

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Social Services

Social Security Act 1991

Social Security (Class of Visas – Newly Arrived Resident’s Waiting Period for Special Benefit) Determination 2015 (No. 2)

Purpose

The purpose of this Determination is to consolidate and remove redundant elements of a number of determinations made under paragraph 739A(3)(b), subsection 739A(6) and paragraph 739A(8)(c) of the *Social Security Act 1991* (the Social Security Act).

Background

Qualification for special benefit and the newly arrived resident’s waiting period

A person may be qualified for special benefit if, among other things, they are an Australian resident or the holder of a visa that is in a class of visas determined by the Minister for the purposes of subparagraph 729(2)(f)(v) of the Social Security Act. The *Social Security (Class of Visas – Qualification for Special Benefit) Determination 2015 (No. 2)* determines a number of classes of visas for the purposes of subparagraph 729(2)(f)(v).

Subsection 739A(1) of the Social Security Act provides that subject to some exceptions, certain persons are subject to a newly arrived resident’s waiting period (NARWP). This includes a person who enters Australia (paragraph 739A(1)(a)).

NARWP for a person who holds a visa determined for purposes of paragraph 739A(3)(b) of the Social Security Act

Subsection 739A(3) of the Social Security Act provides that if:

- (a) a person is subject to a NARWP; and
- (b) applies for a visa that is in a class of visas determined by the Minister by legislative instrument;

then the NARWP:

- (c) starts on the day on which the person applies for the visa; and
- (d) ends when the person has been in Australia for a period of, or periods totalling, 104 weeks after that day.

The *Social Security (Class of Visas – Newly Arrived Resident’s Waiting Period for Special Benefit) Determination 2009* (the 2009 Determination) determines classes of visas for the purposes of paragraph 739A(3)(b). This Determination revokes the

2009 Determination and determines visa classes currently determined in the 2009 Determination that are still in effect.

NARWP does not apply to a person who holds a visa determined for the purposes of subsection 739A(6) of the Social Security Act

Subsection 739A(6) of the Social Security Act provides that the NARWP in subsection 739A(1) does not apply if the person holds, or was the former holder of, a visa in a class of visas determined by the Minister, by legislative instrument, for the purposes of subsection 739A(6). A number of different visa classes have been determined for the purposes of subsection 739A(6) of the Social Security Act in six separate determinations. This Determination revokes those separate determinations and consolidates the visa classes into one determination. Some redundant visa classes which are determined in the separate determinations have not been included in this Determination.

Exemption to NARWP for family members does not apply to a person who holds a visa determined for the purposes of paragraph 739A(8)(c) of the Social Security Act

The *Social Security Legislation Amendment (Newly Arrived Resident's Waiting Periods and Other Measures) Act 1997* (the 1997 Act) amended the Social Security Act to insert a NARWP for a number of payments. However, paragraph 3(1)(e) of the 1997 Act provides that any provision of that Act imposing a waiting period does not apply to a person who is a family member of an Australian citizen. Further, paragraph 3(1)(g) of the 1997 Act provides that any provision of that Act imposing a waiting period does not apply to a person who is a family member of a person who has lawfully been a permanent resident of Australia at any time for a continuous period of not less than two years.

Subsection 739A(8) of the Social Security Act provides that paragraphs 3(1)(e) and (g) of the 1997 Act do not apply to a person if:

- (a) on or after 1 January 2012, the person makes a claim for special benefit; and
- (b) subparagraph 729(2)(f)(v) of the Social Security Act applies to the person; and
- (c) the visa the person holds is in a class of visas determined by the Minister by legislative instrument.

The *Social Security (Class of Visas – Newly Arrived Resident's Waiting Period for Special Benefit) Determination 2011* (the 2011 Determination) determines classes of visas for the purposes of paragraph 739A(8)(c). This Determination revokes the 2011 Determination and determines the visa classes currently determined in the 2011 Determination that are still in effect.

Subsection 33(3) of the Acts Interpretation Act 1901

Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make any instrument of a legislative or administrative character, the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to revoke such instrument.

Commencement

This Determination commences on 1 October 2015.

Consultation

The Department of Immigration and Border Protection was consulted to assist with ensuring that the visa classes determined by this Determination are current.

