decision.[37] These decisions are reviewed in the Migration and Refugee Division.[38] Cancellation and non-revocation decisions may be reviewable under ss.338(3), (3A) and (4) [Part 5] or s.411(1)(d) [Part 7] of the Act. However not all visa cancellation/non-revocation decisions are reviewable by the Tribunal under Part 5 or Part 7 of the Act. Some are reviewable in other Divisions of the AAT, and others are not subject to merits review.

Which decisions are reviewable?

Cancellation decisions under ss.109, 116, 134F, 137Q and 140(2) and non-revocation decisions under s.137L are reviewable by the Tribunal if the visa holder was in Australia both at the time of the decision and at the time of the review application.[39] Such decisions will be reviewable even where the

[35] s.140(4)
[36] s.500A(6)
[37] ss.348 [Part 5] and 414 [Part 7].
[38] s.336N [Part 5] and 409 [Part 7]
[39] ss.338(3), 338(4), and 347(3) [Part 5] and ss.411(1)(d), 411(2)(a) and 412(3) [Part 7]. Section 338(4) provides that decisions to cancel bridging visas held by a person who is in immigration detention because of that cancellation are reviewable. Non-citizens with cancellation decisions reviewable under this sub-section would be in Australia when their visas are cancelled, as a

primary decision is invalid, for example, because the delegate failed to comply with the mandatory procedural requirements set out in the Act;[40] where the visa should not have been granted;[41] where the visa would have already expired at the time of the Tribunal's decision;[42] or where the person who made the purported decision lacked the requisite delegation.[43]

However, such decisions are generally not reviewable if:

- the visa holder was not in Australia (in the migration zone) at the time the decision was made[44]
- *for most Part 5 cases* – the visa holder was in immigration clearance, unless they have had a bridging visa cancelled and that cancellation is reviewable under s.338(4)[45]
- the decision to cancel the visa was made personally by the Minister[46]
- the Minister has issued a conclusive certificate in relation to the decision[47]
- *for Part 7 cases* – the decision was made in reliance on s.5H(2), 36(1C) or s.36(2C)(a) or (b),[48] or under s.36(1B) or a cancellation because ASIO has assessed the person to be a security risk.[49]

Other cancellations are not reviewable by the MRD under Parts 5 or 7, but are reviewable by the AAT and would usually be reviewed in the AAT's General Division:[50]

- Section 501(2) cancellations by a delegate of the Minister (on character grounds) and decisions by a delegate under s.501CA(4) not to revoke a cancellation[51]

visa is generally essential for non-citizens to travel to Australia (s.42) and immigration detention applies to and is authorised for unlawful non-citizens in Australia: see ss.178, 189.

[40] *Zubair v MIMIA* (2004) 134 FCR 344 at [28]-[32], applying *Collector of Customs v Brian Lawlor Automotive Pty Ltd* (1979) 24 ALR 307, *Secretary DSS v Alvaro* (1994) 50 FCR 213, *Yilmaz v MIMA* (2000) 100 FCR 495 and *Thayananthan v MIMA* (2001) 113 FCR 297. Note, however, that the powers on review will depend upon the powers that were available to the primary decision-maker: ss.349(1), 415(1).

[41] *Meng v MIAC* [2007] FMCA 173 (Lloyd-Jones FM, 23 February 2007).

[42] *Kim v MIAC* (2008) 167 FCR 578 per Tamberlin J at [32]-[34], Besanko J agreeing.

[43] In *MHA v CSH18* [2019] FCAFC 80, the Full Federal Court held that by s.414(1) of the Act ([Part 7]; s.348(1) [Part 5]), the Tribunal must review a purported decision made by a person who lacked the requisite delegation if a valid application for review is made. It also held that the words 'powers and discretions that are conferred by this Act on the person who made the decision' in s.415(1) ([Part 7]; s.349(1) [Part 5]) refer to the person who made the purported decision, or who purportedly made the decision, and to the powers and discretions that person would have had if the instrument of delegation had been legally effective (at [65]).

[44] ss.338(3) and (4), and 411(2). Section 338(4) provides that decisions to cancel bridging visas held by a person who is in immigration detention because of that cancellation are reviewable. Non-citizens with cancellation decisions reviewable under this sub-section would be in Australia when their visas are cancelled, as non-citizens are not generally permitted to enter Australia without a visa (s.42), and immigration detention applies to and is authorised for unlawful non-citizens in Australia: see ss.178, 189.

[45] s.338(3)(b). Immigration clearance is explained in s.172. For an example of a cancellation in immigration clearance, see *1705419 (Migration)* [2017] AATA 1900 (Redfern DP and Billings SM, 6 October 2017).

[46] s.338(3)(d), s.411(2)(aa).

[47] ss.338(1)(a) and 339 [Part 5] and 411(2)(b) and (3) [Part 7].

[48] s.500(4)(c) and s.411(1)(d). These decisions might be reviewable in the General Division if the cancellation decision was made under s.501(2). For protection visas granted before 16 December 2014 before the commencement of the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (No.135 of 2014), s.500(4) provided that decisions relying on Article 1F, 32 or 33(2) of the Refugees Convention are not Part 7-reviewable.

[49] s.500(4A).

[50] According to item 2.2 of the President's Direction 'Allocation of Business to Divisions of the AAT' dated 28 February 2019, matters not falling within the table at item 2.1 are dealt with in the AAT's General Division. While there may be a small category of visa cancellation-decisions that could be dealt with in the Security Division (where there is a related security assessment application), in most cases visa cancellations not dealt with in the MRD would be dealt with in the General Division.

[51] s.500(1)(b) and (ba), except in the circumstances set out in s.500(4A). For s.501 cancellation decisions, there is a further limitation that the person would have had to be entitled to apply for review under Part 5 or Part 7 if the decision was made on another ground: s.500(3). Section 501 decisions are expressly not reviewable under Part 5 or Part 7: ss.338(3)(c) and 500(4).

- Visa cancellations under ss.134 (business visas).[52]

Other cancellation decisions are not reviewable by the Tribunal under either Part 5 or Part 7 for the following reasons, and as there are no provisions otherwise conferring jurisdiction on the AAT, they are not subject to merits review:

- Sections 128 and 134B apply only to off-shore visa holders
- Visa cancellations under s.500A (temporary safe haven visas) are expressly excluded from the definition of Part 5-reviewable decision[53]
- Automatic cancellations under ss.137J, 137T, 140(1), 140(3), 164 and 500A(13) are by force of law and as they do not involve a 'decision' there is no AAT-reviewable decision[54]
- Powers to cancel under ss. 501A(2) and (3), s.501BA(2) and 501B(2), and the power to revoke a cancellation in s.501C(4) are personal powers of the Minister and are expressly excluded from merits review.[55]

Prescribed period to apply for review (MRD)

Different prescribed periods for lodging applications for review of cancellation under Part 5 or Part 7 apply, depending on the provision under which they are reviewable and whether or not the person is in detention:

- for bridging visa cancellations where the person is in detention as a result of the cancellation – within 2 working days after notification[56]
- for protection visa cancellations where the applicant is in detention – within 7 working days of notification[57]
- for onshore cancellations of substantive migration visas reviewable under s.338(3) – within 7 working days after notification[58]
- for protection visa cancellations where the applicant is not in detention – within 28 days of notification.[59]

[52] s.136. These decisions are expressly excluded from the definition of Part 5-reviewable decision, and are not related to protection visas so aren't reviewable under Part 7: s.338(3)(c), s.411(1).
[53] s.338(1)(c). As these decisions do not concern protection visas, they do not come within the definition of Part 7-reviewable decision either: s.411(1).
[54] In *Thapaliya v MIBP* [2018] FCCA 3278, the Court held that where there is an automatic cancellation of a visa, there is no relevant migration decision amenable for review: [13]. A decision to refuse to revoke the cancellation under s.137L is reviewable under s.338(3A), however, the automatic cancellation of student visas under s.137J effectively ceased from 13 April 2013. Before 13 April 2013, s.20 of the *Education Services for Overseas Students Act 2000* (ESOS Act) required education providers to send an accepted student of the provider a written notice if the student had breached a prescribed condition of a student visa, which commenced the automatic cancellation process under s.137J. *Migration Legislation Amendment (Student Visas) Act 2012* (No.192, 2012) Schedule 1, item [5] inserted s.20(4A) into the ESOS Act, which provides that a registered provider must not send a notice under s.20(1) of the ESOS Act on or after the day that subsection commenced, being 13 April 2013.
[55] ss.501A(7), 501B(4), 501BA(5), and 501C(5) provide that these decisions are not reviewable under Part 5 or 7.
[56] s.338(4), r.4.10(2)(a)
[57] s.412, r.4.31(1).
[58] r.4.10(1)(b)
[59] s.412, r.4.31(2).

AAT reviews – timeliness, powers, scope, onus and discretion

Timeliness of cancellation reviews

There are provisions requiring expedited decisions on cancellation reviews, but non-compliance with them does not affect the validity of decisions:

- for bridging visa cancellations where the person is in detention as a result of the cancellation (time limited reviews), the Tribunal must make its decision within seven working days after the application is received, unless the applicant agrees to extend the period[60]

- for review of cancellation of other (non-protection[61]) visas, a decision to cancel must be reviewed immediately, and the Tribunal must give notice of its decision as soon as practicable.[62]

There is no statutory penalty for non-compliance with either of these provisions. The Migration Act and Regulations are silent on the consequences of non-compliance.

There are further timeliness requirements for visa cancellations under Presidential Directions. See 6.6 'Timeliness of Decision Making' in the MRD Procedural Law Guide, Chapter 6.

For time limited reviews, the prescribed periods for invitations to comment or give information and for hearing invitations are generally shorter than for other types of decision.[63] Prescribed periods also differ depending on whether an applicant is in detention or not, but they do not otherwise differ between visa cancellations and other Part 5-reviewable decisions.[64]

Powers, scope and effect of merits review

The Tribunal's powers on review in the MRD are set out in s.349 [Part 5] and s.415 [Part 7] of the Act. Pursuant to s.349(1) and s.415(1), the Tribunal may exercise all the powers and discretions conferred by the Act on the primary decision-maker for the purposes of the decision under review. In general, this means that the role of the Tribunal is to conduct a full merits review of the delegate's decision.[65] For the purposes of a review, the Tribunal's task is to determine whether the decision to cancel the applicant's visa is the correct or preferable one to make on the material before it.[66]

Where the Tribunal is reviewing a decision to cancel a visa or to refuse to revoke a visa cancellation, it may affirm or vary the decision, or set it aside and substitute a new decision.[67]

The remittal powers under ss.349(2)(c) and 415(2)(c) do not apply to review of cancellation / non-revocation decisions. The remittal powers apply only to decisions that relate to a matter that is prescribed for those provisions and cancellations / non-revocations are not prescribed matters.[68] If the

[60] s.367, r.4.27.
[61] The Note to Division 4.1 (titled 'Review of decisions other than decisions relating to protection visas') of Part 4 of the Regulations states: 'This Division deals with the review of visa decisions other than protection visa decisions.'
[62] r.4.24
[63] r.4.17-r.4.21.
[64] r.4.17-r.4.21.
[65] *Zubair v MIMIA* (2004) 139 FCR 344, at [27]-[32].
[66] *Drake v MIEA* (1979) 2 ALD 60 (Bowen CJ and Deane J) at 68.
[67] ss.349(2) and 415(2).
[68] see rr.4.15(1) [Part 5] and 4.33(1) [Part 7].

Tribunal disagrees with the primary decision, it should set aside the decision and substitute a decision that the visa should not be cancelled or, in the case of non-revocation, to revoke the cancellation.[69]

How merits review affects a cancellation decision

Where a cancellation decision is affirmed on review the original decision continues to operate as of the date it was made, it is not substituted by the Tribunal's later decision.[70] This means that the Tribunal may make a fresh decision to affirm a decision to cancel a visa at a time when the visa would have already expired.[71]

If a s.109 cancellation (for incorrect information) is set aside by the Tribunal or a court, or if the automatic 137J cancellation of a student visa is revoked, the Act provides that the visa is taken never to have been cancelled: ss.114 and 137P respectively. There is no such general provision in relation to cancellations under s.116, but there are provisions about the effect of cancellation decisions being set aside in specific contexts[72] which apply to cancellation decisions generally. The Federal Court has said that, in the absence of the exercise of any power to back-date the decision, a new decision by the Tribunal operates prospectively.[73]

Scope of merits review in s.109 cancellations

The scope of the Tribunal's review may be more confined in s.109 cancellations than in other cancellations, because s.108(b) requires the Tribunal to decide whether there was non-compliance *in the way described in the s.107 notice*, rather than just deciding whether there was non-compliance. If the Tribunal finds there is not a valid s.107 notice, or that there is not non-compliance as described in the s.107 notice, it must set aside the cancellation.[74] The Tribunal is not able to re-issue a s.107 notice to remedy defects. In contrast, the structure of the Subdivision D (s.116) cancellation regime is such that a failure by the delegate to comply with s.119 may be 'cured' upon review by the Tribunal's own procedural fairness mechanisms.[75] For further discussion of these issues, see MRD Legal Services Commentaries Cancellation under s.109 and Cancellation under s.116.

Deciding whether the ground for cancellation exists – the relevant time for consideration

On the review of a decision to cancel a visa, the issues for the Tribunal are whether a ground for cancellation exists and if so (unless cancellation is mandatory), whether the discretion to cancel should be exercised. In relation to the first issue, a question arises as to whether the Tribunal is limited to considering the facts and circumstances as they existed at the time of the primary decision, or whether it is obliged to consider the facts and circumstances at the time of its own decision. That question can only be answered by reference to the relevant provisions and their statutory context.[76]

Generally information about conduct and events that occurred after the primary decision will be relevant, unless the relevant legislation confines the Tribunal's consideration to the circumstances as they existed at the time of the primary decision.[77] Thus, if a ground for cancellation exists, the circumstances at the time of the Tribunal's decision will generally be relevant to the *discretionary* question as to whether the visa should be cancelled. However, to determine whether the *ground for*

[69] Under ss.349(2)(d) and 415(2)(d).
[70] *Kim v MIAC* (2008) 167 FCR 578, per Tamberlin J at [23], Besanko J agreeing; see also *Lin v MIAC* [2008] FMCA 742 (Nicholls FM, 5 June 2008), at [66] - [72].
[71] *Kim v MIAC* (2008) 167 FCR 578 per Tamberlin J at [32]-[34], Besanko J agreeing.
[72] E.g. in the calculation of the relevant date for Schedule 3 to the Regulations: cl.3001(2) of Schedule 3
[73] *Kim v MIAC* (2008) 167 FCR 578 per Tamberlin J at [33], Besanko J agreeing.
[74] *Saleem v MRT* [2004] FCA 234 (Allsop J, 30 March 2004), at [49] and [60]-[63]. Section 108(b) requires the decision maker to decide whether there was non-compliance by the visa holder in the way described in the s.107 notice, and s.109 provides that the decision maker may cancel the visa after deciding that there was non-compliance under s.108.
[75] See *MIMIA v Ahmed* (2005) 143 FCR 314, *Zubair v MIMIA* (2004) 139 FCR 344.
[76] See *Shi v MARA* (2008) 235 CLR 286 per Hayne & Heydon JJ at [92].
[77] See *Shi v MARA* (2008) 235 CLR 286 per Hayne & Heydon JJ at [98] – [101].

cancellation involves a temporal element that confines the Tribunal's consideration to an earlier point in time, the precise nature of the decision under review must be closely considered.[78]

Section 109

On review of a cancellation decision under s.109, the Tribunal is limited to consideration of the facts as they existed at the time of cancellation in deciding whether the ground is made out, because it is restricted to the ground(s) for cancellation particularised in the s.107 notice.

In exercising the discretion whether to cancel if the ground is made out, the Tribunal must consider all relevant facts and circumstances up until the time of its own decision. This is because there is no temporal limitation expressed as to what it may consider; in fact, the mandatory considerations for this purpose include circumstances after the Department's decision.[79]

Section 116

The relevant time at which the facts are to be assessed on review of a s.116 cancellation depends on the precise terms of the particular cancellation ground in question.

For s.116(1)(a), that is, whether 'the visa grant was based, wholly or partly, on a particular fact or circumstance that is no longer the case or no longer exists' will necessarily consider circumstances before or at the time of grant and whether those circumstances still exist at a later time. There is nothing in the legislation limiting that later time to the time of the delegate's decision as opposed to the time of the Tribunal's decision.[80] As Kirby J observed in *Shi,*[81] albeit in relation to a different cancellation power, it would be remarkable if the Tribunal's decision could not take into account evidence of relevant, and even critical, supervening events.

In relation to s.116(1)(b), in most cases the relevant non-compliance will have occurred prior to the cancellation, as once a visa is cancelled, there cannot be non-compliance with a condition of that visa. [82]

Similarly, the ground in s.116(1)(f) (visa should not have been granted) is necessarily referable to a past event. The ground in s.116(1)(aa) also appears to relate to the particular facts and circumstances at the time of grant of the visa. By contrast, grounds such as s.116(1)(e) ('is or may be, or would or might be, a risk') and (fa) ('is not, or is likely not to be'; 'has engaged, is engaging, or is likely to engage') concern circumstances that could be altered by intervening events and thus would seem to invite consideration of the circumstances at the time of Tribunal's decision.[83]

Onus and satisfaction

A party to proceedings before the Tribunal has no onus of proof, let alone an onus to establish facts to any particular or pre-determined standard.[84] To affirm a cancellation decision, the Tribunal must

[78] See *Shi v MARA* (2008) 235 CLR 286 per Kirby J at [25], per Hayne & Heydon JJ at [92]; per Kiefel J at [119] and [133]. The High Court held that the question of whether the AAT was satisfied that the appellant migration agent "is not a person of integrity or is otherwise not a fit and proper person to give immigration assistance" for the purposes of s.303(1) of the Act required attention to the state of affairs existing at the time the AAT made its decision. Given the Court's emphasis on the significance of the precise nature of the decision in question, it should not be assumed that the same result would necessarily follow under cancellation provisions such as ss.109 and 116. Refer Kirby J at [47], [55], per Hayne & Heydon JJ at [101], per Kiefel J (Crennan J agreeing) at [149], [151].
[79] e.g. r.2.41(e), the present circumstances of the visa holder.
[80] see, e.g., *Singh v MIAC* [2011] FMCA 494 (Cameron FM, 6 July 2011), at [22] and [24].
[81] *Shi v MARA* (2008) 235 CLR 286 per Kirby J at [49].
[82] See e.g. the discussion in *1607917 (Migration)* [2017] AATA 950 (Redfern DP and Raif SM, 6 February 2017) at [38]-[39].
[83] This was the approach taken by the AAT to s.116(1)(e) in *1702551 (Migration)* [2017] AATA 1415 (Redfern DP and Member Murphy, 22 August 2017) at [71]-[98].
[84] *Sullivan v CASA* (2014) 226 FCR 555, per Flick and Perry JJ, at [115].

decide that there was non-compliance (s.109) or be satisfied that the ground is made out (s.116), and decide that the visa should be cancelled. A visa cannot be cancelled simply because the decision-maker has identified a possible ground of cancellation or instance of non-compliance which the visa holder has not been able to rebut.[85] Having identified possible facts which could give rise to the cancellation power, the Tribunal must go on to be satisfied of those facts (or decide that they have occurred), before the cancellation power is enlivened. In forming a state of satisfaction, the decision-maker must 'feel an actual persuasion – an inclination of the mind towards assenting to, rather than rejecting, a proposition'.[86]

To find that non-compliance or a ground is made out, the Tribunal must be reasonably satisfied that the non-compliance occurred or that the ground for cancellation exists. 'Reasonable' in this sense means that the Tribunal's conclusions must be based on logically probative material.[87]

In *Sullivan v CASA*, the Full Federal Court held that when making findings of fact which have 'serious' or 'grave' consequences to a party, the Tribunal is free to consider the evidence and other materials before it; and that it might express more caution in evaluating the factual foundation for more centrally relevant facts.[88] The Tribunal is not bound to apply the principle in *Briginshaw v Briginshaw* that the strength of evidence necessary to make a finding may be greater if the consequences of that finding are serious, but it is not prohibited from applying it if it sees fit.[89] The Court noted that s.33(1)(c) of the *Administrative Appeals Tribunal Act 1975*, which provided that the Tribunal is not 'bound' to apply rules of evidence, was not a prohibition upon the tribunal applying those rules, but imposing a requirement to apply the rule in *Briginshaw* in making factual findings would be an unnecessary constraint upon the Tribunal's freedom to employ such procedures at it sees fit in undertaking its fact-finding role.[90]

Discretion to cancel

Unlike the power to grant or to refuse to grant a visa, most (though not all) of the cancellation powers involve the exercise of a statutory discretion, i.e. the decision-maker *may* cancel the visa.[91] This means that even if the specified ground is made out, there remains a discretion to decide whether the visa should be cancelled. In such cases, it would be an error to cancel a visa, or to affirm a decision to cancel a visa, simply on the basis that the ground(s) for cancellation exist.[92]

[85] *Zhao v MIMA* [2000] FCA 1235, at [32].
[86] *Plaintiff M64/2015 v MIBP* (2015) 90 ALJR 197, per Gageler J, at [64], referring to *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361 and *George v Rockett* (1990) 170 CLR 104 at 116. See also *McDonald v Director-General of Social Security* (1984) 1 FCR 354 at 358 (per Woodward J): 'If the AAT finds itself in a state of uncertainty after considering all the available material, unable to decide a question of fact either way on the balance of probabilities, it will be necessary for it to analyse carefully the decision it is reviewing. If, for example, it is a decision whether or not to cancel a pension in the light of changed circumstances, then it has failed to achieve the statutory requirement of reaching a state of mind that the pension should be cancelled. If, on the other hand, it is a decision, to be made in the light of fresh evidence, whether or not the pension should ever have been granted in the first place, then it has failed to be satisfied that the person ever was permanently incapacitated for work'.
[87] See e.g. *MIEA v Pochi* (1980) 44 FLR 41 at 62.
[88] *Sullivan v CASA* (2014) 226 FCR 555, per Flick and Perry JJ, at [120], applied by the AAT in *1702551 (Migration)* [2017] AATA 1415 (Redfern DP and Member Murphy, 22 August 2017) at [31]ff.
[89] *Sullivan v CASA* (2014) 226 FCR 555, per Flick and Perry JJ, at [121], referring to *Briginshaw v Briginshaw* (1938) 60 CLR 336, where Dixon J held at 362, '… reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences…'.
[90] *Sullivan v CASA* (2014) 226 FCR 555, per Flick and Perry JJ, at [122].
[91] Appendix 1 – Cancellation powers table shows which decisions are automatic or mandatory.
[92] See *Cardenas v MIMA* [2001] FCA 17 (Carr J, 18 January 2001).

A discretion to cancel a visa should not be regarded as a discretion *not* to cancel the visa. Thus, for example, it would be technically incorrect to speak in terms of exercising the discretion in the applicant's favour.[93]

In the exercise of a statutory discretion, the delegate, and on review the Tribunal, must have regard to matters specified in the Act or Regulations, and to any lawful directions given by the Minister. A statutory obligation to have regard to specified matters does not have the effect that relevant considerations are confined to those matters, though it may have the effect of requiring the decision-maker to take those matters into account and give weight to them as a fundamental element in its decision.[94]

The Tribunal must also consider all information relevant to the exercise of the discretion. This will include evidence and arguments from the applicant but could also include other information or considerations arising out of material before the Tribunal, e.g. discretionary considerations set out in the Department's policy, Australia's international treaty obligations, the legal consequences of cancellation,[95] and medical or other evidence advanced by an applicant. Other matters such as a loss of social security benefits may need to be considered if raised by an applicant, but are not otherwise mandatory relevant considerations of themselves, because they are too remote from the scope and purpose of the Migration Act.[96]

A visa may be cancelled even if only one factor militates in favour of visa cancellation and all other factors are neutral or against cancellation.[97]

It is an error in the exercise of a discretion to rely on a policy or guideline which is inconsistent with the Act and Regulations.[98] The departmental policy relevant to MRD-reviewable cancellation decisions are set out in *Policy: Migration Act - Visa cancellation instructions – General cancellation powers (s109, s116, s128 & s140)* available electronically through LEGEND. For more information about using policy in decision making see the MRD Legal Services Commentary: Application of Policy.

Australia's international treaty obligations

Where an applicant claims they may suffer harm if returned to their home country, the Tribunal always has to consider that claim. The extent to which it has to make its own assessment of the risk depends on the circumstances of the case.

[93] See *Cockrell v MIAC* (2008) 171 FCR 345 at [16]-[20]. That case concerned the discretion under s.501(2) but the Court's comments are equally applicable to other visa cancellation powers including ss.109 and 116. At [19] of its reasons, the Full Federal Court referred to the passages in the Tribunal's decision that demonstrated its proper understanding of the nature of the discretion, which included '*the discretion to cancel the applicant's visa*', '*favour the cancellation of the visa*', '*the visa should be cancelled*' and '*to exercise the discretion…to cancel the applicant's visa*'. The Tribunal may be also be guided by the language in Direction No.79 'Visa refusal and cancellation under s.501 and revocation of a mandatory cancellation of a visa under s.501CA'. Paragraph 8 of the Direction states that in applying the considerations and giving information and evidence appropriate weight, '*considerations may weigh in favour of, or against…cancellation of the visa*' (at 8(3)), '*considerations…be given greater weight than the other consideration*' (at 8(4)) and '*considerations may outweigh other…considerations*' (at 8(5)).

[94] *MIMA v Baker* (1997) 73 FCR 187 (Burchett, Branson & Tamberlin JJ, 26 February 1997) at 194. *Baker* was cited with approval by Mathews J in *Suleyman v MIMA* [2000] FCA 610 (Mathews J, 12 May 2000) at [24].

[95] See below under 'Consequences of cancellation'. Possible consequences include detention, and in *NBMZ v MIBP* (2014) FCR 1 the Court held that the Minister must consider the legal consequences of the refusal (including indefinite detention) when exercising a discretion not to grant a protection visa because the applicant did not pass the character test. The reasoning applies equally to discretionary cancellation decisions.

[96] *MIBP v BHA17* [2018] FCAFC 68 (Robertson, Moshinsky and Bromwich JJ, 4 May 2018) at [135]-[139]

[97] See, e.g. *Grewal v MHA* [2019] FCCA 533 (Judge Kelly, 8 March 2019), at [46].

[98] See e.g. *Su v MIMIA* [2005] FCA 655 (Hely J, 24 May 2005) at [17] – [18], *Lobo v MIMIA* (2003) 132 FCR 93, at [63] – [65]. The importance of lawfulness of government policy has also been considered in several cases concerning cancellation pursuant to s.501, e.g. *Aksu v MIMA* (2001) 65 ALD 667 at [10] – [13]; *Ruhl v MIMA* (2001) 184 ALR 401 at [34] – [40] and *Jahnke v MIMA* (2001) 113 FCR 268 at [15] – [22]. The observations of the court in these cases are equally applicable to cancellation pursuant to other sections of the Act.

Where the visa being cancelled is not a protection visa, and there are no character issues, the Tribunal can take into account that the applicant can make a protection visa application. For example, in *COT15*[99] the applicant's Subclass 101 (Child) visa was cancelled and he claimed to fear harm as a Hazara if returned to Quetta, Pakistan. The Tribunal affirmed the cancellation, saying that it was satisfied that the applicant's claims could be canvassed in any application for a protection visa. The Court upheld the decision, noting that the cancellation of a visa is legally distinct from removal.[100]

This reasoning will be problematic where there is a barrier that would prevent someone from getting a protection visa, such as character issues or a statutory bar (e.g. s.48, s.48A). For example, in *BCR16*[101], the applicant's visa was cancelled under s.501(3A) following his convictions and sentence to a term of imprisonment. The Assistant Minister decided not to revoke the cancellation, concluding that it was 'unnecessary to determine' whether non-refoulement obligations were owed due to claimed sectarian violence in Lebanon, because the applicant could apply for a Protection visa. The Court held that this reasoning constituted jurisdictional error, because the Act does not require that the criteria in s.36(2)(a) and (aa) be addressed first, or at all, and the appellant's protection visa application could be refused under s.65 on character grounds and never reach active consideration of the protection criteria in s.36(2).[102]

Since the decision in *BCR16*, the Minister has made a further s 499 Direction requiring departmental delegates to assess protection claims before assessing character considerations in making decisions on protection visa applications.[103] A line of Federal Court judgments has held, or implied, that this direction has addressed the misunderstanding as to the sequence in which claims would be considered which was identified in *BCR16*.[104] These judgments have upheld decisions stating that it was unnecessary to determine whether the applicant was owed non-refoulement obligations as it was considered that the applicant was able to make a valid application for a protection (or other) visa. Other judgments, however, have identified errors in this approach, in the circumstances of their cases.[105]

Where there are barriers to applying for or being granted a protection visa, the Tribunal may need to consider the risk of serious or significant harm to an applicant if returned to their country of reference as a relevant matter, because it has been raised by an applicant or is mentioned in the Department's policy (for more information about the use of the Department's policy in the exercise of a discretion, see above). If it does so, it must ask whether there is a real chance of serious or significant harm, although it may do so in an abbreviated way.[106] For more information on the real chance test, see Chapter 3 of the Guide to Refugee Law in Australia. For more information on consideration of non-refoulement obligations in the discretion to cancel, see Legal Services commentary Visa cancellation and refusal on character grounds.

[99] *COT15 v MIBP (No 1)* (2015) 236 FCR 148
[100] *COT15 v MIBP (No 1)* (2015) 236 FCR 148, at [32].
[101] *BCR16 v MIBP* (2017) 248 FCR 456
[102] *BCR16 v MIBP* (2017) 248 FCR 456, per Bromberg and Mortimer JJ, at [44].
[103] Direction No. 75, Refusal of Protection Visas Relying on Section 36(1C) and Section 36(2C)(b), 6 September 2017, Part 2 of Direction No.75 Directions, para 1. See also *Applicant in WAD531/2016 v MIBP* [2018] FCAFC 213 (White, Moshinsky and Colvin JJ, 30 November 2018) at [99].
[104] *Ali v MIBP* [2018] FCA 650 (Flick J, 10 May 2018) at [34]; *Greene v AMHA* [2018] FCA 919 (Logan J, 31 May 2018) at [19], *Turay v AMHA* [2018] FCA 1487 (Farrell J, 3 October 2018) at [40]-[41]; *DOB18 v MHA* [2018] FCA 1523 (Griffiths J, 17 October 2018) at [35], upheld in *DOB18 v MHA* [2019] FCAFC 63 (Rares, Logan and Robertson JJ, 18 April 2019)**;** *Sowa v MHA* [2018] FCA 1999 (Griffiths J, 14 December 2018) at [19] – [27], upheld in *Sowa v MHA* [2019] FCAFC 111 (Jagot, Bromwich, Thawley JJ, 28 June 2019).
[105] E.g., *Omar v MHA* [2019] FCA 279 (Mortimer J, 7 March 2019)
[106] *Naqvi v MIBP* [2018] FCCA 793 (Judge Riley, 3 April 2018), at [24]. This judgment was upheld on appeal at the Federal Court: *MIBP v Naqvi* [2018] FCA 2075 (White J, 20 December 2018); see also, *Ayoub v MIBP* (2015) 231 FCR 513 at [27] – [28].

Even where there are no barriers to applying for or being granted a protection visa, a protection visa claim may not be the appropriate means of considering the harm claimed, for example, if the harm is not for one of the Convention reasons listed in s.5J, or the harm does not fall within the description of significant harm, or the risk of harm is not high enough to engage protection obligations. Australia's international treaty obligations only address particular kinds of harm, not the universe of harm which could be suffered.[107] By disposing of those claims on the basis that the applicant can apply for a protection visa, the Tribunal would be in error for failing to consider relevant information or claims of harm and risk to safety, rather than for failing to consider *non-refoulement* obligations.

See also the discussion about removal and *non-refoulement* below.

Consequences of cancellation

The potential consequences of cancelling the visa may be relevant when considering the discretionary question of whether a visa should be cancelled. Possible consequences can include the following, but this list is not exhaustive.

Consequential and related cancellations

If a person's visa is cancelled under s.109 or s.116, among other provisions, a visa held by another person on the basis of being a member of the family unit of the first person is also cancelled by operation of law.[108] Similarly, the visas of Australian-born children will be automatically cancelled where they hold the visa because their parent held a visa, and that was cancelled.[109] Others who hold a visa because of a cancelled visa may also be subject to mandatory or discretionary cancellation.[110]

If a person holds a bridging visa in association with a visa application, and their substantive visa is cancelled, the bridging visa ceases immediately upon the substantive visa being cancelled.[111]

Cancellation of a visa on character grounds under s.501, 501A, 501B or 501BA results in deemed refusal of any other undecided non-protection visa applications and deemed cancellation of any other (non-protection) visa held.[112]

Restrictions on further visa applications

Statutory bars

Under s.48(1)(b)(ii) of the Act, applicants who have had their visas cancelled since their last entry into Australia may only make a valid visa application for the classes of visas which have been prescribed by r.2.12 of the Migration Regulations. These include partner, protection and bridging visas, among others. Non-citizens who held a protection visa that was cancelled are prohibited from making a further protection visa application by s.48A(1B). A person who has had a visa cancelled under s.501, 501A, 501B or 501BA (that hasn't been set aside or revoked) can only apply for a protection visa or Bridging R visa while they remain in the migration zone.[113]

[107] *BCR16 v MIBP* (2017) 248 FCR 456, per Bromberg and Mortimer JJ, at [71]. See also *Goundar v MIBP* [2016] FCA 1203 (Robertson J, 12 October 2016), at [22]-[25].
[108] e.g. s.140(1), 137T
[109] s.140(3)
[110] e.g. s.134, 134F, 140(2).
[111] ss.82(10), 82(7A), cll.010.511, 020.511, 030.511.
[112] s.501F
[113] s.501E, r.2.12AA.

PIC 4013 & 4014

PIC 4013 in Schedule 4 to the Migration Regulations is a criterion for the grant of some visas, incorporated in the Schedule 2 criteria.[114] A non-citizen who has previously held a visa that was cancelled under the grounds specified in PIC 4013(1A), (2), (2A) or (3) is deemed to be affected by a 'risk factor' which in turn, means that they will be subject to PIC 4013(1). The circumstances where a visa cancellation will give rise to the application of a risk factor include where the visa was cancelled under s.109 or for certain grounds under s.116.[115]

PIC 4013(1) operates to prevent the grant of a visa to persons affected by a risk factor for a period of three years starting from the date on which the applicant's visa was cancelled,[116] unless the Minister is satisfied that there are compelling circumstances that affect the interests of Australia, or there are compassionate or compelling circumstances that affect the interests of an Australian citizen, permanent resident or eligible New Zealand citizen that justify the granting of a visa within the relevant three-year period after the date of the cancellation.[117]

For more information, see MRD Legal Services Commentary Public Interest Criterion 4013.

Similarly to PIC 4013, PIC 4014 is also included in Schedule 2 criteria for a range of visas. A person who left Australia as an unlawful non-citizen or on a Bridging C, D, E visa is affected by the risk factor in PIC 4014(4), unless they left Australia or held a bridging visa within 28 days of their substantive visa ceasing.[118] This may affect persons who have had a visa cancelled. A person affected by this risk factor will not meet relevant visa criteria within 3 years of their departure, unless there are compelling and/or compassionate circumstances.[119]

SRC 5001 & 5002

The Special Return Criteria in Schedule 5 are also incorporated into Schedule 2 criteria for most visas. Special Return Criterion 5001 requires, in general terms, people not to have had visas cancelled under s.501, 501A or 501B, 501BA, where the cancellation has not been revoked and the Minister has not personally granted a permanent visa to the person after the visa cancellation. SRC 5002 essentially limits a person from being granted a visa within 12 months after being removed from Australia, except in certain compelling and compassionate circumstances. These criteria apply to a wide range of visas (incorporated in the Schedule 2 criteria), but not to Subclass 866 Protection visas.

Eligibility for further Subclass 444 (Special Category) visas

The Subclass 444 visa is a temporary visa permitting the holder to remain in Australia while the holder is a New Zealand citizen.[120] Section 48 does not prevent a person making a further Subclass 444 visa application in Australia.[121] Nor does cancellation of a Subclass 444 visa in itself prevent a person from being granted a further Subclass 444 visa.[122] Public Interest Criterion 4013 is not currently a criterion for a Special Category visa.

To be eligible for a Special Category (Subclass 444) visa, an applicant must be neither 'a behaviour concern non-citizen nor a health concern non-citizen', or they must be a person or in a class of persons declared by the Regulations to be a person for whom any other visa would be inappropriate. The expression 'behaviour concern non-citizen' includes a non-citizen who has been convicted of a

[114] They include (but are not limited to) student, business, skilled and visitor visas, but not bridging, partner or protection visas.
[115] See PIC 4013 for the complete list of circumstances.
[116] This three-year period is referred to as an 'exclusion period' in Departmental Policy; however the term 'exclusion period' does not appear in the Act or Regulations. Policy - Migration Act > Visa cancellation instructions > Exclusion periods, last reviewed 8 July 2016.
[117] PIC 4013(1).
[118] PIC 4014(4)
[119] PIC 4014(1).

crime and been sentenced to imprisonment for at least one year, or has been removed or deported from Australia.[123] A person whose cancellation is based on a criminal conviction may not be able to meet this criterion, but that would be on the basis of the conviction, not the cancellation. Where a person may be removed under s.198 or deported under s.200 following cancellation, the removal or deportation may prevent a person being granted a Subclass 444 visa, though it will be a question of fact whether the removal or deportation is a result of the cancellation.

Similarly, visa cancellation would not in itself prevent a New Zealand citizen from re-entering Australia. People who hold a current New Zealand passport can travel to Australia without a visa.[124]

Unlawful status

Generally, if a visa is cancelled, its former holder becomes an unlawful non-citizen, unless they have or get another visa.[125] Not holding a current visa also makes it more difficult to apply for, and be granted, certain visas. It can also make a person liable to detention or removal.

Schedule 1 visa application requirements

Some visas require people applying in Australia to hold a visa, or to have held one not long before their visa application. Examples include student visas and certain business visas. A Bridging A visa requires an applicant not to have had a visa cancelled (unless the cancellation has been set aside or revoked)[126]. A Bridging E visa requires an applicant not to have been cancelled on the basis of a charge or breach of a code of behaviour to be able to make a valid application.[127]

Schedule 3 criteria

Schedule 3 to the Migration Regulations 1994 contains additional criteria to be met by unlawful non-citizens and certain bridging visa holders who apply for certain visas while in Australia. Not all visas require Schedule 3 criteria to be met. Where a Schedule 2 visa criterion specifies that Schedule 3 criteria need to be met, a failure to satisfy these does not prevent a valid visa application being made, but will preclude grant of the visa.

Detention

Section 189 of the Act requires unlawful non-citizens to be detained. Detention under s.189 is generally for a limited period pending the occurrence of a particular event. However there is the possibility of indefinite detention, particularly following the cancellation of a protection visa, given the potential existence of *non-refoulement* obligations, together with the requirements to detain or remove unlawful non-citizens.[128] On another view, indefinite detention may not result, because of s.197C.[129]

There are laws and policies and procedures in place to reduce the length of detention where possible.[130] When a person has been in immigration detention for two years, and then after every six

[120] cl.444.511 of Schedule 2.
[121] Regulation 2.12 prescribes, for s.48. Special Category (Class TY) as a class of visa which people who have had a visa refused or cancelled after last entering Australia may apply for. Subclass 444 is the only Subclass for Class TY.
[122] See, e.g., *Carr (Migration)* [2018] AATA 731 (Redfern DP, 29 March 2018).
[123] s.5(1)
[124] s.42(2A) of the Act.
[125] s.15.
[126] Item 1301(3) of Schedule 1.
[127] Item 1305(3) of Schedule 1,
[128] ss.189, 196, 198. See discussion in *NBMZ v MIBP* (2014) 220 FCR 1.
[129] See *DMH16 v MIBP* [2017] FCA 448, at [30]; *NKWF v MIBP* [2018] FCA 409, at [41]-[43]; *AQM18 v MIBP* [2019] FCAFC 27, at [17], [25] and [28] (Besanko and Thawley JJ) and at [119]-[120] (White J).
[130] e.g. s.486N requires the Department to report to the Commonwealth Ombudsman on individual circumstances of long-term detainees after they have been in detention for 2 years, and report on each of those people every six months after that (even if they are no longer in detention). Section 486O requires the Ombudsman to assess and report on the appropriateness of detention arrangements relating to those persons to the Minister. A de-identified copy of the report is to be tabled in parliament by the Minister. The Minister is not bound by the Ombudsman's recommendation.

months, the Secretary of the Department must give the Ombudsman a report relating to the circumstances of the person's detention.[131] Those applicants who have been detained for an extended period include those who have not passed the character test in s.501 of the Act or who have had adverse security assessments.[132]

The Minister has personal powers to move people to community detention[133] and to grant visas[134] to enable non-citizens to be released from immigration detention. The Bridging R visa allows the release from detention of persons who have been 'cooperating fully with efforts to remove them', but for whom removal is not reasonably practicable. It may be granted by a delegate of the Minister, and it ceases when the Minister (or a delegate) gives a written notice that the Minister is satisfied that the holder's removal is reasonably practicable, or the holder has breached a visa condition.[135]

Removal and *non-refoulement*

Subject to a few exceptions,[136] an applicant whose visa is cancelled and becomes an unlawful non-citizen is liable to be removed from Australia as soon as practicable, as required by s.198 of the Migration Act.

From time to time, the Department may conduct an International Treaties Obligations Assessment (ITOA)[137], which is an assessment by the Department of whether Australia's *non-refoulement* obligations under international treaties are engaged in relation to a person. In general terms, *non-refoulement* is an obligation not to force refugees or asylum seekers to return to a country in which they are liable to be subjected to persecution.[138]

An ITOA may, but need not, be requested by Departmental officers when considering a visa cancellation. They will not generally be requested when considering cancelling a non protection-related visa, because the s.48 bar on further visa applications by people whose visas have been

[131] s.486N.
[132] In 2016-17, the number of people recorded by the Department in s.486N reports to the Commonwealth Ombudsman to have been detained for five years or more increased from 84 in 2015-16 to 122: Commonwealth Ombudsman, *An analysis of assessments by the Ombudsman under s486O of the* Migration Act 1958 *sent to the Minister for Immigration and Border Protection in 2016-17*, p.24 (accessed 17 January 2018).
[133] s.197AB
[134] s.195A.
[135] cl.070.511. For more about Bridging R visas see Legal Services commentary Bridging - Overview.
[136] For example, where a non-citizen has made a valid application for a substantive visa that can be granted while they are in Australia that has not been finally determined: s.198(2)(c) (e.g. because there are ongoing merits review proceedings – see the definition of finally determined in s.5(9)).
[137] Policy - Refugee and Humanitarian – [ITOA] International Treaties Obligations Assessments – About ITOAs – What is an ITOA (issued 18 August 2017)
[138] The obligation is expressed in Article 33 of the *1951 Convention Relating to the Status of Refugees and its 1967 Protocol* as follows: "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion." Article 3.1 of the *1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* contains a similar obligation about people in danger of being tortured. There is probably an implied *non-refoulement* obligation in the 1966 *International Covenant on Civil and Political Rights* (ICCPR) in article 2 which requires states to respect and ensure the ICCPR rights to all persons in territory and under their control. This has been interpreted to prevent *refoulement* where there is a risk of the harm contemplated by articles 6 and 7. See UN Human Rights Committee General Comment 31, 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant': "the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed". The Department's policy states that Australia has accepted that articles 6 and 7 of the ICCPR, which provide that no one shall be arbitrarily deprived of their life or subjected to torture or to cruel, inhuman or degrading treatment or punishment, contain implied *non-refoulement* obligations: Policy - MIGRATION ACT > Visa cancellation instructions > General visa cancellation powers (s109, s116, s128 & s140) – Australia's international obligations - International treaties - ICCPR non-refoulement obligations. It has been held that Minister's Direction No. 65, which required s.501 refusal or cancellation and s.501CA revocation of cancellation decision-makers to consider international *non-refoulement* obligations, did not require consideration of Australia's international obligations under article 12(4) (right to enter own country): *Steve v MIBP* [2018] FCA 311 (Bromwich J, 16 March 2018).

cancelled does not apply to protection visa applications (whereas people who have had a protection visa cancelled are prevented from the bar in s.48A from re-applying for a protection visa).[139]

Department's policy says that generally protection claims will be assessed through the statutory protection visa process, but an ITOA should be done where this is not appropriate or available.[140] They say that an ITOA may be required to assist in finding durable solutions for people for whom an assessment was made that they engaged Australia's *non-refoulement* obligations but who were refused a protection visa because they failed to meet other visa requirements, such as people refused under s.501(1) (character) or s.36(2C) (crime/security); or to reassess cases as a result of changes in policy, legislation, or a person's circumstances, or a court ruling.[141]

An ITOA may also be requested after a visa cancellation to inform decision making when advising the Minister about the possible exercise of Ministerial intervention powers or considering removal. If an ITOA assessor finds that *non-refoulement* obligations are engaged, options include:

- notifying people of their options in relation to applying for a protection visa (if there is no bar)
- referring the case for Ministerial Intervention under s.48B, or to the Complex Case Resolution Section for assessment against the Minister's guidelines on Minister's detention intervention power (s.195A)
- considering referral under other ministerial intervention powers, e.g. ss.345, 351, 391, 417, 454, 501
- considering other visa options such as a Temporary Humanitarian Stay (UJ-449) visa or a Temporary Humanitarian Concern (UO-786) visa.[142]

Relevant Case Law and Decisions

1607917 (Migration) [2017] AATA 950	
1702551 (Migration) [2017] AATA 1415	
1705419 (Migration) [2017] AATA 1900	
MIMIA v Ahmed [2005] FCAFC 58; (2005) 143 FCR 314	Summary 1 Summary 2
Aksu v MIMA [2001] FCA 514; (2001) 65 ALD 667	
Secretary, Department of Social Security v Alvaro [1994] FCA 1124; (1994) 50 FCR 213	
AQM18 v MIBP [2019] FCAFC 27	
Ara v MIBP [2016] FCCA 2154	Summary
Ara v MIBP [2017] FCA 130	
Ayoub v MIBP (2015) 231 FCR 513; [2015] FCAFC 83	
MIMA v Baker [1997] FCA 105; (1997) 73 FCR 187	

[139] Policy - Refugee and Humanitarian – [ITOA] International Treaties Obligations Assessments – About ITOAs – When is an ITOA necessary – Visa cancellation cases (issued 18 August 2017)
[140] Policy - Refugee and Humanitarian – [ITOA] International Treaties Obligations Assessments – About ITOAs – What is an ITOA (issued 18 August 2017)
[141] Policy - Refugee and Humanitarian – [ITOA] International Treaties Obligations Assessments – About ITOAs – When is an ITOA necessary – Assessing non-refoulement obligations in particular circumstances (issued 18 August 2017)
[142] Policy - Refugee and Humanitarian – [ITOA] International Treaties Obligations Assessments – About ITOAs – Progressing the case following an ITOA (issued 18 August 2017)

BCR16 v MIBP [2017] FCAFC 96; (2017) 248 FCR 456	Summary
MIBP v BHA17 [2018] FCAFC 68	
Briginshaw v Briginshaw [1938] HCA 34; (1938) 60 CLR 336	
MHA v CSH18 [2019] FCAFC 80	Summary
Cardenas v MIMA [2001] FCA 17	Summary
Carr (Migration) [2018] AATA 731	
Cockrell v MIAC [2008] FCAFC 160; (2008) 171 FCR 345	
Collector of Customs v Brian Lawlor Automotive Pty Ltd [1979] FCA 21; (1979) 24 ALR 307	
COT15 v MIBP (No 1)[2015] FCAFC 190; (2015) 236 FCR 148	Summary
DMH16 v MIBP [2017] FCA 448	
DOB18 v MHA [2019] FCAFC 63	
Drake v MIEA (1979) 2 ALD 60	
George v Rockett [1990] HCA 26; (1990) 170 CLR 104	
Goundar v MIBP [2016] FCA 1203	
Ibrahim v MHA [2019] FCAFC 89	
Jahnke v MIMA [2001] FCA 897; (2001) 113 FCR 268	
Kim v MIAC [2008] FCAFC 73; (2008) 167 FCR 578	Summary
Lin v MIAC [2008] FMCA 742	Summary
Lobo v MIMIA [2003] FCAFC 168; (2003) 132 FCR 93	Summary
Maharjan v MIAC [2011] FMCA 200	Summary
McDonald v Director-General of Social Security [1984] FCA 57; (1984) 1 FCR 354	
Meng v MIAC [2007] FMCA 173	
Nagalingam v MILGEA [1992] FCA 470; (1992) 38 FCR 191	
Naqvi v MIBP [2018] FCCA 793	Summary
MIBP v Naqvi [2018] FCA 2075	Summary
NBMZ v MIBP (2014) FCR 1, [2014] FCAFC 38	
Plaintiff M64/2015 v MIBP [2015] HCA 50; (2015) 148 ALD 206	
MIEA v Pochi [1980] FCA 85; (1980) 4 ALD 139	
Ruhl v MIMA [2001] FCA 648; (2001) 184 ALR 401	
Saleem v MRT [2004] FCA 234	Summary
Shi v MARA [2008] HCA 31; (2008) 235 CLR 286	
Singh v MIAC [2011] FMCA 494	
Steve v MIBP [2018] FCA 311	
Su v MIBP [2016] FCCA 83	Summary
Su v MIMIA [2005] FCA 655	

Suleyman v MIMA [2000] FCA 610	Summary
Sullivan v CASA [2014] FCAFC 93; (2014) 226 FCR 555	
Thapaliya v MIBP [2018] FCCA 3278	
Thayananthan v MIMA [2001] FCA 831; (2001) 113 FCR 297	Summary
Yilmaz v MIMA [2000] FCA 906; (2000) 100 FCR 495	Summary 1 Summary 2
Zhao v MIMA [2000] FCA 1235	Summary
Zubair v MIMIA [2004] FCAFC 248; (2004) 139 FCR 344;	Summary

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Appendix 1 – Cancellation powers table

Cancellation power & description	**AAT juris-diction** [143]	**Limitations on power**	**Prior notice / natural justice?**	**Automatic or mandatory?**	**Revocable?**
s.109 Incorrect information	MRD		s.107	Mandatory in prescribed circumstances[144]	
s.116(1) General and prescribed grounds	MRD	If visa holder is onshore, can only be used to cancel temporary visa[145]	s.119	Mandatory in prescribed circumstances[146]	
s.116(1AA) Not satisfied as to identity	MRD		s.119		
s.116(1AB) Incorrect information	MRD		s.119		
s.116(1AC) 'Payment for visas' conduct	MRD		s.119		
s.128 Outside Australia cancellation on s.116 grounds	No	Visa holder must be offshore	No – 'without notice'		Yes – s.131
s.133A(1) Minister set aside AAT/delegate s.109 decision (public interest)	No	Minister's personal power[147]	NJ applies[148]		
s.133A(3) Minister's power if s.109 ground (public interest)	No	Minister's personal power[149]	NJ does not apply[150]		Yes – s.133F
s.133C(1) Minister set aside AAT/delegate s.116 decision (public interest)	No	Minister's personal power;[151] if visa holder is onshore, can only be used to cancel temporary visa[152]	NJ applies[153]		

[143] This column refers to whether the AAT *generally* has jurisdiction. It does not deal with specific circumstances such as conclusive certificates, immigration clearance, or decisions made personally by the Minister to cancel the visa, or the visa holder being offshore, which may make the decision non-reviewable,– see e.g. s.338(1)(a), s.338(3)(b) and (d), and discussion above under Which decisions are reviewable?
[144] s.109(2). There are currently no circumstances prescribed.
[145] See s.117. Permanent visas cannot be cancelled under this section while the holder is in the migration zone and was immigration cleared on last entry: s.117(2).
[146] s.116(3). See r.2.43(2) for the prescribed circumstances.
[147] s.133A(7).
[148] See heading above s.133A(1) and contrast to s.133A(4).
[149] s.133A(7).
[150] There are no express notice provisions but s.133A(4) states that natural justice does not apply to these decisions.
[151] s.133C(7)
[152] s.117 applies to these powers as it does to a s.116 cancellation: s.133C(9).
[153] See heading above s.133C(1) and contrast to s.133C(4).

Cancellation power & description	**AAT juris-diction** [143]	**Limitations on power**	**Prior notice / natural justice?**	**Automatic or mandatory?**	**Revocable?**
s.133C(3) Minister's power if s.116 ground (public interest)	No	Minister's personal power;[154] if visa holder is onshore, can only be used to cancel temporary visa[155]	NJ does not apply[156]		Yes – s.133F
s.134B Emergency cancellation on security grounds	No	Visa holder must be offshore	NJ does not apply[157]	Mandatory	Yes – s.134C
s.134F(2) Consequential cancellation s.134B	No		No – 'without notice'	No	
s.134(1), (3A) and (4) Business visa cancellation	GD		s.134(9), s.135	Mandatory if under s.134(4)[158]	
s.137J(2) Automatic student visa cancellation	No (MRD) [159]		No	Automatic	Yes – s.137L, s.137N
s.137Q(1) and (2) Regional sponsored employment visas	MRD		s.137R		
s.137T(1) Consequential cancellation s.137Q	No		No	Automatic	
s.140(1) Consequential cancellation - family member - ss.109, 116, 128, 133A, 133C, 137J	No		No	Automatic	Yes – s.140(4)
s.140(2) Consequential cancellation - not family member - ss.109, 116, 128, 133A, 133C, 137J	MRD		No – 'without notice'		Yes – s.140(4)
s.140(3) Consequential cancellation - Australian-born child	No		No	Automatic	Yes – s.140(4)
s.164 Criminal justice visa	No		No	Automatic	

[154] s.133C(7)
[155] s.117 applies to these powers as it does to a s.116 cancellation: s.133C(9).
[156] s.133C(4).
[157] s.134A.
[158] s.134(4) relates to consequential cancellation for family members of a person whose visa is cancelled under s.134(1) or (3A). However, visas can't be cancelled under this subsection in cases of extreme hardship: s.134(5).
[159] Although the cancellation is automatic, a decision not to revoke the cancellation under s.137L is reviewable in the MRD, however as discussed above, these decisions no longer arise in practice.

Cancellation power & description	**AAT juris-diction** [143]	**Limitations on power**	**Prior notice / natural justice?**	**Automatic or mandatory?**	**Revocable?**
s.500A(1) and (3) Temporary safe haven visa	No	Minister's personal power[160]	NJ does not apply[161]		
s.500A(13) Consequential cancellation - Temporary safe haven visa	No		No	Automatic	
s.501(2) Character grounds	GD		NJ applies		
s.501(3) Character grounds – no natural justice	No	Minister's personal power[162]	NJ does not apply[163]		Yes – s.501C
s.501(3A) Character grounds – substantial criminal record or child sex offences	No (GD)[164]		Not specified[165]	Mandatory	Yes – s.501CA
s.501A(2) and (3) Minister can set aside AAT/delegate s.501 decision	No[166]	Minister's personal power[167]	NJ applies to s.501A(2) but not s.501A(3)[168]		Yes if under s.501A(3) – s.501C
s.501B(2) Minister can set aside adverse delegate s.501 decision	No[169]	Minister's personal power[170]	No		
s.501BA(2) Minister can set aside AAT/delegate s.501CA decision to revoke s.501(3A) cancellation	No[171]	Minister's personal power[172]	NJ does not apply[173]		

[160] s.500A(6)
[161] s.500A(11).
[162] s.501(4).
[163] s.501(5).
[164] Although the cancellation isn't reviewable, a decision not to revoke under s.501CA(4) is: s.500(1)(ba).
[165] Natural justice does not apply: s.501(5).
[166] s.501A(7)
[167] s.501A(6)
[168] s.501A(4)
[169] s.501B(4)
[170] s.501B(3)
[171] s.501BA(5)
[172] s.501BA(4)
[173] s.501BA(3)

Cancellation of Visas under Section 109

CONTENTS

Overview

Subdivision C of Division 3 of Part 2 of the *Migration Act 1958* (the Act) imposes obligations on non-citizens to provide accurate information in their dealings with the Department and provides for a power to cancel visas based on incorrect information. Section 109(1) of the Act allows the Minister to cancel a visa if the applicant has failed to comply with s.101, 102, 103, 104, 105 or 107(2) of the Act. Broadly speaking, these sections require visa applicants to provide correct information in their visa applications and passenger cards, not to provide bogus documents and to notify the Department of any incorrect information of which they become aware and of any relevant changes in circumstances. A visa can be cancelled under s.109 only if the visa holder is in Australia and immigration cleared.

In the absence of prescribed circumstances to the contrary effect, the power to cancel a visa under s.109 is discretionary. At present, there are no such prescribed circumstances. If the decision maker is satisfied that there was non-compliance with statutory obligations in the way described and particularised in the 'Notice of intention to consider cancelling the visa' issued under s.107, then s/he must consider whether the power to cancel the visa should be exercised, having regard to a number of considerations prescribed in the Migration Regulations 1994 (the Regulations).

The Tribunal has jurisdiction under s.338(3) and (4) [Part 5] and s.411(1)(b) and (d) [Part 7] of the Act to review decisions to cancel visas under s.109.

The Tribunal's powers on review are set out in s.349 [Part 5] and s.415 [Part 7]. Pursuant to s.349(1) and s.415(1), the Tribunal may exercise all the powers and discretions conferred by the Act on the primary decision-maker for the purposes of the decision under review. On the review of a decision to cancel a visa, the Tribunal may affirm or vary the decision, or set it aside and substitute a new decision: s.349(2) and s.415(2). Note that the Tribunal cannot remit the matter for reconsideration as a decision to cancel a visa is not a 'prescribed matter' for the purpose of the remittal powers in ss.349(2)(c) or 415(2)(c) of the Act.

Legal Issues

Which visas can be cancelled under s.109?

Section 109 provides a power to cancel visa for incorrect information. The obligations to provide correct information, and the cancellation power that can be exercised for non-compliance with those obligations, apply to all visas where the visa application was made, and passenger card filled in, on or after 1 September 1994.[1] In some circumstances the power to cancel under s.109 may also apply to pre 1 September 1994 visa and entry permit applications.[2]

[1] s.115(1).
[2] s.115(2), (3). Under s.115(2), the obligations in ss.101 and 102 do not apply to visa and entry permit applications made before 1 September 1994 and not finally determined before that date. Under s.115(3), Subdivision C applies where visas and entry permits were granted prior to 1 September 1994 and the old s.20 'circumstances in which non-citizens may become illegal entrants' applied. For discussion of these provisions and their application, see PAM3 – Migration Act - –Visa cancellation instructions - General visa cancellation powers (s109, s116, s128, s134B & s140) – 'Old s20 Cases' (re-issue date 21/8/16).

Onus on non-citizens to provide correct information

Subdivision C was intended, among other things, to prevent non-citizens from benefiting from the failure to disclose or provide accurate and truthful information in a visa application.[3] It therefore places an onus on non-citizens to provide accurate information and to correct inaccurate information in relation to visa applications. Specifically, non-citizens must:

- fill in visa application forms and passenger cards in such a way that all questions are answered and no incorrect answers are given: ss.101 and 102;
- not provide bogus documents: s.103;
- if circumstances change before the visa is granted, or if granted outside Australia before the applicant is immigration cleared, so that an answer to a question on an application form or an answer under s.104 is incorrect in the new circumstances - advise the Department as soon as practicable of the new circumstances and the new correct answer: s.104
- correct any errors in information provided: s.105;[4] and
- if responding to a notice given under s.107, do so without making any incorrect statement: s.107(2).

Visa applications to be correct – s.101 / Passenger cards to be correct – s.102

Under ss.101 and 102, non-citizens must fill in or complete their application forms and passenger cards in such a way that all questions are answered and no incorrect answers are given or provided.

For the purposes of these provisions, s.99 provides that information given by or on behalf of a non-citizen to the Department or a Tribunal in relation to the application is taken to be an answer in the application form, whether it is given orally or in writing. Section 99 has a very broad deeming effect that considerably expands the ambit of the obligations to include a broad range of information which may be properly regarded as information for the purposes of s.101.[5]

In addition, s.100 makes it clear that for the purposes of Subdivision C, an answer to a question is incorrect even if the person who gave it or caused it to be given did not know that it was incorrect.

<u>Omission</u>

Whether an *omission* can be an incorrect answer for the purposes of s.101 will depend upon the circumstances. For example, if a question in an application seeks exhaustive information (for instance 'Do you have a spouse, de facto, any children, or fiancé who will not be travelling with you?'), then an omission of any such person will be an incorrect answer. However, a more open-ended question, such as 'Why do you want to visit Australia?' requires an answer that is accurate so far as it goes, but will not be considered to be incorrect because it omits information.[6]

[3] Explanatory Memorandum to the Migration Reform Bill 1992 at [32].
[4] This obligation is enlivened when the incorrect information is given, and remains in existence until it is discharged: see *MIAC v Khadgi* (2010) 190 FCR 248 at [89].
[5] *Gido-Christian v MIAC* [2007] FMCA 825 (McInnis FM, 31 May 2007) at [85].
[6] *Sandoval v MIMA* (2001) 194 ALR 71 per Gray J at [50]-[51]. Although the Court in this case was considering cancellation pursuant to s.116(1)(d), the discussion of this issue would appear to be equally relevant to cancellation under Subdivision C. Whether an omission can constitute non-compliance with s.101 was also considered by Mansfield J in *Chhuon v MIMIA* (2003) 198 ALR 500. His Honour appears to have taken the view that an omission can provide a basis for cancellation for non-

However, where the information relied upon has been given during the processing of the visa application – for example in submissions made to the Department or the Tribunal, or during an interview or a Tribunal hearing – it will be more difficult to draw a line between open and closed questions, and omissions that give rise to a non-compliance with s.101 and those that do not. For example, in *Gido-Christian v MIAC*[7] the applicant's spouse visa was cancelled for non-compliance with s.101 in circumstances where, throughout the processing of her application, she had maintained that she was in a genuine and continuing marital relationship as opposed to marrying for immigration convenience. The incorrect information had been described as her failure to provide information about the true nature of her relationship with her sponsor. In rejecting the applicant's argument that an omission could not be an incorrect answer for s.101, the Court referred to the deeming provision of s.99 concluding that this was not a case where a specific incorrect answer needed to be established when dealing with what could only be described as a straightforward and significant notion, namely, the genuineness of the relationship.

