

## LEGEND

Home > All stacks > 01/01/2020 - > Policy – Migration Regulations – Other >  
GenGuideA – All visas – Visa Application Procedures

### On this page

- [Legislative authority](#)
- [PAM3 and visa application procedures](#)
- [About PAM3: GenGuideA](#)
- [What this GenGuide does not cover](#)
- [Case management](#)
- [Other PAM3: GenGuides](#)
- [Defined terms](#)
- [Acronyms and abbreviations](#)
- [General policy terms](#)
- [Applicant](#)
- [Member of the family unit](#)
- [Who is a decision maker](#)
- [Delegation](#)
- [Officers' obligations](#)
- [Other government agencies](#)
- [Agency arrangements](#)
- [The application must be for a particular visa class](#)
- [Schedule 1 requirements](#)
- [Where the application must be made](#)
- [How the application may be made](#)
- [Electronic lodgment](#)
- [Faxed applications](#)
- [Internet applications](#)
- [Oral applications](#)
- [Completing the application - Legislative requirements](#)
- [Signing](#)
- [Subsequent amendments to an application](#)
- [Valid application requirements](#)
- [Limitations to applications in Australia- Overview](#)
- [Persons subject to s46\(1A\) \("no further application" condition\)](#)
- [Persons in immigration detention](#)
- [Criminal justice entry visa holders](#)
- [Partly-completed application forms](#)
- [Valid or invalid applications - Consequences for decision making](#)
- [Merits review](#)
- [Legislative authority](#)
- [If s46\(1A\) applies](#)
- [Why the valid application date is important](#)
- [Recording the valid application date](#)
- [Act, s45AA - application for a visa taken to be an application for a different visa](#)
- [Effect of conversion on visa application charge](#)
- [Effect of conversion on the associated bridging visa](#)

- Persons refused visas or who have had visas cancelled (s48)
- Limitations on further protection visa applications (s48A)
- Opportunity to rectify a visa application
- Period for response
- Contact with third parties
- No opportunity to rectify a visa application
- Part-payment of a visa application charge
- As listed in the application
- Combined applications
- About Schedule 2
- Schedule 2 does not list all visa requirements
- If the visa has Schedule 2 primary criteria only
- If the visa has both Schedule 2 primary and secondary criteria
- Who to assess against primary criteria
- Who to assess against secondary criteria
- Sponsorship, nomination or other support
- Occupational classification
- Adding child born after parent has applied (reg. 2.08)
- Adding other family unit members (reg. 2.08A and reg. 2.08B)
- Deleting (family member) applicants from a combined application
- About supporting documentation
- Photocopies
- What documentation is needed
- Assessing supporting documentation
- Documents not in English
- If supporting documentation is not available
- Legislative authority
- Effective date of withdrawal
- Actioning withdrawals
- Situations that do not constitute withdrawal
- Procedural fairness and natural justice
- Overview
- Regulation 2.13
- Phone/written communication
- Electronic communication
- If reg. 2.13(4) requirements are not met
- Originals or certified copies v faxes
- Where correspondence must be sent
- Replies to correspondence
- Legislative overview
- Electronic communication
- Communication does not have to be in writing
- Use of contact addresses
- Information contained in applications
- Non-disclosable information
- Information provided without the applicant's knowledge
- Weight to be given to non-disclosable information
- Standard letters etc.
- Invitation to give further information or comments (s58)
- Interviews (s58)

- Giving more time to provide information or attend interview (s58)
- Progress enquiries
- Deferring consideration of an application
- If the applicant dies
- "Lapsing" applications
- The s474 privative clause
- The finality of decisions
- Jurisdictional error
- Legal advice must be sought
- Applying the visa application code of procedure
- About s63 of the Act
- Program management
- Caseload management - Prioritising caseload (s51, s91)
- Visa decision making
- Recording of decisions
- Identifying the decision maker
- Granting visas - Overview
- Payment of outstanding debts or charges (s65)
- Recording of all information
- Circumstances applicable to grant
- Effect of visa grant on other visas
- The visa period of effect
- Conditions of entry and stay
- When is the visa taken to have been granted
- Non-compellable discretion
- The discretion applies at primary decision level only
- Who should be invited to apply
- Specific visas and circumstances only
- Does not include applications made in Australia by applicants outside Australia
- Overview
- If first application was for a Prospective Marriage visa
- Different purpose from that at regulation 2.08E
- If first application was for a Partner visa
- Applicant and sponsor originally intended to marry outside Australia
- Applicant and sponsor did not satisfy de facto partner provisions
- First application must have been refused
- Invitation must specify class for further application
- Notification letter must provide certain information
- Information to be provided in the invitation
- Time limit for making further application
- Completed application form required
- New record required
- New visa assessment required
- Further application made concurrent with merits review
- If one or the other application is successful
- No separate merits review right if further application not invited
- Retain case file
- Ascertain whether merits review will be sought
- If merits review is likely to be sought
- If merits review will not be sought

- [Exemption provisions](#)
- [Health insurance in Australia](#)
- [About GenGuides](#)

## **GenGuideA - All visas - Visa application procedures**

### **GenGuideA - All visas - Visa application procedures**

#### **About this instruction**

#### **Contents**

This departmental instruction comprises eight parts:

- [Australia's visa application procedures](#)
- [PAM3: Generic Guidelines - Overview](#)
- [Ministerial delegation and the role of officers](#)
- [Visa application procedures – Applications for visas](#)
- [The Code of procedure](#)
- [Visa application procedures - Other matters](#)
- [Visa application procedures - Visa grant or refusal](#)
- [Other matters.](#)

#### **Related instructions**

This instruction is one of several related instructions; the others are:

- [PAM3: GenGuideA - Global working framework - Output 1.1 Case referral management](#)
- [PAM3: GenGuideA - Site visit guidelines: Managing and conducting site visits](#)

as well as [PAM3: Act – Code of procedure – Notification requirements](#).

#### **Latest changes**

#### **Legislative - 19 November 2016**

##### *Migration Legislation Amendment (2016 Measures No. 5) Regulation 2016*

- amended Schedule 2 of the Migration Regulations to change the prescribed bridging visa cessation events

#### **Policy**

This instruction, which is part of the centralised departmental instructions system (CDIS), was reissued on 19 November 2016, mainly to:

- update instructions in relation to bridging visa cessation events and timeframes for bridging visas granted before 19 November 2016 and bridging visas granted on or after 19 November 2016

## **Owner**

Framework and Training Section

## **email**

[Legal Framework and Notifications](#)

## **Document ID**

LS-1849

## **Contents summary**

[Australia's visa application procedures](#)

[The Migration Act and codified application procedures](#)

[Legislative authority](#)

[PAM3 and visa application procedures](#)

[PAM3: Generic Guidelines - Overview](#)

[About GenGuides](#)

[About PAM3: \*\*GenGuideA\*\*](#)

[What this GenGuide does not cover](#)

[Case management](#)

[Other PAM3: GenGuides](#)

[Terms used in GenGuides and related PAM3 instructions](#)

[Defined terms](#)

[Acronyms and abbreviations](#)

[General policy terms](#)

[Applicant](#)

[Member of the family unit](#)

[Ministerial delegation and the role of officers](#)

[The role and powers of the decision maker](#)

Who is a decision maker

Delegation

The role of other departmental officers

Officers' obligations

Give the delegate all relevant information

Do not pre-empt the delegate's decision

Other agencies

Other government agencies

Agency arrangements

Visa application procedures - Applications for visas

About visa application procedures

How an application is made

The application must be for a particular visa class

Schedule 1 requirements

Where the application must be made

How the application may be made

Electronic lodgment

Faxed applications

Internet applications

Oral applications

Completion of the application form

Completing the application - Legislative requirements

Signing

Subsequent amendments to an application

What is a valid application

Valid application requirements

Form

Fee (visa application charge)

Location

Residential address

No statutory bars

No conditions preventing further application

Visa- or stream-specific requirements

Personal identifiers

Applications made by s46A unauthorised maritime arrivals and s46B transitory persons

Sponsorship

Limitations to applications in Australia - Overview

Persons subject to s46(1A) ("no further application" condition)

Persons in immigration detention

Criminal justice entry visa holders

Partly-completed application forms

Valid or invalid applications - Consequences for decision making

The date of valid application

Legislative authority

If s46(1A) applies

Why the valid application date is important

Recording the valid application date

Conversion of an application after it is validly made

Act, s45AA - application for a visa taken to be an application for a different visa

Effect of conversion on visa application charge

Effect of conversion on the associated bridging visa

Limitations on applying for visas in Australia

Persons refused visas or who have had visas cancelled (s48)

Limitations on further protection visa applications (s48A)

Assessing visa application validity/invalidity

Opportunity to rectify a visa application

Who are applicants

As listed in the application

Combined applications

Applicants, Schedule 2 subclasses and visa criteria

About Schedule 2

Schedule 2 does not list all visa requirements

If the visa has Schedule 2 primary criteria only

If the visa has both Schedule 2 primary and secondary criteria

Which subclass

Who to assess against primary criteria

Who to assess against secondary criteria

Secondary criteria and combined application requirements

Sponsorship, nomination or other support

Occupational classification

Adding family unit members to an application

Adding child born after parent has applied (reg. 2.08)

Adding other family unit members (reg. 2.08A and reg. 2.08B)

Deleting (family member) applicants from a combined application

Supporting documentation (Act: s54)

About supporting documentation

Photocopies

What documentation is needed

Assessing supporting documentation

Documents not in English



If supporting documentation is not available

## Withdrawal of applications

Legislative authority

Effective date of withdrawal

Actioning withdrawals

Situations that do not constitute withdrawal

## The Code of procedure

### Procedural fairness

Procedural fairness and natural justice

### Communication of applicant with Minister

Overview

Regulation 2.13

Phone/written communication

Electronic communication

If reg. 2.13(4) requirements are not met

Originals or certified copies v faxes

Where correspondence must be sent

Replies to correspondence

Communication of Minister with applicant

Legislative overview

Electronic communication

Communication does not have to be in writing

Use of contact addresses

Information contained in applications

Providing more information

Requesting information

Adverse information

Non-disclosable information

Information provided without the applicant's knowledge

Weight to be given to non-disclosable information

Standard letters etc.

Invitation to give further information or comments (s58)

Interviews (s58)

Giving more time to provide information or attend interview (s58)

## Visa application procedures - Other matters

Progress enquiries

General

Enquiries to overseas posts

Deferring consideration of an application

If the applicant dies

Status of the visa application

Finalising the application

If a combined application was made

"Lapsing" applications

Once made, decisions are final

The s474 privative clause

The finality of decisions

Jurisdictional error

Legal advice must be sought

Applying the visa application code of procedure

When decision about visa may be made

About s63 of the Act

Program management

Caseload management - Prioritising caseload (s51, s91)

## Visa application procedures - Visa grant or refusal

### The decision to grant or refuse to grant a visa

Visa decision making

Recording of decisions

Identifying the decision maker

### Granting visas

Granting visas - Overview

Payment of outstanding debts or charges (s65)

Recording of all information

Circumstances applicable to grant

Effect of visa grant on other visas

The visa period of effect

Conditions of entry and stay

### Granting visas - Summary of legislative requirements

About this summary

The Migration Act 1958

The Migration (Visa Application) Charge Act 1997

The Migration Regulations

The Migration (United Nations Security Council Resolutions) Regulations 2007

### Granting visas - Lawful decision making checklist

Delegation

### Notification of decisions

Methods of notifying decisions

If a visa is granted (s67)

Bridging visas

If the visa is refused on character grounds

If in detention

To ensure certainty of receipt of notifications

Notification to an authorised recipient (s494D)

Effect of non-notification (s66(4))

When notification takes place (s66)

Notice of refusal decisions (s66)

Special provisions for certain visa applications that are refused

Legislative authority

How regulation 2.11 operates

Limits to operation of regulation 2.11

Exceptions to further application being of the same kind

Pre-requisites for inviting and processing a further application

The invitation

VAC liability

Processing the invited further application

Merits review

Record management – If first application not a merits reviewable decision

Record management – If first application is a merits reviewable decision

Other matters

Managing and disposing of case records

Cancelling visas

Immigration status of children born to visa holders

The Migration Act and Australia's external territories

The Migration Act and other Commonwealth law

Other matters

Occupation classification

Giving advice on non-immigration matters

[Health insurance in Australia](#)

[Case record management and disposal](#)

[The other PAM3: GenGuides](#)

[About GenGuides](#)

## **Australia's visa application procedures**

### **The Migration Act and codified application procedures**

#### **Legislative authority**

Australia's visa application procedures are set out as codified procedures in the *Migration Act 1958* ("the Act"). These include procedures on:

- how an application is made
- how ministerial delegates should deal with an application and how communication between an applicant and ministerial delegates should be conducted and
- how decisions on visa applications should be made and notified to applicants.

These 3 matters correspond to the 3 subdivisions in the Act that describe the procedures for dealing with visa applications. These subdivisions appear in [Part 2 - Division 3 - Visas for non-citizens](#). When dealing with visa applications, officers are required to refer to these subdivisions and the accompanying Regulations as their primary reference, as the content is largely self-explanatory.

#### **PAM3 and visa application procedures**

The main part of this instruction - namely, [Visa application procedures - Applications for visas](#) - deals with the abovementioned codified visa application procedures and the corresponding subdivisions of the Act:

- [Subdivision AA - Applications for visas](#) - refer to [About visa application procedures](#)
- [Subdivision AB - Code of procedures for fair, efficient and quick dealing with visa applications](#) - refer to [The Code of procedure](#)
- [Subdivision AC - Grant of visas](#) - refer to [Visa application procedures - Visa grant or refusal](#).

### **PAM3: Generic Guidelines - Overview**

#### **About GenGuides**

About PAM3: [GenGuideA](#)

PAM3: [GenGuideA](#) gives guidelines on those aspects of application processing common to all visas listed in Schedule 1 of the *Migration Regulations 1994* (“the Regulations”), regardless of whether the visa is applied for in or outside Australia, but with the exceptions listed in [What this GenGuide does not cover](#).

## What this GenGuide does not cover

This instruction does **not** cover the following visas and/or aspects of visa processing.

### Certain visas

Policy and procedure on two groups of visas are elsewhere in PAM3.

For visas not listed in Regulations Schedule 1, namely the:

- absorbed person visa
- criminal justice visa
- enforcement visa
- ex-citizen visa
- special purpose visa

refer to the corresponding [PAM3: Act - Act-based visa instruction](#).

For transitional visas, that is, those arising from the [Migration Reform \(Transitional Provisions\) Regulations](#), refer to [PAM3: Div1.2/reg1.06 - References to classes of visa - The Class BF and Class UA transitional visas](#).

### Visa-related charges

Except for a few references, the visa application charge (VAC) prescribed by s45A of the Act is not discussed in this instruction – refer instead to [PAM3: Div 2.2A - Visa application charge](#).

### Visa-specific processing

Those aspects of visa processing unique to a particular visa subclass are dealt with in:

- the relevant PAM3: Sch2Visa instruction and, if applicable
- the associated PAM3: GenGuide - refer to [About GenGuides](#).

### s499 directions

Except for a few references, this instruction does not cover matters dealt with by [s499 directions](#) (also known as ministerial policy directions or general policy directions), which are dealt with elsewhere in PAM3. For example, the s499 directions dealing with capping, queuing and prioritising of the non-humanitarian migration program are dealt with in [PAM3: GenGuideB - Non-humanitarian migration - Management of the non-humanitarian migration program](#).

Refer also to [PAM3: Act - Ministerial powers - Ministerial directions under s499](#).

## Visa systems

Procedures relating to use and management of departmental visa data base systems (IRIS/ICSE) are covered by relevant departmental systems manuals.

## eLodgment

Visa-specific policy and procedure on electronic lodgment of visa applications are covered elsewhere. As three examples (only):

- electronic lodgment of Return (Residence) ([Class BB](#)) visas is dealt with in [PAM3: Sch2RRV - Resident return visas](#)
- electronic lodgment of Visitor visa applications is dealt with in [PAM3: GenGuideH - Visitors visas - Visa application and related procedures](#)
- electronic lodgment of certain Temporary Work (Skilled) applications is dealt with in [PAM3: Sch2Visa457](#).

## APEC

For visa application processing associated with the APEC Business Travel Card, refer to [PAM3: Div2.2/reg2.07AA - Applications for certain visitor visas - The APEC Business Travel Card Scheme](#).

## Transitory persons

For transitory persons, refer to:

- the s5(1) definition of [transitory person](#) in the Act, and [PAM3: Act - Act-defined terms - Transitory person](#)
- [Act, s46B](#) (Visa applications by transitory persons) and, in this instruction, [Applications made by s46A unauthorised maritime arrivals and s46B transitory persons](#).

## Case management

Case management policies for various activities including visa application processing and related matters are in [PAM3: GenGuide A - Global working framework - Output 1.1 Case referral management](#).

## Other PAM3: GenGuides

For aspects of processing on most visas it is also necessary to consult, in addition to this instruction, another instruction of narrower coverage but still common to several visas - refer to [The other PAM3: GenGuides](#).

## Terms used in GenGuides and related PAM3 instructions

### Defined terms

Certain terms must be interpreted in a specific way as laid down in either the Act or the Regulations. Officers must learn or check which particular words or phrases are subject to such a legal definition because PAM3 does not necessarily draw that fact to attention. The following terms, (unless indicated otherwise, are defined in s5 of the Act), are particularly important to visa application procedures:

*approved form*

*bridging visa*

*excised offshore place*

*finally determined*

*migration zone*

*non-citizen*

*permanent visa*

*personal identifier* (defined in s5A(1) of the Act)

*substantive visa*

*temporary visa*

*unlawful non-citizen*

*visa applicant.*

### Acronyms and abbreviations

Program-specific acronyms and abbreviations are in specific PAM3 instructions

The Border website has a [list of acronyms](#) and initialisms used across the department.

### General policy terms

#### About policy terms

Policy terms are for convenience only and, unless indicated otherwise, do not have any legal basis (that is, defined meaning).

Except as indicated below, PAM3 uses the terminology of the Act and Regulations. In particular, guidelines on decision making use the terms "[visa grant](#)" and "[visa refusal](#)". Terms such as:



- "approving a visa application"
- "rejecting a visa application" and
- "visa extension"

should be avoided because they have no legislative basis and may inadvertently confuse decision making.

## **Application-related terms**

### **Applicant/primary applicant**

See [Applicant](#).

### **Application**

Unless stated otherwise, "application" means a [valid application](#) as defined in s46 of the Act.

### **Decision maker/(s65) delegate**

Unless stated otherwise, "decision maker" (or "delegate") means the ministerial [s65](#) delegate who grants or refuses the visa. In law, this is also the (one) person who is entitled to decide whether legislative requirements for grant are met.

### **Generic criteria**

"Generic criteria" are those Regulations Schedule 2 prescribed criteria that are not visa specific, in other words, secondary criteria (if any) and those primary criteria that relate to Schedules 3 to 5, to composition of the family unit and to questions of custody etc.

### **Finally determined**

Under [s5\(9\)](#) of the Act, a visa application is considered 'finally determined' when it is not, or no longer, subject to merits review under Part 5 or 7 of the Act. A visa application can also be considered finally determined if the merits review application is not made within the required timeframe for making such an application.

For a protection visa application made by an excluded fast track review applicant, the protection visa application is finally determined when a (primary) decision has been made in respect of that application.

Section [s5\(9\)](#) must be read with [s5\(9A\)](#) and [s5\(9B\)](#), which clarify and put it beyond doubt that if a merits review application has been made in accordance with Part 5 or 7 of the Act in respect of a decision on a visa application, the visa application is finally determined when a decision on review is made, unless the decision on review is to remit the application (with directions) back to the department for reconsideration.

## Member of the family unit

(And all similar references) See [Member of the family unit](#).

## Officer

**Officer** has defined meaning in s5 of the Act. However, in PAM3, it simply means a departmental employee (usually but **not necessarily** a decision maker or delegate).

## Policy

Use of the term “policy” derives from one of the objectives of PAM3, namely always to make clear whether a matter is founded in law. Phrases such as “it is policy that”, “under policy” or “policy envisages” are short-hand ways of drawing attention to the fact that the matter being discussed does not have the force of law. Such matters may, variously, be subject of a considered policy decision, or be a long-standing departmental practice or simply be what is to be expected of officers in the exercise of common sense.

## Prescribed criteria

"Prescribed criteria" are those criteria set out in clauses 2 and 3 of each Regulations Schedule 2 part. Prescribed criteria are, however, not the only legislative requirements that an applicant must meet to be granted a visa - see [Granting visas - Summary of legislative requirements](#) for a more comprehensive list.

## Visa

"Visa" can mean [substantive visa](#), [bridging visa](#), [temporary visa](#) or [permanent visa](#). The terms "bridging visa" and "substantive visa", for example, are used if a distinction has to be made between the two types of visa.

## Visa-specific criteria

"Visa-specific criteria" are those primary criteria (that is, criteria set out in clause 2 of each Regulations Schedule 2 part) that do not relate to Schedules 3 to 5, to composition of the family unit or to questions of custody etc.

## Applicant

In PAM3, "applicant", unless stated otherwise, means a person who has made a [valid visa application](#), either by completing the form or by being listed (as an applicant) on that form. (In law, however, an applicant is a person who has made an application, whether valid or not.)

“Primary applicant” is the applicant in whose name the form is completed (and who is sometimes called this on the form). (Certain departmental business areas prefer the terms “principal applicant”.) Although “primary applicant” is used, that applicant is **not** necessarily the applicant who has to satisfy primary criteria nor the only applicant listed on that form who is capable of satisfying primary criteria. (To use

only the term “applicant who has to satisfy primary criteria” could be sometimes misleading or confusing. It is recognised, of course, that in most cases the terms are interchangeable.)

## Member of the family unit

### As a policy term

"Member/s of the family unit" (and all similar references, for example, "family unit member/s" or "family members"), can have different meanings depending on the context (the relevant meaning should be apparent from its context).

For example, it may mean:

- a person (whether or not an applicant) who has been listed on an application form as a family unit member of the primary applicant or
- for those Schedule 1 (or Schedule 2) provisions for a particular visa that enables (or requires) combined applications - a person who has combined their application with that of the primary applicant or
- for visas that have secondary criteria - an applicant who appears to have to satisfy secondary criteria only (that is, as family unit member of the person who is, or has already been, granted a visa on the basis of satisfying primary criteria) or
- in relation to a family passport, those persons who are “passport dependants” of the passport holder or
- in plural (for example, “members of a family unit”), those persons who are members of the (same) family unit.

### As a defined term

There are 3 relevant regulatory definitions:

- **member of the family unit** (see regulation 1.12). The meaning used in PAM3 is always closely linked to this regulatory definition but may be slightly broader. For instance, under the regulatory definition, the family head is not a member of their own family unit. In PAM3, it is sometimes necessary, for the sake of simplicity, to regard them as being so
- **member of the same family unit**, which has visa-specific definition - see, for example, Schedule 2 Part 866 and
- **member of the immediate family** (defined in regulation 1.12AA) - is used mostly (but not exclusively) in the refugee and humanitarian program.

### Ministerial delegation and the role of officers

#### The role and powers of the decision maker

## Who is a decision maker

The decision maker is the (one) person who, in respect of a visa application:

- decides whether all legislative requirements for visa grant are met and, it follows
- is entitled to [grant or refuse a visa](#).

(The decision as to whether legislative requirements are met for grant of a visa is inherent in the power to grant or refuse the visa.)

