



Review of the current criminal visa cancellations made on criminal grounds (116 of the Migration Act 1958)

Questions on Notice

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QUESTION TAKEN ON NOTICE

Parliamentary Inquiry : 12 September 2018

HOME AFFAIRS PORTFOLIO

**(MA/001) – Joint Standing Committee on Migration – 116 of the
Migration Act 1958 - Cancellation and refusal powers under section 116 of the
*Migration Act 1958***

Asked:

Can the Department please provide information on the cancellation and refusal powers under section 116 of the *Migration Act 1958*?

Answer:

Section 116 Refusal

There is no provision within section 116 of the *Migration Act 1958* (the *Migration Act*) to refuse a visa application.

Section 116 Cancellation

Section 116 of the *Migration Act* sets out certain situation-specific mandatory or discretionary grounds for cancelling visas. Depending on the circumstances, the cancellation power is either mandatory or discretionary. Grounds specified in section 116(1) can be used to cancel temporary visas where the holder is onshore, offshore or in immigration clearance.

A permanent visa can only be cancelled under section 116(1) while the visa holder is offshore.

Grounds specified in section 116(1AA), (1AB) and (1AC) of the *Migration Act* may be used to cancel both temporary and permanent visas where the holder is onshore, offshore, and in immigration clearance. See attached an excerpt of section 116 of the *Migration Act* and the related *Migration Regulations 1994* for prescribed cancellation grounds.

The Minister or delegate may exercise the relevant specific cancellation power to cancel a visa under section 116 of the *Migration Act*.

MIGRATION ACT 1958 - SECTION 116

Power to cancel

(1) Subject to [subsections](#) (2) and (3), the Minister may cancel a visa if he or she is satisfied that:

(a) the decision to grant the visa was based, wholly or partly, on a particular fact or circumstance that is no longer the case or that no longer exists; or

(aa) the decision to grant the visa was based, wholly or partly, on the existence of a particular fact or circumstance, and that fact or circumstance did not exist; or

(b) its holder has not complied with a condition of the visa; or

(c) another person required to comply with a condition of the visa has not complied with that condition; or

(d) if its holder has not entered Australia or has so entered but has not been immigration cleared--it would be liable to be cancelled under Subdivision C (incorrect information given by holder) if its holder had so entered and been immigration cleared; or

(e) the presence of its holder in Australia is or may be, or would or might be, a risk to:

(i) the health, safety or good order of the Australian community or a segment of the Australian community; or

(ii) the health or safety of an individual or individuals; or

(f) the visa should not have been granted because the application for it or its grant was in contravention of this Act or of another law of the Commonwealth; or

(fa) in the case of a student visa:

(i) its holder is not, or is likely not to be, a genuine student; or

(ii) its holder has engaged, is engaging, or is likely to engage, while in Australia, in conduct (including omissions) not contemplated by the visa; or

(g) a prescribed ground for cancelling a visa applies to the holder.

(1AA) Subject to [subsections](#) (2) and (3), the Minister may cancel a visa if he or she is not satisfied as to the visa holder's identity.

(1AB) Subject to [subsections](#) (2) and (3), the Minister may cancel a visa (the *current visa*) if he or she is satisfied that:

(a) incorrect information was given, by or on behalf of the person who holds the current visa, to:

- (i) an officer; or
- (ii) an authorised system; or
- (iii) the Minister; or
- (iv) any other person, or a [tribunal](#), performing a function or purpose under this Act; or
- (v) any other person or body performing a function or purpose in an administrative process that occurred or occurs in relation to this Act; and

(b) the incorrect information was taken into account in, or in connection with, making:

(i) a decision that enabled the person to make a valid application for a visa; or

(ii) a decision to grant a visa to the person; and

(c) the giving of the incorrect information is not covered by Subdivision C.

This [subsection](#) applies whenever the incorrect information was given and whether the visa referred to in subparagraph (b)(i) or (ii) is the current visa or a previous visa that the person held.

(1AC) Subject to [subsections](#) (2) and (3), the Minister may cancel a visa (the *current visa*) if he or she is satisfied that:

(a) a benefit was asked for or received by, or on behalf of, the person (the *visa holder*) who holds the current visa from another person in return for the occurrence of a sponsorship-related event; or

(b) a benefit was offered or provided by, or on behalf of, the person (the *visa holder*) who holds the current visa to another person in return for the occurrence of a sponsorship-related event.

(1AD) [Subsection](#) (1AC) applies:

(a) whether or not the visa holder held the current visa or any previous visa at the time the benefit was asked for, received, offered or provided; and

(b) whether or not the sponsorship-related event relates to the current visa or any previous visa that the visa holder held; and

(c) whether or not the sponsorship-related event occurred.

