

EXPLANATORY STATEMENT

Select Legislative Instrument No. 268, 2013

Issued by the Minister for Immigration and Border Protection

Migration Act 1958

Migration Amendment (AusAID) Regulation 2013

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**.

Provisions in the *Migration Regulations 1994* ('the Principal Regulations') that include reference to the Australian Agency for International Development ('AusAID') support the delivery of the Australia Awards, which are part of the Australian Aid Programme. The Australia Awards are international scholarships and fellowships, funded by the Australian Government, that provide opportunities to undertake study, research and professional development. Students obtain visas to come to Australia as part of this scheme.

The purpose of the *Migration Amendment (AusAID) Regulation 2013* ('the Regulation') is to amend the Principal Regulations to reflect that on 18 September 2013, the Administrative Arrangements Order listed international development and aid, formally a function of AusAID, as being a function of the Department of Foreign Affairs and Trade ('DFAT'). On 1 November 2013, AusAID ceased to exist as an executive agency.

The Regulation amends the Principal Regulations to include new regulation 1.04AA that provides how references to AusAID are to be read, namely that:

- all references to AusAID are taken to also include reference to the DFAT equivalent term; and/or
- all references to AusAID may be, but are not required to be, treated as references to the DFAT equivalent term.

The new regulation 1.04AA also acknowledges that the process of AusAID's integration into DFAT began on 18 September 2013, with AusAID ceasing to exist as an executive agency on 1 November 2013. Accordingly, new regulation 1.04AA applies on and after 18 September 2013 and a particular reference to AusAID may be treated as a reference to AusAID, where the reference relates to a time before the process of integration started, or to DFAT, where the reference relates to a time during or after the process of integration.

Details of the Regulation are set out in **Attachment C**.

A Statement of Compatibility with Human Rights has been completed for the Regulation, in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The Statement's

overall assessment is that the Regulation is compatible with human rights because it advances the protection of human rights and, to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate. A copy of the Statement is at **Attachment B**.

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

The Office of Best Practice Regulation (the OBPR) has been consulted and advises that the changes do not have a regulatory impact on business or the not-for-profit sector. The OBPR consultation reference is 2013/16183. No further consultation was undertaken as the changes are of a minor nature and do not substantially alter existing arrangements.

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulation commences on 14 December 2013.

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, the following provisions may apply:

- subsections 29(2) and 29(3) of the Act relevantly provide that the regulations prescribe 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 there are to be prescribed classes of visas;
- subsection 31(3) of the Act 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, 37A or 38B but not by sections 33, 34, 35, 38 or 38A of the Act);
- 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;
- subsection 45(1) of the Act provides that a non-citizen who wants a visa must apply for a visa of a particular class; and
- paragraph 46(2)(a) of the Act relevantly provides that, subject to subsection 46(2A), 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.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Amendments to reflect AusAID being integrated into the Department of Foreign Affairs and Trade

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

It is to amend the *Migration Regulations 1994* (the Principal Regulations) to include new Regulation 1.04AA that would provide how references to the Australian Agency for International Development (AusAID) are to be read, namely that:

- all references to AusAID are taken to also include reference to the Department of Foreign Affairs and Trade (DFAT) equivalent term; and/or
- all references to AusAID may be, but are not required to be, treated as references to the DFAT equivalent term.

The new regulation 1.04AA applies on and after 18 September 2013 as that is when the process of AusAID's integration into DFAT began. On 1 November 2013, AusAID ceased to exist as an executive agency.

Further, the new regulation 1.04AA would provide that a particular reference to AusAID may be treated as a reference to AusAID, where the reference relates to a time before the process of integration started. A particular reference to AusAID may be treated as a reference to Foreign Affairs, where the reference relates to a time during or after the process of integration.

Human rights implications

As these amendments are merely technical in nature, they do not engage any of the applicable rights and freedoms contained in the seven core international human rights treaties.

Conclusion

This Legislative Instruments is compatible with human rights as it does not raise any human rights issues.

Details of the Migration Amendment (AusAID) Regulation 2013

Section 1 – Name of Regulation

This section provides that the title of the Regulation is the *Migration Amendment (AusAID) Regulation 2013* (the Regulation).

Section 2 – Commencement

This section provides that the Regulation commences on 14 December 2013.

The purpose of this section is to provide for when the amendments made by the Regulation commence.

Section 3 – Authority

This section provides that this Regulation is made under the *Migration Act 1958* ('the Act').

The purpose of this section is to set out the Act under which the Regulation is made.

Section 4 – Schedule(s)

This section provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

The purpose of this section is to provide for how the amendments in this regulation operate.

Schedule 1 – Amendments

Item [1] – regulation 1.03 (at the end of the definition of AusAID)

This item inserts a note at the end of the definition of AusAID in regulation 1.03.

