



Explanatory Statement

Taxation Administration (Remedial Power – Seasonal Labour Mobility Program) Determination 2020

General Outline of Instrument

1. This instrument is made under section 370-5 in Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953). All references to legislative provisions in this Explanatory Statement are references to Schedule 1 to the TAA 1953 unless otherwise stated.
2. The instrument modifies the operation of paragraph 840-905(b)(ii) of the *Income Tax Assessment Act 1997* (ITAA 1997) and paragraph 12-319A(b)(ii) to include foreign resident employees of Approved Employers under the Seasonal Labour Mobility Program ('employees under the Program') who previously held a Temporary Work (International Relations) Visa (subclass 403) and have extended their stay in Australia using a different temporary visa granted under the *Migration Act 1958*. A temporary visa includes a bridging visa.¹
3. The modifications enable employees under the Program who now hold a different temporary visa (for example, a Temporary Activity Visa (subclass 408)) and previously held a Temporary Work (International Relations) Visa (subclass 403) to continue to remain liable to a final withholding tax rate of 15 per cent and their employers to withhold tax at this rate. The modifications only apply to employees under the Program as the other requirements in section 840-905 of the ITAA 1997 and section 12-319 must be met.
4. The instrument is a legislative instrument for the purposes of the *Legislation Act 2003*.
5. Section 370-15 allows the Commissioner of Taxation (Commissioner) to prepare another legislative instrument to repeal this instrument. Subsection 370-15(3) states that subsection 33(3) of the *Acts Interpretation Act 1901* applies only to the extent that it allows the Commissioner to amend or vary this instrument.

Date of effect

6. Section 370-20 provides that a determination made under section 370-5 must not commence before the first day it is no longer liable to be disallowed, or to be taken to have been disallowed, under section 42 of the *Legislation Act 2003*. Therefore, this determination commences on the first day the determination is no longer liable to be disallowed, or to be taken to have been disallowed.
7. The instrument applies with retrospective effect from 24 March 2020 to ensure that taxation arrangements for employees under the Program and their employers do not change as a result of some employees having been granted other temporary visas.

What is this instrument about

8. The purpose of this instrument is to ensure the salary, wages, commission, bonuses or allowances derived by foreign resident employees under the Program continue to be taxed by

¹ *Migration Act 1958* (Cth) s 37.

application of a final withholding tax rate of 15 per cent. It also ensures that this income is otherwise treated as non-assessable non-exempt income. This means that, as is currently the case for those holding a Temporary Work (International Relations) Visa (subclass 403), these foreign resident employees under the Program will not have to lodge an income tax return unless they earn other Australian sourced income.

What is the effect of this instrument

9. This instrument ensures that an employer must withhold, at the rate provided by the *Taxation Administration Regulations 2017*, an amount from salary, wages, commission, bonuses or allowances it pays to foreign resident employees under the Program that previously held a Temporary Work (International Relations) Visa (subclass 403) and now hold a different temporary visa.

10. The instrument also ensures that foreign resident employees under the Program, that previously held the Temporary Work (International Relations) Visa (subclass 403) and now hold a different temporary visa, are liable to pay income tax at 15 per cent under the Seasonal Labour Mobility Program withholding tax (as imposed by the *Income Tax (Seasonal Labour Mobility Program Withholding Tax) Act 2012*).

11. The modifications in this instrument apply to salary, wages, commission, bonuses or allowances paid to and derived by foreign resident employees under the Program on or after 24 March 2020 and ensure that the law is consistent with the practice generally adopted by employers prior to and on and after 24 March 2020 of withholding at a rate of 15 per cent. This aligns with the earliest known date that an employee under the Program went from holding a Temporary Work (International Relations) Visa (subclass 403) to holding a different temporary visa as a result of the restrictions on international movement due to the COVID-19 Pandemic.

12. Whilst the modifications are retrospective, they are wholly beneficial to affected employees and their employers. This is because the modifications ensure impacted foreign resident employees had access to a final withholding tax rate of 15 per cent on their earnings. Without the modifications applying retrospectively, much higher non-resident tax rates would apply to the income earned by these employees under the Program from the time they started to hold a different temporary visa until the modification commenced. These employees would also have the added burden of being required to lodge an income tax return in relation to that income and their employers would be required to have withheld at the higher non-resident tax rates.

13. Any employers that have withheld at a higher rate prior to the modifications will not be subject to penalties under the tax law, and their employees will be entitled to refunds of those amounts, by having them refunded as amounts withheld in error. Although it is not anticipated that this would have occurred in many circumstances, some employees may have had a higher rate of withholding on their income prior to the modification taking effect. Where employers have mistakenly withheld tax within the same financial year, they may refund the tax to the employee. Where the employer has already paid the tax withheld to the ATO and lodged an activity statement, they should revise their activity statement in order to receive a refund for the amounts incorrectly withheld and paid. Where an employer finds out about the mistake after the end of the financial year, the employee must request a refund of the withholding tax from the ATO. These employees can either email their request for a refund of excessive withholding to withholding@ato.gov.au or they can write to the ATO at P.O Box 1032, ALBURY NSW 2640. They will need to provide their and their employer's contact details, their visa status, and details of the payments they received and tax amounts withheld.

