EXPLANATORY STATEMENT

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

Migration Act 1958

Migration Amendment (Parent Visas) Regulations 2021

This instrument makes amendments to the *Migration Regulations 1994* (the Migration Regulations) to assist applicants for certain parent visas who may be impacted by the COVID-19 pandemic.

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 following provisions of the Migration Act:

- 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 338(9), which provides that the regulations may prescribe a decision to be a *Part 5-reviewable decision*; and
- paragraph 347(2)(d), which provides that if a decision is prescribed for the purposes of subsection 338(9) as a *Part 5-reviewable* decision, the regulations may prescribe the person who may apply for review.

The *Migration Amendment (Parent Visas) Regulations 2021* (the Regulations) amend the Migration Regulations to provide for:

- the grant of Subclass 103 (Parent), Subclass 143 (Contributory Parent), and Subclass 173 (Contributory Parent (Temporary)) visas to applicants who are usually required to be outside Australia when the visa is granted but are in Australia during the COVID-19 pandemic under certain circumstances; and
- the grant of Subclass 804 (Aged Parent) and Subclass 864 (Contributory Aged Parent) visas to applicants who are usually required to be in Australia when the visa is granted but are outside Australia during the COVID-19 pandemic under certain circumstances.

These circumstances are that: the application for the visa was made before 24 March 2021 (when the Regulations commence); and the visa is granted on or after 24 March 2021 but before the end of the concession period described in subregulation 1.15N(1) of the Migration Regulations. In addition, for grant of a Subclass 103, Subclass 143 or Subclass 173 visa while the applicant is in Australia, the applicant must have been in Australia on 24 March 2021 and the applicant must be in Australia, but not in immigration clearance, when the visa is granted. For grant of a Subclass 804 or Subclass 864 while the applicant is

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overseas, the applicant must have been outside Australia on 24 March 2021 and must not be in immigration clearance. These provisions would recognise that during the concession period applicants are likely to be impacted by COVID-19 related travel restrictions which present difficulties to the applicant in going overseas or coming to Australia for grant of the visa.

The Regulations also make consequential changes to ensure that certain rights to merits review by the Administrative Appeals Tribunal are maintained.

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, as can be seen in the authorising provisions listed above. These include, for example, section 40 which provides that the regulations may provide that visas or visas of a specified class may only be granted in specified circumstances.

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 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 is 43582.

These measures have been informed by feedback received from stakeholders, including affected visa applicants, who have raised concerns about the impacts of ongoing COVID-19 related travel restrictions on these cohorts. This accords with subsection 17(1) of the *Legislation Act 2003*.

The amendments commence on 24 March 2021.

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

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

The Migration Act specifies 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.

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ATTACHMENT A

Statement of Compatibility with Human Rights

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

Migration Amendment (Parent visas) Regulations 2021

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

Overview of the Disallowable Legislative Instrument

The *Migration Amendment (Parent visas) Regulations 2021* (the Disallowable Legislative Instrument) amends the *Migration Regulations 1994* (the Migration Regulations).

Under current legislative settings, some categories of visas require applicants to be either in or outside of Australia at the time the visa is granted. This Disallowable Legislative Instrument implements measures to assist applicants for certain Parent visas who may be impacted by the COVID-19 pandemic, in particular, the current difficulties faced by applicants seeking to travel overseas or return to Australia for grant of the visa.

The proposed amendments enable visa grants to some Parent visa applicants who are located in Australia, but who would be otherwise required to be outside Australia at the time of visa grant. The visa subclasses are:

- Parent (Permanent) (subclass 103) visa
- Contributory Parent (Permanent) (subclass 143) visa
- Contributory Parent (Temporary) (subclass 173) visa

COVID-19 related travel restrictions and practical limitations have meant that applicants who applied for a Subclass 103, Subclass 143 or Subclass 173 visa and are currently in Australia, face difficulties in departing Australia to be granted a visa outside Australia.

