

# Recognition of Relationships in Australian Immigration Law

By Veronika Hurbis\* & David Bitel<sup>+</sup>

Paper presented by David Bitel

September 2003 Conference of the International Bar Association  
San Francisco, USA

Recognition of Relationships in Australian Immigration Law .....	1
The Current Legal Regime .....	2
Marital Relationships .....	7
De Facto Relationships.....	9
Interdependent Relationships .....	11
ANNEXURE 1.....	15
Annual Migration Program – Family Stream.....	15
ANNEXURE 2.....	16
Regulation 1.15A – Spouse.....	16
ANNEXURE 3.....	18
Regulation 1.09A – Interdependent Relationship .....	18
ANNEXURE 4.....	20
Partner (Provisional) – Subclass 309 and Partner (Migrant) – Subclass 100 Visas (Offshore) .....	20
ANNEXURE 5.....	23
Partner (Temporary) – Subclass 820 and Partner (Residence) – Subclass 801 Visas (Onshore) .....	23
ANNEXURE 6.....	24
Prospective Marriage (Temporary) Visa – Subclass 310.....	24
(Offshore).....	24
ANNEXURE 7.....	25
Interdependent Partner (Provisional) – Subclass 310 and Interdependent Partner (Migrant) – Subclass 110 Visas (Offshore).....	25
ANNEXURE 8.....	26
Interdependent Partner (Temporary) – subclass 826 and Interdependent Partner (Residence) – subclass 814 Visas (Onshore) .....	26
DAVID BITEL .....	27
Bio-Data.....	27

---

\* Solicitor, Parish Patience Immigration Lawyers, Sydney NSW, Australia

<sup>+</sup> Managing Partner, Parish Patience Immigration Lawyers, Sydney NSW, Australia. A summary of Mr Bitel's bio-data is found on page 27 infra.

## ***The Current Legal Regime***

Partners of Australian permanent residents and citizens do not have an automatic right to live in Australia and must make an application for a visa in order to do so. For the purpose of such migration or permanent residence applications, Australian immigration law makes a distinction between 3 types of relationships: marital relationships (including relationships between fiancés), de facto relationships and interdependent relationships.

The Annual Migration Program contains an estimated number of places available for persons within the three relationship categories: Of about 108 thousand available places in Australia's Migration (Non-Humanitarian) Program<sup>1</sup>, approximately 37 to 40 thousand are allocated to the three relationship categories. About 85% of that number are belong to the spouse/de facto category, 13% belong to the fiancé category, with only 2% being constituted by the interdependent category. "Annexure 1" to this paper provides more detail of the numbers allocated to the different visa categories within the Annual Migration Program.

Although there are key differences in the criteria that must be met for the grant of a visa under one of the three categories, all three generally require that:

- the applicant and his or her partner must not be related and must both be aged over 18,
- the applicant, whether in or outside of Australia, must be sponsored by the partner, who is an Australian citizen, Australian permanent resident or eligible New Zealand citizen,
- the applicant and partner do not breach limitations on serial sponsorship,
- the applicant and partner pass health and character requirements,
- the couple have a mutual commitment to a shared existence to the exclusion of all others,
- the relationship is genuine and continuing and the couple live together or do not live separately and apart on a separate basis.

To determine the genuineness of a relationship, the Minister will take into account the particular financial and social aspects of the relationship, the evidence as to their household

---

<sup>1</sup> This is a Departmental estimate for the period from 2002 to 2003. See Annexure 1 to this paper.

and living arrangements and evidence as to the nature of the commitment of the parties. Note that while not excluding the genuineness of a relationship of less than 6 months duration, the Minister has a policy of regarding evidence that 2 persons have been living together at the same address for 6 months or longer as “strong evidence” of a genuine and continuing relationship.

To ascertain whether these prescribed criteria have been met and the relationship is in fact genuine, it is common practice that the Department ask the applicant and his/her partner to attend an interview.

The court’s interpretation of these criteria generally approve of this “ordinary approach to fact finding”<sup>2</sup> applied by the Department in its decision making as to the genuine nature of a relationship. Thus, the requirement that the relationship be genuine is a matter of factual evidence that will satisfy the decision maker that “at the time at which the matter has to be decided it can be said that the parties have a mutual commitment to a shared life [as husband and wife] to the exclusion of others”.<sup>3</sup>

As to the issue of a lack of evidence to enable the decision maker to make a decision, the court has said that “the absence of evidence or material from the visa applicant and relatives could only be described as "pivotal" or "critical" in the sense that, on the evidence before it, the Tribunal made a finding adverse to the review applicant on the commitment issue and, perhaps, the Tribunal might have made a different finding had it had further evidence from these other sources before it.”<sup>4</sup> In all instances in the assessment of the nature of the relationship the decision maker thus has an obligation to consider and take into account all material evidence produced by the parties.

---

<sup>2</sup> Paragraph 23 of the internet edition of the decision of the full Federal Court of Australia in *Minister for Immigration & Multicultural Affairs v Asif* [2000] FCA 228 (7 March 2000) - [http://www.austlii.edu.au/au/cases/cth/federal\\_ct/2000/228.html](http://www.austlii.edu.au/au/cases/cth/federal_ct/2000/228.html)

<sup>3</sup> The legislation incorporates this “true test” as established by judicial interpretation of the term – see *Minister of State for Immigration, Local Government & Ethnic Affairs v Dhillon* (Federal Court of Australia, Full Court, 8 May 1990, unreported) at 11, cited and approved in *Sevim v Minister for Immigration & Multicultural Affairs* [2001] FCA 1597 (12 November 2001).

<sup>4</sup> *Tran v Minister for Immigration & Multicultural Affairs* [2002] FCA 1522 (10 December 2002), para 39 of the internet version at [www.austlii.edu.au](http://www.austlii.edu.au)

All applications involve a two stage process: Provided that all the prescribed criteria have been satisfied, an applicant is initially granted only a temporary 2 year visa. At the end of the 2 year period, and provided that the applicant and partner continue to meet all the prescribed criteria, a permanent visa may be granted. An application is made at once for both the temporary and permanent visa.

