

AHC

AGAPE HENRY CRUX

# VISA CANCELLATION



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# STAGES OF A CANCELLED VISA

## Before your Visa Is Cancelled

In responding to a cancellation of a visa, it is important to determine the following:

### 1. What are the consequences of the visa cancellation?

- Are you barred from applying for another visa?
- Does the 3 year exclusion period apply to you?
- What happens to ongoing lodgments that have not been decided?
- What happens to your family members?

### 2. What visas can you apply for to maintain a lawful status?

- Can you apply for bridging visa E with work permission?

### 3. Can the decision be appealed? If yes, where do you lodge the appeal?

- Administrative Appeals Tribunal "AAT"; or
- Judicial Review

### 4. What are the time limits to appeal?

- 2 days?
- 7 days?
- 21 days?
- 28 days?

### 5. How do we help you formulate a plan to win the appeal?

- Did the Department of Immigration follow proper procedures?
- Did the Department of Immigration make any mistakes?
- Does the Department of Immigration case officer have the delegated powers to consider cancellation?
- Have you prepared a list of evidence to support why your visa should not be cancelled?

## General Visa Cancellations

There are 3 main Cancellation Powers under the General Cancellation category

1. Section 109 Cancellation Powers
  - This is for incorrect information & bogus documents.
2. Section 116 Cancellation Powers
  - There are 39 grounds under this Cancellation Power.
3. Section 128 Cancellation Powers
  - This is for visa holders outside Australia.

## Character Visa Cancellations

There is 1 main Cancellation Power for matters relating to Character. This is commonly known as “501 Cancellations”.

There are 2 grounds:

1. Failure to meet the Character Test.
2. Mandatory Cancellation on visa holders in jail.

## Ministerial Visa Cancellations

There are 6 Cancellation Powers that can only be exercised by the Minister for Immigration personally.

- **Section 133A**
  - Minister personally cancels on section 109 grounds.
- **Section 133C**
  - Minister personally cancels on section 116 grounds.
- **Section 501(3)**
  - Minister personally cancels for failure to meet Character requirements.
- **Section 501A**
  - Minister personally sets aside a non-adverse decision of delegate or Tribunal and cancels visa.
- **Section 501B**
  - Minister personally sets aside and substitutes adverse decisions before Tribunal concludes.
- **Section 501BA**
  - Minister personally sets aside the decision of the delegate or Tribunal to revoke cancellation.

## Other Visa Cancellations

There are 6 further Cancellation Powers.

1. Section 134 - Cancellation of Business Visa
2. Section 134(4) - Consequential Cancellation on Family Members of Business Visa Holders
3. Section 134B - Emergency Cancellation on Security Grounds
4. Section 137Q - Cancellation on RSMS permanent visas
5. Section 137T - Consequential Cancellation on Family Members of RSMS Visa Holders.
6. Section 140 - Consequential Cancellation of Secondary Visa Holders

# VISA CANCELLATION PROCEDURES

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## Step 1

Once the Department of Immigration learns of a non-compliance, they are required to consider if there is a need to consider cancellation. If a need arises to cancel, they are required to consider the most appropriate cancellation power and ground to rely on.

## Step 2

After the Department of Immigration decides that it is appropriate to proceed with visa cancellation, they must first issue a Notice of Intention to Consider Cancellation (NOICC).

The NOICC must clearly state:

- the cancellation power used
- the grounds relied upon
- time provided to respond
- whether the cancellation is discretionary, the matters that must be taken into account

## Step 3

The Department of Immigration must correctly notify you, otherwise, the NOICC will be deemed as a 'defective notification'. Examples of defective notifications are:

- no attempts to locate permanent visa holder and notification sent to last address for service provided to the Department of Immigration in an old visa application.
- NOICC is provided to the visa holder where there is a registered migration agent.
- NOICC does not state key information, e.g. cancellation, power used, grounds relied on, etc.
- NOICC sent to the wrong address, e.g. neighbour.

## Step 4

The Department of Immigration must consider your response and apply the laws correctly in deciding whether to cancel your visa. They are required to notify you in writing of their final decision. If they are satisfied that your visa should be cancelled, then they are required to notify you their decision to cancel, which should specify:

- the ground for cancellation; and
- whether the decision can be merits reviewed and time limits.



