# Migration Amendment Regulations 2002 (No. 5) 2002 No. 213

**EXPLANATORY STATEMENT**

**STATUTORY RULES 2002 No. 213**

Issued by the Minister for Immigration and Multicultural and Indigenous Affairs

*Migration Act 1958*

Migration Amendment Regulations 2002 (No. 5)

Subsection 504(1) of the *Migration Act 1958* (the Act) provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters which by the Act are required or permitted to be prescribed 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 powers listed in Attachment A.

The purpose of the Regulations is to amend the requirements for making valid visa applications for certain visa classes, amend the criteria for the grant of certain visa subclasses, provide for the nomination of business activities by regional employers in relation to genuine positions that cannot be filled locally, increase the number of members who may be appointed to the Migration Review Tribunal (MRT), and require further evidence of identity to be produced by aircrew members arriving in Australia.

The Regulations effect changes to the *Migration Regulations 1994* (the Migration Regulations) to:

- increase border security in the wake of the attacks of 11 September 2001 by requiring operational aircrew members to hold a passport that is in force in order to be accorded the prescribed status of a special purpose visa holder, and to require airline crew members to identify themselves by showing a clearance officer a passport that is in force, and a valid airline identity card, on arrival in Australia;

- increase the prescribed maximum number of Members and Senior Members which can be appointed to the MRT to 100, inclusive of the Principal Member. These amendments are consistent with the existing provisions for the Refugee Review Tribunal, which allow for the appointment of a maximum of 100 Members. The regulation changes

- provide capacity for the MRT to increase its member establishment should it become necessary to do so to meet an increasing caseload;

- provide that an applicant for a Skilled-Independent Overseas Student, or Skilled-Australian-sponsored Overseas Student visa, who is less than 16 years old, is exempted from the requirement to provide evidence of a check of criminal records in relation to the applicant by the Australian Federal Police;

- ensure that AusAID students, and certain other students being provided financial assistance by a foreign country, return to their home country for at least two years before being granted a Subclass 119, 120, 121, 855, 856 or 857 visa;

- amend the student visa provisions to:

- remove references to the term *passports issued by a foreign country* to ensure consistency with Division 1.8 of the Migration Regulations;

- insert public interest criteria 4017 and 4018 into the Schedule 2 requirements for those applicants seeking to meet the primary criteria;

- enable an applicant who does not hold a substantive visa, but who is a member of the family unit of a person who holds a student visa, to be eligible for the grant of a student visa as a dependent;

- permit the discretionary imposition of condition 8534 (no further stay) on specific student visas where additional evidence of financial capacity is provided;

- require assessment level 2 applicants for Subclasses 570 - 575 to establish exceptional reasons for the grant of the visa if applying onshore for their first student visa;

- include the familial relationship of brother and sister into the definition of *acceptable individual* when assessing the financial capacity of an assessment level 3 or 4 applicant;

- change the English language proficiency requirements for certain student visa applicants; and

- clarify certain provisions and ensure that the original policy intention is achieved;

• ensure that a person is "eligible for the grant of" a Subclass 456 (Business (Short Stay)) visa or a Subclass 771 (Transit) visa, for the purposes of being granted a Subclass 773 (Border) visa, even though the person is in Australia, and correct minor typographical errors in clauses 773.214, 773.215, 773.216 and 773.217;

• amend nomination and visa regulations for the Subclass 457 (Business (Long Stay)) visa to:

- enable regionally based employers to nominate activities that do not meet the Subclass 457 skill and salary thresholds, but have been certified by a regional certifying body to be genuine positions that cannot be filled locally; and

- allow the Minister to cancel a Subclass 457 visa granted on the basis that the holder is to be employed in regional Australia, if the holder works or lives in a non-regional location that is specified in a Gazette Notice;

• deem applications for Independent (Migrant) (Class AT), Skill Matching (Migrant) (Class BR) or Skilled - Independent (Migrant) (Class BN) visas to also be applications for a Labour Agreement (Migrant) (Class AU) visa where the applicant is to be employed under a labour agreement or regional headquarters agreement;

• enable applicants with functional English, being a level of English lower than vocational English, to meet the English language criteria for a Subclass 134 (Skill Matching) visa where the applicant is nominated by a State or Territory in which arrangements have been established for English language training, and the applicant pays the fee for that training;

• ensure that certain Subclass 785 (Temporary Protection) visa holders, whose visas were granted before 19 September 2001 (the date on which Statutory Rule 246 of 2001 came into effect) have access to benefits, such as work rights, Medicare and Special Benefit payments, while awaiting the final determination of their further Protection (Class XA) visa application;

The Regulations also effect changes to the *Migration Amendment Regulations 1999 (No. 13)* to ensure that the most recent definition of *remaining relative* applies to an application for a Family (Residence) (Class AO) visa or a Change in Circumstances (Residence) (Class AG) visa made before 1 November 1999 but not finally determined before 1 November 2002.

Details of the Regulations are set out in Attachment B.

These Regulations commence on 1 November 2002. Amendments to the Migration Regulations are made 3 times per year. These changes constitute the "November Round". Having fixed commencement dates for each of the 3 "Rounds" minimises the impact on clients and staff.

The changes made by items [1113], [1201] to [1206], [1301] and [1304] of Schedule 1 to these Regulations have a retrospective effect in certain cases. Item [1113] deems an application for a Labour Agreement (Migrant) (Class AU) visa to have been made. The deemed application is taken to have been made on the date Immigration receives evidence of the applicant's appointment under a labour agreement or regional headquarters agreement. Items [1201] to [1206], [1301] and [1304] make consequential amendments to Schedules 1 and 2 to these Regulations. As the evidence mentioned in item [1113] may have been received prior to the commencement of these Regulations, an application may be deemed to have been made before the commencement of these Regulations.

Items [1113], [1301], [1304] and [1309] of Schedule 1 to these Regulations lower the English language requirement for a Subclass 134 (Skill Matching) visa from vocational to functional English and make consequential amendments lowering the English language standard in respect of certain deemed applications for other visas. As the change affects both time of application and time of decision criteria in Schedule 2 to the Migration Regulations, the amendments have a retrospective effect in certain cases.

Items [1317], [1318], [1324], [1325], [1330], [1331], [1337], [1338], [1344], [1345], [1351], [1352], [1357] and [1358] also have a retrospective effect in certain cases. These items amend the time of application secondary criteria for certain student visa subclasses, by allowing an applicant who does not hold a substantive visa, but who is the member of the family unit of a primary applicant who holds a Subclass 560 or 562 visa, or a student visa of the subclass being assessed, to meet the criteria for the grant of the visa. The amendment applies to applications made, but not finally determined, before the commencement of these Regulations, as well as to applications made after that date.

None of these changes, however, infringe subsection 48(2) of the *Acts Interpretation Act 1901* as the changes are beneficial in nature, and do not affect the rights of any person so as to disadvantage that person, nor do they impose liabilities on any person in respect of anything done or omitted to be done before the date of notification.

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**Attachment A**

Subsection 504(1) of the Act provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters which by the Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

In addition:

- subsections 29(2) and (3) of the Act provide that the regulations may provide a period during which the holder of a visa may travel to, enter, re-enter and remain in Australia;

- subsection 31(1) of the Act provides that the regulations may prescribe classes of visas;

- subsection 31(3) of the Act provides that the regulations may prescribe criteria for a visa or visas of a specified class;

- subsection 31(4) of the Act provides that the regulations may prescribe whether visas of a class are visas to travel to and enter Australia, or to remain in Australia, or both;

- subsection 31(5) of the Act provides that the regulations specify that a visa is a visa of a particular class;

- subsection 33(2) of the Act provides that a non-citizen is taken to have been granted a special purpose visa if the non-citizen has a prescribed status or is a member of a class of persons that has a prescribed status;

- subsection 41(1) of the Act provides that the regulations may provide that visas, or visas of a specified class, are subject to specified conditions;

- subsection 41(2) of the Act provides that, without limiting subsection 41(1), the regulations may provide that a visa, or visas of a specified class, are subject to a condition that the holder of the visa will not, after entering Australia, be entitled to be granted a substantive visa - other than a protection visa or a temporary visa of specified kind - while he or she remains in Australia;

- subsection 41(2A) of the Act provides that the Minister may, in prescribed circumstances, waive a visa condition;

- subsection 41(3) of the Act provides that, in addition to any conditions specified under subsection 41(1), the regulations may, for the purposes of this subsection, permit conditions, which the Minister may specify that a visa is subject to;

- subsection 46(2) of the Act provides that an application for a visa is valid if it is an application for a visa of class prescribed for the purposes of this subsection, and under the regulations, the application is taken to have been validly made;

- subsection 46(3) of the Act provides that the regulations may prescribe criteria that must be satisfied for an application for a visa of a specified class to be a valid application;

- subsection 46(4) of the Act provides that, without limiting subsection 46(3), the regulations may also prescribe the circumstances that must exist for an application for a visa of a specified class to be a valid application, and how and where an application for a visa of a specified class must be made;

- subsection 52(1) of the Act provides that a visa applicant or interested person must communicate with the Minister in the prescribed way;

- subsection 52(2) of the Act provides that the regulations may prescribe different ways of communicating and specify the circumstances when communication is to be in a particular way;

- paragraph 116(1)(g) of the Act provides that the Minister may cancel a visa if satisfied that a prescribed ground for cancelling a visa applies to the holder;

- subsection 166(2) of the Act provides that a person is to comply with paragraphs 166(1)(a) and (b), which concern immigration clearance, in a prescribed way;

- section 395 of the Act provides that the Migration Review Tribunal shall consist of a Principal Member, together with a number of Senior Members and other members provided neither exceeds the prescribed number for each set out in the regulations;

- subparagraph 504(1)(a)(i) of the Act provides that the regulations may make provision for and in relation to the charging and recovery of fees in respect of any matter under this Act or the regulations, including the fees payable in connection with the review of decisions made under this Act or the regulations, whether or not such review is provided for by or under this Act; and

- paragraph 504(1)(e) of the Act provides that the Governor-General may make regulations which make provision for and in relation to the giving of documents to, the lodging of documents with or the service of documents on, the Minister, the Secretary or any other person or body, for the purposes of this Act.

**Attachment B**

Regulation 1 - Name of Regulations

This regulation provides that these Regulations are the *Migration Amendment Regulations 2002 (No. )*.

Regulation 2 - Commencement

This regulation provides that these Regulations commence on 1 November 2002.

Regulation 3 - Amendment of *Migration Regulations 1994*

This regulation provides that Schedule 1 to these Regulations amends the *Migration Regulations 1994* (the Migration Regulations).

Regulation 4 - Amendment of *Migration Amendment Regulations 1999 (No. 13)*

This regulation provides that Schedule 2 to these Regulations amends the *Migration Amendment Regulations 1999 (No. 13).*

Regulation 5 - Transitional

Subregulation 5(1) provides that the amendments made by the items specified in that subregulation apply to an application for a visa made but not finally determined before 1 November 2002, and also to an application for a visa made on or after that date.

