EXPLANATORY STATEMENT

Select Legislative Instrument 2009 No. 375

Issued by the Minister for Immigration and Citizenship

Migration Act 1958

Migration Amendment Regulations 2009 (No. 15)

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 make changes necessary to ensure the intended operation of immigration policy.

The purpose of the Regulations is to amend the Principal Regulations to:

- to ensure that the issuing of a refund of the second instalment of the visa application charge (VAC) is limited to visa classes that only require payment of the second visa application charge if the applicant does not have functional English at time of decision;

- provide that an applicant for an onshore General Skilled Migration visa (GSM visa) subclass must have a suitable skills assessment to satisfy the Schedule 1 requirement for the prescribed visa subclasses (Schedule 849 to the Principal Regulations refers); and

- provide that an applicant for an onshore GSM visa who nominates an occupation which is a identified "trade occupation" specified by the Minister for Immigration and Citizenship in an instrument in writing, would be required to obtain a new skills assessment after 1 January 2010 (Schedule 845 to the Regulations refers).

Details of the Regulations are set out in the Attachment B.

The Act specifies no conditions that need to be satisfied before the power to make the Regulations may be exercised.

The amendments relating to the refund of the second instalment of the VAC would commence on 21 December 2009.

The amendments relating to the skills assessment for a GSM visa would commence on 1 January 2010.

With regard to the amendments made by Schedule 1 to the Regulations, 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.

With regard to the amendments made by Schedule 2 to the Regulations, the Office of Regulation Review in the Productivity Commission has been consulted and advises that the regulations are not likely to have a direct effect, or substantial indirect effect, on business and are not likely to restrict competition.

No consultation was necessary in relation to Schedule 1 because the amendments do not have any potential implications relating to other government departments or agencies, non-government organisations, or any other organisation or interested party.

The Department of Education, Employment and Workplace Relations, specifically Trades Recognition Australia was consulted in relation to Schedule 2.

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.

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(3) of the Act , which provides that the regulations may prescribe criteria for a 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 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 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
- paragraph 504(1)(b) of the Act which provides that regulations may make provision for the remission, refund or waiver of fees of a kind referred to in paragraph 504(1)(a) of the Act or for exempting persons from the payment of such fees.

ATTACHMENT B

Details of the *Migration Amendment Regulations 2009 (No. 15)*

Regulation 1 – Name of Regulations

This regulation provides that the title of the Regulations is the *Migration Amendment Regulations 2009 (No. 15)*

Regulation 2 – Commencement

Subregulation 2(a) provides that regulations 1 to 3 and Schedule 1 commence on 21 December 2009.

Subregulation 2(b) provides that the amendments proposed in Schedule 2 commence on 1 January 2010.

Regulation 3 – Amendment of *Migration Regulations 1994*

Subregulation 3(1) provides that Schedule 1 amends the *Migration Regulations 1994* (the Principal Regulations).

Paragraph 3(2)(a) provides that the amendments made by Schedule 1 would apply in relation to a request for a refund of the second instalment of the VAC:

- made before 21 December 2009; and
- for which a decision had not been made before 21 December 2009.

Paragraph 3(2)(b) provides that the amendments made by Schedule 1 would apply to a request for a refund of the second instalment of the VAC made on or after 21 December 2009.

Regulation 4 – Amendment of *Migration Regulations 1994*

Subregulation 4(1) provides that Schedule 2 amends the Principal Regulations.

Subregulation 4(2) provides that the amendments made by Schedule 2 apply in relation to an application for a visa made on or after 1 January 2010.

Schedule 1 – Amendments relating to refund of second instalment of visa application charge

Item [1] – Paragraph 2.12H(2)(f), (g), (h) and (i)

This item substitutes paragraphs 2.12H(2)(f), (g), (h) and (i) with new paragraph 2.12H(2)(f) in Part 2 in the Principal Regulations.

New paragraph 2.12H(2)(f) provides that the second instalment of the VAC must have been paid under a provision of Schedule 1 of the *Migration Regulations 1994* specified in an instrument in writing made by the Minister for the purposes of this paragraph and where one of the circumstances in subparagraphs 2.12H(f)(i), (ii) or (iii) are met.

The effect of new paragraph 2.12H(2)(f) is to limit the issuing of a refund of the second instalment of VAC to visa classes that only require payment of the second visa application charge if the applicant does not have functional English at time of decision.

New subparagraphs 2.12H(2)(f)(i), (ii), (iii) and (iv) prescribes the circumstances under which a refund of the second visa application charge must be paid by the Minister.