(1A) The regulations may prescribe matters to which the Minister may have regard in determining whether he or she is satisfied as mentioned in [paragraph](#) (1)(fa). Such regulations do not limit the matters to which the Minister may have regard for that purpose.

(2) The Minister is not to cancel a visa under [subsection](#) (1), (1AA), (1AB) or (1AC) if there exist prescribed circumstances in which a visa is not to be cancelled.

(3) If the Minister may cancel a visa under [subsection](#) (1), (1AA), (1AB) or (1AC), the Minister must do so if there exist prescribed circumstances in which a visa must be cancelled.

(4) In this section:

"benefit " has a meaning affected by section 245AQ.

"sponsorship-related event " has the meaning given by section 245AQ.

Migration Regulations 1994 - Regulation 2.43

Grounds for cancellation of visa (Act, s 116)

(1) For the purposes of paragraph 116(1)(g) of the Act (which deals with circumstances in which the Minister may cancel a visa), the grounds prescribed are the following:

(a) that the Foreign Minister has personally determined that:

(i) in the case of a visa other than a relevant visa—the holder of the visa is a person whose presence in Australia:

(A) is, or would be, contrary to Australia's foreign policy interests;

or

(B) may be directly or indirectly associated with the proliferation of weapons of mass destruction; or

(ii) in the case of a relevant visa—the holder of the visa is a person whose presence in Australia may be directly or indirectly associated with the proliferation of weapons of mass destruction;

Note: A relevant visa is explained in subregulation (3).

(aa) in the case of a person who is the holder of a visa other than a relevant visa, the person:

(i) is declared under paragraph 6(1)(b) or (2)(b) of the Autonomous Sanctions Regulations 2011 for the purpose of preventing the person from travelling to, entering or remaining in Australia; and

(ii) is not a person for whom the Foreign Minister has waived the operation of the declaration in accordance with regulation 19 of the Autonomous Sanctions Regulations 2011;

(b) that the holder of the visa has been assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security, within the meaning of section 4 of the Australian Security Intelligence Organisation Act 1979;

(e) in the case of:

(i) the holder of an Electronic Travel Authority (Class UD) visa who is under 18; or

(iii) the holder of a Tourist (Class TR) visa, that was applied for using form 601E, who is under 18; or

(iv) the holder of a Visitor (Class TV) visa who is under 18; or

(iva) the holder of a Subclass 600 (Visitor) visa in the Tourist stream, that was applied for using form 1419 (Internet), who is under 18;

that either:

(v) both of the following apply:

(A) the law of the visa holder's home country did not permit the removal of the visa holder;

(B) at least 1 of the persons who could lawfully determine where the additional applicant is to live did not consent to the grant of the visa; or

(vi) the grant of the visa was inconsistent with any Australian child order in force in relation to the visa holder;

(ea) in the case of a Subclass 601 (Electronic Travel Authority) visa—that, despite the grant of the visa, the Minister is satisfied that the visa holder:

(i) did not have, at the time of the grant of the visa, an intention only to stay in, or visit, Australia temporarily for the tourism or business purposes for which the visa was granted; or

(ii) has ceased to have that intention;

(f) in the case of:

(i) the holder of an Electronic Travel Authority (Class UD) visa who is under 18 and is not accompanied by his or her parent or guardian; or

(iii) the holder of a Tourist (Class TR) visa, that was applied for using a form 601E, who:

(A) is under 18; and

(B) is not accompanied by his or her parent or guardian; or

(iv) the holder of a Visitor (Class TV) visa who is under 18 and is not accompanied by his or her parent or guardian; or

(v) the holder of a Subclass 600 (Visitor) visa in the Tourist stream, that was applied for using form 1419 (Internet), who is under 18 and is not accompanied by his or her parent or guardian;

that the holder of that visa does not have adequate funds, or adequate arrangements have not been made, for the holder's maintenance, support and general welfare during the holder's proposed visit in Australia;

(g) in the case of a temporary visa held by a person other than a visa holder mentioned in paragraph (h)—that the visa holder asks the Minister, in writing, to cancel the visa;

(h) in the case of a temporary visa held by a person who is under the age of 18 years and is not a spouse, a former spouse or engaged to be married—that:

(i) a person who is at least 18 years of age, and who can lawfully determine where the visa holder is to live, asks the Minister, in writing, to cancel the visa; and

(ii) the Minister is satisfied that there is no compelling reason to believe that the cancellation of the visa would not be in the best interests of the visa holder;