Correcting incorrect information

It would appear that non-compliance with the requirement to give correct information (s.101) is not altered by the subsequent correction of the error. In *Jalal v MIMA*, Finkelstein J stated:

> *Whether a non-citizen has given an incorrect answer in his or her application form, or has given incorrect information which is deemed to be an incorrect answer in the application form, is to be determined at the moment the answer is given or the information is provided. Thus, if a question on an application form has been incorrectly answered there will be non-compliance with s101 immediately upon the lodgement of the application form. In the case of incorrect information that is deemed to be an incorrect answer by operation of s99, there will be non-compliance with s101 at the instant the information is given. The fact that the correct answer is given some time later does not alter the character of what had previously occurred.*[8]

Nevertheless, subsequent correction of the error would be relevant to the consideration of the discretion as to whether the cancellation power should be exercised: see s.109(1)(c) and r.2.41(f) (discussed further below).

Where an applicant becomes aware that earlier information provided was incorrect, there is an obligation under s.105 to provide particulars of incorrect answers and to give the correct answer. Therefore, the subsequent correction of incorrect answers, while it does not overcome the non-compliance with s.101, would avoid non-compliance with s.105, provided it was done as soon as practicable after becoming aware of the incorrect information.

compliance with s.101, on the basis that '[t]here is an obligation upon the visa applicant not to mislead' and '[s]ometimes literally correct answers may be misleading by what they omit': at [42]. In that case, the decision maker had taken the view that inaccuracies were significant because they were part of the overall picture of an attempt to secure, by contrivance, permanent residence in Australia for the applicant and her family. Justice Mansfield held that in that context, the 'inaccuracies' may have been information which the applicant should have disclosed and that her failure to mention those matters led her to completing the application form in such a way that literally correct answers were not entirely correct, and that the cancellation decision did not involve jurisdictional error: at [43]-[45]. However, the basis for the assertion that in the context of s.101 there is an obligation upon the visa applicant not to mislead is not explained, and that proposition appears to be contrary to the earlier decision in *Sandoval* where Gray J at [38]-[55] expressly rejected the Minister's argument that a statement that is misleading by reason of an omission is an incorrect answer for the purposes of s.101. Justice Mansfield did not refer to the earlier decision in *Sandoval*, and there may be some doubt as to whether his opinion in relation to omissions that are misleading would be followed.

[7] [2007] FMCA 825 (McInnis FM, 31 May 2007).

[8] (2000) 60 ALD 779 at [17]. On appeal, the Full Federal Court observed that '[i]t may be, although it is not self evident, that, if the non-citizen corrects any incorrect information in accordance with s.105 before the grant of the relevant visa, then the visa may not be subject to cancellation under Subdivision C on the ground of the prior incorrect statement'; however the question did not arise, and the Court found it unnecessary to express any view about it: (2000) 102 FCR 63 at [19].

Where incorrect information is known to the Department

It is unclear whether a visa can be cancelled under s.109 on the basis of incorrect information that was known to the Department to be incorrect at the time when the visa was granted.

The Federal Court in *Jalal v MIMA* held that there are aspects of the provisions of Subdivision C that indicate that the power to cancel a visa for non-compliance with a provision relating to an application form is confined to non-compliance that was not known when the visa was granted.[9] However, on appeal, the Full Court unanimously held that if Subdivision C of the Act were applicable, the Minister had power to cancel the visa even though the non-compliance was known when the visa was granted.[10] The Court held that while the fact that the visa was granted with full knowledge of the non-compliance may be a matter that could be taken into account, there was no basis for concluding that, in such circumstances, the power of cancellation is negated. However, this aspect of the Full Court's decision is best regarded as *obiter dicta* because, ultimately, the Full Court held that the provisions of Subdivision C did not apply to the application in question. Nevertheless, the decision of the Full Court was relied on in *Dy v MIMA*[11] where North J refused leave to raise an argument that the power to cancel could not arise in relation to a non-compliance known at the time when the visa was granted, on the basis that it was bound to fail.[12] The Court's *obiter* comments in *Asenso v MIBP*[13] also support the position that a visa can be cancelled under s.109 even if non-compliance was known, and excused, when the visa was granted.

The correct position is therefore not entirely clear.[14] If the view is taken that the Full Court's decision in *Jalal* did not overrule Finkelstein J's opinion on this issue, its strongly expressed contrary opinion nevertheless raises a serious question as to whether Finkelstein J's opinion is correct. In any event, if Finkelstein J's view is accepted, it should be limited to its own facts, namely where the non-compliance was known *to the decision-maker* when the visa was granted. On that approach, it would be irrelevant that incorrect information relied on for a s.109 cancellation was known within the

[9] *Jalal v MIMA* (2000) 60 ALD 779 at [30], [32]. This case concerned a cancellation under s.128 on the basis of that the ground in s.116(1)(d) was made out. Section 116(1)(d) permits cancellation where the visa would be liable for cancellation under Subdivision C (s.109).

[10] *MIMA v Jalal* (2000) 102 FCR 63 at [18].

[11] [2006] FCA 676 (North J, 3 May 2006).

[12] The issue also arose somewhat obliquely in *Farah v MIMIA* [2010] FMCA 801 (Nicholls FM, 22 October 2010) where the correct information was that the applicant's uncle had died. The Embassy had received an anonymous allegation, which it followed up with the applicant who confirmed (contrary to the fact) that his uncle was still alive. Federal Magistrate Nicholls stated at [38]: 'There is some moral strength to the applicant's complaint now that if the department had known of the uncle's death, or that this was easily verifiable through inquiries with the Minister's department in Australia, why the Embassy proceeded to grant the visas … without some investigation'. He held, however, that whatever the situation in that regard, it did not reveal jurisdictional error on the part of the Tribunal. While his Honour did not squarely address the issue, and while the relevant facts are unclear, his reasoning suggests that the Department's knowledge of the correct information before grant would rise no higher than a moral argument. His Honour also referred to s.110 of the Act which states that s.109 applies 'whether or not the Minister became aware of the non-compliance'. However the relevance of this provision is unclear. Its full text is: 'To avoid doubt, sections 107, 108 and 109 apply whether or not the Minister became aware of the non-compliance *because of information given by the holder*' (emphasis added). Its heading is 'Cancellation provisions apply whatever the source of knowledge of non-compliance'; and the Explanatory Memorandum (EM) states that 'This section makes it clear that the cancellation process under [ss.107, 108 and 109] applies whether or not it was information given by the holder that caused the awareness of non-compliance. In other words, if information given by a non-citizen is discovered to be incorrect by a source other than the non-citizen, the non-citizen will be subject to the processes set out in Subdivision C': EM to the Migration Reform Bill 1992, at [118]. The heading, text and EM strongly suggest that the provision is directed to the source, and not the timing, of disclosure to the Department. So construed, it does not provide support for the view that the cancellation process applies whether or not the Minister became aware of the non-compliance before the visa was granted.

[13] *Asenso v MIBP* [2016] FCCA 756 at [20]. Judge Driver observed, *obiter*, that in circumstances where non-compliance is excused, s.113 of the Act (which provides that if the holder of a visa who has been immigration cleared complied with s.101 - 105 in relation to the visa, it cannot be cancelled because of any matter that was fully disclosed in so complying) would provide no protection against subsequent cancellation.

[14] Oddly, the Full Court's decision in *Jalal* was not referred to by Mansfield J in *Chhuon v MIMIA* (2003) 198 ALR 500 at [37] where his Honour observed, *obiter*, that it was not argued that the decision of Finkelstein J applied to the circumstances before him.

Department, where it was not given in relation to the visa that was cancelled, and not known to the decision maker when the visa was granted.[15]

Bogus Documents – s.103

Under s.103, a non-citizen must not give, present, produce or provide to an officer, an authorised system,[16] the Minister or a tribunal performing a function or purpose under the Act, a bogus document or cause such a document to be so given, presented, produced or provided.[17]

A 'bogus document', in relation to a person, is defined in s.5(1) of the Act[18] to mean a document that the Minister reasonably suspects is one that:

- purports to have been, but was not, issued to a person; or
- is counterfeit or has been altered by a person who does not have authority to do so; or
- was obtained because of a false or misleading statement, whether or not made knowingly.

In assessing whether a document is bogus for s.103, it is necessary to address the question posed by the definition of 'bogus document'. Oblique references to the non-genuineness of a document or statements that the document appears to be falsified will be insufficient.

For example, in *Shu v MIMIA,*[19] the document in question was a work reference, which the decision maker had described in a number of ways, including 'a false work reference'; 'a document that is false and misleading', and 'a document that purports to be a genuine employment reference' but that 'the content of this document is not genuine'. Notwithstanding these statements, the delegate failed to express any suspicion that the reference was not issued in respect of the applicant, or that the reference was obtained because of a false or misleading statement, or that the reference was counterfeit or had been altered by a person who did not have authority to do so. The Court held that the decision maker was in error when he did not turn his mind to the correct question contemplated by s.103. The distinction should also be drawn between a document reasonably suspected of being a 'bogus document' within the meaning of s.5(1), and any false information or misleading statements which are given and which may lead to a 'bogus document' being obtained.[20]

[15] This is consistent with Finkelstein J's reasoning at [31] that, 'if the Minister decides that the non-citizen who has failed to comply with s 101 should be granted a visa that should be an end to the matter'. He also considered that the heading to Subdivision C 'Visas based on incorrect information may be cancelled' confirms that the power to cancel is not to be available where the Minister knows of the non-compliance at the time of grant: at [32]. These considerations would be irrelevant where the non-compliance is known within the Department but not to the person who decided to grant the visa.

[16] 'Authorised system' is defined in s.5(1) of the Act to mean, in relation to a provision in which it is used, an automated system authorised in writing by the Minister or the Secretary for the purposes of the provision. At the time of writing no system had been authorised for the purposes of s.103. Note that the Court in *Brar v MIAC* [2011] FMCA 435 (Driver FM, 28 July 2011) appears to have proceeded on the mistaken assumption that an online visa lodgement system was an 'authorised system' for the purposes of s.103. On appeal the Federal Court was prepared to accept an argument to the contrary, but determined the question was not properly within its jurisdiction: *MIAC v Brar* (2012) 201 FCR 240 at [46]. See also *Rafi v MIAC* [2012] FMCA 1002 (Hartnett FM, 7 November 2012) at [29].

[17] The terms 'produce' and 'produced' were inserted in s.103 by the *Counter Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (No.116, 2014). The amendment applies to documents given, presented, produced or provided on or after 4 November 2014: Schedule 7 to.No.116, 2014.

[18] This definition, removed from s.97 and inserted in s.5(1) by the *Migration Amendment (Protection and Other Measures) Act 2015* (No.35, 2015), with effect from 18 April 2015.

[19] [2003] FCA 791 (Emmett J, 23 June 2003).

[20] *Singh v MIMAC* [2013] FCCA 1435 (Judge Cameron, 24 September 2013) at [27]-[29]. See also *Sharma v MIMAC* [2013] FCCA 1280 (Judge Manousaridis, 6 September 2013) where the Court at [29]-[30] was satisfied that false work reference letters themselves did not fall within any of the categories of *bogus document* as defined, but that a TRA skills assessment which was obtained by relying upon work reference letters which contained false and misleading information did.

There is no requirement, either in the terms of s.103 or in the definition of bogus document, for the document in question to be connected to a visa criterion. In *Batra v MIAC*[21] the Federal Court held that a skills assessment obtained because of a false work reference that was issued by a body which was not validly specified as an assessing authority was still a bogus document.[22] The Court found that the fact that the skills assessment was of no legal effect for its specific purpose was immaterial to whether or not it fell within the definition of a bogus document. The definition of bogus document included a document that 'was obtained because of a false or misleading statement' and the skills assessment was obtained because of a false work reference, notwithstanding the body had no power to make that assessment. By then providing the bogus document to an officer the applicant failed to comply with s.103. [23]

Changes in circumstances – s.104

Under s.104(1), if circumstances change so that an answer to a question on a non-citizen's application form or an answer under s.104 is incorrect in the new circumstances, the non-citizen must, as soon as practicable, inform an officer in writing of the new circumstances and of the correct answer in those circumstances.[24] If the applicant is in Australia at the time of visa grant, this requirement only applies to changes in circumstance before the visa was granted.[25] If the applicant is outside Australia at the time of grant, it only applies to changes in circumstances after the application and before the applicant is immigration cleared.[26]

Actual knowledge is an implicit ingredient of s.104, such that the obligation imposed by s.104(1) is to inform an officer of the change in circumstances as soon as practicable after the non-citizen becomes aware of it.[27] Therefore, where s.104 is an issue, it is necessary to consider and make findings in respect of the timing of an applicant's knowledge of the relevant change in circumstances.

Section 104 has broad application. It is not confined to changes in circumstances which are material to the eligibility of the relevant person for the grant of the visa of which he or she is a holder.[28]

Consequences of non-compliance - visa cancellation

If a decision is made that there has been non-compliance by the holder of a visa with s.101, 102, 103, 104, 105, or 107(2), whether in respect of the current visa, or any previous visa held by the person (s.107A),[29] the visa may be cancelled under s.109. Cancellation in these circumstances is a

[21] [2013] FCA 274 (Murphy J, 28 March 2013).
[22] *Batra v MIAC* [2013] FCA 274 (Murphy J, 28 March 2013) at [60]. Although in the context of PIC 4020, see also *Mudiyanselage v MIAC* [2012] FMCA 887 (Emmett FM, 21 September 2012), upheld on appeal in *Mudiyanselage v MIAC* (2013) 211 FCR 27; *Sun v MIBP* [2015] FCCA 2479 (Judge Jarrett, 11 September 2015) at [41] and S*ingh v MIBP* [2015] FCCA 2805 (Judge Street, 8 October 2015).
[23] *Batra v MIAC* [2013] FCA 274 (Murphy J, 28 March 2013) at [60], which upheld the decision of Riley FM in *Batra v MIAC* (2012) 265 FLR 461. See also *Brar v MIAC* [2012] FMCA 519 (Driver FM, 31 July 2012) where Driver FM held at [71] that it would have been open to the Tribunal to treat the TRA assessment as a 'bogus document' even if it had concluded that the assessment was not relevant to an applicable visa criterion. See also: *Rafi v MIAC* [2012] FMCA 1002 (Hartnett FM, 7 November 2012).
[24] The intended operation of s.104 was considered in the judgment of *Pavuluri v MIBP* [2014] FCA 502 (Mortimer J, 16 May 2014), which concerned a skilled visa refusal decision. The Court reasoned, at [48], that s.104 is concerned to ensure that information in an application is correct and correctly reflects the circumstances of the visa applicant.
[25] s.104(2).
[26] s.104(3).
[27] *Farah v MIAC* (2011) 120 ALD 249 at [12].
[28] *Dou v MIBP* [2016] FCCA 682 (Judge Smith, 22 March 2016) at [18].
[29] The operation of s.107A was considered in *Asenso v MIBP* [2016] FCCA 756, where the Court held at [12] that it clearly permitted cancellation where the relevant conduct underpinned the grant of a visa previously held, and was not inconsistent with s.113. In that case, the s.107 notice referred to non-compliance with ss.101-103 in obtaining a previously held visa. Whether or not the applicant had complied with those provisions in relation to the visa that had been cancelled was,

discretionary power. Cancellation may be for non-compliance with just one of these provisions, or more than one, such as non-compliance with both ss.101 (incorrect information) and 105 (failure to correct the information).[30]

Procedure for Subdivision C cancellation - sections 107, 108, 109

If the decision-maker considers that there has been a relevant non-compliance, certain procedures must be followed before a decision can be made to cancel the visa. In sum, the decision-maker must:

- notify the visa holder of the possible non-compliance;
- consider any response;
- decide whether there was non-compliance *in the way described in the notice*; and if so,
- decide whether or not to exercise the discretion to cancel the visa.

Notification of possible non-compliance - s.107

Under s.107 of the Act, if the Minister considers that the holder of a visa who has been immigration cleared did not comply with ss.101, 102, 103, 104, or 105 the Minister may give the visa holder a notice which must provide, among other things:

- particulars of the possible non-compliance (or non-compliances);[31] and
- an opportunity to respond in writing within the statutory period:
    - showing that there was compliance and in case the decision maker decides that there was non-compliance, showing cause why the visa should not be cancelled; or
    - giving reasons for the non-compliance (or non-compliances), and showing cause why the visa should not be cancelled.[32]

Additional requirements relating to the content of the notice are set out in s.107(1)(c)-(f).[33]

The statutory period for response is 14 days for a permanent visa, and for a temporary visa, it is a 'reasonable period'.[34] What constitutes a 'reasonable period' will depend on the circumstances.[35]

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accordingly, irrelevant. Judge Driver also held at [15] that s.113 did not apply as there was no suggestion that the applicant had complied with ss.101-103 in relation to the visa that had been cancelled.

[30] In *Farah v MIAC* (2011) 120 ALD 249 at [29], Jessup J observed that, where a single power, such as the cancellation of an applicant's visa, is exercised by reference to two or more sources, in the absence of specific indications to the contrary, it normally cannot be assumed that the power would have been exercised, or exercised in the same way, if one of those sources had been unavailable. Accordingly, where the Tribunal relies on more than one type of non-compliance, each must be properly dealt with in its reasoning.

[31] s.107(1)(a). In *McDade v MIMA* [2000] FCA 528 (Nicholson J, 5 May 2000) at [46]-[47] and *SZWAP v MIBP* [2015] FCCA 511 (Judge Street, 4 March 2015) at [22]-[28], it was held that s.112, which provides that action taken because of one instance of non-compliance does not prevent action because of another non-compliance, does not prohibit the issue of a fresh s.107 notice giving particulars of a possible non-compliance relating to the same subject matter which had been given as particular of a possible non-compliance in a previous s.107 notice, in relation to which a relevant decision had been made.

[32] s.107(1)(b).

[33] The s.107 requirements are discussed in PAM3 – Migration Act - –Visa cancellation instructions - General visa cancellation powers (s109, s116, s128, s134B s140) - s109 Cancellation– Issuing a s107 notice (re-issue date 21/8/16).

The preconditions for issuing the notice

Section 107 is only engaged if the Minister or delegate considers that the visa holder has not complied with one of the provisions mentioned in s.107(1). It is only then that the Minister or delegate is entitled to give notice to the visa holder under s.107. Therefore, if a notice is to be given under s.107, the Minister or delegate must have reached a state of mind where they consider that the visa holder has not complied with one or more of the relevant provisions. It is not sufficient that the delegate considers that the visa holder 'may have' provided incorrect information.[36] However, there is no requirement that the notice must contain an assertion as to the requisite state of mind.[37]

Whether the Minister or delegate had reached the requisite state of mind is a question of fact to be determined on the basis of the evidence, which could include the terms of the s.107 notice itself (including whether a reference to 'may have' reflected the decision-maker's state of mind or was simply a standard letter template), the information referred to in the notice, other information or communications recorded in the departmental file, and departmental guidelines for primary decision makers.[38] For example, in *Matete v MIAC*,[39] the notice included statements that in the Passenger Cards the applicant had 'provided incorrect answers', and 'Information held by the Department … indicates' that she had fraudulently obtained her New Zealand passport, and so on.[40] Federal Magistrate Cameron held that the wording of the notice demonstrated that the delegate considering the applicant's position did consider that there had been relevant breaches. Although his Honour was of the view that the notice could have been more clearly drafted, he found that the use of the terms 'may not have complied with' the relevant provisions was not conclusive of the delegate's opinion, but reflected the reality that the delegate might have been incorrect in his conclusion, and a willingness to consider such a possibility.[41]

Sufficiency of Notice

The s.107 notice is a critical step in the cancellation process as it provides the visa holder with an opportunity to show that the grounds for cancellation do not exist, or, if they do exist, to put forward reasons why the discretion to cancel should not be exercised.

The sufficiency of notification is to be tested by reference to the statutory purpose. That is, it must be sufficient to fairly inform the visa holder of the basis upon which cancellation is being considered so that the visa holder is adequately equipped to provide such relevant information as may be available and to make such submissions as may be open.[42] For example, if both paragraphs of s.101 are to be relied on, the notice would need to give particulars of the facts and circumstances which gave rise to the possible breach of each of the paragraphs. It would not be enough to generically claim that the visa holder has breached a section of the Act without giving particulars of the facts and circumstances

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[34] s.107(1A). Under s.107(1A)(a) the period for temporary visas is the prescribed period, or if no period is prescribed, a 'reasonable period'. At the time of writing, no period had been prescribed.
[35] As to what the Department considers a 'reasonable' period, see PAM3 – Migration Act - –Visa cancellation instructions - General visa cancellation powers (s109, s116, s128, s134B s140) - s109 Cancellation– s107 Notices - The visa holder's response – Time allowed for visa holder to respond to a s107 notice (re-issue date 21/8/16).
[36] *Zhong v MIAC* (2008) 171 FCR 444 at [77].
[37] *Zhong v MIAC* (2008) 171 FCR 444 at [75].
[38] For example, PAM3 – Migration Act - –visa cancellation instructions - General visa cancellation powers (s109, s116, s128, s134B & s140) –s109 Cancellation– Issuing a s107 notice (re-issue date 21/8/16).
[39] [2008] FMCA 573 (Cameron FM, 7 August 2008).
[40] *Matete v MIAC* [2008] FMCA 573 (Cameron FM, 7 August 2008) at [40]. Relevant passages from the s.107 notice are annexed to the judgment.
[41] *Matete v MIAC* [2008] FMCA 573 (Cameron FM, 7 August 2008) at [39]-[41].
[42] *Zhao v MIMA* [2000] FCA 1235 (French, Hill and Carr JJ, 1 September 2000) at [25]. In that case the Court was considering the requirements of s.119 notifications for the purposes of Subdivision D cancellation but the principle would be equally applicable to s.107 notifications. The decision was cited with approval by the Federal Court in *MIAC v Brar* (2012) 201 FCR 240: see [57]-[58], a decision that was concerned with a s.107 notification.

which are said to give rise to the possible breach of the particular provision.[43] Simply identifying the statutory provision not complied with would not be an adequate provision of particulars for s.107(1)(a).[44]

However, it may not always be necessary to identify with precision particular answers that are incorrect. For example, in *Gido-Christian v MIAC*, where the core issue related to the genuineness of the applicant's spousal relationship, the s.107 notice identified the incorrect 'answers' as including the applicant's declaration that she 'did not marry or enter a de facto/common law relationship to become eligible for migration to Australia', and that her application was lodged on the basis that she was in a genuine and continuing marital relationship with her sponsor. The Court held that when read in a commonsense way, the notice provided sufficient information and satisfactorily complied with legislative requirements. His Honour stated that this was not a case where a specific incorrect answer needed to be established when dealing with what could only be described as a straightforward and significant notion, namely the genuineness of the relationship.[45]

Further, the fact that allegations in a s.107 notice may be factually incorrect will not invalidate the notice. For example, in *Brar v MIAC*[46] the s.107 notice indicated that the applicant had failed to comply with s.103 because he had provided a skills assessment from Trades Recognition Australia (TRA) obtained by using a false work reference (a 'bogus document') in circumstances where the provision of such an assessment was necessary for the grant of his visa. The Court reasoned that even though TRA had not in fact been validly specified as a relevant assessing authority, and so the s.107 notice was incorrect in stating that the grant of the visa was conditional on provision of the assessment, both the applicant and the Department had proceeded on the basis the assessment was necessary and the applicant had provided false or misleading information to TRA in order to obtain it. The Court held that the allegations in the s.107 notice were thought to be material at the time the notice was issued and the notice was not invalid simply because they were included.[47]

Consequences for the Tribunal of a defect in the s.107 Notice

The terms of ss.108 and 109(1) indicate that the procedural requirements set out in s.107 are mandatory preconditions to the exercise of the power to cancel. Unlike the cancellation process under Subdivision D (s.116 cancellations), it appears that defects in the s.107 notice cannot be cured by the Tribunal on review. Nor does a review by the Tribunal of a cancellation decision under s.109 bring with it the preceding obligation on the Minister to serve a s.107 notice.[48] As Smith FM explained in *Choi v MIAC*, the decision to serve such a notice is not, itself, the decision under review before the Tribunal. At most, an application to review a cancellation decision brings with it an obligation on the Tribunal to be satisfied as to the preconditions of the s.109 powers before their exercise by the Minister and itself, including the preceding service of a valid s.107 notice.[49]

The question of whether the Tribunal, on review, can cure defects in a s.107 notice was addressed by Smith FM in *SZEEM v MIMIA*[50] where his Honour observed that in reviewing a decision to cancel a visa, the Tribunal was bound to apply the laws defining the power of the primary decision-maker. As a

[43] *Zhong v MIAC* (2008) 171 FCR 444 at [80].
[44] *Saleem v MRT* [2004] FCA 234 (Allsop J, 30 March 2004) at [43]-[44].
[45] *Gido-Christian v MIAC* [2007] FMCA 825 (McInnis FM, 31 May 2007) at [87]. See also *Burton v MIAC* (2005) 149 FCR 20; but contrast *Zhong v MIAC* (2008) 171 FCR 444.
[46] [2012] FMCA 519 (Driver FM, 31 July 2012).
[47] *Brar v MIAC* [2012] FMCA 519 (Driver FM, 31 July 2012) at [71]. See also *Kang v MIAC* [2013] FCA 711 (North J, 22 May 2013).
[48] *Choi v MIAC* [2008] FMCA 1717 (Smith FM, 12 December, 2008) at [32].
[49] *Choi v MIAC* [2008] FMCA 1717 (Smith FM, 12 December 2008) at [32].
[50] [2005] FMCA 27 (Smith FM, 27 January 2005).

consequence, the Tribunal must make its decision having regard to the s.107 notice issued by the delegate.

Federal Magistrate Smith considered that s.109(1) requires as an essential precondition to the power to cancel a visa that the decision-maker decide, as a first step in terms of s.108(b), whether there was non-compliance in the way described in the s.107 notice. In other words, the ambit of a s.107 notice defines the 'first step' decision under ss.109(1)(a) and 108(b) in a substantive way. The words 'in the way described in the notice' refer to the particulars of non-compliance required by s.107(1)(a). Those particulars must state the basis on which the non-compliance is alleged to allow the recipient a real opportunity to understand and attempt to answer the allegation. This suggests that if no particulars are given in a s.107 notice, or if those particulars are insufficient to enable the visa holder to respond to the allegation, it will not be possible to make the decision required by s.108(b) and the power to cancel the visa will not arise. In such cases, the only course open to the Tribunal would be to set aside the delegate's decision and substitute a new decision to the effect that the power to cancel the visa under s.109 was not enlivened.

A minor defect in the content of a s.107 notification which does not go to the substance of the allegations or affect the visa holder's capacity to respond to the allegations will not necessarily preclude valid cancellation under s.109. The Full Federal Court in *MIAC v Brar*[51] confirmed that a purposive approach must be taken, so that an error which is minor and insignificant in the context of the facts of a particular case and which does not go to the substance of the allegation of non-compliance will not deprive a decision maker of jurisdiction under ss.108 and 109. In that case the visa holder argued that where a bogus document was submitted as part of an online visa application (which was found by the Tribunal to be an 'authorised system'), a s.107 notification which specified the non-compliance occurred when the document in question was presented to 'an officer of the department' could not support a valid exercise of power under ss.108 and 109. The Court characterised that error as minor and insignificant, noting that the s.107 notification provided adequate particulars of the allegation and the date on which it was submitted so that the visa holder would not have been under any misapprehension as to the occasion upon which it was said that he had failed to comply with s.103 of the Act.[52] In *Salama v MIBP*,[53] the Court dismissed the former visa holder's argument that the s.107 notification did not comply with s.107(1)(c)(ii),[54] and held that even if there was a defect in the notification, it was trivial and insignificant, given there was no suggestion that the visa holder was denied any reasonable opportunity to respond in writing to concerns held about the Minister about possible non-compliance with the visa holder's obligations.[55]

Although the question of whether a review body could re-issue a s.107 notice did not arise, it is implicit in Smith FM's reasoning in *SZEEM v MIMIA* that it would not be open to the Tribunal to issue its own s.107 notice, nor would it be open to the Tribunal to cure deficiencies in the s.107 notice using its own procedural fairness provisions. The Court confirmed that while the Tribunal has the power to cure procedural grounds of invalidity in a delegate's decision, the particulars in a s.107 notice define the substantive powers of the decision-maker. The Tribunal has no power to cure invalidity arising from a misconception of the delegate's substantive powers. In this respect, the cancellation scheme

[51] (2012) 201 FCR 240, overturning *Brar v MIAC* [2011] FMCA 435 (Driver FM, 28 July 2011).
[52] (2012) 201 FCR 240 at [61]. See also *Kang v MIAC* [2013] FCA 711 (North J, 22 May 2013). In *Kang*, the Court accepted that the allegation of non-compliance could have been more clearly put in the s.107 notice. However, this was not fatal to the notice as the applicant was under no misapprehension about what the false or misleading statement was alleged to be.
[53] [2016] FCCA 540 (Judge Smith, 18 March 2016).
[54] *Salama v MIBP* [2016] FCCA 540 (Judge Smith, 18 March 2016) at [19]. The Court held that while the s.107 notification did not replicate the words of s.107(1)(c)(ii) (i.e. if the holder responds to the notice, the Minister will consider cancelling the visa when the response is given), the stipulation that the response had to be provided in writing within 14 calendar days and that the written response 'will also be taken into account' constituted an unequivocal statement that the Minister would consider cancellation if the applicant gave a response within the required period.

under Subdivision C can be distinguished from the scheme under Subdivision D (s.116 cancellations), which was considered in *Zubair v MIMIA*.[56]

Decision as to non-compliance - s.108

After a s.107 notice has been issued notifying the visa holder of the alleged non-compliance, the decision maker must, under s.108:

- consider any response given in the way required by s.107(1)(b); and
- decide whether there was non-compliance by the visa holder in the way described in the s.107 notice.

It is not open to the decision-maker (including the Tribunal on review) to decide whether there was a non-compliance other than that particularised under s.107(1)(a) in the s.107 notice.[57]

Thus, the Tribunal would not be free to rely on a *ground or grounds* that are not referred to in that notice. For example, if the notice refers only to a breach of s.101 (requirement to give correct answers), the Tribunal cannot affirm the decision on the basis of a breach of s.104 (requirement to notify a change in circumstances).[58]

The Tribunal is further restricted to consideration of whether there was non-compliance *in the manner particularised* in the s.107 notice.[59] For example, if s.101 is relied upon, and the s.107 notice particularises the answers that were not given correctly as information relating to the applicant's marital status, the delegate, and the Tribunal, are limited to determining whether there has been non-compliance by reason of incorrect answers given by the applicant about his/her marital status at the time those answers were given. However, the Tribunal is not precluded from considering evidence relevant to the non-compliance, as particularised, that was not referred to in the s.107 notification.[60]

Onus of Establishing Non-Compliance

It is well established that civil law concepts such as onus and standard of proof are generally inappropriate in the administrative law context.[61] However, where, as in cancellation cases, the

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[55] *Salama v MIBP* [2016] FCCA 540 (Judge Smith, 18 March 2016) at [23].
[56] (2004) 139 FCR 344. Federal Magistrate Smith's judgments in *SZEEM* and *Choi* are consistent with the earlier decisions in *SHJB v MIMIA* (2003) 134 FCR 43 and *Saleem v MRT* [2004] FCA 234 (Allsop J, 30 March 2004) that held that the grounds for cancellation were confined to those set out in the s.107 notice.
[57] *Saleem v MRT* [2004] FCA 234 (Allsop J, 30 March 2004). In *Saleem*, Allsop J found that by failing to answer the appropriate question called for by s.108(b), the Tribunal had not 'appropriately directed itself to its task and has not answered the appropriate question, to the extent it can be answered, dictated by the terms of the notice under s.107(1)(a)': at [59] - [63].
[58] While the position is not entirely clear, there is some suggestion that the Tribunal would be further limited to the ground or grounds relied upon in the delegate's decision. In *Saleem v MRT* [2004] FCA 234 (Allsop J, 30 March 2004) the visa was cancelled under s.109 on the basis of non-compliance with s.101, although the s.107 notice also referred to s.104. While the Tribunal limited itself to s.101, and this was conceded by counsel for the Minister to be the proper approach, the point was not argued. The preferable view is that the Tribunal's powers extend to consideration of any question that was before the delegate for the purposes of the decision under review: see *Re Queensland Mines Ltd & Export Development Grants Board* (1985) 7 ALD 357, *Secretary, DSS v Hodgson* (1992) 108 ALR 322 at 329 and *Hospital Benefit Fund of WA v Minister for Health, Housing and Community Services* (1992) 39 FCR 225 at 234. In the context of review of a cancellation decision under s.109, this would include consideration of any non-compliance particularised in the s.107 notice.
[59] *SZEEM v MIMIA* [2005] FMCA 27 (Smith FM, 27 January 2005).
[60] *Sheptitskaya v MIBP* [2015] FCCA 159 (Judge Street, 27 January 2015) at [10]-[16] where it was confirmed that while the Tribunal must determine whether there has been non-compliance of the kind identified in the s.107 notice, it is not restricted to information referred to in the s.107 notice. In that case, the Tribunal sent to the applicant a s.359A letter which identified four additional pieces of information which had not been identified in the s.107 notice, none of which identified any likelihood that the Tribunal would exceed its jurisdiction by going beyond the particular properly identified in the s.107 notice.
[61] *MIEA v Wu Shan Liang* (1996) 185 CLR 259 at 282-283; *Nagalingam v MILGEA* (1992) 38 FCR 191 at 200, *McDonald v D-G of Social Security* (1984) 1 FCR 354 at 357; and *Swan Television & Radio Broadcasters Ltd v ABT* (1985) 8 FCR 291 at 297.

existence of facts grounds the exercise of a statutory power, the onus of establishing those facts is on the Minister (or on review, the Tribunal).[62]

Although the visa holder must be invited to show that the ground does not exist, or if it does, to show cause why the discretion should not be exercised, this does not place an onus on the visa holder to establish at that point that the visa should not be cancelled. In *Zhao v MIMA*, the Court stated:

> *The decision-maker, acting under s 116, must be satisfied of one or other of the matters set out in that section before the visa can be cancelled. That state of satisfaction is a real state of satisfaction which must be reached on a consideration of the available material. A visa cannot be cancelled simply because the visa holder has failed to show cause why it should not. … A visa cannot be cancelled because the decision-maker has identified a possible ground of cancellation which the visa holder has not been able to rebut.*[63]

While that case was concerned with cancellation under s.119, the Court's comments would be equally applicable to s.109. Furthermore, although the principles enunciated in *Briginshaw v Briginshaw*[64] have no direct application in the context of administrative decision making,[65] in the context of s.109, particularly where questions of fraud are involved, in deciding whether the ground for cancellation is made out it may be appropriate to bear in mind the nature of the allegations and the gravity of the consequences.[66]

If the decision maker, including the Tribunal on review, decides that there was **no** non-compliance in the way described in the notice, then the cancellation power does not arise for consideration. In such

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[62] *Mian v MILGEA* (1992) 28 ALD 165 at 169; *Singh v MIEA* (unreported, Federal Court of Australia, Sackville J, 6 December 1994) at [14]. In those cases the Court was referring to the burden of proving relevant facts said to attract s.20 as in force before 1 September 1994, which in turn attracted the deportation power, but the principle would be equally applicable to visa cancellation.

[63] [2000] FCA 1235 (French, Hill and Carr JJ, 1 September 2000) at [25] and [32].

[64] (1938) 60 CLR 336. In that case, Dixon J held at 362 that in civil matters, 'the seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal [of fact]'. For discussion of *Briginshaw* in the civil litigation context, see e.g. *Rejfek v McElroy* 1965 112 CLR 517 at 521-522, *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 110 ALR 449 at 449-451 and *State of Victoria v Macedonian Teachers Association of Victoria* (1999) 91 FCR 47 at [19], [21].

[65] See *MIEA v Wu Shan Liang* (1996) 185 CLR 259 at 282, *Kumar v MIMA* [1999] FCA 156 (Kenny J, 26 February 1999) at [35], *SCAN v MIMIA* [2002] FMCA 129 (Raphael FM, 9 July 2002) at [10], and the cases discussed.

[66] In *Tarasovski v MILGEA* (1993) 45 FCR 570 at 572-3 and *Singh v MIEA* (unreported, Sackville J, Federal Court of Australia, 6 December 1994) at [16], the principle explained by the High Court in *Briginshaw* was referred to with approval in the different statutory context of deportation decisions based on the old s.20, the precursor to ss.101-109. See also *Mian v MILGEA* (1992) 28 ALD 165, where Lee J held that given the serious consequences of the application of s.20, the material said to show the existence of facts which attract its operation should be 'reasonably compelling': at 169. It should be noted, however, that the operation of s.20 did not depend on the opinion of the decision maker but on the existence of a state of fact which was a matter for objective assessment by the court: *Mian* at 168-169. By contrast, the jurisdictional fact that gives rise to the cancellation power in s.109 is a decision by the Minister (or Tribunal) that there was non-compliance: see *SHJB v MIMIA* (2003) 134 FCR 43 at [14]-[21]. In addition, s.20 provided for cancellation of a visa or entry permit by operation of law when the holder had given false or misleading statements: there was no discretion. Nevertheless, the Tribunal's reliance on *Tarasovski* and *Singh* in the context of s.109 was approved in *NBDY v MIMA* [2006] FCAFC 145 (Branson and Stone JJ, 13 October 2006) and *Gido-Christian v MIAC* [2007] FMCA 825 (McInnis FM, 31 May 2007). In *Burton v MIMIA* [2005] FMCA 104 (Lloyd-Jones FM, 9 June 2005), the applicant queried the relevance of civil litigation concepts such as standard of proof; however the Court accepted the Minister's submission that there was no authority directly overruling *Singh* and found that that case remained binding. By contrast, in the more recent decision in *Pan v MIAC* [2011] FMCA 385 (O'Dwyer FM, 7 April 2011) the Court accepted the Minister's submission that it was unclear how the seriousness of the allegation of fraud was relevant having regard to the statutory scheme but that in any event the Tribunal referred to and applied the *Briginshaw* standard. In *Le v MIMIA* [2004] FCA 708 (Marshall J, 4 June 2004), Marshall J rejected an argument that the delegate had erred by failing to apply the *Briginshaw* standard when cancelling a visa under s.128, holding that *Briginshaw* was inapplicable because there was no suggestion that Ms Le had acted fraudulently or provided false information and added that 'serious consequences of themselves cannot require a decision maker to be satisfied on a *Briginshaw* basis. Very few migration decisions do not have serious consequences'. Overall, while it is arguable that the principle enunciated in *Briginshaw* is inapplicable in the context of s.109 its application has not been found to involve jurisdictional error. On the potential relevance of *Briginshaw* in the administrative review context, see also *Sea King Pty Ltd v ATC* (1986) 69 ALR 277 at 285 where the Court stated that '[a]lthough the principles enunciated in *Briginshaw* … have no direct application, the [AAT] should test any suggestion of impropriety against the applicant very carefully'. See also the discussion of this issue in MRD Legal Services Commentary Cancellation of visas under s.116.

cases, the appropriate course for the Tribunal would be to set aside the cancellation decision and substitute a decision that the visa is not cancelled.

If the decision maker, including the Tribunal on review, decides that there **was** non-compliance in the way described in the notice, the decision maker must proceed to consider whether to exercise the power to cancel the visa.

Decision as to cancellation - s.109 and exercise of the discretion

Cancellation of a visa under s.109 is generally discretionary. Section 109(2) provides that the Minister **must** cancel the visa if there exist circumstances declared by the Regulations to be circumstances in which a visa must be cancelled; however there are currently no such prescribed circumstances. Thus, if it is decided that there **was** non-compliance in the way described in the notice, the decision maker must proceed to consider whether to exercise the discretion to cancel the visa.[67]

Section 109(1) provides that the Minister may cancel a visa after:

- deciding under s.108 that there was non-compliance by the visa holder; and
- considering any response to the notice about the non-compliance given in a way required by s.107(1)(b); and
- having regard to any prescribed circumstances.

In addition, when considering the exercise of a discretion, the decision maker should have regard to any lawful government policy.

Mandatory considerations - prescribed circumstances

As noted above, when considering whether to exercise the discretion to cancel the visa, the decision maker, including the Tribunal on review, *must* have regard to the prescribed circumstances. The prescribed circumstances are set out in r.2.41. They are:

- the correct information;[68]
- the content of the genuine document (if any);[69]
- *For a visa cancelled before 12 December 2014* - the likely effect on a decision to grant a visa or immigration clear the visa holder of the correct information or the genuine document;[70] *for a*

[67] Note that, strictly speaking, the discretion under s.109 is a discretion to cancel a visa and should not be regarded as a discretion not to cancel the visa. Thus, for example, it would be technically incorrect to speak in terms of exercising the discretion in the applicant's favour: see *Cockrell v MIAC* (2008) 171 FCR 345 at [16]-[20]. That case concerned the discretion under s.501(2) but the Court's comments are equally applicable to other visa cancellation powers including ss.109 and 116.

[68] r.2.41(a).

[69] r.2.41(b). This requires that regard be had to the genuine version (if any) of a document found to be bogus and does not extend to encompass any document before the Tribunal that was not found to be a bogus document or any document not found to be falsified or issued as a result of false or misleading information broadly relating to the subject matter of the bogus document (*Ahmed v MIBP* [2016] FCCA 708 (Judge Barnes, 7 April 2016) at [79]).

[70] In *Ahmed v MIBP* [2016] FCCA 708, Barnes J held at [97] that the concept of 'the correct information' in r.2.14(c) is clearly used in contradistinction to any information that was found to be incorrect in the context of the decision-maker's consideration of the statutory grounds for cancellation of a visa. However, whether (as found by the Court at [97]) r.2.41 requires the Tribunal to consider the likely effect of such information on a visa of the same class as that which was granted (or, alternatively, the same subclass of visa) is unclear. In *Vata v MIBP* [2015] FCCA 1735 (Judge Hartnett, 26 June 2015) the Court held at [23] that this version of r.2.41(c) required consideration of the effect of the correct information on a decision to grant *a* visa in the general sense. Judge Hartnett found that the Tribunal erred by incorrectly asking whether or not *the* visa granted to the applicant would have been granted if the correct information were known.

visa cancelled on or after 12 December 2014 - whether the decision to grant a visa or immigration clear the visa holder was based, wholly or partly, on incorrect information or a bogus document;[71]

- the circumstances in which the non-compliance occurred;[72]
- the present circumstances of the visa holder;[73]
- the subsequent behaviour of the visa holder concerning his or her obligations under Subdivision C of Division 3 of Part 2 of the Act (ss.97 - 115);[74]
- any other instances of non-compliance by the visa holder known to the Minister;[75]
- the time that has elapsed since the non-compliance;[76]
- any breaches of the law since the non-compliance and the seriousness of those breaches;[77] and
- any contribution made by the holder to the community.[78]

The Full Federal Court's decision in *MIAC v Khadgi*[79] provides useful guidance on what is required of a decision maker in relation to these criteria, and is authority for the following propositions:

[71] r.2.41(c) as amended by item 4, Schedule 3 to Migration Amendment (2014 Measures No.2) Regulation 2014 (SLI 2014, No.199). The amendments apply to a decision to cancel a visa made on or after the commencement date: cl.3803(2), inserted by Schedule 4 to SLI 2014, No.199. In the context of Tribunal review, the relevant decision for the commencement is the decision of the delegate to cancel the visa. In *SZWAP v MIBP* [2015] FCCA 511 (Judge Street, 4 March 2015), it was observed that the changes made by the relevant amendment narrowed the scope considerably from its pre-12 December 2014 form.
[72] r.2.41(d).
[73] r.2.41(e).
[74] r.2.41(f). 'Subsequent behaviour' in this context means behaviour which took place after the non-compliance. 'Concerning' denotes a real link with the subject matter which it qualifies, i.e. obligations under Subdivision C: *MIAC v Khadgi* (2010) 190 FCR 248 at [89]. The Court's reasoning in *Khadgi* makes it clear that subsequent behaviour that is not linked to the visa holder's obligations under Subdivision C is irrelevant to the proper consideration of r.2.41(f). Relevant subsequent behaviour would include a failure to notify relevant change in circumstances (s.104) or to correct the incorrect information (s.105): at [89]. Thus, in *Khadgi*, the Tribunal's finding that the documentation provided in Ms Khadgi's application was incorrect necessarily meant that she had an obligation under s.105 to correct the false information, and her persistent denial that the documentation was incorrect involved a failure to comply with s.105: that failure was the inevitable corollary of the Tribunal's conclusion that the information she provided was false: at [90]-[92], [98].
[75] r.2.41(g). This requires the Tribunal to bring to mind and evaluate all other instances of non-compliance with ss.101 - 105 *known to it*. It must have regard to such instances if, and only if, they exist and are known to the Tribunal; if none exist that would not be a relevant factor. If there are no other instances of non-compliance known to the Tribunal, it is required to do no more than make a finding to this effect: *MIAC v Khadgi* (2010) 190 FCR 248 at [105]-[107].
[76] r.2.41(h). In order properly to consider this factor, the Tribunal must bring to mind the time which has elapsed since the non-compliance: *MIAC v Khadgi* (2010) 190 FCR 248 at [105]-[107]. In that case, the former visa holder did not specifically address the significance of the time that had elapsed. The Court held that the Tribunal was required to do no more than turn its mind to the matters she did raise, i.e. her current employment in Australia, difficulty in obtaining suitable work if returned to Nepal, and the hardship that the cancellation would cause her family: at [111]-[114].
[77] r.2.41(j). This would cover breaches of any law, not just the Migration Act. In *Dalla v MIBP* [2016] FCA 998 (Justice Logan, 18 August 2015), overturning *Dalla v MIBP* [2016] FCCA 1341 (Judge Street, 2 June 2016), the Court held that the Tribunal can only take into account conduct giving rise to a breach of the law which post-dates the non-compliance: at [19]. However, before affording this factor adverse weight, the Tribunal is required to make findings of fact on the conduct amounting to a breach of the law: at [29]. Further, applying *MIAC v Khadgi* (2010) 190 FCR 248, this factor should be approached in the same way as r.2.41(g), that is, the fact that no breaches exist is not a relevant factor: at [107]. However, it would appear that the Tribunal would not fall into error if it did take into account in an applicant's favour the fact that they have committed no other breaches of the law: at [116].
[78] r.2.41(k). This requires evidence going to the past and to the present, not future contributions: *MIAC v Khadgi* (2010) 190 FCR 248 at [120]. In most cases, it will be the visa holder who will be best placed to specify the contribution made by him or her to the community for these purposes: at [118]. In *Khadgi* the Court held at [121]-[122] that the matters raised by the former visa holder - that she was not a member of any clubs, that she was currently working in retail and had reapplied for a skills assessment and obtained a second assessment – were irrelevant to r.2.41(k).
[79] (2010) 190 FCR 248.

- The consideration of the prescribed circumstances in r.2.41 is a jurisdictional prerequisite to the exercise of the discretion to cancel a visa under s.109; and in order to comply with that prerequisite, the decision maker must engage in an 'active intellectual process' in which each of the prescribed circumstances receives 'genuine' consideration.[80] However, it is not essential for the decision maker to compartmentalise its reasons and to set out those reasons by reference to each factor specified in r.2.41. While that may often be convenient and appropriate, it is not the only way for the decision maker to demonstrate that it has had regard to all of those criteria.[81] Further, in any given case, facts and matters raised might be relevant to more than one of the r.2.41 factors.[82]

- Although the decision maker must have regard to each of the r.2.41 factors, not all of them will be central or fundamental to every case.[83] The weight to be given to any one factor or group of factors is a matter for the Tribunal and will vary from case to case;[84] and the extent to which the Tribunal is required to engage with each factor will often depend on the matters put forward by the applicant.[85] The Court in *MIAC v Khadgi* explained that:

  > *it is incumbent on the visa holder who is engaged in the visa cancellation process envisaged by s 109 to articulate facts, matters and circumstances to which he or she suggests the Minister should have regard as required by reg 2.41. The reg 2.41 criteria direct the Minister's attention to particular factors at a general level but it is for the visa holder to shape and mould the Minister's consideration of those criteria by reference to his or her individual circumstances. Whilst the Minister must, of course, have regard to material, information and documentation in his possession which properly fall within the purview of the reg 2.41 criteria, irrespective of their source, it will largely fall to the visa holder to flesh out that material in order to enable the Minister's discretion to be properly exercised.*[86]

- The failure to give any weight to a factor that is of great importance in the particular case may support an inference that the Tribunal did not have regard to that factor. On the other hand, the Tribunal is entitled to be brief in its consideration of a matter which has little or no practical relevance to the circumstances of a particular case.[87] Thus, if the applicant does not address a particular factor or factors with evidentiary material and submissions, there may be little or no material to consider and evaluate, and therefore little to say about those factors.[88]

For visas cancelled before 12 December 2014, it was held in *Vata v MIBP* that r.2.41(c) requires consideration of the likely effect of the correct information on a decision to grant *a* visa in the general sense, rather than the likely effect of the correct information on the decision to grant the visa which is

[80] *MIAC v Khadgi* (2010) 190 FCR 248 at [57].
[81] *MIAC v Khadgi* (2010) 190 FCR 248 at [69]. See, for example, *Sandhu v MIAC* [2013] FMCA 140 (Emmett FM, 4 March 2013) at [29]-[43] where it was claimed the Tribunal had failed to consider all the present circumstances relied on by the applicant in support of r.2.41(e). Emmett FM rejected the claim, finding that the circumstances were not clearly raised in support of r.2.41(e) and were put more as a general submission. And that on a fair reading of the decision, there was nothing to suggest that the Tribunal did not have regard to those circumstances in considering its discretion.
[82] *MIAC v Khadgi* (2010) 190 FCR 248 at [68].
[83] *MIAC v Khadgi* (2010) 190 FCR 248. The Court held that it was open to the Tribunal to regard the applicant's dishonest conduct which had enabled her to procure her Subclass 880 visa as 'a significant and serious matter' and the matters specified in r.2.41(f)-(k) as insufficient to displace the impact of that dishonest conduct. Similarly, in *Suleyman v MIMA* [2000] FCA 610 (Mathews J, 12 May 2000), the Court held that the Tribunal was correct to regard the correct information and its likely effect on a decision to grant the visa (r.2.41(c)) as crucial, observing that it was 'difficult to conceive of a more calculated attempt to dishonestly manipulate Australia's refugee laws' than that which was perpetrated by the applicant in that case.
[84] *MIAC v Khadgi* (2010) 274 ALR438 at [68].
[85] *MIAC v Khadgi* (2010) 274 ALR438 at [84], where the Court observed that the extent to which the Tribunal in that case was compelled to engage with the r.2.41 criteria was inevitably heavily influenced by the terms of Ms Khadgi's responses to the invitations extended to her by both the delegate and the Tribunal to address those criteria. See also *Sandhu v MIAC* [2013] FMCA 140 (Emmett FM, 4 March 2013).
[86] *MIAC v Khadgi* (2010) 190 FCR 248 at [83].
[87] *MIAC v Khadgi* (2010) 190 FCR 248 at [58]-[59].

the subject of the cancellation power.[89] However, *Vata* was not considered in subsequent judgments in *Dou v MIBP*[90] and *Ahmed v MIBP*.[91]

Additional policy considerations

In addition to the prescribed circumstances discussed above, the decision maker should have regard to any lawful government policy. The Department's guidelines[92] set out a number of matters that under policy *should* be taken into account, where relevant, in relation to the discretion to cancel a visa under s.109. They are:

- whether there are persons in Australia whose visas would, or may, be cancelled under s.140;
- whether there are mandatory legal consequences to a cancellation decision; for example
  - whether indefinite detention is a likely consequence of the cancellation decision, if a person cannot be removed from Australia consistently with non-refoulement obligations;
  - whether there are provisions in the Act preventing the person from making a valid application for any visa without the Minister's personal intervention (e.g.s.46A, s.46B, s.48, 48A etc.); and
  - whether, upon cancellation, the person would become an unlawful non-citizen (unless the person holds another visa that is in effect) and is liable to be detained under s.189 and removed under s.198
- whether Australia has obligations under relevant international agreements that would or may be breached as a result of the visa cancellation;[93] for example:
  - if there are children in Australia whose interests could be affected by the cancellation, or who would themselves be affected by consequential cancellation, the best interests of the children are to be treated as a primary consideration;[94]
  - whether the cancellation would lead to the person's removal in breach of Australia's non-refoulement obligations - that is, removing a person to a country where they face persecution, death, torture, cruel, inhuman or degrading treatment or punishment;[95] and

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[88] *MIAC v Khadgi* (2010) 190 FCR 248 at [83].
[89] *Vata v MIBP* [2015] FCCA 1735 (Judge Hartnett, 26 June 2015). The Court held at [23] that the Tribunal erred by incorrectly asking whether or not *the* visa granted to the applicant would have been granted if the correct information were known.
[90] *Dou v MIBP* [2016] FCCA 682 (Judge Smith, 22 March 2016). In this case, the Tribunal had found that the likely effect of the correct information was that the visa holder would have been refused the Subclass 100 visa. The Court held at [27] that the Tribunal had erred by misconstruing the Subclass 100 visa criteria as this mistake was critical to the exercise of power..
[91] *Ahmed v MIBP* [2016] FCCA 708 (Judge Barnes, 7 April 2016), upheld on appeal in *Ahmed v MIBP* [2016] FCA 1029 (Markovic J, 17 August 2016). The Court's finding that r.2.41(c) requires consideration of the likely effect of the information on a decision of the same class of visa that was granted is not consistent with *Vata v MIBP* [2015] FCCA 1735.
[92] PAM 3 – Migration Act - Visa cancellation instructions > General visa cancellation powers (s109, s116, s128, s134B & s140) - s109 Deciding whether to cancel – Matters that should be taken into account (re-issue date 21/8/16).
[93] See PAM3 - Migration Act - Visa cancellation instructions - General visa cancellation powers (s109, s116, s128, s134B & s140) - Australia's international obligations (re-issue date 21/8/16) and PAM3: Act – Compliance and case resolution – Guiding principles – Treatment of children (issue date 1/1/12).
[94] This is consistent with the High Court's decision in *MIMA v Teoh* (1994) 183 CLR 273, and with Article 3.1 of the UN Convention on the Rights of the Child 1989 (CROC) which states: 'In all actions concerning children … the best interests of the child shall be a primary consideration'. For guidance on what constitutes an 'action concerning children' see *Suleyman v MIMA* [2000] FCA 610 (Mathews J, 12 May 2000) at [38] and *Tien v MIMA* (1998) 89 FCR 80 (Goldberg J, 3 December 1998) at 105.
[95] Non-refoulement obligations are generated, explicitly or implicitly, by the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Covenant on Civil and Political Rights, and the Convention on the Rights of the Child. See PAM3 - Migration Act -

- any other relevant matter.[96]

Best interests of the child

In cases where this policy indicates the best interests of a child or children are to be treated as a primary consideration, it will often be appropriate, depending on the particular circumstances of the case and the evidence available, and generally desirable to first make a finding as to what the best interests of each child are, and then assess whether the strength of any other consideration, or the cumulative effect of other considerations, outweigh those interests.[97] In some instances there may be insufficient evidence to determine the best interests of the child.[98]

In considering the best interests of the child, care should be taken to consider what decision in respect of the cancellation would be in their best interests, rather than how the children's interests would be affected by a decision to cancel the relevant visa.[99] While custody and contact orders made under the *Family Law Act 1975* will generally be relevant in assessing the best interests of a child, a decision-maker is not bound by those orders and should make their own assessment.[100]

Non-refoulement obligations

The non-refoulement obligations of Australia are not required to be taken into account as a mandatory consideration when determining whether to cancel a visa.[101] The extent to which the decision-maker must go into claims that Australia has protection obligations to the person when considering the discretion to cancel the visa will vary depending upon the circumstances of the relevant visa holder.

In *COT15 v MIBP (No.1)* the Full Federal Court upheld a Tribunal decision affirming the cancellation of a Subclass 101 (Child) visa in which the Tribunal dealt with claims relating to non-refoulement obligations by referring to the fact that such claims could be canvassed in an application for a

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Visa cancellation instructions - General visa cancellation powers (s109, s116, s128, s134B & s140) - Australia's international obligations (re-issue date 21/8/16).

[96] This overlaps with s.108(a). For example, in *Chen v MIBP* [2014] FCCA 497 (Judge Cameron, 25 March 2014), the applicant submitted to the Tribunal that their integration into Australian society was relevant to the exercise of the s.109 discretion. The Tribunal's reasons indicated it gave no weight to this matter, as any such integration was only possible because of the applicant's fraud in obtaining her visa. The Court found that as a person's integration into society was not a mandatory consideration under r.2.41, whatever the Tribunal's approach to that issue was, it would not constitute a jurisdictional error and, in any event, the Tribunal's approach to the claim was unexceptional.

[97] See *Wan v MIMA* [2011] FCAFC 568 (Branson, Stone and North JJ, 18 May 2001) at [32], *Nweke v MIAC* [2012] FCA 266 (Jagot J, 23 March 2012) at [18]-[21], *MIMA v W157/00A* (2002) 203 ALR 5 at [77], and *Hopkins v MIAC* [2007] FCA 1108 (Moore J, 2 August 2007) at [34], [37]. Note that these judgments concern cancellation under s.501 and rely, following *MIMA v Teoh* (1994) 183 CLR 273, on the legitimate expectation of visa holders to have the best interests of their children treated as a primary consideration, a principle of common law procedural fairness. Accordingly, they do not provide direct authority for the Tribunal's review of s.109 decisions. However, they do provide useful practical guidance on how to ensure a child's best interest are in fact treated as a primary consideration when that obligation arises. Note that in *Durani v MIBP* [2014] FCA 129 (Gilmour J, 24 February 2014), a case concerning cancellation of a visa under s.501A(2), Gilmour J rejected the applicant's submission that 'it cannot ever be in the national interest to make a decision of the kind involved here which has the result that a child will be separated from a parent' and commented that the benefits to the national interest achieved by cancelling the applicant's visa may outweigh the best interests of the child. In this case, the Court found that it was open for the Minister to find that the risk of the applicant re-offending, however low, was unacceptable.

[98] See for example, *Paerau v MIBP* [2014] FCAFC 28 (Buchanan, Barker and Perry JJ, 19 March 2014), in which the Court found the Administrative Appeals Tribunal (AAT) did not err in treating the best interests of a visa holder's children as neutral, because although the AAT was required by a Ministerial direction to make a determination about whether the cancellation was or was not in the best interests of the child, there was insufficient evidence for it to do so. This judgment concerned cancellation under s.501 and a Ministerial direction made under s.499 which does not apply to s.109 cancellations, and accordingly does not provide direct authority in this context. However it suggests that in some circumstances, if determining where the best interest of a child lie is not possible on the available evidence, proceeding without doing so may be appropriate.

[99] See *Vaitaiki v MIEA* (1998) 150 ALR 608 at 618 and *Wan v MIMA* [2011] FCA 568 (Branson, Stone and North JJ, 18 May 2001) at [27]. These judgments concern a deportation decision and a s.501 cancellation decision respectively. However, their findings on this point appear equally applicable to s.109 cancellation where a decision-maker purports to treat the best interests of a child as a primary consideration.

[100] *Cockrell v MIAC* (2008) 171 FCR 345 at [12]. This judgment concerns a cancellation under s.501, however the court's reasoning on this point appears equally applicable to cancellation under s.109 where the best interests of a child are relevant.

[101] *COT15 v MIBP (No.1)* [2015] FCAFC 190 (North, Collier and Flick JJ, 22 December 2015) at [38].

protection visa.[102] The Full Court noted that the Act contemplates that those obligations will be considered in the context of a protection visa application.[103] While this approach may be appropriate in the context of cancellation of a visa other than a protection visa (where there is no legal impediment to making a protection visa application), a more extensive consideration of protection obligations would appear to be necessary in the context of deciding whether to cancel a protection visa.

In *MIBP v Le* the Full Federal Court, agreeing with *COT15 v MIBP (No. 1)*, held that an assessment of Australia's non-refoulement obligations is not a mandatory consideration where it is open for the visa holder to apply in Australia for a protection visa, even if the visa holder had previously been recognised as a refugee for the purposes of the *Refugees Convention*.[104] However, it may be necessary to consider any harm claimed by an applicant which may not engage Australia's international non-refoulement obligations.[105]

Other considerations

In addition to matters specified in r.2.41 and the Department's policy guidelines, the decision-maker may have regard to any other matters that he or she considers relevant. For example, although not specified in r.2.41 or departmental policy, the effect of cancellation on family members other than children, and apart from the effect of consequential cancellation under s.140, may be a relevant consideration depending upon the circumstances. Note that under departmental policy, whether the visa holder has formed strong family, business or other ties in Australia is a relevant consideration in relation to cancellation of a permanent visa under s.116,[106] but is not included in relation to cancellation under s.109.

Notification of decision to cancel

If a visa is cancelled under s.109, the former holder must be notified. The notification of the decision to cancel must be in writing and must set out the ground for the cancellation.[107] Regulations 2.55 (persons not in immigration detention) and 5.02 (persons in immigration detention) prescribe how documents relating to proposed cancellation, cancellation or revocation of cancellation may be given.

Effect of setting aside a decision to cancel a visa

If the Tribunal, the AAT, the Federal Court or Federal Magistrates Court sets aside a decision to cancel a visa under s.109, that visa is taken never to have been cancelled.[108]

[102] *COT15 v MIBP (No.1)* [2015] FCAFC 190 (North, Collier and Flick JJ, 22 December 2015).
[103] *COT15 v MIBP (No.1)* [2015] FCAFC 190 (North, Collier and Flick JJ, 22 December 2015) at [38].
[104] *MIBP v Le* [2016] FCFAC 120 (Allsop CJ, Griffiths and Wigney JJ, 9 September 2016) at [61] and [65], overturning *Le v MIBP* [2015] FCA 1473 (Logan J, 24 December 2015). This case involved judicial review of a personal Ministerial decision to cancel a K4011 Refugee (Vietnamese) Permit under s.501(2) of the Act.
[105] In *Goundar v MIBP* [2016] FCA 1203 (Robertson J, 12 October 2016), the Court held that the Minister erred by treating non-protection visa harm as irrelevant to the discretion to cancel under s.501CA(4). The Minister did not consider the applicant's claims of harm because the applicant could make an application for a protection visa, and in doing so erred by proceeding on the basis that the circumstances the subject of the applicant's claims could, in their entirety, be met by the availability of a protection visa application: at [53].
[106] PAM3 - Migration Act - Visa cancellation instructions - General visa cancellation powers (s109, s116, s128, s134B & s140) – Act, s 116 – s116 – Deciding whether to cancel - Matters that should be considered (re-issue date 21/8/16).
[107] r.2.42.
[108] s.114(1).

