EXPLANATORY STATEMENT

Select Legislative Instrument 2005 No. 339

Issued by the Minister for Immigration
and Multicultural and Indigenous Affairs

Subject - *Migration Act 1958*

Migration Amendment Regulations 2005 (No. 12)

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:

- provide that a New Zealand citizen who holds another substantive visa may not apply for a Special Category Visa (SCV) in immigration clearance, thereby removing the risk of an automatic grant of a SCV that would unintentionally cause the preferred substantive visa to cease;
- enable applicants for a Subclass 471 (Trade Skills Training) visa to apply also for a Bridging visa A or C, at the same time; and
- ensure that accompanying members of the family unit of applicants for a Subclass 151 (Former Resident) visa are required to satisfy specified special return criteria, if they have previously been in Australia.

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 the day after registration.

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

The Office of Regulation Review (ORR) in the Productivity Commission was consulted and advised as follows:

- Schedule 1: The ORR 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: These regulations amend inadvertent omissions in Part 2 of Schedule 7 to the *Migration Amendment Regulations 2005 (No. 9)*, where the ORR had previously advised that a Risk Impact Statement (RIS) was required for Schedule 7. RIS No. 6367 was attached to the Explanatory Statement for the *Migration Amendment Regulations 2005 (No. 9)*; and
- Schedule 3: These regulations amend inadvertent omissions in item [3] of Schedule 12 to the *Migration Amendment Regulations 2005 (No. 9)*, where the ORR had previously advised that the regulations were not likely to have a direct effect, or substantial indirect effect, on business and are not likely to restrict competition.

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:

- 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 46(1) of the Act, which provides that the regulations may provide for the circumstances in which an application for a visa is valid;
- subsection 46(3) of the Act, which provides that the regulations may prescribe criteria that must be satisfied for an application for a visa of a specified class to be a valid application; and
- subsection 46(4) of the Act which provides that (without limiting subsection 46(3) of the Act) the regulations may 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.

ATTACHMENT B

Details of the proposed *Migration Amendment Regulations 2005 (No. 12)*

Regulation 1 – Name of Regulations

This regulation provides that the title of the Regulations is the *Migration Amendment Regulations 2005 (No. 12)*.

Regulations 2 - Commencement

This regulation provides for the Regulations to commence on the day after registration.

Regulation 3 – Amendment of *Migration Regulations 1994*

This regulation provides that the *Migration Regulations 1994* (the Principal Regulations) are amended as set out in Schedules 1, 2 and 3.

Regulation 4 – Transitional

This regulation makes provisions regarding the application of the amendments made by Schedules 1, 2 and 3 to these Regulations.

Subregulation 4(1) provides that the amendments made by Schedules 1 and 2 apply in relation to an application for a visa made on or after the commencement of these Regulations.

Subregulation 4(2) provides that the amendments made by Schedule 3 apply in relation to an application for a visa made on or after 1 November 2005, but not finally determined (within the meaning of subsection 5(9) of the *Migration Act 1958*), before the commencement of these Regulations, and to an application for a visa made on or after the commencement of these Regulations.

Schedule 1 – Amendment of Schedule 1 relating to applications for Special Category Visas

Item [1] – Paragraphs 1219(3)(a) and (b)

This item substitutes paragraphs (3)(a) and (b) of Item 1219 (Special Category (Temporary) (Class TY)) of Schedule 1 to the Principal Regulations with new paragraphs 1219(3)(a) and (b).

New sub-paragraph 1219(3)(a)(i) provides that an applicant who does not hold a visa may apply for a Special Category (Temporary) (Class TY) visa in Australia in immigration clearance, or after immigration clearance, or, if travelling to Australia on a pre-cleared flight, may apply outside Australia in immigration clearance.

New sub-paragraph 1219(3)(a)(ii) provides that an applicant who holds a temporary visa may apply for a Special Category (Temporary) (Class TY) visa in Australia outside immigration clearance. Special Category (Temporary) (Class TY) visa contains one subclass, Subclass 444 (Special Category) visa.