# TIME LIMITATIONS TO RESPOND

NO.	POWER	GENERAL CANCELLATIONS	CHARACTER CANCELLATION
1	Section 109 Cancellation Powers	In the case of cancelling a permanent visa, 14 calendar days. For temporary visa, there is no prescribed period.	If it is a humanitarian visa, then 28 days. In all other cases, 7 working days.
2	Section 116 Cancellation Powers	5 working days, unless at airport, then 10 minutes may be deemed reasonable time to respond.	If it is a humanitarian visa, then 28 days. In all other cases, 7 working days.
3	Section 128 Cancellation Powers	A request to revoke cancellation may be made within 28 days of cancellation. Or within 5 minutes, if the visa holder is in Australia.	Merits review is not available.
4	Section 133A & Section 133C Cancellation Powers	28 days if Minister requests for more information.	Merits review is not available. However, a request that the cancellation be revoked may be made within 28 days of cancellation decision.
5	Section 134 Cancellation Powers	28 days if notice is given in Australia, 70 days if notice is given outside Australia.	28 days.
6	Section 134B Cancellation Powers	N/A	Merits review is not available. However, a request that the cancellation be revoked may be made within 28 days of cancellation decision.
7	Section 137Q Cancellation Powers	28 days if notice is given in Australia, 70 days if notice is given outside Australia.	7 days.



# TIME LIMITATIONS TO RESPOND

NO.	POWER	GENERAL CANCELLATIONS	CHARACTER CANCELLATION
8	Section 137T	N/A	not merits reviewable.
9	Section 501 - Character Cancellation	28 Days	9 Days
10	Section 501(3) - Character (Minister Personal Powers)	N.A	Not merits reviewable but 7 days to request revocation of cancellation.
11	Section 501(3A) - Mandatory Cancellation (Character)	28 days to revoke cancellation	9 days to appeal to Tribunal decision to not revoke cancellation
12	Section 501A - Minister Personally Set Aside	28 days to respond. However, if visa cancelled without natural justice, then a request to revoke cancellation may be made within 7 days.	Not merits reviewable. However, 35 days for appeal to be made to Federal Court of Australia
13	Section 501B & Section 501Ba	N/A	Not merits reviewable. However, 35 days for appeal to be made to Federal Court of Australia.



# CONSEQUENCES OF VISA CANCELLATION

NO.	KEY CONCERNS	GENERAL CANCELLATIONS	CHARACTER CANCELLATION
1	Immigration Status	Visa holder becomes unlawful, unless exceptions apply	Visa holder becomes unlawful, unless exceptions apply
2	Other Visas Held	Any bridging visa held that was granted after the substantive visa (to be cancelled), will also cease, however, if the cancelled visa was granted after the BVA, BVB, or BVC was granted, that bridging visa will not cease to be in effect.	All undecided visa application (except for PV or BVR), is taken to be refused. <ul style="list-style-type: none"> <li>All visas held, is taken to be cancellation by operation of law.</li> <li>Cancellations by operation of law is not merits reviewable.</li> </ul>
3	Bars from making further visas in Australia	s.48 bar for everyone cancelled under 109, 116, 133A, 133C, 134, 137J or 137Q. So, visa holders cancelled under 137T & 140 are NOT affected; <ul style="list-style-type: none"> <li>s48A bar on visa holders who previously applied for PV onshore</li> <li>No bars on bridging visas (r 2.12)</li> </ul>	s501E bars application for any type of visas, except for PV 501E(2)(a) and BVR – r2.12AA <ul style="list-style-type: none"> <li>Currently, s 35A provides PV include Class XA – 866, class XD – 785 and class XE - 790</li> </ul>
4	Consequential Cancellation to Family Members	Family Members' visas cancelled under s134(4), s137T and s140, either by operation of law or discretion: see s140(2)	N/A
5	Risk Factor (3 years Bar)	4013 if cancelled under 109, 116(1)(d), 116(1AA) or (1AB) or 133A; - Cancelled under s128 because of s116(1)(d) of s116(1)(fa) and r2.43 list in his column below; - Cancelled under s133C because of s116(1)(d) or 116(1AA) or (1AB); - Cancelled under s116(1)(fa); s116(1)(e); - r2.43(1)(ea), (i), (ia), (j), (k), (ka), (kb), (kc), (m), (o), (oa) or (ob); 137J; - Cancelled under s116, 128, or 133C because found working without permission; non-compliance of visa conditions found in "Part 2 of Schedule 4 – Conditions Applicable to Certain Subclasses for 4013(2)" 4014 on departing Australia as an unlawful or in certain circumstances, as a holder of BVC, BCD, BVE.	Generally, 4014 on departing Australia as an unlawful or in certain circumstances, as a holder of BVC, BCD, BVE. But due to SRC, this would be of little impact. <ul style="list-style-type: none"> <li>5002 – but of little relevance due to 5001 but look at 5001(a) to (d) carefully to ensure the circumstances of the cancellation warrants 5001 as not all character cancellations attract 5001, eg. cancellation under s500A</li> </ul>





