
Tale of Two Characters – The Paradoxical Application of the Character Test between Visa Holders and Applicants for Australian Citizenship

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Applicants for Australian citizenship must demonstrate that they are persons of good character. Under current Australian law, applicants who fail to meet the character test under the Australian Citizenship Act 2007 (Cth) continue to hold their permanent residency visas. In that context, this article broadly advances two essential arguments. First, it is contended that where a non-citizen fails the character test under the Australian Citizenship Act 2007 (Cth), such a finding demonstrates that the non-citizen also fails the first limb of the character test under ss 501(2) and 501(6)(c) of the Migration Act 1958 (Cth). In support of this contention, it is demonstrated that similar legal principles are relied upon by decision-makers in applying the character test under both pieces of legislation. Second, this article argues that where a non-citizen is determined to have failed the character test under the Australian Citizenship Act 2007 (Cth), a mandatory legislative obligation should be imposed on the Minister for Home Affairs to consider whether the non-citizen's permanent residency visa should also be cancelled on character grounds under s 501(2) of the Migration Act 1958 (Cth).

INTRODUCTION

Under the *Australian Citizenship Act 2007* (Cth) (*Citizenship Act*), to become an Australian citizen, a non-citizen must meet a “good character” requirement (also known as the “character test”) as part of the application process. A finding by the Minister for Home Affairs (the Minister) or the Administrative Appeals Tribunal (AAT) that the non-citizen does not satisfy the good character requirement under the *Citizenship Act* generally does not lead to potential cancellation of his or her permanent residency visa on character grounds under the *Migration Act 1958* (Cth) (*Migration Act*).

There is a striking irony that a non-citizen who fails the character requirement under Australian citizenship law is still taken to satisfy the character test as the holder of a permanent residency visa in Australia. Essentially, the irony is made all the clearer when in fact similar legal and policy principles are relied upon in construing and applying the good character requirement under both the *Citizenship Act* and *Migration Act*.

In Part I, to provide contextual background, I examine the legal relationship between holders of a permanent residency visa in Australia and Australian citizens. In exploring the association between Australian permanent residents and Australian citizens, I outline the key similarities and differences shared by these “two classes” of people.

In Part II, I outline the relevant statutory framework of the good character requirement under both the *Citizenship Act* and *Migration Act*. In doing so, I explore the objects and purposes of the good character requirement under both statutes. Although not entirely the same, this article concludes that the purposes

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of the good character requirement mandated by both the *Citizenship Act* and *Migration Act* are largely analogous.

In Part III, drawing upon Commonwealth policy and jurisprudence before both the AAT and Australian judiciary, I demonstrate the similar interpretation of the good character requirement under both the *Citizenship Act* and *Migration Act*. In examining the character test under the *Migration Act*, I particularly focus on ss 501(2) and 501(6)(c), which regulates a non-citizen’s “past and present criminal conduct” and “past and present general conduct”. It is worth noting upfront that the character test provisions in the *Citizenship Act* have never received substantial judicial treatment in either the Federal Court of Australia or High Court of Australia. Indeed, the character provisions in the *Citizenship Act* have only been cited in passing in three cases before the Federal Court (as at 28 January 2018).¹ Having demonstrated the similar legal treatment of the character test under both the *Citizenship* and *Migration Acts*, I argue that there is an apparent inconsistency or illogicality in the Minister not even considering whether a non-citizen’s Australian permanent visa should be cancelled on character grounds (despite failing to become an Australian citizen on character grounds).

In Part IV, I propose a legislative amendment to the character test under s 501(2) of the *Migration Act*. In circumstances where the Minister or AAT has found that a non-citizen fails the good character requirement under the *Citizenship Act*, the Minister should subsequently have a mandatory obligation to consider cancellation of the non-citizen’s permanent residency visa on character grounds under ss 501(2) and 501(6)(c) of the *Migration Act*.

I. THE RELATIONSHIP BETWEEN PERMANENT RESIDENCY IN AUSTRALIA AND AUSTRALIAN CITIZENSHIP

An Australian citizen is a person who satisfies prescribed criteria in the *Citizenship Act*. A person can automatically acquire Australian citizenship through birth, adoption, by being an abandoned child, and through the incorporation of territory.² A person may otherwise be eligible for Australian citizenship by descent,³ adoption under *The Hague Convention on Intercountry Adoption* or a bilateral arrangement,⁴ or citizenship by conferral.⁵

Conversely, a permanent resident in Australia is a person who is not an Australian citizen. An Australian permanent resident is taken to be a lawful non-citizen whose migration status is regulated by the *Migration Act*. Australian permanent residents are the holders of a “permanent visa”, which is a visa to remain (or travel to and enter) Australia indefinitely.⁶

Other lawful non-citizens in Australia who are not permanent residents generally hold a “temporary visa”, which permits such a visa holder to remain in Australia during a specified period, until a specified event happens, or while the holder has a specified status.⁷

Importantly, a lawful non-citizen who seeks to become an Australian citizen “by conferral” under the *Citizenship Act* must be an Australian permanent resident.⁸ The permanent resident must also meet a number of other prescribed criteria related to age, time spent in Australia requirements, demonstrate a basic level of English language, and satisfy several notable other criteria.⁹

¹ *Al-Qadhi v Minister for Immigration and Border Protection* [2017] FCA 1300, [9], [18]–[19] (McKerracher J); *BMF16 v Minister for Immigration and Border Protection* [2016] FCA 1530, [4], [9], [110], [153] (Bromberg J); *Grass v Minister for Immigration and Border Protection* [2014] FCA 393, [4] (Buchanan J).

² *Australian Citizenship Act 2007* (Cth) Pt 2 Div 1.

³ *Australian Citizenship Act 2007* (Cth) Pt 2 Div 2 Subdiv A.

⁴ *Australian Citizenship Act 2007* (Cth) Pt 2 Div 2 Subdiv AA.

⁵ *Australian Citizenship Act 2007* (Cth) Pt 2 Div 2 Subdiv B.

⁶ *Australian Citizenship Act 2007* (Cth) s 5; *Migration Act 1958* (Cth) ss 5, 30(1).

⁷ *Migration Act 1958* (Cth) s 30(2).

⁸ *Australian Citizenship Act 2007* (Cth) s 21(2)(b).

⁹ *Australian Citizenship Act 2007* (Cth) s 21(2).

Although the preceding has demonstrated at a basic level the legal distinction between Australian citizens and permanent residents in Australia, there are a number of other key differences between these two classes of people. First, unlike permanent residents in Australia, the Preamble to the *Citizenship Act* illustrates that Australian citizens:¹⁰

- represent full and formal membership of the community of the Commonwealth of Australia;
- share a common bond, involving reciprocal rights and obligations, uniting all Australians, while respecting their diversity; and
- undertake to accept obligations related to pledging loyalty to Australia and its people, sharing Australia's democratic beliefs, respecting rights and liberties, and upholding and obeying the laws of Australia.

Senator John Faulkner has stated that the Preamble to the *Citizenship Act* would "define the meaning which the Parliament and the people of Australia accord to citizenship".¹¹ Accordingly, at a broad level of generality, it may be that the Preamble to the *Citizenship Act* illustrates the clearest expression of distinguishing between Australian citizens and permanent residents in Australia.

Second, with respect to both the right to enter Australia and the right to abide within the country, the *Migration Act* subjects non-citizens (such as permanent residents) to a degree of regulation that Australian citizens do not face.¹² With limited exceptions, any non-citizen who wishes to enter Australia must possess a visa that is "in effect".¹³ Given the preceding, permanent residents of Australia are often required to obtain an additional "Return (Residence) (Class BB) visa" if they wish to leave and then re-enter Australia.¹⁴ Australian citizens, unlike non-citizens, do not need to obtain a visa under the *Migration Act* in order to re-enter Australia from overseas.¹⁵

Third, a major vulnerability of non-citizens under the *Migration Act* relates to their susceptibility to expulsion from Australia.¹⁶ Division 9 of Pt 2 of the *Migration Act* creates a number of deportation powers that operate with respect to certain non-citizens. Permanent residents are not excluded from the operation of these powers.¹⁷ In striking contrast, there is no power under current legislation in Australia that enables the deportation of Australian citizens.¹⁸

Fourth, membership of the political community is determined by citizenship status in Australia – at least to the extent that the "political community" is defined by reference to the class of people who may exercise the vote, and the people who sit in Parliament as representatives of the voters.¹⁹ Under the *Commonwealth Electoral Act 1918* (Cth), a person has a right to vote in federal elections in Australia if they are over the age of 18 and hold Australian citizenship.²⁰ It follows that non-citizens, including permanent residents, are not permitted to vote in federal elections in Australia.

¹⁰ *Australian Citizenship Act 2007* (Cth) Preamble.

¹¹ Commonwealth, *Parliamentary Debates*, Senate, 6 May 1993, 208 (John Faulkner).

