

Home Affairs Portfolio
Department of Home Affairs
Supplementary Estimates Hearing – November 2024

KEY BRIEF

Topic: Administrative Appeals Tribunal/Administrative Review Tribunal (AAT/ART) set-asides

Responsible Deputy: Dr Emma Cassar PSM, Associate Secretary Immigration

Key Top Lines

- The Department has reviewed **all** Administrative Appeals Tribunal/Administrative Review Tribunal (AAT/ART) losses under Ministerial Directions (MD) 65, 79, 90, 99 and 110.
- Since May 2024, and as at 18 October 2024, **223** cases have been identified for consideration of the Ministerial powers to set aside a non-adverse AAT/ART decision.
- Of the **223** cases identified within the AAT/ART set aside caseload, as at 18 October 2024, the following action has been taken:
 - o **163 submissions** have been developed for Ministerial consideration.
 - **105** visas have been cancelled or refused by a Minister.
 - **49** of these cases have lodged Judicial Review.
 - In **four (4)** cases, the decisions was non-adverse.
 - In **42** cases, the Minister directed that the person should be afforded natural justice prior to making their decision (currently in progress).
 - **12** submissions are pending Ministerial decision.
 - o **Five (5)** cases were otherwise finalised (already expired, etc).
 - o The remaining **55** cases are in various stages of development ahead of Ministerial consideration.
- The new Ministerial Direction 110 (MD110) commenced on 21 June 2024, prioritising and strengthening the principles of community safety in the making of visa cancellation decisions for both departmental delegates and the AAT/ART.
- Since that date, as at 18 October 2024, the AAT/ART has made **49** decisions and of those, **12** were set aside (an AAT/ART set aside or 'loss' rate of approximately 24 percent).
 - o All AAT/ART set asides under MD110 were immediately raised with Ministers' offices. All cases will be considered by Ministers, if not already (noting delays with receiving written reasons to allow the development of a submission).

- On 6 September 2024, the Minister for Home Affairs verbally directed the Department to use a revised threshold to refer cases to the Minister for visa cancellation consideration using their personal, non-delegable powers, in the national interest, following a non-adverse decision by the AAT/ART.
 - o These thresholds were formally agreed to and finalised on 22 October 2024.
 - o Of note, the new referral thresholds will ensure that cases that pose a **serious** ongoing level of risk to the community or an individual; or AAT/ART outcomes that are **inconsistent with community expectations**, such that the 'national interest' may be invoked, are considered by a portfolio Minister.

Handling Notes:

- Mr Michael Thomas, Group Manager Immigration Compliance and Mr Jaycob McMahon, First Assistant Secretary Character, Cancellation and Case Resolution Division will lead this topic.
- Since the May 2024 Senate Estimates hearing, the Department has worked closely with Ministers to review the AAT/ART set-aside caseload and the relevant Ministerial Directions.

Key Points

- The *Migration Act 1958* (the Migration Act) provides for the refusal or cancellation of a non-citizen's visa if they engage in criminal behaviour or serious conduct that poses a risk to the safety of the Australian community.
- Non-citizens can seek merits review of visa cancellation or refusal decisions at the AAT/ART.
 - o The AAT/ART provides independent merits review of decisions made under Commonwealth law, and must comply with relevant ministerial directions.
- Portfolio Ministers have existing powers under the Migration Act to set-aside decisions made by the AAT/ART and to cancel or refuse a person's visa if the Minister is satisfied that the person does not pass the character test and the Minister considers it is in the *national interest* to cancel the visa.
- On **21 June 2024** Ministerial Direction 110 (MD110) – *Visa refusal and cancellation under section 501 and revocation of a mandatory cancellation of a visa under section 501CA*, commenced replacing Ministerial Direction 99 (MD99). The new MD110 prioritises and strengthens the principles of community safety.
- On **6 September 2024**, the Minister for Home Affairs verbally approved revised thresholds for the Department to refer cases to Ministers following an AAT/ART decision to set aside a character refusal or cancellation.
 - o The referral thresholds will ensure that cases that pose a serious ongoing level of risk to the community or an individual, or that are inconsistent with community expectations, such that the 'national interest' may be invoked, are referred to a Minister for consideration of their personal, non-delegable powers.
 - o This direction was formally agreed on **22 October 2024**.