Background

14. For the purposes of the Seasonal Labour Mobility Program, the Government introduced a final withholding tax regime that applies to the salary, wages, commission, bonuses or allowances

derived by foreign resident employees participating in the Program. This final withholding tax regime is known as the Seasonal Labour Mobility Program withholding tax ('SLMP withholding tax').

15. The taxation obligations of the SLMP withholding tax for employees under the Program and their Approved Employers are set out in Subdivision 840-S of the ITAA 1997 and Subdivision 12-FC, respectively.

16. The relevant provisions make foreign resident employees under the Program liable to a 15 per cent tax on the income paid to them under the Program at a time they hold a Temporary Work (International Relations) Visa (subclass 403) and require their employers to withhold and remit that tax.

17. Ordinarily, employees under the Program can only enter and work in Australia for up to nine months at a time while holding a Temporary Work (International Relations) Visa. However, due to the COVID-19 Pandemic, the Government announced temporary changes to some visa arrangements. The announcement included changes to allow employees under the Program to extend their stay in Australia by up to twelve months.

18. To extend their stay in Australia, employees under the Program with a Temporary Work (International Relations) Visa (subclass 403) can apply for a Temporary Activity Visa (subclass 408) under the Australian Government endorsed events (COVID-19 Pandemic event) stream. Alternatively, some employees under the Program who are not eligible to access the Temporary Activity Visa (subclass 408) are able to access a bridging visa. As part of the announcement the Government stated that the existing conditions which applied to employees under the Program would be carried over to the new visa arrangements.

19. This instrument is necessary to ensure the SLMP withholding tax continues to apply to employees under the Program where they previously held a Temporary Work (International Relations) Visa (subclass 403) and now hold a different temporary visa to remain in Australia and work under the Program.

Modification is not inconsistent with intended purpose or object of the provision

20. The Commissioner considers the modification is not inconsistent with the intended purpose or object of the relevant provisions, being section 840-905 of the ITAA 1997 and section 12-319A. In ascertaining the intended purpose or object of these provisions, consideration was given to:

1. the explanatory memorandum and second reading speeches to the *Tax Laws Amendment (2012 Measures No. 3) Bill 2012*
2. the explanatory memorandum to the *Treasury Laws Amendment (2018 Measures No. 4) Bill 2018*.

21. The policy intention of section 840-905 of the ITAA 1997 and section 12-319A indicates that foreign resident employees under the Program should be liable to a final withholding tax rate of 15 per cent and their employers should withhold tax at that rate. This is intended irrespective of the temporary visa an employee holds to enable them to remain in Australia and participate in the Program.

22. This is supported by amendments made in 2019 to section 840-905 of the ITAA 1997 and section 12-319A which allowed for these provisions to continue to apply when the classification of the visa enabling participation in the Program was changed by the *Migration Amendment (Temporary Activity Visas) Regulation 2016* from the Special Program Visa (subclass 416) to the Temporary Work (International Relations) Visa (subclass 403).

23. The Commissioner considers that had these circumstances been considered at the time the law was drafted; the law would have been drafted differently. It would have provided for this circumstance while still upholding the purpose of the SLMP withholding tax.

Modification is reasonable

24. The Commissioner considers the modifications to be a reasonable measure to ensure that foreign resident employees under the Program continue to be liable to the SLMP withholding tax and not the higher marginal tax rates which would otherwise apply.

25. The modifications are wholly beneficial and will also ensure that affected foreign resident employees under the program do not have the added compliance burden of lodging an income tax return when the only income they earn is from the Program.

26. In light of the intended purpose of the SLMP withholding tax provisions, the Commissioner considers it reasonable to exercise the Commissioner's discretion to use the remedial power for this issue.

Compliance cost

27. Compliance cost impact: Minor – There will be minimal impact for both implementation and ongoing compliance costs. The legislative instrument is minor and machinery in nature.

Budgetary impact

28. The Commissioner has received advice from the Department of the Treasury that the proposed exercise of the CRP would have a negligible cost to the budget.

Consultation

29. Subsection 17(1) of the *Legislation Act 2003* requires, before the making of a determination, that the rule-maker is satisfied that appropriate and reasonably practicable consultation has been undertaken.

30. For this instrument, broad public consultation was undertaken for a period of four weeks from 21 October 2020 to 18 November 2020 inclusive.

