Migration (1993) Regulations (Amendment) 1993 No. 283

EXPLANATORY STATEMENT

STATUTORY RULES 1993 No. 283

Issued by the Authority of the Minister for Immigration and Ethnic Affairs

Subject - Migration Act 1958

Migration (1993) Regulations (Amendment)

Section 181 of the Migration Act 1958 (the Act) provides that the Governor-General may make regulations, not inconsistent with the Act, to prescribe all matters which are required or permitted by the Act to be prescribed, or which are necessary or convenient to be prescribed, for carrying out or giving effect to the Act. Without limiting the generality of section 181, section 23 of the Act enables regulations to be made providing for different classes of visas and section 33 of the Act enables regulations to be made providing for different classes of entry permits.

In addition, subparagraph 181(1)(a)(i) of the Act provides that the regulations may provide for the charging and recovery of fees in respect of any matter under the Act or the Regulations.

The purpose of the Regulations is:

- to provide that an application may be made for the re-evidencing of a resident return visa where the visa stamp or label or the passport or travel document has been lost, damaged or stolen or cannot otherwise be used for travel purposes;

- to provide that where the period of validity of a Class 155 (resident return (B)) visa was limited to the life of the travel document in which it was evidenced the Minister may grant a new Class 155 visa for a period of up to 5 years;

- to provide for the grant of a Class 155 (resident return (B)) visa to a person who is to be employed overseas by an international organization to which the International Organizations (Privileges and Immunities) Act 1963 applies. Previously this provision was limited to employees of the United Nations;

- to provide that an application for a Class 829 (processing (residence)) entry permit is deemed to be made when a review authority remits for further consideration an application in respect of which the only requirement remaining to be satisfied is that the applicant hold a section 47 temporary entry permit;

- to amend an error in Schedule 10 of the Migration (1993) Regulations, in the calculation of the conversion of Australian dollar fees into Hong Kong dollars; and

- to make a number of clarifying and other minor amendments to the operation Class 155 (resident return (B)) and Class 156 (resident return (Q) visas and entry

permits, visitor and visitor (short stay) entry permits, and Class 829 (processing (residence)) visas and entry permits. These amendments have no effect on the substantive operation of the Migration (1993) Regulations.

The regulations commence on gazettal, with the following exceptions:

- subregulation 11.1 which clarifies the operation of Class 829 (processing (residence)) visa and entry permits commences retrospectively on 1 February 1993. This implements intended policy;

- regulation 3 and subregulations 11.4, 11.5, 11.6, 11.7 and 11.8, deeming an application for a Class 829 (processing residence)) entry permit to be made commence retrospectively on 3 June 1993. This is the date on which review authorities were first entitled to remit matters for further consideration; and

- regulation 12, correcting Schedule 10 commences retrospectively on 1 October 1993. This is the date from which the incorrect figures were inserted.

The operation of all these regulations is entirely beneficial to the applicants concerned and is not detrimental to any person. Retrospective operation of these provisions does not, therefore, contravene subsection 48(2) of the Acts Interpretation Act 1901.

Details of the Regulations are set out in the Attachment.

ATTACHMENT

Regulation 1 - Commencement

Subregulation 1.1 provides for subregulation 11.1 to be taken to have commenced on 1 February 1993.

Subregulation 1.2 provides for regulation 3 and subregulations 11.4, 11.5, 11.6, 11.7 and 11.8 to have commenced on 3 June 1993.

Subregulation 1.3 provides for regulation 12 to be taken to have commenced on 1 October 1993.

Retrospective amendment is in each case necessary either to clarify policy or to implement the policy in the manner originally intended. Details of the amendments are set out under the relevant regulation heading. In all cases the effect of the amendment is beneficial and is not detrimental to any person. The amendments, therefore, do not contravene subsection 48(2) of the Acts Interpretation Act 1901.

The remainder of these Regulations commence on gazettal.

Regulation 2: Amendment

This regulation provides for the Migration (1993) Regulations to be amended as set out in these Regulations.

