

EXPLANATORY STATEMENT

Issued by the Minister for Immigration and Multicultural Affairs

Migration Act 1958

Migration Amendment (Immigration Clearance Exemption for Transiting Aircraft Crew) Regulations 2024

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.

The *Migration Amendment (Immigration Clearance Exemption for Transiting Aircraft Crew) Regulations 2024* (the amending Regulations) amend the *Migration Regulations 1994* (the Migration Regulations) by inserting a new item in Part 2 of Schedule 9 to the Migration Regulations, allowing transiting aircraft crew with a turnaround departure time of 90 minutes to be exempt from the requirement to be immigration cleared under section 166 of the Migration Act.

Section 166 of the Migration Act requires any person entering into Australia to present a form of evidence of identity and any information as required under the Migration Act or the Migration Regulations to a clearance authority without unreasonable delay. The existing measures under section 166 of the Migration Act mean that all transiting aircraft crews scheduled to depart in 90 minutes must disembark the aircraft, proceed to airport terminal for immigration clearance, exit security check points, then immediately re-enter and go through immigration clearance again for departure, regardless of their time spent in Australia.

Subsection 168(3) of the Migration Act subsequently provides that a person in a prescribed class is not required to comply with section 166 of the Migration Act. Regulation 3.06 of the Migration Regulations, provides that each class of person set out in Part 2 of Schedule 9 to the Migration Regulations is prescribed.

To minimise disruption of flight schedules and to ensure all international commercial aircraft are able to meet their departure times without any undue or unreasonable delay, the amending Regulations will allow transiting aircraft crew to not be immigration cleared as required under section 166 of the Migration Act, so long as they do not leave the airport lounge except to continue their departure journey within 90 minutes of the arrival into Australia.

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

The matters dealt with in the amending 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 immigration clearance requirements in the Migration

Regulations rather than in the Migration Act itself, with the Migration Act also providing such authority in the provisions listed in [Attachment A](#).

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 effectively manage the operation of a citizen or a non-citizen's entry into Australia and respond quickly to emerging needs.

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

The Office of Impact Analysis (OIA) has been consulted in relation to the amendments, providing that no Impact Analysis is required. OIA consultation reference number is OIA24-06763.

Section 17 of the *Legislation Act 2003* (the Legislation Act) provides that the rule-maker must be satisfied that there has been undertaken any consultation that is appropriate and reasonably practicable before making a legislative instrument. In developing the amending Regulations, the Department of Home Affairs consulted with the Australian Federal Police, the Department of Agriculture, Fisheries and Forestry and affected aviation industry stakeholders. Feedback on the proposed changes was positive, with minimal risks identified.

The Migration Regulations are exempt from sunseting under table item 38A of section 12 of the *Legislation (Exemptions and Other Matters) Regulations 2015*. The Migration Regulations are exempt from sunseting on the basis that the repeal and remaking of the Migration Regulations:

- is unnecessary as the Migration Regulations are regularly amended numerous times each year to update policy settings for immigration programs; and
- would demand complicated and costly training and operational changes that would impose significant strain on Government resources and the Australian public for insignificant gain, while not advancing the aims of the Legislation Act.

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

The amending Regulations commence on the day after registration on the Federal Register of Legislation. Further details of the amending Regulations are set out in [Attachment C](#).

ATTACHMENT A

Subsection 504(1) of the *Migration Act 1958* (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 168(3) of the Migration Act is also relevant. This subsection provides that regulations may prescribe a class of persons not required to comply with immigration clearance requirements under section 166 of the Migration Act.

Statement of Compatibility with Human Rights

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

Migration Amendment (Immigration Clearance Exemption for Transiting Aircraft Crew) Regulations 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 Amendment (Immigration Clearance Exemption for Transiting Aircraft Crew) Regulations 2024* (Instrument) amends the *Migration Regulation 1994* (the Regulations) to include commercial aircrew arriving into Australia who are then scheduled to depart Australia within 90 minutes (as transit or turnaround crew) into Part 2 of Schedule 9 to the Migration Regulations.

This Instrument is made under the *Migration Act 1958* (the Act).

The Act and the Regulations provide the legislative authority to undertake border clearance processes when travellers enter Australia. Section 166 of the Act provides that all travellers entering Australia must be immigration cleared as soon as practicable, unless a legislated exemption applies.

Travellers listed in Part 2 of Schedule 9 for whom special clearance arrangements apply are not required to comply with border clearance provisions outlined in section 168 of the Act.

