

EXPLANATORY STATEMENT

Select Legislative Instrument 2005 No. 76

Issued by the Minister for Immigration
and Multicultural and Indigenous Affairs

Migration Act 1958

Migration Amendment Regulations 2005 (No. 2)

Subsection 504(1) of the Migration Act 1958 (the Act) provides in part 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.

Further relevant legislative provisions are listed in Attachment A.

The purpose of the Regulations is to amend the *Migration Regulations 1994* (the Principal Regulations) to create a new bridging visa to enable the release, pending removal, of persons in immigration detention who have been cooperating fully with efforts to remove them from Australia, but whose removal from Australia is not reasonably practicable at the current time.

In particular, the Regulations enable the grant of a bridging visa to non-citizens in the following circumstances:

- the non-citizen is in immigration detention; and
- the Minister is satisfied that the non-citizen's removal from Australia is not reasonably practicable at that time; and
- the Minister is satisfied that the non-citizen has done everything possible to facilitate the non-citizen's removal from Australia; and
- the Minister is satisfied that the non-citizen has not attempted to obstruct efforts to arrange and effect the non-citizen's removal from Australia;
- the non-citizen has undertaken in writing to cooperate fully with all efforts to arrange and effect his or her removal, including making himself or herself available for removal once removal has been arranged and leaving Australia when advised to do so; and
- the non-citizen has undertaken in writing to abide by any conditions attached to his or her visa; and
- Any visa applications made by the non-citizen have been finally determined; and
- There are no current proceedings in a court or tribunal to which the non-citizen is a party, which raise an issue in connection with visas (including if a visa is not granted or has been cancelled), deportation, or removal of non-citizens.

Details of the Regulations are set out in Attachment B.

The Regulations commence on registration.

Limited consultations have occurred given the urgency of the regulations, and given that the regulations were assessed as not likely to have a direct, or a substantial indirect, effect on business, or restrict competition.

The Regulations are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

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ATTACHMENT A

In addition to the general regulation making power under subsection 504(1) of the *Migration Act 1958* (the Act), the following provisions relate to visas:

- Section 31 of the Act, which deals with classes of visa. In particular:
 - subsection 31(1) of the Act, which provides that the regulations are to prescribe classes of visas;
 - subsection 31(3) of the Act, which provides that the regulations may prescribe criteria for a visa or visas of a specified class;
 - subsection 31(4) of the Act, which provides that the regulations may prescribe whether visas of a particular class are visas to travel to and enter Australia, or to remain in Australia, or both; and
 - subsection 31(5) of the Act, which provides that the regulations may specify that a visa is a visa of a particular class.
- Subsection 40(1) of the Act, which provides that the regulations may provide that visas or visas of a specified class may only be granted in specified circumstances.
- Subsection 41(1) of the Act, which provides that the regulations may provide that visas, or visas of a specified class, are subject to specified conditions.
- Subsection 41(3) of the Act, which provides that, in addition to any conditions specified under subsection 41(1), the regulations may specify that a visa is subjects to such conditions as are permitted by the regulations for the purposes of this subsection.
- Subsection 45B(1) of the Act, which provides that the regulations prescribe the amount that is the amount of visa application charge, not exceeding the visa application charge limit.
- Subsection 45B(2) of the Act, which provides that the regulations may prescribe that the amount in relation to an application be nil.
- Section 46 of the Act, which provides when an application for a visa is a valid application. In particular:
 - subsection 46(2), which provides that an application for a visa is valid if it is an application for a visa of a class prescribed for the purposes of this subsection, and under the regulations, the application is taken to have been validly made,
 - subsection 46(3), which 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; and
 - subsection 46(4), which 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, how and where an application for a visa of a specified class must be made, and where an applicant must be when an application for a visa of a specified class is made;
- Subsection 48(1) of the Act, which provides that in relation to persons to whom paragraphs 48(1)(a) and (b) apply (persons who do not hold a substantive visa and either have had certain visas refused, or have had visas cancelled under certain provisions), the regulations may prescribe classes of visas that a person may apply for.
- Subsection 68(4) of the Act, which provides that the regulations may determine the most beneficial bridging visa.
- Section 70 of the Act, which provides that if a non-citizen is granted a visa, an officer is to give the non-citizen evidence of the visa, subject to the regulations.
- Subsection 71(1) of the Act, which provides for the regulations to prescribe the way in which evidence of a visa is to be given.

- Section 72 of the Act, which provides for prescribed classes of persons to be eligible non-citizens for the purposes of Subdivision AF – Bridging visas.
- Section 73 of the Act, which provides that the Minister may grant a bridging visa to an eligible non-citizen, permitting the non-citizen to remain in Australia during a specified period or until a specified event happens.
- Subsection 501E(2) of the Act, which provides that the regulations may specify a visa for the purposes of the subsection, in relation to which a person may make an application.

