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MIGRATION LAW IMPACTS OF INFRINGEMENTS AND MINOR CRIMINAL MATTERS FOR NON-CITIZEN CLIENTS¹ *

PURPOSE

This fact sheet is designed for lawyers, financial counsellors and others assisting clients who do not hold Australian citizenship, especially clients on a Bridging visa E (BVE). Asylum seekers who arrived in Australia by boat without a visa will in most cases be on BVEs if they have been released from immigration detention.

This fact sheet outlines the potential migration law consequences for non-citizen clients who:

- have been charged with minor criminal offences; or
- have received infringement notices, particularly those who are considering:
 - applying to the enforcement agency for internal review;² or
 - electing to have their infringement offence heard and determined in Magistrates' Court;³ or
 - applying for enforcement review⁴ through the Infringements Court.

This fact sheet contains migration information only and is not intended to be read as providing migration advice. Migration advice should only be provided by registered migration agents.

INFRINGEMENTS AND FINDINGS OF GUILT

Most prosecutions for criminal offences begin by the police laying charges in the Magistrates' Court. Persons may have findings of guilt recorded after pleading guilty or being found guilty following a contested hearing or jury trial.

The infringements system applies to minor criminal offences, such as traffic offences and public transport ticketing offences. Rather than laying a charge in court, an enforcement agency serves an infringement notice to the person, which requires the person to pay a fine. When infringement notices are paid (including via a payment plan or payment order), they do not result in findings of guilt recorded by a court.

¹ Current as at 20 February 2018.

* Thank you also to the Victorian Bar for their assistance with this fact sheet.

² Section 22 Infringements Act 2006.

³ Section 16 Infringements Act 2006.

⁴ Section 32 Fines Reform Act 2014.

Infringement offences have the potential to result in migration consequences. A finding of guilt by a court for the offence may increase that migration risk by reason of making the matter more serious and by increasing the chances of it coming to the attention of the Department of Home Affairs (the Department).

Infringement offences may result in a finding of guilt being recorded by a court where:

- The person elects to have the offences heard and determined in the Magistrates' Court,⁵ and is then found guilty by the court; or
- The enforcement agency elects to have the offences heard and determined in the Magistrates' Court⁶ and the court then finds the person guilty, which may occur as a result of:
 - The person applying to the enforcement agency for internal review;⁷
 - The person applying to the Director, Fines Victoria (Director) for enforcement review, the Director cancels the enforcement of the infringement fine and refers the matter back to the enforcement agency,⁸
 - The person applying to the Family Violence Scheme and the Director referring the matter back to the enforcement agency;⁹
 - The enforcement agency registers the infringement fine with the Director, the Director determines that enforcement of the infringement fine is not appropriate and refers the matter back to the enforcement agency;¹⁰
- The infringement is an automatic conviction infringement for the more serious offences of drink driving, drug driving and excessive speeding which take effect as a conviction 28 days after they are issued.¹¹

Non-citizen clients considering these options should be informed of the potential migration consequences of being found guilty of criminal offences by a court.

Orders made at penalty enforcement warrant hearings under section 165 of the *Fines Reform Act* (after warrants are executed and a person is arrested) do not result in findings of guilt.

IMMIGRATION STATUS AND IMPACT OF INFRINGEMENTS AND MINOR OFFENCES

To determine the potential migration consequences of infringements or charges for non-citizen clients, it is important to ascertain what kind of visa the client holds.

Applicants for citizenship

Applicants for citizenship hold permanent residency. The *Australian Citizenship Act* provides that a person must be of good character for the conferral of Australian citizenship. The term 'good character' is not defined under the Citizenship Act, but policy suggests it is taken to have a broad meaning, including consideration of a person's "enduring moral character" as an indication of whether they are likely to

⁵ Section 16 Infringements Act 2006.

⁶ Section 17 Infringements Act 2006.

⁷ Section 22 Infringements Act 2006.

⁸ Sections 32 to 38 Fines Reform Act 2014.

⁹ Sections 10X to 10Y Fines Reform Act 2014.

¹⁰ Sections 16 to 21 Fines Reform Act 2014.

¹¹ Section 89 Road Safety Act 1986.

uphold and obey the laws of Australia. A person's criminal and general conduct will be taken into account in the assessment of this criterion.

In determining an application for citizenship where the applicant has committed offences, decision makers will consider the seriousness of an offence and the corresponding punishment imposed, as well as other factors such as harm caused to the community. Therefore minor offences such as shoplifting or drink driving offences resulting in findings of guilt may, depending on the circumstances, result in refusal of an application for citizenship. However, minor criminal matters that originated as infringements, such as speeding or toll offences, are unlikely to impact on an application for citizenship unless they are repeat offences which may be considered to amount to a pattern of criminal behaviour.

