



Immigration (Guardianship of Children) Act 1946

No. 45, 1946

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About this compilation

This compilation

This is a compilation of the *Immigration (Guardianship of Children) Act 1946* that shows the text of the law as amended and in force on 16 December 2014 (the *compilation date*).

This compilation was prepared on 22 December 2014.

The notes at the end of this compilation (the *endnotes*) include information about amending laws and the amendment history of provisions of the compiled law.

Uncommenced amendments

The effect of uncommenced amendments is not shown in the text of the compiled law. Any uncommenced amendments affecting the law are accessible on ComLaw (www.comlaw.gov.au). The details of amendments made up to, but not commenced at, the compilation date are underlined in the endnotes. For more information on any uncommenced amendments, see the series page on ComLaw for the compiled law.

Application, saving and transitional provisions for provisions and amendments

If the operation of a provision or amendment of the compiled law is affected by an application, saving or transitional provision that is not included in this compilation, details are included in the endnotes.

Modifications

If the compiled law is modified by another law, the compiled law operates as modified but the modification does not amend the text of the law. Accordingly, this compilation does not show the text of the compiled law as modified. For more information on any modifications, see the series page on ComLaw for the compiled law.

Self-repealing provisions

If a provision of the compiled law has been repealed in accordance with a provision of the law, details are included in the endnotes.

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An Act to make provision for and in connexion with the Guardianship of certain alien children

1 Short title

This Act may be cited as the *Immigration (Guardianship of Children) Act 1946*.

2 Commencement

This Act shall come into operation on a date to be fixed by Proclamation.

3 Application of the *Criminal Code*

Chapter 2 of the *Criminal Code* applies to all offences against this Act.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

4 Definitions

In this Act, unless the contrary intention appears:

custodian means a person who, by or under this Act, is the custodian of a non-citizen child.

declared State or Territory means a State or Territory in respect of which a declaration under section 4AAB is in force.

intending adoptive parent, in relation to a person (the ***child***), means a person who intends to:

- (a) adopt the child under the laws in force in a declared State or Territory; or
- (b) secure the recognition, under the laws in force in a declared State or Territory, of an adoption of the child by the person under the laws of a foreign country.

migration law means any of the following:

- (a) the *Migration Act 1958*;
- (b) regulations made under that Act;
- (c) any instrument made under that Act or those regulations.

non-citizen means a person who is not an Australian citizen.

non-citizen child means a person who is a non-citizen child under subsection 4AAA(1) or (4).

parent: without limiting who is a parent of anyone for the purposes of this Act, a person is the **parent** of another person if the other person is a child of the person within the meaning of the *Family Law Act 1975*.

prescribed adoption class visa means a visa under the *Migration Act 1958* that is declared by the regulations to be an adoption class visa for the purposes of this Act.

regional processing country has the same meaning as in the *Migration Act 1958*.

relative of a person includes:

- (a) a parent of the person; and
- (b) anyone who is a step-parent of the person or would be except that he or she is not legally married to his or her de facto partner (within the meaning of the *Acts Interpretation Act 1901*); and
- (c) anyone else who would be a relative of the person if someone mentioned in paragraph (a) or (b) were a relative of the person.

4AAA Non-citizen child

- (1) Subject to subsections (2) and (3), a person (the **child**) is a non-citizen child if the child:
 - (a) has not turned 18; and
 - (b) enters Australia as a non-citizen; and

- (c) intends, or is intended, to become a permanent resident of Australia.
- (2) Subsection (1) does not apply if the child enters Australia in the charge of, or for the purposes of living in Australia under the care of:
 - (a) a parent of the child; or
 - (b) a relative of the child who has turned 21; or
 - (c) an intending adoptive parent of the child.
- (3) Subsection (1) does not apply if:
 - (a) the child enters Australia in the charge of, or for the purposes of living in Australia under the care of, a person who is not less than 21 years of age (the *adult*); and
 - (b) a prescribed adoption class visa is in force in relation to the child when the child enters Australia; and
 - (c) the adult intends to reside with the child in a declared State or Territory.
- (4) A person is a non-citizen child if:
 - (a) the person has not turned 18; and
 - (b) a direction under section 4AA is in force in relation to the person.

