Migration Amendment (2022 Measures No. 1) Regulations 2022

I, General the Honourable David Hurley AC DSC (Retd), Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following regulations.

Dated 03 March 2022

David Hurley
Governor-General

By His Excellency's Command

Alex Hawke
Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs

Contents

1 Name 1
2 Commencement 1
3 Authority 1
4 Schedules 1

Schedule 1—Work conditions in relation to Subclass 500 (Student) visas 2

Migration Regulations 1994 2

Schedule 2—Application arrangements for Subclass 445 (Dependent Child) visas 3

Migration Regulations 1994 3

Schedule 3—Application arrangements for Subclass 155 and 157 (Resident Return) visas 4

Migration Regulations 1994 4

Schedule 4—Application and transitional provisions 5

Migration Regulations 1994 5

1 Name

This instrument is the *Migration Amendment (2022 Measures No. 1) Regulations 2022*.

2 Commencement

(1) Each provision of this instrument 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.

Commencement information

Column 1	Column 2	Column 3
Provisions	**Commencement**	**Date/Details**
1. The whole of this instrument	5 March 2022.	5 March 2022

Note: This table relates only to the provisions of this instrument as originally made.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.

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

3 Authority

This instrument is made under the *Migration Act 1958*.

4 Schedules

Each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1—Work conditions in relation to Subclass 500 (Student) visas

Migration Regulations 1994

1 Subclause 8104(2) of Schedule 8

Omit "If", substitute "Subject to subclauses (2A) and (2B), if".

2 After subclause 8104(2) of Schedule 8

Insert:

(2A) Subclause (2) does not apply to the holder if:

(a) at the time of applying for the visa, the holder held a substantive visa or a bridging visa (the ***previous visa***); and

(b) the holder was permitted to work in Australia during the period that the previous visa was in effect.

(2B) Subclause (2) does not apply to the holder if the person who satisfies the primary criteria for the grant of the student visa:

(a) held a substantive visa or a bridging visa (the ***previous visa***) at the time of applying for the student visa; and

(b) was permitted to work in Australia during the period that the previous visa was in effect.

(2C) If subclause (2) does not apply to the holder because of subclause (2A) or (2B), then despite subclause (1), the holder may engage in work for more than 40 hours a fortnight:

(a) while the holder is in Australia; and

(b) before the course of study mentioned in subclause (2) commences.

3 Subclause 8105(1A) of Schedule 8

Omit "The", substitute "Subject to subclause (1B), the".

4 After subclause 8105(1A) of Schedule 8

Insert:

(1B) Subclause (1A) does not apply to the holder if:

(a) at the time of applying for the visa, the holder held a substantive visa or a bridging visa (the ***previous visa***); and

(b) the holder was permitted to work in Australia during the period that the previous visa was in effect.

Schedule 2—Application arrangements for Subclass 445 (Dependent Child) visas

Migration Regulations 1994

1 Subparagraph 4.02(4)(s)(ii)

Omit "or".

2 Subparagraph 4.02(4)(s)(iii)

Repeal the subparagraph.

3 After paragraph 4.02(4)(s)

Insert:

(sa) a decision made after the commencement of this paragraph to refuse to grant a Subclass 445 (Dependent Child) visa if the visa was applied for by an applicant who was outside Australia when the application was made;

4 After paragraph 4.02(5)(r)

Insert:

(ra) in the case of a decision to which paragraph (4)(sa) applies—the sponsor;

5 Paragraph 1211(3)(ab) of Schedule 1

Repeal the paragraph, substitute:

(ab) Applicant claims to be a dependent child of a person, and the person holds:

(i) a Subclass 309 (Spouse (Provisional)) visa; or

(ii) a Subclass 309 (Partner (Provisional)) visa; or

(iii) a Subclass 310 (Interdependency (Provisional)) visa; or

(iv) a Subclass 445 (Dependent Child) visa; or

(v) a Subclass 820 (Spouse) visa; or

(vi) a Subclass 820 (Partner) visa; or

(vii) a Subclass 826 (Interdependency) visa.

6 Clause 445.312 of Schedule 2

Omit "445.211(c)", substitute "445.211(b)".

7 Clauses 445.411 and 445.412 of Schedule 2

Repeal the clauses, substitute:

445.411

The applicant may be in or outside Australia at the time of grant, but not in immigration clearance.

Schedule 3—Application arrangements for Subclass 155 and 157 (Resident Return) visas

Migration Regulations 1994

1 Paragraphs 1128(3)(aa) and (b) of Schedule 1

Repeal the paragraphs, substitute:

(b) The applicant may be in or outside Australia, but not in immigration clearance.

