

Monitor 5 of 2024 – Ministerial Response

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**SENATOR THE HON MURRAY WATT
MINISTER FOR AGRICULTURE, FISHERIES AND FORESTRY
MINISTER FOR EMERGENCY MANAGEMENT**

MS24-000142

Ms Hannah Dibley
Committee Secretary
Senate Standing Committee for the Scrutiny of Delegated Legislation

sdlc.sen@aph.gov.au

Dear Ms Dibley

I refer to your email of 28 March 2024 seeking further information about the *Biosecurity (Electronic Decisions) Determination 2023*. I have addressed the issues raised below.

(a) Response to the Committee's request for advice in relation to paragraphs 1.81, 1.87, 1.91 and 1.95 of the Monitor.

My department is in the process of amending the *Biosecurity (Electronic Decisions) Determination 2023 (the Determination)* Explanatory Statement to include the additional details requested by the Committee. The proposed amendments will be provided to the Director of Biosecurity, as the decision maker for this instrument, for consideration.

(b) Response to the Committee's request for further advice in relation to paragraph 1.82 of the Monitor.

The department has a policy ('Automated decision-making under section 541A of the *Biosecurity Act 2015*') relating to automated decision making under section 541A of the *Biosecurity Act 2015 (the Act)*. As a matter of departmental policy, all staff must comply with guidance provided in this policy. The policy ensures that appropriate control arrangements, risk mitigation measures and safeguards are in place to effectively:

- satisfy the Director of Biosecurity that the objects of the Act are being met
- manage legal risks
- satisfy the Director of Biosecurity that electronic decisions made by the operation of a computer program conforms with best practice principles of lawful administrative decision-making.

The department has the ability to audit the decision-making outcomes to enable review of the decisions made by the computer program to which the *Biosecurity (Electronic Decisions) Determination 2023* relates and has processes in place to test the computer program to confirm accuracy of decisions. Routine reviews and audits of the automated decisions are undertaken to:

- ensure the decisions reflects the legal requirements and legislative criteria for decisions
- ensure the decisions are operating consistently with the relevant business rules.

The department undertakes routine reviews of the decisions made by the computer program and when required, updates the business rules of the computer program to ensure the automated decisions remain authorised by legislation and supported by settled policy and/or procedures. The audit and review of decisions also includes routine verification of information provided by users into the computer program is true and correct and ensures the conditions of use are met.

The department also retains a comprehensive set of computer program business rules to ensure there is capability to access earlier versions of the business rules at a given point in time providing transparency around the historical decisions made by the computer program. This includes an audit trail of all decisions that the computer program makes electronically, and where an electronic decision is substituted with a decision made by a biosecurity officer.

The department has ensured there is a dedicated feedback mechanism for persons affected by decisions made by the computer program subject to the *Biosecurity (Electronic Decisions) Determination 2024* and the arrangement made under subsection 541A(1). This mechanism allows a person to raise queries or concerns with decisions made by the computer program or to report problems with reporting information into the computer program. In such circumstances, a biosecurity officer can review a decision made by the computer program to identify if the decision is appropriate and substitute the decision if necessary. The types of factors that a biosecurity officer would consider before substituting a decision made by a computer program would be unique to each particular case. These factors may include:

- the type of automated decision made by the computer program
- the information made available to the biosecurity officer at the time
- the accuracy of the information made available to the biosecurity officer at the time
- the timeliness of a decision that is required to be made to either assess or manage biosecurity risks
- whether there are any delays with a person providing information or documentation to a biosecurity officer to enable the assessment or management of biosecurity risks
- whether the information or documentation exists or is capable of being given by a person at the time.

In the event that an audit and review of an electronic decision identifies an incorrect decision has been made by an authorised computer program, where necessary, the Director of Biosecurity or their delegate have the capacity to substitute a decision or amend the business rules of the authorised computer program to ensure the correct decision is made to manage biosecurity risks.

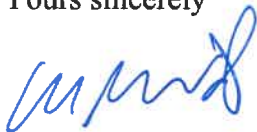
For example, under subsection 193(2) of the Act in order to achieve the legitimate objective of ensuring pre-arrival reports are provided by commercial operators, it is a mandatory requirement for the operator of the vessel to provide information relating to the health status of passengers or crew to enable a biosecurity officer to assess human health biosecurity risks (section 47 of the *Biosecurity Regulation 2016*).

