

EXPLANATORY STATEMENT

Issued by the Minister for Population, Cities and Urban Infrastructure
for the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs

Australian Citizenship Act 2007
Migration Act 1958

Home Affairs Legislation Amendment (2020 Measures No. 2)
Regulations 2020

The *Australian Citizenship Act 2007* (the Citizenship Act) provides for the process of becoming an Australian citizen, the circumstances in which citizenship may cease, and some other matters related to citizenship.

The *Migration Act 1958* (the Migration Act) is an Act relating to the entry into, and presence in, Australia of aliens, and the departure or deportation from Australia of aliens and certain other persons.

Section 54 of the Citizenship Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Citizenship Act to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Citizenship Act.

Subsection 504(1) of the Migration Act provides that the Governor-General may make regulations, not inconsistent with the Migration Act, prescribing matters required or permitted to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Migration Act.

In addition, regulations may be made pursuant to the provisions listed in Attachment A.

The *Home Affairs Legislation Amendment (2020 Measures No. 2) Regulations 2020* (the Regulations) amend the *Migration Regulations 1994* (the Migration Regulations) and the *Australian Citizenship Regulation 2016* (the Citizenship Regulation).

Schedule 1 – Subclass 417 visas – amends criteria in the Migration Regulations relating to applications for, and grant of, the Subclass 417 (Working Holiday) visa so that terminology in the visa is consistent with the expanded scope of the visa. The requirement for work to be undertaken in ‘regional Australia’ to qualify for a second or third Subclass 417 visa is replaced by a requirement to undertake ‘specified Subclass 417 work’. This better reflects current arrangements under which certain kinds of specified work undertaken in areas other than regional Australia, including in response to COVID-19, can count towards eligibility for a second or third visa.

Schedule 2 – Subclass 124 and 858 visas – updates visa arrangements in the Migration Regulations supporting the Global Talent program, under which offshore and onshore applicants previously applied for different distinguished talent visas. The offshore visa – the Subclass 124 (Distinguished Talent) visa – is repealed. There is now one visa – the Subclass 858 (Distinguished Talent) visa – which can be applied for and granted regardless of the visa

applicant's location. The amendments also streamline criteria for the grant of the Subclass 858 visa.

Schedule 3 – Payment of citizenship fees – makes routine amendments to the Citizenship Regulation to incorporate instruments made under the Migration Regulations and therefore update the places and currencies in which citizenship application fees may be paid, and also update the relevant exchange rates.

Schedule 4 – Application of Migration Amendment (COVID-19 Concessions) Regulations 2020 – amends a provision in the Migration Regulations inserted by the *Migration Amendment (COVID-19 Concessions) Regulations 2020* which allows the Subclass 887 (Skilled-Regional) visa to be granted to an applicant who is outside Australia if the application was made on or after 19 September 2020. The amendment allows the visa to be granted to applicants outside Australia if the application was made before 19 September 2020, so that applicants who applied before the concession came into effect, but whose visa application has not been decided, are not disadvantaged.

Schedule 5 – Application and transitional provisions – provides for the application of Schedules 1 and 2, and also establishes transitional arrangements to recognise the contribution of working holiday makers in Australia during the COVID-19 pandemic, by allowing specified work undertaken as the holder of, or an applicant for, certain COVID-19 pandemic event 408 visas, to be counted towards eligibility for a second or third Subclass 417 (Working Holiday) visa or Subclass 462 (Work and Holiday) visa, provided some or all of that work was critical COVID-19 work in the medical and health care sectors.

The matters dealt with in the Regulations are appropriate for implementation in regulations rather than by Parliamentary enactment. It has been the consistent practice of the Government of the day to provide for detailed visa criteria and conditions in the Migration Regulations rather than in the Migration Act itself. The Migration Act expressly provides for these matters to be prescribed in regulations, as can be seen in the authorising provisions listed at [Attachment A](#). These include, for example, subsection 31(3), which provides that the regulations may prescribe criteria for a visa or visas of a specified class.

The current Migration Regulations have been in place since 1994, when they replaced regulations made in 1989 and 1993. Providing for these details to be in delegated legislation rather than primary legislation gives the Government the ability to respond quickly to emerging situations such as the COVID-19 pandemic.

The amendments to the Citizenship Regulation relate to matters of detail that are updated biannually, and are therefore appropriate for inclusion in regulations.

A Statement of Compatibility with Human Rights (the Statement) has been completed in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The overall assessment is that the Regulations are compatible with human rights. A copy of the Statement is at [Attachment B](#).

The Office of Best Practice Regulation (the OBPR) has been consulted in relation to the amendments. No Regulation Impact Statement is required. The OBPR consultation references are:

- Schedule 1 – **42811**;
- Schedule 2 – **25966**;
- Schedule 3 – **42679**;
- Schedule 4 – **26488** (The OBPR was consulted when the *Migration Amendment (COVID-19 Concessions) Regulations 2020* were introduced and advised that there was no regulatory impact. The amendment made by Schedule 4 is a minor change to a provision inserted by those Regulations.)

Consultation in relation to the working holiday maker visa changes (Schedule 1 and Schedule 5) was undertaken with the Department of Education, Skills and Employment, the Department of Agriculture, Water and the Environment, the Department of Health, the Chief Medical Officer and the Victorian Department of Health. The consultation related primarily to allowing working holiday makers to count critical COVID-19 work in the healthcare and medical sectors as specified work for the purpose of applying for a second or third working holiday maker visa.

Consultation in relation to the distinguished talent visa changes (Schedule 2) was undertaken with stakeholders in the migration industry and university sectors as well as Commonwealth and State and Territory government agencies. This consultation occurred as part of the evaluation of the Global Talent program which utilises distinguished talent visas as the primary visa mechanism to fill places in the program.

No consultation was undertaken in relation to Schedule 3 or Schedule 4 as the amendments do not substantially alter existing arrangements. This accords with subsection 17(1) of the *Legislation Act 2003* (the Legislation Act).

Schedules 1, 2, 4 and 5 to the Regulations commence on 14 November 2020 to align with updates to Department of Home Affairs (the Department) systems. Schedule 3 to the Regulations commences on 1 January 2021, at the same time as the incorporated instruments.

The Department follows standard practices to notify clients about the Regulations, including updating its website and notifying peak bodies.

Further details of the Regulations are set out in [Attachment C](#).

The Migration Act and Citizenship Act specify no conditions that need to be satisfied before the power to make the Regulations may be exercised.

The Regulations are a legislative instrument for the purposes of the Legislation Act.

AUTHORISING PROVISIONS

Subsection 504(1) of the *Migration Act 1958* (the Migration Act) relevantly provides that the Governor-General may make regulations prescribing matters required or permitted to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Migration Act.

Section 54 of the *Australian Citizenship Act 2007* (the Citizenship Act) relevantly provides that the Governor-General may make regulations prescribing matters required or permitted by the Citizenship Act to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Citizenship Act.

In addition, the following provisions of the Migration Act may also be relevant:

- subsection 29(1), which provides that the Minister may grant a non-citizen permission, to be known as a visa, to do either or both of the following: (a) travel to and enter Australia; (b) remain in Australia;
- subsection 31(3), which provides that the regulations may prescribe criteria for a visa or visas of a specified class;
- paragraph 46(1)(b), which provides that the regulations may prescribe the criteria and requirements for making a valid application for a visa; and
- subsection 504(2), which provides that section 14 of the Legislation Act does not prevent regulations whose operation depends on a country or other matter being specified by the Minister in an instrument made under the regulations after the commencement of the regulations.

The following provisions of the Citizenship Act may also be relevant:

- subsection 21(1), which provides that a person may make an application to the Minister to become an Australian citizen; and
- paragraph 46(1)(d), which provides that an application under a provision of the Citizenship Act must be accompanied by the fee (if any) prescribed by the regulations.

Statement of Compatibility with Human Rights

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

Home Affairs Legislation Amendment (2020 Measures No. 2) Regulations 2020

The *Home Affairs Legislation Amendment (2020 Measures No. 2) Regulations 2020* (the Amendment Regulations) are 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*.

