

Video Presentation
20 July 2020

VISA ISSUES

IN THE TIME OF COVID

Introduction

Good morning, and thanks to the Council of International Students Australia, for the opportunity to address its members.

I am going to speak on several visa related issues arising from the Pandemic.

In particular I will be speaking on the very major problem of the Government's regulations which attempt to deny the early access of international students to their accrued super savings in the 2020-21 year, and possible solutions to this.

I will also look at:

- Relaxation of work hours restrictions for some student visa holders;
- Solutions for visa holders subject to travel restrictions;
- Study restrictions for dependent partners of international students; and
- Implications for workers without a Tax File Number.

Questions and Answers

1. How can international students apply for superannuation 2020-21 if they have applied for 2019-2020?

What are the legal procedures for the international students should follow around this?

Are there are always the visa restrictions on their end?

Answer

Currently, only in very limited circumstances.

COVID-19 early release of superannuation

If you're adversely financially affected by COVID-19, you may be eligible to access some of your superannuation early.

- Eligible citizens and permanent residents of Australia and New Zealand can submit an application between 1 July 2020 and 24 September 2020 through ATO
- Applications for the 2019–20 financial year **closed on 30 June 2020**.
- If you are eligible and applied for your COVID-19 early release of super in late June 2020, you may receive your money from your fund in the 2020–21 financial year.
- This will not affect your eligibility to apply this financial year.
- Temporary residents impacted by COVID-19 **were eligible** to apply for early release of superannuation in the **2019-20 financial year**.
- **Temporary residents are not eligible** to apply for COVID-19 early release of super

My Observation

I have reviewed the recent legislation and make the following observations:

The Superannuation Industry (Supervision) Regulations 1994 were recently amended to provide the following:

See over

Table of Regulations

<p>Superannuation Industry (Supervision) Regulations 1994 Statutory Rules No. 57, 1994 made under the Superannuation Industry (Supervision) Act 1993 Compilation No. 119 Compilation date: 30 May 2020 Includes amendments up to: F2020L00645 Registered: 30 June 2020</p> <p>6.01B Conditions of release for temporary residents</p> <p>(1) This regulation applies to a member who is or was a temporary resident.</p> <p>(2) This regulation does not apply to a member who:</p> <p>(a) is an Australian citizen, a New Zealand citizen or a permanent resident; or</p> <p>(b) is, at any time, the holder of a Subclass 405 (Investor Retirement) visa or a Subclass 410 (Retirement) visa described in Schedule 2 to the <i>Migration Regulations 1994</i>.</p> <p>(3) The only conditions of release that can be satisfied in respect of a member to whom this regulation applies are:</p> <p>(a) a condition of release that was satisfied by the member before 1 April 2009; and</p> <p>(b) the conditions of release in items 102, 102A, 103, 103A, 103B, 107A, 109, 111A, 111B, 113A, 202, 202A,</p>	<p>6.19B Release of benefits on compassionate ground— coronavirus</p> <p>(1) A person may apply to the Regulator for a determination that an amount of the person's preserved benefits, or restricted non-preserved benefits, in a specified superannuation entity or entities may be released on the ground that it is required to assist the person to deal with the adverse economic effects of the coronavirus known as COVID-19 if:</p> <p>(a) unless paragraph (b) applies—subregulation (1A) applies in respect of the person; or</p> <p>(b) in a case where regulation 6.01B (temporary residents) applies to the person:</p> <p>(i) the person is covered by subregulation (1B); and</p> <p>(ii) subregulation (1C) applies in respect of the person.</p> <p>(1A) For the purposes of paragraph (1)(a), this subregulation applies in respect of the person if:</p> <p>(a) the person is unemployed; or</p> <p>(2) A person may make one or more applications under subregulation (1) as follows:</p> <p>(a) one in the financial year ending 30 June 2020; and</p> <p>(b) in a case where paragraph (1)(a) applies—one in the financial year ending 30 June 2021.</p>	<p>Coronavirus Economic Response Package Omnibus Act 2020 No. 22, 2020 Compilation No. 1 Compilation date: 25 March 2020 Includes amendments up to: Act No. 38, 2020 Registered: 23 April 2020</p> <p><i>6.19B Release of benefits on compassionate ground— coronavirus</i></p> <p><i>(1) A person may apply to the Regulator for a determination that an amount of the person's preserved benefits, or restricted non-preserved benefits, in a specified superannuation entity or entities may be released on the ground that it is required to assist the person to deal with the adverse economic effects of the coronavirus known as COVID-19 if:</i></p> <p><i>(a) the person is unemployed; or</i></p>
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203, 204, 204A, 207AA, 208A and 208B of Schedule 1.	However, no application may be made after 24 September 2020.	
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Conclusions

So... international students and temporary residents who remain in Australia can only claim (deadline expired) for the 2020 financial year (to 30/6/20).