(i) in the case of the holder of:

(i) a Subclass 456 (Business (Short Stay)) visa; or

(ia) a Subclass 459 (Sponsored Business Visitor (Short Stay)) visa; or

(ib) a Subclass 600 (Visitor) visa in the Business Visitor stream; or

(ii) a Subclass 956 (Electronic Travel Authority (Business Entrant—Long Validity)) visa; or

(iii) a Subclass 977 (Electronic Travel Authority (Business Entrant—Short Validity)) visa—

that, despite the grant of the visa, the Minister is satisfied that the visa holder did not have, at the time of the grant of the visa, or has ceased to have, an intention only to stay in, or visit, Australia temporarily for business purposes;

(ia) in the case of a holder of:

(i) a Subclass 400 (Temporary Work (Short Stay Specialist)) visa; or

(ia) a Subclass 401 (Temporary Work (Long Stay Activity)) visa; or

(ib) a Subclass 402 (Training and Research) visa; or

(ic) a Subclass 403 (Temporary Work (International Relations)) visa; or

(id) a Subclass 407 (Training) visa; or

(ie) a Subclass 408 (Temporary Activity) visa; or

(iii) a Subclass 416 (Special Program) visa; or

(v) a Subclass 420 (Entertainment) visa; or

(xi) a Subclass 488 (Superyacht Crew) visa;

that the grounds in subregulation (1A) are met;

(j) in the case of the holder of:

(i) a Subclass 600 (Visitor) visa that is not in the Business Visitor stream or the Frequent Traveller stream; or

(ii) a Subclass 676 (Tourist) visa; or

(iii) a Subclass 679 (Sponsored Family Visitor) visa;

that, despite the grant of the visa, the Minister is satisfied that the visa holder did not have, at the time of the grant of the visa, or has ceased to have, an intention only to visit, or remain in, Australia as a visitor temporarily for the purpose of visiting an Australian citizen, or Australian permanent resident, who is a parent, spouse, de facto partner, child, brother or sister of the visa holder or for another purpose, other than a purpose related to business or medical treatment;

(ja) in the case of the holder of a Subclass 600 (Visitor) visa in the Frequent Traveller stream—that, despite the grant of the visa, the Minister is satisfied that the visa holder did not have, at the time of the grant of the visa, or has ceased to have, an intention only to visit, or remain in, Australia as a tourist or to engage in a business visitor activity;

(k) in the case of the holder of a Subclass 976 (Electronic Travel Authority (Visitor)) visa—that, despite the grant of the visa, the Minister is satisfied that the visa holder did not have, at the time of the grant of the visa, or has ceased to have, an intention only to visit Australia temporarily for tourism purposes;

(ka) in the case of a holder of a Subclass 651 (eVisitor) visa—that, despite the grant of the visa, the Minister is satisfied that the visa holder did not have, at the time of the grant of the visa, or has ceased to have, an intention only to stay in, or visit, Australia temporarily for the tourism or business purposes for which the visa was granted;

(kb) in the case of the holder of a Subclass 457 (Temporary Work (Skilled)) visa that was granted on the basis that the applicant met the requirements of subregulation 457.223(4)—that, despite the grant of the visa, the Minister is satisfied that:

(i) the holder did not have a genuine intention to perform the occupation mentioned in paragraph 457.223(4)(d) at the time of grant of the visa; or

(ii) the holder has ceased to have a genuine intention to perform that occupation; or

(iii) the position associated with the nominated occupation is not genuine;

(l) in the case of the holder of a Subclass 457 (Temporary Work (Skilled)) visa who is a primary sponsored person in relation to a person who is, or was, a standard business sponsor or party to a labour agreement (the sponsor)—that:

(i) the sponsor has not complied, or is not complying, with the undertaking given by the business sponsor in accordance with approved form 1067, 1196 or 1196 (Internet); or

(ii) the sponsor has given false or misleading information to Immigration or the Tribunal; or

(iii) the sponsor has failed to satisfy a sponsorship obligation; or

(iv) the sponsor has been cancelled or barred under section 140M of the Act; or

(v) the labour agreement has been terminated, has been suspended or has ceased;

(la) in the case of the holder of a Subclass 457 (Temporary Work (Skilled)) visa who was granted the visa on the basis of a nomination of an activity under regulation 1.20GA as in force immediately before 14 September 2009—that the holder is living or working within an area specified by the Minister in an instrument in writing for this paragraph;

(lc) in the case of a holder of:

(i) a Subclass 401 (Temporary Work (Long Stay Activity)) visa; or

(ia) a Subclass 402 (Training and Research) visa; or

(ib) a Subclass 407 (Training) visa; or

(ic) a Subclass 408 (Temporary Activity) visa; or

(iii) a Subclass 416 (Special Program) visa; or

(xi) a Subclass 488 (Superyacht Crew) visa;

who is a primary sponsored person in relation to a person who is or was an approved sponsor—that 1 of the grounds specified in subregulation (1B) is met;

(ld) in the case of a holder of:

(i) a Subclass 401 (Temporary Work (Long Stay Activity)) visa; or

(ia) a Subclass 402 (Training and Research) visa; or

(ib) a Subclass 407 (Training) visa; or

(iii) a Subclass 420 (Entertainment) visa; or

(ix) a Subclass 457 (Temporary Work (Skilled)) visa;

who is a secondary sponsored person in relation to a person who is or was an approved sponsor—that the person who is or was an approved sponsor of the primary sponsored person to whom the secondary sponsored person is related has not listed the secondary sponsored person in the latest nomination in which the primary sponsored person is identified;

(le) in the case of a holder of:

(i) a Subclass 401 (Temporary Work (Long Stay Activity)) visa; or

(ia) a Subclass 408 (Temporary Activity) visa granted on the basis that the primary sponsored person satisfied the criteria in clause 408.223 (religious worker) or 408.224 (domestic worker) of Schedule 2; or

(iv) a Subclass 457 (Temporary Work (Skilled)) visa;

who is a primary sponsored person or a secondary sponsored person in relation to a person who is or was an approved sponsor—that the person who is or was an approved sponsor has paid the return travel costs of the holder in accordance with the sponsorship obligation mentioned in regulation 2.80 or 2.80A;

(m) that the Minister reasonably suspects that the holder of the visa has committed an offence under section 232A, 233, 233A, 234 or 236 of the Act;

(n) that:

(i) a certificate is in force under paragraph 271(1)(l) of the Act, stating that a computer program was not functioning correctly; and

(ii) both of the following apply:

(A) the visa was granted at the time, or during the period, that is specified in the certificate;

(B) the grant of the visa is an outcome from the operation of that program, under an arrangement made under subsection 495A(1) of the Act, that is specified in the certificate;

(o) that the Minister reasonably suspects that the visa has been obtained as a result of the fraudulent conduct of any person;

(oa) in the case of the holder of a temporary visa (other than a Subclass 050 (Bridging (General)) visa, a Subclass 051 (Bridging (Protection Visa Applicant)) visa or a Subclass 444 (Special Category) visa)—that the Minister is satisfied that the holder has been convicted of an offence against a law of the Commonwealth, a State or Territory (whether or not the holder held the visa at the time of the conviction and regardless of the penalty imposed (if any));

(ob) in the case of the holder of a temporary visa (other than a Subclass 050 (Bridging (General)) visa, a Subclass 051 (Bridging (Protection Visa Applicant)) visa or a

Subclass 444 (Special Category) visa)—that the Minister is satisfied that the holder is the subject of a notice (however described) issued by Interpol for the purpose of providing a warning or intelligence that:

(i) the holder has committed an offence against a law of another country and is likely to commit a similar offence; or

(ii) the holder is a serious and immediate threat to public safety;

(p) in the case of the holder of a Subclass 050 (Bridging (General)) visa or a Subclass 051 (Bridging (Protection Visa Applicant)) visa—that the Minister is satisfied that the holder:

(i) has been convicted of an offence against a law of the Commonwealth, a State, a Territory or another country (other than if the conviction resulted in the holder's last substantive visa being cancelled under paragraph (oa)); or

(ii) has been charged with an offence against a law of the Commonwealth, a State, a Territory or another country; or

(iii) is the subject of a notice (however described) issued by Interpol for the purposes of locating the holder or arresting the holder; or

(iv) is the subject of a notice (however described) issued by Interpol for the purpose of providing either or both of a warning or intelligence that the holder:

(A) has committed an offence against a law of another country; and

(B) is likely to commit a similar offence; or

(v) is the subject of a notice (however described) issued by Interpol for the purpose of providing a warning that the holder is a serious and immediate threat to public safety;

(q) in the case of the holder of a Subclass 050 (Bridging (General)) visa or a Subclass 051 (Bridging (Protection Visa Applicant)) visa—that:

(i) an agency responsible for the regulation of law enforcement or security in Australia has advised the Minister that the holder is under investigation by that agency; and

(ii) the head of that agency has advised the Minister that the holder should not hold a Subclass 050 (Bridging (General)) visa or a Subclass 051 (Bridging (Protection Visa Applicant)) visa;

(r) in the case of the holder of a Subclass 771 (Transit) visa—that, despite the grant of the visa, the Minister reasonably suspects that the holder of the visa:

(i) did not have, at the time of the grant of the visa, an intention to transit Australia; or

(ii) has ceased to have that intention.