The Attorney-General's Department was consulted to ensure an accurate description of offences set out in subsection 6(2) of this Determination.

Public consultation was considered unnecessary because this Determination is administrative in nature in consolidating current determinations. There are no substantive changes to the law as a result of this Determination.

Regulation Impact Statement (RIS)

This Determination does not require a Regulation Impact Statement because the Determination is not regulatory in nature, will not impact on business activity and will have no or minimal compliance costs or competition impact.

Explanation of the provisions

Section 1

This section provides how the Determination is to be cited, that is, as the *Social Security (Class of Visas – Newly Arrived Resident's Waiting Period for Special Benefit) Determination 2015 (No. 2)*.

Section 2

This section provides that the Determination commences on 1 October 2015.

Section 3

Section 3 provides that six determinations are revoked. Those six determinations determine visa classes for the purposes of paragraph 739A(3)(b), subsection 739A(6) and paragraph 739A(8)(c) of the Act. The visa classes determined in those determinations, and which remain in effect under the *Migration Regulations 1994*, are now determined in this Determination. As such, it is possible to revoke the six determinations.

The *Social Security (Class of Visas – Newly Arrived Resident's Waiting Period for Special Benefit) Determination 2005 (No. 2)* has not been revoked because that determination ceases under Part 6 of the *Legislative Instruments Act 2003* (sunsetting of legislative instruments) on 1 October 2015. This is the same day that this Determination commences.

Section 4

Section 4 provides that in the Determination, “Act” means the *Social Security Act 1991*.

Section 5

Section 5 determines Subclass 309 (Partner (Provisional)) and Subclass 820 (Partner) visas for the purposes of paragraph 739A(3)(b) of the Social Security Act. The effect of this is that if a person is subject to a NARWP and applies for one of these visas, the NARWP starts on the day on which the person applied for that visa and ends when the person has been in Australia for a period of, or periods totalling, 104 weeks after that day.

Subclass 309 (Partner (Provisional)) and Subclass 820 (Partner) visas are currently determined for the purposes of paragraph 739A(3)(b) of the Social Security Act in the 2009 Determination. Subclass 310 (Interdependency (Provisional)) and Subclass 826 (Interdependency (Provisional)) visas are also determined for the purposes of paragraph 739A(3)(b) in the 2009 Determination but have not been included in this Determination because they have been repealed.

Section 6

Section 6 determines classes of visas for the purposes of subsection 739A(6) of the Social Security Act. The classes of visas are:

- Subclass 070 (Bridging (Removal Pending));
- Subclass 449 (Humanitarian Stay (Temporary));
- Subclass 785 (Temporary Protection);
- Subclass 786 (Temporary (Humanitarian Concern));
- Subclass 790 (Safe Haven Enterprise);
- if certain circumstances are met, a criminal justice stay visa.

The circumstances for a criminal justice stay visa are that the visa was granted for the purpose of assisting in the administration of criminal justice in relation to an offence of trafficking in persons, slavery or slavery-like practices.

These offence descriptions are in slightly different terms to the offence descriptions currently set out in the *Social Security (Class of Visas – Newly Arrived Resident’s Waiting Period for Special Benefit Determination 2004* (the 2004 Determination). The 2004 Determination refers to offences of people trafficking, sexual servitude or deceptive recruiting. Since the 2004 Determination was made, the *Criminal Code Act 1995* (the Criminal Code) has been amended and the offence descriptions in that determination do not accurately reflect all of the trafficking-related offences currently in the Criminal Code. The new offence descriptions in this Determination now accurately reflect the trafficking-related offences in the Criminal Code.

Some visa classes that are currently determined for the purposes of subsection 739A(6) of the Social Security Act have not been included in this Determination because they have been repealed. The repealed visa classes which have not been included in this Determination are:

- Subclass 447 (Secondary Movement Offshore Entry (Temporary));
- Subclass 451 (Secondary Movement Relocation (Temporary));
- Subclass 695 (Return Pending);
- Subclass 832 (Close Ties); and
- Subclass 833 (Certain Unlawful Non-citizens).

Section 7

Section 7 determines Subclass 309 (Partner (Provisional)) and Subclass 820 (Partner) visas for the purposes of paragraph 739A(8)(c) of the Social Security Act. The effect of this is that holders of these visas are subject to a NARWP for special benefit.

