

EXPLANATORY STATEMENT

Issued by the Minister for Immigration, Citizenship and Multicultural Affairs

Australian Citizenship Act 2007

Migration Act 1958

Home Affairs Legislation Amendment (2022 Measures No. 1) Regulations 2022

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 other related matters.

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. Paragraph 46(1)(d) of the Citizenship Act provides that an application made under that Act must be accompanied by the fee prescribed by the regulations.

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. Section 40 also provides that the regulations may provide that visas or visas of a specified class may only be granted in specified circumstances. Subsection 46(3) provides that the regulations may prescribe the criteria and requirements which an application must satisfy to be valid.

The *Home Affairs Legislation Amendment (2022 Measures No. 1) Regulations 2022* (the Regulations) amend the *Migration Regulations 1994* (the Migration Regulations) and the *Australian Citizenship Regulation 2016* (the Citizenship Regulation) as follows:

Amendments to the Citizenship Regulation

Schedule 1 – Removal of payment of citizenship fees in foreign currencies

Schedule 1 provides that all citizenship application fees are payable in Australian dollars (AUD), removing provisions that previously allowed payment of citizenship fees and refunds in a foreign currency (and which required biannual amendments to the Citizenship Regulation). This change is consistent with the current practice that most applications are made online, which requires payment in AUD, and all refunds are made electronically in AUD.

Amendments to the Migration Regulations

Schedule 2 - New Zealand Citizen Family Relationship (Temporary) visas

Schedule 2 allows applicants for Subclass 461 (New Zealand Citizen Family Relationship) visas, who are located outside Australia, to lodge an application in Australia in accordance with a legislative instrument made under subregulation 2.07(5) of the Migration Regulations. The intention is that all applicants, whether located in Australia or overseas, will lodge the application by post to an address in Australia. Schedule 2 also allows visas to be granted regardless of the applicant's location at the time of grant. These changes enable more efficient visa processing by requiring all Subclass 461 visa applications to be lodged in Australia. The changes also assist visa applicants by removing the requirement that applicants be in or out of Australia at the time of grant depending on their location at the time of application, which has been difficult due to COVID-19 travel restrictions.

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. These include, for example, subsection 31(3), which provides that the regulations may prescribe criteria for a visa or visas of a specified class.

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 A](#).

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 number for Schedule 1 is 44225, and for Schedule 2 is 44683.

The Department of Home Affairs (the Department) consulted with the Department of Education, Skills and Employment, Treasury, the Department of Finance, and the Department of the Prime Minister and Cabinet. No external consultation was undertaken as the amendments are either beneficial for affected persons or do not substantially alter existing arrangements. This accords with subsection 17(1) of the *Legislation Act 2003* (the Legislation Act).

The amendments commence on 1 July 2022.

The Department follows standard practices to notify clients about the Regulations, including updating its website and notifying peak bodies.

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

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

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

ATTACHMENT A

Statement of Compatibility with Human Rights

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

Home Affairs Legislation Amendment (2022 Measures No. 1) Regulations 2022

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*.

Schedule 1 – Removal of payment of citizenship fees in foreign currencies

Overview

The Legislative Instrument removes redundant provisions from the *Australian Citizenship Regulation 2016* (the Regulation) for the payment of citizenship application fees in foreign countries and in foreign currencies. This aligns the Regulation with the current practice, which is that applications for citizenship are made online or by post and paid for in Australian dollars (AUD) using credit cards or other electronic payment systems. The amendment also removes the need to update the Regulation every six months to reflect foreign currency fluctuations and acceptable foreign currencies.

Current status

Sections 16 and 17 of the Regulation enable the payment of citizenship fees and refunds (if necessary) in a foreign currency and at an Australian post in a foreign country. Because the Regulation does not have an instrument making power, subsection 16(7) of the Regulation references two instruments made under paragraphs 5.36(1A)(a) and 5.36(1)(a) and (b) of the *Migration Regulations 1994* (Migration Regulations). Those instruments prescribe acceptable currencies and applicable exchange rates for visa application payments.

Every six months on 1 January and 1 July, those instruments undergo routine amendment to reflect currency fluctuations and changes to acceptable currencies. Consequently, biannual amendment of subsection 16(7) of the Regulation is required on 1 January and 1 July to reflect the updated instruments made under the Migration Regulations.

Payment practices

The Department of Home Affairs (the Department) encourages electronic payment of citizenship application fees through the ‘My Payments’ section of ImmiAccount for both paper and online applications. As a result of changes to processing arrangements since 1 July 2021, paper citizenship applications must be lodged by mail or courier to an Australian address, with payment made online.

The 2016 Regulation currently provides for payment of fees in 46 foreign currencies (generally aligned with locations of Department offices overseas and/or Australian Visa Application Centres), however cash payments are no longer accepted at these locations and payment of citizenship application fees and delivery of refunds are in practice paid with credit cards or other electronic payment systems in AUD. As a result, the conversion instrument and the places and currencies instrument provided for by section 16 are no longer required.