¹² Sangeetha Pillai, "The Rights and Responsibilities of Australian Citizenship: A Legislative Analysis" (2014) 37 *Melbourne University Law Review* 736, 759.

¹³ *Migration Act 1958* (Cth) s 42(1).

¹⁴ *Migration Act 1958* (Cth) s 42(1) provides that, generally speaking, non-citizens may not travel to Australia without a visa that is in effect. There are two subclasses for the "Return (Residence) (Class BB) visa": *Migration Regulations 1994* (Cth) Sch 1 Pt 1 cl 1128. Subclass 155 authorises re-entry to Australia as a permanent resident for a five-year period, while subclass 157 provides this authorisation for a three-month period: *Migration Regulations 1994* (Cth) Sch 2.

¹⁵ Pillai, n 12, 759.

¹⁶ Pillai, n 12, 761.

¹⁷ Pillai, n 12, 761.

¹⁸ Pillai, n 12, 762.

¹⁹ Kim Rubenstein, *Australian Citizenship Law in Context* (Lawbook Co, 2002) 223.

²⁰ *Commonwealth Electoral Act 1918* (Cth) s 93(1).

Citizenship is also relevant to the right to stand for political office at the Commonwealth level in Australia.²¹ Section 44(i) of the Australian *Constitution* provides that:

Any person who ... is under any acknowledgment of allegiance, obedience, or adherence to a foreign power, or is a subject or a citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power ... shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

While this provision does not, in its terms, demand that parliamentarians hold Australian citizenship, it effectively requires this in practice.²² As such, permanent residents are prohibited from standing for political office at the Commonwealth level in Australia.

Fifth, in the case of rights to protection, Australian citizens appear to enjoy greater rights to diplomatic assistance than non-citizens.²³ However, as no rights in this area are codified, the distinction between Australian citizens and non-citizens cannot be classified as a legal one, and the degree of distinction is difficult to measure.²⁴

Despite the foregoing, there are some striking similarities shared by both Australian citizens and permanent residents in Australia. First, as Rubenstein concluded, statutes in Australia far more commonly discriminate on the basis of residence in Australia than on the basis of citizenship.²⁵ Accordingly, from a global perspective, Commonwealth statutes in Australia predominantly place Australian citizens and permanent residents in the same category when regulating rights and obligations. Second, like permanent residents, it must not be assumed that Australian citizens have an “absolute right of re-entry” into Australia.²⁶ In accordance with ss 4(3) and 166(1) of the *Migration Act*, citizens as well as non-citizens are required to identify themselves upon entering Australia. Third, Australian extradition law does not discriminate on the basis of citizenship, or even of residency.²⁷ The *Extradition Act 1988* (Cth) facilitates the extradition of both citizens and non-citizens, and the criteria that govern extradition do not change depending on whether or not the person whose extradition is sought holds citizenship.²⁸ Fourth, the implied freedom of political communication that has been held to arise out of ss 7 and 24 of the Australian *Constitution* is not restricted to citizens, but rather extends to all persons in Australia.²⁹ In that way, like Australian citizens, permanent residents indirectly form part of the political community in Australia.

II. STATUTORY FRAMEWORK AND OBJECTS OF CHARACTER TEST

There are a number of provisions in the *Citizenship Act* that address issues of good character related to a non-citizen. For relevant purposes, two essential provisions in the *Citizenship Act* impose a good character requirement on applicants seeking to become Australian citizens. Pursuant to s 16(3)(c) of the *Citizenship Act*, a person born outside Australia or New Guinea before 26 January 1949 is eligible to become an Australian citizen if the individual is or has ever been a national or a citizen of any country, or if Art 1(2)(iii) of the Stateless Persons Convention³⁰ applies to the person, the Minister is satisfied

²¹ Pillai, n 12, 777.

²² Pillai, n 12, 778.

²³ Pillai, n 12, 784.

²⁴ Pillai, n 12, 784.

²⁵ Rubenstein, n 19, 184; Pillai, n 12, 750.

²⁶ Rubenstein, n 19, 230.

²⁷ Pillai, n 12, 766.

²⁸ Pillai, n 12, 766.

²⁹ Pillai, n 12, 778.

³⁰ The *Convention Relating to the Status of Stateless Persons* is taken not to apply to persons with respect to whom there are serious reasons for considering that (a) they have committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provisions in respect of such crimes; or (b) they have committed a serious non-political crime outside the country of their residence prior to their admission to that country; or they have been guilty of acts contrary to the purposes and principles of the United Nations: see Art 1(2)(iii).

that the individual is of good character at the time of the Minister's decision on the application. Under s 21(2)(h) of the *Citizenship Act*, a person is eligible to become an Australian citizen if the Minister is satisfied that the individual is of good character at the time of the Minister's decision on the application.³¹ In addition to the good character requirement,³² as outlined earlier, non-citizens must also meet a number of other general eligibility criteria unrelated to issues of character.³³

Under ss 500A–503 of the *Migration Act*, there are a complex set of provisions that relate to the imposition of a good character requirement imposed on Australian visa holders or potential visa holders in Australia. Relevantly, two key provisions require closer consideration for the purposes of this article.

First, under s 501(2) of the *Migration Act*:

- (2) The Minister may cancel a visa that has been granted to a person if:
 - (a) the Minister reasonably suspects that the person does not pass the character test; and
 - (b) the person does not satisfy the Minister that the person passes the character test.

Second, under s 501(6)(c) of the *Migration Act*, a person does not pass the character test if:

- (c) having regard to either or both of the following:
 - (i) the person's past and present criminal conduct;
 - (ii) the person's past and present general conduct;
- the person is not of good character.

A non-citizen may also be taken to fail the character test for various other reasons,³⁴ but those matters are beyond the relevance of this article.³⁵ An assessment that a non-citizen does not pass the character test is not necessarily an assessment of a person's character; it is a single character test that covers a range of conduct.³⁶

For present purposes, it is clear that both the *Citizenship Act* and *Migration Act* impose a good character requirement associated with the status of non-citizens in Australia. Under both Commonwealth statutes, the onus is on the person in question to prove that he or she is of good character.³⁷

Having outlined the broad statutory framework of the good character requirement under both the *Citizenship Act* and *Migration Act*, it is now appropriate to describe the purposes of the character requirement under both Commonwealth statutes. Although not entirely the same, it is clear that the statutory purposes of imposing a character requirement associated with becoming an Australian citizen or holding an Australian visa are very similar.

First, writing in the context of a character case related to the *Citizenship Act*, the AAT has held that the conferral of Australian citizenship is a “privilege”.³⁸ Similarly, in construing the character test under the *Migration Act*, Commonwealth policy mandates a fundamental principle is that coming to or remaining in Australia is a “privilege” Australia confers on visa holders.³⁹ Second, in considering the role of the character requirement under the *Citizenship Act*, the AAT has outlined that Australian citizenship is

³¹ *Haghghi v Minister for Immigration and Border Protection* [2017] AATA 1161, [4] (Senior Member J F Toohey).

³² The good character requirement is also imposed on non-citizens who have a permanent or enduring physical or mental incapacity, persons aged 60 or over or who have hearing, speech or sight impairment, persons born to a former Australian citizen and persons born in Papua: *Australian Citizenship Act 2007* (Cth) ss 21(3)(f), 21(4)(f), 21(6)(d), 21(7)(d).

³³ See further *Australian Citizenship Act 2007* (Cth) s 21(2)(a)–(g).

³⁴ See further *Migration Act 1958* (Cth) s 501(6)–(11).

³⁵ The various limbs of the character test are disjunctive. If any limb is failed, the character test is failed in full: *Madafferi v Minister for Immigration and Multicultural Affairs* (2002) 118 FCR 326, 341 [50] (French, O'Loughlin and Whitlam JJ); [2002] FCAFC 220.

³⁶ Joanne Kinslor and James English, “Decision-Making in the National Interest?” (2015) 79 *AIAL Forum* 35, 37.

³⁷ Savitri Taylor, “Exclusion from Protection of Persons of ‘Bad Character’: Is Australia Fulfilling Its Treaty-based Non-refoulement Obligations?” (2002) 8 *Australian Journal of Human Rights* 83, 92.

³⁸ *Ahmadi v Minister for Immigration and Border Protection* [2017] AATA 1086, [171] (Senior Member J Sosso); *Sui v Minister for Immigration and Citizenship* [2008] AATA 1062.

