GENERAL RESIDENCE REQUIREMENT (S22)

Section 22 sets out the general residence requirement. For applications received on or after 21 September 2009, some applicants who need to travel regularly outside of Australia because of their professions, and cannot meet the general residence requirement, should be assessed against the requirements of the special residence requirements - see:

- Special residence requirement - Persons engaging in activities that are of benefit to Australia (s22A) or
- Special residence requirement - Persons engaged in particular kinds of work requiring regular travel outside Australia (s22B).

To meet the general residence requirement (s22) a person is required to have been lawfully present in Australia for a period of four years immediately prior to making their application, including the last 12 months as a permanent resident.

All periods of lawful residence in Australia, such as temporary visas, visitor visas, student visas, all classes of bridging visas etc, are taken into account when calculating the four year lawful residence period.

Unlawful non-citizen

A person's presence in Australia is determined to be lawful in accordance with the Migration Act. A person is lawful if they hold a visa that is in effect.

An unlawful non-citizen is a person who is not an Australian citizen and is present in Australia without a valid visa.

Under s22(1)(b), a person cannot meet the general residence requirement if they have been an unlawful non-citizen at any time during the 4-year period immediately before applying for citizenship. This means they will need to have spent 4 years in Australia since last ceasing to be an unlawful non-citizen before meeting the general residence requirement, unless they became unlawful because of administrative error - see Ministerial discretion - administrative error (s22(4A) & (5)).

Decision makers must be mindful of SREY-affected cases. In these cases, the person may show as a BVE holder but due to a past notification error, they may in fact still hold a BVA. This means that despite the Department's records showing periods of unlawfulness prior to the granting of a BVE, such applicants may be taken not to have been unlawful for that period. Where a *client of interest* note exists in ICSE indicating the person is SREY-affected, contact a Notification Contact Officer (NCO) in your office for assistance (a list of all NCOs is available on TRIM at PCD2009/3758). Most, but not all, SREY-affected cases will have a *client of interest* note. Further information on whether a person might be SREY-affected can be found in PAM3: Act - Notification - Notification requirements.

OVERSEAS ABSENCES (S22(1A) & (1B))

Section 22(1A) allows for absences from Australia of up to 12 months within the 4 years immediately before applying for citizenship. A period of time cannot be counted as an absence from Australia unless the person has already been present in Australia. This means that a person does not meet the residence requirement if they have 3 years continuous presence in Australia (with the last 12 months as a permanent resident) unless they were previously in Australia.

Example

Ms Jones first entered Australia on 01/01/2007, and became a PR on 01/01/2009. She has not left Australia since her first arrival. Ms Jones does not meet the 4-year lawful period until 01/01/2011.

Section 22(1B) allows a person to be absent for up to 90 days within the 12 months permanent residence immediately before applying providing they remain a permanent resident during this time. Before 15 March 2009, applicants were allowed 3 months absence during the 12 month permanent residence period.

Calculation of the 4-year lawful residence period when a person has been absent from Australia on the day 4 years immediately before applying

If a person's first arrival in Australia is less than 4 years before they apply for citizenship, they cannot meet the general residence requirement, even if they spend 3 years continuously in Australia.

The start date of the 4-year lawful residence period is usually the date 4 years immediately before they lodge their application. However, if the person has not made their first entry into Australia, they need to wait at least 4 years after their first entry to meet this requirement.

Where a person was outside Australia on the day 4 years immediately before applying, but had previously been in Australia, they may still use the day 4-years immediately before applying as a start date (for the purposes of being eligible to satisfy the 4 year lawful requirement), providing that on that day they held a visa which was in effect on that day (a visa granted in Australia is in effect from the day of grant, a visa granted offshore comes into effect when the person enters Australia on that visa).

If these conditions are met, then the person may use the full 4 year period immediately before applying towards meeting the general residence requirement.

For the purposes of the residence calculator, the lawful residence date will be the date that the 'in effect visa' that was held 'on the day 4 years immediately prior to the day of application' came into effect. Refer to the relevant procedural documents for further information on using the residence calculator.

Example

Mr Smith entered Australia on 01/01/2004 on a subclass 457 visa. He departs a week later, and re-enters on 01/01/2006 on the same subclass 457 visa. He remains in Australia, becomes a permanent resident on 01/01/2008 and applies for citizenship on 01/01/2009.

Mr Smith's 4-year lawful period starts on 01/01/2005 (4 years before applying) because although he was outside Australia on this date, he was previously in Australia and was still the holder s/c 457 visa.

New Zealand citizens

Specific policy guidelines apply to New Zealanders to ensure they are not disadvantaged by virtue of the unique status they hold under the Migration Act. These apply only to the calculation of the 4-year lawful residence period, and are not relevant to those New Zealand citizens who became permanent residents before 1 July 2007 and who apply for citizenship by conferral before 1 July 2010.

Unlike most other visas, the subclass 444 visa ceases immediately a person leaves Australia, and the person therefore does not hold a visa while outside Australia.

New Zealand citizens who were outside Australia 4 years immediately before applying for citizenship, but had previously entered Australia on a subclass 444 visa at any time within 8 years before lodging their application, may count the 4 years before lodging their application towards the general residence requirement.

Example

Mr Holt is a New Zealand citizen who was in Australia continuously from 1/1/2000 - 31/12/2002 on a 444 visa. He departed Australia on 1/1/2003 and returned on 1/1/2007 on a 444 visa. On 1/7/2010 he applied for citizenship by conferral.

