

# Migration Regulations (Amendment) 1994 No. 280

## EXPLANATORY STATEMENT

### STATUTORY RULES 1994 No. 280

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

Subject - Migration Act 1958

Migration Regulations (Amendment)

Amendments to the Migration Act 1958 (the Act) commence on 1 September 1994. The Migration Regulations are also made to commence on 1 September 1994 and implement changes necessary as a result of the amendments to the Act. The Migration Regulations (Amendment) amend those Regulations.

The Act, as amended on 1 September 1994, will provide the regulation making powers set out below which enable the Migration Regulations and the Migration Regulations (Amendment) to be made. Where the powers are new regulation making powers, subsection 4(1) of the Acts Interpretation Act 1901 is relied upon. This subsection provides that where an amending Act amends a principal Act in such a way that the principal Act will confer power to make regulations, then the power may be exercised before the amendments come into operation as if they had come into operation. All references to the Act in this Explanatory Memorandum are to the renumbered provisions as they will exist on 1 September 1994.

Section 504 of the Act provides that the Governor-General may make regulations, not inconsistent with the Act, to prescribe all matters which are required or permitted to be prescribed by the Act or which are necessary or convenient to be prescribed for carrying out or giving effect to the Act. Without limiting the generality of section 504, particular provision is made for and in relation to the following matters:

- paragraph 504(1)(a) 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; and
- paragraph 504(1)(e) of the Act provides that regulations may be made in relation to the giving, lodging and serving of documents for the purposes of the Act by the Minister, the Secretary or any other person or body.

In addition, regulations may be made pursuant to the following powers:

- subsection 31(1) of the Act provides that the regulations are to prescribe classes of visas;
- subsection 31(3) of the Act provides that the regulations may prescribe criteria for visas of a specified class;
- subsection 31(4) of the Act provides for the regulations to prescribe whether visas are visas to travel to and enter, or to remain in Australia, or both;
- subsection 33(2) of the Act provides for regulations to be made which prescribe status for the purpose of the grant of special purpose visas;

- section 41 of the Act provides that, without limiting the generality of the section, the regulations may provide that visas or visas of a specified class are subject to specified conditions, including but not limited to a condition that a further visa cannot be granted and a condition restricting work rights;
- subsection 45(3) of the Act provides that, without limiting the generality of subsection 45(1), the regulations may provide for the places in which an applicant must be when an application for a visa of a specified class is made;
- section 48 of the Act provides for prescribing classes of visas which are the only classes of visas for which a person whose visa has been cancelled, or whose application for a visa has been refused, may apply;
- subsection 58(2) of the Act provides for a period to be prescribed within which additional information or comments are to be given in response to the Minister's invitation to respond otherwise than at an interview;
- subsection 68(4) of the Act provides for the regulations to make provision for the determination of which bridging visa held by an applicant is the most beneficial of the bridging visas held by the applicant;
- subsection 71(1) of the Act provides for the regulations to prescribe the way in which evidence of a visa is to be given;
- section 72 of the Act provides that a class of persons may be prescribed who are 'eligible noncitizens' for the purposes of the grant of bridging visas;
- subsection 75(1) of the Act provides for classes of bridging visas to be prescribed for which an application, when made by an eligible non-citizen who is in immigration detention, must be decided by the Minister within a period which may also be prescribed. Failure by the Minister to make a decision on a prescribed application within the prescribed period results in the automatic grant of the visa to the applicant; and
- paragraph 166(1)(b) of the Act provides that the regulations may require information to be given to a clearance officer by persons who enter Australia.

The purpose of the Regulations is to correct some unintended consequences, to clarify a number of ambiguities in the operation of the Migration Regulations, and to implement some policy changes.

The policy changes being implemented are set out below.

- A wider class of persons is made eligible for the grant of a bridging visa. This is achieved through an extension of the classes of eligible non-citizens.
- Fees payable on application for the grant of the Return (Residence) visa and the Prospective Marriage (Temporary) visa are increased.
- A 28 day period is prescribed in specified circumstances for the making of a decision on a bridging visa application where the applicant is in immigration detention.
- Eligibility for the Bridging visa D (Prospective Protection) visa is extended.