- Key changes to the threshold assessments include:
 - o Reverting to referring cases when there is a **serious risk** to the Australian community **or an individual** from **very serious ongoing risk** to the community.
 - o Referrals to the Minister where the offending is inconsistent with community expectations.
 - Primarily be on the basis of objective criteria including serious violent offending, particularly against women or children, a substantial criminal record, violent or repeated family violence, and serious historic offending.
 - o Consideration of matters considered to be exceptional, including significant media interest, high profile matters and serious identity or fraud concerns.
- As has always been the case, departmental delegates can refer any case to the Minister if the circumstances of the case indicate that the Minister should consider using their personal powers.
 - o Additionally, the Minister may personally request the Department to prepare a submission for their consideration.

Key Data and Statistics

- The Department has reviewed all loss decisions by the AAT/ART under Ministerial Directions (MD) 65, 79, 90, 99 and 110.
- As at 18 October 2024, **223** cases have been identified for consideration of the Ministerial powers to set aside a non-adverse AAT/ART decision.
- Since **25 May 2024 (last Senate Estimates hearing)**, there have been an additional **31** departmental losses in the AAT/ART.
 - o 19 cases - loss under MD99 and previous MDs
 - o 12 cases - loss under MD110.
- Of the **223** cases identified within the AAT/ART set aside caseload, as at **18 October 2024**, the following action has been taken:
 - o **163 submissions** have been developed for Ministerial consideration.
 - **105** visas have been cancelled or refused by a Minister using their personal, non-delegable powers to a set-aside decision by the AAT and cancel or refuse the visa.
 - **49** of these cases have lodged Judicial Review.
 - **Four** decisions have been non-adverse – i.e. the Ministers noted that the person did not pass the character test, and either:
 - they were *not* satisfied that it was in the national interest to cancel or refuse the visa, or
 - they decided to *not exercise* their discretion to set aside the AAT's decision, and instead issued a warning.

- 42 cases the Minister directed that the person should be afforded natural justice prior to making their decision.
 - Those cases are currently in various stages of the natural justice process and submission drafting process.
- 12 submissions are pending Ministerial decision.
- Five cases were otherwise finalised (already expired, etc).
- The remaining 55 cases are in various stages of development ahead of Ministerial consideration.

Table 1: Summary of Ministerial decisions on AAT set-aside cases

Minister	Submissions considered	Decided cancelled or refused	Decided - non adverse	Minister directed natural justice	Returned to Department or otherwise finalised	Pending
Minister for Home Affairs (O'Neil)	13	6	0	<5	<5	0
Minister for Immigration, Citizenship and Multicultural Affairs (Giles)	123	88	<5	24	9	0
Minister for Home Affairs, Immigration and Multicultural Affairs (Burke)	8	<5	0	8	0	<5
Assistant Minister for Immigration (Thistlethwaite)	13	6	<5	6	0	6
Assistant Minister for Citizenship and Multicultural Affairs (Hill)	10	10	0	7	0	<5

NOTE: Some submissions were provided to more than one Minister prior to decision.

- New **Ministerial Direction 110** (MD110) commenced on **21 June 2024**, prioritising and strengthening the principles of community safety in the making of visa cancellation decisions for both departmental delegates and the AAT/ART.
- Since that date, as at **18 October 2024**, the AAT/ART has made **49** decisions and of those, **12** were set aside (an AAT/ART set aside or 'loss' rate of approximately **24 percent**).
 - All AAT/ART set aside cases under MD110 were immediately raised with Ministers' offices.
 - All cases will be considered by Ministers, noting submissions in 55 cases remain under development.