Because Mr Holt was absent from Australia on the day 4 years immediately before applying, but had previously been in Australia within 8 years immediately before applying, his period of lawful residence starts on the day 4 years immediately before applying (that is, on 1/7/2006).

He would therefore meet the 4-year lawful period, counting the period 1/7/2006 - 30/12/2006 as a period of absence from Australia within this period.

When using the residence calculator in such situations, decision makers must enter the date of first

arrival (in this case 1/1/2000) as the lawful residence date, and then enter any dates of departure and arrival as required.

People working on ships or aircraft - presence in Australia is not determined by the Migration Act

A person is present in Australia if they are physically present in *Australia*, as defined in s3. Under s80 of the Migration Act, certain non-citizens on ships or aircrafts, may be taken not to have left the 'migration zone'. However, such a person is taken not to be present in Australia for the purposes of meeting the residence requirement during periods when their vessel is outside Australia.

People working as members of a crew of a ship or an aircraft should be assessed against the special residence requirement - persons engaged in particular kinds of work requiring regular travel outside Australia (s22B).

PEOPLE WHO WERE PERMANENT RESIDENTS IMMEDIATELY PRIOR TO 1 JULY 2007

Schedule 3 (Application and transitional provisions) of the *Transitional Act* provides that in the absence of any other relevant provisions, the residence requirements of the old Act (one in two years and two in five years) apply to people who became permanent residents before the commencement of the Act, provided they apply for citizenship before 1 July 2010.

CONFINEMENT IN PRISON OR PSYCHIATRIC INSTITUTION AND MINISTERIAL DISCRETION (S22(1C) & (5A))

Under s22(1C), if a person has been confined in a prison or in a psychiatric institution in relation to a criminal offence at any time, that person will need to spend four years in Australia since last being released from that confinement before being residentially eligible for citizenship.

However, s22(5A) provides that s22(1C) does not apply in relation to a person if, taking into account the circumstances that resulted in the person's confinement, the decision maker is satisfied that it would be unreasonable not to take those periods into account towards the residence requirement.

Circumstances that may be taken into account could include:

- convictions quashed (set aside by the court)
- a pardon, that is, a free and absolute pardon granted because the person was wrongly convicted.

This discretion is not available for applicants who became permanent residents before 1 July 2007 and apply for citizenship prior to 1 July 2010. Periods confined in a prison or a psychiatric institution by order of a court made in connection with proceedings for an offence against an Australian law cannot be counted towards the residence requirement of two in five and one in two years before the application.

PARTIAL EXEMPTION - PERSON BORN IN AUSTRALIA OR FORMER AUSTRALIAN CITIZEN (S22(2))

Under s22(2), applicants who were born in Australia or are former Australian citizens need only have been present in Australia as a permanent resident for 12 months immediately before the application. Absences from Australia in that period of no more than three months are allowed (s22(1B) refers).

Under s24(7) a former citizen cannot be approved for Australian citizenship by conferral unless more than 12 months have passed from the date upon which the person ceased, or last ceased, to be an Australian citizen. Some former Australian citizens may also be eligible to apply for resumption of Australian citizenship. See Chapter 7 - Resuming citizenship.

MINISTERIAL DISCRETION - ADMINISTRATIVE ERROR (S22(4A) & (5))

Under s22(4A) and (5) the Minister has a discretion to count for the purposes of s22(1)(b) and (c) (respectively) periods spent in Australia during which the necessary legal status was absent, provided certain requirements are met (although the specific sections do not apply to people who were permanent residents immediately before 1 July 2007 - in these circumstances the equivalent provisions under s5B of Schedule 3 of the Transitional Act apply instead).

Under s22(4A) the Minister '… may treat a period as one in which the person was not present in Australia as an unlawful non-citizen if the Minister considers the person was present in Australia during that period but, because of an administrative error, was an unlawful non-citizen during that period'.

Under s22(5) the Minister '... may treat a period as one in which the person was present in Australia as a permanent resident if the Minister considers the person was present in Australia during that period but, because of an administrative error, was not a permanent resident during that period.

The discretion can only be exercised on condition that the legal status is absent '... because of an administrative error'. The condition can be divided into 2 parts, namely:

- there must be an administrative error (in other words, an error of a particular kind) and
- the error must be the reason why the person lacks the necessary legal status (in other words, the error is the cause).

The concept of 'administrative error' embraces a range of administrative actions. In broad terms it will extend to administrative mistakes and circumstances in which incorrect information is provided. While each case will need to be assessed on its own merits, specific examples include the following:

- the applicant may have been granted a permanent visa but the decision maker accidentally recorded the grant of a temporary visa in ICSE
- the applicant was advised by the Department that they were a lawful non-citizen when in fact they were unlawful
- the applicant had been entitled to a permanent visa but made an application for a temporary visa as a result of incorrect advice from an officer of the Department.

A delay in processing an application does not constitute an administrative error in itself. Where an adverse decision on an application is subject to merits or administrative review and the decision is subsequently overturned, this is still considered within the normal parameters of an application process and does not constitute an administrative error.

In order for this discretion to be applied, the onus is on the applicant to provide evidence that an administrative error has indeed occurred. All reasonable efforts should be made by the decision maker to verify the applicant's claims. The Department may on its own initiative take action where the Department can identify a clear case of administrative error and apply this discretion on the applicant's behalf.