2 Clauses 155.411 and 155.412 of Schedule 2

Repeal the clauses, substitute:

155.411

The applicant may be in or outside Australia, but not in immigration clearance, at the time of grant.

3 Clauses 157.411 and 157.412 of Schedule 2

Repeal the clauses, substitute:

157.411

The applicant may be in or outside Australia, but not in immigration clearance, at the time of grant.

Schedule 4—Application and transitional provisions

Migration Regulations 1994

1 In the appropriate position in Schedule 13

Insert:

Part 105—Amendments made by the Migration Amendment (2022 Measures No. 1) Regulations 2022

10501 Operation of Schedule 1 (Subclass 500 (Student) visas)

The amendments of these Regulations made by items 1 to 4 of Schedule 1 to the *Migration Amendment (2022 Measures No. 1) Regulations 2022* apply on and after the commencement of that Schedule in relation to visas granted before, on or after that commencement.

10502 Operation of Schedule 2 (Subclass 445 (Dependent Child) visas)

(1) The amendments of these Regulations made by items 1 to 4 of Schedule 2 to the *Migration Amendment (2022 Measures No. 1) Regulations 2022* apply in relation to decisions to refuse to grant Subclass 445 (Dependent Child) visas made after the commencement of that Schedule, whether the application for the visa was made before, on or after that commencement.

(2) The amendment of these Regulations made by item 5 of Schedule 2 to the *Migration Amendment (2022 Measures No. 1) Regulations 2022* applies in relation to visa applications made on or after the commencement of that Schedule.

(3) The amendment of these Regulations made by item 7 of Schedule 2 to the *Migration Amendment (2022 Measures No. 1) Regulations 2022* applies in relation to visa applications made before, on or after the commencement of that Schedule.

10503 Operation of Schedule 3 (Subclass 155 and 157 (Resident Return) visas)

(1) The amendment of these Regulations made by item 1 of Schedule 3 to the *Migration Amendment (2022 Measures No. 1) Regulations 2022* applies in relation to visa applications made on or after the commencement of that Schedule.

(2) The amendments of these Regulations made by items 2 and 3 of Schedule 3 to the *Migration Amendment (2022 Measures No. 1) Regulations 2022* apply in relation to visa applications made before, on or after the commencement of that Schedule.

EXPLANATORY STATEMENT

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

Migration Act 1958

Migration Amendment (2022 Measures No. 1) Regulations 2022

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.

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

The *Migration Amendment (2022 Measures No. 1) Regulations 2022* (the Regulations) amend the *Migration Regulations 1994* (the Migration Regulations). In particular:

Schedule 1 – Work Conditions in relation to Subclass 500 (Student) visas

Schedule 1 amends visa conditions 8104 and 8105 to allow student visa holders and their dependants to work full-time before the student's course of study commences, where they held a substantive visa or bridging visa that permitted them to work in Australia at the time they applied for the student visa. This enables non-citizens working in Australia to continue working on the student visa before studies commence to help alleviate pressure on industries due to the impact of COVID-19. These changes apply to current student visa holders as well as to future student visa grants and are entirely beneficial.

Schedule 2 and 3 – Application arrangements for Subclass 445 (Dependent Child) visas and Subclass 155 and 157 (Resident Return) visas

These Schedules permit dependent child and resident return visa applicants outside Australia to lodge a visa application in Australia. This facilitates the lodgement of applications at specialised processing centres in Australia, including by applicants who are outside Australia, for greater processing efficiency. The amendments also enable applicants who lodged their visa application outside Australia to be granted the visa while they are in Australia, rather than requiring them to travel outside Australia at the time of grant, if they have entered Australia on another visa. These amendments reflect changes in global mobility and visa processing.

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.

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. 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 references are:

- Schedule 1 – OBPR22-01677
- Schedule 2 – OBPR21-44683
- Schedule 3 – OBPR21-44453

Schedule 1 is being implemented in response to calls from industries to amend these conditions to assist with prevailing labour and skills shortages. The amendments are beneficial to affected applicants and reflect COVID-19 concessions. In relation to Schedules 2 and 3, 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).

The Regulations commence on 5 March 2022 to align with updates to Department systems.

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

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.

