



Migration Amendment (Clarifying International Obligations for Removal) Act 2021

No. 35, 2021

**An Act to amend the *Migration Act 1958* to clarify
obligations in relation to removal of unlawful
non-citizens, and for related purposes**

Note: An electronic version of this Act is available on the Federal Register of Legislation
(<https://www.legislation.gov.au/>)

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[Assented to 24 May 2021]

The Parliament of Australia enacts:

No. 35, 2021

*Migration Amendment (Clarifying International Obligations for
Removal) Act 2021*

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1 Short title

This Act is the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021*.

2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. The whole of this Act	The day after this Act receives the Royal Assent.	25 May 2021

Note: This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

- (2) Any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

3 Schedules

Legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Amendments

Migration Act 1958

1 After section 36

Insert:

36A Consideration of protection obligations

- (1) In considering a valid application for a protection visa made by a non-citizen, the Minister must consider and make a record of whether the Minister is satisfied of any of the following:
 - (a) the non-citizen satisfies the criterion in paragraph 36(2)(a) with respect to a country and also satisfies the criterion in subsection 36(1C);
 - (b) the non-citizen satisfies the criterion in paragraph 36(2)(aa) with respect to a country;
 - (c) the non-citizen:
 - (i) satisfies the criterion in paragraph 36(2)(a) with respect to a country but does not satisfy the criterion in subsection 36(1C); and
 - (ii) would satisfy the criterion in paragraph 36(2)(aa) with respect to a country except that the non-citizen is a non-citizen mentioned in paragraph 36(2)(a).
- (2) The Minister must do so:
 - (a) before deciding whether to grant or refuse to grant the visa; and
 - (b) before considering whether the non-citizen satisfies any other criteria for the grant of the visa; and
 - (c) before considering whether the grant of the visa is prevented by any provision of the Act or regulations; and
 - (d) without regard to subsections 36(2C) and (3).
- (3) Subsection (1) does not apply if:
 - (a) the non-citizen (the ***family applicant***) is a member of the same family unit as another non-citizen (the ***family visa***)

- holder*) who holds a protection visa of the same class as the visa the family applicant is applying for; and
- (b) the family applicant's application for a protection visa was made before the family visa holder was granted their visa; and
 - (c) the family visa holder is a non-citizen mentioned in paragraph 36(2)(a) or (aa).

2 Section 197C (heading)

Repeal the heading, substitute:

197C Relevance of Australia's non-refoulement obligations to removal of unlawful non-citizens under section 198

3 At the end of section 197C

Add:

- (3) Despite subsections (1) and (2), section 198 does not require or authorise an officer to remove an unlawful non-citizen to a country if:
 - (a) the non-citizen has made a valid application for a protection visa that has been finally determined; and
 - (b) in the course of considering the application, a protection finding within the meaning of subsection (4), (5), (6) or (7) was made for the non-citizen with respect to the country (whether or not the visa was refused or was granted and has since been cancelled); and
 - (c) none of the following apply:
 - (i) the decision in which the protection finding was made has been quashed or set aside;
 - (ii) a decision made under subsection 197D(2) in relation to the non-citizen is complete within the meaning of subsection 197D(6);
 - (iii) the non-citizen has asked the Minister, in writing, to be removed to the country.
- (4) For the purposes of subsection (3), a *protection finding* is made for a non-citizen with respect to a country if a record was made in relation to the non-citizen under section 36A that the Minister is

satisfied as mentioned in paragraph 36A(1)(a), (b) or (c) with respect to the country.

- (5) For the purposes of subsection (3), a **protection finding** is also made for a non-citizen with respect to a country if the Minister was satisfied of any of the following (however expressed and including impliedly):
- (a) the non-citizen satisfied the criterion in paragraph 36(2)(a) with respect to the country and also satisfied the criterion in subsection 36(1C);
 - (b) the non-citizen satisfied the criterion in paragraph 36(2)(aa) with respect to the country;
 - (c) the non-citizen:
 - (i) would have satisfied the criterion in paragraph 36(2)(a) with respect to the country except that subsection 36(3) applied in respect of the non-citizen; and
 - (ii) satisfied the criterion in subsection 36(1C);
 - (d) the non-citizen:
 - (i) satisfied the criterion in paragraph 36(2)(a) with respect to the country but did not satisfy the criterion in subsection 36(1C); and
 - (ii) would have satisfied the criterion in paragraph 36(2)(aa) with respect to the country except that the non-citizen was a non-citizen mentioned in paragraph 36(2)(a);
 - (e) the non-citizen:
 - (i) satisfied the criterion in paragraph 36(2)(a) with respect to the country but did not satisfy the criterion in subsection 36(1C); and
 - (ii) would have satisfied the criterion in paragraph 36(2)(aa) with respect to the country except that the non-citizen was a non-citizen mentioned in paragraph 36(2)(a) and subsection 36(2C) or (3) applied in respect of the non-citizen;
 - (f) the non-citizen would have satisfied the criterion in paragraph 36(2)(aa) with respect to the country except that subsection 36(2C) or (3) applied in respect of the non-citizen.
- (6) For the purposes of subsection (3), a **protection finding** is also made for a non-citizen with respect to a country if:

- (a) the Minister was satisfied (however expressed and including impliedly) that, because subsection 36(4), (5) or (5A) applied to the non-citizen in relation to the country, subsection 36(3) did not apply in relation to the country; and
 - (b) a protection finding within the meaning of subsection (4) or (5) was made for the non-citizen with respect to another country.
- (7) For the purposes of subsection (3), a **protection finding** is also made for a non-citizen with respect to a country in circumstances prescribed by the regulations.
- (7A) For the purposes of subsection (3), if an unlawful non-citizen has made more than one valid application for a protection visa that has been finally determined, that subsection applies only in relation to the last such application.
- (8) For the purposes of subsection (5), it is irrelevant whether or not the non-citizen satisfied any other criteria for the grant of a protection visa.
- (9) For the purposes of subparagraph (3)(c)(iii), a non-citizen who withdraws their written request to be removed to a country is taken not to have made that request.

3A After section 197C

Insert:

197D Decision that protection finding would no longer be made

- (1) A decision under subsection (2) of this section may only be made for the purposes of subsection 197C(3).
- (2) If the Minister is satisfied that an unlawful non-citizen to whom paragraphs 197C(3)(a) and (b) apply in relation to a valid application for a protection visa is no longer a person in respect of whom any protection finding within the meaning of subsection 197C(4), (5), (6) or (7) would be made, the Minister may make a decision to that effect.
- (3) For the purposes of subsection (2), if an unlawful non-citizen has made more than one valid application for a protection visa that has

been finally determined, that subsection applies only in relation to the last such application.

- (4) If the Minister makes a decision under subsection (2) in relation to an unlawful non-citizen, the Minister must, in writing, notify the non-citizen of the following matters:
- (a) the decision;
 - (b) the reasons (other than non-disclosable information) for the decision;
 - (c) that the decision is reviewable under Part 7;
 - (d) the period within which an application for review can be made;
 - (e) who can apply for review;
 - (f) where the application for review can be made.

Note: For the method by which the notification may be given, see section 494A.

- (5) Failure to comply with subsection (4) in relation to a decision does not affect the validity of the decision.
- (6) For the purposes of subparagraph 197C(3)(c)(ii), a decision under subsection (2) of this section is complete if any of the following apply:
- (a) the period within which an application for review of the decision under Part 7 can be made has ended without a valid application for review having been made;
 - (b) a valid application for review of the decision under Part 7 was made within the period but has been withdrawn;
 - (c) the decision is affirmed (or taken to have been affirmed) on review under Part 7.

3B Section 408 (paragraph beginning “Part 7-reviewable decisions”)

After “circumstances”, insert “or to decisions under subsection 197D(2)”.

3C At the end of subsection 411(1)

Add:

- ; (e) a decision under subsection 197D(2) that an unlawful non-citizen is no longer a person in respect of whom a protection finding within the meaning of subsection 197C(4), (5), (6) or (7) would be made.

3D At the end of Division 2 of Part 7

Add:

419 Certain decisions on review to be made within prescribed period etc.

- (1) If:
- (a) an application for review of a Part 7-reviewable decision is made under section 412; and
 - (b) the Part 7-reviewable decision is a decision of a kind mentioned in paragraph 411(1)(e);
- then, subject to subsection (2) of this section, the Tribunal must make its decision on review, and notify the applicant of the decision, within the prescribed period.
- (2) The Tribunal may, with the agreement of the applicant, extend the period in subsection (1) for the purposes of a particular application.

3E Subsection 423A(1)

Omit “an RRT-reviewable decision (the *primary decision*) in relation to a protection visa”, substitute “a Part 7-reviewable decision (the *primary decision*)”.

3F Paragraphs 423A(1)(a) and (b)

Omit “in the application before”, substitute “before”.

4 Application of amendments

- (1) Section 36A of the *Migration Act 1958*, other than paragraphs 36A(2)(a), (b) and (c), applies in relation to applications for visas made but not decided before this Schedule commences.
- (2) Section 36A of the *Migration Act 1958* applies in relation to applications for visas made after this Schedule commences.

- (3) A reference in section 197C of the *Migration Act 1958* to a protection finding within the meaning of subsection 197C(5) or (6) is a reference to a protection finding made before or after this Schedule commences.

Schedule 2—Review of amendments

Intelligence Services Act 2001

1 After paragraph 29(1)(ce)

Insert:

- (cf) to commence, by the second anniversary of the commencement of the *Migration Amendment (Clarifying International Obligations for Removal) Act 2021*, a review of the operation, effectiveness and implications of the amendments made by Schedule 1 to that Act; and

[*Minister's second reading speech made in—
House of Representatives on 25 March 2021
Senate on 13 May 2021*]

(40/21)
