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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**MIGRATION AND MARITIME POWERS LEGISLATION AMENDMENT
(RESOLVING THE ASYLUM LEGACY CASELOAD)
BILL 2014**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Immigration and Border Protection,
the Hon. Scott Morrison MP)

Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014

OUTLINE

The Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (the Bill) amends the *Migration Act 1958* (the Migration Act), the *Migration Regulations 1994* (the Migration Regulations); the *Maritime Powers Act 2013* (the Maritime Powers Act), the *Immigration (Guardianship of Children) Act 1946* (IGOC Act) and the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) to support the Government's key strategies for combatting people smuggling and managing asylum seekers both onshore and offshore. The Bill fundamentally changes Australia's approach to managing asylum seekers by:

- reinforcing the Government's powers and support for our officers conducting maritime operations to stop people smuggling ventures at sea, clarifying and strengthening Australia's maritime enforcement framework to provide greater clarity to the ongoing conduct of border security and maritime enforcement operations;
- introducing temporary protection for those who engage Australia's *non-refoulement* obligations and who arrived in Australia illegally;
- introducing more rapid processing and streamlined review arrangements, creating a different processing model for protection assessments which acknowledges the diverse range of claims from asylum seekers, helping to resolve protection applications more efficiently;
- deterring the making of unmeritorious protection claims as a means to delay an applicant's departure from Australia;
- supporting a more timely removal from Australia of those who do not engage Australia's protection obligations; and
- codifying in the Migration Act Australia's interpretation of its protection obligations under the *1951 Convention relating to the Status of Refugees* and its *1967 Protocol* (the Refugees Convention).

The measures in this Bill are a continuation of the Government's protection reform agenda and make it clear that there will not be permanent protection for those who travel to Australia illegally. The measures will support a robust protection status determination process and enable a tailored approach to better prioritise and assess claims and support the removal of unsuccessful asylum seekers.

Specifically, the Bill amends the Maritime Powers Act to:

- clarify the powers provided by sections 69 and 72 to move vessels and persons, and related provisions;
- explicitly provide the Minister with a power to give specific and general directions about the exercise of powers under sections 69, 71 and 72 to ensure that government has appropriate oversight;

- ensure that maritime powers may be exercised between Australia and another country, provided the Minister administering the Maritime Powers Act has determined this should be the case;
- provide that the rules of natural justice do not apply to a range of powers in the Maritime Powers Act, including the powers to authorise the exercise of maritime powers, the new Ministerial powers and the exercise of powers to hold and move vessels and persons;
- ensure that the exercise of a range of powers cannot be invalidated because a court considers there has been a failure to consider, properly consider, or comply with Australia's international obligations, or the international obligations or domestic law of any other country;
- clarify for the purposes of sections 69 and 72 that a vessel or a person may be taken to a place outside Australia whether or not Australia has an agreement or arrangements with any country concerning the reception of the vessel or the persons;
- clarify that for the purposes of sections 69 and 72 a "place" is not limited to another country or a place in another country;
- clarify the time during which a vessel or person may be dealt with under sections 69, 71 and 72;
- clarify that the section 69, 71 and 72 powers (and a range of related provisions) operate in their own right, and that there is no implication to be drawn from the Migration Act, particularly from the existence of the regional processing provisions;
- provide an explicit power exempting certain vessels involved in maritime enforcement operations from the inappropriate application of the Marine Safety (Domestic Commercial Vessel) National Law, the *Navigation Act 2012* and the *Shipping Registration Act 1981*;
- make a number of minor consequential and clarification amendments to the Maritime Powers Act, Migration Act, and the ICOG Act; and
- ensure that decisions relating to operational matters cannot be inappropriately subjected to the provisions of the *Legislative Instruments Act 2003*, the *Judiciary Act 1903*, or the ADJR Act.

Specifically, the Bill amends the Migration Act to:

- introduce Temporary Protection visas (TPVs) as a visa product for unauthorised arrivals, whether by air or by sea, who are found to engage Australia's protection obligations;
- create a new visa class to be known as a Safe Haven Enterprise Visa (SHEV);
- explicitly authorise the making of regulations that deem an application for one type of visa to be an application for a different type of visa;

- clarify that the application bars in sections 48, 48A and 501E of the Migration Act also apply in relation to persons in the migration zone who have been refused a visa or held a visa that was cancelled, in circumstances where the refused application or the application in relation to which the cancelled visa was granted earlier was an application that was taken to have been made by the person;
- allow for multiple classes of protection visas;
- include a definition of protection visas;
- create an express link between certain classes of visas that are provided for under the Migration Act (including Permanent Protection visas and Temporary Protection visas) and the criteria prescribed in the Migration Regulations in relation to those visas;
- create a new fast track assessment process and remove access to the Refugee Review Tribunal (RRT) for fast track applicants, who are defined as unauthorised maritime arrivals (UMAs) who entered Australia on or after 13 August 2012 and made a valid application for a protection visa, and other cohorts specified by legislative instrument;
- require the Minister to refer fast track reviewable decisions to the Immigration Assessment Authority (the IAA) which will conduct a limited merits review on the papers and either affirm the fast track reviewable decision or remit the decision for reconsideration in accordance with prescribed directions or recommendations;
- create discretionary powers for the IAA to get new information and permit the IAA to consider new information only in exceptional circumstances;
- provide the manner in which the IAA is to exercise its functions, notify persons of its decisions, give and receive review documents and disclose and publish certain information and enable the Principal Member of the RRT to issue practice directions and guidance decisions to the IAA;
- establish the IAA within the RRT, and provide that the Principal Member of the RRT is to be responsible for its overall operation and administration and specify delegation powers and employment arrangements to apply to the Senior Reviewer and Reviewers of the IAA;
- clarify the availability of the removal powers independent of assessments of Australia's *non-refoulement* obligations;
- remove most references to the Refugees Convention from the Migration Act and replace them with a new statutory framework which articulates Australia's interpretation of its protection obligations under the Refugees Convention;
- clarify, with retrospective effect, that children born to unauthorised maritime arrivals (UMAs) under the Migration Act either in Australia or in a regional processing country are also UMAs for the purposes of the Migration Act;

- clarify, with retrospective effect, that children born to transitory persons either in Australia or in a regional processing country are also transitory persons for the purposes of the Migration Act;
- ensure that children born in Australia to a parent who is a transitory person can also be taken to a regional processing country;
- clarify, with retrospective effect, that any visa application of the child of a UMA or transitory person is invalid, unless the Minister has allowed the application, or the application of that child's parent, to be made; and
- restore the Government's ability to place a statutory limit on the number of protection visas granted in a programme year including repealing of section 65A and section 414A of the Migration Act which require applications for protection visas to be decided in 90 days as well as the associated reporting requirements in section 91Y and 440A, and provide that the requirement for the Minister in section 65 to grant or refuse to grant a visa is subject to sections 84 and 86.

Schedule 1 to the Bill will clarify a range of matters relating to the exercise of maritime powers. Maritime powers are used to respond to a range of threats to Australia's national interest, including the smuggling of contraband goods, protecting Australia's fisheries, protecting our ocean and coastal ecosystems from environmental damage and countering people smuggling. The amendments to the Maritime Powers Act are focussed on strengthening Australia's maritime enforcement framework and will provide greater clarity to the ongoing conduct of border security and maritime enforcement operations.

As with the original Maritime Powers Act, these amendments do not seek to create new powers beyond what is already available to maritime officers – instead, they clarify the intended operation of those powers and their relationship with other law. Limited new powers are provided to the Minister personally, to ensure that the Government has appropriate oversight in this important area of significant policy interest.

Countering people smuggling has been a long-standing bipartisan aspiration. Australia has the right to determine and address national security issues that relate to its national interest. This includes protecting and safeguarding Australian territorial and border integrity. People smugglers operate in organised criminal syndicates, and their activities have serious consequences. Not only does people smuggling support a criminal economy that exposes individuals to serious harm, it also provides an avenue for a large number of undocumented arrivals to gain entry into Australia, potentially including individuals of security concern. The Commonwealth will continue to protect Australia's borders from serious criminal activity, and its consequences.

Protecting Australia's sovereignty is not the only reason to ensure that the powers available to protect Australia's maritime boundaries are robust and flexible. The dangers of attempting to travel to Australia by boat are real. The journey is hundreds of nautical miles long, and is often attempted in bad weather and rough sea conditions. Boats are often unseaworthy and crowded. Crew can be inexperienced or unqualified. Life jackets, when worn, can be of poor quality and unlikely to save lives. Between 2008 and 2013 it is estimated that up to 1,203 people may have died at sea trying to reach Australia illegally by boat. This includes countless tragic incidents: 201 dead or presumed drowned in December 2011; 92 dead or presumed drowned in June 2012 and 55 dead or presumed drowned in June 2013. These

tragic numbers do not take into account the numerous reports received from those who believe their family and friends were on-board a boat to Australia and have not been heard from since.

In the dynamic on-water environment, there is an ongoing requirement to be both flexible and adaptable. People smugglers run profit-based businesses. They operate using tested business models, and as these models are thwarted they will rapidly adapt. Australia must be ready and able to respond to these changes, which can only be done through being able to adapt ourselves, ensuring that maritime officers continue to be appropriately equipped with the legal tools they need.

The challenges in Australia's maritime security environment are complex. It is vital that legislation underpinning maritime security operations remains sustainable and robust and affords the flexibility to respond to complexities as they arise. It has always been Parliament's intent to equip maritime officers with the necessary means to undertake their duties. Significant flexibility was built into the Maritime Powers Act specifically for this purpose, and the amendments in this Bill serve to reinforce and clarify the measures available to maritime enforcement officers when targeting criminal on-water activity.

