

Senate Standing Committee on Education and Employment

QUESTIONS ON NOTICE Supplementary Budget Estimates 2015 - 2016

Agency - Fair Work Ombudsman

Department of Employment Question No. EMSQ15-000444

Senator Ludwig provided in writing.

Question

FWO - 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."

1. 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?
2. 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.
3. 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.

Answer

1. Yes. The Fair Work Ombudsman is guided by the Australian Public Service Commission's *Citizenship in the APS*.
 - a. See attached.
 - b. Last updated 7 August 2015.
 - c. An agency head may waive the requirement of Australian Citizenship depending on the needs and circumstances of the agency (for example, a shortage of the skills or professional qualifications required to perform particular duties).
2. Agency heads are not required to consult with or seek the agreement of anyone in making the decision to hire non Australian citizens.
 - a. N/A
 - b. N/A
 - c. N/A

3. There are no provisions to overrule a Head of Agency's decision to hire a non-Australian citizen
 - a. N/A
 - b. N/A
 - c. N/A

Citizenship in the APS

Introduction

This document provides guidance on imposing citizenship as a condition of engagement and on waiving the citizenship requirement in order to engage people who are not Australian citizens as APS employees. It also provides some information about migration and citizenship legislation that must be observed by employers generally. It sets out the basic obligations that arise out of the *Public Service Act 1999* (the PS Act), as well as requirements that are the responsibility of the Department of Immigration and Citizenship and the Attorney-General's Department.

This information should be read in conjunction with the *Conditions of engagement* information page available on the [Commission's website](#).

There is a general expectation that a person who is to be engaged as an APS employee will be an Australian citizen (subsection 22(8) of the PS Act). An agency head may, however, waive this requirement depending on the needs and circumstances of the agency (for example, a shortage of the skills or professional qualifications required to perform particular duties).

The key points to note are that an agency head can:

- impose Australian citizenship as a condition of engagement in the APS
- waive citizenship as a condition of engagement if they consider it appropriate to do so
- conditionally engage a person who is not an Australian citizen and who intends applying for citizenship (provided they are entitled to be employed in Australia)
- advertise/recruit overseas if they consider it appropriate to do so
- delegate their employer power to waive citizenship (usually to SES employees in their agency but this power can be delegated below the SES level)
- waive citizenship without requiring approval from the Australian Public Service Commissioner
- engage a person who is not an Australian citizen with work entitlements if they consider it appropriate to do so.

Prospective employees must be advised of any conditions applying to their engagement before they are engaged, and that not meeting these conditions can provide a basis for termination of their employment.

The decision to impose a condition on a person's engagement lies with the employing agency head. Decisions such as these, as well as the decision to waive citizenship as a condition of engagement, are able to be delegated by an agency head to an appropriate person in the agency.

1. Legislative framework and general principles

1.1 Legislative provisions

Under the PS Act, an agency head has, on behalf of the Commonwealth, all the rights, duties and powers of an employer in respect of APS employees in the agency (section 20). Their decisions must, of course, comply with the requirements of the PS Act and the various instruments issued under the Act including the *Public Service Regulations 1999* (the Regulations) and the *Australian Public Service Commissioner's Directions 2013* (the Directions). Employment decisions must also take account of the requirements of the *Fair Work Act 2009*, administrative law, the common law of employment and, in the case of citizenship, migration and citizenship legislation.

Under section 22 of the PS Act, APS agency heads (or their delegates) are able to engage persons as either ongoing or non-ongoing APS employees. Subsection 22(6) of the PS Act provides that an agency head may impose conditions, such as citizenship, on such engagements. It should be noted that each condition imposed under subsection 22(6) of the PS Act is a *separate* condition of engagement and will therefore have to be met according to the arrangements for that condition. Should an employee's engagement be subject to, for example, three months' probation *and* their obtaining citizenship within six months, the probation condition will need to be met according to the probation arrangements and the citizenship requirement will need to be met according to the citizenship condition. The employee's engagement will continue to be conditional until each condition attached to that engagement has been satisfied.