The effect of subregulation 5(1) in relation to items [1113] and [1201] to [1206] is that an application for a Class AT, BN or BR visa made, but not finally determined, before 1 November 2002 will be taken to be an application for a Labour Agreement (Migrant)(Class AU) visa. The date the application for the Class AU visa is deemed to be made is the day when Immigration receives evidence of the applicant's appointment by an employer authorised under a labour agreement or regional headquarters agreement to recruit persons.

The retrospectivity in relation to these items is beneficial in that an applicant for a Class AT, BN or BR visa who falls within the requirements of regulation 2.08C will be deemed also to have applied for a Class AU visa. No fee is charged in relation to this further deemed application.

The effect of subregulation 5(1) in relation to items [1301] and [1309] is that an application for a Subclass 134 - Skill Matching visa made, but not finally determined, before 1 November 2002 will be assessed against English language criteria requiring the applicant to have functional English rather than vocational English.

The retrospectivity in relation to these items is beneficial in their effect as they enable an applicant who has functional English, being a lower level of English than vocational English, to meet the language criteria of Subclass 134 subject also to meeting the criteria of new subclause 134.222C(2).

The amendments in the above items are not prejudicial to any person, and do not contravene subsection 48(2) of the *Acts Interpretation Act 1901*.

Subregulation 5(2) provides that the amendments made by the items specified in that subregulation apply in relation to an application for a visa made on or after 1 November 2002. Therefore, these amendments do not apply to an application for a visa made prior to 1 November 2002 where that application has not been finally determined as at 1 November 2002.

Subregulation 5(3) provides that the amendments made by items [1104] and [1105] apply to a nomination of an activity made on or after 1 November 2002.

Subregulation 5(4) provides that the amendments made by items [1115] and [1501] apply to an airline crew member who enters Australia on or after 1 November 2002.

Subregulation 5(5) provides that an airline crew member who is in Australia on 1 November 2002, who entered Australia before 1 November 2002 and who satisfied the requirements of subregulation 2.40(1) as in force before 1 November 2002 is taken to satisfy the requirements of subregulation 2.40(10) as in force on and after 1 November 2002.

Schedule 1 - Amendments of *Migration Regulations 1994*

Part 1 - Amendments of Parts 1, 2, and 4

Item [1101] - Regulation 1.03, definition of *assessment level*

This item amends the definition of *assessment level* in regulation 1.03, to omit the words "a passport issued by a foreign country" and insert in their place "a kind of eligible passport, within the meaning of regulation 1.40".

The purpose of this amendment is to ensure consistency with the student visa provisions in Division 1.8 of the Migration Regulations which refer to the term "eligible passport". This amendment also reflects that passports may be issued by bodies that are not foreign countries, such as the United Nations.

Item [1102] - Regulation 1.03, definition of *guest of Government*, paragraph (b)

This item amends the definition of *guest of Government* in regulation 1.03 to correct a typographical error in paragraph (b).

Item [1103] - Subregulation 1.20C(2)

This item corrects a minor drafting inconsistency in subregulation 1.20C(2) by replacing a reference to "application" with a reference to "an application".

Item [1104] - After regulation 1.20G

This item inserts new regulation 1.20GA in the Migration Regulations enabling a pre-qualified business sponsor or a standard business sponsor (other than a sponsor whose business activities include recruitment or labour hire activities) and in respect of whom there a certification given by a specified body, to nominate an activity in which an individual is proposed to be employed.

The purpose of regulation 1.20GA is to establish arrangements for regional employers seeking to nominate positions under the Subclass 457 Business (Long Stay) visa that recognise the special needs of businesses in regional areas and areas of low population growth. The new arrangements recognise that particular skills may not be readily available in regional areas, and that regional employers may not be able to match levels of remuneration provided by employers in the large cities such as Sydney and Melbourne.

The "regional" arrangements provided for under new regulation 1.20GA, and subregulation 1.20H(1) substituted by these Regulations, essentially allow for the approval of nominated positions that do not meet gazetted skill and/or salary thresholds, where a local certifying body has certified that the position meets specific requirements described in the paragraphs below.

Paragraph 1.20GA(1)(a) requires that the tasks of the nominated activity must:

- correspond to the tasks of an occupation specified in a Gazette Notice; and
- relate to a full-time position that is necessary to the operation of the business; and
- relate to a position that cannot reasonably be filled locally.

Paragraph 1.20GA(1)(b) and (c) provide respectively that the nomination must indicate that the individual will be paid at the level in the nomination, and that this level will be no less than remuneration under relevant legislation and awards.

Paragraph 1.20GA(1)(d) requires that the individual's working conditions must be no less favourable than working conditions under relevant legislation and awards.

Paragraph 1.20GA(1)(e) provides that a body specified for this paragraph by Gazette Notice, must certify that the nomination meets the requirements of paragraphs (a) to (d).

Subregulations 1.20GA(3) and (4) provide respectively that the nomination must be made on approved form 1068, and must be accompanied by a fee of $235.

It is intended that the bodies specified in a Gazette Notice under paragraph 1.20GA(1)(e) will be regionally based development bodies such as state or territory regional development bodies or local chambers of commerce.

Regional certifying bodies will use particular local knowledge to assess the nomination against the requirements of regulation 1.20GA.

While the regional certifying body is required to certify that the nomination meets the requirements of paragraphs 1.20GA(1)(a) to (d), the departmental decision maker must also independently assess whether the requirements of regulation 1.20GA are met, including the requirement that at a regional certifying body has given the requisite certification.

The amendment imposes different nomination requirements on business sponsors who have received the certification of a body referred to in paragraph 1.20GA(1)(e) and who nominate activities under regulation 1.20GA, from business sponsors who have not received the certification of a regional body, and who nominate activities under existing regulation 1.20G.

*Salary level*

In particular, a business sponsor who nominates activities under regulation 1.20GA is required by paragraphs 1.20GA(1)(c) and (d) to indicate in the nomination that an individual will be paid at a level no less than the level of remuneration provided for under relevant Australian legislation and awards, while a business sponsor who nominates activities under regulation 1.20G is required by subregulation 1.20G(4) to indicate that the applicant will be paid at least the "minimum salary level" applying at the time of the nomination. Further, under new paragraph 1.20GA(1)(d) the individual's working condition must also be no less favourable than working conditions provided for under relevant legislation and awards.

*Skill level*

New regulation 1.20GA enables a business sponsor to nominate activities corresponding to the tasks of an occupation specified in a Gazette Notice made under subparagraph 1.20GA(1)(a)(i).

The amendment enables the Minister to specify different occupations for business sponsors who have received the certification of a body referred to in paragraph 1.20GA(1)(e), from the occupations that may be specified by the Minister in a Gazette Notice made under subregulation 1.20G(2) for business nominations that have not received certification.

Item [1105] - Subregulation 1.20H(1)

This item substitutes subregulation 1.20H(1) setting out that the Minister must approve a nomination of an activity made under regulation 1.20G or regulation 1.20GA if the nomination is in accordance with the matters set out in subregulation 1.20H(1).

In the case of a nomination made under regulation 1.20G, the matters set out in substituted subregulation 1.20H(1) are unchanged, and continue to require the Minister to approve the nomination if it is in accordance with subregulations 1.20G(1) and (3), and if they are applicable, with subregulations 1.20G(2), (4) and (5).

In the case of a nomination under regulation 1.20GA, subregulation 1.20H(1) provides that the nomination must be in accordance with regulation 1.20GA.

Item [1106] - Subregulation 1.41(1)

This item amends subregulation 1.41(1) to omit the words "a passport issued by a foreign country" and insert in their place "a kind of eligible passport".

The purpose of this amendment is to ensure consistency with the other student visa provisions in Division 1.8 of the Migration Regulations which refer to the term "eligible passport".

Item [1107] - Subregulation 1.41(2)

This item amends subregulation 1.41(2) to omit the words "passports issued by the foreign country" and insert in their place "a kind of eligible passport".

The purpose of this amendment is to ensure consistency with the other student visa provisions in Division 1.8 of the Migration Regulations which refer to the term "eligible passport".

Item [1108] - Paragraph 1.41(3)(a)

This item amends paragraph 1.41(3)(a) to omit the words "the foreign country" and insert in their place "the kind of eligible passport".

This amendment is consequential to the other amendments made by these Regulations to regulation 1.41.

Item [1109] - Subregulation 1.41(4)

This item amends subregulation 1.41(4) to omit the words "a passport issued by a foreign country" and insert in their place "a kind of eligible passport".

The purpose of this amendment is to ensure consistency with the other student visa provisions in Division 1.8 of the Migration Regulations which refer to the term "eligible passport".

Item [1110] - Subregulation 1.43(1)

This item amends subregulation 1.43(1) to omit the words "issued by different foreign countries".

This amendment is consequential to the amendments made by these Regulations to regulation 1.41.

Item [1111] - Subregulation 2.05(5)

This item makes a technical amendment to subregulation 2.05(5) to make it clear that the ability to waive condition 8534 in subregulation 2.05(5) is intended to operate as an alternative to the waiver provision in subregulation 2.05(4). That is, condition 8534 can be waived under either subregulation 2.05(4) or (5).

Item [1112] - Regulation 2.07AG, heading

This item amends the heading for regulation 2.07AG to more appropriately reflect the content of the regulation.

Item [1113] - Regulation 2.08C

Under regulation 2.08C, an applicant for a Independent (Migrant) (Class AT) visa, a Skilled - Independent (Migrant) (Class BN) visa, or a Skill Matching (Migrant) (Class BR) visa who has been nominated by an employer in respect of an appointment in the employer's business, and who meets other requirements in the regulation, is deemed also to have applied for an Employer Nomination (Migrant) (Class AN) visa.

This item substitutes regulation 2.08C with a new regulation extending the operation of regulation 2.08C to applicants for a Class AT, BN or BR visa who seek to enter Australia in accordance with a labour agreement or a Regional Headquarters (RHQ) agreement, and who are appointed by an employer authorised to recruit persons under a labour agreement or RHQ agreement.

Under new regulation 2.08C, these applicants, if meeting the other requirements in the regulation, will be deemed also to have applied for a Labour Agreement (Migrant) (Class AU) visa.

Subregulation 2.08C(1) provides that the regulation applies to a person who has applied for a Class AT, BN or BR visa, and who meets the requirements in subregulation 2.08C(2).

