EXPLANATORY STATEMENT

Select Legislative Instrument 2007 No. 166

Issued by the Minister for Immigration and Citizenship

Migration Act 1958

Migration Amendment Regulations 2007 (No. 4)

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.

In addition, regulations may be made pursuant to the provisions listed in Attachment A.

The purpose of the Regulations is to amend the *Migration Regulations 1994* (the Principal Regulations) in relation to: Student visas; charge and fee increases; Tourist and Temporary Business Entry visas; and, the obtaining of personal identifiers.

In particular, the Regulations amend the Principal Regulations to:

- in relation to Student visas, ensure that:
  - certain applicants for a student visa must provide evidence at the time of their application that they either intend to reside in Australia with a parent or other suitable guardian or alternatively that their education provider has made appropriate arrangements for their accommodation, support and general welfare;
  - the education providers confirmation of appropriate arrangements must be for at least the minimum period of enrolment plus seven days; and
  - a student will breach their visa conditions if they enter Australia before the day nominated by the education provider for those arrangements to commence.
- increase visa application charges and fees so that they are in line with increases to the Consumer Price Index;
- increase the second instalment of the visa application charge for a contributory parent visa in line with the Contributory Parent Visa Composite Index;
- prescribe a "Nil" visa application charge for certain Tourist and Temporary Business Entry visa applications;
- enable applicants for a Tourist visa to study in Australia in certain circumstances;
- require an applicant to provide a personal identifier as a requirement for the grant of a Protection, Refugee and Humanitarian or Temporary Safe Haven visa;
- allow personal identifiers obtained from a person in fisheries or environment detention to be used for the purpose of immigration detention if useable and of satisfactory integrity; and
- make various technical amendments.

The Regulations reflect regular changes that are made to the Principal Regulations. These changes give effect to the ongoing update of immigration policy and regulations.

Details of the Regulations are set out in Attachment B.

The Regulations commence on 1 July 2007.

The Office of Best Practice Regulation in the Productivity Commission has been consulted in relation to Schedules 1, 2 and 3 and advises that the Regulations are of a minor or machinery nature and do not substantially alter existing arrangements.

In relation to Schedule 1, the Department of Education, Science and Technology and the Migration Review Tribunal were consulted.

No other consultation was undertaken in relation to Schedules 2 and 3 to the Regulations as the amendments were considered not to have relevant implications for any external agencies or other bodies.

In relation to Schedule 4, the Office of Best Practice Regulation's Business Compliance Cost and Competition Assessment Checklists were used to determine that there was no compliance cost to business or impact on competition. The amendments made by Schedule 4 were developed in consultation with the Australian Fisheries Management Authority.

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

ATTACHMENT A

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. Subsection 5(1) of the Act provides, amongst other things, that "prescribed" means prescribed by the regulations.

In addition to subsection 504(1), the following provisions may apply:

- paragraph 5(2)(b) of the Act, which provides that a person has functional English at a particular time if the person provides the Minister with prescribed evidence of the person's English language proficiency;
- section 31 of the Act, which deals with classes of visa, in particular:
  - subsection 31(1) of the Act, which provides that there are to be prescribed 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 class are visas to travel to and enter Australia, or to remain in Australia, or both;
  - subsection 31(5) of the Act, which provides that a visa is a visa of a particular class if the Act or the regulations specify that it is a visa of that 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(2) of the Act, which 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, despite anything else in the Act, 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 a specified kind) while he or she remains in Australia; or
  - a condition imposing restrictions about the work that may be done in Australia by the holder;
- section 46 of the Act, which provides when an application for a visa is a valid application, and in particular:
  - subsection 46(1), which provides that an application for a visa is valid, if and only if, it is for a visa of a class specified in the application, it satisfies the criteria and requirements prescribed under section 46, any visa application charge that the regulations required to be paid at the time when the application is made has been paid, any fees payable in respect of it under the regulations have been paid, and the application is not prevented by section 48, 48A, 91E, 91K, 91P, 161, 164D, 195 or 501E of the Act;
  - subsection 46(2) of the Act, 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) of the Act, 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) of the Act, 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.

ATTACHMENT B

Details of the *Migration Amendment Regulations 2007 (No. 4)*

Regulation 1 – Name of Regulations

This regulation provides that these Regulations are the *Migration Amendment Regulations 2007 (No. 4).*

Regulation 2 - Commencement

This regulation provides that regulations commence on 1 July 2007.