(1A) For paragraph (1)(ia), the grounds are that, despite the grant of the visa, the Minister is satisfied that the visa holder did not have at the time of grant of the visa, or has ceased to have, a genuine intention to stay temporarily in Australia to carry out the work or activity in relation to which:

(a) the visa holder's visa was granted; or

(b) if the visa holder is identified in a nomination after the visa is granted—the visa holder was identified in a nomination.

(1B) For paragraph (1)(lc), the grounds are the following:

(a) the approval of the person as a sponsor has been cancelled, or the approved sponsor has been barred, under section 140M of the Act;

(c) if the primary sponsored person is required to be identified in a nomination—the criteria for approval of the latest nomination in which the primary sponsored person is identified are no longer met;

(d) the person who is or was an approved sponsor has failed to satisfy a sponsorship obligation.

(1C) For subsection 116(1A) of the Act, the Minister may have regard to the matter mentioned in subregulation (1D) in determining whether he or she is satisfied as mentioned in paragraph 116(1)(fa) of the Act.

(1D) For subregulation (1C), the matter is that participation in a course of study by the holder of a student visa has been deferred or temporarily suspended by the provider of the course of study:

(a) because of the conduct of the holder; or

(b) because of the circumstances of the holder, other than compassionate or compelling circumstances; or

(c) because of compassionate or compelling circumstances of the holder, if the Minister is satisfied that the circumstances have ceased to exist; or

(d) on the basis of evidence or a document given to the provider about the holder's circumstances, if the Minister is satisfied that the evidence or document is fraudulent or misrepresents the holder's circumstances.

(2) For subsection 116(3) of the Act, the circumstances in which the Minister must cancel a visa are:

(a) in the case of a visa other than a relevant visa—each of the circumstances comprising the grounds set out in:

(i) sub-subparagraphs (1)(a)(i)(A) and (B); and

(ii) paragraph (1)(aa); and

(iii) paragraph (1)(b); and

(aa) in the case of a relevant visa—the circumstance comprising the grounds set out in subparagraph (1)(a)(ii).

(3) In this regulation:

relevant visa means a visa of any of the following subclasses:

(aa) Subclass 050;

(aaa) Subclass 070;

(a) Subclass 200;

(b) Subclass 201;

(c) Subclass 202;

(d) Subclass 203;

(e) Subclass 204;

(g) Subclass 449;

(i) Subclass 785, including a Subclass 785 visa granted before 2 December 2013;

(j) Subclass 786;

(k) Subclass 866.

QUESTION TAKEN ON NOTICE

Parliamentary Inquiry : 12 September 2018

HOME AFFAIRS PORTFOLIO

**(MA/002) – Joint Standing Committee on Migration – 116 of the
Migration Act 1958 - Revocation process for foreign nationals who have had
their visa cancelled or refused under section 116 of the *Migration Act 1958* -**

Asked:

Can the Department please provide information on the revocation process for foreign nationals who have had their visa cancelled or refused under section 116 of the Migration Act 1958?

Answer:

There is no legislative authority under section 116 of the *Migration Act 1958* (the Act) to refuse a visa. Section 116 specifically provides for the power to cancel a visa.

A non-citizen who has had their visa cancelled under section 116 of the Act does not have the ability to seek revocation of the cancellation decision as there is no legislative authority that allows for revocation. Non-citizens who are onshore can make an application for merits review of the cancellation decision to the Administrative Appeals Tribunal.

QUESTION TAKEN ON NOTICE

Parliamentary Inquiry : 12 September 2018

HOME AFFAIRS PORTFOLIO

**(MA/003) – Joint Standing Committee on Migration - 116 of the
Migration Act 1958 issued a notice of intention to cancel**

Asked:

Are foreign nationals who have had their visa cancelled or refused under section 116 of the *Migration Act 1958* issued a notice of intention to cancel?

Answer:

There is no provision within section 116 of the *Migration Act 1958* (the Act) to refuse a visa application.

Before cancelling a visa under section 116 of the Act, the delegate must, in accordance with section 119 of the Act, notify the visa holder (whether they are inside or outside Australia) of the delegate's intention to consider cancelling the visa and the grounds for the proposed cancellation.