Pursuant to subsection 194(1A) of the Act, if the operator of the vessel becomes aware that the type of information included in the report made under subsection 193(2) of the Act is incorrect it is a requirement for the operator of the vessel to update that information. If the operator of the vessel becomes aware of any travellers or crew on board the vessel having signs or symptoms of a listed human disease (as prescribed by the *Biosecurity (Listed Human Disease) Determination 2016*), they must notify the department as soon as practicable. This is done by submitting a Human Health Update in the computer program.

When a Human Health Update has been submitted by the operator of the vessel, and signs or symptoms of a listed human disease are declared, the computer program has the capacity make a decision under subsection 200(1) of the Act to send a Human Health Questionnaire to the operator of the vessel or agent and require the production of specified documents such as the vessel's medical log and test results pursuant to subsection 201(1) of the Act. This information and documentation will enable a biosecurity officer (not the computer) to effectively assess the level of biosecurity risk associated with the sick passengers or crew.

If the operator of a vessel arriving into Australian territory experiences a telecommunications outage, the outage would prevent the operator of the vessel from providing updated information into the computer system within a timely manner. This would result in the computer program making a decision under subsections 200(1) or 201(1) of the Act not to request further information or documents respectively. In this circumstance, a biosecurity officer may substitute an existing decision made by the computer program to enable the biosecurity officer to assess or manage biosecurity risks associated with any sick passengers or crew. This manual intervention by the biosecurity officer to substitute an original decision made by the computer program ensures an appropriate decision is made consistent with the objects of the Act to manage the relevant biosecurity risks.

Yours sincerely



MURRAY WATT

26 / 4 / 2024



THE HON ANDREW GILES MP
MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS

Ref No: MC24-003529

Ms Hannah Dibley
Committee Secretary
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600

Dear Committee Secretary

Thank you for your correspondence of 8 February 2023 concerning the Senate Standing Committee for the Scrutiny of Delegated Legislation's consideration of the *Migration Amendment (Bridging Visa Conditions) Regulations 2023* (the Amendment Regulations).

The Amendment Regulations commenced on 8 December 2023 and made a number of amendments to the *Migration Regulations 1994* to further strengthen the Government's response to the High Court's decision in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* [2023] HCA 37 (NZYQ). The Amendment Regulations include amendments dealing with the conditions imposed on a Bridging (Removal Pending) visa granted to an NZYQ-affected non-citizen, as well as amendments to provide for periodic review of the imposition of certain visa conditions, including those relating to monitoring device and curfew requirements. The Amendment Regulations also make certain consequential amendments to the Migration Regulations to complement and support the *Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Matters) Act 2023*, which commenced on 8 December 2023.

I appreciate the time the Committee has taken to consider the Amendment Regulations. My response to the matters raised by the Committee is provided at Attachment A. I have also copied this letter to the Minister for Home Affairs and Minister for Cyber Security, the Hon Clare O'Neil MP.

I trust this information is of assistance to the Committee.

Yours sincerely



ANDREW GILES

3 / 4 / 2024

Attachment A

Senate Standing Committee for the Scrutiny of Delegated Legislation
Delegated Legislation Monitor 1 of 2024

Migration Amendment (Bridging Visa Conditions) Regulations 2023

General Comments

Following the High Court's decision in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* [2023] HCA 37 (NZYQ) on 8 November 2023, the Government introduced the Migration Amendment (Bridging Visa Conditions) Bill 2023 (the BVC Bill) into Parliament on 16 November 2023. The BVC Bill passed the Parliament on 16 November 2023, as amended in the Senate, and the *Migration Amendment (Bridging Visa Conditions) Act 2023* (the BVC Act) subsequently commenced on 18 November 2023.

The BVC Act included amendments of the *Migration Act 1958* and the *Migration Regulations 1994* to strengthen the Bridging (Removal Pending) visa (BVR) framework for NZYQ-affected non-citizens released from immigration detention following the High Court's decision. Of note, the Bill included amendments to establish:

- additional visa conditions to be imposed on BVRs granted to NZYQ-affected non-citizens (including requirements in relation to curfews, reporting, and the wearing of a monitoring device), as well as a related procedural fairness mechanism; and
- associated offences for breaches of the requirements of certain visa conditions dealing with reporting, curfew and monitoring device requirements.