Infringements that did not result in findings of guilt are very unlikely to impact on a person's application for citizenship.

All visa holders (non-citizens) – Character test applies

All visa holders (that is, all non-citizens) can have their visas cancelled or their visa applications refused for a variety of reasons, including if they are found to fail the character test.¹²

A person can fail the character test in various ways, including:

- Having a 'substantial criminal record',¹³ which includes someone who has been sentenced to imprisonment for 12 months or more.¹⁴ Minor offences and infringements will not lead to a 'substantial criminal record.'
- Being 'not of good character' having regard to their criminal and general conduct, both past and present.¹⁵ It is possible, although unlikely, for a pattern of minor offending and infringements to result in cancellation of a visa on the basis that the person is 'not of good character'.

Temporary (non-BVE) visa holders

Temporary visas (for example for those held by international students, working holiday makers or those who are sponsored for work or by partners) can also be cancelled under section 116 of the *Migration Act* if they (among other reasons):

- have not complied with a condition of the visa, or in some circumstances a family member has not complied with a condition of a visa;
- have 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)); or
- their presence in Australia might or would pose a risk to the health, safety or good order of the Australian community or an individual.

It is possible, although unlikely, that a charge or finding of guilt for a minor matter such as an infringement could be used as the basis for cancelling on these grounds.

¹² Section 501 Migration Act 1958.

¹³ Section 501(6)(a) Migration Act 1958.

¹⁴ Section 501(7) and (7A) Migration Act 1958.

¹⁵ Section 501(6)(c) Migration Act 1958.

Section 140 of the *Migration Act* provides that where a visa is cancelled in these circumstances any visas held members of the family unit of that person are usually also cancelled.

BVE holders ('UMA' asylum seekers)

Bridging visas allow people to stay in Australia (and not be held in immigration detention) while they are waiting for a substantive visa. So-called Unauthorised Maritime Arrivals' (UMAs) (that is, people who arrived by boat without a valid visa) will in most cases hold a Bridging Visa E (BVE), which is a type of bridging visa.

BVE holders are more vulnerable than other visa holders to having their visas cancelled as a result of minor criminal and infringement offences. This is because there is a lower threshold than the character test for a BVE to be cancelled, including where the person has:

- breached the Code of Behaviour;¹⁶
- been convicted or charged with a criminal offence.¹⁷

Code of Behaviour (the Code)

The Code applies to BVE holders who are UMAs over 18 years of age and who were previously granted a BVE by the Minister personally while they were in immigration detention.¹⁸ The stated purpose of the Code is to ensure that people on a BVE behave appropriately while they are in the community. A BVE can generally only be granted if the person signs the Code.¹⁹ It is a condition of the BVE that the person does not breach the Code.²⁰

What type of behaviour is prohibited by the Code?

The Code prohibits a broad range of conduct, from non-cooperation with the Department to the commission of criminal offences.²¹ In particular, it states that the person:

- must not disobey any Australian laws including Australian road laws; and
- must not take part in, or get involved in, any kind of criminal behaviour in Australia.

Effect of minor offences and infringements on BVE holders – cancellation and bar to further BVE application

Minor offending and infringements enliven the discretion of the Minister or their delegate to cancel a BVE on the grounds that there was a failure to comply with a condition of the visa, i.e. the breach of the Code as evidenced by the infringement or criminal charge.

If a person has had a BVE cancelled on this ground, they will be unable to make a further valid BVE application.²²

¹⁶ Section 116(1)(b) Migration Act 1958; Sch 8 item 8566 Migration Regulations 1994.

¹⁷ Section 116(1)(g) Migration Act 1958; Reg 2.43(1)(p)(i) and (ii) Migration Regulations 1994.

¹⁸ Sch 2 item 050.225 Migration Regulations 1994.

¹⁹ Sch 4 item 4022 Migration Regulations 1994.

²⁰ Sch 2 item 050.619, Sch 8 item 8566 Migration Regulations 1994.

²¹ Code of Behaviour for Public Interest Criterion 4022, Instrument IMMI 13/155.

²² Sch 1 item 1305(3)(f) and (g) Migration Regulations 1994.

