EXPLANATORY STATEMENT

Select Legislative Instrument 2005 No. 275

Issued by the Minister for Immigration
and Multicultural and Indigenous Affairs

Subject - *Migration Act 1958*

Migration Amendment Regulations 2005 (No. 10)

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:

- enable the grant of a Bridging F visa (BVF) to certain non-citizens who are of interest in relation to an offence, or alleged offence, involving people trafficking, sexual servitude or deceptive recruiting and members of their immediate family (Schedule 1);
- make minor amendments to the provisions relating to the Skilled – Independent Regional (Provisional) (Class UX) visa to clarify the policy intention and ensure consistency between the requirements for making a valid application and the criteria for grant of the visa (Schedule 2); and
- align the meaning of "security", as used in the Principal Regulations in respect of provisions relating to the grant and cancellation of visas, with the definition of "security" in section 4 of the *Australian Security Intelligence Organisation Act 1979* (Schedule 3).

Details of the Regulations are set out in Attachment B.

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

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

The Regulations commence on 1 December 2005.

Transitional provisions clarify which provisions apply to applicants who have applications not finally determined at the time the proposed Regulations will commence.

The Office of Regulation Review (ORR) in the Productivity Commission has been consulted and advises that:

- Schedule 1: The ORR has advised that these regulations are not likely to have a direct effect, or substantial indirect effect, on business and are not likely to restrict competition;
- Schedule 2: The ORR was consulted in relation to amendments to the Principal Regulations which commenced on 1 November 2005 and advised that the regulations were not likely to have a direct effect, or substantial indirect effect, on business and were not likely to restrict competition. The present Regulations make minor amendments to the Principal Regulations which are necessary to clarify the 1 November 2005 amendments and do not substantively change those amendments; and
- Schedule 3: The ORR has advised that these regulations are not likely to have a direct effect, or substantial indirect effect, on business and are not likely to restrict competition.

The following external agencies and other bodies were consulted in relation to the Regulations:

- Schedule 3: The Attorney-General's Department and the Australian Security Intelligence Organisation were consulted in relation to this Schedule.

No other consultations were conducted in relation to the other Schedules to the Regulations, as the amendments were considered not to have relevant implications for any external agencies or other bodies.

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 may prescribe a period during which the holder of a visa may travel to, enter, re-enter and remain in Australia.
- Subsection 29(3) of the Act provides that the regulations may prescribe a period during which the holder of a visa referred to in subsection 29(3) may leave Australia and then travel to and re-enter Australia.
- 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 that 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 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 40(2) of the Act, which provides that without limiting subsection 40(1), the circumstances may be, or may include, that, when the person is granted the visa, the person:
  - is outside Australia; or
  - is in immigration clearance; or
  - has been refused immigration clearance and has not subsequently been immigration cleared; or
  - is in the migration zone and, on last entering Australia, was immigration cleared or bypassed immigration clearance and had not subsequently been immigration cleared.

- 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.
- Paragraph 46(2)(a) of the Act provides that the regulations may prescribe, for the purposes of this subsection, a class of visas for which an application is valid, subject to subsection 46(2A) of the Act.
- Paragraph 46(2)(b) of the Act provides that the regulations may prescribe how an application is to have been validly made.
- Subsection 46(3) of the Act 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.
- Subsection 46(4) of the Act provides that the regulations may prescribe, without limiting subsection 46(3):

  (a) the circumstances that must exist for an application for a visa of a specified class to be a valid application; and
  (b) how an application for a visa of a specified class must be made; and
  (c) where an application for a visa of a specified class must be made; and

(d) where an applicant must be when an application for a visa of a specified class is made.

- Subsection 52(1) of the Act provides that the regulations prescribe the way in which a visa applicant or interested person must communicate with the Minister.
  - Subsection 52(2) of the Act provides that the regulations may prescribe different ways of communicating between a visa applicant, or interested person, and the Minister and the regulations may specify the circumstances when communication is to be in a particular way. For the purposes of this subsection, a 'way of communicating' includes any associated process for authenticating identity.