The proposed amendments also enable visa grants to some Parent visa applicants who are located outside Australia, but who would otherwise be required to be in Australia at the time of visa grant. The visa subclasses are:

- Aged Parent (Permanent) (subclass 804) visa
- Contributory Aged Parent (Permanent) (subclass 864) visa

Applicants who applied for a Subclass 804 or Subclass 864 visa in Australia and who have since departed Australia may have difficulties in returning to Australia to be granted their visa due to COVID-19 related restrictions and practical difficulties involved with international travel during the pandemic.

Specifically, the amendments will enable applicants for visa subclasses 103, 143 and 173 to be granted a visa when the applicant is in Australia if: the application for the visa was made before 24 March 2021 (when the Regulations commence); and the visa is granted on or after 24 March 2021 but before the end of the concession period described in subregulation 1.15N(1) of the Migration Regulations. Applicants who are offshore and who meet the usual visa grant requirements will continue to be able to be granted the visa outside Australia.

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Similarly, the amendments will enable applicants for visa subclasses 804 and 864 to be granted a visa when the applicant is outside Australia if: the application for the visa was made before 24 March 2021 (when the Regulations commence); the applicant is not in immigration clearance when the visa is granted and the visa is granted on or after 24 March 2021 but before the end of the concession period described in subregulation 1.15N(1) of the Migration Regulations. Applicants who are onshore and who meet the usual visa grant requirements will continue to be able to be granted the visa in Australia.

The COVID-19 'concession period' is described in subregulation 1.15N(1) of the Migration Regulations as the period commencing on 1 February 2020 and ending on a day specified by the Minister by legislative instrument. As at the date of commencement of these amendments, no instrument has been made to specify a day when the concession period ends.

These amendments will ensure that Parent visa applicants who are in or outside Australia when the Regulations commence and whose visa is granted during the COVID-19 concession period are not disadvantaged by the impact of the COVID-19 pandemic.

The Disallowable Legislative Instrument also prescribes decisions to refuse applications for a relevant subclass of temporary visa as 'Part 5-reviewable decisions'. Allowing a visa grant to applicants for the Contributory Parent (Temporary) (subclass 173) visa in Australia would otherwise result in a refusal decision ceasing to be a Part 5-reviewable decision under section 338 of the *Migration Act 1958*. This amendment ensures that the sponsors of refused applicants continue to have a right to seek merits review of a refusal decision.

Human rights implications

This Disallowable Legislative Instrument 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.

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.

Eligible applicants for visa subclasses 103, 173 and 143 will be able to remain in Australia with their families, without having to make travel arrangements during the COVID-19 pandemic. Providing the ability to grant Parent visas in Australia for eligible applicants means the visa applicant will not have to depart Australia to be granted the visa.

Providing the ability to grant permanent Parent visas outside Australia for eligible applicants for visa subclasses 804 and 864 will mean that those applicants do not have to try to return to Australia in order to be granted their visa at a time when making travel arrangements is difficult. Applicants who are granted their visa outside Australia will have greater certainty in relation to being able to enter Australia on their permanent visa once they are able to make travel arrangements and be reunited with their family.

While the majority of Parent visa applicants have adult children in Australia, the above rights will be engaged in those cases where the applicants have children in Australia who are under 18 years of age or, in relation to the right in Article 23 of the ICCPR, where the children are otherwise dependent and part of the family unit.

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In addition, where the children of visa applicants in Australia are all adults or are not otherwise dependent, the above rights will also be broadly supported by allowing extended families to remain together in Australia, and will likely have a positive impact on the rights of under-18 children where it means they can maintain closer contact with their grandparents. Where the visa applicants are located outside Australia, the changes may assist in extended family members being reunited more quickly in Australia once those applicants are granted permanent visas.

The amendments further ensure that merits review avenues remain available to the sponsor of the affected temporary visa Contributory Parent (Temporary) (subclass 173) visa, if this visa is refused when the applicant is in Australia. For applicants not in Australia when the visa is refused, the sponsor will have the usual review right under s338(5) of the Migration Act.

