Migration Amendment Regulations 1999 (No. 6) 1999 No. 81

EXPLANATORY STATEMENT

STATUTORY RULES 1999 NO. 81

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

Migration Act 1958

Migration Amendment Regulations 1999 (No. 6)

Section 504 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 to be prescribed by the Act or which are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

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

- 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;
- paragraph 504(1)(e) of the Act provides that regulations may be made in relation to the giving of, the lodging with, or the service of documents on the Minister, the Secretary or any other person or body, for the purposes of the Act;
- subsection 504(3) of the Act provides that regulations may be made under paragraph 504(1)(e) providing that a document given to, lodged with, or served on a person has been received at a specified or ascertainable time;
- subsection 31(3) of the Act provides that the Regulations may prescribe criteria for visas of a specified class;
- section 45B of the Act provides that the amount of visa application charge is the amount, not exceeding the visa application charge limit, prescribed in relation to the application; and
- subsection 338(9) of the Act, as amended by *Migration Legislation Amendment Act (No. 1) 1998,* provides that a decision can prescribed to be

an "MRT-reviewable decision";

- paragraph 347(1)(c) of the Act provides for the fee which is to accompany an application for review of an MRT-reviewable decision to be prescribed; and

- paragraph 347(2)(d) of the Act, as amended by *Migration Legislation Amendment Act (No. 1) 1998,* provides that, in the case of a decision prescribed under subsection 338(9) to be an "MRTreviewable decision", the person who can make the application for review can be prescribed.

The purpose of the Regulations is to amend the *Migration Regulations 1994 to* increase specified fees and charges, make certain decisions reviewable by the Migration Review Tribunal, amend criteria for the grant of certain visas, and make technical changes.

In particular, the Regulations:

- amend public interest criteria 4005, 4006A and 4007 in light of the Full Federal Court decision of *Minister for Immigration & Multicultural Affairs v Seligman* (items 4103, and 44014403);

- amend the criteria for the grant of a Five Year Resident Return (Subclass 155) visa to enable former permanent residents and former Australian citizens who have travelled on temporary visas to Australia to regain their entitlement *to* permanent resident status in certain circumstances (items 103, 104, and 4302 4304);

- provide that a decision to reject an application relating to a nominated position (Employer Nomination Scheme) is an "MRT-reviewable decision" (items 410 1, 4105, 4108, 4109, 4301 and 4307);

- provide for the annual indexation of fees and charges (items 201, 4102, 4113, 4201);

- implement Budget decisions in relation to applications for review by the Migration Review Tribunal, and the visa application charge for certain applicants for the following classes: Temporary Business Entry (Class UC), Electronic Travel Authority (Class LID), Long Stay (Visitor) (Class TN) and Short Stay (Visitor) (Class TR) (items 101 and 4201); and

- make technical and consequential changes (items 2119, 301, 4104,4106, 4110 - 4112, 4305

and 4306, and Schedules 5 and 6).

Details of the Regulations are set out in the Attachment.

The Regulations commence on 31 May 1999, 1 June 1999, 1 July 1999 and

1 September 1999 as set out in regulation 2.

ATTACHMENT

Regulation 1 - Name of regulations

This regulation provides that these regulations are the *Migration Amendment Regulations 1999 (No. 6).*

Regulation 2 - Commencement

This regulation provides that these regulations commence as follows:

- regulations 1 - 4 and Schedules 1 and 2 commence on 31 May 1999;

- regulation 5, subregulation 6(1) and Schedule 3 commence on 1 June 1999;

- subregulations 6(2) and (3) and Schedule 4 commence on 1 July 1999; and

- Schedules 5 and 6 commence on 1 September 1999.

Regulation 3 -Amendment of *Migration Amendment Regulations 1999 (No. 4)*

This regulation provides that Schedule 1 to these regulations amends the *Migration Amendment Regulations 1999 (No. 4).*

Regulation 4 - Amendment of *Migration Amendment Regulations 1999 (No. 5)*

This regulation provides that Schedule 2 to these regulations amends the *Migration Amendment Regulations 1999 (No. 5).*

Regulation 5 - Amendment of *Migration Regulations 1994*

This regulation provides that Schedules 3 to 6 to these regulations amend the *Migration Regulations 1994* ("the Regulations").

Regulation 6 - Transitional

Subregulation 6(1) provides that tile amendment made by item 301 of Schedule 3 applies in relation to an application made on or after 1 June 1999.

Subregulation 6(2) provides that the amendments made by items 4302 to 4306 of Schedule 4 apply in relation to an application made, on or after 1 July 1999.

Subregulation 6(3) provides that the amendments made by item 4103 and items 4401 to 4403 of Schedule 4 apply in relation to an applications made, but not finally determined (within the meaning of subsection 5(9) of the Act), before 1 July 1999; or made on or after 1 July 1999.

Schedule 1 - Amendments of Migra*tion Amendment Regulations 1999 (No. 4)*

Item 101 - Schedule 1. item 1120

This item amends subregulation 4.13(1), as amended by the *Migration Amendment Regulations 1999 (No. 4),* to increase the prescribed fee for an application for review by the Migration Review Tribunal from $850 to $1,400.