4AAB Declared States and Territories

- (1) The Minister may declare a State or Territory to be a declared State or Territory for the purposes of this Act.
- (2) A declaration under subsection (1) is to be:
 - (a) made in writing; and
 - (b) published in the *Gazette*.

4AA Orders for guardianship of certain children

- (1) Subject to subsection (2), where:
 - (a) a person under the age of 18 years enters Australia as a non-citizen in the charge of, or for the purpose of living in

- Australia under the care of, a relative of the person (other than a parent) not less than 21 years of age; and
- (b) the person intends to become, or is intended to become, a permanent resident of Australia;
- the Minister may, if the Minister is satisfied that it is necessary in the interests of the person to do so, direct, in writing, that the person shall be the Minister's ward.
- (2) The Minister shall not give a direction under subsection (1) unless the relative consents to the Minister doing so.

4A Evidence

For the purposes of this Act (including proceedings arising under this Act or in which a question arises as to the application of this Act to a person), a certificate in writing by a prescribed officer of the Commonwealth or of a State or Territory that a person named in the certificate is a non-citizen child, or was, at a date specified in the certificate, a non-citizen child, is evidence of the fact so certified.

5 Delegation

- (1) The Minister may, in relation to any matters or class of matters, or in relation to any non-citizen child or class of non-citizen children, by writing under his or her hand, delegate to any officer or authority of the Commonwealth or of any State or Territory all or any of his or her powers and functions under this Act (except this power of delegation) so that the delegated powers and functions may be exercised by the delegate with respect to the matters or class of matters, or the child or class of children, specified in the instrument of delegation.
- (2) Where under this Act the exercise of any power or function by the Minister or the operation of any provision of this Act is dependent upon the opinion or state of mind of the Minister in relation to any matter, that power or function may be exercised by the delegate or

that provision may operate (as the case may be) upon the opinion or state of mind of the delegate in relation to that matter.

- (3) A delegation under this section shall be revocable at will, and no delegation shall prevent the exercise of any power or function by the Minister.

6 Guardianship of non-citizen children

- (1) The Minister shall be the guardian of the person, and of the estate in Australia, of every non-citizen child who arrives in Australia after the commencement of this Act to the exclusion of the parents and every other guardian of the child, and shall have, as guardian, the same rights, powers, duties, obligations and liabilities as a natural guardian of the child would have, until the child reaches the age of 18 years or leaves Australia permanently, or until the provisions of this Act cease to apply to and in relation to the child, whichever first happens.
- (2) Without limiting the meaning of the expression *leaves Australia permanently* in subsection (1), a non-citizen child *leaves Australia permanently* if:
- (a) the child is removed from Australia under section 198 or 199 of the *Migration Act 1958*; or
 - (b) the child is taken from Australia to a regional processing country under section 198AD of that Act; or
 - (c) the child is deported under section 200 of that Act; or
 - (d) the child is taken to a place outside Australia under paragraph 245F(9)(b) of that Act, or under Division 7 or 8 of Part 3 of the *Maritime Powers Act 2013*.

6A Non-citizen child not to leave Australia without consent

- (1) A non-citizen child shall not leave Australia except with the consent in writing of the Minister.

- (2) The Minister shall not refuse to grant any such consent unless he or she is satisfied that the granting of the consent would be prejudicial to the interests of the non-citizen child.
- (3) A person shall not aid, abet, counsel or procure a non-citizen child to leave Australia contrary to the provisions of this section.

Penalty: Two hundred dollars or imprisonment for six months.

7 Custody of non-citizen children

- (1) The Minister may place a non-citizen child in the custody of a person who:
 - (a) is willing to be the custodian of that child; and
 - (b) is, in the opinion of the Minister, a suitable person to be the custodian of that child;and that person shall thereupon become the custodian of that child.
- (2) The Minister may, at any time, if he or she considers it necessary so to do in the interests of a non-citizen child, remove the child from the custody of his or her custodian and place the child in the custody of some other person, who shall thereupon be the custodian of that child.

