

The Status of New Zealand Citizens in Australia

A Briefing Paper for Parliamentarians

Historical background

Since the beginning of European settlement, there has generally been free movement of people across the Tasman. Indeed, New Zealand was for a time part of the Colony of New South Wales and the first European settlers in many regions of New Zealand were Australians. This free movement has largely continued since, although between the late nineteenth-century and 1970s, racially-based migration policies limited the movement of those who were not substantially of European or Indigenous ancestry.

The Trans-Tasman Travel Arrangements (TTTA), established in 1973, ended these discriminatory policies, allowing all Australian and New Zealand citizens and permanent residents to move freely across the Tasman to visit, work, study, and reside. In the years since the initial agreement, Australia has withdrawn the right of New Zealand permanent residents to migrate freely to Australia, although New Zealand continues to extend residence rights to Australian permanent visa holders. From 2001 onwards, and despite the residence rights accorded under the TTTA, Australia has also unilaterally removed New Zealand citizens from the definition of 'resident' in a number of pieces of legislation, resulting in New Zealand citizens migrating to Australia under the TTTA enjoying considerably fewer rights than migrants who settle under the general migration programme.

Below is a basic summary of the rights extended to New Zealand citizens in different periods in comparison to those enjoyed by Australian citizens and other permanent residents:

until 1949 - New Zealanders are treated identically to Australians. There is no legal definition of 'Australian citizenship', Australians and New Zealanders being treated identically as 'British subjects'.

1949-1984 - New Zealanders enjoy similar rights to citizens, including right to vote and access all government services without any waiting period.

1984-2000 - New Zealanders enjoy rights that are generally equivalent to other permanent residents with waiting periods varying over time between 0 and 6 months for access to government services. They, however, no longer automatically receive the right to vote, but can gain it by becoming citizens after two years of residence in Australia.

2000-2001 - New Zealanders enjoy rights identical to those of other permanent residents, being able to access all government services and apply for citizenship after two years of residence in Australia.

from 2001 - New Zealanders have substantially fewer rights than other permanent residents, being ineligible for citizenship and denied access to an ever increasing number of government services.

Visa arrangements and the TTTA

Formerly, both prior to and after the introduction of the TTTA, New Zealand citizens were regarded as 'exempt non-citizens' and thus were not granted a visa on arrival in Australia. This changed with the introduction of the universal visa system on 1 September 1994.

From that date, subject to health and character concerns, New Zealand citizens arriving in Australia were granted Special Category Visas (SCVs). These new visas were intended to continue, as nearly as possible, the treatment of New Zealanders as 'exempt non-citizens.' SCV holders would continue to enjoy the right to reside in Australia indefinitely, subject only to the requirement that they remain New Zealand citizens.

This single condition to continue to hold an SCV meant that under the Migration Act 1958, the SCV was classified as a 'temporary visa,' despite it being subject to no time restriction. This classification also meant that New Zealanders moving to Australia under the TTTA would fall outside the definition of 'permanent resident' in migration law, despite being entitled to reside permanently in Australia. The definition of 'permanent resident' in Australian migration law is entirely tied to whether a visa is classified as 'temporary' or 'permanent'.

The 'temporary' classification of the SCV had no real immediate effect on the status of New Zealanders residing in Australia, who continued to be extended the same rights as all other permanent residents. It is only from 2001 onwards, that this classification was used as a justification to treat SCV holders differently to other permanent residents. Beginning in that year, federal and state governments began systematically to remove SCV holders from the definition of 'resident' in many pieces of legislation and regulation, resulting in them enjoying significantly fewer rights than permanent visa holders. Although often claimed to be a result of an agreement between the Australian and New Zealand governments, the initial change in treatment of SCV holders was entirely unilateral and was announced separately to the bilateral Social Security Agreement as a series of 'Australian National Measures.'