Section 29 of the PS Act provides that an agency head may, by notice in writing, terminate the employment of an APS employee. For an ongoing APS employee, the notice of termination must specify the ground or grounds that are relied on for the termination. The possible grounds for termination are set out in subsection 29(3) of the PS Act, and include *failure to meet a condition imposed under subsection 22(6)* of the PS Act.

1.2 Notification to an employee of a condition of engagement

It is important that all conditions, and any time limits imposed, are notified to the employee *before* they are engaged. If a condition of engagement is not notified to a prospective employee before engagement, there is no power to impose a condition of engagement retrospectively.

A brief description can be made in the Public Service *Gazette* notification, followed up by more detail on each condition in the supporting selection documentation.

In most cases it will be possible to undertake the necessary pre-employment checks on a prospective employee's citizenship status before they are engaged. However, if it has been decided to engage a person *on the condition* they become a citizen after they commence employment, they should be fully advised in writing of any such condition before engagement. (See the APSC publication *Recruitment and selection in the Australian Public Service* for further information). If a pre-employment check reveals that a prospective employee will not meet the agency's particular requirements, the agency can decide not to proceed with the engagement.

If a person who is not an Australian citizen does not have the correct visa entitling them to work in Australia, they cannot be conditionally engaged. See sections 2.2 to 2.10 of this document for further information.

1.3 Movement or promotion prior to satisfying citizenship requirement

It may be the case that an employee will be assigned other duties within the agency before they have been able to satisfy the condition that they obtain Australian citizenship.

Generally, a condition of engagement will continue to apply if there is a change of duties, unless the terms of the condition are incompatible with the new duties, or the agency chooses to waive the condition because it is not relevant to the new duties. If an employee is assigned new duties within the agency this would generally not affect the condition imposed on engagement that the person obtain Australian citizenship.

It may also be the case that a new employee successfully applies to move to another agency before they have satisfied the condition that they obtain Australian citizenship.

In general, any conditions of engagement should be satisfied before a new employee moves to another agency. However, there may be cases where an agency head does not wish to wait until a particular condition is satisfied before an agreement with the employee to move to the new agency takes effect.

In such a case, the post-move or 'new' agency head may choose to waive the condition. Alternatively, the new agency head may wish to continue the condition.

Whether, as a matter of law, a condition of engagement can continue when an employee moves to another agency depends on the nature of the condition and how it was framed—for example, whether it related just to the specific duties for which the employee was originally engaged or whether it reflects a more general policy requirement such as government policy regarding Australian citizenship.

If the condition is framed in such a way that it can continue, and the new agency head wishes it to continue, it will provide more certainty for both sides if this is explicitly recorded, for example as part of the agreement to move under section 26 of the PS Act.

Where a condition continues, the employee's employment may be terminated by the new agency head under paragraph 29(3)(f) of the PS Act if the employee fails to meet the condition (see section 1.4 below).

It is the responsibility of the new agency to inquire into the status of the employee's current employment, the presence of any unmet conditions of engagement, and whether the citizenship condition will continue if the employee moves to their agency.

See also the APSC publication [Implementing Machinery of Government Changes](#) for information on conditions of engagement relating to employees moving to another agency as a result of a Machinery of Government change.

1.4 Consequences of failing to meet a citizenship condition

A person can be engaged and commence employment subject to satisfactorily meeting, within a specified timeframe, the condition that they obtain Australian citizenship. If that person subsequently fails to meet that required condition, the agency is able to terminate their employment under paragraph 29(3)(f) of the PS Act ('failure to meet a condition

imposed under subsection 22(6)'). Termination of employment may, however, cause considerable disruption to the employee, the employer and the workplace. Agencies should therefore consider implementing arrangements to ensure that, as far as practical, they are satisfied that a prospective employee meets, or is able to meet, all the relevant requirements before they are engaged.

Additional information on termination of employment can be found in the APSC publication *Terminating APS employment: The legislative framework*.

2. Citizenship as a condition of engagement

Paragraph 22(6)(b) of the PS Act enables an agency head to impose, as a condition of engagement, a requirement that a person hold Australian citizenship. Subsection 22(8) requires an agency head not to engage a person who is not an Australian citizen as an APS employee, "unless the agency head considers it appropriate to do so".