The effect of subparagraph 2.12H(2)(f)(i) is that where a visa applicant dies before commencing a course of English language tuition, to which the applicant was entitled under section 4C of the *Immigration Education Act 1971*, and paid the second instalment under a provision of Schedule 1 as specified by the Minister in an instrument made for the purposes of paragraph 2.12H(2)(f), the Minister must refund the second instalment of the VAC.

The effect of new subparagraph 2.12H(2)(f)(ii) is that where the visa granted is later cancelled before the applicant commences a course of English language tuition, to which the applicant is entitled under section 4C of the *Immigration Education Act 1971*, and paid the second instalment under a provision of Schedule 1 as specified by the Minister in an instrument made for the purposes of paragraph 2.12H(2)(f) the Minister must refund the amount paid by way of a second instalment of the VAC.

The effect of new subparagraph 2.12H(2)(f)(iii) is that where the visa is granted and ceases to have effect before the applicant commences a course of English language tuition, to which the applicant is entitled under section 4C of the *Immigration Education Act 1971*, and paid the second instalment under a provision of Schedule 1 as specified by the Minister in an instrument made for the purposes of 2.12H(2)(f)the Minister must refund the amount paid by way of a second instalment of the VAC.

The effect of new subparagraph 2.12H(2)(f)(iv) is that the Minister must refund the amount paid by way of a second instalment of the VAC where the Commonwealth's obligation to provide, or arrange the provision of, English language tuition to a visa applicant ceases by operation of paragraph 4D(1)(a) of the *Immigration Education Act 1971*, and paid the second instalment under a provision of Schedule 1 as specified by the Minister in an instrument made for the purposes of 2.12H(2)(f) without the applicant receiving any English language tuition.

Item 2 – Subregulation 2.12H(2A)

This item substitutes the reference to paragraph 2.12H(2)(h) with subparagraph (2)(f)(iii) in subregulation 2.12H(2A) of Part 2 to the Principal Regulations.

This item is a consequential amendment to item 1, which substitutes paragraph 2.12H(2)(h) with subparagraph 2.12H(2)(f)(iii).

Schedule 2 – Amendments relating to skills

Item [1] – Schedule 1, after paragraph 1136(3)(b)

This item inserts a new paragraphs 1136(3)(ba) and (bb) in item 1136 of Schedule 1 to the Principal Regulations.

New paragraph 1136(3)(ba) prescribes a new validity requirement, which provides that an applicant for a Skilled (Residence) (Class VB) visa must have had their skills assessed by the relevant assessing authority as suitable for the applicant's nominated skilled occupation.

New subparagraph 1136(3)(ba)(i) provides that the new validity requirement applies to an applicant who is not seeking to satisfy the criteria for the grant of a Subclass 887 (Skilled – Regional) visa.

New subparagraph 1136(3)(ba)(ii) provides that the new validity requirement does not apply to an applicant who has nominated a skilled occupation which has been specified by the Minister in an instrument in writing for paragraph 1136(3)(bb).

The effect of the new paragraph is to provide that an applicant who is seeking the grant of either a Subclass 885 (Skilled – Independent) visa or a Subclass 886 (Skilled – Sponsored) visa, who nominates an occupation specified by the Minister in an instrument in writing for paragraph 1136(3)(bb) will be required to have had their skills assessed by the relevant assessing authority as suitable for the applicant's nominated skilled occupation.

The new paragraph provides an exception for an applicant who is seeking the criteria for the grant of a Subclass 887 (Skilled – Regional) visa. Currently applicants seeking the grant of a Subclass 887 (Skilled – Regional) visa are not required to have their skills assessed by the relevant assessing authority as suitable. This is because it is a validity requirement for an applicant seeking the grant of a Subclass 887 (Skilled – Regional) visa to be the holder of either a Subclass 475 (Skilled – Regional Sponsored) visa or a Subclass 487 (Skilled – Regional Sponsored). Both the Subclass 475 (Skilled – Regional Sponsored) visa and the Subclass 487 (Skilled – Regional Sponsored) visa, require an applicant to have had their skills assessed by the relevant assessing authority as suitable for the applicant's nominated skilled occupation to be eligible for the grant of the visa.

New paragraph 1136(3)(bb) prescribes a new validity requirement that an applicant who nominates a skilled occupation, which is specified by the Minister in an instrument in writing for the purposes of this paragraph must have been assessed by the relevant assessing authority, on or after 1 January 2010 as suitable for the applicant's nominated skilled occupation.