Regulation 3 - Regulation 2.10 (Prescribed change in circumstances (paragraphs 36(1)(a) and 37(2)(a) of Act)

This regulation inserts a new paragraph 2.10(ma) in the Migration (1993) Regulations and must be read in conjunction with subregulation 11.5. Subregulation 11.5 enables a person whose application for review has been remitted by a review authority for reconsideration to be taken to have applied for a further Class 829 processing (residence) entry permit. Subregulation 2.10 (ma) lifts the barrier imposed by paragraphs 36(1)(a) and 37(2)(a) of the Migration Act 1958 that would otherwise prevent the making of an application for an entry permit by an applicant who has remained in Australia after previously being refused the grant of an entry permit. The effect of paragraph 2.10(ma) is to enable the grant of an entry permit to be made to the applicant.

This regulation is taken to have commenced on 3 June 1993. It implements intended policy which was previously omitted by oversight. Retrospective operation of the regulation is entirely beneficial to the applicants concerned as it permits the grant of an entry permit to them. It is not detrimental to any person, and therefore does not contravene subsection 48(2) of the Acts Interpretation Act 1901.

Regulation 4 - Regulation 2.16 (Application for certain classes of visas to have effect a an application for visas of certain other classes)

This regulation omits subregulations 2.16(4A) and (4B) from the Migration (1993) Regulations. Ibis regulation reflects a change in the application forms now used for resident return visa. A single application form is now used for all classes of resident return visas. There is no longer any need for regulations 2.16(4A) and (4B) and they are therefore omitted.

Regulation 5 - Regulation 2.21 (Recording and evidencing of visas)

Subregulations 5.1 and 5.2 amend subparagraphs 2.21(1)(a)(ii) and 2.21(1)(b)(ii) of the Migration (1993) Regulations, respectively, by inserting the words "a stamp or label evidencing" after "fixing" in each of those subparagraphs. These amendments are intended to make it clear that, consistent with the Migration Act 1958, the stamp or label placed in a person's passport or other travel document is only evidence of the visa and does not constitute the grant of the visa itself. Grant of the visa actually occurs when a decision to grant the visa is recorded on a file.

Regulation 6 - New regulation 2.21A

This regulation inserts a new regulation 2.21A - Re-evidencing of certain visas - in the Migration (1993) Regulations. The purpose of the new regulation is to provide that where a stamp or label evidencing the grant of a Group 1.4 (resident return (permanent entry)) visa or a Class 159 (resident return (F)) visa has been placed in a person's passport or other travel document, on application by the person and payment of the fee (if any) the visa must be recorded again in the person's passport or travel document if any of the following circumstances apply:

the record of the visa, or the passport or other travel document in which it has been placed, has been damaged, defaced, lost, stolen or destroyed, or otherwise cannot for good reason be presented for travel purposes; or

the passport or other travel document has expired, or has been cancelled, or is no longer applicable to that person.

Applications for re-evidencing of visas must be in accordance with approved form 786. If the application is made in Australia the fee is $50. For an application made overseas the fee is $60.

Regulation 7 - Regulation 2.29 (Application for certain classes of entry permits to have effect as an application for entry permits or visas of certain other classes)

This regulation omits subregulation 2.29(1A) of the Migration (1993) Regulations and substitutes a new subregulation 2.29(1A). The new subregulation 2.29(1A) continues to provide that an application after entry for a permanent entry permit has effect as an application for a Class 154 (resident return (A)) visa, but substantively changing the former provisions by providing that this provision does not apply to an application after entry for a Class 808 (confirmatory) entry permit made on the grounds that the applicant is the holder of a Class 159 (resident return (F)) entry permit or a Class 773 (border) entry permit. Applicants for a Class 808 (confirmatory) entry permit on those grounds will have previously entered Australia as permanent residents and will not be eligible for the grant of another Class 154 (resident return (A)) visa if they have previously held a visa of that class.

