

TOPIC 4
COMMON ENTRY CRITERIA

(4.1) PROTECT PUBLIC INTEREST: HEALTH CONCERN

- ❖ **Reg 1.12:** Person to include in visa application (Secondary Applicants/ Dependence)
 - Close family members: Spouse/ de facto, Dependent children and their dependent children
 - Other single, dependent relative living with the family
 - After 1/9/07 partners in homosexual relationship: previously had to seek interdependency visa
 - Can be included, even if living in separate countries (except for asylum seekers)
 - ❖ **Reg 2.30-2.39:** Assurances of Support
 - Mandatory for many of the close family classes (concessional for part of the program)
 - Orphaned unmarried relative; Carer visas (niche, AU citizen to sponsor someone to come and care for them); Parents who pass the balance of family test; Aged dependent relatives; Remaining relative
 - Optional for any other family visa class from concessional through to spouse
 - Can be signed by anyone lawfully in Australia.
 - Social Security bond: \$3,500 + \$1,500 for each applicant – lasts 2 years
 - Contributory parent visas: \$10,000 + \$4,000 for each dependent – last 10 years
 - Used to recover social security payments made to migrant
 - Cost include in Schedule 1.
 - ❖ Other up-front charges for permanent residents
 - Medicare levy: \$870 (Migration Health Services Charge)
 - English language Charge:
 - \$2040 for concessional, independent, distinguished talent, former citizen/resident
 - \$4080 (+\$2040 for each dependent) applicants over 18 included in ENS, labour agreement, business skills
 - ❖ **s60:** temporary visa – likely to undergo health test or stat declaration to testify no disease.
 - ❖ **s65:** Minister making decision that applicant is eligible for a visa. “State of mind” power.
 - Satisfaction is mandatory criteria & of good character. Applicant must prove.
 - ❖ **Public Interest Criteria – Schedule 4**
 - Health tests - Waivable (4005) v Non-waivable (4007)
 - Reg 1.03: PAM (Procedural Advise Manual)
 - Private regime to determine health – MOCs: privatized sector / corporatization of private law
 - Reg 1.16AA/EE? Referral to medical centres.
 - All visa applicants except diplomatic or short term medical treatment categories must meet specified health criteria.
 - The tests imposed vary according to the class of visa sought, nature,length of the non-citizens proposed stay in AU
 - ❖ Health Concern Non-Citizens
 - Test more relaxed for temporary visitors, especially where the cost of any medical treatment can be met through health insurance
 - **Rule 2.25A(1):** *the Minister may proceed without seeking a “medical opinion” in respect of an applicant for a temporary visa where no information is known to immigration authorities from the application or otherwise suggesting the applicant may not meet the health criteria.*
 - ❖ Health Cheats - **ss109, 116:** where an applicant fails to disclose matters relevant to the assessment of health (or character), he or she becomes liable to cancellation of the visa issued as the result of the false or misleading information provided.
 - ❖ PR classes subject to **Non-waivable health test cl 4005**
 - Parents, preferential family, concessional family, independent and business or employment-related migrants.
 - See Sch 2, subcll 103-5; 120-31; 151-2; 303; 410-12; 415-28; 430; 432; 442; 560; 562-3; 661; 672; 675-6; 682; 685-6; 771; 773; 800; 805-6; 832; and 840-5.
 - Applicants in all classes must meet specified health criteria. Applies to **everyone (if one fails, all fail)**.
 - ❖ **Waivable health** classes - see **Sch 4 cl 4007**
 - Minister may waive requirement if satisfied granting of visa would unlikely to result in undue cost to the community or undue prejudice to access health care/community services.
 - Children/ adoption; Spouse/ de facto – interdependency; Various humanitarian visa classes
 - Apply to individual as cl 4005, like cl 4005 except (2) where Minister may waive criteria.
 - Note is that **HAVING THE DISEASE** is counted, regardless whether will increase cost to community.
 - ❖ **Health tests-** what is the **public interest**
 - “Burden on the community”; Cost and access to public services; Disabilities; Infectious diseases
 - ❖ **Cl 4005(c):** *The applicant (c) is not a person who has a disease or condition that ...would be likely to:*
 - (i) *result in a significant cost to the Aust. community in the areas of health care or community services; or*
 - (ii) *prejudice the access of an Aust citizen or PR to health care or community services.*
- Robinson v MIA (2005)**
- Facts: R entered Australia on 13 Aug 2001 on valid business visa with husband and 3 kids. Registered midwife. One of the kids, subclass 855, application for PR. Suffered mild down syndrome, medical officer deemed that will likely require special assistance – significant cost to community – s4005(1)(c)(ii)(A)

