EXPLANATORY STATEMENT

Select Legislative Instrument 2008 No. 168

Issued by the Minister for Immigration and Citizenship

Migration Act 1958

Migration Amendment Regulations 2008 (No. 5)

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) to:

- repeal Subclass 785 (Temporary Protection) visas;
- remove all criteria in Subclass 866 (Permanent Protection) visas that resulted in a person being granted a Subclass 785 (Temporary Protection) visa;
- repeal Subclass 447 (Secondary Movement Offshore Entry (Temporary)) and Subclass 451 (Secondary Movement Relocation (Temporary)) visas;
- as a result of repealing Subclass 447 (Secondary Movement Offshore Entry (Temporary)) and Subclass 451 (Secondary Movement Relocation (Temporary)) visas, remove the seven day rule that must be satisfied to be granted Subclass 200 (Refugee), 202 (Global Special Humanitarian) and 204 (Woman at risk) visas; and
- resolve the status of current and former holders of Subclass 447 (Secondary Movement Offshore Entry (Temporary)), Subclass 451 (Secondary Movement Relocation (Temporary)) and Subclass 785 (Temporary Protection) visas through the grant of a new permanent visa – Resolution of Status (Class CD) visa.

The Regulations ensure that a person to whom the Minister is satisfied Australia owes protection obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (the Refugees Convention), is eligible for grant of a permanent protection visa in the form of a Subclass 866 (Protection) visa, regardless of their mode of arrival in Australia or whether they have previously held a visa. The Regulations also remove the '7 day rule' from permanent protection and permanent humanitarian visas which requires that since last leaving their home country, applicants must not have resided for a continuous period of 7 days or more in a country in which they could have sought and obtained effective protection. Finally, the Regulations allow for the holders of temporary protection and temporary humanitarian visas and in some instances the former holders of these visas, to have their status permanently resolved through the grant of a new permanent visa without the need for a reassessment of whether Australia owes that person protection obligations under the Refugees Convention.

Details of the Regulations are set out in Attachment B.

The Regulations commence on 9 August 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.

Consultation with the Department of Families, Housing, Community Services and Indigenous Affairs has occurred so as to ensure that holders of the new Resolution of Status (Class CD) visa receive the correct social security benefits and entitlements.

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:

- Subsections 29(2) and 29(3) of the Act provide that the regulations 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 prescribe classes of visa.
- Subsection 31(3) of the Act provides that the regulations may prescribe criteria for visa or visas of a specified class (which, without limiting the generality of this subsection, may be a class provided for by sections 32, 36, 37 or 37A but not by sections 33, 34, 35 or 38 of the Act).
- 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 may specify that a visa is a visa of a particular class.
- Subsection 40(1) of the Act 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 provides that the regulations may provide that visas, or visas of a specified class, are subject to specified conditions.
- Section 45 of the Act provides that subject to the Act and the regulations, a non-citizen who wants a visa must apply for a visa of a particular class.
- Subsection 45B(2) of the Act provides that the regulations may prescribe that the amount in relation to a visa application charge may be nil.
- Paragraph 46(1)(b) provides that an application for a visa is valid if, and only if it satisfies the criteria and requirements prescribed under section 46 of the Act.
- Paragraph 46(2)(a) of the Act provides that the regulations prescribe, for the purposes of this subsection 46(2), classes of visas for which the application is made.
- Subsection 46(3) provides that the regulations may prescribe criteria to be satisfied for an application of a specified class to be a valid application.
- Subsection 46(4) 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 an application for a visa of a specified class must be made;
    - 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.
- Paragraph 46(2)(b) provides that the regulations may prescribe when the application referred to in paragraph 46(2)(a) is taken to have been validly made.

- Section 48 of the Act provides that the regulations prescribe, for the purposes of section 48, a class of visa that is the only class of visa for which a person whose visa has been cancelled, or whose application for a visa has been refused may apply.
- Subsection 71(1) of the Act provides that the regulations prescribe a way in which evidence of a visa must be given.
- Section 505 of the Act provides that, to avoid doubt, regulations for the purpose of prescribing a criterion for visas of a class may provide that the Minister, when required to decide whether an applicant for a visa of the class satisfies the criterion:
  (a) is to get a specified person or organisation in the specified class, to:
    (i) give an opinion on a specified matter; or
    (ii) make an assessment of a specified matter; or
    (iii) make a finding about a specified matter; or
    (iv) make a decision about a specified matter; and
  (b) is:
    (i) to have regard to the opinion, assessment, finding or decision in; or
    (ii) to take that opinion, assessment, finding or decision to be correct for the purpose of;

  deciding whether the applicant satisfies the criterion.

ATTACHMENT B

Details of the *Migration Legislation Amendment Regulations 2008 (No. 5)*

Regulation 1 – Name of Regulations

This regulation provides that the title of the Regulations is the *Migration Amendment Regulations 2008 (No. 5).*

Regulation 2 – Commencement

This regulation provides that these regulations commence on 9 August 2008.

Regulation 3 – Amendment of *Migration Regulations 1994*

This regulation provides that Schedule 1 amends the Principal Regulations.

Regulation 4 – Transitional arrangements for applications for visas made but not finally determined before commencement

Subregulation 4(1) provides that the amendments made by Schedule 1 apply in relation to an application for a visa made but not finally determined before 9 August 2008. 'Finally determined' is defined in subsection 5(9) of the *Migration Act 1958* ('the Act') to mean where a decision or an application is not or is no longer subject to merits review by the Migration Review Tribunal or Refugee Review Tribunal or where there was a period allowed for the decision to be reviewed but it has passed.