The note provides for the definition of AusAID in regulation 1.03 to be read with new regulation 1.04AA. Accordingly, a reference to AusAID as an agency in the *Migration Regulations 1994* ('the Principal Regulations') is taken to include reference to Foreign Affairs. 'Foreign Affairs' is defined in regulation 1.03 of the Principal Regulations as the Department of Foreign Affairs and Trade. Further, a reference to AusAID as an agency may be treated as a reference to AusAID, where the reference relates to a time before the process of integration started on 18 September 2013, or to Foreign Affairs, where the reference relates to a time during or after the process of integration.

The effect of the amendment is that the provisions in the Principal Regulations that reference AusAID as an agency can continue to support the delivery of the Australia Awards despite the Machinery of Government change ('MoG change') that saw AusAID integrated into DFAT. The Australia Awards are international scholarships and fellowships funded by the

Australian Government that provide opportunities to undertake study, research and professional development. The amendments enable persons to continue relying on references to AusAID as an agency in their visa applications or visa provisions as those references are now expanded to include reference to Foreign Affairs. The seamless operation of the Australia Awards is important as students obtain visas to come to Australia as part of the Australia Awards scheme.

The purpose of this amendment is to ensure that persons relying on references to AusAID as an agency are not disadvantaged by the MoG change that started on 18 September 2013.

Item [2] – regulation 1.03 (at the end of the definition of *AusAID Minister*)

This item inserts a note at the end of the definition of AusAID Minister in regulation 1.03.

The note provides for the definition of AusAID Minister in regulation 1.03 to be read with new regulation 1.04AA. Accordingly, a reference to the AusAID Minister in the Principal Regulations is taken to include reference to the Foreign Minister. ‘Foreign Minister’ is defined in regulation 1.03 of the Principal Regulations as the Minister for Foreign Affairs. Furthermore, a reference to the AusAID Minister may be treated as a reference to the AusAID Minister, where the reference relates to a time before the process of integration started on 18 September 2013, or to the Foreign Minister, where the reference relates to a time during or after the process of integration.

The effect of the amendment is that the provisions in the Principal Regulations that reference the AusAID Minister can continue to support the delivery of the Australia Awards. For example, clause 576.228 in Schedule 2 of the Principal Regulations relevantly provides that an applicant must have the support of the AusAID Minister for the grant of the Subclass 576 (AusAID or Defence Sector) visa. A person whose application for a Subclass 576 (AusAID or Defence Sector) visa was made, but not finally determined, before the Regulation commences, may be prevented from the grant of the visa by the MoG change. This amendment intends for the MoG change to not prevent the grant of the visa where the person would otherwise satisfy the criteria and this is achieved by expanding the meaning of AusAID Minister to also reference the Foreign Minister.

The purpose of this amendment is to ensure that persons relying on references to ‘AusAID Minister’, either in their criteria for the grant of a visa or as part of their visa provisions, are not disadvantaged by the MoG change that started on 18 September 2013.

Item [3] – regulation 1.03 (at the end of the definition of *AusAID recipient*)

This item inserts a note at the end of the definition of AusAID recipient in regulation 1.03.

The note provides for the definition of AusAID recipient in regulation 1.03 to be read with new regulation 1.04AA. Accordingly, a reference to AusAID recipient in the Principal Regulations may be treated as a reference to AusAID, where the reference relates to a time before the process of integration started on 18 September 2013, or a reference to Foreign Affairs, where the reference relates to a time during or after the process of integration. The effect of this amendment is that persons who firstly, rely on references that contain AusAID recipient as part of the description and secondly, have made their visa application but have

not had their application finally determined before this amendment commences, can continue to rely on those references because they may be treated as a reference to Foreign Affairs.

The purpose of this amendment is to ensure that persons relying on references that contain AusAID recipient as part of the description are not disadvantaged by the MoG change that started on 18 September 2013.

Item [4] – regulation 1.03 (at the end of the definition of *AusAID student*)

This item inserts a note at the end of the definition of AusAID student in regulation 1.03.

The note provides for the definition of AusAID student in regulation 1.03 to be read with new regulation 1.04AA. Accordingly, a reference to AusAID student in the Principal Regulations may be treated as a reference to AusAID, where the reference relates to a time before the process of integration started on 18 September 2013, or a reference to Foreign Affairs, where the reference relates to a time during or after the process of integration. The effect of this amendment is that persons who firstly, rely on references that contain AusAID student as part of the description and secondly, have made their visa application but have not had their application finally determined before this amendment commences, can continue to rely on those references because they may be treated as a reference to Foreign Affairs.

The purpose of this amendment is to ensure that persons relying on references that contain AusAID student as part of the description are not disadvantaged by the MoG change that started on 18 September 2013.

Item [5] – at the end of subregulation 1.04A(1)

This item inserts a note at the end of subregulation 1.04A(1).

The note provides for subregulation 1.04A(1), which provides the definition of AusAID student visa, to be read with new regulation 1.04AA. Accordingly, a reference to AusAID student visa in the Principal Regulations may be treated as a reference to AusAID, where the reference relates to a time before the process of integration started on 18 September 2013, or a reference to Foreign Affairs, where the reference relates to a time during or after the process of integration. The effect of this amendment is that persons who firstly, rely on references that contain AusAID as part of the description and secondly, have made their visa application but have not had their application finally determined before this amendment commences, can continue to rely on those references because they may be treated as a reference to Foreign Affairs.