Item 102 - Schedule 2, item 2119

This item makes amendments to item 2119 of the *Migration Amendment Regulations 1999 (No. 4).* Item 2119 makes a minor technical amendment, relating to terminology. This item replaces the amended terminology, to make it more consistent with the amendments being made by these regulations.

Item 103 -- Schedule 2. item 2307, new paragraph 155.21 1(b)

Item 104 - Schedule 2, item 2314, new paragraph 157.211 (b)

These items make amendments to paragraphs 155.21 1(b) and 157.21 1(b) to more accurately reflect policy intention and ensure consistency between the provisions for former Australian citizens and former Australian residents applying for resident return visas, Subclasses 155 and 157.

Schedule 2 - Amendments of the *Migration Amendment Regulations 1999 (No.* 5)

Item 201 - Amendments of Schedule 1 - visa application charges

This item amends Schedule 1 of the *Migration Amendment Regulations 1999 (No. 5)* to provide for the indexation of the visa application charge for new visa classes Skill Matching Migrant) (Class BR), Skill-Australian-sponsored (Migrant) (Class BQ) and Skill-Independent Migrant) (Class BN). These new visa classes were introduced by the *Migration Amendment Regulations 1999 (No.* 5) and are due to commence on 1 July 1999.

Schedule 3 - Amendment of *Migration Regulations 1994* commencing on 1 June 1999

Item 301 - Schedule 2, subparagraph 050.612A(2)(a)(iv)

This item makes an amendment to clause 050.612A consequential to the amendment made to clause 050.212 by item 1308 of the *Migration Amendment Regulations -1999 (No. 4).*

Schedule 4 - Amendments of *Migration Regulations 1994* commencing on 1 July 1999

Part 4.1 - Amendments of Parts 1. 2, 4 and 5

Item 4 101 - Regulation 1.03, definition of a*pproved appointment*

This item inserts a new definition of "approved appointment", which provides that an approved appointment is a nominated position that is approved under new subregulation 5. 19(1 B).

Item 4102 - Additional amendments of Part 1 - fees

This item amends Part 1 to provide for the annual indexation of specified fees.

Item 4103 - Regulation 2.25B

This item omits regulation 2.25B in light of the Full Federal Court decision of

Minister for Immigration & Multicultural Affairs v Seligman [1999] FCA 117. This decision held that regulation 2.25B was invalid because it was beyond the regulation making power conferred by section 505 of the Act.

Item 4104 - Paragraph 4.02(4)(d)

This item is a technical amendment, consequential to the amendment contained in item 4105, below.

Item 4105 - After paragraph 4.02(4)(d)

This item inserts new paragraph 4.02(4)(e), which makes a decision under new subregulation 5.19(1B) to reject an application for approval of a nominated position reviewable by the Migration Review Tribunal ("MRT").

Under subsection 338(9) of the Act, as amended by *Migration Legislation Amendment Act (No. 1) 1998,* a decision can be prescribed to be an "MRT-reviewable" decision. Regulation 4.02 sets out those decisions which have been prescribed for the purposes of subsection 338(9) of the Act.

Item 4106 - Paragraph 4.02(5)(c)

This is a technical amendment consequential to item [4107].

Item 4107 - After paragraph 4.02(5)(c)

This item is consequential to item 4105 above, and provides that, in the case of a decision mentioned in new paragraph 4.02(4)(e), an application for review of that decision may only be made by the employer to whose nomination of a position the decision relates.

The relevant time limits relating to an application for review of a decision mentioned in new paragraph 4.02(4)(e) are set out in regulation 4. 10 of the Regulations.

Item 4108 - Regulation 5.19. heading

This item amends the heading to regulation 5.19 to bring the terminology in line with the amendments made by these regulations.

Item 4109 - Subregulation 5.19(1)

This item inserts new subregulations 5.19(1), (1A), (1B), (1C) and (1D). These amendments:

- provide for a process of applying for approval of a nominated position relating to the, employer nomination scheme;
- clarify that the decision making power relating to approval of nominated positions is located in regulation 5. 19, so that a decision made to reject an application can be prescribed as an "WRT- reviewable" decision; and
- set out the obligations of the Minister to the applicant after an application has been

decided.

New subregulation 5. 19(1) provides that an employer may apply to the Minister for approval of a nominated position as an "approved appointment". "Approved. appointment" is defined in item 4101 above.

New subregulation 5.19(1A) sets out the way of making a valid application. The application must be made in accordance with an approved form, and accompanied by the prescribed fee.

New subregulation 5.19(1B) contains the decision-making power relating to applications for approval of nominated positions. Under subregulation 5.19(1B), the Minister may, by signed instrument, approve or reject such an application.

New subregulation 5. 19(1C) qualifies the decision-making power in new

subregulation 5.19(1B), providing that, in certain circumstances, the Minister must

approve an application. Those circumstances are where t he application has been

made in accordance with subregulation 5.19(1A) and where the nominated position is

the subject of an employer nomination that meets the requirements of subregulation

5. 19(2) or (4).