The purpose of issuing a section 119 notice to the visa holder is to:

1. to provide the visa holder with an opportunity to respond to the grounds for cancelling the visa as provided by the delegate; and
2. to enable the delegate to cancel the visa if, after considering the visa holder's response (or lack of response), they decide that there are grounds for cancelling the visa.

The section 119 notice must invite the visa holder to show the grounds do not exist or there is a real reason the visa should not be cancelled.

MIGRATION ACT 1958 - SECTION 119

Notice of proposed cancellation

(1) Subject to Subdivision F (non-citizens outside Australia), if the Minister is considering cancelling a visa, whether its holder is in or outside Australia, under section 116, the Minister must notify the holder that there appear to be grounds for cancelling it and:

(a) give particulars of those grounds and of the information (not being non-disclosable information) because of which the grounds appear to exist; and

(b) invite the holder to show within a specified time that:

(i) those grounds do not exist; or

(ii) there is a reason why it should not be cancelled.

(2) The holder is to be notified in the prescribed way or, if there is no prescribed way, a way that the Minister considers to be appropriate.

(3) The way of notifying the holder, whether prescribed or considered appropriate, may, without limiting the generality of [subsection \(2\)](#), be orally.

(4) The other provisions of this Subdivision do not apply to a cancellation:

(a) under a provision other than section 116; or

(b) to which Subdivision F applies.

Migration Regulations 1994 – Regulation 2.55

Giving of documents relating to proposed cancellation, cancellation or revocation of cancellation

(1) This regulation applies to:

(a) the giving of a document to a holder or former holder of a visa relating to the proposed cancellation or the cancellation of a visa under the Act; and

(ab) the giving of a document under subsection 133E(2) of the Act relating to a decision to cancel a visa under subsection 133A(1) or 133C(1) of the Act; and

(b) the giving of a document under subsection 501G(3) of the Act relating to a decision to:

(i) cancel a visa under section 501, 501A, 501B, 501BA or 501F of the Act; or

(ii) not revoke a decision to cancel a visa under section 501CA of the Act; and

(c) the giving of a document to a holder or former holder of a visa relating to the revocation of the cancellation of a visa under the Act.

(2) However, this regulation does not apply in relation to:

(a) a notice to which section 137J of the Act relates; or

(b) a person who is in immigration detention.

Note: See regulation 5.02.

(3) Subject to subregulation (3A), for a document mentioned in paragraph (1)(a) or (c), the Minister must give the document in one of the following ways:

(a) by handing it to the person personally;

(b) by handing it to another person who:

(i) is at the person's last residential or business address known to the Minister; and

(ii) appears to live there (in the case of a residential address) or work there (in the case of a business address); and

(iii) appears to be at least 16 years of age;

(c) by dating it, and then dispatching it:

(i) within 3 working days (in the place of dispatch) of the date of the document; and

(ii) by prepaid post or by other prepaid means;

to the person's last residential address, business address or post box address known to the Minister;

(d) by transmitting the document by:

(i) fax; or

(ii) email; or

(iii) other electronic means;

to the last fax number, email address or other electronic address known to the Minister.

Note: Subregulation (3A) deals with giving documents mentioned in paragraphs (1)(a) and (c) to minors.

(3A) If the person is a minor, the Minister must give a document mentioned in paragraph (1)(a) or (c) in 1 of the following ways:

(a) by handing it to the minor personally;

(b) by handing it to another person who:

(i) is at the last residential or business address for the minor that is known to the Minister; and

(ii) appears to live there (in the case of a residential address) or work there (in the case of a business address); and

(iii) appears to be at least 16 years of age;

(c) by dating and then dispatching the document:

(i) within 3 working days (in the place of dispatch) of the date of the document; and

(ii) by prepaid post or by other prepaid means;

to the minor's last residential address, business address or post box address known to the Minister;

(d) by transmitting the document by:

(i) fax; or

(ii) email; or

(iii) other electronic means;

to the minor's last fax number, email address or other electronic address known to the Minister;

(e) by dating and then dispatching the document:

(i) within 3 working days (in the place of dispatch) of the date of the document; and

(ii) by prepaid post or by other prepaid means;

to a carer of the minor at the last residential address, business address or post box address for the carer of the minor that is known to the Minister;

(f) by transmitting the document by:

(i) fax; or

(ii) email; or

(iii) other electronic means;

to a carer of the minor at the last fax number, email address or other electronic address for the carer of the minor that is known to the Minister.

(4) Subject to subregulation (4A), for a document mentioned in paragraph (1)(ab) or (b):

(a) if the person has held the visa for less than 1 year when the document is to be given, the Minister must give the document in one of the ways mentioned in subregulation (3); and

(b) if the person has held the visa for at least 1 year when the document is to be given:

(i) Immigration must try to find the person; and

(ii) the Minister must give the document in one of the ways mentioned in subregulation (3).

