EXPLANATORY STATEMENT

Select Legislative Instrument 2009 No. 201

Issued by the Minister for Immigration and Citizenship

Migration Act 1958

Migration Amendment Regulations 2009 (No. 8)

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 regulations may be made pursuant to the provisions of the Act in Attachment A.

Protection visa applicants are generally granted a bridging visa while their claims are being assessed or reviewed. This allows them to remain in Australia until their applications are finalised. Previously, people applying for a protection visa who have been in Australia for 45 days or more in the proceeding 12 months were denied permission to work on grant of the bridging visa.

The *Migration Amendment Regulations 2009 (No. 6)* (the No. 6 Regulations) recently amended the *Migration Regulations 1994* (the Principal Regulations) to abolish the 45-day rule for certain bridging visa subclasses and establish new provisions in relation to permission to work for certain applicants.

The purpose of the Regulations is to make minor technical amendments to support and provide full effect to the No. 6 Regulations, in relation to the Subclass 050 – Bridging E visa. This ensures the policy intention behind the amendments in the No. 6 Regulations is reflected in the Principal Regulations.

Details of the Regulations are set out in Attachment B.

Regulations 1, 2, 3 and Schedule 1, which relate to a technical amendment that incorporates all visa criteria set out in the Principal Regulations as a possible basis on which to grant a Subclass 050 – Bridging E visa, commenced on 1 July 2009 and are retrospective. Regulation 4 and Schedule 2, which clarify the imposition of certain visa conditions on the Subclass 050 – Bridging E visa, commence on 14 September 2009.

The Office of Legislative Drafting and Publishing advises that the retrospective amendment would not be contrary to subsection 12(2) of the *Legislative Instruments Act 2003* as the change would not result in:

- the rights of a person (other than the Commonwealth or an authority of the Commonwealth) as at the date of registration being affected so as to disadvantage that person; or
- liabilities being imposed on a person (other than the Commonwealth or an authority of the Commonwealth) in respect of anything done or omitted to be done before the date of registration.

The Office of Best Practice Regulation's Business Cost Calculator and Assessment Checklists were used to determine that there was a low impact and compliance cost on business.

The Department of Health and Ageing, Department of Human Services, Department of Families, Housing, Community Services and Indigenous Affairs and a range of refugee and asylum seeker advocacy non-government organisations were consulted in relation to these amendments. No other consultations were conducted in relation to the Regulations as the amendments were considered not to have relevant implications for any other external agencies or bodies.

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

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

The Minute recommends that Regulations be made in the form proposed.

Authority: Subsection 504(1) of the *Migration Act 1958*

ATTACHMENT A

Details of the *Migration Amendment Regulations 2009 (No. 8)*

Regulation 1 – Name of Regulations

This regulation provides that the title of the Regulations is the *Migration Amendment Regulations 2009 (No. 8)*.

Regulation 2 – Commencement

This regulation provides that the Regulations commence, or are taken to have commenced, as follows:

(a) on 1 July 2009 – regulations 1 to 3 and Schedule 1;
(b) on 14 September 2009 – regulation 4 and Schedule 2.

Regulation 3 – Amendment of *Migration Regulations 1994* – Schedule 1

This regulation provides that Schedule 1 amends the *Migration Regulations 1994* (the Principal Regulations).

Regulation 4 – Amendment of *Migration Regulations 1994* – Schedule 2

This regulation provides that Schedule 2 amends the Principal Regulations, and that the amendments made by Schedule 2 apply in relation to an application for a visa made on or after 14 September 2009.

Schedule 1 Amendment

Item [1] – Subclause 050.212 (1)

This item omits "(6), (6AA), (6A)," and inserts "(5B), (6), (6AA), (6A), (6B)," in subclause 050.212(1) of Part 050 of Schedule 2 to the Principal Regulations.

Subclause 050.212(1) provides criteria to be satisfied at the time of application for a Subclass 050 – Bridging (General) visa includes that the applicant meets the requirements of subclause (2), (3), (3A), (4), (4AAA), (4AA), (4AB), (5), (5A), (6), (6AA), (6A), (7), (8), or (9).

This item makes a minor technical amendment to insert a reference to subclauses 050.212(5B) and (6B) that were inserted in the *Migration Amendment Regulations 2009 (No. 6)* into subclause 050.212(1) of the Principal Regulations. This is a consequential amendment to ensure subclauses 050.212(5B) and (6B) operate as intended within the criteria in subclause 050.212(1) whereby an applicant must meet the requirements of a subclause listed at the time of application to be eligible for a Subclass 050 Bridging (General) visa.

Schedule 2 Amendments

Item [1] – Paragraph 050.212(6B)(a)

This item omits 'subclause (6A),' and inserts 'subclause (6) or (6A),' in paragraph 050.212(6B)(a) of Part 050 of Schedule 2 to the Principal Regulations.