Legislative changes from 2001

2001	<p>Family and Community Services Legislation Amendment (New Zealand Citizens) Act 2001 Australian Citizenship (Permanent Resident Status – New Zealand Citizens) Declaration 2001 [The Act and Declaration amended the definition of 'resident' in social security and citizenship laws. These changes stripped SCV holders of eligibility for citizenship and working age social security payments. SCV holders who had been in Australia on 26 February 2001 or in Australia for at least one year in the two preceding years were 'protected' and thus exempt from these changes.]</p>
2003	<p>Higher Education Support Act 2003 [This Act limited eligibility to HECS-HELP loans to Australian citizens and permanent humanitarian visa holders from 2005. Unlike holders of 'permanent' visas, 'non-protected' SCV holders are unable to apply for Australian citizenship to gain access to this loan programme.]</p>
2012	<p>Social Security Amendment (Supporting Australian Victims of Terrorism Overseas) Act 2012 [This Act relies on the amended definition of resident in the Social Security Act 1991 and thus excludes 'non-protected' SCV holders from receiving assistance under the Act].</p>
2013	<p>National Disability Insurance Scheme Act 2013 [This act copies the amended definition of 'resident' from the Social Security Act 1991 and thus excludes 'non-protected' SCV holders from coverage under the NDIS.] Medicare Levy Amendment (DisabilityCare Australia) Act 2013 [This Act compels all SCV holders to pay an increased Medicare levy to fund the NDIS as they are considered 'residents' under the Health Insurance Act 1973, despite 'non-protected' SCV holders being ineligible for the NDIS.]</p>

Federal legislative changes have also created a domino effect, prompting a number of states to change legislation, regulations, and policies to reduce the rights enjoyed by SCV holders. State governments have attempted to restrict SCV holders (either all or only 'non-protected') from accessing public housing, disability services, subsidised TAFE education, student travel concessions, and public sector employment. A number of these state policies have been successfully challenged on the basis that they are illegal discrimination against New Zealand citizens.

Lack of reciprocity

Despite the increasingly harsh treatment of New Zealand citizens by Australian federal and state governments, New Zealand continues to extend Australians citizens and permanent residents the full rights it accords to all other permanent residents.

	NZ citizens in Australia ('non-protected')	Australian citizens in NZ
Right to vote	No	Yes, after one year
Eligible for citizenship	No	Yes, after five years
Citizenship granted to children at birth	No, children will only be granted citizenship if they reside in Australian continuously until their tenth birthday	Yes
Unemployment benefits	No*	Yes, after two years
Sickness benefits	No*	Yes, after two years
Single parent benefits	No	Yes, after two years
Public housing	Varies by state	Yes, after two years
Disability services	Currently varies by state, but in future will be ineligible under NDIS	Yes
Student loans	No	Yes, after two years
Student allowances	No*	Yes
Student travel concessions	Varies by state	Yes
Employment in public service	Not eligible for employment in Federal Public Service, but eligible for employment in some state public services	Yes
Employment in defence force	No	Yes

* 'Non-protected' SCV holders may be eligible after ten years of continuous residence in Australia for a one-off payment of Newstart, Sickness, or Youth Allowance of no more than six months. They are not eligible for other student allowances under any circumstances.

Consequences of legislative changes

- Most NZ citizens who have moved to Australia since 2001 have no clear pathway to citizenship and thus are permanently disenfranchised. Most are not eligible for a 'permanent' visa that is required to apply. Those who might be eligible for a 'permanent' visa rarely apply as high fees and complicated process are widely considered unjustifiable for someone already possessing work and residence rights – the main advantages such a visa would bring for others.
- Children who have completed most of their schooling in Australia are often unable to attend university as they are now ineligible for HECS-HELP and Youth Allowance – currently they are half as likely to attend university as Australian citizen children.
- The lack of opportunities for tertiary education means many NZ citizens raised in Australia take low skill and low paying jobs. Over time, this will not only affect the prospects of these individuals, but also Australian tax revenues.
- The lack of educational opportunities and a social safety net mean some young people, particularly those from disadvantaged backgrounds, are much more likely to turn to crime as a means of surviving. This can only be considered to have detrimental effects on Australian society.
- Those who lose their jobs through no fault of their own are unable to receive any financial assistance. They are also unable to access their own superannuation and some job seeking services, as to do either of these things they must be in receipt of a Centrelink payment.
- Single mothers (including those fleeing domestic violence) are refused most assistance by Centrelink. Consequently many are also turned away from women's shelters, as these often require residents to be in receipt of specified Centrelink payments. Also, they are often unable to return to NZ where they may be able to receive financial assistance, as they cannot take their children out of country without the father's consent. Under the Hague Convention, children taken out of Australia are likely to be forcibly returned. The result of these policies is that in many women are forced to choose between a series of unappealing options: to remain in an abusive relationship, to remain in Australia destitute and possibly homeless, to return to NZ leaving their children with an abusive former partner or in state care.
- Those with injuries or health problems are unable to receive assistance and are therefore often forced to return to work before this would be suitable. This can result in the original health problems being exacerbated.
- Those affected by natural disasters in Australia are no longer eligible to receive disaster relief payments. In some cases, families have lost their homes and have no immediate access to their own savings, yet are denied any assistance by Centrelink.
- Those who are victims of overseas terrorism, unlike other Australian residents, will not receive assistance from the Australian Government.
- Disabled New Zealanders will be stripped of access to disability services under the NDIS, despite all NZ citizens in Australia being charged the NDIS levy.