The Amendment Regulations amend the *Migration Regulations 1994* (the Migration Regulations) and the *Australian Citizenship Regulation 2016* (the Citizenship Regulation) as follows.

Schedules 1 and 5 – Amendments to Working Holiday visas

Overview

These amendments are inserted by Schedule 1 and Division 3 of Schedule 5 to the Amendment Regulations.

The Working Holiday Maker (WHM) program consists of two visa Subclasses, the Working Holiday (Subclass 417) visa and the Work and Holiday (Subclass 462) visa (WHM visas). The key differences between the two visas are that Subclass 462 (Work and Holiday) visa arrangements generally have caps on the number of visas granted annually (except for the United States of America) and may include additional eligibility requirements such as a minimum education level, English language proficiency or letters of support from a partner country Government. Subclass 417 (Working Holiday) visa arrangements are uncapped with no limit on the annual number of visa grants.

Both WHM visas are granted with a 12-month stay period. There are incentives for working holiday makers (WHMs) to work in locations and industries with critical work shortages, referred to as 'specified work'. While WHMs can work in any area or industry, WHMs holding a first Subclass 417 or 462 visa (having never been previously in Australia as a holder of a WHM visa) can be granted a second visa and third visa if they have carried out specified work in certain parts of Australia on their WHM visa:

- for the Subclass 417 (Working Holiday) visa - construction, fishing and pearling, plant and animal cultivation, mining and tree farming in regional Australia is considered specified work;
- for the Subclass 462 (Work and Holiday) visa - construction, fishing and pearling, plant and animal cultivation in regional Australia, and tourism and hospitality in Northern Australia is considered specified work; and
- for both WHM visas - bushfire recovery work in declared disaster areas and critical COVID-19 work in the healthcare and medical sectors ('critical health work') is also specified work.

During the COVID-19 pandemic, a considerable number of WHMs have chosen to undertake 'critical health work' on a *COVID-19 pandemic event 408 visa* (defined in clause 9204 of Part 92 of Schedule 13 to the Migration Regulations) in various locations around Australia, including in the major cities.

The amendments made by Schedule 1 are changes to terminology in the Subclass 417 visa, replacing references to ‘specified work’ and ‘regional Australia’ with a reference to ‘specified Subclass 417 work’.

The reason for the change is to better reflect current arrangements under which the assessment of eligibility for a second or third Subclass 417 visa takes account of ‘critical health work’ undertaken anywhere in Australia. Accordingly, the reference to ‘regional Australia’ was no longer accurate. The change also aligns the terminology with the Subclass 462 visa, which uses the term ‘specified Subclass 462 work’.

The amendments made by Division 3 of Schedule 5 (‘the transitional arrangements’) will assist some WHMs who were in Australia and who transitioned to a COVID-19 pandemic event 408 visa, and who then carried out ‘critical health work’, to resume the WHM pathway. This is to ensure that there is no disadvantage to WHM holders who remained working in ‘critical health work’ in, for example, Melbourne and Sydney, rather than moving to regional Australia to do qualifying work for the grant of a further WHM visa (noting that ‘critical health work’ only became eligible, for WHM purposes, in relation to WHM applications made on or after 19 August 2020). The amendments will also assist other applicants who were not already working in ‘critical health work’ while they held a WHM visa, but who take up that work while holding a COVID-19 pandemic event 408 visa or an associated bridging visa.

The transitional arrangements allow ‘critical health work’ carried out in any part of Australia by WHMs on certain COVID-19 pandemic event 408 visas to be counted towards specified work for a second or third WHM visa. Other specified work undertaken on the COVID-19 pandemic event 408 visa may also be counted so long as some of it was ‘critical health work’.

These amendments facilitated the retention of labour in the ‘critical health work’ sectors, such as in contact tracing. These Regulations refer to ‘critical health work’ as ‘special Subclass 417 work’ and ‘special Subclass 462 work’.

These amendments acknowledge and reward service by WHMs to Australia’s handling of the COVID-19 pandemic and provide opportunities for an extended stay in Australia to work or holiday.

Human rights implications

These amendments have been assessed against the seven core international human rights treaties and engage the following rights:

- Right to work
- Right to health

These amendments promote the above rights.

Right to work

The amendment positively engages Article 6(1) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), which states 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.

These amendments are primarily aimed at allowing former WHMs who chose to work in ‘critical health care’ roles on a COVID-19 pandemic event 408 visa access to a subsequent WHM pathway, which otherwise would have only been available to them if they had carried out a period of specified work in certain parts of Australia on a WHM visa. These amendments mean that these former WHMs are not disadvantaged in continuing on their WHM pathway by having chosen to undertake ‘critical health work’ on a COVID-19 pandemic event visa.

The subsequent WHM visa eligibility provided by these amendments will allow these people further time in Australia to pursue work, holiday or undertake limited study, which promotes their rights, particularly the right to work.

Right to health

Article 12 of the ICESCR states:

1. *The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.*
2. *The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: [...]*
 - (c) *The prevention, treatment and control of epidemic, endemic, occupational and other diseases;*
 - (d) *The creation of conditions which would assure to all medical service and medical attention in the event of sickness.*

By removing the potential disadvantage to former WHMs in continuing their WHM pathway by undertaking ‘critical health work’ in response to the COVID-19 pandemic, these amendments also positively engage the right to health as they encourage former WHMs to undertake this work, including contact tracing. This supports the right to health of the Australian community during the pandemic and the COVID-19 recovery effort.

Schedule 2 – Amendments to the Distinguished Talent visas

Overview

These amendments are inserted by Schedule 2 to the Amendment Regulations.

The Distinguished Talent program provides access to permanent residence in Australia for people who have an internationally recognised record of exceptional and outstanding achievement in a profession, sport, the arts, academia and research, are still prominent in the area and would be an asset to the Australian community. Since 2019, Distinguished Talent visas have been used for the new Global Talent Independent program designed to attract exceptionally skilled migrants in priority sectors to Australia.

The Distinguished Talent program currently uses two visa Subclasses: Subclass 124 which is intended for applicants residing outside of Australia and Subclass 858 for applicants in Australia. These offshore and onshore distinctions are no longer required given the advances in technology and visa processing. In addition, the current Distinguished Talent visa framework has caused some confusion in the context of the Global Talent program, preventing certain highly skilled candidates from applying for, or being granted a visa, and sometimes resulting in candidates applying for the wrong visa Subclass. The amendments inserted by Schedule 2 repeal the offshore visa and amend the onshore visa to enable it to be used by all applicants regardless of their location.

The aim of these amendments is to simplify the Distinguished Talent visa framework and improve access to the visa product, while protecting the program's integrity. These amendments streamline the distinguished talent category by replacing the current offshore (Subclass 124) and onshore (Subclass 858) visas with one visa (Subclass 858) that can be applied for and granted regardless of the location of the applicant or their previous visa status. These changes also support the Government's Global Talent program, which is implemented primarily via the distinguished talent visas.