Subregulation 2.08C(2) provides that:

- the applicant must be less than 45 years old at the time of the original application for the Class AT, BN or BR visa; and

- a decision to grant or refuse to grant a Subclass 126, 134 or 136 visa has not been made; and

- an applicant for a Class AT or BN visa has been assessed in relation to Subclass 126 or 136, and has been given an assessed score that is at least the applicable pool mark; and

- the applicant:

- in the case of a Class AT application, has functional English and a diploma within the meaning of subregulation 2.26(5) or higher qualification; and

- in the case of a BN application, has vocational English and a diploma with the meaning of subregulation 2.26A(6) or higher qualification; and

- in the case of a Class BR application, has functional English and a diploma within the meaning of subregulation 2.26A(6) or higher qualification.

New subparagraph 2.08C(2)(d)(iii) also amends the existing English language requirement in relation to an applicant for a Class BR visa. Under new subparagraph 2.08C(2)(d)(iii), an applicant is required to have functional rather than vocational English. Functional English is a

lower level of English than vocational English. This amendment is consequential to the lowering of the English language requirement for Class BR applicants made by these Regulations.

Subregulation 2.08C(3) provides that subregulation 2.08C(4) applies to an applicant who has been nominated by an employer for an appointment in the business of the employer if the appointment is an approved appointment in accordance with subregulation 5.19(4).

Subregulation 2.08C(4) deems such applicants to have also applied for an Employer Nomination (Migrant) (Class AN) visa on the day when Immigration receives the employer nomination.

New subregulation 2.08C(5) reproduces the content of old subregulation 2.08C(2), and provides that a deemed application under subregulation 2.08C(4) is taken to be made outside Australia, and that any other person included in the applicant's application is also taken to be included in the applicant's application for the Employer Nomination (Migrant) (Class AN) visa.

New subregulation 2.08C(6) provides that new subregulation (7) applies to an applicant who seeks to enter Australia in accordance with a labour agreement or an RHQ agreement where Immigration has received evidence that the applicant has been appointed by an employer authorised to do so under the labour agreement or RHQ agreement.

New subregulation 2.08C(7) deems these applicants to have also applied for a Labour Agreement (Migrant) (Class AU) visa on the day when Immigration receives the evidence mentioned in new subregulation (6).

New subregulation 2.08C(8) provides that a deemed application under subregulation 2.08C(7) is taken to be made outside Australia, and any other person included in the applicant's application is taken to be included in the applicant's application for the Labour Agreement (Migrant) (Class AU) visa.

The provision may have a retrospective effect by deeming the application for a Class AU visa to have been made on the date that Immigration receives the evidence that the applicant has been appointed by an employer authorised to do so under the labour agreement or RHQ agreement. That is, applications will be deemed to have been made before the commencement of the Regulations.

However, the retrospectivity in relation to the deeming provision is beneficial in that an applicant for a Class AT, BN or BR visa who falls within the requirements of regulation 2.08C will be deemed also to have applied for a Class AU visa. No fee is charged in relation to this further deemed application.

The lowering of the English language requirement in new subparagraph 2.08C(d)(iii) also has a retrospective effect as the change applies to existing applications. However, this change is also beneficial in its effect as it enables an applicant who has functional English, being a lower level of English than vocational English, to meet the language criteria of Subclass 134 subject also to meeting the criteria of new subclause 134.222C(2).

The retrospectivity is not prejudicial to any person, and does not contravene subsection 48(2) of the *Acts Interpretation Act 1901*.

Item [1114] - After regulation 2.08E

This item inserts new regulation 2.08F in Part 2 of the Migration Regulations to provide the circumstances in which certain Subclass 785 (Temporary Protection) visa holders are taken to have applied for a Protection (Class XC) visa. These Regulations also insert new item 1403 in Schedule 1 to establish the new Protection (Class XC) visa class.

New subregulations 2.08F(1) and 2.08F(2) provide that a person is deemed to have applied for a Protection (Class XC) visa only if:

- he or she holds a Subclass 785 (Temporary Protection) visa that was granted before 19 September 2001; and

- he or she is in Australia, but is not in immigration clearance; and

- the visa has not been cancelled; and

- within 36 months after the date of grant of the visa, the person makes, or has made, an application for a Protection (Class XA) visa; and

- the application has not yet been finally determined.

As such a person is automatically taken to have applied for a Protection (Class XC) visa, it will not be necessary for him or her to make an application at an Immigration office.

New subregulation 2.08F(2) specifies the time when such a person is taken to have applied for a Protection (Class XC) visa. It provides that a person mentioned in new subregulation 2.08F(1) is taken to have applied for a Protection (Class XC) visa on the later of:

- the day when he or she makes, or made, an application for a Protection (Class XA) visa; and

- 1 November 2002.

This amendment seeks to ensure that a person granted a Subclass 785 (Temporary Protection) visa before 19 September 2001 can receive the equivalent protection and benefit arrangements, where they have an unresolved further application for a protection visa, as were provided for persons granted a Subclass 785 (Temporary Protection) visa on or after 19 September 2001.

Statutory Rule 246 of 2001, which took effect on 19 September 2001, inserted a new "when visa is in effect" provision which ensured that a Subclass 785 (Temporary Protection) visa would remain in effect beyond the normal 36-month validity period in certain circumstances. These circumstances were where the holder made an application for a Protection (Class XA) visa within the 36 month period from the date of the grant of his or her Subclass 785 (Temporary Protection) visa. In these circumstances, the Subclass 785 (Temporary Protection) visa permitted its holder to remain in Australia until the day on which the Protection (Class XA) visa application was finally determined.

The purpose of this amendment is to ensure that persons mentioned in new subregulation 2.08F(1), who are taken to have applied for a Protection (Class XC) visa, will be able to maintain their status as Subclass 785 (Temporary Protection) visa holders while their Protection (Class XA) application is decided. Importantly, this means that they will continue to access benefits, such as work rights, Medicare and Special Benefit payments, while awaiting the final determination of their Protection (Class XA) application.

Item [1115] - Subregulation 2.40(10)

This item substitutes subregulation 2.40(10) setting out that operational aircrew members have a prescribed status under subparagraph 33(2)(a)(ii) of the Act for 30 days, beginning when he or she disembarks from the aircraft in which he or she travelled to Australia, if and only if he or she:

- holds a passport that is in force; and

- holds a valid airline identity card issued by his or her employer; and

- is included on a list of crew members provided to the Department of Immigration and Multicultural and Indigenous Affairs by or for an international air carrier.

The amendment requires operational aircrew members to hold a passport that is in force in order to be accorded the prescribed status of special purpose visa holder under paragraph 33(2)(a) of the Act.

The effect of the amendment is to increase the level of documentary evidence required from operational aircrew members to be accorded the prescribed status of a special purpose visa.

The amendment is intended to heighten Australia's border security.

Item [1116] - Paragraph 2.43(1)(l)

Paragraph 2.43(1)(l) prescribes for the purposes of paragraph 116(1)(g) of the Act the grounds under which the Minister may cancel a Subclass 457 (Business (Long Stay)) visa granted to a visa holder on the basis of his or her being employed in Australia by a business sponsor.

The cancellation ground in paragraph 2.43(1)(l) relates to undertakings given by the sponsor, the continued satisfaction of the sponsor of the requirements for approval as a sponsor, and whether the sponsor gave correct information to Immigration in relation to the application for approval as a business sponsor.

This item amends paragraph 2.43(1)(l) by extending the cancellation provision to persons granted a Subclass 457 (Business (Long Stay)) visa on the basis of being employed by a business sponsor in respect of whom there is a nomination of an activity under regulation 1.20GA.

Item [1117] - After paragraph 2.43(1)(l)

This item inserts new paragraph 2.43(1)(la) enabling the Minister to cancel a Subclass 457 (Business (Long Stay)) visa granted to a visa holder on the basis of his or her being employed in Australia by a business sponsor, and in respect of whom there is a nomination of an activity under regulation 1.20GA.

The prescribed ground of cancellation in new paragraph 2.43(1)(la) is that the visa holder is living or working within an area specified in a Gazette Notice made for the purposes of paragraph 2.43(la). The areas to be gazetted may exist where a regional-nominated visa holder is living or working in a non-regional area specified in a Gazette Notice. These non-regional locations broadly cover Brisbane, Gold Coast, Newcastle, Sydney, Wollongong, Melbourne and Perth.

This provision does not apply to visa granted to a visa holder on the basis of his or her being employed in Australia by a business sponsor in respect of whom there is a nomination of an activity under regulation 1.20G.

Item [1118] - Subregulation 4.22(1)

Pursuant to paragraph 395(b) of the Act, this item amends subregulation 4.22(1) to increase the number of Senior Members who can be appointed to the Migration Review Tribunal from a maximum of 5 to a maximum of 9. This amendment will keep the ratio of Senior Members to the total number of members at the current rate of ten percent.

The amendment only sets out the maximum number of Senior Members who may be appointed to the Tribunal and does not require that 9 Senior Members be appointed.

Item [1119] - Subregulation 4.22(2)

Pursuant to paragraph 395(c) of the Act, this item amends subregulation 4.22(2) to increase the number of members who can be appointed to the Migration Review Tribunal from a maximum of 50 to a maximum of 90.

The amendment only sets out the maximum number of members who may be appointed to the Tribunal and does not require that 90 members be appointed

Part 2 - Amendments of Schedule 1

Item [1201] - Subparagraph 1114(2)(b)(ii)

Item [1202] - Subparagraph 1114(2)(b)(iv)

These items make minor technical changes consequential to the substitution of regulation 2.08C by these Regulations.

Item [1203] - Subitem 1121(1)

This item clarifies that an applicant for a Class AU visa whose application is deemed to have been made under regulation 2.08C (as amended by these Regulations) is not required to make the application on a specified form.

Item [1204] - Paragraph 1121(2)(a)

This item ensures that applicants who are deemed to have made an application for a Class AU visa under regulation 2.08C (as amended by these Regulations), do not have to pay the first instalment of the visa application charge. This is because these persons have already paid a first instalment visa application charge as part of their application for a Class AT or BN. There is no first instalment charge payable in relation to an application for a Class BR visa.

Item [1205] - Subparagraph 1121(2)(b)(ii)

This item ensures that secondary applicants who are deemed to have made an application under paragraph 2.08C(8)(b) (as inserted by these Regulations) are also included within the provisions of subparagraph 1121(2)(b)(ii). Subparagraph 1121(2)(b)(ii) sets out that a secondary applicant for a Class AU visa who is over 18 at the time of the deemed application and is assessed as not having functional English, must pay the amount of the second instalment of the visa application charge specified in the subparagraph.

Item [1206] - Subparagraph 1121(2)(b)(v)

This item ensures that an applicant for a Class BR visa who is deemed under subregulation 2.08C(4) (as amended by these Regulations) to have applied for a Class AU visa must pay the amount of the second instalment of the visa application charge specified in the subparagraph.

Item [1207] - Subparagraphs 1128BA(3)(c)(ii) and 1128CA(3)(d)(ii)

This item amends subparagraphs 1128BA(3)(c)(ii) and 1128BA(3)(d)(ii) so that it is no longer a requirement for an applicant who is less than 16 years old to provide evidence of a check of criminal records in relation to the applicant by the Australian Federal Police.