The note after subregulation 4(1) alerts the reader to the fact that new regulation 2.07AQ as inserted by item [3] of Part 1 of Schedule 1 to these amendments provides that applications for certain kinds of visas made, but not finally determined before 9 August 2008, may be taken to be valid applications for a Resolution of Status (Class CD) visa.

Subregulation 4(2) provides that despite subregulation 4(1), the Principal Regulations as in force immediately before the amendments continue to apply in relation to applications for Resolution of Status (Residence) (Class BL) and Return Pending (Temporary) (Class VA) visas that were made but not finally determined within the meaning of subsection 5(9) of the Act, before 9 August 2008. Both Resolution of Status (Residence) (Class BL) and Return Pending (Temporary) (Class VA) visas are repealed by Part 2 of Schedule 1 to these amendments. However, there are some applications for these visas which will not be finally determined on the date of commencement. As a result, it is necessary to ensure that the Principal Regulations that are in place on commencement of these Regulations, continue to apply to applications for Resolution of Status (Residence) (Class BL) and Return Pending (Temporary) (Class VA) visas that have not been finally determined.

Schedule 1 – Amendments

Part 1 – Amendments to *Migration Regulations 1994*

Item [1] – Paragraph 1.20(2)(a)

This item omits ‘, Resolution of Status (Residence) (Class BL)’ in paragraph 1.20(2)(a) in Part 1 of the Principal Regulations.

The Resolution of Status (Residence) (Class BL) visa is being substituted with Resolution of Status (Class CD) by item [8] of Part 2 of these amendments. As a result, the reference to Resolution of Status (Residence) (Class BL) visas in paragraph 1.20(2)(a) has been removed. Subregulation 1.20(2) provides for the obligations of a sponsor in relation to certain visas. It is not necessary to include reference to the new Resolution of Status (Class CD) visa in subregulation 1.20 because this visa does not have sponsorship requirements.

The Resolution of Status visa is being moved into the new Class CD to allow for differentiation between Resolution of Status visas granted before and after 9 August 2008 for the purposes of other legislation.

Item [2] – Regulation 2.07AN

This item omits regulation 2.07AN in Part 2 of the Principal Regulations.

Regulation 2.07AN sets out the requirements for making a valid application for a Return Pending (Temporary) (Class VA) visa which is repealed by item [9] of Part 2 of these amendments. As a result, regulation 2.07AN has also been repealed.

Item [3] – After regulation 2.07AP

This item inserts new regulation 2.07AQ in Part 2 of the Principal Regulations. Subregulation 2.07AQ(1) provides that Resolution of Status (Class CD) visa is a prescribed visa for subsection 46(2) of the Act. Subsection 46(2) of the Act provides that an application for a visa of a class prescribed for the purpose of that subsection is valid if under the Principal Regulations, the application is taken to have been validly made.

New subregulation 2.07AQ(2) provides that a valid application for a Resolution of Status (Class CD) visa can only be validly made by meeting the requirements in either subregulation 2.07AQ(3) or item 1127AA of Schedule 1. Item 1127AA is inserted by item [8] of Part 2 of these amendments. Subregulation 2.07AQ(2) ensures that an applicant does not need to satisfy the requirements in both subregulation 2.07AQ(3) and item 1127AA. Meeting the requirements in either subregulation 2.07AQ(3) or item 1127AA is sufficient to make a valid application for a Resolution of Status (Class CD) visa.

The requirements that must be met in subregulation 2.07AQ(3) and item 1127AA in order for a valid Resolution of Status (Class CD) visa application to be made reflect the policy intent that a valid application for the Resolution of Status (Class CD) visa can only be made by a person within the specific target group.

Subregulation 2.07AQ(3) provides that a valid application is made for a Resolution of Status (Class CD) visa if the criteria in at least one of the items of the table in subregulation 2.07AQ(3) are satisfied.

Table item 1 provides that a person who holds a Subclass 447 (Secondary Movement Offshore Entry (Temporary)) visa, a Subclass 451 (Secondary Movement Relocation (Temporary)) visa, a Subclass 695 (Return Pending) visa or a Subclass 785 (Temporary Protection) visa who makes a valid application for a Protection (Class XA) visa, is taken to have also made a valid application for a Resolution of Status (Class CD) visa. Item [18] of Part 3 of these amendments repeals these visa subclasses, (447, 451, 695 and 785). The intention is to resolve the status of the holders of these visas through the grant of a Resolution of Status (Class CD) visa rather than a Protection (Class XA) visa so that it is not necessary that the Minister make an assessment as to whether Australia owes the person protection obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (the Refugees Convention).

Table item 2 provides that a person who held, but no longer holds a Subclass 447 (Secondary Movement Offshore Entry (Temporary)) visa, a Subclass 451 (Secondary Movement Relocation (Temporary)) visa, a Subclass 695 (Return Pending) visa or a Subclass 785 (Temporary Protection) visa that was not cancelled and who makes a valid application for a Protection (Class XA) visa, is taken to have also made a valid application for a Resolution of Status (Class CD) visa if they:

- have not left Australia (unless when leaving Australia they held a visa that allows for lawful re-entry to Australia and they re-entered Australia on that same visa); and
- do not hold a permanent visa.