Subclause 050.212(6B) provides for criteria to be satisfied at the time of application for a Subclass 050 – Bridging (General) visa where the applicant holds, or has held, a Bridging E (Class WE) visa granted before 1 July 2009 on the basis of the applicant meeting the requirements of subclause (6A); and the applicant who is the subject of a decision for which the Minister has the power to substitute a more favourable decision under section 345, 351, 391, 417 or 454 of the Act, has made a request to the Minister before 1 July 2009 to substitute a more favourable decision under section 345, 351, 391, 417 or 454 of the Act and the Minister has not yet made a decision.

The effect of this amendment is that an applicant who holds, or has held, a Bridging E (Class WE) visa granted before 1 July 2009 on the basis of the applicant meeting the requirements of subclause (6); and the applicant, who is the subject of a decision for which the Minister has the power to substitute a more favourable decision under section 345, 351, 391, 417 or 454 of the Act, has made a request to the Minister before 1 July 2009 to substitute a more favourable decision under one of these sections and the Minister has not yet made a decision, can be granted a further Bridging E (Class WE) visa whilst the request is ongoing. This also establishes the basis for determining permission to work as provided for in substituted clause 050.616 (see item [5]).

Item [2] – Subclause 050.612A(1)

This item omits '(whether or not the applicant is an applicant to whom another clause in this Division would otherwise apply)' in subclause 050.612A(1) of Part 050 of Schedule 2 to the Principal Regulations.

The purpose of this item is to clarify that where there may otherwise be overlap between the application of clause 050.612A or 050.614, clause 050.614 applies.

The effect of this item is that the conditions imposed on a Bridging E (Class WE) visa where the holder is an applicant for a Protection (Class AZ) or Protection (Class XA) visa in the specified time periods and who meets the requirements of subclause 050.212(3A), (4), (4AA) or (4A), is provided for by clause 050.614. Under clause 050.614, the 'no work' visa condition 8101 only applies if that condition applied to the last visa held by the holder.

Item [3] – Clause 050.614

This item substituted clause 050.614. Clause 050.614 provides: In the case of a visa granted to an applicant who is an applicant for a Protection (Class AZ) visa in the period starting on 1 July 1997 and ending at the end of 19 October 1999; or an applicant for a Protection (Class XA) visa on or after 20 October 1999; and meets the requirements of subclause 050.212 (3A), (4), (4AA) or (4A); condition 8101, if that condition applied to the last visa held by the holder, and any 1 or more of conditions 8104, 8201, 8207, 8401, 8402, 8403, 8505, 8506, 8507, 8508, 8509, 8510, 8511, 8512 and 8548 may be imposed.

This effect of this item is that where clause 050.614 applies, the 'no work' visa condition 8101 applies if that condition applied to the last visa held by the holder, while the other conditions are discretionary, as they were prior to the 1 July amendments made by *Migration Amendment Regulations 2009 (No. 6).*

Item [4] – Subclause 050.615(1)

This item omits '(whether or not the applicant is an applicant to whom another clause in this Division would otherwise apply)' in subclause 050.615(1)(a) of Part 050 of Schedule 2 to the Principal Regulations.

This item is a technical amendment, removing unnecessary words from subclause 050.615 as no other clause in Division 050.6 of Schedule 2 to the Principal Regulations otherwise applies.

Item [5] – Clause 050.615A, Clause 050.616

This item substituted clause 050.616 in Part 050 of Schedule 2 to the Principal Regulations, including new clauses 050.615A and 050.616.

Clause 050.615A provides: In the case of a visa granted to an applicant who meets the requirements of subclause 050.212(5B) or (6); and was an unlawful non-citizen for all or part of the period after the application for a substantive visa was finally determined until the time of the request for the Minister: to substitute a more favourable decision under section 345, 351, 391, 417 or 454 of the Act; or to make a determination under section 48B of the Act; condition 8101. In addition, any 1 or more of conditions 8102, 8207, 8401, 8403, 8505, 8506, 8507, 8508, 8510, 8511, 8512 and 8548 may be imposed.

Clause 050.615A relates to applicants who have become unlawful non-citizens for all or part of the period after their application for a substantive visa was finally determined until the time of the request for the Minister to substitute a more favourable decision under section 345, 351, 391, 417 or 454 of the Act or make a determination under section 48B of the Act.

The effect of clause 050.615A is that if clause 050.615 does not apply to the visa holder because the visa holder became unlawful for all or part of the period after the application for a substantive visa was finally determined until the time of the request for the Minister to substitute a more favourable decision under section 345, 351, 391, 417 or 454 of the Act, visa condition 8101 is mandatorily imposed on the Subclass 050 – Bridging (General) visa.

Substituted clause 050.616 provides: In the case of a visa granted to an applicant (whether or not the applicant is an applicant to whom another clause in this Division would otherwise apply) who meets the requirements of subclause 050.212 (6B) — condition 8101, if that condition applied to the last visa held by the holder. In addition, any 1 or more of conditions 8104, 8201, 8207, 8401, 8402, 8403, 8505, 8506, 8507, 8508, 8509, 8510, 8511, 8512 and 8548 may be imposed.

The effect of substituted clause 050.616 is that the 'no work' visa condition must be imposed in the case of a visa granted to an applicant who meets the requirements of

subclause 050.212(6B) if that condition applied to the last visa held by the holder. In addition, other visa conditions may be imposed as listed in subclause 050.616(2).