For applicants applying overseas, the application is for a Partner Provisional 309 (spouse) / 310 (interdependency) and Partner Migrant 100 (spouse) / 110 (interdependency) visa.

For applicants applying from within Australia, the application is for a Partner Temporary 820 (spouse) / 826 (interdependency) and Partner Residence 801 (spouse) / 814 (interdependency) visa.

The 2 year waiting period may be waived if the parties have been in a committed relationship for more than 5 years or 2 years when there are dependent children of the relationship.

If, on the other hand, the relationship is terminated or a party dies prior to the grant of the permanent visa, the applicant may still be available for a permanent visa, so long as:

- the relationship broke down once the applicant had entered the country, or
- the applicant or a member of his/her family are the victims of domestic violence committed by the spouse (noting that there need not be a cause and effect link between the termination of the relationship and the incident of domestic violence), or
- the parties to the marriage have children under 18 years of age, or
- it can be shown that the relationship would have continued had one party not died and the applicant has developed close ties with Australia in the interim.

Parties that have not yet married, but have every intention of doing so, may lodge an application for a Prospective Marriage Temporary 300 visa. However they must be outside of Australia in order to do so. There is an onshore equivalent of this visa subclass.

Marital and de facto relationships are exclusive to heterosexual relationships. Relationships between partners of the same sex fall within the interdependent relationship category, which is dealt with further below.

In heterosexual relationships a distinction is drawn between persons applying on the basis of a marital spouse relationship (also referred to as “de jure (marital) relationships”) and those applying on the basis of a de facto relationship (referred to as “de facto (marital) relationships”). The most important difference relates to the requirement that for marital spouse relationships there must be a marriage that is recognised under Australian migration law, while for de factos there must be evidence that the de facto partners have been in a 12 month committed relationship prior to the lodgement of an application.

Same sex couples are unable to apply under either the marital spouse or de facto spouse categories as Australian law and by definition migration law does not recognise same sex marriages, even if recognised by other countries, and the definition of de facto relationship explicitly applies only to persons of opposite sexes. They must therefore rely on the interdependent partner category to make any visa applications.

For transsexuals, according to current Departmental policy<sup>5</sup> the definition of what constitutes a de facto relationship gives rise to an interesting anomaly. Under the Marriage Act, the sex of a person is determined by his or her biological (chromosomal) identity. A transsexual is therefore deemed to retain his or her sex of birth. This means that for the purposes of spouse relationship visa applications, a marriage between a male and a female-to-male- transsexual can be recognised as a marriage while a marriage between a male and male-to-female transsexual cannot be recognised as a marriage.<sup>6</sup> The latter must therefore resort to the interdependent partner category for the purpose of all visa applications.

Recent case law suggests that current Departmental policy is incorrect. In particular, earlier this year, following a detailed and enlightened discussion of the issues of sex determination, the full Family Court of Australia held in *The Attorney-General for the Commonwealth &*

---

<sup>5</sup> Procedures Advice Manual 3 – Guidelines for officers administering Migration Legislation – P/1/7/2003. Note however that this appears to contradict with recent case law: Most recently, the Full Court of the Family Court of Australia in *The Attorney-General for the Commonwealth & "Kevin and Jennifer" & Human Rights and Equal Opportunity Commission* [2003] FamCA 94 (21 February 2003) held that the decision in *R v Harris and McGuinness* (1988) 17 NSW LR 158 that, on the evidence, a post-operative female to male transsexual person in that case was a “man”, was applicable for the purposes of the Marriage Act.

<sup>6</sup> According to departmental policy guidelines hermaphrodites also cannot enter into a marriage that is deemed valid under the Marriage Act as they are deemed to be neither male nor female. Again, however, case law suggests a different outcome: See again the Full Court of the Family Court of Australia in *The Attorney-General for the Commonwealth & "Kevin and Jennifer" & Human Rights and Equal Opportunity Commission* [2003] FamCA 94 (21 February 2003) for a discussion of “physical inter-sex” individuals and the applicability of the English decision of Charles J in *W v W* [2001] 2 WLR 674.

*"Kevin and Jennifer" & Human Rights and Equal Opportunity Commission* that for the purposes of the Marriages Act 1961 a certificate of marriage (and by implication other documents attesting the sex of an individual) “creates no more than a rebuttable presumption as to its accuracy” and that “there is no insuperable objection to the law recognising the “changed' sex of a person who has undergone gender re-assignment procedures”.<sup>7</sup>

“Annexure 2” to this paper is regulation 1.15A, the definition of “spouse” for immigration law purposes, contains the definition and criteria used to determine whether a relationship falls within the marital or de facto relationship category.

---

<sup>7</sup> Full Court of the Family Court of Australia in *The Attorney-General for the Commonwealth & "Kevin and Jennifer" & Human Rights and Equal Opportunity Commission* [2003] FamCA 94 (21 February 2003) at paras 354-357 of the internet edition of the decision - <http://www.austlii.edu.au>.

## ***Marital Relationships***

The regulations recognise both existing marital relationships and prospective marital relationships. In addition to the general criteria already described above, existing marital relationships must be evidenced by a marriage that is recognised as valid for the purposes of the Migration Act 1961. Migration law mirrors the Marriage Act 1961 in determining the validity of marriages. In the case of marriages that have solemnised in Australia, these will not be regarded as valid if:

- one or both of the parties to the marriage did not consent to the marriage<sup>8</sup>
- the parties are closely related<sup>9</sup>
- one or both of the parties to the marriage were under 18 years of age<sup>10</sup>.

With the exception of same sex, and polygamous marriages, and provided that they are deemed valid in the country in which they were performed and:

- the parties to the marriage are not persons within a prohibited degree of relationship, and
- they are over 16 years of age<sup>11</sup> and have mutually consented to the marriage,

foreign marriages will be recognised as valid for the purpose of immigration law.