## Delegation

### How decision makers are given their powers

The powers of individual officers to grant or refuse visas are delegated under instruments of delegation by the Minister. All officers are expected to be aware of the extent of their delegated powers under the Act and Regulations. Certain instruments have been made available to officers separately electronically.

### Delegated powers are not restricted

The power to [grant or refuse a visa](#), if delegated, is not limited to any particular classes of visa. An officer (delegate) who has the power to grant or refuse a [temporary visa](#), for example, has the power to grant or refuse a [permanent visa](#).

However, this does not mean that a delegate necessarily has a duty to grant or refuse visas. It is administrative policy, for example, that certain delegates may be given functional responsibilities that in practice limit their powers to certain visa classes.

For example, locally-engaged staff at overseas posts may be limited to granting or refusing certain classes of temporary visa. As well, situations may arise where the Minister of the day may otherwise indicate that only the Minister personally may grant or refuse certain visas.

### Separate delegated powers may apply

Some powers in the Act and Regulations are considered to be inherent in the power to grant or refuse a visa and are therefore not separately delegated by the Minister. For example, it is inherent in the power to grant or refuse visas that the delegate can decide whether the application is valid - [s46](#), and the order in which to consider applications - [s51\(1\)](#).

Other powers in the Act and Regulations are not inherent in the power to grant or refuse a visa and are subject to separate delegation by the Minister. For example:

- the power to assess skilled category visa applicants against the [general points test](#) has been separately delegated; not all officers with the power to grant or refuse visas need the power to assess applicants against the general points test
- the power to cancel a visa - see [Cancelling visas](#) - is separate from the power to grant or refuse that visa

- certain powers, for example the powers to cap or to suspend applications - see [Program management](#) - rest with the Minister; that is, the powers have not been delegated.

### **A decision maker is not bound by other delegates**

It is for the decision maker (delegate) to decide the level of proof that they require to be satisfied that a requirement is met.

There may be situations where, due to operational efficiency and the demands of caseload management, different parts of the application are processed by different delegates. For example, a delegate ("the first delegate") might undertake the health and character checks in relation to a visa applicant and be satisfied that the visa applicant meets the relevant health and character visa criteria, but the final decision on the visa application (the decision to grant or refuse the visa) is made by another delegate ("the second delegate").

When deciding the visa application, the second delegate should not consider themselves bound by the decision of the first delegate in relation to the health and character criteria, as this amounts to split decision making and could be seen as the second delegate acting under the dictation of the first delegate. To avoid this, the second delegate

- should turn their mind to the first delegate's assessment and decide whether they agree or disagree that the applicant meets the health and character criteria

and

- should provide evidence/ explain in the decision record as to how they themselves reached the necessary state of satisfaction that the visa applicant meets the health and character criteria

and

- should be the one to sign the decision record.

See also [The role of other departmental officers](#).

### **The role of other departmental officers**

#### **Officers' obligations**

The decision to grant or refuse a visa rests with the [s65](#) delegate. It is important, therefore, in circumstances such as those described below, for example, that other officers do not give rise to expectations on anyone's part as to the outcome of a current (or future) visa application.

#### **Give the delegate all relevant information**

Officers are encouraged to provide the relevant visa assessing office with any information held regarding an [applicant](#) (or prospective applicant) that they consider

relevant in assessing that person's visa application. (In certain instances, officers may consider it appropriate for this information to be in the form of a recommendation.)

### **Do not pre-empt the delegate's decision**

In particular for those visas for which application will be made outside Australia, it is not appropriate that officers in Australia appear to pre-empt a decision to be made overseas by advising sponsors or prospective applicants on the likelihood (or otherwise) of certain criteria (for example, [Schedule 4 health criteria](#)) being satisfied (or waived).

As indicated in the following two examples, s65 delegates are not bound by assessments made by other s65 delegates, as indicated in the following two examples:

- For purposes relating to the grant of a permanent visa to a person in Australia, a s65 delegate in Australia may have assessed certain (non-applicant) family unit members outside Australia in regards to their health, character and/or dependency. However, in assessing any subsequent permanent visa application by those same family unit members, a s65 delegate (whether in or outside Australia) is in no way bound by those earlier assessments made by that other decision maker.
- The fact that a s65 delegate in Australia may have waived certain requirements (for example, health) in respect of a family unit member outside Australia in order to grant a permanent visa to a person in Australia does not in any way compel or oblige any other s65 delegate (whether in or outside Australia) to waive that requirement when assessing a (subsequent) permanent visa application by that family unit member.

### **Other agencies**

#### **Other government agencies**

Only the Minister and delegates of the Minister may grant or refuse visas (and assess sponsorships, nominations and other prescribed requirements). In the decision making process, however, the Regulations can specify other agencies (for example, ASIO) or persons (for example, Medical Officers of the Commonwealth) as the competent authority for opinion and advice.

Such agencies/persons are not responsible for decision making but their assessments or recommendations are relevant to the decisions of s65 delegates. It is not the role of these or any other agencies to recommend or otherwise indicate whether a visa should be granted. Therefore, if advising an applicant or sponsor that details of a visa application (or sponsorship) have been referred to a relevant competent authority, officers should not state or imply that the matter has been referred outside the portfolio for decision.

#### **Agency arrangements**

The department has, in certain countries, entered into agreements (known as agency arrangements) with several approved agents to provide a streamlined processing of applications for certain classes of temporary visa. These arrangements are an important initiative to meet the growing volume of work in posts.

The agency agreement specifies the classes of temporary visa to which the arrangements can apply. Arrangements may vary between posts according to the agency agreement.

The scale of fees for the service charged by agencies is dictated by the local market and is not controlled by the department. If the agent collects the visa application charge from the applicant, the relevant visa office bills the agent, using the visa statistical codes to calculate the agency's liability.

## Visa application procedures - Applications for visas

(Act: Part 2 - Division 3 - [Subdivision AA](#))

### About visa application procedures

Visa application procedures vary.

Do not assume that everything in this part applies without qualification to all visa applications in all circumstances. This part provides **general** guidance only and should be read in that light. For various reasons, the application procedures prescribed in the Regulations for certain visas (or for visas in certain prescribed circumstances) are not always as described in this part.

As examples (only) are the requirements in Regulations Schedule 1 for applying for:

- a [TF-995](#) Diplomatic (Temporary) visa or
- a [UD-601](#) Electronic Travel Authority or
- a [UJ-449](#) Temporary Safe Haven or [UO-786](#) Temporary (Humanitarian Concern) visa or
- a [BE-800](#) Territorial Asylum (Residence) visa

as well as the various generic and visa-specific "deemed application" provisions prescribed in Regulations [Division 2.2](#). In particular with such cases, it is important to **read the legislation**. The associated PAM3: Sch2Visa instructions also provide more information in such cases.

### How an application is made

(Act: [s45](#), [s46](#) and [s51](#))

**The application must be for a particular visa class**

### Legislative authority



Section 45 of the Act requires a person who wants a visa to apply for a visa of a particular class.

'Class' in this sense does not refer to a visa class, but should be understood to mean visa of a particular "type". This is because a visa class could comprise more than one visa subclass, (and streams within a subclass) with each visa subclass (or stream) having different validity requirements prescribed in Regulations Schedule 1 - see for example:

- for subclasses within the Business Skills (Residence) (Class DF) visa, Schedule 1 item 1104BA(4) and
- for streams within the Skilled (Provisional) (Class VC) visa, Schedule 1 items 1229(3)(k), (l) and (m).

Therefore, if a person has made a valid application for a visa subclass in accordance with the requirements in Schedule 1 for that visa subclass/stream, the person cannot be assumed to have made a valid application for the entire visa class (to which the visa subclass belongs), because the validity requirements in Schedule 1 in relation to the other visa subclasses/streams within the same visa class might not have been met. A person can be said to have made a valid application for an (entire) visa class only if all the visa subclasses/streams within the visa class have the same Schedule 1 validity requirements.

### As a valid application requirement

Under s46(1)(a), an application is invalid unless it indicates the class of visa being applied for.

### Schedule 1 requirements

#### Legislative authority

Together:

- s46(3) of the Act
- regulation 2.07(1) and
- regulation 2.10

provide for certain requirements relating to the making of an application to be set out in Regulations Schedule 1.

For each visa class, Regulations Schedule 1 specifies:

- the relevant approved form and
- the visa application charge payable - for which see also:
  - Regulations Division 2.2A and
  - PAM3: Div2.2A - Visa application charge.

Schedule 1 may also specify other requirements that must be met in applying for a particular class of visa, for example:



- where the application must be made and
- where the applicant must be when the application is made and
- the class/classes of visa the applicant must (or must not) hold.

### As valid application requirements

These requirements comprise most (but not all) of the requirements that must be met for the application to be a valid application for the purposes of s46 of the Act - see [What is a valid application](#).

### Schedule 1 and Division 2.2

The application validity requirements that can be specified in Schedule 1 are generally as prescribed in regulations [2.07\(1\)](#) and [2.10](#). Note, however, that application validity requirements are not necessarily limited to those specified in Schedule 1; they may, for specific visa classes for example, be set out in [Division 2.2](#) of the Regulations - see [Valid application requirements](#).

### Where the application must be made

#### Legislative authority

Regulation [2.10](#) provides that for section [46](#) of the Act, an application for a visa (not being an internet application) must be made in accordance with this regulation. Regulation 2.10 further provides that requirements relating to where an application must be made **may** be set out in Schedule 1 or elsewhere in [Division 2.2](#) of the Regulations. It also provides that, in the absence in specific provision in Schedule 1 or [Division 2.2](#) for a particular visa class:

- a visa application being made outside Australia must be made at an Australian diplomatic, consular or migration office
- a visa application being made in Australia must be made at an office of the department in Australia.

Regulation [2.10AA](#) provides that, for applicants who are:

- outside Australia and
- citizens of, or residents in, specific countries (as specified by legislative instrument) and
- applying for a visa that is specified by legislative instrument

the application must be made by posting or having it couriered to a specific post office box address specified as available for the purposes of receiving that visa application (and that in such cases, the application is taken to have been made outside Australia).

#### As a valid application requirement

In terms of [s46\(4\)\(c\)](#) of the Act, regulation [2.10](#) and the other provisions (elsewhere in [Division 2.2](#) or in Schedule 1) relating to where an application (other than an

Internet application) must be made operate as application validity requirements. An application is not valid unless made:

- at the office or address specified for applications for that visa class or
- if there is no specific provision relating to applications for that visa class, at an office as indicated in regulation [2.10\(2\)\(b\)](#) or [2.10\(2A\)\(b\)](#).

In establishing, for application validity purposes, whether an application has been made at the correct office, as indicated in regulation [2.10](#), officers need to consider (in order):

- first, the provisions within [Division 2.2](#) relating to applications for particular visa classes - for example regulation [2.07AB](#) relating to ETAs
- then, whether any regulation [2.10AA](#) legislative instrument applies
- then, if nothing is expressly prescribed in [Division 2.2](#), Schedule 1 - which can prescribe where an application for a particular visa class (or subclass) must be made
- then, regulation [2.10\(2\)\(b\)](#) or [2.10\(2A\)\(b\)](#).

If, for an application made in Australia, Regulations Schedule 1 does **not** make specific provisions as to where an application for a particular visa class must be made, the application will be taken to be made 'at an office of the department' within the meaning of regulation [2.10\(2A\)\(b\)](#) if the application is delivered to a GPO box that is leased by the department and held out as being a place to which applications for that visa class could or must be sent ([Chen v Minister for Immigration and Border Protection \[2013\]FCAFC 133.](#)). See also [Recording the valid application date](#).

## How the application may be made

### Relevant legislation

The Regulations can prescribe (including, by legislative instrument) the **method** by which an application can (or must) be made - for example see:

- the regulation [2.10AA](#) requirement for how certain applications must be made (made)
- Schedule 1 item [1124B\(3\)\(ca\)](#) relating to how certain [BS-801](#) Partner (Residence) applications are made.

Applications can also be made electronically – see [Effect of the ET Act on valid application requirements](#).

### As a valid application requirement

In regards to [s46\(4\)\(b\)](#), in establishing, for valid application purposes, whether an application has been made in the correct way, officers should consider (in order):

- first, regulation [2.10AA](#) - which can specify (by legislative instrument) where certain applications by certain persons must be made.
- then, Schedule 1 - which can prescribe how an application for a particular visa class must be made – for example, see Schedule 1 item [1137\(3\)\(a\)](#).

If **nothing** is prescribed:

- a visa application may be made in any manner, for example, in person or sent (for example, mailed) to the relevant office prescribed in regulation [2.10\(2\)\(b\)](#) or [2.10\(2A\)\(b\)](#) (for the latter, see also Where the application must be made – [As a valid application requirement](#))

and

- in accordance with [s47](#) of the Act, a valid application (for example, a paper application) must be accepted and staff, including staff at posts, are not permitted to require that it be made in a preferred format (for example, staff should not insist it be made electronically).

As far as practicable, clients are to have broadly equitable access to visa application processes throughout the service delivery network, however, government decisions, arrangements negotiated with foreign governments and security requirements are examples of practical reasons why some variation may be required.

## Electronic lodgment

### The ET Act

The [Electronic Transactions Act 1999](#) provides that for the purpose of a law of the Commonwealth, a transaction is not invalid because it took place wholly or partly by means of one or more electronic communications.

This means that, if a visa application is made electronically (for example, by fax or email), even though such electronic lodgment is not expressly permitted under the Regulations, the visa application would be considered valid if the application was made electronically in accordance with the department's specific IT requirements. The department's specific IT requirements include, for example, fax numbers or email addresses that have been made available to the public through means such as information sheets, application forms and websites, and which are held out as being available for the purpose of making visa applications.

### Departmental offices in Australia

For departmental offices in Australia these IT requirements are that applications are made by fax using the fax number of the appropriate office, provided the fax number has been publicly advertised (for example in information sheets, application forms or departmental website) as being available for making visa applications.

### Overseas posts

IT requirements for overseas posts are that, wherever technology permits, applications can be made by fax using the fax number of the appropriate office.

For applications lodged by service delivery partners (SDP) on behalf of visa applicants, IT requirements for overseas posts are that:

- applications can be made by email using the designated email address of the appropriate overseas post or
- wherever the technology permits, applications can be made by sending the application over the department's secure file server to the appropriate overseas post.

### Effect of the ET Act on valid application requirements

For certain visa subclasses, Schedule 1, regulation [2.10](#) or regulation [2.10AA](#) requires the application to be sent by mail or courier to a specified address. This requirement, however, does **not** prevent the option of applications for those visa subclasses being made electronically. This is because the Electronic Transactions Act prevails over the Migration Regulations – see [The ET Act](#).

### Faxed applications

#### Limitations

Visa applications may be faxed only to the fax number of the offices as stipulated in the visa application, information forms or on the departmental website. The validity requirements for applications - see [What is a valid application](#) - also apply to faxed applications.

#### Document integrity

Officers should ask the applicant to send in the original application form if there is any uncertainty as to the identity of the applicant or the integrity of information in the application.

### Internet applications

#### Legislative authority

Together, several provisions, including:

- regulation [1.18\(2\)](#)
- regulation [2.10AA](#) and
- regulation [2.12JA](#)

allow visa applications to be made via the Internet. ([Internet application](#) is defined in regulation 1.03). If an Internet application is permitted for a specific class, stream or category of visa, it will be specified in Regulations Schedule 1 for that visa.

#### When is an Internet application "made"

Regulation 2.10C specifies when an Internet application is taken to have been made. In particular, it sets out a method of calculating the time that an application was made when different time zones are an issue. It specifies that an Internet application is taken to have been made at whatever time it was in Australian Eastern Standard Time (or, if applicable, Eastern Summer Time when daylight savings time operates in the ACT) when the Internet application was made.

### "Where" is an Internet application made

An **Internet application** is made in Australia unless the Regulations expressly prescribe otherwise (for example, regulation 2.07AF(2) prescribes that an application made on form 157E 'is taken to have been made outside Australia').

## Oral applications

### Legislative authority

Regulation 2.09, together with relevant Schedule 1 provisions, provides for applications for specific visa classes to be made orally. (**Oral application** is defined in regulation 1.03 to have the meaning prescribed in regulation 2.09.)

### Relevant visa classes

Oral applications for Return (Residence) (Class BB) visas in accordance with regulation 2.09(2) are dealt with in PAM3: Sch2RRV - Resident return visas.

For other visas, and merely as an example, although together:

- regulation 2.09(1) and
- Schedule 1 item 1236(3) table item (3)

enable places and times to be specified by legislative instrument for the purpose of applying orally for certain Class FA-600 Tourist stream visas:

- no instrument has yet been made and so, currently,
- oral FA-600 applications cannot be made.

### Completion of the application form

## Completing the application - Legislative requirements

### Reg. 2.07(3)

Regulation 2.07(3) requires the applicant to complete the application form in accordance with any instructions (for example, that the form must be completed in English). Supporting documentation, in line with any relevant instructions, should also be provided.

See also [Partly-completed application forms](#).

## **Reg. 2.07(4) - Residential address**

Under regulation [2.07\(4\)](#), for a visa application made using an approved form to be valid the applicant must include their residential address - see [Residential address](#).

Usually, the address should be included in the actual application form. If, however, the applicant is reluctant to include their residential address on the application form for reasons such as being under police or security agency protection, the applicant can provide their residential address in a separate document accompanying the visa application. (Departmental officers in Australia can deal with this situation by offering appropriate security such as storing the document in a sealed envelope in the State Manager's safe. Officers should make an appropriate annotation on the application form and the applicant's ICSE record detailing where the document is stored.)

## **Effect of s98**

Persons who do not fill in their own application form are still legally taken to have done so if it is filled in on their behalf.

## **Signing**

The general policy view on the signing of forms is that forms should be signed by:

- each adult applicant (that is, person 18 or older) listed on the form and
- any person (for example, relative, translator, interpreter or agent) who completes (or helps complete) the form for an applicant.

If the primary applicant is a minor (that is, not yet 18):

- the applicant (that is, the minor) should sign the form if reasonably capable of understanding the nature of the application (as a general guide, this would mean those 16 or older)
- [sponsors](#) should sign on behalf of minors applying for an [Adoption visa](#) or as an orphan relative
- in all other cases, generally an adult [parent/legal guardian](#):
  - should sign on behalf of primary applicant minors under 16 and
  - may sign on behalf of primary applicant minors over 16 who have not signed the form themselves

It is not necessary that the adult signatory be an applicant or [sponsor/nominator](#).

Note: Signatures are [personal identifiers](#) for valid application purposes, refer to [Personal identifiers](#).

## **Subsequent amendments to an application**

Officers should not amend any information that has been entered on the form/s or supporting documentation by the applicant/s. They may, however, annotate forms provided they initial and date the annotations.

Any amendment, by applicant/s, to a form or supporting documentation should be initialled and dated by each adult applicant listed on that application.

If an applicant uses blank pages at the back of an application form (or other sheets) to provide additional information, each page used should be signed and dated by each adult applicant listed on that application.

## What is a valid application

(Act: s46)

### Valid application requirements

Together:

- s46 of the Act and
- regulation 2.07 and
- Regulations Schedule 1

specify the requirements for making a valid application for most visa classes. There are, however, exceptions, spelt out in [Division 2.2](#) and, for [bridging visas](#), regulation [2.22](#).

In regards to policy guidance:

- certain valid application requirements are discussed in [How an application is made](#)
- valid application requirements for specific classes are, as necessary, explained in the corresponding PAM3: Sch2Visa instruction/s or PAM3: GenGuide.

Immediately below, however, are seven general factors relating to valid application requirements (including common validity requirements) that officers should first specifically note.

## Form

The specified (prescribed) application form must be complete – see [Completing the application - Legislative requirements](#).

There is generally a particular form required to be filled in which will be specified in Schedule 1. Section 65 delegates should have regard to the principle of substantial compliance - see [Partly-completed application forms](#).

The legislative basis is:

- s46(3), which allows for the regulations to prescribe criteria that must be satisfied for an application to be valid and
- regulation 2.07, which prescribes that the approved form will be listed in Schedule 1.



## Fee (visa application charge)

The specified visa application charge (VAC) must have been paid, unless there is an exception to this – refer to [PAM3: Div2.2A - Visa application charge](#).

The amount of VAC is specified in Schedule 1. There are some specified situations in which the VAC is waived and certain visas are otherwise “VAC free”.

The legislative basis is:

- [s46\(1\)\(c\)](#), which sets out that any fees must be paid and
- [s45A](#) and [s45B](#), which allow for the visa application charge to be prescribed in regulations in relation to a particular visa and
- regulation [2.07](#), which prescribes that the VAC will be listed in Schedule 1.

Regulation [5.36](#) prescribes the currencies in which visa application charges or fees must be paid outside Australia.

## Location

See [Where the application must be made](#).

Schedule 1 will generally specify location (whereabouts) that is:

- whether the applicant needs to be in or outside Australia at time of application and
- where the application must be made.

The legislative basis is:

- [s46\(3\)](#) and [46\(4\)](#), which allow for the regulations to prescribe criteria that must be satisfied for an application to be valid, including where an applicant must be when an application is made; this location is then prescribed in Schedule 1 for each visa class.

## Residential address

The applicant's residential address must be provided.

If the applicant has not provided a residential address their application is invalid. The principle of substantial compliance does **not** eliminate this requirement.

The legislative basis is:

- [s46\(3\)](#), which allows for the regulations to prescribe criteria that must be satisfied for an application to be valid
- regulation [2.07\(4\)](#), which prescribes that an application is invalid unless it sets out the applicant's residential address in the form or in a separate document that accompanies the application ([2.07\(4\)\(b\)](#)). In other words, regulation [2.07\(4\)](#) provides that, for a valid visa application using an approved form to be made, the applicant **must** include in the application their residential address.



## No statutory bars

(As examples of statutory bars, see [s48](#) and [s501E](#).)

See:

- [Applications made by s46A unauthorised maritime arrivals and s46B transitory persons](#)
- [Limitations to applications in Australia - Overview](#).

If an applicant's application is invalid due to a statutory bar, they **might** be permitted by the regulations to apply for waiver of that bar. Unless such a bar is waived, any applications made by the applicant will be invalid.

The legislative basis is:

- [s46\(1\)\(d\)](#), which sets out the statutory bars that prevent a valid application.

## No conditions preventing further application

See [Persons subject to s46\(1A\) \("no further application" condition\)](#).

Examples of "no further application" conditions include condition [8503](#) and [8534](#).

Applicants might be permitted by the regulations to apply for a waiver, however the waiver must be applied for before a visa application can validly be made.

The legislative basis is:

- [s46\(1A\)](#), which sets out that an application is invalid if the applicant has a "no further application" condition, that is, a condition described in [s41\(2\)\(a\)](#) - condition [8503](#) is an example of a condition described in [s41\(2\)\(a\)](#).

## Visa- or stream-specific requirements

Some visas have specific validity requirements that are unique to a subclass (or stream) within that visa class. For such other requirements, check Regulations Schedule 1 and [Division 2.2](#) for specific visa classes and subclasses.

The legislative basis is:

- [s46\(3\)](#), which allows for the regulations to prescribe criteria that must be satisfied for an application to be valid and
- Regulations [Division 2.2](#) and Schedule 1, which prescribe further criteria for specific visa classes, subclasses and/or streams.

## Personal identifiers

## Act, s46(2A)

Under s257A, an applicant may be required to provide one or more **personal identifiers** in relation to their application. The effect of s46(2A) of the Act is that an application for a visa is invalid if:

- the applicant has been required to provide one or more personal identifiers under s257A for the purposes of s46(2A) and
- the operation of s46(2A) has not been waived by a ministerial delegate and
- the applicant has not complied with the requirement.