Relevant Legislation

Migration Amendment (Protection and Other Measures) Act 2015	No.35 of 2015
Migration Amendment (2014 Measures No.2) Regulation 2014	No. 199 of 2014
Counter Terrorism Legislation Amendment (Foreign Fighters) Act 2014	No.116 of 2014

Relevant Case Law

Ahmed v MIBP [2016] FCCA 708	Summary
Ahmed v MIBP [2016] FCA 1029	
Asenso v MIBP [2016] FCCA 756	Summary
Batra v MIAC [2012] FMCA 544; (2012) 265 FLR 461	Summary
Batra v MIAC [2013] FCA 274	Summary
Brar v MIAC [2011] FMCA 435	Summary
MIAC v Brar [2012] FCAFC 30; (2012) 201 FCR 240	Summary
Brar v MIAC [2012] FMCA 519	Summary
Burton v MIMIA [2005] FCA 1455; (2005) 149 FCR 20	Summary
Chen v MIBP [2014] FCCA 497	Summary
Chhuon v MIMIA [2003] FCA 565; (2003) 198 ALR 500	
Choi v MIAC [2008] FMCA 1717	Summary
Cockrell v MIAC [2008] FCAFC 160; (2008) 171 FCR 375	
COT15 v MIABP (No.1) [2015] FCAFC 190	Summary
Dalla v MIBP [2016] FCA 998	Summary
Dalla v MIBP [2016] FCCA 1341	Summary
Dou v MIBP [2016] FCCA 682	Summary
Durani v MIBP [2014] FCA 129	
Dy v MIMA [2006] FCA 676	
Farah v MIAC [2010] FMCA 801	Summary
Farah v MIAC [2011] FCA 185; (2011) 120 ALD 249	Summary
Gido-Christian v MIAC [2007] FMCA 825	Summary
Goundar v MIBP [2016] FCA 1203	
Hopkins v MIAC [2007] FCA 1108	

Jalal v MIMA [2000] FCA 207; (2000) 60 ALD 779	
MIMA v Jalal [2000] FCA 1370; (2000) 102 FCR 63	
Kang v MIAC [2013] FCA 711	Summary
Khadgi v MIAC [2010] FMCA 381	Summary
MIAC v Khadgi [2010] FCAFC 145; (2010) 190 FCR 248	Summary
MIBP v Le [2016] FCFAC 120	
Le v MIBP [2015] FCA 1473	
Le v MIMA [2004] FCA 708	Summary
Matete v MIAC [2008] FMCA 573	Summary
McDade v MIMA [2000] FCA 528	
Mudiyanselage v MIAC [2013] FCA 266	Summary
NBDY v MIMA [2006] FCAFC 145	
Nweke v MIAC [2012] FCA 266	
Paerau v MIBP [2014] FCAFC 28	Summary
Pan v MIAC [2011] FMCA 385	
Pavuluri v MIBP [2014] FCA 502	Summary
Rafi v MIAC [2012] FMCA 1002	Summary
Salama v MIBP [2016] FCCA 540	
Saleem v MRT [2004] FCA 234	Summary
Sandhu v MIAC [2013] FMCA 140	
Sandoval v MIMA [2001] FCA 1237; (2001) 194 ALR 71	
SHJB v MIMIA [2003] FCAFC 303; (2003) 134 FCR 43	
Sheptitskaya v MIBP [2015] FCCA 159	Summary
Shu v MIMIA [2003] FCA 791	
Singh v MIAC [2012] FMCA 145	Summary
Suleyman v MIMA [2000] FCA 610	
SZEEM v MIMIA [2005] FMCA 27	Summary MRT RRT
SZWAP v MIBP [2015] FCCA 511	
Tarasovski v MILGEA (1993) 45 FCR 570	
MIMA v Teoh (1994) 183 CLR 273	
Vaitaiki v MIEA (1998) 150 ALR 608	
Vata v MIBP [2015] FCCA 1735	Summary

MIMA v W157/00A [2002] FCAFC 281; (2002) 203 ALR 5	
Wan v MIMA [2001] FCA 568	Summary
Zhao v MIMA [2000] FCA 1235	Summary
Zhong v MIAC [2008] FCA 507; (2008) 171 FCR 444	Summary
Zubair v MIMIA [2004] FCAFC 248; (2004) 139 FCR 344	Summary

Available Decision Templates

There is one available template suitable for decisions to review a Cancellation under s.109:

- **s.109 Cancellation**

  This template is suitable in relation to a cancellation of a visa under s.109(1) (incorrect information). It is not suitable where the visa has been cancelled under s.116 of the Act or where multiple applicants have had their visa cancelled other than under s.140(1) and purport to combine their applications for review.

Last updated/reviewed: 2 December 2016

Cancellation of Visas under Section 116

CONTENTS

Overview

Subdivision D of Division 3 of Part 2 of the *Migration Act 1958* (the Act) contains a general but structured power to cancel visas on specified grounds. The power to cancel a visa is contained in s.116 of the Act and, subject to specific exceptions, this power is discretionary.

The Minister can cancel a visa under s.116 where the visa holder has not yet entered Australia, is in immigration clearance, is leaving Australia, or (with some exceptions) is in the migration zone. A permanent visa cannot be cancelled under sub-clause 116(1) if a visa holder is in Australia and was immigration cleared on their last entry.[1]

Sub-sections 116(1)(a) - (g), (1AA), (1AB) and (1AC) set out the various grounds under which the Minister may cancel a visa. Section 116(2) also provides for prescribed circumstances in which a visa **must not** be cancelled. Only very limited circumstances have been prescribed and they are set out in r.8(3) of the Migration (United Nations Security Council Resolutions) Regulations 2007 (the UNSCR Regulations). The Act also provides for prescribed circumstances in which a visa **must** be cancelled. Regulation 2.43(2) of the Migration Regulations 1994 (the Regulations) sets out the prescribed circumstances pursuant to s.116(3) in which the Minister must cancel a visa.

Except in cases where the prescribed circumstances exist mandating or prohibiting cancellation, if the decision-maker is satisfied that the grounds for cancellation exist, he/she must consider whether the discretion to cancel the visa should be exercised. It would be an error in such circumstances to cancel a visa, or to affirm a decision to cancel a visa, simply on the basis that grounds for cancellation exist.

The Tribunal (Migration and Refugee Division) has jurisdiction under ss.338(3) and 338(4) of Part 5 and 411(1)(b) and (d) of Part 7 of the Act to review decisions to cancel certain visas. The Tribunal's powers on review under Part 5 and Part 7 of the Act are set out in s.349 and s.415 respectively. Pursuant to s.349(1) and s.415(1), the Tribunal may exercise all the powers and discretions conferred by the Act on the primary decision-maker for the purposes of the decision under review. Where the Tribunal is reviewing a decision to cancel a visa, it may affirm or vary the decision, or set it aside and substitute a new decision.[2] It cannot make a direction remitting the matter for reconsideration, because a decision to cancel a visa is not a 'prescribed matter' for the purposes of the remittal powers in ss.349(2)(c) and 415(2)(c).

Legal Issues

Which visas may be cancelled under s.116?

Section 116 provides a power to cancel certain visas on specified grounds. The availability of this power depends upon whether the visa is temporary or permanent, and whether the visa holder is in Australia and immigration cleared.[3] Immigration clearance is explained in s.172 of the Act.

[1] s.117(2) as amended by *Migration Amendment (Character and General Visa Cancellation) Act* 2014 (No. 129, 2014).
[2] s.349(2) [Part 5] and s.415(2) [Part 7], *Migration Act 1958* (Cth). Unless otherwise stated, all statutory references are to the *Migration Act* 1958 (Cth) and Migration Regulations 1994 (Cth).
[3] s.117.

Permanent Visas

Visas can be cancelled under s.116(1), (1AA), (1AB) or (1AC):

- before the visa holder enters Australia;
- when the visa holder is in immigration clearance;
- when the visa holder leaves Australia; or
- while the non-citizen is in the migration zone.[4]

However, a permanent visa **cannot** be cancelled under s.116**(1)** whilst the visa holder is **in Australia** and was **immigration cleared** on last entering Australia.[5]

The Tribunal has no jurisdiction under either Part 5 or Part 7 of the Act to review decisions to cancel permanent visas where the visa applicant is not in Australia at the time of cancellation. Under Part 5 of the Act jurisdiction to review decisions to cancel visas is limited to circumstances where the visa holder is in the migration zone and not in immigration clearance at the time of cancellation.[6] As a permanent visa cannot be cancelled under s.116(1) whilst the visa holder is in Australia and was immigration cleared, applications to review cancellations of permanent visas under s.116(1) should not arise under Part 5 of the Act. A permanent visa may be cancelled under s.116(1AA) [decision-maker not satisfied as to the visa holder's identity] or s.116(1AC) [benefit asked for, received by, offered or provided by a visa holder in return for a sponsorship-related event] where the visa holder is in the migration zone and immigration cleared and consequently a review of such a cancellation under Part 5 may arise.[7]

Under Part 7 of the Act the Tribunal has jurisdiction to review decisions to cancel protection visas where the visa holder was in the migration zone when the decision was made, provided the decision was not made because of s.36(2C)(a) or (b) of the Act [commission of certain crimes / threat to security] and the Minister has not issued a conclusive certificate in relation to the decision.[8] As the only circumstance in which permanent visas may be cancelled under s.116(1) whilst the visa holder is in the migration zone is where the visa holder is in immigration clearance, the Tribunal's jurisdiction to review cancellations of permanent protection visas under s.116(1) is limited to those where the visa holder is in immigration clearance in Australia at the time of cancellation. It appears a permanent protection visa may be cancelled under s.116(1AA) if the decision-maker is not satisfied as to the visa holder's identity. Such a decision would be reviewable under Part 7 if the visa holder is in the migration zone when the decision was made.[9] However, such cases would likely be rare.

Temporary Visas

Temporary visas can be cancelled under s.116:

- while the visa holder is in the migration zone;

[4] s.117(1).
[5] s.117(2).
[6] s.338(3).
[7] s.117(2) refers only to s.116(1), not s.116(1AA), (1AB) or (1AC). However, cancellation under s.116(1AB) can only be done if the visa could not be cancelled under Subdivision C, ie under s.109 of the Act and cancellation of permanent visas is commonly done under Subdivision C. In practice, this leaves open the possibility of cancellation of a permanent visa under s.116(1AA) and s.116(1AC).
[8] s.411(1)(d); s.411(2).
[9] s.117(2) refers only to s.116(1), not s.116(1AA) or (1AB) and (1AC) is not relevant to protection visas. However, cancellation under s.116(1AB) can only be done if the visa could not be cancelled under Subdivision C, ie under s.109 of the Act and cancellation of permanent protection visas is usually done under Subdivision C. This leaves open the possibility of cancellation of a permanent visa under s.116(1AA).

- before the visa holder enters Australia;
- when the visa holder is in immigration clearance; or
- when the visa holder leaves Australia.[10]

However, if the visa holder has entered Australia, the ground specified in s.116(1)(d) (incorrect information) can only be relied upon to cancel the visa if he/she has *not* been immigration cleared.

The Tribunal has jurisdiction to review cancellation of temporary visas under Part 5 or Part 7 of the Act if the visa holder is in Australia at the time of cancellation. Decisions to cancel temporary visas (other than protection visas) under s.116 are reviewable under Part 5 of the Act provided the visa holder is in the migration zone (but not in immigration clearance) at the time of cancellation.[11] Decisions to cancel temporary protection visas under s.116 are reviewable under Part 7 of the Act provided the applicant is in Australia at the time of cancellation.[12] There is no jurisdiction under Part 7 of the Act to review cancellation of a temporary protection visa under s.116 if the decision was made because of s.36(2C)(a) or (b) of the Act [commission of certain crimes / threat to security], or if the Minister has issued a conclusive certificate in relation to the decision.[13]

Grounds for Cancellation under s.116

Sub-sections 116(1)-(1AC) set out the grounds for cancellation under Subdivision D. The grounds are discussed in more detail below. The current grounds for cancellation under s.116 are as follows:

- decision to grant the visa was based, wholly or partly, on a particular fact or circumstance that is no longer the case or no longer exists;[14]
- decision to grant the visa was based, wholly or partly, on the existence of a particular fact or circumstance and that fact or circumstance did not exist;[15]
- visa holder has not complied with a condition of the visa;[16]
- another person required to comply with a condition of the visa has not complied with that condition;[17]
- would be liable for cancellation under Subdivision C (incorrect information given by visa holder) but visa holder has not entered Australia or has entered, but is not immigration cleared;[18]
- presence of visa holder in Australia is, or may be, or would, or might be, a risk to health, safety or good order of the Australian community or segment of the community or the health or safety of an individual or individuals;[19]
- visa grant was in contravention of the Act or another law of the Commonwealth;[20]

[10] s.117(1).
[11] ss.338(3), (4)(b).
[12] ss.411(1)(d), 411(2)(a).
[13] s.411(1)(d); s.411(2)(b)..
[14] s.116(1)(a) as amended by No.129 of 2014.
[15] s.116(1)(aa) as inserted by No.129 of 2014.
[16] s.116(1)(b).
[17] s.116(1)(c).
[18] s.116(1)(d).
[19] s.116(1)(e) as amended by No.129 of 2014.
[20] s.116(1)(f).

- student visa holder is not, or is likely not to be, a genuine student or has engaged, is engaging or would likely engage in conduct while in Australia not contemplated by the visa;[21]
- a prescribed ground for cancelling the visa exists;[22]
- the Minister is not satisfied as to the visa holder's identity;[23]
- incorrect information was given to an officer, Minister, authorised system, or to a person or tribunal performing a function or purpose under the Act, or to any other person/body performing a function or purpose in an administrative process that occurred in relation to the Act, and the incorrect information was taken into account in connection with a decision enabling a valid visa application or the grant of the visa and the giving of the incorrect information is not covered by Subdivision C of the Act;[24]
- A benefit was asked for or received by or on behalf of, the visa holder from another person in return for the occurrence of a 'sponsorship related event', or a benefit was offered or provided by, or on behalf of, the visa holder to another person in return for the occurrence of a 'sponsorship related event'.[25] 'Sponsorship related event' is defined in s.245AQ[26] and includes applying for approval as a sponsor under s.140E, making a nomination in relation to a person under s.140GB, applying for approval of a nominated position (r.5.19), or not withdrawing any such application / nomination.

Some of these grounds, in their current form, only apply to visas cancelled more recently. Sub-sections 116(1)(a) and (e) were amended on 11 December 2014 and s.116(1)(aa), (1AA) and (1AB) were inserted on that date.[27] These amendments apply to visas held on or after 11 December 2014, however, if a notice of intention to cancel the visa under s.119 was sent by the Department before 11 December 2014, the Act continues to apply as if the amendments to s.116(1)(a), (aa) and (e) had not been made.[28]

The prescribed grounds, referred to in s.116(1)(g), are contained in r.2.43 of the Regulations and r.8(2) of the UNSCR Regulations (discussed below).

Sections 116(1), (1AA) and (1AB) are subject to subsections (2) and (3) which provide:

> *(2) The Minister is not to cancel a visa if there exist prescribed circumstances in which a visa is not to be cancelled.*
> *(3) If the Minister may cancel a visa under subsection (1), the Minister must do so if there exist prescribed circumstances in which a visa must be cancelled.*

For the purposes of s.116(2), limited circumstances in which a visa **may not** be cancelled are prescribed in r.8(3) of the UNSCR Regulations (discussed below).

For the purposes of s.116(3), the circumstances in which a visa **must** be cancelled are prescribed in r.2.43(2) (discussed below).

[21] s.116(1)(fa).
[22] s.116(1)(g)
[23] s.116(1AA) as inserted by No.129 of 2014. Applies to visas held on or after 11 December 2014.
[24] s.116(1AB) as inserted by No.129 of 2014. Applies to visas held on or after 11 December 2014.
[25] s.116(1AC)as inserted by Schedule 1 to Migration Amendment (Charging for a Migration Outcome) Act 2015 (No. 161 of 2015). Applies to visas held before or after 14 December 2015, if the benefit was asked for, received, offered or provided on or after 14 December 2015.
[26] s.116(4) as inserted by No.161 of 2015.
[27] *Migration Amendment (Character and General Visa Cancellation) Act 2014* (No.129 of 2014).
[28] No.129 of 2014.

Section 116(1)(a): Circumstances which permitted the grant of the visa no longer exist

Depending upon when the visa was held, the ground for cancellation in s.116(1)(a) varies slightly in its scope.

For a visa held prior to 11 December 2014 (i.e. decision to cancel visa was made before 11 December 2014), or where the s.119 notice of intention to cancel was sent by the Department prior to 11 December 2014, but the decision to cancel was made on or after that date, s.116(1)(a) provides that cancellation may occur if 'any circumstances which permitted the grant of the visa no longer exist'.[29] The relevant 'circumstances' are to be found by reference to the criteria for the grant of the visa.[30]

For a visa held on or after 11 December 2014, where the s.119 notice was also sent on or after that date, s.116(1)(a) provides for cancellation if the visa grant was based 'wholly or partly, on a particular fact or circumstance that is no longer the case or no longer exists'.[31] There is nothing in the explanatory material to indicate that the change of wording to 'fact or circumstance' is intended to change or enlarge the scope of this ground, however, the addition of 'wholly or partly' appears to broaden the application of the ground.[32]

This provision is concerned with a material change in circumstances.[33] Further, the relevant 'circumstance' is that which is the subject of the ministerial reflection and does not extend to the Minister's own state of mind.[34] A change in the Minister's satisfaction, as such, is not a 'changed circumstance' or changed fact for the purpose of s.116(1)(a).

In *MIMA v Zhang*[35] the delegate had cancelled the visa under s.116(1)(a) on the basis that the visa holder had obtained his visa by a fraudulent statement in his visa application that he intended only to visit Australia. The Court held the ground was not made out. The relevant 'circumstance' which permitted the grant of the visa was that the expressed intention of the visa holder only to visit Australia was genuine. If it were the case that the expressed intention was never genuine, that was a circumstance unchanged by the mere passage of time or the fact of a stated disbelief in the minds of the Minister or the objective discovery of its falsity. The expression 'no longer exists or is no longer the case' in s.116(1)(a) refers to the cessation of a state of affairs that *did* exist; it is not concerned with circumstances which later appear to have *never existed*. This is instead covered by s.116(1)(aa).

[29] Amendments made to the terms of s.116(1)(a) by No.129 of 2014, which commenced on 11 December 2014, are stated as applying in relation to a visa held on or after the commencement of those provisions. However, it also states that if a notification was given under s.119 of the Act before commencement of these particular amendments, the unamended version of Migration Act continues to apply in relation to that notification. Where the s.119 notice was sent before 11 December 2014, but the decision to cancel was made on or after that date and there is a defect in the s.119 notice it appears that the applicable legislation both for the primary decision-maker and upon review would be s.116(1)(a) as in force immediately before 11 December 2014. The Tribunal can cure any defect in the s.119 notice upon review, but it would do so in the context of s.116(1)(a) as in force immediately before 11 December 2014.

[30] See *Maharjan v MIAC* [2011] FMCA 200 (Scarlett FM, 1 April 2011) at [42]. In that case the Court found that, because the applicant had lodged her visa application before 1 July 2009, the Tribunal had correctly applied the pre-1 July 2009 version of the definition of 'spouse' under r.1.15A to determine whether the ground for cancellation under s.116(1)(a) was established.

[31] As amended by No.129 of 2014.

[32] The stated purpose of the amendment is 'to put beyond doubt that the ground for cancellation applies where the facts on which the decision to grant the visa under section 65 of the Migration Act was based no longer exist': Explanatory Memorandum to Migration Amendment (Character and General Visa Cancellation) Bill 2014, p.23 at [9].

[33] *MIMA v Zhang* (1999) 84 FCR 258, per Merkel J at [74].

[34] *MIMA v Zhang* (1999) 84 FCR 258, per French and North JJ at [54], per Merkel J at [74].

[35] (1999) 84 FCR 258.

Further examples of cancellation on the basis of s.116(1)(a) as it stood prior 11 December 2014 can be found in *Cardenas v MIMA,*[36] *Krummrey v MIMIA*,[37] *Maharjan v MIAC*,[38] *Le v MIMIA*,[39] *Nand v MIAC*[40] and *SZJDS v MIAC*.[41]

Section 116(1)(aa): Fact or circumstance for grant of visa did not exist

The ground of cancellation in s.116(1)(aa) only applies to a visa held on or after 11 December 2014 (ie decision to cancel is made on or after 11 December 2014). It provides for cancellation of a visa where the decision to grant the visa was based, wholly or partly, on the existence of a particular fact or circumstance that did not exist.[42] This ground enables cancellation in circumstances which cannot be brought within 116(1)(a) because it cannot be said the relevant fact or circumstance 'no longer exists' if it never existed. This ground is intended to reinforce obligations that a person must provide correct answers or information when seeking a visa.[43]

Departmental guidelines indicate that if a visa holder provided incorrect information or a bogus document to obtain the visa, it would be more appropriate to cancel under s.109 or s.116(1)(d).[44] However, nothing in the terms of s.116(1)(aa) provides a basis for limiting this ground to where a fact or circumstance never existed, and the decision to grant was made on the basis of a mistake by the decision-maker that the fact or circumstance existed. If incorrect information or a bogus document formed the basis for satisfaction of a relevant fact or circumstance for the grant of the visa where that fact or circumstance never existed, the ground for cancellation in s.116(1)(aa) would exist.

Section 116(1)(b): Non-compliance with a condition of a visa

Section 116(1)(b) provides for cancellation of a visa where 'its holder has not complied with a condition of the visa.' Visa conditions for each subclass are identified in the relevant part of Schedule 2 to the Regulations, and described in Schedule 8. Where the terms of a visa condition have been amended during the life of the visa, the version of the condition that must be considered is the version that was applicable at the time of visa grant, unless there is a contrary intention expressed in amending legislation.[45]

Section 116(1)(b) is often the basis for cancellation of student visas, for instance for non-compliance with work conditions (8101 or 8105) or non-compliance with condition 8202 (enrolment and course requirements). For information on cancellation for failure to comply with student visa conditions, please see MRD Legal Services commentary Student Visa Cancellations under s.116.

Section 116(1)(c): Non-compliance of visa condition by another person

Section 116(1)(c) provides for cancellation where 'another person required to comply with a condition of the visa has not complied with that condition'. The ground relates only to visas where a person other than the visa holder has been required to comply with a condition and has not done so. As

[36] [2001] FCA 17 (Carr J, 18 January 2001).
[37] (2005) 147 FCR 557.
[38] [2011] FMCA 200 (Scarlett FM, 1 April 2011).
[39] [2004] FCA 708 (Marshall J, 4 June 2004). This was a cancellation under s.128 (cancellation of visas of people outside Australia) on the basis of the ground in s.116(1)(a).
[40] [2011] FMCA 612 (Nicholls FM, 12 August 2011).
[41] [2011] FMCA 681 (Barnes FM, 31 August 2011), set aside on procedural grounds: (2012) 201 FCR 1.
[42] Inserted by No.129 of 2014, applies to visas held on or after 11 December 2014.
[43] Explanatory Memorandum (EM) to Migration Amendment (Character and General Visa Cancellation) Bill 2014, p.24 at [10].
[44] PAM3 - Visa cancellation instructions > General visa cancellation powers (s109, s116, s128, 134B & s140) - Act, s116(1)(aa) – Visa grant based on fact/circumstance that did not exist (re-issue date 21/8/16).
[45] *Pradhan v MIMA* (1999) 94 FCR 91 at [19]. The Court noted that the scheme of the Act and Regulations did not provide for variation of conditions during the term of the visa.

noted in the Department's guidelines,[46] s.116(1)(c) cannot be used to cancel that other person's visa as well. This is because visa conditions relate only to the actual visa holder. Cancellation of the other person's visa may instead be possible under s.140: see MRD Legal Services commentary Cancellations (Consequential) – Section 140 for further information.

Section 116(1)(d): Incorrect information

Section 116(1)(d) permits cancellation where an offshore visa holder or a visa holder who has not been immigration cleared has provided incorrect information in accordance with ss.101-105. That is, where they would be liable to have their visa cancelled under Subdivision C (s.109) if they were in Australia / immigration cleared. It is in effect a parallel provision to s.109. For information on cancellation under Subdivision C (s.109), please see MRD Legal Services commentary Cancellation of Visas under Section 109.

In *Sandoval v MIMA*, Gray J considered that s.116(1)(d) imported all the provisions of Subdivision C into the ground in s.116(1)(d) except those applicable only to someone who has entered Australia and been immigration cleared.[47]

Importantly, as s.116(1)(d) relates only to persons who have not entered Australia (ie persons who are outside Australia)[48] or who have entered Australia but are not immigration cleared, a decision to cancel a visa other than a protection visa under this ground would not be reviewable under Part 5 of the Act.[49] In contrast, a decision to cancel a protection visa under s.116(1)(d) would be reviewable under Part 7 of the Act if the visa holder was in immigration clearance in Australia.[50] However, cases in which this ground would arise are likely to be rare.

Section 116(1)(e): Risk to the health, safety or good order of the Australian community

Depending upon when the visa was held, s.116(1)(e) varies in its scope.

For a visa held prior to 11 December 2014 (i.e cancellation decision before 11 December 2014), or where the s.119 notice of intention to cancel was sent by the Department prior to 11 December 2014, but the decision to cancel was made on or after that date, s.116(1)(e) provides a ground for cancellation in circumstances where the presence of the visa holder in Australia is, or would be, a risk to the health, safety or good order of the Australian community.[51]. It should be noted that the relevant question is whether presence in Australia 'is, or would be, a risk'.

There is no judicial consideration of the expression 'a risk to the health [or] safety' as it appears in s.116(1)(e). In *Tien v MIMA*, the Court held that the term 'good order of the Australian community'

[46] PAM3: Visa cancellation - General visa cancellation powers (s109, s116, s128, 134B & s140)- s116(1)(c) – Another person's non-compliance (re-issue date 21/8/16).
[47] (2001) 194 ALR 71 at [33]. Note that s.107A, which was inserted on 1 March 1999, and has the effect that a visa can be cancelled under s.109 because of non-compliance with ss.101-105 in relation to a previous visa, would appear to apply equally under s.116(1)(d).
[48] 'Entered' includes re-entered: s.5(1) of the Act. In *Awad v MIBP* [2015] FCCA 1381 the Court held at [38] that s.116(1)(d) is to be interpreted as though the words 'or re-entered' were inserted into it. On that basis the provision applied to the applicant who had, on one occasion, entered Australia, but had not re-entered. The Court noted this conclusion was inconsistent with *obiter* comments in *Singh v MIBP* [2006] FMCA 1163 (Judge Driver, 27 October 2006) at [91].
[49] s.338(3).
[50] s.411(2) and (3).
[51] Amendments made to the terms of s.116(1)(e) made by No.129 of 2014, which commenced on 11 December 2014, are stated as applying in relation to a visa held on or after the commencement of those provisions. However, it also states that if a notification was given under s.119 of the Act before commencement of these particular amendments, the unamended version of the Migration Act continues to apply in relation to that notification. Where the s.119 notice was sent before 11 December 2014, but the decision to cancel was made on or after that date and there is a defect in the s.119 notice it appears that the applicable legislation both for the primary decision-maker and upon review would be s.116(1)(e) as in force immediately before 11 December 2014. The Tribunal can cure any defect in the s.119 notice upon review, but it would do so in the context of s.116(1)(e) as in force immediately before 11 December 2014.

must be construed in the context in which it appears, that is, juxtaposed to the words 'the health, safety' of the Australian community.[52] That is, it contains a public order element and concerns activities which have an impact on public activities or which manifest themselves in a public way. Justice Goldberg stated that the phrase requires that there be:

> *…an element of a risk that the person's presence in Australia might be disruptive to the proper administration or observance of the law in Australia or might create difficulties or public disruption in relation to the values, balance and equilibrium of Australian society. It involves something in the nature of unsettling public actions or activities.*[53]

The above formulation of 'good order' was adopted in *Newall v MIMA*[54] where the Court found that it was open to the delegate to be satisfied that the presence in Australia of the applicant who had recently been convicted of being an accessory after the fact to the murder of his parents would be a risk to the 'health, safety or good order of the Australian community'. In particular, it was open to the delegate to be satisfied, having regard to the seriousness of the offences and the fact that he was still on parole, that the presence of the applicant would 'create difficulties or public disruption in relation to the values, balance and equilibrium of Australian society' (per Goldberg J in *Tien's case* above). The Court found that such satisfaction might be based on the risk of an adverse reaction by certain members of the community to the applicant's presence in Australia, rather than concern about the likely or possible conduct of the visa holder in Australia.[55] More recently, the Court in *ATR15 v MIBP*, applying *Tien v MIMA* and *Newall v MIMA*, held that it was appropriate for the Tribunal to conclude that the risk to good order was about the risk of adverse reaction by certain members of the Australian society to the applicant's presence in the country, rather than on the concern about the applicant's likely or possible conduct.[56]

For visas held on or after 11 December 2014, where the notice under s.119 was sent on or after that date, s.116(1)(e) provides a ground for cancellation if the presence of the visa holder in Australia 'is or may be, or would or might be, a risk' to the health, safety or good order of the Australian community or a segment of the Australian community; or the health or safety of an individual or individuals.[57]

This version of the ground clarifies that the ground applies where the risk of harm is to an individual, or segment of the community, as well as the broader 'Australian public'. It is also a lower threshold than the previous version as the ground exists where there is a *possibility* the person may or might be a risk to health, safety or good order, as well as where there is demonstrated to be an actual risk of harm.[58]

The Department's guidelines indicate that having tuberculosis is the most common reason a visa holder might be a risk to the health of the Australian community. This example would suggest that cancellation on this basis would be appropriate where a visa holder has a highly contagious disease that would be a risk to public health.[59] The guidelines also indicate that a visa holder may present a

[52] (1998) 89 FCR 80 at 94.
[53] *Tien v MIMA* (1998) 89 FCR 80 at 94.
[54] [1999] FCA 1624 (Branson J, 24 November 1999) at [22].
[55] *Newall v MIMA* [1999] FCA 1624 (Branson J, 24 November 1999) at [30].
[56] *ATR15 v MIBP* [2016] FCCA 1089 (Harland J, 20 May 2016) at [57].
[57] Amended by No.129 of 2014. Applies to visas held on or after 11 December 2014.
[58] Explanatory Memorandum to Migration Amendment (Character and General Visa Cancellation) Bill 2014, p.24 at [13]. This was confirmed in *Gong v MIBP* [2016] FCCA 561 at [40].
[59] PAM3 – Cancellation - General visa cancellation powers (s109, s116, s128, 134B & s140)–s116(1)(e) – Risk to health, safety or good order – Risk to health. The guidelines state that having tuberculosis is the most common reason a visa holder might be a risk to the health of the Australian community (re-issue date 21/8/16).

risk to health where the person intends to travel to Australia and publically advocate something which is against Australia's public health interests, for example to advocate against childhood vaccination.[60]

In the context of risks to safety, Departmental guidelines indicate that the risks from which the Australian community, a segment of the community, or an individual or individuals, are to be protected from include injury, danger and physical harm. Examples include:

- where the visa holder is the subject of an apprehended violence order (AVO) or there is evidence that the visa holder has been perpetrating family violence;
- if the visa holder is found to be in possession of child pornography, as this may indicate a higher risk of engaging in child sex offences; and
- if a person has been charged with offences relating to the manufacture or possession of large quantities of illicit substances, provided there is a logical link between the alleged commission of the offences and a risk to the Australian community or a segment of the community.[61]

Departmental guidelines refer to activities which have an impact on public activities or which manifest in a public way as examples of a risk to good order such as where there is evidence that:

- a visa holder in Australia is inciting people in the community to violence; or
- a visa holder in Australia is publicly advocating violence against a particular social group.[62]

In *Gong v MIBP*, Smith J considered that as s.116(1)(e) is engaged where the Minister is satisfied that a visa holder's presence 'may be a risk', it can arise on the possibility that some event occurred in the past.[63] In this case, that possibility was supported by the laying of a number of charges against the visa holder. The Court held that there is no requirement that there be a determination of the guilt of a visa holder.[64] Departmental policy indicates that if relying on the existence of a charge to support cancellation under s.116(1)(e), decision makers should have regard to the nature of the offence and draw a rational link to how the allegation poses a risk to health, safety or good order, as well as consider the relevant evidence (e.g. police statement of facts) when deciding if a person may or might be a risk.[65]

Section 116(1)(f): Visa grant contravened the Act

Section 116(1)(f) provides that a visa can be cancelled if the application for the visa or the grant of the visa was in contravention of the Act or of another law of the Commonwealth. For example, a visa that was granted in circumstances where the visa application was invalid, or where the decision maker had failed to consider required criteria, or where the decision maker was *not* satisfied at the time of

[60] PAM3: Cancellation - General visa cancellation powers (s109, s116, s128, 134B & s140) – s116(1)(e) – Risk to health, safety or good order – Risk to health – Publicly advocating against Australian public health interest
[61] PAM3: Cancellation – General visa cancellation powers (s 109, s116, s128, s134B & s140 – Risk to health, safety of good order – Risk to safety (re-issue date 21/8/16).
[62] PAM3: Cancellation - General visa cancellation powers (s109, s116, s128, 134B & s140) – s116(1)(e) – Risk to health, safety or good order – Risk to good order (re-issue date 21/8/16).
[63] *Gong v MIBP* [2016] FCCA 561 at [41].
[64] *Gong v MIBP* [2016] FCCA 561 at [45].
[65] PAM3: Cancellation – General visa cancellation powers (s 109, s116, s128, s134B & s140 – Risk to health, safety of good order – Risk to safety (re-issue date 21/8/16). In *Gong v MIBP* [2016] FCCA 561, the Court found at [55] that the Tribunal had erred by making a finding of fact, that the basis of the charges was 'reasonable', without evidence. It held that the fact that charges had been laid did not give rise to any inference that there was a reasonable basis for the charges, and for that inference to be drawn, there must be some evidence of the facts upon which the charges were laid and an assessment of those against the elements of the offence.

decision that the applicant met the criteria (in contravention of s.65(1)), or where the wrong visa was granted by mistake, would be liable to cancellation under s.116(1)(f).

Section 116(1)(f) does not allow for a visa to be cancelled where the delegate *was* satisfied at the time of grant that the criteria were met. If the Minister or delegate is satisfied that the applicant met the relevant criteria, the visa is lawfully granted, even if it is later found that the applicant never actually met the criteria. Grant of the visa in those circumstances is not in *contravention of the Act*.[66]

Section 116(1)(fa): Non-genuine student / Conduct not contemplated by the visa

Section 116(1)(fa) permits cancellation of a **student visa** where either:

- the visa holder is not or is likely not to be, a genuine student (s.116(1)(fa)(i)); or
- the visa holder has engaged, or is engaging, or is likely to engage in conduct / omissions in Australia not contemplated by the visa (s.116(1)(fa)(ii)).

Section 116(1A) provides that the regulations may prescribe matters to which the Minister may have regard in determining whether he or she is satisfied as mentioned in s.116(1)(fa) and that such regulations do not limit the matters to which the Minister may have regard for that purpose. The prescribed matters for s.116(1A) are where the education provider defers or temporarily suspends the student's study -

- because of their conduct; or
- because of their circumstances, other than compassionate or compelling circumstances; or
- because of compassionate or compelling circumstances, if the Minister is satisfied that the circumstances have ceased to exist; or
- on the basis of evidence or a document given to the provider about the holder's circumstances, if the Minister is satisfied that the evidence or document is fraudulent or misrepresents the holder's circumstances.[67]

This cancellation ground came into effect on 21 December 2000 and applies in relation to all student visas whether granted before or after that date.[68] It was introduced as a response to the decision of the Federal Court in *Nong v MIMA*[69] which was thought to deprive 8202(b) as then in force[70] of all utility, by preventing a decision-maker from cancelling a visa for breach of visa condition until after

[66] For other examples of situations where a visa may be cancelled under s.116(1)(f), see PAM3 – Cancellation - General visa cancellation powers (s109, s116, s128, 134B & s140) – s116(1)(f) – Visa grant contravened law – (re-issue date 21/8/16). Note that prior to 2 October 2001, s.116(1)(f) operated differently for substantive and bridging visas. Section 73 of the Act specifies the circumstance in which the Minister may grant a bridging visa. Prior to 2 October 2001, there was no requirement that the Minister be *satisfied* that the visa applicant met the criteria for the visa. Rather the visa could be granted if the criteria were met. If it were later found that the visa criteria were not met at the time of grant, the visa could be cancelled under s.116(1)(f). As a result of amendments made by the *Migration Legislation Amendment (Judicial Review) Act 2001* (No.134 of 2001), s.73 is now expressed in similar terms to s.65, requiring the Minister to be 'satisfied' that the prescribed criteria are satisfied in order for the visa to be granted. The effect of this is that from 2 October 2001, there is no difference between cancelling a substantive or a bridging visa under s.116(1)(f). Cancellation of a bridging visa granted before that date is unlikely to come before the Tribunal.

[67] r.2.43(1C) and (1D), inserted by Migration Amendment Regulations 2010 (No.2) (SLI 2010, No.50), which commenced on 27 March 2010 and apply in relation to a student visa if the Minister is considering cancelling the visa under s.116 on or after that date. These provisions would apply in relation to a visa where the s.119 notice was sent on or after 27 March 2010, and arguably, where the s.119 notice was sent before that date and the cancellation was still under consideration as at that date. Prior to 27 March 2010 no matters were prescribed; however the matters specified in r.2.43(1D) would nevertheless be relevant.

[68] *Migration Legislation Amendment (Overseas Students) Act 2000* (No.168 of 2000), Schedule 4, items 1 and 3.

[69] [2000] FCA 1575; 106 FCR 257.

[70] That is, condition 8202 as introduced by Migration Amendment Regulations 1998 (No.10) (SR 1998 No.305) with effect from 1 December 1998. For the content of the various versions of Condition 8202, please see MRD Legal Services commentary '[Visa Condition 8202 (student enrolment, attendance and performance)]', Attachment A.

completion of the student's course.[71] Section 116(1)(fa) overcame that limitation by permitting cancellation of a visa where, for example, a semester had not yet finished but the decision-maker was satisfied that the student was not attending the scheduled contact hours for the course.[72] There is still utility for s.116(1)(fa) in relation to the current version of condition 8202(3) for which certification of unsatisfactory course progress or attendance constitutes the relevant breach of the condition. For example, s.116(1)(fa) may apply where the education provider has provided information about poor attendance or course progress, but the applicant has changed course provider or ceased enrolment before any certification has been issued.

While there may potentially be some overlap with the ground in s.116(1)(b) (non-compliance with visa condition), they are separate grounds, and the ground in s.116(1)(fa) does not cut across or qualify s.116(1)(b).[73] It provides alternative preconditions to the cancellation powers and not cumulative ones.[74] It is directed to circumstances where a student visa holder has been in literal compliance with visa conditions, but has not conducted himself or herself as a genuine student.[75]

As the Department's guidelines explain, the conduct in question must relate to the visa holder's status as a student in order to fall within the scope of s.116(1)(fa). Examples in the guidelines relating to s.116(1)(fa)(i) include: if a Student visa holder is not attending their course but is complying with condition 8202; there is evidence that a deferral was granted for reasons which were not genuine; the applicant is enrolled but has extensive periods without study; there is evidence that the visa holder's primary intention for travel or stay in Australia is for work or other purposes; or the visa holder has been in Australia for significant period without completing a course of study and is not demonstrating a pathway to an educational qualification or outcome.[76] Examples of conduct relevant to s.116(1)(fa)(ii) include the visa holder is found to be selling essays on campus, or receiving payment to attend classes/exams on behalf of another student or repeatedly cheating on exams.[77]

Note that when considering this ground, the decision maker's reasons should be clear as to which limb is being relied upon.[78]

Section 116(1)(g): Prescribed grounds for cancelling a visa

In addition to the grounds for cancellation in s.116(1)(a) to (fa), s.116(1)(g) permits cancellation of a visa if a prescribed ground for cancelling the visa applies to the visa holder. The prescribed grounds for cancellation under s.116(1)(g) are set out in r.2.43(1) of the Regulations and r.8(2) of the UNSCR

[71] (2000) 106 FCR 257. See Supplementary Explanatory Memorandum to the Migration Legislation Amendment (Overseas Students) Bill 2000, which introduced s.116(1)(fa). At the same time, condition 8202 was also amended to overcome the difficulty: *Migration Legislation Amendment (Overseas Students) Act 2000* (No.168 of 2000), Schedule 4 item 4(3).

[72] Supplementary Explanatory Memorandum to the *Migration Legislation Amendment (Overseas Students) Bill 2000.* Other examples given include where there has not been an actual breach of a student visa condition but the decision-maker is nevertheless satisfied the student is not genuine, or where the first academic year of the course has not yet commenced, but the decision-maker is satisfied the visa holder is not a genuine student.

[73] *MIMA v Hou* [2002] FCA 574 (Conti J, 8 May 2002) *obiter* comments at [32] cited with apparent approval in *Tian v MIMIA* [2004] FCA 216 (Mansfield J, 12 March 2004) at [32].

[74] *Weerakoon v MIMIA* [2005] FMCA 624 (Smith FM, 20 April 2005) at [8].

[75] [2002] FCA 574 (per Conti J, 8 May 2002) at [32]. Other cases in which s.116(1)(fa) was applied include *Awan MIMA* [2001] FCA 1036 (Weinberg J, 3 August 2001) and *Ambakkat v MIAC* [2011] FMCA 916 (Riley FM, 30 November 2011). Section 116(1)(fa) was also discussed briefly in *obiter dicta* by Madgwick J in *Shrestha v MIMA* [2001] FCA 359 (Madgwick J, 3 April 2001); however, for reasons explained by Conti J in *Hou* at [23], [25]-[26], that decision should not be regarded as authoritative. It should be noted that on the Minister's appeal, the decision in *Shrestha* was set aside by the consent of both parties: N455/2001, 7 August 2001.

[76] See PAM3 – Cancellation - General visa cancellation powers (s109, s116, s128, 134B & s140) – s116(1)(fa) – Non genuine students and conduct not contemplated by visa, examples where 116(1)(fa)(i) may apply (re-issue date 21/8/16).

[77] See PAM3 – Cancellation - General visa cancellation powers (s109, s116, s128, 134B & s140) – s116(1)(fa) – Non genuine students and conduct not contemplated by visa examples where 116(1)(fa)(ii) may apply (re-issue date 21/8/16).

[78] In *Ambakkat v MIAC* [2011] FMCA 916 (Riley FM, 30 November 2011), the Tribunal did not specify the relevant subparagraph; however the Court held that it was clear from the Tribunal's reasons, and in particular from its use of the precise words from the relevant limb, that it implicitly found that the ground in s.116(1)(fa)(ii) existed.

Regulations. In some cases, where a prescribed ground is made out, the visa must be cancelled, and no discretion is involved.

The prescribed grounds in r.2.43 fall into the following broad groupings:

- Foreign Minister determination
    - *for cancellation of visas before 1 March 2006* - that the Foreign Minister has personally determined that the holder of the visa is a person whose presence in Australia is, or would be, prejudicial to relations between Australia and a foreign country; or may be directly or indirectly associated with the proliferation of weapons of mass destruction;[79]
    - *for cancellation on or after 1 March 2006:*
        - in the case of a visa **other than a relevant visa**, the Foreign Minister has personally determined that the holder of the visa is a person whose presence in Australia is or would be contrary to Australia's foreign policy interests,[80] or may be directly or indirectly associated with the proliferation of weapons of mass destruction;[81]
        - in the case of **a relevant visa** - the Foreign Minister has personally determined that the holder of the visa is a person whose presence in Australia may be directly or indirectly associated with the proliferation of weapons of mass destruction;[82]

          '**Relevant visa**' in this context means Subclass 050, 070, 200, 201, 202, 203, 204, 447, 449, 451, 785, 786 or 866.[83] The relevant question is whether there is a relevant determination by the Foreign Minister. No particular form is required for the determination; and it is a matter for the Foreign Minister personally whether to make such a determination in a particular case.[84]
    - *for visas granted or in effect on or after 14 February 2012* – in the case of a person who is the holder of a visa **other than a relevant visa**, the person is declared under r.6(1)(b) or (2)(b) of the Autonomous Sanctions Regulations 2011 (ASR) for the purpose of preventing the person from travelling to, entering or remaining in Australia, and is not a person for whom the Foreign Minister has waived the operation of the declaration in accordance with r.19 of the ASR;[85]

[79] r.2.43(1)(a) (as in effect prior to 1 March 2006).
[80] r.2.43(1)(a)(i)(A) as amended by Migration Amendment Regulations 2006 (No.1) (SLI 2006, No. 10).
[81] r.2.43(1)(a)(i)(B) as amended by SLI 2006, No. 10.
[82] r.2.43(1)(a)(ii) as amended by SLI 2006 No.10.
[83] r.2.43(3) definition of 'relevant visa', inserted by SLI 2006, No.10. It was amended to include Subclass 050 by Migration Legislation Amendment Regulations 2009 (No.2) (SLI 2009, No.116), and further amended to include Subclass 070 by Migration Amendment Regulation 2013 (No.4) (SLI No.131, 2013). The transitional provisions provide that the definition applies in relation to an application for a visa made on or after 1 March 2006 or made but not finally determined before that date (SLI 2006, No.10), r.4(2), for Subclass 050 an application for a visa made on or after 1 July 2009 (SLI 2009, No. 116). It is unclear how these transitional provisions are intended to operate given that the cancellation provisions to which the definition relates apply in relation to the cancellation of a visa on or after the relevant date. However the difficulty is unlikely to arise as an issue before the Tribunal. No transitional provisions were provided for the introduction of the Subclass 070, with the amending regulation simply commencing 18 June 2013: Migration Amendment Regulation 2013 (No.4) (SLI 2013, No.131).
[84] *Aye v MIAC* [2009] FCA 978 (Emmett J, 28 August 2009).
[85] r.2.43(1)(aa), inserted by Migration Amendment Regulations 2012 (No.1) (SLI 2012, No.4), commencing 14 February 2012. Regulation 6(1)(b) and (2)(b) of the ASR authorise the Foreign Minister (defined in r.1.03 of the Regulations to mean the Minister for Foreign Affairs) to declare a person for the purpose of preventing travel to, entry, or stay in Australia, on the basis that the person is mentioned in an item of the table in r.6, or on the basis that the Minister is satisfied that the person is contributing to the proliferation of weapons of mass destruction. Regulation 19 permits the Minister to waive the operation of

'**Relevant visa**' in this context means Subclass 050, 070, 200, 201, 202, 203, 204, 447, 449, 451, 785, 786 or 866.[86] The relevant question is whether there is a current relevant declaration by the Foreign Minister, the operation of which has not been waived in respect of the visa holder.

- Security risk
    - the visa holder has been assessed by the Australian Security Intelligence Organisation (ASIO) to be directly or indirectly a risk to security, within the meaning of s.4 of the *ASIO Act 1979;*[87]

      In this context the relevant question is whether the visa holder *has been assessed by ASIO* to be directly or indirectly a risk to security, within the meaning of s.4 of the *ASIO Act 1979*. Whether the Minister or delegate agrees with the assessment is irrelevant.[88]

- 1 September 1994 transitional - overstay
    - *for visas that were granted before 1 September 1994 and continued in force as a Transitional (Temporary) visa under the Migration Reform (Transitional Provisions) Regulations and allowed multiple entries to Australia* - at some time before 1 September 1994, the holder exceeded the period of stay in Australia permitted by the visa;[89]
- Child custody concerns and unaccompanied minors
    - *for a holder of a specified visa who is under 18*,[90] either:
        - the law of their home country did not permit the removal of the visa holder and at least one of the people legally entitled to determine where the visa holder can live did not consent to the grant of the visa, or
        - the grant of the visa was inconsistent with an Australian child order;[91]
    - *for a holder of a specified visa who is under 18 and unaccompanied by a parent or guardian*[92] - the visa holder does not have adequate funds, or adequate

such a declaration in specified circumstances. Regulation 9 specifies the duration of a declaration under r.6(1)(b) or (2)(b); and rr.10 and 11 provide for the revocation of such a declaration.

[86] r.2.43(3) definition of 'relevant visa', inserted by SLI 2006, No.10. It was amended to include Subclass 050 by SLI 2009, No.116, and further amended to include Subclass 070 by SLI 2013, No.131. The transitional provisions provide that the definition applies in relation to an application for a visa made on or after 1 March 2006 or made but not finally determined before that date: (SLI 2006, No.10) r.4(2), or, for Subclass 050 an application for a visa made on or after 1 July 2009 (SLI 2009, No.116), r.11. It is unclear how these transitional provisions are intended to operate for the purposes of the cancellation provision in r.2.43(1)(aa), which applies in relation to a visa that is in effect on 14 February 2012 and visas granted on or after that day. However the difficulty is unlikely to arise as an issue before the Tribunal. No transitional provisions were provided for the introduction of the Subclass 070, with the amending regulation simply commencing 18 June 2013: SLI 2013, No.131.

[87] r.2.43(1)(b).

[88] However, the terms of r.2.43(1)(b) would suggest that the assessment would need to be in accordance with s.4 of the *ASIO Act 1979*.

[89] r.2.43(1)(d), repealed by Migration Amendment (Redundant and Other Provisions) Regulation 2014 (SLI 2014, No.30), for visa applications made on or after 22 March 2014.

[90] r.2.43(1)(e) refers to the following visa classes: Class UD; Class TN or Class TR visas applied for using form 601E; Class TV; Subclass 600 (Visitor) visa in the Tourist stream applied for using form 1419 (internet). r.2.43(1)(e)(ii) for Class TN Long Stay (Visitor) was removed by Migration Amendment Regulation 2013 (No.1) (SLI 2013, No.32) with effect from 23 March 2013; r.2.43(1)(e)(iva) inserted by SLI 2013, No.32 with effect from 23 March 2013, and applicable to visa applications made on or after that date.

[91] r.2.43(1)(e), as amended by Migration Amendment Regulations 2008 (No.7) (SLI 2008, No. 205). These amendments commenced on 27 October 2008 and apply to visa applications made on or after that date: rr.2 and 3. However, the amended provision is substantially unchanged: the only substantive amendment to r.2.43(1)(e) relates to the Visitor (Class TV) visa which was also introduced on 27 October 2008: Schedule 1, item 15.

arrangements have not been made, for their maintenance, support and general welfare during the visa holder's proposed visit in Australia;[93]

- Visa holder or guardian requests cancellation
    - *in the case of a temporary visa* - the holder (if aged 18 or over) asks the Minister, in writing, to cancel the visa;[94]
    - *in the case of a temporary visa held by a person under 18 who is not a spouse, a former spouse or engaged to be married* - another person who is over 18 and can lawfully determine where the visa holder can live, asks the Minister in writing to cancel the visa. The Minister must be satisfied that there is no compelling reason to believe that the cancellation of the visa would not be in the best interest of the visa holder;[95]
- Non-genuine visa holders
    - *for Subclass 456, 459, 600 (in the Business Visitor stream), 956 or 977 visa holders* – despite the grant of the visa, the Minister is satisfied that the visa holder did not have, at the time of the grant of the visa, or has ceased to have, an intention only to stay in, or visit, Australia temporarily for business purposes;[96]
    - *for Subclass 411, 415, 416, 419, 420, 421, 423, 427, 428, 442 or 488 visa holders* where the visa application was made on or after 14 September 2009; and *Subclass 401, 402 or 403 holders* where the visa application was made on or after 24 November 2012; *Subclass 400 holders* where the visa application was made on or after 23 March 2013; and *Subclass 407 and 408 visa holders* – the Minister is satisfied that the grounds in r.2.43(1A) are met.[97] They are: that, despite the grant of the visa, the Minister is satisfied that the visa holder did not have at the time of grant of the visa, or has ceased to have, a genuine intention to stay temporarily in Australia to carry out the work or activity in relation to which: (a) the visa holder's visa was

[92] r.2.43(1)(f), refers to the following visa classes: Class UD; Class TN where applied using form 601E; Class TV; and Subclass 600 (Visitor visa in the Tourist stream where applied using form 1419 (internet). r.2.43(1)(f)(ii), relating to holders of Long Stay (Visitor) (Class TN) visas, was removed by SLI 2013, No.32 with effect from 23 March 2013; r.2.43(1)(f)(iv) for Subclass 600 was inserted by SLI 2013, No.32 with effect from 23 March 2013, applicable to visa applications made on or after that date.

[93] r.2.43(1)(f), as amended by SLI 2008, No. 205. These amendments commenced on 27 October 2008 and apply to visa applications made on or after that date. .

[94] r.2.43(1)(g).

[95] r.2.43(1)(h). Prior to 1 July 2009 'spouse' was defined in r.1.15A(1)(b) to include de facto spouse; however from 1 July 2009 the term 'spouse' in migration legislation refers only to married relationships: s.5F of the Act, with 'de facto partner' separately defined in s.5CB: *Same-Sex Relationships (Equal Treatment in Commonwealth Laws - General Law Reform) Act 2008* (No.144 of 2008). The effect of these amendments is that, in general, the reference to spouse (and former spouse) in r.2.43(1)(h) no longer includes a de facto (or former de facto) partner. There is a transitional provision for r.2.43(1)(h): Migration Amendment Regulations 2009 (No.7) (SLI 2009, No.144), r.3(10). The transitional provision was intended to ensure that a minor who was a spouse or former spouse under the regulations as in force before 1 July (and so not eligible for visa cancellation under r.2.43(1)(h)) is taken to continue to be a spouse or former spouse after 1 July (even though they would not otherwise meet the post 1 July definition of a spouse), but whether it achieves this purpose is unclear. It is unlikely that this will arise as an issue for the Tribunals, because circumstances are unlikely to arise where review would be sought in relation to a cancellation decision made under r.2.43(1)(h).

[96] r.2.43(1)(i). Regulation 2.43(1)(i)(ib), relating to a Subclass 600 (Visitor) visa in the Business Visitor stream, was inserted by SLI 2013, No.32 with effect from 23 March 2013, and applicable to visa applications made on or after that date.

[97] r.2.43(1)(ia), inserted by Migration Amendment Regulations 2009 (No.5) (SLI 2009, No.115) as amended by Migration Amendment Regulations 2009 (No.5) Amendment Regulations 2009 (No.1) (SLI 2009, No.203), with effect from 14 September 2009; r.2.43(1)(ia) was further amended to include holders of Subclass 401, 402 (and 403 visas: Migration Legislation Amendment Regulation 2012 (SLI 2012, No. 238), with effect from 24 November 2012 and applicable to visa applications made on or after that date. Regulation 2.43(1)(ia)(i), (ia), (ib), and (ic) were further amended to incorporate Subclass 400 (Temporary Work (Short Stay Activity)) visas by SLI 2013, No.32 with effect from 23 March 2013, and applicable to visa applications made on or after that date. Subclass 407 and 408 were added to r.2.43(1)(ia) with effect from 19 November 2015 for applications made on or after this date, and references to redundant visa subclasses 411, 416, 419, 421, 423, 427, 428 and 442 repealed from this date: Migration Amendment (Temporary Activity Visas) Regulation 2016 (F2016L01743).

granted, or (b) if identified in a nomination after the visa is granted, the visa holder was identified in a nomination.[98]

- *for Subclass 601 holders* –the Minister is satisfied, despite the grant of the visa, that the visa holder did not have, at the time of the grant, an intention only to stay in, or visit, Australia temporarily for the tourism or business purposes for which the visa was granted; or has ceased to have that intention;[99]
- *for Subclass 670 (not in the Business Visitor stream)[100], 676, 679 and 686[101] visa holders* - the Minister is satisfied that, despite the grant of the visa, the visa holder did not have, at the time of the grant, or has ceased to have, an intention only to visit, or remain in, Australia temporarily to visit a specified relative, or for another non business or non medical purpose;[102]
- *for Subclass 976 visa holders* –despite the grant of the visa, the Minister is satisfied that the visa holder did not have, at the time of the grant, or has ceased to have, an intention only to visit Australia temporarily for tourism purposes;[103]
- *for Subclass 651 visa holders* –despite the grant of the visa, the Minister is satisfied that the visa holder did not have, at the time of the grant, or has ceased to have, an intention only to stay in, or visit, Australia temporarily for the tourism or business purposes for which the visa was granted;[104]
- *for Subclass 457 visa holders granted on basis of c.457.223(4) where visa application made on or after 14 September 2009* –despite the grant of the visa, the Minister is satisfied that the holder did not have a genuine intention to perform the occupation mentioned in cl.457.223(4)(d) at the time of grant, or has ceased to have a genuine intention to perform that occupation, or the position associated with the nominated occupation is not genuine.[105] It appears the wording 'the position associated with the nominated occupation is not genuine' is approached in the same way as the similarly

[98] r.2.43(1A), inserted by SLI 2009, No.115 as amended by SLI 2009, No.203, with effect from 14 September 2009. The Explanatory Statement to SLI 2009 No.203 at p.11 explains that the amended Schedule 2 criteria for these visas require the Minister to be satisfied that the visa applicant has a genuine intention to perform the nominated activity. It explains that the purpose of new r.2.43(1)(ia) is to translate these visa criteria into an ongoing obligation, because if either the applicant or the position are no longer genuine, it may be inappropriate for the visa holder to remain in Australia.

[99] r.2.43(1)(ea) inserted by SLI 2013, No.32 with effect from 23 March 2013, and applicable to visa applications made on or after that date.

[100] r.2.43(1)(j)(i), (i), (ii), and (iii) were amended to incorporate Subclass 600 (Visitor) visa not in the Business Visitor stream, by SLI 2013, No.32 with effect from 23 March 2013, and applicable to visa applications made on or after that date.

[101] r.2.43(1)(j)(iv), relating to Subclass 686 (Tourist (Long Stay)) visas, was removed by SLI 2013, No.32 with effect from 23 March 2013.

[102] r.2.43(1)(j). The specified relatives are parent, spouse, de facto partner, child, brother or sister. The relative must be an Australian citizen or an Australian permanent resident. The reference to 'de facto partner' was inserted by SLI 2009, No.144 with effect from 1 July 2009. A similar amendment was made to the related provision in Schedule 2 cl.676.212(a) and 679.211(a) which is satisfied if at the time of application the primary applicant's purpose is to visit a specified relative. Those amendments to Schedule 2 apply to visa applications made on or after 1 July 2009. 'Spouse' and 'de facto partner' are now defined in ss.5F and 5CB of the Act respectively, also with effect from 1 July 2009: *Same-Sex Relationships (Equal Treatment in Commonwealth Laws - General Law Reform) Act 2008* (No.144 of 2008). 'Spouse' now refers only to married relationships, and 'de facto partner' includes committed relationships whether of the same or opposite sex.

[103] r.2.43(1)(k).

[104] r.2.43(1)(ka), inserted by SLI 2008, No. 205 which commenced on 27 October 2008 and applies to visa applications made on or after that date. The Visitor (Class TV) Subclass 651 (eVisitor) visa was introduced at the same time: SLI 2008, No.205.