There is no requirement that the person be found guilty or convicted of an offence before visa cancellation occurs. The discretion to cancel a BVE could be enlivened even if an infringement notice is paid, or the person is ultimately found not guilty or if the charge is dismissed upon entering the diversion program. A recent Commonwealth Ombudsman report identified cases where BVEs were cancelled and asylum seekers re-detained after the issuing of charges, and these individuals were kept in detention for prolonged periods or indefinitely even after they were found not guilty or the charges were withdrawn.²³ However, it is unlikely that a BVE would be cancelled after a person is found not guilty or the charge(s) are otherwise dismissed.²⁴

There is no requirement that the offending be of particular severity, or for the person to be sentenced to any particular term of imprisonment. However, the more serious the alleged offending, the more likely it is that the BVE will be cancelled.

When considering cancellation on the grounds of the person being convicted of or charged with a criminal offence, the Department will be guided by Ministerial Direction 63,²⁵ which requires them to give greater weight to primary considerations including the principle that the Australian Government has a low tolerance for criminal behaviour.²⁶ There is currently no policy or procedure published that specifies how breaches of the Code are assessed for visa cancellation purposes.

Impact of infringements on BVE holders

In the case of infringements, additional matters should be considered where a person is a BVE holder:

- It is unclear whether a person is 'charged' with a criminal offence when an infringement notice is served rather than charges being laid.²⁷ In any case, an infringement offence would breach the Code and thus expose the person to cancellation of their visa.
- Where the infringement is paid, it is unlikely that an infringement offence would be sufficiently serious to result in BVE cancellation, except if there are multiple offences or where the infringements are for more serious offences such as drink driving or excessive speeding.

²³ Commonwealth Ombudsman, *Department of Immigration and Border Protection: The Administration of People Who Have Had Their Bridging Visa Cancelled Due to Criminal Charges or Convictions and are Held in Immigration Detention*, December 2016, available at http://www.ombudsman.gov.au/_data/assets/pdf_file/0026/42596/December-2016_Own-motion-investigation-into-people-who-have-their-Bridging-visa-cancelled-following-criminal-charges.pdf.

²⁴ Clause 5(3) Ministerial Direction 63.

²⁵ Dated 4 September 2014. A Direction given under section 499 Migration Act 1958, which requires decision makers to comply with the direction.

²⁶ Clauses 5.1 and 6.1 Ministerial Direction 63. For consideration of Ministerial Direction 63, see *ACH15 v Minister for Immigration & Anor* [2015] FCCA 1250; *CGG15 v Minister for Immigration & Anor* [2016] FCCA 2016.

²⁷ Note that charges are laid if either the person or the enforcement agency elect to refer the matter to be dealt with in court (sections 40 and 40A Infringements Act 2006) or if the enforcement agency proceeds to prosecute a matter following enforcement review (section 38(1)(a)(iii)).

- A finding and recording of guilt by a court is more likely to bring the infringement offence to the Department's attention. Therefore it is critical that persons subject to the Code are advised of the potential migration consequences of incurring infringements and in particular of electing to have their infringements determined in court or applying for revocation of enforcement orders.

Other consequences of breaching the Code

The Department has discretion to decide what consequence will follow from a breach of the Code. In addition to BVE cancellation, the Department has the power to:

- issue a written warning to the person;
- require the person to attend an interview at the Department to discuss the behaviour; or
- cancel or reduce the income support available to the person.

Notice and cancellation of BVE

If a person receives notice that the Department is considering cancelling their BVE, or if a BVE is cancelled in these circumstances, the person should seek legal advice immediately. A strict limitation period of two working days only applies for seeking review in the Administrative Appeals Tribunal once a person is notified of the decision to cancel their bridging visa and they are in immigration detention as a result of the cancellation of their bridging visa.²⁸ Notification is taken to have occurred immediately where notice of cancellation is given in person or electronically by email or fax. Where the notice is served by post, notification is taken to have occurred seven working days from the date of the notice.

Asylum seekers in community detention

Asylum seekers in community detention are not the holders of a bridging visa and are therefore not subject to visa conditions such as the Code. However, if the person breaks the law the Minister may decide it is no longer in the public interest for them to be in the community.²⁹ Their community detention could be revoked and they can be transferred back into locked detention. There is no right to seek review of this decision.

WHERE TO GET HELP

Where a person has had their bridging visa cancelled, it is important that they get independent migration advice as soon as possible.

For free legal information and advice, please contact:

- Refugee Legal
(03) 9413 0101
www.refugeelegal.org.au
- Victoria Legal Aid
1300 792 387
www.legalaid.vic.gov.au

²⁸ Section 338(4) Migration Act 1958; Reg 4.10(2)(a) Migration Regulations

²⁹ Section 197AB Migration Act 1958.

- Asylum Seeker Resource Centre
(03) 9274 9827
www.asrc.org.au

SUMMARY FLOW-CHART

This flow-chart contains suggested questions for practitioners to identify

