

EXPLANATORY STATEMENT

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

Migration Act 1958

Migration Amendment (Biosecurity Contraventions) Regulations 2020

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.

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. Paragraph 116(1)(g) of the Migration Act permits grounds for cancellation of visas under section 116 of the Migration Act to be prescribed.

The *Migration Amendment (Biosecurity Contraventions) Regulations 2020* (the Regulations) amend the *Migration Regulations 1994* (the Migration Regulations) to prescribe additional visa subclasses that may be cancelled if the visa holder is in Australia, and has not been immigration cleared, and the Minister reasonably believes that the visa holder has contravened subsection 126(2), 128(2), 532(1) or 533(1) of the *Biosecurity Act 2015* (the Biosecurity Act).

In particular, the Regulations include temporary work visas and student visas within the scope of the cancellation power at paragraph 2.43(1)(s) of the Migration Regulations, whereas the cancellation power previously applied only to visitor visas.

Contraventions of the Biosecurity Act pose a serious threat to Australia's agriculture industry. Following the successful introduction, from 17 April 2019, of a power to cancel visitor visas for biosecurity contraventions, it is appropriate to respond to the serious and ongoing threat by expanding the cancellation power to include temporary work visas and student visas. The Regulations give decision-makers (delegates of the Minister) a discretion to cancel temporary work visas and student visas at the point of arrival in cases where there has been an attempt to deceive a Biosecurity officer about the presence of prohibited items in the person's luggage or possessions. In making a decision, decision-makers will weigh up a number of factors, including the seriousness of the breach and the consequences to the passenger.

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 cancellation grounds in the Migration Regulations, to supplement the cancellation grounds in the Migration Act. The Migration Act expressly provides, in paragraph 116(1)(g), for these matters to be prescribed in regulations.

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 need to respond to biosecurity threats.

A Statement of Compatibility with Human Rights has been completed in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*, and is at [Attachment A](#).

Details of the Regulations are set out in [Attachment B](#).

The Department of Home Affairs (the Department) has consulted with the Department of Agriculture, Water and the Environment, the Department of Education, Skills and Employment, and the Department of Foreign Affairs and Trade. This accords with subsection 17(1) of the *Legislation Act 2003* (the Legislation Act).

The Office of Best Practice Regulation (OBPR) advised that a Regulation Impact Statement is not required (OBPR references 25096 and 26348).

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

The Regulations commence on 1 January 2021.

The Department follows standard practices to notify clients about the Regulations, including updating its website and notifying peak bodies. An effective communications campaign with strong pre-departure messaging will ensure that student and temporary work visa holders do not inadvertently contravene biosecurity requirements due to education levels and English language skills.

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

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Migration Amendment (Biosecurity Contraventions) Regulations 2020

This amendment 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 Amendment

The Australian Government is committed to protecting the Australian community from biosecurity risks posed by non-citizens who bring prohibited goods through ports of entry. Contraventions of the *Biosecurity Act 2015* (Biosecurity Act) pose a serious threat to Australia's agriculture industry. The measures in this amendment to the *Migration Regulations 1994* (the Regulations) will enhance Australia's biosecurity regime and protect the Australian community and agricultural systems from biosecurity risks, particularly given the emerging threat of African Swine Fever in the region. It is crucial that African Swine Fever and Foot and Mouth disease outbreaks do not occur in Australia, especially at a time when the economy has already been weakened by COVID-19. A key Government priority is ensuring a bio-secure border and protecting the Australian economy, which in turn, relies on, to a significant extent, a strong agricultural industry.

Commencing on 17 April 2019, the *Migration Amendment (Biosecurity Contraventions and Importation of Objectionable Goods) Regulation 2019* ('the 2019 Amendment') amended the Regulations to:

- insert a discretionary cancellation ground, at paragraph 2.43(1)(s) of the Regulations, allowing cancellation of visitor visas (including tourist and transit visas) where:
 - the holder is in Australia and has not been immigration cleared; and
 - the Minister reasonably believes that the visa holder has contravened subsection 126(2), 128(2) 532(1) and 533(1) of the *Biosecurity Act 2015* (the Biosecurity Act); and
- amend Public Interest Criterion 4013 so that Visitor visa applicants, who have had a previous visa cancelled under one of the new grounds in the last three years, cannot satisfy this criterion for the grant of a visa unless there are compelling circumstances that affect the interests of Australia, or compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen to justify the grant of the visa.

This amendment builds upon the 2019 amendment to further deter non-citizens, specifically student visa holders and temporary work visa holders, from bringing in goods that could compromise Australia's biosecurity.