2.1 Evidence of Australian citizenship

Unless an agency head has decided to waive citizenship as a condition of engagement, the agency should use pre-employment checks to satisfy itself that a prospective employee is an Australian citizen. A prospective employee can be asked to provide proof of their Australian citizenship. This might be an Australian passport (issued after 1 July 2005) or notice of evidence of Australian citizenship (usually an Australian citizenship certificate). An Australian birth certificate is not, of itself, proof of Australian citizenship.

There have been a number of changes to the Australian citizenship legislation since it was first enacted and some of the arrangements for people who are not Australian citizens who wish to acquire Australian citizenship have changed. Some of the more recent changes are:

- Most people born in Australia prior to 20 August 1986 are citizens by birth but not if one parent was a foreign diplomat.
- Most people born in Australia on or after 20 August 1986 acquire citizenship at birth if at least one parent of the person was, at the time of the person's birth, an Australian citizen or permanent resident.
- Children born in Australia whose parents are not permanent residents or Australian citizens automatically become Australian citizens on their tenth birthday if they have been ordinarily resident in Australia for the period of 10 years since their birth.
- *Before 4 April 2002*, a person could have automatically lost their Australian citizenship if they applied for and were granted the citizenship of another country. Their children may also have been affected. This provision was repealed with effect from 4 April 2002.

Documents that can be taken as evidence of Australian citizenship for persons born *on or after* 20 August 1986 are:

- an Australian passport that was issued on or after 1 July 2005 for a period of at least two years—that is not a temporary passport, or
- evidence of Australian citizenship issued by the Department of Immigration and Citizenship (DIAC).

Where a prospective employee is born in Australia *on or after* 20 August 1986 and is not able to provide one of the above documents, evidence of citizenship can usually be established by providing an Australian birth certificate *and* one of the following:

- proof of one parent's Australian citizenship at the time of the prospective employee's birth (i.e. an Australian birth certificate, or certificate of Australian citizenship issued prior to the prospective employee's date of birth), or
- proof of one parent's permanent residence in Australia at the time of the prospective employee's birth (i.e. a passport showing a permanent entry stamp or permanent visa into Australia prior to the time of the prospective employee's birth).

Agencies should be aware that since being issued with an Australian passport or notice of evidence of Australian citizenship, a person may have ceased to be an Australian citizen. For example:

- a person holds an Australian citizenship certificate dated 1 July 1985
- the person then applied for and was granted citizenship of another country sometime between 1985 and 4 April 2002
- this person would have subsequently lost their Australian citizenship
- in addition, if that person had any children aged under 18 years at that time, those children would have also lost their Australian citizenship unless their other parent was an Australian citizen.

Similarly, a person may provide a current Australian passport but have subsequently lost their citizenship after it was issued.

To confirm a person's Australian citizenship status, the person can make an application for evidence of Australian citizenship with DIAC and provide this to the agency as evidence of their citizenship status.

Further information on Australian citizenship is available from the Australian citizenship website at www.citizenship.gov.au or by calling the citizenship information line on 131 880.

2.2 Engagement of people who are not Australian citizens

The PS Act indicates a general expectation that people engaged as APS employees will be Australian citizens. However, people who are not Australian citizens can be engaged as either ongoing or non-ongoing employees if the agency head considers it appropriate for their agency and the person is entitled to be employed in Australia. Alternatively, it may be appropriate to conditionally engage people who are not Australian citizens and who are actively pursuing Australian citizenship. Depending on the needs of the agency (for example, the skill or professional qualifications required to perform particular duties) there may be other circumstances where it is also appropriate to engage a person who is not an Australian citizen.

A decision to employ a person who is not an Australian citizen must take account of the requirements of the *Migration Act 1958*, as outlined in sections 2.3 to 2.9 of this document. Agencies should also be aware of the citizenship requirements of the *Australian Government Protective Security Policy Framework (PSPF)* for eligibility for a security clearance and the exceptions to that requirement. Details are found in the *Personnel Security Management*

Protocol under the heading "Eligibility for a security clearance". More detail is available in the *Agency Personnel Security Guidelines*. The PSPF can be accessed at www.protectivesecurity.gov.au.