³⁹ *Direction No 65*, cl 6.3(1).

given to those who uphold the values of the Australian community and are willing to make a positive contribution to the country they want to call home.⁴⁰

Correspondingly, in applying the character test under the *Migration Act*, Commonwealth policy mandates that there is an expectation that non-citizens will respect important Australian institutions (such as Australia's law enforcement framework).⁴¹ Further, pursuant to Commonwealth policy, applying the character requirement under s 501 of the *Migration Act* is said to reflect community values and standards.⁴² In applying the character test under the *Migration Act*, decision-makers are also to have regard to the length of time a non-citizen has been making a positive contribution to the Australian community.⁴³ This consideration is repeated in Commonwealth policy on several occasions.⁴⁴

Third, the imposition of the good character requirement is to ensure that Australian citizenship is not bestowed upon undesirable persons.⁴⁵ In a similar context, the character test imposed upon visa holders (or non-citizens seeking an Australian visa) is also designed to ensure undesirable non-citizens are denied a particular legal status.⁴⁶

Fourth, writing in the context of what is required of a non-citizen seeking Australian citizenship under the *Citizenship Act*, the AAT in *Zheng* has said:

In the context of the Act, loyalty to Australia, a belief in a democratic form of government, a respect for the rights and liberties of all Australians and obedience to and observance of the law are values that are regarded as significant. An assessment of a person's character will need to have regard to them. They are not values that can be assessed in the abstract. Instead, they are measured in part by what a person says, in part by what a person does and in part by what a person is heard to say and seen to do.⁴⁷

For the purposes of applying s 501(2) of the *Migration Act*, Commonwealth policy mandates that there is an expectation that non-citizens will be law-abiding, respect important Australian institutions and not pose a risk of harm⁴⁸ to individuals or the Australian community.⁴⁹

Arguably, the preceding discussion in *Zheng* demonstrates two essential differences between the object of the good character requirement as it is applied under both the *Citizenship Act* and the *Migration Act*. Essentially, matters of loyalty and a belief in a democratic form of government are not generally relevant considerations for the purposes of the character test under ss 501(2) and 501(6)(c) of the *Migration Act*. Those latter factors are not expressly reflected in the *Migration Act*, nor are they reflected in Commonwealth policy related to the character test under s 501(2). Notwithstanding the identified

⁴⁰ *Fenn v Minister for Immigration and Multicultural Affairs* [2000] AATA 931, [8] (Deputy President Breen).

⁴¹ *Direction No 65*, cl 6.3(1).

⁴² *Direction No 65*, cl 6.2(1).

⁴³ *Direction No 65*, cl 6.3(7). For example, a non-citizen's contribution to society through his employment: *Sadiq v Minister for Immigration and Border Protection* [2016] AATA 463, [26] (Deputy President McDermott); *Al Hashimi v Minister for Immigration and Citizenship* (2012) 130 ALD 640, [53]; [2012] AATA 534.

⁴⁴ *Direction No 65*, cl 10.2(1)(a)(ii), 14.2(1)(a)(ii).

⁴⁵ *Ahmadi v Minister for Immigration and Border Protection* [2017] AATA 1086, [185] (Senior Member J Sosso).

⁴⁶ *Djalic v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 139 FCR 292, 310–311 [71] (Tamberlin, Sackville and Stone JJ); [2004] FCAFC 151; *Akpata v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 65, [103] (Lander J, with whom Carr and Sundberg JJ agreed).

⁴⁷ *Zheng v Minister for Immigration and Citizenship* (2011) 55 AAR 94, [120]; [2011] AATA 304. Cited with approval in *Mahmood v Minister for Immigration and Border Protection* [2017] AATA 2033, [3] (Senior Member M J McGowdie).

⁴⁸ In *Tanielu v Minister for Immigration and Border Protection* (2014) 225 FCR 424, 450 [121]; [2014] FCA 673, Mortimer J found that "risk of harm" was a mandatory consideration under *Migration Act 1958* (Cth) s 501. This aspect of Mortimer J's judgment was cited with approval in *Moana v Minister for Immigration and Border Protection* (2015) 230 FCR 367, [48] (Rangiah J); [2015] FCAFC 54. That said, in *Ayoub v Minister for Immigration and Border Protection* (2015) 231 FCR 513, 525 [37]; [2015] FCAFC 83, Flick, Griffiths and Perry JJ found that reservation may nevertheless be presently expressed with respect to the concern expressed by Mortimer J in *Tanielu* to incorporate the risk of harm to the Australian community as "an integral aspect of the exercise of the power in s 501(2)".

⁴⁹ *Direction No 65*, cl 6.3(1).

differences, *Zheng* demonstrates another fundamental similarity in the objective of the character requirement under both the *Citizenship Act* and *Migration Act* – namely, non-citizens are expected to comply with Australian law for the purposes of holding an Australian visa and becoming an Australian citizen.⁵⁰

The *Citizenship Policy* has been developed by the Citizenship Policy Section of the Department of Home Affairs to provide guidance to delegates of the Minister on the interpretation of, and the exercise of powers under the *Citizenship Act*.⁵¹ In particular, the *Citizenship Policy* provides guidance on construing the character requirement under the *Citizenship Act*.⁵² The *Citizenship Policy* broadly stipulates that character considerations under both the *Migration Act* and *Citizenship Act* are not the same, and it is possible that an applicant could have passed the character test under the *Migration Act* but still not be of good character under the *Citizenship Act*.⁵³

Although the previous guidance provided in the *Citizenship Policy* is strictly correct, it is also true that the objectives to be served by the imposition of a good character requirement under both the *Migration Act* and *Citizenship Act* are largely the same. In that context, it is arguable that a non-citizen who fails the character test under the *Citizenship Act* should have the character requirement under s 501(2) of the *Migration Act* revisited by the Minister. This argument becomes more compelling when it is appreciated that the objectives of the character requirement under both the *Migration* and *Citizenship Acts* are in large part, similar.

III. COMMON CHARACTERISTIC OF “ENDURING MORAL QUALITIES”

Having examined the statutory objects and purposes of the character requirement under both the *Citizenship Act* and *Migration Act*, it is now appropriate to consider what is meant by the phrase good character under both Commonwealth statutes. As will be demonstrated, the phrase has been interpreted to reflect an analogous legal meaning under both the *Citizenship Act* and *Migration Act*.

The Australian Citizenship Act

In the *Citizenship Act*, the good character test is not defined.⁵⁴ Rather, the good character requirement is defined in the *Citizenship Policy*. Adoption of this latter approach is likely to provide a greater level of discretion and flexibility for the Minister in applying the good character criterion. After all, the Minister, unlike his delegates, is not bound to strictly apply government policy. The lack of defining the good character term in the *Citizenship Act* may very well be a contributing factor to explaining (at least in part) why there has been a dearth of judicial analysis on the topic. Conversely, as the good character requirement is extensively defined in the *Migration Act*, this has led to a substantial level of judicial engagement with that requirement (applying relevant principles of statutory interpretation). The *Citizenship Policy* makes plain that good character refers to the *enduring moral qualities* of a person, and is an indication of whether an applicant is likely to uphold and obey the laws of Australia.⁵⁵ The AAT have used the ordinary meaning of the words,⁵⁶ and made reference to dictionary definitions of good character.⁵⁷

⁵⁰ *Abourbakan Kabamba v Minister for Immigration and Border Protection* [2016] AATA 832, [13] (Member Ms A Goodier).

⁵¹ *Citizenship Policy* (Department of Home Affairs, 1 June 2016), 1 <<https://www.homeaffairs.gov.au/Citizenship/Documents/acis-june-2016.pdf>>.

⁵² *Citizenship Policy*, n 51, 144–156.

⁵³ *Citizenship Policy*, n 51, 145.

⁵⁴ *Kerris v Minister for Immigration and Border Protection* [2017] AATA 1148, [16] (Senior Member J Sosso).

⁵⁵ *Citizenship Policy*, n 51, 145.

⁵⁶ *Assafiri v Minister for Immigration and Border Protection* [2014] AATA 35, [64] (Senior Member Toohey); *Zaya v Minister for Immigration and Border Protection* [2017] AATA 366, [77] (Deputy President Dr Christopher Kendall); *Dabbousi v Minister for Immigration and Border Protection* [2016] AATA 812, [4] (Deputy President Bernard J McCabe); *Haghghi v Minister for Immigration and Border Protection* [2017] AATA 1161, [6] (Senior Member J F Toohey); *Martin v Minister for Immigration and Border Protection* [2017] AATA 1093, [7] (Senior Member A Poljak).

⁵⁷ *Assafiri v Minister for Immigration and Border Protection* [2014] AATA 35, [64] (Senior Member Toohey).