These changes assist in mitigating the negative impact of COVID-19 related travel restrictions and practical difficulties in arranging travel amidst the pandemic. They provide a positive benefit to the both the visa applicant and their family in Australia, by allowing the applicant to be granted a visa in or outside Australia, if they have met all other criteria for visa grant and are granted a visa during the COVID-19 concession period. This change supports the family unity of children and their parents where under-18 or dependent children are involved, as well as providing a benefit to extended families, including those involving grandchildren.

Conclusion

This Disallowable Legislative Instrument is compatible with human rights as it promotes human rights.

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ATTACHMENT B

Details of the *Migration Amendment (Parent Visas) Regulations 2021*

Section 1 - Name

This section provides that the name of the instrument is the *Migration Amendment (Parent Visas) Regulations 2021* (the Regulations)

Section 2 - Commencement

This section provides for the Regulations to commence on 24 March 2021.

Section 3 - Authority

This section provides that the Regulations are made under the *Migration Act 1958* (the Migration Act).

Section 4 - Schedules

This section provides for the operation of the amendments made by the Regulations. It provides that an instrument specified in a Schedule to the Regulations is amended or repealed as set out in the Schedule concerned, and any other item in a Schedule has effect according to its terms. In Schedule 1, the only Schedule to the instrument, the specified instrument is the *Migration Regulations 1994* (the Migration Regulations).

Schedule 1 – Facilitating onshore grants of certain parent visa applications

Migration Regulations 1994

Item [1] – At the end of subregulation 4.02(4)

This item adds a new paragraph 4.02(4)(t) to regulation 4.02 of the Migration Regulations. Regulation 4.02 prescribes decisions which are Part 5-reviewable decisions for the purposes of subsection 338(9) of the Migration Act. Regulation 4.02 also prescribes the person who can apply for merits review of a Part 5-reviewable decision by the Administrative Appeals Tribunal.

New paragraph 4.02(4)(t) prescribes as a Part 5-reviewable decision, a decision made after 23 March 2021 to refuse the grant of a Subclass 173 (Contributory Parent (Temporary)) visa to a non-citizen if the visa was applied for before 24 March 2021, the non-citizen was in Australia on 24 March 2021, the decision to refuse the visa was made before the end of the concession period described in subregulation 1.15N(1), and the non-citizen was in Australia on the day the decision to refuse the visa was made.

The concession period described in subregulation 1.15N(1) is a period commencing on 1 February 2020 and ending on a day specified by the Minister by legislative instrument. As at the date of commencement of these amendments, no instrument has been made to specify a day when the concession period ends.

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Under the existing regulations, an applicant for a Subclass 173 (Contributory Parent (Temporary)) visa, other than an applicant who is a contributory parent newborn child, must be outside Australia when the visa is granted. An applicant who is in Australia would normally be required to leave Australia in order for the visa to be granted.

The effect of the amendment made by item [6] of this Schedule, below, is that a Subclass 173 (Contributory (Temporary)) visa may be granted to an applicant who is in Australia if the application for the visa was made before 24 March 2021, the applicant was in Australia on 24 March 2021, the visa is granted on or after 24 March 2021 and before the end of the concession period, and the applicant is in Australia at the time of the decision to grant the visa.

The amendment allowing the visa to be granted to a relevant applicant while the applicant is in Australia affects rights to seek merits review of the decision if the visa is subsequently refused while the applicant is in Australia, because the required location of an applicant when the visa is granted is one of the factors determining review rights under section 338 of the Migration Act.

A decision to refuse to grant a Subclass 173 visa would usually be a Part 5-reviewable decision under subsection 338(5) of the Migration Act, because the applicant must be sponsored for the visa and, under the existing regulations, it is a visa that cannot be granted while the applicant is in Australia.

However, following the amendment made by item [6], below, the visa is no longer a visa that cannot be granted while an applicant is in Australia if the applicant meets the requirements in new subclause 173.411(2), including the requirement that the applicant must be in Australia at the time of the decision. As a consequence, if an applicant is a non-citizen to whom the visa can be granted while the applicant is in Australia, a decision to refuse to grant the visa to the applicant would not be a Part 5-reviewable decision under subsection 338(5) of the Migration Act. It would also not be a Part-5 reviewable decision under any other provision of section 338 unless the decision is prescribed for the purposes of subsection 338(9). It is not the intention of these amendments to remove the rights of any applicant to merits review of a decision to refuse the visa, and therefore this item prescribes the relevant decision as a Part 5-reviewable decision for the purposes of subsection 338(9) of the Migration Act.