Note: Subregulation (4A) deals with giving documents mentioned in paragraph (1)(b) to minors.

(4A) If the person is a minor:

(a) the Minister must give a document mentioned in paragraph (1)(ab) or (b) in 1 of the ways mentioned in subregulation (3A); and

(b) if the minor has held the visa for at least 1 year when the document is to be given, Immigration must try to find the minor.

(4B) If the Minister gives a document to a carer of the minor in accordance with this regulation, the Minister is taken to have given the document to the minor.

(4C) Nothing in subregulation (4B) prevents the Minister giving the minor a copy of the document.

(5) If the Minister gives a document to a person by handing it to the person, the person is taken to have received the document when it is handed to the person.

(6) If the Minister gives a document to a person by handing it to another person at a residential or business address, the person is taken to have received the document when it is handed to the other person.

(7) If the Minister gives a document to a person by dispatching it by prepaid post or by other prepaid means, the person is taken to have received the document:

(a) if the document was dispatched from a place in Australia to an address in Australia—7 working days (in the place of that address) after the date of the document; or

(b) in any other case—21 days after the date of the document.

(8) If the Minister gives a document to a person by transmitting it by fax, email or other electronic means, the person is taken to have received the document at the end of the day on which the document is transmitted.

(9) If:

(a) the Minister purports to give a document to a person by a method specified in this regulation but makes an error in doing so; and

(b) the person nonetheless receives the document or a copy of the document;

the Minister is taken to have given the document to the person and the person is taken to have received the document:

(c) at the time specified by this regulation for that method; or

(d) if the person can show that he or she received the document at a later time—at that later time.

QUESTION TAKEN ON NOTICE

Parliamentary Inquiry : 12 September 2018

HOME AFFAIRS PORTFOLIO

**(MA/004) – Joint Standing Committee on Migration – 116 of the
Migration Act 1958 - Decision makers for section 116 of the *Migration Act 1958***

Asked:

Who are the decision makers for section 116 of the Migration Act 1958?

Answer:

Only Portfolio Ministers and delegated departmental officers may exercise the power to cancel a visa under s116 of the *Migration Act 1958* (the Act).

Subsection 496(1) of the Act and Regulation 1.16 of the *Migration Regulations* (the Regulations) allow the Minister to delegate his powers under the Act and the Regulations. When the Minister's power is delegated, the power exercised by the delegate is taken to have been exercised by the Minister.

The delegated power to make cancellation decisions under section 116 of the Act is delegated under:

1. *Minister – Delegations and Authorisations Instrument No. 4 of 2018* (*Immigration and Citizenship Services Group*) (MHA No. 4 of 2018) delegated to APS 1 to SES 3 officers; and
2. *Australian Border Force (Minister) Delegations and Authorisations 2018* (ABF(M) No.1 of 2018) delegated to APS 1 to SES 3 officers.

QUESTION TAKEN ON NOTICE

Parliamentary Inquiry : 12 September 2018

HOME AFFAIRS PORTFOLIO

(MA/005) – Joint Standing Committee on Migration – 116 of the *Migration Act 1958* - Powers or ministerial directions are considered by the decision maker when exercising their discretion to refuse or cancel a visa under section 116 of the *Migration Act 1958*

Asked:

What discretionary consideration powers or ministerial directions are considered by the decision maker when exercising their discretion to refuse or cancel a visa under section 116 of the Migration Act 1958?

Answer:

Section 116 of the *Migration Act 1958* (the Act) sets out certain situation-specific grounds for cancelling visas. Depending on the circumstances, the cancellation power is either mandatory or discretionary, and can be exercised only after certain legislated procedural requirements have been met.

When considering whether to cancel a visa under section 116 of the Act, delegates should consider the following matters set out in departmental policy:

- The purpose of the visa holder's travel to and stay in Australia.
- The extent of compliance with visa conditions.
- The degree of hardship that may be caused to the visa holder and any family members.
- The circumstances in which the ground for cancellation arose.
- The visa holder's past and present behaviour towards the department (for example, whether they have been truthful and cooperative in their dealings with the department).
- Whether there are persons in Australia whose visas would, or may, be cancelled under section 140 of the Act.
- Whether there are mandatory legal consequences to a cancellation decision.
- Whether Australia has obligations under relevant international agreements that would be breached as a result of the visa cancellation.
- Any other relevant matters.