Schedule 2 to the Bill will address the Government's objective that any illegal arrivals who seek asylum in Australia will not be granted a Permanent Protection visa. The intention is that those who are found to be in need of protection either through existing assessment processes or through the fast track assessment process will be eligible only for grant of temporary protection visas.

The Migration Act and associated Migration Regulations will be amended to establish TPVs for people who have arrived in Australia without visas and are found to engage Australia's protection obligations.

In particular, new section 35A in the Migration Act and the proposed Migration Regulations would create a new Class XD Temporary Protection (Subclass 785 (Temporary Protection)) visas, which would be the protection visa (a visa that may be provided to people within Australia who engage Australia's protection obligations) available to people who:

- are *unauthorised maritime arrivals* as described in the Migration Act; or
- otherwise arrived in Australia without a visa; or
- were not immigration cleared on their last arrival in Australia; or
 - are the member of the same family unit as a person mentioned above; and
 - that person has been granted a Subclass 785 (Temporary Protection) visa; or
- already hold a TPV.

The introduction of TPVs is a key element of the Government's border protection strategy to combat people smuggling and to discourage people from making dangerous voyages to Australia.

The proposed Migration Act amendment and Migration Regulations would prevent people in the above cohort from being eligible to apply for, or being granted, a Permanent Protection

visa that allows the holder to remain in Australia indefinitely (i.e. Subclass 866 (Protection) visas).

The Subclass 866 (Protection) visa would remain available to applicants from outside the cohort, but people within the cohort would be unable to make a valid application for Subclass 866 (Protection) visas, and any existing un-finalised Permanent Protection visa (PPV) application from the cohort would be unable to meet the requirements for grant (as the application will have been deemed to a TPV application).

A new visa to be known as Safe Haven Enterprise Visas (SHEV) will be created. Amendments to the Migration Regulations to prescribe criteria for this visa will follow in 2015.

Schedule 2 to the Bill provides explicit authority for the making of regulations which deem an application for one type of visa to be an application for a different type of visa (conversion regulations), if one or more specified events occur. The Bill also makes conversion regulations that deem Permanent Protection visa applications made by prescribed classes of applicants to be applications for Temporary Protection visas.

These amendments are two key measures which will enable the Government to more effectively manage asylum seekers who have arrived in Australia illegally, and ensure that illegal arrivals who are found to engage Australia's protection obligations are not granted Permanent Protection visas to remain in Australia.

The amendment authorising the making of conversion regulations will have broader future utility as it facilitates greater flexibility in the department's management and processing of on-hand applications for any class of visa (not just Protection visas) in response to changing Government priorities.

Sections 48, 48A and 501E of the Migration Act limit or prohibit the making of further visa applications ('application bars') by non-citizens in the migration zone who, since they last entered Australia, have been refused a visa or held a visa that was cancelled.

Schedule 2 to the Bill will clarify that the application bars will also apply in circumstances where the refused application was taken to have been made by the non-citizen under a provision of the Migration Act or the Migration Regulations, and where the cancelled visa was granted because of an application that the non-citizen was taken to have made under a provision of the Migration Act or the Migration Regulations.

The Bill will also clarify that there may be multiple classes of visas that are 'protection visas' under section 35A and that they may be temporary or permanent visas. Protection visas will include the Class XA Permanent Protection visa, the Class XD Temporary Protection visa and the Safe Haven Enterprise visa. The criteria that need to be satisfied for these visas will be in section 36 and in the Migration Regulations.

Section 5 and regulation 1.03 will be amended to include a definition of *protection visas*, to make it clear that throughout the Migration Act and the Migration Regulations, the term *protection visa* includes a Permanent Protection visa (subclass 866) and a Temporary Protection visa (subclass 785), and a Safe Haven Enterprise visa; and any additional classes of permanent or temporary visas that are prescribed as protection visas by the Migration Regulations.

Schedule 3 to the Bill will create an express link between classes of visa provided for by sections 32 (Special Category visas), 37 (Bridging visas), 37A (Temporary Safe Haven visas), 38B (Maritime Crew visas) and new section 35A (Permanent Protection visas, Temporary Protection visas and Safe Haven Enterprise visas) of the Migration Act, and the criteria prescribed in the Migration Regulations in relation to those classes of visa.

For each of those visas, the amendment will ensure that if the Migration Regulations do not prescribe any criteria which relate to making a valid application for the visa and being granted the visa, non-citizens cannot make a valid application for the visa.

The amendment will also ensure that if there are regulations in effect that prescribe the requirements for making a valid application, or the criteria that must be met in order for the visa to be granted, then an application for the visa will not be valid unless the application in fact meets all the prescribed requirements. A visa must not be granted unless the applicant satisfies the criteria prescribed in the Migration Regulations as well as any other criteria provided for in the Migration Act.

The amendment will also clarify that for each of those visas, the Migration Regulations may, but need not, prescribe criteria which relate to making a valid application for the visa and being granted the visa.

Schedule 4 to the Bill establishes a new fast track assessment process for UMAs who entered Australia on or after 13 August 2012 and made a valid application for a protection visa. The Minister will also be able to later specify other types of applicants who should be subject to the new fast track assessment process, by way of legislative instrument (for example, unauthorised air arrivals). The fast track assessment process will be conducted under existing provisions of the Migration Act. It is intended that the process will be supported by a code of procedure with shorter time frames which will be prescribed in the Migration Regulations. All fast track applicants will receive a full and comprehensive assessment of their claims for protection.

A key component of the fast track assessment process is that fast track applicants will not be permitted to seek review from the RRT of their protection visa decisions. The Bill will instead, require the Minister to refer, as soon as reasonably practicable, certain decisions made in respect of fast track review applicants to the Immigration Assessment Authority (the IAA). The IAA will conduct a limited review of these decisions.

There will also be fast track applicants who in turn, will be excluded fast track review applicants. After an assessment of their protection claims, excluded fast track applicants will be those who have found to have put forward claims that indicate they have been previously been refused protection, already have protection available elsewhere or have unmeritorious claims and as such, their cases suggest prompt resolution of their status should be a priority. Excluded fast track review applicants will not have access to any form of merits review. Excluding these applicants from merits review will stop unmeritorious claims being considered by the IAA which can lead to delays in departure and an inefficient and costly use of resources. Decisions made in relation to certain excluded fast track applicants who are identified as vulnerable can be referred to the IAA by way of a legislative instrument. All fast track applicants will continue to have access to judicial review.

New Part 7AA establishes the IAA and the new limited merits review framework. Under this Part, the Minister will be required to refer fast track reviewable decisions to the IAA and

provide the IAA with review material as soon as reasonably practicable after the primary decision to refuse to grant a protection visa has been made under section 65 of the Migration Act. Similar to the RRT, the IAA will have the power to either affirm the decision or remit the decision to the department for reconsideration in accordance with prescribed directions or recommendations.

In carrying out its functions under the Migration Act, the IAA is to pursue the objective of providing a mechanism of limited review that is efficient and quick. While there will be discretionary powers for the IAA to get new and relevant information and to get information in the most suitable and convenient way from applicants, the IAA is under no duty to accept or request new information or interview an applicant.

As a limited review body, other than in exceptional circumstances, the IAA is prohibited from considering any new information for the purposes of making a decision, irrespective of whether the IAA obtained it through its discretionary powers or an applicant provided it of their own volition. New information will only be considered if the IAA is satisfied that there are exceptional circumstances to justify the consideration of that new information. For example, exceptional circumstances may be found where there is evidence of a significant change of conditions in the applicant's country of origin that means the applicant may now engage Australia's protection obligations. Where an applicant provides or seeks to provide the IAA with new information of their own volition, they would also have to satisfy the IAA that the new information could not have been provided to the Minister before the primary decision was made. The limited review mechanism supports the measures in the Migration Amendment (Protection and Other Measures) Bill 2014 which clarify the responsibility of asylum seekers to specify the particulars of their claim, provide sufficient evidence to establish their claim and encourage complete information to be provided upfront. The measures will prevent those asylum seekers who attempt to exploit the merits review process by presenting new claims or evidence to bolster their original unsuccessful claims only after they learn why they were not found to engage Australia's protection obligations by the Department of Immigration and Border Protection.

The IAA will be independent of the Department of Immigration and Border Protection and be established as a separate office within the RRT. The Principal Member of the RRT will be responsible for the overall operation and administration of the IAA and will be able to issue practice directions and guidance decisions to the IAA. A Senior Reviewer will be appointed to oversee the functions and operations of the IAA and perform any powers and functions delegated by the Principal Member. The Senior Reviewer and reviewers of the IAA will all be engaged under the *Public Service Act 1999*.

Schedule 5 to the Bill will clarify Australia's international law obligations. It is important that the right mechanisms are in place to ensure that those who do not engage our protection obligations can be removed from Australia. This amendment will support onshore protection processing (including the fast track Assessment process). The Bill will make clear that the removal power is available independent of assessments of Australia's *non-refoulement* obligations, where a non-citizen meets the circumstances specified in the express provisions of section 198 of the Migration Act. This is in response to a series of High Court decisions which have found that the Migration Act as a whole is designed to address Australia's *non-refoulement* obligations. There are a number of personal non-compellable powers available for the Minister to use, before the exercise of the removal power, to allow a visa application or grant a visa where this is in the public interest.

The form of administrative arrangements in place to support Australia meeting its *non-refoulement* obligations is a matter for the Government. Prompt removal of failed asylum seekers from Australia supports the integrity of the protection status determination process, including the fast track Assessment Process.

The Bill also removes most references to the Refugees Convention from the Migration Act and instead creates a new, independent and self-contained statutory framework which articulates Australia's interpretation of its protection obligations under the Refugees Convention. It is not the intention of the Government to resile from Australia's protection obligations under the Refugees Convention but rather to codify Australia's interpretation of these obligations within certain sections of the Migration Act. These amendments set out the criteria to be satisfied in order to meet the new statutory definition of a *refugee*. They also clarify those grounds which exclude a person from meeting the definition or which (where a person satisfies the definition of a *refugee*) render them ineligible for the grant of a Protection visa.