- Children born to NZ citizen parents are not granted citizenship at birth – those born disabled will be denied care under the NDIS. If parents take such a child to NZ for treatment, the child will not be granted Australian citizenship at 10 years of age as they will not have fulfilled the residency requirements.
- Inability to obtain citizenship means many NZ citizens are locked out of employment in the federal public service, ADF, and defence-related positions, despite the supposed existence of a trans-Tasman 'common labour market'.
- NZ citizens are unable to sponsor family members who are citizens of a third country for permanent residency in Australia. Instead, they must keep applying for temporary (subclass 461) visas. If the NZ citizen sponsoring them dies, 461 visa holders have little choice but to leave Australia once their visa expires, despite possibly many years of residence in Australia.
- Australian citizens with NZ citizen family members are disadvantaged if their family falls upon hard times as they will receive considerably less assistance than if all family members were Australian citizens or held permanent visas.
- Australian citizens who are dying or have serious illnesses are being left without adequate care, as their NZ citizen partners are denied assistance to act as full-time carers.
- Australian citizen children are being left in situations of dire poverty, as their NZ citizen parents are denied assistance if they fall upon hard times.
- The inconsistent use of the term '(permanent) resident' in relation to SCV holders has led to substantial confusion among NZ citizens and throughout the community more generally. Many government services and payments, employment opportunities, scholarships, grants, insurance policies and a variety of other things (in both the public and private sector) require that an applicant be a 'permanent resident' without specifying what they mean by the term. Many SCV holders are finding themselves included in or excluded from the term in a totally arbitrary manner, often at the whim of an individual administering unclear policies, leading to the denial of opportunities or services. In numerous cases, SCV holders are being informed they are ineligible for things because they are not 'permanent residents', because an individual has misinterpreted a policy which includes SCV holders within the definition of 'permanent resident'.

Provision of information relating to legislative changes

- Given that people had moved freely across the Tasman for two centuries, it is clear that any dramatic changes made to the rights of NZ citizens in Australia would need to be backed by a widespread and clear information campaign to overcome generations' worth of understanding about the nature of trans-Tasman migration. This did not occur.
- The information initially provided by the Australian Government was often misleading and did not make clear the true results of the 2001 changes. It stated that in future New Zealanders moving to Australia would 'most probably need to apply for permanent residence before you can access certain social security payments.' In reality, New Zealand would have to both apply for and receive a permanent visa to access these payments. The information emphasised continuing access to other services, including health, education, and employment services. Much of the information provided said nothing at all about the changes to citizenship eligibility, a matter that would have concerned more people than easy welfare access.
- Provision of relevant information on government websites remained very limited until recently. The little that existed was difficult to find, often unclear, and frequently contradictory.
- Information on government websites about the need for New Zealanders to apply for 'permanent residency' was misleading, stating that New Zealanders would merely need to apply for it to receive access to a range of services and citizenship eligibility as if gaining this status was a mere formality. Nowhere did it state that this was not simply a matter of applying, but that instead receiving 'permanent residence' involved going through a highly competitive and complicated visa application process costing thousands of dollars per person. No reasonable person could have been expected to understand this was the case, given that New Zealanders already enjoy a right to reside permanently in Australia.
- Information on government websites was not updated to cover changes made after 2001 by federal and state governments, such as access to education funding and disability services.
- Information on citizenship eligibility is often confusing and contradictory. The Australian Citizenship website currently states that New Zealand citizens must receive 'permanent residence' if they wish to apply for Australian citizenship. However, it provide the following definition: 'Having permanent residence means you have a current visa that permits you to live in Australia indefinitely', a description that would include SCV holders.
- Some Department of Immigration and Centrelink officials are still, twelve years after the initial changes took place, informing New Zealand citizens migrating to Australia that they will be eligible for all government services and citizenship after serving waiting periods.
- No attempt has been made to inform New Zealanders already residing in Australia of changes to their entitlements. Generally, the only way they discover these changes is through being denied a service for which they were formerly eligible.
- The result of this unclear information is that most New Zealanders who moved to Australia since 2001 came with the understanding they held 'permanent residence' status or that the acquisition of this status was a mere formality. Most knew they faced restrictions in accessing welfare payments, but few realised the full range of restrictions they faced, including restrictions on applying for Australian citizenship.