8 Operation of other laws

- (1) Except as prescribed, nothing in this Act shall affect the operation in relation to non-citizen children of any provision of the laws of any State or Territory relating to child welfare.
- (2) Nothing in this Act:
 - (a) affects the operation of the migration law; or
 - (b) affects the performance or exercise, or the purported performance or exercise, of any function, duty or power under the migration law or the *Maritime Powers Act 2013*; or
 - (c) imposes any obligation on the Minister or another Minister to exercise, or to consider exercising, any power conferred by or under the migration law or the *Maritime Powers Act 2013*.

- (3) Without limiting subsection (2), nothing in this Act affects the performance or exercise, or the purported performance or exercise, of any function, duty or power relating to:
- (a) the removal of a non-citizen child from Australia under section 198 or 199 of the *Migration Act 1958*; or
 - (b) the taking of a non-citizen child from Australia to a regional processing country under section 198AD of that Act; or
 - (c) the deportation of a non-citizen child under section 200 of that Act; or
 - (d) the taking of a non-citizen child to a place outside Australia under paragraph 245F(9)(b) of that Act, or under Division 7 or 8 of Part 3 of the *Maritime Powers Act 2013*.

9 Offences in respect of non-citizen child

A person shall not, without lawful excuse (proof whereof shall lie upon him or her):

- (a) remove any non-citizen child, or counsel or cause any non-citizen child to be withdrawn or to abscond, from the custody of his or her custodian; or
- (b) knowing any non-citizen child to have been so removed or withdrawn or to have so absconded, harbour or conceal the child or prevent him or her from returning to his or her custodian.

Penalty: Two hundred dollars or imprisonment for six months.

10 False statements in applications

For the purposes of section 136.1 of the *Criminal Code*, an application made for the purposes of this Act is taken to be an application for a benefit.

11 Exemption of children from Act

The Minister may, by order in writing under his or her hand, direct that the provisions of this Act shall not apply in respect of a child specified in the order, or a child included in a class of children so

specified, and, while the order is in force, the provisions of this Act do not apply to or in relation to that child or to a child included in that class of children.

11A Reconsideration and review of certain decisions

- (1) In this section, unless the contrary intention appears:

decision has the same meaning as in the *Administrative Appeals Tribunal Act 1975*.

relevant decision means a decision of a delegate of the Minister under section 4AA or 11.

reviewable decision means:

- (a) a decision of the Minister under section 4AA or 11; or
 - (b) a decision of the Minister under subparagraph (3)(a)(ii) or subsection (4).
- (2) Subject to subsection (3), a person affected by a relevant decision may request the Minister to reconsider the decision.
- (3) The request shall:
- (a) be made by notice in writing given to the Minister within:
 - (i) the period of 28 days after the decision first comes to the notice of the person; or
 - (ii) such further period as the Minister (whether before or after the expiration of that period of 28 days), by notice in writing served on the person, allows; and
 - (b) shall set out the reasons for making the request.
- (4) The Minister shall, within 45 days after receipt of the request, reconsider the relevant decision and may:
- (a) confirm the decision;
 - (b) vary the decision; or
 - (c) set the decision aside and make a new decision in substitution for the decision set aside.

- (5) Where, pursuant to a request under subsection (2), the Minister reconsiders a relevant decision, the Minister shall, by notice in writing served on the person who made the request, inform the person of the result of the reconsideration.
- (6) Applications may be made to the Administrative Appeals Tribunal for review of reviewable decisions.

11B Statements to accompany notification of certain decisions

- (1) In this section, *decision*, *relevant decision* and *reviewable decision* have the same respective meanings as in section 11A.
- (2) Where a delegate of the Minister makes a relevant decision and gives to a person whose interests are affected by the decision notice in writing of the making of the decision, the notice shall include a statement to the effect that a person affected by the decision:
 - (a) may, if the person is dissatisfied with the decision, seek a reconsideration of the decision by the Minister in accordance with subsection 11A(3); and
 - (b) may, subject to the *Administrative Appeals Tribunal Act 1975*, if the person is dissatisfied with the decision of the Minister on the reconsideration, apply to the Administrative Appeals Tribunal for review of the last-mentioned decision.
- (3) Where the Minister makes a reviewable decision and gives to a person whose interests are affected by the decision notice in writing of the making of the decision, the notice shall include a statement to the effect that subject to the *Administrative Appeals Tribunal Act 1975*, a person affected by the decision may, if the person is dissatisfied with the decision, apply to the Administrative Appeals Tribunal for review of the decision.
- (4) Any failure to comply with the requirements of subsection (2) or (3) in relation to a decision does not affect the validity of the decision.