If an agency head decides to offer engagement to a person who is not an Australian citizen, it would be good practice to inform the person that the citizenship requirement for employment may vary from one APS agency to another should they seek to move to another agency in the future. Australian citizenship, as a *condition of engagement*, cannot be imposed by the new agency if the person is already an APS employee.

Australia has a number of bilateral agreements in place, some of which include employment agreements relating to the dependants of diplomatic staff. These agreements give such dependants work entitlements in Australia, but they do not guarantee work in the APS. Agency heads will still need to determine that it is appropriate to engage this type of person who is not an Australian citizen.

Where it is considered appropriate to engage a person who is not an Australian citizen, the approval of the agency head or delegate should be documented and retained in the employee's personal records. In addition, when considering whether to grant a security clearance for access to security classified resources, Australian Government protective security policy requires that a record of all decisions to waive citizenship eligibility requirements be maintained (see the *Personnel Security Management Protocol* and the *Agency Personnel Security Guidelines* for more information).

Where an agency intends to engage a permanent resident or a person who is not an Australian citizen who holds a visa with work entitlements, the employee should be informed that if they cease to hold valid work entitlements the agency head can terminate their employment for loss of an essential qualification. Agencies should consider including information to this effect in the person's letter of engagement. This may help to avoid complications concerning the person's continued employment in the APS should they fail to meet the ongoing requirements of their visa.

2.3 Implications of the Migration Act 1958

Where a decision is made to offer employment to a person who is not an Australian citizen, the agency head must ensure that the person has the appropriate visa and work entitlements.

Any decision to employ a person who is not an Australian citizen must take account of the requirements of the migration legislation. The *Migration Amendment (Employer Sanctions) Act 2007* amended the *Migration Act 1958* to introduce new criminal offences for knowingly or recklessly allowing an illegal worker to work, or referring an illegal worker for work. An illegal worker is someone from overseas who is not an Australian citizen and is either working in Australia without a visa, or who is working in Australia in breach of their visa conditions.

Each agency head and their agency is responsible for ensuring they implement robust recruitment procedures and practices to meet their obligations under the migration legislation. This is particularly vital under the employer sanctions legislation. Regular checks should be made with DIAC to ensure the person's visa arrangements have not changed, particularly that relating to work entitlement.

In most instances, only Australian citizens, Australian permanent residents and New Zealand citizens have unrestricted entitlements to employment in Australia, although this right to general employment in Australia does not automatically extend to employment in the APS other than for Australian citizens (See section 2.8 for visa arrangements for New Zealand citizens). Other people who have entered, or plan to enter, Australia and intend working in Australia must have a visa allowing them to work.

People who are not Australian citizens are granted a visa (permission to enter and stay) for a specific purpose that will specify the work entitlements they enjoy, if any, and how long they can lawfully remain in Australia.

It is important to remember that not all visas provide work entitlements, and some may provide limited work entitlements only. It is the responsibility of the employing agency to verify those entitlements.

The types of visa that a person who is not an Australian citizen may possess include:

- a temporary visa granting the person authority to travel to and stay in Australia with no work entitlements
- a temporary resident visa that may allow the person *limited* work entitlements only
- a permanent resident visa granting the person authority to stay permanently in Australia with unlimited work entitlements.

An employee who is not an Australian citizen must hold appropriate work entitlements to be able to perform duties in the APS. This is an independent legal requirement and applies on an ongoing basis. It applies whether or not a condition relating to Australian citizenship was imposed under the PS Act, and regardless of whether the employee was notified of such a requirement at the time of engagement. The PS Act provides for termination of the employment of an APS employee on this basis (paragraph 29(3)(b)).