Paragraph 36(2)(a) of the Migration Act will be amended to provide as a criterion for the grant of a protection visa that the applicant satisfy the definition of a *refugee* as set out by the new statutory framework. Australia's interpretation of Article 1A(2) of the Refugees Convention will be implemented through the new section 5H which defines the term 'refugee' and also provides the grounds where the meaning of 'refugee' does not apply (consistent with the exclusion clause under Article 1F of the Refugees Convention).

It is not intended to incorporate Article 1D of the Refugees Convention into the Migration Act. Following the Full Federal Court's finding in *Minister for Immigration and Multicultural Affairs v WABQ* [2012] FCFC 329 Palestinian refugees as a class of persons do not fall within the scope of Article 1D due to protection from organs or agencies of the United Nations, other than the United Nations High Commissioner for Refugees, having ceased for this group. Consistent with this finding, any Palestinian refugees making claims for protection in Australia are to be considered against the definition of *refugee* under the new section 5H in the Migration Act.

The new section 5J sets out the circumstances that must be satisfied for a person to have a *well-founded fear of persecution*. This amendment sets out the five grounds for refugee status consistent with those listed in Article 1A(2) of the Refugees Convention. Under the new statutory framework a person will continue to be assessed as to whether they have a 'real chance' of being persecuted. The 'real chance' test is consistent with the High Court's decision in *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379. New paragraph 5J(1)(b) is a statutory implementation of this test.

The new paragraph 5J(1)(c) makes it clear that a person only has a well-founded fear if that person has a 'real chance' of persecution in all areas of the receiving country. When determining whether a person can relocate to another area of the receiving country where they do not have a real chance of persecution, a decision maker should take into account whether the person can safely and legally access the area upon returning to the receiving country.

It is the Government's intention that this statutory implementation of the 'internal relocation' principle not encompass a 'reasonableness' test which assesses whether it is reasonable for an asylum seeker to relocate to another area of the receiving country. Australian case law has

broadened the scope of the ‘reasonableness’ test to take into account the practical realities of relocation. Decision makers are currently required to consider information that is additional to protection considerations under Article 1A(2) of the Refugees Convention such as a diminishment in quality of life or potential financial hardship. In the Government’s view, these considerations are inconsistent with the basic principle that protection ought be offered by the international community only in the absence of protection within all areas of a receiving country.

The new subsection 5J(2) clarifies Australia’s interpretation of the standard of effective state or non-state protection within the receiving country that is required in order to make a determination of whether a person has a well-founded fear of persecution in that country. It is the Government’s intention to provide a statutory formulation of these concepts which is consistent with current Australian case law on effective state protection. The new paragraph 5J(2)(a) codifies the interpretation of effective protection measures provided by the State consistent with the High Court’s decision in *Minister for Immigration and Multicultural Affairs v S152/2003* (20204) 222 CLR. The new paragraph 5J(2)(b) codifies the adequate and effective protection measures provided by sources other than the relevant State consistent with the reasoning in *Siaw v Minister for Immigration and Multicultural Affairs* [2001] FCA 953.

It is the intention of Government by inserting the new subsection 5J(3) to expressly make it clear that a person does not have a well-founded fear of persecution if they could objectively take reasonable steps to modify their behaviour so as to avoid a real chance of persecution in the receiving country. A modification that would be in conflict with a characteristic that is fundamental to the person’s identity or conscience is excluded, as are modifications that would require the person to conceal an innate or immutable characteristic. The purpose of this amendment is to clarify that any assessment of whether a person has a ‘well-founded fear of persecution’ is to take into account not only what a person would do but also what they *could* do upon returning to a receiving country to avoid the relevant persecution.

New section 5L seeks to clarify and limit the definition of ***membership of a particular social group*** which is one of the grounds for a **well-founded fear of persecution** set out in new paragraph 5J(1)(a). The new section 5L applies to membership of a particular social group other than the person’s family. Currently there is minimal legislative guidance for decision makers to determine what constitutes a particular social group in this circumstance, which has resulted in a broad interpretation of the term being taken by the High Court in *Applicant S v Minister for Immigration and Multicultural Affairs* [2004] 217 CLR 387. The breadth of this interpretation has led to long lists of increasingly elaborate potential particular social groups being drawn for the purposes of protection visa applications thereby making implementation of the term complex and difficult for decision makers to apply, and is broader than that being applied in other jurisdictions (eg. Canada, the United States of America, New Zealand and the European Union). The new section 5L is based on the approach taken in these other jurisdictions and is intended to reduce the incentive and capacity for applicants to advance extensive lists of possible particular social groups. The new section 5L is not intended to exclude a finding that a person’s family constitutes a particular social group. Rather, it is intended to clarify that membership of a particular social group consisting of family will be dealt with separately under the new section 5K. The new section 5K is unchanged from its previous formulation at section 91S and is intended to provide legislative guidance to decision makers to determine what constitutes a particular social group other than the person’s family.

The Government intends the codification of Article 33(2) of the Refugees Convention, which operates as an exception to the prohibition against *refoulement*, to make it clear that it is both appropriate and desirable for decision makers to consider this concept as part of the criteria for a protection visa. The statutory implementation of Article 33(2) of the Refugees Convention is through the new subsection 36(1C). Where a person is found to meet the definition of ‘refugee’ but does not meet the criterion under subsection 36(1C) they will be ineligible for grant of a Protection visa. This criterion is consistent with the ineligibility criteria under paragraph 36(2C)(b) in relation to the complementary protection provisions in the Migration Act.

Schedule 6 to the Bill will clarify the legal status of children of UMAs and transitory persons.

Section 5AA of the Migration Act will be amended to include the children of UMAs, who are born in Australia or in a regional processing country, within the definition of UMA in this section. Such children are not currently explicitly included in the definition of UMA in the Migration Act. This means that the policy intent, which is that such children are prevented from applying for a Permanent Protection visa while in Australia by virtue of being a UMA, is not explicit on the face of the legislation.

This amendment will also make it clear that children of UMAs who arrive post-13 August 2012 are subject to transfer to a regional processing country, which will place them in a position consistent with their parents. If the children of UMAs are not subject to offshore processing then this may undermine the government’s offshore processing policies, both in respect of the children and the children’s family members. In terms of both preventing UMAs from applying for Permanent Protection visas and making UMAs subject to offshore processing, it is important to maintain consistency within the family unit and ensure families are not separated by the operation of the Migration Act. The new subsection 198AD(2A) will make clear that the children of UMAs who arrived in Australia prior to 13 August 2012 are not subject to offshore processing, consistent with their parents.

Consequential amendments will also be made to sections 5, 198 and 198AH of the Migration Act to ensure provisions relating to ‘transitory persons’ in the Migration Act account for the new definition of UMA.

These measures will commence on the day after the day of the Royal Assent is received and will operate with retrospective effect. This will clarify that any visa applications from children born to UMAs prior to commencement are invalid. However, the retrospective effect of the amendments will not apply to visa applications in respect of which the Minister has previously intervened to allow a valid visa application to be made. Accordingly, on-hand visa applications that the Minister has already allowed to proceed can continue to be assessed.

Schedule 7 to the Bill will make amendments so that the Minister for Immigration and Border Protection is able to place a statutory limit on the number of protection visas granted in a programme year.

In *Plaintiff S297/2013 v MIBP* [2014] HCA 24 a majority of the High Court interpreted the time limit created by current section 65A for processing protection visas as conflicting with the section 85 power to limit the number of visas that may be granted in a specified financial year. The Court resolved that conflict by finding that section 85 did not apply to protection visas. To address that decision, sections 65A and 414A of the Migration Act which require

applications for protection visas to be decided in 90 days, and corresponding reporting requirements in sections 91Y and 440A, will be repealed.

In addition the initial policy intent for introducing a 90 day requirement was to support flexible, fair and timely resolution of protection visa applications, but it is no longer an effective mechanism to achieve this outcome. Ministerial directions have been put in place regarding the order of consideration for processing of protection visa applications which achieve a more effective and responsive approach to different caseloads, without generating resource-intensive reporting.

The amendments in the Bill will also make clear that the requirement for the Minister in section 65 to grant or refuse to grant a visa after considering a valid application is subject to sections 84 and 86 of the Migration Act. The Bill will also amend sections 84 and 85 of the Migration Act to specifically state that a visa of a specified class includes protection visas.

FINANCIAL IMPACT STATEMENT

The financial impact of the Bill is medium. Any costs will be met from within existing resources of the Department of Immigration and Border Protection.

REGULATION IMPACT STATEMENT

The Office of Best Practice Regulation has been consulted and a regulation impact statement is not required. The advice references are 17300, 17451, 17519 and 17433.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

A Statement of Compatibility with Human Rights has been completed in relation to the amendments in this Bill and assesses that the amendments are compatible with Australia's human rights obligations. A copy of the Statement of Compatibility with Human Rights is at Attachment A.

MIGRATION AND MARITIME POWERS LEGISLATION AMENDMENT (RESTORING THE ASYLUM CASELOAD) BILL 2014

NOTES ON INDIVIDUAL CLAUSES

Clause 1 Short title

1. Clause 1 provides that the short title by which this Act may be cited is the *Migration and Maritime Powers Legislation Amendment (Restoring the Asylum Legacy Caseload) Act 2014*.