This Legislative Instrument amends section 16 of the Regulation to remove any provisions relating to payment of fees in foreign currencies. References to the instruments made under paragraphs 5.36(1A)(a) and 5.36(1)(a) and (b) of the Migration Regulations are removed and the Department is no longer required to amend subsection 16(7) of the Regulation biannually to reflect the updated instruments made under the Migration Regulations.

Subsection 17(8) of the Regulation relating to refund of fees in a foreign currency is also removed.

Human rights implications

The measures in this Disallowable Legislative Instrument may engage the right to acquire a nationality under the following international instruments:

- Article 24(3) of the International Covenant on Civil and Political Rights;
- Article 7 of the Convention of the Rights of the Child.

However, the amendments do not alter any existing rights to citizenship. Since July 2021, no Australian citizenship application services have been available in foreign countries, and all application caseloads are received and processed in Australia. Most applications are now lodged online and fees are paid with credit cards or other electronic payment systems (such as PayPal) in AUD. Only one citizenship fee payment was receipted in a foreign currency in each of the financial years 2021 and 2022 (to date). Therefore, because citizenship applicants applying from overseas currently pay online, the foreign currency provisions this Legislative Instrument are redundant.

Schedule 2 – New Zealand Citizen Family Relationship (Temporary) visas

Overview

The New Zealand Citizen Family Relationship (subclass 461) visa is a temporary visa that is intended for a person who is not a New Zealand citizen, but is a member of a family unit of a New Zealand citizen, who either:

- is in Australia as the holder of a Special Category (subclass 444) temporary visa; or
- who will be accompanying the subclass 461 visa holder to Australia and will be eligible to hold a subclass 444 visa on entry to Australia.

Subclass 444 visa holders are able to remain in Australia indefinitely. However, the subclass 444 visa does not permit non-New Zealand citizen family members to be included in the subclass 444 application, and subclass 444 visa holders who are not eligible New Zealand citizens (generally because they commenced residence in Australia after February 2001) are not able to sponsor family members for family migration visas.

The subclass 461 visa therefore supports family unity and social cohesion by allowing non-New Zealand citizen family members of some New Zealand citizens to enter and remain in Australia temporarily to be with their subclass 444 visa holder family members.

Subclass 461 visa holders may apply for further visas of this class provided they meet the relevant criteria and either continue to be a member of the family unit of a New Zealand citizen or they are no longer a member of a family unit of a New Zealand citizen and have not become a member of the family unit of another person.

Schedule 2 amends the Migration Regulations to:

- Enable subclass 461 visa applicants to be granted this visa regardless of their location at the time they made their visa application and at the time that the visa is granted, and
- Allow subclass 461 visa applicants outside Australia to lodge their application directly with a departmental office in Australia.

Prior to this amendment, the applicant for a subclass 461 visa had to be either in Australia or outside Australia in order to be granted this visa, depending on where they had made their application. That is, applicants who applied outside Australia had to be outside Australia at the time of grant, while applicants who applied in Australia had to be in Australia at the time of grant. In addition, applicants outside of Australia had to make their application outside of Australia by lodging an application with a Departmental office overseas. This requirement posed challenges for applicants during COVID-19 related lockdowns, when some departmental offices outside Australia were not able to operate.

This measure reduces the burden on subclass 461 visa applicants by making it easier for applicants to meet time of grant requirements without needing to travel to or from Australia, including during any future periods when travel may be difficult.

In addition, the amendment repeals the requirement for subclass 461 visa applicants outside Australia to make their applications outside Australia. Repealing this requirement will allow applicants outside Australia to send their application to a processing centre in Australia. This will assist in more efficient processing of applications in specialised centres, irrespective of where the applicant was at the time of lodgement.

Human rights implications

The amendment in Schedule 2 promotes rights relating to family unity, in particular:

- Article 23 of the International Covenant on Civil and Political Rights (ICCPR); and
- Article 10(1) of the Convention on the Rights of the Child (CRC).

Article 23 of the ICCPR provides that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State, and that the right of men and women of marriageable age to marry and to found a family shall be recognised.

Article 10(1) of the CRC provides that applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner.

Providing the ability to grant subclass 461 visas regardless of the applicant's location will make it easier for applicants to meet visa grant requirements regarding their location at the time of grant and, in many instances, allow applicants and their New Zealand citizen family member, to more easily remain in Australia as a family unit during the visa application process.

Enabling subclass 461 applicants to make an application in Australia regardless of their location will facilitate more efficient processing of subclass 461 visas by allowing visa applications to be lodged directly with specialised processing offices.

The amendment in Schedule 2 therefore supports New Zealand citizens who are travelling to or living in Australia as holders of subclass 444 visas to maintain family unity with their non-New Zealand citizen family unit members.

Conclusion

This Disallowable Legislative Instrument is compatible with human rights.

The Hon. Andrew Giles, MP

Minister for Immigration, Citizenship and Multicultural Affairs

ATTACHMENT B

Details of the *Home Affairs Legislation Amendment (2022 Measures No. 1) Regulations 2022*

Section 1 - Name

This section provides that the name of the instrument is the *Home Affairs Legislation Amendment (2022 Measures No. 1) Regulations 2022*.