Partners who have not yet undertaken marriage vows but intend to do so may be eligible for a Prospective Marriage visa. This visa, also sometimes referred to as the “fiancé” visa, may be available provided that the Minister is satisfied that the prospective marriage partners:

- have met and know each other personally,
- genuinely intend to marry and live together as spouses, and
- intend to become married within the 9 month visa period.

---

<sup>8</sup> The notion of “consent” is dealt with in s 23B of the Marriage Act 1961, and excludes consent obtained by duress or fraud, consent of a party who was mistaken as to the identity of the other party, and consent of a party not mentally capable of understanding the nature and effect of a marriage. Thus arranged marriages or proxy marriages may be valid for the purposes of migration law, provided that there was real consent.

<sup>9</sup> This does not include marriages between cousins, nephews and aunts or nieces and uncles, which are permitted under the Marriage Act 1961.

<sup>10</sup> However if a party to the marriage is between 16-18 years of age, under s 12 of the Marriage Act 1961 an Australian court may make an order authorising the marriage.

<sup>11</sup> If parties to a foreign marriage are less than 16 years of age, the marriage will be recognised as valid only once both parties have turned 16 years of age.

On grant of a prospective marriage visa, the applicant has 9 months to travel to Australia, marry the sponsor, and apply to remain permanently in Australia within that period. If these requirements are met, applicants are granted a spouse temporary visa, and subject to continuing to meet all the requirements, a permanent spouse visa.

“Annexure 4” and “Annexure 5” to this paper contain summaries of the prescribed criteria in relation to onshore and offshore visa applications by marital spouses.

“Annexure 6” to this paper contains summaries of the prescribed criteria in relation to visa applications by prospective spouses.

## ***De Facto Relationships***

The definition of a de facto relationship is contained in the definition of spouse as found in regulation 1.15A.<sup>12</sup>

Generally the de facto relationship visa is available to couples of opposite sex who are not already within a marriage that is recognised as valid under the Migration Act at the time of application. For example, the category may include applications by partners who are still legally married at the time of application or grant, provided that there is proof of a permanent separation from the legal spouse.

All de facto applicants must satisfy the same criteria as have been described above in relation to marital relationships. However, in addition, they must also prove that for the period of 12 months immediately preceding the visa application:

- they had a mutual commitment to a shared life to the exclusion of all others,
- their relationship was and is genuine and continuing,
- they had been living together or not been living separately and apart on a permanent basis.

The 12 month relationship rule was introduced in May 1997 to prevent abuse by applicants not involved in genuine relationships. However, if it seems that the rule may prevent a genuine couple in a genuine relationship of less than 12 months duration from making an application, then they may choose to either marry or, alternately, to make an application for waiver of the 12 month rule on the basis of “compelling and compassionate circumstances”.

Compelling and compassionate circumstances include, but are not limited to:

- applicants with a partner who has been granted a permanent humanitarian visa and who declared the existence of that relationship at the time of the application,
- if the applicant and spouse have a dependent child of the relationship,
- if the cohabitation was not legally permitted in the country in which they lived during the 12 month period.

---

<sup>12</sup> See Annexure 2

Note that the 12 month rule also applies in instances where de facto spouses are included as a member of the family unit<sup>13</sup> in applications under other migration categories including the skilled stream, parent, aged dependent relative, carer and remaining relative visa categories. The rule applies also to interdependent relationships but only in so far as the application that is being lodged is for a partner visa. Interdependent relationships are not recognised for the purpose of other family applications available to the spouse category applications.

“Annexure 4” and “Annexure 5” to this paper contain summaries of the prescribed criteria in relation to onshore and offshore visa applications by de facto partners.

---

<sup>13</sup> Annexure 8 to this paper is a copy of regulation 1.12 which defines the term “family unit” for the purposes of migration law.

## ***Interdependent Relationships***

Australia's Immigration Laws have progressively become more accepting of persons in same sex relationships, though as yet, full equality with persons in heterosexual relationships has not yet been achieved.

In the early 1980's, lobbying commenced of politicians to give recognition to same sex workers and interested individuals banded together and in 1984 the organization which is now known as the Gay and Lesbian Immigration Task Force was established.

As one of the founding members of this organization and one of its early Trustees, I had the privilege to participate with a delegation which in September 1985 descended on Canberra, our national Capital, to lobby Members of Parliament to effect a change in the law. In those days, Australia's immigration law contained general discretions under which the Minister could approve entry into Australia of migrants. A substantial rewriting of the law took place in December 1989 to introduce the current regulatory regime which effectively removed the previous restrictions.

In any event, the lobbyists had done their homework well. To our pleasure and the badly concealed confusion of the departmental bureaucrats, the then Minister for Immigration, Chris Hurford, a right wing member of the then Labour party Government (and reportedly a devout Catholic) announced that he recognised the justice of our demands and agreed that he would give limited recognition to persons seeking to sponsor for permanent entry into Australia their same sex partners where the relationship had been in existence for 4 years. We were directed to the work out the "nitty gritty" of the new arrangement with the confused departmental officers. Having regard to the sensitivity of the change and the potential political embarrassment that could arise, the Minister directed that all applications were to be brought to his personal attention for consideration and decision.

In the years that followed, a modus operandi was developed and GLIFF became well established as a lobby group in the immigration arena in Australia. Successive Ministers adapted with the cohabitation requirements over the years. Ultimately, a form of equality was achieved between persons applying for migration and/or residence in Australia on the

sponsorship of a same sex partner with persons applying in the basis of their sponsorship by a de facto (heterosexual partner).

Australia's immigration law now recognises that Australian citizens, permanent residents or eligible New Zealand citizens in genuine and continuing same sex relationships involving a mutual commitment to a shared life together can sponsor their partners for migration and/or permanent residence. The applicant and sponsor must not be related and must both be aged over 18. The Migration Act 1956 and Regulations enacted there under which regulate the entry into Australia of non-residents contain distinct visa subclasses permitting the entry into Australia of people in interdependent (the technical term for same sex partners) relationships.