Item [1208] - Sub-subparagraph 1222(3)(ca)(iii)(B)

This item removes a reference to assessment level 2 from sub-subparagraph 1222(3)(ca)(iii)(B) of Schedule 1, to exclude assessment level 2 applicants seeking to satisfy the primary criteria from making an Internet application for a Student (Temporary) (Class TU) visa in Australia. This amendment is a result of requiring assessment level 2 applicants for Subclasses 570 - 575 to establish exceptional reasons for the grant of an initial student visa onshore. The intention is that applicants required to establish exceptional reasons for the grant of a student visa onshore should not be able to make an Internet application.

Item [1209] - After item 1402

This item inserts new item 1403 in Schedule 1 to the Migration Regulations to provide for a new Protection (Class XC) visa class.

Under new subclauses 1403(1) and 1403(2), no application form is required to make a valid application for a new Protection (Class XC) visa and no visa application charge is payable.

Under new subclause 1403(3), only an applicant who is taken to have made an application for a Protection (Class XC) visa under new regulation 2.08F, is able to make a valid application for a new Protection (Class XC) visa. This is because the new Protection (Class XC) visa class is specifically designed to ensure that persons granted a Subclass 785 (Temporary Protection) visa before 19 September 2001, who make a Protection (Class XA) visa application while holding that visa, maintain their status as temporary protection visa holders until the final determination of their Protection (Class XA) application.

New subclause 1403(4) provides that the new Protection (Class XC) visa class contains only the Subclass 785 (Temporary Protection) visa subclass. This ensures that applicants are assessed solely against the criteria for the grant of a Subclass 785 (Temporary Protection) visa and not, as with the existing Protection (Class XA) visa class, the criteria for the grant of a Subclass 866 (Protection) visa.

This amendment therefore enables certain Subclass 785 (Temporary Protection) visa holders, who are taken to have made a valid visa application for the new Protection (Class XC) visa under new regulation 2.08F, to continue to receive Special Benefit payments and Medicare.

Determinations made under sub-subparagraph 729(2)(f)(v) of the *Social Security Act 1991* identify Subclass 785 (Temporary Protection) visa holders as qualifying for Special Benefit payments. In addition, a class order under subsection 6(1) of the *Health Insurance Act 1973* provides that holders of a Subclass 785 (Temporary Protection) visa are entitled to Medicare.

The note to new item 1403 provides a reference to new regulation 2.08F, which provides that only certain visa applicants are taken to have applied for a Protection (Class XC) visa. This is the only way in which it is possible to apply for a Protection (Class XC) visa.

Part 3 - Amendments of Schedule 2

Item [1301] - Clause 119.211

This item substitutes new clause 119.211. This clause specifies criteria which the applicant must satisfy at the time of application for the grant of a Subclass 119 (Regional Sponsored Migration Scheme) visa.

The new clause maintains the operation of clause 119.211 prior to this amendment, apart from requiring an applicant whose original application was for a Class BR visa, and whose application for a Class AN visa was made under regulation 2.08C, to have functional English.

This amendment is consequential to amendments to the English language criteria in the Subclass 134 (Skill Matching) visa made by these Regulations.

As the amendment changes time of application criteria, the amendment will have a retrospective effect in certain cases. However, the amendments are beneficial in their effect as they enable an applicant who has functional English, being a lower level of English than vocational English, to meet the language criteria of Subclass 119.

Item [1302] - Paragraphs 119.223(b) and 119.225(1)(b)

The amendments made by this item make it a criterion to be satisfied by applicants seeking to satisfy the primary criteria for the grant of a Subclass 119 (Regional Sponsored Migration Scheme) visa (the primary applicant) that:

- the primary applicant; and

- each member of the family unit of the primary applicant, who is also an applicant for a Subclass 119 (Regional Sponsored Migration Scheme) visa,

satisfy special return criterion 5010.

Special return criterion 5010 imposes a restriction on applicants who hold, or whose last substantive visa was, an AusAID student visa within the meaning of regulation 1.04A or a Subclass 560, 562, 563, 570, 571, 572, 573, 574 or 575 visa granted to applicants who were provided financial support by the government of a foreign country. The restriction is to require such applicants to have spent at least 2 years outside Australia since ceasing, completing, withdrawing or being excluded from, the course of study or training to which the visa related (if the course or training was for more than 12 months) unless this requirement is waived.

The purpose of these amendments is to strengthen the policy that AusAID students, and certain other students being provided financial assistance by a foreign country, return to their home country for at least two years to use the skills and knowledge they gained while in Australia under the AusAID or financial assistance program.

Item [1303] - Clause 119.323

The amendments made by this item ensure that applicants seeking to satisfy the secondary criteria for the grant of a Subclass 119 (Regional Sponsored Migration Scheme) visa must satisfy special return criterion 5010.

The purpose of these amendments is to strengthen the policy that AusAID students, and certain other students being provided financial assistance by a foreign country, return to their home country for at least two years to use the skills and knowledge they gained while in Australia under the AusAID or financial assistance program.

Item [1304] - Clause 120.211

This item substitutes clause 120.211. This clause specifies criteria which the applicant must satisfy at the time of application for the grant of a Subclass 120 (Labour Agreement) visa.

New subclause 120.211(1) maintains the current requirements in relation to applicants who seek to enter Australia in accordance with a labour agreement or in accordance with an RHQ agreement.

New subclause 120.211(2) requires an applicant who is taken to have made the application under regulation 2.08C, and who seeks to enter Australia in accordance with a labour agreement, to have:

- qualifications and experience that are suitable for the position to be taken by the applicant under the labour agreement; and

- not turned 45 at the time of their original application for a Class AT, BN or BR visa.

Applicants who seek to enter Australia in accordance with a RHQ agreement and who are taken to have made an application under regulation 2.08C, are not required to meet the requirements of new subclause 120.211(2).

As the amendment changes time of application criteria, the amendment will have a retrospective effect in certain cases. However, as prior to 1 November 2002 it was not possible for an applicant seeking to enter Australia in accordance with a labour agreement to make an application for this visa, the amendments are not prejudicial to applicants.

Item [1305] - Paragraphs 120.222(b) and 120.224(1)(b)

The amendments made by this item make it a criterion to be satisfied by applicants seeking to satisfy the primary criteria for the grant of a Subclass 120 (Labour Agreement) visa (the primary applicant) that:

- the primary applicant; and

- each member of the family unit of the primary applicant, who is also an applicant for a Subclass 120 (Labour Agreement) visa,

satisfy special return criterion 5010.

Special return criterion 5010 imposes a restriction on applicants who hold, or whose last substantive visa was, an AusAID student visa within the meaning of regulation 1.04A or a Subclass 560, 562, 563, 570, 571, 572, 573, 574 or 575 visa granted to applicants who were provided financial support by the government of a foreign country. The restriction is to require such applicants to have spent at least 2 years outside Australia since ceasing, completing, withdrawing or being excluded from, the course of study or training to which the visa related (if the course or training was for more than 12 months) unless this requirement is waived.

The purpose of these amendments is to strengthen the policy that AusAID students, and certain other students being provided financial assistance by a foreign country, return to their home country for at least two years to use the skills and knowledge they gained while in Australia under the AusAID or financial assistance program.

Item [1306] - Clause 120.323

The amendments made by this item ensure that applicants seeking to satisfy the secondary criteria for the grant of a Subclass 120 (Labour Agreement) visa must satisfy special return criterion 5010.

The purpose of these amendments is to strengthen the policy that AusAID students, and certain other students being provided financial assistance by a foreign country, return to their home

country for at least two years to use the skills and knowledge they gained while in Australia under the AusAID or financial assistance program.

Item [1307] - Paragraphs 121.224(b) and 121.226(1)(b)

The amendments made by this item make it a criterion to be satisfied by applicants seeking to satisfy the primary criteria for the grant of a Subclass 121 (Employer Nomination) visa (the primary applicant) that:

- the primary applicant; and

- each member of the family unit of the primary applicant, who is also an applicant for a Subclass 121 (Employer Nomination) visa,

satisfy special return criterion 5010.

Special return criterion 5010 imposes a restriction on applicants who hold, or whose last substantive visa was, an AusAID student visa within the meaning of regulation 1.04A or a Subclass 560, 562, 563, 570, 571, 572, 573, 574 or 575 visa granted to applicants who were provided financial support by the government of a foreign country. The restriction is to require such applicants to have spent at least 2 years outside Australia since ceasing, completing, withdrawing or being excluded from, the course of study or training to which the visa related (if the course or training was for more than 12 months) unless this requirement is waived.

The purpose of these amendments is to strengthen the policy that AusAID students, and certain other students being provided financial assistance by a foreign country, return to their home country for at least two years to use the skills and knowledge they gained while in Australia under the AusAID or financial assistance program.

Item [1308] - Clause 121.323

The amendments made by this item ensure that applicants seeking to satisfy the secondary criteria for the grant of a Subclass 121 (Employer Nomination) visa must satisfy special return criterion 5010.

The purpose of these amendments is to strengthen the policy that AusAID students, and certain other students being provided financial assistance by a foreign country, return to their home country for at least two years to use the skills and knowledge they gained while in Australia under the AusAID or financial assistance program.

Item [1309] - Clause 134.212

This item amends clause 134.212 to change the English language requirement in Subclass 134 (Skill Matching) from vocational to functional English, as defined under subsection 5(2) of the Act.

These amendments are applied retrospectively to applications for a Subclass 134 (Skill Matching) visa made, but not finally determined, before 1 November 2002. The amendments are beneficial in their effect as they enable an applicant who has functional English, being a lower level of English than vocational English, to meet the language criteria of Subclass 134 subject also to meeting the criteria of new subclause 134.222C(2).

The amendments are not prejudicial to any person, and do not therefore contravene subsection 48(2) of the *Acts Interpretation Act 1901*.

Item [1310] - After clause 134.222B

This item inserts new clause 134.222C. This clause specifies additional time of decision criteria for an applicant for a Subclass 134 (Skill Matching) visa.

New subclause 134.222C(1) specifies that the applicant must have vocational English, or, if they do not have vocational English, must have functional English and meet the requirements of subclause 134.222C(2).

New subclause 134.222C(2) provides that an applicant must have been nominated under clause 134.222 by a State or Territory specified by Gazette Notice in which arrangements are established for suitable English language training, and the Minister must be satisfied that the applicant has paid any fee or charge for the training mentioned above.

Item [1311] - Paragraph 457.223(4)(f)

This item amends paragraph 457.223(4)(f) to clarify that the time of decision criteria in paragraph 457.223(4)(f) need only be satisfied by an applicant in respect of whom there is a nomination of an activity under regulation 1.20G.

