EXPLANATORY STATEMENT

Issued by the Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs

Australian Citizenship Act 2007

Migration Act 1958

Home Affairs Legislation Amendment (2021 Measures No. 2) Regulations 2021

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.

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.

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.

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.

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

The *Home Affairs Legislation Amendment (2021 Measures No. 2) Regulations 2021* (the Regulations) amend the *Migration Regulations 1994* (the Migration Regulations) and *Australian Citizenship Regulation 2016* (the Citizenship Regulation) as follows:

Amendments to the Migration Regulations 1994

Schedule 1 – Allow applications for certain skilled visas by persons in Australia under section 48 – amends regulation 2.12 to prescribe three skilled visa classes as visas for which an application may be made in Australia by applicants who have been refused a visa or had a visa cancelled while in Australia and are prevented by section 48 of the Migration Act from applying for a visa other than a prescribed visa while remaining in Australia. This amendment facilitates applications in Australia by applicants who are prevented from leaving due to COVID-19 related travel restrictions but meet all other requirements for making an application for the visa.

Schedule 2 – Payment of citizenship fees in foreign currencies – makes routine amendments to incorporate instruments made under the Migration Regulations that update the places and currencies in which citizenship application fees may be paid and the relevant exchange rates.

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.

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 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 reference for Schedule 1 is 43962 and for Schedule 2 is 42679.

In relation to Schedule 1, no consultations external to the Department of Home Affairs (the Department) were considered to be appropriate or required. The amendments are beneficial to affected applicants and reflect COVID-19 concessions. In relation to Schedule 2, no consultation was undertaken as the amendments do not substantially alter existing arrangements. This accords with subsection 17(1) of the *Legislation Act 2003* (Legislation Act).

Schedule 1 to the Regulations commence on 13 November 2021 to align with updates to Department systems. Schedule 2 to the Regulations commence on 1 January 2022, at the same time as the incorporated instruments.

Further details of the Regulations are set out in Attachment C.

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

ATTACHMENT A

AUTHORISING PROVISIONS

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.

Subsection 504(1) of the *Migration Act 1958* (the Migration Act) relevantly provides that the Governor-General may make regulations (the 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.

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.

In addition, the following provision of the Migration Act is relevant:

- section 48, which provides that a non-citizen who does not hold a substantive visa and, after last entering Australia, was refused or cancelled a visa may, subject to the regulations, apply for a visa of a class prescribed for the purpose of the section, but not for a visa of any other class.

ATTACHMENT B

Statement of Compatibility with Human Rights

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

Home Affairs Legislation Amendment (2021 Measures No 1) Regulations 2021

This Disallowable Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of Schedule 1 – Allow applications for certain skilled visas by persons in Australia under section 48

Section 48 of the *Migration Act 1958* (the Migration Act) prevents certain visa applications being lodged by a non-citizen in Australia who has had a visa cancelled or refused in Australia and does not hold a substantive visa, except for a visa that is prescribed for the purposes of section 48. The operation of this bar is intended to prevent non-citizens from lodging repeat applications to delay their departure from Australia. The Migration Act does not allow for the section 48 bar to be waived in any circumstances. A person who is affected by the section 48 bar and who wishes to apply for a visa that is not a prescribed visa for this purpose must leave Australia and make any further applications for a visa for Australia from outside Australia.

Regulation 2.12 of the *Migration Regulations 1994* (the Migration Regulations) prescribes a list of visas that a person subject to section 48 is permitted to apply for while remaining in Australia. This list includes protection visas, partner visas, bridging visas and a small number of other visas.

The purpose of this Disallowable Legislative Instrument is to amend regulation 2.12 to prescribe the following skilled visas in the list of visas for which persons subject to section 48 may apply:

- Subclass 190 – Skilled Nominated (Permanent);
- Subclass 494 – Skilled Employer Sponsored Regional (Provisional); and
- Subclass 491 – Skilled Work Regional (Provisional).