Regulation 8 - Schedule 2, Chapter 1.4 (Resident return (permanent entry) visas and entry permits)

Part 155 - Class 155 (Resident return (B)) visa and entry permit

Subregulation 8.1 omits paragraphs 155.221(a) and (b) of the Migration (1993) Regulations and substitutes new paragraphs 155.221(a) and (b). The new paragraph (a) continues the provisions of the previous paragraphs (a) and (b). The new paragraph (b) make new provisions for the period of validity of a Class 155 visa granted before or after entry, respectively, to an applicant who is or was the holder of a Class 155 visa granted between 19 December 1989 and 16 September 1991 and the period of validity of that visa was limited by the operation of paragraph 16(4)(b) of the Migration (1989) Regulations as in force at that time. The effect of the new paragraph 155.221 (b) is to provide that Class 155 visas granted to these persons under those new provisions are to be valid for a period of 5 years from the date of grant of the original Class 155 visa, or for such lesser period as the Minister may decide, irrespective of the expiry date of the passport.

Subregulation 8.2 omits subparagraphs 155.222(a)(i) and (ii) of the Migration (1993) Regulations and substitutes new subparagraphs 155.222(a)(i) and (ii). The new subparagraph (i) continues the provisions of the previous subparagraphs (i) and (ii). The new subparagraph (ii) makes a new provision for the period of validity of a Class 155 visa granted as an entry visa to an applicant who is or was the holder of a Class 155 visa granted between 19 December 1989 and 16 September 1991 and the period

of validity of that visa was limited by the operation of paragraph 16(4)(b) of the Migration (1989) Regulations as in force at that time. The effect of the new subparagraph 155.222(a)(ii) is to provide that a Class 155 entry visa granted to persons under that new provision are to be valid for a period of 5 years from the date of grant of the original Class 155 visa, or for such lesser period as the Minister may decide, irrespective of the expiry date of the passport.

Subregulation 8.3 amends subclause 155.321(1) of the Migration (1993) Regulations by inserting a reference to the new subclause 155.321(5) inserted in the Migration (1993) Regulations by subregulation 8.6 of these Regulations. The effect of this amendment is to provide that an applicant satisfying the criteria of the new subclause (5) is able to meet the criteria to be satisfied at time of application for a Class 155 visa before entry.

Subregulation 8.4 omits paragraph 155.321(3)(d) of the Migration (1993) Regulations and substitutes a new paragraph 155.321(3)(d). The purpose of the new paragraph (d) is to clarify that a person may be eligible for the grant of a Class 155 visa before entry if the person is travelling or has travelled overseas within the same family unit as an Australian citizen, (replacing the existing provision that the applicant must be a member of that Australian citizen's family unit). The meaning of "within the same family unit as an Australian citizen" for the purposes of this provision is set out in the new subclause 155.321(4) inserted in the Migration (1993) Regulations by subregulation 8.6 of these Regulations. For further details, please see the notes on subregulation 8.6, below.

Subregulation 8.5 amends paragraph 155.321(3)(e) of the Migration (1993) Regulations by omitting the words "the United Nations" and substituting "an international organization to which the International Organizations (Privileges and Immunities) Act 1963 applies, within the meaning of subsection 3(1) of that Act." The effect of this amendment is to enlarge the number of international organizations, including the United Nations, by which a person may be employed overseas in order to satisfy the criterion of paragraph (e) for the grant of a Class 155 visa before entry.

Subregulation 8.6 inserts two new subclauses 155.321(4) and (5) in the Migration (1993) Regulations, and also adds a clarifying note after the new subclause (5).

New subclause 155.321(4) prescribes the circumstances under which a person is "within the same family unit as an Australian citizen" for the purposes of the new paragraph 155.321(3)(d) inserted by subregulation 8.4 of these Regulations. The intention is that a person may also be eligible for a Class 155 visa if that person is travelling or has travelled overseas with an Australian citizen who is not the person's family head and on whom the person is not dependent, but the Australian citizen and the person are both members of the family unit of the same third person. Under the provision of paragraph (c), these persons are also within the family unit for the purposes of paragraph 155.321(3)(d) and therefore are able to satisfy the criterion of that paragraph for the grant of a Class 155 visa.