Section 257A enables officers to, in writing or orally, require a person to provide one or more **personal identifiers**. A personal identifier is defined in s5A(1) as any of the following seven (including in digital form):

- fingerprints or handprints of a person
- a measurement of a person's height and weight
- a photograph or other image of a person's face and shoulders
- an audio or video recording of a person (other than a recording under s261AJ)
- an iris scan
- a person's signature
- any other identifier prescribed by the regulations, other than an identifier the obtaining of which would involve the carrying out of an intimate forensic procedure within the meaning of s23WA of the *Crimes Act 1914*.

For s257A policy and procedure in relation to visa applications, refer to:

- [PAM3: Act - Identity, biometrics and immigration status - Collecting personal identifiers onshore](#)
- [PAM3: Act - Identity, biometrics and immigration status - Biometrics for offshore visa processing](#).

## Minister may determine personal identifiers not required

Under s258, the Minister may, by legislative instrument, determine that a specified person or class of persons must not be required to provide any personal identifiers, or one or more specified kinds of personal identifiers under s257A. The Minister may also determine that in specified circumstances, a specified person or class of persons must not be required to provide personal identifiers, or to provide specified kinds of personal identifiers under s257A.

## Circumstances in which person cannot be required to provide person identifier

Under s258A, a person must not be required to provide a personal identifier under s257A if the person:

- is in immigration detention, but not only because the person is detained for questioning detention (s192) and
- has, during the detention, provided a personal identifier of that type under Division 13AA of the Act.

## Applications made by s46A unauthorised maritime arrivals and s46B transitory persons

Section 46A and s46B of the Act state that visa applications made by **unauthorised maritime arrivals** and **transitory persons** (as defined in s5AA and s5 of the Act) are invalid if the applicant is:

- in Australia and
- either an unlawful non-citizen or the holder of a bridging visa, temporary protection visa or prescribed temporary visa.

Section 46A(2) and s46B(2) state that if the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to the unauthorised maritime arrival or transitory person, determine that s46A(1) (or s46B(1)) does not apply to an application by that person for a visa of a class specified in the determination.

The determination may provide that it has effect only for a specified period (and the period specified in a determination may be different for different classes of unauthorised maritime arrivals). Moreover, s46A(2C) and s46B(2C) enable the Minister to vary or revoke a determination made under s46A(2) or s46B(2) if the Minister thinks that it is in the public interest to do so.

These powers can be exercised only by the Minister personally.

The Minister does not have a duty to consider whether to exercise the power under s46A(2) (or s46A(2C)) and s46B(2) (or s46B(2C)), whether requested to do so or in any other circumstances - see s46A(7) and s46B(7).

## Sponsorship

In certain specifically prescribed circumstances, sponsorship (or lodgment of an application to become a sponsor) can be an additional requirement for making a valid application.

If sponsorship (or lodgment of an application to become a sponsor) is a requirement to make a valid application, it is generally prescribed in Regulations Schedule 1 for that visa class.

## Limitations to applications in Australia- Overview

There are three limitations on the making of applications by persons in Australia.

- A person in Australia who does not hold a substantive visa and who has had a visa refused since last entering Australia or who has had a visa cancelled. See s48 of the Act, and (if applicable) MRA transitional regulation 8. There may also be common law (that is, decisions of the Court) that affect validity – see [Persons refused visas or who have had visas cancelled \(s48\)](#).
- A person in Australia who has been refused a protection visa (or has had their protection visa cancelled) – see [Limitations on further protection visa applications \(s48A\)](#)

- A person in Australia who is subject to the provisions of:

- [s91E](#) of the Act (safe third countries) or
- [s91K](#) of the Act (temporary safe haven visas) or
- [s91P](#) of the Act (persons with “third country protection”) or
- [s161](#) of the Act (criminal justice) or
- [s195](#) of the Act (detainees) or
- [s501E](#) of the Act (visa refused or cancelled on character grounds)

- see [s46\(1\)\(d\)](#) of the Act. For policy and procedure, see Limitations to applications in Australia - Overview.

### Persons subject to [s46\(1A\)](#) ("no further application" condition)

#### Legislative background

Section [41\(2\)\(a\)](#) of the Act states that a visa may be subject to the condition that the visa holder will not be entitled to the grant of a [substantive visa](#) (other than a protection visa or a temporary visa of a specified kind) while they remain in Australia.

#### Effect of a [s46\(1A\)](#) visa condition

Under [s46\(1A\)](#), for persons in Australia who hold or who have held such a visa since last entering Australia, the condition operates as a bar on valid applications for **all** classes of substantive visa other than:

- a protection visa (as an example of the relevant visa condition, see Regulations Schedule 8 condition [8503](#))
- specifically-prescribed classes of substantive temporary visas (as examples of the relevant visa condition, see Regulations Schedule 8 condition [8534](#) or [8535](#))

unless the Minister or delegate has waived the condition under [s41\(2A\)](#) of the Act.

#### Waiver under reg. 2.05

The waiver mentioned above is available only in prescribed circumstances, see:

- regulation [2.05](#) and
- for further policy on the waiver, [PAM3: Div2.1/reg2.05 - Conditions applicable to visas - Waiver of "no further application" conditions](#).

### Persons in immigration detention

Apart from protection and bridging visas, a detainee can make a valid application for a visa only if they apply within the time limits in [s195](#).

### Criminal justice entry visa holders

Criminal justice entry visa holders may validly apply for a Protection visa only - see [s155](#) and [s161](#) of the Act and [PAM3: Act - Act-based visas - Criminal justice visas](#).

Criminal justice visa holders are **not** recorded on the movement reconstruction database; their details appear only on the Movement Alert List (MAL). Therefore, in the absence of a movement data base record, officers must check MAL records to establish whether an applicant is a criminal justice entry visa holder. If so, an application will be valid only if it is for a protection visa.

### Partly-completed application forms

Even though the requirements of regulation [2.07\(3\)](#) to complete the application form 'in accordance with any directions on it', the principle of substantial compliance means that a partly completed form can be accepted as a valid application unless:

- seriously deficient in information or
- a residential address has not been provided - see [Residential address](#) or
- a personal identifier is required - see [Personal identifiers](#) - but has not been provided, in which case, see [No opportunity to rectify a visa application](#).

### Valid or invalid applications - Consequences for decision making

#### Legislative requirements

Valid applications **must** be considered and decided unless subject to limitation provisions in [s63](#) or withdrawn in accordance with [s49](#).

Invalid applications **cannot** be considered ([s47](#)) and must be handled in accordance with [Assessing visa application validity/invalidity](#).

#### Importance of checking details at all stages

In view of the above, on receipt of an application, officers should date-stamp the form and check:

- that the form/s is fully completed and signed
- for payment (or evidence of payment) of the prescribed visa application charge and
- as far as practicable, for complete supporting documentation.

If Schedule 1 specifies that the applicant must be in a specific **location**, officers will have to check (for example, ICSE and the movement reconstruction database) to establish whether this requirement has been met.

To ensure that visas are not obtained fraudulently, officers are expected to:

- check all details of each applicant's answers to questions on the application against supporting documentation and
- satisfy themselves, at each stage of processing, that the person assessed against criteria (and, if applicable, granted and issued a visa) is the same person whose particulars appear on the application.

## Merits review

A finding that an application is not valid because the prescribed requirements for the application to be valid have not been met is not merits-reviewable; it is **not** prescribed under [s338](#) of the Act as a merits-reviewable decision.

## The date of valid application

(Act: [s46](#))

## Legislative authority

### Act, [s46](#)

Section [46](#) of the Act implicitly defines the time when a valid application is made as the time when **all** requirements for a valid application have been met.

If, for example, a visa application charge is paid by a sponsor and the application form is lodged by the applicant at a later date, the application is not validly made until both the form is lodged and all other requirements in the relevant part of Schedule 1 have been satisfied.

Officers should request evidence of the payment of the visa application charge and check the date on which the application form was lodged to establish the date of valid application - see [Recording the valid application date](#).

All impediments to a valid application must be overcome before an application can be considered to have been made. The date of the application is the date that the *last* requirement for a valid application was met.

For [Internet applications](#), regulations [2.10C](#) expressly provides that the application is taken to have been made at whatever time it was in Australian Eastern Standard Time (or, if applicable, Eastern Summer Time when daylight savings time operates in the ACT) when the Internet application was made - see [Internet applications](#).

## If [s46\(1A\)](#) applies

### If a waiver case

In the case of applicants who seek waiver of a "no further application" condition (for example, Schedule 8 condition [8503](#)) on a subsequent visa application, the date of the subsequent application is the date, after a decision is made that the condition will be waived, when all the application requirements (for example, completion of the application form and visa application charge) are met.

It is **not** the date on which the person sought waiver of the condition, even if they accompanied that request with a visa application form and the appropriate application charge - see [Persons subject to \[s46\\(1A\\)\]\(#\)](#).

## Why the valid application date is important

## Impact on visa eligibility

The date on which an application is considered to have been validly made is important as it might impact significantly on visa eligibility, for example, for those visas for which age at time of application is expressly relevant, whether as a visa criterion or, if applicable, for allocation of points under a prescribed points test such as Regulations [Schedule 6D](#) or [7A](#).

## BV eligibility

In Australia, the immigration status of the applicant on the date of valid application for a [substantive visa](#) (that is, when all requirements for a valid application have been met) has implications for the class of bridging visa applied for - see the relevant bridging visa instructions.

## Recording the valid application date

Officers must record the date of valid application on the file and computer system. The date on the receipt for the payment of the visa application charge will not always be a reliable source for this (as outlined above) or in situations where a cheque to cover a charge subsequently bounces and, on re-presentation, is still not cleared.

Efficient procedures are essential to preserve the entitlements of visa applicants. As three examples:

- Delays in date-stamping the receipt of an application for a substantive visa could result in the grant of a less beneficial bridging visa, affecting work and travel entitlements.
- Delays in deciding the associated bridging visa application could result in a person becoming or remaining an unlawful non-citizen.
- Delays in registering a change of address could result in an invalid notification of a decision.

The procedures in place to require same day date-stamping of applications received via a drop box, or by fax or mail are as follows.

Departmental STOs are responsible for ensuring same-day opening and date-stamping, as follows:

- Applications received by mail or via a drop box are to be date stamped on the day they are received (faxed applications should already have the time and date of transmission marked on them).
- Drop boxes are to be closed at close of business each day and their contents date-stamped. The drop box is to have a sign stating that all items dropped after a specified time will be recorded as having been received the following day.

Applications received by mail, fax and drop box are, after being date-stamped, to be referred to Client Services for receipting and processing of the associated bridging visa application.



Applications made in Australia and received by mail should be recorded as having been made **one business day prior to the date-stamp**. As two examples:

- If the application has been date-stamped by Converga as being received on a Thursday, the date the application was made (assuming the application meets other validity requirements) was Wednesday.
- If the application has been date-stamped by Converga as being received on a Tuesday because Monday was a public holiday, the date the application was made (assuming the application meets other validity requirements) was the Friday of the preceding week.

A visa application will be taken to be made 'at an office of the department' within the meaning of regulation [2.10\(2A\)\(b\)](#) if the application is received at a locked bag or a GPO Box leased by the department and held out (for example, on the departmental website) as being a place to which applications for that visa class could or must be sent ([Chen v Minister for Immigration and Border Protection \[2013\] FCAFC 133](#)). This is so even if the visa application is not collected and delivered to the department, and date-stamped by Converga, until the following business day.

If the method by which the application was made cannot be determined, the date-stamp date should be used as the date the application was made.

### Conversion of an application after it is validly made

#### Act, s45AA - application for a visa taken to be an application for a different visa

Section [45AA](#) of the Act authorises the making of regulations (a conversion regulation) in certain circumstances. The circumstances in which a conversion regulation may be made are:

- a person has made a valid application (a pre-conversion application) for a visa (a pre-conversion visa) of a particular class and
- the pre-conversion visa has not been granted to the person, whether or not a migration decision has been made in relation to the pre-conversion application and
- since the application was made, one or more of the following events has occurred:
  - the requirements for making a valid application for that class of visa change
  - the criteria for the grant of that class of visa change
  - that class of visa ceases to exist and
- had the application been made after the event (or events) occurred, because of that event (or those events):
  - the application would not have been valid or
  - that class of visa could not have been granted to the person.

Under s45AA, conversion regulations may be made to apply to specified classes of visas (including protection visas), specified classes of applicants, and applicants for a visa who are taken to have applied for the visa by operation of law.



Further, conversion regulations may be made so as to have the effect that a pre-conversion visa application is taken not to be, and never to have been, a valid application for the pre-conversion visa; and is taken to be, and to always have been, a valid application for a visa of a different class (as specified by the conversion regulations).

Conversion regulations may also prescribe:

- a class or classes of pre-conversion visa
- a class or classes of applicants for pre-conversion visas
- a time when the conversion regulation is to start to apply in relation to a pre-conversion application, including different conversion times that depend on the occurrence of different event.

For an example of conversion regulations made under [s45AA](#), refer to regulation [2.08F](#).

### **Effect of conversion on visa application charge**

If a person's visa application has been converted to an application for a different class of visa, the first instalment of the visa application charge (VAC) that was paid by the person is taken not to have been paid as the VAC for the pre-conversion application, but is instead taken to be payment of the VAC for the converted application.

This is so even if the VAC amount that would otherwise have been payable for the converted application is greater than the actual amount that the person paid for the pre-conversion application. This ensures that a person whose application has been converted is not required to pay the difference in VAC amounts.

On the other hand, if the VAC amount that is payable for the converted application is less than the VAC amount that the person actually paid for the pre-conversion application, the difference in VAC amounts will not be refundable to the person.

### **Effect of conversion on the associated bridging visa**

Where a person who applied for a pre-conversion visa holds a bridging visa that was granted in association with the pre-conversion application, then, following the occurrence of conversion, that bridging visa would 'transfer' to and be held by the person in association with the converted application. In other words, it is as if the bridging visa was granted in association with the converted application.

If the person has made a bridging visa application in association with the pre-conversion application, but at the time the conversion occurred, the bridging visa application was not finally determined, then the bridging visa application would be taken to have been made in association with the converted application, and the bridging visa (if granted) would have effect as if it was granted because of the converted application.

## Limitations on applying for visas in Australia

### Persons refused visas or who have had visas cancelled (s48)

#### Limitations on applying - Overview

In certain circumstances a person in Australia who does not hold a substantive visa can validly apply only for certain visas (prescribed in regulation 2.12), namely if, since last entering Australia they:

- have been refused a visa (other than a refusal of a bridging visa or a refusal under s501, 501A or 501B), whether or not that application has been finally determined - see s48(1)(b)(i)

or

- held a visa that was cancelled under certain provisions - see s48(1)(b)(ii).

The limitation on applications under s48:

- prevents repeat visa applications being made by a person in Australia who does not hold a substantive visa and who has had a visa application refused or a visa cancelled since last entering Australia and
- as discussed immediately below, ensures that such a person cannot avoid s48 by arguing that they either did not make or understand the nature of the refused application (s48(1A)), or that s48 does not apply because they left Australia following the visa refusal or cancellation (s48(2) and (3)).

#### Act, s48(1A)

Section 48(1A) supplements s48(1) by clarifying that the limitation on valid applications applies to a person in Australia who does not hold a substantive visa and who, since last entering Australia, was refused a visa (other than a refusal of a bridging visa or a refusal under s501, s501A or s501B) even if the refused application was made on their behalf and the person did not know about or understand the nature of the application due to a mental impairment or because the person was a minor at the time the application was made.

Section 48(1A) ensures that persons:

- who are minors or lack capacity due to a mental impairment and
- who have been refused a visa since they last entered Australia

are not able to avoid s48 by arguing that s48 does not apply to them because they did not apply for the (refused) visa themselves or did not understand the nature of the visa application made on their behalf.

## Act, s48(2)

Section 48(2) provides that a person who has been removed from the migration zone but who had to be brought back because of a reason covered by s42(2A)(d) or (e) is taken to have been continuously in the migration zone despite the removal. This ensures that such a person is not able to argue that s48 no longer applies to them because the visa refusal or cancellation did not occur 'since he or she last entered Australia'.

## Act, s48(3)

Section 48(3) provides that a person who leaves and re-enters the migration zone while holding a bridging visa is taken to have been continuously in the migration zone despite that travel.

## Prioritising applications

Priority must be given to processing visa applications received from persons who are subject to s48, to ensure that persons are discouraged from making an unfounded application solely to delay departure. See [No opportunity to rectify a visa application](#).

## Limitations on further protection visa applications (s48A)

### Effect of s48A

Section 48A of the Act prevents persons making further protection visa applications. It is designed to ensure that a person in the migration zone who has been fully-considered for a protection visa and been refused, or who held a protection visa that was cancelled, cannot make successive applications to delay departure from Australia.

## Act, s48A(1C)

The application bar in s48A will apply to such a person **regardless** of any of the following four factors (see s48A(1C)):

- The grounds on which an application would be made or the criteria which the person would claim to satisfy.
- Whether the grounds on which an application would be made or the criteria which the person would claim to satisfy existed earlier.
- The grounds on which an earlier application was made or the criteria which the person earlier claimed to satisfy.
- The grounds on which a cancelled protection visa was granted or the criteria the person satisfied for the grant of the visa.

Section 48A(1C) ensures that the application bar applies to a person in the migration zone who has been refused a protection visa or held a visa that was cancelled, regardless of the basis of their subsequent protection visa application and regardless of whether the basis of their subsequent protection visa application differs from the basis of their previous protection visa application or protection visa grant.

For further guidance on policy and procedure, refer to [PAM3: Refugee and Humanitarian - Protection visas – All applications – Common processing guidelines – Application validity – Application validity requirements- Application bars](#).

### **Act, s48A(1)**

Under [s48A\(1\)](#), a person who, while in the [migration zone](#), has made an application for a protection visa (or any application which involved a determination of refugee status) that was refused, cannot apply again for a protection visa. The s48A(1) bar applies regardless of whether:

- the previous application was made before or after 1 September 1994  
or
- the application has been [finally determined](#) see [s5\(9\)](#), [s5\(9A\)](#) and [s5\(9B\)](#)  
or
- the person still holds a [substantive visa](#).

### **Act, s48A(1AA)**

Section [48A\(1AA\)](#) clarifies that the application bar will apply to a person who has been refused a protection visa even if the protection visa application was made on behalf of the person (for example, by a responsible parent or legal guardian) and the person did not know about or did not understand the nature of the Protection visa application that was made on their behalf because of a mental impairment or because they were a minor at the time the application was made on their behalf.

### **Act, s48A(1A)**

A person who has been removed from the migration zone and has to be brought back to Australia because of a reason covered by [s42\(2A\)\(d\)](#) or (e) is taken to have been continuously in the migration zone despite the removal [s48\(1A\)](#).

### **Protection visa cancelled**

Section [48A\(1B\)](#) of the Act similarly prevents further protection visa applications being made by a person whose protection visa has been cancelled.

### **s48A "waiver"**

Section [48B](#) of the Act gives the Minister personal non-compellable discretion to allow the making of a further protection visa application by a person to whom [s48A](#) applies. For policy and procedure, refer to [PAM3: Refugee and Humanitarian - Protection visas - s48A cases and requests for s48B ministerial intervention](#).

### **Assessing visa application validity/invalidity**

#### **Opportunity to rectify a visa application**

#### **Timing of visa application validity assessment**

Officers must assess the validity/invalidity of a visa application in a timely manner.

### Opportunity to rectify a visa application

If a visa application appears to be invalid, the officer should consider whether to give the applicant an opportunity to rectify the invalidity of the visa application.

A visa applicant should be given an opportunity to rectify invalidity defects with an application if the defects can be **quickly and easily remedied**. As two examples of when this might be the case:

- The visa applicant has failed to provide sufficient payment for the visa application charge, and the applicant can immediately make up the payment deficit (see also [Part-payment of a visa application charge](#))
- The visa applicant has failed to provide sufficient particulars or critical details in their visa application form when they are at the counter.

Three circumstances in which it would also be appropriate to try and contact a visa applicant and ask whether they wish to rectify the visa application are:

- Where it is clear that the visa applicant will soon no longer be able to meet a validity requirement (for example an age requirement).
- Where the substantive visa of a visa applicant in Australia is due to cease within a week, which may affect the applicant's eligibility in Australia for a further substantive visa.
- Where a visa applicant outside Australia plans to travel to Australia within a week using the visa that they believe they have applied for.

If a client file or record exists in the relevant departmental system (for example, ICSE), a comprehensive case note of the communication with the visa applicant must be made in that system.

If an officer is attempting to contact a visa applicant by phone, they should attempt to contact the visa applicant at least twice over a period of two days.

If the applicant cannot be contacted by phone, or fails to respond to a request to rectify an application within a reasonable period (see [Period for response](#)), the processing officer may proceed to notify the visa applicant that their visa application is invalid - see:

- [No opportunity to rectify a visa application](#)
- [PAM3: Act - Code of procedure - Notification requirements - Notice of invalid visa application](#).

### Number of opportunities for rectifying a visa application

Generally a visa applicant should be given only one opportunity to rectify their invalid visa application.

## Period for response

Recent changes to client service arrangements mean that very few applications are assessed in person at the counters. Rather, Client Liaison Officers, who are stationed at the Client Services area, encourage clients to apply online at first instance at one of the many booths/kiosks with a computer terminal located at the Client Services area. If clients are unable to apply online, the Client Liaison Officer will direct clients to submit their paper application via a “drop box” located within the Client Services area. Applications in the drop box are then delivered to the appropriate area for processing.

Clients are advised by Client Liaison Officers to provide all required forms, documentation and payment details with their visa application. Nevertheless, where processing officers form the view that the application is invalid due to some deficiency in the application, processing officers should provide visa applicants with a reasonable period to rectify their invalid visa application. What is reasonable should be assessed on the facts of each case taking into account the applicant's individual circumstances and, in particular, how they are to provide any further information. For example, if an applicant will be responding by mail, periods for mail delivery according to the particular mail system being used should be taken into account. Generally, a response period of 7 days (calculated from deemed receipt of the notification of invalid application) should be specified unless the facts of the case and the applicant's individual circumstances indicate a longer or shorter period should be given.

## Contact with third parties

If the visa application has been lodged on the visa applicant's behalf by a third party (for example, a migration agent), officers should consider whether it is appropriate to contact the third party direct (officers should have regard to [PAM3: Act - Code of procedure - Notification requirements](#) if the visa applicant has appointed an authorised recipient). For example, it may be appropriate to contact the third party if the third party can easily and quickly rectify the visa application so that it is valid.

## No opportunity to rectify a visa application

If an invalid visa application cannot be quickly and easily rectified, the processing officer should notify the person that the application is invalid (in accordance with [PAM3: Act - Code of procedure - Notification requirements](#)). The invalid application, or a copy of it, should be kept on the client's file. The Department should return the invalid application and associated material if requested to do so but a copy must be kept on the client's file. Regardless of any request, original documents (such as birth certificates) should also be returned after copies are made for the client's file.

Following are eight examples of when the visa applicant should be notified **without** providing the applicant with an opportunity to rectify:

- No application form has been lodged.
- The application has been made to an incorrect place so that the Schedule 1 requirement as to where the application must be made cannot be met.



