EXPLANATORY STATEMENT

Select Legislative Instrument 2008 No. 91

Issued by the Minister for Immigration and Citizenship

Migration Act 1958

Immigration (Education) Act 1971

Migration Legislation Amendment Regulations 2008 (No. 1)

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.

Section 13 of the *Immigration (Education) Act 1971* (the Immigration Act) provides that the Governor-General may make regulations, not inconsistent with the Immigration Act, prescribing all matters required or permitted by the Immigration Act to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to the Immigration 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 eligibility for second working holiday visas and access to bridging visas for certain applicants; and amend both the Principal Regulations and the *Immigration (Education) Regulations 1992* (the Immigration Regulations) in relation to fees and charges.

In particular, the Regulations amend:

- the *Migration Regulations 1994* to expand eligibility for a second Working Holiday (Subclass 417) visa to include applicants who have undertaken specified work in regional Australia;
- clarify that applicants who have applied for judicial or merits review of a decision made under the *Australian Citizenship Act 2007* can access a Subclass 050 – Bridging (General) visa;
- increase visa application charges and fees so that they are in line with increases to the Consumer Price Index (CPI) and provide for sufficient cost recovery; and
- amend the *Immigration (Education) Regulations 1992* to increase the fees in line with the CPI for prescribed English courses available to migrants and other persons under section 4 of the Act. The amount of this increase would be approximately 2.3%, which would not cause the applicable fee limit set out in subsection 4A(3A) of the Immigration Act to be exceeded.

Details of the Regulations are set out in Attachment B.

The Regulations commence on 1 July 2008.

The Office of Best Practice Regulation's Business Cost Calculator and Assessment Checklists were used to determine that there was no compliance cost on business or impact on competition in relation to these amendments.

In relation to Schedule 1 amendments to expand eligibility for second working holiday (Subclass 417) visas, the Department of Foreign Affairs and Trade, the Department of Education, Employment and Workplace Relations, and the Department of Resources, Energy and Tourism were consulted.

The Department of Finance and Deregulation was consulted in relation to Schedules 2 and 3.

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:

- 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 40(1) of the Migration Act, which provides that the regulations may provide that visas or visas of a specified class may only be granted in specified circumstances;
- section 46 of the Migration 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.

Section 13 of the *Immigration (Education) Act 1971* (the Immigration Act) provides that the Governor-General may make regulations, not inconsistent with the Immigration Act, prescribing all matters required or permitted by the Immigration Act to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to the Immigration Act.

Section 4 of the Immigration Act provides that the Minister for Immigration and Citizenship may arrange for English courses to be provided for persons intending to migrate to Australia and to persons in Australia, including permanent residents, temporary visa holders listed in a Gazette notice, new Australian citizens, children of permanent residents, New Zealand citizens who hold a special category visa and, under certain circumstances, persons in the Territory of Cocos (Keeling) Islands or the Territory of Christmas Island.

Subsection 4A(1) of the Immigration Act provides that the regulations may provide for the charging and recovery of fees, not exceeding the applicable fee limit per year per student, in respect of English courses (the applicable fee limit in respect of a course is worked out in accordance with the formula in subsection 4A(3A) of the Immigration Act).

ATTACHMENT B

Details of the *Migration Legislation Amendment Regulations 2008 (No. 1)*

Regulation 1 – Name of Regulations

This regulation provides that the title of the Regulations is the *Migration Legislation Amendment Regulations 2008 (No. 1)*

Regulation 2 – Commencement

This regulation provides for the Regulations to commence on 1 July 2008.

Regulation 3 – Amendment of *Migration Regulations 1994*

Subregulation (1) provides that the *Migration Regulations 1994* (the Principal Regulations) are amended as set out in Schedule 1 and Schedule 2.

Subregulation (2) provides that the amendments made by Schedule 1 apply in relation to an application for a visa made on or after 1 July 2008.

Subregulation (3) provides that the amendments made by Schedule 2 apply in relation to a matter for which an obligation to pay a fee is incurred on or after 1 July 2008.