The policy intention of these amendments is to create a more flexible visa product that is accessible to a greater number of applicants and to bring it more in line with other skilled visas. Specifically these amendments:

- Repeal the Distinguished Talent (Migrant) (Subclass 124) visa.
- Amend the Distinguished Talent (Resident) (Subclass 858) visa so that:
 - The applicant may be in Australia or outside Australia but not in immigration clearance at time of application and grant. This will simplify access to the visa product.
 - Holders or former holders of certain temporary visas will no longer be barred from applying for a Distinguished Talent visa onshore. This measure will make the visa more accessible to potential applicants. Applicants who are in Australia will be required to hold a substantive visa or bridging A, B or C visa.
 - Public Interest Criterion (PIC) 4005 is replaced with PIC 4007, allowing for the discretionary waiver of certain health-related requirements for both the applicant and their family members. This will bring the visa in line with a number of other skilled visas and improve access to the visa product.
 - Introduce special return criteria 5001, 5002 and 5010 for the grant of this visa for all primary and secondary applicants. These criteria require: that the applicant is not a person who left Australia following a visa cancellation on character grounds; that the applicant is not a person who was removed from Australia in the 12 months before applying for the visa, unless there are compelling or compassionate circumstances; and that the applicant is not a 'Foreign Affairs student visa' holder or a student visa holder supported by a foreign government, unless certain requirements are met. These are standard integrity criteria, and are included in the Subclass 858 visa for consistency with other permanent visas, and in most cases would not affect persons who are in Australia.
 - If the applicant is outside Australia when the visa is granted, first entry must be made before a date specified by the Minister for the purpose, and condition 8515 may be imposed on secondary applicants. Condition 8515 is aimed at ensuring that persons granted the visa on the basis of being a dependent of the primary visa holder are still 'dependent' at the time of entry.
- Provide access to the family violence concession for secondary applicants for applicants who were in Australia at the time the application was made.
 - Generally, a member of the family unit (secondary applicant) may be granted a visa if the primary applicant has been granted the visa. However if they are no longer a member of the family unit at the time of decision, they will not be able to be granted the visa on this basis. The effect of the family violence concession is that a spouse or de facto partner of a primary visa holder may also be granted the visa, even if the relationship has ended, if it is a situation in which family violence has occurred.
 - Prior to these amendments, this concession was available for the onshore Subclass 858 visa and not to the offshore Subclass 124 visa. Most applicants for the

Subclass 124 visa are not in Australia at any stage, because the applicant must be outside Australia at the time of grant.

- Once the Subclasses are merged by these amendments, the concession will continue to be available to applicants who apply for the Subclass 858 visa in Australia, but will not be extended to applicants who applied outside Australia.
- This is largely to maintain the status quo in relation to access to the family violence concession as it currently exists under the two visas with onshore and offshore distinctions, given it is not available to the offshore Subclass 124 visa applicants. This is because, in broad terms, the policy is to assist applicants who experience family violence in Australia to remain in Australia after their relationship has ended.

Human rights implications

These amendments engage the following rights:

- Right to work in Article 6 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR);
- Right to equality and non-discrimination in Article 26 of the *International Covenant on Civil and Political Rights* (ICCPR) and Article 2(2) of the ICESCR; and
- Right to health in Article 12 of the ICESCR.

Right to work

Article 6(1) of the ICESCR states:

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.

These amendments as a whole broadly promote the right to work for persons eligible for a Distinguished Talent visa, especially those who are already in Australia, by providing greater flexibility and reducing complexity in the framework for these visas.

Non-discrimination

Article 26 of the ICCPR states:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 2(2) of the ICESCR states:

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

These rights are engaged in relation to two aspects of these amendments: the availability of the family violence concession in clause 858.213 and the introduction of a health waiver provision.

Availability of family violence concession for Subclass 858 visa applicants

This aspect of the amendments may engage the right of equality and non-discrimination, including in relation the equal protection of the law.

Clause 858.321 requires a person (a ‘secondary applicant’) who has applied for a Subclass 858 Distinguished Talent visa as a member of the family unit of a person who has satisfied the primary criteria and is the holder of a Subclass 858 Distinguished Talent visa (the primary visa holder), to still be a member of the family unit of the primary visa holder at time of decision.

The exception to this is where the secondary applicant, another member of the family unit of the secondary applicant or a dependent child of the secondary applicant or of the primary visa holder has suffered family violence committed by the primary visa holder. In these cases, a person can still be granted a visa even if the relationship with the primary visa holder has ceased. This is known as the ‘family violence concession’.

This concession exists in the current onshore Subclass 858 Distinguished Talent (Residence) visa, but not in the offshore Subclass 124 Distinguished Talent (Migrant) visa, as the family violence concessions are not intended to provide a pathway to permanent residence for visa applicants who experience family violence in another country.

As these amendments combine the two existing visas into a single revised Subclass 858 Distinguished Talent visa, the intention is to preserve this policy rationale by excluding offshore applicants from accessing this provision. The Department has not been able to identify any case in which the family violence concession has been used in recent years by a Subclass 858 visa applicant.

To the extent that the amendments may discriminate because of ‘other status’ (location of the applicant at the time of application) in being able to be granted a visa on the basis of the family violence concession, this is highly unlikely to affect visa applicants who are in Australia and who have suffered family violence in Australia. Although it is possible that an applicant could apply outside Australia and then travel to Australia and experience family violence in Australia resulting in the cessation of their relationship with the primary visa holder during visa processing, this is unlikely given the relatively brief processing times for the majority of visa applicants. Further, a secondary applicant who was in Australia, and had experienced family violence in Australia, would be still have the equal protection of the law from this violence and be able to seek assistance from the authorities. If the secondary applicant wished to remain in Australia following the end of the relationship with the primary visa holder, other visa options may be available to them.

Therefore in the rare case where a secondary applicant who had applied outside Australia had to end their relationship after suffering family violence in Australia, the secondary applicant would not be precluded from the equal protection of the law from the violence.

Replacement of Public Interest Criterion (PIC) 4005 with PIC 4007

This aspect of the amendments will promote the right of equality and non-discrimination, including in respect of the right to work, of applicants for the Distinguished Talent visa who are in Australia and wish to remain in Australia.

The current PIC 4005 for Subclass 858 Distinguished Talent visa sets out the health requirements that must be met by a visa applicant in order to be eligible for grant of a visa. This includes that the applicant, including secondary applicants, be free from a disease or condition which is likely to require health care or community services that would be likely to result in significant cost to the Australian community in the areas of healthcare and community services or that would prejudice access of an Australian citizen or permanent resident to health care or community services.

Replacing PIC 4005 with PIC 4007 allows the Minister (or delegate) to waive this aspect of the health requirement on a discretionary basis where the Minister/delegate is satisfied that granting the visa will not result in undue cost to the Australian community or undue prejudice to the access of an Australian citizen or permanent resident to health care or community services. Each health waiver case is considered on its merits, with all relevant factors taken into account, including the capacity to mitigate the potential costs or prejudice to access, and the strength of any compelling and/or compassionate circumstances.

The introduction of the waiver of this aspect of the health requirement will broaden possible access to this visa to people who may previously have been unable to be granted the visa due to a health condition but are able to meet all other criteria for the grant of a Subclass 858 Distinguished Talent visa.

Right to health

Article 12 of the ICESCR states:

- 1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.*
- 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: [...]*
 - (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.*

The aspect of these amendments to replace PIC 4005 with PIC 4007 also engages the right to health.

The introduction of the waiver provision for applicants with a health condition or disease will promote access to healthcare in Australia for applicants who are granted this visa. Since this will only occur where the Minister is satisfied that the granting of the visa would be unlikely to result in undue cost to the Australian community or undue prejudice to the access of an Australian citizen or permanent resident to health care or community services, the PIC is also aimed at ensuring that the right to health of Australian citizens and permanent residents is protected.

Schedule 3 – payment of citizenship fees

Overview

Schedule 3 to the Amendment Regulations amends the Citizenship Regulation to allow citizenship application fees, and refunds of citizenship application fees where appropriate, to be paid in foreign countries and foreign currencies.

In particular, item 1 of Schedule 3 amends subsection 16(7) of the Citizenship Regulation to incorporate, by reference, updated instruments made under the Migration Regulations that relate to the payment of fees in foreign countries and foreign currencies. Australian Government offices overseas routinely collect Australian citizenship application fees. These amendments facilitate the lawful collection of citizenship application fees in specified foreign countries and foreign currencies at updated exchange rates.

Subsections 16(2) and (3) of the Citizenship Regulation provide that the application must be made in a place, and in the currency, specified in the ‘places and currencies instrument’. Subsection 16(4) of the Citizenship Regulation provides that, if the currency in which the payment is to be made is specified in the ‘conversion instrument’, the amount of the payment is to be worked out using the exchange rate for the currency specified in the instrument. These instruments are defined in subsection 16(7) of the Citizenship Regulation and are re-made under the Migration Regulations every six months to reflect currency fluctuations and changes to acceptable currencies. Consequently, subsection 16(7) of the Citizenship Regulation requires biannual amendment to reflect the current version of these instruments.