In addition, the following provisions of the Migration Act may also be relevant:

- subsection 31(1), which provides that the Regulations may prescribe classes of visas;
- subsection 31(3), which provides that the Regulations may prescribe criteria for a visa or visas of a specified class;
- section 40, which provides that the Regulations may provide that visas or visas of a specified class may only be granted in specified circumstances;
- subsection 41(1) which provides that the regulations may provide that visas, or visas of a specified class, are subject to specified conditions;
- Paragraph 46(1)(b), which provides that a visa application is valid only if it satisfies the criteria and requirements prescribed in the regulations.
- Section 338 which sets out decisions that are Part 5 reviewable decisions, in respect of which an application for review may be made to the AAT
- Subsection 338(9) of the Act provides that the regulations may prescribe a decision as a Part 5 reviewable decision.
- Paragraph 347(2)(d) which provides that for a Part 5 reviewable decision prescribed under subsection 338(9), the regulations may prescribe the person who may apply for review by the AAT.

ATTACHMENT B

Statement of Compatibility with Human Rights

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

Migration Amendment (2022 Measures No.1) Regulations 2022

The *Migration Amendment (2022 Measures No. 1) Regulations 2022* (the Amendment Regulations) are 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*.

The Amendment Regulations amend the *Migration Regulations 1994* (the Migration Regulations) as follows.

Schedule 1 – Work conditions in relation to Subclass 500 (Student) visas

Overview

Schedule 1 amends the Migration Regulations to support Student visa holders and their dependents to work full-time before the students course commences, where they had permission to work on their previous visa. These amendments also align with the Government's objective of retaining workers in the labour market.

Subclass 500 (Student) visas provide international students (referred to as 'primary visa holders') and members of their family unit (referred to as 'secondary visa holders') with access to the Australian education and employment system for periods specified by the Minister. Student visa holders are able to work 40 hours per fortnight while the primary visa holder's course of study or training is in session. Prior to this amendment, the visa conditions in subclauses 8105(1A) and 8104(2) of the Migration Regulations prohibited the primary and secondary visa holders (respectively) from working at all in the period before the primary visa holder's course commences.

The intention of the visa conditions in subclauses 8105(1A) and 8104(2) is to prevent Student visa holders from deferring their course of study or training in order to work full-time instead of studying. This serves as an important integrity measure to ensure the primary purpose of the Student visa is to obtain an Australian education qualification.

However, the operation of the visa conditions in subclauses 8105(1A) and 8104(2) meant that people who had been able to work in Australia on a previous temporary visa must immediately stop working once they are granted a Student visa, until the primary visa holder's course commences. It may be a number of months before the course commences.

In some cases this meant that a person, who still had a period of time with work entitlements remaining on their previous visa, lost their permission to work in Australia upon being granted a Student visa, as the grant of this visa ceased their earlier visa, and this disadvantaged people who applied for a Student visa early. Further, due to current labour and skills shortages there has been

significant pressure from industries to allow visa holders who hold visas with work entitlements at the time their application is granted for a Student visa to maintain those entitlements and continue working before the commencement of their studies.

The amendment in Schedule 1 removes this restriction on people who move from a visa with work entitlements onto a Student visa from being able to continue working before the primary visa holder's course commences. This enables employers to retain employees who move onto a Student visa from another temporary visa with work entitlements, and employees to remain employed during the period before their course commences.

Human rights implications

The amendment in Schedule 1 positively engages the right to work in Article 6(1) of the *International Covenant on Economic, Social and Cultural Rights*. Article 6(1) 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.*

The amendment in Schedule 1 supports the right to work of Student visa holders by removing certain Student visa restrictions relating to work. This has the effect of:

- Allowing primary student visa holders to choose to continue in (full-time) employment upon the grant of a Student visa and before their education course commences, if they had work entitlements on a visa they held immediately before being granted a Student visa
- Allowing secondary student visa holders to choose to continue in (full-time) employment upon the grant of a Student visa and before the primary visa holder's education course commences, if they or the primary visa holder had work entitlements on a visa they held immediately before being granted a Student visa.

Schedule 2 - Application arrangements for Subclass 445 (Dependent Child) visas

Overview

The Dependent Child (Temporary) (subclass 445) visa is a temporary visa that is intended for the dependent child of a provisional partner visa holder. Visa applications by a person to enter and/or remain in Australia on the basis of being the partner of an Australian citizen, permanent resident or eligible New Zealand citizen (the 'sponsor') are usually progressed in two stages. First, if they meet the relevant requirements, the visa applicant is granted a provisional partner visa, then after two years on this visa, they may be granted a permanent partner visa. The visa applicant is able to include members of their family unit in these visa applications, however in some cases, the person does not do this before the provisional partner visa is granted. In those circumstances, the subclass 445 visa is available to allow a provisional partner visa holder's dependent children (and any dependent children they may have) to enter and/or remain in Australia, as well as study

and work, while their parent's permanent partner visa application is decided. The subclass 445 visa holder can also be added to their parent's application for the permanent partner visa.