- The Schedule 1 requirement as to the class of visa the visa applicant must hold is not met.
- A Schedule 1 age requirement is not met.
- The visa application is “prevented” by the Act under:
  - s48 (visa refused or cancelled earlier) or
  - s48A (protection visa refused or cancelled) or
  - s91E (safe third countries) or
  - s91K (temporary safe haven visa) or
  - s91P (non-citizens with access to protection from third countries) or
  - s161 (criminal justice) or
  - s164D (enforcement visa) or
  - s195 (detainees) or
  - s501E (visa refused or cancelled on character grounds).
- The visa application is made by a non-exempt unauthorised maritime arrival.
- The visa application is made by a made by a non-exempt transitory person
- The visa application form is seriously deficient of information, for example no details have been entered apart from the visa applicant's name.

### Part-payment of a visa application charge

Generally an officer should not accept part-payment of a visa application charge. There may be exceptional circumstances in which it would be prudent to accept part-payment.

All part-payments, whether made in cash or by cheque, must be receipted (both ICSE and the overseas Revenue Collection System have a facility to accept part-payment).

If a part-payment is accepted (that is, there are exceptional circumstances), officers must ensure that the date of visa application recorded in the application system is the date that the balance of the payment is made, **not the date of the first payment**. The balance of the payment must also be linked with the earlier part-payment and the visa application.

If, in exceptional circumstances, part-payment is accepted (either in the mail or at the counter) it should be made clear to the visa applicant (either by phone or by letter) that:

- the visa application will not be valid until the balance of the payment is made
- processing will not commence until the application is valid and
- migration law changes from time to time and the law that will be used to assess that application is the law that will be in place at the time that all the application validity requirements are met.

If the visa applicant does not, within a reasonable time, make their visa application valid (for example, by paying the balance of the visa application charge or by meeting any other outstanding requirement), the payment should be repaid as there is no legal basis for keeping it without there having been a valid visa application.

## Who are applicants

### As listed in the application

Most departmental forms allow (or, in some cases, require) the primary applicant to list certain (or all) family members and, if applicable, to indicate which of those are, variously, "included in the application", "travelling" "accompanying" "migrating", "included in the passport" etc.

Briefly, provided a valid application is made - see s46 of the Act - every non-citizen who is listed on the application form as "included" in the application (however described):

- is an applicant in their own right and so
- in law, has made their own application.

### Combined applications

#### As a Schedule 1 provision

For most visa classes, Regulation Schedule 1 states that applications may be combined if 2 or more applicants claim to be members of the same family unit, see:

- Schedule 1 item 1114(3)(b)
- Schedule 1 item 1208(3)(c).

(Regulation 2.12E provides in these cases that payment of one visa application charge only is required.)

For the purposes of assessing whether a valid application has been made, it is not necessary to decide at the time of application whether the applicants are all actually members of the same family unit. Rather, this assessment will usually be necessary in deciding, for example, whether Schedule 2 secondary criteria for the grant of a visa are satisfied.

#### Effect of a combined application

It is irrelevant that, in a combined application, only one application form has been completed and lodged. Each person who combines their application with another person:

- is an applicant in their own right
- in law, has made their own application and
- must be considered against primary criteria and secondary criteria.

(Usually, only one family member (for example, the "primary applicant") has to satisfy primary criteria; the other family members usually need only satisfy secondary criteria.)

It is possible too that more than one person who combined applications on the one form will satisfy primary criteria, see:



- [If the visa has Schedule 2 primary criteria only](#)
- [If the visa has both Schedule 2 primary and secondary criteria.](#)

See also [Adding family unit members to an application.](#)

### **Family members not residing with the primary applicant**

Situations arise where family members who do not currently reside with the primary applicant are required to undergo assessment against Schedule 2 criteria - for example health, character, questions of dependency or access rights.

This situation arises most often in applications for certain permanent visas (cases in which usually even family members who are not applicants must undergo certain assessments).

It is for the office handling the (primary applicant's) application to decide the most appropriate course for arranging assessment of these family members.

As obtaining and providing information regarding these family members rests with the visa applicant/s, officers should exhaust all other options before seeking help from other offices of the department.

In particular, officers can obtain the name and location of all panel physicians from the Border website [Panel doctors directory](#). There should be little need therefore to ask other departmental offices to arrange health examinations of family members. (For policy and procedure on health requirements, refer to [PAM3: Sch4/4005-4007 - the health requirement.](#)) In these cases:

- processing officers are to issue medical forms for the absent family member using photos supplied by the applicant (the applicant should not use the versions of forms obtained elsewhere)
- the medical and x-ray reports must be received direct from the panel physicians, not via the family member or the applicant. (Note: Some panel physicians may require a courier fee for despatching documents direct to a processing officer in Australia. Also, some panel physicians may agree only to sending the reports to the nearest office, due to fraud and mail difficulty in some countries.)
- departmental offices should keep a copy of the photos used to prepare the medical forms for comparison with the completed forms.

### **Applicants, Schedule 2 subclasses and visa criteria**

#### **About Schedule 2**

#### **Related to Schedule 1**

Each applicant (whether or not the primary applicant) is an applicant for a specific visa class. That visa class may comprise one or more visa subclasses - see Schedule 1.

If an applicant indicates in their application that they wish to be considered against only one (or only a few subclasses) within the visa class, this does not necessarily

mean that the application is valid only in relation to those specified subclass or subclasses. Which subclass or subclasses of visa an applicant has made valid applications for (and therefore must be assessed) has to be determined by reference to the relevant requirements met by the applicant – refer also to [The application must be for a particular visa class](#).

## Criteria

For each visa subclass there are either:

- primary criteria only or
- primary criteria or secondary criteria

to be satisfied - see regulation [2.03](#), regulation [2.03A](#) (if applicable) and the Schedule 2 part for the relevant subclass.

If secondary criteria exist, certain applicants are able to be granted a visa on the basis, amongst other things, of their being a family unit member of the applicant who satisfies the primary criteria.

Note: References in this instruction to subclasses of visa (and visa subclass criteria) are, if and as applicable, to be read as being references to visa subclass streams (and visa subclass stream criteria) as per regulations [1.07](#), [2.03\(1A\)](#) and [2.03\(1B\)](#).

## In assessing visa eligibility

In law, officers are required to:

- assess each applicant (whether or not the primary visa applicant) against each visa subclass in the visa class in respect of which the applicant has objectively made a valid application (which may include subclasses that the applicant has not specifically indicated they are applying for)

and

- take into consideration all information given in relation to the application (s54). This information may be set out in the application, a document attached to the application or submitted at any time before a decision is made.

In practice, however, this extensive assessment against each subclass will become necessary only if there is a [decision to refuse the applicant a visa](#). If the applicant satisfies criteria for a visa subclass (and, it follows, is granted the class of visa applied for), nothing requires officers to consider the applicant further against the other visa subclasses (if any).

## Assessing primary and secondary criteria

For simplicity, policy and procedure on assessing:

- which applicant (if any) has to satisfy primary criteria, and which applicants have to satisfy secondary criteria only and

- which is the appropriate visa subclass

are provided below separately - see:

- [If the visa has Schedule 2 primary criteria only](#)
- [If the visa has both Schedule 2 primary and secondary criteria](#)
- [Who to assess against primary criteria](#) and
- [Who to assess against secondary criteria](#).

However, in practice, these assessments are usually made in tandem. In practice, too, the information provided by the primary applicant should to a great extent assist officers in deciding these factors. In particular, if a combined application is made, it is envisaged (and to some degree officers may assume) that the applicant who considers themselves to have the strongest claim to satisfying visa criteria will have completed the application form.

### Schedule 2 does not list all visa requirements

It is important that officers keep in mind that Regulations Schedule 2 sets out **most**, but **not all**, of the requirements an applicant must satisfy to be granted a visa.

Officers must also establish whether grant of the visa is effectively precluded, or should be refused, under legislative provisions **outside** Schedule 2 - see [Granting visas - Summary of legislative requirements](#).

### If the visa has Schedule 2 primary criteria only

#### Each applicant must be assessed

If the visa applied for does not have secondary criteria each applicant must satisfy all prescribed primary criteria in their own right. This is so regardless of whether, for example, an applicant:

- has combined their application with that of another [family unit member](#) or
- is the passport dependant of another applicant.

#### Order of consideration

In deciding in which order to consider the various visa subclasses, officers should assess:

- if a combined application is made, the strength of the primary applicant's claims against the visa-specific criteria for each visa subclass, having regard to the information on the application form and any supporting documentation provided by the primary applicant. (It is unlikely that the primary applicant's family unit members would present stronger claim for any other visa subclass) otherwise
- the strength of the applicant's claim against the visa-specific criteria for each visa subclass, having regard to the factors described in the point immediately above.

Note:

- If the visa subclass has visa streams and the applicant has expressly applied for one of those streams, they must satisfy visa subclass criteria in accordance with regulation [2.03\(1A\)](#).
- If a combined application is made for a visa having primary criteria only, nothing requires all the applicants in that combined application to satisfy primary criteria for the same visa subclass. In practice, however, this is unlikely to have any consequences.

### If the visa has both Schedule 2 primary and secondary criteria

#### Effect of reg. 2.03

Regulation [2.03](#) provides that, if the visa applied for has secondary as well as primary criteria, each applicant must satisfy either primary criteria or secondary criteria to satisfy prescribed criteria for visa grant. If the visa subclass has visa streams and the applicant has expressly applied for one of those streams, they must satisfy visa subclass criteria in accordance with regulation [2.03\(1A\)](#).

In combined applications, at least one applicant must satisfy primary criteria.

Officers should keep the following in mind in deciding in which order to consider the visa subclasses and which (one) [family unit member](#) (if any) must satisfy primary criteria. This itself may depend on which visa subclass is being considered.

#### Which subclass

#### Assessing supporting information

As a general rule, it is likely that:

- the primary applicant (and, for certain [permanent visa](#) classes only, their partner, if any) will present claims and supporting documentation in support of **one** visa subclass only and
- if a combined application is made, the rest of the family unit will usually present supporting documentation (for example, marriage certificate, birth certificates and/or evidence of dependency on the primary applicant) in support of satisfying secondary criteria only.

If, as is usually the case, one (and only one) of the applicants must satisfy primary criteria, officers should decide who should be assessed (at least initially) against primary criteria and in which visa subclass by considering (against visa-specific criteria):

- the claims and supporting documentation provided by the primary applicant
- in the name of which applicant the [sponsorship](#)/nomination (if any) has been completed
- for permanent visa classes only (other than [Return \(Residence\)](#)), the claims and supporting documentation provided by the primary applicant's partner (if any, and only if an applicant)

- the strength of the primary applicant's (and, as described above, their partner's) claims for each subclass.

As stated earlier, if a combined application is made, it is likely that the application form will have been completed by the applicant whom the family unit considers as having the strongest claim to a visa. However, officers should not assume that the primary applicant (even if assessed to be a person who has to satisfy primary criteria) is necessarily the *only* applicant capable of satisfying primary criteria.

If an applicant does not satisfy secondary criteria and has not previously been assessed against the primary criteria, it will be necessary to assess them against primary criteria before a decision can be made on their application.

For those applicants who appear to have to satisfy secondary criteria only, it is a prescribed secondary criterion that they be a **member of the family unit** of the person who has to satisfy primary criteria. This person:

- is usually an applicant (but sometimes, in certain circumstances, may already hold the relevant visa) but, in any case,
- if an applicant, is not necessarily the primary applicant.

In practice, the following will usually apply if:

- (as in most cases) the person who has to satisfy primary criteria is a **visa applicant** (rather than a **visa holder**) and
- a combined application has been made.

### Who to assess against primary criteria

For **temporary visa** classes that have **secondary criteria**, it should usually be necessary for officers to assess only the primary applicant against primary criteria. It is unlikely that other **family unit members** would have put forward any claim (or supporting documentation) to satisfy primary criteria in their own right.

For **permanent visa** classes that have secondary criteria, it should be necessary for officers to assess only the **primary applicant** and, if applicable, their **partner**, against primary criteria.

This is because the other family unit members are unlikely to have put forward sufficient evidence to support any claim of satisfying primary criteria in their own right:

- It is policy that these other family unit member applicants be assessed against primary criteria only on the basis of supporting documentation lodged at the time of application.
- Officers are not required to (and, under policy, should not) invite any "dependant" to provide further documents in support of any primary criteria claim.
- It is open to any of these other family unit members who wishes to be fully-assessed against primary criteria to make their own application (and pay any applicable prescribed visa application charge).

Although both primary applicant and partner (if any) should be assessed against primary criteria, few circumstances should arise where officers would have to fully assess both primary applicant and partner against primary criteria:

- Officers may process an application on the basis of fully-assessing only the primary applicant against primary criteria if, on the basis of documents lodged with the application
  - the primary applicant (rather than the partner) appears to have the stronger claim to satisfying primary criteria or
  - the primary applicant and the partner appear to have equal claim to satisfying primary criteria.
- It is, of course, always open to officers to proceed with an application on the basis of the primary applicant's partner being the person who has to satisfy primary criteria if, at any time prior to decision, the partner appears to have stronger claim than the primary applicant to satisfying those criteria. (Procedures for amending the data base in such cases are in the relevant departmental systems manual.)

### Who to assess against secondary criteria

It is a prescribed criterion that an applicant who appears to have to satisfy secondary criteria only to be granted a visa must be a **member of the family unit** of the person who has to satisfy primary criteria. However, note the following four points.

- **Member of the family unit** is defined in regulation 1.12. For policy and procedure on assessing relationship and degree of dependency (if any), first see [PAM3: Div1.2/reg1.12 - Member of the family unit](#).
- Regardless of whether the person who satisfies primary criteria is an applicant or already holds that class of visa, eligibility of any person to be a family unit member of that person derives from their relationship to that person as (nominal) **family head**.
- This means, for example, that, although a minor child can readily satisfy criteria to be a **member of the family unit** of its parent/s, parents (or siblings) do not satisfy criteria to be a **member of the family unit** of a (minor) child, see regulation [1.12\(1\)\(e\)](#). (Specific exception has been made for certain visa categories - see for example regulations [1.12\(6\)](#) and [\(7\)](#).)
- The applicant must already be a member of that family unit. "Intended" family unit members (for example, "fiancés") do not meet regulation [1.12](#) requirements to be a **member of the family unit**.

### Secondary criteria and combined application requirements

As indicated immediately below, an applicant's ability to satisfy secondary criteria **may** be linked to the making of a combined application. For the grant of certain visas, generally those permanent and provisional visas for which the applicant must, at time of application, be outside Australia, there is a secondary criterion that **requires** family unit member applicants to have made a combined application with the person who satisfies the primary criteria.

For these visa subclasses this means, for example, that if a widowed parent living in the same household as the main visa applicant does not apply at the same time and



place (that is, make a combined application) as the primary applicant, that widowed parent cannot satisfy Schedule 2 secondary criteria, even if a [member of the family unit](#). (A [dependent child](#) has not been used as the example here because, unlike a widowed parent, a dependent child is taken to be "added" to an application later and still be regarded as having combined their application with that of the primary applicant - see regulation [2.08A](#).)

The requirement described above generally does not apply to those permanent visas that must be applied for in Australia. Family members of a person who satisfies the primary criteria may apply separately (provided the application has not yet been decided) and still be able to satisfy secondary criteria. However, it is expected that those applications would be assessed together to ensure that criteria relating to all family members are assessed appropriately.

As a general rule, it is possible for family members of applicants for temporary visas to apply separately from the person who satisfies the primary criteria. For example, a family unit member of a person who holds a GC-402 visa may apply, outside Australia, for a visa of the same class and be able to satisfy Schedule 2 secondary criteria, even if the person who satisfied the primary criteria was granted their visa some months previously and is in Australia.

### Sponsorship, nomination or other support

Sponsorship, nomination or similar support is a prescribed criterion for certain visas. For policy and procedure on:

- the (approved) manner in which an applicant is to be sponsored or nominated, first see the relevant PAM3: Sch2Visa instruction
- which office is responsible for assessing the sponsor/sponsorship or nominator/nomination - see the relevant PAM3: Sch2Visa instruction, which will, in turn, refer to the associated PAM3 instruction.

Note: For specific visas, the Regulations provide for **separate** sponsor and/or nomination procedures relating to the proposed **activity**, not to the visa applicant who will be performing that activity - in particular:

- Employer nomination visas, for which see [PAM3: Div5.3/reg5.19](#)
- the visas to which Regulations Divisions [2.11](#) - [2.23](#) relate for which see [PAM3: Sponsorship applicable to Division 3A of Part 2 of the Act - Sponsorship](#)

### Occupational classification

#### Purpose

Although not a legal requirement for visa grant, the following applicants have to be occupationally classified. This is necessary for purposes relating to visa-specific criteria and program management and must not be confused with any separate requirement outlined in the relevant PAM3: Sch2Visa instruction for certain applicants to have their skills assessed):

- For permanent visas other than Return (Residence), all applicants must be occupationally classified.
- For (most) temporary visas, only the primary applicant has to be occupationally classified, mainly to establish the appropriate visa subclass.

## Use of ANZSCO

The [ANZSCO](#) system provides the most consistent and authoritative method of classifying occupations in Australia.

It is policy therefore that officers should resolve any doubts about a person's occupational classification (including, where appropriate, for the purposes of subsequently assessing their skills in that occupation) by comparing the duties of the applicant's occupation with the duties of relevant occupations as described in the ANZSCO standard.

For more information see [Occupation classification](#).

## Adding family unit members to an application

### Adding child born after parent has applied (reg. 2.08)

#### Deemed application

Under regulation [2.08](#):

- a child (other than a contributory parent newborn child) born to an applicant after an application is made but before it is decided (that is, visa granted or refused) is taken to have applied at birth for a visa
- the child's application is taken to have been combined with the parent's application.

For more information, see [PAM3: Act - Act-defined terms - s5G - Relationships and family members - Dependent family members - Application by newborn child](#).

#### Scope

Regulation [2.08](#):

- applies to all visa classes but
- does not cover **adopted** children.

Regulation 2.08 also does not apply if the visa application is precluded by the Act - see for example [s46A\(1\)](#).

#### Critical date

Regulation [2.08](#) applies **if the child is born before the application is decided** (that is, before the parent has been granted or refused a visa) even if the department is not notified as to the birth of the child until after the decision is made.



In such cases there is a deemed application by the newborn child; it is awaiting decision and can be decided once the parent/s notify the department of the birth and provide documentary evidence of the birth.

### **No application form is required**

Regardless of whether the child must satisfy primary or secondary criteria, the child is automatically taken to have applied when it was born and have a combined application with its [parent/s](#).

Therefore, a separate application form is not required for the purpose of making the application. However, it is policy (supporting case audit requirements) that the parent completes a standard visa application form in favour of the child. (No visa application charge is payable as the completion of the form is not intended to constitute an application under [s45](#) of the Act.)

Moreover, as further information about the child will be needed to satisfy the criteria of the visa class, it may be appropriate in some circumstances to use an application form for this purpose.

Under [s104](#), the child's parents are required to notify the department, as soon as practicable, of the birth of the child, as this constitutes a change of circumstances. If evidence of the birth is not provided with this advice, it should be sought under [s56](#) of the Act.

If a child has a deemed application under regulation [2.08](#) (regardless of whether the parent has completed a visa application form in favour of the child), a decision on the application must be made in respect of the child either:

- at the same time that a decision is being made on the parent's visa application or
- if a decision has already been made on the parent's application, as soon as a decision maker becomes aware of the deemed application

whichever is relevant.

### **Combined visa applications**

If a child is born to two non-citizens who have made a combined application for the same visa (and a decision has not yet been made on those applications), the child is taken to have made **two** applications for the same visa, rather than one application for the same visa. This means a separate decision must be made on each of the child's (two) visa applications. If a decision maker only makes a decision to grant or refuse one of the child's visa applications then the other visa application remains undecided (unless it is withdrawn). The child would remain the holder of any associated Bridging Visa until a decision is made on the child's second visa application.

Where a child is taken to have made two visa applications for the same visa, which is combined with the parent's visa application, the decision maker may send one notification letter addressed to the primary applicant but covering all applicants if:

- the decision for all visa applicants is the same and
- each applicant has the same entitlements to merits review.

The notification letter must refer specifically to each applicant and the decision made on that applicant's visa application. Where it is a refusal decision, each visa applicant must be told what criterion they did not meet, why they did not meet it and their review rights (if any). In respect of the child, the notification letter must clearly state that there has been two decisions and, if the child has review rights, that there are review rights for both refusal decisions.

### **Certain situations in which reg. 2.08 cannot apply**

In some cases where a child is born to a provisional/temporary Partner visa holder, although regulation 2.08 operates by law to add the child to the parent's permanent partner visa application, the child will not be able to satisfy Schedule 2 criteria that they hold a provisional/temporary partner visa or a 445 Dependent Child visa.

In these circumstances, the newborn child should be sponsored for a 445 Dependent Child visa.

For more detail on the operation of regulation 2.08 and Partner visas, see [PAM3: Act - Act-defined terms - s5G - Relationships and family members - Dependent family members - Application by newborn child - If two-stage partner visa processing applies](#).

### **If the visa class is deleted from Schedule 1 before the child is born**

Cases may arise where:

- the [parent](#) has applied for a class of visa listed in Schedule 1
- that class of visa has since been deleted from Schedule 1 (and, it follows, applications can ordinarily no longer be made for that class)
- the child is born after the visa class has been deleted (but before any decision has been made on its parent's application).

If the regulation amendment that deleted the visa class from Schedule 1 included a transitional provision to ensure that the deletion did not apply to applications made before that date, the child is taken to have applied for the same class of visa as its parent, even though that visa class no longer existed when the child was born.

### **Applicable Schedule 2 criteria**

Children taken under regulation 2.08 to have applied for a visa must satisfy all Schedule 2 "time of decision" criteria - regulation 2.08(2)(a).

They must also - regulation 2.08(2)(b) - satisfy (at time of decision) any applicable "time of application" prescribed criterion that the applicant be sponsored, nominated or proposed. (A new sponsorship (or equivalent) form has to be completed for the child only, not the rest of the family unit already sponsored.)

## Be aware of subsequent regulation changes

In assessing, against Schedule 2 criteria, children who are taken under regulation 2.08 to have applied for a visa, decision makers must keep in mind whether any regulatory changes to Schedule 2 criteria have been subject to transitional provisions specifying which "version" of a Schedule 2 criterion applies to a child to whom regulation 2.08 applies.

## Cases at merits-review stage

In the case of a child born when its parent's application for a visa is with a merits review body, if the decision is set aside and the application **remitted to the department**, the child can be added to the application. This is because a fresh decision has to be made and the application reverts to the primary decision making stage.

Current legislation does not permit a child to be added to an AAT review application if there is no primary decision in respect of the child. This means that the child cannot be included in that decision if the review body:

- **affirms** the decision to refuse to grant the parent a visa or
- **substitutes** the decision of the department with a decision to grant a visa to the parent.

## Adding other family unit members (reg. 2.08A and reg. 2.08B)

### About regulations 2.08A and 2.08B

Regulation 2.08 provides only for a child **born** to an applicant to be added to its parent's application. Regulations 2.08A (and regulation 2.08B) provide for adding a partner and/or other dependent children to (certain) visa applications.

For policy and procedure see, in [PAM3: Act - Act-defined terms - s5G - Relationships and family members - Dependent family members](#):

- [Addition of certain applicants to certain applications for permanent visas](#)
- [Addition of certain dependent children to certain applications for temporary visas](#).