Subclass 309 (Partner (Provisional)) and Subclass 820 (Partner) visas are currently determined for the purposes of paragraph 739A(8)(c) of the Social Security Act in the 2011 Determination. Subclass 310 (Interdependency (Provisional)) and Subclass 826 (Interdependency (Provisional)) visas are also determined in the 2011 Determination for the purposes of paragraph 739A(8)(c) but have not been included in this Determination because they have been repealed.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Social Security (Class of Visas – Newly Arrived Resident’s Waiting Period for Special Benefit) Determination 2015 (No. 2)

The *Social Security (Class of Visas – Newly Arrived Resident’s Waiting Period for Special Benefit) Determination 2015 (No. 2)* is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The *Social Security (Class of Visas – Newly Arrived Resident’s Waiting Period for Special Benefit) Determination 2015 (No. 2)* is made under paragraph 739A(3)(b), subsection 739A(6) and paragraph 739A(8)(c) of the *Social Security Act 1991* (the Act).

The purpose of this Determination is to:

- provide that if a person is subject to a newly arrived resident’s waiting period (NARWP) and applies for one of the visas determined under paragraph 739(3)(b) of the Act, then the NARWP starts on the day on which the person applies for the visa and ends when the person has been in Australia for a period of, or periods totalling, 104 weeks after that day;
- exempt the holders of the determined visas from the 104-week NARWP for Special Benefit. This will ensure that holders of the determined visas who are qualified for Special Benefit may be paid immediately subsequent to the grant of the determined visas; and
- provide that holders of these visas determined under paragraph 739A(8)(c) of the Act are subject to a NARWP for Special Benefit.

The Determination consolidates a number of determinations currently made under paragraph 739A(3)(b), subsection 739A(6) and paragraph 739A(8)(c) of the Act.

Human rights implications

This Determination engages or gives effect to the following human rights:

- Article 24 of the United Nations (UN) 1951 Convention and 1967 Protocol Relating to the Status of Refugees, Article 28 of the Convention on the Rights of Persons with Disabilities (CRPD), and Articles 11(1)(e) and 14(2)(c) of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); and
- the right to an adequate standard of living contained in Article 11(1) of the ICESCR, Article 28 of the CRPD and Article 14(2)(h) of the CEDAW.

NARWP does not apply to a person who holds a visa determined for the purposes of subsection 739A(6) of the Act

The Determination will assist Australia to meet its international obligations under the ICESCR, the UN Refugees Convention and Protocol, the CRPD and the CEDAW by providing an exemption to the waiting period in which holders of the determined visas qualify for Special Benefit. The Determination will also ensure an adequate standard of living for those who are granted the determined visas and require financial assistance by providing immediate access to social security payments.

NARWP for a person who holds a visa determined for purposes of paragraph 739A(3)(b) of the Act and exemption to the NARWP for family members does not apply to a person who holds a visa determined for the purposes of paragraph 739A(8)(c) of the Act

To the extent that the Determination limits the right to social security and an adequate standard of living by setting the period of the NARWP for a person who applies for a provisional or temporary partner visa and by removing an exemption to the NARWP for family members who hold a provisional or temporary partner visa, the limitation is legitimate, reasonable, necessary and proportionate.

The limitation is legitimate because the NARWP ensures that holders of a provisional or temporary partner visa provide for their own support or seek support from their families or partners during their initial settlement period in Australia, rather than immediately relying on social security payments.

The limitation is reasonable because it is reasonable to expect that holders of a provisional or temporary partner visa should be able to support themselves, or be supported by their families and partners in Australia.

The limitation is necessary because without the NARWP holders of a provisional or temporary partner visa are less likely to seek support from their families or partners, or to find employment during their initial settlement period in Australia.

The limitation is proportionate because holders of a provisional or temporary visa will still be able to access special benefit if they have experienced both financial hardship and a substantial change in circumstances beyond their control after arrival in Australia.

Conclusion

This Determination is compatible with human rights as it promotes the right to social security and an adequate standard of living for holders of the determined visas. To the extent that it may limit human rights, that limitation is legitimate, reasonable, necessary and proportionate.

The Hon Christian Porter MP, Minister for Social Services