31. The draft instrument and draft explanatory statement were published to the ATO Legal database. Publication was advertised via the 'What's new' page on that website, and via the 'Open Consultation' page on ato.gov.au. Major tax and superannuation publishers and associations monitor these pages and include the details in the daily and weekly alerts and newsletters to their subscribers and members. This ensures advice of the draft is disseminated widely across the tax professional community, and that they are in an informed position to provide comments and feedback.

32. No comments were received as a result of the consultation.

33. In addition, targeted consultation on a prospective CRP candidate is undertaken with the CRP Advisory Panel, a body comprised of private sector specialists, Treasury and ATO representatives. The Panel supported the exercise of the CRP and provided feedback on the draft determination and explanatory statement.

34. The Board of Taxation was also consulted on the use of the CRP to resolve the issue, the draft determination and explanatory statement. The Board agreed that the modification is consistent with the objects of that provision, and reasonable having regard to the provision's intended purpose. Accordingly, the Board considered it would be appropriate to exercise the power.

Repeal of this instrument

35. This instrument will be repealed at the start of 1 April 2024, which is the usual sunseting day and approximately 3 years after the expected commencement date of this instrument. As the

modifications made by the instrument are due to the effects of the COVID-19 Pandemic, this ensures that the instrument remains in force for only as long as it is needed.

Legislative references

Acts Interpretation Act 1901

Income Tax Assessment Act 1997

Income Tax (Seasonal Labour Mobility Program Withholding Tax) Act 2012

Legislation Act 2003

Taxation Administration Act 1953

Statement of compatibility with Human Rights

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

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This 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*.

Overview of the Legislative Instrument

This Legislative Instrument is made under section 370-5 of Schedule 1 to the *Taxation Administration Act 1953* (TAA 1953), known as the Commissioner's Remedial Power. It modifies the operation of paragraph 840-905(b)(ii) of the *Income Tax Assessment Act 1997* and paragraph 12-319A(b)(ii) of Schedule 1 to the TAA 1953. The effect of the modification is that an individual who is an employee of an Approved Employer under the Seasonal Labour Mobility Program ('the Program'), who previously held a Temporary Work (International Relations) Visa (subclass 403) and then holds a different temporary visa granted to them under the *Migration Act 1958* is treated as if they hold a Temporary Work (International Relations) Visa (subclass 403) at that time for the purposes of the Seasonal Worker Mobility Program withholding tax.

The modification ensures that foreign resident employees under the Program who previously held a Temporary Work (International Relations) Visa (subclass 403) and now hold a different temporary visa granted under the *Migration Act 1958* remain liable to pay income tax at the rate of 15 per cent and their employers withhold tax at that rate for these employees.

Human rights implications

This Legislative Instrument engages the following rights:

- the right to work, right to enjoy just and favourable conditions of work, and right to an adequate standard of living under articles 6(1), 7(a) and 11(1) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).

Right to work

This Legislative Instrument promotes the right to work under article 6(1) of the ICESCR. Article 6(1) states that everyone has the right to 'gain his living by work which he freely chooses or accepts' and that 'appropriate steps' be taken 'to safeguard this right'. This right is promoted by ensuring that employees under the Program are not impacted by higher marginal tax rates where they now hold a different temporary visa after previously holding a Temporary Work (International Relations) Visa (subclass 403), which allows the Program to continue to be an attractive employment opportunity that individuals from participating countries will choose to engage in.

Right to enjoy just and favourable conditions of work

This Legislative Instrument promotes the right to enjoy just and favourable conditions of work, especially adequate remuneration under article 7(a) of the ICESCR. Article 7(a) states that everyone has the right to enjoy 'just and favourable conditions of work' which ensures remuneration that provides 'a decent living for themselves and their families'. This right is promoted by ensuring that employees under the Program are not subject to a higher marginal tax rate where they now hold a different temporary visa after previously holding a Temporary Work (International Relations) Visa

(subclass 403). This assists employees under the Program to receive remuneration that provides them with a decent standard of living and enough money to send to their home country to better their and their families' lives.

Right to an adequate standard of living

This Legislative Instrument promotes the right to work under article 11(1) of the ICESCR. Article 11(1) states that everyone has the right 'to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions' and 'appropriate steps' be taken to realise this right. This right is promoted by allowing employees under the Program to continue receiving lower taxed Australian wages by not being subject to a higher marginal tax rate where they now hold a different temporary visa after previously holding a Temporary Work (International Relations) Visa (subclass 403). Therefore, these employees will have more money to provide both adequate food, clothing and housing for themselves and their families, and improve their overall standard of living.

The promotion of these rights under the ICESCR is achieved by allowing employees under the Program to continue to remain liable to a final withholding tax rate of 15 per cent under the Seasonal Worker Mobility Program withholding tax and their employers to withhold tax at that rate where the employee previously held a Temporary Work (International Relations) Visa (subclass 403) and now holds a different temporary visa.

Conclusion

This Legislative Instrument is compatible with human rights because it promotes the protection of human rights.