Clause 2 Commencement

2. Subclause 2(1) provides that each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.
3. Table item 1 provides that sections 1 to 3 and anything in this Act not elsewhere covered by the table commences on the day this Act receives the Royal Assent.
4. Table item 2 provides that Schedule 1 commences the day after this Act receives the Royal Assent.
5. Table item 3 provides that Schedule 2, Part 1, Division 1 commences the day after this Act receives the Royal Assent.
6. Table item 4 provides that Schedule 2, Part 1, Division 2 commences on a single day to be fixed by Proclamation. However, if the provisions do not commence within the period of 6 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period.
7. Table item 5 provides that Schedule 2, Part 1, Division 3 commences the day after this Act receives the Royal Assent.
8. Table item 6 provides that Schedule 2, Parts 2 and 3 commence the day after this Act receives the Royal Assent.
9. Table item 7 provides that Schedule 2, Part 4, Division 1 commences the day after this Act receives the Royal Assent.
10. Table item 8 provides that Schedule 2, Part 4, Division 2 commences immediately after the commencement of the provisions covered by table item 7.
11. Table item 9 provides that Schedule 2, Part 4, Divisions 3 and 4 commence the day after this Act receives the Royal Assent.
12. Table item 10 provides that Schedule 3 commences the day after this Act receives the Royal Assent.
13. Table item 11 provides that Schedule 4 commences on a single day to be fixed by Proclamation. However, if the provisions do not commence within the period of

6 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period.

14. Table item 12 provides that Schedule 5, items 1 and 2 commence the day after this Act receives the Royal Assent.
15. Table item 13 provides that Schedule 5, item 3 commences immediately after item 4 of Schedule 2 to the *Migration Amendment (Protection and Other Measures) Act 2014* commences.
16. Table item 14 provides that Schedule 5, Part 2 commences on a single day to be fixed by Proclamation. However, if the provisions do not commence within the period of 6 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period.
17. Table item 15 provides that Schedule 5, item 18 commences at the same time as the provisions covered by table item 3. However, if item 3 of Schedule 2 to the *Migration Amendment (Protection and Other Measures) Act 2014* commences at or before that time, the provisions do not commence at all.
18. Table item 16 provides that Schedule 5, items 19 to 22 commence at the same time as the provisions covered by table item 3. However, if Schedule 1 to the *Migration Amendment (Regaining Control Over Australia's Protection Obligations) Act 2014* commences at or before that time, the provisions do not commence at all.
19. Table item 17 provides that Schedule 5, item 23 commences immediately after the *Migration Amendment (Regaining Control Over Australia's Protection Obligations) Act 2014* commences.
20. Table item 18 provides that Schedule 5, item 24 commences immediately after item 3 of Schedule 3 to the *Migration Amendment Act 2014* commences.
21. Table item 19 provides that Schedule 5, item 25 commences immediately after item 5 of Schedule 3 to the *Migration Amendment Act 2014* commences.
22. Table item 20 provides that Schedule 5, item 26 commences immediately after the *Migration Amendment (Regaining Control Over Australia's Protection Obligations) Act 2014* commences.
23. Table item 21 provides that Schedule 5, item 27 commences the day after this Act receives the Royal Assent.
24. Table item 22 provides that Schedule 5, items 28 and 29 commence at the same time as the provisions covered by table item 3.
25. Table item 23 provides that Schedules 6 and 7 commence the day after this Act receives the Royal Assent.
26. A note after the table in subclause 2(1) of this Act provides that the table in subclause 2(1) relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

27. Subclause 2(2) provides that any information in column 3 of the table in subclause 2(1) is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

Clause 3 Schedules

28. Subclause 3(1) provides that legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.
29. Subclause 3(2) provides that the amendment of any regulation under subsection 3(1) does not prevent the regulation, as so amended, from being amended or repealed by the Governor-General.

SCHEDULE 1 – Amendment relating to maritime powers

Maritime Powers Act 2013

Item 1 Section 7

1. This item omits “In accordance with international law, the exercise of powers is limited in places outside Australia.” in section 7 of Division 2 of Part 1 of the Maritime Powers Act.
2. Section 7 is a guide that describes the operation of the Maritime Powers Act. The omitted provision was for the purpose of acknowledging that Australia’s extraterritorial jurisdiction is limited as a matter of international law, particularly under the United Nations Convention on the Law of the Sea. However, it created an ambiguity due to its lack of specificity. This amendment does not change the need to give effect to Australia’s international obligations. It merely reflects the intention that the interpretation and application of such obligations is, in this context, a matter for the executive government, noting that the executive government is accountable to the international community for its compliance with those obligations.

Item 2 Section 8

1. This item inserts a new definition of **destination** and **Marine Safety (Domestic Commercial Vessel) National Law** in section 8 of Division 3 of Part 1 of the Maritime Powers Act.
2. The new definition of “destination” provides that:

destination:

- in relation to a vessel detained under subsection 69(1) – see subsections 69(2), (3) and (3A); or
- in relation to a person detained under subsection 72(4) – see subsections 72(4), (4A) and (4B).

Note: see also section 75C.

Marine Safety (Domestic Commercial Vessel) National Law has the meaning given by section 17 of the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012*.

3. Subsection 69(1) of the Maritime Powers Act provides that a maritime officer may detain a vessel or aircraft. Subsection 72(4) of the Maritime Powers Act, as substituted by item MP1F of Schedule MP to the Bill, provides that a maritime officer may detain a person who is or was on a detained vessel or aircraft and take the person, or cause the person to be taken, to a place in the migration zone or outside the migration zone, including a place outside Australia.
4. Subsection 69(2) is amended by items MP1B and MP1BA of Schedule MP to the Bill. Subsection 69(3) is repealed and substituted with a new subsection 69(3) by item MP1C of Schedule MP to the Bill and new subsection 69(3A) is inserted by the same item. Subsection 72(4) is repealed and substituted with new subsection 72(4) item MP1F of Schedule MP to the Bill and new subsection 82(4A) is inserted by the same

item. The new defined term “destination” is used to replace the un-defined term “place” in sections 69 and 72. The purpose of those changes is explained below in items MP1B and MP1D.

5. The new definition of “Marine Safety (Domestic Commercial Vessel) National Law” refers to the “national law” established by the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012*, which is referred to in new section 75H.

Item 3 Section 8 (paragraph (e) of definition of monitoring law)

6. This item inserts “73 or” after “Division” in paragraph (e) of the definition of monitoring law in section 8 of Division 3 of Part 1 of the Maritime Powers Act.
7. The current definition provides that **monitoring law** means:
 - the *Customs Act 1901*; or
 - the *Fisheries Management Act 1991*; or
 - the *Migration Act 1958*; or
 - the *Torres Strait Fisheries Act 1984*; or
 - section 72.13 or Division 307 of the *Criminal Code*; or
 - clause 8 of Schedule 1 to the *Environment Protection and Biodiversity Conservation Act 1999*; or
 - a law prescribed by the regulations.
8. The effect of this amendment is to provide that Division 73 of the *Criminal Code* is a monitoring law for the purposes of this definition. Division 73 of the *Criminal Code* deals with people smuggling and related offences. This will ensure that the people smuggling offences in the Migration Act and Criminal Code will be treated similarly for the purposes of the Maritime Powers Act, and reflect the importance and original intention of the Maritime Powers Act in countering people smuggling operations.

Item 4 Section 11

9. This item inserts “(1)” before “For the purposes” in section 11 of Division 3 of Part 1 of the Maritime Powers Act.
10. Current section 11 provides that for the purposes of the Maritime Powers Act, the **continuous exercise of powers** does not end only because there is a period of time between the exercise of one or more of the powers.
11. The effect of this change is to reorganise the current content of Section 11 into new subsection 11(1). This facilitates the insertion of new subsection 11(2) by item 5 below.

Item 5 At the end of section 11

12. This item inserts “(2) To avoid doubt, a **continuous exercise of powers** does not end merely because the destination to which a vessel, aircraft or person is to be taken (or caused to be taken) is changed to a different place under subsection 69(3A) or 72(4B).” in section 11 of Division 3 of Part 1 of the Maritime Powers Act.
13. The effect of this amendment is to avoid any doubt that a change of destination under subsections 69(3A) or 72(4B) could interrupt the continuous exercise of powers. Parliament’s intent is that this is a broad provision which provides maritime officers with the flexibility and discretion needed to effectively exercise maritime powers in real-world operational circumstances. Other examples of matters which would not put an end to the continuous exercise of powers include arrival at a destination while detention continues, or pausing a journey to a destination for other operational reasons, for example to rescue persons from a vessel in distress or to reprovise a vessel.

Item 6 At the end of Division 2 of Part 2

14. This item adds new section 22A **Failure to consider international obligations etc. does not invalidate authorisation** and new section 22B **Rules of natural justice do not apply to authorisations** at the end of Division 2 of Part 2 of the Maritime Powers Act.
15. New subsection 22A(1) provides that the exercise of a power to give an authorisation under a provision of this Division is not invalid
 - because of a failure to consider Australia’s international obligations, or the international obligations or domestic law of any other country; or
 - because of a defective consideration of Australia’s international obligations, or the international obligations or domestic law of any other country; or
 - because the exercise of the power is inconsistent with Australia’s international obligations.
16. The intention of this provision is that, as a matter of domestic law, the failure to consider or comply with Australia’s international obligations or a failure to consider the domestic law or international obligations of another country should not be able to form the basis of a domestic legal challenge to the exercise of the powers to give an authorisation under Division 2 of Part 2 of the MPA.
17. The Australian Government takes its international obligations seriously, and Australia is bound to act in compliance with its international obligations as a matter of international law. This amendment does not seek to change that fact. Appropriate measures are always taken to ensure that operational activities involving the exercise of maritime powers comply with Australia’s international obligations. This amendment merely reflects the intention that the interpretation and application of such obligations is, in this context, a matter for the executive government. The Parliament’s intent in passing this amendment is that it be put beyond doubt that Australia’s international obligations, the international obligations of other countries and other countries’

domestic law cannot form the basis of an invalidation of the exercise of the powers in Division 2 of Part 2 as a matter of domestic law.