This amendment recognises that the travel limitations imposed by many countries in response to the COVID-19 pandemic, may have affected some non-citizens in Australia who are barred by section 48 of the Act from making an application for a visa while they remain in Australia but who have been nominated or sponsored for one of the above visas.

The changes to the Migration Regulations expands the list of exempted classes of visas prescribed in regulation 2.12 enabling regional and nominated skilled visa applications to be made by people who are affected by the bar, but who may meet the criteria for the grant of one of these visas. These applications may also be made by members of the family unit of the person who has been nominated.

Human rights implications

This Disallowable Legislative Instrument engages the following rights:

- the right to work in Article 6(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and
- the right to freedom of movement in article 12 of the International Covenant on Civil and Political Rights (ICCPR).

Right to work

This Disallowable Legislative Instrument engages Article 6(1) of the ICESCR. Article 6(1) states:

> *The States Parties to the present Covenant recognise 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 Disallowable Legislative Instrument positively engages the right to work of some non-citizens in Australia who are barred by section 48 of the Act from making an application for a visa while remaining in Australia as a result of COVID-19, but who have been nominated by an employer or a State or Territory Government, and in some cases a family member, for a visa to remain and work in Australia. The amendments made by this Disallowable Legislative Instrument allow those non-citizens to apply for a visa which permits them to work (and/or continue working) in Australia without having to leave Australia to apply to for that visa.

The right to freedom of movement

Article 12 of the ICCPR states:

> *1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.*
>
> *2. Everyone shall be free to leave any country, including his own.*
>
> *3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (order public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognised in the present Covenant.*
>
> *4. No one shall be arbitrarily deprived of the right to enter his own country.*

The right to freedom of movement includes the right to move freely within a country for those who are lawfully within the country.

Prescribing three additional visa subclasses that a person who is barred by section 48 of the Migration Act can apply for, gives those persons more options to remain in Australia and not have to depart Australia to make another visa application. Two of these three subclasses are regionally-focussed visas.

People who choose to apply for and are granted one of the regionally-focussed visas are expected to live, work and study in a designated regional area. Currently this is everywhere in Australia with the exception of certain major metropolitan cities. However they are free to visit other areas of Australia. Although it is a requirement of these visas to be nominated by a state/territory or a regional employer, or, in some cases, by a family member who resides in a regional area, it is the applicant's decision to do work for an employer who is located in certain areas.

The amendments allow people who already have a nomination for these visas to continue with their applications, despite the bar in section 48 of the Migration Act. These people have already chosen to work in these locations and they are not limited in other movement around the country.

Persons who are barred by section 48 of the Migration Act but who do not wish to live, work and study in a regional area may also seek to apply for one of the other visas which are prescribed in regulation 2.12, including the third visa being added by this Disallowable Legislative Instrument, the subclass 190 visa, which does not have a regional focus.

As such, the ability to apply for a regionally-focussed visa is additional to the other options that a person who is barred by section 48 of the Migration Act has for applying for a visa while they remain in Australia. It is expected that the persons who choose to pursue this option will be those who are already living and/or working in a regional area. The amendments therefore do not limit the freedom of movement of persons who are barred by section 48 of the Act.

Overview of Schedule 2 – Payment of citizenship fees in foreign currencies

Schedule 2 of the *Home Affairs Legislation Amendment (2021 Measures No. 2) Regulations 2021* (the Amendment Regulations) amends the *Australian Citizenship Regulation 2016* (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 2 to the Amendment Regulations amends subsection 16(7) of the Citizenship Regulation to incorporate, by reference, 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.

Purpose of amendments

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 name in subsection 16(7).

As such, the amendments made by this Disallowable Legislative Instrument are technical in nature, and do not substantially alter existing arrangements.

Human rights implications

This Disallowable Legislative Instrument does not engage any of the applicable rights or freedoms.

Conclusion

The Disallowable Legislative Instrument is compatible with human rights.