- Subsection 72(1) of the Act provides that the regulations prescribe a class of persons, who are "eligible non-citizens" for the purposes of the grant of a bridging visa under *Subdivision AF – Bridging visas*.
- Paragraph 116(1)(g) of the Act provides that the regulations may prescribe the grounds for cancellation of a visa under section 116.
- Subsection 116(3) of the Act provides that the regulations may prescribe the circumstances in which the Minister must cancel a visa under subsection 116(1).

The *Migration Regulations 1994* (the Principal Regulations) prescribe matters relating to the entry into, and presence in, Australia of non-citizens, and the departure or deportation from Australia of non-citizens and certain other persons.

ATTACHMENT B

Details of the proposed *Migration Amendment Regulations 2005 (No. 10)*

Regulation 1 – Name of Regulations

This regulation provides that the title of the Regulations is the *Migration Amendment Regulations 2005 (No. 10).*

Regulation 2 – Commencement

This regulation provides for the Regulations to commence on 1 December 2005.

Regulation 3 – Amendment of *Migration Regulations 1994*

This regulation provides that the Principal Regulations are amended as set out in Schedules 1 to 3.

Regulation 4 – Transitional – Schedule 1

This regulation provides that the amendments made by Schedule 1 apply to an application for a visa made before 1 December 2005 and not finally determined (within the meaning of subsection 5(9) of the Act), before 1 December 2005; and an application for a visa made on or after 1 December 2005.

Regulation 5 – Transitional – Schedule 2

This regulation provides that the amendments made by Schedule 2 apply in relation to an application for a visa made on or after 1 December 2005.

This regulation further provides that despite the amendments made by Schedule 2, the Principal Regulations are taken to apply in relation to an application for a visa made, but not finally determined (within the meaning of subsection 5(9) of the Act), before 1 December 2005, as if those amendments had not been made.

Regulation 6 – Transitional – Schedule 3

This regulation provides for transitional application of the amendments made by Schedule 3.

Subregulation 6(1) provides that the amendment made by item 1 of Schedule 3 applies in relation to a visa granted before 1 December 2005 or on or after 1 December 2005.

Subregulation 6(2) provides that the amendment made by item 2 of Schedule 3 applies in relation to an application for a visa made before 1 December 2005 and not finally determined (within the meaning of subsection 5(9) of the Act) before 1 December 2005; and to an application for a visa made on or after 1 December 2005.

Schedule 1 – Amendments relating to Bridging F (Class WF) visas

Item [1] – Subregulation 2.20(1)

This item omits the words "subregulations (2) to (12)" in subregulation 2.20(1) of Part 2 of the Principal Regulations, and inserts the words "subregulations (2) to (12) and (14) and (15)". This amendment is consequential upon the insertion of new subregulations 2.20(14) and 2.20(15) in Part 2 of the Principal Regulations by item [2] of these regulations, below.

Item [2] – After subregulation 2.20(13)

This item inserts new subregulations 2.20(14) and 2.20(15) in Part 2 of the Principal Regulations.

The purpose of the new subregulations is to prescribe further classes of non-citizen as eligible non-citizens under paragraph 72(1)(b) of the Act.

New paragraph 2.20(14)(a) prescribes a non-citizen who is outside Australia and in relation to whom, an officer of the Australian Federal Police, State or Territory police force, or a Commonwealth, State or Territory Director of Public Prosecutions (or similar) has told the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) in writing that the non-citizen is a person of interest in relation to an offence or alleged offence involving people trafficking, sexual servitude or deceptive recruiting. The same officer must also have told DIMIA in writing that arrangements have been made for the care, safety and welfare of the person while they are in Australia for the proposed period of the bridging visa.

New paragraph 2.20(14)(b) prescribes a non-citizen who is outside Australia and who is a member of the immediate family of a non-citizen mentioned in new paragraph 2.20(14)(a), and in relation to whom, an officer of the authority that told DIMIA of the care arrangements in relation to the non-citizen in paragraph 2.20(14)(a) has also told DIMIA in writing that arrangements have been made for the care, safety and welfare of the non-citizen while they are in Australia for the proposed period of the bridging visa.