- Provision is made for a former Australian citizen usually resident in Australia to count periods of residence in, Australia as an Australian citizen towards the grant of a return visa.
- The circumstances under which health criteria 4007 and 4008 may be waived are made more flexible.
- Provision is made to facilitate the entry into Australia of staff of organisations that have entered into Regional Headquarters Agreements with the Commonwealth Government to establish a regional headquarters in Australia.

The amendments to facilitate the entry to Australia of staff of organisations who have entered into Regional Headquarters Agreements with the Commonwealth Government commence on 1 October 1994. The remainder of the amendments commence on 1 September 1994 except for the technical provisions which commence on gazettal.

Details of the Regulations are set out in the Attachment.

## **ATTACHMENT**

### **PART 1 - PRELIMINARY**

#### Regulation 1 - Commencement

Subregulation 1.1 of these Regulations provides for Part 2 of these Regulations to commence on 1 September 1994. Subregulation 1.2 provides for Part 3 of these Regulations to commence on 1 October 1994. The remainder of these Regulations commence on gazettal.

#### Regulation 2 - Amendment

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

### **PART 2 - AMENDMENTS HAVING EFFECT ON 1 SEPTEMBER 1994**

#### Regulation 3 - Regulation 1.03 (Interpretation)

This regulation omits paragraph (b) from the definition of "Commonwealth forces member" and substitutes a new paragraph. The effect of the amendment is to ensure that a person who qualifies as a Commonwealth forces member maintains that status while in Australia in the course of his or her duty.

#### Regulation 4 - Regulation 2.09 (Application taken to have been validly made (Act, s.46(2)))

This regulation omits regulation 2.09 on the basis that it is unnecessary. It is not the intention that any invalid application is to be validated by operation of law.

#### Regulation 5 - Regulation 2.12 (Certain non-citizens whose applications refused in Australia (Act, s.48))

Section 48 of the Act limits, in specified circumstances, the right of a non-citizen in Australia who has been refused the grant of a visa to make a further application for a visa. An application may only be made for a prescribed class of visa.

Subregulation 5.1 inserts new paragraph 2.12(1)(ca) which provides that the Long Stay (Visitor) visa is a prescribed class of visa in the circumstances specified in subregulation 2.12(3). Subregulation 2.12(3) is inserted by subregulation 5.2 of these Regulations.

Subregulation 5.2 omits subregulation 2.12(2) and inserts new subregulations 2.12(2) and 2.12(3).

New subregulation 2.12(2) clarifies the policy intention as to the circumstances in which the Protection visa is a prescribed class of visa for a person who has previously applied for a Protection visa.

New subregulation 2.12(3) sets out the requirements that must be satisfied for the Long Stay (Visitor) visa to be a prescribed class of visa. The effect of new subregulation 2.12(3) is that this visa is a prescribed class of visa only for those persons who satisfy a specified criterion for the grant of the Subclass 685 Medical Treatment (Long Stay) visa.

Regulation 6 - Regulation 2.15 (Response to invitation to give information or comments prescribed periods)

This regulation omits paragraph 2.15(1)(b) and substitutes a new paragraph. The new paragraph sets out the prescribed periods for providing additional information or comments both where the invitation to provide information or comments is given at an interview and where it is given in other circumstances. The purpose of the amendment is to prescribe the periods that apply where an invitation is given at interview. This clarifies policy intention.

Regulation 7 - Regulation 2.17 (Ways of giving evidence of a visa)

This regulation omits subregulation 2.17(6) and substitutes a new subregulation which clarifies when and how replacement evidence of the grant of a visa will be given. Where replacement evidence is required to be given it will be given only by means of a visa label and may include specified information.