[105] r.2.43(1)(kb), inserted by SLI 2009, No.115 as amended by SLI 2009, No.203, with effect from 14 September 2009. Regulation 2.43(kb) was further amended by SLI 2014, No.30 substituting the reference in r.2.43(1)(kb) to 'Subclass 457 (Business (Long Stay)) visa' with 'Subclass 457 (Temporary Work (Skilled)) visa' and applying to visa applications made on or after 22 March 2014. Clause 475.223(4) relates to standard business sponsorship. The reference to cl.457.223(4) in r.2.43(1)(kb) is a reference to that provision as amended by Migration Amendment Regulations 2009 (No. 9) (SLI 2009 No. 202). Amended cl.475.223(4)(d) requires the Minister to be satisfied that both the applicant's intention to perform the occupation, and the position associated with the nominated occupation, are genuine. The Explanatory Statement to SLI 2009, No. 203 at Attachment C p.9 explains that the purpose of the new r.2.43(1)(kb) is to translate the visa criteria into an ongoing obligation, because if either the applicant or the position are no longer genuine, it may be inappropriate for the Subclass 457 visa holder to remain in Australia.

worded criteria in r.2.72(10)(f),[106] that is, it requires a qualitative analysis of the position by the decision maker;[107]

- Temporary business and work visas - breach of undertaking / obligations, false or misleading information or sanction imposed on sponsor

  - *for Subclass 457 visas granted on the basis of employment in Australia by a business sponsor where there is a current nomination and visa application made before 14 September 2009* - the current business sponsor has breached a relevant sponsorship undertaking, or no longer meets the requirements for sponsorship approval, or gave incorrect information in relation to the sponsorship;[108]

  - *for primary Subclass 457 visa holders where visa application was made on or after 14 September 2009 and the s.119 notice of proposed cancellation was issued before 27 March 2010* - the sponsor has not complied, or is not complying, with a sponsorship undertaking; or has given false or misleading information to the Department or Tribunal in relation to either an application under r.1.20C for approval as a standard business sponsor[109] or any other matter relating to the business sponsor; or has failed to satisfy a sponsorship obligation; or has been cancelled or barred under s.140M of the Act; or the labour agreement has been terminated, has been suspended or has ceased;[110]

  - *for primary Subclass 457 visa holders where the visa application was made on or after 14 September 2009 and the s.119 notice of proposed cancellation was issued on or after 27 March 2010* - the sponsor has not complied, or is not complying, with a sponsorship undertaking; or has given false or misleading information to the Department or Tribunal; or has failed to satisfy a sponsorship obligation; or has been cancelled or barred under s.140M of the Act; or the labour agreement has been suspended or has ceased;[111]

    In relation to the ground relating to false and misleading information as amended on 27 March 2010, to ensure that its broad nature is exercised only in appropriate circumstances, the amendment was accompanied by comprehensive Departmental policy guidelines, which emphasised the discretionary nature of the visa cancellation power, and that visa cancellation under this ground should not be made as a matter of course merely because the sponsor has given false or misleading information to the Department or the Tribunal. The guidelines also emphasised that decision-makers

[106] r.2.72(10)(f) is a prescribed criteria for applications for approval of a nomination by an approved sponsor under s.140GB and states that 'the position associated with the nominated occupation is genuine'.
[107] In *Kaur v MIBP* [2016] FCCA 601 at [22], Driver J referenced the Court's interpretation of this phrase in *Cargo First Pty Ltd v MIBP* [2015] FCCA 2091.
[108] r.2.43(1)(l) as in force before 14 September 2009.
[109] Note that r.1.20C was repealed by SLI 2009, No.115 with effect from 14 September 2009.
[110] r.2.43(1)(l) as substituted by SLI 2009, No.115 as amended by SLI 2009, No.203, with effect from 14 September 2009. The Explanatory Statement to SLI 2009 No.203 at Attachment C p.9 explains that depending on the circumstances, it may be appropriate to cancel a visa based on the conduct of the sponsor and that there are two main instances in which this may occur: first, where the visa holder is complicit in the conduct that led to the sponsor's non-compliance, and secondly, where the sponsor's non-compliance is so serious that it would be inappropriate for the sponsor's relationship with the visa holder to continue, despite the personal preference of the visa holder concerned. The definition of 'primary sponsored person' is set out in r.2.57(1), inserted by SLI 2009, No.115 as amended by SLI 2009, No.203.
[111] r.2.43(1)(l) as amended by SLI 2009, No.115 as amended by SLI 2009, No.203 with effect from 14 September 2009; and Migration Amendment Regulations 2010 (No.1) (SLI 2010 No.38), with effect from 27 March 2010. The 27 March 2010 amendment amends r.2.43(1)(l)(ii) to remove the limitation on the relevant categories of false or misleading information. The Explanatory Statement at p.11 explains that the effect of the amendment "is to capture the wide variety of situations in which false or misleading information may be given by the sponsor … [including] information which is not given in relation to matters directly related to the sponsor (for example information given by the sponsor in support of the visa application made by the Subclass 457 visa holder)". It also removes the need to distinguish between false or misleading information given by the sponsor in relation to applications made under the Regulations as in force before 14 September 2009 and those made under the regulations as amended at that time.

must have regard to key factors such as the nature of the false or misleading information given and whether it was material in the decision to grant the visa, and whether the visa holder was complicit in the giving of the false or misleading information.[112]

- *for Subclass 488 visa holders where the visa application was made on or after 27 October 2008 but before 14 September 2009* –the visa holder's sponsor has not complied, or is not complying, with its sponsorship undertakings;[113]
- *for primary Subclass 411, 415, 416, 419, 420, 421, 423, 427, 428, 442 and 488 visa holders where the visa application was made on or after 14 September 2009; primary Subclass 401 or 402 holders where the visa application was made on or after 24 November 2012; and Subclass 407 and 408 visa holders* –one of the grounds in r.2.43(1B) is met.[114]

  The grounds in r.2.43(1B) are: that (a) the sponsorship approval has been cancelled, or the approved sponsor barred, under s.140M; or, for applications made prior to 24 November 2012, (b) if the approved sponsor is a party to a work agreement, that the work agreement has been terminated or has ceased;[115] or (c) if the primary sponsored person is required to be identified in a nomination, the criteria for approval of the latest nomination in which that person is identified are no longer met; or (d) the person who is or was an approved sponsor has failed to satisfy a sponsorship obligation;[116]

- Subclass 457 visa holders living/working in non-regional area
  - where the visa was granted on the basis of employment in Australia by a business sponsor, and in respect of whom there is a nomination of an activity under r.1.20GA (regional employment) – the visa holder is living or working within a (non-regional) area specified by the relevant instrument;[117]
- Temporary business and work visas - inclusion in nomination (secondary persons)
  - *for secondary Subclass 411, 419, 420, 421, 423, 427, 428, 442 or 457 visa holders where visa applications made on or after 14 September 2009; secondary Subclass 401 or 402 holders where the visa application was made on or after 24 November 2012; and secondary Subclass 407 visa holders* –the person who is or was an

[112] Explanatory Statement to SLI 2010, No.38, Schedule 3 item [1]. Such guidelines are not reflected in current PAM3, where there is no express reference to cancelling a 457 visa because a *sponsor* provided false or misleading information, see PAM3: General visa cancellation powers (s109, s116, s128, s134B and s140) - s116(1)(g) - Prescribed grounds - Reg. 2.43(1)(l) - UC-457 cases - Sponsor has failed to comply with sponsorship obligations (re-issue date 21/8/16).

[113] r.2.43(1)(lb) inserted by Migration Amendment Regulations 2008 (No.6) (SLI 2008, No.189), with effect from 27 October 2008; removed by SLI 2009, No.115 as amended by SLI 2009, No.203 with effect from 14 September 2009. For visa applications made on or after 14 September 2009, see r.2.43(1)(lc) and 2.43(1B)(d).

[114] r.2.43(1)(lc), inserted by SLI 2009, No.115 as amended by SLI 2009, No.203, with effect from 14 September 2009. r.2.43(1)(lc) was amended to include holders of Subclass 401 and 402 visas: SLI 2012, No. 238 with effect from 24 November 2012 and applicable to visa applications made on or after that date. It was further amended to include Subclass 407 and 407 visas with effect from 19 November 2016 for applications made on or after that date, with references to redundant visa subclasses 411, 415, 420, 421, 423, 427, 428 and 442 also repealed from that date: Migration Amendment (Temporary Activity Visas) Regulation 2016 (F2016L01743).

[115] r.2.43(1B)(b) was omitted by SLI 2012, No. 238 with effect from 24 November 2012.

[116] r.2.43(1B), inserted by SLI 2009, No.115 as amended by SLI 2009, No.203, with effect from 14 September 2009. The Explanatory Statement to SLI 2009, No.203 at Attachment C pp.11-12 explains that the purpose of this amendment is the same as the purpose of r.2.43(1)(l), ie that it may be appropriate in some circumstances to cancel a visa because of the conduct of the sponsor.

[117] See 'RegAustpre010712' tab of Register of Instruments: Business visas. r.2.43(1)(la) as substituted by SLI 2009, No.115 as amended by SLI 2009, No.203, with effect from 14 September 2009 and applicable to visa applications made on or after that date. The amendment is technical only, and preserves the ground in r.2.43(1)(la) as previously in force which referred to a gazetted (non-regional) area.

approved sponsor of the primary sponsored person has not listed the secondary sponsored person in the latest nomination in which the primary sponsored person is identified;[118]

- Temporary business and work visas - travel costs paid
    - *for Subclass 427, 428 or 457 visa holders where visa applications made on or after 14 September 2009; Subclass 401 visa holders where visa applications made or after 23 March 2013; and Subclass 408 visas granted on the basis that the primary sponsored person satisfied the criteria in cl.408.223 or 408.224 of Schedule 2* - the person who is or was an approved sponsor has paid the return travel costs of the holder in accordance with the sponsorship obligation mentioned in r.2.80 or 2.80A;[119]
- People-smuggling offences, fraud, and systems malfunction
    - the Minister reasonably suspects that the visa holder has committed an offence under s.232A, 233, 233A, 234 or 236 of the Act.[120] These provisions relate to people-smuggling offences and use of false documents / or other person's documents to enter and remain in Australia;
    - where the visa was granted as a result of a certified computer programme malfunction;[121]
    - the Minister reasonably suspects that the visa has been obtained as a result of the fraudulent conduct of any person.[122]
- Criminal convictions (temporary visa holders other than Bridging Visa E or Subclass 444)
    - the Minister is satisfied the temporary visa holder has been convicted of a Commonwealth, State or Territory offence, whether or not the visa was held at the time of the offence and regardless of the penalty imposed (if any);[123]

[118] r.2.43(1)(ld), inserted by SLI 2009, No.115 as amended by SLI 2009, No.203, with effect from 14 September 2009. r.2.43(1)(ld) was amended to include holders of Subclass 401 and 402 visas: SLI 2012, No. 238 with effect from 24 November 2012 and applicable to visa applications made on or after that date. It was further amended to include Subclass 407 with effect from 19 November 2016 for applications made on or after that date, with references to redundant subclasses 411, 419, 421, 423, 427, 428 and 442 also repealed from that date: Migration Amendment (Temporary Activity Visas) Regulation 2016 (F2016L01743). According to the Explanatory Statement to SLI 2009, No.203, Attachment C at.10-11, r.2.43(1)(ld) 'ensures that a visa can be cancelled where the approved sponsor of a primary sponsored person is not also the approved sponsor of any secondary sponsored persons who are related to the primary sponsored persons. This may occur where the primary sponsored person transitions between standard business sponsors onshore and the subsequent sponsor has not agreed to sponsor some or all of the secondary sponsored persons. This provision serves two purposes. First, it operates as an incentive for primary sponsored persons to ensure that secondary sponsored persons are included in subsequent nominations. Second, it serves to protect the first sponsor who remains liable for the secondary sponsored person despite no longer benefiting from the services of the primary sponsored person until, among other things, the visa ceases as a result of cancellation'. The definitions of 'primary sponsored person' and 'secondary sponsored person' are set out in r.2.57(1), inserted by SLI 2009, No.115.

[119] r.2.43(1)(le), inserted by SLI 2009, No.115 as amended by SLI 2009, No.203, with effect from 14 September 2009. SLI 2009 No.115 as amended by SLI 2009, No.203 also inserted r.2.80, which relates to an obligation to pay travel costs to enable sponsored persons to leave Australia, and r.2.80A, which sets out a domestic worker sponsor's obligation to pay travel costs. The Explanatory Statement to SLI 2009, No.203 at Attachment C p.11 states that the cancellation ground in r.2.43(1)(le) 'preserves the policy intention of the obligation in regulations 2.80 and 2.80A, which is to ensure that the Commonwealth does not have to pay to remove the sponsored person from Australia. [It] allows a visa to be cancelled where the sponsored person has returned to their home country, having had their return travel costs paid by the approved sponsor. This prevents the sponsored person from returning to Australia as the holder of that visa, once the obligation to pay return travel costs has already been satisfied'. r.2.43(1)(le) was further amended to include a Subclass 401 (Temporary Work (Long Stay Activity)) visa by SLI 2013, No.32 with effect from 23 March 2013, and applicable to visa applications made on or after that date. It was additionally amended to include Subclass 408 with effect from 19 November 2016 for applications made on or after that date, with references to redundant subclasses 427 and 428 also repealed: Migration Amendment (Temporary Activity Visas) Regulation 2016 (F2016L01743).

[120] r.2.43(1)(m).

[121] r.2.43(1)(n).

[122] r.2.43(1)(o).

- the Minister is satisfied the visa holder is the subject of a notice issued by Interpol for the purpose of provide a warning or intelligence that: the holder has committed an offence against a law of another country and is likely to commit a similar offence; or the holder is a serious and immediate threat to public safety.[124]

- Certain bridging visas – criminal offences, Interpol notices, threats to public safety, or advice from an agency responsible for enforcement or security in Australia

  - *for Subclass 050 and 051 visa holders* – the Minister is satisfied that the visa holder:

    - has been convicted of or charged with an offence against a law of the Commonwealth, a State, a Territory or another country;[125] or

    - is the subject of a notice (however described) issued by Interpol: for the purposes of locating the holder or arresting the holder;[126] for the purpose of providing either or both of a warning or intelligence that the holder has committed an offence against a law of another country; and is likely to commit a similar offence;[127] for the purpose of providing a warning that the holder is a serious and immediate threat to public safety.[128]

  - *for Subclass 050 and 051 visa holders* –an agency responsible for the regulation of law enforcement or security in Australia has advised the Minister that the holder is under investigation by that agency *and* the head of that agency has advised the Minister that the holder should not hold a Subclass 050 visa or a Subclass 051 visa.[129]

    See below for matters specific to cancellation on these prescribed grounds.

- Subclass 771 (transit visa) holders

  - Despite the grant of the visa, the Minister reasonably suspects the visa holder did not have an intention to transit Australia at the time of grant, or has ceased to have that intention.[130]

- UNSCR

  - For the purposes of s.116(1)(g), r.8(2) of the UNSCR Regulations enables the Minister to cancel a visa if the Minister is satisfied that the holder of the visa is a 'UNSC-designated' person (whether or not the person was a designated UNSC-designated person at the time of the grant of the visa).[131] Under r.5 of the UNSCR Regulations, a person is a UNSC-designated person if, under a United Nations Security Council resolution, Australia is required to prevent the person entering or transiting through Australian territory.[132] As these regulations only apply to a limited

[123] r.2.43(1)(oa), inserted by Migration Amendment (2014 Measures No.2) Regulation 2014 (SLI No.199, 2014). Applies to a decision to cancel a visa made on or after 12 December 2014.
[124] r.2.43(1)(ob), inserted by SLI No.199, 2014. Applies to a decision to cancel a visa made on or after 12 December 2014.
[125] r.2.43(1)(p)(i) and (ii), inserted by Migration Amendment (Subclass 050 and Subclass 051 Visas) Regulation 2013 (SLI 2013, No.156), with effect from 29 June 2013.
[126] r.2.43(1)(p)(iii), inserted by SLI 2013, No.156 with effect from 29 June 2013.
[127] r.2.43(1)(p)(iv), inserted by SLI 2013, No.156 with effect from 29 June 2013.
[128] r.2.43(1)(p)(v), inserted by SLI 2013, No.156 with effect from 29 June 2013.
[129] r.2.43(1)(q), inserted by SLI 2013, No.156 with effect from 29 June 2013.
[130] r.2.43(1)(r), inserted by SLI 2014, No.199. Applies to decision to cancel visa made on or after12 December 2014.
[131] Under r.8(1) of the UNSCR Regulations, this provision applies to visas of any class granted before, on or after 1 July 2007.
[132] UNSCR Regulations r.4 defines 'resolution' to mean a UN Security Council Resolution specified by the Minister by legislative instrument. The instrument currently in force is the Migration (United Nations Security Council Resolutions) Regulations 2007 – Specification of United Nations Security Council Resolutions under Regulation 4 August 2011 – IMMI 14/034, commenced 9

class of persons, applications to review decisions to cancel visas on this basis are expected to be rare.

Section 116(1AA): Not satisfied as to visa holder's identity

Section 116(1AA) only applies to visas held on or after 11 December 2014.[133] It permits cancellation of a visa if the Minister is not satisfied as to the visa holder's identity. The Explanatory Memorandum to the legislation inserting s.116(1AA) provides the following example: two or more documents or pieces of information about a person's identity have been given by, on behalf of, or in relation to the visa holder and it is not possible to form a conclusion regarding which document or piece of information is genuine.[134]

Departmental guidelines indicate that this ground will not be applicable if, for example, a non-citizen has used a false identity to obtain a visa, but their true identity is later confirmed.[135] It is only applicable where there is conflicting information as to the visa holder's identity and the decision-maker cannot be satisfied as to which, if any, is the true identity.

Section 116(1AB): Incorrect information given by or on behalf of visa holder

Section 116(1AB) applies to visas held on or after 11 December 2014.[136] It provides for cancellation where incorrect information was given by or on behalf of the visa holder to an officer, authorised system, Minister, tribunal, or any other person performing a function or purpose under the Act, or any other person or body performing a function or purpose in an administrative process that occurred or occurs in relation to the Act.[137] The incorrect information must have been taken into account in connection with making a decision that enabled the person to make a valid visa application or a decision to grant the person a visa.[138] The giving of the incorrect information must not be covered by Subdivision C (s.97 – 115 of the Act),[139] which requires that information in visa applications and passenger cards be correct, bogus documents are not to be given, changes in circumstances in an application or particulars of incorrect information on an application or passenger card are to be notified and a visa may be cancelled under s.109 for breach of these requirements.

The purpose of s.116(1AB) is to provide that incorrect information must not be given at any time, not just where the information is provided as part of a person's visa application. An example given in the Explanatory Memorandum to the Bill that introduced this provision is where incorrect information is given which informs the grant of a visa where no visa application is required to be made, or which is granted through ministerial intervention.[140] This would include incorrect information provided to an officer or person in connection with making a recommendation to the Minister about exercising the power under s.46A(2) to permit an unauthorised maritime arrival to make a valid application for a visa.

Section 116(1AC): Benefit in return for 'sponsorship-related event'

Section 116(1AC) provides for cancellation of a visa where a visa holder has asked for, received, offered or provided a benefit in return for a 'sponsorship-related event'.[141] 'Benefit' includes a

May 2014. For instruments effective prior to this date see 'UNSCResolutions' tab of Register of Instruments: Misc and Other Visas.

[133] Inserted by No.129 of 2014.
[134] Explanatory Memorandum to Migration Amendment (Character and General Visa Cancellation) Bill, p.24, at [16].
[135] PAM3 - Visa Cancellation instructions - General visa cancellation powers (s109, s116, s128, s134B and s140) - s116(1AA) – Not satisfied as to identity (re-issue date 21/8/16).
[136] Inserted by No.129 of 2014.
[137] s.116(1AB)(a).
[138] s.116(1AB)(b).
[139] s.116(1AB)(c).
[140] Explanatory Memorandum to Migration Amendment (Character and General Visa Cancellation) Bill, p.25, at [20].
[141] s.116(1AC) inserted by No.161 of 2015.

payment, deduction of an amount, any kind of real or personal property, an advantage, a service and a gift.[142] 'Sponsorship-related event' has the meaning given in s.245AQ and includes events such as applying for approval as a sponsor under s.140E, making a nomination in relation to a person under s.140GB, applying under the regulations for approval of a nominated position (r.5.19), or not withdrawing any such application / nomination.[143] The ground applies to visas granted before or after 14 December 2015, if the benefit referred to in s.116(1AC) was asked for, received, offered or provided *after* that date, i.e the relevant 'payment for visa' conduct occurred after 14 December 2015.[144]

The visa holder does not have to have asked for, received, offered or provided the benefit personally, the ground in s.116(1AC) applies if it was done on behalf of the visa holder.

The legislation expressly states that the ground applies:

- whether or not the visa holder held the visa or any previous visa at the time the benefit was asked for, received, offered or provided;
- whether or not the sponsorship-related event relates to the current visa or any previous visa held by the visa holder; and
- whether or not the sponsorship-related event occurred.[145]

Circumstances in which a visa cannot be cancelled

Pursuant to s.116(2) of the Act, a visa **must not** be cancelled if there exist prescribed circumstances in which a visa is not to be cancelled. The only circumstances prescribed are located in r.8(3) of the UNSCR Regulations (see above) and apply only to UNSC-designated persons, and only in very limited circumstances. Under that provision, the Minister must not cancel a visa granted to a UNSC-designated person (whether or not the person was UNSC-designated at the time of grant) if the Minister is satisfied that: a committee has determined that the person's travel to or transit through Australia is justified; or a committee has authorised the person's travel to or transit through Australia; or a decision not to cancel the visa would be justified by compelling circumstances.[146] Without limiting r.8(3)(c), compelling circumstances may include the fulfilment of an international obligation owed by Australia.[147] Cases in which these provisions arise for consideration are likely to be rare.

Circumstances in which a visa must be cancelled

Pursuant to s.116(3) of the Act, a visa that may be cancelled under subsection (1) **must** be cancelled if there exist prescribed circumstances in which a visa must be cancelled. For the purposes of s.116(3), the circumstances in which a visa **must** be cancelled are prescribed in r.2.43(2).[148] In summary, the circumstances in which a visa **must** be cancelled are:

[142] s.245AQ. Section 116(4) states that 'benefit' has a meaning affected by s.245AQ. .
[143] s.116(4).
[144] Item 18, Schedule 1 to No.161 of 2015.
[145] s.116(1AD), inserted by No.161 of 2015.
[146] UNSCR Regulations r.8(3)(a), (b) and (c) respectively. Regulation 4 defines 'committee' to mean a Committee established under a UN Security Council Resolution.
[147] UNSCR Regulations r.8(4).
[148] There have been various amendments to the prescribed grounds for mandatory cancellation in r.2.43(2). If reviewing a cancellation decision made prior to 1 March 2006, contact MRD Legal Services for further information. Note that in *Zhao v MIMIA* [2005] FMCA 1945 (Scarlett FM, 20 December 2005) at [67], Scarlett FM interpreted the words 'For subsection 116(3) of

- **for all visa holders**, the circumstances comprising the ground set out in r.2.43(1)(a)(i)(B) and (ii) (association with weapons of mass destruction);[149] or,

- **for certain visa holders**, the circumstances comprising the grounds set out in r.2.43(1)(a)(i)(A) (contrary to Australia's foreign policy interests) and (1)(b) (risk to national security).[150]

Procedure for s.116 Cancellation - Subdivision E

If the Minister is considering cancellation under s.116, certain procedures must be followed before a decision can be made to cancel the visa. The procedures for cancelling a visa under s.116 where the visa holder is in Australia are specified in Subdivision E (ss.118A -127). These provisions provide that the Department must:

- notify the visa holder of the proposed cancellation, and adverse information, if any;
- wait for a response;
- decide whether the ground for cancellation has been made out; and if so,
- decide whether or not to cancel the visa.[151]

Notification of proposed cancellation and adverse information – ss.119, 120, 121

Under s.119, if the Department is considering cancelling a visa under s.116, it must notify the visa holder in the prescribed way, or in a way that the Department considers to be appropriate: s.119(2). No methods of notification have yet been prescribed in the Regulations under this subsection. The Act does specifically provide that the Minister may notify the visa holder orally.[152] If a notice is sent in writing, the Regulations prescribe the ways in which the document may be given.[153]

The s.119 notification must inform the visa holder that there **appear to be grounds** for cancelling the visa and:

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the Act, the circumstances in which the Minister must cancel a visa are: (a) each of the circumstances comprising the grounds set out in paragraphs (1)(a) and (b)…' in r.2.43(2) as meaning those grounds set out in s.116(1)(a) and (b) of the Act. This judgment however, appears to be clearly erroneous and should be treated with caution. Legislative amendments to r.2.43(2)(a), and the accompanying explanatory statements demonstrate that the reference in r.2.43(2)(a) to 'each of the circumstances comprising the grounds set out in paragraphs (1)(a) and (b)…' is a reference to the circumstances in r.2.43(1)(a) and (b) not the circumstances set out in s.116(1)(a) and (b). See the Explanatory Statement to the Migration Amendment Regulations 1998 (No.10) 1998 (SR305 of 1998), Item 2 which states: 'New subregulation 2.43(2) provides the circumstances in relation to subsection 116(3) of the Act, in which the Minister must cancel a visa. Those circumstances are; each of the circumstances comprising the grounds are set out in paragraphs 2.43(1)(a), (b) and (c); … .' See also for example amendment in item [3126] of the Migration Amendment Regulations 2000 (No.2) (SR 62 of 2000) and the Explanatory Statement to SR62 of 2000.

[149] r.2.43(2)(a)(i) and (aa) as amended by SLI 2006, No.10.

[150] r.2.43(2)(a) as amended by SLI 2006, No.10. Cancellation on these grounds is not mandatory for holders of a relevant visa, as defined in r.2.43(3), i.e. Subclasses 200, 201, 202, 203, 204, 447, 449, 451, 785, 786 and 866; and, from 1 July 2009, Subclass 050; and, from 18 April 2013, Subclass 070. Regulation 2.43(3)(f) (subclass 477) and (3)(h) (subclass 451) were repealed by SLI 2014, No.30 for applications made on or after 22 March 2014. Prior to 13 April 2013, cancellation for breaches of conditions 8104, 8105 and 8202 were prescribed circumstances for mandatory cancellation of student visas under r.2.43(2)(b). These provisions were repealed on 13 April 2013 by Migration Legislation Amendment Regulation 2013 (No.1) (SLI 2013 No. 33).

[151] Procedural fairness does not require a visa holder to be given notice of a potential notice under s.121 or of an opportunity to obtain legal or consular advice or assistance: *MIBP v Srouji* [2014] FCA 50 (Jagot J, 21 February 2014).

[152] s.119(3).

[153] See r.2.55 and r.5.02 (persons in immigration detention) in relation to the giving of documents relating to proposed cancellation, cancellation or revocation of cancellation. References in PAM3 to s.494B in relation to cancellation notices should be treated with caution following the judgment in *Butt v MIBP* [2014] FCA 1354, which held that s.127 and r.2.55, not s.494B and 494C, were the relevant provisions in relation to notification of cancellation decisions.

- give particulars of those grounds and of the information because of which the grounds appear to exist; and
- invite the holder to show within a specified time that those grounds do not exist or why the visa should not be cancelled.

In addition, under s.120, if the decision-maker has relevant adverse information about the visa holder or another person that was not provided by the visa holder and is not included in the s.119 notice, it must:

- give the visa holder particulars of the information; and
- invite him or her to comment [s.120 is in similar terms to ss.359A and 424A].

An invitation under ss.119 or 120 must specify how the response may be given, which may be in writing, or at an interview, or by telephone, and it must specify times, time limits, and places: s.121.[154]

Further, in order for notification under s.119(1) to be effective, it must be given by someone who has the appropriate delegation and is thereby capable of proceeding to cancel a visa under s.116.[155]

These procedures are mandatory for the primary decision maker and must be followed before a visa can be cancelled.[156] Note, however, that unlike the cancellation regime under Subdivision C (s.109 cancellations) procedural defects at the primary level do not necessarily constrain the Tribunal, and are curable by the Tribunal on review.[157]

Implications for the Tribunal of a defect in the Departmental procedure

It is not generally part of the Tribunal's role to examine the procedures followed by the Department to ensure that the statutory requirements have been met,[158] although, in some circumstances it may be called on to consider whether or not the procedural requirements at the primary level have been followed and the consequences, if any, if they have not been followed.[159] There are some circumstances in which defects in Departmental procedures, that may otherwise invalidate a process, can be remedied by the Tribunal. Specifically, the Tribunals can 'cure' a defect in natural justice or procedural fairness that occurred in the delegate's decision, such as a defect in the ss.119-121 notice requirements, through their own procedural fairness mechanisms, such as ss.359A / 424A.[160]

[154] The reasonable period of time referred to in s.121(3) is to be determined in light of the particular circumstances of the case: *Dao v MIAC* [2008] FMCA 1000 (Riethmuller FM, 6 June 2008) at [33]. In *MIBP v Srouji* [2014] FCA 50 (Jagot J, 21 February 2014) the Court commented that, while the circumstances of the visa holder must be considered in determining the reasonableness of the period, they must be weighed in the overall statutory context. In this case, Jagot J found that a period of 20 minutes was not unreasonable in respect of a visa holder in immigration clearance at the airport given the context, including the intention of the statutory regime to ensure that no-one remained in immigration clearance with an undetermined immigration status for a lengthy period of time.

[155] See *Erinfolami v MIMIA* (2001) 114 FCR 151 in which a cancellation decision was set aside by the Court because the Departmental officer who gave notification under s.119 did not have a delegation from the Minister of the Minister's power to cancel visas under s.116.

[156] *Tien v MIMA* (1998) 89 FCR 80 per Goldberg J at 92, 98.

[157] *Zubair v MIMIA* (2004) 139 FCR 344 at [28] and [32], *Krummrey v MIMIA* (2005) 147 FCR 557 at [3] and *Alam v MIMIA* [2004] FMCA 583 (Barnes FM, 11 October 2004) at [42] following *Zubair.*

[158] *Zubair v MIMIA* (2004) 139 FCR 344 at [35].

[159] *Cowle v MIMA* [2000] FCA 49 (Cooper J, 3 February 2000) at [19].

[160] See *Zubair v MIMIA* (2004) 139 FCR 344 at [32], *MIMIA v Ahmed* (2005) 143 FCR 314 at [3], *Uddin v MIMIA* (2005) 149 FCR 1 at [55]-[58], *Krummrey v MIMIA* (2005) 147 FCR 557. See also *Twist v Randwick Municipal Council* (1976) 136 CLR 106 at 116 and *Secretary, Department of Social Security v Alvaro* (1994) 50 FCR 213 at 219.

This is not confined to curing a lack of procedural fairness but would extend to curing a failure to follow mandatory procedures under ss.119-121.[161]

For example, in *Zubair v MIMIA*[162] the delegate failed to comply with ss.119(1)(a) and 121(2) by not providing the visa holder with particulars of the grounds of possible cancellation or of the information because of which those grounds appeared to exist, and by not giving the visa holder an adequate opportunity to respond to the information. The Court held, at [32], that the MRT was able to 'cure' those defects, and did so.

In *Fang v MIMIA*[163] it was contended that the s.119 notice failed to give particulars, the appellant was not given a reasonable period within which to respond, and the delegate's decision was based on grounds other than those in respect of which the appellant had been given notice. The Court held that all these matters were cured by the nature of the review before the MRT. The Court confirmed that the MRT had jurisdiction to review even where the delegate's decision may be legally ineffective and that to the extent there may have been a defect in the delegate's decision, the full merits review in the MRT was able to cure that defect.[164]

It should be noted, however, that the Tribunal does not cure a procedural defect by exercising the procedural powers applicable at the primary level (i.e. ss.119-121). Rather, the procedures applicable to the Tribunal are those set out in Part 5 or 7 of the Act.[165]

The scope of the Tribunals' powers on review of a decision made under s.116 is considered in more detail below.

Errors in the primary decision making process

The statutory requirements are aimed at procedural fairness and, as mentioned above, defects in the process may be cured by the Tribunal exercising its own procedural powers. The Tribunal may be called on to consider whether or not the procedural requirements at the primary level have been followed and the consequences, if any, if they have not been followed.[166] Aspects of the primary process have been the subject of judicial consideration and provide some guidance as to when the Tribunal may need to consider using its own procedural powers to 'cure' defects at primary level.

Specification of the time referred to in s.119(1)(b) (the time *within which* the visa holder is to respond to the notice of proposed cancellation) is not sufficient compliance with the s.121(3)(b) requirement that an invitation to respond at an interview specify the time *at which* the interview is to take place.[167] In *Tien v MIMA* it was held that a procedural defect of that kind was not overcome where the visa holder was in fact given a very fair and ample opportunity to be heard and to respond to the grounds alleged.[168] In *Alam v MIMIA* the Court held that the procedures required by ss.119 and 121 were not

[161] *Alam v MIMIA* [2004] FMCA 583 (Barnes FM, 11 October 2004) at [42], referring to *Zubair v MIMIA* (2004) 139 FCR 344 at [28] and [32].
[162] (2004) 139 FCR 344.
[163] [2004] FCA 1387 (RD Nicholson J, 29 October 2004).
[164] *Fang v MIMIA* [2004] FCA 1387 (RD Nicholson J, 29 October 2004) at [31]-[35], referring to *Zubair v MIMIA* (2004) 139 FCR 344 at [28]-[32]. Whilst both *Tien v MIMA* (1998) 89 FCR 80 and *Zhao v MIMA* [2000] FCA 1235 (French, Hill and Carr JJ, 1 September 2000) state the s.116 power can only be lawfully exercised where there has been compliance with the ss.119-121 notification provisions, these cases were concerned with a primary decision to cancel a visa rather than a Tribunal decision. Both *Tien* and *Zhao* predate *Zubair* and the consideration of whether the Tribunals' own procedures could 'cure' defects in the s.119 notice, and neither case involved merits review.
[165] *Zubair v MIMIA* (2004) 139 FCR 344 at [35], referring to the procedural framework applicable to the MRT; see also *MIMIA v Ahmed* (2005) 143 FCR 314 at [41] and *Cowle v MIMA* [2000] FCA 49 (Cooper J, 3 February 2000) at [19].
[166] *Cowle v MIMA* [2000] FCA 49 (Cooper J, 3 February 2000) at [19].
[167] *Tien v MIMA* (1998) 89 FCR 80 per Goldberg J at 97-98, 100.
[168] *Tien v MIMA* (1998) 89 FCR 80. Note this judgment did not involve merits review and predates *Zubair*.

observed by the Department, first because of the failure to give adequate particulars and information and second, because of the failure to give the requisite invitation prior to the interview.[169]

There must be sufficient compliance with the statutory requirements to ensure that the visa holder is informed of the substance of the matters of concern and to provide an opportunity to consider the content of the notice so as to enable the visa holder to provide a meaningful response.[170] The guiding principle is whether the overall purpose of procedural fairness is served.[171]

The requirement in s.119(1)(a) to give particulars of the grounds requires more than simply stating the ground of cancellation.[172] For example, where cancellation is considered under s.116(1)(a) (circumstances which permitted the grant of the visa no longer exist), the identification of the circumstance is a minimum requirement of particularisation of that ground.[173] It is not sufficient compliance with s.119(1)(a) to advise a visa holder that the visa is to be cancelled because 'the circumstances which permitted the grant of the visa no longer exist'.[174] Further, it is not enough to simply refer to the information giving rise to the ground of cancellation. The nexus between the information and the ground must also be communicated.[175]

The statutory purpose of fairness is also a guiding principle in relation to the permissible modes of notification. Under the Act, a s.119 notice may be given in any way the Minister thinks appropriate, including orally: ss.119(2) and (3). In *Zhao v MIMA*, the Court indicated that the requirement of notification could be found in more than one document and there was no reason why it could not be met by both written and oral notification.[176] However, the Federal Court has expressed a strong preference for notification under s.119 to be given in writing to prevent evidentiary disputes.[177]

Minor irregularities in the notice of intention to cancel a visa under s.119 will not generally invalidate the notice. For example in *Singh v MIMA*[178] a notice under s.119 was found to be valid even though it incorrectly referred to s.116(1)(a) rather than s.116(1)(b) as it was clear that the Tribunal did not rely on s.116(1)(a) but on s.116(1)(b). In *Zhao v MIMA*[179] a deficiency in the first letter was made good by a second letter. Generally, however, strict compliance is required and failure to give adequate particulars or failure to give the visa holder an opportunity to give a meaningful response to the substance of the matters of concern would involve a failure to meet a jurisdictional prerequisite to the exercise of the delegate's power.[180] Further, if the irregularity results in uncertainty as to whether the decision-maker has properly understood the facts and applied the relevant law then this may result in a finding of invalidity. For example, in *Schwart v MIMIA*[181] the cancellation notice mistakenly referred to a temporary rather than a permanent visa. The Court was of the view that it was not clear when the Minister exercised his discretion that he understood the visa he was considering. As a result, the Minister could not form a view as to the nature and consequence of the decision he was engaged in because the material he relied upon did not enable him to do so. (This case concerned the exercise of

[169] [2004] FMCA 583 (Barnes FM, 11 October 2004) at [34].
[170] *Alam v MIMIA* [2004] FMCA 583 (Barnes FM, 11 October 2004) at [27]. An appeal was dismissed: *MIMIA v Alam* (2005) 145 FCR 345.
[171] *Zhao v MIMA* [2000] FCA 1235 (French, Hill and Carr JJ, 1 September 2000), at [26].
[172] *Alam v MIMIA* [2004] FMCA 583 (Barnes FM, 11 October 2004) at [27]. An appeal was dismissed: *MIMIA v Alam* (2005) 145 FCR 345.
[173] *Zhao v MIMA* [2000] FCA 1235 (French, Hill and Carr JJ, 1 September 2000), at [27].
[174] *Chiorny v MIMA* (1997) 73 FCR 238.
[175] *Tien v MIMA* (1998) 89 FCR 80, at 92-93.
[176] [2000] FCA 1235 (French, Hill & Carr JJ, 1 September 2000) at [26].
[177] *Erinfolami v MIMA* (2001) 114 FCR 151 per Katz J at [22].
[178] [2003] FCA 52 (Heerey J, 7 February 2003).
[179] [2000] FCA 1235 (French, Hill and Carr JJ, 1 September 2000).
[180] *Alam v MIMIA* [2004] FMCA 583 (Barnes FM, 11 October 2004) at [34]-[36].
[181] [2003] FCA 169 (Selway J, 7 March 2003), affirmed: *MIMIA v Schwart* [2003] FCAFC 229 (Tamberlin, Mansfield and Emmett JJ) 16 October 2003.

the Minister's discretion to cancel a visa pursuant to s.501; however, the principles are equally applicable to notices issued pursuant to s.119.)

As stated above, these kinds of defects would be curable by the Tribunal on review, using its own statutory procedural fairness mechanisms.

Decision to cancel – Exercising the s.116 Power

A decision to cancel the visa can be made at any time after the visa holder responds to the notice, or advises that they do not wish to comment, or the time for commenting has passed: s.124. The decision-making process requires consideration as to (1) whether the ground for cancellation under s.116(1) has been made out and if so, (2) whether the cancellation power should (where there is a discretion) or must (where there is no discretion) be exercised.

Whether a Specific Ground is Made Out

The power to cancel a visa under s.116 arises where the decision maker is satisfied that one of the specified grounds set out in s.116(1), (1AA), (1AB) or (1AC) exists.

In considering whether the ground is made out, regard should be had to any matters raised by the visa holder in response to the invitation to show that the grounds do not exist (s.119(1)(b)(i)) and in response given to the Tribunal. Note, however, that this does not create an onus on the visa holder to establish that the facts that give rise to the ground do not exist.

Establishing the relevant facts

Cancellation under s.116 requires the Minister, or on review the Tribunal, to be satisfied that at least one of the grounds set out in s.116(1)(a) – (g), (1AA), (1AB) or (1AC) has been made out.

It is well established that civil law concepts such as onus and standard of proof are generally inappropriate in the context of administrative decision-making.[182] However, where, as in cancellation cases, the existence of facts grounds the exercise of a statutory power, the onus of establishing those facts is on the Minister (or on review, the Tribunal).[183]

As to the appropriate standard of proof, it has been argued in the s.116 context, by reference to *Briginshaw v Briginshaw*,[184] that having regard to the serious consequences of a visa cancellation, a high degree of satisfaction is required before making adverse findings.[185] In *Le v MIMIA*[186] the critical finding was that the applicant's marriage had come to an end triggering s.116(1)(a) (circumstances that permitted the grant of the visa no longer exist). Justice Marshall rejected the *Briginshaw*

[182] See *MIEA v Wu Shan Liang* (1996) 185 CLR 259 at 282-3; *MIMIA v QAAH* (2006) 231 CLR 1 at [40] and cases there cited.
[183] See *Zhao v MIMA* [2000] FCA 1235 (French, Hill and Carr JJ, 1 September 2000), at [25], [32]-[34]. See also *Mian v MILGEA* (1992) 28 ALD 165 at 169 and *Jasbeer Singh v MIEA* (1994) 127 ALR 383 per Sackville J at [14]. In those two cases the Court was referring to the burden of proving relevant facts said to attract s.20 as in force before 1 September 1994, which in turn attracted the deportation power, but the principle would be equally applicable to visa cancellation.
[184] In *Briginshaw v Briginshaw* (1938) 60 CLR 336, Dixon J held at 362 that in civil matters, "the seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the Tribunal [of fact]". This principle has been applied by the courts in a number of migration cases involving allegations of actual bias (e.g. *MIMIA v Jia Legeng* (2001) 205 CLR 507 at [127] per Kirby J and [266] per Callinan J) and *Sun v MIEA* (1997) 81 FCR 71) and fraud (e.g. *SZFDE v MIAC* (2007) 232 CLR 189 at [53]; *MIAC v SZLIX* (2008) 245 ALR 501 at [33]; *SZMGX v MIAC* [2009] FCAFC 67 (Bennett, Reeves and Foster JJ, 5 June 2009) at [25]). See also *Housam Slayman v MIMA* (unreported, Federal Court of Australia, Foster J, 12 August 1997), *Tarasovski v MILGEA* (1993) 45 FCR 570 at 572-3 and *Jasbeer Singh v MIEA* (1994) 127 ALR 383 each of which concerned the Court's own satisfaction as to whether the visa holder had provided bogus documents or false or misleading information for the purposes of s.20 of the Act as in force before 1 September 1994.
[185] *Le v MIMIA* [2004] FCA 708 (Marshall J, 4 June 2004).

argument, on the basis that there was no suggestion that the applicant had acted fraudulently or provided false information and that in any event serious consequences of themselves cannot require a decision maker to be satisfied on a *Briginshaw* basis, adding that very few migration decisions do not have serious consequences.[187] In relation to other migration decisions, including s.501 cancellation on character grounds and visa refusals generally, courts have repeatedly emphasised that the observations of Dixon J in *Briginshaw* concern the satisfaction of facts on the balance of probabilities in civil proceedings and are of little assistance in the context of administrative decision-making.[188] Thus, while different considerations may apply in relation to cancellation under s.109,[189] it appears that the principle in *Briginshaw* is not generally applicable in the context of s.116 and that, provided the Tribunal's satisfaction is based on findings or inferences of fact which are supported by probative material and logical grounds, it is a matter for it what weight to attach to particular matters and how to evaluate them.[190]

If the decision maker, including Tribunal on review, **is not satisfied** that the ground specified in the notice is made out, then the cancellation power does not arise for consideration. In such cases, the appropriate course for the Tribunal would be to set aside the cancellation decision and substitute a decision that the visa is not cancelled.

If the decision maker, including Tribunal on review, **is satisfied** that the ground for cancellation has been made out, the decision maker must proceed to consider whether to exercise the power to cancel the visa.

Exercising the power to cancel - mandatory and discretionary cancellation

Once a ground for cancellation has been established, the decision maker must proceed to consider whether the power to cancel the visa *should* or *must* be exercised.

Visa cannot be cancelled

If the applicant whose visa has been cancelled is a UNSC-designated person and the circumstances fall within the provisions of r.8(3) of the UNSCR Regulations, then the cancellation is prevented by that provision and must be set aside. The circumstances specified in r.8(3) of the UNSCR Regulations are outlined above, under 'Circumstances in which a visa cannot be cancelled'. Cases in which these provisions arise for consideration are likely to be rare.

Mandatory cancellation

If the circumstances that have been found to exist fall within r.2.43(2), the visa **must** be cancelled: s.116(3). No discretion is involved. The circumstances prescribed in r.2.43(2) are outlined above, under 'Circumstances in which a visa must be cancelled'.

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[186] [2004] FCA 708 (Marshall J, 4 June 2004) .
[187] *Le v MIMIA* [2004] FCA 708 (Marshall J, 4 June 2004) at [26]. Different considerations might arguably apply in relation to cancellations under s.109 on the basis of bogus documents or false or misleading information.
[188] See, e.g., *Ngaronoa v MIAC* (2007) 244 ALR 119 at [12], *Kumar v MIMA* [1999] FCA 156 (Kenny J, 26 February 1999) at [35], *SCAN v MIMIA* [2002] FMCA 129 (Raphael FM, 9 July 2002) at [10] and *DZACE v MIAC* [2012] FMCA 378 (Raphael FM, 8 May 2012) at [27]-[29].
[189] See MRD Legal Services commentary: Cancellation of visas under s.109.
[190] See *Ngaronoa v MIAC* (2007) 244 ALR 119 upholding *Ngaronoa* v MIAC [2007] FCA 1565 (Jacobson J, 11 October 2007). The Full Court at [12] described as "misplaced" a contention that in considering the applicant's criminal conduct for the purpose of his discretion under s.105 the Minister should have applied the *Briginshaw* standard of proof. The Court agreed with the primary Judge 'that it was a matter for the Minister what weight to attach to particular matters and how to evaluate them for the purpose of the exercise of his discretion. Provided the Minister does not act arbitrarily or capriciously, or outside the limits of jurisdiction established by the Act, the exercise of his discretion is not subject to judicial review'. Although in that case the issue arose in the context of discretionary considerations under s.501, the reference to *MIMA v Eshetu* (1999) 197 CLR 611at [145]

If the Tribunal finds that the ground for cancellation exists and is one of the prescribed circumstances in which a visa must be cancelled, it must proceed to affirm the decision under review.

Discretionary Cancellation

In all other cases, ie where the circumstances prescribed in r.2.43(2) do not apply, cancellation is discretionary.[191]

For cancellation of a Bridging E visa where the visa holder has been charged with, or convicted of an offence or an enforcement agency has notified they are under investigation, there is a Ministerial Direction under s.499 of the Act specifying considerations which must be taken into account in exercising the discretion (discussed below). In all other cases, there are no matters specified in the Act or regulations that are required to be considered in relation to exercising the s.116 discretion. However, it is apparent that the decision-maker must take into consideration any matters raised by the visa holder as to why the visa should not be cancelled.[192]

In addition, the decision-maker should have regard to lawful government policy and any other relevant considerations. The Department's guidelines[193] set out matters that as a matter of policy should be taken into account, where relevant, when considering whether to cancel a visa, whether temporary or permanent, under s.116. They are:

- the purpose of the visa holder's travel to and stay in Australia, whether the visa holder has a compelling need to travel to or remain in Australia;
- the extent of compliance with visa conditions;
- the degree of hardship that may be caused to the visa holder and any family members (financial, psychological, emotional or other hardship);
- the circumstances in which the ground for cancellation arose (for example, whether there were extenuating circumstances beyond the visa holder's control that led to the ground/s for cancellation existing). If cancellation is considered because of a relationship breakdown, consider whether the breakdown is the result of family violence. The guidelines indicate that as a general rule, a visa should not be cancelled where the circumstances in which the ground for cancellation arose were beyond the visa holder's control.[194] On review, this relates to the circumstances which the Tribunal finds give rise to the ground for cancellation;[195]
- the visa holder's past and present behaviour towards the Department (for example, whether they have been truthful and cooperative in their dealings with the Department);

suggests that the Court's reasoning would be applicable more broadly to factual findings that go to questions of satisfaction, including satisfaction as to whether a ground for cancellation under s.116(1) exists.

[191] Note that the discretion under s.116 is a discretion to cancel a visa and should not be regarded as a discretion not to cancel the visa. Thus, for example, it would be technically incorrect to speak in terms of exercising the discretion in the applicant's favour: see *Cockrell v MIAC* (2008) 171 FCR 345 at [16]-[20]. That case concerned the discretion under s.501(2) but the Court's comments are equally applicable to other visa cancellation powers including ss.109 and 116.

[192] Section 119(1)(b)(ii) (the visa holder must be invited to show that there is a reason why the visa should not be cancelled) and s.124(2) (prohibiting the decision-maker from making a decision before a response is received or the time for responding has passed).

[193] PAM3 Visa Cancellation instructions – General visa cancellation powers (s109, s116, s128, 134B & s140)' – s116 - Deciding whether to cancel – Matters that should be considered (re-issue date 21/8/16).

[194] PAM3 Visa Cancellation instructions – General visa cancellation powers (s109, s116, s128, 134B & s140)' – s116 - Deciding whether to cancel – Matters that should be considered (re-issue date 21/8/16).

[195] *Kautoga v MIBP* (No.2) [2015] FCCA 1679 (Judge Street, 3 July 2015) at [13].

- if cancellation is being considered because of the circumstances set out in r.2.43(1)(la) – the following mitigating factors:
    - the length of time the visa holder was with their employer;
    - the proportion of time spent by the visa holder in the non-regional location;
    - any compelling reasons requiring the visa holder to relocate to a non-regional area (such as to provide care for a sick relative);[196]
- whether there are persons in Australia whose visas would, or may, be cancelled under s.140;
- whether indefinite detention is a possible consequence of the cancellation decision;
- whether upon cancellation the person would become an unlawful non-citizen liable to be detained under s.189;
- whether there are provisions in the Act which prevent the person from making a valid application for a visa without the Minister's intervention (eg ss.46A, 46B, 48, 48A, 91E, 91K, 91P);
- whether Australia has obligations under relevant international agreements that would be breached as a result of the visa cancellation, such as:
    - if there are children in Australia whose interests could be affected by the cancellation, or who would themselves be affected by consequential cancellation, the best interests of the children are to be treated as a primary consideration;[197]
    - whether the cancellation would lead to removal in breach of Australian's non-refoulement obligations - that is, removing a person to a country where the person faces persecution, death, torture, cruel, inhuman or degrading treatment or punishment;[198]

[196] PAM3: General visa cancellation powers (s109, s116, s128, s134B and s140) - Reg. 2.43(1)(la) - Regional UC-457 cases (re-issue date 21/8/16).

[197] This is consistent with the High Court's decision in *MIMA v Teoh* (1994) 183 CLR 273, and with Article 3.1 of the UN Convention on the Rights of the Child 1989 (CROC) which states: "In all actions concerning children … the best interests of the child shall be a primary consideration". The UN Convention on the Rights of the Child has been judicially considered in the context of visa cancellation cases in a number of cases: see *McDade v MIMA* [2000] FCA 528 (RD Nicholson J, 5 May 2000), *Suleyman v MIMA* [2000] FCA 610 (Mathews J, 12 May 2000), *Le v MIMIA* [2004] FCA 875 (French J, 5 July 2004), *Berryman v MIMIA* [2004] FCA 993 (French J, 30 July 2004) (not challenged on appeal: see *Berryman v MIMIA* [2005] FCAFC 17 (Hill, Sundberg and Stone JJ, 22 February 2005) at [13]), *Tien v MIMA* (1998) 89 FCR 80, *Hopkins v MIAC* [2007] FCA 1108 (Moore J, 2 August 2007) and *Holani v MIAC* [2007] FCA 1140 (Collier J, 3 August 2007). In particular, see Suleyman's case and Tien's case for discussion of what constitutes an "action concerning children". Also in *W157/00A v MIMA* (2001) 190 ALR 55, in the context of a s.501 cancellation, Lee J considered that the applicants were entitled to expect that not only would their interests as children be assessed as a primary concern, but also that their interests as Australian citizens would be considered in conjunction (citing Branson J in *Vaitaiki v MIEA* (1998) 150 ALR 608 at 630). In *Nweke v MIAC* [2012] FCA 266 (Jagot J, 23 March 2012) the Court, considering cancellation under s.501A(2), held that a decision maker must as a starting point make a clear determination as to what the best interests of the child are, and then go on to determine whether any other factor outweighs that consideration; see [12] – [15] and [20] – [21]. On the relevance of access orders under the *Family Law Act* 1975 (Cth), see *Cockrell v MIAC* (2008) 117 FCR 345 (application for special leave dismissed: [2009] HCASL 2, 11 February 2009). In *Durani v MIBP* [2014] FCA 129 (Gilmour J, 24 February 2014), the Court, considering a cancellation under s.501A(2)(e), rejected the applicant's submission that 'it cannot ever be in the national interest to make a decision of the kind involved here which has the result that a child will be separated from a parent'. In this case, the Court found that it was open for the Minister to find that the risk of the applicant re-offending, however low, was unacceptable. See also PAM3 – –Visa cancellation instructions - General visa cancellation powers (s109, s116, s128, 134B & s140) – Australia's international obligations (re-issue date 21/8/16).

[198] Non-refoulement obligations are generated, explicitly or implicitly, by the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Covenant on Civil and Political Rights, and the Convention on the Rights of the Child. See PAM3 – Visa

- any other relevant matters.

In addition, in relation to cancellation of a permanent visa, whether the visa holder has formed strong family, business or other ties in Australia must also be considered.[199]

The Tribunal on review can consider the discretion to cancel once it has found the relevant ground in s.116 is made out. Where the delegate has relied upon more than one ground under s.116, or for example, on more than one breach of condition for the purposes of s.116(1)(b), the Tribunal need only find one ground, or one breach of condition, to enliven the power to cancel. However, if the Tribunal decides not to rely upon a particular ground or breach of condition in finding that the ground for cancellation exists, it should take care in how it deals with evidence and delegate's findings relating to that ground or breach of condition in the Tribunal's consideration of the discretion.[200]

Discretionary Cancellation of Bridging E visas on prescribed grounds r.2.43(1)(p) or (q)

Ministerial Direction No.63[201] sets out a framework within which decision-makers must consider the exercise of the discretion to cancel a Bridging E visa where the prescribed grounds in r.2.43(1)(p) or (q) apply. The prescribed grounds relate to where the Bridging E visa holder has been charged with an offence, or convicted of an offence, or a law enforcement or security agency has notified the Minister that the visa holder is under investigation, or should not hold a Subclass 050 or 051 visa. If the grounds in s.116(1)(g) and r.2.43(1)(p) or (q) are made out, the decision-maker must have regard to the considerations specified in Direction 63 in determining whether to cancel the visa. Direction 63 is set out in Attachment A below.

The Direction specifies primary and secondary considerations that must be taken into account. It also specifies the weight that should be given to the considerations.

One of the prescribed primary considerations in cl.6 of the Direction is the Government's view that the prescribed grounds in r.2.43(1)(p) and (q) should be applied rigorously, in that every instance of non-compliance should be *considered* for cancellation in accordance with the discretionary cancellation framework.[202] The rigour referred to in this clause is addressed solely to the question of whether to enter into consideration of cancelling the visa and is not saying that the power to cancel should be exercised rigorously.[203] The decision-maker must take the government's view as part of the matters to be weighed in the exercise of the discretion, rather than simply follow the view.[204]

cancellation instructions - General visa cancellation powers (s109, s116, s128, 134B & s140) - Australia's international obligations – Non-refoulement obligations (re-issue date 21/8/16) for further discussion of these.

[199] Further, in relation to cancellation of visas under s.116(1AC), the explanatory memorandum to the legislation introducing the ground refers to cancellation being discretionary and that it requires consideration be given to a range of factors such as the person's complicity in the 'payment for visas' arrangement, strength of ties to Australia and contribution to the Australian community, in considering whether or not to cancel the visa: Explanatory Memorandum to Migration Amendment (Charging for a Migration Outcome) Bill 2015 at p.6, paragraph [18].

[200] In *Kautoga v MIBP* (No.2) [2015] FCCA 1679 (Judge Street, 3 July 2015) the Court found at [15] and [18] that the Tribunal, having found the visa holder had breached condition 8107, engaged in irrational reasoning in the exercise of the discretion amounting to jurisdictional error when it expressly made no findings about whether the visa holder being charged with serious criminal offences was a breach of condition 8303, but then took the delegate's findings as to the breach of condition 8303 into account in the exercise of the discretion.

[201] Issued under s.499 of the Act, commenced 12 September 2014. Section 499 permits the Minister to give written directions to a person or body about the performance of functions or the exercise of powers under the Act. Such person or body must comply with the direction: s.499(5). The Minister, however, is not empowered to make directions that would be inconsistent with the Act or regulations.

[202] cl.6(1)(a) of Direction No.63.

[203] *ACH15 v MIBP* [2015 FCCA 1250 (Judge Smith, 19 May 2015) at [28]-[31]

[204] *ACH15 v MIBP* [2015 FCCA 1250 (Judge Smith, 19 May 2015) at [33]. See also *obiter* comments in *CGG15 v MIBP* [2016] FCCA 219 (Judge Smith, 10 February 2016) at [32] on the need to engage with the government's view in cl.6.1.

Another primary consideration is that of the best interests of any children under the age of 18 in Australia who would be affected by the cancellation.[205]

In considering the secondary consideration in cl.7(1)(c) of the Direction, circumstances in which the cancellation arose, the Tribunal should have regard to all relevant circumstances.[206]

Notification of Decision to Cancel

If a visa is cancelled under s.116, the former holder must be notified.[207] The notification must set out the ground for the cancellation, and details of review rights: s.127(1) and (2). Where the Department has failed to give notification of a decision, this does not affect the validity of the decision (s.127(3)); however, it will affect the time limit for lodging a review application. See the Procedural Law Guide at Chapter 2 for further information.

Scope of Tribunal Review

Under ss.349(1) and 415(1) respectively, the Tribunal has, for the purposes of the review of a Part 5 or Part 7-reviewable decision, all the powers and discretions conferred by the Act on the person who made the decision.

The powers and discretions conferred on the Tribunals under ss.349(1) and 415(1) are 'for the purposes of the review' of the reviewable decision, not powers and discretions that may be exercised at large.[208] It is therefore necessary in any particular case to determine what is the reviewable decision,[209] and the boundaries of that decision.[210] This is to be found by examining the terms of the power purportedly exercised, its statutory context, the terms of the reasons, the form of the decision and the material before the decision-maker.[211]

Can the Tribunal consider cancellation on a different basis from the primary decision?

It is clear that if a decision has been made to cancel a visa under s.116, it is not open to the Tribunal on review to consider whether the visa might have been cancelled under a different power, such as s.109, and conversely, if a visa has been cancelled under s.109, it would not be open to the Tribunal on review to consider whether it might have been cancelled under s.116. On the other hand, the Tribunal is not limited to the particular issues that the delegate considered.[212] Thus, it has been held that on the review of a decision to cancel a visa under s.116(1)(b) for breach of condition 8202(3)(a) (80% attendance requirement) it was open to the Tribunal to affirm the decision on the basis of

[205] For a useful illustration of the correct approach to assessing this factor, see *CQU15 v MIBP* [2016] FCCA 1946 (Barnes J, 29 July 2016).
[206] In *CGG15 v MIIBP* [2016] FCCA 219 (Judge Smith, 10 February 2016), the Court held at [29] that the Tribunal's failure to consider all the circumstances, and instead consider only the ground for cancellation, constituted a failure to comply with cl.7(1)(c) and a jurisdictional error.
[207] See r.2.55 and r.5.02 in relation to the giving of documents relating to proposed cancellation, cancellation or revocation of cancellation.
[208] See *Lees v Comcare* (1999) 56 ALD 84 at [39] where the Full Federal Court considered the powers of the Administrative Appeals Tribunal (AAT) under s.43(1) of the *AAT Act 1975*, which is in similar terms to ss.349(1) and 415(1).
[209] *Secretary DSS v Riley* (1987) 17 FCR 99 at 105; *Power v Comcare* (1998) 89 FCR 514 at 525; *MIMIA v Ahmed* (2005) 143 FCR 314.
[210] *MIMIA v Ahmed* (2005) 143 FCR 314 at [36].
[211] *MIMIA v Ahmed* (2005) 143 FCR 314 at [38].
[212] *SZBEL v MIMIA* (2006) 228 CLR 152.

breach of condition 8202(3)(b) (academic result). The Court rejected the contention that the Tribunal was limited to the issues that had been raised in the s.119 notice of proposed cancellation.[213]

However, whether on review of a decision made under s.116 the Tribunal is limited to the ground or grounds relied on by the primary decision-maker and/or identified in the s.119 notice is unclear. This would depend upon the characterisation of the power in question and in particular, whether the source of the power is identified as s.116, or as the particular sub-clause or sub-paragraph of that provision.

In *MIMIA v Ahmed*[214] the decision under review was a decision to cancel a visa for breach of condition 8202. The Full Federal Court found it unnecessary to discuss at what level of generality or specificity one analyses the delegate's decision for the purpose of identifying the decision in the statutory context, the Tribunal had dealt with breach of condition 8202 as the delegate had.[215] However, in the course of its reasons the Court identified s.116(1)(b) as the source of the power that the Tribunal acceded to in that case.[216] This could suggest that when reviewing a s.116 decision the Tribunal would be restricted to consideration of the particular ground or grounds relied on by the delegate.

However, there is some support for the proposition that a Tribunal is not so confined. In *Krummrey v MIAC*[217] the grounds for cancellation considered by both the delegate and the Tribunal were those in s.116(1)(a) and (b). It was agreed that the Tribunal's findings did not justify the conclusion that there had been a relevant change of circumstances within the meaning of s.116(1)(a) on the basis that the applicant had impermissibly changed his intention only to visit Australia temporarily for business purposes, however it was submitted by the Minister that the Tribunal's findings fell squarely within s.116(1)(g) and r.2.43(1)(i). The Full Federal Court accepted that it would (theoretically) have been open to the delegate, and on review the Tribunal, to give consideration to cancelling the visa in reliance on s.116(1)(g) and r.2.43(1)(i). However, their Honours observed that neither the delegate nor the Tribunal gave any consideration to those provisions and that it could not be known whether the Tribunal would have exercised its discretion to cancel in reliance on s.116(1)(g) in the same way as it purported to exercise its discretion under s.116(1)(a). In the result, the Court rejected the submission that the Tribunal was to be understood to have unwittingly exercised jurisdiction to which it did not direct its attention. It was not suggested that the Tribunal could not consider s.116(1)(g) because the delegate did not do so and that issue was not expressly considered. While it is not without doubt, this judgment would appear to support the view that the Tribunal is not limited to the particular ground or grounds considered by the delegate, and/or those described in the s.119 notice. On that view, where, for example, there may be some doubt as to whether the former holder of a student visa was in breach of visa condition 8202 in a technical sense but the evidence demonstrates unsatisfactory course progress or attendance, it may be open to the Tribunal to consider whether the cancellation of the visa under s.116(1)(b) might nevertheless be affirmed on the basis of the ground in s.116(1)(fa). However, it is recommended that some caution be exercised if considering any departure from the ground on which the visa was cancelled.

There may be some limitation on the ability to consider cancellation on a different ground in s.116 in circumstances involving a Bridging E visa that has been cancelled because the visa holder has been

[213] *Zhang v MIAC* [2007] FMCA 1855 (Cameron FM, 25 September 2007) at [16]-[18]. Note that the discussion of condition 8202(3)(b) is no longer reliable in light of the Full Court's decision in *Wen Bi Dai v MIAC* (2007) 165 FCR 458.
[214] *MIMIA v Ahmed* (2005) 143 FCR 314.
[215] *MIMIA v Ahmed* (2005) 143 FCR 314 at [37].
[216] *MIMIA v Ahmed* (2005) 143 FCR 314 at [35], [38]. The Court also observed that what was done under s.119, or what should have been done under s.119, may affect the assessment of the boundaries of the delegate's decision by assisting an understanding as to the subject matter of the reviewable decision that the Tribunal is reviewing.
[217] (2005) 147 FCR 557.

charged with an offence under a State or Territory law. Ministerial Direction No.63[218] sets out a framework for decision-makers deciding whether to cancel a Bridging E visa under s.116(1)(g) relying upon the prescribed grounds in r.2.43(1)(p) or (q), which apply to a visa holder who has been charged with, convicted of, or under investigation for an offence. The Direction states that, where more than one ground for cancellation exists including cancellation under s.116(1)(g) and r.2.43(1)(p), the ground in s.116(1)(g) and r.2.43(1)(p) would be the more appropriate ground.[219] Therefore, even if it is generally open to the Tribunal to make a decision on the basis of another ground, for example s.116(1)(b) for non-compliance with a condition of the visa such as condition 8564,[220] in this context there is a Ministerial Direction with which the Tribunal must comply.[221]

Whether the ground for cancellation exists – the relevant time for consideration

A related issue is whether the Tribunal, when considering whether a ground for cancellation exists, is limited to consideration of the facts and circumstances as they existed at the time of the primary decision, or whether it is obliged to consider the facts and circumstances at the time of its own decision. As a general rule, unless there is some temporal element in the relevant legislation that confines the tribunal's consideration to the circumstances as they existed at the time of the primary decision, information about subsequent conduct and events will be relevant. To determine whether there is a temporal element of that kind, the precise nature of the decision under review must be closely considered.[222] In the case of cancellation decisions under s.116, the relevant time at which the facts are to be assessed on the review may depend on the precise terms of the particular cancellation ground in question, as well as the facts to which that ground invites attention. For further discussion please see MRD Legal Services commentary Visa Cancellations – Overview.