Regulation 4 – Amendment of *Immigration (Education) Regulations 1992*

Subregulation (1) provides that the *Immigration (Education) Regulations 1992* (the Immigration Regulations) are amended as set out in Schedule 3.

Subregulation (2) provides that the amendment made by Schedule 3 applies in relation to enrolment in a prescribed English course that occurs on or after 1 July 2008.

Schedule 1 – Amendments of *Migration Regulations 1994*

Item [1] – Schedule 1, paragraph 1225(3B)(c)

This item substitutes the term 'seasonal work' used in paragraph 1225(3B)(c) of Schedule 1 with a new term 'specified work'. The reason for using this new term is explained in item [3] below.

The effect of this amendment is to provide that an applicant who has previously entered Australia as the holder of a Working Holiday (Subclass 417) visa must have carried out 'specified work' (as that term is defined) in regional Australia for at least three months to be eligible to apply for a second Working Holiday visa.

Item [2] – Schedule 1, subitem 1225(5), definition of *seasonal work*

This item substitutes the definition of 'seasonal work' with a similar definition for the term 'specified work'. It defines 'specified work' as 'work of a kind specified by the Minister in an instrument in writing for this definition'.

Item [3] – Schedule 2, clause 417.111, definition of *seasonal work*

This item is consequential to the amendment made by item [2]. It defines 'specified work' as 'work of a kind specified by the Minister in an instrument in writing for the definition of ***specified work*** in subitem 1225(5) of Schedule 1'.

The purpose of these amendments is to replace the term 'seasonal work' with a term that accurately reflects the types of work that an applicant must have carried out to be eligible to apply for a second Working Holiday visa. The types of 'specified work' would be specified in a legislative instrument made by the Minister under subitem 1225(5) of Schedule 1. It is intended that the types of work that an applicant must have carried out to be eligible for a second Working Holiday visa will not be restricted in the future to work that would commonly be understood as 'seasonal work'. The term 'specified work' has been substituted to provide flexibility for other types of work carried out in regional Australia to be included in the relevant legislative instrument.

The legislative instrument for the purposes of subitem 1225(5) of Schedule 1 is not subject to disallowance because Schedule 1 to the Principal Regulations is exempt from disallowance under item 26 of subsection 44(2) of the *Legislative Instruments Act 2003*.

Item [4] – Schedule 2, Division 417.2, note

This item corrects a typographical error by removing the word 'be' from the sentence, so that the note reads '*Note* All applicants must satisfy the primary criteria'.

Item [5] – Schedule 2, subclause 417.211(5)

This item omits the term 'seasonal work' and inserts 'specified work'.

This item is consequential to the amendment made by item [1]. The effect of this amendment is that an applicant who has previously entered Australia as the holder of a Working Holiday (Subclass 417) visa must have carried out specified work in regional Australia for at least three months to be eligible to apply for a second Working Holiday visa.

Item [6] – Schedule 2, Division 417.3, note

This item ensures consistency with the note in Division 417.2 by substituting the word 'meet' with 'satisfy', so that both clauses read '*Note* All applicants must satisfy the primary criteria'.

Item [7] – Further amendments – instrument in writing

This item substitutes all references to the term 'Gazette Notice' with 'instrument in writing' in item 1225 and Part 417 to avoid the confusion of two different terms appearing in the same part of the Principal Regulations.

Item [8] – Further amendments – *Australian Citizenship Act 2007*

This item amends paragraph 050.212(4AAA)(b), clause 050.511C, clause 050.511D and the note in clause 050.511D of Schedule 2 to the Principal Regulations by substituting the references to the '*Australian Citizenship Act 1948*' with references to the '*Australian Citizenship Act 1948* or the *Australian Citizenship Act 2007*'.

This is a technical amendment to clarify on the face of the Principal Regulations that an applicant for judicial or merits review of a decision made under the *Australian Citizenship Act 1948* or the *Australian Citizenship Act 2007* is eligible for the grant of a Subclass 050 - Bridging (General) visa.

