

EXPLANATORY STATEMENT

Migration Regulations 1994

**WORKING HOLIDAY VISA – DEFINITION OF *SPECIFIED WORK* AND
*REGIONAL AUSTRALIA 2016/041***

(subitem 1225(5))

1. Instrument IMMI 16/041 is made under subitem 1225(5) of Schedule 1 to the *Migration Regulations 1994* (the Regulations).
2. The Instrument revokes IMMI 08/048 (F2008L02264) under subsection 33(3) of the *Acts Interpretation Act 1901*, which states where an Act confers a power to make, grant or issue 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 repeal, rescind, revoke, amend, or vary any such instrument.
3. The Instrument operates for the Minister to specify a place that is in ***regional Australia*** and, to specify the work of a kind identified as ***specified work*** for the purposes of an Item 1225 Working Holiday (Temporary) (Class TZ) visa. Under subitem 1335(3B), if an applicant has previously held no more than one Working Holiday (Temporary) (Class TZ) visa and is seeking a second Working Holiday (Temporary) (Class TZ) visa, the application must be accompanied by a declaration that he or she has carried out specified work in regional Australia for a total period of 3 months as holder of that visa.
4. The purpose of the Instrument is for the Minister include in the Schedule to the Instrument that the entire territory of Norfolk Island is ***regional Australia***.
5. Currently, Commonwealth immigration law does not extend to Norfolk Island and the *Immigration Act 1980* (NI) and the *Immigration Regulations 1984* (NI) govern immigration arrangements for the Territory. On 1 July 2016, these Norfolk Island Immigration laws will be repealed, and the *Migration Act 1958* (the Act) will be extended to apply to Norfolk Island. On that date, all non-citizens who hold a permit under Norfolk Island Immigration legislation will be “deemed” to hold comparable

Australian visas under the Act by way of a transitional rule made under the *Norfolk Island Legislation Amendment Act 2015*.

This means consequential amendments to existing Legislative Instruments under the relevant provisions of the Regulations which are being amended as a result of the *Norfolk Island Legislation Amendment Act 2015* and the *Migration Legislation Amendment (2016 Measures No.2) Regulation 2016*.

6. Consultation has been undertaken with the Department of Infrastructure and Regional Development, Department of Human Services, Department of Social Services, Attorney-General's Department, Department of Employment, Department of Health, the Administrator of Norfolk Island, Staff of the Norfolk Island Administration, including Norfolk Island Immigration and members of the Norfolk Island community before this Instrument was made.
7. The Office of Best Practice Regulation (OBPR) has advised that a Regulatory Impact Statement is not required (OBPR Reference 19860)
8. Under section 42 of the *Legislation Act 2003*, the Instrument is subject to disallowance and therefore a Statement of Compatibility with Human Rights has been provided.
9. The Instrument commences on 1 July 2016.

Statement of Compatibility with Human Rights

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

Migration Legislation Amendment (2016 Measures No. 2) Regulation 2016

This Disallowable Legislative Instrument 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*.

Schedule 1 – Norfolk Island transitional migration amendments

Overview of Schedule 1 of the Legislative Instrument

From 1 July 2016 the Australian Government will commence delivering essential national functions on Norfolk Island. Responsibility for administering immigration and other border functions will transfer from the Norfolk Island Administration to the Department of Immigration and Border Protection.

Norfolk Island currently regulates its own immigration through the *Immigration Act 1980* (NI). On 1 July 2016, this will be repealed and the *Migration Act 1958* (the Migration Act) will be extended to include Norfolk Island in the Australian migration zone.

The objective of this legislative instrument is to provide one part of the necessary regulatory amendments required to put in place arrangements to facilitate the transition of Norfolk Island permit holders and foreign national residents to the Australian visa regime as of 1 July 2016.

The changes are also designed to ensure that foreign national permit holders and permanent residents on Norfolk Island, and the island's economy, are not disadvantaged by a change in the immigration status of foreign nationals as a result of the governance reforms; this by way of providing comparable rights and benefits to affected Norfolk Island foreign national residents that they are currently afforded.

This regulation achieves one aspect of the transition by modifying aspects of relevant visa subclasses to ensure that each group of persons affected retain a similar migration status and preserve any existing pathways to permanent residence. A pathway to permanent residence will also be provided to persons affected by the changes to the *Immigration Act 1980* (NI) in October 2014, which precludes foreign nationals, who arrived on Norfolk Island after 3 October 2014, from gaining permanent residence on Norfolk Island unless they also hold an Australian permanent visa.

This regulation will achieve this by providing the following:

- Foreign nationals who hold permanent residency under the *Immigration Act 1980* (NI) will be deemed to hold a comparable permanent Australian visa (a Subclass 808 (Confirmatory Residence) visa)
- Foreign nationals (other than New Zealand citizens) who hold temporary resident status, that is, a Temporary Entry Permit or General Entry Permit will be deemed to hold a temporary Australian visa (a Subclass 159 (Provisional Resident Return) visa)
- New Zealand citizens who hold a temporary Unrestricted Entry Permit will transition onto a Subclass 444 (Special Category) visa.
- After meeting the residence requirement of five out of seven years on Norfolk Island, Subclass 159 and Subclass 444 visa holders will be eligible to apply for a permanent

Subclass 808 (Confirmatory (Residence)) visa. The time frame for the residence requirement matches the five out of seven years residence requirement for permanent residency on the island under the current *Immigration Act 1980* (NI).

Human rights implications

The human rights implications (including the right to work) relevant to the Norfolk Island reform were addressed as part of the *Norfolk Island Legislative Amendment Act 2015*. However, included within the Subclass 159 (Provisional Resident Return) visa that will be deemed to be held by holders of Temporary Entry Permits or General Entry Permits, there will be a condition for these persons that the holder can work only on Norfolk Island. As such this condition engages the right to work under articles 6 and 4 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Article 6 and Article 4 of the ICESCR

Article 6 of ICESCR provides that:

The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

It is the long standing position of the Australian Government that an authority from the Australian Government needs to be granted before a non-citizen is permitted to work. This authority and associated ‘work rights’ are attached to certain types of visas. A person is not permitted to work in Australia unless work rights have been granted.

The work rights of temporary non-citizens may be conditioned or limited on a case by case basis. Article 4 of ICESCR provides that the State may subject the rights enunciated in the ICESCR:

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

The authority from the Australian Government granting work rights and conditions or limitations placed on temporary non-citizens in respect of those work rights is lawful as a matter of domestic law and serves the dual objectives of maintaining the integrity of the migration programme and ensuring that affected persons are not disadvantaged by a change in the immigration status of foreign nationals as a result of the governance reforms. By ensuring that the rationale for the original issuing of the Temporary Entry Permit or General Entry Permit is maintained will also ensure the services performed by these permit holders will continue to benefit the Norfolk Island community. As such, the proposed amendments are justified in accordance with Article 4 of ICESCR. The condition for these persons that the holder can work only on Norfolk Island does not impact their movement within Australia unrelated to work and does not prevent their ability to apply for other visa subclasses, if eligible.

Conclusion

Schedule 1 of this Disallowable Legislative Instrument is compatible with human rights as to the extent that it engages the right to work, any limitations are reasonable, necessary and proportionate.