# CONSEQUENCES TO VISA CANCELLATION

NO.	KEY CONCERNS	GENERAL CANCELLATIONS	CHARACTER CANCELLATION
6	Special Return Criteria	12 months bar if removed under s198, 199 or 205, unless can satisfy Minister compelling and compassionate circumstances	5001 – permanent bar (but doesn't apply to a person who is granted a PR by Minister personally) • 5002 – but of little relevance due to 5001 but look at 5001(a) to (d) carefully to ensure the circumstances of the cancellation warrants 5001 as not all character cancellations attract 5001, eg. cancellation under s500A
7	Setting Aside or Revoking Cancellation	If cancellation is set aside by a court of tribunal, that cancellation is taken to have not occurred.	If a cancellation is revoked under section 133, the cancelled visa is taken to be granted upon revocation. If cancelled under section 501CA, then it is taken to have never been cancelled by the detention period will remain lawful.
8	Detention & Removal	If you do not hold a visa, then you will be detained and removed.	Once your visa is cancelled under Character cancellation powers, you will be immediately detained. If you do not have a pending immigration matter, you will be removed or deported (PR) from Australia.

# 1

## Challenge all the mistakes made by the Department of Immigration

It is common to pick up mistakes made, especially where there is a level of human involvement. Identifying mistakes made could help with:

- trimming the facts immigration relies on, down to a lean state, where only relevant points require responding
- additional time to respond or appeal
- obtaining a bridging visa
- the merits of the case

# 2

## Always seek legal representation (if possible, an Accredited Specialist)

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Seek legal assistance, preferably a practitioner who only practices immigration law and nothing else. Even as lawyers ourselves, we were taught never to defend ourselves when sued for many reasons.

## TIPS ON HOW TO WIN VISA CANCELLATIONS



# 3

## Act FAST & SEEK Extension of Time

REQUEST information that Immigration has on your record.

There is NEVER enough time to prepare a response for Visa Cancellations because the law provides very little time to respond for visa cancellations.

Therefore, the challenge is to put together a strong “Response” in the limited amount of time given, which entails:

- retrieving all the information the Department has (including internal emails amongst case officers)
- researching persuasive & binding case laws
- drafting a potent submission
- collating evidence to support the claim

It should be noted that in some cases, the law does not allow the Department of Immigration to extend the time to respond.

## 4

### Never lie!

Even though there are grounds to cancel, Immigration must always exercise their discretion in your favour, in not cancelling your visa.

Most cancellations are 'discretionary', which means, that even if the Department has solid evidence, you can win by applying the laws which require the Case Officer not cancel you visa.

## 5

### Lodge another visa before your current visa is cancelled

Once your visa is cancelled, you will be barred from making another visa application in Australia. Therefore, applying for another visa before your current visa is cancelled, is a strategic move which opens up more opportunities.



## TIPS ON HOW TO WIN VISA CANCELLATIONS

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### Use Case Law

No matter how complex your case is, there is always another case more or equally as complex as yours which the Tribunals and Courts have dealt with. These stories are guidance to Case Officers, how they are to perform their duties and exercise their discretion.

## 7

### Formulate a 4-pronged strategy

Always devise a 4-pronged approach, considering a contingency plan in the event you are not successful.

1. Canvass all options & pathways available.
2. Execute a short-term plan.
3. Create a mid-term plan.
4. Devise the long-term plan.



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