New subparagraph 1136(3)(bb)(i) provides that the new validity requirement applies to an applicant who is not seeking to satisfy the criteria for the grant of a Subclass 887 (Skilled – Regional) visa.

New subparagraph 1136(3)(bb)(ii) provides that the new validity requirement applies to an applicant who nominates a skilled occupation, which is specified by the Minister in an instrument in writing for the paragraph.

These amendments provide that all applicants, with the exception of an applicant for a Subclass 887 (Skilled – Regional) visa, have been assessed as holding suitable skills for the nominated skilled occupation prior to lodging an application for a Skilled (Residence) (Class VB) visa. This would ensure that a consistent standard of skills and competencies are held by all applicants for a Skilled (Residence) (Class VB) visa. The amendments would also provide that applicants, who nominate a skilled occupation specified by the Minister in an

instrument in writing, must have had their skills assessed as suitable by the relevant assessing authority on or after 1 January 2010.

Item [2] – Schedule 1, after paragraph 1229(3)(a)

This item inserts new paragraphs 1229(3)(aa) and (ab) in item 1229 of Schedule 1 to the Principal Regulations.

New paragraph 1229(3)(aa) prescribes a new validity requirement, which provides an applicant for a Skilled (Provisional) (Class VC) visa must have had their skills assessed by the relevant assessing authority as suitable for the applicant's nominated skilled occupation.

New subparagraph 1229(3)(aa)(i) provides that the new validity requirement applies to an applicant who is not seeking to satisfy the criteria for the grant of a Subclass 485 (Skilled – Graduate) visa.

New subparagraph 1229(3)(aa)(ii) provides that the new validity requirement does not apply to an applicant who has nominated a skilled occupation which has been specified by the Minister in an instrument in writing for paragraph 1229(3)(ab).

The effect of the new paragraph is to provide that an applicant who is seeking to satisfy the criteria for the grant of a Subclass 487 (Skilled – Regional Sponsored) visa who nominates an occupation specified by the Minister in an instrument in writing for paragraph 1229(3)(ab) will be required to have had their skills assessed by the relevant assessing authority as suitable for the applicant's nominated skilled occupation. The exception to the new validity requirement is intended to allow applicants seeking the grant of a Subclass 485 (Skilled – Graduate) visa adequate time to meet the relevant criteria for a permanent GSM visa.

New paragraph 1229(3)(ab) prescribes that an applicant who nominates a skilled occupation, which is specified by the Minister in an instrument in writing for the purposes of this paragraph must have been assessed by the relevant assessing authority, on or after 1 January 2010 as suitable for the applicant's nominated skilled occupation.

New subparagraph 1229(3)(ab)(i) provides that the new validity requirement applies to an applicant who is not seeking to satisfy the criteria for the grant of a Subclass 485 (Skilled – Graduate) visa.

New subparagraph 1229(3)(ab)(ii) provides that the new validity requirement applies to an applicant who nominates a skilled occupation, which is specified by the Minister in an instrument in writing for the paragraph.

These amendments provide that all applicants, with the exception of an applicant for a Subclass 485 (Skilled – Graduate) visa must have been assessed as holding suitable skills for the nominated skilled occupation prior to lodging an application for a Skilled (Provisional) (Class VC) visa. This would ensure that a consistent standard of skills and competencies are held by all applicants for a Skilled (Provisional) (Class VC) visa. These amendments would also provide that applicants who nominate a skilled occupation specified by the Minister in an instrument in writing, must have had their skills assessed as suitable by the relevant assessing authority on or after 1 January 2010.

Item [3] – Schedule 2, clause 175.211

This item substitutes clause 175.211 with new clause 175.211 in Part 175 of Schedule 2 to the Principal Regulations.

New subclause 175.211(1) provides that in circumstances where the applicant has nominated a skilled occupation which is specified by the Minister in an instrument in writing for this subclause, the applicant must have been employed for at least 12 months in the period of 24 months immediately prior to the day on which the application was made.

This amendment provides that applicants who nominate a skilled occupation, which has been specified by the Minister, must have been employed in the nominated skilled occupation for at least 12 months in the preceding 24 month period prior to making an application for a Subclass 175 (Skilled – Independent) visa. This will ensure that applicants for a Subclass 175 (Skilled – Independent) visa, who have nominated a specified skilled occupation hold relevant up-to-date practical experience in their nominated occupation.

New subclause 175.211(2) provides that an applicant who has not nominated a skilled occupation described in subclause 175.211(1) must have satisfied either of the following:

- been employed for at least 12 months in the period of 24 months immediately prior to the day on which the application was made; or
- satisfied the Australian study requirement in the period of six months ending immediately prior to the day on which the application was made; and
- each degree, diploma or trade qualification used to satisfy the Australian study requirement is closely related to the applicant's nominated skilled occupation.