Most AAT cases have adopted the following definition of good character from the Full Federal Court judgment in *Irving v Minister for Immigration, Local Government and Ethnic Affairs (Irving)* (which concerned the good character term in the *Migration Act*):⁵⁸

Unless the terms of the Act and regulations require some other meaning be applied, the words “good character” should be taken to be used in their ordinary sense, namely, a reference to the enduring moral qualities of a person, and not the good standing, fame or repute of that person in the community. The former is an objective assessment apt to be proved as a fact while the latter is a review of subjective public opinion ... A person who has been convicted of a serious crime and thereafter held in contempt in the community, nonetheless may show that he or she has reformed and is of good character ... Conversely, a person of good repute may be shown by objective assessment to be a person of bad character.⁵⁹

In this context, “moral” does not have any religious connotations.⁶⁰ The phrase “enduring moral qualities” encompasses the following concepts:⁶¹ (1) characteristics which have been demonstrated over a very long period of time;⁶² (2) distinguishing right from wrong;⁶³ and (3) behaving in an ethical manner, conforming to the rules and values of Australian society.⁶⁴

The good character requirement looks at the essence of the applicant.⁶⁵ Their behaviour is a manifestation of their essential characteristics.⁶⁶ This broad definition means that a decision-maker can be satisfied that an applicant is of good character if the applicant has demonstrated good enduring/lasting moral qualities⁶⁷ that are evident before their visa application and throughout their migration and citizenship processes.⁶⁸

Under the *Citizenship Policy*, Commonwealth policy outlines that an applicant of good character would have the following characteristics:⁶⁹

- Respect and abide by the law in Australia and other countries;
- Be honest and financially responsible (for example, pay their taxes, and not be in dishonest receipt of public funds);
- Be truthful and not practise deception or fraud in their dealings with the Australian Government, or other governments and organisations ... ;
- Not be violent, involved in drugs or unlawful sexual activity, and not cause harm to others through their conduct (for example recklessness exhibited by negligent or drink driving, excessive speeding or driving without a licence or insurance);⁷⁰
- Not be associated with others who are involved in anti-social or criminal behaviour, or others who do not uphold and obey the laws of Australia;
- Not have evaded immigration control or assisted others to do so, or been involved in the illegal movement of people;⁷¹

⁵⁸ *Irving v Minister for Immigration, Local Government and Ethnic Affairs* (1996) 68 FCR 422.

⁵⁹ *Irving v Minister for Immigration, Local Government and Ethnic Affairs* (1996) 68 FCR 422, 431–432. Cited with approval in *CVGY v Minister for Immigration and Border Protection* [2017] AATA 2094, [24] (Deputy President Christopher Kendall).

⁶⁰ *Zaya v Minister for Immigration and Border Protection* [2017] AATA 366, [76] (Deputy President Dr Christopher Kendall); *Haghghi v Minister for Immigration and Border Protection* [2017] AATA 1161, [8] (Senior Member J F Toohey).

⁶¹ *CVGY v Minister for Immigration and Border Protection* [2017] AATA 2094, [25] (Deputy President Christopher Kendall).

⁶² *Martin v Minister for Immigration and Border Protection* [2017] AATA 1093, [7] (Senior Member A Poljak).

⁶³ *Haghghi v Minister for Immigration and Border Protection* [2017] AATA 1161, [8] (Senior Member J F Toohey).

⁶⁴ *Kumar v Minister for Immigration and Border Protection* [2017] AATA 997, [9] (Member Mr S Webb).

⁶⁵ *Martin v Minister for Immigration and Border Protection* [2017] AATA 1093, [7] (Senior Member Poljak).

⁶⁶ *Citizenship Policy*, n 51, 145.

⁶⁷ *Haghghi v Minister for Immigration and Border Protection* [2017] AATA 1161, [8] (Senior Member J F Toohey).

⁶⁸ *Citizenship Policy*, n 51, 146.

⁶⁹ *Citizenship Policy*, n 51, 147.

⁷⁰ *Nguyen v Minister for Immigration and Border Protection* [2017] AATA 1157, [19] (Senior Member Griffin) (footnote added).

⁷¹ For example, conduct of a non-citizen that related to abuse of Australia’s migration laws: *Sebastian v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 31, [2] (Tamberlin, Kiefel and Emmett JJ) (footnote added).

- Not have committed, been involved with or associated with war crimes, crimes against humanity and/or genocide;⁷²
- Not be the subject of any extradition order or other international arrest warrant;
- Not be involved in or providing assistance to, or reasonably suspected of being involved in or providing assistance to, terrorist organisations or acts of terrorism overseas or in Australia; and
- Not be the subject of any verifiable information causing character doubts.⁷³

The preceding list is not exhaustive.⁷⁴ The citizenship character assessment is informed by the applicant's character prior to applying for a visa⁷⁵ and during their time in Australia.⁷⁶ It is an evaluation of all the available information to date, including any information provided in the visa application process and while the applicant has been a visa holder in Australia.⁷⁷ Ultimately, the assessment about whether an applicant is of good character requires a consideration of an aggregate of qualities.⁷⁸

Essentially, the question for decision-makers is whether any mitigating circumstances and/or explanation provided by the applicant outweigh the behaviour in question.⁷⁹ In weighing up the various factors, the decision-maker must not apply their own personal standards, but must apply community standards.⁸⁰

A decision-maker needs to look holistically at an applicant's behaviour over a lasting or enduring period of time.⁸¹ The amount of time considered to be "lasting" or "enduring" depends on the merits of each case, but in most cases will go back prior to any visa application.⁸²

The Migration Act

Everyone who wants to enter or stay in Australia must satisfy the character requirements as set out in s 501 of the *Migration Act*.⁸³ If a person does not pass the character test, their visa application may be refused or their visa may be cancelled.⁸⁴ The character test comprises several limbs that capture a broad range of non-citizens of character concern, including non-citizens who do not have criminal convictions, but are nevertheless determined to be a risk to the Australian community.⁸⁵

Decisions to cancel or refuse visas on the basis of the character test are made after full consideration of all the circumstances of the case.⁸⁶ Under s 501(2) of the *Migration Act*, the Minister may consider cancelling the visa of a non-citizen if the Minister reasonably suspects the person does not pass the

⁷² Cited in *Santos v Minister for Immigration and Multicultural Affairs* [2000] AATA 567, [25]; *Haneef v Minister for Immigration and Citizenship* (2007) 161 FCR 40, [94] (Spender J); [2007] FCA 1273 (footnote added).

⁷³ Cited in *Kerris v Minister for Immigration and Border Protection* [2017] AATA 1148, [22] (Senior Member J Sosso) (footnote added).

⁷⁴ *Haghigi v Minister for Immigration and Border Protection* [2017] AATA 1161, [9] (Senior Member J F Toohey).

⁷⁵ *Bhatia v Minister for Immigration and Border Protection* [2017] AATA 927, [13] (Deputy President Gary Humphries).

⁷⁶ *Citizenship Policy*, n 51, 149.

⁷⁷ *Citizenship Policy*, n 51, 149.

⁷⁸ *Prasad v Minister for Immigration and Ethnic Affairs* [1994] AATA 326, [7]; *Bhatia v Minister for Immigration and Border Protection* [2017] AATA 927, [13] (Deputy President Gary Humphries); *Ahmadi v Minister for Immigration and Border Protection* [2017] AATA 1086, [27] (Senior Member J Sosso); *Katambwe v Minister for Immigration and Border Protection* [2016] AATA 989, [18].

⁷⁹ *Citizenship Policy*, n 51, 149.

⁸⁰ *Rahman v Minister for Immigration and Border Protection* [2016] AATA 1034, [20]; *Wang v Minister for Immigration and Border Protection* [2014] AATA 89, [7]; *Katambwe v Minister for Immigration and Border Protection* [2016] AATA 989, [18].

⁸¹ *Singh v Minister for Immigration and Border Protection* [2016] AATA 1020, [57] (Senior Member T Tavoularis); *Mahmood v Minister for Immigration and Border Protection* [2017] AATA 2033, [5] (Senior Member M J McGowdie).

⁸² *Citizenship Policy*, n 51, 150.

⁸³ *Citizenship Policy*, n 51, 148.

⁸⁴ *Citizenship Policy*, n 51, 148.

⁸⁵ *Citizenship Policy*, n 51, 148.

⁸⁶ *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1, 23–24 [70] (Griffiths J); [2016] FCAFC 11.

character test. The matters identified in s 501(6)⁸⁷ show that the *Migration Act* is designed to protect the community from criminal or other undesirable conduct and to permit the Minister to give effect to what might loosely be described as community expectations that perpetrators of such behaviour, should not be allowed to remain in Australia.⁸⁸

In accordance with s 501(6)(c) of the *Migration Act*, one way a non-citizen is taken to fail the character test under s 501(2) is if the person is not of good character because of that person's past and/or present criminal or general conduct.⁸⁹ In considering whether an individual is not of good character, all the relevant circumstances of the particular case are to be taken into account to obtain a complete picture of the person's character.⁹⁰

Significantly, in construing the good character requirement under ss 501(2) and 501(6)(c) of the *Migration Act*, Commonwealth policy has adopted the "enduring moral qualities" principle espoused by Lee J in *Godley*⁹¹ and *Irving*:⁹²

The words "of good character" mean enduring moral qualities reflected in soundness and reliability in moral judgement in the performance of day-to-day activities and in dealing with fellow citizens. It is not simply a matter of repute, fame or standing in the community but of continuing performance according to moral principle. A person of ill repute by reason of past criminal conduct may nonetheless, on objective examination at a later stage in life, be shown to be a person reformed and now of good character. (See: *Irving v Minister for Immigration, Local Government and Ethnic Affairs* (1996) 68 FCR 422 at 431-432).⁹³

The statement of Lee J was approved by the Full Federal Court in *Baker*⁹⁴ and more recently by the Full Federal Court in *Goldie*.⁹⁵ In *Goldie*, in a joint judgment, Spender, Drummond and Mansfield JJ said:

The concept of "good character" in s 501 is not concerned with whether an applicant for entry meets the highest standards of integrity, but with a less exacting standard than that. It is concerned with whether the applicant for entry's character in the sense of his or her enduring moral qualities, is so deficient as to show it is for the public good to refuse entry.⁹⁶

In discussing s 501(6) of the *Migration Act*, the Full Court (Madgwick, Lander and Crennan JJ) in *Godley*⁹⁷ quoted with express approval lengthy passages from the reasons of Lee J at first instance

⁸⁷ The definition of a person passing the character test in *Migration Act 1958* (Cth) s 501(6) shows that Parliament intended that persons who have been convicted of relatively serious crime; associate with criminals; have a history including an immediate history of criminal conduct or general conduct indicating bad character; are a significant risk of engaging in criminal conduct or undesirable conduct, should not be permitted to travel to or remain in Australia: *Akpata v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 65, [103] (Lander J, with whom Carr and Sundberg JJ agreed).