The purpose of this amendment is to ensure that persons relying on references that contain AusAID as part of the description are not disadvantaged by the MoG change that started on 18 September 2013.

Item [6] – at the end of subregulation 1.04A(2)

This item inserts a note at the end of subregulation 1.04A(2).

The note provides for subregulation 1.04A(2), which provides the definition of AusAID recipient, to be read with new regulation 1.04AA. Accordingly, a reference to AusAID recipient in the Principal Regulations may be treated as a reference to AusAID, where the

reference relates to a time before the process of integration started on 18 September 2013, or a reference to Foreign Affairs, where the reference relates to a time during or after the process of integration. The effect of the amendment is that persons who firstly, rely on references that contain AusAID recipient as part of the description and secondly, have made their visa application but have not had their application finally determined before this amendment commences, can continue to rely on those references because they may be treated as a reference to Foreign Affairs.

The purpose of this amendment is to ensure that persons relying on references that contain AusAID recipient as part of the description are not disadvantaged by the MoG change that started on 18 September 2013.

Item [7] – after regulation 1.04A(3)

This item inserts a note at the end of subregulation 1.04A(3).

The note provides for subregulation 1.04A(3), which provides the definition of AusAID student, to be read with new regulation 1.04AA. Accordingly, a reference to AusAID student in the Principal Regulations may be treated as a reference to AusAID, where the reference relates to a time before the process of integration started on 18 September 2013, or a reference to Foreign Affairs, where the reference relates to a time during or after the process of integration. The effect of the amendment is that persons who firstly, rely on references that contain AusAID student as part of the description and secondly, have made their visa application but have not had their application finally determined before this amendment commences, can continue to rely on those references because they may be treated as a reference to Foreign Affairs.

The purpose of this amendment is to ensure that persons relying on references that contain AusAID student as part of the description are not disadvantaged by the MoG change that started on 18 September 2013.

Item [8] – after regulation 1.04A

This item inserts new regulation 1.04AA titled ‘References to AusAID’.

New regulation 1.04AA provides that:

- In the Principal Regulations, a reference to AusAID, in the capacity of an agency, is taken to include a reference to Foreign Affairs and may be, but is not required to be, treated as a reference to Foreign Affairs. A reference to AusAID may be treated as a reference to AusAID where the reference relates to a time before the process of AusAID’s integration into DFAT started on 18 September 2013. Alternatively, a reference to AusAID may be treated as a reference to Foreign Affairs because it relates to a time during or after the process of integration.
- In the Principal Regulations, a reference to the AusAID Minister is taken to include a reference to the Foreign Minister and may be, but is not required to be, treated as a reference to the Foreign Minister. A reference to the AusAID Minister may be treated as a reference to the AusAID Minister, where the reference relates to a time before the process of integration started. Alternatively, a reference to the AusAID Minister may

be treated as a reference to the Foreign Minister, where it relates to a time during or after the process of integration.

- In the Principal Regulations, a reference to AusAID in the name of a visa may be, but is not required to be, treated as a reference to Foreign Affairs. A reference to AusAID in the name of a visa may be treated as a reference to AusAID, where the reference relates to a time before the process of integration started, or to Foreign Affairs, where the reference relates to a time during or after the process of integration.
- In the Principal Regulations, any other reference to AusAID, as part of a description, may be, but is not required to be, treated as a reference to Foreign Affairs. A reference to AusAID as part of a description may be treated as a reference to AusAID, where the reference relates to a time before the process of integration started, or to Foreign Affairs, where the reference relates to a time during or after the process of integration.
- New subregulations 1.04AA(1) to (4) apply on and after 18 September 2013.

The effect of this amendment is that all AusAID references in the Principal Regulations are taken to include references to the role of the Foreign Minister and Foreign Affairs as of 18 September 2013, as well as AusAID as it existed prior to 18 September 2013. This ensures the seamless operation of the Australia Awards as persons relying on references to AusAID in their visa applications or visa provisions are not disadvantaged by the MoG change. For example, clause 405.224 in Schedule 2 of the Principal Regulations (which is a criterion for the grant of a Subclass 405 (Investor Retirement) visa) provides: *“If the applicant is an AusAID student or an AusAID recipient, the applicant has the support of the AusAID Minister for the grant of the visa.”*

The effect of this amendment is that if a person applied for a Subclass 405 visa and obtained the support of the AusAID Minister but their application was not decided before the Regulation commences, they would still satisfy the criteria in clause 405.224. This is because references to AusAID student, AusAID recipient and AusAID Minister are now expanded to also reflect the role of the Foreign Minister and DFAT whilst also including references to AusAID as it existed prior to 18 September 2013.

The purpose of this amendment is to ensure that persons relying on AusAID references are not disadvantaged by the MoG change that started on 18 September 2013.