The amendment in Schedule 2 amends the Migration Regulations to enable subclass 445 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 to allow subclass 445 visa applicants outside Australia to lodge their application directly with a Departmental office in Australia.

Prior to this amendment, in normal circumstances, the applicant for a subclass 445 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 amendment in effect puts in place an enduring and expanded version of a concessionary measure at subclause 445.411(2) as inserted by the *Migration Amendment (2021 Measures No 1) Regulations 2021* on 27 February 2021 with effect during the 'COVID-19 concession period'. This concessionary measure allowed the grant of a subclass 445 visa in Australia to applicants who applied overseas but then came to Australia and have experienced difficulties in going overseas again for visa grant due to COVID-19 related travel requirements and practical limitations. This concessionary measure is no longer required following this amendment as the amendment allows the subclass 445 visa to be granted irrespective of whether the applicant is in or outside of Australia and is not limited to the COVID-19 concession period or to any other particular period. This measure reduces the burden on subclass 445 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 445 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.

The amendment also prescribes decisions to refuse subclass 445 visa applications as 'Part 5-reviewable decisions'. This aspect of the amendment ensures that merits review avenues remain available to the sponsor of the subclass 445 visa applicant if the visa is refused when the applicant is in Australia. For applicants not in Australia when the visa is refused, the sponsor will have the normal review right under s338(5)) of the *Migration Act 1958*.

Lastly, the amendment makes some largely technical changes to correct a minor error in the subclass 445 visa criteria, and to clarify that, since the visa grant criteria require the applicant to be the dependent child of a person who holds one of the relevant provisional partner visas, only those persons whose claimed parent holds one of those visas are able to make a valid visa application, and means that people do not make futile applications (and pay the associated fees) in cases where they will not meet this objective criterion.

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 445 visas regardless of the applicant's location will make it easier to applicants to meet visa grant requirements regarding their location at the time of grant and, in many instances, allow sponsors and applicants, in particular children and their parents, to more easily remain in or outside Australia as a family unit during the visa process.

Enabling subclass 445 applicants to make an application in Australia regardless of their location will facilitate more efficient processing of subclass 445 visas by allowing visa applications to be lodged directly with specialised processing offices.

The amendment further ensures that the sponsors of refused applicants continue to have a right to seek merits review of a refusal decision despite the changes relating to where an applicant can be at the time of visa grant.

The amendment in Schedule 2 therefore supports the family unity of children and their parents and/or sponsor.

Schedule 3 - Application arrangements for Subclass 155 and 157 (Resident Return) visas

Overview

The purpose of Resident Return visa arrangements is to allow certain people who are or have been permanent residents or are former citizens of Australia to return to Australia as permanent residents following international travel. When a person is granted a permanent visa, this visa allows them to remain in Australia indefinitely, but, if the person chooses to travel out of Australia, the 'travel facility' on their permanent visa generally only allows them to re-enter Australia during the first 5 years of their visa. If a person wishes to re-enter Australia following international travel after this first 5 years of holding a permanent visa and has not yet become an Australian citizen, or if the person has previously been an Australian citizen but is no longer one, they are able to apply for a Resident Return visa to allow them to re-enter Australia.

The Five Year Resident Return (subclass 155) visa is a permanent visa with a travel facility of up to 5 years. Applicants who have been in Australia as a permanent resident or a citizen for a total of 2 years in the last 5 years are eligible to be granted the maximum travel facility of 5 years. A majority of applicants meet this residence requirement. Those successful applicants who do not

meet the residence requirement, but who have other significant ties to Australia, are granted a travel facility for up to 12 months.

The Three Month Resident Return (subclass 157) visa is a permanent visa with a travel facility of 3 months. It is generally granted to applicants who do not meet the requirements for a subclass 155 visa, for example, an applicant who has recently commenced living in Australia, but needs to travel overseas for compelling and compassionate reasons and be able to re-enter Australia afterwards.

The amendments in Schedule 3 amend the Migration Regulations to:

- enable subclass 155 and 157 visa applicants outside Australia to make an application in Australia, regardless of whether it is an internet or paper application; and
- enable subclass 155 and 157 visa applicants who lodged their visa application outside Australia to be granted the visa while they are in Australia, rather than requiring them to be outside Australia at the time of grant.