(Note: The [TK-445](#) visa separately provides a pathway for adding a dependent child to a permanent partner visa application in circumstances where the parent holds a provisional/temporary partner visa.

### Purpose

Regulations 2.08A and 2.08B were inserted into the Regulations in recognition of the delays that occur in finalising some applications and the changes in personal circumstances that occur over time. The provisions cover two situations:

- The original applicant has acquired a partner or dependent child since applying for their visa.

- The partner and/or dependent child were not included in the original application for some reason (for example, because the relevant Schedule 1 item required to them to be in Australia and they were outside Australia when that application was made).

## Scope

The partner/[dependent child](#) (the **additional applicant**) can be added to the original application:

- only on request from the original applicant in accordance with the prescribed forms of communication (Regulations [Division 2.3](#)) and
- only if the partner/dependent child meets the requirements of Schedule 1 in relation to where they must be at time of application (for example, in or outside Australia) and
- only if the visa class is **not** excluded from regulation 2.08A - see regulation [2.08A\(2A\)](#).

Each person who wishes to be added to the original application must be included in the request and must meet the relevant Schedule 1 requirements.

## The application date

The additional applicant is considered to have made their application at the time the department receives the request for them to be added to the original application - regulations [2.08A\(1\)\(f\)\(i\)](#) and [2.08B\(1\)\(f\)\(i\)](#) refer - provided they are assessed as having met all the requirements of regulation [2.08A](#) or [2.08B](#) at that time.

This means that:

- their application is **not** backdated to the date of the original application, nor is it to be treated as such
- for applications made in Australia, the date of the associated [bridging visa](#) application for the partner and/or dependent children is taken to be the date the request to add them to the original application was received (provided they met the requirements of regulations [2.08A](#) or [2.08B](#) at that date).

Note that an application, if posted to a post office box leased by the department, is received at the time it reaches the post office box, **not** the time that it comes to the attention of the department. For policy on when an application received at a post office should be taken to have been received, see [Recording the valid application date](#).

## Applicable Schedule 2 criteria

Each additional applicant must satisfy:

- applicable “time of application” secondary criteria (**their** “time of application” being the time that the department receives the request for them to be “added” to the original application) and

- applicable secondary criteria to be satisfied at time of decision. That is, they must meet the same requirements that they would have if they had combined their application in the first place - regulation [2.08A\(2\)](#) and regulation [2.08B\(2\)](#) refer.

### Be aware of subsequent regulation changes

In assessing, against Schedule 2 criteria, a partner or dependent child who applies for a visa under regulation [2.08A](#) provisions, decision makers must check whether any regulatory changes to Schedule 2 criteria have also been subject to transitional provisions specifying which version of a Schedule 2 criterion applies to the partner or child.

As an example, amendments were made on 1 July 2000 to Schedules 2 and 4 relating to the custody of dependent children. The transitional provisions of the Migration Amendment Regulations 2000 (No 2) (which gave effect to those changes), ensure that:

- if the original applicant applied for their visa prior to 1 July 2000 (and that application was unfinalised as of 1 July 2000) and
- a [dependent child](#) under 18 is added, under regulation [2.08A](#), to the application on or after 1 July 2000

the child is assessed against the Schedule 2 "custody criterion" as it existed before 1 July 2000, **not** as it existed when the child's application is taken to have been made under regulation [2.08A](#).

### If the case is at merits-review stage

A partner or dependent child cannot be added to an application during merits review of a refusal decision. If a request under regulation [2.08A](#) to add a partner or child is received at merits review stage, contact Legal Opinions Section.

### Cases remitted by merits review authority

If a visa application to which regulation [2.08A](#) (or, if applicable, regulation [2.08B](#)) applies is remitted by a merits review authority for fresh decision, the application reacquires the status of being an undecided application. On this basis, it is possible to add (as applicable to the regulation) a partner or dependent child to that undecided application using regulation [2.08A/2.08B](#).

### Who is covered by reg. 2.08A

Regulation [2.08A](#) allows a **partner** or [dependent child](#) (except those newborn children to whom regulation [2.08](#) applies) to be added to certain **permanent** visa applications that have not yet been decided, provided the application is for a class of visa for which Schedule 1 permits combined applications and certain prescribed requirements are met.

For policy and procedure, see [PAM3: Act - Act-defined terms - s5G - Relationships and family members - Dependent family members - Addition of certain applicants to certain applications for permanent visas](#).

## Who is covered by reg. 2.08B

Regulation [2.08B](#) allows a **dependent child** (other than those newborn children to whom regulation 2.08 applies) to be added to certain **temporary** visa applications, provided certain other prescribed requirements are met, see:

- the list of visas in regulation 2.08B and
- for policy and procedure, [PAM3: Act - Act-defined terms - s5G - Relationships and family members - Dependent family members - Addition of certain dependent children to certain applications for temporary visas](#).

Like regulation [2.08A](#), regulation 2.08B allows dependent children to be added to certain visa applications up until a primary decision is made on the application.

## If the visa class no longer exists

In certain cases - for details see [PAM3: Act - Act-defined terms - s5G - Relationships and family members - Dependent family members](#) - amending regulation transitional provisions relating to regulations [2.08A](#) and [2.08B](#) allow a partner/dependent child to be added to an application even after the visa class ceases to exist (that is, provided the original applicant's application is still undecided).

In such cases, even if the visa classes no longer exist at the time the request is received, they are considered to have applied for the same class of visa for which the original application was made.

In such cases, too - but read the relevant Migration Amendment Regulation - the transitional provisions usually specify (in effect) that the partner/dependent child is assessed against Schedule 1 and 2 criteria as in force immediately before the class/subclass were deleted from the Regulations.

## Ineligible family members

Regulations [2.08A](#) and [2.08B](#) do not provide for other family unit members (for example, a widowed parent now living with the visa applicant) to be added to an undecided application.

Nothing, of course, precludes any family unit member from making their own (that is, separate) application. If a person wishes to be considered for a visa as a **family unit member** of another applicant but cannot meet the requirements of regulations [2.08A](#) or [2.08B](#), they must apply separately for a visa in their own right, pay any applicable visa application charge, and be considered (first) against Schedule 2 secondary criteria for the class of visa that they (and the original visa applicant) have applied for.

However, keep in mind that, for certain visas, a family unit member **cannot** satisfy Schedule 2 secondary criteria if they apply separately; in other words there is a Schedule 2 secondary criterion that requires family member to make a combined application with the person who has to satisfy primary criteria – see for example 309.311 for the UF-309 Partner visa.



## Deleting (family member) applicants from a combined application

Migration law does not provide for applicants to be deleted from an application - see [s47\(2\)](#) - whether or not at the request of the primary applicant. Rather, the relevant applicant should be asked to withdraw their application in writing in accordance with [s49\(1\)](#).

## Supporting documentation (Act: s54)

### About supporting documentation

Supporting documentation means any document (including certain departmental supplementary forms) provided in support of an applicant's claims to satisfying prescribed criteria.

It is expected that all supporting documentation will be lodged with applications. If a case file is raised, a list of all documents provided should be recorded (for example, on the inside file cover).

### Photocopies

#### Retention

Photocopied supporting documents certified as true copies of the originals are to be kept on the case file.

#### Authenticating

If the original document is also provided (or is requested by an officer), it:

- should be examined to verify that it is genuine and has not been tampered with and
- generally, (if presented in person) should be returned to the person lodging it. (If kept, it should be returned later by secure mail.)

#### Certification

Note that regulation [2.13\(5\)](#) does not require that certification of photocopies be done by the departmental officers (although this may in fact be the case at many offices). It is open to offices to make alternative local administrative arrangements requiring documents to be certified by acceptable outside authorities - as described in regulation [2.13\(5\)](#).

### What documentation is needed

The nature of documentation needed depends on the visa class applied for and other specific country or individual circumstances. For further guidance see the relevant PAM3: GenGuide.

However, note that it is a valid application requirement that each applicant provide a passport-type photograph of themselves, refer to [Personal identifiers](#).

## Assessing supporting documentation

### Overview

It is for the decision maker to decide the weight (if any) to be given to a document provided by the applicant which purports to support the applicant's claim to satisfying prescribed criteria. However, note the following.

### Photocopies

A photocopied document lodged without the original should be given little weight unless certified as a true copy of the original document - see regulation [2.13\(5\)](#) - except in certain situations mentioned in [Originals or certified copies v faxes](#).

### Legally altered documents

In some countries it is legally possible for birth certificates or other personal documentation to be altered officially.

If there is reason to believe that the applicant has had the document officially altered to assist their claims to satisfy a prescribed criterion (for example, age or relationship) it is policy that the document (even though genuine) be given little weight in assessing criteria. (The applicant should, however, be given opportunity to provide acceptable alternative supporting documentation before a decision on the visa application is made.)

### Bogus documents etc.

If the genuineness of any document is in doubt, officers may ask the applicant to present the original for examination.

If officers suspect any document to be bogus (for example, fraudulent, counterfeit, forged or unofficially altered), they should send the document to (or, if more appropriate, may first seek advice from) the Document Examination Section, Identity Branch, Risk, Fraud and Integrity Division, National Office. If it is established that a document is bogus, it should be given no weight in assessing criteria.

See also [PAM3: Act - Identity, biometrics and immigration status - False identities and/or bogus or fraudulent documents](#).

## Documents not in English

### Requesting English translations

Briefly, there is no provision in migration law that provides that a document that is not in English must be accompanied by an English translation. Although it is open to officers to request an applicant to provide English translations for documents not in



English, it is **not** open to officers to refuse to accept or refuse to consider visa applications that do not have English translations of supporting documentation.

### **If supporting documentation is not available**

#### **Background**

The onus is on the visa applicant to satisfy the decision maker that prescribed criteria are satisfied.

However, it is for the decision maker, having regard to relevant guidelines elsewhere in PAM3, to decide the level of proof they require to be satisfied that these criteria are satisfied.

#### **Policy**

Policy accepts that, in certain situations (such as significant civil unrest in the source country), an applicant may genuinely be unable to provide supporting documentation verifying their claims to satisfying prescribed criteria.

In clearly difficult circumstances, officers are expected to use their judgement in deciding whether to insist on supporting documentation.

They should, however, attempt to verify these claims wherever possible. They may, for example:

- already have information from official sources as to the current availability of certain documents from the source country
- ask the Australian post in that source country for advice as to whether certain documents are readily available or
- seek advice from (or ask the applicant to obtain a statement from) the relevant foreign government mission (that is, in the country of visa application) as to the availability (or otherwise) of such documents.

#### **Alternative departmental sources**

Officers should keep in mind that there may be other ways of verifying certain claims, for example a familial relationship between visa applicant and sponsor. Officers should be aware, for example, that all records of persons granted permanent visas are (eventually) consigned to National Archives of Australia:

- they may ask Outsource Australia to locate the relevant case record and verify the family composition recorded when the sponsor applied for a permanent visa however,
- to assist Outsource Australia, officers should first try to ascertain as many details of the sponsor as possible - for example:
  - the sponsor's full name (including former names) and date of birth
  - the office at which their visa was granted
  - their case file number (if known to the sponsor or if recorded on MPMS or other departmental records in Australia)
  - their date of arrival, if they were outside Australia at time of visa grant.

## Withdrawal of applications

(Act: s49)

### Legislative authority

Section 49 of the Act provides that an applicant may withdraw an application by giving written notice, and that an application that is withdrawn is taken to have been disposed of. Written notice can be provided in either paper or electronic form.

### Effective date of withdrawal

The effective date of withdrawal of an application is the date that the applicant's written withdrawal notification intercepts the decision process.

The withdrawal will not be effective merely upon receipt at the counter or in registry. Instead it will be effective when the withdrawal notice is received by the delegate who will decide the application. This is because, under s47 and s65, unless the delegate is aware of the withdrawal, the delegate must continue to consider the application.

However, this does not always mean that the delegate must have actually received the notice of withdrawal. Depending on the circumstances of the case, it may be sufficient if the notice of withdrawal is capable of being accessed or known by the delegate who has responsibility for deciding the application. This is because if the notice of withdrawal is capable of being accessed or known by the responsible delegate, the delegate may be taken to have constructive notice of the withdrawal, even if the delegate does not have actual knowledge of the withdrawal.

Examples of when a delegate may be taken to have constructive notice of a withdrawal include (this is not an exhaustive list):

- the notice of withdrawal is emailed to a group email box of the processing centre to which the delegate has access
- when a withdrawal notice received at counter is entered into the applicant's ICSE record and the delegate makes a decision without reference to the case note in ICSE
- the withdrawal notice is placed into the delegate's in-tray and the delegate fails to check the in-tray prior to making a decision.

Delegates presented with situations not covered by the above examples should seek advice by emailing [LOHD](#) (the Legal Opinions Helpdesk).

### Actioning withdrawals

#### Updating departmental records

On receipt of the letter of withdrawal, the delegate should:

- prepare a file note documenting that they have sighted the withdrawal and recognises as a consequence that the application is withdrawn on that day (the day of sighting by the delegate)
- record their position number on the file note and place it on the relevant file
- enter the correct date of withdrawal (that is, the date the delegate had notice, or constructive notice, of the notification of withdrawal) into IRIS/ICSE. This can be done either by the delegate, or another officer with systems authorisation to record the withdrawal. The correct date is particularly important if the applicant is in Australia, as ICSE calculates the cease date of the associated bridging visa by counting:
  - 28 days from the withdrawal date entered – if the associated bridging visa was granted before 19 November 2016 or
  - 35 days from the withdrawal date entered – if the associated bridging visa was granted on or after 19 November 2016.

See [PAM3: Act - Code of procedure - Notification requirements - General guidance for all notifications – Notifications and bridging visa cessation](#) for further information.

The withdrawn application, or a copy of it, should be kept on the client's file. The Department should return the withdrawn application and associated material if requested to do so but a copy must be kept on the client's file. Regardless of any request, original documents (such as birth certificates) should also be returned after copies are made for the client's file.

## Prioritising

It is important to act on written advice of withdrawal of an application as soon as possible after receipt. This avoids (for example) the visa being granted or refused between the time when the withdrawal advice is physically received in the office and when it is brought to the attention of the delegate.

## If delegate unavailable

If the delegated officer is unavailable, or if (for example) an application is withdrawn before it is assigned to a delegated officer, it can be received and actioned (as described above) by another officer who is a delegate for the purposes of the application and whose normal duties include deciding such applications.

## Situations that do not constitute withdrawal

### Failure to respond

An applicant's failure to respond to requests for supporting documentation does not constitute withdrawal of the application.

### Withdrawal by one family unit member

Withdrawal of an application by one [family unit member](#) does not constitute withdrawal of the application by other family unit members. Written notice of withdrawal must be given by each applicant (whether primary applicant or family unit

member). A [parent](#) (or other legal [guardian](#)) may give notice on behalf of minor children.

### Subsequent application

An earlier application is not withdrawn simply by the applicant making another (that is, fresh) application. For example, if a visa 136 or 138 applicant in the pool makes a fresh application to take advantage of a change in their circumstances, their existing application (and those of any family unit members) must eventually be considered and decided (unless withdrawn by the applicant/s).

## THE CODE OF PROCEDURE

### (Act: Part 2 - Division 3 - Subdivision AB)

#### Procedural fairness

##### Procedural fairness and natural justice

In 2002, the Migration Legislation Amendment (Procedural Fairness) Act was enacted so that the codes of procedure in the Migration Act exhaustively replaced the common law natural justice hearing rule.

There are several codes of procedure in the Act to deal with matters such as visa applications and visa cancellations. For visa applications, the code of procedure in [Subdivision AB](#), Division 3 of Part 2, exhaustively sets out the procedural steps that s65 delegates are required to follow to deal “fairly, efficiently and quickly with visa applications.”

Prior to 1 January 2015:

- for applicants for those visas that could be granted while the applicant was in the migration zone, and for which a decision to refuse the visa was merits-reviewable by the MRT or RRT), the obligations to give procedural fairness were set out in [s57](#) of the Act
- the situation was different for applicants for those visas that could not be granted while the applicant was in the migration zone (or for which there was no right of review by the AAT), however, following [Saeed v M/AC \[2010\] HCA 23](#), these applicants were required to be given procedural fairness under the common law.

Section 57(3) was repealed with effect from 1 January 2015, removing the distinction between the two categories of applicants described immediately above. As a result, [s57](#) applies to all visa applications made on or after 1 January 2015. This means that in practice, for a visa application that was made before 1 January 2015, the code of procedure/common law distinction outlined above would still apply. Therefore, decision makers should take care to apply the appropriate type of procedural fairness for pre-1 January 2015 applications.

Note: From 1 July 2015, the MRT and the RRT were amalgamated into the AAT.

## Communication of applicant with Minister

(Act: s52)

### Overview

#### Legislative requirements

Section 51A(1) states that Subdivision AB 'is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters that it deals with'. The scope of the common law natural justice hearing rule is therefore qualified by the operation of the Code of Procedure.

Section 52 of the Act requires a visa applicant or *interested person* to communicate with the Minister (in other words, the department) in the prescribed way - see regulations 2.13 and 2.14. (Examples of interested persons who may communicate on behalf of the applicant are migration agents, solicitors, MPs, sponsors, relatives or guardians.)

Section 52 also requires a visa applicant to inform the Minister(department) of the residential address where they intend to live while the visa application is being dealt with, and to notify any change to that address if intending to live at another address for 14 days or more. Section 52 also allows that if 2 or more non-citizens apply for visas together, notification of a decision on the visa given to one applicant is taken to be given to all of them: s52(3C).

#### Effect of non-compliance

If a visa applicant does not communicate in the manner prescribed in the Regulations, the information is taken not to have been received unless it is actually received. In other words, unless the communication is actually received by the processing office there is no requirement to take the information into account.

This ensures that an applicant cannot jeopardise the lawfulness of a decision by sending relevant information to another office with the intention that it not be available and thereby provide grounds for judicial review on the ground of a failure to take account of relevant information on the basis that it was held by the department. Regulation 2.14 specifies where an applicant must send the information. See:

- [Legislative authority](#) and
- [Implications for decision makers](#).

### Regulation 2.13

#### Purpose

Regulation 2.13 sets down several conditions that apply to communication initiated by an applicant or *interested person*.

#### Communication must be in writing

All communication must be in writing unless it is about a [bridging visa](#) application or an enquiry about the stage reached in a visa application - regulation [2.13\(3\)](#). (Regulation [2.13](#) provides for other exceptions such as [oral applications](#) and ETAs - for details on these see the PAM3 instruction for the relevant visa).

The Acts Interpretation Act defines **writing** to include any mode of representing or reproducing words, figures, drawings or symbols in a visible form. Therefore, faxes and email are considered an acceptable form of writing.

### **Client record details**

Under regulation [2.13\(4\)](#), all correspondence must contain:

- the applicant's name as it appears in the application and date of birth and
- either [client number](#), current case file number or visa application charge receipt number and
- for applications made outside Australia, the processing post where the application was made.

See [If reg. 2.13\(4\) requirements are not met](#).

### **Supporting documentation**

Usually - see regulation [2.13\(5\)](#) - documents must be originals or certified photocopies - see [Originals or certified copies v faxes](#).

### **Phone/written communication**

#### **Policy background**

It is recognised that a considerable amount of communication about the processing of an application takes place by phone, as well as in writing, and that many phone calls from applicants are more than just progress enquiries.

For example, applicants sometimes phone to discuss their circumstances in relation to satisfying criteria for the class of visa, the provision of appropriate documentation, or the meaning of instructions they have received.

The requirement for the applicant to communicate in writing has been introduced to protect the applicant and decision maker with regard to information or advice passed on by the applicant which may be relevant to the decision to grant a visa.

It makes the applicant responsible for any information they wish to be taken into account. However, it does not discharge officers from the need to make file notes of conversations in accordance with normal file management procedures.

#### **Phone contact**

If the applicant chooses to communicate a piece of information or seek advice by phone, an officer should respond orally and note the discussion on file and in ICSE/IRIS. Although not in the prescribed form, this form of communication is

nevertheless received, and must be considered in reaching a decision on the application (s54). However the applicant should be reminded of the need to communicate in writing and asked to confirm the information given in writing.

### **Electronic communication**

If an applicant chooses to communicate by electronic means (for example, by fax or email) the department is obliged under the ET Act to accept the electronic communication, provided its form meets the department's IT requirements. These IT requirements are determined on basis of local business and technical needs and must be widely advertised through such means as information sheets, application forms and web sites.

### **If reg. 2.13(4) requirements are not met**

#### **Overview**

The requirement for the applicant to provide details under regulation 2.13(4) is to facilitate matching of information received with the appropriate applicant records.

If the applicant fails to comply with these requirements and correspondence is received that does not contain, for example, a client number or file number, or date of birth, officers should nevertheless attempt to link it to the correct applicant records. The extent to which this will be possible will depend on the amount of identifying information in the correspondence.

#### **Implications for decision makers**

If the item can be linked to the correct applicant records, and it has come to the decision maker's attention prior to deciding the visa application, then the decision maker is obliged to take it into account under s54 as information in the application. If the information cannot be linked to a file, a decision maker is legally supported if, ultimately, the information is not able to be considered. The onus is on the applicant to ensure that full information is supplied in the prescribed way.

### **Originals or certified copies v faxes**

#### **Legislative authority**

Documents accompanying a piece of correspondence from an applicant, such as birth certificates, educational certificates or employment references, must be originals or certified copies, unless the delegate permits in writing that an electronic copy of an original document may be sent electronically - regulation 2.13(5).

#### **Implications for decision makers**

A visa cannot be refused merely because documents have been received in electronic form without the delegate's consent.

#### **Handling documents**



Photocopies of items of communication (letters, memos etc.) written by the applicant are acceptable.

If electronic versions or uncertified photocopies of official documents are received, an original or certified copy should be sought and received (before the application is decided) if:

- there is any uncertainty as to the information contained in the document and
- the information is relevant to deciding the application.

Officers should ask external agencies involved in the application process to forward items such as educational assessments or medical reports as originals or certified copies, unless there is an arrangement with the agency for electronic transmission of documentation.

### Where correspondence must be sent

#### Legislative requirements

Regulation 2.14 specifies that any written communication from the applicant must be sent to the appropriate address, being either the office at which the application was made, or if the department has notified the applicant of another office in writing, that office.

The applicant may send further communication to either the physical office address or the electronic address provided by the department.

#### Consistent communication

It is departmental policy that, if delegates have been consistently and reliably communicating with applicants through a particular method, delegates should **continue** to use this method when sending notification of the decision. For example, if an officer has been effectively and reliably communicating with an applicant via email throughout the processing of the visa application, they should also use email to send the notification of visa refusal, to ensure the applicant is not caught by surprise and reduce the risk of the applicant not receiving the notification and therefore miss out on seeking merits review (where applicable).

An officer should change method of corresponding with an applicant only if there is a good reason to do so. As two examples:

- If the applicant has been forewarned in the visa application form that should a decision be made to refuse, the applicant would be notified by mail (as some older versions of the application forms contain this annotation).
- If a delegate receives an email bounce back and the bounce back is not the result of typographical error by the officer in entering the email address, which means that email has suddenly become unavailable as a method of sending correspondence, thereby requiring the delegate to use a different method of communication instead. In this situation, however, it may be appropriate to contact the applicant by phone first, if it is reasonable to do so, to check whether



there are any issues with the applicant's email address that has rendered this previously reliable communication channel to suddenly become unavailable.

### **Applicant's obligations**

Applicants are required to inform not just any office of the department, but the relevant processing office, or other address, as advised. If the item of communication is received at another office or address, it should be transferred to the appropriate office or address and considered as part of the application.

