



COVERSHEET

Minister	Hon Kris Faafoi	Portfolio	Immigration
Title of Cabinet paper	Immigration (Visa, Entry Permission, and Related Matters) Amendment (COVID-19 – Applications and Fees) Regulations (No 2) 2020	Date to be published	24 November 2020

List of documents that have been proactively released

Date	Title	Author
September 2020	Immigration (Visa, Entry Permission, and Related Matters) Amendment (COVID-19 – Applications and Fees) Regulations (No 2) 2020	<i>Office of the Minister of Immigration</i>
5 October 2020	CAB-20-MIN-0448	<i>[Cabinet Office]</i>

Information redacted

YES / NO [select one]

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In Confidence

Office of the Minister of Immigration

Chair, Cabinet

COVID-19 RESPONSE: FURTHER AMENDMENTS TO IMMIGRATION AMENDMENT REGULATIONS

- 1 Reflecting the current border closures, this paper proposes to extend the current suspension of the ability to submit a visa application by most people offshore in the *Immigration (Visa, Entry Permission and Related Matters) Regulations 2010* (the Visa Regulations) and make some further minor and technical amendments to those regulations, through approval of the *Immigration (Visa, Entry Permission, and Related Matters) Amendment (COVID-19—Applications and Fees) Regulations (No 2) 2020* (the Amendment Regulations).

Relation to government priorities

- 2 The proposed immigration regulation changes relate to the Government's response to COVID-19.

Executive Summary

- 3 This paper seeks Cabinet's agreement to changes to the Visa Regulations. These changes would:
 - 3.1 with regard to persons outside New Zealand, extend for a further three months (to February 2021) the current suspension of their ability to apply for most categories of temporary entry class visa, until a person has been accepted under the border exception process and invited to apply (noting that Ministers with Power to Act would be able to revoke that suspension, in whole or in part, if conditions warranted it);
 - 3.2 carve out from that suspension applications made from within a Safe Travel Zone where the applicant is eligible to travel and is planning to travel to New Zealand from that Safe Travel Zone;
 - 3.3 clarify that travellers who are participants in a national Antarctic programme operated by a Contracting Party to the Antarctic Treaty are not liable to pay visa fees;
 - 3.4 remove a provision which potentially enables foreign nationals travelling on marine craft to be deemed to hold a visa on arrival in New Zealand, as this is not congruent with the active border management being undertaken under the Government's response to COVID-19; and
 - 3.5 address a cross-referencing error (the Visa Regulations state that "Scheduled International Service" is defined in the *Immigration Act 2009* at section 96(4), but the definition was moved to section 4 in 2017).
- 4 The extension to the current suspension will continue to manage the flow of incoming visa applications. As visas cannot be granted until the applicant is able to

travel, but cannot be declined if they meet the policy of the day, increasingly large numbers of aging applications were continuing to accumulate until the current suspension came into effect. Applications on hand are relatively expensive to manage. Continuing the suspension will therefore enable Immigration New Zealand to focus on the efficient processing of visas for those people who have been granted exemptions or exceptions which allow them to travel to New Zealand.

- 5 If Ministers wish to exempt a wider range of intending travellers from the effect of this suspension during the three-month life of the regulations, this could be done through Ministers with Power to Act suspending the regulations in whole or part, or through Cabinet agreeing that a new group of travellers are eligible for a border exception.
- 6 The carving out of applications made from within a Safe Travel Zone will reflect that the establishment of Safe Travel Zones (which will enable non-quarantinable international travel) will enable a normalisation of travel for eligible foreign nationals who meet ordinary immigration requirements.
- 7 The removal of the deeming provision will avoid any doubt that foreign nationals seeking to travel to New Zealand by sea who are not cargo or military persons must apply for and be granted a border exception and a visa before arrival.
- 8 These changes, and the two minor technical amendments also proposed (clarifying the charging-free status of foreign nationals seeking to travel to New Zealand as a participant in a national Antarctic programme, and fixing a cross-referencing error) are intended to come into effect on 9 November 2020. The suspension of certain offshore applications will expire on 8 February 2021 unless further extended. The ability to make further extensions will expire on 15 May 2021, due to the expiry on that date of the relevant provision in the *Immigration Act 2009*, unless that legislation is amended.