Human rights implications

The acceptable foreign countries and currencies are set out in legislative instruments made under subregulations 5.36(1) and (1A) of the Migration Regulations. The *Australian Citizenship Act 2007* does not allow for the making of a legislative instrument under the Citizenship Regulation to specify matters in relation to the collection of application fees in foreign countries and foreign currencies. Instead, subsection 16(7) of the Citizenship Regulation incorporates by reference instruments made under the Migration Regulations to specify the foreign countries where a fee may be paid, the currency that can be accepted in each listed country and the currency exchange rate that must be applied.

As a result, the relevant instruments, *Places and Currencies for Paying of Fees* and *Payment of Visa Application Charges and Fees in Foreign Currencies*, are updated on 1 January and 1 July each year, and amendments to the Citizenship Regulation are made to incorporate those instruments from that date. The only amendments this disallowable legislative instrument makes to the Citizenship Regulation are the updating of the instrument numbers (including the instrument year) in subsection 16(7). As such, the amendments are technical in nature and do not substantially alter existing arrangements.

The amendments made by Schedule 3, therefore, do not engage any of the applicable rights or freedoms.

Schedule 4 – Application of Migration Amendment (COVID-19 Concessions) Regulations 2020

Schedule 4 to the Amendment Regulations amends a provision in the Migration Regulations inserted by the *Migration Amendment (COVID-19 Concessions) Regulations 2020* which allows the Subclass 887 (Skilled-Regional) visa to be granted to an applicant who is outside Australia if the application was made on or after 19 September 2020. The amendment allows the visa to be granted to applicants outside Australia if the application was made before 19 September 2020, so that applicants who applied before the concession came into effect, but whose visa application has not been decided, are not disadvantaged.

Human rights implications

Schedule 4 to the Amendment Regulations makes minor technical amendments with no human rights implications. The human rights implications of the *Migration Amendment (COVID-19 Concessions) Regulations 2020* were addressed in the statement of compatibility with human rights included in the explanatory statement to that instrument.

Conclusion

This Disallowable Legislative Instrument is compatible with human rights.

Details of the Home Affairs Legislation Amendment (2020 Measures No. 1) Regulations 2020

Section 1 - Name

This section provides that the name of the instrument is the *Home Affairs Legislation Amendment (2020 Measures No. 2) Regulations 2020*.

Section 2 - Commencement

This section provides for the commencement of the instrument.

Sections 1 to 4, and anything in the instrument that is not covered by the table, commence the day after the instrument is registered.

Schedules 1, 2, 4, and 5 commence on 14 November 2020, to align with the roll-out of changes to the relevant Departmental systems.

Schedule 3 commences on 1 January 2021 to coincide with the updating of the relevant instruments incorporated by reference.

Section 3 - Authority

This section provides that the instrument is made under the *Australian Citizenship Act 2007* (the Citizenship Act) and the *Migration Act 1958* (the Migration Act).

Section 4 - Schedules

This section provides for how the amendments in these Regulations operate.

Schedule 1 – Subclass 417 visas

Migration Regulations 1994

Item 1 – Regulation 1.03

Item 2 – After regulation 1.15F

Item 3 – Paragraph 1225(3B)(c) of Schedule 1

Item 4 – Subparagraph 1225(3B)(ca)(i) of Schedule 1

Item 5 – Subitem 1225(5) of Schedule 1

Item 6 – Clause 417.111 of Schedule 2

Item 7 – Paragraphs 417.211(5)(a) and (6)(a) of Schedule 2

These items amend certain requirements that must be satisfied in order to apply for, and be granted, a second or third Subclass 417 (Working Holiday) visa.

To obtain the second Subclass 417 visa, three months' work is required on the first Subclass 417 visa. To obtain the third Subclass 417 visa, another 6 months' work is required on the

second Subclass 417 visa (in certain circumstances, work on a bridging visa held while waiting for the second Subclass 417 visa application to be processed may also be counted).

Previously, the work was required to be ‘specified work’ carried out in ‘regional Australia’.

The amendments replaced the definitions of ‘specified work’ and ‘regional Australia’ with a new term, which is ‘specified Subclass 417 work’. There is no substantive change as a result of this amendment. As with the definitions of ‘specified work’ and ‘regional Australia’, the detail of ‘specified Subclass 417 work’ will be located in a legislative instrument, made under regulation 1.15FAA (see item 2).

The reason for the amendments is that some kinds of work that may qualify a person for a second or third Subclass 417 visa may be undertaken in areas other than regional Australia.

In 2020, for example, the government has expanded the definition of ‘specified work’ for Subclass 417 to include certain kinds of work undertaken in areas other than regional Australia, including critical COVID-19 work in the healthcare and medical sectors, carried out after 31 January 2020, including, but not limited to:

- medical treatment, nursing, contact tracing, testing and research; and
- support services such as cleaning of medical and health care facilities and equipment.

This rule change was implemented on 19 August 2020 by a legislative instrument – see section 9 of the *Migration (LIN 20/182: Subclass 417 (Working Holiday) visa—Specified work and places) Instrument 2020*. The rule change was possible because ‘regional Australia’ was defined as a place specified by the Minister in a legislative instrument (subitem 1225(5) of Schedule 1 to the Migration Regulations). The amendments remove the reference to ‘regional Australia’ to more accurately reflect the current scope of the scheme.

A transitional provision at subclause 9201(3) (see Schedule 5 below) provides for the existing legislative instrument (LIN 20/182) to continue in force as if it was made under regulation 1.15FAA.

The change also aligns the Subclass 417 visa with the existing approach in the Subclass 462 (Work and Holiday) visa, which uses the term ‘specified Subclass 462 work’. The Subclass 417 and Subclass 462 visas together make up the visas available under Australia’s working holiday maker program.

The transitional arrangements at Division 3 of Part 92 of Schedule 13 to the Migration Regulations (at Schedule 5 below) set out further COVID-19 related concessions for Subclass 417 and Subclass 462 applicants.

Schedule 2 – Subclass 124 and 858 visas

Part 1 – Subclass 124 visas

Migration Regulations 1994

Item 1 – Subregulation 1.12(7)

This item omits the reference to the Distinguished Talent (Migrant) (Class AL) visa from subregulation 1.12(7) of the Migration Regulations. Subregulation 1.12(7) allows parents and siblings to be included as secondary applicants if the primary applicant for a distinguished talent visa is under the age of 18 at the time of application. The omission of the reference to the Distinguished Talent (Migrant) (Class AL) visa is consequential to the repeal of that visa by items 2 and 3 below.

Item 2 – Item 1112 of Schedule 1

This item repeals item 1112 of Schedule 1 to the Migration Regulations. Item 1112 provides for the Distinguished Talent (Migrant) (Class AL) visa, which includes the Subclass 124 (Distinguished Talent) visa. This visa can only be granted to an applicant who is outside Australia. The repeal is part of a restructure and streamlining of the distinguished talent visas, under which the existing onshore visa (Subclass 858) is amended to cater for all applicants regardless of their location when they apply or when the visa is granted.

The effect of the repeal is that an application for a Subclass 124 (Distinguished Talent) visa cannot be made after 13 November 2020. From 14 November 2020, all applicants for a distinguished talent visa may apply for the Subclass 858 (Distinguished Talent) visa.

Item 3 – Part 124 of Schedule 2

This item repeals Part 124 of Schedule 2 to the Migration Regulations. Part 124 provides for the criteria for the grant of the Subclass 124 (Distinguished Talent) visa. The repeal is consequential to item 2.

As noted in the previous item, from 14 November 2020 all applicants for a distinguished talent visa may apply for the Subclass 858 (Distinguished Talent) visa. However, the repeal of the Subclass 124 visa does not affect the processing of applications for that visa that were made before 14 November 2020.

Part 2 – Subclass 858 visas

Division 1 – Main amendments

Migration Regulations 1994

Item 4 – Subregulation 1.12(7) (heading)

This item inserts a new heading to subregulation 1.12(7), consequential to the repeal of the Distinguished Talent (Migrant) (Class AL) visa, and the changed name of the Distinguished

Talent (Residence) (Class BX) visa, which becomes the Distinguished Talent (Class BX) visa.