⁸⁸ *Djalic v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 139 FCR 292, [71] (Tamberlin, Sackville and Stone JJ); [2004] FCAFC 151.

⁸⁹ *Direction No 65*, Annexure A, s 2 cl 5(1).

⁹⁰ *Direction No 65*, Annexure A, s 2 cl 5(3).

⁹¹ *Godley v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 83 ALD 411; [2004] FCA 774.

⁹² Applied in the Administrative Appeals Tribunal: see *Santos v Minister for Immigration and Multicultural Affairs* [2000] AATA 567; *May v Minister for Immigration and Multicultural Affairs* [2000] AATA 480, [44]-[47], [52]; *Mann v Minister for Immigration and Multicultural Affairs* [2000] AATA 791, [31]-[32], [56]-[58], [63].

⁹³ *Godley v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 83 ALD 411, [51]; [2004] FCA 774. Cited in *Powell v Administrative Appeals Tribunal* [1998] FCA 1747 (French J) and more recently in *Adekoja v Minister for Immigration and Border Protection* [2017] AATA 2028, [79] (Member K Parker); *Mehdi v Minister for Immigration and Border Protection* [2017] AATA 2029, [41]-[45] (Senior Member Egon Fice).

⁹⁴ *Minister for Immigration and Ethnic Affairs v Baker* (1997) 73 FCR 187.

⁹⁵ *Goldie v Minister for Immigration and Multicultural Affairs* (1999) 56 ALD 321; [1999] FCA 1277.

⁹⁶ *Goldie v Minister for Immigration and Multicultural Affairs* (1999) 56 ALD 321, [8]; [1999] FCA 1277. See further *Minister for Immigration and Multicultural Affairs v Gunner* (1998) 50 ALD 11, 408; 84 FCR 400.

⁹⁷ *Minister for Immigration and Multicultural and Indigenous Affairs v Godley* (2005) 141 FCR 552; [2005] FCAFC 10.

including, in particular, his Honour’s observations about s 501(6) which they said, “constitutes a valuable guide for decision-makers”.⁹⁸

In *Baker*, the Full Court also gave guidance concerning the way in which a person’s general conduct should be taken into account when assessing whether or not they were of good character under s 501(6)(c) of the *Migration Act*:

We do not think there is any warrant for extracting from the broad word “general” a meaning that would eliminate conduct other than conduct so frequently indulged in as to be described as prevalent or usual. Just as a person’s criminal conduct on a few occasions may be very revealing of character, so also some instances of general conduct as we understand the term, displayed but once or twice, may lay character bare very tellingly.⁹⁹

Before past and present general conduct may be taken to reveal indicia that a non-citizen is not of good character, it must generally be demonstrated that this conduct shows a continuing lack of *enduring moral quality*.¹⁰⁰ Although in some circumstances isolated elements of conduct may be significant and display lack of moral worth they will be rare, and as with consideration of criminal behaviour there must be due regard given to recent good conduct.¹⁰¹

The past and present general conduct provision under s 501(6)(c)(ii) of the *Migration Act* allows a broader view of a person’s character where convictions may not have been recorded or where the person’s conduct may not have constituted a criminal offence.¹⁰² Under this limb of the character test, Commonwealth policy provides a number of examples which are relevant to “general conduct”:¹⁰³

- Whether the person has been involved in activities indicating contempt or disregard for the law or for human rights;
- Whether the person has been removed or deported from Australia or another country and the circumstances that led to the removal/deportation;
- Whether the person has been dishonourably discharged or discharged prematurely from the Armed Forces of another country as a result of disciplinary action; and
- Where a person is in Australia and charges have been brought against that person in a jurisdiction other than an Australia jurisdiction.¹⁰⁴

For the purposes of the character test under s 501(6)(c)(i),¹⁰⁵ criminal conduct means conduct that is punishable by law and has actually been punished by a conviction for an offence.¹⁰⁶ All other conduct, both good and bad, including conduct that may be a crime that was never prosecuted, where no conviction was recorded or the non-citizen was acquitted, is treated as general conduct.¹⁰⁷

The ability to take such matters into account as past and present general conduct (or indeed as past and present criminal conduct for the purposes of s 501(6)(c)(i)) is dependent on a finding that conduct of that description has occurred.¹⁰⁸ In the absence of a prosecution and conviction, satisfaction that

⁹⁸ *Minister for Immigration and Multicultural and Indigenous Affairs v Godley* (2005) 141 FCR 552, 559 [34]; [2005] FCAFC 10.

⁹⁹ Cited in *Santos v Minister for Immigration and Multicultural Affairs* [2000] AATA 567, [48].

¹⁰⁰ *Direction No. 65*, Annexure A, s 2, cl 5(4), 27; *Godley v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 83 ALD 411, [56] (Lee J); [2004] FCA 774.

¹⁰¹ *Godley v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 83 ALD 411, [56] (Lee J); [2004] FCA 774.

¹⁰² *Direction No. 65*, Annexure A, s 2 cl 5.2(1), 27.

¹⁰³ See further *Haneef v Minister for Immigration and Citizenship* (2007) 161 FCR 40, [94] (Spender J); [2007] FCA 1273.

¹⁰⁴ *Direction No. 65*, Annexure A, s 2 cl 5.2(2), 28.

¹⁰⁵ The general conduct of a person may involve criminal conduct and criminal conduct may involve aspects of general conduct: *Morales v Minister for Immigration and Multicultural Affairs* (1998) 82 FCR 374, 379 (Black CJ, Burchett and Tamberlin JJ).

¹⁰⁶ *Santos v Minister for Immigration and Multicultural Affairs* [2000] AATA 567, [23].

¹⁰⁷ *Santos v Minister for Immigration and Multicultural Affairs* [2000] AATA 567, [23].

¹⁰⁸ *Brown v Minister for Immigration and Citizenship* (2010) 183 FCR 113, [22] (Edmonds J); [2010] FCAFC 33.

criminal conduct has occurred will not be attained on slight material.¹⁰⁹ That said, “criminal conduct” and “general conduct” are not a dichotomy and may overlap.¹¹⁰ General conduct¹¹¹ also includes recent good behaviour.¹¹² Any good acts of the non-citizen after reprehensible conduct¹¹³ are indication that the non-citizen’s character may have reformed.¹¹⁴ Thus, both good and bad conduct must be taken into consideration in obtaining a complete picture of the non-citizen’s character.¹¹⁵ Neither ss 501(6)(c)(i) nor 501(6)(c)(ii) of the *Migration Act* could be engaged by merely looking respectively at a non-citizen’s past general conduct or past criminal conduct.¹¹⁶

The compendious concept “past and present general conduct” requires attention to the character of the visa applicant over the continuum of a period of time.¹¹⁷ It is not necessary that in every circumstance there must be past general bad conduct and present general bad conduct.¹¹⁸ Past bad conduct may, in certain circumstances, outweigh recent general good conduct so as to compel or favour a conclusion that the person continues to lack moral worth.¹¹⁹

In *Powell*,¹²⁰ French J gave an insightful analysis of the good character requirement imposed under s 501 of the *Migration Act*:

Character may be a little like curates egg and an assessment of whether an applicant is not of good character in the context of an application for a visa must have regard to the public purposes to be served by an adverse finding. In addition it is not sufficient in my opinion for the decision-maker to simply determine under s 501 that a person is not of good character and then move on to consider other discretionary considerations. The nature of the moral deficiencies of persons which justify a view that they are not of good character may be infinite in their range. The want of good character in persons convicted of offences against the person or dealing in addictive drugs may be very different in kind from that of persons who have lied in order to get into the country. And the quality of the character found not to be good will be relevant to the exercise of the discretion which remains after that finding is made by the decision-maker under s 501.¹²¹

Ultimately, a person’s past and present general conduct under s 501(6)(c)(ii) of the *Migration Act* also carries with it the overriding concern for the protection of the Australian community.¹²² The word

¹⁰⁹ B Robertson, “Criminal Allegations in Civil Cases” (1991) 107 *Law Quarterly Review* 194, cited in *Brown v Minister for Immigration and Citizenship* (2010) 183 FCR 113, [22] (Edmonds J); [2010] FCAFC 33.