Item [2] – At the end of subregulation 4.02(5)

This item adds a new paragraph 4.02(5)(s) to regulation 4.02 of the Migration Regulations. The purpose of new paragraph 4.02(5)(s) is to prescribe that the person who may apply for a review of a Part 5-reviewable decision prescribed in new paragraph 4.02(4)(t) (see item [1], above) is the sponsor. This is consistent with the review right that would have existed under subsection 338(5) before the amendments allowing grant of the visa while the applicant is in Australia were made.

Items [3], [4], [5] and [6]

These items make amendments to allow Subclass 103 (Parent), Subclass 143 (Contributory Parent), and Subclass 173 (Contributory Parent (Temporary)) visas to be granted while the applicant is in Australia in certain circumstances.

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Most applicants for these visas are usually required to be outside Australia when the visa is granted. The effect of subparagraph 65(1)(a)(iii) of the Migration Act is that if an applicant cannot satisfy the requirements concerning the applicant's location when the visa is granted, the visa is to be refused.

These amendments respond to concerns that some applicants for the relevant visas are in Australia, but COVID-19 related travel restrictions present difficulties to applicants in going overseas for the visa to be granted.

Specific details of items [3], [4], [5] and [6] are as follows.

Item [3] – Clause 103.411(1) of Schedule 2

This item amends subclause 103.411(1) of Schedule 2 of the Migration Regulations by inserting a reference to subclause (3) after the existing reference to subclause (2). This amendment facilitates the insertion of new subclause 103.411(3) by item [4], below.

Item [4] – After subclause 103.411(2) of Schedule 2

This item inserts a new subclause (3) after subclause 103.411(2) of Schedule 2 to the Migration Regulations.

Subclause 103.411(1) provides that an applicant for a Subclass 103 (Parent) visa must be outside Australia when the visa is granted unless current subclause 103.411(2) or new subclause 103.411(3) applies. If subclause 103.411(2) or (3) applies, the applicant may be in or outside Australia but not in immigration clearance when the visa is granted.

Current subclause 103.411(2) applies to certain applicants who were in Australia on 18 May 2018 as the holders of specified visas and members of their family unit.

New subclause 103.411(3) applies to a visa if:

- the application for the visa was made before 24 March 2021;
- the applicant for the visa was in Australia on 24 March 2021;
- the visa is granted after 23 March 2021 and before the end of the concession period described in subregulation 1.15N(1) of the Migration Regulations; and
- the applicant for the visa is in Australia but not in immigration clearance.

A Subclass 103 visa described in new subclause 103.411(3) may be granted to an applicant while the applicant was in Australia but not in immigration clearance.

Item [5] – Clause 143.412 of Schedule 2

This item repeals clause 143.412 in Schedule 2 to the Migration Regulations and substitutes a new clause 143.412.

Repealed clause 143.412 provided that unless clause 143.411 applies, an applicant for a Subclass 143 (Contributory Parent) visa must be outside Australia when the visa is granted. Current clause 143.411 applies to small groups of applicants who held certain visas at the time they applied.

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New clause 143.412 has two subclauses. New subclause 143.412(1) provides that an applicant must be outside Australia when the visa is granted unless clause 143.411 applies, or the visa is a visa to which new subclause 143.412(2) applies.

New subclause 143.412(2) applies to a visa if:

- the application for the visa was made before 24 March 2021;
- the applicant for the visa was in Australia on 24 March 2021;
- the visa is granted after 23 March 2021 and before the end of the concession period described in subregulation 1.15N(1) of the Migration Regulations; and
- the applicant for the visa is in Australia but not in immigration clearance.

A Subclass 143 visa described in new subclause 143.412(2) may be granted to an applicant while the applicant was in Australia but not in immigration clearance.

Item [6] – Clause 173.411 of Schedule 2

This item repeals clause 173.411 in Schedule 2 to the Migration Regulations and substitutes a new clause 173.411.