In accordance with the Biosecurity Act and the *Regulatory Powers (Standard Provisions) Act 2014* (the biosecurity regime), travellers may be fined or prosecuted for making a false declaration on their Incoming Passenger Card (IPC) relating to a biosecurity question. A

person's visa may also be cancelled under the *Migration Act 1958* (Migration Act) if they provide incorrect answers on their IPC.

The 2019 amendment responded to limitations in this legislative coverage. For example, a person may declare on their IPC that they are bringing in goods that fall under the category of: "meat, poultry, fish, seafood, eggs, dairy, fruit and vegetables". However, when the person is questioned by a biosecurity officer, they may state untruthfully that they only have a piece of fruit in their luggage. A luggage search might then reveal, for example, significant quantities of meat products - a serious threat to Australia's biosecurity. In this situation, no false declaration has been made on the IPC as meat is covered under the category of goods that the passenger declared on their card. Accordingly, the visa could not be cancelled. The offender would be issued an infringement notice under the biosecurity regime for attempting to mislead the biosecurity officer, the payment of which would discharge them of civil and/or criminal liability, despite their disregard for Australia's biosecurity laws. The effect of the 2019 amendment was to allow visitor visas to be cancelled in this situation, thus providing an immediate and effective deterrent to actions that pose a serious risk to Australia. The 2019 amendment therefore provided an option to prevent the offenders from entering Australia on the basis of their disregard for Australia's biosecurity laws.

The cancellation ground introduced by the 2019 amendment for visitor visa holders, and extended by this amendment to student and temporary work visa holders, is available in situations where, at the port of entry, the non-citizen fails to comply with the directions of a biosecurity officer in relation to the provision of information or movement of goods, or knowingly provides false or misleading information or documents.

This amendment extends this cancellation regime to the student and temporary work visa subclasses listed below:

- Subclass 400 (Temporary Work (Short Stay Specialist) visa);
- Subclass 403 (Temporary Work (International Relations)) visa;
- Subclass 407 (Training) visa;
- Subclass 408 (Temporary Activity) visa;
- Subclass 417 (Working Holiday) visa;
- Subclass 457 (Temporary Work (Skilled)) visa;
- Subclass 462 (Work and Holiday) visa;
- Subclass 476 (Skilled-Recognised Graduate) visa;
- Subclass 482 (Temporary Skill Shortage) visa;
- Subclass 485 (Temporary Graduate) visa;
- Subclass 500 (Student) visa;
- Subclass 590 (Student Guardian) visa;
- Subclass 988 (Maritime Crew) visa.

Extending the visa cancellation ground to include these student and temporary work visas will strengthen the government's ability to manage serious biosecurity risks, such as African Swine Fever and Foot and Mouth Disease, at ports of entry.

Biosecurity officers have continued to detect African Swine Fever virus fragments in a significant quantity of meat products intercepted at Australian airports. If undetected, these products could have transmitted the virus into Australia's biosecurity system. In October 2019, Australian Border Force (ABF) officers first cancelled an international traveller's visa

using the new ground introduced by the 2019 Amendment. The traveller had knowingly produced a false or misleading document (incoming passenger card) to a biosecurity officer at an airport by failing to declare 4.6 kg of pork. As at 1 September 2020, ABF officers have cancelled 14 visitor or transit visas using the new biosecurity-related cancellation ground, with 10 of these decisions relating to failure to declare pork or pork products. These risks are magnified when the visa holder who breaches biosecurity laws resides in regional Australia, works on a farm, or in an agricultural industry. For example, in May 2019, biosecurity officers intercepted a traveller who had recorded their occupation as ‘agricultural (including veterinarian)’ who had failed to declare various foodstuffs including 1100g of sausages. The traveller had come to Australia for employment purposes associated with a piggery. If these goods had not been intercepted at the airport, they could have had serious implications for the farm and potentially the pork industry more generally.

African Swine Fever has established itself in Asia and parts of Europe and continues to spread. The Inspector-General of Biosecurity’s Review Report on the adequacy of preventative border measures to mitigate the risk of African Swine Fever states that since April 2019, African Swine Fever has been widespread across Chinese provinces, resulting in the death of millions of pigs. Outbreaks have also occurred in Cambodia, Hong Kong, North Korea, Laos, Philippines, Myanmar, South Korea, Timor-Leste, and Indonesia. African Swine Fever has no vaccine and kills about 80 per cent of the pigs it infects. The Department of Agriculture, Water and the Environment advises that African Swine Fever has never occurred in Australia. Its rapid spread in other countries presents a significant biosecurity threat to our country. An outbreak would be devastating for Australia’s pork industry and damage trade and the economy.