New paragraph 2.20(15)(a) applies to a non-citizen who is in Australia, who is the subject of a valid Criminal Justice Stay Certificate, and whom the Minister is satisfied has a compelling and compassionate reason for travelling outside Australia. An officer of the Australian Federal Police, State or Territory police force, or a Commonwealth, State or Territory Director of Public Prosecutions (or similar) must have told DIMIA in writing that arrangements have been made for the care, safety and welfare of the non-citizen while they are in Australia for the proposed period of the bridging visa.

New paragraph 2.20(15)(b) prescribes a non-citizen who is a member of the immediate family of a non-citizen mentioned in paragraph 2.20(15)(a), and in relation to whom an officer of the authority that told DIMIA of the care arrangements in relation to the non-citizen in paragraph 2.20(15)(a) has also told DIMIA that arrangements have been made for the care, safety and welfare of the non-citizen while they are in Australia.

Item [3] – After regulation 2.20A

This item inserts new regulation 2.20B in Part 2 of the Principal Regulations, consequential to item [2] above.

New subregulation 2.20B(1) prescribes a Bridging F (Class WF) visa as a prescribed class of visa for the purposes of subsection 46(2) of the Act. The effect of prescribing the visa class for these purposes is that the regulations may provide for an application for the class to be taken to have been validly made.

New subregulation 2.20B(2) provides that, despite regulation 2.07 and Schedule 1 to the Principal Regulations, and as an alternative to item 1306 of Schedule 1 to the Principal Regulations, an application for a Bridging F (Class WF) visa is taken to have been validly made by a non-citizen to whom subregulations 2.20(14) or 2.20(15) apply, or a non-citizen to whom subregulation 2.20(15) would have applied if the non-citizen had not been immigration cleared, if the non-citizen has been given an invitation in writing by the Minister, by one of the methods specified in section 494B of the Act, to apply for the visa, and the non-citizen has indicated in writing to DIMIA within 7 days of when they are taken to have received that invitation that they accept that invitation.

This new regulation allows an application for a Bridging F (Class WF) visa to be taken to have been validly made by an applicant to whom new subregulation 2.20(14) or 2.20(15) applies (or to whom subregulation 2.20(15) would apply if they were not immigration cleared and therefore already an eligible non-citizen) by responding within the appropriate time to an invitation by the Minister to apply for the visa.

Item [4] – Schedule 1, item 1306, at the foot

This item inserts a note at the foot of item 1306 of Schedule 1 to the Principal Regulations.

This note clarifies that subregulation 2.20B(2) provides an alternative process for an application for a Bridging F (Class WF) visa to be taken to have been validly made.

This note draws the reader's attention to the fact that subregulation 2.20B(2) permits a valid application for a Bridging F (Class WF) visa to be made in accordance with that section, notwithstanding the different process specified in Item 1306 of Schedule 1.

Item [5] – Schedule 2, clause 060.222

Item [6] – Schedule 2, clause 060.323

These items insert the words "in Australia" after "welfare of the applicant" in clauses 060.222 and 060.323 in Schedule 2 to the Principal Regulations, respectively.

Clauses 060.222 and 060.323 require the Minister to be satisfied that suitable arrangements have been made for the care, safety and welfare of the applicant for the proposed period of the Bridging F (Class WF) visa while they are in Australia.

These changes are consequential to the changes in item [2] permitting the holder of a Bridging F (Class WF) visa to apply for and be granted the visa while not in Australia. Prior to the changes implemented by these Regulations, there was no prospect for an applicant to be outside Australia and hold a Bridging F (Class WF) visa. Under the amended arrangements, it is possible for an applicant to be outside Australia while holding the visa, and appropriate to limit the obligation to provide for the care, safety and welfare of the applicant to the period while the applicant is in Australia.

Item [7] – Schedule 2, clause 060.411

This item substitutes clause 060.411 in Schedule 2 to the Principal Regulations with new clause 060.411.

New subclause 060.411(1) provides that an applicant to whom subregulation 2.20(14) (see item [2]) applies and who has applied using the application process described by subregulation 2.20B(2) (see item [3]) must be outside Australia when the visa is granted.