Decision-makers are guided by the Act, the *Migration Regulations 1994*, the policy guidance contained in *Procedural Instruction: General visa cancellation powers (s109, s116, s128, s134B and s140)*, and *Ministerial Direction 63* (regarding the cancellation of Bridging visas).

QUESTION TAKEN ON NOTICE

Parliamentary Inquiry : 12 September 2018

HOME AFFAIRS PORTFOLIO

**(MA/006) – Joint Standing Committee on Migration – 116 of the
Migration Act 1958 - Review process for foreign nationals who have had their
visa cancelled or refused under section 116 of the *Migration Act 1958***

Asked:

Can the Department please provide information on the review process for foreign nationals who have had their visa cancelled or refused under section 116 of the Migration Act 1958?

Answer:

There is no legislative authority under section 116 of the *Migration Act 1958* (the Act) to refuse a visa.

Where a non-citizen's visa has been cancelled under section 116 of the Act (and they are onshore) they may make an application to the Administrative Appeals Tribunal for merits review of the decision made by the Department.

Where a non-citizen's visa has been cancelled under section 116 of the Act and they are offshore, they cannot apply to the Administrative Appeals Tribunal for merits review of the decision. However, the non-citizen may seek judicial review.

QUESTION TAKEN ON NOTICE

Parliamentary Inquiry : 12 September 2018

HOME AFFAIRS PORTFOLIO

**(MA/007) – Joint Standing Committee on Migration – 116 of the
Migration Act 1958 - Timeframes on which a valid review application may be
lodged with either the Department or the Administrative Appeals Tribunal**

Asked:

Are there timeframes on which a valid review application may be lodged with either the Department or the Administrative Appeals Tribunal?

Answer:

A non-citizen whose visa is cancelled onshore under section 116 of *Migration Act 1958* has seven working days from the date they are taken to receive notification of decision to apply to the Administrative Appeals Tribunal (not the Department) for review of the cancellation decision.

QUESTION TAKEN ON NOTICE

Parliamentary Inquiry : 12 September 2018

HOME AFFAIRS PORTFOLIO

(MA/008) – Joint Standing Committee on Migration – 116 of the *Migration Act 1958* - Statistics

Asked:

Can the Department please provide the following statistics:

- Administrative Appeals Tribunal review outcomes for section 116 decisions by financial year for the last 5 years;
- all section 116 cancellations and refusals over the past 5 years by financial year;
- section 116 cancellations over the past 5 years by financial year grouped by primary reason;
- section 116 cancellations over the past 5 years grouped by nationality and by financial year;
- revocation outcomes for section 116 cancellations over the past 12 months?

Answer:

- The Department does not collect this data in a way that would allow a timely response.

b.

s116 Cancellations by Financial Year*					
2013-2014	2014-2015	2015-2016	2016-2017	2017-2018	Total
6356	7204	7002	10375	8513	39450

Figures for 2013-14 to 2016-17 were extracted from Departmental systems on 7 July 2017. Figures for 2017-18 were extracted from Departmental systems on 12 July 2018. As data has been drawn from a live systems environment, the figures provided may differ slightly in previous or future reporting.

*A visa may be recorded as cancelled more than once. An example of this is when a visa is cancelled, the cancellation is subsequently set aside, and then the visa is cancelled again.

- A cancellation may be set aside for a number of reasons, including legal proceedings, and administrative or jurisdictional errors.

- The Department is unable to provide the response required without an unreasonable diversion of resources.

d.

s116 Cancellations by Financial Year and Citizenship*					
Country (Top 10 countries identified)	2013- 2014	2014- 2015	2015- 2016	2016- 2017	2017- 2018
China	836	697	792	1464	2217
Malaysia	1059	1282	1082	2227	1532
India	363	799	597	1177	717
Vietnam	505	603	730	1029	396
United Kingdom	314	383	396	342	275
Thailand	230	183	228	424	263
New Zealand	14	12	64	126	254
South Korea	325	311	203	236	201
Pakistan	136	127	172	307	194
Taiwan	206	318	390	206	159

Figures for 2013-14 to 2016-17 were extracted from Departmental systems on 7 July 2017. Figures for 2017-18 were extracted from Departmental systems on 12 July 2018. As data has been drawn from a live systems environment, the figures provided may differ slightly in previous or future reporting.

*A visa may be recorded as cancelled more than once. An example of this is when a visa is cancelled, the cancellation is subsequently set aside, and then the visa is cancelled again.

- A cancellation may be set aside for a number of reasons, including legal proceedings, and administrative or jurisdictional errors.

e. There is no legislative authority in the *Migration Act 1958* that allows for the revocation of a section 116 cancellation decision.