Consultation

- The Chief Data Officer, or their delegate undertaking the Data Clearance function, has cleared the statistics contained within this brief.
- Group Manager Legal has cleared the legal information contained within this brief.

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KEY BRIEF

Topic: Regional Processing

Responsible Deputy: Dr Emma Cassar PSM, Associate Secretary Immigration

Key Top Lines

- Regional processing is a key pillar of Operations Sovereign Borders (OSB).
 - The Governments of Australia and Nauru signed a Memorandum of Understanding (MOU) for an enduring regional processing capability in Nauru on 24 September 2021, committing to long-term regional processing arrangements.
- Nauru remains ready to receive and process any new unauthorised maritime arrivals (UMAs), future-proofing Australia's response to maritime people smuggling.
- As at 30 September 2024, there are 100 UMAs under regional processing in Nauru.

Handling Notes:

- Mr Joe Feld, A/g First Assistant Secretary Regional Processing Taskforce, will be the lead witness on the topics contained in this brief.
- Any questions relating to Operation Sovereign Borders and or on-water operations, Rear Admiral Brett Sonter, Commander JATF will be the lead witness on the topic.

Key Points

- From 1 June 2024 to 30 September 2024, 47 UMAs have transferred to Nauru for regional processing.
- Since September 2023, a total of 119 UMAs have been transferred to Nauru for regional processing:
 - Less than 10 UMAs were transferred in September 2024;
 - Less than 5 UMAs were transferred in July and August 2024;
 - 37 UMAs were transferred in June 2024;
 - 10 UMAs were transferred in April 2024;
 - 39 UMAs were transferred in February 2024;
 - 12 UMAs were transferred in November 2023;
 - 11 UMAs were transferred in September 2023.
- Returns assistance is available for UMAs seeking to voluntarily return to their country of origin or a country to which they have right of entry.
 - Between September 2023 and 30 September 2024, 19 UMAs have returned home voluntarily.
 - There are an additional 12 UMAs engaged in Assisted Voluntary Return as at 30 September 2024.

Claim of Public Interest Immunity on questions from the Senate Standing Committee on Legal and Constitutional Affairs: material related to assisted voluntary returns and details of individuals in regional processing in Nauru.

- The requested information refers to the individual characteristics of transferees and operationally sensitive information.
- The Department considers the public disclosure of this information would not be in the public interest on grounds it would, or could reasonably be expected to, cause damage to Australia's national security and international relations.

Regional Processing Funding and Service Delivery Contracts

- Australia bears all costs associated with regional processing arrangements.

Regional Processing costs related to PNG and Nauru to 30 September 2024.

	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18	2018-19	2019-20	2020-21	2021-22	2022-23	2023-24	2024-25*	Total
	\$ (m)	\$ (m)	\$ (m)	\$ (m)	\$ (m)	\$ (m)	\$ (m)	\$ (m)	\$ (m)	\$ (m)	\$ (m)	\$ (m)	\$ (m)	\$ (m)
Totals \$ (m)	358.8	1,306.9	1,313.2	1,138.9	990.4	1,037.6	939.3	815.1	601.9	607.2	421.0	329.7	93.6	9,953.7

* Year to date costs to 30 September 2024

Note: Inclusive of departmental, capital and administered expenditure for Nauru and PNG regional processing capability. The PNG costs are up to 31 December 2021. Totals may vary due to rounding.

Regional Processing Policy & Operations

- There has been no shift in the Government's maritime people smuggling policies.
 - The Department remains committed to maintaining the Government's objective of an enduring regional processing capability in Nauru as a key pillar of OSB.
 - The continued transfer of new UMAs to Nauru demonstrates the strength of Australia's border protection policies.
- Nauru remains ready to receive and process any new UMAs future proofing Australia's response to maritime people smuggling.
- The Government of Nauru (GoN) is responsible for the administration and implementation of regional processing arrangements in Nauru, including the management of UMAs under those arrangements and considering any protection claims the cohort may raise.
 - Australia supports the GoN to implement arrangements, including through the provision of contracted service providers.