The Hon. Alex Hawke MP,

Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs

ATTACHMENT C

Details of the *Home Affairs Legislation Amendment (2021 Measures No. 2) Regulations 2021*

Section 1 – Name

This section provides that the name of the instrument is the *Home Affairs Legislation Amendment (2021 Measures No. 2) Regulations 2021* (the Regulations).

Section 2 – Commencement

This section provides for the commencement of the instrument.

Schedule 1 commences on 13 November 2021.
Schedule 2 commences on 1 January 2022.

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 the regulations operate.

Schedule 1 – Allow applications for certain skilled visas by persons in Australia under section 48

Migration Regulations 1994

Item [1] – After paragraph 2.12(r)

This item adds new paragraphs 2.12(s), (t) and (u) to regulation 2.12 of the Migration Regulations.

The new paragraphs refer to Skilled – Nominated (Permanent)(Class SN) visas, Skilled Work Regional (Provisional)(Class PS) visas, and Skilled Employer Sponsored (Provisional)(Class PE) visas, respectively. The effect of the amendment is to prescribe visas of these classes for the purposes of section 48 of the Migration Act.

Section 48 of the Migration Act provides that a non-citizen in the migration zone who does not hold a substantive visa and after last entering Australia was refused a visa or held a visa that was cancelled, may, subject to the regulations, apply for a visa of a class prescribed for the purposes of section 48 but not for a visa of any other class.

Applicants for visas of Skilled – Nominated (Permanent)(Class SN) or Skilled Work Regional (Provisional)(Class PS) are required to be nominated by a State or Territory government agency and must be invited to apply for the visa. Applicants for visas of Skilled Employer Sponsored (Provisional)(Class PE) must be nominated by a regional Australian

business. These applicants therefore complement, without displacing, job opportunities for Australians and as skilled migrants they are prioritised in areas where there is a need.

This amendment facilitates applications by affected non-citizens while they remain in Australia and are unable to leave to make an application overseas due to COVID-19 related travel restrictions or for other reasons.

Schedule 2 – Payment of citizenship fees in foreign currencies

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 (Payment of Visa Application Charges and Fees in Foreign Currencies) Instrument (LIN 22/001) 2022* as in force on 1 January 2022'.

The purpose of this amendment is to incorporate by reference a new instrument titled *Migration (Payment of Visa Application Charges and Fees in Foreign Currencies) Instrument (LIN 22/001) 2022.* This instrument, made under paragraph 5.36(1A)(a) of the *Migration Regulations 1994* (the Migration Regulations), commences on 1 January 2022 and replaces the *Migration (Payment of Visa Application Charges and Fees in Foreign Currencies) Instrument (LIN 21/003) 2021 (No. 2).*

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 (Places and Currencies for Paying of Fees) Instrument (LIN 22/002) 2022* as in force on 1 January 2022'.

The purpose of this amendment is to incorporate by reference a new instrument titled *Migration (Places and Currencies for Paying of Fees) Instrument (LIN 22/002) 2022.*This instrument, made under paragraphs 5.36(1)(a) and (b) of the Migration Regulations, commences on 1 January 2022 and replaces the *Migration (Places and Currencies for Paying of Fees) Instrument (LIN 21/004) 2021 (No. 2).*

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 (Payment of Visa Application Charges and Fees in Foreign Currencies) Instrument (LIN 22/001) 2022* and the *Migration (Places and Currencies for Paying of Fees) Instrument (LIN 22/002) 2022* are both 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 are, therefore, incorporated in the Citizenship Regulation by these 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 an 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 (being 1 January 2022).

Both the *Migration (Payment of Visa Application Charges and Fees in Foreign Currencies) Instrument (LIN 22/001) 2022* and the *Migration (Places and Currencies for Paying of Fees) Instrument (LIN 22/002) 2022* will be freely available online on the Federal Register of Legislation.

Item [2] – In the appropriate position in Part 4

This item inserts section 30 in Part 4 of the Citizenship Regulation.

Section 30 provides that the amendments apply in relation to new applications made on or after 1 January 2022.