Item 5 – Subregulation 1.12(7)

This item is consequential to the changed name of the Distinguished Talent (Residence) (Class BX) visa, which becomes the Distinguished Talent (Class BX) visa.

Item 6 – Item 1113 of Schedule 1 (heading)

This item changes the name of the Distinguished Talent (Residence) (Class BX) visa, which becomes the Distinguished Talent (Class BX) visa. The previous classification of the visa as a ‘Residence’ visa was because the visa could only be applied for and granted if the applicant was in Australia. The visa for applicants who were outside Australia was the ‘Migrant’ visa – the Distinguished Talent (Migrant) (Class AL) visa. With the restructure of the visas into one visa that can be applied for and granted regardless of the location of the applicant, the description of the visa as a ‘Residence’ visa is redundant.

Item 7 – Paragraph 1113(3)(b) of Schedule 1

This item amends paragraph 1113(3)(b) of Schedule 1 to the Migration Regulations, to omit the requirement to be in Australia to make an application for the Subclass 858 (Distinguished Talent) visa, and to provide instead that the applicant may in in or outside Australia, but not in immigration clearance.

Item 8 – After paragraph 1113(3)(b) of Schedule 1

This item inserts a new paragraph in subitem 1113(3) of Schedule 1 to the Migration Regulations, which provides that an applicant for a Subclass 858 (Distinguished Talent) visa who is in Australia when making the application must hold a substantive visa or a Bridging A, B, or C visa. The purpose of this provision is to restrict applications by non-citizens in Australia to persons who have remained compliant with Australia’s immigration law. The inclusion of this requirement in Schedule 1 is consistent with existing provisions in a number of skilled visas, and also allowed the repeal of criteria in Schedule 2 that had a similar purpose (see item 10 below).

Item 9 – Paragraph 1113(3)(c) of Schedule 1

This item is consequential to the changed name of the Distinguished Talent (Residence) (Class BX) visa, which becomes the Distinguished Talent (Class BX) visa.

Item 10 – Clause 858.211 of Schedule 2

This item repeals clause 858.211 of Schedule 2 to the Migration Regulations. Clause 858.211 specified a number of visitor visas and other temporary visas that could not be held by an applicant for the Subclass 858 (Distinguished Talent) visa. The clause also referred to certain requirements in Schedule 3 to the Migration Regulations that needed to be satisfied, e.g. clause 3001 which required the application to be made within 28 days of ceasing to hold a substantive visa. These restrictions on eligibility for grant of a Subclass 858 visa are replaced by the new Schedule 1 requirement to hold any substantive visa or a Bridging visa A, B, or C,

as outlined above at item 8. The changes streamline the processing of Subclass 858 visa applications and remove limitations that are no longer required.

Item 11 – Paragraphs 858.221(a) and 858.223(1)(a) and (2)(b) of Schedule 2

This item omits references to the public interest criterion (PIC) 4005 in the primary criteria for the grant of a Subclass 858 (Distinguished Talent) visa. Those references are replaced with references to PIC 4007. The text of the PICs is set out in Schedule 4 to the Migration Regulations. The PICs require the applicant not to have health problems that will affect the access of an Australian citizen or permanent resident to health care or impose significant costs on the Australian community. The difference between the PICs is that PIC 4007 allows the Minister to waive the health requirement if the applicant satisfies all other criteria for the visa and the Minister is satisfied that the granting of the visa would be unlikely to result in undue cost to the Australian community or undue prejudice to the access to health care or community services of an Australian citizen or permanent resident. The effect of the amendment is to introduce more flexibility into the processing and grant of Subclass 858 visas.

Item 12 – At the end of Subdivision 858.22 of Schedule 2

This item adds a new clause 858.228 to the primary criteria for the grant of a Subclass 858 (Distinguished Talent) visa. The new clause requires the primary applicant and any family member included in the application to satisfy special return criteria 5001, 5002, and 5010. These criteria are set out in Schedule 5 to the Migration Regulations and impose the following requirements:

- 5001 – the applicant is not a person who left Australia while subject to a deportation order or following a visa cancellation on character grounds;
- 5002 – the applicant is not a person who was removed from Australia in the 12 months before applying for the visa, unless there are compelling or compassionate circumstances; and
- 5010 – the applicant is not a ‘Foreign Affairs student visa’ holder or a student visa holder supported by a foreign government, unless certain requirements are met.

These are standard integrity criteria, and are included in the Subclass 858 visa for consistency with other permanent visas.

Item 13 – Division 858.3 of Schedule 2 (note 2 to the heading)

Item 14 – Paragraph 858.311(a) of Schedule 2

These items are consequential to the changed name of the Distinguished Talent (Residence) (Class BX) visa, which becomes the Distinguished Talent (Class BX) visa.

Item 15 – Clause 858.312 of Schedule 2

This item repeals clause 858.312 of Schedule 2 to the Migration Regulations. Clause 858.312 applied to applicants who were seeking to satisfy the secondary criteria for the grant of a Subclass 858 (Distinguished Talent) visa. The criterion required that any sponsorship or nomination given in respect of the primary applicant also included the secondary applicant.

The criterion was redundant as there is no requirement for sponsorship or nomination for the Subclass 858 visa.

Item 16 – At the end of subclause 858.321(3) of Schedule 2

This item adds a new paragraph (d) to subclause 858.321(3) of Schedule 2 to the Migration Regulations.

Clause 858.321 sets out time-of-decision criteria for secondary applicants (members of the family unit of the primary applicant).

Subclause 858.321(1) provides that the applicant must meet the requirements of subclause (2), (3), or (4).

Subclause 858.321(2) provides that a member of the family unit may be granted a Subclass 858 visa if the primary applicant has been granted a Subclass 858 visa.

Subclause 858.321(3) provides that a spouse or de facto partner of that primary visa holder may be granted the visa if the relationship with the primary visa holder has ended and family violence has occurred.

Subclause 858.321(4) provides that, if a spouse or de facto partner is eligible under subclause 858.321(3), the eligibility extends to members of his or her family unit who made a combined application for the Subclass 858 visa.

For the spouse or de facto partner to satisfy subclause 858.321(3), the relationship must have ended while the visa application was being processed, as the relationship must be ongoing when the visa application is made (clause 858.311). In addition, the primary applicant must have been granted a Subclass 858 visa. Given these limitations, and the relatively quick processing times for the majority of Subclass 858 applications, the family violence provisions have a limited role. The Department has not been able to identify any case in which the provisions have been used in recent years, and the provisions may therefore be redundant in practice.

The effect of paragraph 858.321(3)(d) is to limit the availability of the family violence provisions in subclauses 858.321(3) and (4) to situations where the spouse or de facto partner was in Australia at the time he or she applied for the Subclass 858 visa.

The reason for this amendment is that, with the merger of the ‘offshore’ and ‘onshore’ visas, the policy intention is to maintain the status quo in relation to access to the family violence concession for secondary applicants under subclauses 858.321(3) and (4). The status quo is that there are no family violence provisions in the repealed Subclass 124 (Distinguished Talent) visa, which has been merged with the Subclass 858 (Distinguished Talent) visa. The Subclass 858 visa is now available to applicants outside Australia, as well as applicants in Australia.

It is appropriate to maintain the status quo because it is not intended to provide a pathway to permanent residence for secondary visa applicants whose relationship with the primary visa applicant ends due to family violence experienced in another country. In addition, most applicants who apply for a Distinguished Talent Visa outside Australia do not travel to Australia while their visa application is being processed.

Item 17 – Paragraph 858.322(a) of Schedule 2

This item omits references to the public interest criterion (PIC) 4005 in the secondary criteria for the grant of a Subclass 858 (Distinguished Talent) visa and substitutes references to PIC 4007. See item 11 above for an explanation of the amendment.

Item 18 – At the end of Subdivision 858.32 of Schedule 2

This item adds a new clause 858.327 to the secondary criteria for the grant of a Subclass 858 (Distinguished Talent) visa. The new clause requires secondary applicants to satisfy special return criteria 5001, 5002, and 5010. See item 12 above for an explanation of the amendment.