Statistics relating to New Zealand citizens in Australia

Number of NZ citizens living in Australia:	approx. 500,000 – 600,000 (approx. 40% 'non-protected')
Unemployment rate for NZ-born (July 2012):	4.8% (Australian-born: 4.9%)
Workforce participation of NZ-born (July 2012):	78.2% (Australian-born: 68%)
Short-term visits by NZ citizens to Australia (2011-12):	1,048,075

Productivity Commission findings

In 2012, the Productivity Commissions of Australia and New Zealand completed their joint report, 'Strengthening economic relations between Australia and New Zealand'. They found that Australia's policies towards New Zealand citizens were unreasonable and unjustified and recommended that Australia change its policies in this regard.

The following quotations are taken from Supplementary Paper D of the report:

p 41-2 - "In summary, developing alternative pathways to Australian permanent residency and/or citizenship would provide one approach to remedying the potential for hardship faced by a growing number of non-Protected SCV holders. Moreover, an alternative pathway would provide the right to vote in Australia's electoral system for these 'indefinite temporary' residents.

The Commissions note that detailed work would be required to cost alternative pathways and to consider the wider ramifications for its wider immigration settings and citizenship aims, including the risk of 'back-door' entry from third countries (see below).

The Australian Government should address the issues faced by a small but growing number of non-Protected SCV holders living long term in Australia, including their access to certain welfare supports and voting rights. This requires policy changes by the Australian Government, including the development of a pathway to achieve permanent residency and/or citizenship."

p 43 - "Access of New Zealand citizens to Australian tertiary education and vocational education and training should be improved through the provision of student loans. Access should be subject to an appropriate waiting period and debt recovery arrangements."

p 44 - "Given the previous Australian and New Zealand Governments agreement to a single trans-Tasman labour market (through the TTTA which subsequently underpinned the CER and the SEM), reviewing the existing principles governing access to social security would seem appropriate along with arrangements governing migration policy."

p 45-46 - "In light of the circumstances and emerging trends in relation to the status of New Zealand people who generally arrived in Australia after 2001 and who have lived and worked in Australia for long periods, consideration could usefully be given to developing similar principles under the CER agreement drawn, for example, from the following:

policy independence — the country in which the person lives should determine the social security legislation under which he or she is covered (the existing social security agreement between Australia and New Zealand facilitates the transfer of government revenue to fund the social security payments specified in that agreement)

prevention of government transfer shopping — access to social security should not encourage migration of citizens from one country to another. Waiting periods should apply in most circumstances

equal treatment — subject to relevant waiting periods or other initial conditions, individuals should have the same rights and obligations as citizens or permanent residents

portability — each country has its own portability rules for the payments that each country covers. (The existing social security agreement between Australia and New Zealand may affect the rate of some payments for individuals entitled to a payment in one country but living in the other country.)”

p 49 - “In principle it may be desirable to have fully aligned migration policies for a single trans-Tasman labour market. In practice, given the relatively low levels of ‘back door’ migration, it would be possible to implement the principle of ‘equal treatment’.”

Significantly, the Productivity Commissions advised that Australia should implement their recommendations regarding the treatment of New Zealand citizens in the short term.

Despite frequently expressed Australian fears of 'backdoor migration' via New Zealand, the Productivity Commissions found these concerns to be largely unjustified. They suggested further harmonisation of migration policies was possible, however, concluded this was less important than resolving issues surrounding the treatment of New Zealand citizens by Australia, indicating it was a matter that could be considered in the medium term.

The full report can be found at: <http://transtasman-review.pc.gov.au>

Parliamentary Human Rights Committee findings

In its report of 5 June 2013, the Parliamentary Joint Committee on Human Rights raised concerns about the exclusion on 'non-protected' SCV holders from the NDIS:

'Eligibility to participate in the National Disability Scheme

1.45 In order to participate in the NDIS a person must satisfy the residence requirement set out in section 23 of the National Disability Insurance Scheme Act 2013, which is the same test as set out under the Social Security Act 1991. Thus, New Zealand citizens who are SCV holders and long-term residents of Australia, but who are not protected SCV holders (i.e. they were not resident before February 2001) or the holders of permanent visas, will not be eligible to participate in the NDIS.