- The cost of a small outbreak of African Swine Fever is estimated at \$667 to \$877 million and a large multi-point outbreak at \$1.5 billion to \$2.03 billion over five years. This estimate includes the impact on trade and revenue from domestic animal losses, loss of export markets and decreased retail demand. It does not include the cost of control and eradication, surveillance, or the impact of entry to and spread within the feral pig population.
- A large to medium outbreak of Foot and Mouth Disease would likely result in an estimated \$50 billion of economic losses over ten years.

This amendment presents a reasonable and proportionate response to the serious harm that ongoing contraventions of the Biosecurity Act pose to Australia’s agricultural industry.

Data provided by the Department of Agriculture, Water and the Environment indicates that since the commencement of the Biosecurity Act from 16 June 2016, through to 31 August 2020, of the total travellers, approximately 30 per cent of permanent migrants/returning residents and 70 per cent of temporary entrants were issued infringement notices for contravening the Biosecurity Act. Of the infringements issued to temporary entrants during this period, approximately 40 per cent were issued to individuals visiting relatives and friends, 24 per cent to students and six per cent to individuals travelling to Australia for employment purposes.

Data provided by the Department of Agriculture, Water and the Environment also showed that from 1 July 2019 to 30 June 2020, there was an increase of approximately 64 per cent in the total number of biosecurity-related infringement notices issued to visitors or temporary

entrants compared to the previous financial year, as indicated below (data disaggregated by purpose of travel, as indicated by travellers on their incoming passenger cards):

- visiting relatives and friends – increased by approximately 48 per cent
- employment – increased by approximately 82 per cent
- education – increased by approximately 62 per cent.

These increases are despite African Swine Fever education and awareness campaigns to declare goods on entering Australia and the infringement regime under the Biosecurity Act. The statistics demonstrate the need for further deterrence action to influence compliant behaviours, including by extending the existing visa cancellation grounds to cover certain other cohorts. This amendment will enable the Minister and their delegates to continue to assess and address biosecurity risks that Student and Temporary work visa holders may pose by failing to properly declare goods that threaten Australia's biosecurity and/or providing false information to a biosecurity officer at ports of entry. In line with community expectations, it is appropriate that a person who has flagrant disregard for Australia's biosecurity and migration legislation should not be allowed to enter Australia.

Cancellation of student and temporary work visas for breaches of biosecurity laws will be discretionary and consideration of cancellation will take into account the individual circumstances of the visa holder. It is anticipated that cancellation would generally only occur in repeat offending or egregious or serious offending cases.

Prior to implementation of this amendment, the Australian Government will undertake:

- extensive messaging through relevant Australian Government websites, migration agents, education providers and through international posts around biosecurity risks and the ability to cancel student and temporary work visas in immigration clearance for contravention of biosecurity laws.
- pre-departure education for students and temporary workers to ensure that while protecting biosecurity, Australia's reputation as a higher education destination and bilateral labour mobility commitments are balanced.
- development of communication material for incoming passengers, international students and temporary workers, so that the cancellation ground is understood. These communication materials will be shared in both traditional media and social media platforms to inform the general public, international students and temporary work visa holders of their obligations and consequences of breaching biosecurity laws.
- development of robust procedural instructions and training for staff at ports of entry to ensure judicious and targeted operationalisation of the amendment, including appropriate referrals by biosecurity officers.

The government's intention and expectation is that, during the initial six months from commencement of the amendments on 1 January 2021, there will be an emphasis on education and counselling, with cancellation occurring only in repeat or egregious cases. This cautious and fair approach recognises that temporary workers and international students are important to Australia and have more substantial connections with Australia and Australians than most visitor visa holders. Visa cancellation officers will be provided with policy guidance about this phased implementation of the new regime.

While a person whose visa has been cancelled on these grounds is prevented by Public Interest Criterion 4013 from being granted a further visa to travel to Australia for three years from the date of the cancellation decision, a decision-maker could grant the visa in

compelling circumstances that affect the interests of Australia, or compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen.

Human rights implications

This amendment engages the following rights:

- Right to equality and non-discrimination – Article 2 and Article 26 of the *International Covenant on Civil and Political Rights (ICCPR)*
- Right to work – Article 6(1) of the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*
- Right to education – Article 13 of the ICESCR.
- Right to liberty – Article 9 of the ICCPR;
- Non-refoulement obligations – Article 3(1) of the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)* and Articles 6 and 7 of the ICCPR;
- Expulsion of aliens – Article 13 of the ICCPR;
- Right to respect for the family – Articles 17(1) and 23(1) of the ICCPR;
- Consideration of the best interests of the child – Article 3(1) of the *Convention on the Rights of the Child (CRC)*;
- Right to privacy – Article 17(1) of the ICCPR.