- HELD: (FCA) it's not sufficient to be identified as having a condition or disease that would pose a significant cost on the community (because conditions come in wide varieties and forms). Must look at a more finely aggregated assessment of the individual by looking **at the particularities of the impairment, not just the label**. Once identified to have condition, Cth medical officer assessment kicked in & you could be liable to be excluded for failing the health grounds
 - Here, UK midwife held valid Business Entry visa and family was sponsored, but one child had Down's Syndrome. Medical officer had to take a two-step inquiry: first assess the condition of the person, and then undertake a costs analysis of the hypothetical person who suffered from that level of the condition.
 - The distinction lay between whether it was enough that you were identified as having the particular condition, or is the decision maker required to actually look at a more finely aggregated assessment of the particular individual
 - Not enough to simply say having a particular condition is enough the fail the health criterion

MIMA v X (2005)

- Facts: Zambian national applied for student visa, HIV positive. The medication was self-administered – the question was does “healthcare” under s(1)(c)(ii)(A) include self administration of medication?
- HELD: Have to undergo constant checks, re cl 4005, likely to result to significant cost to Australian society [high medication expense, exclude on health grounds]

(4.2) CHARACTER AND CONDUCT

Character requirements

- ❖ **Section 501** (formerly s 180A) Minister may cancel or refuse visas on grounds that:
 - A non-citizen is not of “good character”, having regard to the person's past criminal conduct or general conduct.
 - The presence of a person in Australia (Minister satisfied) would threaten the safety or wellbeing of the community.
- ❖ **s 501(1)**: The Minister may refuse to grant a visa to a person if does not satisfy person passes the character test **(6)**
- ❖ Nature of Minister's 2 powers:
 - Power to exercise of which is subject to the rules of “natural justice” s 501(1) and (2).
 - A power available only to the Minister acting personally - the exercise of which is not subject to the rules of natural justice (**s 501(3) and (4)**). Decisions of this type are to be outside of the code of procedure in Part 2 Subdiv 3AB
- ❖ Minister exercising a **non-natural justice cancellation power**
Section 501C: Minister choses to exercise the powers conferred by s501(3) OR 501(3A), (as soon as practicable after the making of the original decision) the Minister must:
 - (a) Minister gives **written notice of the decision and particulars of “relevant information”** i.e. personal info.
 - (b) Except applicant is not entitled to make representations, **Minister must invite person to make representations**.
- ❖ **Character test reverses onus of proof**, must show haven't committed crimes and you aren't a threat to the community
- ❖ **MIAC v Haneef (2007)**
 - Facts: Indian doctor under 457 visa in Qld. Haneef studied in UK and later come to Australia, second cousin came to Australia and Haneef gave him a SIM card. In June 2007, there is an attempted terrorist bombing (drove into door of airport) in Glasgow who is second cousin of Haneef, it was traced to Australia and Haneef was detained under s23C Crimes Act – association in terrorist activities.
 - HELD: The crime would have to be one that is criminal in Australia and **character test has to be one of the applicant themselves** (not just assuming bad character because of association with cousin).
 - Spencer J – Minister cancellation effected by jurisdictional error. S501(6)(b) must reflect adversely on character.
 - Character test of s501(6)(b): Minister reasonably suspects that the person has been in association with group/person and involved in criminal conduct.
- ❖ **Plaintiff M47/2012 v Director General of Security (2012)**
 - Facts: Plf was Sri Lankan Tamil who was requesting refugee protection. ASIO issued a security assessment against him and visa was refused. Successful challenged Act & Regulation. Extended mandatory detention. Failed character test but not been told of s501(3) treatment of grounds that they were excluded.
 - HELD: Continued detention was authorised despite dissonance between the Regulations and the Act ('security' meant decision would fall on ASIO officers and their character assessment differed from Migration Act).
- ❖ **Graham v MIBP [2017]**
 - Facts: Graham was NZ citizen reside in Australia since 1966. Minister can visa under s501(3) not deemed as good character as they were outlaw bikie group. Sought to challenge Minister decisions. Minister considered decision based on material that has been protected by the Migration Act to be given to courts when reviewing. Applicant was not told about the materials that were collected, neither was the court allowed to access this information either.
 - Section 501(3)(a)(ii) effective as it interferes with court's judicial power?
 - HELD: (HCA) Cannot enact law to deny court to exercise power under s 75 judicial power and limits impacts to make judicial decisions and obtaining access to relevant decisions under review.
- ❖ **PIC 4001**: Person either satisfies Minister they'd pass **character test**, or Minister satisfied there's nothing to indicate they'd fail, or Minister has decided not to refuse visa despite reasonably suspecting they'd fail, or Minister has decided not to refuse despite not being satisfied they pass.