1.46 At the same time, New Zealand citizens residing in Australia who are not protected SCV holders or holders of permanent visas fall within the definition of 'Australian resident' for the purposes of the Health Insurance Act 1973 meaning they are eligible for Medicare and are also liable to pay the Medicare levy, including the increase in the Medicare levy imposed to finance the NDIS.

1.47 The exclusion of certain New Zealand residents in Australia from access to the NDIS raises a number of human rights concerns. These include issues of equal protection of the law and non-discrimination on the basis of nationality, national origin or immigration status and the right to social security and its non-discriminatory enjoyment.

Equality and non-discrimination

1.48 The eligibility criteria for participation in the NDIS involve differential treatment of New Zealand long-term residents compared to Australian citizens, permanent residents and holders of protected SCV holders. Apart from the category of New Zealand citizens who arrived before 2001 and are protected SCV holders, there appears to be no difference in the treatment of New Zealand citizens and citizens from other countries so far as eligibility for participation in the NDIS is concerned. The concern, however, in relation to New Zealand citizens is that, unlike other non-Australian citizens, they may stay in Australia indefinitely and so could live most of their lives here yet not be eligible to access the NDIS should they need it.

Right to social security

1.52 The UN Committee on Economic Social and Cultural Rights has noted in relation to the right to social security:

9. The right to social security includes the right not to be subject to arbitrary and unreasonable restrictions of existing social security coverage, whether obtained publicly or privately, as well as the right to equal enjoyment of adequate protection from social risks and contingencies.'

'24. Qualifying conditions for benefits must be reasonable, proportionate and transparent.'

'36. Article 2, paragraph 2, prohibits discrimination on grounds of nationality and the Committee

notes that the Covenant contains no express jurisdictional limitation. Where non-nationals, including migrant workers, have contributed to a social security scheme, they should be able to benefit from that contribution or retrieve their contributions if they leave the country...

37. Non-nationals should be able to access non-contributory schemes for income support, affordable access to health care and family support. Any restrictions, including a qualification period, must be proportionate and reasonable. All persons, irrespective of their nationality, residency or immigration status, are entitled to primary and emergency medical care.

1.53 The committee considers that the exclusion of New Zealand citizens who are long-term residents in Australia and who are not protected SCV holders, permanent residents or Australian citizens, from access to the NDIS, raises issues of compatibility with the enjoyment of the right to social security and the right to non-discrimination in the enjoyment of that right, in particular as that exclusion affects New Zealand citizens who have been long-term residents of Australia.

1.54 The committee recognises that article 4 of the ICESCR permits limitations on the enjoyment of the right to social security but notes that article permits only

such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

1.55 The committee considers that it is not apparent from the NDIS Act and accompanying explanatory materials why the exclusion of certain categories of New Zealand residents is a justified limitation on the enjoyment of the right to social security.

1.56 The committee intends to write to the Minister for Families, Community Services and Indigenous Affairs and Minister for Disability Reform to seek clarification as to whether the exclusion from access to the NDIS of New Zealand citizens who are long-term residents of Australia, and not protected SCV holders or permanent residents, is consistent with right to non-discrimination and the right to social security.'

Recommendations for policy change

In accordance with the recommendations of the Productivity Commissions, Australia should ensure that New Zealand citizens residing in Australia under the terms of the TTTA receive treatment equal to that afforded to citizens and other permanent residents after serving reasonable waiting periods.

This could be achieved by:

- repealing legislative changes enacted since 2001 that have reduced the rights of SCV holders; or
- signing a treaty with New Zealand to guarantee a minimum standard of treatment is afforded to all who migrate under the TTTA; or
- replacing the SCV with a visa classified as 'permanent' for New Zealand citizens.

Such change would provide reasonable protections for the Australian Government from any risk of 'benefit shopping' as New Zealand citizens would be subjected to the Newly Arrived Resident's Waiting Period.

They would also provide reasonable protections from the possibility of third-country nationals migrating via New Zealand in order to gain access to Australian citizenship or government services. Since 2001, both Australia and New Zealand have substantially increased their residence requirements for a grant of citizenship. It now takes 5 years before a migrant to New Zealand can apply for citizenship with a grant of citizenship likely to take place roughly a year after the application is lodged. It is only at this point that a third-country migrant could then move to Australia. Therefore, no one migrating to Australia via NZ could access Australian welfare less than 8 years after initially moving to New Zealand and could not apply for Australian citizenship in less than 10 years after initially moving to New Zealand. These long waiting periods would act as a very substantial deterrent.