Right to equality and non-discrimination

The right to equality and non-discrimination is contained in articles 2 and 26 of the *International Covenant on Civil and Political Rights (ICCPR)*:

Article 2

1. *Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

Article 26

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.'

The UN Human Rights Committee has recognised that '*not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant*'.

Further, neither the ICCPR nor the ICESCR give a right for non-citizens to enter Australia for the purposes of seeking residence or employment. The UN Human Rights Committee, in its General Comment 15 on the position of aliens under the ICCPR, stated that:

The [ICCPR] does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory. However, in certain circumstances an alien may enjoy the protection of the [ICCPR] even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.

Consent for entry may be given subject to conditions relating, for example, to movement, residence and employment. A State may also impose general conditions upon an alien who is in transit. However, once aliens are allowed to enter the territory of a State party they are entitled to the rights set out in the [ICCPR].

As such, Australia is able to set requirements for the entry of non-citizens into Australia and conditions for their stay, and does so on the basis of reasonable and objective criteria.

The amendment to extend the availability of the biosecurity cancellation ground to student and temporary work visa holders is intended for the legitimate objective of addressing biosecurity concerns from all student and temporary work visa holders who bring in goods that could compromise Australia's biosecurity, irrespective of which country the visa holder originates from. Noting the statistics on infringement notices issued in recent years, these categories of visa holder have presented significant biosecurity risks and extending the availability of the biosecurity-related cancellation ground to these visa holders to address these risks and further deter non-compliance with biosecurity laws is a necessary and proportionate response.

The objective of the Migration Act is to 'regulate, in the national interest, the coming into, and presence in, Australia of non-citizens'. The Government is committed to protecting the Australian community from biosecurity risks to Australian agriculture posed by non-citizens who bring prohibited goods through ports of entry. Data provided by the Department of Agriculture, Water and the Environment indicates that in 2018-19 and 2019-20, biosecurity-related infringement notices issued to temporary entrants arriving for education and employment purposes remained the same at approximately 23 per cent and 5 to 6 per cent, respectively. This amendment will enhance the ability to protect the Australian community and agricultural systems from biosecurity risks, particularly given the emerging threat of African Swine Fever to the Australian pork industry.

The discretionary cancellation ground introduced by this amendment does not differentiate between adults and persons under the age of 18. However, as described below, the best interests of the child are, and will remain, a primary consideration in any decision on whether to cancel a visa held by the child themselves or a visa held by a parent or family member of the child.

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.'

This amendment neither deprives people of work unfairly nor does it seek to preclude foreign nationals from entering and working temporarily in Australia. Visas are granted under the student and temporary work visa programs with the expectation that the visa holder will obey Australia's laws, make a positive contribution to Australian society, and respect community values.

As noted above, States are able to set the conditions for the entry and stay of aliens. Article 4 of ICESCR provides that the State may subject the rights enunciated in the ICESCR:

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

This amendment may engage the right in Article 6 due to the practical effect of cancelling a visa holder's temporary work visa under paragraph 2.43(1)(s), which would mean the person would not be able to commence, remain or continue their employment in Australia. This discretionary cancellation ground would be available in situations where, at the port of entry, the Minister reasonably believes that the visa holder has contravened subsection 126(2), 128(2), 532(1) or 533(1) of the Biosecurity Act, which includes where the non-citizen fails to comply with the directions of a biosecurity officer in relation to the provision of information or movement of goods, or knowingly provides false or misleading information or documents such as an incoming passenger card.

This amendment seeks to balance the right to protect the Australian community from biosecurity risks with the right to work for individuals who temporarily enter Australia for work purposes. Visa holders must comply with Australian laws and visas are granted on the understanding that not complying with relevant laws may lead to cancellation of the visa under the Migration Act.

As noted above, extensive communications campaigns will ensure that visa holders affected by this Amendment are aware of the relevant biosecurity laws and the possible consequences of the contravention of those laws.

Visa cancellations on the biosecurity-related ground are discretionary meaning that even if the grounds for cancellation exist, the Minister (or delegate) does not have to cancel the visa. Decision makers who are considering the cancellation of a temporary work visa may do so while taking into account a range of factors, including the impact on the Australian employer of the individual. The individual will also be given the opportunity to provide the decision maker with reasons as to why the visa should not be cancelled, such as the individual's circumstances and the consequences of cancelling the visa. The decision maker will consider these factors in relation to the seriousness of the breach as part of their decision-making process. While, if their visa is cancelled, the individual would be deprived of the ability to undertake the work in Australia for which their visa was granted, this would be the consequence of the individual's disregard for Australia's biosecurity laws.