18. New subsection 22A(2) provides that subsection 22A(1) is not to be taken to imply that the exercise of a power under any other provision of this Act is invalid for a reason of a kind specified in paragraphs 22A(1)(a), 22A(1)(b) or 22A(1)(c).
 19. The purpose of subsection 22A(2) is to make it clear that there should be no implication drawn from the inclusion of section 22A that international law or the laws of other countries may be used to impugn other exercises of power or decisions under the Maritime Powers Act.
 20. New subsection 22B(1) provides that the rules of natural justice do not apply to the exercise of a power to give an authorisation under a provision of Division 2 of Part 2 of the Maritime Powers Act.
 21. New subsection 22B(2) provides that subsection 22B(1) Subsection (1) is not to be taken to imply that the rules of natural justice do apply in relation to the exercise of powers under any other provision of this Act.
 22. The purpose of subsection 22B(1) is to put it beyond doubt that the rules of natural justice do not apply to the process of issuing an authorisation under Division 2 of Part 2 of the Maritime Powers Act.
 23. The purpose of subsection 22B(2) is to make it clear that there should be no implication drawn from the inclusion of section 22B that the rules of natural justice may be used to impugn other exercises of power or decisions under the Maritime Powers Act.
 24. The original intention of the Maritime Powers Act was to provide a complete statement on the balance between individual protections, including natural justice, and law enforcement imperatives. The *Replacement Explanatory Memorandum* to the Maritime Powers Bill 2012 stated on page 62 that
- Part 5 provides both substantive and procedural protections to individuals held by maritime officers. These protections strike a balance between, on the one hand, the necessity of treating held individuals in accordance with natural justice and human dignity and, on the other hand, recognising the unique circumstances facing law enforcement in a maritime environment.
25. Part 5 does not impose a general requirement to provide natural justice, and the explanatory memorandum clearly acknowledges that the “unique circumstances...in a maritime environment” render the provision of natural justice in most circumstances impracticable. In dealing with powers to detain and move persons, Part 5 does not provide for natural justice. Nevertheless, to provide authorising officers with the greatest certainty while performing their work, it is appropriate to put it beyond doubt that they are not bound to provide natural justice in deciding to authorise the exercise of maritime powers.

Item 7 Paragraph 31(a)

26. This item inserts “or prevent” after “investigate” in paragraph 31(a) of Subdivision C of Division 4 of Part 2 of the Maritime Powers Act
27. The purpose of this amendment is to put it beyond doubt that, when authorised, maritime officers may exercise maritime powers to prevent a contravention of the law.

Item 8 Subsection 41(1) (note)

28. This item omits “note” and substitutes “note 1” in the note to subsection 41(1) of Subdivision B of Division 5 of the Maritime Powers Act.
29. This is a consequential amendment that reflects the insertion of a second note to the subsection.

Item 9 At the end of subsection 41(1)

30. This item adds “note 2: This section does not apply to the exercise of powers under Divisions 7 and 8 of Part 3 in some circumstances: see section 75D.” at the end of subsection 41(1) of Subdivision B of Division 5 of the Maritime Powers Act.
31. The purpose of this note is to direct the reader to section 75D. Section 75D is inserted by this bill, as discussed below, and provides a ministerial power to determine that the exercise of powers between countries may take place in certain circumstances.

Item 10 At the end of subsection 69(1)

32. This item adds “Note: For other provisions affecting powers under this section, see section 69A and Division 8A.” at the end of Subsection 69(1) of Division 7 of Part 3 of the Maritime Powers Act.
33. The purpose of this note is to direct the reader to section 69A and Division 8A. These were inserted by this Bill, as discussed below, and may affect the exercise of powers under section 69.

Item 11 Subsections 69(2) and (3)

34. This item repeals subsections 69(2) and 69(3) and substitutes new subsection 69(2), 69(3) and 69(3A).
35. New subsection 69(2) provide that the officer may take the vessel or aircraft, or cause the vessel or aircraft to be taken, to a place (the destination) and remain in control of the vessel or aircraft, or require the person in charge of the vessel or aircraft to remain in control of the vessel or aircraft, at the destination, until whichever of the following occurs first:
 - the vessel or aircraft is returned to a person referred to in subsection 87(1);
 - action is taken as mentioned in subsection 87(3) in relation to the vessel or aircraft.

36. Current section 69(2) provides that an officer take a detained vessel or aircraft, or cause the vessel or aircraft to be taken, to a port, airport or other place that the officer considers appropriate, and may remain in control of the vessel or aircraft, or require the person in charge of the vessel or aircraft to remain in control of the vessel or aircraft, at that place until the vessel is released or disposed of. Current subsection 69(3) provides that a maritime officer may take the vessel or aircraft, or cause it to be taken, to the port, airport or other place even if it is necessary for the vessel or aircraft to travel outside Australia to reach the port, airport or other place.
37. The effect of this change is to use the new term **destination** in lieu of the phrase “port, airport or other place that the officer considers appropriate”, and to clarify the period of time during which maritime officers may remain in control of a vessel. The new term **destination** is intended to provide clarity and consistency. It also harmonises the language with that in subsection 72(4). Section 75C contains additional provisions about the place that may be the destination.
38. New subsection 69(3) provides that the destination may be in the migration zone or outside the migration zone (including outside Australia).
39. A new note after new subsection 69(3) notes that Section 75C contains additional provisions about the place that may be the destination.
40. New subsection 69(3A) provides that a maritime officer may change the destination to a different place at any time (including a time after arrival at the place that was previously the destination). If the destination is changed to a different place, that different place is then the destination, but this does not affect the exercise of powers under the Maritime Powers Act before the change.
41. A note after new subsection 69(3A) advises that it is possible that the destination may change more than once.
42. This amendment is to clarify the intended operation of section 69, putting it beyond doubt that a maritime officer may change the place to which a vessel is to be taken. This understanding is reflected in the explanatory memorandum for the *Maritime Powers Bill 2012* (see page 50 of the replacement memorandum).

Item 12 After section 69

43. This item inserts “**69A Additional provisions relating to taking a vessel or aircraft to a destination under section 69**” after section 69 of Division 7 of Part 3 of the Maritime Powers Act.
44. New subsection 69A(1) provides that for the purpose of taking a vessel or aircraft (or causing a vessel or aircraft to be taken) to a destination under paragraph 69(2)(a), the vessel or aircraft may be detained under subsection 69(1)
 - for any reasonable period required to decide which place should be the destination or to consider whether the destination should be changed to a different place under subsection 69(3A), and (if it should be changed) to decide what that different place is; and

- for any period reasonably required for the minister to consider whether to give a direction under section 75D, 75F or 75H in relation to a matter referred to in subparagraphs 69A(a)(i) or 69A(a)(ii) or any other matter relating to the vessel or aircraft, or in relation to persons on (or suspected as having been on) the vessel or aircraft; and
 - for the period it actually takes to travel to the destination.
45. A new note to new subsection 69A(1) notes that the total period for which the vessel or aircraft is detained may be longer than the periods covered by this subsection: see subsection (3) and section 87.
 46. The effect of subsection 69A(1) is to provide further clarity and certainty in respect of maritime officers' power to detain a vessel or aircraft while exercising the power to take a vessel or aircraft to a place under paragraph 69(2)(a). This enables a vessel or aircraft to be detained while a destination is determined, to consider whether the destination should be changed, or while the Minister considers whether to give a direction under 75D, 75F or 75H. This subsection also allows for the vessel or aircraft to be detained during actual travel time.
 47. New subsection 69A(2) clarifies that for the purposes of paragraph 69A(1)(c) the period it actually takes to travel to the destination may include stopovers at other places on the way to the destination, and any time for other logistical, operational or other contingencies relating to travelling to the destination and there is no requirement that the most direct route to the destination must be taken. It was always intended that the powers to move a vessel contemplated such periods of time; however, this provision is intended to ensure that result is as clear as possible.
 48. The purpose of new section 69A is to confirm that the powers in section 69 are intended to account for the real time it takes to deal with a vessel detained under section 69 safely and in an operationally realistic way, including all the elements which may delay operations, both predictable and unpredictable. This subsection strikes a balance between the need for clear operational powers and the desirability of imposing constraints on the exercise of power by making paragraphs 69A(1)(a) and 69A(1)(b) subject to a reasonableness requirement. Paragraph 69A(1)(c) is not subject to an equivalent requirement of reasonableness as it is confined to the time that it actually takes to travel to a destination.
 49. The safe exercise of the power to move a vessel requires the clear ability to undertake stopovers (for example to re-provision or conduct a crew replacement), and to account for logistical issues, operational or other contingencies. Explicitly providing that there is no requirement that the most direct route to the destination be taken puts it beyond doubt that Australia's maritime personnel are able to undertake operations safely and in a manner that they consider appropriate to the circumstances. These provisions are designed to provide maritime officers with the flexibility they need to exercise their professional judgement to perform their difficult work in the safest and most effective way.
 50. New subsection 69A(3) provides that days in periods covered by subsection 69A(1) do not count towards the 28 day limit specified in paragraph 87(2)(a).

51. The effect of this provision is to clarify the relationship between new subsection 69A(3) and paragraph 87(2)(a). This reflects the policy that the holding period should not commence until after the vessel or aircraft reaches its destination.

Item 13 Subsection 72(1) (note)

52. This item omits “Note:” and substitutes “Note 1:” in the note to section 72(1) of Division 8 of Part 3 of the Maritime Powers Act.
53. This is a consequential amendment that reflects the insertion of a second note after the current note to subsection 72(1).