Regulation 1.09A defines when people are in an interdependent relationship. A copy of the regulation is "Annexure 3" to this paper.

Visa classes 310 and 310 permit the migration to Australia of a person sponsored by his or her partner. Visa classes 826 and 814 permit comparably change of status within Australia. The 2 categories mirror those applying to persons seeking entry on the basis of de facto relationships.<sup>14</sup>

The Annual Migration Program contains a discrete number of places available for persons in the interdependent categories. The numbers are very small having regard to the total size of Australia's Migration (Non-Humanitarian) Program. For the 2002-2003 financial year, 700 places out of a total of some 37 thousand places allocated to the 3 relationships categories were reserved for interdependency visas.

There are several major problems which persons in same sex relationships experience which can however severely disadvantage them as against persons in heterosexual spousal relationships. Most significantly, there is the 12 month rule which can only be waived if compelling circumstance are in existence. This has already been discussed above in relation to de facto relationships. However the rule can be particularly harsh if applicants come from countries which criminalise or persecute persons who engage in homosexual conduct. Policy

---

<sup>14</sup> "Annexure 7" and "Annexure 8" to this paper contain summaries of the prescribed criteria in relation to onshore and offshore visa applications by interdependent partners.

however does accept as a compelling circumstance a situation where cohabitation is contrary to the law of the applicant's country.

A second major omission from the current immigration law is the failure to permit persons from overseas seeking to either migrate or enter Australia temporarily from including in their application as member of their family unit and thus bringing with them persons with whom they currently reside in same sex relationships. This extends to the visa categories of parent, aged dependent relative, carer and remaining relative.

The exclusion of same sex relationships from these categories operates by virtue of the definition of "member" of a "family unit" for immigration law purposes, which extends to a spouse, dependent child, parent or relative only. This means that even though 2 persons are recognised as falling within the interdependent relationship category, they are not deemed to be members of each other's family unit. GLITF has been lobbying Governments for some years to achieve legislative reform in this area to overcome the substantial hardship that the current discriminatory law occasions. Unfortunately, Australia currently has a conservative government and it is unlikely that law reform will be achieved in this or in the near future.

It should be noted also that same sex partners remain excluded from applications for a grant of Australian citizenship although this is generally available to permanently resident spouses of Australian citizens. This is because the meaning of "spouse" under the Australian Citizenship Act is identical to the definition of "spouse" under the Migration Regulations, which is exclusive to partners of opposite sex. There is currently a bill before the Federal Parliament seeking an amendment to the Australian Citizenship Act by way of inclusion of the term "de facto spouse" and the corresponding definition of "a person who, whether or not of the same gender as the person, lives with the person and they have a mutual commitment to a shared life to the exclusion of all others." It remains to be seen whether or not this proposed amendment will go through.

Notwithstanding the above reservations, Australia was one of the first countries in the world to provide legal recognition for same sex relationships in the immigration area, and remains in this elite group. Further, the basic rules do not substantially discriminate against persons seeking to bring to this country their life partners and for this Australians can in large part be proud.



## ANNEXURE 1

### Annual Migration Program – Family Stream

	2002-03 Outcome	2003-04 Planning Level
<b>FAMILY STREAM</b>		
Spouse/Interdependency <sup>(1)</sup>	29 710	30 200
Fiance <sup>(1)</sup>	5 350	5 200
Child <sup>(2)</sup>	2 680	2 800
Parent	510	500
Other <sup>(3)</sup>	2 520	1 900
<b>TOTAL FAMILY</b>	<b>40 790</b>	<b>40 600</b>

Note: Figures have been rounded and the totals may not be the exact sum of components.  
 Note: Program numbers do not include New Zealand citizens and are detailed at the mid-point of the Program's planning range.

1. Net outcome as places taken by provisional visa holders who do not subsequently obtain permanent visas are returned to the program in the year that the temporary visas expire.
2. Includes child-adoption, child dependent and orphan minor.
3. Includes aged dependent, carer, unmarried orphan and remaining relatives.

The program planning level for 2002-03 comprises:

<b>Family Stream (43 200):</b>	
Spouse	32 000
Fiancé(e)	4 800
Child	2 700
Parent	500
Preferential - other*	2 500
Interdependency	700

\* Includes: dependent relatives, special need relatives and orphan dependent relatives.

# Source: Department of Immigration and Multicultural and Indigenous Affairs: [www.immi.gov.au](http://www.immi.gov.au)

## ANNEXURE 2

### Regulation 1.15A – Spouse

- (1) For the purposes of these Regulations, a person is the spouse of another person if the 2 persons are:
  - (a) in a married relationship, as described in subregulation (1A); or
  - (b) in a de facto relationship, as described in subregulation (2).
  
- (1A) Persons are in a married relationship if:
  - (a) they are married to each other under a marriage that is recognised as valid for the purposes of the Act; and
  - (b) the Minister is satisfied that:
    - (i) they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and
    - (ii) the relationship between them is genuine and continuing; and
    - (iii) they:
      - (A) live together; or
      - (B) do not live separately and apart on a permanent basis.
  