ATTACHMENT B**Details of the Migration Amendment Regulations 2005 (No. 2)**Regulation 1 – Name of Regulations

This regulation provides that these Regulations are the *Migration Amendment Regulations 2005 (No. 2)*.

Regulation 2 - Commencement

This regulation provides that these Regulations commence on registration.

Regulation 3 – Amendment of *Migration Regulations 1994*

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

Schedule 1 – AmendmentsItem [1] – Regulation 2.07A, at the foot

This item inserts a note at the foot of regulation 2.07A to explain that other provisions relating to the making of applications for bridging visas are set out in regulations 2.10A, 2.10B and 2.20A.

Item [2] – After paragraph 2.12(1)(ma)

This item inserts new paragraph 2.12(1)(mb) into Part 2 (Visas) of the Principal Regulations.

The effect of new paragraph 2.12(1)(mb) is that the new Bridging R (Class WR) visa class is a visa class that may be applied for under section 48 of the *Migration Act 1958* (the Act). Section 48 of the Act limits a further visa application by a person who does not hold a substantive visa, and whose visa has been cancelled or whose visa application has been refused, to the classes of visas prescribed in subregulation 2.12(1) only.

Item [3] – After regulation 2.12

This item inserts new regulation 2.12AA into Part 2 of the Principal Regulations.

The effect of new regulation 2.12AA is that the new Bridging R (Class WR) visa is a visa that may be applied for under paragraph 501E(2)(b) of the Act. Section 501E limits a further visa application by a person in the migration zone if he or she has had a visa refused or cancelled under section 501, 501A or 501B of the Act, and that decision has not been set aside or revoked before the application for the further visa is made. Paragraph 501E(2)(b) provides that the regulations may specify a visa that a person may apply for despite section 501E of the Act.

Item [4] – Subregulation 2.20(1)

This item omits references to subregulations 2.20(2) to (11) in subregulation 2.20(1) of Part 2 of the Principal Regulations, and replaces it with references to subregulations (2) to (12). This item is consequential to the insertion of new subregulation 2.20(12) into the Principal Regulations, by these Regulations (see item 5 below).

Item [5] – After subregulation 2.20(11)

This item inserts new subregulation 2.20(12) into Part 2 of the Principal Regulations. The effect of new subregulation 2.20(12) is that persons coming within the following class are prescribed as eligible non-citizens under the Act:

- the non-citizen is in immigration detention; and
- the Minister is satisfied that the non-citizen’s removal from Australia is not reasonably practicable at that time; and
- the Minister is satisfied that the non-citizen has done everything possible to facilitate their removal from Australia, and has not attempted to obstruct efforts to arrange and effect his or her removal from Australia; and
- the non-citizen has undertaken in writing:
 - (i) to cooperate fully with all efforts to arrange and effect the non-citizen’s removal, including making himself or herself available for removal once removal has been arranged and leaving Australia when advised to do so; and
 - (ii) to abide by any conditions to which a visa granted to the non-citizen may be subject; and
- any visa applications made by the non-citizen have been finally determined; and
- there are no current proceedings in a court or tribunal to which the non-citizen is a party, and that raise an issue in connection with visas (including if a visa is not granted or has been cancelled), deportation, or removal of non-citizens.

Item [6] – After regulation 2.20

This item inserts new regulation 2.20A into Part 2 of the Principal Regulations.

The effect of new regulation 2.20A is that an application for a Bridging R (Class WR) is taken to be validly made by a person if, and only if:

- the person has been given an invitation in writing by the Minister, by one of the methods specified in section 494B of the Act, to apply for the visa; and
- the person indicates in writing to Immigration, not later than 7 days after the person is taken to have received that invitation, that he or she accepts that invitation.

Section 494B of the Act specifies various means of giving a document to a person, including the Minister or an authorised officer handing the document to the recipient.

The new note at the foot of regulation 2.20A explains that section 494C of the Act specifies when a person is taken to have received a document given by one of the methods specified in section 494B.

Item [7] – After paragraph 2.21(2)(d)

This item inserts new paragraph 2.21(2)(da) into Part 2 of the Principal Regulations.

New paragraph 2.21(2)(da) lists the Bridging R (Class WR) visa as more beneficial than the Bridging E (Class WE) and the Bridging F (Class WF) visas, but less beneficial than the Bridging B (Class WB), Bridging A (Class WA), Bridging C (Class WC) and the Bridging D (Class WD) visas for the purposes of subsection 68(4) of the Act.

Subsection 68(4) of the Act provides that where a non-citizen does not hold a substantive visa and holds more than one bridging visa, the most beneficial bridging visa held by the non-citizen comes into effect.

Item [8] – Schedule 1, after item 1306

This item inserts new item 1307 into Schedule 1 (Classes of Visas) to the Principal Regulations, to create the new bridging visa class – Bridging R (Class WR).

