

EXPLANATORY STATEMENT

Issued by authority of the Minister for Immigration, Citizenship and Multicultural Affairs

Migration Regulations 1994

Migration (COVID-19 Pandemic event for Temporary Activity (Subclass 408) visa) Repeal Instrument (LIN 24/003) 2024

- 1 The instrument, departmental reference LIN 24/003, is made under paragraph 408.229(b) of Schedule 2, and subclause 9204(2) of Schedule 13, to the *Migration Regulations 1994* (the Migration Regulations).
- 2 The instrument repeals *Migration (COVID-19 Pandemic event for Temporary Activity (Subclass 408) visa) Instrument (LIN 22/046) 2022* (LIN 22/046) (F2022L00316) in accordance with subsection 33(3) of the *Acts Interpretation Act 1901* (the Acts Interpretation Act). That subsection provides that a power to make a legislative instrument includes a power to amend or repeal that instrument in the same manner, and subject to the same conditions, as the power to make the instrument.
- 3 The instrument commences on 1 February 2024. It is a legislative instrument for the *Legislation Act 2003* (the Legislation Act).

Purpose

Background – LIN 22/046

- 4 LIN 22/046, made under subregulation 2.07(5) of the Migration Regulations, specifies for paragraphs 408.229(b) and (c) of Schedule 2 and subclause 9204(2) of Schedule 13 to the Migration Regulations, the event known as the ‘COVID-19 pandemic’ as an ‘Australian Government endorsed event’ (AGEE) and classes of persons in relation to the event who may be eligible for a Subclass 408 (Temporary Activity) visa (Subclass 408 visa).
- 5 An applicant seeking to satisfy the primary criteria for the grant of a Subclass 408 visa must be a person to whom a clause in subdivision 408.2 of Schedule 2 to the Migration Regulations applies. Clause 408.229 will apply to an applicant if that applicant seeks to enter or remain in Australia to undertake work directly associated with the AGEE. To meet this criterion, the AGEE must be specified in a legislative instrument made by the Minister and the applicant is in a class of persons specified in the instrument in relation to the event for the purposes of paragraphs 408.229(b) and (c) of Schedule 2 to the Migration Regulations.
- 6 Subclause 9204(2) of Schedule 13 to the Migration Regulations provides the Minister may, by legislative instrument, specify an event for the purposes of paragraph (b) of the definition of ‘COVID-19 Pandemic event 408 visa’ (Pandemic event visa) in subclause 9204(1) to the Migration Regulation, (which means, if the event is specified for the purposes of paragraph 408.229(b) of Schedule 2 to the Migration Regulations).

Closure of the Pandemic event visa

- 7 The Government announced on 31 August 2023 that the Pandemic event visa will close to all applicants from February 2024. The closure of the Pandemic event visa will better regulate Australia's visa system now that the circumstances that drove the operation of the visa no longer exist.
- 8 The purpose of the instrument is to repeal LIN 22/046 in order to implement this decision. After LIN 22/046 is repealed, the COVID-19 pandemic will no longer be a specified event for the purposes of paragraph 408.229(b) of Schedule 2 and subclause 9204(2) of Schedule 13 to the Regulations.

Consultation

- 9 The Department of Home Affairs has engaged with external stakeholders following the Government's 31 August 2023 announcement of the closure of the Pandemic event visa, to advise them of the changes. The Department consulted relevant Commonwealth departments and agencies through a whole of government process to inform the Government's decision to close the Pandemic event visa.
- 10 The Office of Impact Analysis (OIA) was consulted and considered that the measures in this instrument are unlikely to have more than a minor or machinery regulatory impact and therefore an Impact Analysis is not required. The OIA reference number is OIA23-05026.

Details of the Instrument

- 11 Section 1 provides the name of the instrument.
- 12 Section 2 provides that the instrument commences on 1 February 2024.
- 13 Section 3 provides for the instrument being made under paragraph 408.229(b) of Schedule 2, and subclause 9204(2) of Schedule 13, to the *Migration Regulations 1994*.
- 14 Section 4 provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in each Schedule of this instrument and any other item in a Schedule to this instrument has effect according to its terms.
- 15 Schedule 1 to the instrument repeals the *Migration (COVID-19 Pandemic event for Temporary Activity (Subclass 408) visa) Instrument (LIN 22/046) 2022*.