- (2) Persons are in a de facto relationship if:
  - (a) they:
    - (i) are of opposite sexes; and
    - (ii) are not married to each other under a marriage that is recognised as valid for the purposes of the Act; and
    - (iii) are not within a relationship that is a prohibited relationship for the purposes of subsection 23B (2) of the Marriage Act 1961; and
  - (b) they are full age, that is:
    - (i) if either of the persons is domiciled in Australia-both of them have turned 18; or
    - (ii) if neither of the persons is domiciled in Australia-both of them have turned 16; and
  - (c) the Minister is satisfied that:
    - (i) they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and
    - (ii) the relationship between them is genuine and continuing; and
    - (iii) they:
      - (A) live together; or
      - (B) do not live separately and apart on a permanent basis; and
  - (d) subject to paragraph (e) and subregulation (2A), where either of them is an applicant for a permanent visa, a Partner (Provisional) (Class UF) visa, or a Partner (Temporary) (Class UK) visa - the Minister is satisfied that, for the period of 12 months immediately preceding the date of application of the party relying on the existence of the relationship:
    - (i) they had a mutual commitment to a shared life as husband and wife to the exclusion of all others; and
    - (ii) the relationship between them was genuine and continuing; and
    - (iii) they had:
      - (A) been living together; or
      - (B) not been living separately and apart on a permanent basis; and
  - (e) where either of them is an applicant for a Resolution of Status (Residence) (Class BL) or Resolution of Status (Temporary) (Class UH) visa - the Minister is satisfied (unless the applicant can establish compelling and compassionate circumstances for the grant of the visa) that, for the period of 12 months immediately preceding 13 June 1997:
    - (i) they had a mutual commitment to a shared life as husband and wife to the exclusion of all others; and
    - (ii) the relationship between them was genuine and continuing; and
    - (iii) they had:
      - (A) been living together; or
      - (B) not been living separately and apart on a permanent basis.
  
- (2A) Paragraph 2 (d) does not apply if:
  - (a) the applicant is applying as:
    - (i) the spouse of a person who:
      - (A) is, or was, the holder of a permanent humanitarian visa; and

- (B) before that permanent humanitarian visa was granted, was in a relationship with the applicant that satisfies the requirements of subparagraphs (2) (c) (i), (ii) and (iii) and of which Immigration was informed before the visa was granted; or
- (ii) a member of the family unit of a person who is an applicant for a permanent humanitarian visa; or
- (b) the applicant can establish compelling and compassionate circumstances for the grant of the visa.

Note: 'permanent humanitarian visa' is defined in regulation 1.03.

(3) In forming an opinion whether 2 persons are in a married relationship, or a de facto relationship, in relation to an application for:  
 [Paragraph 1.15A(3)(aa) was omitted by Statutory Rules 1999, No. 259 with effect on and from 1 November 1999.]

(ab) a Special Eligibility (Residence) (Class AO) visa; or  
 [Paragraph 1.15A(3)(ac) was omitted by Statutory Rules 1999, No. 259 with effect on and from 1 November 1999.]

- (ad) a Partner (Migrant) (Class BC) visa; or
- (ae) a Partner (Provisional) (Class UF) visa; or
- (af) a Partner (Residence) (Class BS) visa; or
- (ag) a Partner (Temporary) (Class UK) visa;

the Minister must have regard to all of the circumstances of the relationship, including, in particular:

- (a) the financial aspects of the relationship, including:
  - (i) any joint ownership of real estate or other major assets; and
  - (ii) any joint liabilities; and
  - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments;
- and
- (iv) whether one party to the relationship owes any legal obligation in respect of the other; and
- (v) the basis of any sharing of day-to-day household expenses;
- (b) the nature of the household, including:
  - (i) any joint responsibility for care and support of children, if any; and
  - (ii) the parties' living arrangements; and
  - (iii) any sharing of responsibility for housework;
- (c) the social aspects of the relationship, including:
  - (i) whether the persons represent themselves to other people as being married or in a de facto relationship with each other;
  - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
  - (iii) any basis on which the persons plan and undertake joint social activities;
  - (d) the nature of the persons' commitment to each other, including:
    - (i) the duration of the relationship; and
    - (ii) the length of time during which the persons have lived together; and
    - (iii) the degree of companionship and emotional support that the persons draw from each other; and
    - (iv) whether the persons see the relationship as a long-term one.

(4) In forming an opinion whether 2 persons are in a married relationship, or a de facto relationship, in relation to an application for a visa of a class other than a class specified in paragraph (3) (ab), (ad), (ae), (af) or (ag), the Minister may have regard to any of the factors set out in subregulation (3).

(5) If 2 persons have been living together at the same address for 6 months or longer, that fact is to be taken to be strong evidence that the relationship is genuine and continuing, but a relationship of shorter duration is not to be taken not to be genuine and continuing only for that reason.

## ANNEXURE 3

### Regulation 1.09A – Interdependent Relationship

- (1) In this regulation:  
ancestor  
includes a parent.
- (2) For the purposes of these Regulations, a person is in an interdependent relationship with another person if:
- (a) they are not within a prohibited degree of relationship; and
  - (b) they have both turned 18; and
  - (c) the Minister is satisfied that:
    - (i) they have a mutual commitment to a shared life to the exclusion of any spouse relationships or any other interdependent relationships; and
    - (ii) the relationship between them is genuine and continuing; and
    - (iii) they:
      - (A) live together; or
      - (B) do not live separately and apart on a permanent basis; and
    - (d) subject to subregulation (2A), where either of them is an applicant for a Partner (Migrant) (Class BC), Partner (Provisional) (Class UF), Partner (Residence) (Class BS), or Partner (Temporary) (Class UK) visa - the Minister is satisfied that, for the period of 12 months immediately preceding the date of application of the party relying on the existence of the relationship:
      - (i) they had a mutual commitment to a shared life to the exclusion of any spouse relationships or any other interdependent relationships; and
      - (ii) the relationship between them was genuine and continuing; and
      - (iii) they had:
        - (A) been living together; or
        - (B) not been living separately and apart on a permanent basis.
- (2A) Paragraph 2 (d) does not apply if the applicant can establish compelling and compassionate circumstances for the grant of the visa.
- (3) For the purposes of this regulation, persons are within a prohibited degree of relationship if either of them is:
- (a) an ancestor or descendant of the other person; or
  - (b) a brother or sister of the other person (whether or not they have both parents in common).
- (4) For the purposes of subregulation (3):
- (a) a person is taken to be an ancestor or descendant of another person even if the relationship between them is traced through, or to, a person who is or was an adopted child; and
  - (b) the relationship of parent and child between an adoptive parent and an adopted child is taken to continue even though:
    - (i) the order by which the adoption was effected has been annulled, cancelled or discharged; or
    - (ii) the adoption has otherwise ceased to be effective; and
    - (c) the relationship between an adopted child and the adoptive parent, or each of the adoptive parents, is taken to be or to have been the natural relationship of child and parent; and
    - (d) a person who has been adopted more than once is taken to be the child of each person by whom he or she has been adopted.
- (5) In forming an opinion for the purposes of subregulation (2) in relation to an application for a visa, the Minister must have regard to all the circumstances of the relationship, including, in particular:
- (a) the financial aspects of the relationship, including:
    - (i) any joint ownership of real estate or other major assets; and
    - (ii) any joint liabilities; and
    - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
  - (iv) whether one party to the relationship owes any legal obligation in respect of the other; and