The Government subsequently introduced the Migration Amendment (Bridging Visa Conditions and Other Measures) Bill 2023 (BVCOM Bill) into Parliament on 27 November 2023. This Bill, as introduced, included amendments to the Migration Act to build on and further strengthen the framework established by the BVC Act. The BVCOM Bill included additional offences for NZYQ-affected BVR holders who fail to comply with certain visa conditions that were included in the BVC Bill by parliamentary amendments; as well as amendments to clarify the powers of an authorised officer to fit, operate and monitor an electronic monitoring device, and to collect, use and disclose information gathered by such a device.

After the High Court published its written reasons in NZYQ on 28 November 2023, the Government moved amendments to the BVCOM Bill in the Senate on 5 December 2023 to amend the *Criminal Code* to establish a new Community Safety Order (CSO) Scheme to protect the Australian community from the risk presented by certain members of the NZYQ-affected cohort who have been convicted of serious violent or sexual offences. The Senate agreed to these amendments on 5 December 2023, and the Bill passed the Parliament on 6 December 2023, renamed as the Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Bill 2023. The *Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Act 2023* (BVSOOM Act) commenced on 8 December 2023, amending the Criminal Code and the Migration Act, and making consequential amendments to other Commonwealth Acts to support the CSO Scheme.

The *Migration Amendment (Bridging Visa Conditions) Regulations 2023* (the Amendment Regulations) commenced at the same time as the BVSOOM Act on 8 December 2023, and made amendments to complement and support those made by the BVSOOM Act. The Amendment Regulations also made other amendments to the Migration Regulations that further enhance the effective operation of the BVR framework in response to the High Court's written reasons in NZYQ.

The Amendment Regulations amended provisions of the Migration Regulations which enable the Minister to grant a BVR visa without application to a non-citizen who is NZYQ-affected, including in circumstances where the non-citizen otherwise indicates they may not comply with the conditions of their BVR. In circumstances where those non-citizens may pose a risk to vulnerable people in the community, this amendment substantially enhances the protection of the community by ensuring that those non-citizens who are released from immigration detention as a consequence of the High Court's decision in NZYQ are subject to appropriate and enforceable visa conditions. In some circumstances, a breach of a visa condition may also constitute a criminal offence.

The Amendment Regulations also provided for a range of new and amended conditions for BVR visa holders, some of which apply to those individuals who have committed offences involving a minor or a vulnerable person, or offences involving violence and sexual assault. The new or amended conditions provided by the Amendment Regulations include those relating to the reporting of residence information (condition 8612), interstate and overseas travel (condition 8614), associations and memberships of organisations involving minors (condition 8615), contact with individuals involved in criminal activities (condition 8616), financial transactions (condition 8617), bankruptcy (condition 8618), personal contact details (condition 8625) and personal information online (condition 8626).

The Amendment Regulations also amended the Migration Regulations to provide that if conditions 8617 (financial transactions), 8618 (bankruptcy), 8620 (curfews) or 8621 (electronic monitoring) are imposed on a BVR granted to a non-citizen, the visa is subject to those conditions for 12 months from the day of visa grant. The intention of this amendment is to ensure that the imposition of these conditions is subject to a form of periodic review at least once in every 12 month period. If the Minister grants a further BVR during or after that period, the Minister would at that time be required to re-consider whether it is not reasonably necessary to impose the condition for the protection of any part of the Australian community. The grant of a further BVR restarts the 12-month period of effect for these visa conditions.

Together with the amendments made by the BVC Act and the BVSOOM Act, the Amendment Regulations operate to keep the Australian community safe, and to strengthen relevant laws to respond appropriately and effectively to the High Court's decision in NZYQ.

Responses to the Committee's specific questions

Why it is considered necessary and appropriate in this instance to further amend the BVR framework by delegated legislation, rather than primary legislation.

It has been the usual practice of the Government of the day to provide for detailed matters relating to visa criteria and visa conditions in the *Migration Regulations 1994* rather than in the *Migration Act 1958*. The Migration Act expressly provides for these matters to be prescribed in the regulations. Schedule 2 to the Migration Regulations prescribes the individual requirements of each visa subclass and "stream" therein, including the conditions to be imposed when a visa is granted. To update the requirements for the grant of a visa, or the conditions to be imposed on a visa when granted, it is necessary to amend Schedule 2 to the Migration Regulations.

Whether further detail can be provided regarding the factors the minister may take into account in determining whether each of the relevant conditions is 'not reasonably necessary' for the protection of the Australian community...