Item [18] of Part 3 of these amendments repeals Subclass 447, 451, 695 and 785 visas. The intention is to resolve the status of former holders of these visas through the grant of a Resolution of Status (Class CD) visa rather than a Protection (Class XA) visa so that it is not necessary that the Minister make an assessment as to whether Australia owes the person protection obligations under the Refugees Convention. Applicants will be eligible for a Resolution of Status (Class CD) visa under table item 2 only if they have not departed Australia since grant of the Subclass 447, 451, 695 or 785 visa. However, former holders of these visas may have been granted a visa in accordance with regulation 2.07AO that allows them to depart and re-enter Australia on that same visa. A Subclass 457 (Business (Long Stay)) visa is an example of a visa that has this re-entry facility. Former holders of Subclass 447, 451, 695 and 785 visas who have departed and re-entered Australia while holding one of these visas will be able to make a valid application for a Resolution of Status (Class CD) visa.
Table item 3 provides that a person makes a valid application for a Resolution of Status (Class CD) visa if:

- the applicant holds a Temporary Safe Haven (Class UJ) visa or a Temporary (Humanitarian Concern) (Class UO) visa; and
- the applicant has been offered a permanent stay in Australia by the Australian Government; and
- the applicant indicates to an authorised officer that they accept the offer of a permanent stay; and
- the authorised officer endorses in writing the person’s acceptance of the offer.

Temporary Safe Haven (Class UJ) visas are granted to allow for the entry and temporary stay of persons deemed by the Minister to be in humanitarian need. Temporary (Humanitarian Concern) (Class UO) visas provide for temporary stay for persons in humanitarian need in circumstances where it has been established that there is a need for the stay to be extended for a period beyond that initially provided for by the Class UJ visa. Applications for both Class UJ and Class UO visas are made by an offer and acceptance process under regulation 2.07AC. The amendments provide a mechanism to transition some Class UJ or Class UO visa holders to a permanent visa without the need for the Minister to be satisfied that Australia owes the person protection obligations under the Refugees Convention. A Resolution of Status (Class CD) visa will be offered to certain Class UJ or Class UO visa holders by the Australian Government. In this context, the Australian Government refers to the Minister for Immigration and Citizenship (or another Minister). However, an authorised officer is able to communicate that offer to a Class UJ or Class UO visa holder and endorse acceptance of that offer.

Table item 4 provides that a person makes a valid application for a Resolution of Status (Class CD) visa if they are:

- a member of the family unit of a person who is taken to have made a valid application under table item 3 and:
- they have been offered a permanent stay in Australia by the Australian Government; and
- they have indicated to an authorised officer that they accept the offer of a permanent stay; and
- the authorised officer endorses in writing the person's acceptance of the offer.

Subregulation 2.07AQ(4) clarifies when a Resolution of Status (Class CD) visa is taken to have been made under regulation 2.07AQ. Paragraph (a) provides that if the application was made following an application for a Protection (Class XA) visa in accordance with items 1 and 2 in the table in subregulation 2.07AQ(3), then the application will be taken to be made for the Resolution of Status (Class CD) visa on 9 August 2008, if the application for the Protection Class XA visa was made before 9 August 2008.

Subregulation 2.07AQ(5) clarifies when a Resolution of Status (Class CD) visa is taken to have been made under regulation 2.07AQ. Paragraph (a) provides that if the application was made following an application for a Protection (Class XA) visa in accordance with items 1 and 2 in the table in subregulation 2.07AQ(3), then the application will be taken to be made for the Resolution of Status (Class CD) visa on the date of the Protection (Class XA) visa application, if the application for the Protection (Class XA) visa was made on or after 9 August 2008.

Subregulation 2.07AQ(6) provides that if the application is made in accordance with the offer and acceptance process in item 3 or 4 of the table in subregulation 2.07AQ(3), then the application is taken to be made when the authorised officer endorses the person's acceptance of the offer.

Subregulation 2.07AQ(7) puts it beyond doubt that a Subclass 447 (Secondary Movement Offshore Entry (Temporary)) visa, a Subclass 451 (Secondary Movement Relocation (Temporary)) visa, a Subclass 695 (Return Pending) visa or a Subclass 785 (Temporary Protection) visa holder or former holder may make a valid application for a Resolution of

Status (Class CD) visa, despite those visas formerly being subject to a condition that the holders of those visas would not be entitled to the grant of a substantive visa, other than a protection visa or a specifically prescribed visa.

Item [4] – Paragraph 2.08A(2A)(a)

This item omits paragraph 2.08A(2A)(a) in Part 2 of the Principal Regulations.

Subregulation 2.08A(2A) provides that subregulations 2.08A(1) and (2) do not apply to certain visas. Paragraph (a) specifies a Resolution of Status (Residence) (Class BL) visa. As item [8] of Part 2 of these amendments repeals Resolution of Status (Residence) (Class BL) visas, paragraph 2.08A(2A)(a) has also been repealed.

Item [5] – Subregulation 2.08A(3)

This item omits subregulation 2.08A(3) in Part 2 of the Principal Regulations.

Subregulation 2.08A(3) specifies when certain applicants may be added to an application for a Resolution of Status (Residence) (Class BL) visa. As item [8] of Part 2 of these amendments repeals Resolution of Status (Residence) (Class BL) visas, subregulation 2.08A(3) has also been repealed.

Item [6] – Regulation 2.08F

This item omits regulation 2.08F in Part 2 of the Principal Regulations.

Regulation 2.08F applies to Subclass 785 (Temporary Protection) visa holders who:

- were granted that visa before 19 September 2001;
- are in Australia;
- have not had their visa cancelled; and
- have applied for a Protection (Class XA) visa within 36 months of the date of grant of the Subclass 785 visa and this application has not been finally determined.

These persons are taken to have applied for a Protection (Class XC) visa either on the day he or she makes the application or on 1 November 2002, whichever is later. Subclass 785 (Temporary Protection) is the only visa subclass in Protection (Class XC) visa. As item [12] of Part 2 of these amendments repeals Protection (Class XC) visas and item [18] of Part 3 of these amendments repeals Subclass 785 (Temporary Protection) visas, regulation 2.08F has also been repealed.