Relevant Case Law

ACH15 v MIBP [2015] FCCA 1250	Summary
ATR15 v MIBP [2016] FCCA 1089	Summary
MIMIA v Ahmed [2005] FCAFC 58; (2005) 143 FCR 314	Summary 1 Summary 2
Alam v MIMIA [2004] FMCA 583	Summary 1 Summary 2
Secretary, Department of Social Security v Alvaro (1994) 50 FCR 213	
Ambakkat v MIAC [2011] FMCA 916	Summary
Awan v MIMA [2001] FCA 1036	
Briginshaw v Briginshaw (1938) 60 CLR 336	
Cardenas v MIMA [2001] FCA 17	Summary
CGG15 v MIIBP [2016] FCCA 219	Summary

[218] Made under s.499 of the Act, commenced 12 September 2014. Section 499 permits the Minister to give written directions to a person or body about the performance of functions or the exercise of powers under the Act. Such person or body must comply with the direction: s.499(5). The Minister, however, is not empowered to make directions that would be inconsistent with the Act or regulations.
[219] Direction No. 63 - Bridging E visas - Cancellation under s116(1)(g) – reg 2.43(1)(p) or (q), Part two, at 5(1).
[220] Condition 8564 'The holder must not engage in criminal conduct', inserted by SLI 2013, No.156, commenced on 29/6/13.
[221] See *ACH15 v MIBP* [2015] FCCA 1250 (Judge Smith, 19 May 2015) at [26]. The Court noted that cl.5(1) of Direction No.63 appeared to reflect the example referred to in s.499(1A) of the Act.
[222] See *Shi v MARA* (2008) 235 CLR 286.

Chiorny v MIMA (1997) 73 FCR 238	
Cockrell v MIAC [2008] FCAFC 160; (2008) 171 FCR 345	
Cowle v MIMA [2000] FCA 49	
CQU15 v MIBP [2016] FCCA 1946	Summary
Dao v MIAC [2008] FMCA 1000	
DZACE v MIAC [2012] FMCA 378	
Erinfolami v MIMIA [2001] FCA 956; (2001) 114 FCR 151	
Gong v MIBP [2016] FCCA 561	Summary
MIMA v Hou [2002] FCA 574	Summary
Kaur v MIBP [2016] FCCA 601	
Kautoga v MIBP [2015] FCCA 1679	Summary
Krummrey v MIMIA [2005] FCAFC 258; (2005) 147 FCR 557	Summary
Le v MIMIA [2004] FCA 708	Summary
Maharjan v MIAC [2011] FMCA 200	Summary
Mian v MILGEA (1992) 28 ALD 165	
Nand v MIAC [2011] FMCA 612	Summary
Nagalingam v MILGEA (1992) 38 FCR 191	
Newall v MIMA [1999] FCA 1624	
Ngaronoa v MIAC [2007] FCA 1565	
Ngaronoa v MIAC [2007) FCAFC 196; (2007) 244 ALR 119	
Nong v MIMA [2000] FCA 1575; (2000) 106 FCR 257	Summary
Nweke v MIAC [2012] FCA 266	
Pradhan v MIMA (1999) 94 FCR 91	
Sandoval v MIMA [2001] FCA 1237; (2001) 194 ALR 71	
Schwart v MIMIA [2003] FCA 169	Summary
MIMIA v Schwart [2003] FCAFC 229	Summary
Shi v MARA [2008] HCA 31; (2008) 235 CLR 286	
Shrestha v MIMIA [2001] FCA 359; (2001) 64 ALD 669	Summary
Singh v MIMA [2003] FCA 52	Summary
Jasbeer Singh v MIEA (1994) 127 ALR 383	
Housam Slayman v MIMA (unreported, Foster J, 12 August 1997)	
SZJDS v MIAC [2011] FMCA 681	Summary
SZJDS v MIAC [2012] FCAFC 27	Summary
Tarasovski v MILGEA (1993) 45 FCR 570	
Tian v MIMIA [2004] FCA 216	Summary
Tien v MIMA (1998) 89 FCR 80	Summary

Twist v Randwick Municipal Council (1976) 136 CLR 106	
Uddin v MIMIA [2005] FCAFC 218; (2005) 149 FCR 1	Summary
Weerakoon v MIMIA [2005] FMCA 624	
MIEA v Wu Shan Liang (1996) 185 CLR 259	
MIMA v Zhang [1999] FCA 84; (1999) 84 FCR 258	
Zhang v MIAC [2007] FMCA 1855	Summary
Zhao v MIMA [2000] FCA 1235	Summary
Zubair v MIMIA [2004] FCAFC 248; (2004) 139 FCR 344	Summary

Relevant Legislative Amendments

Title	Reference number
Migration Amendment (Temporary Activity Visas) Regulation 2016	F2016L01743
Migration Amendment (Charging for a Migration Outcome) Act 2015	No.161 of 2015
Migration Amendment (2014 Measures No.2) Regulation 2014	SLI 2014, No.199
Migration Amendment (Character and General Visa Cancellation) Act 2014	No.129 of 2014
Migration Amendment (Redundant and Other Provisions) Regulation 2014	SLI 2014, No.30
Migration Amendment (Subclass 050 and Subclass 051 Visas) Regulation 2013	SLI 2013, No.156
Migration Amendment Regulation 2013 (No.4)	SLI 2013, No.131
Migration Legislation Amendment Regulation 2013 (No.1)	SLI 2013, No.33
Migration Amendment Regulation 2013 (No.1)	SLI 2013, No.32
Migration Legislation Amendment Regulation 2012 (No.4)	SLI 2012, No.238
Migration Amendment Regulations 2012 (No.1)	SLI 2012, No.4
Migration Amendment Regulations 2010 (No.2)	SLI 2010, No.50
Migration Amendment Regulations 2010 (No.1)	SLI 2010, No.38
Migration Amendment Regulations 2009 (No.5) Amendment Regulations 2009 (No.1)	SLI 2009, No.203
Migration Amendment Regulations 2009 (No. 9)	SLI 2009, No.202
Migration Amendment Regulations 2009 (No.7)	SLI 2009, No.144
Migration Legislation Amendment Regulations 2009 (No.2)	SLI 2009, No.116
Migration Amendment Regulations 2009 (No.5)	SLI 2009, No.115
Migration Amendment Regulations 2008 (No.7)	SLI 2008, No. 205
Migration Amendment Regulations 2008 (No.6)	SLI 2008, No.189
Migration Amendment Regulations 2006 (No.1)	SLI 2006, No.10

Available Decision Templates

There are 4 decision templates designed for s.116 cancellations:

- **Cancellation s.116(1) - General -** this template is for use in relation to a cancellation of a visa under s.116(1). Relevant text is inserted based on selection of the relevant ground for cancellation.

- **Cancellation s.116 - Breach of condition 8104 -** This template is for use in cases where a student visa has been cancelled under s.116(1)(b) for breach of condition 8104. It applies to cases where the visa was granted on or after 26 April 2008.

- **Cancellation s.116 - Breach of condition 8105 -** This template is for use in cases where a student visa has been cancelled under s.116(1)(b) for breach of condition 8105. It applies to cases where the visa was granted on or after 26 April 2008

- **Cancellation s.116 - Breach of condition 8202 -** This template is for use in cases where a student visa has been cancelled under s.116(1)(b) for breach of condition 8202 where the breach occurred on or after 1 July 2007.

- **Optional standard paragraphs – Cancellation** – Contains some standard paragraphs which may be inserted into decisions as required. The document currently contains standard paragraphs relating to condition 8516 (continues to satisfy criteria) for use in a cancellation under s.116(1)(b) (failure to comply with a condition).

Last updated/reviewed: 18 November 2016

Attachment A – Direction 63

DIRECTION NO. 63

MIGRATION ACT 1958

DIRECTION UNDER SECTION 499

Bridging E visas
Cancellation under section 116(1)(g) – Regulation 2.43(1)(p) or (q)

I, Scott Morrison, Minister for Immigration and Border Protection give this Direction under section 499 of the Migration Act 1958.

Dated 4-9-2014

SCOTT MORRISON
Minister for Immigration and Border Protection

Part 1 Preliminary

1. Name of Direction

This Direction is Direction No. 63 – Bridging E visas – Cancellation under section 116(1)(g) – Regulation 2.43(1)(p) or (q).
It may be cited as Direction 63.

2. Commencement

This Direction commences on the 12th day of September 2014.

3 Contents

This Direction comprises a number of Parts:

Part one

Contains the Objectives of this Direction, General Guidance for decision-makers and the Principles that provide a framework within which decision-makers should approach their task of deciding whether to exercise the discretion to cancel a non-citizen's visa under either:

- section 116(1)(g) – relying on the prescribed ground in regulation 2.43(1)(p); or
- section 116(1)(g) – relying on the prescribed ground in regulation 2.43(1)(q).

Part two

Identifies considerations relevant to Bridging E visa holders in determining whether to

exercise the discretion to cancel a non-citizen's visa under 116(1)(g) [sic - LEGEND note] and regulation 2.43(1)(p) or (q).

4 Part one

4.1 Objectives

(1) The Object of the Migration Act 1958 (the Act) is to regulate, in the national interest, the coming into, and presence in, Australia of non-citizens.

(2) Under section 116(1)(g) of the Act, a decision-maker may cancel a visa if they are satisfied that a prescribed ground for cancelling a visa applies to the visa holder. The prescribed grounds are set out in regulation 2.43 of the Migration Regulations 1994. For the purpose of this Direction, only regulations 2.43(1)(p) and (q) are relevant.

(3) The purpose of this Direction is to guide decision-makers who are delegated to perform functions or exercise powers under the Act to cancel the visa of a non-citizen under section 116(1)(g) and regulation 2.43(1)(p) or (q). Under section 499(2A) of the Act such decision-makers must comply with a Direction made under section 499. This Direction also applies to Tribunal members reviewing visa cancellation decisions made under section 116(1)(g) and regulation 2.43(1)(p) or (q).

4.2 General Guidance

(1) The Government is committed to ensuring that non-citizens given the privilege of living in the Australian community on Bridging E visas behave in a manner that is in accordance with Australian laws and which respects Australia's community values and standards of democracy, multiculturalism, respect, inclusion, cohesion, tolerance, and cooperation. The principles below are of critical importance in furthering that objective.

(2) The Principles in this Direction provide a framework within which decision-makers should approach their task of deciding whether to cancel a non-citizen's Bridging E visa under section 116(1)(g) because a prescribed ground at regulation 2.43(1)(p) or (q) applies to the holder. The relevant factors that must be considered in making such decisions are identified in Part two of this Direction.

4.3 Principles

(1) Mandatory detention applies to any non-citizen who arrives and/or remains in Australia and who does not hold a visa that is in effect.

(2) All non-citizens residing in the community are expected to abide by the law. This is particularly relevant where the Minister for Immigration and Border Protection has used his personal non delegable power to grant a non-citizen in immigration detention a visa in the public interest.

(3) The Australian Government has a low tolerance for criminal behaviour by non-citizens who are in the Australian community on a temporary basis, and do not hold a substantive visa. In the case of a non-citizen who, but for the Minister granting them a visa in the public interest, would be subject to mandatory detention, it is a privilege and not a right to be allowed to live in the community while their immigration status is

being resolved.

(4) In order to effectively protect the Australian community and to maintain integrity and public confidence in the migration system, the Government has introduced measures that support the education of Bridging E visa holders about community expectations and acceptable behaviour. These measures encourage compliance with reasonable standards of behaviour and support the taking of compliance action, including consideration of visa cancellation, where Bridging E Visa holders do not abide by the law.

(5) Bridging E visa holders who have been found guilty of engaging in criminal behaviour should expect to be denied the privilege of continuing to hold a Bridging E visa while they await the resolution of their immigration status. Similarly, where Bridging E visa holders are charged with the commission of a criminal offence or are otherwise suspected of engaging in criminal behavior or being of security concern, there is an expectation that such Bridging E visas ought to be cancelled while criminal justice processes or investigations are ongoing.

(6) The person's individual circumstances, including the seriousness of their actual or alleged behaviour, and any mitigating circumstances are considerations in the context of determining whether a Bridging E visa should be cancelled.

Part two - Section 116(1)(g) and regulation 2.43(1)(p)

5. Prescribed grounds under regulation 2.43(1)(p)

(1) Where more than one ground for cancellation under section 116(1) is relevant to the facts of the case, the decision-maker should consider cancellation under the most appropriate ground based on the evidence before the decision-maker. For instance, where there may appear to be non-compliance with condition 8564 because a visa holder has been charged with an offence against a State or Territory law, the ground at section 116(1)(g) and regulation 2.43(1)(p) would generally be the more appropriate cancellation ground, rather than the ground at section 116(1)(b), namely, non-compliance with a condition of the visa.

(2) The grounds for cancellation at regulation 2.43(1)(p)(i) and (ii) are enlivened when a visa holder is convicted of, or charged with, any offence, irrespective of the seriousness of the offence. However, the seriousness of the offence may be considered as a secondary consideration in the exercise of discretion under section 116(1).

(3) Where a Bridging E visa holder has been charged with an offence(s), but the charge(s) is/are dismissed, cancellation is not appropriate. Similarly, where a Bridging E visa holder has been charged with an offence but has been found by a court to be not guilty or the charge is otherwise dismissed, cancellation is also not appropriate.

5.1 How to exercise the discretion

(1) Informed by the Principles in paragraph 4.3, a decision-maker must take into account the primary and secondary considerations in Part two of this Direction, where relevant, in order to determine whether a Bridging E visa holder should have their visa cancelled.

(2) Both primary and secondary considerations may weigh in favor of, or against, cancellation of a Bridging E visa.

(3) The primary considerations should generally be given greater weight than any secondary considerations.

(4) One primary consideration may outweigh the other primary consideration.

(5) In applying the considerations (both primary and secondary), information and evidence from independent and authoritative sources should be generally be given greater weight than information from other sources.

6. Primary considerations

(1) In deciding whether to cancel a non-citizen's Bridging E visa under the prescribed grounds in regulation 2.43(1)(p) or (q), the following are primary considerations:

a. the Government's view that the prescribed grounds for cancellation at regulation 2.43(1)(p) and (q) should be applied rigorously in that every instance of non-compliance against these regulations should be considered for cancellation, in accordance with the discretionary cancellation framework; and

b. the best interests of children under the age of 18 in Australia who would be affected by the cancellation.

6.1 The Government's view that the prescribed grounds for cancellation at regulation 2.43(1)(p) and (q) should be applied rigorously

(1) In weighing the Government's view that the prescribed grounds for cancellation at regulation 2.43(1)(p) and (q) should be applied rigorously, decision-makers should have regard to the principle that the Australian Government has a low tolerance for criminal behaviour, of any nature, by non-citizens who are in the Australian community on a temporary basis, and who do not hold a substantive visa. This is particularly the case for non-citizens who, but for the Minister granting them a visa in the public interest, would be subject to mandatory detention while their immigration status is being resolved.

6.2 The best interests of any children under the age of 18 in Australia who would be affected by the cancellation.

(2) Decision-makers must make a determination about whether cancellation is, or is not, in the best interests of any children under 18, who would be affected by the decision.

a. in considering the best interests of the child, decision-makers should have regard to the fact that the cancellation of a Bridging E Visa under the prescribed grounds in regulation 2.43(1)(p) or (q) does not necessarily represent final resolution of a person's immigration status in Australia.

7. Secondary considerations

(1) In deciding whether to cancel a non-citizen's Bridging E visa, the following secondary considerations must be taken into account:

a. the impact of a decision to cancel the visa on the family unit (such as whether the cancellation will result in the temporary separation of a family unit);

b. the degree of hardship that may be experienced by the visa holder if their visa is cancelled;

c. the circumstances in which the ground for cancellation arose (such as whether

there are mitigating factors that may be relevant, as well as the seriousness of the offence, the reason for the person being the subject of a notice (however described) issued by Interpol, or the reason for the person being under investigation by an agency responsible for the regulation of law enforcement);

d. the possible consequences of cancellation, including but not limited to, whether cancellation could result in indefinite detention, or removal in breach of Australia's non-refoulement obligations, noting that a decision to cancel a Bridging E visa does not necessarily represent a final resolution of a person's immigration status;

e. delegates may also consider any other matter they consider relevant.

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Student Visa Cancellations under s.116

Contents

Overview

Section 116(1) of the *Migration Act 1958* (the Act) is a general cancellation power that provides for a range of grounds for cancelling a visa. A number of these grounds are potentially applicable to student visas,[1] however this commentary focuses on two grounds of cancellation in particular: cancellation under s.116(1)(b) for breach of visa condition 8516 (continues to satisfy visa criteria) and cancellation of student visas under s.116(1)(fa), where the visa holder is not a genuine student or has engaged in conduct not contemplated by the visa.

Student visas can also be cancelled under s.116(1)(b) for breaches of conditions 8104 or 8105 (both concerning work limitations) and condition 8202 (enrolment, attendance and academic performance requirements). For more information about conditions 8104, 8105 and 8202 see the MRD Legal Services Commentaries on Visa Conditions 8104, 8105 – work restrictions, and Visa Condition 8202 - academic requirements.

In practice, almost all student visa cancellations under s.116 are discretionary. For information on when cancellation is mandatory and when it is discretionary, see MRD Legal Services Commentary Cancellation Under s.116 – General. The process therefore involves two steps: first, establish whether the ground is made out; and if so, second, decide whether the visa should be cancelled. For principles applicable to determining the ground and exercising the discretion in relation to visa cancellations generally, see MRD Legal Services Commentary Cancellation Overview, and under s.116 more specifically see Cancellation under s.116 – General.

Cancellation under s.116(1)(b) - non-compliance with conditions 8104, 8105, 8202 or 8516

Before determining whether there has been non-compliance with a visa condition, it is necessary to determine, as a question of fact, whether the condition in question was 'a condition of the visa', i.e. whether it applied to the visa that has been cancelled, and if so, which version of the condition applied. Having determined that the condition was a condition of the visa, the decision-maker must determine, again as a question of fact, whether there has been non-compliance with that condition.

Section 116(1)(b) permits the cancellation of a visa if its holder has not complied with a condition of *the* visa. This suggests that a visa can only be cancelled under s.116(1)(b) if its holder failed to comply with a condition of that particular visa (not a previously held visa), and that it would not be permissible to cancel a visa that was granted after the non-compliance occurred.

[1] For the purposes of this commentary, a student visa includes, for applications made prior to 1 July 2016, Subclasses 570-576, and for applications made on or after 1 July 2016, Subclass 500. For more information about Subclass 500, see MRD Legal Services Commentary Subclass 500.

The Department's guidelines[2] set out matters that as a matter of policy should be taken into account, where relevant, when considering whether to cancel a visa under s.116. See discussion of these in MRD Legal Services commentary Cancellation under s.116 – General.

Issues arising in cases concerning breach of condition 8516

Condition 8516 is a condition which applies to student visas. It requires that the holder must 'continue to be a person who would satisfy the primary or secondary criteria, as the case requires, for the grant of the visa.' This condition will generally arise for consideration if the visa was granted on the basis that the applicant satisfied a particular criterion, there is evidence that the applicant no longer satisfies that criterion and they do not satisfy any relevant alternative criteria. For example, the visa holder was granted a Subclass 500 visa on the basis of the secondary criteria that the applicant is a member of the family unit of a Subclass 500 visa holder and there is evidence that they are no longer a member of the family unit of that visa holder.

In determining whether there has been non-compliance with condition 8516, the relevant primary or secondary criteria which were applicable to the particular subclass of visa that was granted must be identified. The decision-maker must then determine whether the visa holder would continue to satisfy the criteria for grant.

The circumstances which give rise to breach of condition 8516 for cancellation under s.116(1)(b) may overlap with cancellation under s.116(1)(a) 'the decision to grant the visa was based, wholly or partly, on a particular fact or circumstance that is no longer the case or that no longer exists'.[3] However, the s.116(1)(b) ground will not be made out where a fact (e.g. enrolment) ceased to exist, even for a long time, but where the applicant has re-enrolled at the time of decision. That same person, if they were not enrolled for a brief period, could be in breach of Condition 8516 as they may not have continued to satisfy the enrolment requirement for the relevant period.

At what point in time is compliance with the condition/satisfaction of criteria assessed?

Condition 8516 contains a temporal requirement in the words 'continue to be'. In the context of condition 8516, the word 'continue' has been interpreted as meaning 'to go on with or persist in: to continue an action' and 'to carry on, keep up, maintain', and does not mean 'to carry on from the point of suspension or interruption'.[4] Therefore, 'would satisfy' the criteria applies as if the criteria were being assessed at the time compliance with the condition is required, i.e. at any time during the period of the visa. Determining compliance with the condition depends upon the terms of the relevant visa criteria and any temporal restriction within the criteria.

For example, a criterion that the applicant held a particular type of visa at time of visa application, such as in cl.573.211, once met, will always 'continue to be' satisfied during the period of the visa for the purposes of condition 8516. A criterion such as cl.573.231 that the applicant 'is enrolled in, or the subject of a current offer of enrolment in' a principal course of a type that is specified for Subclass 573, or the alternative criterion in cl.573.223(1A) for an 'eligible higher degree student' falls to be

[2] PAM3: Migration Act > Visa cancellation instructions > General visa cancellation powers (s109, s116, s128 & s140) > 4.2 Act s116 – Cancellation of visas on specified grounds – Considering s116 cancellation -s116 - Deciding whether to cancel - Matters that should be considered (re-issue date 1/7/2017).
[3] As amended by *Migration Amendment (Character and General Visa Cancellation) Act 2014* (No.129 of 2014). This version of s.116(1)(a) applies to visas held on or after 11 December 2014, where the s.119 notice was also sent on or after 11 December 2014: item 22, Schedule 2 to No.129 of 2014. Prior to that date s.116(1)(a) wording was 'circumstances which permitted the grant of the visa no longer exist'.
[4] *Singh v MIBP* [2015] FCCA 2998 (Judge Smith, 27 November 2015) at [56], upheld on appeal in *Singh v MIBP* [2016] FCA 679 (Buchanan J, 8 June 2016)

assessed at any relevant time during which the visa that is subject to condition 8516 is held.[5] This is similar in effect to the enrolment requirement in condition 8202(a) that the visa holder be enrolled in a registered course.[6] If, during the period of holding a Subclass 573 visa, the visa holder ceased to be enrolled in, or the subject of a current offer of enrolment in a course of a type specified for Subclass 573 and so would not satisfy cl.573.231 or the alternative criterion in cl.573.223(1A), a breach of condition 8516 would be established and could not be 'cured' by a subsequent enrolment or offer of enrolment in a course of the relevant type.[7]

Is compliance with condition 8516 only considered in relation to the particular criteria satisfied at the time of grant of the visa?

In certain student visa subclasses (where the visa application was made before 1 July 2016) there are criteria with enrolment requirements relevant to streamlined visa processing arrangements,[8] which require the applicant to be enrolled in the relevant kind of principal course with an 'eligible education provider' specified in an applicable instrument. If the applicant is not enrolled in the relevant kind of course with an 'eligible education provider' there is an alternative enrolment criterion in cl.57X.231. In the case of *Singh v MIBP*[9] the Court held that if a visa holder no longer meets the streamlined visa processing criterion in cl.573.223(1A) as the visa holder ceased enrolment in the relevant kind of course with an 'eligible education provider', compliance with condition 8516 requires consideration of the alternative criterion in cl.573.231.[10] This reasoning would apply equally to consideration of condition 8516 in relation to the similar criteria relating to streamlined processing arrangements in Subclasses 572, 574 and 575.

Therefore, if there are alternative criteria that may be satisfied in relation to the visa that was granted, condition 8516 requires consideration of whether the applicant would satisfy any relevant alternative criteria, not just the criteria which were satisfied at the time of the visa grant.

Changing course level

Although it has not been expressly considered, Courts have accepted without argument that to comply with Condition 8516, a visa holder must continue to satisfy criteria for the Subclass of visa they were granted, not criteria for the Student visa class as a whole.[11] For example, someone granted a Subclass 573 visa would need to continue to satisfy cl.573.231, requiring that they be an eligible

[5] *Paul v MIBP* [2016] FCCA 64 (Judge Jarrett, 18 January 2016) at [26]-[27]. In *Karki v MIBP* [2015] FCCA 1940 (Judge Emmett, 20 July 2015) the Court commented at [22] that the Tribunal, which had already found a breach of Condition 8202, correctly stated that Condition 8516 required the applicant, as the holder of a Subclass 573 visa, to maintain eligibility for the visa, which included maintaining the financial capacity to remain enrolled. At [40] the Court noted the overlap between Conditions 8202 and 8516, but appeared to focus on enrolment only in relation to Condition 8202.

[6] *Liu v MIMIA* [2003] FCA 1170 (Cooper J, 24 October 2003), at [19]-[20]; and *Feng v MIAC* [2011] FMCA 576 (Barnes FM, 27 July 2011). See discussion of enrolment requirement in MRD Legal Services commentary Visa Condition 8202. In *Patel v MIBP* [2014] FCCA 2000 the Court upheld the tribunal's decision to cancel the applicant's Subclass 573 visa under s.116(1)(b) for breach of condition 8202, requiring enrolment in a registered course in circumstances where the applicant ceased enrolment in his degree course in 2009 and commenced studying TAFE courses, which he ceased in 2012 when he applied for a Temporary Graduate Visa. At no point was consideration given to breach of any condition other than 8202 by the Department or Tribunal as the basis for the cancellation. The court's statements at [38] that the applicant was not in breach of his Higher Education Visa requirements until he ceased studying the TAFE courses should be read in this context and do not appear to suggest that the circumstance of ceasing enrolment in the type of course specified for Subclass 573 could not be a breach of condition 8516.

[7] *Paul v MIBP* [2016] FCCA 64 (Judge Jarrett, 18 January 2016) at [26]. In *Abhishek v MIBP* [2016] FCCA 82 (Judge Heffernan, 2 February 2016) the Court commented at [9] at that a breach would occur if a person withdrew from one course and then re-enrolled in a different course a fortnight later.

[8] See cl.572.223(1A) and the definition of 'eligible Vocational Education Training student' in cl.572.111; cll.573.223(1A), 574.223(1A) and the definition of 'eligible higher degree student' in cl.573.111 and cl.574.111 respectively; and 575.223(1A) and the definition of 'eligible non-award student' in cl.575.111.

[9] *Singh v MIBP* [2015] FCCA 2998 (Judge Smith, 27 November 2015)

[10] *Singh v MIBP* [2015] FCCA 2998 (Judge Smith, 27 November 2015) at [79]-[80]. The Court was prepared to find that the Tribunal had, in this case, considered both alternative criteria, cl.573.223(1A) and cl.573.231. This judgment was upheld on appeal in *Singh v MIBP* [2016] FCA 679 (Buchanan J, 8 June 2016).

[11] See, e.g. *Singh v MIBP* [2016] FCA 679 (Buchanan J, 8 June 2016), *Sachin v MIBP* [2017] FCA 527 (Robertson J, 16 May 2017).

higher degree student or be enrolled in a course of a type specified for Subclass 573 (Higher Education Sector). A person who ceased enrolment in a higher education course to enrol in a Vocational Education and Training Sector course (specified for Subclass 572) would therefore not meet this criterion and be in breach of Condition 8516.

When deciding what type of course a person is enrolled in, the Tribunal should decide for itself whether a particular course falls within one course type category or another, having regard to the relevant instrument, and not taking the education provider's description as determinative[12]. The description given by the education provider is, however, one relevant factor to be considered along with any other available evidence, such as the terms of the Australian Skills Quality Authority approval, and the course sector identified on the Commonwealth Register of Institutions and Courses for Overseas Students.[13]

If the criterion refers to an instrument, what is the relevant instrument?

Where the relevant criterion includes reference to an instrument, the relevant instrument when determining whether the visa holder would continue to satisfy the criteria for grant of the visa, will usually be the instrument that applied in relation to the decision to grant the visa.

If the criterion in question is the enrolment criterion (cl.570.232, 571.232, 572.231, 573.231, 574.231 or 575.231), the criterion itself identifies the instrument specifying the course for the particular Subclass as one made under r.1.40A that was in force at the time the visa application was made.

If the criterion in question is cl.573.223(1A) for an eligible higher degree student, it is unclear whether the relevant instrument specifying 'eligible education providers' in relation to the definition of 'eligible higher degree student' in cl.573.112 is the instrument that applied at time of grant of the visa, or the instrument that applies at the time of the cancellation decision, or the instrument that applies at the time of the Tribunal decision on review of the cancellation.[14] See MRD Legal Services commentary: Genuine Student, for further discussion on what is the relevant instrument for this criterion, and issues relating to determining the applicable instrument.

Must the Tribunal consider Ministerial Directions under s.499 relevant to the GTE criterion in assessing whether a person continues to meet student visa criteria?

It is not clear whether Direction 53 or 69 *must* be considered in assessing whether a person continues to meet the GTE criterion.[15] On the one hand, the Direction is expressly stated to apply to people making or reviewing student visa refusal decisions under s.65, not decision-makers exercising cancellation powers.[16] On the other, factors relevant in considering whether a person meets the criteria would appear to also be relevant to whether they *continue* to meet the criteria. Although there is no statutory duty to consider Direction 53 or 69 factors when cancelling for not continuing to satisfy

[12] *Singh v MIBP* [2016] FCA 611, (Charlesworth J, 31 May 2016) at [43] – [45].
[13] See *Singh v MIBP* [2018] FCA 29 (White J, 31 January 2018).
[14] *Singh v MIBP* [2015] FCCA 2345 (Judge Howard, 28 August 2015), at [56]-[57]. The Court in *obiter* comments agreed that the Tribunal did not err in applying IMMI 14/007, the instrument in effect for specifying eligible education providers for cl.573.112(b) at the time of the Tribunal's cancellation review decision. The Tribunal was reviewing a decision to cancel a Subclass 573 visa under s.116(1)(a) on the basis that a circumstance which permitted the grant of the visa, that the applicant was an 'eligible higher degree student', no longer existed. Nothing turned on the instrument as the Tribunal found the applicant was not in fact enrolled with any of the education providers claimed by the applicant as eligible education providers. The comments should be treated with caution as the legislative basis for the reference to the instrument in the Tribunal decision and Court reasoning is unclear. The Tribunal referred to the instrument in the context of the exercise of discretion to cancel, not whether there was a breach of condition 8516 and the Court referred to condition 8516 although the Tribunal decision was based on s.116(1)(a), not s.116(1)(b).
[15] *Sharma v MIBP* [2017] FCCA 431 (Judge Riethmuller, 10 March 2017), at [50]. The judgment was overturned on the basis that the Court had erred in failing to hold that the hearing was affected by apprehended bias, without argument on the need to consider Direction 53 in *Sharma v MIBP* [2017] FCAFC 227 (North, Logan and Charlesworth JJ).
[16] s.499, Minister's Direction No 53 - Assessing the Genuine Temporary Entrant Criterion for Student Visa Applications

the GTE criterion, it appears those factors could usefully inform a decision about whether the criterion continues to be met.

Cancellation under s.116(1)(fa) - not a genuine student / engaging in conduct not contemplated

A student visa may be cancelled under s.116(1)(fa) where:

- the visa holder is not, or is likely not to be, a genuine student - s.116(1)(fa)(i); or
- the visa holder has engaged, or is engaging, or is likely to engage in conduct / omissions in Australia not contemplated by the visa - s.116(1)(fa)(ii)

The term 'genuine student' is not defined in the Act or the Regulations.

In *Tian v MIMIA*, Mansfield J expressed the view that s.116(1)(fa) appears to be directed to circumstances different from those to which s.116(1)(b) refers, and does not fall within the reach of the circumstances prescribed under s.116(3) – as conditions 8104, 8105 and 8202 then were.[17] His Honour referred with apparent approval to the decision in *MIMIA v Hou*, where Conti J expressed the view in *obiter dicta* that the 'genuine student concept' of s.116(1)(fa)(i) 'is directed to circumstances where a student visa holder has been in literal compliance with visa conditions, for instance as to course attendances, yet has not conducted himself or herself as a genuine student for instance in relation to behaviour at lecturers [*sic*], and is occupying a place in a tertiary institution which could well or potentially be taken up by a genuine student'.[18]

The term 'genuine student' in s.116(1)(fa) has elements in common with the term 'genuine applicant for entry and stay as a student' in cl.500.212, but it is a different term, with a different meaning.

The term 'conduct not contemplated by the visa' is also not defined. Departmental guidelines suggest that the conduct must relate to the visa holder's status as a student and the ground should not be used in relation to actual or alleged criminal conduct. The guidelines also suggest the second limb would be restricted to academic misconduct,[19] but this is not clearly apparent from the terms of the provision.

However, there does appear to have been a clear intention that the conduct in question is tied to their status as a student. The Supplementary Explanatory Memorandum to the Migration Legislation Amendment (Overseas Students) Bill 2000, which introduced s.116(1)(fa), gave the following as examples of the circumstances in which this cancellation power may be used[20]:

- where there has not been an actual breach of a student visa condition but the decision-maker is nevertheless satisfied that the student is not genuine; or

[17] [2004] FCA 216 (Mansfield J, 12 March 2004) at [32].
[18] [2002] FCA 574 (per Conti J, 8 May 2002) at [32]. Other cases in which s.116(1)(fa) was applied include *Awan v MIMA* [2001] FCA 1036 (Weinberg J, 3 August 2001) and *Ambakkat v MIAC* [2011] FMCA 916 (Riley FM, 30 November 2011). Section 116(1)(fa) was also discussed briefly in *obiter dicta* in *Shrestha v MIMA* [2001] FCA 359 (Madgwick J, 3 April 2001); however, for reasons explained by Conti J in *Hou* at [23], [25]-[26], that decision should not be regarded as authoritative. On the Minister's appeal, the decision in *Shrestha* was set aside by the consent of both parties: N455/2001, 7 August 2001.
[19] PAM3 – Visa cancellation instructions > General visa cancellation powers (s109, s116, s128 and s140) - s116(1)(fa) – Non-genuine students and conduct not contemplated by the visa – Conduct not contemplated by the visa – s116(1)(fa)(ii) (re-issue date 24/04/17).
[20] Supplementary Explanatory Memorandum, Migration Legislation Amendment (Overseas Students) Bill 2000 at item 7.

- where the first academic year of the course in which the student is enrolled has not yet commenced, but the decision-maker is satisfied that the visa holder is not a genuine student; or

- where a semester for the course has not yet finished but the decision-maker is satisfied that the student is not attending the scheduled contact hours for the course in which he or she is enrolled.

While there may potentially be some overlap with the ground in s.116(1)(b) (non-compliance with visa condition), they are separate grounds, and the ground in s.116(1)(fa) does not cut across or qualify s.116(1)(b).[21] Alternative preconditions to the cancellation powers, subparagraphs (i) and (ii), are not cumulative ones,[22] and when considering this ground, the decision maker's reasons should be clear as to which limb is being relied upon.[23]

Prescribed matters the Minister may have regard to in relation to s.116(1)(fa)

While there are no definitions that apply in relation to a determination under s.116(1)(fa), s.116(1A) of Act provides that the Regulations may prescribe matters to which the Minister, or the Tribunal on review, may have regard in determining whether he or she is satisfied as mentioned in s.116(1)(fa). While these matters are prescribed, they do not limit the matters to which the Minister or the Tribunal may have regard to for that purpose.

The prescribed matters for s.116(1A) are where the education provider defers or temporarily suspends the student's study:

- because of the student's conduct; or

- because of their circumstances, other than compassionate or compelling circumstances; or

- because of compassionate or compelling circumstances, if the Minister is satisfied that the circumstances have ceased to exist; or

- on the basis of evidence or a document given to the provider about the holder's circumstances, if the Minister is satisfied that the evidence or document is fraudulent or misrepresents the holder's circumstances.[24]

Relevant Legislation

Migration Amendment (Character and General Visa Cancellation) Act	No. 129 of 2014

[21] *MIMIA v Hou* [2002] FCA 574 (Conti J, 8 May 2002) at [32], *Tian v MIMIA* [2004] FCA 216 (Mansfield J, 12 March 2004) at [32].
[22] *Weerakoon v MIMIA* [2005] FMCA 624 (Smith FM, 20 April 2005) at [8].
[23] In *Ambakkat v MIAC* [2011] FMCA 916 (Riley FM, 30 November 2011), the Tribunal did not specify the relevant subparagraph; however the Court held that it was clear from the Tribunal's reasons, and in particular from its use of the precise words from the relevant limb, that it implicitly found that the ground in s.116(1)(fa)(ii) existed.
[24] r.2.43(1C) and (1D), inserted by Migration Amendment Regulations 2010 (No.2) (SLI 2010, No.50), r.2, 4 and Schedule 2, Item [13], which commenced on 27 March 2010 and apply in relation to a student visa if the Minister is considering cancelling the visa under s.116 on or after that date. These provisions would apply in relation to a visa where the s.119 notice was sent on or after 27 March 2010, and arguably, where the s.119 notice was sent before that date and the cancellation was still under consideration as at that date. Prior to 27 March 2010 no matters were prescribed; however the matters specified in r.2.43(1D) would nevertheless be relevant.

2014	
Migration Legislation Amendment Regulation 2013 (No. 1)	SLI 2013 No. 33
Migration Legislation Amendment (Student Visas) Act 2012	SLI 2012 No.192
Migration Amendment Regulations 2010 (No.2)	SLI 2010, No.50
Migration Legislation Amendment (Overseas Students) Act 2000	No.168 of 2000
Migration Legislation Amendment (2016 Measures No. 1) Regulation 2016	F2016L00523

Relevant Case Law

Bao v MIMIA [2005] FCA 270	Summary
Cockrell v MIAC (2008) 171 FCR 345; [2008] FCAFC 160	
Ding v MIAC [2012] FMCA 844	Summary
Feng v MIAC [2011] FMCA 576	Summary
Ganji v MIAC [2010] FMCA 711	Summary
Gerhard v MIMIA [2003] FCA 495	Summary
Gupta v MIBP [2015] FCCA 1915	
Hassan v MIAC [2012] FMCA 155	Summary
Hatcher v Cohn [2004] FCA 1548; (2004) 139 FCR 425	
Humayun v MIMIA [2006] FCAFC 35; (2006) 149 FCR 558	Summary
Humayun v MIMIA [2005] FMCA 1247	
Karki v MIAC [2011] FMCA 369	Summary
Karki v MIBP [2015] FCCA 1940	
KC v MIBP [2014] FCCA 2591	Summary
Kim v MIAC [2011] FMCA 780	Summary
Maharjan v MIMIA [2005] FMCA 1442	Summary
Patel v MIAC [2012] FCA 958	Summary
Patel v MIAC [2011] FMCA 112	Summary
Paul v MIBP [2016] FCCA 64	Summary
Sharma v MIBP [2017] FCCA 431	Summary
Singh v MIBP [2015] FCCA 2998	Summary
Singh v MIBP [2015] FCCA 2345	
Singh v MIBP [2016] FCA 611	

Singh v MIBP [2016] FCA 679	Summary
Singh v MIBP [2018] FCA 29	Summary
Tian v MIMIA [2004] FCA 216	Summary
Ting Ting Lin v MIMIA [2006] FMCA 578	
Tsang v MIBP [2015] FCCA 31	
Weerakoon v MIMIA [2005] FMCA 624	
Wei v MIBP [2015] HCA 51	Summary
MIMIA v Yu [2004] FCAFC 333; (2004) 141 FCR 448	Summary
MIMIA v Zhou [2006] FCAFC 96; (2006) 152 FCR 115	Summary
Zhou v MIMIA [2004] FCA 1078	Summary
Zhang v MIAC [2007] FMCA 1855	Summary

Available Decision Templates

There are four decision templates relevant to the cancellation of student visas. These are:

- **Cancellation s.116 - Breach of condition 8104 -** This template is for use in cases where a student visa has been cancelled under s.116(1)(b) for breach of condition 8104. It applies to cases where the visa was initially granted on or after 26 March 2008.

- **Cancellation s.116 - Breach of condition 8105 -** This template is for use in cases where a student visa has been cancelled under s.116(1)(b) for breach of condition 8105. It applies to cases where the visa was initially granted on or after 26 April 2008

- **Cancellation s.116 - Breach of condition 8202 -** This template is for use in cases where a student visa has been cancelled under s.116(1)(b) for breach of condition 8202 where the breach occurred on or after 1 July 2007 (and the visa application was made before 1 July 2016).

- **Cancellation s.116(1) - General -** this template is for use in relation to a cancellation of a visa under s.116(1) (prescribed grounds) and can be used for cancellation under s.116(1)(b) for breach of a condition other than 8104, 8104 or 8202. It includes cancellation under s.116(1)(fa) relating to whether the visa holder is a genuine student / engaging in conduct not contemplated by the visa.

- **Optional Standard Paragraphs** – **Cancellation** – These paragraphs are available to be inserted into cancellation decisions if required. Currently it includes standard paragraphs relating to condition 8516 for use in a cancellation under s.116(1)(b) (failure to comply with a condition), including specific paragraphs for failure to comply with condition 8516 in the context of subclass 573.

Last updated/reviewed: 2 July 2018

Cancellations (Consequential) – Sections 140, 134F

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Overview

Section 140 of the *Migration Act 1958* (the Act) provides for the cancellation of a visa where the holder has that visa because another person (the 'first person') held a visa which has subsequently been cancelled. Cancellation may occur by *operation of law* (s.140(1) or (3)) or by the *exercise of a discretionary decision* (s.140(2)). Section 134F of the Act provides for a discretionary decision to cancel a visa similar to that in s.140(2), where a visa held by the first person has been subject to emergency cancellation on security grounds under s.134B. Such cancellations are 'consequential' because they flow from the decision to cancel another person's visa.

Where a person was granted a visa because he or she is a member of the family unit of a person whose visa has been cancelled under ss.109 (incorrect information), 116, 128, 133A, 133C[1] or 137J (student visas), the visa of the family unit member is also cancelled by operation of law. In circumstances where a person holds a visa only because a person whose visa has been cancelled under ss.109, 116, 128, 133A, 133C, s.134B or 137J held their visa, but not because of being a member of the family unit of that person, there is a discretion to cancel that other person's visa.

Where a person (the child) was granted a visa under s.78 (child born in Australia), and their parent's visa is cancelled under *any* provision of the Act, the child's visa is also cancelled under s.140(3).

Consequential cancellations by operation of law do not involve a 'decision' as such. The Tribunal does *not* have jurisdiction in respect of these cancellations.[2] However, discretionary cancellations do involve a 'decision' and accordingly the Tribunal does have jurisdiction to review those cancellations if the decision is otherwise reviewable under the Act.[3]

Cancellations under s.140 are consequentially revoked if the Minister revokes the first person's visa cancellation under ss.131, 133F, 137L or 137N of the Act (s.140(4)).

Consequential Cancellation by Operation of Law

Cancellation by operation of law arises in two circumstances: s.140(1) or s.140(3).

First, s.140(1) of the Act provides that, where a person's visa is cancelled under ss.109, 116, 128, 133A, 133C or 137J, a visa held by another person because of being 'a member of the family unit' is also cancelled.

Thus, visa holders who satisfied a visa criterion that required them to be 'a member of the family unit' of another person will have their visas cancelled under s.140(1) where that other person's visa is cancelled under ss.109, 116, 128, 133A, 133C or 137J. The definition of 'member of the family unit' in

[1] Sections 133A and 133C give the Minister personal power to cancel a visa in the public interest if satisfied a s.109 or s.116 ground exists.
[2] See *Farah v MIAC* [2011] FCA 185 (Jessup J, 9 March 2011) at [2], *Singh v MIBP* [2018] FCAFC 162 (Greenwood ACJ, Charlesworth and O'Callaghan JJ) at [50].
See *Rani & Ors v MIMA* (1997) 80 FCR 379 at 400-1.

r.1.12 of the Migration Regulations 1994 (the Regulations) covers a range of family relationships, such as spouse and dependent child.[4]

For many visa subclasses, membership of the family unit is a secondary criterion.[5] Nevertheless, there appears to be no reason why s.140(1) would not apply where membership of the family unit is expressed to be one of the primary criteria. In other words, s.140(1) may apply to a person who acquired a visa by satisfying a primary criterion expressed specifically in terms of being a 'member of the family unit' of another person whose visa is later cancelled.[6]

Second, s.140(3) of the Act provides for the cancellation of a visa that was granted to a child under s.78 of the Act[7] where the parent's visa is cancelled under *any* provision of the Act.

As they occur by operation of law, the Tribunal does *not* have jurisdiction to review cancellations under ss.140(1) or (3) because such cancellations do not involve any 'decision' within the meaning of s.338 [Part 5] and s.411[Part 7] of the Act.[8]

Consequential Discretionary Cancellation

There are two provisions providing for consequential discretionary cancellation, s.140(2) and s.134F.

Section 140(2)

Subsection 140(2) of the Act provides that the Minister *may*, without notice, cancel a visa where:

- another person's visa is cancelled under ss.109 (incorrect information), 116, 128, 133A, 133C or 137J (student visas); and
- the visa holder, to whom s.140(1) does not apply, holds a visa only because the person whose visa is cancelled held a visa.

The word 'only' in s.140(2) does not mean *solely* but, rather, means that the fact of another person holding a visa was a condition precedent to the grant of the visa. It may not be the only condition for

[4] Note that a more limited definition of 'member of the family unit' applies in relation to visa applications made on or after 19 November 2016 or a visa granted as a result of such an application: see Schedule 4 of the *Migration Legislation Amendment (2016 Measures No.4) Regulation 2016*.
[5] For example, Subclasses 100 (Partner), 101 (Child) .
[6] *Rani & Ors v MIMA* (1997) 80 FCR 379 at 399, finding that s.140(1) only applies where a visa holder obtained the visa by satisfying a criterion explicitly framed in terms of being 'a member of the family unit' of another person whose visa is cancelled. On that view, s.140(1) would apply to a protection visa granted to a person because they satisfied s.36(2)(b) of the Act ('member of the same family unit') as in force from 1 July 2009 (amended by *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* (No. 144 of 2008), Sch.10 item [22]). Similarly, s.140(1) would apply to a protection visa granted to a person because they satisfied cl.866.222 of Schedule 2 to the Regulations as in force before 1 November 1995 ("member of the family unit") and as amended by SR 1995 No.268 ("member of the same family unit"). Although the expression "member of the same family unit" does not precisely reflect s.140(1), the expression "member of the same family unit" is relevantly defined by reference to membership of the family unit (s.5(1) of the Act and cl.866.112 of Sch.2 to the Regulations respectively) and *Rani* suggests that a protection visa granted on this basis would be vulnerable to automatic cancellation under s.140(1). However, the position in relation to s.36(2)(b) before 1 July 2009 ("spouse or a dependant") is less clear. The reasoning in *Rani* at 399-400 suggests that s.140(1) would not apply. Note that s.140 would not apply at all to a family member found to satisfy the protection criterion in their own right (s.36(2)(a) and cl.866.221).
[7] s.78 essentially provides that, if a child born in Australia is a non-citizen when born and at the time of birth one or both of the child's parents holds a visa, other than a special purpose visa, then the child is taken to have been granted at time of birth a visa of the same kind and class and on the same terms and conditions.
[8] *Rani & Ors v MIMA* (1997) 80 FCR 379 at 385, 393, 400, and *Tien & Ors v MIMA* (1998) 89 FCR 80 at 96. See also *Farah v MIAC* [2011] FCA 185 (Jessup J, 9 March 2011) at [2] which confirmed that visa cancellation occurs by operation of s.140 of the Act itself and does not involve cancellation by a delegate under s.109.

the visa granted but it is the *material* condition for the purposes of s.140(2).[9] Examples of persons whose visas may be cancelled under s.140(2) include visa holders who were sponsored by a person whose visa is cancelled (for example, Prospective Marriage, Partner and other family visa holders[10]) and visa holders who satisfy a criterion that involves another visa holder.

Unlike s.140(1), discretionary cancellations under s.140(2) do involve a 'decision', and the Tribunal generally *does* have jurisdiction[11] where the visa cancellation decision is otherwise reviewable under s.338 or s.411.

Section 134F

Section 134F provides that if a person holds a visa only because another person (the relevant person) held a visa, the Minister *may* cancel the person's visa if:

- the relevant person's visa has been cancelled under s.134B; and
- the Minister has decided under s134C(3) not to revoke that cancellation; and
- The Minister has given a notice to the relevant person under s.134E about the cancellation.

The power to cancel under s.134B (and hence the possibility of discretionary consequential cancellation) only arises in very specific circumstances. It is expected that this will be a rare occurrence. The discretionary consequential cancellation under s.134F would involve a 'decision', but it would only be reviewable by the Tribunal if the visa holder were in Australia at the time of the decision.[12]

Operation of s.140(2) where cancellation of other visa is set aside or revoked

Subsection 140(4) provides that if a visa is cancelled under ss.140(1), (2) or (3) because another visa is cancelled, and the cancellation of the other visa is revoked under ss.131[13], 133F, 137L or 137N, the cancellation under s.140(1), (2) or (3) is revoked. Revocation under s.140(4) occurs by operation of law, and does not involve any 'decision'.

Subsection 140(4) does not deal with the circumstance where a decision to cancel another person's visa under ss.109 or 116 is set aside. Pursuant to s.114, if a decision made under s.109 to cancel a person's visa is set aside by the Tribunal, then the visa is taken never to have been cancelled. It appears that the circumstances specified in s.140(4) do not arise. On that view, where s.114 applies, a decision to cancel a visa under s.140(2) should be set aside by the Tribunal on the basis that the other person's visa is not cancelled. However there is no equivalent deeming provision for cancellation under s.116. Therefore the position for persons affected by s.140(2) is unclear where a decision to cancel another person's visa under s.116 has been set aside.

[9] *Ara v MIBP* [2016] FCCA 2154 (Driver J, 29 September 2016) at 33, upheld on appeal in *Ara v MIBP* [2017] FCA 130 (Jagot J, 17 February 2017) at [7].
[10] E.g. people granted a visa on the basis of being a 'dependent child' (cl.101.211) or 'orphan relative' (cl.117.211) of an Australian relative who is a permanent resident.
[11] Decisions to cancel a visa other than a protection visa are reviewable by the Tribunal under s.338(3) and (4)(b) [Part 5] and decisions to cancel a protection visa are reviewable under s.411(1)(d)[Part 7]. These decisions are reviewable by the Tribunal in its Migration and Refugee Division: s.336M of the Act.
[12] s.338(3) [Part 5], s.411(1)(d) and (2)(a) [Part 7].
[13] Section 131 provides for revocation of a decision made under s.128 (cancellation of visas without notice of people outside Australia). Section 133(1) provides that, if the cancellation is revoked, the visa has effect as if it were granted on the revocation.

Exercise of the discretion

There are no legislative grounds required to be taken into account before a decision to cancel a person's visa under s.140(2) or s.134F may be made. In relation to s.140(2), departmental policy is that decision makers consider a number of matters including the purpose of the visa holder's travel to Australia; the degree of hardship that may be caused to the visa holder and family members; the circumstances in which the ground for cancellation arose; the visa holder's past and present behaviour towards the department; links to the community in the case of a permanent visa; the impact of cancellation on any victims of family violence if relevant; and relevant international obligations before making such a decision.[14] Australia's international obligations derive, in part, from treaties to which Australia is a party, and generally apply to persons within Australia's territory and jurisdiction. The obligations likely to be most relevant to the cancellation process are those relating to the best interests of children, maintaining family unity and non-refoulement.[15] Pursuant to those obligations, decision makers should:

- treat the best interests of any children under 18 years old who are in Australia or within Australia's jurisdiction as a primary consideration;
- consider the effect of cancellation on family members in line with family unity principles; and
- consider Australia's non-refoulement obligations.[16]

Departmental guidelines in relation to discretionary cancellation under s.134F indicate that decision-makers should consider the same matters as they would consider under s.140(2) in deciding whether to cancel a visa.[17]

Merits Review

Cancellation of a decision by operation of law under s.140(1) or s.140(3) of the Act does not involve a 'decision' and, therefore, there is no relevant Part 5-reviewable or Part 7-reviewable decision. There is no merits review in relation to these cancellations.

A discretionary consequential cancellation under s.140(2) or s.134F of a visa will be reviewable if the visa holder is in Australia and not in immigration clearance at the time of decision and where the Minister has not issued a conclusive certificate.[18] If the visa cancelled was a protection visa it would be a Part 7-reviewable decision under s.411(1)(d). If the visa cancelled was not a protection visa, it would be a Part 5-reviewable decision under s.338(3) of the Act, or s.338(4) if the visa was a bridging visa and the visa holder is in immigration detention because of the cancellation.

There are no express notification requirements for a discretionary consequential cancellation decision made under s.140(2) or s.134F. The requirements in r.2.55 for giving of documents relating to a cancellation would apply to a document relating to cancellation under s.140(2) and s.134F. The

[14] Policy - Migration Act – –Visa Cancellation instructions - General visa cancellation powers (s109, s116, s128, s134B and s140) Act, 140 – Deciding whether to cancel (re-issue date 1/7/2017).
[15] Policy - Migration Act – Visa Cancellation instructions - General visa cancellation powers (s109, s116, s128, s134B and s140) Act, 140 – Deciding whether to cancel (re-issue date 21/8/16). For further discussion of Australia's international obligations in the context of visa cancellation, see Policy - Migration Act – –Visa Cancellation instructions - General visa cancellation powers (s109, s116, s128, s134B and s140) – Australia's international obligations (re-issue date 1/7/2017).
[16] Australia's non-refoulement obligations arise primarily from the Refugees Convention. However, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child also generate explicit or implicit non-refoulement obligations: see Policy - Migration Act – –Visa Cancellation instructions - General visa cancellation powers (s109, s116, s128, s134B and s140) – Australia's international obligations (re-issue date 1/7/2017).
[17] Policy - Migration Act - Visa Cancellation instructions - General visa cancellation powers (s109, s116, s128, s134B and s140) – Act, s134F – Effect of cancellation on other visas – Matters to be considered (re-issue date 1/7/2017).
[18] s.338(1)(a) [Part 5], s.411(2) [Part 7].

Department's policy[19] is to give a written notification of the decision with the same content requirements as for other visa cancellation decisions (specified in s.127 of the Act. On the Department's approach a discretionary consequential cancellation decision requires a written statement setting out the ground for the cancellation, whether the decision is reviewable and, if so, stating that it can be reviewed, the time in which the application for review may be made, who can apply for review and where the application can be made and should be given to the visa holder in accordance with one of the methods in r.2.55 in order for relevant prescribed periods for applying for review to commence.

Relevant Legislation

Tribunals Amalgamation Act 2015	No.60, 2015
Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014	SLI 2014, No.116
Migration Amendment (Character and General Visa Cancellation) Act 2014	No.129, 2014

Relevant Case Law

Ara v MIBP [2017] FCA 130	
Ara v MIBP [2016] FCCA 2154	Summary
Farah & Ors v MIAC & Anor [2010] FMCA 801	Summary
Farah v MIAC [2011] FCA 185	Summary
Rani & Ors v MIMA (1997) 80 FCR 379 [1997] FCA 1493	Summary
Singh v MIBP [2018] FCAFC 162	
Tien & Ors v MIMA (1998) 89 FCR 80	Summary

Last updated/reviewed: 18 January 2019

[19] Policy - Migration Act – Visa Cancellation Instructions – General visa cancellation powers (s109, s116, s128, s134B and s140) – s140 cases – notifying the person (and also s134F – To be notified in writing) (re-issue date 1/7/2017).

Visa cancellation and refusal on character grounds
(including revocation of mandatory cancellation)

CONTENTS

- Decision to be made within 84 days
- Protected information
- Evidentiary matters

Common Issues

- Reasonably suspects
- Effect of conviction on exercise of discretion

Relevant case law and AAT decisions

Overview

The *Migration Act 1958* (the Act) provides special powers for the Minister to refuse or cancel visas on character grounds. In some circumstances where a visa is cancelled on character grounds, the Minister can revoke that cancellation decision.

These powers generally involve consideration of whether a person passes the character test, and if they do not, the exercise of a discretion about what decision should be made (whether the visa should be refused or cancelled, or whether the cancellation should be revoked).

The character test is set out in s 501(6) of the Act, which essentially deems individuals to be of bad character in the circumstances listed in that subsection.

This commentary focuses on the three types of visa decisions on character grounds which may be subject to review by the AAT: visa refusals under s 501(1), visa cancellations under s 501(2), and decisions under s 501CA not to revoke a mandatory cancellation.[1] It looks at the nature of each of these decision-making powers, the AAT's jurisdiction to review primary decisions, the application of the character test and the exercise of the discretion. It also looks at specific provisions governing the conduct of these reviews by the AAT and some common legal issues affecting decisions in this area.

The Powers

The character related visa powers are powers of the Minister under the Act. However, the powers are often exercised by officers in the Department of Home Affairs as delegates of the Minister under s 496 of the Act Unless otherwise indicated, references to the Minister in this commentary include the Minister's delegates.

[1] Other visa decisions on character grounds cannot be reviewed by the AAT – see for example the character-based powers in s 501A, 501B and 501BA. These are personal powers of the Minister and are not subject to AAT review.

Visa refusal under s 501(1) and cancellation under s 501(2)

Under s 501(1), the Minister may refuse to grant a visa if the person does not satisfy the Minister that the person passes the character test.[2] This special visa refusal power is related to the general power to grant or refuse to grant a visa in s 65 of the Act.[3]

Under s 501(2), a person's visa can be cancelled if the Minister reasonably suspects that the person does not pass the character test and the person does not satisfy the Minister that the person passes the character test.[4] If a person does not pass the character test, the decision-maker must then go on to consider the discretion to cancel or refuse the visa. Failure to pass the character test provides the occasion, but not the reason, for the exercise of that discretion. There is a need in each case to make an individual assessment of the visa application or cancellation.[5]

The discretion conferred by s 501(2) is a discretion to cancel; to approach it as a discretion *not to* cancel is a jurisdictional error.[6]

Although in their terms each of these powers may be exercised where the person does not satisfy the Minister that they *do* pass the character test, as explained below under 'The character test', in practice the powers operate when the Minister makes a finding that they *do not* pass the character test.

Revocation under s 501CA(4) of mandatory cancellation

Under s 501(3A), the Minister must cancel a visa of certain persons in prison who do not pass the character test because of sexually based offences involving a child, or because of a substantial criminal record as a result of being sentenced to death, life imprisonment, or a term of imprisonment more than 12 months.[7] The person must be serving a sentence of imprisonment, on a full time basis in a custodial institution, for an offence against a law of the Commonwealth, a State or a Territory.[8]

If a visa is cancelled under s 501(3A), the Minister must give the person a written notice setting out the decision and particulars of certain adverse information, and inviting the person to make representations about revocation of the original decision.[9]

If the person makes representations in accordance with the invitation, then under s 501CA(4), the Minister may revoke the original decision if satisfied the person passes character test or that there is another reason why the original decision should be revoked.