12 Regulations

The Governor-General may make regulations, not inconsistent with this Act, prescribing all matters which by this Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to this Act, and in particular for:

- (aa) prescribing principles to be observed in considering whether or not to give a direction under section 4AA;
- (a) prescribing the principles to be observed in relation to the placing of non-citizen children with custodians;
- (b) regulating the placing of such children with custodians and the transfer of such children from one custodian to another;
- (c) prescribing provisions to be observed by custodians in relation to the custody, control, welfare, care, education, training and employment of non-citizen children;
- (d) providing that any provision of the laws of any State or Territory relating to child welfare shall not apply in relation to non-citizen children, and making provision in lieu of any such provision;
- (da) prescribing powers, rights, duties and liabilities of or in relation to the Minister as guardian of the estate in Australia of non-citizen children, including provisions for the receipt, disposition, management and control of property of non-citizen children, and of property of deceased non-citizen children from their deaths until the grant of administration;
- (db) making provision for preventing non-citizen children from leaving Australia without the consent in writing of the Minister; and
- (f) prescribing penalties not exceeding Forty dollars, for any offence against the regulations.

Endnote 1—About the endnotes

The endnotes provide information about this compilation and the compiled law.

The following endnotes are included in every compilation:

Endnote 1—About the endnotes

Endnote 2—Abbreviation key

Endnote 3—Legislation history

Endnote 4—Amendment history

Endnotes about misdescribed amendments and other matters are included in a compilation only as necessary.

Abbreviation key—Endnote 2

The abbreviation key sets out abbreviations that may be used in the endnotes.

Legislation history and amendment history—Endnotes 3 and 4

Amending laws are annotated in the legislation history and amendment history.

The legislation history in endnote 3 provides information about each law that has amended (or will amend) the compiled law. The information includes commencement details for amending laws and details of any application, saving or transitional provisions that are not included in this compilation.

The amendment history in endnote 4 provides information about amendments at the provision (generally section or equivalent) level. It also includes information about any provision of the compiled law that has been repealed in accordance with a provision of the law.

Misdescribed amendments

A misdescribed amendment is an amendment that does not accurately describe the amendment to be made. If, despite the misdescription, the amendment can be given effect as intended, the amendment is incorporated into the compiled law and the abbreviation “(md)” added to the details of the amendment included in the amendment history.

If a misdescribed amendment cannot be given effect as intended, the amendment is set out in the endnotes.

Endnotes

Endnote 2—Abbreviation key

Endnote 2—Abbreviation key

A = Act	orig = original
ad = added or inserted	par = paragraph(s)/subparagraph(s) /sub-subparagraph(s)
am = amended	pres = present
amdt = amendment	prev = previous
c = clause(s)	(prev...) = previously
C[x] = Compilation No. x	Pt = Part(s)
Ch = Chapter(s)	r = regulation(s)/rule(s)
def = definition(s)	Reg = Regulation/Regulations
Dict = Dictionary	reloc = relocated
disallowed = disallowed by Parliament	renum = renumbered
Div = Division(s)	rep = repealed
exp = expires/expired or ceases/ceased to have effect	rs = repealed and substituted
F = Federal Register of Legislative Instruments	s = section(s)/subsection(s)
gaz = gazette	Sch = Schedule(s)
LI = Legislative Instrument	Sdiv = Subdivision(s)
LIA = <i>Legislative Instruments Act 2003</i>	SLI = Select Legislative Instrument
(md) = misdescribed amendment	SR = Statutory Rules
mod = modified/modification	Sub-Ch = Sub-Chapter(s)
No. = Number(s)	SubPt = Subpart(s)
o = order(s)	<u>underlining</u> = whole or part not commenced or to be commenced
Ord = Ordinance	