### **Replies to correspondence**

#### **Legislative authority**

Section 51 of the Act authorises decision makers to consider and dispose of applications in any order without this, by itself, being seen as an unreasonable delay. Therefore, there is no legal obligation under the Act for officers to reply to correspondence initiated by the applicant within specific time frames.

The prescribed time periods for responses to information requests - discussed in [Communication of Minister with applicant](#) - apply only to visa applicants, not to the department. However, in keeping with good administrative practice, applications should be dealt with as quickly and efficiently as possible.

#### **Communication of Minister with applicant**

**(Act: s494A-s494D)**

#### **Legislative overview**

Section 494A, s494B and s494C of the Act provide the manner in which the Minister (in effect, the department) may give documents to persons. These provisions also determine as to when a document is taken to have been received (that is, deemed receipt) and allow for the transmission of documents electronically via fax, email or other electronic means.

Section 494D of the Act requires documents to be given to an authorised recipient if a visa applicant has appointed one in connection with their visa application.

Section 55 provides that the applicant is permitted to provide more information at any stage up until the time of decision.

Section 56 of the Act allows for additional information to be obtained by the department, including by inviting persons to give the information, and s58 allows for time limits to be imposed for the response to such invitations. Legislation does not specify when further information should be sought (other than being sought prior to decision) but as a general guide requests should be made when it is considered fair and reasonable to do so.

For policy and procedures, see [PAM3: Act - Code of procedure - Notification requirements](#) in particular:

- [Inviting comment before decision - s56-s58](#)
- [Prescribed methods for giving notification](#)
- [Deemed receipt - s494C and regulation 2.55.](#)

## Electronic communication

### Applicant's consent

Except in relation to an application for an eVisitor (for which regulation [2.13\(8\)](#) prescribes how the applicant must communicate with the department), officers must have the applicant's consent to communicate with them electronically (for example, via email or fax). Application forms include a question seeking the applicant's consent. If there is no consent, then the department cannot communicate with the applicant electronically.

For policy and procedures, see [PAM3: Act - Code of procedure - Notification requirements](#) in particular [Transmitting by fax, email or other electronic means](#).

### Implied consent

Instances may arise where an applicant communicates with the department through electronic means (for example, via fax or email), despite not having provided their written consent for the department to communicate with them electronically. In such instances, consent may be inferred from the applicant's conduct ("implied consent").

For example, if the applicant sends the department an email asking a question about their visa application:

- they are likely to expect an email response, and so
- the applicant's consent to receive electronic (email) communication can be inferred.

However, if an applicant has simply used email to send their responses to the decision maker's request for further information, the applicant's consent to receive electronic communication cannot be so readily inferred.

Implied consent does not extend to an applicant merely providing a fax number or an email address (but no indication of consent) on their application form or in a letter to the department.

## Communication does not have to be in writing

The restrictions on the applicant's method of communication - see [Communication of applicant with Minister](#) - do not apply to decision makers. Therefore, officers may contact an applicant by phone or may ask an applicant to phone the office, or attend an interview.

Communication initiated by the department does not have to be in writing. However, it is preferable to have evidence of contact with the applicant confirming that the request or message has been understood.

Only if communication is initiated by the applicant (other than in certain situations as mentioned in [Phone/written communication](#)), and no contrary instructions have been given by the department, is it essential for it to be in writing.

## Use of contact addresses

### Legislative requirements

To facilitate the department's communication with the applicant, [s52](#) requires the applicant to inform the processing office of their residential address during the processing of the application and of any residential address where they intend to live for more than 14 days (see [Change of address notifications](#)). However, provision of this residential address may not be the address the applicant provides for the purpose of receiving documents.

### Implications for decision makers

The address provided for the purposes of [s52](#) of the Act may differ from the residential address provided in the application form for the purposes of regulation [2.07\(4\)](#) (see [Valid application requirements](#)), and may also differ from the address provided for the purpose of receiving documents from the department.

Notifications must be sent using a method under [s494B](#) of the Act, this will ensure that the deemed receipt provisions of [s494C](#) take effect, namely that the notification is taken to have been received by the applicant.

For policy and procedures on notification, see [PAM3: Act - Code of procedure - Notification requirements](#), in particular:

- [Notifying authorised recipients - s494D](#)
- [Prescribed methods for giving notification](#)
- [Deemed receipt - s494C and regulation 2.55](#)

### Use of third parties

Applicants may authorise in writing another person to act on their behalf in respect of their application - [s494D](#). If this is the case, officers must give or send to the authorised recipient any documents that they would otherwise have been given to the applicant.

For policy and procedures on notification, see [PAM3: Act - Code of procedure - Notification requirements](#), in particular:

- [Notifying authorised recipients - s494D](#)
- [Prescribed methods for giving notification](#)
- [Deemed receipt - s494C and regulation 2.55](#)

### Effect on s494C

The timeframes in [s494C](#) apply in relation to documents sent to 'the recipient'. This means that it encompasses authorised recipients as well as visa applicants.

Authorising the person to receive documents in connection with an application does not, however, affect the requirement for an applicant to keep the department informed of their residential address.

### Consent needed

Before documents are sent using electronic means, the recipient must have consented to receiving communication by electronic means. If a document is to be sent to an authorised recipient then it is that person who must provide the consent rather than the applicant.

Application forms contain a question seeking the authorised recipient's consent.

### Change of address notifications

Under [s52\(3A\) and \(3B\)](#) of the Act, visa applicants must inform the department of the address at which the applicant intends to live while their application is being dealt with. If they propose change their address for 14 days or more, they must also inform the department of the address and the period of proposed residence.

If an applicant notifies change of address using the form 929 change of address form, that notification is to be directed to the STO client address management area responsible for processing the application.

Change of address forms 929 are to be either box filed or included in a register before being placed on the case file. Whichever method is used, it is essential that the original document notifying the change of address be able to be accessed quickly.

Each STO is to identify an area that is to be responsible for updating addresses on departmental systems and processing/filing all change of address forms received by the office. If notification is sent to a particular program area or officer, the receiving area is to update departmental systems and send the form 929 or a copy of the letter to the STO's client address management area for filing.

For policy and procedures on notification, see [PAM3: Act - Code of procedure - Notification requirements](#), in particular:

- [Notifying authorised recipients - s494D](#)
- [Prescribed methods for giving notification](#)
- [Deemed receipt - s494C and regulation 2.55](#)

### Information contained in applications

#### Legislative requirements

Sections [54](#), [55](#), [56](#), [58](#) and [63](#) of the Act require officers to take into account all information that is before them prior to the time a decision is made, even if it arrives after the time given for its receipt.

A delegate is only required to consider 'information in the application' that has been provided in accordance with ss54 or 55 of the Act. Therefore information supplied in relation to a previous (or another) visa application is not required to be considered in a subsequent visa application. Nor can an officer be taken to have constructive knowledge of information, if that information was supplied in connection with a separate visa application ([Shrestha v Minister for Immigration \[2014\] FCCA 2709](#)).

### Providing more information

Under s55 of the Act, an applicant is permitted to provide more information at any stage up until the time of decision. Such information is 'information in the application' (s54(2), the Act) and a decision maker must have regard to all the information in the application: s54(1), the Act. However, a decision maker is not required to delay making a decision just because an applicant has said they will provide more information for the purposes of section 55.

Section 56 of the Act provides that when considering an application for a visa the decision maker, if they want to, may get any information relevant. This includes the discretion to invite an applicant to provide additional information in a specified way. Section 58 provides that the invitation must specify the method the applicant is to use to respond to the request for further information, and to specify the time period applicable to the circumstance under s58.

For policy and procedure on notification, see [PAM3: Act - Code of procedure - Notification requirements](#), in particular, [Inviting comment before decision - s56-s58](#).

### Requesting information

Section 56 of the Act enables the Minister to obtain any information that they consider relevant for the purpose of considering a visa application.

There is no obligation to obtain information if the delegated decision maker considers that there is sufficient information to enable a decision to be made on the visa application. As a general guide, if the decision maker thinks that obtaining additional information would assist in assessing whether or not the applicant meets all the criteria for the grant of the visa, it would be reasonable and appropriate for the decision maker to exercise their discretionary power under s56 to get the additional information.

Although there is no obligation to obtain information, if the decision maker does decide to obtain additional information under s56 and gets the information, the decision maker must take the additional information so obtained into consideration when making a decision on the visa application. Refer to s58 for more information on inviting further information, and regulation 2.15 in relation to the timeframe for responding to an invitation to give information.

It is important for decision makers to be aware that a request for or invitation to give additional information under s56 does not necessarily have to involve a formal request/invitation (whether by telephone or in writing). For example, a statement made by a decision maker during an interview with the applicant that the applicant may provide a document may, in certain circumstances and depending on how the

statement is made, be construed as an invitation to give information under s56 (so as to attract the prescribed response period under regulation [2.15](#)).

## Adverse information

### About s57

Section [57](#) of the Act details the department's obligation to present certain applicants with 'relevant information' and to give the applicant the opportunity to comment on it.

For policy and procedure on notification, see [PAM3: Act - Code of procedure - Notification requirements](#), in particular, [Inviting comment before decision - s56-s58](#).

### Right to comment

Under [s57\(3\)](#), the obligation to notify an applicant of adverse information and give them the opportunity to comment applies only if:

- the visa can be granted while the applicant is in Australia (for example, compare [100.411](#) with [309.412](#)) **and**
- a decision to refuse the visa would be a [Part-5 reviewable](#) or [Part-7 reviewable decision](#), reviewable by the AAT.

Note: Because s57(3) was repealed with effect from 1 January 2015, from that date **all** visa applications made on or after 1 January 2015 are subject to s57.

Note: Section [57\(1\)\(a\)](#) was amended with effect from 18 April 2015 to cover the fast track assessment process. The effect of the amendment is that the obligation to provide procedural fairness under s57 also applies to information that the decision maker considers would be the reason, or part of the reason, for deciding that the applicant is an [excluded fast track review applicant](#). For policy and procedure on the fast track assessment process, see [PAM3: Refugee and Humanitarian – Protection visas - Temporary protection and fast track assessment process](#).

### Relevant information

The requirement to give an applicant an opportunity to comment applies only to 'relevant information'. There are three elements that have to be met for information to qualify as 'relevant information' under [s57\(1\)](#). Relevant information (excluding non-disclosable information) is information that the s65 delegate considers:

- would be the reason or part of the reason for refusing the visa
- and
- is specifically about the applicant or another person (not just about a class of persons of which the applicant or other person is a member)
- and
- was not given by the applicant for the purpose of the application.

Information that does not meet all three elements is not 'relevant information' and there is no obligation under [s57](#) to provide that information to the applicant for comment.



For policy and procedure on what is 'non-disclosable information', see [Information contained in applications](#).

### Obligation for opportunity to comment on relevant information

There are three main requirements under [s57\(2\)](#) when a decision maker is dealing with relevant information:

- give the particulars of the information to the applicant in the way the delegate considers appropriate in the circumstances
- ensure, as far as reasonably practicable, that the applicant understands why the information is relevant to the application and
- invite the applicant to comment on it.

Since the Act permits information to be given to an applicant under [s57](#), this falls under [s494A](#) of the Act allowing a method under [s494B](#) to be used for giving the applicant the information in writing. However, [s58](#) of the Act, and the associated regulation [2.15](#), permit invitation to comment under [s57](#) (as well as request for further information under [s56](#)) to be given orally over the telephone or at interview.

Depending on the method the decision maker has chosen to invite comments, and the method by which the applicant is to provide their response, delegates should be careful about choosing the correct corresponding response timeframe. For guidance, refer also to:

- [Invitation to give further information or comments \(s58\)](#), and
- TRIM - ADD2012/1162357 - Reg 2.15 Prescribed Timeframes table for guidance.

### Adverse health information

Section [57](#) requires delegates to disclose a proposed refusal on health grounds to the applicant. It is policy, however, that if a Medical Officer of the Commonwealth recommends, this type of information is to be communicated through a medical professional of the applicant's choice. See [PAM3: Sch4/4005-4007 - The health requirement - The health requirement and visa decision making - If the applicant fails to meet the health requirement](#).

### Non-disclosable information

#### Legislative authority

Officers are not required to provide an applicant with [non-disclosable information](#), as defined in [s5\(1\)](#) of the Act.

#### Definition

Paragraph (c) of the [s5\(1\)](#) definition provides that non-disclosable information includes information or matter, release of which would be contrary to the national interest because its "disclosure would found an action by a person, other than the Commonwealth, for breach of confidence", see, as applicable:



- [PAM3: Act - Merits review - Disclosure of certain information to and by the AAT](#)
- [PAM3: Act - Visa cancellation - General visa cancellation powers \(s109, s116, s128, s134B and s140\)](#)
- [PAM3: Act - Character and security - s501 - The character test, visa refusal and visa cancellation.](#)

Consequently, information should not be released to an applicant if the release of the information would give rise to a legal action for breach of confidence. This does not include complaints that may be made, for example, to MPs or the Ombudsman.

If there is information that is subject to criminal or other investigations or proceedings by the Commonwealth, it may be against the public interest to disclose that information to the applicant, and as such may fall under 'non-disclosable information' and fall outside the scope of 'relevant information' under [s57\(1\)](#).

## Breach of confidence

There are 4 key elements to an action for breach of confidence:

- the information claimed as confidential must be identified with specificity and not merely in global terms and
- the information must be of a confidential nature and not be common or public knowledge and
- the information must be communicated in a relationship of confidence or received in circumstances importing an obligation of confidence, for example, if:
  - the information is given and received in confidence (that is, there is a mutual understanding that the information is given in confidence) or
  - there is an express or inferred obligation that the communication will be kept confidential and
- unauthorised use of the information must be actual or threatened and clearly without the confider's consent.

The extent to which detriment is necessary to found a breach of confidence remains unsettled in Australian law. Nonetheless, the current approach by the department is that detriment arising from a breach of confidence is unlikely to be necessary for information to be non-disclosable information.

## Information provided without the applicant's knowledge

### Overview

The question of whether information is non-disclosable is most likely to arise when the information is provided to the department on the initiative of an informant and without the applicant's knowledge.

In deciding whether or not information is non-disclosable, it is important to distinguish between the *source* of the information (the informant) and the *content* of the information.

## **The content**

If the information provided is not inherently confidential, there will be no need to discuss the confidentiality of the information with the informant. In other cases, officers should seek the informant's consent for disclosure of information to an applicant, particularly if there is any suggestion that disclosure might identify the informant.

## **The source**

The identity of the informant will generally be non-disclosable information because they are likely to expressly ask for such protection. Sometimes the content of the allegations or adverse material may also be non-disclosable.

This will be the case if disclosure, in any form, will reveal the identity of the informant and the informant has sought to keep their identity from the applicant. In such cases, careful consideration should be given to the weight given to such material.

Officers should advise informants who seek to maintain confidentiality of their information that their identity will be protected but that the department is required to put the material to the applicant in sufficient detail to enable the applicant to respond to the allegations/concerns.

If the informant insists that the information not be disclosed, the department is bound by that request if the informant appears to have reasonable grounds for fearing harassment or other harm if the information is disclosed.

## **Weight to be given to non-disclosable information**

If adverse information cannot be disclosed, it may be appropriate to give it little or no weight. Alternatively, it may be possible to respect confidentiality and procedural fairness obligations by providing the applicant with a general idea of, and opportunity to comment on, the adverse material that might lead to a refusal. This is sufficient to cover the obligation under s57(2) because it only requires the particulars of the information to be given. The particulars should be sufficient to alert the applicant to the nature of the information and its importance to the application but it may be possible to protect the confidence within which such information was given.

If information is non-disclosable because of an obligation of confidence, it may be possible nevertheless to obtain other evidence of issues raised by the informer.

Requests under the FOI Act for non-disclosable information must be dealt with under the provisions of that Act and the departmental FOI administrative instruction, the FOI Handbook.

## **Standard letters etc.**

If using standard letters (or similar), officers should ensure that the wording is appropriate to the circumstances of the individual applicant and has legislative authority.

For example, phrases such as "...your application cannot be approved unless you provide..." should not be used, as there is no legislative concept of "approving" a visa application.

Departmental correspondence is to be in English. Only an English language version of correspondence relating to decisions under migration law has any force and translations (if provided) are of an advisory nature only. (It is open to the applicant (or their agent) to obtain any translation from the English that they may require.)

Under Secretary's Instruction 12, it is mandatory that all client correspondence be made using only legally approved templates, where available. See [PAM3: Act - Code of procedure - Notification requirements](#) for more information about using templates.

### Invitation to give further information or comments (s58)

#### Legislative authority

Section 58 of the Act permits time periods to be prescribed in which an applicant must respond to a request by the Minister (department) to give more information or comment. These deadlines apply from the date the applicant is deemed to have received the invitation and have been prescribed in regulation 2.15.

#### The invitation

For policy and procedures on notification, see [PAM3: Act - Code of procedure - Notification requirements](#), in particular, [Inviting comment before decision - s56-s58](#).

#### If an invitation is given

Section 62 of the Act authorises delegates to make a decision after the prescribed time for response by the applicant has elapsed without taking any more action to get the information requested. (However, there is no **compulsion** to make a decision.) Therefore, if a delegate is able to make a decision and no response has been received from the applicant within the prescribed time period, the delegate may, subject to s63 of the Act, make the decision.

Having requested information, a delegate must not make a decision until either the information is provided, the applicant notifies them that no information will be forthcoming or the deadline passes, whichever happens first (s63).

#### If the applicant needs more time

If an applicant notifies a delegate of their inability (with good reason) to provide the information within the timeframe, the delegate should allow more time (as prescribed in regulation 2.15) for the applicant to provide the information before making a decision - see [Giving more time to provide information or attend interview \(s58\)](#).

An applicant or [interested person](#) may choose to initiate communication with the department, before any request for information by a decision maker, to advise that

more information will be provided (often within a specified time frame) but then fails to provide the information.

Delegates are authorised under [s62](#) to make a decision without the information and without contacting the applicant again. However, it may be reasonable in some circumstances to formalise the applicant's request and notify them of, for example, a 28 or 70 day period (as prescribed in regulation [2.15](#)) in which to provide the information. This would be regarded as an initial request as described in this section.

### Third party information

The above time limits do not apply to requests for information relating to health, public interest, English language and qualifications assessments or other information to be obtained from a third party. This is because these involve significantly longer periods of time and are generally outside the applicant's control. However, delegates may request evidence that the applicant has taken action on these matters within the timeframe prescribed in regulation [2.15](#).

## Interviews (s58)

### Policy guidance

The relevant PAM3: GenGuide or PAM3: Sch2Visa instruction indicates the circumstances (if any) in which applicants are, under policy, to be interviewed and, if so, any specific matters to be addressed.

For policy and procedures on notification, see [PAM3: Act - Code of procedure - Notification requirements](#), in particular, [Inviting comment before decision - s56-s58](#).

### Prescribed time limits for interviewing

Together, [s58\(3\)\(b\)](#) of the Act and regulation [2.15\(3\)](#) prescribe time limits within which interviews must take place. The purpose of this requirement is to:

- put an obligation on an applicant to attend an interview and not to repeatedly postpone or fail to attend and
- give the decision maker a legal framework within which to act if the applicant fails to comply.

There is no requirement for decision makers to schedule an interview within a particular period after receipt or initial consideration of the application.

The time limits for interviews are the same as for requests for more information, as set out in [Invitation to give further information or comments \(s58\)](#). For policy and procedures on notification, see [PAM3: Act - Code of procedure - Notification requirements](#), in particular, [Inviting comment before decision - s56-s58](#).

A range of interview dates and times may be offered to the applicant for flexibility and may be presented to the applicant either by phone (or electronically, if the applicant has given consent) before a date is specified in writing.

The interview may be scheduled at any time suiting the interviewing officer, but the interview date must be within the deadline referred to in regulation [2.15](#). This means that the applicant must attend the interview within that period.

### **If the applicant cannot attend**

If the applicant is not able to attend the interview on the specified date, the interview may be rescheduled for a date within the same period.

## **Giving more time to provide information or attend interview (s58)**

### **Overview**

If an applicant does not respond to a request to provide information or attend an interview, the decision maker may under [s58\(4\)](#) give the applicant more time to reply, if the circumstances suggest that it is reasonable and the original time period for response has not expired. Officers cannot grant an extension of time once the original time period for response has expired, because there is nothing to extend.

However, as outlined in [Invitation to give further information or comments \(s58\)](#), if a delegate has enough information to decide whether the applicant satisfies the criteria, they may proceed to make the decision. There is no obligation under s62 for the decision maker to offer more time for the information to be provided or to pursue the interview.

### **Prescribed time limits**

Prescribed periods for extension to the time limit are in regulation [2.15\(4\)](#). The decision maker is not, however, obliged to make a decision to grant or refuse a visa immediately on expiry of the prescribed periods ([s62](#)).

For policy and procedure on prescribed time periods, refer to [PAM3: Act - Code of procedure - Notification requirements](#), in particular, [Extension of time – s58\(4\) – \(5\) and reg 2.15\(4\)](#).

### **Information received outside the time limit**

If the information has not been received by the deadline but is received by the decision maker before the decision is made, the decision maker is obliged to take it into account under [s54](#). The decision maker cannot refuse to take the information into account just because it was received after the prescribed deadline.

### **If the applicant needs more time**

If the applicant has advised that they are trying to obtain the information or attend the interview but, for good reason, has not been able to do so and will not meet the deadline, the decision maker should specify a further period, as appropriate, and await a response. Should the applicant fail to reply to this second request by the specified deadline with no good reason, the decision maker should proceed to make a decision under [s62](#) without seeking more information or pursuing the interview.

## Visa application procedures - Other matters

### Progress enquiries

#### General

Officers must ensure that any oral or written (including electronic) advice to an applicant or an authorised recipient on the progress of an application does not give rise to an expectation of visa grant. Such advice should always be qualified as subject to all relevant legislative requirements being met.

Officers handling progress enquiries (especially from other than the applicant) should also have regard to IMMINet - Freedom of Information and Privacy Matters.

#### Enquiries to overseas posts

Officers in Australia are expected to exercise restraint in requesting progress reports from overseas posts. However, if an overseas post is aware that a case is of special interest, progress reports should be made up to time of decision.

If a post cannot send a prompt substantive reply to a request for a progress report, an early interim report should be sent explaining the delay and indicating when a full response may be expected.

For those cases in which the Minister is known to be personally interested in the outcome, posts should notify the appropriate STO promptly, preferably by email, otherwise by fax.

See also [PAM3: GenGuideA - Global working - Output 1.1 - Case referral management](#).

### Deferring consideration of an application

The Act does not provide for applicants to defer assessment or decision on their application. However, it is implicit in [s51\(1\)](#) and [s63\(1\)](#) of the Act that the decision maker may defer consideration of an application (but they are not compelled to do so). There are currently no further policy guidelines on when it may be appropriate for the decision maker to agree to an applicant's request to defer consideration of their application.

### If the applicant dies

#### Status of the visa application

If the visa applicant dies before a decision is made to grant/refuse the visa, there is no application. The Act is silent on the issue of handling applications by persons who die before a decision to grant or refuse to grant a visa is made. However, the provisions of the Act clearly assume that there is a living applicant. Because of [s49](#) the application cannot be regarded as withdrawn as this requires a written notice from the applicant.



If combined visa applications are made by a family unit, the death of one of the family members has no effect on the visa applications made by the other family members. As a matter of law, each person included in a visa application is a visa applicant in their own right - refer to [If a combined application was made](#).