Regulation 8 - Regulation 2.20 (Eligible non-citizen (Act, s.72))

The amendments made by this regulation add further classes of persons to those prescribed under section 72 of the Act as 'eligible non-citizens'. This amendment facilitates the grant of a bridging visa to persons who come within these classes. The new classes are set out in new subregulations 2.20(6) - (11). The new subregulations are inserted by subregulation 8.2. The amendment made by subregulation 8.1 is a technical amendment that is consequential on the amendment made by subregulation 8.2.

Regulation 9 - Regulation 2.21 (Most beneficial bridging visas (Act, s.68(4)(b)(ii)))

This regulation inserts new subregulation 2.21(5) which provides that where a non-citizen holds 2 or more Bridging E visas, the one that is granted later is taken to be the more beneficial- Whether or not a bridging visa is taken to be more beneficial is relevant in determining when a bridging visa that has ceased to be in effect will be reactivated. (Refer section 68 of the Act).

Regulation 10 - Regulation 2.24 (Eligible non-citizen in immigration detention (Act, s.75))

This regulation omits subregulation 2.24(2) and substitutes a new subregulation that prescribes the periods in which a decision on a bridging visa application must be made in respect of a non-citizen in immigration detention. The purpose of the amendment is to provide that in specified circumstances the prescribed period will be 28 days. In all other cases the prescribed period is 2 working days. The fact that two different periods have been prescribed reflects the differing complexities of the decisions to which the prescribed periods relate.

Regulation 11 - Regulation 2.25 (Grant of bridging visa E without application)

This regulation omits paragraph 2.25(a) and substitutes a new paragraph which clarifies the circumstances in which a bridging visa E can be granted without an application being made for the grant of the visa. The purpose of the amendment is to ensure that the provision is sufficiently wide to allow for the granting of a bridging visa E where a non-citizen is located in a remote area with no access to an office of the Department.

Regulation 12 - Regulation 2.40 (Persons having a prescribed status - special purpose visas (Act, s. 33(2)(a))

The amendments made by this regulation clarify the operation of regulation 2.40 in respect of members of the crew of non-military ships (other than imported ships) and members of the crew of imported ships.

Subregulation 12.1 omits paragraph 2.40(1)(k) and substitutes new paragraphs 2.40(1)(k) and 2.40(1)(ka). This amendment divides the class of persons included in the omitted paragraph into two classes. Subregulations 12.2 and 12.3 make consequential amendments to subregulations 2.40(4) and 2.40(7). Subregulation 12.4 omits subregulation 2.40(8) and inserts a new subregulation which sets out the circumstances in which persons coming within new paragraph 2.40(1)(ka) are taken to hold a special purpose visa.

#### Regulation 13 - Regulation 4.17 (Time limits etc. in relation to other evidence - bridging visa decisions)

This regulation amends subregulation 4.17(3). The amended subregulation provides that where evidence required to be provided to the Immigration Review Tribunal is sent by facsimile transmission, the evidence is taken to have been provided when the facsimile is received at a registry of the Tribunal rather than when it is sent. This rectifies an inadvertent omission from the Migration Regulations.

#### Regulation 14 - Regulation 5.02 (Service of document-on person in immigration detention)

This regulation omits subregulation 5.02(1) and substitutes a new subregulation which clarifies the policy intention regarding the way in which a document is required to be served on a person who is in immigration detention.

#### Regulation 15 - Regulation 5.03 (Time of receipt of document that is sent)

This regulation omits regulation 5.03 and substitutes a new regulation which clarifies when a document that is sent is taken to be received.

#### Regulation 16 - Schedule 1 (Classes of visas)

Subregulation 16.1 amends paragraph 1128(2)(a). Subregulation 16.2 amends subitem 1215(2). The effect of the amendments is to raise the application fees for a Return (Residence) visa applied for in Australia from \$60 to \$65 and for a Prospective Marriage (Temporary) visa from \$395 to \$400. The amendments are made pursuant to a Budget decision.