Item [7] – Paragraphs 2.12(1)(o), (p) and (q)

This item substitutes paragraphs 2.12(1)(o), (p) and (q) with new paragraphs 2.12(1)(o) and (p) in Part 2 of the Principal Regulations.

Subregulation 2.12(1) prescribes classes of visas for section 48 of the Act. Section 48 of the Act provides that a non-citizen in the migration zone who does not hold a substantive visa and who after last entering Australia was refused a visa or held a visa that was cancelled, may apply for a visa of a class prescribed for the purpose of section 48, but not for a visa of any

other class. Current paragraphs 2.12(1)(o) and (q) prescribe Resolution of Status (Residence) (Class BL) and Return Pending (Temporary) (Class VA) visas respectively. Items [8] and [9] of Part 2 of these amendments repeals these visa classes.

The effect of this item is to remove Resolution of Status (Residence) (Class BL) and Return Pending (Temporary) (Class VA) visas from the list of visas prescribed under section 48 of the Act and insert new Resolution of Status (Class CD) visas into this list. Item [8] of Part 2 of the amendments inserts new Resolution of Status (Class CD) visas. Child (Residence) (Class BT) visas remain intact in the list of visas prescribed under section 48 of the Act.

Part 2 – Amendments to Schedule 1 to the *Migration Regulations 1994*

Item [8] – Schedule 1, item 1127A

This item substitutes item 1127A with new item 1127AA in Schedule 1 to the Principal Regulations.

Item 1127A sets out how to make a valid application for a Resolution of Status (Residence) (Class BL) visa. Subclass 851 (Resolution of Status) visa is the only visa subclass in Class BL. Subclass 851 (Resolution of Status) visas have been substantially amended by item [14] of Part 3 of these amendments and have become a subclass in the new Resolution of Status (Class CD) visa. As a result of this, item 1127A in Schedule 1, containing Resolution of Status (Residence) (Class BL), has been repealed.

The item replacing item 1127A is item 1127AA. Item 1127AA sets out the circumstances in which a person may make a valid application for a new Resolution of Status (Class CD) visa. The *'Note'* that appears immediately below the title refers to other ways in which a valid application is taken to have been made for a Resolution of Status (Class CD) visa, and refers to subregulation 2.07AQ(3). To make a valid application for a Resolution of Status (Class CD) visa, an applicant need only meet the requirements in either item 1127AA or regulation 2.07AQ. Item [3] of Part 1 of these amendments inserts new regulation 2.07AQ.

Subitem 1127AA(1) specifies that an application for a Resolution of Status (Class CD) visa is to be made using Form 1364. It should be noted that subregulation 2.07AQ(2) sets out other circumstances in which a valid application is taken to have been made where use of Form 1364 is not required.

Subitem 1127AA(2) specifies that there is to be no charge for an application for a Resolution of Status (Class CD) visa.

Subitem 1127AA(3) sets out other criteria to be met in making a valid application for a Resolution of Status (Class CD) visa. It specifies that the application must be made in Australia and that the applicant must be in Australia and not in immigration clearance. Furthermore it requires that an applicant meet at least one of the criteria listed in the table in paragraph 1127AA(3)(c).

Table item 1 provides that a person who holds a Subclass 447 (Secondary Movement Offshore Entry (Temporary)) visa, a Subclass 451 (Secondary Movement Relocation (Temporary)) visa, a Subclass 695 (Return Pending) visa or a Subclass 785 (Temporary Protection) visa may make a valid application for a Resolution of Status (Class CD) visa.

Table item 2 provides that a person who held, but no longer holds a Subclass 447 (Secondary Movement Offshore Entry (Temporary)) visa, a Subclass 451 (Secondary Movement Relocation (Temporary)) visa, a Subclass 695 (Return Pending) visa or a Subclass 785 (Temporary Protection) visa that was not cancelled may make a valid application for a Resolution of Status (Class CD) visa if they:

- have not left Australia (unless when leaving Australia they held a visa that allows for lawful re-entry to Australia and they re-entered Australia on that same visa); and
- do not hold a permanent visa.

Applicants are eligible for a Resolution of Status (Class CD) visa under table item 2 only if they have not departed Australia since grant of the Subclass 447, 451, 695 or 785 visa. However, former holders of these visas may have been granted a visa in accordance with regulation 2.07AO that allows them to depart and re-enter Australia on that same visa. A Subclass 457 (Business (Long Stay)) visa is an example of a visa that has this re-entry facility. Former holders of Subclass 447, 451, 695 and 785 visas who have departed and re-entered Australia while holding one of these visas will be able to make a valid application for a Resolution of Status (Class CD) visa.

Table item 3, provides that a valid application for a Resolution of Status (Class CD) visa may be made by a member of the same family unit as a person who has made a valid application for a Resolution of Status (Class CD) visa under item 1 or 2 if:

- the member of the same family unit is in Australia on 9 August 2008 and was a member of the same family unit on this date; or
- is born on, or after, 9 August 2008.

The effect of this measure is to ensure that the member of the same family unit is present in Australia, unless they are born on or after the date of commencement, 9 August 2008, in which case there is no restriction on being in Australia for making a Resolution of Status (Class CD) visa application. A member of the same family unit is defined at subitem 1127AA(5), inserted by table item 3 of the amendments.

Subitem 1127AA(4) declares that there is one subclass of visa in the Resolution of Status (Class CD) visa, the Subclass 851 (Resolution of Status) visa. Item [14] of Part 3 of these amendments amends Subclass 851 (Resolution of Status) visa.