Regulation 3 – Amendment of *Migration Regulations 1994*

This regulation provides that Schedule 1 amends the *Migration Regulations 1994* (the Principal Regulations), and that the amendments made by Schedule 1 apply in relation to an application for a visa made on or after 1 July 2007.

Regulation 4 – Amendment of *Migration Regulations 1994*

This regulation provides that Schedule 2 amends the Principal Regulations, and that the amendments made by Schedule 2 apply in relation to an application for a visa made on or after 1 July 2007.

Regulation 5 – Amendment of *Migration Regulations 1994*

This regulation provides that Schedule 3 amends the Principal Regulations, and that the amendments made by Schedule 3 apply in relation to an application for a visa made on or after 1 July 2007.

Regulation 6 – Amendment of *Migration Regulations 1994*

Subregulation 6(1) provides that Schedule 4 amends the Principal Regulations.

Subregulation 6(2) provides that the amendment made by item [1] of Schedule 4 applies in relation to an application made, but not finally determined (within the meaning of subsection 5(9) of the *Migration Act 1958* (the Act)) before 1 July 2007, or, made on or after 1 July 2007.

Subregulation 6(3) provides that the amendment made by item [2] of Schedule 4 applies in relation to a person who, on or after 1 July 2007, is in detention under any of the following Acts:

- the *Environment Protection and Biodiversity Conservation Act 1999* (the EPBCA);
- the *Fisheries Management Act 1991* (the FMA);
- the *Torres Strait Fisheries Act 1984* (TSFA).

Schedule 1 – Amendments relating to student visa welfare arrangements

Item [1] – Schedule 1, after paragraph 1222(3)(f)

This item inserts new paragraphs 1222(3)(g) and 1222(3)(h) in Schedule 1 to the Principal Regulations. Item 1222 of Schedule 1 provides the requirements that a person must meet for an application for a Student (Temporary)(Class TU) visa to be valid.

New paragraph 1222(3)(g) provides that, in the case of an application to which new paragraph 1222(3)(h) applies, the application must be accompanied by either:

- evidence of an intention to reside in Australia with a person who is:
  - a parent of the applicant or a person who has custody of the applicant; or
  - a relative of the applicant who is aged at least 21 years and who is nominated by a parent of the applicant or a person who has custody of the applicant; or

- evidence that the education provider for the course in which the applicant is enrolled has made appropriate arrangements for the applicant's accommodation, support and general welfare, for at least the minimum period of enrolment plus seven days after the end of that period as stated on the:
  - applicant's certificate of enrolment;
  - electronic confirmation of enrolment; or
  - Acceptance Advice of Secondary Exchange Student (AASES).

New paragraph 1222(3)(h) applies to an application if the application is made in Australia on form 157A or 157A (Internet) and the applicant is under 18 years of age and not an AusAID student or a Defence student.

The purpose of new paragraphs 1222(3)(g) and 1222(3)(h) is to ensure that applicants for Student (Temporary)(Class TU) visas who are under 18 years of age, in Australia and hold certain prescribed visas have adequate arrangements in place for their accommodation, support and general welfare while their application is being assessed, as well as for the duration of the student's course. AusAID students and Defence students are exempt from this requirement.

Item [2] – Schedule 4, paragraph 4012A(b)

This item omits from paragraph 4012A(b) of Schedule 4 to the Principal Regulations the concluding words "during the applicant's stay in Australia" and substitutes them with the new requirement: "for at least the minimum period of enrolment stated on the applicant's:

- certificate of enrolment; or
- electronic confirmation of enrolment; or
- Acceptance Advice of Secondary Exchange Student (AASES),

plus 7 days after the end of that period."

The purpose of this amendment is to specify the period which must be provided in the signed statement given to the Minister of Immigration and Citizenship (the Minister) by the education provider confirming that appropriate arrangements have been made for the applicant's accommodation, support and general welfare. The period will be the minimum

period of enrolment stated on the applicant's Confirmation of Enrolment Certificate or Electronic Confirmation of Enrolment or Acceptance Advice of Secondary Exchange Student, plus 7 days after the end of that period.

The intention of this amendment is to ensure that the duration of the student visa aligns with the period that welfare arrangements are in place.