Endnote 3—Legislation history

Endnote 3—Legislation history

Act	Number and year	Assent	Commencement	Application, saving and transitional provisions
Immigration (Guardianship of Children) Act 1946	45, 1946	15 Aug 1946	30 Dec 1946 (s 2 and <i>Gazette</i> 1946, p. 3598)	
Immigration (Guardianship of Children) Act 1948	62, 1948	6 Dec 1948	6 Dec 1948 (s 2)	s 3(2)
Immigration (Guardianship of Children) Act 1952	29, 1952	16 June 1952	16 June 1952 (s 2)	—
Statute Law Revision (Decimal Currency) Act 1966	93, 1966	29 Oct 1966	1 Dec 1966 (s 2)	—
Statute Law Revision Act 1973	216, 1973	19 Dec 1973	31 Dec 1973 (s 2)	s 9(1) and 10
Migration (Miscellaneous Amendments) Act 1983	84, 1983	14 Nov 1983	Part V (s 9–20): 2 Apr 1984 (s 2 and <i>Gazette</i> 1984, No. S119)	s 20
Statute Law (Miscellaneous Provisions) Act (No. 1) 1985	65, 1985	5 June 1985	s 3: 1 July 1986 (<i>Gazette</i> 1986, No. S311)	—
Immigration (Guardianship of Children) Amendment Act 1994	45, 1994	15 Mar 1994	12 Apr 1994	—
Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000	137, 2000	24 Nov 2000	s 1–3 and Sch 1 (items 1, 4, 6, 7, 9–11, 32): 24 Nov 2000 (s 2)	Sch 2 (items 418, 419)

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Endnotes

Endnote 3—Legislation history

Act	Number and year	Assent	Commencement	Application, saving and transitional provisions
Migration Legislation Amendment (Application of Criminal Code) Act 2001	97, 2001	22 Aug 2001	19 Sept 2001 (s 2)	s 4
Statute Law Revision Act 2008	73, 2008	3 July 2008	Sch 4 (items 334–342): 4 July 2008 (s 2(1) item 64)	—
Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Act 2008	144, 2008	9 Dec 2008	Sch 10 (items 79–82): 15 Mar 2009 (s 2(1) item 29)	Sch 10 (item 82)
Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012	113, 2012	17 Aug 2012	Sch 2: 18 Aug 2012 (s 2)	—
Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014	135, 2014	15 Dec 2014	Sch 1 (items 32–35): 16 Dec 2014 (s 2(1) item 2)	—

Endnote 4—Amendment history

Endnote 4—Amendment history

Provision affected	How affected
Title	am No 84, 1983
s 3	rep No 216, 1973 ad No 97, 2001
s 4	am No 29, 1952; No. 216, 1973; No. 84, 1983; No. 65, 1985; No. 45, 1994; No. 144, 2008; No. 113, 2012
s 4AAA	ad No 45, 1994
s 4AAB	ad No 45, 1994
s 4AA	ad No 65, 1985
s 4A	ad No 29, 1952 am No 216, 1973; No. 84, 1983
s 5	am No 216, 1973; No. 84, 1983; No. 73, 2008
s 6	am No 62, 1948; No. 216, 1973; No. 84, 1983; No. 144, 2008; No. 113, 2012; No 135, 2014
s 6A	ad No 62, 1948 am No 93, 1966; No. 84, 1983; No. 73, 2008; No. 113, 2012
s 7	am No 62, 1948; No. 84, 1983; No. 73, 2008
s 8	am No 216, 1973; No. 84, 1983; No. 113, 2012; No 135, 2014
s 9	am No 93, 1966; No. 84, 1983; No. 73, 2008
s 10	am No 93, 1966 rs No 137, 2000
s 11	rs No 29, 1952 am No 73, 2008
s 11A	ad No 65, 1985
s 11B	ad No 65, 1985
s 12	am No 62, 1948; No. 93, 1966; No. 216, 1973; No. 84, 1983; No. 65, 1985