New subclause 060.411(2) provides that an applicant to whom subregulation 2.20(15) (see item [2]) applies and who has applied using the application process described by subregulation 2.20B(2) (see item [3]) must be in Australia when the visa is granted.

New subclause 060.411(3) provides that an applicant to whom subregulation 2.20(15) (see item [2]) would apply if he or she had not been immigration cleared and who has applied using the application process described by subregulation 2.20B(2) (see item [3]) must be in Australia when the visa is granted.

New subclause 060.411(4) provides that, in any other case, the applicant must be in Australia when the visa is granted.

These changes are consequential to the changes in items [2] and [3]. Prior to these changes, applicants could only be in Australia. New subclause 060.411(1) permits applicants to whom subregulation 2.20(14) applies, and who apply using the new application process described by subregulation 2.20B(2), to be outside Australia when the visa is granted. New subclause 060.411(2) permits applicants, to whom subregulation 2.20(15) applies and who apply using the new application process described by subregulation 2.20B(2), to be in Australia when the visa is granted. In all other cases, the original provision that the applicant must be in Australia when the visa is granted is preserved. New subclause 060.411(3) permits applicants to whom subregulation 2.20(15) would apply if they were not immigration cleared and who apply using the new application process described by subregulation 2.20B(2) to be in Australia when the visa is granted. New subclause 060.411(4) preserves the former behaviour of this clause by requiring for all other cases that the applicant be in Australia when the visa is granted.

Item [8] – Schedule 2, clause 060.511

This item substitutes clause 060.511 in Schedule 2 to the Principal Regulations with new clause 060.511.

New subclause 060.511(1) provides that a Bridging F (Class WF) visa granted to an applicant to whom the new subregulation 2.20(14) (see item [2]) applies, and who made an application in accordance with new subregulation 2.20B(2) (see item [3]), comes into effect on grant and permits the holder to travel to and enter Australia on one occasion until a date specified by the Minister, and remain in Australia until a date specified by the Minister.

New subclause 060.511(2) provides that a Bridging F (Class WF) visa granted to an applicant to whom the new subregulation 2.20(15) (see item [2]) applies or to whom new subregulation 2.20(15) would apply if they were not immigration cleared, and who made an application in accordance with new subregulation 2.20B(2) (see item [3]), comes into effect on grant and permits the holder to travel to and enter Australia on one occasion and remain in Australia until the earliest of a date specified by the Minister, the date on which the holder is granted a Criminal Justice Stay Visa, or the date on which the holder's criminal justice stay certificate is cancelled.

New subclause 060.511(3) provides that a Bridging F (Class WF) visa granted to an applicant, in any other case, comes into effect on grant and permits the applicant to remain in Australia until the earliest of:

- a date specified by the Minister;

- the end of 30 days after the date of grant;

- where an officer of the Australian Federal Police or a State or Territory police force told DIMIA in writing that the holder was a person of interest in relation to an offence or alleged offence of people trafficking, sexual servitude or deceptive recruiting, until DIMIA is told in writing that the holder is no longer of interest and the Minister gives written notice to the holder under section 494B of the Act that they are no longer a person of interest; or

- where the holder is a member of the immediate family of another person who is a person of interest as above, until DIMIA is told in writing that other person is no longer a person of interest and the Minister gives written notice under section 494B of the Act that the other person is no longer a person of interest.

The purpose of this amendment is to provide for the time a visa is in effect for the two new groups of potential applicants provided for by subregulation 2.20(14) and 2.20(15) and who applied in accordance with the application process in subregulation 2.20B(2). Subclause 060.511(3) is intended to reflect exactly the same terms as were contained by clause 060.511 prior to this amendment.

Item [9] – Schedule 2, after clause 060.612

This item inserts new clause 060.613 in Schedule 2 to the Principal Regulations.

New clause 060.613 provides that, in addition to the conditions specified by clauses 060.611 and 060.612 a Bridging F (Class WF) visa granted to a non-citizen who applied for the visa using the new application process in subregulation 2.20B(2) and who satisfied the secondary criteria for the grant of the visa must have condition 8502 imposed on the visa.

