

Senate Economics Legislation Committee

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Supplementary Budget Estimates

2015 - 2016

Department/Agency: ASIC

Question: SBT 141-143(enter question number)

Topic: non-Australian Citizens

Reference: written - 30 October 2015

Senator: Ludwig, Joe

Question:

All Staffing - employment of non-Australian citizens I refer you to section 22 (8) of the Public Service Act 1999 which says:

"An Agency Head must not engage, as an APS employee, a person who is not an Australian citizen, unless the Agency Head considers it appropriate to do so."

141. Does the department have guidelines or similar to assist Agency Heads to assess when it is appropriate to hire non-Australian citizens? If no, do individual agencies have their own guidelines? If yes to either:
 - a. Please provide a copy.
 - b. When did they come into effect?
 - c. Can Agency Heads decide to go against the advice? If yes, under what circumstances?
142. Are Agency Heads required to provide a reason to anyone for hiring non-Australian citizens? If yes:
 - a. Who are they required to report the reason to?
 - b. Does this reporting happen before or after the hire has been made?
 - c. Is this reason provided in writing? If no, how is it provided?
 - d. Can you please provide a list of reasons that have been used since the Federal election in September, 2013.
143. Are there any provisions to over-rule a Head of Agency's decision to hire a non-Australian citizen? If yes:
 - a. Who can over-rule this decision?
 - b. Under what circumstances can it be over-ruled?
 - c. How many times has this occurred since the Federal election in September, 2013.

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Answer:

- 141. Does the department have guidelines or similar to assist Agency Heads to assess when it is appropriate to hire non-Australian citizens? If no, do individual agencies have their own guidelines? If yes to either:**
- a. Please provide a copy.**
 - b. When did they come into effect?**
 - c. Can Agency Heads decide to go against the advice? If yes, under what circumstances?**

ASIC's approach to recruitment complies with the Australian Public Service Regulations to ensure recruitment in ASIC meets the APS standards.

ASIC complies with recruitment within the APS context via the following guiding principles:

- A competitive merit-based assessment.
- A reasonable opportunity to apply for APS employment.
- No discrimination or favouritism.
- Recognition and utilisation of the diversity of the Australian community.
- The application of natural justice and procedural fairness.

These principles and associated requirements are articulated in the APS Values and other provisions of the Public Service Act 1999, the Public Service Regulations, the Public Service Commissioner's Directions and the Public Service Classification Rules.

It is a condition of employment with the Australian Securities & Investments Commission (ASIC) that an employee be an Australian Citizen. Under s22 (8) of the Public Service Act 1999, the delegate may review the claims of a non-citizen to be employed with ASIC and waive the requirement of citizenship under certain conditions.

These conditions are:

- The position is specialised and the other candidates did not readily demonstrate the skills and experience for the position;
- That the employee has the necessary visa and work rights extending throughout the period of employment; and
- That the employee endeavour to become an Australian citizen as soon as practical.

This waiver of citizenship is usually granted for periods of 6-12 months only with an option to review. ASIC generally only offers non-ongoing engagements to non-Australian citizens.

Should the employee receive citizenship they are required to send a certified copy of their citizenship certificate to ASIC. It is also a requirement to be an Australian citizen to gain a security clearance at ASIC.

The Chairman has delegated the authority to waive the Australian citizenship requirement under Section 22 (8) to nominated delegates, mostly within the HR team.

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a. Please provide a copy.

Extract of 2012 ASIC Commission approved Personnel security policy

Eligibility for a security clearance

60 Only Australian citizens with a checkable background are eligible to be granted a security clearance, unless these eligibility requirements are waived. Permanent residence status is not an acceptable alternative to the citizenship requirement.

Eligibility waivers

61 The granting of an eligibility waiver is separate from the clearance process. The Chairman or their delegate may waive the requirement for a person to be eligible for a security clearance and we are to finalise the waiver prior to requesting a clearance.

62 Prior to granting an eligibility waiver, Risk & Security Services is to consult with AGSVA as to whether there are other pre-existing concerns regarding the clearance subject.

63 The Chairman has delegated the authority to waive eligibility requirements to the Chief of Operations, ASA and Manager of Security Assessments & Mitigation.

64 They must be provided with written advice addressing all relevant aspects of the matter and include a thorough analysis of the risks to the Australian Government and possible impact on national security and the national interest. See our *Personnel security protocol* for more details on preparing eligibility waivers.

65 Risk & Security Services is to notify AGSVA of any eligibility waivers. The record is to be retained on the clearance subject's personal security file (PSF).

66 AGSVA may deny a clearance on suitability grounds where there are significant concerns, including the eligibility condition that was waived.

67 AGSVA may, at its discretion, not accept the request for security clearance if the documents supporting the waiver do not fully detail the risks to the national interest, mitigations and any residual risks. AGSVA may also decline the request for clearance if, notwithstanding the waiver, there is no chance of a clearance being granted.