¹¹⁰ *Wong v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 440, [33]–[35] (Black CJ, Hill and Hely JJ).

¹¹¹ *Wong v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCAFC 440, [29].

¹¹² *Santos v Minister for Immigration and Multicultural Affairs* [2000] AATA 567, [26].

¹¹³ Examples of reprehensible conduct for the purposes of *Migration Act 1958* (Cth) s 501(6)(c)(ii) may include conduct that may not be criminal overseas, yet might be regarded in Australia as showing that a person is “not of good character”, including brothel keeping, usury, exploitation of child labour, and defaulting on child maintenance: *Baker v Minister for Immigration and Multicultural Affairs* (1996) 69 FCR 494, 500 (Whitlam J). Further, *Migration Act 1958* (Cth) s 501(6)(c)(ii) would encapsulate a person who entered into a sham marriage and subsequently sought to perpetuate the sham by the production of forged documents: *Mujedenoovski v Minister for Immigration and Citizenship* (2010) 115 ALD 477; [2010] AATA 380.

¹¹⁴ *Santos v Minister for Immigration and Multicultural Affairs* [2000] AATA 567, [26].

¹¹⁵ *Santos v Minister for Immigration and Multicultural Affairs* [2000] AATA 567, [26].

¹¹⁶ *Mujedenoovski v Minister for Immigration and Citizenship* (2009) 112 ALD 10, [41] (Ryan, Mansfield and Tracey JJ); [2009] FCAFC 149.

¹¹⁷ *Mujedenoovski v Minister for Immigration and Citizenship* (2009) 112 ALD 10, [47]; [2009] FCAFC 149.

¹¹⁸ *Mujedenoovski v Minister for Immigration and Citizenship* (2009) 112 ALD 10, [47]; [2009] FCAFC 149.

¹¹⁹ *Mujedenoovski v Minister for Immigration and Citizenship* (2009) 112 ALD 10, [47]; [2009] FCAFC 149.

¹²⁰ *Powell v Administrative Appeals Tribunal* (1998) 89 FCR 1; [1998] FCA 1747.

¹²¹ *Powell v Administrative Appeals Tribunal* (1998) 89 FCR 1, 15 (French J); [1998] FCA 1747.

¹²² *Tanielu v Minister for Immigration and Border Protection* (2014) 225 FCR 424, 451 [132] (Mortimer J); [2014] FCA 673; *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1, 6–7 [16] (Allsop CJ); [2016] FCAFC 11; *Djalic v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 139 FCR 292, 310 [68] (Tamberlin, Sackville and Stone JJ); [2004] FCAFC 151.

“protection” contemplates that there is some kind of harm, disadvantage, or unacceptable or undesirable consequence.¹²³

There must be an affirmative finding by the Minister that a person does not pass the character test under s 501(2) of the *Migration Act* before the precondition to the discretion to refuse or cancel a visa arises.¹²⁴ In other words, the scheme of ss 501(2) and 501(6)(c) of the *Migration Act* requires an affirmative finding by the decision-maker that there is the requisite kind of difficulty with how an individual might behave in Australia sufficient to enliven the discretion to refuse or cancel a visa.¹²⁵

Analogous Application of Character Test

Having discussed at some length the meaning and application of the character test under s 501(2) of the *Migration Act* and the *Citizenship Act*, it is clear that the test is applied in a comparable way under both Commonwealth statutory regimes. In that respect, a number of points can be made.

First, under both Australian citizenship law and the migration legislation in Australia, the term “good character” is understood as referring to the “enduring moral qualities” of a non-citizen. The preceding view is clearly reflected in government policy in both the *Citizenship Policy*¹²⁶ and *Direction No 65*.¹²⁷ As previously explored, the genesis of the enduring moral qualities expression was outlined in Federal Court cases such as *Irving*¹²⁸ and *Godley*¹²⁹ in the context of the character test under s 501 of the *Migration Act*. Significantly, those same cases have been directly applied to interpreting the good character requirement under the *Citizenship Act*.

Second, a fundamental similarity shared between the first limb of the character test under s 501(2) of the *Migration Act*¹³⁰ and the *Citizenship Act*¹³¹ is a focus on whether the relevant non-citizen is “likely to uphold and obey the laws of Australia”. In that context, analogous to the character requirement under both s 501(2) of the *Migration Act* and *Citizenship Act* is a focus on compliance with Australian law.

Third, in determining character under both s 501(2) of the *Migration Act*¹³² and *Citizenship Act*, decision-makers generally focus on characteristics of a non-citizen that has been demonstrated over “a very long period of time”.¹³³ Correspondingly, decision-makers have regard to whether the non-citizen behaves in an ethical matter (by reference to conforming to the rules and values of Australian society) under both s 501(2) of the *Migration Act* and the character test in the *Citizenship Act*.¹³⁴

Fourth, in determining matters of character under both the first limb of the character test in s 501(2) of the *Migration Act* and the *Citizenship Act*, decision-makers have regard to all available information to date and broadly apply community standards (in contrast to their own personal standards).¹³⁵

¹²³ *Tanielu v Minister for Immigration and Border Protection* (2014) 225 FCR 424, [133]; [2014] FCA 673; *Djalic v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 139 FCR 292, 310–311 [71] (Tamberlin, Sackville and Stone JJ); [2004] FCAFC 151.

¹²⁴ *Minister for Immigration and Multicultural and Indigenous Affairs v Godley* (2005) 141 FCR 552, 566 [54]; [2005] FCAFC 10.

¹²⁵ *Tanielu v Minister for Immigration and Border Protection* (2014) 225 FCR 424, 452 [133]; [2014] FCA 673.

¹²⁶ *Citizenship Policy*, n 51, 145.

¹²⁷ *Direction No 65*, Annexure A, s 2 cl 5(3)(a), 26.

¹²⁸ *Irving v Minister for Immigration, Local Government and Ethnic Affairs* (1996) 68 FCR 422.

¹²⁹ *Godley v Minister for Immigration and Multicultural and Indigenous Affairs* (2004) 83 ALD 411; [2004] FCA 774 (appeal dismissed *Minister for Immigration and Multicultural and Indigenous Affairs v Godley* (2005) 141 FCR 552; [2005] FCAFC 10).

¹³⁰ *Direction No 65*, cl 6.3(1), 3.

¹³¹ *Haghghi v Minister for Immigration and Border Protection* [2017] AATA 1161, [6] (Senior Member J F Toohey); *Citizenship Policy*, n 51, 145–146.

¹³² In light of *Migration Act 1958* (Cth) s 501(6)(c).

¹³³ *Direction No 65*, Annexure A, s 2 cl 5.1(1), 27; *Citizenship Policy*, n 51, 145.

¹³⁴ *Direction No 65*, Annexure A, s 2 cl 5(3), 26; *Citizenship Policy*, n 51, 145.

¹³⁵ *Direction No 65*, cl 6.2(1), 3; *Citizenship Policy*, n 51, 145.

Implications of Analogy in Character Test

A number of decisions before the AAT have determined that a refusal to grant a non-citizen Australian citizenship on character grounds under the *Citizenship Act* has no adverse consequence(s) (as related to character) for the non-citizen continuing to hold an Australian visa.¹³⁶ In *Karatunov*,¹³⁷ the non-citizen argued that if he is taken not to be of good character under the *Citizenship Act*, he risked becoming a “stateless person”.¹³⁸ In rejecting this argument, Senior Member T Tavoularis held:

Any finding that this Applicant is not of good character now is not determinative of a finding that he is of good character in the future. He could apply again in the future and, provided enough time has passed, and he has not reoffended, there is every possibility of his becoming an Australian citizen. Nor does an adverse finding here impact on his current permanent residency status. Consequently, I do not consider that this weighs against a potential finding that the Applicant is not of good character.¹³⁹

By way of further example, in *Konur*,¹⁴⁰ Senior Member W Stefaniak RFD said:

I note also the respondent has indicated that your visa expires in 2019, and they have absolutely no problem at this stage with a renewal. So I make that point as well. That obviously is something that again, if need be, should be put on the record, and I so do. I think the representative for the respondent very adequately went through all the likely scenarios there and indicated if you keep your nose clean you don't get into any further trouble, you just don't have anything to worry about with such things like re-entering the country or renewal of a visa.¹⁴¹

In very recent proceedings before the Federal Court in *Al-Qadhi*,¹⁴² a non-citizen argued that the consequence of a finding that he is not of good character under the *Citizenship Act* would “lay the foundation” for the cancellation of his permanent residency visa under the *Migration Act*, including that relevant to the non-citizen’s past and present general conduct under s 501(6)(c)(ii).¹⁴³