### **Finalising the application**

The [visa application charge](#) must be refunded according to the provisions of regulations [2.12F](#), [2.12H](#) and [2.12I](#). For policy and procedure, refer to [PAM3: Div2.2A - Visa application charge](#).

Cases should be finalised on files and computer systems, as appropriate. No correspondence is required with the relatives of the deceased. If family unit members of the deceased were included in a combined application, some of the second instalment of the visa application charge may be refundable (regulation [2.12H](#) and regulation [2.12I](#)). For policy and procedure, refer to [PAM3: Div2.2A - Visa application charge](#).

### **If a combined application was made**

If, in respect of a combined application, the applicant who had to satisfy primary criteria dies, officers should, in an appropriately sensitive manner, seek written advice from the [family member/s](#) as to whether they wish to withdraw their own applications. If, for whatever reason, written withdrawal is not received, [s47](#) of the Act requires officers to consider and decide the applications.

Even though the family unit members of the deceased were included in a combined application, each person should be considered as an applicant in their own right.

### **"Lapsing" applications**

See [s47\(2\)](#) of the Act. Migration law does not provide for applications to lapse, even if, for example, the applicant fails to respond to correspondence.

### **Once made, decisions are final**

#### **The s474 privative clause**

Section [474](#) (the "privative clause") of the Migration Act was enacted with the intention of restricting access to judicial review. The clause has been interpreted narrowly by the courts, however, and now has little practical operation. Decision makers must always act in accordance with their delegated legislative powers and responsibilities. A failure to do so is likely to result in decisions being overturned on review.

#### **The finality of decisions**

There is no power in the Migration Act to revisit or remake a decision, even if a mistake has been made. In fact, [s69](#) prevents officers from doing so. In most circumstances, remaking a decision is an unlawful exercise of power. In this context,



a “decision” means the “final” decision to grant, refuse to grant or cancel a visa. Such a decision is made from the instant the decision is committed to paper or electronic record, with the exception of automatic visa cancellation under s137J.

There is, however, a line of reasoning by the High Court that allows the department to revisit a decision in certain circumstances where a court would grant relief on the basis that it was affected by "jurisdictional error". As a general guide, jurisdictional error occurs if a decision maker does not correctly exercise their powers and responsibilities. This is a complex and evolving area of law, discussed in more detail below.

Staff must seek advice from Legal Opinions Section, National Office before taking any action to remake or revisit a decision.

### **Jurisdictional error**

Jurisdictional error is a type of legal error. As a general guide, jurisdictional error occurs if a decision maker does not correctly exercise their powers and responsibilities. However, the courts' view of what constitutes jurisdictional error is constantly evolving. As four examples, the courts have found jurisdictional error in situations where the delegate:

- had no power to make the decision in the first place
- failed to provide the person who is the subject of the decision with procedural fairness (whether under a statutory code of procedure or under the common law)
- took into account irrelevant consideration
- applied an agency policy inflexibly and failed to consider whether to exercise a discretion given by legislation.

To properly exercise their jurisdiction, delegates must at least:

- ensure that they have the power to make the decision

and

- correctly understand and apply the legislative test that must be applied to that case

and

- identify all the elements of that test and consider only material that is relevant to those elements

and

- afford the person procedural fairness

and

- ensure that each decision in the process is not biased

and

- ensure that each decision in the process would be reasonable to the average impartial observer.

### Legal advice must be sought

Consideration of what amounts to a jurisdictional error will vary on a case-by-case basis. Given the complexity of this issue and its ongoing evolution, it is essential that **legal** advice be obtained **before** steps are taken to revisit a decision that was already made. If a delegate thinks a decision to cancel, grant or refuse a visa should be revisited because it contains a significant error of law, legal advice from Legal Opinions Section, National Office, must be sought prior to taking any action.

### Applying the visa application code of procedure

The procedural code discussed in [The Code of procedure](#) does not prevent officers from doing more than it requires - for example, inviting a visa applicant to comment on adverse information that is not specifically about the visa applicant or another person, and is instead about a class of persons of which the visa applicant or that other person is a member).

However, as a matter of general principle, officers should refrain from doing more than what is required by the code of procedure unless legal advice has first been obtained from the Legal Opinions helpdesk. This is because doing more than what is required by the statutory code of procedure increases the risk of a court expanding the requirements of the code in the event that the disputed decision is judicially reviewed.

### When decision about visa may be made

(Act: s63)

#### About s63 of the Act

Section [63\(1\)](#) of the Act places certain limitation on when a [decision to grant or refuse a visa](#) may be made. These limitations support the following policies.

#### Program management

##### Supported by legislation

The legislative provisions described in this section are used to manage immigration programs. When any of the legislative provisions described below are invoked, National Office notifies offices separately and arranges for a legislative instrument to be made (as required by the relevant provision).

##### Planning

To assist management of immigration programs, the Minister (as advised by National Office) may allocate regions and/or offices planning levels. For those visas for which planning levels are usually allocated, the relevant PAM3: GenGuide gives policy

background. (As a particular example, see [PAM3: GenGuideB - Non-humanitarian migration - Management of the non-humanitarian migration program.](#))

### Visa capping (s39 and s85)

Under [s85](#) of the Act, the Minister (advised by National Office) may, by legislative instrument, determine the maximum number of visas in a specified class (or classes, or subclass/subclasses) that may be granted in a specified program year. This establishes a numerical limit ("cap") on that visa class.

Depending on the prescribed visa criteria for the class of visa being capped, the reaching of the cap specified in the legislative instrument will have different consequences.

#### Cap and cease

If the prescribed visa criteria for the relevant visa subclass being capped includes a criterion of the type described in [s39\(1\)](#) of the Act, then once grants of the relevant visa subclass have reached the cap specified in the legislative instrument, any unfinalised applications for visas of that subclass are taken not to have been made, pursuant to [s39\(2\)](#) of the Act. This is sometimes known as "cap and cease".

#### Cap and queue

If the prescribed visa criteria for the visa subclass being capped **does not include** a criterion of the type described in [s39\(1\)](#), once the cap specified in the legislative instrument has been reached, then, under [s86](#), no further visas of that visa subclass can be granted in that program year, even if an application is otherwise assessed as meeting all the visa criteria. This is sometimes known as "cap and queue".

The fact that no further visas for the visa subclass can be granted in that program year once the cap has been reached under a "cap and queue" arrangement does not prevent other actions from being taken in relation to an application for the visa subclass. An application for that visa subclass can still be assessed, processed and refused for not meeting all the applicable visa criteria - refer to [s88](#) of the Act.

For those visas that are subject to capping, the relevant PAM3: GenGuides provide policy background and, if necessary, further guidance.

Officers must not confuse capping with "suspension" or "pooling", which are discussed immediately below.

#### Suspension of processing (s84)

The Minister may, by legislative instrument, determine that the processing of applications for certain visas is to be suspended until a day specified in the determination (the 'resumption day'). No action is to be taken in relation to any application for a visa of a class concerned until the resumption day specified in the determination.

This does not affect an application for a visa made by a person on the ground that he or she is the spouse, de facto partner or dependent child of:

- an Australian citizen
- a permanent visa holder or
- a person who is usually resident in Australia and whose continued presence in Australia is not subject to a limitation as to time imposed by law.

A legislative instrument made under [s84](#) does not prevent an act being done to implement a decision to grant or refuse a visa if the decision was made before the date of the relevant determination.

### **Pooling of applications (s95)**

Section [95](#) of the Act (applicable to general points tested visas only) provides for applications to be pooled. For policy and procedure, see [PAM3: Sch6D - General points test for General Skilled Migration visas mentioned in subregulation 2.26AC\(1\) - Scoring](#).

### **Caseload management - Prioritising caseload (s51, s91)**

#### **Order of consideration s499 directions**

Section [51\(1\)](#) of the Act allows officers to deal with applications in any order seen fit. This allows officers, for example, to:

- take into account variations in workload in dealing with applications
- process applications in accordance with the priorities that, under policy, are given to certain applications, for example those for a specific visa class (or subclass). (If this applies, the relevant PAM3: GenGuide will provide details (but see also immediately below)) and
- give priority to individual applications, having regard to the particular circumstances of the case.

Together, [s499](#), [s51](#) and [s91](#) of the Act enable the orderly and controlled processing of applications and assist in the achievement of planning levels. As two examples:

- [GenGuideB - Non-humanitarian migration \(Offshore and onshore\) - Management of the non-humanitarian migration program](#) describes the "order of consideration" [s499 directions](#) used for the family stream program ([Section 499 directions](#) are dealt with generally in [PAM3: Act - Ministerial powers - Ministerial directions under s499](#).)
- There is also an order of consideration s499 direction relating to the skilled visa streams.

#### **Visa application procedures - Visa grant or refusal**

**(Act: Part 2 - Division 3 - Subdivision AC)**

#### **The decision to grant or refuse to grant a visa**

Read with [Granting visas - Lawful decision making checklist](#).

## Visa decision making

### Decisions

Section [67](#) and [s138](#) of the Act set out how and when the following four decisions are made:

- a decision to grant a visa
- a decision to refuse to grant a visa
- a decision to cancel a visa or not to cancel a visa
- a decision to revoke the cancellation of a visa or not to revoke the cancellation of a visa.

### Once made, decisions are final

Section [67](#) and [s138](#) of the Act provide that:

- a decision is taken to have been made by the delegate causing a record to be made of the decision
- the record must state the day and time of its making
- the decision is taken to have been made on the day and the time the record is made and
- there is no power to vary or revoke the decision after the day and time the record is made.

In combination these provisions put it beyond doubt that a decision on an application for a visa, cancellation of a visa or revocation of the cancellation of a visa is taken to be finally made, and the decision maker is taken to be functus officio at the time and on the day a record of the decision is made.

The day and time a decision is made is also important because it may have an impact on the client's immigration status. For example, a number of the cessation events for bridging visas granted on or after 19 November 2016 are calculated from the date of decision. See [PAM3: Act - Code of procedure - Notification requirements - General guidance for all notifications – Notifications and bridging visa cessation](#) for further information.

Once a record of a decision is made, no new information that an applicant or visa holder provides can be considered, regardless of whether notification of the decision has been communicated irrevocably and externally and regardless of whether the purported notification was properly performed (that is, effective notification given) according to law.

For example, if new information were to become available to a delegate on the same day the decision was made but before the notification of the decision was dispatched, providing the new information became available only after the date and time marked on the record of the decision, the delegate is legislatively prohibited from considering the information by varying or revoking the decision.

## Recording of decisions

### Requirements

To ensure that the date and time of a decision is not in doubt, it is important that officers record their decisions in departmental computer systems such as ICSE and IRIS. These systems automatically log the date and time a record of a decision is made so it is not necessary for decision-makers to manually record this information to comply with section 67 and section 138 of the Act.

While there is no legal requirement to do so, the date of decision should also be included in any notification letter and/or decision record. This is important particularly in relation to any client who was granted an associated bridging visa on or after 19 November 2016 – this is because in accordance with Schedule 2 of the Migration Regulations, the associated bridging visa will cease a specified period after the date of decision. See [PAM3: Act - Code of procedure - Notification requirements - General guidance for all notifications – Notifications and bridging visa cessation](#) for further information.

## Identifying the decision maker

### Overview

There is no legal requirement expressly requiring the name, or other identifier, of the actual visa decision maker be recorded in departmental systems (IRIS/ICSE).

It is of critical importance, however, that the actual visa decision maker be identifiable. Not recording the name or other identifier of the actual decision maker risks causing confusion as to who actually made the visa decision, and that could give rise later to problems in relation to judicial review of the visa decision or internal case auditing.

### Why must the decision maker be identifiable

To illustrate, if the visa decision was subsequently challenged in the court, that decision could be set aside by the court if the decision maker did not in fact hold valid ministerial delegation to make such a decision.

The privative clause provisions of s474 of the Act do not 'immunise' visa decisions from such a defect. It is therefore of critical importance that the actual decision maker be identifiable so that it can be established that they held the necessary delegation at the time of decision.

The same need to identify the actual visa decision maker is critical in any internal audit procedures.

### Decision maker should complete the IRIS record

IRIS records as the decision maker the person recording the decision. It does not allow the person recording the decision to separately record the name of the actual

decision maker. For this reason, only the actual decision maker should complete the IRIS record as decision maker. Otherwise, a real risk of confusion or ambiguity arises as to who made the actual decision. That risk is increased if, for example, it is unclear which decision record (for example, paper or systems) was first created or the original paper file/record goes missing.

## Granting visas

### Granting visas - Overview

#### Legislative requirements

Section [65\(1\)](#) of the Act specifies the requirements that an applicant must satisfy in order to be granted the class of visa for which they have applied.

At all times, officers must keep in mind that Schedules 1 and 2 do not list all the legislative requirements an applicant must meet to be granted a visa. Legislation outside these Schedules can bar the grant of visas or indeed, preclude consideration of applications - see [Granting visas - Summary of legislative requirements](#).

#### The decision's components

In granting a visa, officers must at the same time decide (and record):

- the period during which the visa is to be in effect and
- visa conditions, if any.

In other words, it is implicit in migration law that officers cannot choose to grant a visa with a view to deciding the period of effect and/or conditions at a later time. Schedule 2 specifies which of these are prescribed by law and which are 'determined by the Minister' that is, by a s65 delegate exercising discretion (in other words, decided under policy by the delegate).

#### Payment of outstanding debts or charges (s65)

Before deciding to grant a visa, the decision maker (s65 delegate) must be satisfied that the provisions of [s65](#) (requirements for the grant of the visa) have been met. This includes any requirement that other Australian government charges, such as the second instalment of the visa application charge (Regulations [Division 2.2A](#)), be paid prior to the grant. If the decision maker is not satisfied that such debts or charges have been paid, the visa is not to be granted.

#### Recording of all information

Good administrative practice requires that all information that is before a decision maker at the time of visa grant must be clearly documented on file. This facilitates decisions under [s113](#) (no cancellation if full disclosure).

It is not possible to detect from the visa label that adverse information was considered by the decision maker at the time of visa grant.



It is essential therefore that such material be recorded on the case record so that in any future dealings with the visa holder (for example, when considering visa cancellation or a subsequent application) the department knows if the adverse information was taken into account when the visa was granted.

### **Circumstances applicable to grant**

#### **Where the applicant must be to be granted a visa**

Usually - see regulation [2.04](#) and Schedule 2 clause 4 - the Regulations specify where the applicant must be (that is, in or outside Australia) to be granted their visa. (Even for combined visa applications, the requirement applies to each applicant.) An applicant who is in the wrong location at the time of decision must be refused their visa.

Delegates should check local records (for example, movements data base for applications made in Australia) to verify the whereabouts of the applicant at the time a decision is to be made.

Applicants who:

- applied for their visa in Australia
- leave and are outside Australia at the time of decision and
- are refused the visa as a result of being "in the wrong place" when the decision is being made

are ineligible for merits review of the decision to refuse unless they return to Australia (for example, on a BVB, if held) within the period for making a review application. In other words, although the decision to refuse in these circumstances might be merits reviewable, the applicant is unable to make a valid review application unless they are in the migration zone.

In this situation, the [s65](#) delegate should:

- in order to comply with the requirements of [s66\(2\)\(d\)](#) of the Act, notify the applicant that the decision to refuse is merits-reviewable but
- clarify that the applicant must be in the migration zone to make a valid application for merits review.

#### **If the applicant is in the "wrong" location**

It is policy that, if an applicant cannot satisfy the circumstances applicable to grant because of their current location, the [s65](#) delegate should consider whether it is reasonable in the circumstances to defer making a decision.

Some factors to consider are whether the applicant has, as required by [s52](#), notified the department of changes of address of more than 14 days, and the period involved. For example, if, for an application made in Australia, the applicant has left Australia for only a few days, clearly it would be unreasonable to proceed to decide the application.

## Effect of visa grant on other visas

Section 82(2) of the Act states that a [substantive visa](#) ceases to be in effect if another substantive visa (other than a [special purpose visa](#)) comes into effect.

A visa granted to an applicant in one class will cease any other visa previously granted to an applicant. This could disadvantage applicants who, for example, have applied for a [permanent visa](#) and who wish to travel to Australia in the short-term on a [temporary visa](#).

If the permanent visa is granted and a temporary visa is subsequently granted, the permanent visa will cease. To get another permanent visa in this situation, the applicant would have to re-apply for a permanent visa. It **might** be possible for the decision to grant the temporary visa to be vacated if it is affected by a jurisdictional error, but officers must seek legal advice from National Office on a case by case basis.

Most application forms ask an applicant to state whether they have any other unfinalised visa applications. However, officers should also check local records for multiple visa applications by the one applicant. If the grant of more than one visa is appropriate, decision makers should ensure that the most advantageous visa is granted **last**, because it will cease the visa previously granted to the applicant.

## The visa period of effect

Clause 5 in each Regulations Schedule 2 Part prescribes "when (the) visa is in effect". This encompasses:

- when the visa operates (s68) and
- if applicable, the time limit for using the visa to travel to (or return to) Australia (s29) and
- if applicable, the number of journeys to Australia that may be made using the visa (s29).

As applicable, the relevant PAM3: Sch2Visa instruction gives policy guidelines on these factors.

## Conditions of entry and stay

Clause 6 in each Regulations Schedule 2 Part enables (or may require) conditions to be attached to certain visas. For policy guidance, see

- the relevant PAM3: GenGuide and PAM3: Sch2Visa instruction for possible further comment, otherwise
- the [PAM3: Sch8](#) instruction for the specific visa condition.

## Granting visas - Summary of legislative requirements

### About this summary

This part summarises the various legislative provisions relevant in assessing whether an application may be considered and, if so, whether a visa can be granted. The summaries are an “alert” only and are **not** necessarily comprehensive. The description of each provision is only a summary of its content. Read the actual legislation for a full understanding and whenever assessing individual cases. Where possible, references have been made to other instructions.

## **The Migration Act 1958**

### **s39(1)**

Under s39(1) of the Act, a visa of a specified class may not be granted if:

- that class has a prescribed criterion that the grant would not cause the total number of visas granted in that class to exceed a number fixed by the Minister and
- the maximum number of that visa class (as determined by the Minister) has been reached for that financial year.

As well, any undecided applications are taken not to have been made (s39(2)) - see [Program management](#). Do not confuse this “capping” provision with the capping provisions of s85 of the Act, described further below.

### **s40(1)**

Certain classes of visa may only be granted in specified circumstances (for example, to a person who is outside the migration zone) - see Regulations Schedule 2 clause 4 ‘Circumstances applicable to grant’.

### **s41(2)(a)**

Provides that a visa may be subject to a condition that the holder will not be entitled to be granted a substantive visa (other than a protection visa) while that person remains in Australia. If a visa held (or previously held) is subject to this condition, s46(1A) applies - see PAM3: Sch8 - Visa conditions - “No further application” conditions.

### **s46(1)**

An application is valid, and, it follows, may be considered (see the reference below to s47(3)), only if s46 requirements are met - see [What is a valid application](#).

### **s46A**

An application by a person who is an unauthorised maritime arrival is invalid unless the Minister decides that it is in the public interest to determine that s46A does not apply to the applicant.

### **s46B**

An application by transitory persons is invalid unless the Minister decides that it is in the public interest to determine that s46B does not apply to the applicant.

### **s47(3)**

The Minister may consider (and it follows may grant visas in respect of) valid applications only - see [Valid or invalid applications - Consequences for decision making](#).

**s63**

The Minister may be limited as to when the visa may be granted - see for example the reference below to s84.

**s65(1)(a)(i)**

A visa cannot be granted unless health criteria (if any) for that visa have been satisfied - see [PAM3: Sch4/4005-4007 - The health requirement](#).

**s65(1)(a)(ii)**

A visa cannot be granted unless all other criteria prescribed by the Act or by the Regulations have been satisfied.

**s65(1)(a)(iii)**

A visa cannot be granted if prevented by [s91W](#) of the Act (evidence of identity and bogus documents)

**s65(1)(a)(iii)**

A visa cannot be granted if prevented by [s91WA](#) of the Act (bogus documents and destroying identity documents)

**s65(1)(a)(iii)**

A visa cannot be granted if prevented by [s91WB](#) of the Act (applications for protection visas by members of same family unit)

**s65(1)(a)(iii)**

A visa cannot be granted if prevented by [s40](#) of the Act - see Regulations Schedule 2 clause 4 'Circumstances applicable to grant'.

**s65(1)(a)(iii)**

A visa cannot be granted if prevented by s501 of the Act (special power to refuse) - see [PAM3: Act- Compliance and Case Resolution - Character - s501 - The character test, visa refusal and visa cancellation](#).

**s65(1)(a)(iii)**

A visa cannot be granted if prevented by any other provision of the Act.

**s65(1)(a)(iii)**

A visa cannot be granted if prevented by any other law of the Commonwealth. (There are no current examples.)

**s65(1)(a)(iv)**

A visa cannot be granted unless the visa application charge (if any) payable in respect of the application has been paid - see [The Migration \(Visa Application\) Charge Act 1997](#).

**s84(2)**

Unless s84(3) or s84(4) applies, a visa cannot be granted if the Minister has used his powers under s84 to determine that dealing with applications for visas for a specified class is to stop until a specified date. This is known as 'suspension' - see [Program management](#).

## **s85**

Unless s87 applies, a visa cannot be granted if:

- the Minister has used ministerial powers under s85 to determine at most number of visas that may be granted in a specified class in a financial year and
- that number has been reached.

This is one of two ways in which a visa class may be “capped” (the other is s39 of the Act). Refer to [Program management](#).

## **s94**

A visa cannot be granted if the application has been put aside (and is taken to have been put into a pool). This refers to the pooling provisions that apply only to cases to which the Regulations Schedule 6B, 6C or 6D points test applies. (For current visas, for example, see [PAM3: Sch6D](#).)

## **s501(1)**

The Minister may refuse to grant a visa if the character test is not satisfied - see [PAM3: Act - Character and security - s501 - The character test, visa refusal and visa cancellation](#).

## **The Migration (Visa Application) Charge Act 1997**

This Act imposes the visa application charge payable in respect of most visa applications. It comprises:

- a ‘first instalment’ payable at time of application and, for certain applications,
- a ‘second instalment’, payable prior to visa grant.

For policy and procedure, see [PAM3: Div2.2A - Visa application charge](#).

## **The Migration Regulations**

As provided for by [s65\(1\)\(a\)\(ii\)](#) of the Act:

- Schedule 1 provisions (and any associated regulations) in respect of the relevant class must be satisfied.
- Schedule 2 provisions in respect of the relevant class must be satisfied.

For Schedule 1, see [Schedule 1 requirements](#). For Schedule 2, see the relevant [PAM3: Sch2Visa](#) instruction. (Most [PAM3: Sch2Visa](#) instructions also provide Schedule 1 information.)

## **The Migration (United Nations Security Council Resolutions) Regulations 2007**

These Regulations operate to preclude visa grant to (and/or provide for visa cancellation of visas granted to) persons who fall within their scope. For policy and procedure, see [PAM3: The Migration UNSCR Regulations](#).

## **Granting visas - Lawful decision making checklist**

This section summarises the elements for a visa application decision to be lawful. It is a summary only; relevant sections elsewhere in this instruction give more information.

## **Delegation**

Check you are a delegate and so have the power to make the decision under [s29](#) and [s65](#) of the Act. Refer to LEGEND's [Delegations folder](#).

## **Valid application**

Check there is a valid visa application under [s46](#) of the Act and Regulations Schedule 1.