Subitem 1127AA(5) defines ‘member of the same family unit’ for the purpose of item 1127AA. Inclusion of this subitem allows for a broader application of the definition of ‘member of the family unit’ than that provided in regulation 1.12 of the Principal Regulations which relies on there being an identifiable ‘head’ of the family unit. This is the same definition that is used for Subclass 866 (Protection) visas. This subitem provides a definition that requires that an individual, A, be a member of the same family unit as a second individual, B. Conversely, the individual known as B, may be a member of the same family unit as the individual known as A. Essentially the difference between these instances revolves around the proposition that there need not be an identifiable ‘head’ of the family unit. In a third permissible instance, both individuals, A and B, may be members of a family unit primarily associated with a third person. The reason for this permutation is that both individuals A and B may be related to one another by virtue of their connection to the family

unit of a third person. An instance in which this third combination might occur is where individuals A and B are siblings born to the same parent, but where, as a result of divorce, each live in separate households with different heads of the family unit.

Item [9] – Schedule 1, item 1217AA

This item omits item 1217AA in Schedule 1 to the Principal Regulations.

Item 1217AA sets out the requirements for making a valid application for a Return Pending (Temporary) (Class VA) visa. Currently, a note at the end of item 1217AA indicates that regulation 2.07AN sets out how an application for a Return Pending (Temporary) (Class VA) visa is taken to have been made. Regulation 2.07AN provides, among other things that:

- the applicant holds or has held a Subclass 447 (Secondary Movement Offshore Entry (Temporary)) visa, a Subclass 451 (Secondary Movement Relocation (Temporary)) visa or a Subclass 785 (Temporary Protection) visa;
- the applicant has made an application for a Protection (Class XA) visa; and
- the Minister has refused to grant the Protection (Class XA) visa on grounds other than the grounds set out under section 501 of the Act.

Item [18] of Part 3 of these amendments repeals Subclass 447 (Secondary Movement Offshore Entry (Temporary)), Subclass 451 (Secondary Movement Relocation (Temporary)) and Subclass 785 (Temporary Protection) visas. As a result, item 1217AA in Schedule 1, which contains the Return Pending (Temporary) (Class VA) visa has also been repealed.

Item [10] – Schedule 1, subitem 1401(4)

This item omits '785 (Temporary Protection)' in subitem 1401(4) in item 1401 of Schedule 1 to the Principal Regulations.

The effect of this item is to remove Subclass 785 (Temporary Protection) as a subclass of Protection (Class XA) visas. Item [18] of Part 3 of these amendments repeals Subclass 785 (Temporary Protection) visas. Consequently, the reference to this subclass in subitem 1401(4) has also been removed.

Item [11] – Schedule 1, subitem 1402(4)

This item omits '447 (Secondary Movement Offshore Entry (Temporary))' and 451 (Secondary Movement Relocation (Temporary))' from subitem 1402(4) in item 1402 of Schedule 1 to the Principal Regulations.

The effect of this item is to remove Subclass 447 (Secondary Movement Offshore Entry (Temporary)) and Subclass 451 (Secondary Movement Relocation (Temporary)) visas as a subclass of Refugee and Humanitarian (Class XB) visas. Item [18] of Part 3 of these amendments repeals these visa subclasses. Consequently, the reference to these subclasses in subitem 1402(4) has also been removed.

Item [12] – Schedule 1, item 1403

This item omits item 1403 in Schedule 1 to the Principal Regulations.

Item 1403 contains the Protection (Class XC) visa. The only subclass in Class XC is Subclass 785 (Temporary Protection) visa. As item [18] of Part 3 of these amendments repeals Subclass 785 (Temporary Protection) visas, item 1403 has also been repealed.

Part 3 – Amendments to Schedule 2 to the *Migration Regulations 1994*

Item [13] – Schedule 2, after subparagraph 202.211(2)(b)(ii)

This item inserts new subparagraph 202.211(2)(b)(iia) in Schedule 2 to the Principal Regulations.

Clause 202.211 is a criterion to be satisfied at the time of application by applicants seeking to satisfy the primary criteria for grant of a Subclass 202 (Global Special Humanitarian) visa. Subclause 202.211(1) provides that the applicant will meet the requirements of this subclause if they meet the requirements in subclause (2). Subclause (2) provides that, among other things, the applicant must be proposed by an Australian citizen or an Australian permanent resident ('the proposer'). Paragraph 202.211(2)(b) specifies which visas an Australian permanent resident must hold, or have held, to propose an applicant for a Subclass 202 (Global Special Humanitarian) visa. The effect of new paragraph 202.211(2)(b)(iia) is to add a Resolution of Status (Class CD) visa to the list of visas that the proposer may hold. The Resolution of Status (Class CD) visa is inserted into Schedule 1 to the Principal Regulations by item [8] of Part 2 of these amendments. In order to satisfy new paragraph 202.211(2)(b)(iia), the applicant must have been a member of the immediate family of the proposer on the date of application for that visa. This amendment enables members of the immediate family of persons who hold a Resolution of Status (Class CD) visa, to reunite with the Resolution of Status (Class CD) visa holder in Australia.

Item [14] – Schedule 2, Part 851

This item substitutes Part 851 in Schedule 2 to the Principal Regulations with new Part 851.