Prior to these amendments, if the subclass 155 or 157 visa applicant was outside Australia and lodged a paper application, the application needed to be made outside Australia and the applicant needed to be outside Australia at the time of grant. One aspect of these amendments is to remove the requirement that prevents applicants outside Australia from lodging a paper application in Australia. This assists with more flexible and efficient processing of applications which could be directly received and processed in specialised processing centres.

Another aspect of these amendments is to allow any applicant to be in or outside Australia at time of grant, regardless of whether their application was lodged in or outside Australia. This enables applicants who lodged an application outside of Australia and who were able to come to Australia on another visa, to meet the time of grant requirements for their subclass 155 or 157 visa without needing to leave Australia again.

Human rights implications

The amendments in Schedule 3 may broadly support rights relating to freedom of movement as well as broadly supporting other rights, depending on the circumstances of individual cases.

The amendments made by Schedule 3 aim to improve processing efficiencies and remove certain regulatory burdens on applicants for subclass 155 and 157 visas.

For those subclass 155 and 157 visa applicants for whom Australia may be considered their ‘own country’ due to the strength, nature and duration of their ties to Australia as permanent residents or former Australian citizens, these enhancements will largely support their ability to enter Australia, and support their rights under Article 12(4) of the ICCPR.

The amendments made by Schedule 3 may more broadly support human rights in individual cases. For example, removing the requirement for the visa applicant to be outside Australia for the grant of the visa if they lodged their visa application outside Australia, may support family unity where the person has family members in Australia and does not have to depart Australia in order to be granted the visa. While this affects only a small number of applicants, some of the difficulties associated with travel during the COVID-19 pandemic will result in this being a positive measure in those cases. Similarly, where the person was working or intends to work in

Australia, removing this requirement may assist them in exercising their right to work more quickly or easily.

Schedule 4 – Application and transitional provisions

The amendments in Schedule 4 provide for the application of the amendments in Schedules 1, 2 and 3 described above and set out certain transitional provisions. The amendments in Schedule 4 are technical and consequential to the amendments described above and do not raise additional human rights issues.

Conclusion

The Amendment Regulations are compatible with human rights.

The Hon Alex Hawke MP,

Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs

ATTACHMENT C

Details of the *Migration Amendment (2022 Measures No. 1) Regulations 2022*

Section 1 - Name

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

Section 2 - Commencement

This section provides for the commencement of the instrument.

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 effect of the table is that Schedule 1, 2 and 3 of the Regulations commence on 5 March 2022.

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 the Regulations operate.

Schedule 1 – Work Conditions in relation to Subclass 500 (Student) visas

Migration Regulations 1994

Item [1] – subclause 8104(2) of Schedule 8

This item omits 'The' and substitute 'Subject to subclause (2A), if'. It makes a technical amendment to subclause 8104(2) of Subclass 500 in Schedule 8 to the Migration Regulations, to facilitate the insertion of a new subclause 8104(2A) by item 2 of this Schedule, below.

Item [2] – after subclause 8104(2) of Schedule 8

This item inserts a new subclause 8104(2A), a new subclause 8104(2B) and a new subclause 8104(2C)

Currently, subclause 8104(2) prevents a person who met the secondary criteria for the visa (the secondary holder) from engaging in work in Australia until the person who met the primary criteria (the primary holder) has commenced their course of study.

New subclause 8104(2A) allows the secondary holder of a Subclass 500 visa to work before the primary visa holder has commenced their course of studies, if they satisfy the following conditions.

- The holder must have held a substantive visa or bridging visa at the time they applied for the Subclass 500 student visa.
- The holder must also have been permitted to work in Australia during the period they held the substantive or bridging visa.

New subclause 8104(2B) limits the operation of subclause 8104(2) to allow secondary holders of a Subclass 500 visa to work before the commencement of the primary visa holder's studies if the following conditions.

- The primary visa holder must have held a substantive visa or a bridging visa at the time of applying for the student visa.
- The primary visa holder must also have been permitted to work in Australia during the period that the substantive or bridging visa was in effect.

The effect of these amendments is to exclude the application of subclause 8104(2) to a secondary holder who has moved onto a Subclass 500 visa from, either a substantive or bridging visa that allowed them to work in Australia, even if that visa had some restrictions on the kind of work that could be undertaken. They also exclude the application of subclause 8104(2) to a secondary holder, where the primary visa holder moved onto a Subclass 500 visa from visa that allowed them to work in Australia.

The effect is that the secondary holder is permitted to undertake any kind of work before the primary holder's course of study commences if either they, or the primary holder, had permission to work their previously held visa (if it was held at the time of applying for the student visa).