Item 19 – Clause 858.411 of Schedule 2

This item repeals clause 858.411 of Schedule 2 to the Migration Regulations and substitutes a new clause 858.411. The repealed clause required an applicant for a Subclass 858 (Distinguished Talent) visa to be in Australia, but not in immigration clearance, when the visa is granted. The substituted clause provides that the applicant may be in Australia or outside Australia when the visa is granted, but not in immigration clearance.

This change, in conjunction with item 7 above, converts the Subclass 858 visa from a visa that can only be applied for by, and granted to, an applicant who is in Australia, to a visa that can be applied for by, and granted to, an applicant regardless of location, provided they are not in immigration clearance.

Item 20 – Division 858.6 of Schedule 2

This item repeals Division 858.6 of Schedule 2 to the Migration Regulations and substitutes a new Division 858.6.

Division 858.6 sets out the conditions applicable to Subclass 858 (Distinguished Talent) visas. Previously, there were no conditions. The amendment:

- requires the applicant to enter Australia before a date specified by the Minister (paragraph 858.611(a)); and
- gives the Minister a discretion to impose condition 8515 on a visa granted to a secondary applicants who is outside Australia when the visa is granted. Condition 8515, in Schedule 8 to the Migration Regulations, provides that the holder of the visa must not marry or enter into a de facto relationship before entering Australia.

These are standard provisions for most permanent visas granted to applicants who are outside Australia.

Division 2 – Amendments relating to Subclass 773 visas

Migration Regulations 1994

Item 21 – At the end of subclause 773.213(2) of Schedule 2

This item adds a reference to the Distinguished Talent (Class BX) visa in subclause 773.213(2) of Schedule 2 to the Migration Regulations. That subclause provides, in conjunction with sub-subparagraph 773.213(1)(d)(i)(B), for the grant of the Subclass 773 (Border) visa to a dependent child of a listed permanent visa holder in situations where the child arrives in Australia without a visa, and in the care of a person who is an Australian citizen or the holder of a visa.

The Distinguished Talent (Migrant) (Class AL) (Subclass 124) is listed at subclause 773.213(2) but the Distinguished Talent (Residence) (Class BX) visa (Subclass 858) is not. This is because there is eligibility for the dependent children of Australian permanent residents at sub-subparagraph 773.213(1)(d)(i)(A). As defined in regulation 1.03 of the Migration Regulations, ‘Australian permanent resident’ includes a Subclass 858 holder who is “usually resident in Australia”. As Subclass 858 visas could previously only be applied for and granted in Australia, Subclass 858 holders were likely to be usually resident in Australia, and therefore would be Australian permanent residents. With the changes to allow Subclass 858 visas to be applied for by, and granted to, persons outside Australia, the visa holder is less likely to be usually resident in Australia, at least initially. In effect, the item ensures that the current arrangements in relation to Subclass 773 visas are maintained.

Schedule 3 - Payment of citizenship fees

Australian Citizenship Regulation 2016

Item 1 – Subsection 16(7)

This item repeals and substitutes subsection 16(7) of the *Australian Citizenship Regulation 2016* (the Citizenship Regulation), which defines the terms ‘conversion instrument’ and ‘places and currencies instrument’.

Definition of ‘conversion instrument’

This item substitutes the definition of ‘conversion instrument’ in subsection 16(7) of the Citizenship Regulation with ‘conversion instrument means the *Migration (LIN 21/001: Payment of Visa Application Charges and Fees in Foreign Currencies) Instrument 2021* as in force on 1 January 2021’.

The purpose of this amendment is to incorporate by reference a new instrument titled *Migration (LIN 21/001: Payment of Visa Application Charges and Fees in Foreign Currencies) Instrument 2021*. This instrument, to be made under paragraph 5.36(1A)(a) of the *Migration Regulations 1994* (the Migration Regulations), will commence on 1 January 2021 and replace the *Migration (LIN 20/003: Payment of Visa Application Charges and Fees in Foreign Currencies) Instrument 2020*.

The conversion instrument sets out the exchange rates to be used for specified foreign currencies in relation to the payment of fees. This instrument is relevant to the Citizenship Regulation because, once incorporated by reference, it allows a person who makes an application under the Citizenship Act to pay an application fee in a foreign currency, at an exchange rate specified in the conversion instrument (see subsection 16(4) of the Citizenship Regulation).

Definition of 'places and currencies instrument'

This item also substitutes the definition of 'places and currencies instrument' in subsection 16(7) of the Citizenship Regulation with 'places and currencies instrument means the *Migration (LIN 21/002: Places and Currencies for Paying of Fees) Instrument 2021* as in force on 1 January 2021'.

The purpose of this amendment is to incorporate by reference a new instrument titled *Migration (LIN 21/002: Places and Currencies for Paying of Fees) Instrument 2021*. This instrument, to be made under paragraphs 5.36(1)(a) and (b) of the Migration Regulations, will commence on 1 January 2021 and replace the *Migration (LIN 20/004: Places and Currencies for Paying of Fees) Instrument 2020*.

The places and currencies instrument sets out the places and currencies in which fees may be paid. This instrument is relevant to the Citizenship Regulation because, once incorporated by reference, it allows a person who makes an application under the Citizenship Act to pay an application fee in a place, and in the currency, that is specified in the places and currencies instrument (see subsections 16(2) and (3) of the Citizenship Regulation).

Purpose of amendments

Australian Government offices overseas routinely collect Australian citizenship application fees. The amendments made by this item ensure that applicants for Australian citizenship may make the payment of a citizenship application fee in a specified foreign country, and in a foreign currency, at a defined and updated exchange rate.

The conversion instrument and the places and currencies instrument are re-made every six months under the Migration Regulations, so that the content of the instruments can be updated to reflect changes in exchange rates, specified foreign currencies and the places where application fees may be paid. As a consequence, subsection 16(7) of the Citizenship Regulation must also be amended so that it refers to and incorporates the re-made instruments.

The Citizenship Act does not currently allow for the making of a legislative instrument under the Citizenship Regulation to specify matters in relation to the collection of application fees in foreign countries and foreign currencies. Instead, the Citizenship Regulation incorporates by reference relevant instruments made under the Migration Regulations to specify the foreign countries where a fee may be paid, the currency that can be accepted in each listed country, and the currency exchange rate that must be applied.

The *Migration (LIN 21/001: Payment of Visa Application Charges and Fees in Foreign Currencies) Instrument 2021* and the *Migration (LIN 21/002: Places and Currencies for Paying of Fees) Instrument 2021* will both be made under Part 5 of the Migration Regulations

and are not subject to disallowance (see item 20(b), regulation 10 of the *Legislation (Exemptions and Other Matters) Regulation 2015*). These instruments will, therefore, be incorporated in the Citizenship Regulation by the Regulations, as permitted by paragraph 14(1)(b) of the *Legislation Act 2003* (the Legislation Act).

Due to the operation of paragraph 14(1)(b) and subsection 14(2) of the Legislation Act, the Citizenship Regulation may not make provision in relation to a matter by applying, adopting or incorporating any matter contained in a non-disallowable instrument or other writing as in force *from time to time*. Rather, the legislative instruments made under paragraphs 5.36(1A)(a), 5.36(1)(a) and 5.36(1)(b) of the Migration Regulations can only be incorporated as in force at the time of incorporation (which will be 1 January 2021).

Both the *Migration (LIN 21/001: Payment of Visa Application Charges and Fees in Foreign Currencies) Instrument 2021* and the *Migration (LIN 21/002: Places and Currencies for Paying of Fees) Instrument 2021* will be freely available online on the Federal Register of Legislation.

Item 2 - In the appropriate position in Part 4

This item inserts section 27 entitled ‘Application of amendment made by Schedule 3 to the *Home Affairs Legislation Amendment (2020 Measures No. 2) Regulations 2020*’.

Section 27 provides that the amendment of section 16 made by Schedule 3 to the Regulations applies in relation to an application made on or after 1 January 2021.