Part 851 contains Subclass 851 (Resolution of Status) visa. Subclass 851 was the only visa in Resolution of Status (Residence) (Class BL) visa. Use of Subclass 851 visa in its past form made permanent residence available to a select group of applicants who had been in Australia under humanitarian arrangements for some time with their status unresolved. The former Subclass 851 visa was granted to Subclass 850 (Resolution of Status (Temporary)) visa holders who had accrued 10 years residency in Australia. Subclass 850 visas were granted to citizens of the People's Republic of China, Sri Lanka, the former Yugoslavia, Kuwait, Iraq and Lebanon to cater for special instances, linked to geopolitical events in the early years of the 1990s. Members of the immediate family of Subclass 850 visa holders were able to join the Subclass 850 visa holder in Australia through the grant of a Subclass 450 (Resolution of Status – Family Member (Temporary)) visa and they too became eligible for a Subclass 851 visa. The time that a person may make a valid application for a Resolution of Status (Residence) (Class BL) visa has now passed. As a result, use of Subclass 851 visa in its past form is redundant.

The effect of this item is to use the title Subclass 851 (Resolution of Status) visa for a new purpose in accordance with the provisions set out below. Subclass 851 has become a subclass of Resolution of Status (Class CD) visa in item 1127AA as inserted by item [8] of

Part 2 of these amendments. The Resolution of Status visa has been moved into the new Class CD to allow for differentiation between Resolution of Status visas granted before and then after 9 August 2008, for the purposes of other legislation.

Interpretation

New Division 851.1 contains a note which indicates that there are no interpretation provisions in this Part.

Primary criteria

New Division 851.2 sets out the primary criteria for the grant of a Subclass 851 (Resolution of Status) visa. A note at the start of Division 851.2 indicates that the primary criteria must be satisfied by all applicants for a Subclass 851 (Resolution of Status) visa.

Subdivision 851.21 provides that there are no criteria to be satisfied at time of application for a Subclass 851 (Resolution of Status) visa.

Subdivision 851.22 sets out the criteria to be satisfied at time of decision for a Subclass 851 (Resolution of Status) visa. The criteria relating to health, character and security requirements mirror the requirements that must be met for grant of a Permanent Protection visa, Subclass 866.

New clause 851.221 requires the applicant to undergo a medical examination:

- by a Commonwealth Medical Officer;
- a medical practitioner approved by the Minister; or
- a medical practitioner employed by an organisation approved by the Minister.

New clause 851.222 provides that the applicant must undergo a chest x-ray examination conducted by a medical practitioner who is a qualified radiologist in Australia unless the applicant:

- is under 11 years of age and is not a person in respect of whom a relevant medical practitioner has requested such an examination; or
- is a person who is confirmed to be pregnant by a medical practitioner and:
    - has been examined for tuberculosis by a clinic officer of a health authority of a State or Territory; and
    - has signed an undertaking to place herself under the professional supervision of a health authority of a State or Territory and to undergo any necessary treatment; and
    - who the Minister is satisfied should not be required to undergo a chest x-ray at this time.

New clauses 851.223 and 851.224 require a medical assessment of the visa applicant to determine whether the applicant poses a health risk to the community. If the applicant does pose a health risk, the amendments require health management arrangements to be put in place.

New clause 851.225 provides that an applicant must satisfy public interest criteria 4001, 4002 and 4003A. If the applicant has turned 18 at the time of application, they must also satisfy public interest criterion 4019.

New clause 851.226 provides that where the applicant makes a valid application for a Resolution of Status (Class CD) visa on the basis of being a member of the family unit as a person who makes a valid application under item 4 of the table in subregulation 2.07AQ(4), then the applicant and the other person must, at the time of decision, continue to be members of the family unit.

New clause 851.227 provides that where the applicant makes a valid application for a Resolution of Status (Class CD) visa on the basis of being a member of the same family unit as a person who makes a valid application under item 3 of the table in paragraph 1127AA(3)(c), then the applicant and the other person must, at the time of decision, continue to be members of the same family unit.

Secondary Criteria

New Division 851.3 sets out the secondary criteria for grant of a Subclass 851 (Resolution of Status) visa. A note after Division 851.3 provides that there are no secondary criteria for the grant of a Subclass 851 visa. All applicants must satisfy the primary criteria.

Circumstances applicable to grant

New Division 851.4 sets out the circumstances applicable to grant for a Subclass 851 (Resolution of Status) visa. New clause 851.411 provides that the applicant must be in Australia at time of grant.

When visa is in effect

New Division 851.5 sets out when the visa is in effect. New clause 851.511 provides that a Subclass 851 (Resolution of Status) visa is a permanent visa.

Conditions

New Division 851.6 provides that there are no conditions for a Subclass 851 (Resolution of Status) visa.

Way of giving evidence

New Division 851.7 sets out ways of giving evidence for a Subclass 851 (Resolution of Status) visa. Clause 851.711 provides that no evidence need be given. Clause 851.712 provides that if evidence is given, it is to be given by a label affixed to a valid passport, valid Convention travel document or an approved form.

Item [15] – Schedule 2, clause 866.111, definition of *fraudulent document*

This item omits the definition of ‘fraudulent document’ in clause 866.111 of Schedule 2 to the Principal Regulations.

'Fraudulent document' in Part 866 of Schedule 2 to the Principal Regulations is used only in clause 866.212. Clause 866.212 has been repealed by item [18] of this part of the amendments. Consequently, the definition of 'fraudulent document' in clause 866.111 has also been repealed.

Item [16] – Schedule 2, after clause 866.230

This item inserts new clauses 866.231 and 866.232 in Part 866 of Schedule 2 to the Principal Regulations.

New clause 866.231 provides that a criterion to be satisfied at time of decision for applicants for a Subclass 866 visa is that they have not been offered a permanent stay in Australia by means of a Resolution of Status (Class CD) visa. The offer of a Resolution of Status (Class CD) visa is made in accordance with item 3 of the table in subregulation 2.07AQ(3) which is inserted by item [3] of Part 1 of these amendments.