Item [3] – Schedule 8, paragraph 8532(b)

This amendment adds to condition 8532 of Schedule 8 to the Principal Regulations the requirement that the visa holder must not enter Australia before the day nominated by the education provider as the day which arrangements commence for the visa holder's accommodation, support and general welfare.

Therefore if the student enters Australia prior to the commencement of the arrangements, their visa may be cancelled under paragraph 116(1)(b) of the *Migration Act 1958* (the Act). The purpose of this amendment is to ensure that appropriate arrangements for the student's accommodation, support and general welfare are in place from the time the student arrives in Australia.

Schedule 2 – Amendments relating to fees

Items [1] to [141]

These items amend Parts 1 and 5 of, and Schedule 1 to, the Principal Regulations to provide for the annual indexation of specified fees and charges. These amendments result in an increase to most fees and charges of 3.5% in line with the consumer price index. The exceptions are the second instalment of the visa application charge for Contributory Parent (Migrant) (Class CA), Contributory Aged Parent (Residence) (Class DG), Contributory Parent (Temporary) (Class UT) and Contributory Aged Parent (Temporary) (Class UU) visas. They are indexed in accordance with the Contributory Parent Visa Composite Index, which is currently at 7.6%.

All increases are rounded to a multiple of $5.00 according to the following methodology:

- if the amount of the charge calculated under this formula is not a multiple of $5.00, and if the amount exceeds the nearest lower multiple of $5.00 by $2.50 or more, the amount is rounded up to the nearest $5.00;
- in any other case, where the charge calculated under the formula is not a multiple of $5.00, the amount is rounded down to the nearest lower multiple of $5.00.

The amount of the increase in these items does not exceed the applicable charge limit set out in the *Migration (Visa Application) Charge Act 1997.*

Schedule 3 – Amendments relating to tourist visas

Item [1] – Schedule 1, subparagraph 1218(2)(a)(i)

This item substitutes subparagraph 1218(2)(a)(i) of Schedule 1 to the Principal Regulations with new subparagraph 1218(2)(a)(i). Item 1218 of Schedule 1 provides the requirements that a person must meet for an application for a Tourist (Class TR) visa to be valid. Subitem 1218(2) provides for the visa application charge (if any) which must be paid.

Subparagraph 1218(2)(a)(i) currently provides that the visa application charge is "Nil" in the case of an applicant who applies in the course of acting as a representative of a foreign government. New subparagraph 1218(2)(a)(i) will add that the visa application charge is "Nil" in the case of a visa applicant who is in a class of persons specified in an instrument in writing for this subparagraph.

The amendment made by new sub-subparagraph 1218(2)(a)(i)(B) will allow the Minister to specify classes of persons who may apply for a Tourist (Class TR) visa without having to pay a visa application charge.

The classes are expected to include European Union passport holders who apply for a Tourist (Class TR) visa electronically and seek to stay in Australia for a period of three months or less and may also include persons seeking to visit Australia to participate in special events. This amendment will ensure that it is easier and cheaper for EU citizens to visit Australia. This initiative is part of the Australian Government's commitment to ensuring visa reciprocity with the EU and equal treatment of all member states.

Other classes of persons may include persons seeking to visit Australia to participate in special events or persons who the Minister has decided should be given access to visas with no application charge to assist persons affected by an emergency situation, such as a natural disaster, in their home country.

Item [2] – Schedule 1, subparagraph 1218(3)(e)(i)

This item omits subparagraph 1218(3)(e)(i) of Schedule 1 to the Principal Regulations. Subparagraph 1218(3)(e)(i) refers to "Subclass 676 (Tourist (Short Stay))". This subclass was substituted by new Subclass 676 (Tourist) by Select Legislative Instrument 2005 No. 133 from 1 July 2005. The reference to Subclass 676 (Tourist (Short Stay)) had been retained in paragraph 1218(3)(e) as a transitional measure, however, this is no longer necessary.

Item [3] – Schedule 1, after subparagraph 1223A(2)(a)(viii)

This item inserts new subparagraph 1223A(2)(a)(ix) in Schedule 1 to the Principal Regulations. Item 1223A of Schedule 1 provides the requirements that a person must meet for an application for a Temporary Business Entry (Class UC) visa to be valid.

New subparagraph 1223A(2)(a)(ix) provides that the visa application charge is "Nil" in the case of an applicant who is in a class of persons specified in an instrument in writing for this paragraph.