The purpose of this amendment is to ensure that an applicant who meets the secondary criteria and who applied through the new application process cannot travel to Australia in advance of the applicant who meets the primary criteria.

Schedule 2 – Amendments relating to skilled-independent visas

Item [1] – Schedule 1, subparagraph 1218A(5A)(c)(v)

This item substitutes the phrase "the applicant must have been in Australia" in subparagraph 1218A(5A)(c)(v) of Schedule 1 to the Principal Regulations with the phrase "the applicant has been in Australia".

This is a technical amendment to align the wording of the subparagraph with the preceding paragraph 1218A(5A)(c).

Item [2] – Schedule 2, paragraph 495.216(d)

This item substitutes the phrase "the applicant has held" in paragraph 495.216 (d) of Schedule 2 to the Principal Regulations, with the phrase "the applicant has been in Australia as the holder of".

This amendment clarifies the policy intention that the applicant must have been in Australia for six months as the holder of the relevant visa, and ensures consistency between the time of application criteria in clause 495.216 and the visa application validity provisions in subparagraph 1218A(5A)(c)(v) of Schedule 1 to the Principal Regulations.

Item [3] – Schedule 2, clause 495.218

This item substitutes the phrase "subitem 1218A(6) of Schedule 1" in clause 495.218 of Schedule 2 to the Principal Regulations with the phrase "paragraph 1218A(6)(b) of Schedule 1".

This is a technical amendment which ensures that clause 495.218 refers precisely to the relevant requirement in Schedule 1 to the Principal Regulations.

Schedule 3 – Amendments relating to security assessment

Item [1] – Paragraph 2.43(1)(b)

This item substitutes paragraph 2.43(1)(b) in Part 2 of the Principal Regulations with new paragraph 2.43(1)(b).

New paragraph 2.43(1)(b) prescribes, as a ground for cancellation of a visa under paragraph 116(1)(g) of the Act, "that the holder of the visa has been assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security, within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*."

The effect of new paragraph 2.43(1)(b) is to substitute the words "competent Australian authorities" with "Australian Security Intelligence Organisation" to clarify that the Australian Security Intelligence Organisation (ASIO) is the only competent Australian authority able to provide security assessments to the Department of Immigration and Multicultural and Indigenous Affairs. New paragraph 2.43(1)(b) also has the effect of omitting the words "Australian national" from before the word "security" in current paragraph 2.43(1)(b). In addition, new paragraph 2.43(1)(b) has the effect of inserting the words "within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*", after the word "security".

The definition referred to in section 4 of the *Australian Security Intelligence Organisation Act 1979* provides that "security" means the protection of the Commonwealth, the States and the Territories from espionage, sabotage, politically motivated violence, promotion of communal violence, attacks on Australia's defence system, and acts of foreign interference. It also provides, in addition, that "security" means the carrying out of Australia's responsibilities to any foreign country in relation to any of these matters.

The scope for an assessment as a risk to security, under this definition, is not therefore restricted to Australian national security, but may also extend to the carrying out of Australia's responsibilities to foreign countries in security-related matters.

Under subsection 116(3) of the Act and subregulation 2.43(2) of Part 2 of the Principal Regulations, the Minister must cancel a visa if an assessment as a risk to security is made by ASIO in relation to the holder of the visa.

Item [2] – Public Interest Criterion 4002

This item substitutes Public Interest Criterion 4002 in Schedule 4 to the Principal Regulations with new Public Interest Criterion 4002.

New Public Interest Criterion 4002 requires that "The applicant is not assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security, within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*."

The effect of new Public Interest Criterion 4002 is to make changes to the current Public Interest Criterion 4002 which are directly similar to the changes made to paragraph 2.43(1)(b) of Part 2 of the Principal Regulations by item [1] of this Schedule. For more details of these changes, please see the notes on item [1], above.

Public Interest Criterion 4002 is prescribed as a criterion to be satisfied for the grant of the majority of visas. The effect of this amendment is that, to prevent the grant of a visa, an assessment as a risk to security need not necessarily be restricted to Australian national security, but may relate to the carrying out of Australia's responsibilities to foreign countries in security-related matters.