There is no exhaustive list of matters relevant to the Minister's consideration whether the imposition of a condition listed in cl 070.612A is not reasonably necessary for the protection of any part of the Australian community. These conditions have a protective purpose, having regard to the risk of harm the non-citizen poses. The factors which would be relevant to that consideration would include, but are not limited to:

- the nature and frequency of past offending or other serious conduct;
- the extent of rehabilitation (if any) and other matters going to the likelihood of engaging in further conduct of that kind;
- the extent to which other conditions to which the BVR will be subject address that risk;
- the non-citizen's residential and family circumstances, and any other community support;
- the extent to which other factors address that risk (e.g. if the non-citizen is subject to parole conditions, bail conditions, is in criminal detention, is, or is no longer, subject to medical conditions that increase/decrease risk, etc.).

In considering these matters, the Minister would have regard to information relevant to an assessment of the risk of harm the non-citizen poses to the Australian community. This may include things such as:

- the non-citizen's criminal history (if any);
- reports from law enforcement authorities relating to criminal and other serious activities the non-citizen has engaged in, or is alleged to have engaged in;
- reports from correctional authorities relating to any time spent by the non-citizen in criminal detention or on parole;
- information about parole conditions or restrictive measures to which the non-citizen will be subject while in the community;
- reports relating to any time spent in immigration detention;
- reports from experts (e.g. psychologists);
- representations from the non-citizen and any representations made on their behalf (e.g. character references).

Whether any safeguards or limitations apply to the exercise of the minister's powers or functions under new subclause 070.612A(1), including the availability of any review mechanisms such as independent merits review.

Paragraph 76E(1)(a) of the Migration Act provides that section 76E applies to a decision to grant a non-citizen a BVR if there is no real prospect of the removal of the non-citizen from Australia becoming practicable in the reasonably foreseeable future, and the BVR is subject to a prescribed condition. There are four conditions prescribed in regulation 2.25AD:

- 8617 (notifying of certain financial transactions);
- 8618 (notifying of bankruptcy);
- 8620 (curfew);
- 8621 (electronic monitoring).

These four conditions are the same four mentioned by subclause 070.612A(1) of Schedule 2 to the Migration Regulations, which provides that for a BVR granted under regulations 2.25AA or 2.25AB to an NZYQ-affected person, each condition must be imposed unless the Minister is satisfied that the imposition of the condition is not reasonably necessary for the protection of any part of the Australian community.

Subsection 76E(2) provides that the rules of natural justice do not apply in relation to a decision to grant a non-citizen a Subclass 070 (Bridging (Removal Pending)) visa subject to the four prescribed conditions. Subsection 76E(3) of the Migration Act provides a mechanism for the visa holder to make representations to the Minister about why the visa should not be subject to one or more of the conditions prescribed by regulation 2.25AD.

If the non-citizen makes representations to the Minister, and the Minister is satisfied that the imposition of those conditions is not reasonably necessary for the protection of any part of the Australian community, subsection 76E(4) provides that the Minister must grant the individual a further Subclass 070 (Bridging (Removal Pending)) visa which is not subject to those conditions.

A decision to grant a visa is not reviewable by the Administrative Appeals Tribunal. However, a decision by the Minister under subsection 76E(4) not to grant a BVR that is not subject to one or more of the prescribed conditions is reviewable by the Administrative Appeals Tribunal under Part 5 of the Migration Act. This is provided for in paragraph 338(4)(c) of the Migration Act.

New regulation 2.25AE also operates as a safeguard in relation to the imposition of conditions 8617, 8618, 8620 and 8621. It provides that those conditions, if imposed on a BVR, are only imposed for a period of 12 months from the day the BVR is granted. In this way, regulation 2.25AE operates to ensure that the imposition of these conditions is subject to a form of review at least every 12 months. If the Minister grants a further BVR during or after that period, the Minister would at that time be required to consider afresh, under clause 070.612A, whether it is not reasonably necessary to impose one or more of these conditions for the protection of any part of the Australian community.

Independent oversight and investigation of complaints about administrative actions taken by the Department of Home Affairs or the Australian Border Force is also available through the Commonwealth Ombudsman. However, a person is entitled to seek judicial review of a decision of this kind, and may seek other forms of relief from a court.

...[w]hich other Commonwealth agencies were consulted...

...[w]hether any persons likely to be affected by the instrument, any experts or any stakeholders representing the NZYQ-affected cohort were otherwise consulted and, if so, who or, if not, why not.