Subregulations 16.3 to 16.5 inclusive amend subitems 1302(3), 1303(3) and 1304(3) of Schedule 1. The effect of the amendments is to prevent specified classes of eligible non-citizen from applying for a Bridging visa class B, C or D.

Subregulation 16.6 omits subitem 1305(4) and inserts a new subitem which sets out the subclasses within Bridging visa class E.

#### Regulation 17 - Schedule 2, Part 010 (Bridging visa A)

Subregulation 17.2 omits subclause 010.211(2) and substitutes a new subclause which has a wider operation than the omitted subclause. Subregulations 17.3 and 17.4 make amendments consequential to this amendment. The clauses omitted by these subregulations are unnecessary given the wider ambit of new subclause 010.211(2). Subregulation 17.1 is a technical amendment that is consequential on the amendment that is made by subregulation 17.2.

Subregulation 17.5 of these Regulations omits subclause 010.611(1) and substitutes a new subclause. The new subclause sets out the conditions that will attach to the grant of the Bridging visa A in the circumstances specified. The purpose of the amendment is to make some technical changes. A change is made to the name of the Protection visa. A reference to subclause 010.211(5) is changed to a reference to subclause 010.211(4).

Subregulation 17.6 of these Regulations omits subclause 010.611(2) and substitutes a new subclause. The new subclause clarifies an ambiguity in the omitted subclause by providing expressly that no conditions attach to the grant of the Bridging Visa A in the circumstances specified. In addition the amendment makes the same technical changes to this subclause as subregulation 17.5 of these Regulations makes to subclause 010.611(1).

#### Regulation 18 - Schedule 2, Part 020 (Bridging visa B)

This regulation corrects an error in the numbering of the paragraphs in clause 020.512.

#### Regulation 19 - Schedule 2, Part 041 (Bridging- visa (Non-applicant))

This regulation omits clause 041.611 and substitutes a new clause which lists the conditions which attach to subclass 041. This corrects a drafting error.

#### Regulation 20 - Schedule 2, Part 042 (Bridging visa (Prospective protection visa applicant))

Subregulation 20.1 omits clause 042.211 and substitutes a new clause. The effect of this amendment is to allow bridging visa holders to be granted this subclass of visa.

Subregulation 20.2 of these regulations omits clause 042.611 and substitutes a new clause which lists the conditions which attach to this visa. Condition 8401 which was inserted in error is omitted.

#### Regulation 21 - Schedule 2, Part 050 (Bridging visa E)

Subregulation 21.1 of these regulations inserts a new heading to this Part.

Subregulation 21.2 omits clause 050.211 and substitutes a new clause. The effect of the amendment is to restrict the class of persons who have access to this visa subclass to persons who are unlawful non-citizens or who already hold a Bridging visa Class E and who are eligible non-citizens other than those referred to in subregulation 2.20 (7) - (11).

Subregulation 21.3 omits existing subparagraph 050.515(1)(c)(iii). The subparagraph is unnecessary. It is encompassed by new subparagraph 050.511(1)(ca) that is inserted by subregulation 21.4. The purpose of the amendments is to clarify when this subclass of visa will cease in cases where a non-citizen is released on an order for periodic detention.

Subregulation 21.5 of these Regulations makes an amendment to subclause 050.515(2) consequential on the amendments made by subregulations 21.3 and 21.4 of these Regulations. In addition, an incorrect reference to subparagraph (1)(b)(ii) is corrected to the intended reference to subparagraph (1)(c)(ii).

Subregulation 21.6 of these Regulations omits an incorrectly numbered condition in subclause 050.614 and substitutes the correct one.

#### Regulation 22 - Schedule 2. new Part 051

This regulation inserts Part 051 as set out in the Schedule to these Regulations into Schedule 2. This part sets out the criteria to be satisfied, the circumstances applicable to the grant, when the visa is in effect, applicable conditions and the way in which evidence of decision to grant this subclass of visa is given.

#### Regulation 23 - Schedule 2, Part 155 (Five year return)

The purpose of the amendments contained in this regulation and in regulations 24, 25 and 26 of these Regulations is to enable former Australian citizens to count periods in which they were usually resident in Australia as Australian citizens towards the grant of the subclass 155, 156, 157 and 159 visas.