This amendment preserves the current requirement for an applicant for a Subclass 175 (Skilled – Independent) visa to have either been employed for 12 months in the preceding 24 month period prior to lodging an application or to have satisfied the Australian study requirement, using a degree, diploma or trade qualification, which is closely related to the applicant's skilled nominated occupation, in the six months prior to lodging an application.

Item [4] – Schedule 2, clause 176.211

This item substitutes clause 176.211 with new clause 176.211 in Part 176 of Schedule 2 to the Principal Regulations.

New subclause 176.211(1) provides that in circumstances where the applicant has nominated a skilled occupation which is specified by the Minister in an instrument in writing for this subclause, the applicant must have been employed for at least 12 months in the period of 24 months immediately prior to the day on which the application was made.

This amendment provides that applicants who nominate a prescribed skilled occupation, which has been specified by the Minister, must have been employed in the nominated skilled occupation for at least 12 months in the preceding 24 month period prior to making an application for a Subclass 176 (Skilled – Sponsored) visa. This will ensure that applicants for a Subclass 176 (Skilled – Sponsored) visa, who have nominated a specified skilled occupation hold relevant up-to-date practical experience in their nominated occupation.

New subclause 176.221(2) provides that an applicant who has not nominated a skilled occupation described in subclause 176.211(1) must have satisfied either of the following:

- been employed for at least 12 months in the period of 24 months immediately prior to the day on which the application was made; or
- satisfied the Australian study requirement in the period of six months ending immediately prior to the day on which the application was made; and
- each degree, diploma or trade qualification used to satisfy the Australian study requirement is closely related to the applicant's nominated skilled occupation.

This amendment preserves the current requirement for an applicant for a Subclass 176 (Skilled – Sponsored) visa to have either been employed for 12 months in the preceding 24 month period prior to lodging an application or to have satisfied the Australian study requirement, using a degree, diploma or trade qualification, which is closely related to the applicant's skilled nominated occupation, in the six months prior to lodging an application.

Item [5] – Schedule 2, clause 475.211

This item substitutes clause 475.211 with new clause 475.211 in Part 475 of Schedule 2 to the Principal Regulations.

New subclause 475.211(1) provides that in circumstances where the applicant has nominated a skilled occupation which is specified by the minister in an instrument in writing for this subclause, the applicant must have been employed for at least 12 months in the period of 24 months immediately prior to the day on which the application was made.

This amendment provides that applicants who nominate a prescribed skilled occupation, which has been specified by the Minister, must have been employed in the nominated skilled occupation for at least 12 months in the preceding 24 month period prior to making an application for a Subclass 475 (Skilled – Regional Sponsored) visa. This will ensure that applicants for a Subclass 475 (Skilled – Regional Sponsored) visa, who have nominated a specified skilled occupation, hold relevant up-to-date practical experience in their nominated occupation.

New subclause 475.211(2) provides that an applicant who has not nominated a skilled occupation described in subclause 475.211(1) must have satisfied either of the following:

- been employed for at least 12 months in the period of 24 months immediately prior to the day on which the application was made; or
- satisfied the Australian study requirement in the period of six months ending immediately prior to the day on which the application was made; and
- each degree, diploma or trade qualification used to satisfy the Australian study requirement is closely related to the applicant's nominated skilled occupation.

This amendment preserves the current requirement for an applicant for a Subclass 475 (Skilled – Regional Sponsored) visa to have either been employed for 12 months in the preceding 24 month period prior to lodging an application or to have satisfied the Australian study requirement, using a degree, diploma or trade qualification, which is closely related to the applicant's skilled nominated occupation, in the six months prior to lodging an application.

Item [6] – Schedule 2, clause 885.212

This item omits clause 885.212 from Part 885 of Schedule 2 to the Principal Regulations.

This amendment is consequential to the amendment proposed by item [1]. This clause 885.212 is no longer needed as the applicant must have been assessed as holding suitable skills for the nominated skilled occupation in order to make a valid application for a Skilled (Residence) (Class VB) visa.

Item [7] – Schedule 2, clause 886.212

This item omits clause 886.212 from Part 886 of Schedule 2 to the Principal Regulations.

This amendment is consequential to the amendment proposed by item [1]. This clause 886.212 is no longer needed as the applicant must have been assessed as holding suitable

skills for the nominated skilled occupation in order to make a valid application for a Skilled (Residence) (Class VB) visa.