Given that many temporary work visa holders work in sectors directly impacting on biosecurity (eg agricultural labour and animal farming industry), any risks presented by these cohorts need to be effectively mitigated. The ability to cancel visas for egregious or repeat offending would provide a strong deterrent. Further, the available statistical evidence

indicates that less restrictive alternatives like infringements and civil penalties have not altered non-compliant behaviour.

Accordingly, any limitation on the right to work of a person whose visa is cancelled based on the ground in this amendment would be reasonable, necessary and proportionate in the context of protecting Australia from the risk that contraventions of the Biosecurity Act will have on Australia's community, agriculture and biosecurity.

Right to Education

Article 13(1) of the ICESCR states:

The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

The amendment may engage this right where a student visa holder has their visa cancelled as a result of the biosecurity-related cancellation ground being extended to Student visas. Visa cancellation may result in disrupting the individual commencing or continuing their education in Australia.

Decision-makers considering whether cancellation of a student visa is appropriate may take into account Australia's reputation as an international education destination and the significant financial investment made by the student in education fees and charges and living arrangements. The individual will be given the opportunity to provide the decision maker with reasons as to why the visa should not be cancelled, such as the individual's circumstances and the consequences of cancelling the visa for the individual. The decision maker will consider these factors in relation to the seriousness of the breach and will only exercise their discretion to cancel a visa if they are reasonably satisfied that the reasons to cancel the visa are not outweighed by the reasons to not cancel.

As noted above, visa holders are responsible for complying with Australian laws and visas are granted on the understanding that not complying with relevant laws may lead to cancellation of the visa under the Migration Act. Extensive communications campaigns will ensure that visa holders affected by this amendment are aware of the relevant biosecurity laws and the consequences of the contravention of those laws.

A cancellation of a visa only occurs where the decision-maker is satisfied that the nature and seriousness of the offence outweigh matters raised by the individual. Accordingly, any limitation on the right to education of a person whose visa is cancelled on the basis of the ground in this amendment would be reasonable, necessary and proportionate in the context of protecting Australia from the risk that contraventions of the Biosecurity Act will have on the community, agriculture and biosecurity.

Right to liberty

Article 9(1) of the ICCPR states:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

The purpose of the Migration Act is to ‘regulate, in the national interest, the coming into and presence in Australia of non-citizens’. A visa holder whose visa is liable for cancellation may be detained under section 192 of the Migration Act for up to four hours for the purposes of questioning. An officer may then question the individual who has been detained about the person’s visa and matters relevant to that visa. A person whose visa is cancelled becomes an ‘unlawful non-citizen’ under the Migration Act and is liable for removal under s198 and/or immigration detention under s189 of the Migration Act.

Individuals whose visas are cancelled on the biosecurity ground would be refused immigration clearance and returned to their country of origin or citizenship on the next available flight. In instances where it is not feasible to return the individual to their country of origin or citizenship straight away, the visa cancellation may result in immigration detention until it is reasonably practicable to remove the individual.

The cancellation of an individual’s visa in these circumstances is aimed at achieving a legitimate purpose – the protection of the Australian community from biosecurity risks that threaten the agricultural industry, economy and international trading reputation and the integrity of the migration program.

Decision-makers exercising the discretion to cancel a person’s visa will be guided by comprehensive policy guidelines and will take into account the individual’s circumstances, relevant international obligations, seriousness of the breach and the consequences for the individual. The individual will be given the opportunity to provide reasons why the visa should not be cancelled. Judicial review of a decision to cancel is available. That is, procedural fairness is afforded in the visa cancellation process. As such, the visa cancellation decision, and any consequent detention are not arbitrary. Rather they constitute a proportionate response to the individual circumstances of each case.

In light of the above considerations, to the extent the amendments may engage the right under Article 9 of the ICCPR, the proposed amendments are consistent with Article 9(1) of the ICCPR as any detention would be lawful and would not be arbitrary.

Non-refoulement obligations

Article 6 of the ICCPR states:

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

Article 7 of the ICCPR states:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 3(1) of the CAT states:

No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

As a person whose visa is cancelled is liable for removal from Australia under the Migration Act and the amendment means that a greater number of people may be subject to cancellation and hence removal, the amendment potentially engages Article 3(1) of the CAT and Articles 6 and 7 of the ICCPR.

Australia remains committed to its international obligations concerning non-refoulement. There is scope for these obligations to be considered as part of the decision to cancel a visa or through the protection visa process if the person makes a claim for Australia's protection from these kinds of harm. Individuals would not be subject to removal unless and until any claims for protection they may have had been assessed according to law. As such, this amendment does not affect Australia's commitment to complying with its non-refoulement obligations in relation to Article 3 of the CAT and Articles 6 and 7 of the ICCPR.