Item [1312] - After paragraph 457.223(4)(f)

This item inserts new paragraph 457.223(4)(fa) to ensure that a visa applicant nominated under 1.20GA is required to satisfy the Minister that they will be paid the level specified in the nomination, and that this level will be no less than remuneration under relevant legislation and awards. The Minister is also to be satisfied that the working conditions are no less favourable than working conditions under relevant legislation and awards. These requirements ensure that the visa holder is fully aware of the level at which they are to be remunerated, and of their conditions of employment. The visa holder would usually demonstrate this awareness by producing an employment contract or a letter of appointment at the point of visa application.

Item [1313] - Subclause 570.221(1)

This amendment is consequential to the insertion of new clause 570.234.

Item [1314] - Subparagraphs 570.221(2)(b)(ii) and (3)(b)(ii)

These amendments are consequential to the insertion of new clause 570.234.

Item [1315] - Paragraph 570.227(b)

This item amends paragraph 570.227(b) so that clause 570.227 extends to include assessment level 2 applicants. This amendment ensures that assessment level 2 applicants who apply for a Subclass 570 (Independent ELICOS Sector) visa in Australia, and who hold a substantive visa listed in clause 570.227, are unable to be granted an initial student visa unless they establish exceptional reasons for the grant of that Subclass 570 (Independent ELICOS Sector) visa.

Item [1316] - After clause 570.233

This item inserts new clause 570.234 to require applicants who meet the primary criteria, and who have not turned 18 years old, to satisfy public interest criteria 4017 and 4018 at time of decision. Public interest criteria 4017 and 4018 require the Minister to be satisfied that there is no lawful impediment to the removal of the applicant from his or her home country and that it is in the applicant's best interests to be granted the visa.

Item [1317] - Subclause 570.312(1)

This amendment is consequential to the insertion of new subclause 570.312(5).

Item [1318] - After subclause 570.312(4)

This item inserts new subclause 570.312(5) to provide that an applicant seeking to meet the secondary criteria, who does not hold a substantive visa and who is a member of the family unit of a person who holds a Subclass 560 (Student) visa, a Subclass 562 (Iranian Postgraduate Student) visa or a Subclass 570 (Independent ELICOS Sector) visa, may be eligible for the grant of a Subclass 570 (Independent ELICOS Sector) visa.

This new subclause makes provision for the grant of a Subclass 570 (Independent ELICOS Sector) visa to a student dependent in Australia, where his or her substantive visa has ceased but the person who met the primary criteria still holds a substantive visa.

The amendments made by this item, and the item above, have a retrospective effect as the change affects time of application criteria and applies to applications made, but not finally determined, before the commencement of these Regulations, as well as to applications made after that date. The retrospectivity is not prejudicial to any person, and does not contravene subsection 48(2) of the *Acts Interpretation Act 1901*.

Item [1319] - Clause 570.613

This item substitutes existing clause 570.613 for new clause 570.613, relating to visa conditions.

New subclause 570.613(1) provides for the mandatory imposition of condition 8534 (no further stay) on assessment level 3, 4 or 5 applicants who are seeking to undertake an ELICOS course (an English Language Intensive Course for Overseas Students) of 10 months duration or less.

New subclause 570.613(2), however, provides for the discretionary imposition of condition 8534 on assessment level 3 applicants who supply additional evidence relating to their financial capacity. As this is a discretionary power, the Minister may still decide to impose condition 8534 on the Subclass 570 (Independent ELICOS Sector) visa even where the applicant provides this additional evidence. The additional financial capacity evidence is specified in new subclause 570.613(3). Applicants must show that they have funds in addition to the funds they provided evidence of under Schedule 5A in order to satisfy clause 570.223 (subclause 570.613(4)). This prevents applicants using the same funds to satisfy the evidentiary requirements in both Schedule 5A and new clause 570.613.

New subclause 570.613(5) ensures an applicant who satisfies the secondary criteria will have the same, if any, condition imposed on his or her visa as the person who satisfied the primary criteria.

Item [1320] - Subclause 571.221(1)

This amendment is consequential to the insertion of new clause 571.234.

Item [1321] - Subparagraphs 571.221(2)(b)(ii) and (3)(b)(ii)

These amendments are consequential to the insertion of new clause 571.234.

Item [1322] - Paragraph 571.227(b)

This item amends paragraph 571.227(b) so that clause 571.227 extends to include assessment level 2 applicants. This amendment ensures that assessment level 2 applicants who apply for a Subclass 571 (Schools Sector) visa in Australia, and who hold a substantive visa listed in clause 571.227, are unable to be granted an initial student visa unless they establish exceptional reasons for the grant of that Subclass 571 (Schools Sector) visa.

Item [1323] - After clause 571.233

This item inserts new clause 571.234 to require applicants who meet the primary criteria, and who have not turned 18 years old, to satisfy public interest criteria 4017 and 4018 at time of decision. Public interest criteria 4017 and 4018 require the Minister to be satisfied that there is no lawful impediment to the removal of the applicant from his or her home country and that it is in the applicant's best interests to be granted the visa.

Item [1324] - Subclause 571.312(1)

This amendment is consequential to the insertion of new subclause 571.312(5).

Item [1325] - After subclause 571.312(4)

This item inserts new subclause 571.312(5) to provide that an applicant seeking to meet the secondary criteria, who does not hold a substantive visa and who is a member of the family unit of a person who holds a Subclass 560 (Student) visa, a Subclass 562 (Iranian Postgraduate Student) visa or a Subclass 571 (Schools Sector) visa, may be eligible for the grant of a Subclass 571 (Schools Sector) visa.

This new subclause makes provision for the grant of a Subclass 571 (Schools Sector) visa to a student dependent in Australia, where his or her substantive visa has ceased but the person who met the primary criteria still holds a substantive visa.

The amendments made by this item, and the item above, have a retrospective effect as the change affects time of application criteria and applies to applications made, but not finally determined, before the commencement of these Regulations, as well as to applications made after that date. The retrospectivity is not prejudicial to any person, and does not contravene subsection 48(2) of the *Acts Interpretation Act 1901*.

Item [1326] - Subclause 572.221(1)

This amendment is consequential to the insertion of new clause 572.233.

Item [1327] - Subparagraphs 572.221(2)(b)(ii) and (3)(b)(ii)

These amendments are consequential to the insertion of new clause 572.233.

Item [1328] - Paragraph 572.227(b)

This item amends paragraph 572.227(b) so that clause 572.227 extends to include assessment level 2 applicants. This amendment ensures that assessment level 2 applicants who apply for a Subclass 572 (Vocational Education and Training Sector) visa in Australia, and who hold a substantive visa listed in clause 572.227, are unable to be granted an initial student visa unless they establish exceptional reasons for the grant of that Subclass 572 (Vocational Education and Training Sector) visa.

Item [1329] - After clause 572.232

This item inserts new clause 572.233 to require applicants who meet the primary criteria, and who have not turned 18 years old, to satisfy public interest criteria 4017 and 4018 at time of decision. Public interest criteria 4017 and 4018 require the Minister to be satisfied that there is no lawful impediment to the removal of the applicant from his or her home country and that it is in the applicant's best interests to be granted the visa.

Item [1330] - Subclause 572.312(1)

This amendment is consequential to the insertion of new subclause 572.312(5).

Item [1331] - After subclause 572.312(4)

This item inserts new subclause 572.312(5) to provide that an applicant seeking to meet the secondary criteria, who does not hold a substantive visa and who is a member of the family unit of a person who holds a Subclass 560 (Student) visa, a Subclass 562 (Iranian Postgraduate Student) visa or a Subclass 572 (Vocational Education and Training Sector) visa, may be eligible for the grant of a Subclass 572 (Vocational Education and Training Sector) visa.

This new subclause makes provision for the grant of a Subclass 572 (Vocational Education and Training Sector) visa to a student dependent in Australia, where his or her substantive visa has ceased but the person who met the primary criteria still holds a substantive visa.

The amendments made by this item, and the item above, have a retrospective effect as the change affects time of application criteria and applies to applications made, but not finally determined, before the commencement of these Regulations, as well as to applications made after that date. The retrospectivity is not prejudicial to any person, and does not contravene subsection 48(2) of the *Acts Interpretation Act 1901*.

Item [1332] - Clause 572.613

This item substitutes existing clause 572.613 for new clause 572.613, relating to visa conditions.

New subclause 572.613(1) provides for the mandatory imposition of condition 8534 (no further stay) on assessment level 3, 4 or 5 applicants who are seeking to undertake a course of study of 10 months duration or less.

New subclause 572.613(2), however, provides for the discretionary imposition of condition 8534 on assessment level 3 applicants who supply additional evidence relating to their financial capacity. As this is a discretionary power, the Minister may still decide to impose condition 8534 on the Subclass 572 (Vocational Education and Training Sector) visa even where the applicant provides this additional evidence. The additional financial capacity evidence is specified in new subclause 572.613(3). Applicants must show that they have funds in addition to the funds they provided evidence of under Schedule 5A in order to satisfy clause 572.223 (subclause 572.613(4)). This prevents applicants using the same funds to satisfy the evidentiary requirements in both Schedule 5A and new clause 572.613.

New subclause 572.613(5) ensures an applicant who satisfies the secondary criteria will have the same, if any, condition imposed on his or her visa as the person who satisfied the primary criteria.

Item [1333] - Subclause 573.221(1)

This amendment is consequential to the insertion of new clause 573.233.

Item [1334] - Subparagraphs 573.221(2)(b)(ii) and (3)(b)(ii)

These amendments are consequential to the insertion of new clause 573.233.

Item [1335] - Paragraph 573.227(b)

This item amends paragraph 573.227(b) so that clause 573.227 extends to include assessment level 2 applicants. This amendment ensures that assessment level 2 applicants who apply for a Subclass 573 (Higher Education Sector) visa in Australia, and who hold a substantive visa listed

in clause 573.227, are unable to be granted an initial student visa unless they establish exceptional reasons for the grant of that Subclass 573 (Higher Education Sector) visa.

Item [1336] - After clause 573.232

This item inserts new clause 573.233 to require applicants who meet the primary criteria, and who have not turned 18 years old, to satisfy public interest criteria 4017 and 4018 at time of decision. Public interest criteria 4017 and 4018 require the Minister to be satisfied that there is no lawful impediment to the removal of the applicant from his or her home country and that it is in the applicant's best interests to be granted the visa.

Item [1337] - Subclause 573.312(1)

This amendment is consequential to the insertion of new subclause 573.312(5).

Item [1338] - After subclause 573.312(4)

This item inserts new subclause 573.312(5) to provide that an applicant seeking to meet the secondary criteria, who does not hold a substantive visa and who is a member of the family unit of a person who holds a Subclass 560 (Student) visa, a Subclass 562 (Iranian Postgraduate Student) visa or a Subclass 573 (Higher Education Sector) visa, may be eligible for the grant of a Subclass 573 (Higher Education Sector) visa.