Item 14 At the end of subsection 72(1)

54. This item adds “Note 2: For other provisions affecting powers under this section, see section 72A and Division 8A.” at the end of subsection 72(1) of Division 7 of Part 3 of the Maritime Powers Act
55. The purpose of this note is to direct the reader to new sections 69A, 72A and Division 8A, all of which are inserted by this act and may affect the exercise of power under section 72.

Item 15 Subsections 72(3) and (4)

56. This item repeals subsections 72(3) and 72(4) and substitutes new subsections 72(3), 72(4), 72(4A) and 72(4B) of Division 7 of Part 3 of the Maritime Powers Act.
57. Current subsection 72(3) provides that a maritime officer may require that the person remain on the vessel or aircraft until it is taken to a port, airport or other place (see section 69) or permitted to depart from the port, airport or other place. The note to current subsection 72(3) states that it is an offence to fail to comply with a requirement under this subsection: see section 103.
58. Current subsection 72(4) provides that a maritime officer may detain the person (who is or was on a detained vessel or aircraft) and take the person, or cause the person to be taken, to a place in the migration zone or to a place outside the migration zone, including a place outside Australia.
59. New subsection 72(3) provides that a maritime officer may require the person to remain on the vessel or aircraft until whichever of the following occurs first:
- the vessel or aircraft is returned to a person referred to in subsection 87(1);
 - action is taken as mentioned in subsection 87(3) in relation to the vessel or aircraft.
60. A new note states that it is an offence to fail to comply with a requirement under this section: see section 103.
61. The effect of this is to clarify the period during which a maritime officer may require a person to remain on a detained vessel or aircraft, and to harmonise the language between this provision and amended paragraph 69(2)(b).

62. New subsection 72(4) provides that a Maritime officer may detain the person and take the person, or cause the person to be taken, to a place (the **destination**). New subsection 72(4A) provides that the destination may be: (a) in the migration zone or (b) outside the migration zone (including outside Australia).
63. The new note to new section 72(4A) states that section 75C contains additional provisions about the place that may be the destination.
64. The effect of these amendments is to clarify the places to which a person may be taken, and to harmonise the language between sections 69 and 72.
65. New subsection 72(4B) provides that a maritime officer may change the destination to a different place at any time (including a time after arrival at the place that was previously the destination). If the destination is changed to a different place: (a) that different place is then the destination; but (b) this does not affect the exercise of powers under this Act before the change. The new note to new section 72(4B) states that it is possible that the destination may change more than once.
66. This amendment is to clarify the intended operation of subsection 72(4), putting it beyond doubt that a maritime officer may change the place to which a person is to be taken. This understanding is reflected in the explanatory memorandum for the Maritime Powers Bill 2012 (see page 51 of the replacement memorandum).

Item 16 Subsection 72(5)

67. This item omits “another place” and substitutes “the destination” in subsection 72(5) of Division 8 of Part 3 of the Maritime Powers Act.
68. Current subsection 72(5) provides that for the purposes of taking the person to another place, a maritime officer may within or outside Australia place the person on a vessel or aircraft or restrain the person on a vessel or aircraft or remove the person from a vessel or aircraft.
69. This is a consequential amendment that replaces the reference to “another place” with “the destination”. This reflects the consistent use of the term “the destination” throughout the Act. The use of this term is further explained in item 16.

Item 17 Paragraphs 72(5)(a) and (b)

70. This item inserts “, or in a particular place on a vessel or aircraft” after “or aircraft” in paragraphs 72(5)(a) and 72(5)(b) in Division 8 of Part 3 of the Maritime Powers Act.
71. Current subsection 72(5) provides that for the purposes of taking the person to another place, a maritime officer may within or outside Australia place the person on a vessel or aircraft or restrain the person on a vessel or aircraft or remove the person from a vessel or aircraft.
72. The purpose of this provision is to clarify that a maritime officer may place or restrain a person to whom section 72 applies in a particular place on a vessel or aircraft, in addition to on a vessel or aircraft generally. This reflects a power already provided in section 71, but explicitly applies it in circumstances where a person is detained under subsection 72(4).

Item 18 After section 72

73. This item inserts new section 72A **Additional provisions relating to taking a person to a destination under subsection 72(4)** in Division 8 of Part 3 of the Maritime Powers Act.
74. New subsection 72A(1) provides that a person may be detained under subsection 72(4) for any period reasonably required to decide which place should be the destination or to consider whether the destination should be changed to a different place under subsection 72(4B), and (if it should be changed) to decide what the different place is; and for any period reasonably required for the Minister to consider whether to make or give a determination or direction under sections 75D, 75F or 75H in relation to a matter referred to in subparagraphs 72A(a)(i) or 72A(a)(ii) or any other matter relating to the exercise of powers in relation to the person and for the period it actually takes to travel to the destination and for any period reasonably required to make and effect arrangements relating to the release of the person.
75. New subsection 72A(2) provides that for the purpose of paragraph 72A(1)(c) the period it actually takes to travel to the destination may include stopovers at other places on the way to the destination, and time for other logistical, operational or other contingencies relating to travelling to the destination and there is no requirement that the most direct route to the destination must be taken.
76. New subsection 72A(3) provides that the person must not be detained under subsection 72(4) for any longer than is permitted by subsection 72A(1).
77. New subsection 72A(4) provides that powers may be exercised in accordance with subsection 72(5) in relation to the person at any time while the person continues to be detained under that subsection.
78. New subsection 72A(5) provides that subsection 72A(3) does not prevent the arrest of the person or the detention of the person or the exercise of any other power in relation to the person.
79. The purpose of new section 72A is to put it beyond doubt that the Maritime Powers Act is intended to account for the real time it takes to deal with a person under 72(4) safely and in an operationally realistic way. This section strikes a balance between the need for clear operational powers and the desirability of imposing constraints on the exercise of power by making paragraphs 72A(1)(a), 72A(1)(b) and 72A(1)(d) subject to a reasonableness requirement. Paragraph 72A(1)(c) is not subject to an equivalent requirement of reasonableness as it is confined to the time that it actually takes to travel to a destination.
80. The effect of 72A(3) is to make it clear that subsection 72A(1) places limits on the time during which a person may be detained under subsection 72(4).
81. The purpose of subsection 72A(4) puts it beyond doubt that the powers to place, restrain or remove a person under section 72(5) can be exercised at any time while a person is detained.

82. This purpose of this provision is to remove doubt about the relationship between subsection 72A(3) and other provisions by specifying that while subsections 72A(1) and 72A(3) together limit detention under subsection 72(4), this should not be interpreted to prevent either the arrest or detention of a person under Australian law or other exercises of power in relation to such a person.

Item 19 After Division 8 of Part 3

83. This item inserts new **Division 8A General provisions relating to powers under Divisions 7 and 8** after Division 8 of Part 3 of the Maritime Powers Act and new sections **75A Failure to consider international obligations etc. does not invalidate exercise of powers, 75B Rules of natural justice do not apply to exercise of powers, 75C Additional provisions about destination to which a vessel, aircraft or person may be taken, 75D Exercising powers between countries, 75E Powers are not limited by the *Migration Act 1958*, 75F Minister may give directions about exercise of powers, 75G Compliance with directions and 75H Certain maritime laws do not apply to certain vessels detained or used in exercise of powers.**
84. New subsection 75A(1) provides that the exercise of a power under section 69, 69A, 71, 72, 74 72A, 72D, 75F, 75G or 75H is not invalid
- because of a failure to consider Australia's international obligations, or the international obligations or domestic law of any other country; or
 - because of a defective consideration of Australia's international obligations, or the international obligations or domestic law of any other country; or
 - because the exercise of the power is inconsistent with Australia's international obligations.
85. The intention of this provision is that, as a matter of domestic law, the failure to consider or comply with Australia's international obligations or a failure to consider the domestic law or international obligations of another country should not be able to form the basis of a domestic legal challenge to the exercise of the powers under the relevant sections of the Maritime Powers Act.
86. The Australian Government takes its international obligations seriously, and Australia is bound to act in compliance with its international obligations as a matter of international law. This amendment does not seek to change that fact. Appropriate measures are always taken to ensure that operational activities involving the exercise of maritime powers comply with Australia's international obligations. This amendment merely reflects the intention that the interpretation and application of such obligations is, in this context, a matter for the executive government. The Parliament's intent in passing this amendment is that it be put beyond doubt that Australia's international obligations, the international obligations of other countries and other countries' domestic law cannot form the basis of an invalidation of the exercise of the affected powers as a matter of domestic law.
87. New subsection 75A(2) provides that subsection 75A(1) does not prevent the exercise of a power under a provision referred to in that subsection from being invalid because it was not in accordance with Part 2.