Somewhat oddly, subsequent to the hearing in *Al-Qadhi*, the non-citizen informed the associate to McKerracher J that he no longer pressed the submission that his visa would be subject to mandatory cancellation.¹⁴⁴ In response to that correspondence, the Minister noted that consideration of any potentially applicable cancellation power is discretionary and provides an opportunity for the applicant to give a response to any notice of intention to consider cancellation.¹⁴⁵ Despite the more recent correspondence of the non-citizen after the hearing, McKerracher J briefly addressed the original submission.¹⁴⁶ McKerracher J found that even if the non-citizen’s citizenship application was rejected on character grounds, there could be no suggestion that cancellation of the non-citizen’s visa “would occur immediately, or in the future”.¹⁴⁷

¹³⁶ *Fenn v Minister for Immigration and Multicultural Affairs* [2000] AATA 931, [8] (Deputy President Breen); *Konur v Minister for Immigration and Border Protection* [2016] AATA 950 (Senior Member W Stefaniak RFD); *Singh v Minister for Immigration and Border Protection* [2016] AATA 1020, [6] (Senior Member T Tavoularis); *Bhatia v Minister for Immigration and Border Protection* [2017] AATA 927, [60] (Deputy President Gary Humphries); *Karatunov v Minister for Immigration and Border Protection* [2017] AATA 132, [68], [70] (Senior Member T Tavoularis).

¹³⁷ *Karatunov v Minister for Immigration and Border Protection* [2017] AATA 132.

¹³⁸ *Karatunov v Minister for Immigration and Border Protection* [2017] AATA 132, [68].

¹³⁹ *Karatunov v Minister for Immigration and Border Protection* [2017] AATA 132, [70].

¹⁴⁰ *Konur v Minister for Immigration and Border Protection* [2016] AATA 950 (Senior Member W Stefaniak RFD).

¹⁴¹ *Konur v Minister for Immigration and Border Protection* [2016] AATA 950 (Senior Member W Stefaniak RFD).

¹⁴² *Al-Qadhi v Minister for Immigration and Border Protection* [2017] FCA 1300.

¹⁴³ *Al-Qadhi v Minister for Immigration and Border Protection* [2017] FCA 1300, [19].

¹⁴⁴ *Al-Qadhi v Minister for Immigration and Border Protection* [2017] FCA 1300, [27].

¹⁴⁵ *Al-Qadhi v Minister for Immigration and Border Protection* [2017] FCA 1300, [27].

¹⁴⁶ *Al-Qadhi v Minister for Immigration and Border Protection* [2017] FCA 1300, [28], [30].

¹⁴⁷ *Al-Qadhi v Minister for Immigration and Border Protection* [2017] FCA 1300, [28].

It is argued that in circumstances where a non-citizen fails the character requirement under the *Citizenship Act*, the non-citizen is also taken to fail the first limb of the character test under ss 501(2) and 501(6)(c) of the *Migration Act*. There are a number of reasons for coming to this view. First, a finding that a person does not meet the character test under the *Citizenship Act* essentially means the non-citizen has failed to demonstrate they have the requisite enduring moral qualities required to be of good character.¹⁴⁸ Given that the enduring moral qualities test is also applied under ss 501(2) and 501(6)(c), this must mean the non-citizen also fails the first limb of the character test under the *Migration Act*.

Second, if the preceding point is not accepted, a paradoxical and odd result follows – namely, despite not demonstrating the enduring moral qualities required to gain Australian citizenship, the non-citizen otherwise satisfies the enduring moral qualities test under ss 501(2) and 501(6)(c) of the *Migration Act* (which rely upon the same legal cases that have developed the enduring moral qualities requirement).

Third, it makes entirely logical sense that the non-citizen who has been found not to be of good character for the purposes of Australian citizenship is also taken to fail the first limb of the character requirement under ss 501(2) and 501(6)(c) of the *Migration Act*. As previously demonstrated, the objects and purposes of the good character requirement under both the *Citizenship Act* and *Migration Act* are strikingly similar. In other words, the imposition of the character requirement under the *Citizenship Act* and *Migration Act* serve similar objectives.

Fourth, it is not suggested that a non-citizen who fails the character requirement under the *Citizenship Act* should therefore have their Australian visa automatically cancelled on character grounds under s 501(2) of the *Migration Act*. As previously stated, a non-citizen who fails the character requirement under the *Citizenship Act* should only be taken to have failed the first limb of the character test under ss 501(2) and 501(6)(c) of the *Migration Act*.

Consequently, despite failing the first limb of the character test in the *Migration Act*, the non-citizen will keep their Australian visa if they satisfy the second limb of the character test under s 501(2) of the *Migration Act* (which give rise to decision-makers considering factors such as protection of the Australian community,¹⁴⁹ the best interests of any minor children in Australia, Australia's international legal obligations and the ties that the non-citizen has to Australia).¹⁵⁰

IV. PROPOSED LEGISLATIVE AMENDMENT

The statutory operation of s 501(2) of the *Migration Act* takes effect in discretionary terms. In that context, the invocation of the character requirement under the *Migration Act* is a matter for the discretion of the Minister. Although a non-citizen may undoubtedly be taken to fail the character test (ie, the first limb), there is no mandatory obligation for the Minister even to consider applying the character requirement under s 501(2).¹⁵¹

In light of the preceding, where a non-citizen is taken to have failed the character requirement under the *Citizenship Act*, such a finding should impose a mandatory legislative obligation on the Minister to consider cancellation of the non-citizen's Australian visa on character grounds under ss 501(2) and 501(6) of the *Migration Act*. In most instances, a finding that a person does not meet the character requirement under the *Citizenship Act* will also mean the non-citizen fails the first limb of the character test under ss 501(2) and 501(6)(c) of the *Migration Act*. As previously explored, this is because the concept of *enduring moral qualities* is the essential consideration going to whether a non-citizen is of good character under both Commonwealth statutes. However, it does not follow in all instances that a

¹⁴⁸ *Citizenship Policy*, n 51, 145; *Irving v Minister for Immigration, Local Government and Ethnic Affairs* (1996) 68 FCR 422, 431–432.

¹⁴⁹ Transcript of Proceedings, *Falzon v Minister for Immigration and Border Protection* [2017] HCATrans 230 (14 November 2017), [610], [630], [810]–[820] (Lloyd SC).

¹⁵⁰ *Direction No 65; Citizenship Policy*, n 51, 148.

¹⁵¹ *VWOK v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 147 FCR 135, [12] (Heerey, Finkelstein and Allsop JJ); [2005] FCAFC 249.

non-citizen who fails the character requirement under the *Citizenship Act* will also fail the first limb of the character test under ss 501(2) and 501(6)(c) of the *Migration Act*. For example, in determining that a non-citizen does not satisfy the character test under the *Citizenship Act*, the decision-maker may have had regard to legal principles or factual material which are erroneous.

The introduction of the proposed mandatory legislative obligation being imposed upon the Minister arguably invokes at least two implications. In those circumstances, it is important to explore those implications. First, it is arguable that the introduction of the proposed mandatory legislative obligation is likely to have a deterrent effect upon applications for Australian citizenship. If a non-citizen is aware that their Australian visa would be considered for cancellation on character grounds (where they are refused Australian citizenship on character grounds), that person is less likely to apply for Australian citizenship. The apparent deterrent effect is not necessarily objectionable. Non-citizens who have a dark cloud over their character should think very carefully before making an application for Australian citizenship in any event. The apparent deterrent effect may have the real consequence of forcing the non-citizen to look more closely at the character requirement under the *Citizenship Act* before making an application for Australian citizenship.

Second, the proposed mandatory legislative obligation will cure the current apparent paradox in the conduct of the Minister. Presently, where the Minister either finds (at first instance) or argues successfully on appeal before the AAT that a non-citizen is not a person of enduring moral qualities (applying principles espoused in cases such as *Godley and Irving*), the Minister generally takes no position on invoking ss 501(2) and 501(6)(c) of the *Migration Act* (which also focus on the enduring moral qualities test).¹⁵² As will be demonstrated below, the current apparent paradox is unacceptable.

For example, in *Nguyen*,¹⁵³ a non-citizen's application for Australian citizenship was refused on character grounds. There, Senior Member Griffin found that the applicant's pattern of behaviour (demonstrated by a series of driving offences in Australia) indicated that he had a "singular disregard for the safety of himself and others on the road".¹⁵⁴ Senior Member Griffin further found that the non-citizen also had disregard, in general, for laws which are in operation to protect other citizens and displayed a continuing willingness to place himself outside the rules which govern the behaviour of people in Australia.¹⁵⁵ As the decision of *Nguyen* demonstrated, the non-citizen posed an ongoing risk of harm to members of the Australian community. Indeed, since filing his original Australian citizenship application, the non-citizen was convicted (once again) with a driving offence.¹⁵⁶

In light of the foregoing circumstances found in *Nguyen*,¹⁵⁷ it is astonishing that the Minister did not take any steps to consider cancellation of the non-citizen's visa on character grounds under ss 501(2) and 501(6)(c) of the *Migration Act*. After all, an apparent consequence of the *Nguyen* decision was that the non-citizen not only failed the enduring moral qualities test,¹⁵⁸ but continued to pose a continuing risk of harm to members of the Australian community.¹⁵⁹ In refusing a non-citizen's application for Australian

¹⁵² *Konur v Minister for Immigration and Border Protection* [2016] AATA 950 (Senior Member W Stefaniak RFD).