The measures in the BVSOOM Act and the Amendment Regulations were informed by consideration of the High Court's written reasons in NZYQ, and consultation by the Department of Home Affairs with other Commonwealth agencies. The Department worked closely with the Attorney-General's Department, the Australian Government Solicitor (AGS) and the Office of Parliamentary Counsel in the course of developing and drafting the Amendment Regulations.

Following passage and commencement of the BVSOOM Act and the Amendment Regulations, the Department of Home Affairs has held roundtable discussions on three occasions with the Australian Human Rights Commission, the Commonwealth Ombudsman's Office and the Australian Red Cross to discuss matters relating to implementation of the legislative response to NZYQ, management of the NZYQ-affected cohort, and to hear these organisations' views on these and related matters.



Attorney-General

Reference: MC24-002070

Senator Deborah O'Neill
Chair
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
CANBERRA ACT 2600

By email: sdlc.sen@aph.gov.au

Dear Chair

I am writing in response to correspondence of 29 February 2024 from the Senate Standing Committee for the Scrutiny of Delegated Legislation outlining scrutiny concerns in relation to *Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2024 (Chapter 21 Amendments)* [F2024L00088] (the Instrument).

Chapter 21 of the *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1)* (AML/CTF Rules) provides exemptions from the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act) for the issuing or selling of securities or derivatives in a number of specific circumstances. This includes the issuing or selling of securities or derivatives on certain domestic and foreign financial markets where there is no reasonable way for the issuer or seller to know the identity of the buyer.

The AML/CTF Rules Amendment Instrument extends one part of the existing Chapter 21 exemptions so that it applies to market participants of FEX Global Pty Ltd (FEX). It also clarifies that the Australian Securities Exchange Limited (ASEL) is not a prescribed financial market under the *Corporations Act 2001*, but has been specified as an exempt financial market.

The Instrument did not seek to alter the other exemptions contained in Chapter 21 (such as issuing an interest in a managed investment or litigation funding scheme) on which a range of other businesses rely. The amendments sought only to address a time-sensitive competitive neutrality issue, and ensure equal treatment of FEX and ASEL under the AML/CTF Rules.

As outlined in my letter to the Committee of 4 October 2022, regarding *Anti-Money Laundering and Counter-Terrorism Financing Rules Amendment Instrument 2021 (No. 2)* [F2021L01658], the inclusion of exemptions in the AML/CTF Rules ensures that the AUSTRAC CEO has sufficient flexibility to make, amend, and repeal exemptions as circumstances require without being delayed by infrequent and lengthy legislative amendment processes. In this instance, the issue was time-sensitive and needed to be addressed faster than legislative amendment would allow.

Further, I consider using the Instrument to introduce a cessation date for the whole Chapter is not appropriate. The Chapter contains multiple enduring exemptions upon which a range of entities rely and this change would have had a much broader regulatory impact than the minor amendments the Instrument made. Conversely, applying a cessation date only to the exemption as it applied to FEX and ASEL would place them at a comparative disadvantage to all other entities that are covered by the Chapter 21 exemptions.

However, as the Committee would be aware, the Australian Government has commenced consultation on reforms to Australia's anti-money laundering and counter-terrorism financing regime.

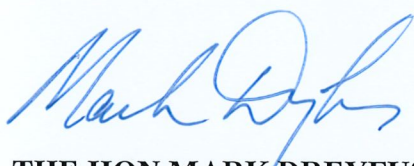
As part of the reform process, the Attorney-General's Department (the department) is giving consideration to which of the exemptions currently contained in the AML/CTF Rules should be moved into the AML/CTF Act.

In order to ensure appropriate parliamentary oversight and provide regulatory certainty for industry, the department proposes to codify in the AML/CTF Act those exemptions that are intended to be enduring. Exemptions which are limited in scope, have detailed conditions attached, or are likely to require amendment to adapt to changing circumstances will be retained in the AML/CTF Rules. It is intended that any exemption that is to be retained in the AML/CTF Rules will be remade and time-limited consistent with the Committee's expectations.

I consider that the reform process will provide an opportunity to systematically consider exemptions to the AML/CTF Act in a way that is consistent, and ensures equality of treatment for the businesses that rely on them.

I trust this information will assist members of the Committee in their consideration of the Instrument. If the Committee has further questions, AUSTRAC would be happy to meet with the Committee to discuss the AML/CTF Rules and the Committee's concerns in more detail.

Yours sincerely



THE HON MARK DREYFUS KC MP

20 / 3 / 2024