New subclause 155.321(5) provides for an additional criterion which a person may satisfy to be eligible for the grant of a Class 155 visa before entry. The new criterion may be satisfied by a person who is or was the holder of a Class 155 visa granted

between 19 December 1989 and 16 September 1991 and the period of validity of that visa was limited by the operation of paragraph 16(4)(b) of the Migration (1989) Regulations as in force at that time. The amendments made by subregulations 8.1 and 8.2 of these Regulations provide that the period of validity of a visa granted pursuant to this provision will be for 5 years from the date of grant of the original Class 155, or for such lesser period as the Minister may decide, irrespective of the expiry date of the passport in which it was evidenced.

Subregulation 8.7 amends subclause 155.421(1) of the Migration (1993) Regulations by inserting a reference to the new subclause 155.421(5) inserted in the Migration (1993) Regulations by subregulation 8.10 of these Regulations. The effect of this amendment is to provide that an applicant satisfying the criteria of the new subclause (5) is able to meet the criteria to be satisfied at time of application for a Class 155 visa after entry.

Subregulation 8.8 omits paragraph 155.421(3)(e) of the Migration (1993) Regulations and substitutes a new paragraph 155.421(3)(e). The purpose of the new paragraph (e) is to clarify that a person may be eligible for the grant of a Class 155 visa after entry if the person is travelling or has travelled overseas within the same family unit as an Australian citizen, (replacing the existing provision that the applicant must be a member of that Australian citizen's family unit). The meaning of "within the same family unit as an Australian citizen" for the purposes of this provision is set out in the new subclause 155.421(4) inserted in the Migration (1993) Regulations by subregulation 8.10 of these Regulations. For further details, please see the notes on subregulation 8.10, below.

Subregulation 8.9 amends paragraph 155.421(3)(f) of the Migration (1993) Regulations by omitting the words "the United Nations" and substituting "an international organization to which the International Organizations (Privileges and Immunities) Act 1963 applies, within the meaning of subsection 3(1) of that Act." The effect of this amendment is to enlarge the number of international organizations, including the United Nations, by which a person may be employed overseas in order to satisfy the criterion of paragraph (e) for the grant of a Class 155 visa after entry.

Subregulation 8.10 inserts two new subclauses 155.421(4) and (5) in the Migration (1993) Regulations, and also adds a clarifying note after the new subclause (5).

New subclause 155.421(4) prescribes the circumstances under which a person is "within the same family unit as an Australian citizen" for the purposes of the new paragraph 155.421(3)(e) inserted by subregulation 8.8 of these Regulations. The intention is that a person may also be eligible for a Class 155 visa if that person is travelling or has travelled overseas with an Australian citizen who is not the person's family head and on whom the person is not dependent, but the Australian citizen and the person are both members of the family unit of the same third person. Under the provision of paragraph (c), these persons are also within the family unit for the purposes of paragraph 155.421(3)(e) and therefore are able to satisfy the criterion of that paragraph for the grant of a Class 155 visa.

New subclause 155.421(5) provides for an additional criterion which a person may satisfy to be eligible for the grant of a Class 155 visa after entry. The new criterion

may be satisfied by a person who is or was the holder of a Class 155 visa granted between 19 December 1989 and 16 September 1991 and the period of validity of that visa was limited by the operation of paragraph 16(4)(b) of the Migration (1989) Regulations as in force at that time. The amendments made by subregulation 8.1 of these Regulations provide that the period of validity of a visa granted pursuant to this provision will be for 5 years from the date of grant of the original Class 155, or for such lesser period as the Minister may decide, irrespective of the expiry date of the passport in which it was evidenced.

Part 156 - Class 156 (Resident return (Q) visa and entry permit

Subregulation 8.11 makes a minor technical amendment to paragraph 156.421(b) of the Migration (1993) Regulations by inserting "permanent" after "Australian". This puts beyond doubt that the applicant must be a permanent resident of Australia.