88. Part 2 of the Maritime Powers Act provides a framework within which the exercise of maritime powers is authorised and limited. The purpose of subsection 75A(2) is to make it clear that subsection 75A(1) should not prevent invalidity of a decision or exercise of power for reasons of a failure to comply with the conditions placed on that decision or exercise by the Maritime Powers Act itself – that is, the act should be internally consistent, including in circumstances where *by the terms of the Act itself* a maritime power is limited under an international obligation, for example when maritime powers are exercised under section 33. It should be noted that Division 2 of Part 2 will contain in new section 22A an equivalent provision to new section 75A which applies to that division (but not to the rest of Part 2).
89. New subsection 75A(2) provides that subsection (1) is not to be taken to imply that the exercise of a power under any other provision of this Act is invalid for a reason of a kind specified in paragraphs 75A(1)(a), 75A(1)(b) or 75A(1)(c).
90. The purpose of this subsection is to clarify that specifying that the Australia's international obligations or the domestic laws of another country will not lead to the invalidity of an exercise of power under section 69, 69A, 71, 72, 74 72A, 75D, 75F, 75G or 75H] is not intended to imply that such considerations will lead to the invalidity of other powers or provisions under the Maritime Powers Act.
91. New subsection 75B(1) provides that the rules of natural justice do not apply to the exercise of powers under section 69, 69A, 71, 72, 74 72A, 75D, 75F, 75G or 75H.
92. The original intention of the Maritime Powers Act was to provide a complete statement on the balance between individual protections, including natural justice, and law enforcement imperatives. The *Replacement Explanatory Memorandum* to the Maritime Powers Bill 2012 stated on page 62 that:

Part 5 provides both substantive and procedural protections to individuals held by maritime officers. These protections strike a balance between, on the one hand, the necessity of treating held individuals in accordance with natural justice and human dignity and, on the other hand, recognising the unique circumstances facing law enforcement in a maritime environment.
93. Part 5 does not impose a general requirement to provide natural justice, and the explanatory memorandum clearly acknowledges that the “unique circumstances...in a maritime environment” render the provision of natural justice in most circumstances impracticable. In dealing with powers to detain and move persons, Part 5 does not provide for natural justice. Nevertheless, to provide authorising officers with the greatest certainty while performing their work, it is appropriate to put it beyond doubt that they are not bound to provide natural justice in deciding to authorise the exercise of maritime powers.
94. New subsection 75B(2) provides that subsection 75B(1) is not to be taken to imply that the rules of natural justice do apply in relation to the exercise of powers under any other provision of this Act.
95. The purpose of this subsection is to clarify that specifically excluding the rules of natural justice from the exercise of power under section 69, 69A, 71, 72, 74, 72A, 75D,

75F, 75G or 75H is not intended to imply that the rules of natural justice do apply to other powers or provisions under the Maritime Powers Act.

96. New section 75C provides in subsection 75C(1) that to avoid doubt:
 - a) the destination to which a vessel, aircraft or person is taken (or caused to be taken) under section 69 or 72:
 - i. does not have to be in a country, and
 - ii. without limiting subparagraph (i)—may be just outside a country; and
 - iii. may be a vessel; and
 - b) a vessel, aircraft or person may be taken (or caused to be taken) to a destination under section 69 or 72:
 - whether or not Australia has an agreement or arrangement with any other country relating to the vessel or aircraft (or the persons on it), or the person; and
 - irrespective of the international obligations or domestic law of any other country.
97. The effect of new section 75C is to put it beyond doubt that a destination does not need to be inside a country and that a vessel, aircraft or person may be taken to a destination that is not inside a country whether or not Australia has an agreement with the country, and irrespective of the international obligations or domestic laws of any other country. While this amendment simply gives explicit voice to Parliament's intent in the original Maritime Powers Act, as demonstrated particularly by the fact that section 40 provides for the agreement of another country only for the exercise of maritime powers inside another country, this amendment puts the matter beyond doubt.
98. A new note to new section 75C states that the definition of country in section 8 includes the territorial sea and archipelagic waters of the country, as well as various other areas.
99. The purpose of this provision is to draw the reader's attention to a relevant defined term in section 8.
100. New subsection 75C(2) provides that if the destination is in another country, section 40 must be complied with.
101. The purpose of this provision is to draw the reader's attention to the fact that, to exercise powers *in* another country (including its territorial sea or archipelagic waters) with the authorisation of the Maritime Powers Act, section 40 must be complied with. While taking persons or a vessel to a place in another country requires either a request from or the agreement of that country to exercise maritime powers, it is intended that nothing further is required, such as an agreement as to the reception of the persons taken. It is Parliament's intent that issues beyond mere permission to exercise powers in another country are more properly dealt with by the executive government.

102. New subsection 75D(1) provides that section 41 (foreign vessels between countries) does not apply to an exercise of power under section 69, 69A, 71, 72, 72A or 74 if the exercise of power is covered by a determination in force under subsection (2), the exercise of power is part of a continuous exercise of powers and the continuous exercise of powers commenced in accordance with any applicable requirements of Division 5 of Part 2.
103. New subsection 75D(2) provides that for the purpose of subsection 75D(1), the Minister may make a written determination that is expressed to cover the exercise, in a specified circumstance, of powers under one or more of the sections referred to in subsection 75D(1).
104. New subsection 75D(3) provides that the Minister may, in writing, vary or revoke a determination made under subsection 75D(2).
105. New subsection 75D(4) states that the only condition for the exercise of the power to make a determination under subsection 75D(2), or to vary a determination, is that the Minister thinks that it is in the national interest to make or vary the determination. The term ‘national interest’ has a broad meaning and refers to matters which relate to Australia’s standing, security and interests. For example, these matters may include governmental concerns related to such matters as public safety, border protection, the prevention of transnational and organised crime, national security, defence, Australia’s economic interests, Australia’s international obligations and its relations with other countries. Measures for the effective management of Australia’s maritime security are in the national interest.
106. The new note to subsection 75D(4) puts it beyond doubt that there are no conditions for the exercise of the power to revoke a determination.
107. New subsection 75D(5) provides that a determination under subsection 75D(2), or an instrument varying or revoking a determination, comes into force unless paragraph 75D(5)(b) applies — when it is made or if the determination or instrument specifies a later time as the time when it is to come into force—at that later time.
108. New subsection 75D(6) provides that a determination under subsection 75D(2) remains in force until whichever of the following occurs first: an instrument revoking the determination comes into force or if the determination is expressed to cease to be force at a specified time—the time so specified.
109. New subsection 75D(7) provides that a determination under subsection 75D(2), or a variation or revocation of a determination, is not a legislative instrument.
110. New section 75D creates an exception to the general limits on the exercise of powers in relation to foreign vessels between countries created by section 41. Subsection 75D(1) provides limited circumstances in which the exception is applicable. Subsection 75D(2) allows the minister to make a written determination that will enliven the exception, in relation to such an exercise of power, in those limited circumstances. The purpose of this exception is to provide for flexibility in exercising powers relating to foreign vessels between countries, reflecting the policy concern that the unique nature of the maritime environment can create contingencies that are difficult to predict.

111. New section 75D provides a mechanism for ensuring that Australia's international law obligations can be taken into account by the executive government. This power is broadly framed and is subject to the exclusion of new section 75A such that its exercise cannot be invalidated, as a matter of domestic law, on the basis of international law. This is because the intention in this context is that the interpretation and application of such obligation is a matter for the executive government. Parliament's intent in passing this amendment is that the Minister have the personal ability to provide for the exercise of maritime powers in circumstances not otherwise covered by the Maritime Powers Act, provided that exercise is part of a continuous exercise of powers which commenced consistent with Division 5 of Part 2.
112. New subsection 75D(3) provides a power to vary or revoke a determination made under subsection 75D(2). This is incidental to the power to issue the determination. New subsection 75D(4) provides that the only condition for the Minister to vary or revoke a subsection 75D(2) determination is that the Minister thinks that it is in the national interest to do so. This is intended to preserve flexibility for the Minister to issue a determination in a wide variety of difficult to predict situations if the Minister considers it in the national interest to do so. The note to this subsection makes it clear that there are no conditions on the exercise of the power to revoke a decision.
113. New subsections 75D(5) and 75D(6) make provision for when a determination comes into force and remains in force. A determination comes into force when it is made unless the determination specifies a later time, in which case it comes into force at that time. A determination remains in force until it is revoked by an instrument or a time specified in the determination for it to cease to be in force accrues.
114. Subsection 75D(7) provides that a determination under subsection (2) or variation or revocation is not a legislative instrument. This means that the requirements of the *Legislative Instruments Act 2003* (LIA) will not apply to it. This is a substantive exemption from the LIA. Such an exemption is necessary because it would not be appropriate to publish the determinations on the Federal Register of Legislative Instruments (FRLI). The determinations will necessarily contain sensitive operational matters which, in the national interest, would not be suitable for public release. A substantive exemption from the LIA would provide an exemption from the publication requirements and thus provide protection of this sensitive operational information. dangerous and unique maritime operational environment.
115. New subsection 75E(1) provides that Powers under sections 69, 69A, 71, 72, 72A, 74, 75D, 75F, 75G or 75H are not in any respect subject to, or limited by, the *Migration Act 1958* (including regulations and other instruments made under that Act).
116. This provision puts it beyond doubt that the powers in sections 69, 69A, 71, 72, 72A, 74, 75D, 75F, 75G or 75H powers operate in their own right, and that there is no implication to be drawn from the provisions of the Migration Act. This provision aids in refuting the incorrect claim that the existence of the regional processing arrangements in the Migration Act limits the extent to which maritime powers may be used to address maritime people smuggling. It is Parliament's intent that the existence of the Regional Processing arrangements particularly, and the Migration Act generally, is not to be used as a basis or part of a basis to read down or limit the relevant provisions of the Maritime Powers Act, which are intended to operate in their own right.