The judicial authorities indicate that although the provision says the decision-maker *may* revoke the cancellation if there is another reason to do so, this does not involve a separate exercise of a discretion but

[2] s 501(1).
[3] See e.g. discussion in *SZLDG v MIAC* (2008) 166 FCR 230 about the interaction between s 65 and s 501.
[4] See discussion of 'Reasonably Suspects' below
[5] *NBMZ v MIBP* (2014) 220 FCR 1 at [204]-[205].
[6] *Lesuma v MIAC (No 2)* [2007] FCA 2106 (Emmett J, 19 December 2007) at [23]-[33].
[7] Specifically, this applies to persons who fail the character test under paragraph (6)(e) or under (6)(a) due to a substantial criminal record as defined in paragraphs (7)(a), (b) or (c). See discussion of 'The Character Test' below.
[8] For these purposes, periods of periodic detention and orders to participate in certain residential schemes or programs count as terms of imprisonment: s 501(8) and (9). A 'sentence' includes any form of determination of the punishment for an offence and 'imprisonment' includes any form of punitive detention in a facility or institution and: s 501(12).
[9] s 501CA(3). The adverse information is referred to as 'relevant information' which is defined in s 501CA(2) as information that would be a reason or part of the reason for making the decision, and is specifically about an individual and not just a class of persons. Non-disclosable information as defined in s 5(1) is excluded from the definition of 'relevant information' and so need not be given under this provision. For a discussion of similarly worded adverse information provisions relating to MRD reviews, see Chapter 10 of the MRD Procedural Law Guide. In *Picard v MIBP* [2015] FCA 1430 (Tracey J, 16 December 2015) at [40], the Court observed that this was a somewhat strange provision as the obligation relates to information bearing on the decision to cancel, not information on which the Minister might rely in deciding whether or not to revoke the cancellation decision: at [40].

rather is part of a single balancing exercise.[10] In deciding whether there is 'another reason' why the decision should be revoked, the decision-maker must form a state of satisfaction about the existence of 'another reason' by forming a state of satisfaction about matters including the considerations in the Minister's Direction.[11] The Minister must assess and evaluate the factors for and against revocation, and if satisfied that the cancellation should be revoked, the Minister is obliged to act on that view – this is a single process and the Minister does not have a residual discretion to refuse to revoke the cancellation if satisfied that it should be revoked.[12]

In making a decision under s 501CA(4)(b), the decision-maker is not constrained to consider only 'relevant information' given at the time of formal notification of the cancellation decision and the representations made in response.[13]

In a decision not to revoke, it is preferable to express the conclusion in the terms used by the provision, that the decision-maker is neither satisfied that the person passes the character test, nor that there is 'another reason why the original decision should be revoked'.[14]

Jurisdiction

Reviewable decisions

Decisions by a delegate to refuse a visa under s 501(1), to cancel a visa under s 501(2), or not to revoke a mandatory visa cancellation under s 501CA(4), are reviewable by the AAT in its General Division.[15] As only decisions made by delegates are reviewable, decisions made by the Minister personally are not subject to merits review.[16] References to the Minister include any one of the Ministers administering the relevant provisions, including e.g. an Assistant Minister appointed to administer the Act.[17]

Statutory time limits

For decisions made under ss 501 and 501CA(4), where the person affected is in the migration zone, they must apply to the Tribunal for review within 9 days after the day on which they were notified of the decision in accordance with s 501G(1).[18] This time period cannot be extended.[19] If the applicant is outside the migration zone the review application must be lodged no later than 28 days after the document setting out the terms of the decision is given to the applicant, but this time can be extended.[20]

[10] See *MHA v Buadromo* [2018] FCAFC 151 (Besanko, Barker and Bromwich JJ, 14 September 2018), at [21], referring to *Gaspar v MIBP* [2016] FCA 1166 (North ACJ, 28 September, 2016) and *Marzano v MIBP* (2017) 250 FCR 548, but contrasting the emphasis Gageler and Gordon JJ placed on the word 'may' in *Falzon v MIBP* [2018] 9 HCA 2 at [74].
[11] *YNQY v MIBP* [2017] FCA 1466 (Mortimer J, 7 December 2017) at [59].
[12] *Gaspar v MIBP* [2016] FCA 1166 (North ACJ, 28 September 2016) at [38].
[13] *Marzano v MIBP* (2017) 250 FCR 548 at [56], [57], [59], [60].
[14] See *Romanov v MHA* [2018] FCA 1494 (Jagot J, 5 October 2018) at [20].
[15] s 500(1)(b), (ba). Mandatory visa cancellation decisions by delegates under s 501(3A) are not reviewable: s 500(4A). Character-based visa decisions under s 501 are not subject to review in the MRD: s 500(4)(b). See the President's Direction: Allocation of Business to Divisions of the AAT, 9 October 2017.
[16] The personal powers of the Minister to cancel or refuse visas under ss 500A(2) and (3), s 501(3), s 501A(2) and (3), s 501B(2) and 501BA(2), and the power to revoke a cancellation in s 501C(4) are not reviewable as they are not included in the list of reviewable decisions in s 500(1), and are also excluded from review by the MRD under Parts 5 or 7: s 500A(7), s 338(2), s 411(2)(aa), s 501A(7), s 501B(4), s 501BA(5), s 501C(11).
[17] Due to the effect of s 19A of the *Acts Interpretation Act 1901*: see *Maxwell v MIBP* (2016) 249 FCR 275 at [20]-[21].
[18] s 500(6B).
[19] s 500(6B) provides that s 29(7)-(10) of the *Administrative Appeals Tribunal Act 1975*, which concern extensions of time, do not apply.
[20] s 29(1)(d) and (2)(a) and s 29(7)-(10) of the *Administrative Appeals Tribunal Act 1975*.

Standing

Standing to apply to the AAT for review is ordinarily governed by s 27(1) of the *Administrative Appeals Tribunal Act 1975* (AAT Act), which provides for a person whose interests are affected by a decision to apply for a review. However, for visa cancellation and refusal decisions under s 501 (but not non-revocation decisions under s 501CA), a person is not entitled to make an application for review unless the person would be entitled to seek review of the decision under Part 5 or 7 of the Migration Act if the decision had been made on another ground.[21]

This calls for consideration of the provisions about standing to apply for review in s 347(2), (3) and (3A) (for general migration visas) and s 412(2) and (3) (for protection visas). For visa cancellations, it is generally the person whose visa was cancelled who has standing, and the person must be in the migration zone at the time of the cancellation decision. For visa refusals, the rules are more complicated, but in most cases for visas applied for onshore, the visa applicant has standing, while for offshore visas requiring sponsorship, the sponsor has standing.[22] For detailed discussion of the provisions about standing in Parts 5 and 7 of the Migration Act, including who may apply and where the review applicant must be located to apply, see Chapter 4 of the MRD Procedural Law Guide.

Application fee

The application for review must be accompanied by the prescribed fee.[23] Although the full fee $920 is payable if no concessional circumstance applies, in most onshore cases, the concessional $100 fee will apply as the applicant will be in prison or immigration detention.[24] The AAT can dismiss an application if the fee is not paid within 6 weeks of lodgement, and the AAT is not required to deal with the application until the fee is paid.[25]

The Character Test

The character test is defined in s 501(6) of the Migration Act. It is generally concerned with protection of the Australian community from the risk of harm.[26]

The character test deems individuals to be of bad character if they fit any of the criteria listed.

A person does not pass the character test only if one of the paragraphs in s 501(6) applies to that person.[27] While an applicant must satisfy the Minister in relation to factual matters relevant to the Minister's determination of whether a paragraph in s 501(6) applies, there will generally need to be a finding, or an opinion or suspicion based on reasonable grounds,[28] that one of these paragraphs applies. For example, whether or not a person has a substantial criminal record for s 501(6)(a) can only be determined by means of an objective finding by the Minister. Such a finding is therefore implicitly required.[29] In circumstances

[21] s 500(3), which refers to s 500(1)(b); *Administrative Appeals Tribunal Act 1975,* s 27(1).
[22] See ss 338 and 347 (general migration visas) and 412 (protection visas).
[23] s 29(1)(b), *Administrative Appeals Tribunal Act 1975.*
[24] s 20(1)(a) and s 21 of the *Administrative Appeals Tribunal Regulation 2015* – see in particular s 21(d), which applies where the applicant is an inmate of a prison or is otherwise lawfully detained in a public institution.
[25] s 69C(1) of the *Administrative Appeals Tribunal Act 1975* and s 24 of the *Administrative Appeals Tribunal Regulation 2015.*
[26] See, e.g., *Moana v MIBP* (2015) 230 FCR 367, at [52]-[56], where Rangiah J went through the various character grounds then in force and related them to protection of the community from harm; *Djalic v MIMA* (2004) 139 FCR 292 at [68] and [72]; *Akpata v MIMIA* [2004] FCAFC 65 (Carr, Sundberg and Lander JJ, 25 March 2004) at [168]. Some judges, however, have expressed the view that it would not necessarily be error for the Minister acting personally not to consider the risk of harm: see *MIBP v Lesianawai* (2014) 227 FCR 562, at [26].
[27] *MIMIA v Godley* (2005) 141 FCR 552 at [54].
[28] *MIMIA v Godley* (2005) 141 FCR 552 at [34].
[29] *MIMIA v Godley* (2005) 141 FCR 552 at [48].

where the Minister is unsure whether a paragraph in s 501(6) applies, the Minister could not refuse or cancel the visa.[30]

Some paragraphs of s 501(6) require a reasonable suspicion or opinion. Section 501(6)(c), for example requires consideration of whether a person is of good character, having regard to past and present conduct.

In effect, s 501(6) provides a complete statement of how the person may satisfy the Minister. The effect of that statement is that, unless a paragraph in s 501(6) applies, the person is to be taken as having satisfied the Minister.[31] Section 501(6) provides: 'Otherwise, the person passes the character test'.

Consistent with judicial authorities, Direction No. 79 says: 'Persons who are being considered under section 501 of the Act must satisfy the decision-maker that they pass the character test set out in section 501(6) of the Act. In practice, this requires the decision-maker to determine, on the basis of all relevant information including information provided by the person, that the person does not pass the character test by reference to section 501(6) of the Act'.[32]

Substantial criminal record

A person who has a substantial criminal record does not pass the character test.[33] For this purpose, the categories of sentences and detention in s 501(7) have been selected by the Parliament as objective, easily identified, criteria.[34]

Sentence

The phrase 'substantial criminal record' is defined to include having been sentenced to: death or life imprisonment; a term of imprisonment of 12 months or more; two or more terms of imprisonment totalling 2 or more years; or having been institutionalised after being acquitted on grounds of unsoundness of mind or insanity, or been found by a court[35] to not be fit to plead. The Act defines a 'term of imprisonment' broadly. It includes time that a court has ordered a person to spend in drug rehabilitation or a residential program for the mentally ill.[36] For sentences of periodic detention, the 'term of imprisonment' is calculated as the total number of days for which a person is required to be detained.[37] A sentence or conviction must be disregarded if the conviction has been quashed, or the person has been pardoned in relation to that conviction, and the effect is that the person is taken never to have been convicted.[38]

For the purposes of determining whether an applicant has been sentenced to a term of imprisonment of 12 months or more, or to two or more terms of imprisonment totalling two years or more within s 501(7), it is the term of imprisonment to which the applicant was sentenced, not the term actually served, that is relevant.[39] A sentence to a term of imprisonment which is suspended falls within the section.[40]

Sentences served concurrently must be totalled for the purposes of s 501(7).[41]

[30] See *MIMIA v Godley* (2005) 141 FCR 552 at [53]-[55].
[31] *MIMIA v Godley* (2005) 141 FCR 552 at [56].
[32] Direction No. 79, Annex A, Section 1, Discretionary visa cancellation or refusal, paragraph (2), p.22.
[33] s 5016).
[34] See *Brown v MIAC* (2010) 183 FCR 113 at [10].
[35] 'Court' includes a court martial or similar military tribunal: s 501(12).
[36] s 501(9)
[37] s 501(8).
[38] s 500(10).
[39] *Drake v MIEA* (1979) 76 FLR 409 at 415-418.
[40] *Brown v MIAC* [2010] FCAFC 33 (Moore, Rares, Nicholas JJ, 20 April 2010) at [11]-[12].
[41] s 501(7A).

Association with/membership of groups involved in criminal conduct

Individuals are also deemed to fail the character test if the Minister reasonably suspects that they have been a member of a group, or have had an association with, a person or a group who the Minister reasonably suspects has been or is involved in criminal conduct. For a person to fail the membership limb, there does not need to be an assessment that the person was sympathetic with, supportive of, or involved in the criminal conduct of the group or organisation.[42] The evidence required will depend on the circumstances of the case. The Federal Court has said that membership implies at the very least a voluntary decision by the person to assume membership of the group and recognition by the group of the person as a member.[43]

To fail the association limb, the decision-maker must have a reasonable suspicion that the person was sympathetic with, supportive of, or involved in the criminal conduct of the person, group or organisation – mere knowledge of the criminality of the associate is not, in itself, sufficient. In order not to pass the character test on this ground, the association must have some negative bearing upon the person's character;[44] it does not refer to merely social, familial or professional relationships.[45] In establishing association, decision-makers are to consider the nature of the association; the degree and frequency of association; and its duration.

It has been said that it is implicit that a person who fails this test may pose a risk of harm to the Australian community.[46]

Good character, having regard to conduct

A person will not pass the character test if they are not of good character having regard to the person's past and present criminal conduct or past and present general conduct.[47]

The question whether a person is or is not of 'good character' is primarily an issue of fact and there are no precise parameters to distinguish 'good character' from 'bad character'.[48] 'Good character' does not refer to a person's reputation and repute however, a person's criminal record can assist decision makers, who should have regard to the nature of any crimes to determine whether they reflect adversely on the applicant's character as well as the applicant's evidence as to whether they have reformed and any character references.[49] 'Good character' refers to enduring moral qualities reflected in soundness and reliability in moral judgement in the performance of day to day activities and in dealing with fellow citizens.[50] Conduct may make those qualities visible, but it should never be confused with them. Having had regard to the conduct, the Minister must still come to a further conclusion, whether or not to be satisfied that the person is not of good character.[51]

Section 501 does not charge the decision-maker with the task of making a judgment, general in nature, about the character of a person, i.e, a judgment to which the statutory context is of no relevance. The concept of 'good character' in s 501 is not concerned with whether a person meets the highest standards of integrity, but with a less exacting standard than that. It is concerned with whether the person's character in the sense of their enduring moral qualities, is so deficient as to show it is for the public good to refuse entry

[42] *Roach v MIBP* [2016] FCA 750 (Perry J, 24 June 2016) at [133]-[149].
[43] *Roach v MIBP* [2016] FCA 750 (Perry J, 24 June 2016) at [144].
[44] Direction No. 79, Annex A, Section 2, 3(5), p.25. This incorporates the principle from the Full Federal Court judgment in *Haneef v MIAC* (2007) 163 FCR 414 at [130].
[45] *Haneef v MIAC* (2007) 161 FCR 40 at [254].
[46] *Roach v MIBP* [2016] FCA 750 (Perry J, 24 June 2016), at [70].
[47] s 501(6)(c.)
[48] *Irving v MILGEA* (1996) 68 FCR 422 at 427-428.
[49] *Irving v MILGEA* (1996) 68 FCR 422 at 425.
[50] *MIMIA v Godley* (2005) 141 FCR 552 at [34], citing with approval *Godley v MIMIA* [2004] FCA 774 (Lee J, 18 June 2004) at [51].
[51] *MIEA v Baker* (1997) 73 FCR 187, at 197.

(or cancel their visa). The standard is not fixed but elastic, in the sense that identified deficiencies in the moral qualities of an applicant for a short-term visa may not justify a conclusion that a person is 'not of good character' within s 501(2), while similar deficiencies may suffice to justify that conclusion, where the person seeks long-term entry (or stay).[52]

It is for the administrative decision-maker to arrive at a decision whether a person is of good character. An applicant must satisfy the Minister in relation to factual matters relevant to that determination, but the Minister must make a supervening determination, having had regard to those matters of past and present conduct, that a person is of bad character before the visa can be refused or cancelled. The consideration of past and present conduct provides indicia as to the presence or absence of good character but does not in itself answer the question. The decision-maker must look at the totality of the circumstances and determine whether the person is distinguishable from others as a person not of good character.[53] Once the decision has been made, it matters not that another decision-maker may have concluded differently. The decision will stand unless an error of law is established, e.g. that the decision was such that no reasonable decision-maker could have arrived at it.[54]

Criminal conduct

The concepts of criminal and general conduct are not mutually exclusive.[55]

'Past criminal conduct' does not refer only to conduct the subject of criminal conviction.[56] In the absence of a prosecution and conviction, however, satisfaction that criminal conduct has occurred will not be attained on slight material.[57] In determining whether a person's conduct has been criminal, the weight to be attached to evidence such as police intelligence reports will be a matter for the Tribunal.[58]

It is necessary when finding that a person is not of good character due to their criminal conduct to:[59]

- examine the conduct and assess it 'as to its degree of moral culpability or turpitude'
- examine past and present criminal conduct sufficient to establish that a person at the time of decision is not then of good character
- if there is no recent criminal conduct, give due weight to that fact before concluding that the person is not of 'good character'. A person of ill repute due to past criminal conduct may nonetheless reform into a person of good character.[60] It could be error not to take an absence of evidence of 'present criminal conduct' into account, and to ask instead whether there has been an affirmative demonstration of facts occurring since the relevant conduct sufficient to displace the conclusion, otherwise compelled by past conduct, that a person is not of good character.[61]

General conduct

The Act and regulations are not concerned with infractions or patterns of conduct that show weakness or blemishes in character but with ensuring that the exercise of a sovereign power to prevent a non-citizen entering Australia is only invoked when the non-citizen is a person whose lack of good character is such that

[52] *Goldie v MIMA* [1999] FCA 1277 (Spender, Drummond, Mansfield JJ, 14 September 1999) at [8].
[53] *MIMIA v Godley* (2005) 141 FCR 552 at [34], citing with approval *Godley v MIMIA* [2004] FCA 774 (Lee J, 18 June 2004) at [52],
[54] *Irving v MILGEA* (1996) 68 FCR 422, at 428.
[55] *Wong v MIMIA* [2002] FCAFC 440 (Black CJ, Hill and Hely JJ, 20 December 2002) at [33].
[56] *MIEA v Baker* (1997) 73 FCR 187, at 194.
[57] *MIEA v Baker* (1997) 73 FCR 187, at 194.
[58] See *Brown v MIAC* (2010) 183 FCR 113 at [128].
[59] *Godley v MIMIA* [2004] FCA 774 (Lee J, 18 June 2004) at [55].
[60] *Irving v MILGEA* (1996) 68 FCR 422 at 431-432.

it is for the public good to refuse entry.[62] The absence of harm to the Australian community from the issue of a visa is relevant to the meaning of good character.[63]

Conduct other than prevalent or usual conduct may be regarded as 'general conduct'. Just as a person's criminal conduct on a few occasions may be very revealing of character, so also some instances of general conduct, displayed but once or twice, may lay character bare very tellingly.[64]

It is not necessary that in every circumstance there must be past general bad conduct and present bad conduct. Past bad conduct may, in certain circumstances, outweigh recent general good conduct so as to compel or favour a conclusion that the person continues to lack moral worth.[65]

A deportation order is a matter that may be taken into account[66], although such orders do not of themselves throw much light upon the inherent qualities which a person may have.[67]

Risk in regard to future conduct

This section requires an evaluative judgment by the decision-maker as to whether they are satisfied that there is a risk that a person would engage in conduct of the kinds specified. Then, if the decision-maker is so satisfied, they have a discretion to refuse or cancel a visa, or revoke a visa cancellation.[68]

A conditional finding positing that there is a risk that a person would engage in certain conduct should a second circumstance (e.g. drinking to excess) occur is not necessarily disqualified from serving as a finding of risk. However, it has been said that as a matter of logic, such a conditional conclusion can only do so if there are express, or implied, findings (a) that there is sufficient probability that the second event will happen; and (b) that that there is sufficient probability that the happening of the second event was triggered by the first.[69]

Abstract propensity reasoning (i.e. that a person who has offended once will have a propensity to reoffend) may not be permissible reasoning to reach a conclusion regarding the jurisdictional fact of whether someone passes the character test because of the risk of future conduct.[70] Direction No. 79 says that it is not enough that the person has committed relevant conduct in the past, there must be a risk that they would engage in such conduct in the future.[71]

According to the Direction, the level of risk requires that there is more than a minimal or remote chance that the person, if allowed to enter or to remain in Australia, would engage in the relevant conduct.[72]

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[61] *Mujedenovski v MIAC* [2009] FCAFC 149 (Ryan, Mansfield and Tracey JJ, 23 October 2009) at [48].
[62] *Irving v MILGEA* (1996) 68 FCR 422, at 432.
[63] *Irving v MILGEA* (1996) 68 FCR 422, at 433.
[64] *MIEA v Baker* (1997) 73 FCR 187, at 195.
[65] *Mujedenovski v MIAC* [2009] FCAFC 149 (Ryan, Mansfield and Tracey JJ, 23 October 2009) at [47].
[66] *MIEA v Baker* (1997) 73 FCR 187, at 196.
[67] *Irving v MILGEA* (1996) 68 FCR 422, at 425-6.
[68] See *Sabharwal v MIBP* [2018] FCAFC 160 (Perram, Murphy, Lee JJ, 21 September 2018) at [2]. The Court considered s.501(1), but the reasoning also applies to s.501(2) and s.501(3A).
[69] See *Sabharwal v MIBP* [2018] FCA 10 (Kerr J, 22 January 2018), at [106]. The judgment was overturned on appeal in *MIBP v Sabharwal* [2018] FCAFC 160 (Perram, Murphy, Lee JJ, 21 September 2018), at [59]-[65] because the Full Federal Court did not agree that the Minister's finding was conditional upon the probability of the applicant again drinking to excess. In these circumstances, the Full Court did not consider whether it was error to make a conditional finding without making the relevant findings on the 'triggering event'.
[70] See *Sabharwal v MIBP* [2018] FCA 10 (Kerr J, 22 January 2018), at [106]-[112]. Kerr J distinguished the use of such reasoning in determining whether a person passes the character test, from cases such as *Muggeridge v MIBP* (2017) FCR 255 81, where it would not be inconsistent with the exercise of the discretion to cancel a visa if the Minister was to address the question of the likelihood of reoffending in this way, *after* the ground (in that case a 'substantial criminal record') had been made out.
[71] Direction No. 79, Annex A, Section 2, cl 6.(3), pp.28-9.
[72] Direction No. 79, Annex A, Section 2, cl 6.(2).

Other grounds

The other character grounds in s 501(6) – immigration detention offences, sexually based offences involving a child, crimes under International Humanitarian Law, national security risk, and certain Interpol notices – have not had as much judicial consideration as those discussed above.

Minister's Directions and Discretion

The discretions under ss 501 and 501CA are unfettered in their terms. Nevertheless, the law imposes certain limits on the exercise of the discretions. Decision-makers may not act arbitrarily, capriciously or legally unreasonably. The subject matter, scope and purpose of the Act may also require that certain considerations be taken into account.[73] The Minister also has the ability to provide some guidance and framework to the exercise of these discretions by way of Directions issued under s 499 of the Act.

Directions and how they should be applied

The Minister may give written directions to a person or body exercising powers under the Act if those directions are about the performance of those functions or the exercise of those powers.[74] The Minister has issued such a direction for people or bodies exercising powers under ss 501 and 501CA.[75]

The purpose of the Direction is to *guide* decision-makers exercising powers under the Act. Delegates and the Tribunal must generally follow the Minister's Direction. Non-compliance with a s 499 Ministerial Direction can constitute jurisdictional error.[76] Compliance with the Direction does not involve dictating the way in which the discretion is to be exercised; rather it creates a framework within which the discretion vested in the decision-maker is lawfully to be exercised. It identifies certain principles which provide a framework within which decision-makers should approach their task.[77] It prescribes relevant considerations which must be taken into account, but provides guidance only as to the manner in which they are to be balanced. It equips decision-makers with a width of discretion that enables them to take into account the myriad of different circumstances and different combinations of circumstances that may arise and thereby to reach a result that is fair and rational in all the circumstances, while ensuring that account is had to crucial considerations.[78]

Direction No. 79

Direction No. 79 does not determine rules of general application but gives directions to the Tribunal as to the policy it must apply in the exercise of the discretion conferred on it by s 43 of the AAT Act in exercising the power conferred by ss 501 and 501CA of the *Migration Act*. The Direction does not derogate from the Tribunal's duty to reach the preferable decision in the particular case before it. Indeed, the Direction has that end as its purpose.[79]

[73] *NBMZ v MIBP* (2014) 220 FCR 1, at [6]. The Court was discussing s 501(1), but the reasoning also applies to s 501(2) and s 501(3A). These types of considerations are discussed further below.
[74] s 499, *Migration Act 1958*.
[75] Direction No. 79 is the direction currently in force.
[76] See *Williams v MIBP* (2014) 226 FCR 112 at [34]-[35]. In *YNQY v MIBP* [2017] FCA 1466 (Mortimer J, 7 December 2017), the Court distinguished such non-compliance from failure to take into account a relevant consideration, assuming (but not deciding) that s 499 Directions are capable of imposing on decision-makers the kind of mandatory obligations it purports to do: at [35]-[40].
[77] *MIBP v Lesianawai* (2014) 227 FCR 562, at [80]-[81].
[78] *MIBP v Lesianawai* (2014) 227 FCR 562, at [83]. The Court was discussing Direction No. 55, but the reasoning applies equally to Direction No. 79.
[79] *Uelese v MIBP* [2016] FCA 348 (Robertson J, 12 April 2016) at [50].

Direction No. 79 revoked Direction No. 65 and commenced on 28 February 2019.[80] It is substantially the same as Direction No. 65, except with regards to the consideration of violence against women and children and in the assessment of risk and consideration of the best interests of children for non-revocation decisions.[81] Where judgments and Tribunal decisions discussed in this commentary have considered Direction No. 65 or previous Directions, the reasoning applies equally to Direction No. 79, unless indicated otherwise.

Section 1 of the Direction includes a preamble which contains statements about its objectives, general guidance and principles.

Section 2, titled 'Exercising the discretion', says that decision-makers must take into account the mandatory considerations in Parts A, B, and C of the Direction where they are relevant, and in doing so they are to be informed by the principles.[82]

Section 2 identifies primary and other considerations for each of the three types of decision - visa refusal, visa cancellation and non-revocation of mandatory visa cancellation. The primary considerations are the same for all.[83] The other considerations are generally the same for the three types of decision. The exceptions are that the strength, nature and duration of ties and extent of impediments if removed are stated considerations for cancellations and revocations,[84] but not for visa refusals. Impact on family members is an express consideration for visa refusals, but not for cancellations and non-revocations.[85]

While a decision-maker is bound to take into account certain considerations, they are not limited to those set out in the Direction. The Direction specifies the relative, but not the actual, weight to be given to those considerations. To that extent, it imposes requirements on the exercise of the Tribunal's discretion, but the Tribunal is obliged to examine the merits of the case and decide for itself whether to affirm the decision.[86]

The weight to be given to any particular matter is a matter for the decision-maker and cannot be the subject of some ritualistic formula.[87] Phrases such as 'should generally be given greater weight than the other considerations' and 'one or more primary considerations may outweigh other primary considerations' have been interpreted as provisions that are intended to provide guidance to the decision maker as to how the balancing exercise required by the Direction should be approached, while leaving it open to the decision-maker to adopt a different approach in the exercise of discretion in the individual case.[88] It is not the content of the Direction which determines the outcome of the exercise of the discretion, but rather its application by a decision-maker to the evidence and material in an individual case.[89]

As well as the considerations identified in the Direction, the Tribunal must have regard to all relevant considerations, both in determining the ground and exercising the discretion.[90] For more information, see Other considerations not set out in Direction No. 79. Where the Direction purports to interpret a statutory

[80] Direction No. 79, Section 1, p.1.
[81] Clauses 6.3(3), 9.1.1, 11.1.1, 13.1.1, 13.1.2, and 13.2(1) differ from provisions in Direction No.65. The overall effect is that decision-makers no longer need to have regard to the sentence imposed, in considering the nature and seriousness of crimes of a violent nature against women and children, that they no longer need to have regard to the principle that the community's tolerance for any risk of harm becomes lower as the seriousness of potential harm increases, in considering whether someone represents an unacceptable risk for non-revocation decisions, and they must make a determination about whether revocation 'is in the best interests of the child' instead of about whether it 'is, or is not, in the best interests of the child'.
[82] Direction No. 79, Clauses 7 and 8.
[83] Direction No. 79, Section 2, Part A, 9, p.5; Section 2, Part B, 11, p.11; Section 2, Part C, 13, p.16.
[84] Direction No. 79, Section 2, Part A, 10, p.8; Section 2, Part C, 14, p.19.
[85] Direction No. 79, Section 2, Part B, 12, p.14.
[86] See *MIBP v Lesianawai* (2014) 227 FCR 562, at [21].
[87] *Howells v MIMIA* (2004) 139 FCR 580, at [127].
[88] *MIBP v Lesianawai* (2014) 227 FCR 562 at [83].
[89] *Jagroop v MIBP* (2016) 241 FCR 461 at [78].
[90] *Craig v South Australia* (1995) 184 CLR 163, at 179, *MIAC v Li* (2013) 249 CLR 332 at [10], [26], [71], [72], [110], *MIMA v Yusuf* (2001) 206 CLR 323 at [82].

term or describe a legal requirement, a decision-maker may only apply it where the interpretation or requirement is consistent with the legislation and judicial authority.[91]

Discretion - Weighing up relevant considerations

As well as setting out relevant considerations, Direction No. 79 gives guidance on how they should be weighed and applied in the exercise of the discretion. Direction No. 79 says that in taking the relevant considerations into account both primary and other considerations may weigh in favour of, or against, refusal, cancellation, or non-revocation; that primary considerations should generally be given greater weight than other considerations; and that one or more primary considerations may outweigh other primary considerations.[92]

It makes clear that an evaluation is required in each case as to the weight to be given to the 'other considerations' (including non-refoulement obligations). It requires both primary and other considerations to be given 'appropriate weight'. Direction No. 79 does provide that, generally, primary considerations should be given greater weight. They are primary in the sense that, absent some factor that takes the case out of that which pertains 'generally', they are to be given greater weight. However, Direction No. 79 does not require that the other considerations be treated as secondary in all cases, nor does it provide that primary considerations are 'normally' given greater weight. Rather, it concerns the appropriate weight to be given to both 'primary' and 'other considerations'. In effect, it requires an inquiry as to whether one or more of the other considerations should be treated as being a primary consideration or the consideration to be afforded greatest weight in the particular circumstances of the case because it is outside the circumstances that generally apply.[93]

In weighing up a consideration, the Tribunal must make a conclusion on it and, having done so, put its conclusion on that issue on the scales in the manner provided for by the Direction.[94]

When applying the discretion the Tribunal must genuinely weigh factors leading to opposite conclusions and not artificially limit the weight to be given to any of the factors.[95]

The discussion of any mitigating factors advanced by the applicant must relate the factors to a person's overall conduct, not just to the most serious parts of it.[96]

Demonstrating consideration

Courts will generally treat the written statement of reasons as a statement of the matters that a decision-maker "adverted to, considered and [took] into account", unless there is probative evidence to the contrary; and if something is not mentioned, it may be inferred that it has not been adverted to, considered or taken into account.[97]

The failure to give any weight to a factor to which a decision-maker is bound to have regard in circumstances where that factor is of great importance in the particular case may support an inference that the decision-

[91] See e.g. *Port of Brisbane Corporation v DCT* (2004) 140 FCR 375 and *MIAC v Anochie* (2012) 209 FCR 497 at [36]. More generally, see Legal Services commentary Application of Policy.
[92] Direction No. 79, Section 2, 8(3)-(5), p.5.
[93] *Suleiman v MIBP* [2018] FCA 594 (Colvin J, 2 May 2018) at [23].
[94] *Rokobatini v MIMA* 90 FCR 583 at [23]. The issue in that case was the hardship to the applicant if removed.
[95] *Hong v MIMA* [1999] FCA 1567 (Madgwick J, 10 November 1999) at [20].
[96] *Green v MIAC* [2008] FCA 125 (Tamberlin J, 20 February 2008) at [22]-[28].
[97] *NBMZ v MIBP* (2014) 220 FCR 1 at [16], citing s 25D of the *Acts Interpretation Act 1901* (Cth.), s 501G of the Migration Act, *MIMIA v Yusuf* (2001) 206 CLR 323 at [5], [37], [69], [89] and [133]. This judgment considered a decision made by the Minister personally, but the principle is drawn from authorities applying to administrative decision-makers generally.

maker did not have regard to that factor at all.[98] Similarly, a decision-maker does not take into account a consideration that he or she must take into account if he or she simply dismisses it as irrelevant. On the other hand, it does not follow that a decision-maker who genuinely considers a factor only to dismiss it as having no application or significance in the circumstances of the particular case will have committed an error. A decision-maker is entitled to be brief in their consideration of a matter which has little or no practical relevance to the circumstances of a particular case. A court would not necessarily infer from the failure of a decision-maker to expressly refer to such a matter in its reasons for decision that the matter had been overlooked. But if it is apparent that the particular matter has been given cursory consideration only so that it may simply be cast aside, despite its apparent relevance, then it may be inferred that the matter has not in fact been taken into account in arriving at the relevant decision. Whether that inference should be drawn will depend on the circumstances of the particular case.[99]

A decision-maker is not required to make a finding of fact with respect to every claim made or raised by an applicant. A finding of fact may not be required if a claim or issue is irrelevant or if it is subsumed within a claim or issue of greater generality.[100] Nor is a failure to mention every element in the process of reasoning that led to a conclusion necessarily an indication that it failed to take some matter into account.[101]

On judicial review, a Court will assess whether the decision-maker has as a matter of substance had regard to the representations put. The fact that a decision-maker says they have had regard to a representation does not by itself establish that they have, as a matter of substance, had that regard. Neither does the Court ignore such a statement.[102]

Primary considerations

(A) Protection of the Australian community

Direction No. 79 says that when considering protection of the Australian community, decision-makers should have regard to the principle that the Government is committed to protecting the Australian community from harm as a result of criminal activity *or* other serious conduct by non-citizens.[103] It adds that there is a low tolerance for visa applicants who have previously engaged in criminal or other serious conduct,[104] and that remaining in Australia is a privilege conferred in the expectation that non-citizens are and have been law-abiding, will respect important institutions, and will not cause or threaten harm to individuals or the Australian community.[105] These principles appear to reinforce one of the principles set out in the Preamble, the low tolerance of such conduct by visa applicants or those holding a limited stay visa, reflecting that there should be no expectation that such people should be allowed to come to, or remain permanently in, Australia.[106]

In addressing this consideration, decision-makers should give consideration to the nature and seriousness of the non-citizen's conduct to date, and the risk to the Australian community should the non-citizen commit

[98] *MIAC v Khadgi* (2010) 190 FCR 248 at [58]. That judgment concerned prescribed circumstances in r 2.41 to be taken into account in cancelling a visa for incorrect information under s 109, but the principle applies to administrative decisions generally.
[99] *MIAC v Khadgi* (2010) 190 FCR 248 at [59]. That judgment concerned prescribed circumstances in r 2.41 to be taken into account in cancelling a visa for incorrect information under s 109, but the principles apply to administrative decisions generally. See also *MIBP v Maioha* [2018] FCAFC 216 (Rares, Flick, Robertson JJ) at [41] and [45].
[100] *MIBP v Maioha* [2018] FCAFC 216 (Rares, Flick, Robertson JJ) at [41].In that judgment, the Court noted that in *MHA v Buadromo* [2018] FCAFC 151 (Besanko, Barker and Bromwich JJ, 14 September 2018), the Full Court said at [58]-[60] that although the decision-maker did not make an express finding that Mr Buadromo would or would not find it impossible to obtain work in Fiji, they addressed whether he was likely to find employment in Fiji or sufficient employment to provide for his family. The decision-maker was not required to make a precise finding about his prospects of finding employment. The decision-maker addressed the issue, finding that Mr Buadromo had work skills which might help him gain employment and expressly found that his children would suffer hardship.
[101] *Goldie v MIMA* (2001) 111 FCR 378 at
[102] *MIBP v Maioha* [2018] FCAFC 216 (Rares, Flick, Robertson JJ) at [45]
[103] Direction No. 79, cll.9.1(1), 11.1(1), 13.1(1).
[104] Direction No. 79, cl 11.1(1)
[105] Direction No. 79, cll 9.1(1), 13.1(1).
[106] Direction No. 79, cl 6.3(6).

further offences or engage in other serious conduct.[107] It has been said that these considerations help a decision-maker to gauge how low the community's level of tolerance towards non-citizens who have engaged in criminal or serious conduct would be in the particular circumstances of a case.[108] The Direction goes on to explain and provide guidance about the concepts of the nature and seriousness of conduct and the risk to the community, including matters to which decision-makers must, or should, have regard in coming to a view on the primary consideration of protection of the Australian community. Decision-makers should, however, be careful not to inadvertently elevate any of these matters into primary considerations.[109]

While the Direction provides guidance on what conduct or offences are considered serious and how risk should be assessed, a decision-maker has no duty to evaluate the risk of harm to the community 'in any particular way or to ascribe any particular characterisation to the quality of the risk' or conduct.[110] While statements about types of conduct considered serious point to the likelihood that 'serious crime' includes violent and sexual crimes, particularly against women or children or vulnerable members of the community, they ought not be regarded as the sole, or even necessarily determinative, source of information relevant to the characterisation.[111] The Direction also requires decision-makers to consider other types of evidence, such as the sentence imposed, which can serve as a guide to the objective seriousness of conduct.[112] There is no statutory constraint on the way that the decision-maker assesses risk or characterises conduct, save that whatever they take into account must be logical and rational.[113]

Evaluation of whether a risk of harm is 'unacceptable' does not discharge the function of the decision-maker,[114] it must go on to consider whether other considerations outweigh that risk. It is not possible to say that the required evaluation is subsumed in a conclusion about whether a perceived risk of future harm is unacceptable.[115]

Likelihood of engaging in further criminal or other serious conduct

To say that the statute implicitly recognises that all persons who have previously committed an offence are more likely to offend in the future is to state the implication too highly. The fact of prior offending will, in most if not all cases, invite consideration of the question of whether the person in question in fact presents some risk to the Australian community and the starting point in that consideration will invariably be the fact of the prior offending. But that is all. The statute does not, of itself, supply an answer to the factual question of whether a particular visa holder has a propensity, however slight, to re-offend. The decision-maker is not required to evaluate the risk of a person re-offending in any particular way, but if they do in fact embark upon an evaluation of a person's prospects of re-offending in a way that is acutely fact dependent (e.g. that someone is likely to re-offend if they join a motorcycle club or drink alcohol), there needs to be an evident rational connection between the conclusion and the particular materials relied on.[116] The bare recital of convictions and sentences in and of themselves, without examination of mitigating circumstances or the

[107] Direction No. 79, cll 9.1(2), 11.1, 13.1(2).
[108] See *LCNB and MIBP* [2015] AATA 463 (Frost DP, 30 June 2015) at [38].
[109] See *LCNB and MIBP* [2015] AATA 463 (Frost DP, 30 June 2015) at [43].
[110] *Brown v MIAC* (2010) 183 FCR 113, at [41]
[111] See *DND v MHA* [2018] AATA 2716 (Taylor SM, 9 August 2018), at [26]-[27]. The decision considered this consideration as described in part C of Direction No. 65, dealing with revocation requests. This consideration is explained in substantially similar terms in Parts A and B, which deal with cancellation and refusals, and part C, of Direction No. 79.
[112] See *NBMZ v MIBP* (2014) 220 FCR 1 at [202].
[113] *BSJ16 v MIBP* [2016] FCA 1181 (Moshinsky J, 6 October 2016) at [68].
[114] *MIBP v Lesianawai* (2014) 227 FCR 562, at [31].
[115] *MIBP v Lesianawai* (2014) 227 FCR 562, at [39]. This judgment considered Minister's Direction No. 55, which directed decision-makers to take into account the primary considerations *and* determine whether the risk of future harm was unacceptable in cl 7, 'How to exercise the discretion'. The second step, determining unacceptable risk of harm, does not appear in cl 7 of Direction No. 79, but the concept of unacceptable risk remains, e.g. in cl 9.1.2, as an element of the primary consideration 'Protection of the Australian community'.
[116] *Muggeridge v MIBP* (2017) 255 FCR 81, at [46]-[47], and [54]-[56]. The Court could not reconcile the exercise of the discretion with the Minister's express findings concerning the applicant's demonstrated rehabilitation, his serious physical debilitation and the absence of evidence that he had had any connections with like motorcycle clubs for more than two decades.

circumstances leading to each conviction, may not be sufficient to rationally support a finding that there is an unacceptable risk of harm.[117]

'Offending' does not include acts committed at a time when a person could not, by law, be attributed with criminal responsibility.[118] This does not mean that the Tribunal cannot take into account evidence about a person's conduct as a child. However, the evidence of that conduct must have some relevance to an issue that properly arises in the course of the Tribunal's decision-making and there must be some logical connection with the inferences or conclusions that the Tribunal then draws from that evidence.[119]

The Tribunal may examine the circumstances surrounding the commission of the relevant offence or matters relating to the trial itself for the purpose of enabling the Tribunal to make its own assessment of the nature and gravity of the applicant's criminal conduct,[120] and its significance so far as the risk of recidivism is concerned.[121]

Serious Conduct

'Serious conduct' is not defined in the Act or Regulations, but is defined in Appendix B of Direction No. 79:

> *Behaviour or conduct of concern where a conviction may not have been recorded, or where the conduct may not, strictly speaking, have constituted a criminal offence.*
>
> *Such conduct may include, for example, involvement in activities indicating contempt or disregard for the law or human rights, or a history of serious breaches of immigration law. It also includes conduct which may be considered under s501(6)(c) and/or s501(6)(d).*[122]

Further, for cancellations and refusals, any conduct that forms the basis for a finding that a non-citizen does not pass a subjective limb of the character test is considered to be serious.[123]

If a person's 'serious conduct', for which a conviction has not been recorded, is relevant to the risk of a person reoffending and the risk they pose to the Australian community, a person may need to be put on notice of that issue. Giving a person their record of criminal convictions may not be sufficient.[124]

B) The best interests of minor children in Australia

The best interests of minor children in Australia form the second of the primary considerations outlined in the Direction.

Direction No. 79 says that decision-makers must make a determination about whether cancellation/refusal/ revocation is, or is not, in the best interests of the child.[125] It is not enough merely to have regard to those interests.[126] It has been held that, at least where the decision-maker has relevant information or evidence, the balancing and weighing exercise cannot be undertaken in relation to the best interests of the child

[117] *Splendido v AMIBP (No 2)* [2018] FCA 1158 (Steward J, 8 August 2018) at [32].
[118] *CVN17 v MIBP* [2019] FCA 13 (Kenny J, 16 January 2019) at [99]. The Court said that evidence of the applicant's conduct at nine years of age was incapable of providing a logical basis for the Tribunal's statement that the applicant's 'history of offending' began at this young age.
[119] *CVN17 v MIBP* [2019] FCA 13 (Kenny, 16 January 2019) at [99].
[120] *MIEA v Daniele* (1981) 61 FLR 354 at 358
[121] *MIMA v Ali* (2000) 106 FCR 313, at [45].
[122] Direction No. 79, Appendix B, pp.32-33..
[123] Direction No. 79, cll.9.1.1(1)(d), 11.1.1(1)(d),
[124] See *Stowers v MIBP* [2018] FCAFC 174 (Flick, Griffiths and Derrington JJ, 12 October 2018) at [54].
[125] Direction No. 79, cll 9.2(1), 11.2(1), 13.2(1).
[126] *Spruill v MIAC* [2012] FCA 1401 (Robertson J, 10 December 2012) at [18].

consideration (where it is relevant) unless this determination has first been made.[127] A determination *about* whether a decision is or is not in the best interests of a child includes a finding that the decision is a neutral factor so far as the child's best interests are concerned, or that the evidence before it is insufficient to show whether or not it is in a child's best interests.[128]

The approach to this determination is to:

- identify what are the best interests of the child or children with respect to the exercise of the discretion, and

- assess whether the strength of any other considerations, or the cumulative effect of other considerations, outweigh the consideration of the best interests of the child or children understood as a primary consideration.[129]

Provided that the Tribunal does not treat any other consideration as inherently more significant than the child's best interests, it is entitled to conclude, after a proper consideration of the evidence and other material before it, that the strength of other considerations outweigh the best interests of the children.[130]

(C) Expectations of the Australian community

Expectations of the Australian community form the third primary consideration in the Direction. This consideration provides:[131]

> *The Australian community expects non-citizens to obey Australian laws while in Australia. Where a non-citizen has breached, or where there is an unacceptable risk that they will breach this trust or where the non-citizen has been convicted of offences in Australia or elsewhere, it may be appropriate to [cancel the visa held by/refuse the visa application of/not revoke the mandatory visa cancellation of] such a person. [Visa cancellation/visa refusal/non-revocation] may be appropriate simply because the nature of the character concerns or offences are such that the Australian community would expect that the person should not [continue to hold/be granted/hold] a visa. Decision-makers should have due regard to the Government's views in this respect.*

The decision maker is also to be informed by the principle that 'The Australian community expects that the Australian Government can and should refuse entry to non-citizens, or cancel their visas, if they commit serious crimes in Australia or elsewhere'.[132]

Accordingly, the Direction expressly states that the Australian community expects two things: first, that the Government should refuse or cancel visas of persons who commit serious crimes in Australia;[133] and second, that non-citizens will obey the law in Australia.[134] While the Direction also refers to other expectations, privileges, values and standards, none of these are described as expectations of the Australian community.

This consideration does not deal with any objective or ascertainable expectations of the Australian community; rather, it is a kind of deeming provision by the Minister about how the Government wishes to

[127] *Paerau v MIBP Protection* (2014) 219 FCR 504, per Barker J at [52]-[54]. See also Buchanan J at [27]: 'there could be no objection to the AAT concluding that the best interests of the child did not weigh either for or against the cancellation of a visa, so long as the available material was assessed conscientiously.'
[128] *Nigam v MIBP* (2017) 254 FCR 295 at [43], *CVN17 v MIBP* [2019] FCA 13 (Kenny J, 16 January 2019) at [47].
[129] *Wan v MIMA* [2001] 107 FCR 133 at [32]..
[130] *Wan v MIMA* [2001] 107 FCR 133 at [32].
[131] Direction No. 79, cll 9.3 (Part A, for visa cancellation under s 501), 11.3 (Part B, for visa refusal under s 501) and 13.3 (Part C, for revocation under s 501CA of mandatory visa cancellation).
[132] Direction No. 79, cll 6.3(2) and 7.1.
[133] Direction No. 79, cl 6.3(2).
[134] Direction No. 79, cll 9.3, 11.3 and 13.3.

articulate community expectations, whether or not there is any objective basis for that belief. [135] Given the difficulties in obtaining evidence about and assessing community expectations (or standards or values),[136] inquiries about what is meant about community expectations are unnecessary – the Direction sets out the Government's view of what the community expects, and it does not require decision-makers to have regard to any expectations of the community not stated in the Direction. Indeed, the deeming nature of the consideration may mean that doing so could create a risk of error on the basis of a misapplication of the Direction, taking into account an irrelevant consideration, or making findings based on no evidence.[137] References to the AAT's own opinion or belief are best avoided because of the risk of it leading to error.[138] Considerations such as expectations of a 'fair go' or sympathy arising out of the length of time in the community, compassionate or mitigating circumstances, prospects for rehabilitation, and community standards and values, could be dealt with either under considerations in the Direction expressly referring to these matters or under 'other considerations', which are non-exhaustive.[139]

It is also clear from the authorities that where a person has committed serious crimes, the deeming effect is that it weighs adversely for the applicant (i.e. in favour of cancelling or refusing the visa, or against revoking a cancellation). The Direction describes the following as serious crimes, which would be relevant in determining the application of this consideration: violent and or sexual crimes, crimes against vulnerable members of the community (such as minors, the elderly or disabled), and certain offences relating to immigration detention.[140]

The application of this consideration in cases not involving serious crimes is less clear. Where a non-citizen has not obeyed Australian laws while in Australia, that person has not met the community's expectations, but unlike the expectation in relation to serious crimes (that the person should not hold a visa), the Direction does not tie any consequence to a breach of that expectation. Additionally, while the Direction states that the nature of some character concerns or offences are such that the Australian community would expect that the relevant person should not hold a visa, it does not indicate what kinds of concerns or offences these are, beyond saying that if a person has committed a serious crime, the community expects that they should not hold a visa. While the principles do refer to a 'low tolerance of any criminal or other serious conduct[141] by visa applicants or those holding a limited stay visa, reflecting that there should be no expectation that such people should be allowed to come to, or remain permanently in, Australia,'[142] on a plain reading, what is referred to here is not a deemed expectation of the Australian community, but the absence of an expectation. In sum, where there are character concerns which are not serious crimes, the Direction does not appear to go so far as to articulate an expectation by the community that a visa be cancelled or refused.

[135] *Uelese v MIBP* (2016) 248 FCR 296 at [23]

[136] See e.g. *Visa Cancellation Applicant and MIAC* [2011] AATA 690 (Downes J and McCabe SM, 6 October 2011) at [73]-[83]. That case was more about the role of community standards and values in discretionary administrative decision-making, as the Direction in force at that time (Direction no. 41), did not require decision-makers to consider community expectations. The Minister's submissions in *Uelese* at [43] referred to paragraph [77] of *Visa Cancellation Applicant and MIAC*, which in turn refers to a lecture by Sir Anthony Mason stating that it 'scarcely seems sensible' to require proof of public opinion by evidence. See also *LCNB and Minister for Immigration and Border Protection* [2015] AATA 463 (Frost DP, 30 June 2015) at [80].

[137] See *Uelese v MIBP* (2016) 248 FCR 296 at [23], [64]-[66], *YNQY v MIBP* [2017] FCA 1466 (Mortimer J, 7 December 2017) at [76]-[77], and *Afu v MHA* [2018] FCA 1311 (Bromwich J, 29 August 2018) at [85].

[138] See *Ali v MHA* [2018] FCA 1895 (Bromwich J, 30 November 2018) at [38].

[139] Each of clauses 10(1), 12(1) and 14(1) lists 5 categories of 'other considerations' to be taken into account where relevant, but notes that the other considerations are not limited to those categories. Expectations around compliance with international non-refoulement obligations, ties to Australia and other matters specifically referred to could be addressed under those expressly stated considerations in the Direction.

[140] Direction No. 79, cll 9.1.1(1)(a), (c) and (d); 11.1.1(1)(a), (c) and (d); and 13.1.1(1)(a), c) and (i).

[141] Annex B of Direction No. 79, titled 'Interpretation', defines 'serious conduct' as 'behaviour or conduct of concern where a conviction may not have been recorded, or where the conduct may not, strictly speaking, have constituted a criminal offence. Such conduct may include, for example, involvement in activities indicating contempt or disregard for the law or human rights, or a history of serious breaches of immigration law. It also includes conduct which may be considered under s 501(6)(c) [past and present criminal and general conduct] and/or s 501(6)(d) [harassment/vilification/inciting discord]'. The Direction , in the context of the primary consideration of protection to the community, also provides the principle that any conduct that forms the basis for a finding that a non-citizen does not pass a subjective limb of the character test under s 501(6)(c) is serious, for refusals and cancellations under s 501: cll 9.1.1(1)(e) and 11.1.1(1)(e).

[142] Direction No. 79, cl 6.3(6).

Accordingly, this consideration is more likely to be neutral in the absence of a serious crime, but in most cases it is unlikely to be favourable to the applicant.[143]

Whatever assessment is made of this consideration (whether adverse or neutral), it is not necessarily fatal as it needs to be weighed alongside findings on other considerations in making the correct or preferable decision on review.

Other considerations

Other considerations which must be taken into account where relevant include international non-refoulement obligations (for former visa holders and applicants), and the extent of impediments if removed (for former visa holders only).[144] Information suggesting that a former visa holder may face harm if removed could be relevant to both of these considerations. The level of detail necessary for these considerations will depend, among other things, on the likelihood of a person being removed and the level of generality or specificity of the information[145] suggesting harm. Generally speaking, less detailed consideration will suffice where a person is not at immediate risk of removal as a result of the particular power being exercised, or suggestions of harm are vague and general.

In addressing these considerations, decision-makers must properly understand and consider the legal consequences of the decision being made (in particular detention and removal). What the legal consequences are is a question of fact. To avoid error in this consideration, decision-makers must address and properly understand the direct and immediate consequences of their decision, as well as other (possibly less direct) consequences raised by an applicant.

Decision-makers must also consider the adverse impact of removal upon an applicant, including the impact of harm which does not engage Australia's non-refoulement obligations.[146]

In practice, consideration of the consequences of a decision, including detention and removal, international non-refoulement obligations, the risk of harm and other difficulties in a person's home country may need to be considered together, particularly where removal is a direct consequence of the decision.

International non-refoulement obligations

Direction No. 79 describes 'international non-refoulement obligations' as obligations not to forcibly return a person to a place where they will be at risk of harm from which persons are protected under international agreements such as the Refugees Convention, the Convention Against Torture, and the International Covenant on Civil and Political Rights.[147]

The Direction states that:

- Australia will not remove a person to a country in respect of which there is a non-refoulement obligation

[143] Clause 8(3) of Direction No. 79 states that both primary and other considerations may weigh in favour of, or against an applicant. The community expectations consideration could weigh in an applicant's favour, if for example, they have complied with Australian laws while in Australia, but are being considered for refusal on another basis (e.g. a non-serious crime committed overseas).
[144] Cll. 10, 12, 14. The other considerations are the impact on Australian business interests; the impact on victims; the impact on family members (visa applicants only) and the strength, nature and duration of ties (visa holders only). They are not discussed further in this commentary.
[145] See, e.g., *Ogbonna v MIBP* [2018] FCA 620 (Thawley J, 7 May 2018) at [62].
[146] See, e.g. *BCR16 v MIBP* (2017) 248 FCR 456.
[147] Direction No. 79, cll 10.1 (visa cancellations), 12.1 (visa refusals) and 14.1 (decisions about whether to revoke a visa cancellation). See also *BKS18 v MHA* [2018] FCA 1731 (Barker J, 13 November 2018) at [86].

- if the person could apply for another visa, then for the purposes of the decision it is unnecessary to decide whether non-refoulement obligations are owed

- if the decision relates to a protection visa, the person is generally barred from applying for a further protection visa, and in these circumstances the decision-maker should seek an assessment of international obligations and weigh any such obligation against the seriousness of the criminal offending, noting the person would face the prospect of indefinite detention.

The terms of the Direction and judicial authority suggest that the key question in this consideration is whether a decision is likely to result in a breach of Australia's international non-refoulement obligations. This enquiry involves two questions:

- Will the decision result in a person's removal to a country where they face a risk of harm?

- Does the person face a real risk of serious or significant harm if removed to their home country? If a person does not face such a risk, it may be unnecessary to address the likelihood of removal for this consideration.

Will the decision result in removal?

If a person is unlikely to be removed, it may not be strictly necessary to assess the risk of harm in a person's home country. Even if a person is owed non-refoulement obligations, those obligations will not be breached if the person is not removed. Accordingly, a key issue which arises when considering non-refoulement obligations is the extent to which a decision-maker can rely on the ability of the person to apply in Australia for a protection visa. Several judgments have suggested that removal is not generally considered to be a direct and immediate consequence of a decision, where a person has a right to apply for another visa in Australia.[148] However, in some circumstances the risk of harm must be assessed even where a person can apply for another visa.[149]

In *BCR16 v MIBP* (2017) 248 FCR 456, a Full Court of the Federal Court held in a judicial review of a personal Ministerial decision under s 501CA that a decision-maker may fall into error if they decline to consider the harm befalling an applicant if they are returned to their home country based on the mistaken assumption that non-refoulement obligations would necessarily be considered during the determination of a protection visa application, if one was made. At that time, nothing in the decision-making scheme required those obligations to be considered. The visa could be refused on character criteria which would mean that considerations of the risk of harm might never be reached.[150] On this reasoning, whether non-refoulement obligations were owed had to be determined in all cases, regardless of whether the person could subsequently apply for a protection visa.

Since the decision in *BCR16*, the Minister has made a further s 499 Direction requiring departmental delegates to assess protection claims before assessing character considerations in making decisions on protection visa applications.[151] A line of Federal Court judgments at first instance have held that this direction has addressed the misunderstanding as to the sequence in which claims would be considered which was

[148] See, e.g., *Ali v Minister for Immigration and Border Protection* [2018] FCA 650 (Flick J, 10 May 2018) at [34]; *Greene v AMHA* [2018] FCA 919 (Logan J, 31 May 2018) at [19], *Sowa v MHA* [2018] FCA 1999 (Griffiths J, 14 December 2018) at [19] – [27].
[149] *Omar v MHA* [2019] FCA 279 (Mortimer J, 7 March 2019).
[150] *BCR16 v MIBP* (2017) 248 FCR 456, at [68]. This concerned a non-revocation, but in *Steyn v MIBP* [2017] FCA 1131 (Jagot J, 25 September 2017) the court held that the same principles apply to the refusal and cancellation powers under s 501(1) and (2).
[151] Direction No. 75, Refusal of Protection Visas Relying on Section 36(1C) and Section 36(2C)(b), 6 September 2017, Part 2 of Direction No.75 Directions, para 1. See also *Applicant in WAD531/2016 v MIBP* [2018] FCAFC 213 (White, Moshinsky and Colvin JJ, 30 November 2018) at [99].

identified in *BCR16*.[152] These judgments have upheld decisions stating that it was unnecessary to determine whether the applicant was owed non-refoulement obligations as it was considered that the applicant was able to make a valid application for a protection (or other) visa. A decision on another visa application would be made at some point of time in the future, but the discretion for the particular character decision needs to be exercised by reference the facts and circumstances prevailing at the time that decision is made.[153]

These cases were distinguished, however, in *Omar v MHA* [2019] FCA 279, another Federal Court judgment at first instance.[154] In *Omar*, the Court did not consider those other judgments to be incompatible with its own conclusions. On the facts of the case before it, however, including the representations made to the Assistant Minister, which included submissions about the effect of continued detention on the applicant's mental health, and the prospect of spending considerable time in detention until any future application was decided, and of indefinite detention afterwards, the Assistant Minister was not authorised to simply carve out aspects of the representations made and particular reasons for revoking the cancellation, hive them off to any (as yet) non-existent protection visa application process, and decline to deal with them.[155]

In light of the line of cases following *Ali*, and the distinction drawn between those cases and *Omar*, the following principles appear to apply in cases where a person may make another visa application in Australia:

- It is permissible to have regard to the fact that a person may make another visa application in Australia in considering non-refoulement obligations for the exercise of the discretion in character decisions, but using a formulation such as "It is not necessary to determine whether the applicant is owed non-refoulement obligations" may be interpreted as a failure to undertake the required statutory task. Where it appears that a person may be owed non-refoulement obligations, and a likely consequence is removal, it appears necessary based on the reasoning in *Omar* to determine whether non-refoulement obligations are owed.[156]

- Where a person may be owed non-refoulement obligations or there is some other significant obstacle to a person's removal, the prospect of detention until a further visa application is decided will need to be considered at the time the discretion is exercised. It cannot be disposed of by reference to a decision to be made on a future visa application. Where there are no significant obstacles to a person returning to their home country, detention is not necessarily a consequence of an adverse decision.

If a decision-maker does rely on the ability of an applicant to apply for a further visa, they should not assume that other matters, such as the prospect of indefinite detention, will be considered in a separate visa decision to refuse or grant a visa. This is because there is no requirement to consider other matters in deciding a protection visa application if it is found that a person is not owed protection obligations.[157] Nor is there a requirement to consider other matters if a person does not satisfy the criteria in s 36(1C) or (2C) (ineligibility because of involvement in crimes/security risk). Direction No. 75 states that its purpose is to direct decision-makers to refuse protection visa applications using s 36(1C) or 36(2C)(b) rather than to refer the case for consideration under s 501.[158] A general discretion to consider other matters is enlivened, however, if refusal is considered under s 501 because a person does not meet the character test. Direction No. 75 says that if the decision-maker finds that s 36(1C) or (2C)(b) do not apply to an applicant, the decision-maker may

[152] *Ali v MIBP* [2018] FCA 650 (Flick J, 10 May 2018) at [34]; *Greene v AMHA* [2018] FCA 919 (Logan J, 31 May 2018) at [19], *Turay v AMHA* [2018] FCA 1487 (Farrell J, 3 October 2018) at [40]-[41]; *DOB18 v MHA* [2018] FCA 1523 (Griffiths J, 17 October 2018) at [35]**;** *Sowa v MHA* [2018] FCA 1999 (Griffiths J, 14 December 2018) at [19] – [27].
[153] *Ali v MIBP* [2018] FCA 650 (Flick J, 10 May 2018) at [33].
[154] *Omar v MHA* [2019] FCA 279 (Mortimer J, 7 March 2019)
[155] *Omar v MHA* [2019] FCA 279 (Mortimer J, 7 March 2019) at [27], [33]-[35], [38], [51], [81].
[156] See *Omar v MHA* [2019] FCA 279 (Mortimer J, 7 March 2019) at [56]-[59], [66]..
[157] See, e.g., *EAO17 v MIBP* [2018] FCCA 3319 (Judge Neville, 6 December 2018), at [41].

consider whether any residual character concerns justify referral of the application for consideration under s 501.[159]

Another issue which often arises in the context of non-refoulement obligations concerns the decision-maker's understanding of the consequences of a decision to refuse or cancel a visa in light of ss 197C and 198. In particular, in circumstances where non-refoulement obligations are owed, the person will not necessarily be indefinitely detained because the person must be removed irrespective of any such obligations.[160] Accordingly, it may be a jurisdictional error to fail to recognise in an appropriate case that, subject to consideration of alternative management options such as those outlined in s 195A, ss 197C and 198 require the person to be removed from Australia. Statements in paragraphs 10.1(6), 12.1(6) and 14.1(6) of Direction No. 79 that 'Given that Australia will not return a person to their country of origin if to do so would be inconsistent with its international non-refoulement obligations, the operation of ss 189 and 196 of the Act means that, if the person's Protection visa [were cancelled/ were refused/remains cancelled], they would face the prospect of indefinite immigration detention' may reflect a misunderstanding of the legal consequences of a decision, and should not be applied.[161] Nevertheless, it will not necessarily be an error to consider the potential for indefinite detention, as long as the legal effect of s 501CA is properly understood.[162]

The legal consequences of the decision more broadly, including mandatory detention and removal, are discussed in more detail under Detention and removal.

Is there a real chance that a person will be harmed if removed?

In assessing the risk of harm for this purpose, a decision-maker must apply the real risk/real chance standard.[163] For further information on the real chance test, see MRD Services Guide to Refugee Law, Chapter 3.