The proposed amendments are limited in scope and reflect existing policy settings

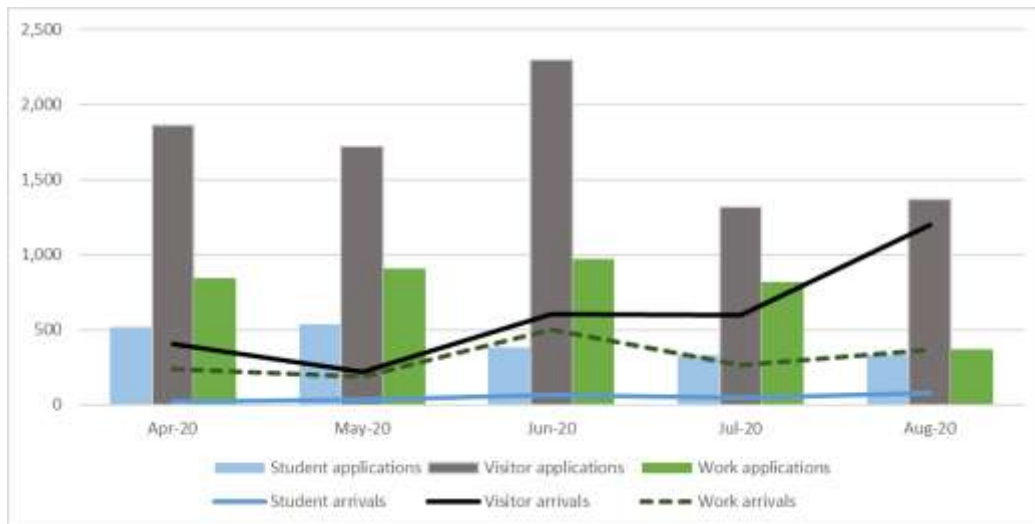
Regulation Change One – Continuing the suspension of offshore temporary entry class visa applications for a further three months

- 9 The *Immigration (COVID-19 Response) Amendment Act 2020* established a number of time-limited powers. One of those powers (section 401A) enables the making of regulations to suspend the ability of all persons, or any class of persons, who are outside New Zealand, to apply for a classes or type or visa or submit an expression of interest in applying for a visa. The regulations may be extended for a period of time not exceeding three months, as long as this extension is approved before the regulations expire. (The section 401A power will expire on 15 May 2021, unless the *Immigration Act 2009* is amended again.)
- 10 Cabinet made decisions in July [CBC-20-MIN-0069 and LEG-20-MIN-0108] to temporarily suspend the ability to apply for most types of temporary entry class visa outside New Zealand. These decisions were made because Immigration New Zealand was continuing to receive significant numbers of temporary applications (including significant numbers of visitor visa applications) but, as the New Zealand border was and is closed, it was not possible to decide those applications.
- 11 Figure one below illustrates how temporary applications continued to be received from people offshore during lockdown months, although the Immigration New Zealand website advised against making applications, and the numbers of people

who were allowed to travel to New Zealand were low. (Note that applications made on the basis of family connections to New Zealand, for humanitarian reasons, or for medical travel, are not included in the counts, but associated arrivals are counted.)

- 12 The increase in visitor arrivals in August reflects the introduction of the Critical Visitor Visa mechanism, and the reduction in applications in August reflects the 10 August commencement of the regulations suspending most offshore temporary entry class applications.

Figure one: Selected* offshore temporary visa applications compared with all temporary arrivals to New Zealand by month, April – August 2020



Source: MBIE statistics, query 8766 and A1 Arrivals table

* Student: Full fee paying and Scholarship

Visitor: Business, General Visitor and Group Visitor

Work: Approved in Principle, Crew, Skilled Work, RSE, Work to Residence, Working Holiday Visa

- 13 Most offshore temporary entry class visa applications received during lockdown could not be approved (as the *Immigration Act 2009* establishes at section 43 that an Immigration Officer may not grant a visa if the Officer does not consider that entry permission will be granted to the person if they travel) but, if the applications otherwise met policy, they could not be declined either. This meant that, as at the end of August, almost 39,000 temporary applications made offshore (not relating to family connections to New Zealand, medical travel, or other humanitarian reasons) were sitting on hand.
- 14 As applications age the supporting details provided with them (such as medicals or job offers) go out of date and the reason for travel may evaporate, meaning that applicants would need to resubmit much of the material at the point that the border reopens. In addition, it is likely that a proportion of applicants will eventually request refunds, which carry a relatively high administrative cost.
- 15 Table one below sets out the number of selected temporary entry class visa applications on hand by month between April and August. It shows how they increased between April and July. It also shows that the rate of increase slowed considerably in August, reflecting the regulation change that came into effect on 10 August.