The amendment made by this item will allow the Minister to specify classes of persons who may apply for a Temporary Business Entry (Class UC) visa without having to pay a visa application charge. The classes of persons will include EU passport holders. This amendment

will ensure that it is easier and cheaper for EU citizens to visit Australia. This initiative is part of the Australian Government's commitment to ensuring visa reciprocity with the EU and equal treatment of all member states

The classes of persons may also include persons seeking to visit Australia to participate in special events.

Item [4] – Schedule 2, subparagraph 676.221(2)(c)(ii)

This item omits public interest criterion 4012 from subparagraph 676.221(2)(c)(ii) of Part 676 of Schedule 2 to the Principal Regulations. Part 676 provides the criteria which an applicant must satisfy to be granted a Subclass 676 (Tourist) visa.

Public interest criterion 4012 only applies to an applicant who has not turned 18. However, subparagraph 676.221(2)(c)(ii) only applies if an applicant is has turned 18. This item removes the anomalous inclusion of public interest criterion 4012.

Item [5] – Schedule 2, paragraph 676.221(2)(e)

This item substitutes paragraph 676.221(2)(e) of Part 676 of Schedule 2 to the Principal Regulations with new paragraph 676.221(2)(e). Part 676 provides the criteria which an applicant must satisfy to be granted a Subclass 676 (Tourist) visa.

Subclause 676.221(1) requires an applicant seeking to satisfy the primary criteria to meet the requirements in either subclauses 676.221(2) or (3) at the time of decision. New subparagraphs 676.221(2)(e)(i) and (ii) require that, if the applicant is in Australia:

- the applicant continues to satisfy the criteria in paragraph 676.215(b) (which require the applicant, at the time of application, to have substantially complied with any conditions applicable to the last of any substantive or bridging visa held by the applicant); and
- the Minister is satisfied that the applicant intends to comply with any conditions subject to which the visa is granted.

New subparagraph 676.221(2)(e)(iii) provides that, if the applicant is in Australia and is the holder of a student visa (or has been the holder of a student visa since last entering Australia), the Minister is satisfied that the period of the applicant’s stay in Australia is not sought for the purpose of:

- commencing a registered course; or
- continuing or completing a registered course in which the applicant is enrolled.

The amendment made by this item will ensure that the criteria for a Subclass 676 (Tourist) visa in relation to study are consistent for applicants who either apply in or outside Australia. It will enable tourists who decide to stay in Australia for longer than originally planned to study for up to three months. This amendment will also enable applicants who hold or have held a student visa since last entering Australia, to obtain a Subclass 676 (Tourist) visa in order undertake limited forms of study in situations in which they cannot meet the criteria for a further student visa.

Item [6] – Schedule 2, clause 676.212 (appearing after clause 676.611)

This item makes a technical amendment to remedy the incorrect numbering of a clause in Division 676.6 of Part 676 of Schedule 2 to the Principal Regulations. The clause incorrectly numbered clause 676.212, and appearing after clause 676.611, is renumbered as clause 676.612.

Schedule 4 – Amendments relating to information

Item [1] – Regulation 2.04

This item substitutes regulation 2.04 of Division 2.1 of Part 2 of the Principal Regulations with new regulation 2.04 to prescribe additional circumstances for section 40 of the Act. Section 40 allows the regulations to prescribe that visas may only be granted in specified circumstances.

New paragraph 2.04(1)(a) provides that for paragraph 40(1) of the Act, and subject to the Principal Regulations, the only circumstances in which a visa may be granted to a person who has satisfied the criteria in a relevant Part of Schedule 2 are the circumstances set out in that Part, unless the visa is a class of visa mentioned in new subregulation 2.04(2). This maintains the operation of regulation 2.04.

New paragraph 2.04(1)(b) provides that a class of visa referred to in new subregulation 2.04(2) may be granted to an applicant who has satisfied the criterion in the relevant Part of Schedule 2 only if the circumstances set out in that Part of Schedule 2 exist and the applicant has complied with any requirement of an officer to provide one or more personal identifiers in relation to the application for a visa. The term “personal identifiers” is defined in section 5A of the Act, and includes photographs of a person’s face and shoulders, signatures, and fingerprints.