New subclause 8104(2C) allows for secondary holders, where either they or the primary holder had permission to work on the previous visa, to engage in more than 40 hours of work a fortnight before the course of study of the primary visa holder commences. The effect is to enable these secondary holders to work full-time before the primary holder's course of study commences. Once the primary holder's course of study commences, the secondary holder is only permitted to work 40 hours a fortnight in accordance with subclause (2).

The aim is to permit persons working in Australia to continue working on the student visa before the primary holder's studies commence. Secondary holders are not permitted to continue to work full-time after the primary holder commences study to preserve the integrity of the student visa program and ensure it is not used as a de-facto work visa.

Item [3] – subclause 8105(1A) of Schedule 8

This item omits 'The' and substitute 'Subject to subclause (1B). It makes a technical amendment to subclause 8105(1A) of Subclass 500 in Schedule 8 to the Migration Regulations, to facilitate the insertion of a new subclause 8105(1B) by item 4 of this Schedule, below.

Item [4] – after subclause 8105(1A) of Schedule 8

This item inserts a new subclause 8105(1B).

Currently, subclause 8104(1A) prevents a primary holder of a Subclass 500 visa from engaging in any work in Australia, before their course of study commences. New subclause (1B) allows the primary holder to work before their studies commence if they satisfy the following conditions:

- At the time of applying for the Subclass 500 visa, the holder must have held a substantive or bridging visa.
- During the time that the substantive or bridging visa was in effect, the holder must have been permitted to work in Australia.

The effect of this amendment is to exclude the application of subclause 8104(1A) to an applicant who has moved onto a Subclass 500 visa from a visa that permitted them to work in Australia, whether that visa was a substantive or bridging visa, even if that permission to work was restricted. A holder of a Subclass 500 visa is therefore permitted to work before having commenced their course of study, subject to having been permitted to work on the visa they held at the time of making their application for a Subclass 500 visa.

The aim is to permit persons working in Australia to continue working on the student visa before their studies commence. Full-time work is permitted during this period. Once studies commence, work must be limited to 40 hours a fortnight while study is in session.

Schedule 2 – Application arrangements for Subclass 445 (Dependent Child) visas

Migration Regulations 1994

Item [1] – subparagraph 4.02(4)(s)(ii)

This item omits "or" at the end of subparagraph 4.02(4)(s)(ii). This is a technical amendment to facilitate the repeal of subparagraph 4.02(4)(s)(iii) by item 2 of this Schedule, below.

Item [2] – subparagraph 4.02(4)(s)(iii)

This item repeals subparagraph 4.02(4)(s)(iii).

Subparagraph 4.02(4)(s)(iii) was inserted to prescribe a right to merits review of a decision to refuse to grant a Subclass 445 (Dependent Child) visa if:

- the decision was made after 26 February 2021; and

- the visa was applied for before the end of the concession period outlined in subregulation 1.15N(1); and
- the applicant made the application outside Australia; and
- the applicant was in Australia at any time during the concession period; and
- the applicant was in Australia on the day the decision was made.

The purpose of subparagraph 4.02(4)(s)(iii) was to maintain review rights in respect of certain applications for a Subclass 445 visa that were made while the applicant was outside of Australia, but the applicant was inside Australia at the time of visa decision to refuse to grant the visa. Concessionary provisions made as a response to the COVID-19 pandemic allowed the visa to be granted to these applicants while in Australia and subparagraph 4.02(4)(s)(iii) ensured that there continued to be a review right if the application was subsequently refused. However, subparagraph 4.02(4)(s)(iii), which restricts the review right to the applicants who would be eligible for grant of the visa under the concessionary provisions, is no longer relevant as the amendments made by item 7 of this Schedule, below, remove the geographical limitations on all applicants at the time of the grant of the visa, making it appropriate to ensure there are review rights for all applicants who apply outside Australia, not just those in the concessionary group See items 3 and 4 of this Schedule, below.

Item [3] – after paragraph 4.02(4)(s)

This item inserts a new paragraph 4.02(4)(sa) in regulation 4.02. Subregulation 4.02(4) prescribes decisions which are Part 5- reviewable decisions for the purposes of subsection 338(9) of the *Migration Act* (the Migration Act). The purpose of the new paragraph is to prescribe a decision to refuse the grant of a Subclass 445 (Dependent Child) visa to an applicant who made the application while outside Australia.