## **Apply the law**

Apply the relevant migration law in the Act and the Regulations. The prescribed criteria for visas, in Schedule 2 of the Regulations, set out the basic rules for your decision.

There are also a few overriding matters, in provisions in the Act or the Regulations, that prevent the grant of a visa (even if prescribed criteria are met). Section 65(1)(a)(iii) and s65(1)(a)(iv) of the Act operate as a checklist of most of these matters.

See also [Granting visas - Summary of legislative requirements](#).

Remember, a matter will be relevant only if it relates to the prescribed criteria or to the provisions that prevent grant.

## **Apply the policy**

Apply any relevant policy. Policy is a relevant consideration that will assist, in particular, in interpreting and applying the prescribed criteria and provisions.

Policy must be taken into account but should not be applied in an inflexible way. Remember, it is only the requirements of the Act and Regulations that **must** be met. If policy requirements for grant of a visa are not met, consider whether the case should be one for grant outside policy. But if you believe a case is one for grant outside policy, you should normally contact the relevant policy area for further advice to assist you in making your decision.

## **Ascertain the facts**

Obtain all the facts or evidence that you need. If you are seeking further information from the applicant, s56 and s58 of the Code of Procedure in the Act allow you to:

- specify to the applicant how you want his or her response (for example, by writing, at interview, or by telephone)

and

- ask the applicant to respond or attend the interview within prescribed time limits, set out in regulation 2.15, so that decision making times are not “strung-out”.

Make sure the information you seek (or the questions you ask at interview) will cast light on the prescribed criteria.

### **Test the evidence**

Test the “facts” or evidence for relevance to prescribed criteria and reliability/credibility.

Remember, when you are recording your decision you should be able to discuss why you give certain weight to, or accept or reject key evidence.

### **Procedural fairness**

Check whether you must invite the applicant to comment on information under [s57](#) of the Act dealing with the Code of Procedure. Section 57 of the Act applies in relation to information - other than non-disclosable information as defined in [s5\(1\)](#) of the Act - if:

- the information would be the reason for refusing the visa and
- it is specifically about the applicant or another person and
- it was not given by the applicant for the purpose of the application.

Remember to:

- specify how you want the applicant to respond and within what prescribed time limits

and

- ensure, as far as is reasonably practicable, that the applicant understands why the information is relevant to your consideration of the application.

### **Make findings of fact**

Make your findings of fact against the relevant migration law, that is, the prescribed criteria for the class/subclass of visa, or the provisions that prevent grant. Consider the issues in a comprehensive manner - explore both sides of a case. Do not ignore evidence that is inconvenient. Consider whether more than one finding of fact, or inference, is possible. If so, indicate why you preferred the finding you came to. Ensure there is evidence for your findings - you should be able to refer to highly relevant evidence in your decision record.

### **Do not act under direction**

Exercise your decision making power in an independent and personal manner. Do not make a decision at the direction of another person.

### **Record the decision**



Record your decision. A decision record should make it clear whether your decision is to grant or to refuse the visa (or the cancel the visa, as the case may be) and set out your reasoning process with reference to the prescribed criteria. It should include your name, position number and the date of the decision.

For refusal decisions, [s66\(2\)](#) of the Act spells out notification requirements (and hence what you need to record). You:

- must specify:
  - which criterion was not satisfied. Be careful not to suggest that the applicant meet all other criteria if these were not assessed or
  - which provision in the Act or the Regulations prevented grant

and

- must give the reasons why the criterion was not satisfied (or why the provision prevented grant) spelling out your findings against the criterion/provision, and referring to highly relevant evidence. (This is not required for those cases for which there is no merit review right - see [s66\(2\)\(c\)](#) and [s66\(3\)](#)).

When setting out your reasons:

- use plain language that makes it clear what you are doing, for example “I find that ...”, “I accept that ...”, “I reject that ...”, “I acknowledge that ...”, “I took into account that ...”, “I found this to be irrelevant ...”

and

- if you are referring to the criterion, use the specific wording of the criterion - do not substitute other words, which might indicate that you did not really understand or apply the correct legal test

and

- avoid language that:
  - is vague or ambiguous, for example “it appears ...”
  - is negative such as to suggest bias, for example “this reflects poorly on the applicant ”
  - suggests the case has not been given an individual assessment on the merits, for example “this is a typical claim”.

### **Notify the applicant**

Notify the applicant of the decision. For policy and procedure, see [PAM3: Act - Code of procedure - Notification requirements](#).

### **Notification of decisions**

#### **Methods of notifying decisions**

Except for:

- the visa-specific circumstances prescribed in regulations 2.16(2A), (2B) and (2C) (relating to grant of visa subclasses 444 and 834) and
- the grant of a bridging visa in the circumstances described in regulation 2.16(2)

for policy and procedure on notification of decisions, see [PAM3: Act - Code of procedure - Notification requirements](#).

### **If a visa is granted (s67)**

#### **When is the visa taken to have been granted**

A visa is taken to have been granted on the day and at the time the record of the decision is made (s67), either on the computer system or on file. The first record created effects the grant of the visa.

Decisions to grant must be notified - see regulations [2.16\(2\)](#) - (2D). Except for:

- ☐ the visa-specific circumstances prescribed in regulations [2.16\(2A\)](#), (2B) and (2C) (relating to grant of special category and AW-834 visas) and
- ☐ the grant of a bridging visa in the circumstances described in regulation [2.16\(2\)](#)

for policy and procedure on notification, see [PAM3: Act - Code of procedure - Notification requirements](#), in particular [Notice of decision to grant a visa - s66](#).

### **Bridging visas**

Briefly, under regulation 2.16(2), if a bridging visa is granted at the same time as the associated substantive visa, the applicant is notified of the grant of the bridging visa by being notified (in accordance with regulation 2.16(2D)) of the grant of the substantive visa. See [PAM3: Sch2 Bridging visas - Visa application and related procedures](#).

If there is a delay between the grant of the bridging visa and the decision concerning the substantive visa, the applicant must be notified in accordance with regulation 2.16(2D), for which see [PAM3: Act - Code of procedure - Notification requirements](#).

### **If the visa is refused on character grounds**

If a visa is refused under s501 of the Act, the applicant is to be notified in accordance with [PAM3: Act - Code of procedure - Notification requirements - Notice of decision to refuse to grant a visa on character grounds - s501G](#).

### **If in detention**

See [PAM3: Act - Code of procedure - Notification requirements](#).

### **To ensure certainty of receipt of notifications**

See [PAM3: Act - Code of procedure - Notification requirements](#).

## Notification to an authorised recipient (s494D)

See [PAM3: Act - Code of procedure - Notification requirements](#).

## Effect of non-notification (s66(4))

See [PAM3: Act - Code of procedure - Notification requirements](#).

## When notification takes place (s66)

See [PAM3: Act - Code of procedure - Notification requirements](#).

## Notice of refusal decisions (s66)

See [PAM3: Act - Code of procedure - Notification requirements](#).

## Special provisions for certain visa applications that are refused

### Legislative authority

Under s45 of the Act, non-citizens seeking a visa must apply for a visa of a particular class. To support this, visa application forms usually allow an applicant to apply for only one visa class.

Regulation 2.11 allows a delegate to invite a person who has been refused a visa (the application for which was made outside Australia)- the first application as described in regulation 2.11(1) to make another application (further application) for a specified different class of visa. The effect of this is to enable officers to give certain applicants who appear to have applied for the “wrong” visa the opportunity to apply for a different class of visa if, on the basis of the information provided, it appears that a visa of that other class would be likely to be granted.

Note:

- Not all refused applicants can be invited under regulation 2.11 to make a further application - refer to [Limits to operation of regulation 2.11](#).
- Before inviting a further application, officers must check ministerial instruments of authorisation and delegation (available on IMMI net) to ensure that they are delegated for this purpose.
- A further application under these provisions is an application in all respects under the Act and Regulations, other than the requirement to pay the full VAC. For policy and procedure, refer to [VAC liability](#).

### How regulation 2.11 operates

#### Non-compellable discretion

Regulation 2.11(1) gives delegates the non-compellable discretion to invite a person who has been refused a visa to make a further application for a (specified) different class of visa.

### **The discretion applies at primary decision level only**

Under regulation [2.11\(3\)](#), a merits review authority cannot invite a person to make a further application.

### **Who should be invited to apply**

An invitation to apply again should be extended only to those persons whose circumstances at the time of the first application which (including information supplied with application) indicate that it is likely that they would have been eligible for the grant of a visa of a different class had they applied for it. There are other restrictions on who can be invited to make a further application and what kind of visa they can apply for - refer to [Limits to operation of regulation 2.11](#).

### **Limits to operation of regulation 2.11**

#### **Specific visas and circumstances only**

Regulation [2.11\(1\)\(a\)](#) specifies the visa applications to which this concession applies, namely where the first application was made outside Australia.

If the first application was for:

- a permanent visa, the invited further application can only be for another permanent visa (see regulation [2.11\(2\)\(a\)](#)) or
- a temporary visa, the invited further application can only be for another temporary visa (see regulation [2.11\(2\)\(b\)](#)).

However, there are specific exceptions - refer to [Exceptions to further application being of the same kind](#).

Note: Regulation [2.11\(1\)\(a\)](#) operates only in respect of applications made outside Australia: it cannot be used in respect of:

- visa applications made directly to an office in Australia by a person who is outside Australia - refer to Does not include applications made in Australia by applicants outside Australia or
- application made via the Internet (all Internet applications are taken to have been made in Australia).

#### **Does not include applications made in Australia by applicants outside Australia**

Regulation [2.11\(1\)\(a\)](#) operates only in respect of applications made outside Australia. This means that it cannot be used in respect of visa applications made directly to an office in Australia by a person who is outside Australia. For example, it cannot be used in respect of a Parent (Migrant) application for which Schedule 1 (by legislative instrument) requires the application to be made at a specific office of Immigration in Australia.

### **Exceptions to further application being of the same kind**

## Overview

Regulation 2.11(2A) provides for three exceptions to the requirement that the further invited application be limited to the same kind of visa (that is, permanent or temporary) as the first application:

- a person who has been refused a [TO-300](#) Prospective Marriage visa can be invited to apply for a [UF-309/BC-100](#) Partner visas
- a person who has been refused [UF-309/BC-100](#) Partner visas can be invited to apply for a [TO-300](#) Prospective Marriage visa
- a person who has been refused a Return (Residence) [BB-155](#) or [BB-157](#) visa can be invited to apply for a [TP-159](#) Provisional Resident Return visa (a situation not specially dealt with in this instruction - but see [PAM3: Sch2 RRV - Visa subclass 159 - Provisional Resident Return](#)).

### If first application was for a Prospective Marriage visa

Regulation [2.11\(2A\)\(a\)](#) refers.

The discretion to invite a person who has been refused a [TO-300](#) Prospective Marriage visa to apply for the [UF-309/BC-100](#) Partner visas is intended for use when an officer is not satisfied about a relevant criterion for the TO-300 visa but nevertheless considers that the applicant would have been likely to have been granted a Partner visa if they had applied for one.

It is expected that this situation will not occur often in practice because, if there are concerns about the genuineness of a relationship these will generally apply equally to both types of application. However, one example of a scenario where the discretion may arise would be if the s65 delegate is not satisfied that the parties intend to marry within the visa period but considers that there is evidence indicating that the parties are in a genuine partner relationship.

In considering a further application (that is for the UF-309/BC-100 visas), officers must fully assess the applicant's claims against the relevant Schedule 2 criteria, given that the nature of the relationship required for the UF-309/BC-100 visas - namely, a genuine and ongoing partner relationship - is different from that for a TO-300 visa, which requires that there is a genuine intention to marry.

### Different purpose from that at regulation 2.08E

Regulation [2.08E](#) provides that a person who has applied for a TO-300 visa and, before the application is decided, marries their sponsor, is taken to have applied for UF-309/BC-100 Partner visa on the day the department receives notice of the marriage.

For policy and procedure on this provision, refer to [PAM3: Div2.2/reg2.08E](#).

### If first application was for a Partner visa

There are two situations in which policy envisages that a person who has been refused UF-309/BC-100 Partner visas could be invited to apply for a TO-300

Prospective Marriage visa. Both situations relate to the applicant and sponsor having decided to marry in Australia.

Delegates must use careful judgment when exercising the discretion to invite a further application for a TO-300 visa, as the person's circumstances, at the time of processing of the first application, must have suggested an intention to marry in Australia.

#### **Applicant and sponsor originally intended to marry outside Australia**

If a person:

- had applied for UF-309/BC-100 Partner visas on the basis that they intended, prior to the application being decided, to marry their sponsor outside Australia but
- they changed their minds and indicated that they would, instead, marry after they arrive in Australia

they would not satisfy the Schedule 2 Part 309 time of decision criteria (unless the s65 delegate is satisfied that the de facto partner provisions are met instead).

If the Partner visa application is refused, the person could then be invited to make a further application for a TO-300 Prospective Marriage visa.

#### **Applicant and sponsor did not satisfy de facto partner provisions**

An unmarried Partner visa applicant who applied on the basis that they are the de facto partner of their sponsor but is assessed as not satisfying the de facto partner provisions must be refused.

If the person had indicated in their first application that they intended to marry their sponsor in Australia, they may be invited to make a further application for a TO-300 Prospective Marriage visa.

#### **Pre-requisites for inviting and processing a further application**

##### **First application must have been refused**

Regulation 2.11(1)(b) requires the first application to have been formally refused in accordance with s65 of the Act.

Before inviting a further application, officers must first record on departmental systems and in the case record/case file the decision to refuse to grant the visa in respect of the first application.

##### **The invitation**

##### **Invitation must specify class for further application**

Regulation 2.11(1) provides that officers must specify in the invitation the class of visa for which the further application is being invited.

## Notification letter must provide certain information

If the discretion at regulation 2.11 is exercised, the letter notifying the person of the decision to refuse the first application should also include the invitation to make a further application, together with the appropriate visa application form or, if the application can be made electronically, details of the online form to be used.

## Information to be provided in the invitation

The invitation to make a further application should clearly state that the application will be assessed in accordance with the legislation and policy applicable at the time the further application is made.

Therefore, even though the person's original circumstances were used as an indication of their prospects in relation to the legislation in effect at that earlier time, the invitation to apply for the (specified) visa class does not guarantee that the person will be granted the visa.

The invitation should also:

- indicate any additional information or documents that need to be provided
- remind the person of the legal requirement that they notify the department of any changes in their circumstances
- where applicable, ask the person to advise if they intend applying for merits review of the refused application (see [Merits review](#)) and
- advise the person whether a VAC must accompany the application and, if so, the amount (see [VAC liability](#)).

## Time limit for making further application

The invitation should also advise the person that, if they intend to make a further application, they must do so within the prescribed time limit, that is, 28 days (or in some cases 70 days) of receipt of the notification - refer to [regulation 2.11\(4\)](#). Note: Section 494C of the Act specifies when the person is taken to have received the invitation (document). For policy and procedure on notification, refer to [PAM3: Act - Code of procedure - Notification requirements](#).

## VAC liability

Regulation [2.11\(5\)](#) provides that the VAC payable in respect of the invited further application is the difference (if any) between that amount and the VAC that was paid in respect of the first application.

This includes any VAC increases that may have come into effect between the time the first application was made and the time the further application is made.

If the VAC for the further application is greater, the difference is payable upon making the further application.

However, if the VAC for the further application is less than that for the first application, regulation 2.11(6) provides that no refund of the difference is payable.



## Processing the invited further application

### Completed application form required

In order to make a further application, the person must complete the relevant approved form and meet s46 and all Schedule 1 requirements for making a valid application - regulation 2.07(1) refers.

The person's completion of the application form will give officers current and comprehensive details of the person's circumstances. Given that processing times vary between offices and visa application types, changes in the person's circumstances may have occurred that could affect their eligibility for the grant of the visa applied for in the further application.

### New record required

A new system record and, if appropriate to the visa class, a new case file record must be created for the further application.

### New visa assessment required

An invited further application is a completely new application, not a review of the first application. The further application must be assessed in accordance with the migration legislation and policy that apply at the time that the valid further application is made.

## Merits review

### Further application made concurrent with merits review

Merits review of the first application and submission of an invited further application are entirely separate processes and can be pursued concurrently.

Section 47(1) of the Act requires that a valid application must be considered. Even though it is the same visa applicant, there is no authority to delay assessment of the further application while merits review of the decision to refuse the first application is being undertaken.

### If one or the other application is successful

If a decision to grant a visa is made on either the first application (that is, at merits review) or the further application (at the processing office), officers may, when notifying the person of visa grant, ask them to withdraw whichever of the applications is unresolved. Section 49 of the Act requires the withdrawal of a visa application to be made in writing.

This should occur only if the entitlements of the respective visas are identical or the visa granted is more beneficial. In this context, officers should bear in mind the provisions at s82(2) of the Act, which provides that a substantive visa ceases to be in effect if another substantive visa comes into effect.

## **No separate merits review right if further application not invited**

Failure to exercise the discretion to invite a further application is not a merits-reviewable decision because it is not a decision to refuse to grant a visa under the Act.

Any successful application for judicial review of an officer's failure to exercise their discretion to invite a further application would simply result in the officer having to reconsider the exercise of discretion. It would not result in the grant of a visa in respect of the refused first application.

## **Record management - If first application not a merits reviewable decision**

Case files for (refused) first applications that are not merits reviewable are to be dealt with in accordance with the department's disposal procedures - refer to [PAM3: GenGuideB - Overseas case record management and disposal](#).

In such cases, a person submitting a further application need not submit another complete set of documentation. Any supporting documents on the first file may be photocopied and used by officers in respect of the invited further applications. However, any new documentation required in support of the further application must be submitted.

## **Record management - If first application is a merits reviewable decision**

### **Retain case file**

Case files for (refused) first applications that are merits reviewable should be appropriately retained until the time limit for making the further application passes (see [Assessing supporting documentation](#)) or the further application is made, whichever comes first.

## **Ascertain whether merits review will be sought**

If the decision to refuse to grant the visa in respect of the first application is merits reviewable, the person should be asked to indicate in writing whether they intend to seek review of the decision.

Note: Even if a person indicates that they do not intend to seek review of the refusal decision, they still retain the right to do so within the standard time limit for seeking merits review.

## **If merits review is likely to be sought**

If a person advises that they intend to seek review of the refusal decision made on the first application, the officer should ask them to submit with their invited further application another complete set of relevant supporting documents.

This:

- allows the original case file to be transferred in accordance with the department's procedures for access to case files by the review tribunal and

- obviates any need for officers to photocopy those documents from the original file that are needed to assess the visa criteria relevant to the further application.

### **If merits review will not be sought**

Case files for (refused) first applications where merits review will not be sought may be kept at the processing office until a decision on the further application is made.

In such cases, a person submitting a further application need not submit another complete set of documents. Any supporting documents on the first file may be photocopied and used by officers in respect of the invited further applications. However, any new documents required in support of the further application must be submitted.

If, after the further application has been made, an officer is formally advised that the person has, in fact, sought review and that the file is therefore required by the review tribunal, the officer should ask the person for another complete set of documents (for the further application case file) before transferring the case file relating to the first application.

### **Other matters**

#### **Managing and disposing of case records**

[PAM3: GenGuideB - Overseas case record management and disposal](#) provides guidelines on certain aspects of managing departmental case records at overseas posts. Officers should refer to the Records Management Guide on IMMI.net.

#### **Cancelling visas**

The general power to cancel visas (that is, powers other than the visa program specific s134B and the character related s501 of the Act) is dealt with under Part 2 - Division 3 - Subdivisions C-H of the Act, for which refer to [PAM3: Act - Visa cancellation - General visa cancellation powers \(s109, s116, s128, s134B and s140\)](#).

#### **Immigration status of children born to visa holders**

A child born **in** Australia to the holder of a **permanent** visa will, with very few exceptions, be an Australian citizen by birth - see the Australian Citizenship Act. A child born **outside** Australia to the holder of a permanent visa is not an Australian citizen unless eligible (for example, by the other parent being an Australian citizen) to be registered as such - see the Australian Citizenship Act - and, it follows, requires a visa (for example, an AH-101 Child visa).

In regards to a child born in Australia to the holder of a **temporary** visa:

- s78 of the Act states that the child (if not an Australian citizen) is taken to have been granted a visa (or visas) of the same kind as its parent/s

and

- under policy, the child is regarded no differently from other family unit members. For example, if a further visa is applied for, the child is subject to standard assessment against the applicable Schedule 4 health criterion.

### The Migration Act and Australia's external territories

In accordance with s7 of the Migration Act, the Act applies to prescribed external Territories, namely:

- Norfolk Island
- the Coral Sea Islands Territory
- the Territory of Cocos (Keeling) Islands
- the Territory of Christmas Island and
- the Territory of Ashmore and Cartier Islands.

These external territories are also in the migration zone - refer to the s5(1) definitions of **migration zone** and **Territory**). However, several have been declared to be **excised offshore places** (refer to the s5(1) definition), which has significant implications for **unauthorised maritime arrivals** (s5AA). In particular, without ministerial intervention such persons cannot validly apply for any class of visa (including a protection visa) while in Australia – refer to **s46A** of the Act.

### The Migration Act and other Commonwealth law

#### Exemption provisions

Be aware that various exemptions apply to matters within the scope of the Migration Act. As examples (if necessary, read the relevant legislative provisions for precise details):

- under **s507** of the Migration Act, provisions of the Sex Discrimination Act 1984 relating to de jure or de facto marital status do not apply in regards to migration regulations relating to the nature of a relationship or the period for which a relationship must have existed to be a partner relationship (as example, refer to regulation **2.03A**)
- s43 of the Age Discrimination Act 2004 states that the unlawful age discrimination provisions of that Act do not make unlawful anything done in relation to the administration of the Migration Act, the Immigration (Guardianship of Children) Act 1946 or associated regulations
- s52 of the Disability Discrimination Act 1992 states that the provisions in that Act relating to discrimination in work or other areas do not affect discriminatory provisions in the Migration Act or Regulations.

### Other matters

#### Occupation classification

For policy and procedure relating to:

- occupational classification of visa applicants and
- ANZSCO (the Australian and New Zealand Standard Classification of Occupations)

refer to PAM3: Div1.2/reg1.03 - ANZSCO.

## Giving advice on non-immigration matters

### Health insurance in Australia

It is not appropriate for officers to counsel enquirers regarding matters outside this department's responsibilities. Enquirers should be referred to the [australia.gov.au website](http://australia.gov.au) to find relevant government information and services.

## Case record management and disposal

For policy and procedure on the management of departmental case records at overseas posts, see [PAM3: GenGuideB - Overseas case record management and disposal](#). The procedures apply to (among other records) all visa applications made outside Australia, whether migrant, humanitarian, visitor, temporary residence, student or resident return.

## The other PAM3: GenGuides

### About GenGuides

Most Schedule 1 visa classes have one or more visa program-specific GenGuide instructions associated with each subclass of visa in that class. Each PAM3: Sch2Visa instruction lists (as a related instruction) which GenGuides apply to that subclass.

The GenGuide name is merely for convenience; it is not a strictly accurate representation of the types of visa (permanent or temporary) covered by that instruction.

For similar reasons, visa subclasses are included in a particular GenGuide according to whether applications for those subclasses are handled similarly.

**GenGuideA** covers all Schedule 2 visas but note [About visa application procedures](#)

Visa application procedures vary.

The GenGuides are listed in [PAM3: Readers Guide, Owners and Contents](#).

**END OF DOCUMENT**