Table one: Selected* offshore temporary visa applications on hand by month, April – August 2020

	Apr-20	May-20	Jun-20	Jul-20	Aug-20
Student	5,479	6,013	6,429	6,764	7,113
Visitor	20,994	20,804	22,165	22,830	22,939
Work (not WHS)	3,340	3,775	3,957	4,092	4,182
Working Holiday Visa	1,666	2,162	2,862	3,435	3,618
Total on hand	31,479	32,754	35,413	37,121	37,852

Source: MBIE statistics, query 8766

* Student: Full fee paying and Scholarship

Visitor: Business, General Visitor and Group Visitor

Work: Approved in Principle, Crew, Skilled Work, RSE, Work to Residence, Working Holiday Visa

- 16 The current regulations expire on 9 November 2020. In detail, they establish that offshore applications and expressions of interest for all temporary entry class visa categories are suspended, apart from applications from persons who have been invited to apply for a visa by Immigration New Zealand through the border exception process, and applications for the following visa types:
- 16.1 Visas for partners and dependent children of a New Zealand citizen or resident, where the visa is based on that relationship;
 - 16.2 Antarctic Visitor and Work Visas;
 - 16.3 Visas for diplomatic and consular personnel, and recognised family members;
 - 16.4 Recognised Seasonal Employer Limited Visas.
- 17 I consider that it is appropriate to continue leaving these visa types open for application, to align with current border exemption policy settings, and to reflect their status with respect to New Zealand's international obligations.
- 18 The Amendment Act specifies that, in recommending such regulations, I must be satisfied that they are reasonably necessary to manage the effects, or deal with the consequences of:
- 18.1 the outbreak of COVID-19;
 - 18.2 measures taken under the Immigration Act or any other enactment to respond to the outbreak of COVID-19 or its effects; or
 - 18.3 any other measures (whether in New Zealand or elsewhere) to contain or mitigate the outbreak of COVID-19 or its effects.
- 19 I consider that extending the current suspension will continue to complement the border restrictions currently in place, and to communicate to persons offshore that, unless they are members of an exempted class of people or have special circumstances which qualify for a border exception, they are unable to travel to New Zealand until border restrictions are eased. Taking all of this into account, and noting that the current suspension has not been controversial, I therefore recommend extending the current regulations for a further three months, to expire on 8 February 2021.
- 20 In line with the decision already made by Cabinet [CBC-20-MIN-0069] I propose that Ministers with Power to Act (the Minister of Immigration, the Minister of Foreign Affairs, the Minister of Housing and the Minister of Health) be authorised to revoke the regulations, in whole or in part, upon my recommendation. This would enable, before the end of the three month period, the suspension to be lifted, if conditions

warranted that change. As noted above at paragraph 16, people (including groups of people) who are invited to apply for a visa are not subject to this suspension.

Regulation Change Two – Carving out applications made in a Safe Travel Zone where the applicant intends to travel to New Zealand from within that Safe Travel Zone

- 21 Cabinet has agreed that negotiations can be undertaken with Australia and with Realm countries to establish Safe Travel Zones, once it is safe to undertake quarantine-free travel. New Zealand and Australia have not yet agreed on the definition of who will be eligible to travel in the trans-Tasman Safe Travel Zone. Cabinet ministers have agreed that New Zealand's preference is that a person lawfully in a Safe Travel Zone country for 14 days should be able to travel in the Safe Travel Zone, subject to meeting health and immigration requirements. [CAB-20-MIN-0278 and CAB-20-MIN-0345].
- 22 I therefore propose that the current suspension of offshore applications be amended such that foreign nationals who are in a Safe Travel Zone country can apply for a temporary entry class visa to enable them to travel to New Zealand. (Visa waiver travellers, such as United Kingdom citizens, would not need to hold a visa to travel to New Zealand and apply for a visitor visa and entry permission on arrival.)
- 23 This carve out would apply from the date that a Safe Travel Zone came into effect during the time that offshore applications more generally are suspended.