Section 2 - Commencement

This section provides that the whole of the instrument commences on 1 July 2022.

Section 3 - Authority

This section provides that the instrument is made under the *Australian Citizenship Act 2007* and the *Migration Act 1958*.

Section 4 - Schedules

This section provides for how the amendments made by the Regulations operate.

Schedule 1—Removal of payment of citizenship fees in foreign currencies

Australian Citizenship Regulation 2016

Items [1] and [7] – Section 5 definitions and Schedule 3

These items make consequential amendments to subsection referencing as a result of the amendments made by Item 2.

Item [2] – Subsection 16(1)

This item makes a consequential amendment to subsection numbering as a result of the amendments made by Item 4.

Item [3] – Paragraphs 16(1)(b) and (c)

This item makes amendments to omit references in subsection 16(1) to the foreign currencies of New Zealand and Singapore.

Items [4] and [5] – Subsections 16(2) to (7), subsection 17(8)

These items repeal provisions of sections 16 and 17 which provide for payment or refund of citizenship application fees in foreign currencies and in foreign countries. These provisions are now redundant as the Department no longer provides citizenship application services in foreign countries and accepts citizenship application fees in Australian Dollars.

Item [6] – In the appropriate position in Part 4

This item inserts an application provision which provides that the amendments made by Schedule 1 to the Regulations will apply in relation to a citizenship application made on or after 1 July 2022.

Schedule 2 – New Zealand Citizen Family Relationship (Temporary) visas

Migration Regulations 1994

Item [1] – Paragraphs 1214BA(3)(ab) and (b) of Schedule 1

This item repeals paragraphs 1214BA(3)(ab) and (b) of Schedule 1 to the Migration Regulations.

Paragraph 1214BA(3)(ab) requires that an applicant be outside Australia to make an application outside Australia. Paragraph 1214BA(3)(b) requires that an applicant be in Australia to make an application in Australia. These paragraphs are repealed because the policy intention is to require all Subclass 461 visa applications to be made in Australia via post, regardless of whether the applicant is onshore or offshore. The only necessary criteria pertaining to an applicant’s location is paragraph 1214BA(3)(aa), which provides that the applicant may not be in immigration clearance at the time of application.

Item [2] – Clause 461.213 of Schedule 2

This item omits the words “If the application is made in Australia” and substitutes the words “If the applicant is in Australia at the time of application” in clause 461.213 of the Migration Regulations.

This amendment is consequential to the amendments made to item 1214BA of Schedule 1 to the Migration Regulations by item [1] of this Schedule above, which have the effect that all applications will be made in Australia via post. The amendment clarifies that the requirements of clause 461.213 regarding the holding of a substantive visa, will still apply to applicants who are physically located in Australia at the time the application is made.

Item [3] – Paragraph 461.213(a) of Schedule 2

This item omits the words “at the time of application” and substitutes the words “at that time” in paragraph 461.213(a) of the Migration Regulations.

This amendment is consequential to the amendment made to clause 461.213 by item [2] of this Schedule above. The time of application is now referred to at the beginning of the clause, and therefore paragraph 461.213(a) now needs to refer simply to “that time”.

Item [4] – Clause 461.225 of Schedule 2

This item omits the words “If the application is made in Australia” and substitutes the words “If the applicant is in Australia at the time of application” in clause 461.225 of the Migration Regulations. This item is consequential to item 1 above.

Item [5] – Clause 461.226 of Schedule 2

This item omits the words “If the application is made outside Australia” and substitutes the words “If the applicant is outside Australia at the time of application” in clause 461.226 of the Migration Regulations. This item is consequential to item 1 above.

Item [6] – Clauses 461.411 and 461.412 of Schedule 2

This item repeals clauses 461.411 and 461.412 of Schedule 2 to the Migration Regulations and inserts new clause 461.411.

New clause 461.411 provides that an applicant may be in or outside Australia, but not in immigration clearance, at the time of grant. The effect of this amendment is to remove the requirement that an applicant be either on or offshore at the time of grant, depending on their location at the time of application, in order for a Subclass 461 visa to be granted.

Item [7] – In the appropriate position in Schedule 13

This item inserts a new Part 109 – Amendments made by the *Home Affairs Legislation Amendment (2022 Measures No. 1) Regulations 2022* – in Schedule 13 (Transitional Arrangements) to the Migration Regulations.

Paragraph (1) of Item 10901 – Operation of Schedule 2 (New Zealand Citizen Family Relationship (Temporary) visas) provides that the amendments made by items 1 to 5 of Schedule 2, which allow all applications for subclass 461 visas to be made onshore, apply in relation to an application for a visa made on or after 1 July 2022.

Paragraph (2) of Item 10901 provides that the amendment made by item 6 of Schedule 2, which removes the geographical requirement for an applicant at the time of grant, applies in relation to a visa granted on or after 1 July 2022, whether the application for the visa was made before, on or after that date.

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