International Engagement

- Regional processing is a key component of Australia's valued relationship with Nauru.
- Nauru remains Australia's only regional processing partner. Nauru's continued receipt of new UMA cohorts demonstrates its strength as Australia's regional processing partner.

Consultation

- The Chief Statistician has cleared the statistics contained within this brief.
- The Chief Finance Officer has cleared financial data contained within this brief.

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KEY BRIEF

Topic: Visa response to the Hamas-Israel conflict

Responsible Deputy: Dr Emma Cassar PSM, Associate Secretary Immigration

Key Top Lines

- All non-citizens who wish to travel to, enter or remain in Australia must satisfy the requirements of the *Migration Act 1958* (the Migration Act) and the *Migration Regulations 1994*. This includes identity, health, character and security requirements.
 - The same criteria applies to all non-citizens applying for an Australian visa, regardless of nationality or location.
- The Australian Government is committed to protecting the safety of all Australians and has security checking procedures in place, drawing on information from several sources, including, but not limited to, alerts and profiles from other agencies, intelligence provided by other countries, departmental alerts, open source and information provided in the application form.
 - The Department of Home Affairs assesses all applications against security criteria in line with security agencies guidance.
 - Checks are repeated multiple times along a person's journey to Australia, including at the time of visa grant, while they hold a visa outside Australia, and once they arrive in Australia.
- The Australian Government is making available, on a case by case basis, a temporary humanitarian visa pathway to people impacted by the Hamas-Israel conflict, including Palestinian temporary visa holders currently in Australia.

Key Points

- The Department of Home Affairs (the Department) screens all applications in line with security agencies' guidance, drawing on information provided by security agencies about individuals, documents and characteristics of concern.
 - Setting out full details of the security checking procedures could jeopardise the effectiveness of the process and our ability to obtain information in the future.
 - The Department has provided the details of all Palestinian visa holders to ASIO for additional checks.

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- The Department routinely cancels visas where there are grounds to do so. This can include where the Department has additional information about an individual that was not available when the visa was granted.
 - For example, the financial year 2023/24, 22,822 visas have been cancelled under section 128 when the visa holder was outside of Australia.
 - In the period of 7 October 2023 to 15 October 2024, the Visitor visas of 44 Palestinian nationals were cancelled while the person was offshore on a range of grounds.
- In response to a Senate Order to Produce Documents, the Government has released four documents with redactions that contain advice from the Department of Home Affairs to its former portfolio Ministers relating to the issuance of visas to Palestinians in response to the Hamas-Israel conflict. These documents show that:
 - The portfolio's former Ministers and the Department worked closely with partners across Government to deliver a visa response to the Hamas-Israel conflict.
 - The granting of temporary visas allowed people to arrive in Australia to be with their families during this difficult time.
 - The Department will continue to take actions to keep Australian communities safe. Every person granted a visa was assessed against the legal requirements including health, character and security criteria.

Key Statistics

- Due to the Hamas-Israel conflict, there are more visa applications than in previous years and this is reflected in higher numbers of grants when compared with other periods.
- Between 7 October 2023 and 15 October 2024, the Department granted 7,010 Visitor visas to Israeli citizens who met all requirements. An additional 4,115 migration and temporary visas were granted.
 - 51.3 per cent were to women and children
- Between 7 October 2023 and 15 October 2024 the Department granted 2,618 Visitor visas to Palestinians who met all requirements and were outside of Australia. An additional 403 migration and temporary visas were granted.
 - 65.1 per cent were to women and children
- Between 7 October 2023 and 15 October 2024 the Department refused 7,252 Visitor visas to people declaring Palestinian citizenship as they did not demonstrate they met all requirements.
- Having an Australian visa does not mean that the person will choose to or be able to travel to Australia.

Consultation

- The Chief Statistician has cleared the statistics contained within this brief.
- Character, Cancellation and Case Resolution Division.