Expulsion of aliens

Article 13 of the ICCPR states:

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Under international law, Australia has the right to take reasonable steps to control the entry and stay of aliens. Decisions to cancel a visa for contraventions of certain sections of the Biosecurity Act will be made in accordance with the Migration Act and the Regulations including under paragraph 2.43(1)(s).

To the extent individuals will have their visa cancelled which leads to their expulsion, the processes are in accordance with Article 13 in that, prior to a decision to cancel, the visa holder is provided with adequate opportunity to put forward reasons as to why their visa should not be cancelled to a delegated officer. Procedural fairness provisions for visa cancellations are enshrined in Subdivision E of the Migration Act and will apply to these decisions and judicial review in Australian courts is available. As such, this amendment does not infringe on Article 13 of the ICCPR.

Rights relating to children

Article 3(1) of the CRC states:

In all actions concerning children, whether undertaken by a public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

This amendment engages this obligation in relation to any decision to cancel a visa held by the child themselves or a visa held by a parent or family member of the child. In the former circumstance, the effect would be that the child may be detained or removed pursuant to the Migration Act. In the latter, the effect may be that the parent or family member is detained or removed under the Migration Act. Temporary visa holders who are members of the family unit (including spouses, partners and children) of a person whose temporary visa is cancelled will have their visas consequentially cancelled by operation of law. In most cases, this means that a family travelling together will be removed together if the primary holder has their visa cancelled. Of the primary visa grants to international students in 2019-20 (to 29 February 2020), most were to individuals who were adults.

The best interests of the child are *a*, not *the*, primary consideration to be taken into account in decisions affecting a child and may be outweighed by countervailing primary considerations including the safety of the Australian community. The discretionary decision to cancel a visa under paragraph 2.43(1)(s) will allow the decision-maker to appropriately weigh the best interests of any children in Australia against other primary considerations, including the risks to the Australian community from biosecurity hazards. Further, to ensure targeted application of this ground and effective deterrence, there will be policy guidance to assist decision-makers to appropriately consider the best interests of the child and how to weigh these against other primary considerations. Accordingly, on the basis that the best interests of the child are treated as a primary consideration in the exercise of the discretion to cancel a visa, this amendment is consistent with Article 3(1) of the CRC.

Furthermore, this amendment has the practical effect of extending Public Interest Criterion 4013 so that visa applicants who have had a previous Student or Temporary Work visa cancelled under paragraph 2.43(1)(s) in the last three years, cannot satisfy the criterion unless there are compelling reasons to justify the grant of the visa. This may engage the obligation under Article 3 of the CRC to the extent that the visa applicant has family members who are children who reside in Australia to whom Australia's international obligations apply. The inability to have a visa granted for three years would have an impact on the ability of the visa applicant's family members residing in Australia to have physical contact with the visa applicant.

However, under paragraph 4013(1) of Schedule 4 of the Regulations a decision-maker assessing the subsequent visa application has the discretion to grant the visa if satisfied, in the applicant's particular case, that:

- there are compelling circumstances that affect the interests of Australia; or
- compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen, justifying the granting of the visa within three years after the cancellation.

This discretion allows the decision-maker to consider the best interests of an affected child as a primary consideration in determining whether to grant the visa under the exception. This is consistent with the obligation under Article 3 of the CRC.

Rights in relation to family

Article 17(1) of the ICCPR states:

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.'

Article 23(1) of the ICCPR states:

The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 17 of the ICCPR sets out a prohibition on arbitrary and unlawful interference with the family and Article 23 sets out an obligation about the protection of the family. These obligations may be engaged by extending the visa cancellation ground under paragraph 2.43(1)(s) to include student and temporary work visas, to the extent that such visa holders may be detained or removed from Australia because of their visa being cancelled. In some circumstances, the detention or the removal of a person from Australia may result in the separation of family members as a direct consequence of action taken by Australia. In other circumstances, separation of family members will be a consequence of the choices made by family members who continue to have an entitlement to remain in Australia.

To the extent that family members are separated as a direct consequence of action taken by the Commonwealth, it will not be an unlawful or arbitrary interference with the family or otherwise impermissibly limit Articles 17 or 23. These rights can be subject to proportionate and reasonable limitations that are aimed at legitimate objectives. In the case of these measures, these objectives include the protection of the Australian community from biosecurity risks.

As discussed above, extending the ground for cancellation under paragraph 2.43(1)(s) to include student and temporary work visas is necessary as an additional measure to protect the Australian community from biosecurity hazards. Further, the impact of a cancellation decision on the visa holder's family members in Australia will be taken into account as part of the discretionary decision to cancel the visa. While rights relating to family generally weigh against cancellation, these rights do not grant an absolute right to remain in Australia and so they also need to be considered in conjunction with the risk that contraventions of the Biosecurity Act will have on Australia's community, agriculture and biosecurity.