Regulation Change Three – Clarifying that no immigration charges apply where people are seeking to travel to New Zealand as part of a national Antarctic programme

- 24 New Zealand has entered into legally binding cooperation agreements with several parties to the Antarctic Treaty under which we have agreed to facilitate travel to Antarctica via New Zealand for participants in their national Antarctic programmes. The United States, Italy and the Republic of Korea manage their operations in the Ross Sea region from Christchurch pursuant to these agreements and other countries (e.g. Germany) use Christchurch as a gateway to the Ross Sea region on an ad hoc basis. In the case of the United States, we agreed to waive our visa and immigration laws as appropriate in respect of their national Antarctic programme personnel.
- 25 Accordingly, New Zealand does not charge participants in any countries' national Antarctic programme the usual suite of border-related fees. The Visa Regulations already establish that participants in national Antarctic programmes are waived the requirement to hold a visitor or transit visa, that they are waived the requirement to pay the International Visitor (Conservation and Tourism) Levy (which would otherwise apply to an Electronic Travel Authority), and that they are deemed to hold a visa (at no charge) if they enter the Ross Dependency other than from the New Zealand mainland.
- 26 The *Immigration (Visa, Entry Permission, and Related Matters) Amendment (COVID-19—Applications and Fees) Regulations 2020*, (COVID-19 Regulations) came into effect on 10 August [CBC-20-MIN-0069 and LEG-20-MIN-0108]. They similarly establish that, for people who are members of, or associated with, any scientific programme or expedition under the auspices of a Contracting Party to the Antarctic Treaty within the meaning of the Antarctica Act 1960, or are a person to whom section 5 of that Act applies, a prescribed fee is not payable by the person for either:

- 26.1 notifying an interest in obtaining an invitation to apply for a specified visa if the person may, by virtue of COVID-19 immigration instructions, apply for the visa if invited to do so, or
- 26.2 requesting, under COVID-19 immigration instructions, agreement to the person applying for variation of conditions imposed on their specified visa.
- 27 The COVID-19 Regulations also state that this has effect despite anything to the contrary in the regulations, and that “specified visa” means a residence class visa or a temporary entry class visa.
- 28 It has now become clear that the regulations changes should however also have covered the employer’s Approval in Principle fee and the prescribed fee for the subsequent visa application (these are currently being waived on a case-by-case basis by Special Direction). I therefore propose to amend the Visa Regulations to make it clear that no charges apply in relation to visa applications or expressions of interest by either individuals or agencies where those applications or expressions of interest are for participants in national Antarctic programmes under the auspices of a Contracting Party to the Antarctic Treaty.

Regulation Change Four – Removing a provision which deems certain people travelling on marine craft to hold a visa

- 29 The Visa Regulations specify the people arriving at the maritime border who are deemed to hold a visa. Prior to the COVID-19 outbreak, most maritime arrivals were listed in Schedule 3 as deemed to hold a visa on arrival, and exempted under regulation 25 from the requirement to apply for entry permission.
- 30 However, these settings are substantially overwritten at present by the tight border restrictions we have imposed, to limit who can enter New Zealand while our borders are closed to manage the public health risks posed by COVID-19. Cargo ship crew and passengers are now the only maritime arrivals who are deemed to hold visas, and are exempt from COVID-19 border restrictions, and who can therefore continue to enter New Zealand without a visa.
- 31 Most other maritime arrivals who are deemed and listed in Schedule 3, such as cruise ship crew and passengers, currently cannot enter New Zealand, as the ships themselves are not able to enter under the *COVID-19 Public Health Response (Maritime Border) Order (No 2) 2020*.
- 32 However, Schedule 3 includes a group of people that should not be deemed to have a visa: namely, Item 5 - passengers or crew on a ship that is carrying passengers, cargo, or both, who are not covered under the other items covering maritime crew and passenger in Schedule 3.
- 33 The operation of the current border restrictions for maritime arrivals has highlighted a theoretical risk that Item 5 could be utilised by small craft and others who may claim to be travelling in the ‘ordinary course of the business of the ship’ to New Zealand.
- 34 People travelling to New Zealand on small craft, yachts and other non-cargo vessels currently need a compelling reason to travel here in order to be approved for entry (although vessels that are New Zealand-flagged can travel to New Zealand). There is a risk that people who are not New Zealand citizens or resident visa holders could seek to enter under the deeming provision in Item 5, Schedule 3. This is an unacceptable risk in the current environment.