Subregulation 23.1 amends subclause 155.211(1) to provide that it is a criterion to be satisfied at the time of application that the applicant satisfy the requirements of one of subclauses 155.211 (2), (2A), (3) or (5).

Subregulation 23.2 inserts a new subclause 155.211(2A). This subclause provides for periods of residence in Australia as an Australian citizen usually resident in Australia to be counted towards satisfying the time of application criterion by an applicant who is a former Australian citizen.

Subregulation 23.3 omits subclause 155.211(3) and substitutes a new subclause. This new subclause provides for Australian permanent residents and former Australian citizens who were usually resident in Australia at some time in the five years to have access to the subclass 155 (Five year return) visa.

#### Regulation 24 - Schedule 2, Part 156 (One year return)

This regulation omits clause 156.211 and substitutes a new clause. New subclause 156.211 (1) provides that an applicant is required to satisfy either subclause 156.211(2) or (3) to satisfy the time of application criterion. New subclause 156.211(2) provides for periods of residence in Australia as an Australian permanent resident to be counted towards satisfying the time of application criterion. New subclause 156.211(3) provides for periods of residence as an Australian citizen usually resident in Australia to be counted towards satisfying the time of application criterion by an applicant who is a former Australian citizen.

#### Regulation 25 - Schedule 2, Part 157 (Three month return)

This regulation omits clause 157.211 and substitutes a new clause. The new clause has the same effect in respect of the subclass 157 (Three month return) visa as the amendment made in respect of the subclass 156 (Five year return) visa by regulation 24 of these Regulations.

#### Regulation 26 - Schedule 2, Part 159 (Resident return)

The amendments made by this regulation provide Australian permanent residents and former Australian citizens usually resident in Australia who meet the criteria inserted by subregulations 26.1 and 26.2 of these Regulations with access to the grant of the subclass 159 (Resident return) visa.

#### Regulation 27 - Schedule 2, Part 424 (Public lecturer)

This regulation omits clauses 424.611 and 426.612 which set out the conditions which attach to the grant of this subclass of visa. New clauses are substituted which have the effect of correcting misnumbered conditions.

#### Regulation 28 - Schedule 2, Part 560 (Student)

The amendments made by this regulation correct an unintended effect of the consolidation of the former classes 560 (category A student) and 561 (category B student) into one subclass 560 in the Migration Regulations.

Students whose courses are paid for in whole or part by the Commonwealth or the government of a State or Territory (previously category A students) were not intended to be subject to restrictions on the number of short courses undertaken, entry of dependants and work rights for certain dependants. Those restrictions previously applied only to category B students. These amendments ensure that students receiving assistance from the Commonwealth or a State or Territory government continue to be free of those restrictions.

#### Regulation 29 - Schedule 2, Part 672 (Business visitor (short stay))

This regulation omits paragraph 672.221(2)(f) and substitutes a new paragraph which makes it clear when an applicant is required to satisfy relevant special return criteria.

#### Regulation 30 - Schedule 2, Part 673 (Close family visitor (short stay))

Subregulation 30.1 amends paragraph 673.221(3)(b) by omitting an unintended criterion.

Subregulation 30.2 omits clauses 673.611 and 673.612 and substitutes new clauses which list the conditions that apply to the grant of the subclass 673 (Close family visitor) (short stay) visa. This corrects a drafting error.

#### Regulation 31 - Schedule 2, Part 832 (Close ties)

This regulation omits paragraph 832.212(5)(b) and substitutes a new paragraph. The effect of the amendment is to omit an unintended criterion.

#### Regulation 32 - Schedule 4 (Public interest criteria)

Subregulations 32.1 and 32.2 amend item 4007 of Schedule 4. Subparagraph 4007(2)(b)(iv) and paragraph 4007(2)(c) are omitted by subregulations 32.1 and 32.2 respectively. Subregulation 32.2 inserts a new paragraph 4007(2)(c). The effect of the amendments is to allow the Minister more flexibility in exercising his or her discretion to waive a failure to meet this health criterion.