¹⁵³ *Nguyen v Minister for Immigration and Border Protection* [2017] AATA 1157.

¹⁵⁴ *Nguyen v Minister for Immigration and Border Protection* [2017] AATA 1157, [32].

¹⁵⁵ *Nguyen v Minister for Immigration and Border Protection* [2017] AATA 1157, [32].

¹⁵⁶ *Nguyen v Minister for Immigration and Border Protection* [2017] AATA 1157, [32].

¹⁵⁷ A similar set of circumstances to *Nguyen* are evident in *Martin v Minister for Immigration and Border Protection* [2017] AATA 1093, [16], where Senior Member A Poljak found that the number of repeat traffic offences of a non-citizen indicated a pattern of offending and disregard for the law.

¹⁵⁸ A number of non-citizens have had their applications for Australian citizenship refused on character grounds because of a consistently poor traffic record in Australia: see further *Kumar v Minister for Immigration and Border Protection* [2017] AATA 997 (Member S Webb); *Rahman v Minister for Immigration and Border Protection* [2016] AATA 1034 (Deputy President Professor R Deutsch).

¹⁵⁹ The decision of *Kleeman v Minister for Immigration and Border Protection* [2017] AATA 875, [54], [56]–[57], [62] (Deputy President J W Constance and Senior Member Linda Kirk) demonstrates that whether a person "poses a risk of harm" to members of the Australian community is a relevant consideration in determining whether to cancel an Australian citizenship in the "public interest".

citizenship on character grounds, the AAT in *Zaya*¹⁶⁰ found that it was not satisfied the non-citizen would “remain non-violent, not involved in drugs and will not cause harm to others through his conduct”.¹⁶¹ In coming to this conclusion, the AAT held it had serious concerns that the non-citizen would not remain drug and alcohol free (being the essential contributors to the non-citizen’s ongoing criminality).¹⁶²

By way of final example, in *Grafton*,¹⁶³ the AAT refused a non-citizen’s application for Australian citizenship. There, Senior Member Tavoularis found that the Applicant had throughout the majority of his life engaged in a pattern and regularity of offending which was indicative of a disregard for Australian law.¹⁶⁴ For Senior Member Tavoularis, the non-citizen had not demonstrated an “adequately consistent and reliable capacity to distinguish right from wrong”.¹⁶⁵ The AAT concluded that the non-citizen has a propensity, when confronted with a difficult or problematic situation, to not orientate his behaviour in line with the rules and values of Australian society.¹⁶⁶

Given the express findings made in *Grafton, Nguyen, Zaya*, which were all supported by the Minister, it appears illogical that the same Minister did not consider cancellation of the non-citizen’s visa under ss 501(2) and 501(6)(c) of the *Migration Act*. That a Minister would both support a finding that a non-citizen does not have the enduring moral qualities for Australian citizenship and poses an ongoing risk of harm to members of the Australian community, but then take no such action under s 501(2) of the *Migration Act*, is somewhat ironic.

As outlined earlier, considerations of enduring moral qualities of a non-citizen and risk of harm to members of the Australian community are primary considerations under ss 501(2) and 501(6)(c) of the *Migration Act*. That said, as the very recent AAT decision in *Henin*¹⁶⁷ demonstrated, a non-citizen may fail the character test under s 501(6)(c) despite *not actually* posing a risk of future harm to members of the Australian community.¹⁶⁸

CONCLUSION

It is both odd and a paradox that a Minister would find (or support a finding) that a non-citizen should not be granted Australian citizenship on character grounds, yet not subsequently consider cancelling the non-citizen’s Australian visa under ss 501(2) and 501(6)(c) of the *Migration Act*. Many of the cases where a non-citizen has been refused Australian citizenship on character grounds show a concern that the resident posed an ongoing risk of harm to the Australian community,¹⁶⁹ has continually failed to comply with Australian values¹⁷⁰ and, collectively, is a person who does not satisfy the enduring moral qualities standard¹⁷¹ outlined in cases such as *Godley and Irving*. Where such adverse decisions are made in rejecting Australian citizenship applications on character grounds, this should serve as a platform for which the Minister should consider cancelling the non-citizen’s Australian visa under the *Migration Act*.

¹⁶⁰ *Zaya v Minister for Immigration and Border Protection* [2017] AATA 366.

¹⁶¹ *Zaya v Minister for Immigration and Border Protection* [2017] AATA 366, [65] (Deputy President Dr Christopher Kendall).

¹⁶² *Zaya v Minister for Immigration and Border Protection* [2017] AATA 366, [65], [73]–[74] (Deputy President Dr Christopher Kendall).

¹⁶³ *Grafton v Minister for Immigration and Border Protection* [2016] AATA 981.

¹⁶⁴ *Grafton v Minister for Immigration and Border Protection* [2016] AATA 981, [18].

¹⁶⁵ *Grafton v Minister for Immigration and Border Protection* [2016] AATA 981, [54].

¹⁶⁶ *Grafton v Minister for Immigration and Border Protection* [2016] AATA 981. See further *Singh v Minister for Immigration and Border Protection* [2016] AATA 1020, [57] (Senior Member T Tavoularis).

¹⁶⁷ *Henin v Minister for Immigration and Border Protection* [2017] AATA 2095.

¹⁶⁸ *Henin v Minister for Immigration and Border Protection* [2017] AATA 2095, [37].

¹⁶⁹ *Zaya v Minister for Immigration and Border Protection* [2017] AATA 366, [73]–[74] (Deputy President Dr Christopher Kendall).

¹⁷⁰ *Singh v Minister for Immigration and Border Protection* [2016] AATA 1020, [57] (Senior Member T Tavoularis); *Henin v Minister for Immigration and Border Protection* [2017] AATA 2095, [37] (Member Anna Burke).

¹⁷¹ *Bhatia v Minister for Immigration and Border Protection* [2017] AATA 927, [56] (Deputy President Gary Humphries).

After all, the same enduring moral qualities standard is adopted in applying the character requirement under both the *Citizenship Act* and ss 501(2) and 501(6)(c) of the *Migration Act*.

Although it is appreciated that the Minister may wish to adopt a “wait and see approach” after the non-citizen’s Australian citizenship application has been refused on character grounds, such an approach is unacceptable. The level of unacceptability increases in circumstances where the Minister has publicly found (or indeed submitted successfully on appeal) that the non-citizen poses an ongoing risk of harm to members of the Australian community. Plainly, in those circumstances, action should be taken to consider cancellation of the non-citizen’s visa under ss 501(2) and 501(6)(c) of the *Migration Act*.

Citizenship takes a person from a position in which he or she has many of the privileges and responsibilities of an Australian citizen to a position in which he or she enjoys and bears them all.¹⁷² In the ordinary rush of day-to-day living, the differences between Australian citizens and permanent residents in Australia are of little consequence as a rule.¹⁷³ A citizen and a permanent resident each has access to private institutions such as banks and schools, to public institutions such as educational institutions and to benefits such as Medicare benefits and many under social security legislation.¹⁷⁴ Each can own real and personal property without restriction.¹⁷⁵

There are differences, however, and they relate to two main areas. The first is the freedom to come and go from Australia at will. A citizen may do that but a permanent resident must bear in mind the need to obtain the appropriate return visa. The second relates to voting. In general terms, only those who are Australian citizens are entitled to vote.¹⁷⁶

With the preceding in mind, unless the Minister is obliged to consider cancelling a non-citizen’s visa under ss 501(2) and 501(6)(c) of the *Migration Act* (where an application for Australian citizenship has failed on character grounds), the Minister will indeed be acting in a paradoxical and odd manner.

¹⁷² *Zheng v Minister for Immigration and Citizenship* (2011) 55 AAR 94, [51] (Deputy President Forgie); [2011] AATA 304.

¹⁷³ *Zheng v Minister for Immigration and Citizenship* (2011) 55 AAR 94, [51] (Deputy President Forgie); [2011] AATA 304.

¹⁷⁴ *Zheng v Minister for Immigration and Citizenship* (2011) 55 AAR 94, [51] (Deputy President Forgie); [2011] AATA 304.

¹⁷⁵ See further *Ahmadi v Minister for Immigration and Border Protection* [2017] AATA 1086, [171] (Senior Member J Sosso).

¹⁷⁶ *Zheng v Minister for Immigration and Citizenship* (2011) 55 AAR 94, [51] (Deputy President Forgie); [2011] AATA 304.