

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

Contents

1 Short title 2

2 Commencement 2

3 Schedules 2

Schedule 1—Amendments 3

Migration Act 1958 3

Schedule 2—Review of amendments 10

Intelligence Services Act 2001 10



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

[*Assented to 24 May 2021*]

The Parliament of Australia enacts:

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Note: This table relates only to the provisions of this Act as originally enacted.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Legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.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)