The effect of new paragraph 1219(3)(a) is to prevent a valid application for a Subclass 444 (Special Category) visa from being made in immigration clearance by a person who holds another visa. Under the previous paragraph 1219(3)(a), it was possible for a temporary visa holder to unknowingly make a valid application for a Special Category visa in immigration clearance (by presenting a completed passenger card and a New Zealand passport). The Special Category visa would then have to be granted. Grant of the Special Category visa would have the effect of ceasing any other visa held by the person. This could be prejudicial to the person if the visa held was more beneficial than a Special Category visa, for instance, if it was a provisional temporary visa that was required to be held before the grant of permanent residence visa.

New Zealand citizens who hold temporary visas, or whose temporary visas may have ceased, may still make valid applications for Special Category visas in Australia after immigration clearance, that is, at a Department of Immigration and Multicultural and Indigenous Affairs Regional Office.

New paragraph 1219(3)(b) maintains the requirement that an applicant for a Special Category visa must give the clearance officer a New Zealand passport that is in force. However, it adds a further provision that the passport must be given either to a clearance officer, or to an officer. This is to take into account the situation where a temporary visa holder applies in Australia after having been immigration cleared.

Existing paragraph 1219(3)(c) continues to prevent a valid application for a Special Category visa being made in any circumstances by the holder of a permanent visa.

Schedule 2 – Amendments of Schedule 1 relating to bridging visas

Item [1] – Subitem 1301(1)

This item amends item 1301 (Bridging A (Class WA)) in Schedule 1 to the Principal Regulations by inserting a reference to Form 1261 in subitem 1301(1).

The effect of this amendment is that an application for a Subclass 471 (Trade Skills Training) visa made on Form 1261 will also be an application for a Bridging A visa, made at the same time and place.

This will facilitate the grant of a Bridging Visa A to ensure that applicants remain lawful during the processing of their application.

This provision was inadvertently omitted in Part 2 of Schedule 7 to the *Migration Amendment Regulations 2005 (No. 9)*. It provides consistency with the way that bridging visas A and C are granted according to the Principal Regulations.

Item [2] – Subitem 1303(1)

This item amends item 1303 (Bridging C (Class WC)) in Schedule 1 to the Principal Regulations by inserting a reference to Form 1261 in subitem 1303(1).

The effect of this amendment is that an application for a Subclass 471 (Trade Skills Training) visa made on Form 1261 will also be an application for a Bridging C visa, made at the same time and place.

This will facilitate the grant of a Bridging Visa C to ensure that applicants remain lawful during the processing of their application.

This provision was inadvertently omitted in Part 2 of Schedule 7 to the *Migration Amendment Regulations 2005 (No. 9)*. It provides consistency with the way that bridging visas A and C are granted according to the Principal Regulations.

Schedule 3 – Amendments of Schedule 2 relating to members of the family unit of a Subclass 151 (Former Resident) visa applicant

Item [1] – Paragraph 151.225(b)

This item replaces “4010.” with “4010; and” in paragraph 151.225(b) in Part 151 of Schedule 2 to the Principal Regulations. This amendment is technical and is consequential to the insertion of new paragraph 151.225(c) by item [2] below.

Item [2] – After paragraph 151.225(b)

This item inserts new paragraph 151.225(c) after paragraph 151.225(b) in Part 151 of Schedule 2 to the Principal Regulations.

New paragraph 151.225(c) provides that if an applicant for a Subclass 151 (Former Resident) visa, on the basis of satisfying the primary criteria, is a long residence applicant who is

outside Australia, each member of the applicant's family unit who is also applying for a Subclass 151 (Former Resident) visa and who has previously been in Australia, must satisfy special return criteria 5001, 5002 and 5010 before the primary applicant can be granted the visa.

On 1 November 2005 the previous Subclass 151 (Former Resident) (offshore) visa was merged with the previous Subclass 832 (Close Ties) (onshore) visa. The requirement for accompanying members of a long residence applicant's family unit to satisfy the special return criteria, if they have previously been in Australia, was inadvertently omitted.

The purpose of this amendment is to insert this requirement in the 'new' Subclass 151 (Former Resident) visa arrangements, as intended.