The amendment will also have the practical effect of extending Public Interest Criterion 4013 so that visa applicants who have had a previous Student or Temporary Work visa cancelled under paragraph 2.43(1)(s) in the last three years, cannot satisfy the criterion unless there are compelling reasons to justify the grant of the visa. This will engage the rights under Articles 17 and 23 of the ICCPR to the extent that the visa applicant has family members who reside in Australia to whom Australia's international legal obligations apply. This is because it will affect the ability of the visa applicant's family members residing in Australia to have physical

contact with the visa applicant. The amendments however, do not prevent family members from maintaining contact using other means, in particular those they would ordinarily use to maintain contact whilst not visiting each other.

Further, the exclusion from the grant of a subsequent visa following visa cancellation is temporary and subject to a discretion to grant the visa despite the visa applicant not meeting public interest criterion 4013 where:

- there are compelling circumstances that affect the interests of Australia; or
- compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen, justifying the granting of the visa within three years after the cancellation.

This exception allows for the consideration of these rights in the context of the individual circumstances of particular visa holders. As such, the amendment is consistent with the rights under Articles 17 and 23 of the ICCPR.

Right to privacy

Article 17(1) of the ICCPR states:

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.'

This amendment extends the circumstances in which personal information can be collected and disclosed by customs and biosecurity officers for the purpose of identifying non-citizens who breached the Biosecurity Act. Information sharing and disclosure between Commonwealth officers is subject to the requirements of the *Privacy Act 1988* and will be guided operationally through the development of procedural instructions, including referral guidelines to protect the privacy rights of non-citizens.

Information collection, use and disclosure to allow consideration of the cancellation ground in this amendment is not arbitrary or unreasonable because it is in the public interest that information held by the Department, including information provided to the Department by other agencies, be effectively utilised to arrive at lawful and merit-based decisions. Further, it supports the legitimate objective of upholding the migration and biosecurity frameworks as such information could be used to protect the safety of the community where a person has provided false or misleading information or not disclosed relevant information.

The collection, use and disclosure of personal information, in accordance with the requirements of the *Privacy Act 1988*, for the purpose of identifying non-citizens who contravene the Biosecurity Act, is a reasonable and proportionate measure to achieve the intended operation of cancellation grounds for the purpose of protecting the Australian community. Any interference with the privacy of the person who has contravened the Biosecurity Act, in order to help identify them, would therefore not be unlawful or arbitrary under Article 17 of the ICCPR.

Conclusion

The changes made by this amendment are for the legitimate purpose of protecting the Australian community from the risk of harm posed by biosecurity threats. Therefore, the amendment is compatible with human rights as, to the extent it may limit some human rights, those limitations are reasonable, necessary and proportionate to its objective.

Details of the Migration Amendment (Biosecurity Contraventions) Regulations 2020

Section 1 – Name

This section provides that the title of the Regulations is the *Migration Amendment (Biosecurity Contraventions) Regulations 2020* (the Regulations).

Section 2 – Commencement

Subsection 2(1) provides that each provision of the Regulations specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

The table states that the Regulations commence on 1 January 2021.

A note clarifies that this table relates only to the provisions of this instrument as originally made. It will not be amended to deal with any later amendments of this instrument.

Subsection 2(2) provides that any information in column 3 of the table is not part of the Regulations. Information may be inserted in this column, or information in it may be edited, in any published version of this instrument. Column 3 of the table provides the date/details of the commencement date.

The purpose of this section is to provide for when the amendments made by the Regulations commence.

Section 3 – Authority

This section provides that the Regulations are made under the *Migration Act 1958* (the Migration Act).

Section 4 – Schedules

The purpose of this section is to provide for how the amendments in these Regulations operate.

Schedule 1 – Amendments

Migration Regulations 1994

Item 1 – Subparagraphs 2.43(1)(s)(i) to (v)

This item repeals subparagraphs 2.43(1)(s)(i) to (v) and inserts new subparagraphs 2.43(1)(s)(i) to (xviii). The subparagraphs prescribe the visa subclasses that are subject to discretionary cancellation under the cancellation ground set out in paragraph 2.43(1)(s) of the *Migration Regulations 1994* (the Migration Regulations).

The cancellation ground at paragraph 2.43(1)(s) allows cancellation of visas where:

- the holder is in Australia and has not been immigration cleared; and
- the Minister reasonably believes that the visa holder has contravened subsection 126(2), 128(2), 532(1) or 533(1) of the *Biosecurity Act 2015* (the Biosecurity Act).