Where there are claims of harm, decision-makers should also be careful to consider harm which might not necessarily enliven international non-refoulement obligations.[164]

Where there is nothing to prevent a person's removal, the AAT must consider claims of harm, but need not undertake as comprehensive an assessment as if they were deciding that question for the purpose of deciding whether they meet relevant protection visa criteria.[165] A conclusion that a consequence of the

[158] Direction No. 75, Refusal of Protection Visas Relying on Section 36(1C) and Section 36(2C)(b), 6 September 2017, 4. Preamble, Objectives, Item 6.
[159] Direction No. 75, Refusal of Protection Visas Relying on Section 36(1C) and Section 36(2C)(b), 6 September 2017, Part 2 of Direction No. 75 – Directions, Item 4.
[160] *DMH16 v MIBP* (2017) 253 FCR 576 at [26]-[30], *NKWF v MIBP* [2018] FCA 409 (Siopis J, 27 March 2018) at [41]-[44].
[161] See, e.g., *PRHR and MIBP* [2017] AATA 2782 (Forgie DP, 22 December 2017) at [101]-[159], considering the effect of the reasoning in *DMH16 v MIBP* (2017) 253 FCR 576. See *PRHR* at [158], for an example of the Tribunal's consideration of non-refoulement obligations and the consequences of the decision to refuse to grant a temporary protection visa, taking account of s 197C.
[162] See, e.g. *Omar v MHA* [2019] FCA 279 (Mortimer J, 7 March 2019) at [56]-[57], where the Court said that if non-refoulement obligations are engaged, and if the Minister decides not to revoke a visa cancellation, the likely alternative is indefinite detention. It gave *DMH16v MIBP* [201] FCA 448 as an example of a case where the Minister did consider indefinite detention as a possible outcome. In *DMH16*, the Minister, immediately after rejecting a protection visa application, agreed to consider alternative management options. The applicant could be detained until the Minister completed that consideration. However, once the Minister refused to consider, or did consider and rejected, the exercise of power under s 195A, then s 197C required that he be removed to Syria, notwithstanding the fact that Australia had been found to owe non-refoulement obligations in respect of him: *DMH16*, at [22].
[163] *MIAC v SZQRB* (2013) 210 FCR 505 at [246]-[247].
[164] *Goundar v MIBP* [2016] FCA 1203 (Robertson J, 12 October 2016) at [53]-[56], *BCR16 v MIBP* (2017) 248 FCR 456 at [70]-[72].
[165] *Ayoub v MIBP* (2015) 231 FCR 513 at [28]. For examples, see *PRHR and MIBP* [2017] AATA 2782 (Forgie DP, 22 December 2017) at [101]-[159], considering the effect of the reasoning in *DMH16 v MIBP* (2017) 253 FCR 576; and *CZCV and MHA (Migration)* [2019] AATA 91 (Evans SM, 6 February 2019) at [145]-[152] and [164]-[167].

decision is that Australia will be in breach of non-refoulement obligations is not determinative; it is one consideration to be weighed up against others.[166]

Other considerations not set out in Direction No. 79

The matters set out in the Direction are not exhaustive.[167] Other matters that may be relevant include submissions by the applicant and factors referred to in Ministerial or policy guidelines.[168] Some factors, such as detention and removal, are so closely related to the scheme of the Act that they may need to be considered, whether raised by an applicant or in guidelines or not.[169] What factors a decision-maker is bound to consider in making the decision is determined by construction of the statute conferring the discretion. If the relevant factors are not expressly stated, they must be determined by implication from the subject-matter, scope and purpose of the Act.[170]

In short, any matter that would move the Minister to allow a person of proven bad character (as is defined in the Act) to travel to or remain in Australia, notwithstanding that proven bad character, would be relevant.[171]

Consequences of character cancellation/refusal

In determining whether or not to exercise the powers in ss 501(1), 501(2) and 501CA(4) of the Act, the decision-maker must take into account the legal consequences of the decision.[172] The reason it must do so has been described as being necessary because the subject matter, scope and purpose of the Act require that they be taken into account,[173] and because consequences such as becoming subject to detention or refoulement are the most up to date material before the decision-maker relevant to consideration of the detriment to the applicant from the exercise of the power.[174] The legal framework which must be taken into account includes the direct and immediate statutorily prescribed consequences of the decision in contemplation.[175]

In the case of a decision under s 501CA(4), there is also an obligation to consider matters raised in representations made in response to the statutorily mandated invitation.[176]

The consequences of a visa refusal or cancellation under s 501 or related provisions include:

- unlawful status
- the likelihood of becoming subject to detention and/or removal[177]
- refusal of other visa applications and cancellation of other visas[178]
- a prohibition on applying for other visas[179]

[166] For an example, in *CWGF and MHA (Migration)* [2019] AATA 179 (Illingworth SM, 19 February 2019) at [92]-[103], the AAT found that the applicant was a person to whom Australia had non-refoulement obligations, but affirmed the decision not to revoke the cancellation because this was outweighed by other considerations.
[167] See *SZRTN* [2014] FCA 303 (Katzmann J, 31 March 2014) at [86].
[168] Generally speaking, the Tribunal should have regard to Departmental guidelines when exercising a discretion, but not for interpreting a term, or determining the relevant legal test: see MRD Legal Services Commentary Application of Policy.
[169] See *MIBP v BHA17* [2018] FCAFC 68 (Robertson, Moshinsky and Bromwich JJ, 4 May 2018) at [135]-[139].
[170] See *Tanielu v MIBP* (2014) 225 FCR 424 at [122].
[171] *Akpata v MIMIA* [2004] FCAFC 65 (Carr, Sundberg, Lander JJ, 25 March 2004) at [107].
[172] *NBMZ v MIBP* (2014) 220 FCR 1 at [6]. *MIBP v Le* (2016) 244 FCR 56 at [61].
[173] *NBMZ v MIBP* (2014) 220 FCR 1 at [6], for s.501; *DLJ18 v MHA* [2018] FCA 1650 (Thawley J, 6 November 2018) at [43].
[174] *FRH18 v MHA* [2018] FCA 1769 (Rares J, 16 November 2018) at [45].
[175] *Taulahi v MIBP* (2016) 246 FCR 146 at [84]. See also *MIBP v BHA17* [2018] FCAFC 68 (Robertson, Moshinsky, Bromwich JJ, 4 May 2018) at [136].
[176] *Hay v MHA* [2018] FCAFC 149 (White, Moshinsky, Colvin JJ, 5 September 2018) at [9]-[15].
[177] ss.189, 196, 197C, 198.
[178] s 501F.

- periods of exclusion and special return criteria may apply[180]

Unlawful status

Where a visa application is refused or a visa is cancelled under s 501, any other non-protection visa held by that person is taken to have been cancelled.[181] Generally, if a visa is cancelled its former holder becomes an unlawful non-citizen immediately after cancellation.[182] Under s 189 of the Act, an immigration officer who reasonably suspects that a person in Australia is an unlawful non-citizen must detain that person and, in the absence of a visa application or other specified circumstances, must remove them as soon as reasonably practicable under s 198.

Detention and removal

The legal consequences may include the prospect of the affected person being held in indefinite (or indeterminate) detention because of the operation of ss 189, 196 and 198 of the Act.[183] The test is whether, on the basis of all the material which is before the decision-maker at the time of considering whether or not to exercise the powers, there is at least a real possibility that the person's removal from Australia would not be reasonably practicable, with the consequence that the person faces the prospect of indefinite detention.[184] The factual circumstances which can give rise to the prospect of indefinite detention can vary considerably – for example, the state of the person's health,[185] or the unwillingness of their country of reference to accept them.

The key features of the detention and removal scheme are as follows:

- Section 189, which requires departmental officers to detain any suspected unlawful non-citizen (person without a visa);

- Section 198, which requires officers to remove an unlawful non-citizen as soon as reasonably practicable in certain circumstances. These relevantly include if an unlawful-non citizen's visa was cancelled under s 501(3A), they do not have a valid substantive visa application on foot, and they either did not make representations about revocation, or they did so and the cancellation was not revoked; and

- Section 197C, which provides that for the purposes of removal under s 198, it is irrelevant whether Australia has non-refoulement obligations, and the duty to remove the unlawful non-citizen arises irrespective of whether such obligations have been assessed.

The Minister also has personal, non-compellable, discretionary powers that can ameliorate the consequences of the mandatory detention and removal regime, including the ability to grant a detainee a visa of any kind under s 195A, and making a 'residence determination' under s 197AB, that a person reside at a place other than an immigration detention centre in what is often referred to as 'community detention'. Under a residence determination the person remains a detainee under the law, but instead of being detained they must reside at a specific place in the community. Because these powers are non-

[179] s 501E.
[180] s 503, SRC 5001.
[181] s.5F.
[182] s.15.
[183] *MIBP v Le* (2016) 244 FCR 56 at [61].
[184] *MIBP v Le* (2016) 244 FCR 56 at [61].
[185] See, e.g. *Sach v MHA* [2018] FCA 1658 (Barker J, 12 December 2018).

compellable, their relevance in a given case is unlikely to be significant, unless there is evidence that the Minister intends to exercise them to grant a visa.[186]

Where a person may make a further visa application

In determining whether or not to exercise powers under s 501 or s 501CA, Australia's non-refoulement obligations and the prospect of indefinite detention are, in the absence of representations that they be considered, not mandatory considerations in circumstances where it is open to the person whose visa has been refused or cancelled on character grounds to apply in Australia for a protection visa or some other visa (which visa application the decision-maker is legally bound to consider and determine). This position is generally unaffected by the presence in the Act of various provisions which confer personal powers on the Minister to 'lift the bar' (such as s 48B) or to grant a visa to a detainee which would have the effect of changing the detainee's status from being an unlawful non-citizen (such as s 195A). As there is no legal duty on the Minister to consider whether to exercise such a personal power, there is no assurance that any consideration will be given in a relevant case to Australia's non-refoulement obligations or the prospect of indefinite detention.[187]

In these circumstances, removal and its consequences are not necessarily direct and immediate consequences of the AAT's decision. The legal consequences in these circumstances may include a period of detention until a person's visa application is decided. In terms of harm and other impediments in an applicant's home country, these should be considered, but the reasoning does not need to assume that an applicant will be removed. Nevertheless, where there is strong evidence that a person would face a real risk of harm or other difficulties *if* removed it could necessary to assess the risk of harm. For example, in *Omar v MHA* [2019] FCA 279, the Federal Court held that, at least where non-refoulement obligations are raised in response to a s.501CA(3)(b) (mandatory cancellation) invitation, it is an error to decline to determine those factual matters by reference to a different statutory process, which is non-existent at the time of the exercise of the power.[188]

Where a person may not make a further visa application

Where a person is prevented by the Act from applying in Australia for a protection visa, the Minister's obligation to consider the legal consequences of a decision under s 501 will include consideration of Australia's non-refoulement obligations and the prospect of indefinite detention, where those matters are relevant to the person's particular circumstances.[189] However, decision-makers should be careful not to assume a person will be indefinitely detained because Australia owes them non-refoulement obligations, due to the terms of s 197C.[190]

In these circumstances, detention and/or removal will generally be direct and immediate consequences of the AAT's decision. Detention is a consequence because the effect of ss 189, 197C and 198 of the Act is that an unlawful non-citizen must be removed as soon as reasonably practicable, and detained until then. Prolonged detention might occur because, for example, a person's health prevents them travelling, or because there is no country which will accept them. Under the legislation, indefinite detention will *not* occur on the basis that removal would result in a breach of non-refoulement obligations, and it would be error for the AAT to assume that it would.[191]

[186] See, e.g., *MIBP v Le* (2016) 244 FCR 56 at [61].
[187] *MIBP v Le* (2016) 244 FCR 56 at [61]
[188] *Omar v MHA* [2019] FCA 279 (Mortimer J, 7 March 2019) at [81]. The Court distinguished *Ali v MIBP* [2018] FCA 650 (Flick J, 10 May 2018) and *Greene v AMHA* [2018] FCA 919 (Logan J, 31 May 2018) on the basis that the grounds of review and the basis on which the Courts considered the applicant's arguments were different.
[189] *MIBP v Le* (2016) 244 FCR 56 at [61]
[190] *DMH16 v MIBP* (2017) 253 FCR 576 at [26]-[30].
[191] *DMH16 v MIBP* (2017) 253 FCR 576 at [30].

Where there is nothing to prevent a person's removal, the AAT must consider claims of harm, but need not undertake as comprehensive an assessment as if they were deciding that question for the purpose of deciding whether they meet relevant protection visa criteria.[192]. A conclusion that a consequence of the decision is that Australia will be in breach of non-refoulement obligations is not determinative; it is one consideration to be weighed up against others.

Prohibition on applying for other visas

Under s 501E, a person cannot apply for another visa while they remain in Australia if:

- they have been subject to a visa refusal or cancellation under s 501 and
- the decision has not been set aside or revoked prior to their making the visa application.

Such an application is not a valid application for a visa.[193] The only exceptions are an application for a protection visa or a visa specified in the Regulations (i.e. r 2.12AA).[194]

Deemed refusal and cancellation

If a decision to refuse to grant or to cancel a visa is made under s 501, any other visa application made by that person is taken to have been refused and all other visas held by the person are taken to have been cancelled.[195] The only exceptions relate to protection visas and visas prescribed in the Regulations. There are currently no visas prescribed in the Regulations.

If the original decision made under s 501 is set aside or revoked, any refused visa applications or cancelled visas are revived.[196]

Periods of exclusion/special return criteria

Certain visas are subject to special return criteria (SRCs). For the visa subclasses to which SRCs apply, the SRC is prescribed in Schedule 2 to the Regulations as a criterion for visa grant.

Relevantly, SRC 5001(c) provides for permanent exclusion if the visa applicant has previously had a visa cancelled under s 501 and there was no revocation of the decision under s 501CA. There is no provision for a visa applicant to whom SRC 5001 applies to request a waiver of the permanent exclusion.

SRC 5001 ceases to apply if the Minister acts personally to grant a permanent visa to a person whose visa was cancelled under s 501.

Conduct of the review

The Tribunal must not hold a hearing or make a decision under s 43 of the AAT Act until at least 14 days after the day on which the Minister was notified that the application had been made.[197]

[192] *Ayoub v MIBP* (2015) 231 FCR 513 at [28].
[193] s 46(1)(d).
[194] s 501E(2).
[195] s 501F.
[196] s 501F(4).
[197] s 500(6G).

Decision to be made within 84 days

Where the applicant is in the migration zone, the Tribunal must make a decision within the period of 84 days after the day on which the person was notified of the decision otherwise the decision will be taken to have been affirmed.[198]

It would be futile to reinstate an application under s 42A(9)[199] of the AAT Act after the 84-day period has elapsed. This is because the effect of reinstatement would be that no decision under s 42A in relation to the decision under review would be extant.[200]

The 2-day Rule

Where an applicant is in the migration zone, the Tribunal must not have regard to any information presented orally in support of the person's case unless the information was set out in a written statement given to the Minister at least 2 business days before the Tribunal holds a hearing (except for a directions hearing) in relation to the decision under review.[201] If the oral evidence does not change the nature of the case and merely 'puts flesh on the bones', it may not be capable of being excluded from consideration.[202]

The restriction extends to oral evidence to be given by a witness for the applicant.[203] It only applies to information presented 'in support of the person's case', i.e., information that the applicant provides as part of their case-in-chief,[204] and not to submissions which an applicant may wish to make in respect of the evidence before the Tribunal.[205] An applicant's answer to a question asked of him or her or of one of his or her witnesses in the course of cross-examination is not excluded under these provisions. Such an answer is information elicited orally at the instance of the Minister with the aim of derogating from the applicant's case and thereby or otherwise supporting the Minister's case. Further, an oral submission to a matter raised by the AAT of its own motion is not excluded from consideration by s 500(6H).[206]

A witness could be called to speak to their statement, to correct any inaccuracies, to explain any ambiguities, or to elaborate upon certain matters as long as in doing so they do not stray outside the subject matter of the material covered in the statement.[207]

This restriction also applies to any documents submitted in support of the applicant's case (except for documents in the Minister's possession).[208]

These provisions are binding on the Tribunal and failure to comply with them would arguably amount to jurisdictional error.[209]

The purpose of these provisions is that the Minister is to be given an opportunity to answer the case to be put by the applicant for review without the necessity of an adjournment of the hearing. The purpose of the

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[198] s 500(6L)(c).
[199] Under s 42A(9) of the *Administrative Appeals Tribunal Act 1975* (Cth.), the Tribunal may reinstate an application and give such directions as it appears to be appropriate.
[200] *Somba v MHA (No 2)* [2018] FCA 1537 (Barker J, 12 October 2018) at [47]. In that case, the AAT dismissed the application for review on 8 January 2018, following the applicant's failure to appear at the hearing scheduled for that day. The 84th day after notification was 17 January 2018, and the applicant applied for reinstatement on 6 February 2018.
[201] s 500(6H)
[202] *SZRTN v MIBP* [2014] FCA 303 (KatzmannJ, 31 March 2014) at [70].
[203] *Demillo v MIBP* [2013] FCAFC 134 (Greenwood, Buchanan, McKerracher JJ, 21 November 2013) at [18].
[204] *Jagroop v MIBP* (2014) 225 FCR 482 at [94].
[205] *Jagroop v MIBP* (2014) 225 FCR 482 at [102].
[206] *Uelese v MIBP* (2015) 256 CLR 203 at [102].
[207] *SZRTN v MIBP* [2014] FCA 303 (KatzmannJ, 31 March 2014) at [70].
[208] s 500(6J).
[209] *Milne v MIAC* [2010] FCA 495 (Gray J, 20 May 2010) at [40].

scheme in s 500 is that an applicant for review should not be able to change the nature of his or her case, catching the Minister by surprise, and forcing the Tribunal into granting one or more adjournments to enable the Minister to meet the new case put. The expressed intention of the amending legislation was to prevent the use of the procedure of merits review to prolong the stay in Australia of a person denied a visa by the application of the character test.[210]

Section 500(6H) does not suggest an intention to fetter the power of the Tribunal to grant an adjournment where the fair conduct of the review hearing requires it and where the applicant has not sought to surprise the Minister with late changes to the applicant's case.[211] It does not limit the power of the Tribunal to conduct a review or authorise the Tribunal to give less than the 'proper consideration of the matters before it'.[212] Nothing in its text warrants the imposition of a rigid limit upon the otherwise flexible power of the Tribunal to ensure that the proceedings before it are conducted fairly to all parties.[213] The Tribunal may adjourn the hearing in order to hear more submissions and evidence from an applicant where they comply with the 2-day rule with respect to the new hearing date. The purpose of ensuring that reviews under s 500 are dealt with expeditiously does not require a blanket limitation on the Tribunal's power to adjourn a hearing.[214]

If either party seeks an adjournment on the ground that it is surprised and disadvantaged by new evidence and requires an adjournment of the hearing to meet that disadvantage, then the question whether or not the fair determination of the application for review could only be achieved by granting the adjournment would arise for the Tribunal to resolve. Delaying tactics such as of an applicant such as cynically withholding oral evidence in order to have it presented later in the course of a hearing so as to precipitate an adjournment would expose an applicant to the risk of a deemed affirmation of the decision by operation of s 500(6L). In exercising its discretion, the Tribunal must be mindful of the timeframe established by s 500(6L).[215]

Protected information

Section 503A is designed to protect intelligence about criminals and criminal activity. Sections 503A(2)(c) and 503A(6) can operate to override the natural justice requirement to provide information to a person whose visa has been cancelled where that information is credible, relevant and significant to the Minister's decision under s 501 or s 501CA.[216]

Evidentiary matters

The Tribunal is under no obligation to inquire into the provenance of unchallenged documents such as the record of convictions, bail reports, statements of facts before sentencing judges or parole officers' reports, or the qualifications of parole officers expressing opinions.[217]

[210] *Goldie v MIMA* (2001) 111 FCR 378 at [25], referring to the second reading speech to the bill that became the *Migration Legislation Amendment (Strengthening of Provisions Relating to Character and Conduct) Act 1998* (Cth.)
[211] *Uelese v MIBP* (2015) 256 CLR 203 at [73] Nettle J agreeing at [105].
[212] *Uelese v MIBP* (2015) 256 CLR 203 at [54].
[213] *Uelese v MIBP* (2015) 256 CLR 203 at [74].
[214] *Uelese v MIBP* (2015) 256 CLR 203 at [77].
[215] *Uelese v MIBP* (2015) 256 CLR 203 at [74]-[77]. Section 500(6L) provides that, if the Tribunal has not made a decision upon the review within 84 days after the day on which the application was notified of the decision under review, the Tribunal is taken, at the end of that period, to have decided to affirm the decision under review. See Decision to be made within 84 days..
[216] *Vella v MIBP* [2015] FCAFC 53 (Buchanan, Flick and Wigney JJ, 21 April 2015), at [61] and [68].
[217] *Aporo v MIAC* [2009] FCA 79 (Bennett J, 12 February 2009) at [81]-[86].

Reasonably suspects

The cancellation power in s 501(2) is enlivened if the Minister 'reasonably suspects' that a person does not pass the character test. The character test also includes limbs where the Minister 'reasonably suspects' their membership of or association with a group or person involved in criminal conduct,[218] or involvement in certain criminal activities.[219] The meaning of the term 'reasonably suspects' has been judicially considered in relation to s 501(2), and the reasoning is probably applicable to s 501(6) as well.

A suspicion that a person does not pass the character test may be objectively reasonable even if the suspicion is subsequently discovered to be affected by a mistake of fact or law.[220] Whether or not the suspicion is reasonable at the relevant time will depend on the matters known or reasonably capable of being known by the decision-maker at the relevant time.[221]

Section 501(2) requires that the Minister, having first formed that reasonable suspicion, then go on to determine whether the person concerned has satisfied him or her that the person passes the character test. In that regard, the Act contemplates that the Minister will, in the exercise of the powers conferred under s 501(2) form a considered view as to whether the person passes the character test or not by reference not only to the material supporting the Minister's suspicion formed under s 501(2)(a), but also by reference to materials provided to the Minister by the visa holder for the purposes of s 501(2)(b).[222]

The Court's jurisdiction to determine whether an administrative decision is affected by legal unreasonableness (as explained in *Li*[223]) is properly to be exercised by reference to all of the materials before the Minister that properly bear upon that question. It is not to be exercised on a fiction that the Minister only had before him the disclosed materials and nothing else.[224]

The meaning of 'reasonably suspects' is discussed in Direction No. 79 in relation to the membership/association character ground, but not more generally. It is probably not an error to have regard to the meaning there when applying the term for other character grounds, but it could be an error to assume that a decision-maker is bound to apply that meaning.

Effect of conviction on exercise of discretion

It is impermissible in a decision on character grounds for the Tribunal to impugn the conviction on which the decision was based.[225] The decision-maker is entitled to receive evidence of a conviction and sentence and to treat it as probative of the factual matters upon which the conviction and sentence were necessarily based.[226] This principle applies to the substantial criminal record and immigration detention and child sex offence grounds.

[218] s 501(6)(b).
[219] s 501(6)(ba).
[220] *Stevens v MIBP* [2016] FCA 1280 (Charlesworth J, 2 November 2016) at [14], citing *Ruddock v Taylor* (2005) 222 CLR 612.
[221] *Ruddock v Taylor* (2005) 222 CLR 612 at [40].
[222] *Stevens v MIBP* [2016] FCA 1280 (Charlesworth J, 2 November 2016) at [56].
[223] *MIAC v Li* (2013) 249 CLR 332.
[224] *Stevens v MIBP* [2016] FCA 1280 (Charlesworth J, 2 November 2016) at [109].
[225] *MIMA v SRT* (1991) 91 FCR 234. The judgment concerned the deportation power in s 200, but the reasoning applies equally to those character grounds which are enlivened by a conviction.
[226] *MIMA v Ali* (2000) 106 FCR 313 at [41].

For other grounds, where suspected criminal conduct may be relevant but no conviction is necessary, or for conviction grounds where there is another conviction that is not the basis for failing the character test, even a conviction or sentence which is not a precondition to the exercise of the relevant statutory power should be treated as strong prima facie evidence of the facts upon which it is necessarily based.[227] There is, however, no absolute rule that the Tribunal may not consider material which challenges the grounds upon which relevant convictions are based.[228] In these circumstances, the decision-maker is not obliged to make findings of guilt or innocence if there is no sufficient basis for such a finding or such an inquiry.[229]

The Tribunal may, however, examine the circumstances surrounding the commission of the relevant offence or matters relating to the trial itself for the purpose of enabling the Tribunal to make its own assessment of the nature and gravity of the applicant's criminal conduct,[230] and its significance so far as the risk of recidivism is concerned.[231]

Relevant case law and AAT decisions

Afu v MHA [2018] FCA 1311
Akpata v MIMIA [2004] FCAFC 65; 139 FCR 292
Ali v MIBP [2018] FCA 650
Ali v MHA [2018] FCA 1895
Aporo v MIAC [2009] FCA 79
Ayoub v MIBP (2015) 231 FCR 513; [2015] FCAFC 83
BCR16 v MIBP [2017] FCAFC 96; (2017) 248 FCR 456
BKS18 v MHA [2018] FCA 1731
Brown v MIAC [2010] FCAFC 33; 183 FCR 113
BSJ16 v MIBP [2016] FCA 1181
Craig v South Australia (1995) 184 CLR 163; (1995) 184 CLR 163
CVN17 v MIBP [2019] FCA 13
CWGF and MHA (Migration) [2019] AATA 179
CZCV and MHA (Migration) [2019] AATA 91
Demillo v MIBP [2013] FCAFC 134
Djalic v MIMA [2004] FCAFC 151
DMH16 v MIBP [2017] FCA 448; 253 FCR 576
DND and MHA [2018] AATA 2716
DOB18 v MHA [2018] FCA 1523
Drake and MIEA [1979] AATA 179
Drake v MIEA (1979) 46 FLR 409
EAO17 v MIBP [2018] FCCA 3319
FRH18 v MHA [2018] FCA 1769
Gaspar v MIBP [2016] FCA 1166
Godley v MIMIA [2004] FCA 774
Goldie v MIMA [1999] FCA 1277
Goldie v MIMA (2001) 111 FCR 378; [2001] FCA 1318
Goundar v MIBP [2016] FCA 1203
Green v MIAC [2008] FCA 125
Greene v AMHA [2018] FCA 919
Haneef v MIAC [2007] FCA 1273
Hay v MHA [2018] FCAFC 149

[227] *MIMA v Ali* (2000) 106 FCR 313, at [43].
[228] *MIMA v Ali* (2000) 106 FCR 313, at [43]. At [44], however, the Court said that although a decision-maker in such a case may accept evidence which contradicts the facts essential to a conviction, they may not be entitled to reach or express a view that the person was wrongly convicted.
[229] *Tham v MIAC* (2012) 204 FCR 612, at [37].
[230] *MIEA v Daniele* (1981) 54 [1981] FCA 212 (Fisher, Davies, Lockhart JJ, 17 December 1981), (1981) 61 FLR 354at [358].
[231] *MIMA v Ali* (2000) 106 FCR 313, at [45].

Hong v MIMA [1999] FCA 1567
Howells v MIMA [2004] FCA 530; 139 FCR 580
Irving v MILGEA [1996] FCA 663; 68 FCR 422
Jagroop v MIBP (2016) 241 FCR 461; [2016] FCAFC 48
Karabay and MHA (Migration) [2019] AATA 167
Kumeroa and MHA [2018] AATA 3744
Lesuma v MIAC (No.2) [2007] FCA 2106
LNCB and MIBP [2015] AATA 463
Maxwell v MIBP [2016] FCA 47; FCR 275
MHA v Buadromo [2018] FCAFC 151
MIAC v Anochie [2012] FCA 1440; 209 FCR 497
MIAC v Khadgi (2010) 190 FCR 248; [2010] FCAFC 145
MIAC v Li (2013) 249 CLR 332; [2013] HCA 18
MIAC v SZQRB (2013) 210 FCR 505; [2013] FCAFC 33
MIBP v BHA17 [2018] FCAFC 68
MIBP v Le (2016) 244 FCR 56; [2016] FCAFC 120
MIBP v Lesianawai [2014] FCAFC 141; 227 FCR 562
MIBP v Maioha [2018] FCAFC 216
MIEA v Baker [1997] FCA 105; 73 FCR 187
MIEA v Daniele (1981) 39 ALR 649; 61 FLR 354
Milne v MIAC [2010] FCA 495
MIMA v Ali [2000] FCA 1385; 106 FCR 313
MIMA v SRT [1999] FCA 1197; 91 FCR 234
MIMIA v Godley [2005] FCAFC 10; (2005) 141 FCR 552
MIMIA v Huynh [2004] FCAFC 256; 139 FCR 505
MIMIA v Yusuf (2001) 206 CLR 323; [2001] HCA 30
Minister for Aboriginal Affairs v Peko-Wallsend (1986) 162 CLR 24
Misa and MHA [2018] AATA 1511
MNLR and MHA (Migration) [2019] AATA 61
Moana v MIBP [2014] FCA 1084; (2015) 230 FCR 367
Muggeridge v MIBP [2017] FCA 730; 255 FCR 81
Mujedenovski v MIAC [2009] FCAFC 149
NBMZ v MIBP [2014] FCAFC 38; 220 FCR 1
Nigam v MIBP (2017) 254 FCR 295; (2017) FCAFC 127
NKWF v MIBP [2018] FCA 409
Nweke v MIAC [2012] FCA 266
Ogbonna v MIBP [2018] FCA 620
Omar v MHA [2019] FCA 279
Paerau v MIBP [2014] FCAFC 28; (2014) 219 FCR 504
Port of Brisbane Corporation v Deputy Commissioner of Taxation [2004] FCA 1232; 140 FCR 375
PRHR and MIBP [2017] AATA 2782
Roach v MIBP [2016] FCA 750
Rokobatini v MIMA [1999] FCA 1238; 90 FCR 583
Romanov v MHA [2018] FCA 1494
Ruddock v Taylor (2005) 222 CLR 612
Sabharwal v MIBP [2018] FCA 10
Sabharwal v MIBP [2018] FCAFC 160
Sach v MHA [2018] FCA 1658
Shaw v MIMIA [2005] FCAFC 106; 142 FCR 402
Somba v MHA (No 2) [2018] FCA 1537
Sowa v MHA [2018] FCA 1999
Splendido v AMIBP (No 2) [2018] FCA 1158
Spruill v MIAC [2012] FCA 1401
Stevens v MIBP [2016] FCA 1280
Steyn v MIBP [2017] FCA 1131
Suleiman v MIBP [2018] FCA 594
SZRTN v MIBP [2014] FCA 303
Tanielu v MIBP [2014] FCA 673; 225 FCR 424

Taulahi v MIBP (2016) 246 FCR 146; [2016] FCAFC 177
Tham v MIAC [2012] FCA 234; 204 FCR 612
Turay v AMHA [2018] FCA 1487
Uelese v MIBP [2016] FCA 348; (2016) 248 FCR 296
Vella v MIBP [2015] FCAFC 53
Visa Cancellation Applicant and MIAC [2011] AATA 690
Waits and MIMIA [2003] AATA 1336
Wan v MIMA [2001] FCA 568; 107 FCR 133
Williams v MIBP (2014) 226 FCR 112; [2014] FCA 674
Wong v MIMIA [2002] FCAFC 440
YNQY v MIBP [2017] FCA 1466

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Visa Condition 8202
(Student enrolment, attendance and performance)

CONTENTS

Overview

Non-compliance with a visa condition may result in cancellation of the visa,[1] and may be relevant to whether the visa holder is able to satisfy the criteria for the grant of a further visa.[2]

Schedule 8 condition 8202 imposes enrolment, attendance and academic progress obligations on student visa holders. The current version applies to visa applications made on or after 1 July 2016.[3]

This commentary focuses on the requirements of condition 8202, but when reviewing a cancellation for breach of Condition 8202, more general principles to do with visa cancellations under s.116(1)(b) of the *Migration Act 1958* (the Act) and visa cancellations overall will apply. These are discussed in Legal Services Commentaries Cancellation Under s.116 – General and Cancellation Overview.

Condition 8202 is underpinned by certain provisions of the *Education Services for Overseas Students Act 2000* (the ESOS Act) and the National Code of Practice for Providers of Education and Training to Overseas Students 2018, administered by the Department of Education and Training (Education).

Generally speaking, a person providing or offering a course to an overseas student must be registered by an ESOS agency.[4] The ESOS Act imposes certain obligations on a registered provider, including, critically, to provide information about an accepted student who does not begin his or her studies, or whose study is terminated, or who breaches condition 8202.[5] The information must be given by entering it onto the Provider Registration and International Student Management System (PRISMS).[6]

Key requirements of Condition 8202

Condition 8202 imposes certain enrolment, progress and attendance obligations on student visa holders. This condition has been subject to a number of amendments since its introduction. Versions applying since 1 July 2007 are set out in Attachment A. This commentary focuses on the current (post 1 July 2016) version of condition 8202, but it also, where indicated, considers the previous version of condition 8202 which applied to visas granted on or after 1 July 2007 ('the previous version').

For further information on earlier versions, contact MRD Legal Services.

[1] Sections 116(1)(b) and (c) and 137J of the Act.
[2] See Schedule 2 cl.500.212(b), 570.223(2)(b), 571.223(2)(b), 572.223(1A)(b), 573.223(1A)(b), 574.223(1A)(b), 575.223(1A)(b) and 576.222(2)(b).
[3] Migration Legislation Amendment (2016 Measures No. 1) Regulation 2016 (F2016L00523)
[4] ESOS Act, ss.8-10. The ESOS agency for a registered higher education provider is the Tertiary Education Quality and Standards Agency (TEQSA); for a registered Vocational and Educational Training provider it is the National Vocational Educational and Training Regulator (known as the Australian Skills Quality Authority (ASQA)); for an approved school provider, it is the Secretary of the Department of Education; for other providers, it is an agency specified by legislative instrument: ESOS Act, ss.5, 6C; *National Vocational Education and Training Regulator Act 2011*, ss.3, 155. The Secretary (of Education) must cause a Register, called the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS), containing the names of registered providers and course, to be kept: ESOS Act, s.14A.
[5] ESOS Act, s.19; ESOS Regulations 2001, r.3.03A.
[6] ESOS Act, s.19, ESOS Regulations 2001, r.1.03.

Breach of condition 8202 on or after 1 July 2007

The current version of condition 8202, which applies in relation to an application for a visa made on or after 1 July 2016[7] requires, in general terms, that a visa holder is enrolled in a full-time course, and has not been certified as not achieving satisfactory course progress or attendance. It is set out in Attachment A.

The previous version of Condition 8202 that applied to visas granted on or after 1 July 2007 and where the visa application was made before 1 July 2016 has broadly similar requirements, but refers to Standards 10 and 11, which are broadly similar to the 'relevant standard[s]' mentioned in the post 2016 version.

For information in relation to 8202 for visas granted before 1 July 2007, contact MRD Legal Services.

Enrolment requirement

Condition 8202(2)(a) requires that the holder be enrolled in a full-time registered course. 'Registered course' is defined in r.1.03 to mean 'a course of education or training provided by an institution, body or person that is registered, under Division 3 of Part 2 of the *Education Services for Overseas Students Act 2000*, to provide the course to overseas students'. Both Division 3 of Part 2 of the ESOS Act, and part 2 more generally, are titled 'Registration of providers.[8] Section 8A, the Guide to Part 2, says that Division 4 requires the Secretary to cause a Register to be kept that contains specified information about the registration of all registered providers. 'Register' means the Register kept under s.14A,[9] which is called the Commonwealth Register of Institutions and Courses for Overseas Students[10] (CRICOS).

Condition 8202(2)(a) requires that the holder be enrolled in the sense of being registered for a registered course, and does not require that the visa holder attend classes for the course.[11] This requirement and the other requirements in condition 8202(2) do not apply to visa holders who are secondary exchange students, Foreign Affairs students or Defence students (who instead must be enrolled in a full-time course of study or training).[12]

The current condition 8202 explicitly requires primary student visa holders to maintain enrolment in a registered course, making it clear that this is a continuing requirement and that a student cannot change to a non-registered course. Clause 8202(2)(b) requires the holder to maintain enrolment in a registered course that, once completed, will provide a qualification from the Australian Qualification Framework (AQF)[13] that is at the same level as, or at a higher level than, the registered course in relation to which the visa was granted. This latter requirement will be taken to be met where the holder is enrolled in a course at AQF Level 10 and changes their enrolment to a course at the AQF

[7] Migration Legislation Amendment (2016 Measures No. 1) Regulation 2016 (F2016L00523), Sch.4, item [43] and Sch 5, item [2].
[8] ESOS Act, ss.8A -14.
[9] ESOS Act, s.5.
[10] ESOS Act, s.14A(2).
[11] See *Liew v MIBP* [2016] FCA 172 (Rangiah J, 2 March 2016) at [38]-[39]. Rather, failure to attend classes is dealt with in the certification of unsatisfactory attendance clause in Condition 8202.
[12] Condition 8202(1) and (2).
[13] The Australian Qualifications Framework (AQF) is the policy for regulated qualifications in the Australian education and training system. It is monitored and maintained by the Commonwealth Department of Education and Training, in consultation with the states and territories. It is made up of 10 levels as follows: 1 – Certificate I; 2 – Certificate II; 3 – Certificate III; 4 – Certificate IV; 5 – Diploma; 6 – Advanced Diploma, Associate Degree; 7 – Bachelor Degree; 8 – Bachelor Honours Degree, Graduate Certificate, Graduate Diploma; 9 – Masters Degree; 10 – Doctoral Degree. See https://www.aqf.edu.au/.

Level 9.[14] However, unless this exception applies, a visa holder would need to apply for a new visa if they intended to change to a course at a lower AQF level.

Although the previous version of condition 8202(2)(a) did not specify that the course had to be 'full time', there is no real difference between it and the current version because *all* registered courses are full-time: under the ESOS legislation, only courses which can be undertaken on a full-time basis can be registered on the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS).[15]

The enrolment requirement in the previous condition 8202 is also a continuing requirement and does not allow the visa holder to cease to be enrolled in a course, even to the extent of a temporary gap in enrolment.[16] Furthermore, the enrolment must relate to and be an enrolment capable of satisfying the criteria and conditions of the visa. This means, in the context of visas granted under the pre 1 July 2016 student visa framework (i.e. subclasses 570-576), that (for example) for a Subclass 572 visa, the enrolment must be an enrolment that would satisfy that Subclass.[17]

Usually cessation of enrolment will be reflected in the provider's records, and the evidence of PRISMS,[18] or direct evidence from the provider, may assist in establishing whether a student was enrolled in a registered course at a particular time.

A cessation of enrolment may be established not only by evidence of termination of enrolment by the education provider, but also by evidence of withdrawal from a course or discontinuance by a student communicated to the education provider. It is not essential that any such act of a student be accepted by the education provider for there to be a cessation of enrolment.[19]

Certification - course progress and attendance

The course progress and attendance requirements are found in the current condition 8202(2)(c) and previous condition 8202(3). Non-compliance with these requirements is constituted by the existence of a certification by the education provider of unsatisfactory progress or attendance. That is, a breach or non-compliance will occur when the certification is issued by the education provider, not when the student's unsatisfactory conduct occurs.[20] These requirements do not apply to student visa holders who are Defence, Foreign Affairs or secondary exchange students.[21]

[14] cl.8202(3).
[15] The National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students 2007 and National Codes of Practice for Providers of Education and Training to Overseas Students 2017 and 2018 (made under s.33 of the ESOS Act) all provide that only full-time courses can be registered on CRICOS (cl.7.1 of 2007 and 2017 Codes, Standard 11 of 2018 Code). (For VET courses, full-time study is a minimum of 20 scheduled course contact hours per week unless specified by an accrediting authority: Standard 11 of 2018 Code).
[16] *Liu v MIMIA* [2003] FCA 1170 (Cooper J, 24 October 2003), at [19]-[20]. *Liu* was followed by Rangiah J in *Liew v MIBP* [2016] FCA 172 (Rangiah J, 2 March 2016) at [40].
[17] *Chen v MIAC* [2011] FMCA 177 (Burnett FM, 8 April 2011) at [31]-[35]. For Subclass 500 visas, on the other hand, condition 8202(b) requires the enrolment to be in a course at the same Australian Qualifications Framework (AQF) level or higher. Thus while for pre-2016 student visas, a student could not enrol in a higher level course (e.g. switch from vocational education and training to higher education) without getting a new student visa, there is no such restriction for Subclass 500 visa holders, who are only prohibited from switching to a course at a *lower* level.
[18] PRISMS (Provider Registration and International Student Management System) is defined in r.1.03 of the Education Services for Overseas Students Regulations 2001 (the ESOS Regulations) to mean the electronic system of that name used to process information given under s.19 of the ESOS Act. There is no requirement to take enrolment records on PRISMS to be correct, and a failure by a registered provider to upload on to PRISMS a confirmation of enrolment as required by ESOS Act, s.19 will result in an invalid exercise of the s.116(1)(b) cancellation power, if the evidence of non-enrolment on PRISMS is the basis of the cancellation: *Wei v MIBP* (2015) 257 CLR 22, Gageler and Keane JJ, at [32]-[35].
[19] *Zhang v MIAC* [2010] FMCA 809 (Barnes FM, 25 October 2010), at [71]-[72].
[20] *Maan v MIAC* (2009) 179 FCR 581 at [44].
[21] These holders are only subject to cl.8202(1), which requires enrolment in a full-time course of study or training.

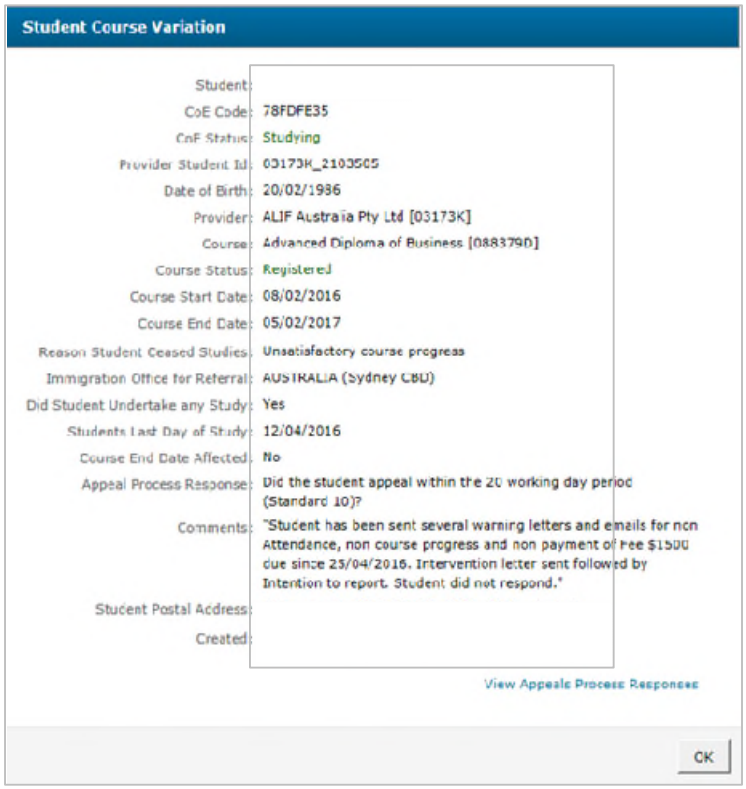
Current condition 8202 requires certification *for* ESOS Act s.19 and the National Code, and the previous version requires certification *in accordance with* s.19 and the 2007 Code. Section 19 of the ESOS Act requires the registered provider to report any breach by a student of a prescribed student visa condition,[22] and the relevant standards of the National Code (Standards 10 and 11 of the 2007 Code, Standard 8 of the 2018 Code) deal with monitoring course progress and attendance. There is judicial authority (discussed further below) that the Tribunal does not need to go behind a certificate which is valid on its face and decide whether it was made in accordance with the ESOS Act and Code.[23] A certificate will be valid if, on its face, it engages condition 8202; that is, it certifies a person, for a registered course, as not achieving satisfactory course progress or attendance.[24] For current condition 8202, certification of unsatisfactory progress or attendance would generally be 'for' the relevant provisions of the Act and Code, even if not made strictly 'in accordance with' them.

The certification

Non-compliance with condition 8202(2)(c) occurs if the education provider

- has certified the visa holder,
- for a registered course undertaken by the holder,
- as not achieving satisfactory course progress or attendance
- for s.19 of the ESOS Act and the relevant standard of the National Code made by the Education Minister under s.33 of that Act.

Whether there is a relevant certification is a question of fact, to be determined on the basis of the evidence. Typically, the evidence is an entry on the PRISMS database, such as this:



[22] Condition 8202 is prescribed for ESOS Act, ss.19-20: Education Services for Overseas Students Regulations 2001, r.3.03A.
[23] *Patel v MIAC* (2012) 206 FCR 384, at [38] and [52]-[58]; *Vannemreddy v MIAC* (2013) 211 FCR 223, at [55]-[57] and [61]-[63].
[24] *Patel v MIAC* (2012) 206 FCR 384, at [34]-[36].

Prima facie, this can be treated as a certification as to unsatisfactory course progress or attendance for s.19 and the relevant standard within the meaning of condition 8202, on the basis that it certifies a person as not achieving satisfactory course progress for a registered course.[25]

There is no requirement to 'go behind' a certificate that, on its face, is of a kind that engages condition 8202.[26] The only task that the Minister has to determine is that there exists, on its face, a certificate of the kind that engages condition 8202.[27] Circumstances in which it has been held that a decision-maker did not have to go behind the certificate include:

- claimed factual errors in the calculation of attendance;[28]
- a defect in the exercise of the education provider's power under s.19 of the ESOS Act;[29]
- failure to comply with the National Code[30].

The power to cancel for breach of Condition 8202 arises if the Minister is satisfied that a certificate that engages it exists. It does not depend on whether such a certificate exists as a jurisdictional fact. It is not the role of the Minister (or Tribunal) to go behind any certificate. The scheme was designed so that the Minister could simply rely upon the fact of the certificate and that a student wishing to prevent the issue of a certificate had available internal appeal systems. It follows that any relief sought in relation to a certificate lies against the education provider and not the Minister. [31]

What if the applicant was never enrolled in the course specified in the certificate?

There has been no judicial consideration of this question. For the condition 8202(2)(c) to be engaged, the certification must be in respect of a registered course undertaken by the visa holder.[32] Arguably, a decision-maker could not reasonably be satisfied that a certification is of the relevant kind, if it is in respect of a course which the decision-maker knows is not of the kind specified in condition 8202.

[25] There are, however, difficulties with this view. Firstly, s.19 of the ESOS Act requires a registered provider to give particulars of a breach of 8202. At the time the ESOS Act was introduced, a breach was the unsatisfactory attendance or academic result; now it is *certification* of unsatisfactory attendance or progress. So s.19 actually requires a provider to give particulars of certification. Secondly, it is not clear that a record such as this is 'certification' within the meaning of the legislation. "Certify" is not defined in the Migration Act or Regulations. It is defined in the Macquarie Dictionary Online as 'to testify or vouch for in writing'. Nevertheless, it does not appear to have been successfully argued that a record such as this is not a valid certificate *for* (although perhaps not in compliance with) s.19, or at least evidence that there is such a certificate.See *Bharaj Construction Pty Ltd v MIBP (No.3)* [2019] FCCA 31,(Judge Nicholls, 9 January 2019) where the Court said that the meaning of the word 'certifies' in a different provision should be given its ordinary meaning. It considered that the ordinary meaning includes some 'formality' and the notion of to 'inform with certainty', and is in essence a written statement setting out certain facts as found by the person or body issuing the certificate (at [65]-[66]). On this view, certification does not require words such as 'I certify that…' or any other reference to certification.

[26] *Maan v MIAC* (2009) 179 FCR 581, at [43]-[47], *Hassan v MIAC* [2012] FCA 816, at [46]. In *Maan*, the Court said that it 'is the certification by the educational institution as to breach of its attendance policies which constitutes the breach by the student of the visa'. It held that any errors in calculation of attendance could have been remedied by pursuing the education provider's appeal processes, and that reliance on a factually incorrect certificate would not be an issue going to the jurisdiction of the Tribunal. *Maan* has since been applied in a number of cases as authority that it is not the role of the Tribunal to go behind a certificate that is valid on its face. In *Vannemreddy v MIAC* (2013) 211 FCR 223 the Court reviewed some of these cases and at [57] said 'In assessing compliance with condition 8202 the scheme of the legislation is that the decision-maker can rely upon the certification by the education provider. The decision-maker is not required to look behind the certification so as to form its own view about the appellant's attendance at the course.'

[27] *Patel v MIAC* [2011] FMCA 112 (Burnett FM, 2 March 2011), at [53]–[56]. Upheld in *Patel v MIAC* (2012) 206 FCR 384, at [34].

[28] *Maan v MIAC* (2009) 179 FCR 581, at [43]-[47].

[29] *Patel v MIAC* (2012) 206 FCR 384, at [57]-[58] and [68]-[70], where it was held that improper delegation for s.20 [see 38] did not invalidate the relevant certificate; and see *Singh v MIAC* [2012] FMCA 821 (Burnett FM, 12 September 2012) at [39]-[44], where the applicant's claim not to be an accepted student at time of certification failed.

[30] *Vannemreddy v MIAC* (2013) 211 FCR 223, at [55]-[57]

[31] *Patel v MIAC* [2011] FMCA 112 (Burnett FM, 2 March 2011), at [53]-[56]. Upheld in *Patel v MIAC* (2012) 206 FCR 384, at [34].

[32] 'registered course' means a course of education or training provided by an institution, body or person that is registered, under Division 3 of Part 2 of the ESOS Act, to provide the course to overseas students: Migration Regulations, r.1.03. ESOS Act, s.14A requires information about each registered course to be entered on the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS).

However, different considerations may arise if the certificate was intended to be issued for a course in which the student was enrolled, but incorrectly referred to the wrong course by virtue of a typographical error or the like. In those circumstances, whether the certificate engages condition 8202 could depend on a variety of factors including whether it was obviously a typographical error.

What if the provider certified the student after the visa has expired?

As the visa condition is met unless there is a relevant certification, it would appear that if there was no relevant certification until after the visa had expired, then a breach of condition would not be established. In other words, as breach of the condition is constituted by the certification, the visa holder will have complied with the condition during the life of the visa, even if the unsatisfactory course progress or attendance that gave rise to the certificate occurred during that time.

The time the student was certified as not achieving satisfactory course progress or attendance is a question of fact to be established on the evidence, after further enquiries from the provider if appropriate.

Enrolment in two or more courses

In respect of a student who is enrolled in more than one registered course at different times during the life of the visa, certification of unsatisfactory progress or attendance in any of those courses would be enough to amount to a breach of 8202.[33]

Similarly, if a student is concurrently enrolled in more than one registered course, certification in respect of one would seem to be enough to amount to a breach of 8202. Satisfactory performance in another course would be relevant to the exercise of the discretion.

The ESOS Framework – s.19 and Standards 8 and 10 and 11

Section 19 of the ESOS Act requires education providers to give certain information including particulars of any breach by an accepted student of a prescribed condition of a student visa, as soon as practicable after the breach occurs.[34] Condition 8202 is prescribed.[35]

Standard 8 of the National code deals with the education provider's obligations in relation to course attendance and course progress. It says that registered providers must have and implement appropriate documented policies and processes to monitor the progress of students and their attendance where applicable, and notify and counsel students who are at risk of failing to meet these requirements. Attendance requirements apply to students enrolled in an accredited school course, ELICOS or Foundation Programs, or certain vocational education and technical (VET) training

[33] See *Wu v MIBP* [2016] FCCA 342 (Judge Jones, 19 February 2016) at [80]-[82].The Court held that as long as there had been certification by a registered provider while the applicant held his visa, subsequent enrolment in another course would not render that certification ineffective.

[34] ESOS Act s.19(2). For breaches that occurred on or after 1 July 2012, this requirement continues even if the student has ceased to be an accepted student of the provider: s.19(2A), inserted by *Education Services for Overseas Students Legislation Amendment (Tuition Protection Service and Other Measures) Act 2012*, No. 9 of 2012 s.2(1), s.3 and Schedule 5 items 2 and 8. ESOS Act s.19(3) requires a registered provider to give the relevant information by entering the information in the computer system established by the Secretary under section 109. Section 109 says it applies if a computer system is established by the Secretary for receiving and storing information about current and former accepted students under s.19.The relevant computer system is PRISMS (Provider Registration and International Student Management System), defined in r.1.03 of the ESOS Regulations to mean the electronic system of that name used to process information given under s.19.

[35] ESOS Regulations r.3.03A. Extracts from the ESOS Act, ESOS Regulations, and National Code 2018 are set out in Attachment B.

courses.[36] Students in such courses are required to achieve satisfactory attendance which is specified to be at least 80% of the scheduled course contact hours.[37]

Where the registered provider has assessed a student as not achieving satisfactory course progress or attendance, the provider must notify the student in writing of its intention to report the student accordingly, and inform the student that he or she may, within 20 working days, access the provider's complaints and appeals process, as per Standard 10 of the National Code.[38]

Where the student does not access the complaints and appeals processes within the 20 working day period, or withdraws from the process, or the process is completed and results in a decision supporting the registered provider, the registered provider may report *unsatisfactory course progress or attendance* in PRISMS. in accordance with s.19(2) of the ESOS Act.[39]

Standard 10 of the National Code, 'complaints and appeals', requires the education provider to have an internal complaints handling and appeals process which must be conducted in a professional, fair and transparent manner;[40] and if the student is not successful in the internal process, the registered provider must advise the student of his or her right to access the external appeals process at minimal or no cost.[41] Cancellation of the student's enrolment should generally not occur until the internal appeals process is completed[42] and a report of unsatisfactory progress or attendance must not be made before the internal and external complaints processes have been completed.[43]

Relevant legislative amendments

Title	Reference number
Migration Regulation 1994	No.268 of 1994
Migration Amendment Regulations 1998 (No.10)	No.305 of 1998
Migration Amendment Regulations 1999 (No.11)	No.220 of 1999
Migration Amendment Regulations 2000 (No.5)	No.259 of 2000
Migration Legislation Amendment (Overseas Student) Act 2000	No.168 of 2000
Migration Amendment Regulations 2001 (No.4)	No.142 of 2001
Migration Amendment Regulations 2001 (No.5)	No.162 of 2001
Migration Amendment Regulations 2003 (No.9)	No. 296 of 2003

[36] VET providers will only have to monitor attendance if this is set as a condition of registration by the ESOS agency for the provider; the minimum attendance requirement, if imposed, is 80% of the scheduled contact hours for the course..
[37] National Code 2018, Standard 8.6.1 and 8.11.
[38] National Code 2018, Standard 8.13.3.
[39] National Code 2018, Standard 8.14. PRISMS (Provider Registration and International Student Management System) is defined in r.1.03 of the ESOS Regulations to mean the electronic system of that name used to process information given under s.19 of the ESOS Act. Section 19(2) of the ESOS Act, on the other hand, requires a provider to give particulars of a *breach* of 8202, not particulars of unsatisfactory progress or attendance itself. As discussed above, since 2007 the breach is *certification* of unsatisfactory progress/attendance, not the underlying fact of unsatisfactory progress/attendance. Section 19(2) still uses the term 'breach' that now means certification, but before the 2007 amendment to condition 8202 meant a student's actual failure to achieve satisfactory progress or attendance. While a certification of unsatisfactory progress/attendance on PRISMS may not be, strictly speaking, in itself a certification of 'breach' (i.e. a certification of certification) *in accordance with* s.19, it is nevertheless probably a certification of unsatisfactory attendance/progress *for* s.19. In any case, judicial authority that the Tribunal should not generally go behind a certificate that is valid on its face (see 'The certification' below) means that whether the certificate is provided in accordance with s.19 is unlikely to be an issue, and *Karki v MIAC* [2011] (Cameron FM, 25 May 2011) on the difference between a notice pursuant to s.19 of the ESOS Act and a condition 8202 certification: at [24]-[26].
[40] National Code 2018, Standard 10.2.
[41] National Code 2018, Standard10.3.
[42] National Code 2018, Standard 9.6.
[43] National Code 2018, Standard 8.4

Migration Amendment Regulations 2007 (No. 5)	No.190 of 2007
Migration Amendment Regulation 2013 (No.1)	No.33 of 2013
Migration Legislation Amendment (2014 Measures No. 1) Regulation 2014	No.82 of 2014
Migration Legislation Amendment (2016 Measures No. 1) Regulation 2016	F2016L00523

Relevant Case Law

Chen v MIAC [2011] FMCA 177	Summary
Wen Bi Dai v MIAC (2007) 165 FCR 458	Summary
Hassan v MIAC [2012] FCA 816	Summary
Karki v MIAC [2011] FMCA 369	Summary
Kim v MIAC [2011] FMCA 780	Summary
Krummrey v MIMIA [2005] FCAFC 258; (2005) 147 FCR 557	Summary
Kumar v MIAC [2010] FMCA 614	Summary
Liew v MIBP [2016] FCA 172	
Liu v MIMIA [2003] FCA 1170	Summary
Luo v MIAC [2011] FMCA 160	Summary
Maan v MRT [2009] FMCA 1738	Summary
Maan v MIAC [2009] FCAFC 150; 179 FCR 581	Summary
Mo v MIAC [2010] FCA 162	Summary
Patel v MIAC [2011] FMCA 112	Summary
Patel v MIAC [2012] FCA 958	Summary
Shao v MIMIA [2007] FCA 18; (2007) 157 FCR 300	
Shrestha v MIMA [2001] FCA 1578	Summary
Shrestha v MIMA (2001) 64 ALD 669; [2001] FCA 359	Summary
Singh v MIAC [2012] FMCA 821	Summary
Vannemreddy v MIAC [2013] FCA 245; (2013) 211 FCR 223	
Wei v MIBP (2015) 257 CLR 22; [2015] HCA 51	Summary
Wu v MIBP [2016] FCCA 342	
Yang v MIMA [2007] FMCA 38	Summary

Zhang v MIAC [2010] FMCA 809	Summary

Available Decision Templates / Precedents

There is one template / precedent relevant to the review of decisions relating to visa condition 8202:

- **Cancellation s.116 - Breach of condition 8202 -** This template/precedent is for use in cases where a student visa has been cancelled under s.116(1)(b) for breach of condition 8202 where the breach occurred on or after 1 July 2007 (where visa application made before 1 July 2016).

Last updated/reviewed: 24 January 2019

Attachment A - Condition 8202 (1 July 2007 - present)

Visa granted on or after 1/7/07, and to visas granted before 1/7/07 where breach occurred on or after 1/7/07[44] (where visa application made before 1 July 2016)

8202 (1) The holder (other than the holder of a Subclass 560 (Student) visa who is an AusAID/Foreign Affairs student or the holder of a Subclass 576 (AusAID/Foreign Affairs or Defence Sector) visa) must meet the requirements of subclauses (2) and (3).

(2) A holder meets the requirements of this subclause if:
- (a) the holder is enrolled in a registered course; or
- (b) in the case of the holder of a Subclass 560 or 571 (Schools Sector) visa who is a secondary exchange student — the holder is enrolled in a full-time course of study or training.

(3) A holder meets the requirements of this subclause if neither of the following applies:
- (a) the education provider has certified the holder, for a registered course undertaken by the holder, as not achieving satisfactory course progress for:
  - (i) section 19 of the *Education Services for Overseas Students Act 2000*; and
  - (ii) standard 10 of the National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students 2007;
- (b) the education provider has certified the holder, for a registered course undertaken by the holder, as not achieving satisfactory course attendance for:
  - (i) section 19 of the *Education Services for Overseas Students Act 2000*; and
  - (ii) standard 11 of the National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students 2007.

(4) In the case of the holder of a Subclass 560 visa who is an AusAID/Foreign Affairs student or the holder of a Subclass 576 (AusAID/Foreign Affairs or Defence Sector) visa — the holder is enrolled in a full-time course of study or training.

Visa application made on or after 01/07/16[45]

8202 (1) The holder must be enrolled in a full-time course of study or training if the holder is:
- (a) a Defence student; or
- (b) a Foreign Affairs student; or
- (c) a secondary exchange student.

(2) A holder not covered by subclause (1):
- (a) must be enrolled in a full-time registered course; and
- (b) subject to subclause (3), must maintain enrolment in a registered course that, once completed, will provide a qualification from the Australian Qualifications Framework that is at the same level as, or at a higher level than, the registered course in relation to which the visa was granted; and
- (c) must ensure that neither of the following subparagraphs applies in respect of a registered course undertaken by the holder:
  - (i) the education provider has certified the holder, for a registered course undertaken by the holder, as not achieving satisfactory course progress for

[44] SLI 2007 No.190, rr.2, 5; Sch.3 item [1]. Amends cl.8202(3)..Amendment to 8202(3) applies in relation to visa applications made but not finally determined before 1/7/07, or made on or after 1/7/07; and in relation to visas granted before 1/7/07, but only in relation to a breach that occurred on or after 1/7/07: r.5(2) and (3). SLI 2014 No 82 amended condition 8202 so that when it is attaching to a visa granted on or after 1 July 2014, the references to AusAID in 8202(1) and 8202(4) should be read as 'Foreign Affairs'.

[45] Migration Legislation Amendment (2016 Measures No. 1) Regulation 2016 (F2016L00523), Sch 5, item [2].

section 19 of the *Education Services for Overseas Students Act 2000* and the relevant standard of the national code made by the Education Minister under section 33 of that Act;

(ii) the education provider has certified the holder, for a registered course undertaken by the holder, as not achieving satisfactory course attendance for section 19 of the *Education Services for Overseas Students Act 2000* and the relevant standard of the national code made by the Education Minister under section 33 of that Act.

(3) A holder is taken to satisfy the requirement set out in paragraph (2)(b) if the holder:
(a) is enrolled in a course at the Australian Qualifications Framework level 10; and
(b) changes their enrolment to a course at the Australian Qualifications Framework level 9.

Attachment B - Extracts from ESOS Act 2000, ESOS Regulations 2001, and National Code 2018

Education Services for Overseas Students Act 2000

Part 1 - Introduction

5 Definitions

In this Act, unless the contrary intention appears:

accepted student of a registered provider means a student (whether within or outside Australia):

(a) who is accepted for enrolment, or enrolled, in a course provided by the provider; and

(b) who is, or will be, required to hold a student visa to undertake or continue the course.

Part 3 – Obligations on registered providers

Division 1 – General obligations

19 Giving information about accepted students

…

(2) A registered provider must give particulars of any breach by an accepted student of a prescribed condition of a student visa as soon as practicable after the breach occurs.

(2A) A registered provider must give particulars of a breach by a student under subsection (2) even if the student has ceased to be an accepted student of the provider.

(3) A registered provider must give the information required by this section by entering the information in the computer system established by the Secretary under section 109.

Note 1: If a registered provider breaches this section, the ESOS agency for the provider may take action under Division 1 of Part 6 against the provider.

Note 2: It is an offence to provide false or misleading information in complying or purporting to comply with this section: see section 108.

Unincorporated registered providers

(4) If the registered provider is an unincorporated body, then it is instead the principal executive officer of the provider who must give the information as required under this section.

(5) A registered provider, or the principal executive officer of a registered provider that is an unincorporated body, who fails to comply with this section commits an offence.

Penalty: 60 penalty units.

(6) An offence under subsection (5) is an offence of strict liability. [46]

Note: For strict liability, see section 6.1 of the *Criminal Code*.

[46] Subsection (6) and accompanying note were inserted by *ESOS Legislation Amendment Act 2011*, No 11 of 2011, s.3 and Sch 1 Pt 1 item 10.

Education Services for Overseas Students Regulations 2001

3.03A Breach by an accepted student of a student visa condition

For subsections 19 (2) and 20 (1) of the Act, a prescribed condition of a student visa is visa condition 8202, set out in Schedule 8 to the *Migration Regulations 1994.*

Note: Subsection 19(2) of the Act requires a registered provider to give particulars of any breach by an accepted student of a prescribed condition of a student visa. Under subsection 19(3) of the Act, the information must be entered in the computer system established by the Secretary under section 109 of the Act.

