EXPLANATORY STATEMENT

Select Legislative Instrument 2012 No. 237

Issued by the Minister for Immigration and Citizenship

Migration Act 1958

Migration Amendment Regulation 2012 (No. 6)

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 Regulation is to amend the *Migration Regulations 1994* ('the Principal Regulations') to prescribe a new class of persons as eligible non-citizens under paragraph 72(1)(b) of the Act. That class of persons is non-citizens who:

- When he or she last entered Australia was not immigration cleared; and
- After entering Australia, was granted a Bridging E (Class WE) visa (BVE) under section 195A of the Act.

As eligible non-citizens, persons in this class of persons are able to make valid applications for bridging visas in Australia subject to any other provisions in the Act or the Principal Regulations.

The amendment facilitates implementation of the Government's approach to managing asylum seekers in Australia – that non-immigration cleared persons who meet initial health, identity and security requirements, and who do not pose an unacceptable risk to the Australian community, are progressively considered for release from detention on bridging visas while their asylum claims are assessed. Many of these clients have been granted a BVE by the Minister personally under section 195A of the Act.

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 assessment is that the Regulation does not raise any human rights issues. A copy of the Statement is at Attachment B.

Details of the Regulation are set out at Attachment C.

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 in relation to the amendments made by the Regulation and advises that the regulation is not likely to have a direct effect, or substantial indirect effect, on business and is not likely to restrict competition. The OBPR consultation reference is 13569.

No consultation outside the Department of Immigration and Citizenship was undertaken in the preparation of the measure in this Regulation because it was required urgently. While the Minister announced in late 2011 that he would release people from immigration detention on Bridging visas, the mechanism to manage the subsequent grants of visas to Irregular Maritime Arrivals was first proposed in early 2012. Work was suspended on this proposal while different management options were explored. The Minister advised recently that the measure was required urgently.

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

ATTACHMENT A

POWERS OF DELEGATION

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:

- 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 the subsection, may be a class provided for by section 32, 36, 37, 37A or 38B but not by section 33, 34, 35, 38 or 38A);

- Subsection 46(1) of the Act, which relevantly provides that an application for a visa is valid if, and only if, it satisfies the criteria and requirements prescribed under section 46;

- Subsection 72(1) of the Act, which relevantly provides that the term 'eligible non-citizen' means a non-citizen who is in a prescribed class of persons; and

- Section 73 of the Act, which relevantly provides that, if the Minister is satisfied that an eligible non-citizen satisfies the criteria for a bridging visa as prescribed under subsection 31(3), the Minister may grant a bridging visa.

ATTACHMENT B

Statement of Compatibility with Human Rights

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

Amendment to the *Migration Regulations 1994* for improved management of offshore entry person clients on Bridging visas to prescribe certain non-immigration-cleared people as a class of persons for the definition of 'eligible non-citizen'. This amendment 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 Regulation

The amendments to the *Migration Regulations 1994* (the Principal Regulations) have been developed in order to create a new prescribed class of persons so that all non-immigration cleared persons who have been granted a Bridging E (Class WE) visa (BVE) by the Minister personally under section 195A of the *Migration Act 1958* (the Act) are in a class of persons that meets the definition of 'eligible non-citizen', for the purposes of subsection 72(1) of the Act. This will enable this cohort to be eligible, following the grant of the initial BVE under section 195A, to apply for, and be granted, subsequent Bridging visas subject to any other provisions in the Act or the Principal Regulations. This change will enable a delegate of the Minister in the Department of Immigration and Citizenship to decide subsequent visa applications for this cohort without requiring the Minister to consider using his personal power under section 195A. If a delegate of the Minister were to decide to grant a visa, the Minister would not be required to cause to be laid before each House of Parliament a statement under section 195A setting out the reasons for granting the visa for each subsequent grant.

Human rights implications

This amendment to the Principal Regulations does not engage any of the applicable rights or freedoms.

Conclusion

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

ATTACHMENT C

Details of the *Migration Amendment Regulation 2012 (No. 6)*

Section 1 – Name of Regulation

This section provides that the title of the Regulation is the *Migration Amendment Regulation 2012 (No. 6)*.

Section 2 – Commencement

This section provides for the Regulation to commence on the day after it is registered.

Section 3 – Amendment of *Migration Regulations 1994*

This section provides that Schedule 1 of the Regulation amends the *Migration Regulations 1994* (the Principal Regulations).

Schedule 1 – Amendments

Item [1] – Subregulation 2.20(1)

This item omits reference to subregulation 2.20(16) in subregulation 2.20(1) and inserts in its place reference to new subregulation 2.20(17).

This amendment is consequential to the amendment in item [2] below, which inserts new subregulation 2.20(17) after current subregulation 2.20(16).

Item [2] – After subregulation 2.20(16)

This item inserts new subregulation 2.20(17) after subregulation 2.20(16) in Division 2.5 of Part 2 of the Principal Regulations.

The purpose of this amendment is to amend the Principal Regulations to prescribe a new class of persons as eligible non-citizens under paragraph 72(1)(b) of the *Migration Act 1958* (the Act). That class of persons is non-citizens who:

- When he or she last entered Australia was not immigration cleared; and
- After entering Australia, was granted a Bridging E (Class WE) visa (BVE) under section 195A of the Act.

As eligible non-citizens, persons in the prescribed class can make a valid visa application in Australia, subject to any other provisions in the Act or the Principal Regulations.

Subsection 195A(2) of the Act provides that if the Minister thinks that it is in the public interest to do so, the Minister may grant to a person in immigration detention under section 189 of the Act a visa of a particular class (whether or not the person has applied for the visa).

The amendment enables non-citizens in this cohort to apply for a BVE and delegated decision-makers to grant visas to clients in the prescribed class of eligible non-citizens rather than the Minister having to do so personally in each case. This will obviate the need to re-detain the client or seek the Minister's continued intervention every time a further visa grant is required.

The new prescribed class of persons includes all non-immigration cleared persons in respect of whom the Minster has used section 195A to grant a BVE. Such non-immigration cleared persons include offshore entry persons, irregular maritime arrivals who arrive in Australia at places other than excised offshore places, and people who arrive by air and either do not hold a visa that is in effect on arrival in Australia or have their visa cancelled while they are in immigration clearance and make claims for protection in immigration clearance.