- (v) the basis of any sharing of day-to-day household expenses; and
- (b) the nature of the household, including:
  - (i) any joint responsibility for care and support of children, if any; and
  - (ii) the persons' living arrangements; and
  - (iii) any sharing of responsibility for housework; and
- (c) the social aspects of the relationship, including:
  - (i) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
  - (ii) any basis on which the persons plan and undertake joint social activities; and
  - (iii) whether the persons represent themselves to other persons as being in an interdependent relationship;
- and
- (d) the nature of the persons' commitment to each other, including:
  - (i) the duration of the relationship; and
  - (ii) the length of time during which the persons have lived together; and
  - (iii) the degree of companionship and emotional support that the persons draw from each other; and
  - (iv) whether the persons themselves see the relationship as a long-term one.
  
- (6) If 2 persons have been living together at the same address for 6 months or longer, that fact is to be taken to be strong evidence that the relationship is genuine and continuing, but a relationship of shorter duration is not to be taken not to be genuine and continuing only for that reason.

## ANNEXURE 4

### **Partner (Provisional) – Subclass 309 and Partner (Migrant) – Subclass 100 Visas (Offshore)**

#### SUBCLASS 309 VISA

Application must be outside Australia, at the same time and place as an application for the Partner (Migrant) subclass 100 visa and the applicant must also be outside of Australia.

Application by a person claiming to be a member of the family unit of a person who is an applicant for the visa may be made at the same time and place as, and combined with, the application by that person.

*Primary Criteria* (To be satisfied by at least 1 member of a family unit).

At the time of application the applicant must be the spouse (marital or de facto) of an Australian citizen; or an Australian permanent resident; or an eligible New Zealand citizen.

This includes applicants who intend to marry an Australian citizen; or an Australian permanent resident; or an eligible New Zealand citizen; and the intended marriage will, if it takes place, be a valid marriage for the purposes of section 12 of the Act. But), the marriage must have taken place before the applicant can be granted a visa of this subclass.

The spouse, or intended spouse, of the applicant is not prohibited from being a sponsor. A prohibition on sponsorship applies if, for example, the spouse, or intended spouse, is a woman who was granted a woman-at-risk visa within the 5 years immediately preceding the application.

The applicant must be sponsored:

if the applicant's spouse has turned 18 - by the spouse; or

if the applicant's spouse has not turned 18 - by a parent or guardian of that spouse who has turned 18; and is an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen.

A the time of decision, the applicant must continue to satisfy the criteria set out above and the sponsorship must have been approved by the Minister and must still be in force.

The applicant and each member of his or her family unit must satisfy the character, health and other relevant public interest criteria and if the applicant or a member of his or her family unit has previously been in Australia, they must also satisfy special return criteria.

If requested by the Minister, the applicant must have provided an assurance of support in relation to the applicant.

*Secondary Criteria* (To be satisfied by applicants who are members of the family unit of a person who satisfies the primary criteria.)

Criteria to be satisfied at time of application

The applicant is a member of the family unit of, and made a combined application with, a person who satisfies the primary criteria.

The sponsorship of the person who satisfies the primary criteria includes sponsorship of the applicant.

Criteria to be satisfied at time of decision

The applicant continues to be a member of the family unit of a person who, having satisfied the primary criteria, is the holder of a Subclass 309 visa.

The sponsorship has been approved by the Minister and is still in force.

The applicant satisfies health and character criteria and public interest criteria and if the applicant has previously been in Australia, the applicant satisfies special return criteria.

If the Minister has required an assurance of support the applicant is included in the assurance of support and that assurance has been accepted by the Minister.

If the applicant has not turned 18, public interest criteria relating to permission of removal of the family member from his or her home country and the best interests of the family member.

At the time of grant of the visa, if the application is being made by an applicant who holds a Subclass 303 (Emergency (Temporary Visa Applicant)) visa the applicant must be in Australia, but not in immigration clearance; or outside Australia when the visa is granted.

In any other case, the applicant must be outside Australia at the time of grant.

The visa granted is temporary and it permits the holder to travel to, enter and remain in Australia until the end of the day on which the holder is notified that his or her application for a Spouse (Migrant) (Class BC) visa or a Partner (Migrant) (Class BC) visa has been decided or until the application is withdrawn.

#### SUBCLASS 100 VISA

The application may be made in or outside Australia, but not in immigration clearance. Application by a person claiming to be a member of the family unit of the applicant may be made at the same time and place as, and combined with, the application by that person

*Primary Criteria* (To be satisfied by at least 1 member of a family unit.)

Generally the applicant must be the holder of a Subclass 309 (Spouse (Provisional)) visa; or was the holder of a Subclass 309 (Spouse (Provisional)) visa granted before 1 November 1999 that has ceased to be in effect because the applicant was outside Australia at the end of the 30 month period specified in the Subclass 309 visa for travelling to and entering Australia; or left Australia after the end of the 30 month period specified in that visa for travelling to and entering Australia; and the applicant is the spouse of the sponsoring spouse; and at least 2 years have passed since the application was made.