Parliamentary scrutiny etc.

- 16 The instrument is subject to disallowance under section 42 of the Legislation Act. A Statement of Compatibility with Human Rights has been prepared in relation to the instrument, and provides that the instrument is compatible with human rights as it promotes the right to equality and non-discrimination and the right to work to temporary visa holders, and, to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate. The Statement is included at **Attachment A** to this explanatory statement.
- 17 The instrument is made by a delegate of the Minister, in accordance with paragraph 408.229(b) of Schedule 2 and subclause 9204(2) of Schedule 13 to the Migration Regulations.

Statement of Compatibility with Human Rights

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

Migration (COVID-19 Pandemic event for Temporary Activity (Subclass 408) visa) Repeal Instrument (LIN 24/003) 2024

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 the Disallowable Legislative Instrument

The *Migration Regulations 1994* (the Migration Regulations) set out requirements for the grant of a Subclass 408 (Temporary Activity) visa. One stream of this visa permits entry and stay in Australia for the purpose of undertaking work associated with an ‘Australian Government endorsed event’ (AGEE), where the AGEE is specified by an instrument. During the COVID-19 pandemic, the *Migration (COVID-19 Pandemic event for Temporary Activity (Subclass 408) visa) Instrument (LIN 22/046) 2022* (LIN 22/046) (F2022L00316) specified the event known as the ‘COVID-19 pandemic’ as an AGEE and also the classes of persons in relation to the event who may be eligible for a Subclass 408 visa. Subclass 408 visas which are granted on the basis of the COVID-19 pandemic event being specified as an AGEE are commonly referred to as ‘Pandemic Event visas’. Pandemic Event visas were usually granted for a duration of 12 months.

This Disallowable Instrument, the *Migration (COVID-19 Pandemic event for Temporary Activity (Subclass 408) visa) Repeal Instrument (LIN 24/003) 2024* repeals LIN 22/046. This has the effect of closing the Pandemic Event visa to all applicants from 1 February 2024.

The Pandemic Event visa opened in April 2020. The purpose of the visa was to enable temporary migrants to lawfully remain in Australia while the practical difficulties of travel during the COVID-19 pandemic, such as infrequent and expensive flights, limited their ability to leave Australia. It also helped to provide a temporary workforce to address labour shortages in critical sectors due to the pandemic. Given that international travel has largely returned to normal and new migrant arrivals are replacing outgoing workers, the original intent of having the COVID-19 pandemic as a specified event for the AGEE stream of the Subclass 408 visa is no longer relevant.

On 31 August 2023, the Minister for Home Affairs and the Minister for Immigration, Citizenship and Multicultural Affairs jointly announced the staged closure of the Pandemic Event visa to new or further applications, with a closure on 2 September 2023 to applicants who have not previously held a Pandemic Event visa and the full closure by 1 February 2024. The impact on temporary visa holders in the Australian community is being mitigated by closing the Pandemic Event visa in these two stages.

All existing visa holders can remain on their existing visa until it expires as the closure applies to new/further visa applications. Those who hold a Pandemic Event visa that expired or is expiring on or before 28 February 2024 have had the opportunity to apply for a further Pandemic Event visa up until the visa is, by way of this instrument, fully closed on 1 February 2024. Extending the time

before fully closing the visa to further applications has allowed existing Pandemic Event visa holders to remain working in Australia and have time to consider their options. During this period, they have been able to make arrangements to apply for other visas or depart Australia before their current visa expires. The end date for full closure has been chosen to give suitable warning to employers and visa holders while considering labour market impact, as well as the Department's work to return visa applicants and visa holders to regular visa pathways and a well-managed migration system following the COVID-19 pandemic.

As well as removing a COVID-19 pandemic-related visa product that is no longer fit for purpose, the repeal of LIN 22/046 will also help to reduce complexity in Australia's visa system. As a result, closure of the Pandemic Event visa will contribute to a well-managed migration system that better regulates visa pathways and normalises the flow of temporary migrants in and out of Australia.

This Disallowable Legislative Instrument also has the effect of repealing LIN 22/046 for the purpose of clause 9204 of Schedule 13 to the Migration Regulations, which contains transitional provisions relating to the Working Holiday Subclass 417 and 462 visas. The repeal of LIN 22/046 does not substantively affect holders of these visas as the relevant provisions, which relate to specified work by Working Holiday visa holders for the purpose of subsequent visas, continue to operate in the absence of an instrument relating to Subclass 408 visas being in effect.