Repealed clause 173.411 provided that unless the applicant was a contributory parent newborn child, the applicant must be outside Australia when the visa is granted. Current clause 173.412 provides that if the applicant is a contributory parent newborn child, the applicant may be in or outside Australia when the visa is granted but not in immigration clearance. A contributory parent newborn child is a child born at a time when the parent holds, or is an applicant for, a Subclass 173 visa.

New clause 173.411 has two subclauses. New subclause 173.411(1) provides that unless the applicant is a contributory newborn child or unless new subclause 173.411(2) applies to the visa, the applicant must be outside Australia when the visa is granted.

New subclause 173.411(2) applies to a visa if:

- the application for the visa was made before 24 March 2021;
- the applicant for the visa was in Australia on 24 March 2021;
- the visa is granted after 23 March 2021 and before the end of the concession period described in subregulation 1.15N(1) of the Migration Regulations; and
- the applicant for the visa is in Australia but not in immigration clearance.

A Subclass 173 visa described in new subclause 173.411(2) may be granted to an applicant while the applicant was in Australia but not in immigration clearance.

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Schedule 2 – Facilitating offshore grants of certain parent visa applications

Migration Regulations 1994

Items [1] and [2]

These items would make amendments to allow Subclass 804 (Aged Parent) and Subclass 864 (Contributory Aged Parent) visas to be granted while the applicant is outside Australia in certain circumstances.

Applicants for these visas are usually required to be in Australia when the visa is granted. The effect of subparagraph 65(1)(a)(iii) of the Migration Act is that if an applicant cannot satisfy the requirements concerning the applicant's location when the visa is granted, the visa is to be refused.

These amendments would respond to concerns that some applicants for the relevant visas are outside Australia, but COVID-19 related travel restrictions present difficulties to applicants in travelling to Australia for the visa to be granted.

Specific details of proposed items [1] and [2] are as follows.

Item [1] – Clause 804.411 of Schedule 2

This item would repeal clause 804.411 of Schedule 2 to the Migration Regulations and substitute a new clause 804.411.

Currently clause 804.411 provides that an applicant for a Subclass 804 (Aged Parent) visa must be in Australia when the visa is granted but not in immigration clearance.

Proposed new clause 804.411 would have two subclauses. Proposed new subclause 804.411(1) would provide that an applicant must be in Australia, but not in immigration clearance, when the visa is granted unless subclause 804.411(2) applies to the visa.

Proposed new subclause 804.411(2) would apply to a visa if:

- the application for the visa was made before 24 March 2021;
- the applicant for the visa was outside Australia on 24 March 2021;
- the visa is granted after 23 March 2021 and before the end of the concession period described in subregulation 1.15N(1) of the Migration Regulations; and
- the applicant for the visa is not in immigration clearance.

The effect of this amendment would be that a Subclass 804 visa described in proposed new subclause 804.411(2) could be granted to an applicant while the applicant is in or outside Australia but not in immigration clearance.

Item [2] – Clause 864.411 of Schedule 2

This item would repeal clause 864.411 of Schedule 2 to the Migration Regulations and substitute a new clause 864.411.

Currently clause 864.411 provides that an applicant for a Subclass 864 (Contributory Aged Parent) visa must be in Australia when the visa is granted but not in immigration clearance.

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Proposed new clause 864.411 would have two subclauses. Proposed new subclause 864.411(1) would provide that an applicant must be in Australia, but not in immigration clearance, when the visa is granted unless subclause 864.411(2) applies to the visa.

Proposed new subclause 864.411(2) would apply to a visa if:

- the application for the visa was made before 24 March 2021;
- the applicant for the visa was outside Australia on 24 March 2021;
- the visa is granted after 23 March 2021 and before the end of the concession period described in subregulation 1.15N(1) of the Migration Regulations; and
- the applicant for the visa is not in immigration clearance.

The effect of this amendment would be that a Subclass 864 visa described in proposed new subclause 864.411(2) could be granted to an applicant while the applicant is in or outside Australia but not in immigration clearance.

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