Regulation 9 - Schedule 2. Chapter 2.3 (Visitor visas and entry permits)

Subregulation 9.1 amends clauses 680.711, 682.711, 683.711, 684.711 and 685.711 by omitting the words "form 2" and substituting the words "form 60P'. These amendments are necessary as the Minister has approved a new form 601 for the making of applications for Group 2.3 (visitor) entry permits after entry.

Regulation 10 - Schedule 2. Chapter 2.4 (Visitor (short stay) visas and entry permits)

Subregulation 10.1 amends clauses 670.711, 672.711, 673.711, 674.711 and 675.711 by omitting the words "form 2" and substituting the words "form 60P'. These amendments are necessary as the Minister has approved a new form 601 for the making of applications for Group 2.4 (visitor (short stay)) entry permits after entry.

Regulation 11 - Schedule 2. Chapter 2.8 (Miscellaneous visas and entry permits)

Part 829 - Class 829 (Processing (residence) visa and entry permit)

Subregulation 11.1 deletes clause 829.411 of the Migration (1993) Regulations and substitutes a new clause 829.411. The new clause continues the provision of the previous clause that an application for a Class 829 visa after entry must be made in accordance with approved form 43, but it also adds the provision that an application by a person who is included in the passport of another applicant for a Class 829 visa may be combined with, and lodged at the same time as, the application by that other applicant. Its operation is therefore made retrospective to 1 February 1993, the date of commencement of the Migration (1993) Regulations. Retrospective operation of the provision is entirely beneficial to the applicants concerned and is not detrimental to any person. It therefore does not contravene subsection 48(2) of the Acts Interpretation Act 1901.

Subregulation 11.2 makes a technical amendment to the note following subdivision 829.41 of the Migration (1993) Regulations by correcting the reference to specify clause 829.811.

Subregulation 11.3 omits clause 829.442 of the Migration (1993) Regulations and substitutes a new clause 829.442. The purpose of the new clause is to make it clear that no discretionary conditions are to be placed on a Class 829 visa granted after entry.

Subregulation 11.4 omits subdivision 829.52 of the Migration (1993) Regulations and substitutes a new subdivision 829.52. The new paragraph 829.521(a) makes provision for the period of validity of a Class 829 entry permit granted to an applicant to whom the new clause 829.712 does not apply. A Class 829 entry permit granted to these applicants is valid until a decision is made not to grant an entry permit to which the applicant's principal application relates and the applicant is notified of the decision, or until the application is granted or the application is withdrawn, whichever is the sooner.

The new paragraph 829.521(b) makes provision for the period of validity of a class 829 entry permit granted to an applicant to whom clause 829.712 applies. A Class 829 entry permit granted to these applicants is valid until the entry permit to which the principal application relates is granted or the application is withdrawn, whichever is the sooner. This subregulation is taken to have commenced on 3 June 1993. The effect of the provisions is entirely beneficial to the applicants concerned and is not detrimental to any person. Retrospective operation of the amendments therefore does not contravene the provisions of subsection 48(2) of the Acts Interpretation Act 1901.

Subregulation 11.5 omits subdivision 829.71 of the Migration (1993) Regulations and substitutes a new subdivision 829.71 - application (entry permit (after entry)). The purposes of the clauses of the new subdivision are as follows: The new clause 829.711 clarifies that a person is taken to have applied for a Class 829 entry permit on making an application for any of the Group 1.2 (permanent resident (after entry)) entry permits set out in subregulation 2.29(1B). The new clause 829.712 makes an additional provision that where a person whose application for a Group 1.2 (permanent resident (after entry)) entry permit has been refused seeks a review of that decision and a review authority remits the application for reconsideration under paragraph 118(4)(ba) of the Act, the person is taken to have applied for a Class 829 entry permit when either the review authority determines in writing that the Group 1.2 entry permit would be granted except that the person does not hold a section 47 temporary entry permit, or, following remittal of the application by a review authority, the Minister determines that the Group 1.2 entry permit would be granted except that the person does not hold a section 47 temporary entry permit. The effect of the new clause 829.712 is to enable an application for a Class 829 entry permit (which is a section 47 entry permit) to be made automatically when it is determined on review that the holding of a section 47 temporary entry permit is the only requirement remaining to be satisfied by the applicant for grant of the Group 1.2 entry permit.