The visa cancellation ground is enlivened by any attempt to mislead or deceive biosecurity officers. In summary, the relevant provisions of the Biosecurity Act have the following effect:

- Subsection 126(2) – A person who is required, by a biosecurity officer, to answer questions about goods, must comply with the requirement;
- Subsection 128(2) – A person must comply with a direction by a biosecurity officer in relation to the movement of goods;
- Subsection 532(1) – A person must not knowingly give false or misleading information for the purpose of the Biosecurity Act; and
- Subsection 533(1) – A person must not knowingly produce a false or misleading document for the purpose of the Biosecurity Act.

The visa cancellation ground gives the Minister (or the Minister's delegate) the discretion to cancel a prescribed visa at the point of arrival in cases where, for example, there has been an attempt to deceive a biosecurity officer about the presence of prohibited items in the person's luggage or possessions. The Minister (or the Minister's delegate) must have a reasonable belief that the contravention has occurred. This is a higher standard than reasonable suspicion. The higher standard is appropriate because the decision-maker will be responding to an alleged contravention that has occurred immediately before the referral for possible visa cancellation. The referral will usually be supported by an infringement notice issued by a biosecurity officer under the Biosecurity Act alleging a contravention of one of the four provisions. To issue an infringement notice, the biosecurity officer must have reasonable grounds for believing that the offence has occurred. In the context of an airport luggage inspection, the facts will usually be clear and uncontested.

In making a decision whether to cancel the visa, the decision-maker will provide procedural fairness to the visa holder and will weigh up a number of factors, including the seriousness of the breach, the potential threat posed by the prohibited item(s), the personal circumstances of the visa holder, and the consequences of visa cancellation for that person and others who may be affected.

In accordance with the merits review entitlements under the Migration Act, there is no provision for merits review by the Administrative Appeals Tribunal (AAT) if the visa is cancelled in immigration clearance. This is because the purpose of visa cancellation in immigration clearance is to provide for the immediate removal of the person from Australia.

The cancellation ground previously applied to the following visitor visas:

- Subclass 600 (Visitor) visa;
- Subclass 601 (Electronic Travel Authority) visa;
- Subclass 651 (eVisitor) visa;
- Subclass 676 (Tourist) visa;
- Subclass 771 (Transit) visa.

The effect of the amendment is to expand the list of visas that may be cancelled, to include the following temporary work visas and student visas:

- Subclass 400 (Temporary Work (Short Stay Specialist)) visa;
- Subclass 403 (Temporary Work (International Relations)) visa;
- Subclass 407 (Training) visa;
- Subclass 408 (Temporary Activity) visa;
- Subclass 417 (Working Holiday) visa;
- Subclass 457 (Temporary Work (Skilled)) visa;
- Subclass 462 (Work and Holiday) visa;
- Subclass 476 (Skilled–Recognised Graduate) visa;
- Subclass 482 (Temporary Skill Shortage) visa;
- Subclass 485 (Temporary Graduate) visa;
- Subclass 500 (Student) visa;
- Subclass 590 (Student Guardian) visa;
- Subclass 988 (Maritime Crew) visa.

Contraventions of the Biosecurity Act continue to pose an unacceptable threat to Australia’s agriculture industry. African Swine Fever and Foot and Mouth Disease continue to be detected in meat products intercepted at airports. Studies have estimated \$50 billion of economic losses over ten years if there was a large to medium outbreak of Foot and Mouth Disease in Australia. In light of the ongoing risks, it is appropriate to strengthen the compliance tools available to deter and respond to behaviour that is in contravention of Australia’s biosecurity laws. The original cancellation power in subregulation 2.43(1)(s), when created on 17 April 2019, targeted visitor visa holders because of the high volume of visitors to Australia each year and because sanctions other than visa cancellation are unlikely to be effective. It was noted, at that time, that other visa holders and Australian citizens who contravene the Biosecurity Act will continue to be dealt with via infringement notices, civil penalties, and criminal prosecutions.

However, in view of the scale of the threat and the need to strengthen deterrence, it is appropriate to include other temporary visas within the scope of the discretionary cancellation power. Whether the cancellation of a particular temporary work visa or a student visa on arrival at an airport in Australia is appropriate will depend on a number of factors as noted above. The Australian Government’s intention and expectation is that, during the initial six months from commencement of the amendments on 1 January 2021, there will be an emphasis on education and counselling, with cancellation occurring only in egregious cases. This cautious and fair approach recognises that temporary workers and international students are important to Australia and have more substantial connections with Australia and Australians than most visitor visa holders. Visa cancellation officers will be provided with policy guidance about this phased implementation of the new regime.