New clause 866.232 provides that a criterion to be satisfied at time of decision for applicants for a Subclass 866 visa is that they do not hold a Resolution of Status (Class CD) visa. As a Resolution of Status (Class CD) visa provides equivalent benefits and entitlements as a Subclass 866 (Protection) visa, there will be no benefit for persons who hold or who have been offered a Resolution of Status (Class CD) to continue to be eligible for a Subclass 866 (Protection) visa. Additionally, subregulation 2.07AQ(3) provides that certain persons who have made a valid application for a Protection (Class XA) visa are taken to have also made a valid application for a Resolution of Status (Class CD) visa, that a person has an outstanding application for both visas. An application can only be finalised if an applicant withdraws that application, or the application is refused or approved. Where a person has been granted a Resolution of Status visa, and they do not withdraw their Protection (Class XA) visa application, new clause 866.232 allows the Protection visa application to be finalised.

Item [17] – Schedule 2, Division 866.3, second note

This item omits the second note in Division 866.3 in Part 866 of Schedule 2 to the Principal Regulations.

The second note in item 866.3 refers to a deeming provision that, by operation of law, results in the holders of visas of subclasses 451 (Secondary Movement Relocation (Temporary)), 447 (Secondary Movement Offshore Entry (Temporary)) and 785 (Temporary Protection) as having been taken to have made a valid application for a Return Pending (Class VA) visa in accordance with regulation 2.07AN. Item [18] of this part of these amendments repeals Subclass 451 (Secondary Movement Relocation (Temporary)), Subclass 447 (Secondary Movement Offshore Entry (Temporary)) and Subclass 785 (Temporary Protection) visas and item [9] of Part 2 of these amendments repeals Return Pending (Class VA) visas. As a result, this note has also been repealed.

Item [18] – Further amendments – omissions

This item lists a table of provisions in Schedule 2 that are omitted.

Clauses 200.212, 202.212 and 204.213

Clauses 200.212, 202.212 and 204.213 were time of application criteria in Subclass 200 (Refugee), 202 (Global Special Humanitarian) and 204 (Woman at risk) visas. Each of these visas is a permanent humanitarian visa in Refugee and Humanitarian (Class XB). Clauses 200.212, 202.212 and 204.213 required that since leaving their home country, the applicant had not resided for a continuous period of at least seven days in a country in which they could have sought and obtained effective protection. Repeal of these clauses removes the '7 day rule' from these visa subclasses. Subclass 447 and Subclass 451 visas allowed for temporary resettlement in Australia for persons who cannot satisfy the '7 day rule'. As this item also repeals Subclass 447 and 451 visas, this clause as it relates to humanitarian visa applicants has become redundant. Following the amendments, an applicant is now eligible for Subclass 200 (Refugee), 202 (Global Special Humanitarian) and 204 (Woman at risk) visas regardless of whether, since leaving their home country, they have resided for a continuous period of seven days or more in a country in which they could have sought and obtained effective protection.

Parts 447 and 451

Parts 447 and 451, containing Subclass 447 (Secondary Movement Offshore Entry (Temporary)) and Subclass 451 (Secondary Movement Relocation (Temporary)) visas, have been repealed by this table. Subclass 447 and Subclass 451 visas allowed for temporary resettlement in Australia for persons who could not satisfy the '7 day rule' formerly in Subclass 200 (Refugee), 202 (Global Special Humanitarian) and 204 (Woman at risk) visas. Subclass 447 visas were granted to offshore entry persons while to be eligible a Subclass 451 visa, the applicant must not have been an offshore entry person. These temporary Humanitarian visas are repealed in order to provide certainty of outcome and access to the full range of settlement services to people granted an offshore Humanitarian visa.

Part 695

Part 695, containing Subclass 695 (Return Pending) visas (RPVs) has been repealed by this table. RPVs were generally granted to Subclass 447 (Secondary Movement Offshore Entry (Temporary)), Subclass 451 (Secondary Movement Relocation (Temporary)) and Subclass 785 (Temporary Protection) visa holders whose application for a Protection (Class XA) visa had been refused by the Minister if they:

- had not held a substantive visa other than a Subclass 447, 451 or 785 visa;
- met character requirements; and
- had not obtained a Subclass 447, 451 or 785 visa through concealment or misrepresentation of facts.

RPVs allowed holders to remain in Australia for 18 months from the later of either the date of refusal of their Protection (Class XA) visa or the date of grant of the RPV. As Subclass 447, 451 and 785 visas have been repealed by this item, there will no longer be persons eligible for an RPV so they have also been repealed.

Part 785

Part 785, containing Subclass 785 (Temporary Protection) visas (TPVs), has been repealed by this table. TPVs were generally granted to persons in Australia found to be owed protection obligations but who last entered Australia without a visa that was in effect. These persons must have held the TPV for a continuous period of at least 30 months before they could satisfy the time of decision criteria for grant of a permanent Protection visa which is a Subclass 866 (Protection) visa, unless the Minister specified a shorter period in relation to the applicant. In addition, persons in Australia who held a visa that was in effect who were found to be owed protection obligations, would have been granted a Subclass 785 visa and not a Subclass 866 visa if:

- since last entering Australia they held a TPV and since leaving their home country they had resided for at least seven days in a country in which the person could have sought and obtained protection;
- they had in the previous four years been convicted of an offence against the law of the Commonwealth or a State or Territory for which the maximum penalty in imprisonment for at least 12 months; or
- on their last entry to Australia, they used a visa that was counterfeit or fraudulently obtained.