Uncheckable backgrounds

68 A clearance subject has an uncheckable background when AGSVA cannot complete the minimum checks and inquiries for the requisite checking period.

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69 AGSVA only notify ASIC of uncheckable backgrounds when there are no other significant concerns that would preclude the granting of a security clearance to allow limited access to classified information.

70 In this circumstance, the Chairman or their delegate may grant an eligibility waiver as detailed in paragraph 64.

Conditions for clearances subject to an eligibility waiver

71 Clearances granted under eligibility waivers are subject to strict conditions which include, but are not limited to ASIC:

- (a) not allowing non-Australian citizens granted a waiver access to 'eyes only' information unless it includes the person's country of citizenship;
- (b) not granting access to security classified information from a foreign government without the written agreement of that foreign government, subject to the provisions of any information sharing agreements;
- (c) not granting access to security classified information from other agencies without consultation with those agencies; and
- (d) limiting access to security classified information to that required to perform the specific duty identified and which could not be performed by an eligible person as detailed in the waiver.

72 The waiver should be reassessed and AGSVA advised if the clearance subject changes duties.

73 Risk & Security Services reassesses the eligibility waivers at least every two years as part of the review of our security risk and security plan.

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ASIC's Personnel security protocol

Is the person an Australian citizen?

- 82 Under the PS Act s22(8) and as detailed in the Australian Public Service (APS) *Conditions of Engagement* an agency head may:
- (a) impose Australian citizenship as a condition of engagement in the APS;
 - (b) waive Australian citizenship as a condition of engagement if considered appropriate;
 - (c) conditionally engage a non-Australian citizen who intends applying for Australian citizenship; and/or
 - (d) advertise/recruit overseas if considered appropriate.
- 83 We are also required to confirm identities and whether personnel are eligible to work in Australia—i.e., they are Australian citizens or have valid work visas by the *Migration Act 1958*. For further details see the [Department of Immigration and Border Protection](#).
- 84 The PSPF requires that all employees holding a security clearance be Australian citizens with a checkable background unless our Chairman or their delegate (see paragraph 83) waives the eligibility requirement.

b. When did they come into effect?

ASIC has always followed the PS Act in this regard. The clauses from the Security policy and protocol were included from 1 July 2012.

c. Can Agency Heads decide to go against the advice? If yes, under what circumstances?

ASIC is able to employ staff under s 120 (3) of the ASIC Act, including non-Australian citizens, applying the same conditions:

- That the position is specialised and the other candidates did not readily demonstrate the skills and experience for the position;
- That the employee has the necessary visa and work rights extending throughout the period of employment; and
- That the employee endeavour to become an Australian citizen as soon as practical.

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- 142. Are Agency Heads required to provide a reason to anyone for hiring non-Australian citizens? If yes:**
- a. Who are they required to report the reason to?**
 - b. Does this reporting happen before or after the hire has been made?**
 - c. Is this reason provided in writing? If no, how is it provided?**
 - d. Can you please provide a list of reasons that have been used since the Federal election in September, 2013.**

- a. Who are they required to report the reason to?**

During the recruitment process, the ASIC Risk and Security Services team is advised of the intention to offer a position to a non-Australian citizen. The hiring manager is required to provide a business case detailing the reasons including a risk assessment in accordance with the Australian Government personnel security guidelines—Agency personnel security responsibilities to Risk and Security Services as to why they are hiring a non-Australian citizen. The HR team is notified that a non-Australian citizen has been offered a role and requires a Public Service Act s22(8) waiver. The HR team may seek further information from the ASIC Recruitment Team on the nature of the role and whether the candidate meets the conditions under the Public Service Act., and then issues a waiver to the candidate with the employment contract.

- b. Does this reporting happen before or after the hire has been made?**

This usually happens before the hire is made. The candidate is required to complete a pre-engagement assessment to assess their suitability to be employed. Their citizenship is verified by our Risk and Security Services Team. On the few occasions where a non-Australian citizen has been identified, the reasons were assessed and the waiver granted prior to their hire in accordance with the Government's Protective Security Policy Framework. ASIC reports the number of a non-Australian citizen holding security clearances to Attorney Generals Departments in compliance with the Government's Protective Security Policy Framework annual reporting requirements.

- c. Is this reason provided in writing? If no, how is it provided?**

Yes – as detailed in (a) above.

- d. Can you please provide a list of reasons that have been used since the Federal election in September, 2013.**

The position is specialised and the other candidates did not readily demonstrate the skills and experience for the position.

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143. Are there any provisions to over-rule a Head of Agency's decision to hire a non-Australian citizen?

If yes:

a. Who can over-rule this decision?

The decision of the Head of Agency may be reviewable under the provisions of *Administrative Decisions (Judicial Review) Act 1977*.

b. Under what circumstances can it be over-ruled?

It may be possible that a decision of the Head of Agency may be reviewable under the provisions of *Administrative Decisions (Judicial Review) Act 1977* on a point of law.

c. How many times has this occurred since the Federal election in September, 2013.

None.