This new subclause makes provision for the grant of a Subclass 573 (Higher Education Sector) visa to a student dependent in Australia, where his or her substantive visa has ceased but the person who met the primary criteria still holds a substantive visa.

The amendments made by this item, and the item above, have a retrospective effect as the change affects time of application criteria and applies to applications made, but not finally determined, before the commencement of these Regulations, as well as to applications made after that date. The retrospectivity is not prejudicial to any person, and does not contravene subsection 48(2) of the *Acts Interpretation Act 1901*.

Item [1339] - Clause 573.613

This item substitutes existing clause 573.613 for new clause 573.613, relating to visa conditions.

New subclause 573.613(1) provides for the mandatory imposition of condition 8534 (no further stay) on assessment level 3, 4 or 5 applicants who are seeking to undertake a course of study of 10 months duration or less.

New subclause 573.613(2), however, provides for the discretionary imposition of condition 8534 on assessment level 3 applicants who supply additional evidence relating to their financial capacity. As this is a discretionary power, the Minister may still decide to impose condition 8534 on the Subclass 573 (Higher Education Sector) visa even where the applicant provides this additional evidence. The additional financial capacity evidence is specified in new subclause 573.613(3). Applicants must show that they have funds in addition to the funds they provided evidence of under Schedule 5A in order to satisfy clause 573.223 (subclause 573.613(4)). This prevents applicants using the same funds to satisfy the evidentiary requirements in both Schedule 5A and new clause 573.613.

New subclause 573.613(5) ensures an applicant who satisfies the secondary criteria will have the same, if any, condition imposed on his or her visa as the person who satisfied the primary criteria.

Item [1340] - Subclause 574.221(1)

This amendment is consequential to the insertion of new clause 574.233.

Item [1341] - Subparagraphs 574.221(2)(b)(ii) and (3)(b)(ii)

These amendments are consequential to the insertion of new clause 574.233.

Item [1342] - Paragraph 574.227(b)

This item amends paragraph 574.227(b) so that clause 574.227 extends to include assessment level 2 applicants. This amendment ensures that assessment level 2 applicants who apply for a Subclass 574 (Masters and Doctorate Sector) visa in Australia, and who hold a substantive visa listed in clause 574.227, are unable to be granted an initial student visa unless they establish exceptional reasons for the grant of that Subclass 574 (Masters and Doctorate Sector) visa.

Item [1343] - After clause 574.232

This item inserts new clause 574.233 to require applicants who meet the primary criteria, and who have not turned 18 years old, to satisfy public interest criteria 4017 and 4018 at time of decision. Public interest criteria 4017 and 4018 require the Minister to be satisfied that there is no lawful impediment to the removal of the applicant from his or her home country and that it is in the applicant's best interests to be granted the visa.

Item [1344] - Subclause 574.312(1)

This amendment is consequential to the insertion of new subclause 574.312(5).

Item [1345] - After subclause 574.312(4)

This item inserts new subclause 574.312(5) to provide that an applicant seeking to meet the secondary criteria, who does not hold a substantive visa and who is a member of the family unit of a person who holds a Subclass 560 (Student) visa, a Subclass 562 (Iranian Postgraduate Student) visa or a Subclass 574 (Masters and Doctorate Sector) visa, may be eligible for the grant of a Subclass 574 (Masters and Doctorate Sector) visa.

This new subclause makes provision for the grant of a Subclass 574 (Masters and Doctorate Sector) visa to a student dependent in Australia, where his or her substantive visa has ceased but the person who met the primary criteria still holds a substantive visa.

The amendments made by this item, and the item above, have a retrospective effect as the change affects time of application criteria and applies to applications made, but not finally determined, before the commencement of these Regulations, as well as to applications made after that date. The retrospectivity is not prejudicial to any person, and does not contravene subsection 48(2) of the *Acts Interpretation Act 1901*.

Item [1346] - Clause 574.613

This item substitutes existing clause 574.613 for new clause 574.613, relating to visa conditions.

New subclause 574.613(1) provides for the mandatory imposition of condition 8534 (no further stay) on assessment level 3, 4 or 5 applicants who are seeking to undertake a course of study of 10 months duration or less.

New subclause 574.613(2), however, provides for the discretionary imposition of condition 8534 on assessment level 3 applicants who supply additional evidence relating to their financial capacity. As this is a discretionary power, the Minister may still decide to impose condition 8534 on the Subclass 574 (Masters and Doctorate Sector) visa even where the applicant provides this

additional evidence. The additional financial capacity evidence is specified in new subclause 574.613(3). Applicants must show that they have funds in addition to the funds they provided evidence of under Schedule 5A in order to satisfy clause 574.223 (subclause 574.613(4)). This prevents applicants using the same funds to satisfy the evidentiary requirements in both Schedule 5A and new clause 574.613.

New subclause 574.613(5) ensures an applicant who satisfies the secondary criteria will have the same, if any, condition imposed on his or her visa as the person who satisfied the primary criteria.

Item [1347] - Subclause 575.221(1)

This amendment is consequential to the insertion of new clause 575.233.

Item [1348] - Subparagraphs 575.221(2)(b)(ii) and (3)(b)(ii)

These amendments are consequential to the insertion of new clause 575.233.

Item [1349] - Paragraph 575.227(b)

This item amends paragraph 575.227(b) so that clause 575.227 extends to include assessment level 2 applicants. This amendment ensures that assessment level 2 applicants who apply for a Subclass 575 (Non-award Foundation/Other Sector) visa in Australia, and who hold a substantive visa listed in clause 575.227, are unable to be granted an initial student visa unless they establish exceptional reasons for the grant of that Subclass 575 (Non-award Foundation/Other Sector) visa.

Item [1350] - After clause 575.232

This item inserts new clause 575.233 to require applicants who meet the primary criteria, and who have not turned 18 years old, to satisfy public interest criteria 4017 and 4018 at time of decision. Public interest criteria 4017 and 4018 require the Minister to be satisfied that there is no lawful impediment to the removal of the applicant from his or her home country and that it is in the applicant's best interests to be granted the visa.

Item [1351] - Subclause 575.312(1)

This amendment is consequential to the insertion of new subclause 575.312(5).

Item [1352] - After subclause 575.312(4)

This item inserts new subclause 575.312(5) to provide that an applicant seeking to meet the secondary criteria, who does not hold a substantive visa and who is a member of the family unit of a person who holds a Subclass 560 (Student) visa, a Subclass 562 (Iranian Postgraduate Student) visa or a Subclass 575 (Non-award Foundation/Other Sector) visa, may be eligible for the grant of a Subclass 575 (Non-award Foundation/Other Sector) visa.

This new subclause makes provision for the grant of a Subclass 575 (Non-award Foundation/Other Sector) visa to a student dependent in Australia, where his or her substantive visa has ceased but the person who met the primary criteria still holds a substantive visa.

The amendments made by this item, and the item above, have a retrospective effect as the change affects time of application criteria and applies to applications made, but not finally determined, before the commencement of these Regulations, as well as to applications made after that date. The retrospectivity is not prejudicial to any person, and does not contravene subsection 48(2) of the *Acts Interpretation Act 1901*.

Item [1353] - Clause 575.613

This item substitutes existing clause 575.613 for new clause 575.613, relating to visa conditions.

New subclause 575.613(1) provides for the mandatory imposition of condition 8534 (no further stay) on assessment level 3, 4 or 5 applicants who are seeking to undertake a course of study of 10 months duration or less.

New subclause 575.613(2), however, provides for the discretionary imposition of condition 8534 on assessment level 3 applicants who supply additional evidence relating to their financial capacity. As this is a discretionary power, the Minister may still decide to impose condition 8534 on the Subclass 575 (Non-award Foundation/Other Sector) visa even where the applicant provides this additional evidence. The additional financial capacity evidence is specified in new subclause 575.613(3). Applicants must show that they have funds in addition to the funds they provided evidence of under Schedule 5A in order to satisfy clause 575.223 (subclause 575.613(4)). This prevents applicants using the same funds to satisfy the evidentiary requirements in both Schedule 5A and new clause 575.613.

New subclause 575.613(5) ensures an applicant who satisfies the secondary criteria will have the same, if any, condition imposed on his or her visa as the person who satisfied the primary criteria.

Item [1354] - Subclause 576.221(1)

This amendment is consequential to the insertion of new clause 576.231.

Item [1355] - Subparagraphs 576.221(2)(b)(ii) and (3)(b)(ii)

These amendments are consequential to the insertion of new clause 576.231.

Item [1356] - After clause 576.230

This item inserts new clause 576.231 to require applicants who meet the primary criteria, and who have not turned 18 years old, to satisfy public interest criterion 4017 and 4018 at time of decision. Public interest criteria 4017 and 4018 require the Minister to be satisfied that there is no lawful impediment to the removal of the applicant from his or her home country and that it is in the applicant's best interests to be granted the visa.

Item [1357] - Subclause 576.312(1)

This amendment is consequential to the insertion of new subclause 576.312(5).

Item [1358] - After subclause 576.312(4)

This item inserts new subclause 576.312(5) to provide that an applicant seeking to meet the secondary criteria, who does not hold a substantive visa and who is a member of the family unit of a person who holds a Subclass 560 (Student) visa, a Subclass 562 (Iranian Postgraduate Student) visa or a Subclass 576 (AusAID or Defence Sector) visa, may be eligible for the grant of a Subclass 576 (AusAID or Defence Sector) visa.

This new subclause makes provision for the grant of a Subclass 576 (AusAID or Defence Sector) visa to a student dependent in Australia, where his or her substantive visa has ceased but the person who met the primary criteria still holds a substantive visa.

The amendments made by this item, and the item above, have a retrospective effect as the change affects time of application criteria and applies to applications made, but not finally

determined, before the commencement of these Regulations, as well as to applications made after that date. The retrospectivity is not prejudicial to any person, and does not contravene subsection 48(2) of the *Acts Interpretation Act 1901*.

Item [1359] - Paragraph 576.611(1)(a)

This item inserts a reference to condition 8535 (no further stay) in paragraph 576.611(1)(a) to impose this condition, on a mandatory basis, on Subclass 576 (AusAID or Defence Sector) visas if the applicant satisfies the primary criteria.

Item [1360] - Paragraph 576.611(1)(d)

This item omits the reference to condition 8535 (no further stay) as a result of the amendment made to paragraph 576.611(1)(a), mentioned above. In addition, this item removes condition 8534 (no further stay) as a condition that may be imposed on Subclass 576 (AusAID or Defence Sector) visas if the applicant satisfies the primary criteria.

Item [1361] - Subparagraph 773.213(1)(g)(iii)

This item substitutes a new subparagraph 773.213(1)(g)(iii) in place of the existing subparagraph 773.213(1)(g)(iii). The purpose of this amendment is to clarify the operation of sub-subparagraphs 773.213(1)(g)(iii)(C) and (D).