Paragraph 10(b) of the *Acts Interpretation Act 1901*, in conjunction with paragraph 13(1)(a) of the *Legislative Instruments Act 2003* (which provides that the *Acts Interpretation Act 1901* applies to any legislative instrument as if it were an Act), has the effect of including a reference to the *Australian Citizenship Act 2007* wherever there is a reference to the *Australian Citizenship Act 1948* in the Principal Regulations. However, this amendment will ensure that the position is clear.

Schedule 2 – Amendments of *Migration Regulations 1994* relating to fees and charges

Item [1] Amendments

This item amends fees and charges in Parts 1, 2 and 5 of, and Schedule 1 to, the Principal Regulations to:

- provide for the annual indexation of specified fees and charges;
- increase fees and charges to visa classes referred to in the table below in line with the Department of Immigration and Citizenship Financial Health Review recently undertaken by the Department of Finance and Deregulation; and
- increase the Visa Application Charge (VAC) for Work and Holiday (Temporary) (Class US) to align with the VAC for Working Holiday (Temporary) (Class TZ).

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 increases made for the annual indexation of fees and charges resulted in an increase to most fees and charges of 2.3 per cent in line with changes to the Consumer Price Index (CPI).

Increases to fees and charges as a result of the Financial Health Review of greater than 2.3 per cent were made to Resident Return visas and Visitor visas to better align them with the administrative costs associated with processing applications for these visas. Increases of greater than 2.3 per cent were also made to Temporary Resident visas to align the charges more closely with those of other nations. A table of these amendments is set out below.

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*.

Visa Application Charge (VAC) / Fee	***Description***	***Provision***	***omit***	***insert***
Re-evidencing of Resident Return Visas Fee	Resident Return	paragraph 2.18(3)(b)	$70	$100
Sponsorship Fee	Temporary Resident	paragraph 5.38(2)(a)	$2 700	$2 750
		paragraph 5.38(2)(b)	$270	$275
Return (Residence) (Class BB) VAC	Resident Return	subparagraph 1128(2)(a)(i)	$120	$240
		subparagraph 1128(2)(a)(ii)	$120	$240
Cultural/Social (Temporary) (Class TE) VAC	Temporary Resident	subparagraph 1205(2)(a)(iv)	$1 900	$2 500
		subparagraph 1205(2)(a)(iva)	$1 900	$2 500
		subparagraph 1205(2)(a)(v)	$190	$250
Domestic Worker (Temporary) (Class TG) VAC	Temporary Resident	paragraph 1207(2)(a)	$190	$250
Educational (Temporary) (Class TH) VAC	Temporary Resident	subparagraph 1208(2)(a)(ii)	$190	$250
Medical Practitioner (Temporary) (Class UE) VAC	Temporary Resident	paragraph 1214AA(2)(a)	$190	$250
Retirement (Temporary) (Class TQ) VAC	Temporary Resident	subparagraph 1217(2)(a)(ii)	$190	$250
Sponsored (Visitor) (Class	Visitor	subparagraph 1217A(2)(a)(i)	$75	$100
Tourist (Class TR) VAC	Visitor	sub-subparagraph 1218(2)(a)(ii)(A)	$75	$100
Sponsored Training (Temporary) (Class UV) VAC	Temporary Resident	paragraph 1220B(2)(a)	$190	$250
Temporary Business Entry (Class UC) VAC	Temporary Resident	subparagraph 1223A(2)(a)(i)	$75	$100
		subparagraph 1223A(2)(a)(iii)	$190	$250

Schedule 3- Amendment of *Immigration (Education) Regulations 1992*

Item [1] – Paragraph 4(1)(a)

This item amends paragraph 4(1)(a) of the Immigration Regulations to provide for the annual indexation of the prescribed fee for a formal English course provided in accordance with section 4 of the *Immigration (Education) Act 1971* (the Immigration Act). The fee is increased from $325 to $335. This indexation will result in an increase to the charge of approximately 2.3% which is in line with the CPI. The increase does not cause the applicable fee limit set out in subsection 4A(3A) of the Immigration Act to be exceeded.