This would seem to allow a major level of discriminatory conduct by the Regulator against Temporary Residents.

Options:

- The new Regulation says only one early release.
- However, actions taken by statutory authorities can in some cases, be challenged in the Courts, where those actions are held to be in jurisdictional error.
- Jurisdictional error can arise from actions/decisions taken by a statutory body which go against fundamental human rights. This is known as the doctrine of legality
 - It is the idea that...that legislation should not be read as reflecting and intention to abrogate or curtail fundamental rights or freedoms unless that intention is manifested in unambiguous language.
- So in our view, **the decision of the Regulator to refuse a second application for release, could be challenged in the Federal Court.**
- What other avenues?
 - Lobby govt
 - Ombudsman
 - Go to media

Suggestion:

- Keep lobbying Govt; or
- Go to High Court
 - Judicial review
 - We will be looking at Judicial Review options on this issue, And will notify CISA of our suggestions as soon as possible.

2. Allowance for Student Visa Holders to work more than 40 hours fortnight?

Answer

The Rules

Note: Work rights are governed by the conditions attached to a student visa. This is known as Conditions 8104 and 8105 as follows:

8104 - Student Family Member

- **must not work for more than 40 hours a fortnight**
- member of the family unit **must not work until the student has commenced a course of study.**
- If the course is for the award of a **masters or doctoral degree**, then the holder **may engage in work for more than 40 hours a fortnight**
- **fortnight** means the period of 14 days commencing on a Monday.

8105 -Student

- **must not work in Australia before the holder's course of study commences.**
- **must not work for more than 40 hours a fortnight during** any fortnight when the holder's **course of study** or training is in session.
- Above does **not apply**:
 - in relation to a **masters degree by research or doctoral degree** if the holder has commenced the masters degree by research or doctoral degree.
- **fortnight** means the period of 14 days commencing on a Monday.

Relaxation of the Rules

- Work more than 40 hours /fortnight?
- Yes. In some circumstances.
 - From 23 April NDIS workers and
 - Nursing students and
 - Healthcare related students
 - Note: without permission: constitutes a breach and possible offence

3. What happens if international students Temporary graduate visa is expiring few days and can't travel, what are the legal procedures the students should follow on that circumstances?

Answer

- Apply for **Temporary Activity Visa**.
- Applicant will be granted a Bridging visa while the application is processing.
- Very likely to be granted, unless there is some serious adverse information in application.

4. Can I work in a job paying cash while I wait for my TFN on student visa? This is an issue which many international students are facing. What are laws on this?

Answer

- Paying cash implies the employer is not withholding tax, and the employee is not paying tax. Both are illegal
- A person **can work without a TFN** but the employer **must withhold tax at 47%** or
- **45%** for a **foreign resident employee** from the total gross payment.
- **Solution is to work (within your visa work conditions) , but seek TFN asap.**

5. An international student who came as a **dependent, say partner visa** and are pursuing their study how are their working hours restricted?

Can each party work 40 hours?

Answer

- See **Qn 2 above**
- If they wanted the benefit of working 40hrs week outside of term, would need to apply for their own student visa.
- **Note** for dependent student visa holders
 - **Condition 8201** applies: Must not (except Guardians) engage, for more than 3 months in any studies or training .

6. Can international students get their 2 years study visa get extended as they aren't able to come to Australia and stuck overseas?

Answer:

- At this stage: No
- The Gov't is talking about the 485 becoming available for offshore students.
- But this has yet to be introduced

7. What will be your best legal advice for future internationals students in Australia?

Answer

- As always, choose a course you are comfortable with and want to pursue long term.
- You don't want to be in a position where you choose any course and find yourself hating it and not succeeding in course;
- Because it is so expensive, choose wisely.

8. What resources are there for international students in need some legal advice and services?

Answer

- DHL is offering legal advice to students in financial hardship.
 - See the *pro bono* section on our website for more details.

Disclaimer

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