Schedule 4 – Application of Migration Amendment (COVID-19 Concessions) Regulations 2020

Migration Regulations 1994

Item 1 – Subclause 9101(1) of Schedule 13

This item makes a technical amendment.

Item 2 – After subclause 9101(1) of Schedule 13

This item inserts new subclause (1A) into clause 9101 of Schedule 13 to the Migration Regulations.

Clause 9101 sets out the application provisions for certain amendments made by the *Migration Amendment (COVID-19 Concessions) Regulations 2020*. In particular, subclause 9101(1) has the effect that an amendment to allow Subclass 887 (Skilled-Regional) visas to be granted to applicants located outside Australia applies to visa applications made on or after 19 September 2020. The provision did not cover the situation of a small number of applicants who had applied for the Subclass 887 visa in Australia before 19 September 2020, and who then travelled overseas and were unable to return because of the COVID-19 travel restrictions.

This problem is remedied by the insertion of subclause 9101(1A) which allows Subclass 887 visas to be granted to applicants outside Australia regardless of when the visa

application was made. For applications made before 19 September 2020, it is a requirement that the application has not been finally determined before 19 September 2020. ‘Finally determined’ is defined at subsection 5(9) of the Migration Act and means that the application has been decided by the Department and is no longer subject to review by the Administrative Appeals Tribunal.

Item 3 – Subclause 9102(2) of Schedule 13

This item amends subclause 9102(2) of Schedule 13 to the Migration Regulations.

Subclause 9102(2) provides that an amendment made by the *Migration Amendment (COVID-19 Concessions) Regulations 2020* to allow grant of Subclass 485 (Temporary Graduate) visas to applicants located outside Australia applies to visa applications made before, on or after 19 September 2020.

The amendment makes a technical change so that the reference to applications made before 19 September 2020 is replaced by a reference to applications made, but not finally determined, before that date. This change aligns the wording of subclause 9102(2) with new subclause 9101(1A) inserted by the previous item. The new wording is more precise in identifying the visa applications to which the amendments made by the *Migration Amendment (COVID-19 Concessions) Regulations 2020* are applicable.

Schedule 5 – Application and transitional provisions

Migration Regulations 1994

Division 1- Operation of Schedule 1

Item 1 – In the appropriate position in Schedule 13

This item inserts a new Part 92 in Schedule 13 to the Migration Regulations to provide for how the amendments made by these regulations are to apply, and also sets out certain transitional provisions.

Part 92 has three Divisions, as set out below.

Division 1- Operation of Schedule 1

9201 Operation of Schedule 1

Clause 9201 sets out application and savings provisions in relation to the amendments in Schedule 1 to these Regulations.

Subclause 9201(1) provides that the amendments apply to applications for Subclass 417 (Working Holiday) visas made on or after 14 November 2020.

Subclause 9201(2) ensures that work, carried out before 14 November 2020, that was *specified work* in *regional Australia*, is taken to be *specified Subclass 417 work*.

Subclauses 9201(3) and 9201(4) ensure that the instruments made under the repealed definitions of *specified work* and *regional Australia* continue in force as if they had been

made under regulation 1.15FAA, which allows the Minister to specify areas of Australia and kinds of work for the purposes of the definition of *specified Subclass 417 work* in regulation 1.03.

These provisions ensure that there is no substantive impact on eligibility for a second or third Subclass 417 visa resulting from the changes made by Schedule 1 to these Regulations (refer to the explanation of Schedule 1 set out above).

Division 2- Operation of Schedule 2

9202 Operation of Part 1 of Schedule 2

Subclause 9202(1) provides that the amendments made by Part 1 of Schedule 2 to these Regulations do not apply to applications for Subclass 124 (Distinguished Talent) visas made before 14 November 2020, and also do not apply to Subclass 124 visas granted at any time. The purpose of subclause 9202(1) is to clarify that the repeal of the Subclass 124 visa on 14 November 2020 does not affect the processing of visa applications made before that date, and also does not affect the status of any Subclass 124 visa previously granted or granted after 14 November 2020 on the basis of an application made before that date.

Subclause 9202(2) provides that the repeal of the Subclass 124 visa does not affect the operation of provisions in the Migration Regulations (regulation 2.08 and 2.08A) that allow a dependent child or a spouse or de facto partner to be added to the visa application during visa processing.

9203 Operation of Part 2 of Schedule 2

Subclause 9203(1) provides that the amendments made by Division 1 of Part 2 of Schedule 2 to these Regulations apply in relation to an application for a Subclass 124 (Distinguished Talent) visa made on or after 14 November 2020. The purpose of Subclause 9203(1) is to clarify that the amendments to visa criteria applicable to Subclass 858 visas do not apply to applications made before 14 November 2020.

Subclause 9203(2) provides that the amendments made by Division 2 of Part 2 of Schedule 2 to these Regulations apply in relation to an application for a Subclass 773 (Border) visa made on or after 14 November 2020. The purpose of the provision is to clarify that the amendments to visa criteria for the grant of Subclass 773 visas do not apply to applications made before 14 November 2020.

Subclause 9203(3) clarifies that the reference to the Distinguished Talent (Class BX) visa inserted into the visa criteria for the Subclass 773 (Border) visa is a reference to a visa of that class whenever granted.

Division 3 - Transitional provisions relating to subclass 417 and 462 visas

Overview

Division 3 of Part 92 of Schedule 13 to the Migration Regulations provides concessions to certain applicants for a second or third Subclass 417 (Working Holiday) visa or Subclass 462 (Work and Holiday) visa.

In the discussion below the Subclass 417 and Subclass 462 visas are referred to collectively as working holiday maker (WHM) visas.

The COVID-19 pandemic has caused disruption to the plans of many WHM visa holders in Australia. Many WHM visa holders, whose visas expired during the pandemic, have been unable to depart Australia and have been granted a *COVID-19 pandemic event 408 visa* (defined in subclause 9202(1)). While holding that visa (or an associated bridging visa), some former WHM visa holders have made an important contribution to Australia's response to the pandemic by undertaking critical COVID-19 work in the healthcare and medical sectors.

The concessions in Division 3 recognise that work by permitting it to be counted towards the total amount of work that is required to qualify for the grant of a second or third WHM visa. As an additional concession, individuals who have carried out that critical work may also count any other work that is eligible for WHM purposes, if the work was carried out while holding certain COVID-19 pandemic event visas or associated bridging visas.

The normal rule is that, to obtain a second WHM visa, three months' work is required on the first WHM visa. The normal rule is that, to obtain a third WHM visa, another 6 months' work is required on the second WHM visa (in certain circumstances, work on a bridging visa held while waiting for the second Subclass 417 visa application to be processed may also be counted).

The effect of the concessions is that work carried out on a COVID-19 pandemic event 408 visa or an associated bridging visa will, subject to the rules described below, be counted toward the three months or six months' work requirement. This gives those WHM visa holders who did not undertake the minimum period of specified work required for a subsequent WHM visa another opportunity to do so by allowing them to also count work undertaken on a COVID-19 pandemic event 408 visa or associated bridging visa.

9204 Definitions

Clause 9204 inserts definitions for the purposes of Division 3.

COVID-19 pandemic event 408 visa is defined. In summary, it means a Subclass 408 (Temporary Activity) visa granted because of the COVID-19 pandemic, as specified in the legislative instrument, *Migration (LIN 20/229: COVID-19 Pandemic event for Subclass 408 (Temporary Activity) visa and visa application charge for Temporary Activity (Class GG) visa) Instrument 2020*, or granted on the basis of an event specified in a legislative instrument under subclause 9202(2). The provision for a legislative instrument in subclause 9202(2) will provide flexibility to respond to any future changes to the eligibility for the Subclass 408 visa.

special Subclass 417 work and *special Subclass 462 work* are defined. These are labels to refer to critical COVID-19 work in the healthcare and medical sectors, carried out anywhere in Australia after 31 January 2020, including, but not limited to:

- medical treatment, nursing, contact tracing, testing and research; and
- support services such as cleaning of medical and health care facilities and equipment.