National Code of Practice for Providers of Education and Training to Overseas Students 2018

Standard 8 - Overseas student visa requirements

Monitoring overseas student progress, attendance and course duration

8.1 The registered provider must monitor overseas students' course progress and, where applicable, attendance for each course in which the overseas student is enrolled.

8.2 The expected duration of study specified in the overseas student's CoE must not exceed the CRICOS registered duration.

8.3 The registered provider must monitor the progress of each overseas student to ensure the overseas student is in a position to complete the course within the expected duration specified on the overseas student's CoE.

8.4 The registered provider must have and implement documented policies and processes to identify, notify and assist an overseas student at risk of not meeting course progress or attendance requirements where there is evidence from the overseas student's assessment tasks, participation in tuition activities or other indicators of academic progress that the overseas student is at risk of not meeting those requirements.

8.5 The registered provider must clearly outline and inform the overseas student before they commence the course of the requirements to achieve satisfactory course progress and, where applicable, attendance in each study period.

Schools, ELICOS and Foundation Programs: course progress and attendance requirements

8.6 The registered provider of a school, ELICOS or Foundation Program course must have and implement a documented policy and process for monitoring and recording attendance of the overseas student, specifying:

8.6.1 requirements for achieving satisfactory attendance for the course which at a minimum must be 80 per cent—or higher if specified under state or territory legislation or other regulatory requirements—of the scheduled contact hours

8.6.2 the method for working out minimum attendance under this standard

8.6.3 processes for recording course attendance

8.6.4 details of the registered provider's intervention strategy to identify, notify and assist overseas students who have been absent for more than five consecutive days without approval, or who are at risk of not meeting attendance requirements before the overseas student's attendance drops below 80 per cent

8.6.5 processes for determining the point at which the overseas student has failed to meet satisfactory course attendance.

8.7 The registered provider must have and implement a documented policy and process for monitoring and recording course progress for the overseas student, specifying:

8.7.1 requirements for achieving satisfactory course progress for the course

8.7.2 processes for recording and assessing course progress

8.7.3 details of the registered provider's intervention strategy to identify, notify and assist students at risk of not meeting course progress requirements in sufficient time for those students to achieve satisfactory course progress

8.7.4 processes for determining the point at which the student has failed to meet satisfactory course progress.

Higher education: course progress requirements

8.8 The registered provider of a higher education course must have and implement a documented policy and process for monitoring and recording course progress for the overseas student, specifying:

8.8.1 requirements for achieving satisfactory course progress, including policies that promote and uphold the academic integrity of the registered course, and processes to address misconduct and allegations of misconduct

8.8.2 processes for recording and assessing course progress requirements

8.8.3 processes to identify overseas students at risk of unsatisfactory course progress

8.8.4 details of the registered provider's intervention strategy to assist overseas students at risk of not meeting course progress requirements in sufficient time for those overseas students to achieve satisfactory course progress

8.8.5 processes for determining the point at which the overseas student has failed to meet satisfactory course progress.

Vocational education and training (VET): course progress and attendance requirements

8.9 The registered provider of a VET course as defined in the NVETR Act must have and implement a documented policy and process for assessing course progress that includes:

8.9.1 requirements for achieving satisfactory course progress, including policies that promote and uphold the academic integrity of the registered course and meet the training package or accredited course requirements where applicable, and processes to address misconduct and allegations of misconduct

8.9.2 processes for recording and assessing course progress requirements

8.9.3 processes to identify overseas students at risk of unsatisfactory course progress

8.9.4 details of the registered provider's intervention strategy to assist overseas students at risk of not meeting course progress requirements in sufficient time for those overseas students to achieve satisfactory course progress

8.9.5 processes for determining the point at which the overseas student has failed to meet satisfactory course progress.

8.10 The registered provider must have and implement a documented policy and process for monitoring the attendance of overseas students if the requirement to implement and maintain minimum attendance requirements for overseas students is set as a condition of the provider's registration by an ESOS agency.

8.11 If an ESOS agency requires a VET provider to monitor overseas student attendance as a condition of registration, the minimum requirement for attendance is 80 per cent of the scheduled contact hours for the course.

8.12 If an ESOS agency requires a VET provider to monitor overseas student attendance, the registered provider must have and implement a documented policy and process for monitoring and recording attendance of the overseas student, specifying:

8.12.1 the method for working out minimum attendance under this standard

8.12.2 processes for recording course attendance

8.12.3 details of the registered provider's intervention strategy to identify, notify and assist overseas students who have been absent for more than five consecutive days without approval, or who are at risk of not meeting attendance requirements before the overseas student's attendance drops below 80 per cent

8.12.4 processes for determining the point at which the overseas student has failed to meet satisfactory course attendance.

Reporting unsatisfactory course progress or unsatisfactory course attendance

8.13 Where the registered provider has assessed the overseas student as not meeting course progress or attendance requirements, the registered provider must give the overseas student a written notice as soon as practicable which:

8.13.1 notifies the overseas student that the registered provider intends to report the overseas student for unsatisfactory course progress or unsatisfactory course attendance

8.13.2 informs the overseas student of the reasons for the intention to report

8.13.3 advises the overseas student of their right to access the registered provider's complaints and appeals process, in accordance with Standard 10 (Complaints and appeals), within 20 working days.

8.14 The registered provider must only report unsatisfactory course progress or unsatisfactory course attendance in PRISMS in accordance with section 19(2) of the ESOS Act if:

8.14.1 the internal and external complaints processes have been completed and the decision or recommendation supports the registered provider, or

8.14.2 the overseas student has chosen not to access the internal complaints and appeals process within the 20 working day period, or

8.14.3 the overseas student has chosen not to access the external complaints and appeals process, or

8.14.4 the overseas student withdraws from the internal or external appeals processes by notifying the registered provider in writing.

8.15 The registered provider may decide not to report the overseas student for breaching the attendance requirements if the overseas student is still attending at least 70 per cent of the scheduled course contact hours and:

8.15.1 for school, ELICOS and Foundation Program courses, the overseas student provides genuine evidence demonstrating that compassionate or compelling circumstances apply; or

8.15.2 for VET courses, the student is maintaining satisfactory course progress.

Allowable extensions of course duration

8.16 The registered provider must not extend the duration of the overseas student's enrolment if the overseas student is unable to complete the course within the expected duration, unless:

8.16.1 there are compassionate or compelling circumstances, as assessed by the registered provider on the basis of demonstrable evidence, or

8.16.2 the registered provider has implemented, or is in the process of implementing, an intervention strategy for the overseas student because the overseas student is at risk of not meeting course progress requirements, or

8.16.3 an approved deferral or suspension of the overseas student's enrolment has occurred under Standard 9 (Deferring, suspending or cancelling the overseas student's enrolment).

8.17 If the registered provider extends the duration of the student's enrolment, the provider must advise the student to contact Immigration to seek advice on any potential impacts on their visa, including the need to obtain a new visa.

Modes of delivery

Note: *Online learning is study where the teacher and overseas student primarily communicate through digital media, technology-based tools and IT networks and does not require the overseas student to attend scheduled classes or maintain contact hours. For the purposes of the ESOS framework, online learning does not include the provision of online lectures, tuition or other resources that supplement scheduled classes or contact hours. Distance learning is any learning that an overseas student undertakes off campus and does not require an overseas student on a student visa to physically attend regular tuition for the course on campus at the provider's registered location.*

8.18 A registered provider must not deliver a course exclusively by online or distance learning to an overseas student.

8.19 A registered provider must not deliver more than one-third of the units (or equivalent) of a higher education or VET course by online or distance learning to an overseas student.

8.20 A registered provider must ensure that in each compulsory study period for a course, the overseas student is studying at least one unit that is not by distance or online learning, unless the student is completing the last unit of their course.

8.21 For school, ELICOS or foundation programs, any online or distance learning must be in addition to minimum face-to-face teaching requirements approved by the relevant designated State authority or ESOS agency as part of the registration of the course, if applicable.

8.22 The registered provider must take all reasonable steps to support overseas students who may be disadvantaged by:

8.22.1 additional costs or other requirements, including for overseas students with special needs, from undertaking online or distance learning

8.22.2 inability to access the resources and community offered by the education institution, or opportunities for engaging with other overseas students while undertaking online or distance learning.

Standard 9 - Deferring, suspending or cancelling the overseas student's enrolment

9.1 A registered provider must have and implement a documented process for assessing, approving and recording a deferment of the commencement of study or suspension of study requested by an overseas student, including maintaining a record of any decisions.

9.2 A registered provider may defer or suspend the enrolment of a student if it believes there are compassionate or compelling circumstances.

9.3 A registered provider may suspend or cancel a student's enrolment including, but not limited to, on the basis of:

9.3.1 misbehaviour by the student

9.3.2 the student's failure to pay an amount he or she was required to pay the registered provider to undertake or continue the course as stated in the written agreement

9.3.3 a breach of course progress or attendance requirements by the overseas student, which must occur in accordance with Standard 8 (Overseas student visa requirements).

9.4 If the registered provider initiates a suspension or cancellation of the overseas student's enrolment, before imposing a suspension or cancellation the registered provider must:

9.4.1 inform the overseas student of that intention and the reasons for doing so, in writing

9.4.2 advise the overseas student of their right to appeal through the provider's internal complaints and appeals process, in accordance with Standard 10 (Complaints and appeals), within 20 working days.

9.5 When there is any deferral, suspension or cancellation action taken under this standard, the registered provider must:

9.5.1 inform the overseas student of the need to seek advice from Immigration on the potential impact on his or her student visa

9.5.2 report the change to the overseas student's enrolment under section 19 of the ESOS Act.

9.6 The suspension or cancellation of the overseas student's enrolment under Standard 9.3 cannot take effect until the internal appeals process is completed, unless the overseas student's health or wellbeing, or the wellbeing of others, is likely to be at risk.

Standard 10 – Complaints and appeals

10.1 The registered provider must have and implement a documented internal complaints handling and appeals process and policy, and provide the overseas student with comprehensive, free and easily accessible information about that process and policy.

10.2 The registered provider's internal complaints handling and appeals process must:

10.2.1 include a process for the overseas student to lodge a formal complaint or appeal if a matter cannot be resolved informally

10.2.2 include that the provider will respond to any complaint or appeal the overseas student makes regarding his or her dealings with the registered provider, the registered provider's education agents or any related party the registered provider has an arrangement with to deliver the overseas student's course or related services

10.2.3 commence assessment of the complaint or appeal within 10 working days of it being made in accordance with the registered provider's complaints handling and appeals process and policy, and finalise the outcome as soon as practicable

10.2.4 ensure the overseas student is given an opportunity to formally present his or her case at minimal or no cost and be accompanied and assisted by a support person at any relevant meetings

10.2.5 conduct the assessment of the complaint or appeal in a professional, fair and transparent manner

10.2.6 ensure the overseas student is given a written statement of the outcome of the internal appeal, including detailed reasons for the outcome

10.2.7 keep a written record of the complaint or appeal, including a statement of the outcome and reasons for the outcome.

10.3 If the overseas student is not successful in the registered provider's internal complaints handling and appeals process, the registered provider must advise the overseas student within 10 working days of concluding the internal review of the overseas student's right to access an external complaints handling and appeals process at minimal or no cost. The registered provider must give the overseas student the contact details of the appropriate complaints handling and external appeals body.

10.4 If the internal or any external complaints handling or appeal process results in a decision or recommendation in favour of the overseas student, the registered provider must immediately implement the decision or recommendation and/or take the preventive or corrective action required by the decision, and advise the overseas student of that action.

National Code of Practice for Registration Authorities and Providers of Education and Training to Overseas Students 2007

(This Code is no longer in force for determining compliance by education providers[47], but is referred to in the previous version of Condition 8202.)

Standard 10 – Monitoring course progress

Outcome of Standard 10

Registered providers systematically monitor students' course progress. Registered providers are proactive in notifying and counselling students who are at risk of failing to meet course progress requirements. Registered providers report students, under section 19 of the ESOS Act, who have breached the course progress requirements.

10.1 The registered provider must monitor, record and assess the course progress of each student for each unit of the course for which the student is enrolled in accordance with the registered provider's documented course progress policies and procedures.

10.2 The registered provider must have and implement appropriate documented course progress policies and procedures for each course, which must be provided to staff and students, that specify the:
- a. requirements for achieving satisfactory course progress
- b. process for assessing satisfactory course progress
- c. procedure for intervention for students at risk of failing to achieve satisfactory course progress
- d. process for determining the point at which the student has failed to meet satisfactory course progress, and
- e. procedure for notifying students that they have failed to meet satisfactory course progress requirements.

10.3 The registered provider must assess the course progress of the student in accordance with the registered provider's course progress policies and procedures at the end point of every study period.

10.4 The registered provider must have a documented intervention strategy, which must be made available to staff and students, that specifies the procedures for identifying and assisting students at risk of not meeting the course progress requirements. The strategy must specify:
- a. procedures for contacting and counselling identified students
- b. strategies to assist identified students to achieve satisfactory course progress, and

[47] Currently registered providers must be compliant with the 2018 Code from 1 January 2018: National Code of Practice for Providers of Education and Training to Overseas Students 2018, cl.5.

c. the process by which the intervention strategy is activated.

10.5 The registered provider must implement the intervention strategy for any student who is at risk of not meeting satisfactory course progress requirements. At a minimum, the intervention strategy must be activated where the student has failed or is deemed not yet competent in 50% or more of the units attempted in any study period.

10.6 Where the registered provider has assessed the student as not achieving satisfactory course progress, the registered provider must notify the student in writing of its intention to report the student for not achieving satisfactory course progress. The written notice must inform the student that he or she is able to access the registered provider's complaints and appeals process as per Standard 8 (Complaints and appeals) and that the student has 20 working days in which to do so.

10.7 Where the student has chosen not to access the complaints and appeals processes within the 20 working day period, withdraws from the process, or the process is completed and results in a decision supporting the registered provider, the registered provider must notify the Secretary of DEST through PRISMS[48] of the student not achieving satisfactory course progress as soon as practicable.

Standard 11 – Monitoring attendance

Outcome of Standard 11

Registered providers systematically monitor students' compliance with student visa conditions relating to attendance. Registered providers are proactive in notifying and counselling students who are at risk of failing to meet attendance requirements. Registered providers report students, under section 19 of the ESOS Act, who have breached the attendance requirements.

11.1 The registered provider must record the attendance of each student for the scheduled course contact hours for each CRICOS registered course in which the student is enrolled which is:
a. an accredited vocational and technical education course (unless Standard 11.2 applies)
b. an accredited school course
c. an accredited or non-award ELICOS course, or
d. another non-award course[3].

11.2 Where the registered provider implements the DEST and DIAC approved course progress policy and procedures for its vocational and technical education courses, Standard 11 does not apply.[49]

11.3 For the courses identified in 11.1, the registered provider must have and implement appropriate documented attendance policies and procedures for each course which must be provided to staff and students that specify the:
a. requirements for achieving satisfactory attendance, which at a minimum, requires overseas students to attend at least 80 per cent of the scheduled course contact hours
b. manner in which attendance and absences are recorded and calculated
c. process for assessing satisfactory attendance
d. process for determining the point at which the student has failed to meet satisfactory attendance, and
e. procedure for notifying students that they have failed to meet satisfactory attendance requirements.

[48]PRISMS (Provider Registration and International Student Management System) is defined in r.1.03 of the ESOS Regulations to mean the electronic system of that name used to process information under s.19 of the ESOS Act.
[3] For the purposes of the National Code, non-award courses do not include higher education courses or units, including Study Abroad courses.
[49] Note that the reference to DEST should now be understood as a reference to Education: see *Legislation Act 2003* s.13, *Acts Interpretation Act* s.19A(3).

11.4 For the courses identified in 11.1, the registered provider's attendance policies and procedures must identify the process for contacting and counselling students who have been absent for more than five consecutive days without approval or where the student is at risk of not attending for at least 80 per cent of the scheduled course contact hours for the course in which he or she is enrolled (i.e. before the student's attendance drops below 80 per cent).

11.5 For the courses identified in the registered provider must regularly assess the attendance of the student in accordance with the registered provider's attendance policies and procedures.

11.6 Where the registered provider has assessed the student as not achieving satisfactory attendance for the courses identified in 11.1, the registered provider must notify the student in writing of its intention to report the student for not achieving satisfactory attendance. The written notice must inform the student that he or she is able to access the registered provider's complaints and appeals process as per Standard 8 (Complaints and appeals) and that the student has 20 working days in which to do so.

11.7 Where the student has chosen not to access the complaints and appeals processes within the 20 working day period, withdraws from the process, or the process is completed and results in a decision supporting the registered provider, the registered provider must notify the Secretary of DEST through PRISMS[50] that the student is not achieving satisfactory attendance as soon as practicable.

11.8 For the vocational and technical education and non-award courses identified in 11.1.a and d, the registered provider may only decide not to report the student for breaching the 80 per cent attendance requirement where:

a. that decision is consistent with its documented attendance policies and procedures, and
b. the student records clearly indicate that the student is maintaining satisfactory course progress, and
c. the registered provider confirms that the student is attending at least 70 per cent of the scheduled course contact hours for the course in which he or she is enrolled.

11.9 For the ELICOS and school courses identified in 11.1, the registered provider may only decide not to report a student for breaching the 80 per cent attendance requirement where:

a. the student produces documentary evidence clearly demonstrating that compassionate or compelling circumstances (e.g. illness where a medical certificate states that the student is unable to attend classes) apply, and
b. that decision is consistent with its documented attendance policies and procedures, and
c. the registered provider confirms that the student is attending at least 70 per cent of the scheduled course contact hours for the course in which he or she is enrolled.

[50] PRISMS (Provider Registration and International Student Management System is defined in r.1.03 of the ESOS Regulations to mean the electronic system of that name used to process information under s.19 of the ESOS Act.

Visa Conditions 8104, 8105, 8607 and 8107 (Work restrictions)

CONTENTS

Overview

Conditions 8104 and 8105 as set out in Schedule 8 to the Migration Regulations 1994 (the Regulations) place restrictions on a visa holder's capacity to undertake work in Australia. In general terms, they restrict visa holders to working 40 hours a fortnight (or 20 hours a week for people whose visas were cancelled before 26 March 2012), although some exceptions and additional restrictions apply. Condition 8105 is imposed on primary student visa holders,[1] and 8104 on secondary visa holders.[2] They most commonly arise as an issue for the Tribunal in relation to cancellation of student visas, but may also be relevant to whether the visa holder is able to satisfy the criteria for the grant of a further visa.[3]

Conditions 8107 and 8607 apply to primary Subclass 457 and 482 visa holders and some other temporary visa holders. Broadly, they prohibit visa holders from ceasing the relevant employment or activity and engaging in other work. They require visa holders to work in the occupation in relation to which their visa was granted, and only for the same employer. Additionally, Subclass 457 and 482 visa holders must commence work in Australia within 90 days and not cease employment for a certain time period, and need to hold any mandatory licencing, registration or professional memberships for their occupation and meet other associated requirements. There are numerous versions of condition 8107 which are discussed below.

This commentary focuses on the requirements of conditions 8104, 8105, 8107, and 8607, but when reviewing a cancellation for breach of these conditions, more general principles relating to visa cancellations under s.116(1)(b) of the *Migration Act 1958* (the Act) and visa cancellations overall will apply. These are discussed in Legal Services Commentaries Cancellation Under s.116 – General and Cancellation Overview.

Key requirements of conditions 8104 and 8105

Condition 8105 is imposed on primary student visa holders,[4] and 8104 on secondary visa holders.[5]

Condition 8105

Condition 8105 limits the hours a primary student visa holder may work to 40 hours per fortnight while their course is in session.[6] The word 'fortnight' is defined to mean 'the period of 14 days commencing on a Monday'.[7] Previous versions imposed a 20 hours per week limit.[8] The restriction does not apply to work that was specified as a requirement of the course when the course particulars were entered in

[1] cll.500.611, 570.611, 571.611, 572.611, 573.611, 574.611, 575.611, 576.611.
[2] cll.500.612, 570.617, 571.614, 572.617, 573.617, 574.617, 575.617, 576.614.
[3] cll.500.212(b), 570.223(2)(b), 571.223(2)(b), 572.223(1A)(b), 573.223(1A)(b), 574.223(1A)(b), 575.223(1A)(b) and 576.222(2)(b).
[4] cll.500.611, 570.611, 571.611, 572.611, 573.611, 574.611, 575.611, 576.611.
[5] cll.500.612, 570.617, 571.614, 572.617, 573.617, 574.617, 575.617, 576.614.
[6] Condition 8105(2). This limit applies in relation to visa applications made on or after 26 March 2012, visa applications made before but not yet finally determined by 26 March 2012 and to any visas granted on or after 26 April 2008 which are in effect on 26 March 2012 (see SLI 2002 No. 35 (F2012L00664). r.7, sch. 6).
[7] Condition 8105(3).
[8] For visas granted before 26 April 2008, and visas granted on or after that date but not in effect on 26 March 2012. For visas granted on or after 26 April 2008 but not in effect on 26 March 2012, 'week' is defined in Condition 8105(3) as 'the period of '7 days commencing on a Monday'.

the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS), or to people who have commenced a course of study for the award of a masters or doctorate degree.[9]

Versions of Condition 8105 that apply to visas cancelled on or after 26 March 2012 are set out in Attachment A.

All primary visa holders are also prohibited from working in Australia before their course commences.[10]

Thus, the issues that may arise for consideration in respect of condition 8105 are:

- whether the visa holder has engaged in work in Australia for more than 40 hours a fortnight 'during any fortnight when the holder's course of study is in session'; and, if so:
    - whether the work is specified as a requirement of the course and registered as such with CRICOS; or
    - whether they have commenced a masters degree by research or doctoral degree; and
- whether the holder engaged in *any* work in Australia before their course of study commenced.

Condition 8104

Condition 8104 limits the hours a secondary student visa holder may work to 40 hours per fortnight while the holder is in Australia.[11] The word 'fortnight' is defined to mean 'the period of 14 days commencing on a Monday'.[12] Previous versions imposed a 20 hours per week limit.[13]

All versions of Condition 8104 are set out in Attachment A.

All secondary visa holders are also prohibited from working in Australia before the primary visa holder has commenced a course, while family members of certain masters or doctorate degree students are not subject to a limit on work hours.[14]

Thus, the issues that may arise for consideration in respect of condition 8104 are:

- whether the visa holder has engaged in 'work', as defined by the Regulations, while in Australia;
- whether such work was undertaken for more than the permissible amount and if so, for student visas granted on or after 26 April 2008, whether the holder is a family member to whom one of the exceptions relating to certain masters and doctorate students applies; and
- for student visas granted on or after 26 April 2008 to family members of the primary visa holder, whether they engaged in work before the primary visa holder commenced a course of study.

[9] Condition 8105(2).
[10] Condition 8105(1A), introduced by SLI 2008 No. 56 (F2008L01025). This prohibition applies to visa applications made on or after 26 April 2008 as well as those made prior to, but not finally determined as at that date: r.5.
[11] Condition 8104(1). This limit applies in relation to visa applications made on or after 26 March 2012, visa applications made before but not yet finally determined by 26 March 2012 and to any visas granted on or after 26 April 2008 which are in effect on 26 March 2012 (see SLI 2002 No. 35 (F2012L00664); r.7, sch. 6).
[12] Condition 8104(6).
[13] For visas granted before 26 April 2008, and visas granted on or after that date but not in effect on 26 March 2012. For visas granted on or after 26 April 2008 but not in effect on 26 March 2012, 'week' is defined in Condition 8104(6) as 'the period of 7 days commencing on a Monday'.
[14] SLI 2008 No. 56 (F2008L01025). These changes apply to visa applications made on or after 26 April 2008 as well as those made prior to, but not finally determined as at that date: r.5.

Legal Issues

Meaning of 'work'

Both conditions 8104 and 8105 restrict a visa holder's capacity to engage in 'work' in Australia. Regulation 1.03 of the Regulations defines work as 'an activity that, in Australia, normally attracts remuneration'. While the construction of that definition is a question of law, the question of whether a visa holder's activities fall within the definition is a question of fact to be determined by the Minister (or the Tribunal on review).[15]

The definition provided in r.1.03 may include an activity for which an individual visa holder is not remunerated. It is sufficient that it 'be an activity that normally attracts remuneration'.[16]

Whether a particular activity will fall within that definition depends on the circumstances and character of the activity. 'Circumstances can arise in which persons engage in activity of a domestic or social character… which should not be seen as falling within the notion of work as used in the Regulations.'[17] 'Just as in some cases the pursuit of an activity for the purpose of gaining a livelihood or monetary reward will lead to the conclusion that the activity constitutes 'work', there will also be cases where an activity is so clearly in pursuit, for example, of leisure or a hobby that beyond question no element of 'work' in the ordinary sense of the term will be involved. Between the two extremes will fall cases where no particular factor is conclusive.'[18] '[C]ommercial, social, domestic or altruistic motivations may, in the context of all the facts of a case, assist in determining whether a particular activity undertaken voluntarily is one that ordinarily attracts remuneration.'[19] The assessment of whether an activity should be regarded as work is a 'matter of evaluation and degree'.[20] The test to be applied is an objective one; it is not whether the individual performing the activity actually receives remuneration for it (although this is relevant evidence in applying the test), nor whether they perform it for commercial motives or for some other reason. This test requires an enquiry into the nature of the activity rather than into the arrangement under which the activity is conducted.[21]

Determining whether an activity is work that is normally remunerated 'requires going beyond the nature of the activity in question to the particular context of the assistance provided'.[22] The decision-maker must consider the circumstances surrounding the activity, including the motivations and agreements which have resulted in the activity, and the personal and economic context in which the

[15] *Al Ferdous v MIAC* [2011] FCA 1070 (Stone J, 20 September 2011) at [25].
[16] *Braun v MILGEA* (1991) 33 FCR 152 at 156. *Braun* considered the definition in then r.2, in which work was also defined 'as an activity that, in Australia, normally attracts remuneration'.
[17] *Braun v MILGEA* (1991) 33 FCR 152 at 156.
[18] *MILGEA v Montero* (1991) 31 FCR 50, at 58. At the time of this judgment, the term 'work' was not defined in the Act or Regulations, and was to be treated as a word of common usage according to its ordinary meaning. Its reasoning on this point has been held to apply to later definitions of 'work': see *Braun v MILGEA* (1991) 33 FCR 152 at 156, *Dib v MIMA* (1998) 82 FCR 489.
[19] *Dib v MIMIA* (1998) 82 FCR 489 at 495.
[20] *Braun v MILGEA* (1991) 33 FCR 152 at 156.
[21] *Kim v Witton* (1995) 59 FCR 258 at 268. While a person's motives or whether they are paid are not in themselves the test, '[n]one of this is to suggest that the voluntary nature of a particular activity, nor that the purposes for which it is undertaken, are necessarily irrelevant in determining whether the activity is one that ordinarily attracts remuneration': at 269. In *Kim*, the 'employer' was prepared to a pay a person for tasks which were claimed to have been performed voluntarily, and the court held that there was evidence before the Tribunal from which it could be reasonably satisfied that the tasks performed were of a nature that, in Australia, normally attracts remuneration.
[22] *Dib v MIMIA* (1998) 82 FCR 489 at 495.

activity is performed, including whether there is evidence of any remuneration actually being received.[23]

Some examples given by the Courts to illustrate how these factors may affect the factual assessment of whether an activity in a particular context may be work that normally attracts remuneration are:

- assistance which is purely domestic, such as helping relatives to look after children and driving them to doctors' appointments, are the types of favours any relative would perform for their family in difficulties and cannot be 'work';[24]
- house-painting is often 'work' performed for remuneration, but this does not mean that it is not also undertaken as a domestic activity by the owners of a house and their relatives or friends;[25]
- a son or daughter may do household chores, gardening, wash the car and may receive pocket money or use of the car in return. That this activity may also be done by a professional gardener, car washer or domestic assistant where it is 'work' does not mean that it is 'work' in the relevant sense when done by the son or daughter;[26]
- the work of a chef may be usually remunerated, however the work of a chef undertaken at a charity event may not be work that is usually remunerated;[27]
- a taxi driver waiting for a fare is doing *'work'* even though not actually driving a paying passenger. Once they begin their driving shift, the time a taxi driver spends waiting for a fare or waiting between fares is a necessary and inextricable aspect of driving a taxi for remuneration.[28] Returning the taxi to base, handing over to the next driver, and logging on and off is capable of being 'work' even where the driver did not earn a fare for the return journey or the handover.[29] Activities such as filling the vehicle with petrol, changing flat tyres and attending to other maintenance are all incidental aspects of earning remuneration by the conveyance of fare paying passengers;[30]
- being available for work is not always *'work'.* For example, a contractor who is available for work throughout the week but willing to undertake actual work for, say, only two days but at variable times, would not be undertaking work for more than two days in each week;[31]
- the preparation of graphic artwork on behalf of an educational authority, on a regular and systematic basis over a period of seven months, even though the arrangement provided only for reimbursement of expenses and did not entitle the applicant to a wage or salary, could fall within the definition of 'work';[32]
- activities which can be described generally as an 'involvement in management decisions and managerial oversight' might be found 'normally' to attract remuneration in some situations, particularly if the person lacks any other apparent motivation for taking an interest in the business. However, where a person holds a significant investment in and claims to be receiving weekly repayments on a loan to that business, a decision-maker needs to consider those relationships to the business in identifying and characterising the particular 'activity'. It

[23] *Bhatia v MIBP* [2015] FCCA 409 (Judge Driver, 20 March 2015) at [10], fn 3, citing *Xu v MIAC* [2007] FMCA 285 (Smith FM, 26 March 2007) at [21] and *Tikoisuva v MIMA* [2001] FCA 1347 (Stone J, 20 September 2001) at [11].[24] *Dib v MIMIA* (1998) 82 FCR 489 at 492.
[24] *Dib v MIMIA* (1998) 82 FCR 489 at 492.
[25] *Dib v MIMIA* (1998) 82 FCR 489 at 495.
[26] *Dib v MIMIA* (1998) 82 FCR 489 at 495.
[27] *Bhatia v MIBP* [2015] FCCA 409 (Judge Driver, 20 March 2015) at [29]. The Court concluded at [32] that the Tribunal erred in finding the applicant's unpaid volunteer work as a chef was work that is usually remunerated, without considering the particular circumstance claimed, that the work was undertaken for the purpose of obtaining a TRA skills assessment.
[28] *Verma v MIBP* [2017] FCCA 69 (Judge Young, 18 January 2017), at [22].
[29] *Al Ferdous v MIAC* [2011] FCA 1070 (Stone J, 20 September 2011), at [25]. At first instance, Nicholls FM had held that the Tribunal's finding was reasonably open to it, but noted in *obiter* that a different member may have come to a different view as to whether the 51 minutes worked in excess of 20 hours in one week fell within the meaning of 'work': *Al Ferdous v MIAC* [2010] FMCA 824 (Nicholls FM, 29 October 2010), at [55] – [56].
[30] *Amandeep v MIAC* [2011] FMCA 757 (Jarrett FM, 30 September 2011), at [23].
[31] *Verma v MIBP* [2017] FCCA 69 (Judge Young, 18 January 2017), at [21].
[32] *Kim v Witton* (1995) 59 FCR 258 at 269.

cannot assume that a person in the applicant's situation would 'normally' be paid remuneration, without investigating the actual extent and nature of the applicant's involvement in management, and without considering the implications of his proprietary and personal interest in the business. It must identify the 'activity', before considering whether it is an activity which 'normally attracts remuneration';[33]

- the fact that an applicant's clients and payments are located offshore does not mean that he or she has not engaged in 'work in Australia' when he or she uses a home telephone, fax and internet in Australia to operate the business.[34]

Meaning of 'week' and 'fortnight'

For visas granted on or after 26 April 2008 the terms 'week' and 'fortnight' are defined in Condition 8104 and 8105.

For visas granted on or after 26 April 2012 the relevant term is 'fortnight'. 'Fortnight' is defined in cl.8104 to mean the period of 14 days commencing on a Monday. This means that a visa holder cannot work more than a fortnight in any one particular period. Hours worked by a student visa holder cannot be 'averaged out' over the period of their stay in Australia.[35]

Meaning of 'when the holder's course of study or training is in session'

Condition 8105(1) provides that a visa holder must not engage in work in Australia for more than 40 hours a fortnight (or 20 hours a week, where applicable) *when the holder's course of study or training is in session*. Provided a visa holder's course has commenced, a visa holder subject to condition 8105 is not limited in the amount of work they can engage in when their course is 'out of session'.

The Regulations do not define when a course of study or training is considered to be 'in session'. Departmental guidelines suggest a course is considered to be 'in session':

- for the duration of the advertised semesters (including periods when exams are being held)
- if a student is undertaking another course during a break from their main course and the points will be credited towards their main course.[36]

While it is a guide to the Department's interpretation, care should be taken not to elevate Departmental policy guidelines to a legislative requirement. In the absence of judicial consideration, the question of whether a visa holder's course of study or training is 'in session' for the purpose of condition 8105 will ultimately be a question of fact for the Tribunal.

Work prior to the grant of a student visa to which condition 8105 applies

There is nothing in the wording of condition 8105 which suggests that it can be breached before it has been imposed. That is, a visa holder can only breach condition 8105 by working in excess of the permissible hours in any fortnight/week during the life of the visa.

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[33] *Xu v MIAC* [2007] FMCA 285 (Smith FM, 26 March 2007) at [17] - [21] and [27].
[34] *Panta v MIMA* [2006] FMCA 855 (Driver FM, 29 September 2006). This case was dealing with condition 8101 but it contains the equivalent phrase 'work in Australia' and is therefore of relevance in interpreting this phrase in condition 8105.
[35] See *Islam v MIAC* (2007) 158 FCR 579, at [15] – [16]. In the version of condition 8104 considered in this case, 'fortnight' or 'week' was not defined. The inability to average out hours has since been made clearer in the definition of 'fortnight' as 'the period of 14 days commencing on a Monday'.
[36] Policy - Migration Regulations - Schedules > [Sch2Visa500] - Student > 5. Procedural Instruction > Recording a Decision > Student Visa Conditions > Condition 8105 work limitation (primary visa holders) - Defining 'in session' and 'out of session' (re-issue date 21/09/2018). Departmental policy also refers to other circumstances that are effectively considered 'out of session'.

The relevant course of study, where multiple courses are undertaken

Where a person undertakes more than one course of study during the life of a visa, it appears that condition 8105(1) may be breached if excessive hours are worked during *any* of those courses, not necessarily the main course for which the visa was granted. The definitions of 'course of study' for Parts 500 and 570 to 576 of Schedule 2 include 'a full-time registered course'[37] and do not distinguish between principal and other courses. While relevant visa criteria and application requirements contemplate primary applicants intending to undertake at least one course of study, there is no limit on the number that may be undertaken for the duration of a visa. In the absence of judicial authority it is not free from doubt, but it appears that the course of study for condition 8105 need not be a principal course.

Work prior to commencement of course of study

Primary applicants – 8105

Condition 8105(1A) prohibits an applicant working prior to the commencement of the course of study. It applies in relation to visa holders granted student visas on the basis of satisfying the primary criteria. The application of this condition will be straightforward in relation to the initial grant of a student visa. The condition will not be relevant for a visa holder who is granted a visa to enable the completion of a course of study which has already commenced. It will generally arise for consideration in relation to the grant of a further student visa if there is a gap in study and the visa is sought for a new course of study.

There has been no judicial consideration of the terms of condition 8105(1A) and the particular course commencement to which the work prohibition attaches.

Departmental policy guidelines indicate that students on a visa associated with a package of courses may continue working between courses.[38]

On the view that condition 8105 applies to each course of study undertaken during the currency of the visa discussed above, the Department's view is correct. Provided a person had commenced *any* course of study while holding the relevant visa before working, they would not be in breach of condition 8105(1A). It does not matter that the earlier course is a prerequisite or unrelated course to the main course.

On this view, the word 'the' in 'before the holder's course of study commences' in condition 8105(1A) does not refer to a single course, but to any of the courses undertaken while the visa is current.

It also appears that a person would be in breach of condition 8105(1A) if they commenced work before *any* course in the relevant visa period had commenced, but after a course undertaken while a previous visa was in force. One reason for this view is that although the word 'the' in 'before the holder's course of study commences' does not limit the course to only one undertaken during the life of a visa, it still suggests some connection to the current visa, rather than to any course undertaken in Australia, ever. Consistent with this view, Departmental policy guidelines describe condition 8105(1A) as requiring a student who has completed a course of study and has subsequently been granted or applied for a student visa (including a student on a bridging visa subject to condition 8105) to

[37] Cl.500.111, 57X.111

[39] Policy - Migration Regulations - Schedules > [Sch2Visa500] - Student > Procedural Instruction > Recording a Decision > Student Visa Conditions > Condition 8105 work limitation (primary visa holders) - Eligibility to continue working between courses and student visas (re-issue date 21/09/2018).

undertake a *different* course of study, to stop working from the grant date of the new visa and not to work until the new course commences.[39]

Secondary applicants – 8104

Condition 8104(2) provides that, if the visa holder is a member of the family unit (family unit visa holder) of a person who satisfies the primary criteria for the student visa (primary visa holder), the family unit visa holder must not engage in work in Australia until the primary visa holder has commenced a course of study.

If the primary visa holder has commenced a course of study, 8104(3) provides that the member of the family unit must not engage in work for more than 40 hours a fortnight while in Australia unless an exception applies. The exceptions permit *unrestricted* work by a family member of a primary visa holder if:

- for visa applications before 1 July 2016, the primary visa holder holds a Subclass 573 (Higher Education Sector) or 574 (Postgraduate Research Sector) visa and the course of study that has been commenced is a masters or doctorate degree course registered on CRICOS,[40] or the primary visa holder holds a Subclass 576 (Foreign Affairs or Defence Sector) visa and the course of study commenced is for the award of a masters or doctorate degree.[41] The exceptions are intended to provide an incentive for primary visa holders to commence their masters or doctorate degrees without undue delay,[42] or
- for visa applications made on or after 1 July 2016, the course of study undertaken by the primary visa holder is for the award of a masters or doctoral degree.[43]

Condition 8105(2): a requirement of the course when the course particulars were entered in the CRICOS

Condition 8105(2) allows a visa holder to work more than 20 hours in a week if the work was specified as a course requirement when the course particulars were entered in the Commonwealth Register of Institutions and Courses for Overseas Students (CRICOS).

Evidence from an education provider and employer that work is part of, or relevant to a course is insufficient. For condition 8105(2) to apply, the Tribunal must be satisfied that the work was 'specified as a requirement of the course' and that it was so specified when the course particulars were entered in the CRICOS.[44]

[39] Policy - Migration Regulations - Schedules > [Sch2Visa500] - Student > Procedural Instruction > Recording a Decision > Student Visa Conditions > Condition 8105 work limitation (primary visa holders) - Eligibility to continue working between courses and student visas (re-issue date 21/09/2018).
[40] Condition 8104(4).
[41] Condition 8104(5).
[42] Explanatory Statement to SLI 2008 No.56, p.38.
[43] Condition 8104(3).
[44] *Mohammed v MIMIA* [2004] FCA 970 (RD Nicholson J, 27 July 2004) at [13]. In upholding this judgment on appeal, the Full Federal Court emphasised the need for the Tribunal to be satisfied both that the work was specified as a requirement of the course and that it was so specified when the course particulars were entered on the CRICOS: *Mohammed v MIAC* [2005] FCAFC 47 (Moore, North and Emmett JJ, 8 April 2008) at [22]. The Court held (at [22]) that while there was evidence before the Tribunal that might have supported a conclusion that the work undertaken by the appellant was undertaken as a requirement of his course, the Tribunal was entitled to find there was no evidence before it establishing that temporal connection.

Relevance of intent

Conditions 8104 and 8105 will be breached if relevant time limits on work are exceeded, regardless of whether a visa holder intentionally engages in work exceeding those limits.[45] In *Kaur v MIAC*, where the applicant claimed she was pressured to work longer hours, the Court held the Tribunal was not required to consider whether or not the applicant intentionally worked greater than 20 hours in at least one week, and that in considering condition 8105 it was only required to make a finding as to whether work in excess of the relevant limit was undertaken by the applicant while her course of study was in session.[46]

Conditions 8107 and 8607

Conditions 8107 and 8607 broadly require visa holders to work in the occupation for which their visa was granted. Condition 8107 applies to all primary Subclass 457 visa holders[47] as well as holders of a number of other temporary visas,[48] and 8607 applies to Subclass 482[49] and related bridging visa holders.

These conditions require Subclass 457 and 482 visa holders:

- to work only in the occupation listed in the most recently approved nomination for the holder (8107, for Subclass 457 holders), or in the nominated occupation identified in the most recent Subclass 482 visa application (8607, for Subclass 482 visa holders);
- to work only in a position in the sponsor's business, or an associated entity, unless the nominated occupation is specified in a written instrument, or the holder is fulfilling a legal requirement to give notice;
- to commence work within 90 days after arrival or visa grant (8107, for Subclass 457 visas in effect on or after 1 June 2013; 8607, for Subclass 482 visas);
- not to cease employment for more than 60 consecutive days (8107, for Subclass 457 holders granted on or after 19 November 2016, and 8607, for all Subclass 482 visa holders);
- not to engage in work for another person or on the holder's own account while undertaking the employment in relation to which the visa was granted (8107, for Subclass 457 holders); and
- meet relevant licence, registration or membership requirements (8107, for Subclass 457 visas in effect on or after 1 June 2013; 8607, for Subclass 482 visas).

For these conditions. employment may cease by a termination of that employment by the visa holder or by the employer or sponsor.[50]

Condition 8107 imposes similar, but not identical, requirements on holders of certain other temporary activity visas.[51] For these visas, condition 8107 requires the holder not to engage in work or an activity

[45] *Kaur v MIAC* [2012] FMCA 394 (Burnett FM, 14 May 2012). This judgment considered condition 8105, however its reasoning appears equally applicable to the time restrictions on work (20 hours per week or 40 hours per fortnight as relevant) imposed by condition 8104.
[46] *Kaur v MIAC* [2012] FMCA 394 (Burnett FM, 14 May 2012) at [25].
[47] cl.457.611(2).
[48] For example, Subclasses 400, 401, 402, 403, 407 and 408. Different provisions within condition 8107 will apply depending on the relevant subclass. Refer to Schedule 2 of the Regulations to determine if condition 8107 applies to a particular subclass.
[49] cl.482.611.
[50] The meaning of 'ceases' employment was considered in *Da Silveira v MIBP* [2016] FCCA 1703 (Judge Jarrett, 8 July 2016). In that case, the Court was called upon to consider whether the text of Condition 8107(3)(b) might be properly construed as applying only where a visa holder's employment comes to an end by a termination of that employment by the visa holder. The Court found, however, that the reference to 'ceases employment' in Condition 8107(3)(b) covers circumstances where the employment ceases due to termination by the employer or sponsor as well as by the visa holder: at [24]. The reasoning would equally to Condition 8607.

inconsistent with the activity in relation to which the visa was granted, or the most recently nominated occupation, program, or activity.[52] For these visas, condition 8107 requires a comparison between the nominated or relevant activity, occupation, or program, and that actually being done by a visa holder. A comparison between the Australian and New Zealand Standard Classification of Occupations (ANZSCO) criteria for different occupations may not be required. If it were found that a person was working in a different occupational classification (e.g. farmhand) to that nominated (e.g. Agricultural Technical Officer), that would not automatically mean that the positions are inconsistent.[53]

Relevant legislative amendments

Title	Reference number
Migration Regulations 1994	No.268
Migration Amendment Regulation 2002 (No.2)	SR 2002, No. 86
Migration Amendment Regulations 2008 (No.2)	SLI 2008, No.56
Migration Amendment Regulations 2009 (No.5)	SLI 2009, No. 115
Migration Amendment Regulations 2009 (No.5) Amendment Regulations 2009 (No.1)	SLI 2009, No. 203
Migration Legislation Amendment Regulation 2012 (No.1)	SLI 2012, No.35
Migration Amendment (Temporary Sponsored Visas) Act 2013	No. 122, 2013
Migration Amendment Regulation 2013 (No.5)	SLI 2013, No.145
Migration Legislation Amendment Regulation 2013 (No.3)	SLI 2013, No. 146
Migration Legislation Amendment (2014 Measures No.1) Regulation 2014	SLI 2014, No.82
Migration Amendment (Clarifying Subclass 457 Requirements) Regulation 2015	SLI 2015, No. 185
Migration Legislation Amendment (2016 Measures No. 1) Regulation 2016	F2016L00523
Migration Legislation Amendment (2016 Measures No. 4) Regulation 2016)	F2016L01696
Migration Legislation Amendment (Temporary Activity Visas) Regulation 2016	F2016L01743

Relevant Case Law

Alam v MIMIA [2004] FMCA 583	Summary
Al Ferdous v MIAC [2010] FMCA 824	
Al Ferdous v MIAC [2011] FCA 1070	

[51] e.g. Subclass 402 (Training and Research), Subclass 420 (Temporary Work (Entertainment)), Subclass 400 (Temporary Work (Short Stay Specialist).
[52] Cl.8107(2), (4), and (5).
[53] *Morgun v MIAC* [2009] FMCA 1306 (Wilson FM, 22 January 2000) at [34]-[41]. Although this judgment referred to the Australian Standard Classification of Occupations (ASCO), this has now been superseded by the ANZSCO.

Amandeep v MIAC [2011] FMCA 757	Summary
Bhatia v MIBP [2015] FCCA 409	Summary
Braun v MILGEA (1991) 33 FCR 152; (1991) 33 FCR 152	
Broussard v MILGEA (1989) 21 FCR 472; [1989] FCA 508	
Da Silverira v MIBP [2016] FCCA 1703	Summary
Dib v MIMIA (1998) 82 FCR 489; [1998] FCA 415	
Hossain v MIAC [2007] FMCA 175	
Islam v MIAC [2007] FCAFC 66	Summary
Kaur v MIAC [2012] FMCA 394	Summary
Kim v Witton (1995) 59 FCR 258; [1995] FCA 1508	
MILGEA v Montero (1991) 31 FCR 50;[1991] FCA 183	
MIMIA v Alam (2005) 145 FCR 345	Summary
Mohammed v MIMIA [2004] FCA 970	
Mohammed v MIMIA [2005] FCAFC 47	
Morgun v MIAC [2009] FMCA 1306	
Panta v MIMA [2006] FMCA 855	Summary
Tikoisuva v MIMA [2001] FCA 1347	
Verma v MIBP [2017] FCCA 69	
Xu v MIAC [2007] FMCA 285	Summary

Available Decision Templates

There are 2 templates relevant to the review of decisions relating to visa conditions 8104 and 8105. These are:

- **Cancellation s.116 - Breach of condition 8104 -** This template is for use in cases where a student visa has been cancelled under s.116(1)(b) for breach of condition 8104. It applies to cases where the visa was initially granted on or after 26 April 2008 (and where the visa application was made before 1 July 2016).

- **Cancellation s.116 - Breach of condition 8105 -** This template is for use in cases where a student visa has been cancelled under s.116(1)(b) for breach of condition 8105. It applies to

cases where the visa was initially granted on or after 26 April 2008 (and where the visa application was made before 1 July 2016)

Last updated/reviewed: 28 February 2019

Attachment A - Versions of Condition 8104 (1 September 1994 - present)

Visa granted before 26 April 2008[54]

8104. The holder must not engage in work for more than 20 hours a week while the holder is in Australia.

Visa granted between 26 April 2008 and 25 March 2012 (inclusive), not in effect on 26 March 2012[55]

8104 (1) Subject to subclauses (2) to (6), the holder must not engage in work for more than 20 hours a week while the holder is in Australia.

(2) If the holder is a member of the family unit of a person who satisfies the primary criteria for the grant of a student visa, the holder must not engage in work in Australia until the person who satisfies the primary criteria has commenced a course of study.

(3) If the holder is able to engage in work in accordance with subclause (2), the holder must not engage in work for more than 20 hours a week while the holder is in Australia unless subclause (4) or (5) applies.

(4) Subclause (3) does not apply if:
(a) the visa for which the primary criteria were satisfied is:
(i) a Subclass 573 (Higher Education Sector) visa; or
(ii) a Subclass 574 (Postgraduate Research Sector) visa; and
(b) the course of study is a course for the award of a masters or doctorate degree that is registered on the Commonwealth Register of Institutions and Courses of Overseas Students.

(5) Subclause (3) does not apply if:
(a) the visa for which the primary criteria were satisfied is a Subclass 576 (AusAID or Defence Sector) visa; and
(b) the course of study is a course for the award of a masters or doctorate degree.

(6) In this clause:
week means the period of 7 days commencing on a Monday.

Visas granted on or after 26 March 2012 (for applications made before 1 July 2016) and visas granted on or after 26 April 2008 in effect on 26 March 2012[56]

8104 (1) Subject to subclauses (2) to (6), the holder must not engage in work for more than 40 hours a fortnight while the holder is in Australia.

[54] Migration Regulations 1994 No. 268, Schedule 8. No transitional provisions in effect.
[55] SLI 2008 No. 56 (F2008L01025). This version applies to visa applications made on or after 26 April 2008 as well as those made prior to, but not finally determined as at that date: r.5. However its application is limited by the effect of SLI 2012 No.35 (F2012L00664) so that visas to which this version would otherwise apply that are still in effect on 26 March 2012 will be subject to condition 8105 as amended by that Regulation.
[56] SLI 2012 No.35 (F2012L00664). This version applies in relation to visa applications made on or after 26 March 2012, visa applications made before but not yet finally determined by 26 March 2012 and to any visas granted on or after 26 April 2008 which are in effect on 26 March 2012 (see r.7).

(2) If the holder is a member of the family unit of a person who satisfies the primary criteria for the grant of a student visa, the holder must not engage in work in Australia until the person who satisfies the primary criteria has commenced a course of study.

(3) If the holder is able to engage in work in accordance with subclause (2), the holder must not engage in work for more than 40 hours a fortnight while the holder is in Australia unless subclause (4) or (5) applies.

(4) Subclause (3) does not apply if:
(a) the visa for which the primary criteria were satisfied is:
(i) a Subclass 573 (Higher Education Sector) visa; or
(ii) a Subclass 574 (Postgraduate Research Sector) visa; and
(b) the course of study is a course for the award of a masters or doctorate degree that is registered on the Commonwealth Register of Institutions and Courses of Overseas Students.

(5) Subclause (3) does not apply if:
(a) the visa for which the primary criteria were satisfied is a Subclass 576 (AusAID/Foreign Affairs[57] or Defence Sector) visa; and
(b) the course of study is a course for the award of a masters or doctorate degree.

(6) In this clause:
fortnight means the period of 14 days commencing on a Monday.

Visa applications made on or after 1 July 2016[58]

8104 (1) The holder must not engage in work for more than 40 hours a fortnight while the holder is in Australia.

(2) If the holder is a member of the family unit of a person who satisfies the primary criteria for the grant of a student visa, the holder must not engage in work in Australia until the person who satisfies the primary criteria has commenced a course of study.

(3) If the course of study mentioned in subclause (2) is for the award of a masters or doctoral degree, then despite subclause (1), the holder may engage in work for more than 40 hours a fortnight while the holder is in Australia.

(4) In this clause:
fortnight means the period of 14 days commencing on a Monday.

[57] Migration Legislation Amendment (2014 Measures No.1) Regulation 2014 no.82, 2014 (F2014L00726) amended condition 8104 so that when it is attaching to a visa granted on or after 1 July 2014, the reference to AusAID in 8104(5)(a) should be read as 'Foreign Affairs': F2014L00726, Schedule 5, item [17];, Schedule 13, cl.3103 of the Regulations, inserted by F2014L00726, Schedule 8, item [2]
[58] F2016L00523. This version applies in relation to an application for a visa made on or after 1 July 2016: (schd. 4 item [40]; and sch.13 cl.5404(1) of the Regulations, inserted by F2016L00523).

Attachment B - Versions of Condition 8105 (1 September 1994 - present)

Visa granted before 26 April 2008[59]

8105 (1) Subject to subclause (2), the holder must not engage in work in Australia for more than 20 hours a week during any week when the holder's course of study or training is in session.

(2) Subclause (1) does not apply to work that was specified as a requirement of the course when the course particulars were entered in the Commonwealth Register of Institutions and Courses for Overseas Students.

Visa granted between 26 April 2008 and 25 March 2012 (inclusive), not in effect on 26 March 2012[60]

8105 (1A) The holder must not engage in any work in Australia before the holder's course of study commences.

(1) Subject to subclause (2), the holder must not engage in work in Australia for more than 20 hours a week during any week when the holder's course of study or training is in session.

(2) Subclause (1) does not apply to work that was specified as a requirement of the course when the course particulars were entered in the Commonwealth Register of Institutions and Courses for Overseas Students.

(3) In this clause:

week means the period of 7 days commencing on a Monday.

Visas granted on or after 26 March 2012 and visas granted on or after 26 April 2008 in effect on 26 March 2012[61]

8105 (1A) The holder must not engage in any work in Australia before the holder's course of study commences.

(1) Subject to subclause (2), the holder must not engage in work in Australia for more than 40 hours a fortnight during any fortnight when the holder's course of study or training is in session.

(2) (Subclause (1) does not apply:
(a) to work that was specified as a requirement of the course when the course particulars were entered in the Commonwealth Register of Institutions and Courses for Overseas Students; and

[59] Migration Amendment Regulations 2000 (No. 5) (F2000B00270). No transitional provisions in effect.
[60] SLI 2008 No. 56 (F2008L01025). This version applies to visa applications made on or after 26 April 2008 as well as those made prior to, but not finally determined as at that date: r.5. However its application is limited by the effect of SLI 2012 No.35 (F2012L00664) so that visas to which this version would otherwise apply which are still in effect on 26 March 2012 will be subject to condition 8105 as amended by that Regulation (see F2012L00664, r.7, sch. 5).
[61] SLI 2012 No.35 (F2012L00664). This version applies in relation to visa applications made on or after 26 March 2012, visa applications made before but not yet finally determined by 26 March 2012 and to any visas granted on or after 26 April 2008 which are in effect on 26 March 2012 (see r.7, sch. 6).
).

(b) in relation to a Subclass 574 (Postgraduate Research Sector) visa if the holder has commenced the masters degree by research or doctoral degree.

(3) In this clause:

fortnight means the period of 14 days commencing on a Monday.

Visa application made on or after 1 July 2016[62]

8105 (1A) The holder must not engage in any work in Australia before the holder's course of study commences.

(1) Subject to subclause (2), the holder must not engage in work in Australia for more than 40 hours a fortnight during any fortnight when the holder's course of study or training is in session.

(2) (Subclause (1) does not apply:
(a) to work that was specified as a requirement of the course when the course particulars were entered in the Commonwealth Register of Institutions and Courses for Overseas Students; and

(b) in relation to a student visa granted in relation to a masters degree by research or doctoral degree if the holder has commenced the masters degree by research or doctoral degree.

(3) In this clause:

fortnight means the period of 14 days commencing on a Monday.

Attachment C - Condition 8107

8107 (1) If the visa is not a visa mentioned in subclause (3) or (4), and was granted to enable the holder to be employed in Australia, the holder must not:
(a) cease to be employed by the employer in relation to which the visa was granted; or
(b) work in a position or occupation inconsistent with the position or occupation in relation to which the visa was granted; or
(c) engage in work for another person or on the holder's own account while undertaking the employment in relation to which the visa was granted.

(2) If the visa is not a visa mentioned in subclause (3) or (4), and subclause (1) does not apply, the holder must not:
(a) cease to undertake the activity in relation to which the visa was granted; or
(b) engage in an activity inconsistent with the activity in relation to which the visa was granted; or
(c) engage in work for another person or on the holder's own account inconsistent with the activity in relation to which the visa was granted.

(3) If the visa is, or the last substantive visa held by the applicant was, a Subclass 457 (Temporary Work (Skilled)) visa that was granted on the basis that the holder met the requirements of subclause 457.223(2) or (4) (as in force before 18 March 2018):
(a) the holder:

[62] F2016L00523. This version applies in relation to an application for a visa made on or after 1 July 2016: (see sch.13 cl.5404(1) of the Regulations, inserted by F2016L00523).

(i) must work only in the occupation listed in the most recently approved nomination for the holder; and

(ii) unless the circumstances in subclause (3A) apply:

(A) must work only for the party to a labour agreement or former party to a labour agreement who nominated the holder in the most recently approved nomination; or

(B) if the sponsor is, or was, a standard business sponsor who was lawfully operating a business in Australia at the time of the sponsor's approval as a standard business sponsor, or at the time of the last approval of a variation to the sponsor's term of approval as a standard business sponsor—must work only in a position in the business of the sponsor or an associated entity of the sponsor; or

(C) if the sponsor is or was a standard business sponsor who was not lawfully operating a business in Australia, and was lawfully operating a business outside Australia, at the time of the sponsor's approval as a standard business sponsor, or at the time of the last approval of a variation to the sponsor's term of approval as a standard business sponsor—must work only in a position in the business of the sponsor; and

(aa) subject to paragraph (c), the holder must:

(i) if the holder was outside Australia when the visa was granted—commence work within 90 days after the holder's arrival in Australia; and

(ii) if the holder was in Australia when the visa was granted—commence work within 90 days after the holder's visa was granted; and

(b) if the holder ceases employment—the period during which the holder ceases employment must not exceed 60 consecutive days; and

(c) if the holder is required to hold a licence, registration or membership that is mandatory to perform the occupation nominated in relation to the holder, in the location where the holder's position is situated—the holder:

(i) must hold the licence, registration or membership while the holder is performing the occupation; and

(ii) if the holder was outside Australia when the visa was granted—the holder must hold that licence, registration or membership within 90 days after the holder's arrival in Australia; and

(iii) if the holder was in Australia when the visa was granted—the holder must hold that licence, registration or membership within 90 days after the holder's visa was granted; and

(iv) must notify the Department, in writing as soon as practicable if an application for the licence, registration or membership is refused; and

(v) must comply with each condition or requirement to which the licence, registration or membership is subject; and

(vi) must not engage in work that is inconsistent with the licence, registration or membership, including any conditions or requirements to which the licence, registration or membership is subject; and

(vii) must notify the Department, in writing as soon as practicable if the licence, registration or membership ceases to be in force or is revoked or cancelled.

(3A) For subparagraph (3)(a)(ii), the circumstances are that:

(a) the holder's occupation is specified in an instrument in writing for subparagraph 2.72(10)(e)(ii) or (iii) as in force before 18 March 2018; or

(b) the holder is continuing to work for the sponsor, or the associated entity of the sponsor, for the purpose of fulfilling a requirement under a law relating to industrial relations and relating to the giving of notice.

(4) If the visa is:

(a) a Subclass 401 (Temporary Work (Long Stay Activity)) visa; or

(b) a Subclass 402 (Training and Research) visa; or

(ba) a Subclass 420 (Temporary Work (Entertainment)) visa;

the holder must not:

(c) cease to engage in the most recently nominated occupation, program or activity in relation to which the holder is identified; or

(d) engage in work or an activity that is inconsistent with the most recently nominated occupation, program or activity in relation to which the holder is identified; or

(e) engage in work or an activity for an employer other than the employer identified in accordance with paragraph 2.72A(7)(a) as in force before 19 November 2016 (subject to subregulation 2.72A(8) as in force before that day) in the most recent nomination in which the holder is identified.

(5) If the visa is a subclass 407 (Training) visa, the holder must not:

(a) cease to engage in the most recently nominated program in relation to which the holder is identified; or

(b) engage in work or an activity that is inconsistent with the most recently nominated program in relation to which the holder is identified; or

(c) engage in work or an activity for an employer other than an employer identified in accordance with paragraph 2.72A(8)(a) (subject to subregulation 2.72A(9)) in the most recent nomination in which the holder is identified.

Attachment D - Condition 8607

8607 (1) The holder must work only in the occupation (the nominated occupation) nominated by the nomination identified in the application for the most recent Subclass 482 (Temporary Skill Shortage) visa granted to the holder.

(2) Unless subclause (3) applies, the holder must:

(a) if the most recent Subclass 482 (Temporary Skill Shortage) visa granted to the holder is in the Labour Agreement stream—work only for the person who nominated the nominated occupation; or

(b) if the most recent Subclass 482 (Temporary Skill Shortage) visa granted to the holder is in the Short-term stream or Medium-term stream and the person who nominated the nominated occupation was an overseas business sponsor at the time the nomination was approved—work only in a position in the person's business; or

(c) if the most recent Subclass 482 (Temporary Skill Shortage) visa granted to the holder is in the Short-term stream or Medium-term stream and the person who nominated the nominated occupation was not an overseas business sponsor at the time the nomination was approved—work only in a position in the person's business or a business of an associated entity of the person.

(3) This subclause applies if:

(a) the nominated occupation is an occupation specified by the Minister in an instrument made under subregulation 2.72(13); or

(b) the holder is continuing to work for a person for the purpose of fulfilling a requirement under a law relating to industrial relations and relating to the giving of notice.

(4) Subject to subclause (6), the holder must commence work within:

(a) if the holder was outside Australia when the visa was granted—90 days after the holder's arrival in Australia; or

(b) if the holder was in Australia when the visa was granted—90 days after the holder's visa was granted.

(5) If the holder ceases employment, the period during which the holder ceases employment must not exceed 60 consecutive days.

(6) If the holder is required to hold a licence, registration or membership (an authorisation) that is mandatory to perform the nominated occupation in the location where the holder's position is situated, the holder must:

(a) hold the authorisation within:
    (i) if the holder was outside Australia when the visa was granted—90 days after the holder's arrival in Australia; or
    (ii) if the holder was in Australia when the visa was granted—90 days after the holder's visa was granted; and
(b) continue to hold the authorisation while the holder is performing the occupation; and
(c) notify Immigration, in writing, as soon as practicable if an application for the authorisation is refused; and
(d) comply with each condition or requirement to which the authorisation is subject; and
(e) not engage in work that is inconsistent with the authorisation, including any conditions or requirements to which the authorisation is subject; and
(f) notify Immigration, in writing, as soon as practicable if the authorisation ceases to be in force or is revoked or cancelled.