A decision to refuse to grant a Subclass 445 (Dependent child) visa which was applied for when the applicant was outside Australia would previously have been subject to merits review by the Administrative Appeals Tribunal (AAT) as it would be a Part 5-reviewable decision under subsection 338(5) of the Migration Act. This was because there was required to be a sponsor for the visa and the visa could not be granted while the applicant was in Australia. The sponsor would have a right to apply for a review by the AAT.

The amendments made by item 7 of this Schedule, below, however, have the effect that the visa can be granted to an applicant who applied while offshore but is in Australia at the time the application is decided. The effect of this amendment is that subsection 338(5) of the Migration Act no longer applies to make a decision to refuse the application a Part 5-reviewable decision. It is not the intention that these decisions are to cease being Part 5-reviewable decisions. Consequently the decision is now prescribed by new paragraph 4.02(4)(sa) as a Part-5 reviewable decision under subsection 338(9) of the Migration Act.

Item [4] – after paragraph 4.02(5)(r)

This item inserts a new paragraph 4.02(5)(ra) in regulation 4.02. Subregulation 4.02(5) prescribes the persons who can apply for merits review by the AAT of a Part 5-reviewable decision. The purpose of the new paragraph is to prescribe that in respect of the decision

prescribed as a Part-5 reviewable decision by new paragraph 4.02(4)(sa) (see item 3 above), the sponsor of the applicant has the right to apply for review. The effect of this amendment is to ensure that a sponsor can apply for a merits review of a decision to refuse the grant of a Subclass 445 (Dependent child) visa to an applicant who was outside Australia when the application was made. This ensures that the same rights to apply for merits review exist as previously, when the decision would have been a Part-5 reviewable decision under subsection 338(5) of the Migration Act.

Item [5] – paragraph 1211(3)(ab) of Schedule 1

This item repeals paragraph 1211(3)(ab) of Schedule 1 to the Migration Regulations, and substitutes a new paragraph 1211(3)(ab) to require that an applicant for a Subclass 445 (Dependent child) visa must claim to be a dependent child of a person who also holds a visa of one of the following subclasses:

- Subclass 309 (Spouse (Provisional)).
- Subclass 309 (Partner (Provisional))
- Subclass 310 (Interdependency (Provisional))
- Subclass 445 (Dependent Child)
- Subclass 820 (Spouse)
- Subclass 820 (Partner)
- Subclass 826 (Interdependency)

Previously, paragraph 1211(3)(ab) required that an applicant must be in Australia to make an application in Australia. The repeal of paragraph 1211(3)(ab) removes that requirement. An applicant for a Subclass 445 (Dependent child) visa may now be in or outside of Australia, but not in immigration clearance (paragraph 1211(3)(aa)) in order to make an application in Australia. This facilitates the lodgement of applications at specialised processing centres in Australia by applicants who are outside Australia, for greater efficiency.

The new paragraph 1211(3)(ab) has the effect that an applicant for a Subclass 445 (Dependent child) visa must claim to be a dependent child of a person who holds one of the listed visas. Only an applicant who is a dependent child of the holder on one of those visas is able to meet the criteria of Subclass 445 (see clauses 445.111 and 445.211 of Schedule 2 to the Migration Regulations). New paragraph 1211(3)(ab) requires the claimed parent to hold one of those visas before a valid application for a Subclass 445 can be made. This prevents the making of a futile application which would be unable to satisfy the criteria of Subclass 445.

Item [6] – clause 445.312 of Schedule 2

This item omits the reference to paragraph 445.211(c) from clause 445.312 of Subclass 445 in Schedule 2 to the Migration Regulations, and substitutes a reference to paragraph 445.221(b).

This correct the reference as paragraph 445.221(c) has been repealed from Subclass 445 but by oversight this reference was not previously corrected.

Item [7] – clauses 445.411 and 445.412 of Schedule 2

This item repeals clauses 445.411 and 445.412 of Subclass 445 in Schedule 2 to the Migration Regulations and substitutes a new clause 445.411.

Previously clause 445.411 required that if an application for a Subclass 445 (Dependent child) visa is made outside Australia, the applicant must be outside of Australia when the visa is granted, and clause 445.412 required that if an application is made in Australia, the applicant must be in Australia when the visa is granted.

New clause 445.411 provides that the applicant may be in or outside Australia and the visa is granted, but not in immigration clearance.

The effect of the new clause 445.411 is to allow applicants who applied outside Australia to be granted a Subclass 445 visa in Australia (but not in immigration clearance) if they have since entered Australia on another visa.