The general purpose of a Subclass 773 (Border) visa is to accommodate non-citizens who arrive in Australia without a visa because it has ceased, expired or been cancelled prior to presentation at immigration clearance. Subclass 773 (Border) visas are granted to non-citizens for whom entry to Australia is more appropriate than refusal of immigration clearance.

Paragraph 1223A(3)(a) of Schedule 1 to the Regulations provides that to make a valid application for a Temporary Business Entry (Class UC) visa, which contains the Subclass 456 (Business (Short Stay)) visa, the applicant must be *outside Australia* and make the application *outside Australia*. In addition, clause 456.411 in Schedule 2 to the Regulations requires that to be eligible for the grant of a Subclass 456 (Business (Short Stay)) visa, the applicant must be *outside Australia* at the time of grant.

The amendments made by this item clarify that an applicant for a Border (Temporary) (Class TA) visa, which contains the Subclass 773 (Border) visa, does not have to meet the requirements in paragraph 1223A(3)(a) and clause 456.411 of the Regulations, to be *eligible for the grant of* a Subclass 456 (Business (Short Stay)) visa.

Therefore, an applicant may meet one of the criteria for the grant of a Subclass 773 (Border) visa on the basis that he or she appears to be eligible for the grant of a Subclass 456 (Business (Short Stay)) visa, notwithstanding that the applicant is in Australia.

A similar problem arises in relation to Transit (Temporary) (Class TX) visas.

Subitem 1224(3) of Schedule 1 to the Regulations provides that for a Transit (Temporary) (Class TX) visa, which contains the Subclass 771 (Transit) visa, the application must be made *outside Australia* and the applicant must be *outside Australia*. In addition, clause 771.411 of Schedule 2 requires that to be eligible for the grant of a Subclass 771 (Transit) visa, the applicant must be *outside Australia* when the visa is granted.

The amendments made by this item clarify that an applicant for a Border (Temporary) (Class TA) visa does not have to meet the requirements in subitem 1224(3) and clause 771.411 of the Regulations, to be *eligible for the grant of* a Transit (Temporary) (Class TX) visa.

Therefore, an applicant may meet one of the criteria for the grant of a Subclass 773 (Border) visa on the basis that he or she appears to be eligible for the grant of a Subclass 771 (Transit) visa, notwithstanding that the applicant is in Australia.

Item [1362] - Clauses 773.214 and 773.215

These items amend clauses 773.214 and 773.215 to correct typographical errors.

Item [1363] - Subclause 773.216(1)

This item amends subclause 773.216(1) to correct a typographical error.

Item [1364] - Clause 773.217

This item amends clause 773.217 to correct a typographical error.

Item [1365] - Clause 785.511

This item omits existing clause 785.511 of Part 785 of Schedule 2 to the Migration Regulations and substitutes new clause 785.511, which sets out when a Subclass 785 (Temporary Protection) visa is in effect.

New paragraph 785.511(a) applies in relation to an applicant who holds a Subclass 785 (Temporary Protection) (Class XA) visa. New subparagraph 785.511(a)(ii) provides that the Subclass 785 (Temporary Protection) (Class XA) visa has a normal validity period of 36-months, in which its holder is permitted to remain in, but not re-enter Australia.

New subparagraph 785.511(a)(i) provides an exception to this general rule where a Subclass 785 (Temporary Protection) (Class XA) visa holder applies for a Protection (Class XA) visa within the 36 month period from the date of the grant of the Subclass 786 (Temporary Protection) (Class XA) visa. In these circumstances, a Subclass 785 (Temporary Protection) (Class XA) visa will remain in effect until the day on which the Protection (Class XA) visa application is finally determined or withdrawn.

This amendment makes it clear that where an applicant withdraws his or her application for a Protection (Class XA) visa, the Subclass 785 (Temporary Protection) visa ceases to be in effect on the day the application is withdrawn. That is, the Subclass 785 (Temporary Protection) visa will not remain in effect until the end of the normal 36-month validity period.

The amendment also clarifies that a protection application includes both an application for the Subclass 866 (Protection) visa and the Subclass 785 (Temporary Protection) visa. Previously, paragraph 785.511(a) only referred to an application for a permanent visa and did not accurately reflect that a person may only be eligible for the Subclass 785 (Temporary Protection) visa.

This amendment is necessary because clause 866.215 of Part 866 of Schedule 2 to the Migration Regulations prevents Subclass 785 (Temporary Protection) visa holders who:

- have resided in a country for a continuous period of at least 7 days prior to their arrival in Australia; and

- could have sought effective protection from that country

from satisfying the criteria for the grant of a Subclass 866 (Protection) visa.

New paragraph 785.511(b) applies in relation to an applicant who holds a Subclass 785 (Temporary Protection) (Class XC) visa. It provides that a Subclass 785 (Temporary Protection)

(Class XC) visa permits its holder to remain in, but not re-enter Australia, until the day when his or her Protection (Class XA) visa application is finally determined or withdrawn.

Item [1366] - After clause 855.212

This item inserts new clause 855.212A into Subdivision 855.21 of Schedule 2 to the Migration Regulations.

The amendments made by this item ensure that applicants seeking to satisfy the primary criteria for the grant of a Subclass 855 (Labour Agreement) visa must satisfy the requirements set out in special return criterion 5010. This requirement applies despite the fact that applicants are in Australia, and whether or not applicants have previously been in Australia.

Special return criterion 5010 imposes a restriction on applicants who hold, or whose last substantive visa was, an AusAID student visa within the meaning of regulation 1.04A or a Subclass 560, 562, 563, 570, 571, 572, 573, 574 or 575 visa granted to applicants who were provided financial support by the government of a foreign country. The restriction is to require such applicants to have spent at least 2 years outside Australia since ceasing, completing, withdrawing or being excluded from, the course of study or training to which the visa related (if the course or training was for more than 12 months) unless this requirement is waived.

The purpose of these amendments is to strengthen the policy that AusAID students, and certain other students being provided financial assistance by a foreign country, return to their home country for at least two years to use the skills and knowledge they gained while in Australia under the AusAID or financial assistance program.

Item [1367] - After subclause 855.225(1)

The amendments made by this item make it a criterion to be satisfied by applicants seeking to satisfy the primary criteria for the grant of a Subclass 855 (Labour Agreement) visa (the primary applicant), that each member of the family unit of the primary applicant, who is also an applicant for a Subclass 855 (Labour Agreement) visa, satisfies the requirements set out in special return criterion 5010. This requirement applies despite the fact that the member of the family unit is in Australia, and whether or not he or she has previously been in Australia.

The purpose of these amendments is to strengthen the policy that AusAID students, and certain other students being provided financial assistance by a foreign country, return to their home country for at least two years to use the skills and knowledge they gained while in Australia under the AusAID or financial assistance program.

Item [1368] - After clause 855.312

This item inserts new clause 855.313 in Subdivision 855.31 of Schedule 2 to the Migration Regulations.

The amendments made by this item ensure that applicants seeking to satisfy the secondary criteria for the grant of a Subclass 855 (Labour Agreement) visa must satisfy the requirements set out in special return criterion 5010. This requirement applies despite the fact that applicants are in Australia, and whether or not applicants have previously been in Australia.

The purpose of these amendments is to strengthen the policy that AusAID students, and certain other students being provided financial assistance by a foreign country, return to their home country for at least two years to use the skills and knowledge they gained while in Australia under the AusAID or financial assistance program.

Item [1369] - After clause 856.212

This item inserts new clause 856.212A in Subdivision 856.21 of Schedule 2 to the Migration Regulations.

The amendments made by this item ensure that applicants seeking to satisfy the primary criteria for the grant of a Subclass 856 (Employer Nomination Scheme) visa must satisfy the requirements set out in special return criterion 5010. This requirement applies despite the fact that applicants are in Australia, and whether or not applicants have previously been in Australia.

Special return criterion 5010 imposes a restriction on applicants who hold, or whose last substantive visa was, an AusAID student visa within the meaning of regulation 1.04A or a Subclass 560, 562, 563, 570, 571, 572, 573, 574 or 575 visa granted to applicants who were provided financial support by the government of a foreign country. The restriction is to require such applicants to have spent at least 2 years outside Australia since ceasing, completing, withdrawing or being excluded from, the course of study or training to which the visa related (if the course or training was for more than 12 months) unless this requirement is waived.

The purpose of these amendments is to strengthen the policy that AusAID students, and certain other students being provided financial assistance by a foreign country, return to their home country for at least two years to use the skills and knowledge they gained while in Australia under the AusAID or financial assistance program.

Item [1370] - After subclause 856.225(1)

The amendments made by this item make it a criterion to be satisfied by applicants seeking to satisfy the primary criteria for the grant of a Subclass 856 (Employer Nomination Scheme) visa (the primary applicant), that each member of the family unit of the primary applicant, who is also an applicant for a Subclass 856 (Employer Nomination Scheme) visa, satisfies the requirements set out in special return criterion 5010. This requirement applies despite the fact that the member of the family unit is in Australia, and whether or not he or she has previously been in Australia.

The purpose of these amendments is to strengthen the policy that AusAID students, and certain other students being provided financial assistance by a foreign country, return to their home country for at least two years to use the skills and knowledge they gained while in Australia under the AusAID or financial assistance program.

Item [1371] - After clause 856.312

This item inserts new clause 856.313 in Subdivision 856.31 of Schedule 2 to the Migration Regulations.

The amendments made by this item ensure that applicants seeking to satisfy the secondary criteria for the grant of a Subclass 856 (Employer Nomination Scheme) visa must satisfy the requirements set out in special return criterion 5010. This requirement applies despite the fact that applicants are in Australia, and whether or not applicants have previously been in Australia.

The purpose of these amendments is to strengthen the policy that AusAID students, and certain other students being provided financial assistance by a foreign country, return to their home country for at least two years to use the skills and knowledge they gained while in Australia under the AusAID or financial assistance program.

Item [1372] - After clause 857.212

This item inserts new clause 857.212A in Subdivision 857.21 of Schedule 2 to the Migration Regulations.

The amendments made by this item ensure that applicants seeking to satisfy the primary criteria for the grant of a Subclass 857 (Regional Sponsored Migration Scheme) visa must satisfy the requirements set out in special return criterion 5010. This requirement applies despite the fact that applicants are in Australia, and whether or not applicants have previously been in Australia.

Special return criterion 5010 imposes a restriction on applicants who hold, or whose last substantive visa was, an AusAID student visa within the meaning of regulation 1.04A or a Subclass 560, 562, 563, 570, 571, 572, 573, 574 or 575 visa granted to applicants who were provided financial support by the government of a foreign country. The restriction is to require such applicants to have spent at least 2 years outside Australia since ceasing, completing, withdrawing or being excluded from, the course of study or training to which the visa related (if the course or training was for more than 12 months) unless this requirement is waived.