New sub-item 1307(1) provides that the application must be taken to have been made in accordance with subregulation 2.20A (2) (see item 6 above).

New sub-item 1307(2) provides that the visa application charge is nil.

New sub-item 1307(3) provides that there is only one visa subclass in the Bridging R (Class WR) visa class; the 070 (Bridging (Removal Pending)) visa subclass.

Item [9] Schedule 2, after Part 060

This item inserts new Part 070 into Schedule 2 (Provisions with respect to the grant of Subclasses of visas) to the Principal Regulations.

Division 070.1 Interpretation

This division provides interpretation provisions specific to new Part 070 of Schedule 2 to the Principal Regulations.

New clause 070.111 provides that ‘eligible non-citizen’ has the meaning given in regulation 2.20.

The new note at the foot of clause 070.111 explains that regulation 2.20A sets out how an application for a Bridging R (Class WR) visa is taken to have been validly made.

Division 070.2 Primary criteria

This division specifies the primary criteria that must be met for the grant of a Subclass 070 visa.

The new note in division 070.2 explains that all applicants must satisfy the primary criteria in order to be granted the visa.

Subdivision 070.21 Criteria to be met at time of application

This subdivision specifies the criteria that must be met at time of application.

New clause 070.211 requires that at the time of application, the applicant be an eligible non-citizen mentioned in subregulation 2.20(12) who is taken to have made an application in accordance with subregulation 2.20A (2). Subregulation 2.20A(2) specifies the requirements that must be met before a Bridging R (Class WR) visa application is taken to have been validly made (see item 6).

Subdivision 070.22 Criteria to be met at time of decision

This subdivision specifies the criteria that must be met at the time of decision.

New clause 070.221 requires that at the time of decision, the applicant continue to satisfy the criterion set out in clause 070.211.

New clause 070.222 requires that the Minister be satisfied that, if the bridging visa is granted, the applicant will abide by the conditions to which the visa is subject.

New clause 070.223 requires that the applicant satisfies public interest criterion 4001 and 4002. Public interest criterion 4001 relates to the character test. Public interest criterion 4002 requires that the applicant is not assessed by the competent Australian authorities to be directly or indirectly a risk to Australian national security.

Division 070.3 Secondary criteria

This division specifies that there is no secondary criteria for this visa subclass; all applicants must satisfy the primary criteria for grant of this visa.

Division 070.4 Circumstances applicable to grant

This division specifies circumstances applicable to the grant of the Subclass 070 bridging visa.

New clause 070.411 requires that the applicant be in immigration detention when the visa is granted.

Division 070.5 When visa in effect

This division provides for when the new Subclass 070 visa is in effect.

New paragraph 070.511(a) provides that the visa comes into effect on grant.

New paragraph 070.511(b) provides that the visa permits the holder to remain in Australia.

New paragraph 070.511(c) provides that the visa ceases when the Minister gives a notice in writing to the holder, by one of the methods specified in section 494B of the Act, stating that:

- the Minister is satisfied that the holder's removal from Australia is reasonably practicable; or
- the holder has breached a condition to which the visa is subject.

Division 070.6 Conditions

This division provides the conditions to be attached to the new Subclass 070 visa.

Clause 070.611 provides that conditions 8303, 8401, 8506, 8513, 8514, and new conditions 8541, 8542 and 8543 are mandatory conditions for the Subclass 070 visa.

Condition 8303 provides that the holder must not become involved in activities disruptive to, or violence threatening harm to, the Australian community or a group within the Australian community.

Condition 8401 provides that the holder must report:

- (a) at a time or times; and
- (b) at a place;

specified by the Minister for the purpose.

Condition 8506 provides that the holder must notify Immigration at least 2 working days in advance of any change in the holder's address.

Condition 8513 provides that the holder must notify Immigration of his or her residential address within 5 working days of grant.

Condition 8514 provides that during the visa period of the visa, there must be no material change in the circumstances on the basis of which it was granted.

Division 070.7 Way of giving evidence

This division specifies the way of giving evidence of the Subclass 070 visa.

New clause 070.711 provides that no evidence of the visa need be given.

New clause 070.712 provides that if evidence is to be given, the evidence is to be given by way of a visa label attached to a valid passport or an approved form.

Item [10] – Schedule 8, after item 8540

This item inserts new visa conditions 8541, 8542 and 8543 into Schedule 8 (Visa conditions) to the Principal Regulations.

New condition 8541 provides that the holder:

- must do everything possible to facilitate his or her removal from Australia; and
- must not attempt to obstruct efforts to arrange and effect his or her removal from Australia.

New condition 8542 provides that the holder must make himself or herself available for removal from Australia in accordance with instructions given to the holder by Immigration for the purpose of that removal.

New condition 8543 provides that the holder must attend at a place, date and time specified by Immigration in order to facilitate efforts to arrange and effect his or her removal from Australia.