However, if the sponsoring spouse has died the Minister must be satisfied that the applicant would have continued to be the spouse of the sponsoring spouse if the sponsoring spouse had not died.

And if the relationship between the applicant and the sponsoring spouse has ceased; then it must be shown that after the applicant first entered Australia as the holder of the visa either or both the applicant or a member of the family unit of the sponsoring spouse or of the applicant or of both of them has suffered domestic violence committed by the sponsoring spouse; or the applicant has custody or joint custody of, or access to; or has a residence order or contact order made under the Family Law Act 1975 relating to at least 1 child in respect of whom the sponsoring spouse has been granted joint custody or access or has a residence order or contact order made under the Family Law Act 1975; or has an obligation under a child maintenance order made under the Family Law Act 1975, or any other formal maintenance obligation.

If the applicant held a Subclass 309 (Spouse (Provisional)) visa that ceased on notification of a decision of the Minister to refuse a Subclass 100 visa; and if the Tribunal has remitted that decision for reconsideration and, as a result, the Minister decides that the applicant satisfies the criteria for the grant of a Subclass 100 visa apart from the criterion that the applicant hold a Subclass 309 visa; or has determined that the applicant satisfies the criteria for the grant of a Subclass 100 visa apart from the criterion that the applicant hold a Subclass 309 visa.

Note that some exceptions to the above apply.

The applicant and each member of the family unit of the applicant must continue to satisfy public interest criteria such as character and health provisions.

If so requested by the Minister, an assurance of support in relation to the applicant and each member of the family unit of the applicant has been given, and has been accepted by the Minister.

And if at least 2 years have passed since the application was made and the applicant does not meet the requirements relating to the primary criteria, the applicant is nominated for the grant of the Subclass 100 visa by the sponsoring spouse.

*Secondary Criteria* (To be satisfied by applicants who are members of the family unit of a person who satisfies the primary criteria.)

The applicant is a member of the family unit of a person who has applied for a Partner (Migrant) (Class BC) visa, and the Minister has not decided to grant or refuse to grant a visa to the person.

The applicant is the holder of a Subclass 309 (Spouse (Provisional)) visa that was granted on the basis that the applicant was a member of the family unit of another person who was the holder of a Subclass 309 visa, and that other person has been granted a Subclass 100 visa; or was the holder of a Subclass 309 (Spouse (Provisional)) visa granted before 1 November 1999 that has ceased to be in effect because the applicant was outside Australia at the end of the 30 month period specified in the Subclass 309 visa for travelling to and entering Australia; or left Australia after the end of the 30 month period specified in that visa for travelling to and entering Australia; or was granted on the basis that the applicant was a member of the family unit of another person who was the holder of a Subclass 309 visa, and that other person has been granted a Subclass 100 visa; or is the holder of a Subclass 445 (Dependent Child) visa that was granted on the basis that the applicant was the dependent child of a parent who was the holder of a Subclass 309 or 445 visa and who has been granted a Subclass 100 visa; or is a person: (i) who holds a Subclass 445 (Dependent Child) visa; or a Subclass 309 (Spouse (Provisional)) visa; which the Minister has decided to grant to the applicant; and (ii) who, at the time the visa mentioned in subparagraph (i) was granted, was the dependent child, or a member of the family unit, as the case requires, of another person: who, at the time mentioned in subparagraph (ii), was the holder of a Subclass 445 (Dependent Child) or Subclass 309 (Spouse (Provisional)) visa; and (B) who, since the time mentioned in subparagraph (ii), has been granted a Subclass 100 visa.

The applicant satisfies public interest character and health criteria and if the Minister requires an assurance of support in respect of the person who satisfies the primary criteria the applicant is included in the assurance of support and that assurance has been accepted by the Minister.

The applicant must be in Australia, but not in immigration clearance; or outside Australia; when the visa is granted.

Permanent visa permitting the holder to travel to and enter Australia for a period of 5 years from the date of grant.

## **ANNEXURE 5**

### **Partner (Temporary) – Subclass 820 and Partner (Residence) – Subclass 801 Visas (Onshore)**

**The applicable prescribed criteria generally mirror those at Annexure 4.**

**However the applicant must be in Australia and the application must be made in Australia.**

## ANNEXURE 6

### **Prospective Marriage (Temporary) Visa – Subclass 310**

#### **(Offshore)**

Application must be made outside Australia.

Applicant must be outside Australia.

Application must be made at the same time and place as an application for Partner (Migrant) visa. Application by a person claiming to be a member of the family unit of a person who is an applicant for a Partner (Provisional) (Class UF) visa may be made at the same time and place as, and combined with, the application by that person.

The applicant must have turned 18; and must be in an interdependent relationship with a person who has turned 18 and who is an Australian citizen, an Australian permanent resident or eligible New Zealand citizen, who has sponsored the applicant.

Criteria to be satisfied at time of decision:

The applicant continues to satisfy the above mentioned criteria and the sponsorship has been approved by the Minister and is still in force and the applicant continues to be in an interdependent relationship with the Australian citizen, Australian permanent resident or eligible New Zealand citizen with whom the applicant was in an interdependent relationship at the time of the application.

The applicant and each member of the family unit of the applicant satisfies public interest character and health criteria and, if she or he has previously been in Australia, also satisfies special return criteria.

If so requested by the Minister, an assurance of support in relation to the applicant has been given, and has been accepted by the Minister.

As for applicants who are members of the family unit of a person who satisfies the primary criteria, applicant is a member of the family unit of, and made a combined application with a person who satisfies the primary criteria, and the sponsorship of the person who satisfies the primary criteria includes sponsorship of the applicant.

An applicant who holds a Subclass 303 (Emergency (Temporary Visa Applicant)) visa; and has applied for a Partner (Provisional) (Class UF) visa, the applicant must be in Australia, but not in immigration clearance; or outside Australia when the visa is granted.