- 35 Removing Item 5 would ensure, through the removal of doubt, that all maritime arrivals (other than those explicitly specified in Schedule 3) should have to apply and be granted a border exception and a visa through standard immigration processes before seeking to travel to New Zealand. This would minimise the risk of unauthorised ships (particularly small craft and yachts that may try to use this provision) or people arriving at the border while New Zealand is operating tight border restrictions to manage a global pandemic.
- 36 I therefore propose that this provision be removed from the Schedule.

Regulation Change Five - Fixing a cross-referencing error

- 37 The Visa Regulations state that “Scheduled International Service” is defined in the *Immigration Act 2009* at subsection 4 of section 96 (*Carrier, and person in charge, of commercial craft to provide advance passenger processing information before departure*).
- 38 Section 96 was replaced, on 28 September 2017, by section 270 of the *Intelligence and Security Act 2017* and the definition of “Scheduled International Service” was shifted to section 4 (*Interpretation*). I propose that this error be rectified.

Financial implications

- 39 Most of the proposals in this paper have no material financial implications. The continuation of the visa applications suspensions means that Immigration New Zealand is continuing to not collect fee revenue from the offshore temporary entry class visa applications that might otherwise be made while the proposed regulations are in effect. However, I do not consider it appropriate for Immigration New Zealand to accept applications and fees when there is no or a very low likelihood that applicants will be able to travel to New Zealand. In addition, it is likely that a proportion of applicants would request refunds, which carry a relatively high administrative cost.

Legislative Implications

- 40 It is proposed that the policy recommendations in this paper are given effect by:
- 40.1 making regulations under the *Immigration Act 2009*; and
 - 40.2 amending the *Immigration (Visa, Entry Permission and Related Matters) Regulations 2010*.

Impact Analysis

Regulatory Impact Statement

- 41 The Treasury has determined that the regulatory proposals in this paper are exempt from the requirement to provide a Regulatory Impact Statement (RIS) because they are intended to alleviate the short-term impacts of the declared emergency event of the COVID-19 outbreak. The Treasury recommends a Supplementary Analysis Report or plans for a Post Implementation Assessment (in lieu of RIA) that addresses interactions, trade-offs and implementation issues related to numerous proposals in the border package.

Climate Implications of Policy Assessment

- 42 This proposal does not have climate implications.

Population Implications

43 This proposal does not have population implications.

Human Rights

44 While the *Immigration Act 2009* recognises that immigration matters inherently involve different treatment on the basis of personal characteristics, immigration policy development seeks to ensure that any changes are necessary and proportionate. The Ministry of Business, Innovation and Employment considers that the proposals in this paper are consistent with the *New Zealand Bill of Rights Act 1990* and the *Human Rights Act 1993*.

Timing and 28-day rule

- 45 If Cabinet agrees to these proposals and to the associated regulation changes, no waiver of the 28-day rule is sought and I recommend that the Amendment Regulations come into force on the 9 November 2020, which is the date that the current application suspension expires.
- 46 I note that, if Cabinet does not approve the regulation changes at this point, there is a risk that the timing of the election may mean it is not possible to extend the suspension of offshore temporary entry class visa applications before 9 November. If they are not suspended before 9 November their suspension must lapse and cannot be renewed.
- 47 If it is considered appropriate to continue suspending offshore temporary visa applications after 8 February 2021 I will return to Cabinet in December 2020 to seek further agreement.
- 48 The ability to make further extensions will expire on 15 May 2021, due to the expiry on that date of the relevant provision in the *Immigration Act 2009*, unless that legislation is amended. If it appears appropriate to continue some or any of the powers conferred by the *Immigration (COVID-19 response) Amendment Act 2020* (including this power), I will seek Cabinet decisions before the end of 2020.

Compliance

- 49 The Amendment Regulations comply with each of the following:
- 49.1 the principles of the Treaty of Waitangi;
 - 49.2 the rights and freedoms contained in the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993;
 - 49.3 relevant international standards and obligations;
 - 49.4 the Legislation Design Advisory Committee's Guidelines on Process and Content of Legislation.
- 50 Specifically, I note that the proposed continuation of the suspension of offshore temporary visa applications does not unlawfully discriminate on the grounds of nationality, as it is based on where individuals are, rather than on their citizenship.

Regulations Review Committee

51 There are no anticipated grounds for the Regulations Review Committee to draw the Amendment Regulations to the attention of the House under Standing Order 315.