The effect of repealing Subclass 785 visas is that all persons in Australia who are found to be owed protection obligations will be granted a Subclass 866 visa. This eliminates the uncertainty that holders of Subclass 785 visas faced due to the temporary nature of their visas. It also ensures that all persons found to be owed protection obligations have access to the full range of settlement services to enable them to more quickly settle, integrate and positively contribute to the Australian community.

Clauses 866.212 and 866.213

Clauses 866.212 and 866.213 are repealed by this table. Clause 866.212 was a criterion to be satisfied at time of application for a Subclass 866 (Protection) visa by a person who claimed to be a person to whom Australia had protection obligations under the Refugees Convention. Clause 866.213 was a criterion to be satisfied at time of application for a Subclass 866 visa by a person who claimed to be a member of the same family unit as a person who made specific claims under the Refugees Convention and was an applicant for a Protection (Class XA) visa. For persons seeking to satisfy clause 866.212, subclause 866.212(1) required applicants to be immigration cleared and meet the requirements of either subclause (2), (3) or (4). Persons seeking to satisfy clause 866.213 need only have satisfied subclause 866.212(2), (3) or (4). Removal of these clauses ensures that all persons found to be owed a protection obligation and members of their same family unit, will be granted a Subclass 866 visa.

Clause 866.214

Clause 866.214 is repealed by this table. Clause 866.214 was a criterion to be satisfied at time of application by all applicants for a Subclass 866 (Protection) visa. It provided that an applicant must not have held a Subclass 447 (Secondary Movement Offshore Entry (Temporary)) visa since last entering Australia, unless the Minister waived the requirement having been satisfied that it was in the public interest to do so. As this table repeals Subclass 447, clause 866.214 has also been repealed. This provision was also redundant as the

intention is to resolve the status of current and former holders of a Subclass 447 visa through grant of a Resolution of Status (Class CD) visa rather than a Protection (Class XA) visa so as to ensure that it is not necessary that the Minister make an assessment as to whether Australia owes the person protection obligations under the Refugees Convention.

Clause 866.215

Clause 866.215 is repealed by this table. Clause 866.215 was a criterion to be satisfied at time of application for all applicants for a Subclass 866 (Protection) visa. It provided that if the applicant had held a Subclass 785 (Temporary Protection) visa since last entering Australia, they have not, since last leaving their home country, resided for a continuous period of 7 days in a country in which they could have sought and obtained effective protection, unless the Minister believed that it was in the public interest for them to be granted a Subclass 866 visa. As this table also repeals Subclass 785, this clause as it relates to TPVs is redundant. In addition, the effect of this amendment is that an applicant will be eligible for a Subclass 866 (Protection) visa regardless of whether since leaving their home country, they have resided for a continuous period of seven days or more in a country in which they could have sought and obtained effective protection.

Clause 866.222A and 866.222B

Clauses 866.222A and 866.222B are repealed by this table. Clause 866.222A provided that for a person who has made specific claims to be a person to whom Australia has protection obligations under the Refugees Convention, that person must not have been convicted of an offence against the law of the Commonwealth, a State or Territory for which the maximum penalty is at least 12 months. Clause 866.222B was the same provision as it relates to members of the same family unit of a person who has made specific claims to be a person to whom Australia has protection obligations under the Refugees Convention. Other amendments made in this table ensure that applicants do not need to have held another visa before being eligible for a Subclass 866 (Protection) visa and all applicants who are found to be owed protection obligations will be eligible for grant of a Subclass 866 visa in the first instance. As a result, clauses 866.222A and 866.222B are redundant and have been repealed.

Clause 866.228

Clause 866.228 is repealed by this table. Clause 866.228 was a criterion to be satisfied at time of decision by all applicants for a Subclass 866 (Protection) visa. It provided that if the applicant held a Subclass 785 (Temporary Protection) visa, they must have held that visa for a continuous period of 30 months or a shorter period specified by the Minister. This provision is redundant as the intention is to resolve the status of current and former holders of a Subclass 785 (Temporary Protection) visa through the grant of a Resolution of Status (Class CD) visa rather than a Protection (Class XA) visa so as to ensure that it is not necessary that the Minister make an assessment as to whether Australia owes the person protection obligations under the Refugees Convention.

Clause 866.228A

Clause 866.228A is repealed by this table. Clause 866.228A was a criterion to be satisfied at time of decision for all applicants for a Subclass 866 (Protection) visa. It provided that if the applicant held a Subclass 451 (Secondary Movement Relocation (Temporary)) visa, the

applicant had held that visa for a continuous period of 54 months or a shorter period specified by the Minister. This provision was redundant as the intention is to resolve the status of current and former holders of a Subclass 451 (Secondary Movement Relocation (Temporary)) visa through the grant of a Resolution of Status (Class CD) visa rather than a Protection (Class XA) visa so as to ensure that it is not necessary that the Minister make an assessment as to whether Australia owes the person protection obligations under the Refugees Convention.

Clause 866.229

Clause 866.229 is repealed by this table. Clause 866.229 was a criterion to be satisfied at time of decision for all applicants for a Subclass 866 (Protection) visa. It provided that if the applicant had been offered a temporary stay in Australia by the Australian Government for the purpose of a Temporary (Humanitarian Concern) (Class UO) visa, the offer must have been made more than 30 months before the time of decision, or a shorter period specified by the Minister. This amendment provides that a person to whom the Minister is satisfied Australia owes protection obligations under the Refugees Convention is eligible for grant of a permanent protection visa in the form of a Subclass 866 (Protection) visa, without a requirement to hold a Class UO visa for a specified period of time.