Human rights implications.

This Disallowable Legislative Instrument may engage:

- The rights of equality and non-discrimination in Articles 2 and 26 of the *International Covenant on Civil and Political Rights* (ICCPR) and Article 2 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)
- The right to work in Article 6 of the ICESCR.

Article 2(1) of the ICCPR states:

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 of the ICCPR states:

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

Article 2(2) of the ICESCR states:

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

In its General Comment 18, the UN Human Rights Committee (UNHRC) stated that:

The Committee observes 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 [ICCPR].

Similarly, in its General Comment on Article 2 of the ICESCR, the UN Committee on Economic, Social and Cultural Rights has stated (at 13) that:

Differential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective. This will include an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the [ICESCR] rights and solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realized and the measures or omissions and their effects.

Neither the ICCPR nor the ICESCR give a right for non-citizens to enter Australia. The UNHRC, 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 and stay of non-citizens in Australia, and does so on the basis of reasonable and objective criteria.

The full closure of Pandemic Event visa will mean some temporary visa holders who have been part of the Australian community since the pandemic will no longer be able to apply for a further Pandemic Event visa to enable them to continue living and working in Australia and will have to apply for a different visa if they wish to continue to do so. This may engage the above rights relating to equality and non-discrimination including in relation to the right to work in Article 6 of the ICESCR.

Temporary visa holders are aware that further stay beyond the duration of their current visa requires them to meet the requirements for a further visa. In addition, the Pandemic Event visa was intended as a temporary measure to assist visa holders and employers during the international travel disruptions caused by the COVID-19 pandemic. As these disruptions have now ended, it is reasonable to close the Pandemic Event visa to new/further applications. Visa holders in Australia who wish to continue living and working in Australia have a range of visa options depending on their circumstances, including, the Temporary Graduate visa for students who complete their studies, Working Holiday visas, Temporary Skills Shortage visa or other skilled visas.

These visa options will help ensure the integrity of the migration system, by ensuring that visa applicants apply for a visa which best reflects the purpose of their stay and which affords protections relevant to that purpose, such as safeguards relating to migrant worker exploitation. For example, the

international education industry has raised concerns that an increasing number of former student visa holders, such as those who enrolled in English Language Intensive Courses for Overseas Students, were using the Pandemic Event visa to work full time rather than study. This situation leaves these visa holders open to potential exploitation by unscrupulous employers.

The closure of the Pandemic Event visa has also been supported by targeted communications to ensure that eligible visa holders are aware of the closure and can make suitable arrangements to utilise other regular migration products to remain working in Australia and/or pursue a visa pathway to permanent residence and citizenship. The communications surrounding the closure of the visa have been extensive with the Department of Home Affairs emailing Pandemic Event visa holders in Australia with information on the closure between 18 October 2023 and 3 November 2023. These emails advised applicants of the closure of the Pandemic Event visa, confirming that new applications will only be available to existing holders and provided information on application requirements. The emails also advised that applicants will not be able to apply for a new Pandemic Event visa from 1 February 2024, and provided information to assist them to explore other options to remain in Australia or make arrangements to depart Australia before their visa expires.

The closure of the Pandemic Event visa therefore does not present an unreasonable limitation on the rights of equality and non-discrimination and the right to work of current Pandemic Event visa holders as:

- they will be able to remain in Australia on their current Pandemic Event visa (and any subsequently-granted Pandemic Event visa that they applied for prior to 1 February 2024) until it expires;
- those who wish to continue living and working in Australia beyond that point may apply for a visa suitable to the purpose of their stay and their circumstances;
- the closure has been well-publicised to give visa holders and employers the opportunity to make further arrangements; and
- the closure is appropriate noting the temporary nature of the travel disruptions caused by the COVID-19 pandemic and the desirability to return temporary visa holders to normal visa pathways which are more appropriate to their circumstances.

Conclusion

This Disallowable Legislative Instrument is compatible with human rights as, to the extent it may limit some human rights, those limitations are reasonable, necessary and proportionate to legitimate objectives.

The Honourable Andrew Giles MP

Minister for Immigration, Citizenship and Multicultural Affairs