Certification by Parliamentary Counsel

52 The draft Regulations have been certified by the Parliamentary Counsel Office as being in order for submission to Cabinet.

Consultation

53 This paper was prepared by the Ministry of Business, Innovation and Employment. The Ministries of Education and Foreign Affairs and Trade, Education New Zealand, the New Zealand Customs Service, the Treasury and the Department of Prime Minister and Cabinet have been consulted and their views taken into account during the development of this paper.

Communications

54 A communications plan will be developed by officials in consultation with Ministers' offices. Communications will be appropriately positioned within wider messaging designed to ensure that international markets (including international education markets) understand that New Zealand will welcome travellers once the threat of importing COVID-19 can be appropriately managed.

Proactive release

55 I propose to release this paper proactively. Any redactions made will be consistent with the Official Information Act 1982.

Recommendations

56 I recommend that Cabinet:

- 1 **note** that, to reflect the current border closures, Cabinet agreed in July 2020 to suspend, for the maximum period of three months, the ability of people offshore to apply for, or express interest in applying for, most temporary entry class visa types [CBC-20-MIN-0069 and LEG-20-MIN-0108];
- 2 **note** that the *Immigration (Visa, Entry Permission, and Related Matters) Amendment (COVID-19 – Applications and Fees) Regulations 2020*, which reflect the decision in paragraph 1 above, came into effect on 10 August 2020 and will expire on 9 November 2020 unless extended through a further regulation change;
- 3 **note** that the Minister of Immigration considers that the suspension of applications should be continued post the November expiry date, and that this continues to be reasonably necessary to manage the effects, or deal with the consequences of, the outbreak of COVID-19;
- 4 **agree** to extend the current suspension of applications for, and expressions of interest in applying for, most offshore temporary visas, for a further three months to 8 February 2021;
- 5 **agree** that Ministers with Power to Act (the Minister of Immigration, the Minister of Foreign Affairs, the Minister of Housing and the Minister of Health) continue to be authorised to revoke the regulations, in whole or in part, should the Minister of Immigration recommend that:
 - 5.1 suspending the ability of persons outside of New Zealand from applying for a temporary entry class visa is no longer required; or

- 5.2 applications for certain temporary entry class visas should be reopened before the end of the suspension period;
- 6 **agree** that this suspension not apply to people applying for visas from within a Safe Travel Zone that is in effect, where they intend to travel to New Zealand from that Safe Travel Zone;
- 7 **agree** that the *Immigration (Visa, Entry Permission, and Related Matters) Regulations 2010* be amended to clarify that participants in national Antarctic programmes operated by a Contracting Party to the Antarctic Treaty are not liable for immigration charges in any circumstances, including where national Antarctic programmes are expressing interest in individuals being able to undertake such travel and where individuals are then applying for visas;
- 8 **note** that item 5 in Schedule 3 of the *Immigration (Visa, Entry Permission, and Related Matters) Regulations 2010* establishes that people who travel to New Zealand on a marine craft that is not a cruise or a cargo vessel are deemed to hold a visa on arrival and that this provision conflicts with current maritime border management, which requires such people, who are not New Zealand citizens or visa holders, to apply for and be granted a border exception and a visa before arrival;
- 9 **agree** to the removal of item 5 from Schedule 3 of the *Immigration (Visa, Entry Permission, and Related Matters) Regulations 2010*;
- 10 **agree** that a cross referencing error in section 4 of the *Immigration (Visa, Entry Permission, and Related Matters) Regulations 2010* relating to the definition of a “Scheduled International Service” be rectified;
- 11 **approve** the *Immigration (Visa, Entry Permission, and Related Matters) (COVID-19) Amendment Regulations 2020*, which give effect to the decisions above;
- 12 **authorise** the submission to the Executive Council of the *Immigration (Visa, Entry Permission, and Related Matters) (COVID-19) Amendment Regulations 2020*;
- 13 **agree** that the *Immigration (Visa, Entry Permission, and Related Matters) (COVID-19 Response) Amendment Regulations 2020* come into effect on 9 November 2020; and
- 14 **note** that, if it is considered appropriate to continue suspending offshore temporary visa applications after 8 February 2021, the Minister of Immigration will return to Cabinet in December 2020 to seek further agreement.

Authorised for lodgement

Hon Kris Faafoi
Minister of Immigration