2.4 Determining work entitlements

The relevant employer services and publications produced by DIAC are essential reference resources for agencies, especially those relating to checking the work entitlements of prospective employees. DIAC's website (www.immi.gov.au) contains information on employers' obligations, employer sanctions and the work entitlements of migrants and visitors to Australia. DIAC's Visa Entitlement Verification Online (VEVO), available 24 hours a day every day, allows employers to check the work entitlements of a visa holder on line. To conduct a VEVO check, you need to enter the following details from the passport:

- name
- date of birth
- passport number and country of issue.

The results will be returned almost immediately.

For further information please call DIAC's Employers' Immigration Hotline on (free call) 1800 040 070.

2.5 Recruiting outside Australia

There is no APS-wide sponsorship scheme for recruiting people who are not Australian citizens from overseas for employment in the APS. Agencies should contact DIAC for information on employer sponsorship schemes.

If an agency decides to recruit people from outside Australia, overseas advertising would need to be concurrent with, or occur within four weeks of, a notification in the *Public Service Gazette* (www.apsjobs.gov.au) to meet the requirements of the Public Service Commissioner's Directions (Chapter 2 of the Directions).

If an overseas applicant who is not an Australian citizen is likely to be successful in gaining employment in the APS, the agency should check that the applicant is eligible for temporary or permanent migration to Australia and is able to obtain the appropriate work entitlements *before* a firm offer is made.

The type of employment offered to a temporary resident visa holder will usually be temporary in nature, that is, a non-ongoing engagement or other arrangement consistent with the person's visa requirements. Agencies should check with DIAC on the specific arrangements for individual visa holders as they can vary from one temporary visa holder to another.

2.6 Imposing a requirement to obtain Australian citizenship

If an agency head chooses to engage a permanent resident, they may require the person to obtain Australian citizenship within a specified time (subsection 22(6) of the PS Act). This should be advised in writing to the prospective employee before engagement. The condition should state the requirement to obtain Australian citizenship, and specify a timeframe within which citizenship must be obtained. It should be drafted so that the agency can terminate the person's employment at an earlier date if citizenship is refused, or if it becomes clear that citizenship will not be obtained.

An agency should determine a maximum period for attaining citizenship, having regard to the residence requirements that persons must satisfy before they become eligible to apply for Australian citizenship. The agency's policy may stipulate a *maximum* period (rather than a specific date) within which citizenship is expected to be obtained for the purposes of conditional engagement.

Further information on residence requirements is available on the [citizenship website](#). As outlined in section 2.7 below, agencies should note that the residence requirements changed on 1 July 2007 for persons who become permanent residents on or after that date and that new special residence requirements were introduced on 21 September 2009. Agencies should regularly check the citizenship website for any changes in citizenship eligibility requirements.

Most people do not become an Australian citizen until they make the pledge of commitment at a citizenship ceremony. The pledge of commitment must be made within 12 months of approval of their citizenship application. A person who fails to do so may have the approval of their citizenship application cancelled.

An applicant is usually notified of the decision on their citizenship application within one month of lodging their application. If the application is approved, conferral of citizenship usually takes place at a citizenship ceremony within three months of approval. However, this

depends on the frequency of ceremonies conducted by local government in the area where the applicant lives.

Where an application for citizenship has been refused or an approval cancelled, the applicant may appeal to the Administrative Appeals Tribunal. Agencies may wish to take this into account when considering the engagement of a person in this circumstance.

2.7 Permanent and temporary resident visa holders

Permanent residence is one of the general eligibility requirements for Australian citizenship. Most applicants for citizenship by conferral must be permanent residents of Australia. Agencies should bear in mind the time it would take for a temporary resident to apply for and be granted a permanent visa and then fulfil the residence requirements for Australian citizenship. Most people who become permanent residents on or after 1 July 2007 will need to have been lawfully resident in Australia for four years immediately before applying for citizenship. The four year period must include at least 12 months as a permanent resident. This means that up to three years of temporary residence can count towards the four years lawful residence requirement.

People who became permanent residents before 1 July 2007 and apply for citizenship before 1 July 2010 must have been physically present in Australia as a permanent resident for a total of two years in the five years before applying, including one year within the two years immediately before applying.