Schedule 3 – Application arrangements for Subclass 155 and 157 (Resident Return) visas

Migration Regulations 1994

Item [1] – paragraphs 1128(3)(aa) and (b) of Schedule 1

This item repeals paragraphs 1128(3)(aa) and 1128(3)(b) from Schedule 1 to the Migration Regulations, and substitutes a new paragraph 1128(3)(b) which provides that to make a valid application for a Subclass 155 (Five Year Resident Return) or Subclass 157 (Three Month Resident Return) visa, an applicant may be in or outside Australia, but not in immigration clearance.

Previously, paragraph 1128(3)(aa) required that an applicant must be in Australia to make an application in Australia. Paragraph 1128(3)(b) provided that applicants may be in or outside Australia when making an internet application, but not in immigration clearance.

New paragraph 1128(3)(b) allows an applicant to be located in or outside Australia (but not in immigration clearance) when making any type of application. This facilitates the lodgement of paper applications at specialised processing centres in Australia by applicants who are outside Australia, for greater efficiency.

Item [2] – clause 155.411 and 155.412 of Schedule 2

This item repeals clauses 155.411 and 155.412 of Schedule 2 to the Migration Regulations and substitutes a new clause 155.411.

Previously, clause 155.411 required that if an application was made outside Australia, the applicant must be outside Australia when the visa is granted, and clause 155.412 required that if an application is made in Australia, the applicant may be in or outside Australia when the visa is granted.

New clause 155.411 provides that the applicant may be in or outside Australia when the visa is granted, but not in immigration clearance.

The effect of the new clause 155.411 is to allow applicants who applied outside Australia to be granted a Subclass 155 visa either in or outside Australia (but not in immigration clearance). This would permit offshore applicants who have since entered Australia on another visa to be granted the Subclass 155 visa in Australia.

Item [3] – clause 157.411 and 157.412 of Schedule 2

This item repeals clauses 157.411 and 157.412 of Schedule 2 to the Migration Regulations and substitutes a new 157.411.

Previously, clause 157.411 required that if an application was made outside Australia, the applicant must be outside Australia when the visa is granted, and clause 157.412 required that if an application is made in Australia, the applicant may be in or outside Australia when the visa is granted.

New clause 157.411 provides that the applicant may be in or outside Australia when the visa is granted, but not in immigration clearance.

The effect of the new clause 157.411 is to allow applicants who applied outside Australia to be granted a Subclass 157 visa either in or outside Australia (but not in immigration clearance). This would permit offshore applicants who have since entered Australia on another visa to be granted the Subclass 157 visa in Australia.

Schedule 4 – Application and transitional provisions

Migration Regulations 1994

Item [1] – In the appropriate position in Schedule 13

This item inserts in the appropriate position in Schedule 13, a new Part 105 to provide for the application of the amendments and to set out certain transitional provisions.

Clause 10501 Operation of Schedule 1 (Subclass 500 (Student) visas)

Clause 10501 provides that the amendments made by Schedule 1 (about work conditions) apply to Subclass 500 visas granted before, on and after the commencement of the amendments. This ensures that existing student visa holders may benefit from the permission to undertake full-time work before studies commence, as well as future visa holders.

Clause 10502 Operation of Schedule 2 (Subclass 445 (Dependent Child) visa)

Subclause 10502(1) provides that the amendments made by Items 1 to 4 of Schedule 2 (which maintain access to merits review) apply to applications made before, on and after the

commencement of these amendments. This amendment is beneficial as it maintains access to merits review for existing applications, as outlined above.

Subclause 10502(2) clarifies that the amendments made by Item 5 of Schedule 2 (requiring the applicant to claim to be a dependent child of certain visa holders to make a valid application) apply to applications made on and after the commencement of these amendments.

Subclause 10502(3) provides that the amendments made by Item 7 of Schedule 2 (permitting grant in Australia) applies to applications made before, on and after the commencement of these amendments. This amendment is beneficial as it ensures that existing applications can be granted in Australia if the applicant has since travelled to Australia, as well as future applications.

Clause 10503 Operation of Schedule 3 (Subclass 155 and 157 (Resident Return) visas)

Subclause 10503(1) clarifies that the amendments made by Item 1 of Schedule 3 (permitting an applicant outside Australia to apply in Australia) apply to applications made on and after the commencement of these amendments.

Subclause 10503(2) provides that the amendments made by Items 2 and 3 of Schedule 3 (permitting grant in Australia) apply to applications made before, on and after the commencement of these amendments. This amendment is beneficial as it ensures that existing applications can be granted in Australia if the applicant has since travelled to Australia, as well as future applications.