'Long residence applicant' is defined in Division 151.1 of Part 151 of Schedule 2 to the Principal Regulations. A long residence applicant is an applicant who has satisfied the Minister that they have spent the larger part of their life before the age of 18 in the migration zone as an Australian permanent resident; that they have not acquired Australian citizenship; that they have maintained business, cultural or personal ties with Australia and that they have not turned 45 at the time of application.

Criterion 5001 in Schedule 5 to the Principal Regulations requires that the applicant must not be a person who was the subject of a deportation order, or whose visa was cancelled due to past criminal conduct.

Criterion 5002 in Schedule 5 to the Principal Regulations requires that if the applicant was previously removed from Australia, the applicant must meet certain requirements before being granted a visa to return to Australia.

Criterion 5010 in Schedule 5 to the Principal Regulations requires that if the applicant holds, or previously held, an AusAID student visa, the applicant must meet certain requirements before being granted a visa to return to Australia.

Item [3] – Paragraph 151.226(b)

This item replaces "4010." with "4010; and" in paragraph 151.226(b) of Part 151 of Schedule 2 to the Principal Regulations. This amendment is technical and is consequential to the insertion of new paragraph 151.226(c) by item [4] below.

Item [4] – After paragraph 151.226(b)

This item inserts new paragraph 151.226(c) after paragraph 151.226(b) in Part 151 of Schedule 2 to the Principal Regulations.

New paragraph 151.226(c) provides that if an applicant for a Subclass 151 (Former Resident) visa, on the basis of satisfying the primary criteria, is a long residence applicant who is in Australia, each member of their family unit, who is applying for a Subclass 151 (Former Resident) visa and who has previously been in Australia, must satisfy special return criteria 5001 and 5002 before the primary applicant can be granted the visa.

The purpose of this amendment is to restore this requirement to the 'new' Subclass 151 (Former Resident) visa arrangements, as it was inadvertently omitted when the previous Subclasses 151 and 832 were merged on 1 November 2005. See item [2] above for further details.

Item [5] – Paragraph 151.227(a)

This item replaces "criterion 4007; or" with "criterion 4007; and" in paragraph 151.227(a) of Part 151 of Schedule 2 to the Principal Regulations. This amendment is a technical amendment to clarify the intention that paragraphs 151.227(a) and (b) are accumulative, rather that alternative.

Item [6] – After clause 151.227

This item inserts new clauses 151.227A and 151.227B after clause 151.227 in Part 151 of Schedule 2 to the Principal Regulations.

New clause 151.227A provides that if an applicant for a Subclass 151 (Former Resident) visa, on the basis of satisfying the primary criteria, is a defence service applicant who is outside Australia, each member of their family unit, who is applying for a Subclass 151 (Former Resident) visa and who has previously been in Australia, must satisfy special return criteria 5001, 5002 and 5010 before the primary applicant can be granted the visa.

The purpose of this amendment is to restore this requirement to the 'new' Subclass 151 (Former Resident) visa arrangements, as it was inadvertently omitted when the previous Subclasses 151 and 832 were merged on 1 November 2005. See item [2] above for further details.

New clause 151.227B provides that if an applicant for a Subclass 151 (Former Resident) visa on the basis of satisfying the primary criteria is a defence service applicant who is in Australia, each member of their family unit, who is applying for a Subclass 151 (Former Resident) visa and who has previously been in Australia, must satisfy special return criteria 5001 and 5002 before the primary applicant can be granted the visa.

The purpose of this amendment is to restore this requirement to the 'new' Subclass 151 (Former Resident) visa arrangements, as it was inadvertently omitted when the previous Subclasses 151 and 832 were merged on 1 November 2005. See item [2] above for further details.

'Defence service applicant' is defined in Division 151.1 in Schedule 2 to the Principal Regulations. A defence service applicant is an applicant who satisfies the Minister that they have completed at least 3 months continuous Australian defence service; or they were discharged before completing the 3 months of Australian defence service because they were medically unfit for service, or further service, and became medically unfit because of their Australian defence service.