On 21 September 2009, two special residence requirements came into effect allowing some people who are required to travel frequently because of their professions to access Australian citizenship. Specific requirements apply and can be found on [DIAC's citizenship website](#). Agencies should not attempt to assess a person's eligibility for the special residence requirements, and should contact DIAC for further information.

Residence exemptions and discretions may also be available in certain circumstances. These are matters for DIAC. The desire to become an Australian citizen in order to gain employment in the APS is not, of itself, sufficient under policy to warrant the application of the residence discretions. Further information on exemptions and discretions is available on DIAC's citizenship website at www.citizenship.gov.au.

Temporary resident visa holders who have work entitlements are not, because of their temporary resident status alone, necessarily excluded from being considered for employment. Generally, however, a temporary resident visa holder would only be eligible for non-ongoing employment opportunities, as they are not in a position to offer themselves as available for ongoing employment.

Agencies need to consider whether it is practical to engage a person conditionally when their employment remains uncertain for a considerable time. When engaging a person holding a temporary resident visa, the employee should be informed that if they cease to hold a valid work entitlement the agency can terminate their employment for the loss of an essential qualification. (See also information about 'employer sanctions' at section 2.3.)

If the visa expires or is withdrawn, the PS Act provides for termination of employment on this basis (paragraph 29(3)(b)).

2.8 Visa arrangements for New Zealand citizens

Under the Trans-Tasman Travel Arrangement, most New Zealand citizens are automatically granted a Special Category Visa (SCV) on arrival in Australia, which enables them to live and work indefinitely in Australia.

Before 26 February 2001, a person holding an SCV was considered to be a permanent resident for the purposes of the (then) *Australian Citizenship Act 1948*.

New bilateral social security arrangements between Australia and New Zealand were introduced on 26 February 2001. Under these arrangements, New Zealand citizens are still granted an SCV on arrival in Australia and can continue to live and work indefinitely in Australia. However, New Zealand citizens entering Australia on or after 26 February 2001 as the holder of an SCV *are no longer considered to be permanent residents* for the purposes of the Australian citizenship legislation and for access to certain social security payments.

A limited number of New Zealand citizens continue to be treated as permanent residents for the purposes of the Australian citizenship legislation (and therefore do not need to apply for a permanent residence visa in order to acquire Australian citizenship). They are New Zealand citizens who:

- were in Australia on 26 February 2001 as an SCV holder, or
- were outside Australia on 26 February 2001, but were in Australia as an SCV holder for at least one year in the two years before that date, and have subsequently returned to Australia, or
- have a certificate, issued under the *Social Security Act 1991*, stating that they were residing in Australia on a particular date.

A New Zealand citizen who arrives in Australia on or after 27 February 2001, and who does not fall within one of the three categories above, is required to apply for and acquire a permanent resident visa before being eligible for Australian citizenship by conferral.

For the purposes of selection and engagement in the APS, a New Zealand citizen who has arrived in Australia on or after 27 February 2001 with an SCV, but who does not fall within one of the three categories outlined above, is not to be considered a permanent resident visa holder.

A New Zealand citizen who holds a permanent resident visa for Australia has the same status as a permanent resident of another nationality.

2.9 Holders of dual citizenship

Some Australian citizens also hold citizenship of another country. This is known as dual citizenship. If a person in this position can demonstrate evidence of Australian citizenship, they can be engaged as an APS employee, regardless of other citizenship they may hold at the same time.

Dual citizenship may, however, cause other employment-related issues to arise, for example, if the person is required to obtain a security clearance or to work in an area where their dual citizenship could be seen as giving rise to a conflict of interest. Agency heads will therefore

need to be aware of, and manage effectively, recruitment to sensitive jobs. In situations where specific qualifications such as a security clearance are required, agencies should ensure that the person has the necessary clearance before being engaged.

2.10 More information about citizenship, visa and migration matters

For more information about citizenship, visa and migration matters, contact the [Department of Immigration and Citizenship](#) or the [citizenship website](#).

Agencies should address any policy queries on citizenship relating to security matters to the Attorney-General's Department. Queries can be forwarded to pspf@ag.gov.au. For advice about individual's security clearances agencies should liaise directly with the Australian Government Security Vetting Agency..