The amendments made by subregulation 11.5 implement the intended policy but were previously omitted by oversight. The subregulation is therefore taken to have commenced on 3 June 1993. The effect of the provisions is entirely beneficial to the applicants concerned and is not detrimental to any person. Retrospective operation of the amendments therefore does not contravene the provisions of subsection 48(2) of the Acts Interpretation Act 1901.

Subregulation 11.6 amends clause 829.723 by providing the clause does not apply to an applicant to whom clause 829.712 applies. Clause 829.712 is inserted by regulation 11.5 above. The subregulation is therefore taken to have commenced on 3 June 1993. The effect of the provisions is entirely beneficial to the applicants concerned and is not detrimental to any person. Retrospective operation of the amendments therefore does not contravene the provisions of subsection 48(2) of the Acts Interpretation Act 1901.

Subregulation 11.7 amends subclause 829.731(1) of the Migration (1993) Regulations by omitting "or (4)" and substituting ",(4) or (5)". The effect of this amendment is to provide that an applicant is able to meet the criteria at time of decision for grant of a Class 829 entry permit after entry if the applicant satisfies the requirements of the new subclause 829.731(5) inserted in the Migration (1993) Regulations by subregulation 11.8 of these Regulations. For further details of the new subclause (5), please see the notes on subregulation 11.8, below. Operation of this amendment is made retrospective to 3 June 1993, as it implements the intended policy but was previously omitted by oversight. Retrospective operation of these provisions is entirely beneficial to certain applicants and is not detrimental to any person. It therefore does not contravene the provisions of subsection 48(2) of the Acts Interpretation Act 1901.

Subregulation 11.8 inserts a new subclause 829.731(5) in the Migration (1993) Regulations to provide for an additional criterion which an applicant may satisfy at the time of decision for grant of a Class 829 entry permit after entry. The new subclause (5) provides that an applicant meets the criterion if the applicant is an applicant to whom the new clause 829.712 applies. Clause 829.712 inserted in the Migration (1993) Regulations by subregulation 11.5 of these Regulations. Please see the notes on subregulation 11.5, above, for further details of the applicants to whom it refers. As this subregulation implements intended policy previously omitted by oversight, it is taken to have effect from 3 June 1993. The effect of the new provisions is entirely beneficial to the applicants concerned and is not detrimental to any person. Retrospective operation of the amendments therefore does not infringe the provisions of subsection 48(2) of the Acts Interpretation Act 1901.

Subregulation 11.9 omits clause 829.742 of the Migration (1993) Regulations and substitutes a new clause 829.742. The purpose of the new clause is to make it clear that no discretionary conditions are to be placed on a Class 829 entry permit granted after entry.

Subregulation 11.10 omits subdivision 829.81 of the Migration (1993) Regulations and substitutes a new subdivision 829.81. The new subdivision continues the existing provision for a fee of $50 in respect of a separate application for a Class 829 visa after entry, but makes a substantive change in the existing provisions by providing that there is no fee in relation to an application combined with an another application made on or after 1 February 1993 on which the fee payable is paid. Subregulation 11.1 of these Regulations makes a new provision for an application for a Class 829 visa by a person who is included in the passport of another applicant for a Class 829 visa to be combined with and lodged at the same time as the application by that other applicant. The substantive effect of the amendment made by subregulation 11.10 is therefore to exempt that combined application from a fee.

Regulation 12 - Schedule 10 (Amounts of fees in certain currencies)

Subregulation 12.1 omits the column relating to Hong Kong and substitutes a new column relating to Hong Kong. This amends an earlier error in the calculation of the conversion commenced on 1 October 1993, the date the table was last updated and when the error occurred. Retrospective operation of the regulation is entirely beneficial to the applicants concerned as it corrects an error which would have caused applicants to pay fees at inappropriate and excessive rates. It is not detrimental to any person and it therefore does not contravene subsection 48(2) of the Acts Interpretation Act 1901.