Provision is also made, in subclauses 9204(3) and 9204(4), for a legislative instrument to specify the kinds of work that are *special Subclass 417 work* and *special Subclass 462 work*. Only work that is already specified for the purposes of eligibility for a second or third WHM visa can be specified in the instrument. This amendment permits the Minister to make changes to the ‘special’ subset of specified work that, if undertaken on a COVID-19 pandemic event or associated bridging visa, allows the holder to count it and any other specified work also undertaken on those visas towards eligibility for a subsequent WHM visa. This will permit flexibility if priorities change over time.

9205 Transitional provision—*applicants for second Subclass 417 visas who carried out specified Subclass 417 work under COVID-19 pandemic event visas*

9207 Transitional provision—*applicants for second Subclass 462 visas who carried out specified Subclass 462 work under COVID-19 pandemic event visas*

Clauses 9205 and 9207 set out the details of the concessions available to persons who have held one WHM visa and who wish to qualify for a second WHM visa. The clauses are relevantly identical and it is therefore convenient to discuss them together.

The concessions apply in relation to applications for a second WHM visa made on or after 14 November 2020.

As noted above in the overview, the concessions are available to former holders of a first WHM visa who moved on to a COVID-19 pandemic event 408 visa. As non-citizens are required to maintain lawful status in Australia, the expectation is that the COVID-19 pandemic event 408 visa will be applied for before the first WHM visa ceases. However, an allowance is also made for a short gap – up to 28 days – between the first WHM visa ceasing and an application being made for the COVID-19 pandemic event 408 visa. It is also possible that the non-citizen will hold more than one COVID-19 pandemic event 408 visa. Those visas are usually granted for 3 months, although longer periods may be granted for workers in critical sectors. All of the eligible work on an unbroken chain of COVID-19 pandemic event 408 visas (and associated bridging visas) may be counted, provided that there is no more than a 28 day gap between one COVID-19 pandemic event 408 visa ending and the next COVID-19 pandemic event 408 visa being applied for.

The allowance of 28 days is provided for in subclauses 9205(5) and 9207(5). The term ‘eligible 408 visa’ is used to refer to a COVID-19 pandemic event 408 visa applied for while holding the first WHM visa, or within 28 days of that visa ceasing, or as a part of a chain of COVID-19 pandemic event 408 visas as described in the previous paragraph.

The concession requires that, while holding the eligible 408 visa or an associated bridging visa, the visa holder must have undertaken some work that is ‘*special Subclass 417 work*’ or ‘*special Subclass 462 work*’ (as applicable). As noted at clause 9202 above, this means

critical COVID-19 work in the healthcare and medical sectors, unless other work is later specified in a legislative instrument. Provided that the visa holder has undertaken at least some of this work (there is no minimum duration), the visa holder can then count all of the other work they have carried out which falls within the scope of the WHM program, i.e. ‘specified Subclass 417 work’ and ‘specified Subclass 462 work’ as set out in legislative instruments. The work can only be counted up to the date that the second WHM visa application is made, as all applicants for a second WHM visa must have completed the required work before a valid application can be made.

The concessions are set out at subclauses 9205(1) and (2), and 9207(1) and (2). Subclauses 9205(2) and 9207(2) are technical provisions to ensure that the work eligible under the concessions is treated as if it was work carried out as the holder of the first WHM visa, and can therefore be counted when the second WHM visa application is assessed.

Subclauses 9205(3) and 9207(3) provide that if the applicant for a second WHM visa holds an eligible 408 visa on the day they apply for the second WHM visa, the second WHM visa, if granted, will be valid for 12 months from the day that the eligible 408 visa would otherwise have ceased to be in effect. This mirrors the existing rule when a person moves from a first WHM visa to a second WHM visa. The rule provides certainty, as the visa holder knows when the first visa is due to cease, and also knows that the second visa will cease 12 months after that date, regardless of when it is granted. The rule also removes any incentive to delay applying for a second WHM visa until just before the first visa ceases, as no additional time is gained by doing so.

However, it is also important to note that there is no requirement to apply immediately for the second WHM visa. A person who has worked the required time to be eligible for a second WHM visa could potentially move to another visa such as a visitor visa or student visa, or return to the home country for a period, before applying for the second WHM visa.

9206 Transitional provision—*applicants for third Subclass 417 visas who carried out specified Subclass 417 work under COVID-19 pandemic event visas*

9208 Transitional provision—*applicants for third Subclass 462 visas who carried out specified Subclass 462 work under COVID-19 pandemic event visas*

Clauses 9206 and 9208 set out the details of the concessions available to persons who have held two WHM visas and who wish to qualify for a third WHM visa. The clauses are relevantly identical and it is therefore convenient to discuss them together.

The concessions apply in relation to applications for a third WHM visa made on or after 14 November 2020.

The concessions are the same concessions that apply, as outlined above, in relation to clauses 9205 and 9207 in relation to applications for a second WHM visa, and the clauses are substantively identical. Please refer to that discussion.

There are minor differences in the drafting to ensure that there is no double counting of work, and to cover an additional scenario, mentioned below.

There is no scope for double counting of work (that is, work cannot be counted for the purposes of the second WHM visa and also counted for the purposes of the third WHM visa).

The work that may be counted towards the second WHM visa must be completed before the day the second WHM application is made. The work that may be counted towards the third WHM visa is work done after the day that the application for the second WHM visa is made and before the day the application for the third WHM visa is made.

In summary, an applicant for a third WHM visa can count eligible work (as discussed above in the previous section of this Explanatory Statement) undertaken on any of the following visas:

- a bridging visa that is in effect and was granted on the basis of the application for the second WHM visa, if the applicant held the first WHM visa when the application for the second WHM visa was made (as per the existing criteria);
- the second WHM visa (as per the existing visa criteria);
- a COVID-19 pandemic event 408 visa applied for while the applicant held the second WHM visa or within 28 days after that visa ceased to be in effect;
- a subsequent COVID-19 pandemic event 408 visa applied for while the applicant held the previous COVID-19 pandemic event 408 visa or within 28 days after that visa ceased to be in effect;
- a bridging visa that is in effect and was granted on the basis of the application for the second WHM visa, if the applicant held a COVID-19 pandemic event 408 visa when the application was made, and that COVID-19 pandemic event 408 visa was part of an unbroken chain of COVID-19 pandemic event 408 visas following the first WHM visa (as discussed above).

The final scenario can be illustrated by this theoretical example of an applicant for a third WHM visa:

The applicant held a first WHM visa that expired in May 2020. The applicant had remained in Melbourne doing COVID contact tracing work in April and May, rather than relocating to do work in regional Australia that would qualify the applicant for another WHM visa. Accordingly, the applicant was not qualified to obtain a second WHM visa when the first WHM visa expired.

In May 2020, the applicant was granted a COVID-19 pandemic event 408 visa, valid for three months.

The applicant then continued doing contact tracing work in Melbourne and did that work for three months (June, July and August). This meets the requirement for a second WHM visa under these amendments.

In September 2020 the applicant obtained another COVID-19 pandemic event 408 visa (applied for while the applicant held the previous COVID-19 pandemic event 408 visa).

On 15 November 2020 (i.e. after the commencement of these amendments) the applicant applies for a second WHM visa.

Shortly after making this application, the second COVID-19 pandemic event 408 visa expires and a bridging visa associated with the second WHM application comes into effect. At this point the applicant continues contact tracing work with a view to obtaining a third WHM visa in due course.

The applicant completes another 6 months of contact tracing work, in April 2021. By this time the applicant is on the second WHM visa, which is granted in January 2021. The applicant did three months' work on the bridging visa associated with that application and three months' work on the second WHM visa.

Under the amendments, the applicant is able to be granted a third WHM visa.

Subclauses 9206(3) and 9208(3) provide that if the applicant for a third WHM visa holds an eligible 408 visa on the day they apply for the third WHM visa, the third WHM visa, if granted, will be valid for 12 months from the day that the eligible 408 visa would otherwise have ceased to be in effect – see the explanation above in relation to subclauses 9205(3) and 9207(3) for further details about this rule.