In any other case, the applicant must be outside Australia at the time of grant.

## ANNEXURE 7

### Interdependent Partner (Provisional) – Subclass 310 and Interdependent Partner (Migrant) – Subclass 110 Visas (Offshore)

This category is relevant to persons outside Australia who are the interdependent partner of an Australian citizen, permanent resident or eligible New Zealand citizen.

At the time of making the application, the applicant must have turned 18, must be sponsored by a person who has turned 18 and is an Australian citizen, permanent resident or eligible New Zealand citizen, and must be in an interdependent relationship with the sponsor.

An interdependent relationship is taken to exist where the applicant and his/her partner have a mutual commitment to a shared life to the exclusion of any spouse or any other interdependent relationships, where the relationship is genuine and ongoing, and where the applicant and his/her partner either live together or do not live separately and apart on a permanent basis.

An application for a subclass 310 visa is made at the same time as an application for a subclass 110 interdependency (residence) visa. Visa 310 holders are usually required to wait two years between the application and the grant of the 110 visa. At the end of this period, the applicant must demonstrate that the nomination remains on foot and that the relationship continues to be a genuine one. There is provision for the grant of the visa where the relationship is not continuing at the end of the two year period, because the sponsor has either died, or has committed domestic violence against the applicant or a dependent child of the applicant. In these circumstances, the visa may be granted before the end of the two year period.

An applicant for a subclass 310/110 visa must also satisfy certain public interest criteria and return criteria if they have previously been in Australia before the visa is granted.

An assurance of support in relation to the applicant may be required before the subclass 110 residence visa is granted.

An applicant may include members of their family unit in the application for the interdependency visa. Each member of the family unit must, at the time of application, be included in the primary applicant's application, and in the sponsorship. At the time of the decision, each member of the family unit must continue to be part of the primary applicant's family unit and included in the sponsorship, and must satisfy the public interest criteria and the return criteria if they have previously been in Australia before the visa is granted. An assurance of support in relation to each member of the family unit may also be required.

Where a member of the family unit is a dependent child, the visa will only be granted where the grant will not prejudice the rights and interests of any person who has custody or guardianship of, or access to, the dependent child.

## ANNEXURE 8

### Interdependent Partner (Temporary) – subclass 826 and Interdependent Partner (Residence) – subclass 814 Visas (Onshore)

This category is relevant to persons currently in Australia who are the interdependent partner of an Australian citizen, permanent resident or eligible New Zealand citizen.

At the time of making the application, the applicant must have turned 18, must be nominated for the grant of the visa by a person who has turned 18 and is an Australian citizen, permanent resident or eligible New Zealand citizen, and must be in an interdependent relationship with the sponsor.

An interdependent relationship is taken to exist where the applicant and his/her partner have a mutual commitment to a shared life to the exclusion of any spouse or any other interdependent relationships, where the relationship is genuine and ongoing, and where the applicant and his/her partner either live together or do not live separately and apart on a permanent basis. In forming an opinion as to the existence of an interdependent relationship, the following are taken into consideration: the financial aspects of the relationship, the nature of the household, the social aspects of the relationship, and the nature of the persons' commitment to each other.

An application for a subclass 826 visa is made at the same time as an application for a subclass 814 interdependency (residence) visa. Visa 826 holders are usually required to wait two years between the application and the grant of the 814 visa. At the end of this period, the applicant must demonstrate that the nomination remains on foot and that the relationship continues to be a genuine one. There is provision for the grant of the visa where the relationship is not continuing at the end of the two year period, where the sponsor has either died, or has committed domestic violence against the applicant or a dependent child of the applicant. In these circumstances, or if at the date of application if the relationship was "long-term" (ie had continued for a period of not less than 5 years), the visa may be granted before the end of the two year period.

An applicant for a subclass 826/814 visa must also satisfy certain public interest criteria before the visa is granted.

An assurance of support in relation to the applicant may be required before the subclass 814 residence visa is granted.

An applicant may include members of their family unit in the application for the interdependency visa. Members of the family unit must, at the time of application, be included in the primary applicant's application, and in the sponsorship. At the time of the decision, members of the family unit must continue to be part of the primary applicant's family unit and included in the nomination, and must satisfy the public interest criteria before the visa is granted. An assurance of support in relation to each member of the family unit may also be required.

Where a member of the family unit is a dependent child, the visa will only be granted where the grant will not prejudice the rights and interests of any person who has custody or guardianship of, or access to, the dependent child.

## **DAVID BITEL**

### **Bio-Data**

Born in Sydney, David Bitel has a BA (Hons) in History and an LL B from Sydney University. He has been a practising attorney since 1976 and is a senior partner of the Sydney law firm Parish Patience established in 1888. He specialises in all aspects of immigration and administrative law. He is a registered migration agent and an accredited immigration law specialist by NSW Law Society.

His professional associations include:

- Judicial Member of the Equal Opportunity Tribunal of New South Wales since 1990 presiding over complaints under the Anti-Discrimination Act.
- Secretary General of the Australian Section of the International Commission of Jurists since 1986.
- Current President of the Refugee Council of Australia, Convenor the Board of Trustees of the Australian Refugee Foundation and executive member of the Refugee Council of Australia since 1985.
- Founding Secretary of the Australian Legal Resources International, a lawyers NGO which provides legal assistance to countries in need.
- Member of the migration law sub-committees of the Law Society of NSW, Law Council of Australia and the International Bar Association.
- Consultant author of Butterworth's Australian Immigration Law Service.

He is an honorary solicitor to a number of organisations in the Bangladesh, Egyptian, Filipino and Indonesian communities and writes regular feature articles for these community newspapers. His articles can also be found on the home page for Parish Patience at **[www.ParishPatience.com.au](http://www.ParishPatience.com.au)**.

With over twenty years of experience providing legal advice on immigration matters, David Bitel is an acknowledged leader in the field and he has a large team of specialist lawyers working with him.