The purpose of these amendments is to strengthen the policy that AusAID students, and certain other students being provided financial assistance by a foreign country, return to their home country for at least two years to use the skills and knowledge they gained while in Australia under the AusAID or financial assistance program.

Item [1373] - After subclause 857.225(1)

The amendments made by this item make it a criterion to be satisfied by applicants seeking to satisfy the primary criteria for the grant of a Subclass 857 (Regional Sponsored Migration Scheme) visa (the primary applicant), that each member of the family unit of the primary applicant, who is also an applicant for a Subclass 857 (Regional Sponsored Migration Scheme) visa, satisfies the requirements set out in special return criterion 5010. This requirement applies despite the fact that the member of the family unit is in Australia, and whether or not he or she has previously been in Australia.

The purpose of these amendments is to strengthen the policy that AusAID students, and certain other students being provided financial assistance by a foreign country, return to their home country for at least two years to use the skills and knowledge they gained while in Australia under the AusAID or financial assistance program.

Item [1374] - After clause 857.312

This item inserts new clause 857.313 in Subdivision 857.31 of Schedule 2 to the Migration Regulations.

The amendments made by this item ensure that applicants seeking to satisfy the secondary criteria for the grant of a Subclass 857 (Regional Sponsored Migration Scheme) visa must satisfy the requirements set out in special return criterion 5010. This requirement applies despite the fact that applicants are in Australia, and whether or not applicants have previously been in Australia.

The purpose of these amendments is to strengthen the policy that AusAID students, and certain other students being provided financial assistance by a foreign country, return to their home country for at least two years to use the skills and knowledge they gained while in Australia under the AusAID or financial assistance program.

Item [1375] - Clause 866.228

This item makes a minor amendment to clause 866.228 of Part 866 of Schedule 2 to the Migration Regulations consequential to the creation of the new Protection (Class XC) visa class by these Regulations.

The amendment provides the time of decision criterion to be satisfied by an applicant for a Subclass 866 (Protection) visa who holds a Subclass 785 (Temporary Protection) visa and has previously held a Subclass 785 (Temporary Protection) visa. It provides that the applicant must have held that visa, or that visa and another Subclass 785 (Temporary Protection) visa, for the lesser of:

- a continuous period of 30 months; and

- a shorter period specified in writing by the Minister in relation to the applicant.

This amendment is necessary to account for the fact that a person may hold a Subclass 785 (Temporary Protection) (Class XA) visa and a Subclass 785 (Temporary Protection) (Class XC) visa before a decision is made on whether or not to grant the Subclass 866 (Protection) visa.

Part 4 - Amendments of Schedule 5A

Item [1401] - Subparagraph 5A204(c)(ii)

This item amends subparagraph 5A204(c)(ii) of Schedule 5A to correct a typographical error.

Item [1402] - Subclause 5A205(2), definition of *acceptable individual*, paragraph (d)

The amendments made by this item extend the definition of *acceptable individual* in subclause 5A205(2) of Schedule 5A to include the applicant's brothers and sisters. This means that brothers and sisters are considered *acceptable individuals* within the definition of *funds from an acceptable source* when assessing the financial capacity of an assessment level 4 Subclass 570 (Independent ELICOS Sector) visa applicant.

Item [1403] - Subclause 5A208(2), definition of *acceptable individual*, paragraph (d)

The amendments made by this item extend the definition of *acceptable individual* in subclause 5A208(2) of Schedule 5A to include the applicant's brothers and sisters. This means that brothers and sisters are considered *acceptable individuals* within the definition of *funds from an acceptable source* when assessing the financial capacity of an assessment level 3 Subclass 570 (Independent ELICOS Sector) visa applicant.

Item [1404] - Subclause 5A305(2), definition of *acceptable individual*, paragraph (d)

The amendments made by this item extend the definition of *acceptable individual* in subclause 5A305(2) of Schedule 5A to include the applicant's brothers and sisters. This means that brothers and sisters are considered *acceptable individuals* within the definition of *funds from an acceptable source* when assessing the financial capacity of an assessment level 4 Subclass 571 (Schools Sector) visa applicant.

Item [1405] - Subclause 5A405(2), definition of *acceptable individual*, paragraph (d)

The amendments made by this item extend the definition of *acceptable individual* in subclause 5A405(2) of Schedule 5A to include the applicant's brothers and sisters. This means that brothers and sisters are considered *acceptable individuals* within the definition of *funds from an acceptable source* when assessing the financial capacity of an assessment level 4 Subclass 572 (Vocational Education and Training Sector) visa applicant.

Item [1406] - Subparagraph 5A407(d)(ii)

This item amends subparagraph 5A407(d)(ii) of Schedule 5A to correct a typographical error.

Item [1407] - Subclause 5A408(2), definition of *acceptable individual*, paragraph (d)

The amendments made by this item extend the definition of *acceptable individual* in subclause 5A408(2) of Schedule 5A to include the applicant's brothers and sisters. This means that brothers and sisters are considered *acceptable individuals* within the definition of *funds from an acceptable source* when assessing the financial capacity of an assessment level 3 Subclass 572 (Vocational Education and Training Sector) visa applicant.

Item [1408] - Subparagraph 5A504(d)(ii)

This item amends subparagraph 5A504(d)(ii) of Schedule 5A to correct a typographical error.

Item [1409] - Subclause 5A505(2), definition of *acceptable individual*, paragraph (d)

The amendments made by this item extend the definition of *acceptable individual* in subclause 5A505(2) of Schedule 5A to include the applicant's brothers and sisters. This means that brothers and sisters are considered *acceptable individuals* within the definition of *funds from an acceptable source* when assessing the financial capacity of an assessment level 4 Subclass 573 (Higher Education Sector) visa applicant.

Item [1410] - Subparagraph 5A507(d)(ii)

This item amends subparagraph 5A507(d)(ii) of Schedule 5A to correct a typographical error.

Item [1411] - Subparagraph 5A604(2)(c)(i)

This item substitutes existing subparagraph 5A604(2)(c)(i) for new subparagraph 5A604(2)(c)(i). These amendments ensure that, in addition to the exemption provided to certain fully funded student visa applicants, certain assessment level 4 Subclass 574 (Masters and Doctorate Sector) visa applicants, who hold an International Postgraduate Research Scholarship funded by the Commonwealth Government, are also exempt from the International English Language Testing System (IELTS) test.

Item [1412] - Subparagraph 5A604(2)(d)(ii)

This item amends subparagraph 5A604(2)(d)(ii) of Schedule 5A to correct a typographical error.

Item [1413] - Subclause 5A605(2), definition of *acceptable individual*, paragraph (d)

The amendments made by this item extend the definition of *acceptable individual* in subclause 5A605(2) of Schedule 5A to include the applicant's brothers and sisters. This means that brothers and sisters are considered *acceptable individuals* within the definition of *funds from an acceptable source* when assessing the financial capacity of an assessment level 4 Subclass 574 (Masters and Doctorate Sector) visa applicant.

Item [1414] - Subparagraph 5A607(2)(c)(i)

This item substitutes existing subparagraph 5A607(2)(c)(i) for new subparagraph 5A607(2)(c)(i). These amendments ensure that, in addition to the exemption provided to certain fully funded student visa applicants, certain assessment level 3 Subclass 574 (Masters and Doctorate Sector) visa applicants, who hold an International Postgraduate Research Scholarship funded by the Commonwealth Government, are also exempt from the International English Language Testing System (IELTS) test.

Item [1415] - Subparagraphs 5A607(2)(d)(ii) and 5A704(d)(ii)

This item amends subparagraphs 5A607(2)(d)(ii) and 5A704(d)(ii)

of Schedule 5A to correct a typographical error.

Item [1416] - Subclause 5A705(2), definition of *acceptable individual*, paragraph (d)

The amendments made by this item extend the definition of *acceptable individual* in subclause 5A705(2) of Schedule 5A to include the applicant's brothers and sisters. This means that brothers and sisters are considered *acceptable individuals* within the definition of *funds from an acceptable source* when assessing the financial capacity of an assessment level 4 Subclass 575 (Non-award Foundation/Other Sector) visa applicant.

Item [1417] - Subparagraph 5A707(d)(ii)

This item amends subparagraph 5A707(d)(ii) of Schedule 5A to correct a typographical error.

Item [1418] - Subclause 5A708(2), definition of *acceptable individual*, paragraph (d)

The amendments made by this item extend the definition of *acceptable individual* in subclause 5A708(2) of Schedule 5A to include the applicant's brothers and sisters. This means that brothers and sisters are considered *acceptable individuals* within the definition of *funds from an acceptable source* when assessing the financial capacity of an assessment level 3 Subclass 575 (Non-award Foundation/Other Sector) visa applicant.

Part 5 - Amendment of Schedule 9

Item [1501] - Part 1, item 14, column 3

This item substitutes Schedule 9, Part 1, item 14, column 3 which sets out the evidence of identity aircrew members are required to give for immigration clearance pursuant to subsection 166(2) of the Act. Aircrew members who are taken to have been granted a special purpose visa under paragraph 33(2)(a) of the Act are required to show a clearance officer a passport that is in force, and a valid airline identity card, as evidence of the person's identity.

This amendment is related to amendments to regulation 2.40 made by these regulations requiring operational aircrew members to hold a passport that is in force in order to be accorded the prescribed status of special purpose visa.

The amendment is intended to heighten Australia's border security.

Schedule 2 - Amendment of *Migration Amendment Regulations 1999 (No. 13)*

Item [2101] - After subregulation 5(8)

This item amends the *Migration Amendment Regulations 1999 (No. 13)* so that the most recent definition of a *remaining relative*, introduced by item [2109] of Schedule 2 to those Regulations, applies in relation to the criteria to be satisfied at the time of decision for an application for a visa of one of the following classes made before 1 November 1999 but not finally determined before 1 November 2002:

- Family (Residence) (Class AO);
- Change in Circumstances (Residence) (Class AG).

This amendment is necessary to resolve a conflict between subregulations 5(2) and 5(5) of the *Migration Amendment Regulations 1999 (No. 13)*.

Subregulation 5(2) states that the new definition of a *remaining relative* applies to an application for a visa:

- made, but not finally determined before 1 November 1999; or

- made on or after 1 November 1999.

However, subregulation 5(5) provides that the *Migration Regulations 1994*, as in force immediately before 1 November 1999,

continue to apply to certain applications, including Family (Residence) (Class AO) and Change in Circumstances (Residence) (Class AG) visa applications, made, but not finally determined, before 1 November 1999. That is, the old definition of a *remaining relative* was to apply.

As this amendment applies only in relation to the time of decision criteria to be satisfied in relation to an application for a Family (Residence) (Class AO) visa or a Change in Circumstances (Residence) (Class AG) visa, made before 1 November 1999 but not finally determined before 1 November 2002, it is not retrospective. That is, the amendment does not change the law that applied at the time an application was made.