Subregulations 32.3 and 32.4 have the same effect in respect to item 4008 of Schedule 4 as subregulations 32.1 and 32.2 of these Regulations have in respect of item 4007.

Regulation 32 must be read in conjunction with regulation 4 of the Migration Reform (Transitional Provisions) Regulations (Amendment) which commence operation on 1 September 1994. This regulation provides for the health waiver, as amended by this Regulation, to be applied to applications for the grant of a visa or entry permit made prior to 1 September 1994 which remain unresolved on that date.

#### Regulation 33 - Schedule 9

Subregulation 33.1 omits the heading to Schedule 9 and inserts the heading: "Schedule 9 Special Entry and Clearance Arrangements".

Subregulation 33.2 omits items 12 and 13 of Part 1 of Schedule 9 and substitutes new items. This amendment corrects typographical errors which confused the meaning of the items.

Subregulation 33.3 amends Part 3 of Schedule 9 by inserting a reference to New Zealand. The effect of the amendment is that New Zealand citizens, while transit passengers, will not be required to comply with immigration clearance requirements. The amendment reflects policy intention.

#### Regulation 34 - Schedule 10

This regulation omits the heading to Schedule 10 and inserts the heading: "Schedule 10 - Prescribed Forms".

### **PART 3 - AMENDMENTS HAVING EFFECT ON 1 OCTOBER 1994**

The purpose of the amendments contained in this Part is to implement the Government's decision to provide streamlined immigration arrangements to organisations establishing their Asia-Pacific regional headquarters in Australia.

The key element in the arrangements will be that the Government has entered into a Regional Headquarters (RHQ) agreement with an organisation intending to establish its regional headquarters in Australia. Entry of personnel is facilitated by amendments to the criteria for the grant of subclass 120 (Labour agreement), subclass 413 (Executive) and subclass 414 (Specialist) visas.

#### Regulation 35 - Regulation 1.03 (Interpretation)

This regulation inserts two new definitions into regulation 1.03. These definitions are relevant to the amendments made in this Part.

#### Regulation 36 - New regulation 1. 16A

This Regulation inserts a new regulation 1. 16A which sets out what is meant by an RHQ agreement.

#### Regulation 37 - Schedule 2, Part 120 (Labour agreement)

This regulation omits clause 120.211 and substitutes a new clause. The new clause provides for the grant of a permanent visa to applicants seeking to enter Australia in accordance with an RHQ agreement (new paragraph 120.211 (b)) or a labour agreement (new paragraph 120.211 (a)).

#### Regulation 38 - Schedule 2, Part 413 (Executive.)

This regulation amends the criteria for the grant of this subclass of visa to facilitate the grant of a temporary visa to applicants seeking to enter Australia in accordance with an RHQ agreement. For this purpose a new time of decision criterion is inserted by subregulation 38.2 of these regulations.

The amendment made by subregulation 38.1 is a technical amendment which reflects the insertion of the new criterion. The amendments made by the remaining subregulations in this regulation exempt persons who meet the new criterion from criteria that would otherwise be applicable.

### Regulation 39 - Schedule 2, Part 414 (Specialist)

This regulation amends the criteria for the grant of this subclass of visa to facilitate the grant of a temporary visa to applicants seeking to enter Australia in accordance with an RHQ agreement. For this purpose a new time of decision criterion is inserted by subregulation 39.1. The amendments made by subregulations 39.2 and 39.3 exempt persons who meet the criterion inserted by subregulation 39.1 from criteria that would otherwise be applicable.

### **SCHEDULE**

#### Schedule - New Part 051 for Insertion in Schedule 2

The Schedule contains the new Part 051 - Bridging Visa E - which is inserted in Schedule 2 by regulation 22 of these Regulations. See the notes above on regulation 22 for details of the new Part 051.