New subregulation 5.19(1D) sets out the notification obligations of the Minister following a decision on an application. Following a decision to approve or reject an application, the Minister must, as soon as practicable after making the decision, give the employer (who has made the application) a copy of the instrument which sets out the decision. Further, in the case of a rejection of an application, the Minister must also give the employer both written reasons for the rejection and a statement notifying the employer that the decision to reject the application is an "MRT-reviewable" decision. The note at the end of subparagraph 5. 19(1D) sets out relevant explanatory material relating to details of review under paragraph 4.01(4)(e).

Item 4110 - Paragraph 5.19 (2)(f)

Item 4111 - Subregulation 5.19(3)

Item 4112 - Subregulation 5. 19(3)

These are technical amendments.

Item 4113 - Additional amendments of Part 5 - fees

This item amends Part 5 to provide for the annual indexation of specified fees.

Part 4.2 - Amendments of Schedule 1 Item 4201 - Amendments of visa application charges

This item amends Schedule 1 to provide for the annual indexation of specified visa **application charges.** The item also increases the visa application charges for certain applicants for the following classes - Temporary Business Entry (Class UC), Electronic Travel Authority (Class UD), Long Stay (Visitor) (Class IN) and Short Stay (Visitor) (Class TR) - in accordance with the 1999-2000 Budget decision.

Part 4.3 - Amendments of Schedule 2

Item 4201 - Clause 121.221

This item is consequential to the amendments made by item 4109 above. This item amends the "time of decision" criteria relating to Employer Nomination (Subclass 121) visas to provide that the appointment which is the subject of the visa application is, at the time of decision, an "approved appointment" (see item 4101 above).

Item 4302 - Subclause 155.212(3)

This amendment is consequential to the amendments made in item 4304 below, which requires a restructure of this subclause.

Item 4303 ~ Paragraph 155.212(3)(a)

This amendment is made a consequence of the amendment made in item 4304 below. The provision substitutes a new paragraph (a) to ensure continuity for those who have previously been covered by subclause 155.212(3).

Item 43 04 - Paragraph 155.212(3)(b)

This amendment implements a policy change which enables former permanent residents, and former Australian citizens, who have travelled on temporary visas to Australia to regain their entitlement to permanent resident status in certain circumstances. Especially since the introduction of Electronic Travel Authorities, a large number of people have travelled on temporary visas without realising that this would mean loss of their resident status.

The provision requires that people who have been former permanent residents and former Australian citizens within the last 10 years must have substantial business, cultural, employment or personal ties which are of benefit to Australia. In addition, if they have been absent from Australia for a cumulative period of 5 years or more since last departure as a permanent resident or Australian citizen, they must show compelling reasons for that absence.

Item 4305 - Paragraph 155.212(4)(b)

This provision is a consequential amendment to subclause 155.212(4), inserting a reference to new subclause 155.212(3A) inserted by the *Migration Amendment Regulations 1999 (No. 4).*

Item 4306 -Clause 155.511

This is a technical amendment.

Item 4307 - Clause 805.222

This item is consequential to the amendments made by item [4109], above. This item amends the "time of decision" criteria relating to Skilled (Subclass 805) visas, to **provide that the appointment** which is the subject of the visa application is, at the time of decision, an "approved appointment" (see item [410 11 above).

Part 4.4 - Amendments of Schedule 4

Item 4401 - Paragraph 4005(c)

Item 4402 - Paragraph 4006A(1)(c)

Item 4403 - Paragraph- 4007 (1)(c)

These items substitute new paragraphs 4005(c), 4006A(1)(c) and 4007(1)(c). The purpose of these amendments is to maintain the intended effect of the unamended paragraphs read together with regulation 2.25B (repealed by these Statutory Rules), by making the limitation previously contained in regulation 2.25B part of the Schedule 4 criteria. That limitation makes it clear that whether or not the health care or community services will be used in connection with the applicant is not a matter to which regard may be had in determining whether the applicant meets the criteria- The criteria are determined with regard to the medical aspects of the disease or condition, as opposed to social and financial circumstances.

In particular, the new paragraphs provide that an applicant must not have a disease or condition of the following nature:

- the disease or condition is such that a person who has it would be likely to require health care or community services, or to meet the medical criteria for the provision of a community service, during the period proposed for stay in Australia in the visa application; and
- provision of the care or services relating to the disease or condition would be likely either to result in a significant cost to the Australian community in the areas of health care and community services, or to prejudice the access of an Australian citizen or permanent resident to health care or community services;

regardless of whether the care or services will be used in connection with the applicant.

Paragraphs 4006A(1)(c) and 4007(1)(c) are subject to the Minister's waiver as provided for in existing subclauses 4006A(2) and 4007(2) respectively.

Schedule 5 - Amendments of *Migration Regulations 1994* commencing on 1 September 1999

Schedule 6 - Additional amendments of *Migration Regulations-1994* commencing on 1 September 1999

These Schedules make minor technical amendments to correct typographical spelling errors, and minor omissions; and to establish consistent terminology throughout the Regulations.