New subregulation 2.04(2) prescribes circumstances for the purposes of paragraph 40(3)(a) of the Act. Subsection 40(3) of the Act provides that where prescribed circumstances exist, and the Minister has not waived the operation of subsection 40(3) in relation to the person, the circumstances under subsection 40(1) may include that the person has complied with any requirement of an officer to provide one of more personal identifiers in relation to the application for the visa. The prescribed circumstances in new subregulation 2.04(2) are that the person is an applicant for a Protection (Class XA) visa, a Refugee and Humanitarian (Class XB) visa or a Temporary Safe Haven (Class UJ) visa which are set out in items 1401, 1402 and 1223B of Schedule 1 to the Regulations respectively.

The effect of new paragraph 2.04(1)(b) and new subregulation 2.04(2) is that applicants for Protection, Refugee and Humanitarian, or Temporary Safe Haven visas must comply with any requirement to provide personal identifiers, unless the Minister has waived the requirement for that person. This will provide a further tool to decision makers, allowing them to require personal identifiers from an applicant during visa processing should the identity of the applicant become an issue.

Subsection 40(5) of the Act provides that subsection 40(4) does not apply in prescribed circumstances, if the personal identifier is of a prescribed type. Subsection 40(4) requires

personal identifiers to be provided by an identification test carried out by an authorised officer. New subregulation 2.04(3) prescribes circumstances for the purposes of subsection 40(5) of the Act. The prescribed circumstances are that the person is an applicant for a visa that is a Protection, Refugee and Humanitarian or Temporary Safe Haven visas.

New subregulation 2.04(4) provides that for the purposes of subsection 40(5) of the Act, the prescribed types of personal identifiers are a photograph or other image of the applicant's face and shoulders and the applicant's signature.

The effect of new subregulations 2.04(3) and (4) is that an applicant for a Protection, Refugee and Humanitarian, or Temporary Safe Haven visa may provide their signature and photo, where required, other than by a test carried out by an authorised officer.

Item [2] – Subregulation 3.30(1)

This item substitutes subregulation 3.30(1) of Division 3.4 of Part 3 of the Principal Regulations with new subregulation 3.30(1). This item also inserts new subregulation 3.30(1A).

When a person enters into fisheries detention or environment detention, personal identifiers are collected by authorised officers under the FMA, the TSFA or the EPBCA.

The clients are not at that stage in immigration detention as they are granted an enforcement visa by operation of law. When detention under the FMA, TSFA or EPBCA ceases, the enforcement visa ceases, the client becomes an unlawful non-citizen and detention continues under the Act.

Subsection 261AA(1) of the Act provides that a non-citizen who is in immigration detention must (other than in the prescribed circumstances) provide to an authorised officer one or more personal identifiers. Such circumstances are set out in regulation 3.30. This item prescribes further circumstances for the purposes of subsection 261AA (1) of the Act.

New paragraph 3.30(1)(a) prescribes as circumstances for subsection 261AA(1) that the non-citizen is in the company of and restrained by an officer, or, in the case of a particular non-citizen, by another person directed by the Secretary to accompany and restrain the non-citizen. This maintains the operation of subregulation 3.30(1). In these circumstances, even though under the Act the person is in immigration detention, the person is not required to provide a personal identifier.

New paragraph 3.30(1)(b) prescribes other circumstances for the purposes of subsection 261AA(1). It applies to non-citizens who are in immigration detention immediately following a period of detention under the FMA, EPBCA or TSFA where the non-citizen provided a personal identifier or identifiers under one of those Acts during that previous detention.

Subsection 261AA(1) provides that a non-citizen who is in immigration detention must (other than in the prescribed circumstances) provide to an authorised officer one or more personal identifiers. In the circumstances prescribed in new paragraphs 3.30(1)(a) and (b) the person is not required to provide a personal identifier.

New subregulation 3.30(1A) provides that an authorised officer must be satisfied that each of the identifiers is usable and must be satisfied about the integrity of each of the identifiers.

The effect of new paragraph 3.30(1)(b) and new subregulation 3.30(1A) is that provided an authorised officer is satisfied about the usability and integrity of all the identifiers provided under the FMA, EPBCA or TSFA, the non-citizen is not required to provide any personal identifiers under section 261AA of the Act. This will be the case only where the personal identifiers were provided under the FMA, EPBCA or TSFA during a period of fisheries or environment detention immediately preceding the immigration detention. This will ensure that the provisions allowing for disclosure of identifying information in the FMA, TSFA and EPBCA may be taken advantage of, and persons who have already been through the process of providing personal identifiers need not do so again unnecessarily.