Regulation 3.06 provides the exemption for each class of persons listed in Part 2 of Schedule 9. Currently, aircrew are not a prescribed class of persons in the list.

This Instrument will prescribe aircrew who are scheduled to depart Australia within 90 minutes of arrival into Australia as a class of persons for the purpose of subsection 168(3) of the Act. Any crew that fall outside the criteria will be out of scope.

At present, to comply with section 166 requirements, aircrew must disembark the aircraft on arrival and present to the primary line inside the terminal for arrival immigration and border clearance, and then present to the Australian Border Force (ABF) again upon departure.

Currently, an interim arrangement is in place where the ABF attend the aircraft gate to conduct immigration clearance without aircrew having to present to the ABF immigration and customs clearances line. This short term arrangement was put in place during the COVID-19 Pandemic, and it was agreed that it was to continue while a longer term legislative solution was considered.

This Instrument is needed to ensure aircrew arriving and departing Australia on a commercial aircraft within 90 minutes are exempt from complying with section 166 requirements. Arriving aircrew will have to disembark the aircraft but are not required to proceed to the ABF control point for face-to-passport checks and inwards and outwards clearance. Rather the crew will be able to remain within the airport transit lounge. This will accommodate the airlines flight scheduling and crew rostering

requirements due to short turnaround times between arrival and departure flights, but will maintain security and integrity of the border. This will also assist the ABF with diverting staffing resources to focus on areas of high concern and risk.

Given the amending Instrument is to only exempt the aircrew from complying with the immigration clearance requirements, all other entry and pre-entry requirements, including pre-arrival and departure crew reporting, will continue to apply. Should the ABF need to confirm the crew's identity on arrival, ABF has the power to request the crew to produce identity documents under section 225 of the Act.

Human rights implications

This Instrument does not engage any of the applicable rights or freedoms. The cohort of crew will be able to remain in the airport transit lounge area but will be required to comply with other aircrew reporting requirements before they board their departing flight. Should the crew want to leave the transit lounge area they can do so, but will be required to undertake inwards and outwards immigration and customs clearance as normal.

Conclusion

This Instrument is compatible with human rights as it does not raise any human rights issues.

The Hon Tony Burke MP
Minister for Immigration and Multicultural Affairs

Details of the Migration Amendment (Immigration Clearance Exemption for Transiting Aircraft Crew) Regulations 2024

Section 1 – Name

This section provides that the title of this instrument is the *Migration Amendment (Immigration Clearance Exemption for Transiting Aircraft Crew) Regulations 2024*.

Section 2 – Commencement

This section provides the commencement of the provisions in the Regulations.

Subsection 2(1) provides that each provision of the Regulation specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. The effect of this provision is that the proposed Regulations will commence in its entirety on the day after the instrument is registered on the Federal Register of Legislation.

A note at the foot of the table under subsection 2(1) explains that the table relates only to the provisions of the Regulations as originally made. The table will not be amended to deal with any later amendments to the Regulations.

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

Section 3 – Authority

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

Section 4 – Schedules

This section provides for how the amendments made by this instrument would operate.

Schedule 1 – Amendments

Migration Regulations 1994

Item [1] – At the end of Part 2 of Schedule 9

Item 1 amends Part 2 of Schedule 9 to the *Migration Regulations 1994* (the Migration Regulations), by inserting a new item to prescribe a new class of persons who is not required to comply with section 166 of the Migration Act ('transiting aircraft crew member').

A transiting aircraft crew member must be a person who:

- is employed or engaged by an international air carrier as an aircrew member; and
- enters into Australia in the course of their employment or engagement as a member of the crew of an international passenger aircraft; and
- is scheduled to depart Australia as a member of the crew of that aircraft within 90 minutes of the person's arrival into Australia; and
- does not leave the airport transit lounge except to continue their journey.

The amendment would have the effect of allowing transiting aircraft crew to disembark the aircraft upon arrival into Australia, without leaving the airport transit lounge (that is, they are able to remain within the departures waiting area of the airport, past security screening check points).

Item [2] – In the appropriate position in Schedule 13

Item 2 inserts a new Part 133 in Schedule 13 to the Migration Regulations. Part 133 provides for the operation of amendments made by this instrument.

New clause 13301 of Part 133 of Schedule 13 to the Migration Regulations provides that the amendments made by Schedule 1 to the amending Regulations apply in relation to a person who departs Australia on or after the commencement of that Schedule, regardless of when the person enters Australia. In other words, the instrument would not apply to transiting aircraft crew who arrived into Australia before the commencement of this instrument.