117. New subsection 75E(2) provides that subsection (1) of this section is not to be taken to imply that other powers under this Act are subject to, or limited by, the *Migration Act 1958* (including regulations and other instruments made under that Act).
118. The purpose of this subsection is to clarify that specifying that the powers under section 69, 69A, 71, 72, 72A, 74 75D, 75F, 75G or 75H are not subject to or limited by the *Migration Act 1958* is not intended to imply that other powers or provisions under the Maritime Powers Act are limited by or subject to the *Migration Act 1958*.
119. New subsection 75F(1) provides that this section applies in relation to the powers in sections 69, 69A, 71, 72 and 72A. New subsection 75F(2) provides that the Minister may, in writing, give directions requiring the exercise of a power or powers in a specified circumstance, or in circumstances in a specified class, or relating to the exercise of a power or powers in a specified circumstance, in a specified class of circumstances or more generally. New subsection 75F(3) provides that without limiting subsection (2), the Minister may give a direction under that subsection specifying a place that is to be, or is not to be, the destination to which a vessel, aircraft or person is taken under paragraph 69(2)(a) or subsection 72(4) or specifying matters to be taken into account in deciding the destination to which a vessel, aircraft or person is to be so taken.
120. The effect of subsections 75F(1), 75F(2) and 75F(3) is that the Minister may, by written direction, require that powers under sections 69, 69A, 71, 72 and 72A are exercised, relating to the exercise of those powers, which includes specifying a place that is to be, or not to be a destination for a vessel, aircraft or person, or specifying matters to be taken account into making a decision about the destination to which a vessel, aircraft or person is to be taken. Such directions may also be directed by the Minister at a class of circumstances, rather than a particular circumstance. The purpose of this provision is to put it beyond that the Minister has the power to provide instructions to direct the exercise of these powers.
121. Subsection 75F(4) provides a power for the minister to vary or revoke a direction given under subsection 75F(2). This is incidental to the power to issue the determination.
122. New subsection 75F(5) provides that the only condition for the exercise of the power to give a direction under subsection 75F(2), or to vary a direction, is that the Minister thinks that it is in the national interest to give or vary the direction. The term 'national interest' has a broad meaning and refers to matters which relate to Australia's standing, security and interests. For example, these matters may include governmental concerns related to such matters as public safety, border protection, national security, the prevention of transnational and organised crime, defence, Australia's economic interests, Australia's international obligations and its relations with other countries. Measures for the effective management of Australia's maritime security are in the national interest. The note to new subsection 75F(5) puts it beyond doubt that there are no conditions for the exercise of the power to revoke a direction.
123. New subsection 75(6) provides that a direction under subsection 75(2) may specify the circumstances in which the direction need not be complied with.
124. New subsections 75F(7) and 75F(8) make provision for when a determination comes into force and remains in force. A determination comes into force when it is made

unless the determination specifies a later time, in which case it comes into force at that time. A determination remains in force until it is revoked by an instrument or a time specified in the determination for it to cease to be in force accrues.

125. New subsection 75F(9) provides that a direction made under paragraph 75F(2)(a) authorises the exercise of powers (as contemplated by Part 2 of the Maritime Powers Act) in accordance with the direction and the authorisation remains in force while the direction is in force. Paragraph 75F(9)(b) specifies that such an authorisation remains in force while the direction is in force, despite section 23 which provides other circumstances when an authorisation will generally cease to be in force.
126. New subsection 75F(10) provides that a direction under subsection 75F(2), or an instrument varying or revoking a direction, is not a legislative instrument. The effect of this provision is that the requirements of the *Legislative Instruments Act 2003* will not apply to a determination made under subsection 75F(2). This is a substantive exemption from the LIA. Such an exemption is necessary because it would not be appropriate to publish the determinations on the Federal Register of Legislative Instruments (FRLI). The determinations will necessarily contain sensitive operational matters which, in the national interest, would not be suitable for public release. A substantive exemption from the LIA would provide an exemption from the publication requirements and thus provide protection of this sensitive operational information.
127. New subsection 75G(1) provides that subject to subsections 75G(2), 75G(3) and 75G(4), a maritime officer must comply with any applicable directions in force under section 75F. However, a failure to comply does not invalidate the exercise of a power.
128. The purpose of this provision is to clarify that while maritime officers must comply with applicable directions in force under section 75F, failure to do so does not result in invalidity of the exercise of power. This is intended to avoid the situation where a technical failure to comply, or a failure in circumstances of compelling operational matters, for example, may otherwise lead to the conclusion that the failure to comply invalidated the exercise of powers.
129. New subsection 75G(2) provides that a maritime officer who is a member of the Australian Defence Force is not required to comply with a direction under section 75F to the extent that the direction is inconsistent with an order or other exercise of command under sections 8 and 9 of the *Defence Act 1903*.
130. The effect of this provision is to preserve the command power given under sections 8 and 9 of the *Defence Act 1903*.
131. New subsection 75G(3) provides that a maritime officer is not required to comply with a direction under section 75F to the extent that he or she reasonably believes that it would be unsafe to do so.
132. The purpose of this provision is to preserve the role of maritime officers in making independent judgements about the safety of exercises of maritime power, and to enable a maritime officer to act other than in compliance with a direction under section 75F where it is reasonably believed to be unsafe to do so.

133. New subsection 75H(1) provides that the laws specified in subsection 75H(3) (including regulations and other instruments made under those laws) do not apply in relation to a vessel at any time when the vessel is detained in exercise (or purported exercise) of powers under section 69.
134. New subsection 75H(2) provides that the laws specified in subsection 75H(3) (including regulations and other instruments made under those laws) do not apply in relation to a vessel at any time when the following paragraphs are satisfied:
- the vessel is being used in the exercise (or purported exercise) of powers under subsection 72(4) or 72(5), or is intended for use in the exercise of such powers;
 - the vessel is specified in, or is included in a class of vessels specified in, a determination under subsection 75H(4) that is in force;
 - if the determination states that it has effect, in relation to the vessel or class of vessels, only in specified circumstances—those circumstances exist;
 - if the determination states that it has effect, in relation to the vessel or the class of vessels, only in one or more specified periods—the time is in that period, or one of those periods.
135. The note to new subsection 75H(2) states that paragraphs 75H(2)(c) and 75H(2)(d) do not have to be satisfied unless the determination states as mentioned in those paragraphs, i.e. if the determination does not state that it has effect in relation to a class of vessels only in specified circumstances, 75H(2)(c) has no effect.
136. New subsection 75H(3) provides that the laws that, because of subsection 75H(1) or 75H(2), do not apply in relation to a vessel are the *Navigation Act 2012* and the *Shipping Registration Act 1981* and the Marine Safety (Domestic Commercial Vessel) National Law.
137. Subsections 75H(1), 75H(2) and 75H(3) provide that certain other laws do not apply to certain vessels that are subject to the exercise of power under the Maritime Powers Act. The vessels that are subject to this disapplication of certain laws are vessels detained under section 69, vessels used in exercise of powers under subsections 72(4) and 72(5) and vessels specified by the minister through subsection 75H(4). The laws that are disappplied are specified by subsection 75H(3). They are the *Navigation Act 2012*, the *Shipping Registration Act 1981* and the Marine Safety (Domestic Commercial Vessel) National Law (as defined in section 8 – see above). The purpose is to provide flexibility in the exercise of the relevant maritime powers by ensuring that these laws, intended to apply to vessels with a requisite connection to Australia, do not inappropriately restrict the operational freedom of maritime officers.
138. New subsection 75H(4) provides that for the purpose of subsection 75H(2), the Minister may make a written determination specifying a vessel, or a class of vessels. The determination may also state either or both of the following:
- that it has effect, in relation to the vessel or class of vessels, only in specified circumstances;

- that it has effect, in relation to the vessel or the class of vessels, only in one or more specified periods.
139. The effect of this provision is to allow the minister to specify a vessel or class of vessels to which the legislation specified in subsection 75H(3) will not apply through the operation of 75H(2). The intention of this provision is to provide the Minister with further flexibility in directing the exercise of the relevant maritime powers.
140. New subsection 75H(5) provides that the Minister may, in writing, vary or revoke a determination made under subsection 75H(4).
141. New subsection 75H(6) provides that the only condition for the exercise of the power to make a determination under subsection (4), or to vary a determination, is that the Minister thinks that it is in the national interest to make or vary the determination. The term ‘national interest’ has a broad meaning and refers to matters which relate to Australia’s standing, security and interests. For example, these matters may include governmental concerns related to such matters as public safety, border protection, national security, the prevention of transnational and organised crime, defence, Australia’s economic interests, Australia’s international obligations and its relations with other countries. Measures for the effective management of Australia’s maritime security are in the national interest.
142. The note to new subsection 75H(6) puts it beyond doubt that there are no conditions for the exercise of the power to revoke a determination.
143. Subsection 75H(5) provides a power for the Minister to vary or revoke a direction given under subsection 75H(4). This is incidental to the power to issue the determination. New subsection 75F(6) provides that the only condition for the Minister to vary or revoke a determination is that the Minister thinks that it is in the national interest to do so. This is intended to preserve flexibility for the Minister to issue a determination in a wide variety of situations if the Minister considers it in the national interest to do so.
144. New subsection 75H(7) provides that a determination under subsection 75H(4), or an instrument varying or revoking a determination, comes into force:
- unless paragraph 75H(7)(b) applies, when it is made or
 - if the determination or instrument specifies a later time as the time when it comes into force, at that later time.
145. New subsection 75H(8) provides that a determination made under subsection (4) remains in force until whichever of the following occurs first:
- an instrument revoking the determination comes into force;
 - if the determination is expressed to cease to be in force at a specified time, the time so specified.
146. New subsections 75H(7) and 75H(8) make provision for when a determination comes into force and remains in force. A determination comes into force when it is made

unless the determination specifies a later time, in which case it comes into force at that time. A determination remains in force until it is revoked by an instrument or a time specified in the determination for it to cease to be in force accrues.

147. New subsection 75H(9) provides that a determination under subsection 75H(4), or a variation or revocation of a determination, is not a legislative instrument.
148. The effect of this provision is that the requirements of the *Legislative Instruments Act 2003* will not apply to a determination made under subsection 75H(4) or a variation or revocation thereof. This is a substantive exemption from the Legislative Instruments Act. Such an exemption is necessary because it would not be appropriate to publish the determinations on the Federal Register of Legislative Instruments (FRLI). The determinations will necessarily contain sensitive operational matters which, in the national interest, would not be suitable for public release. A substantive exemption from the LIA would provide an exemption from the publication requirements and thus provide protection of this sensitive operational information..

Item 20 Section 79

149. This item omits “Written notice must be given to the owner or person who was in possession or control of a seized, retained or detained thing.” and substitutes “Written notice must be given to the owner of a seized, retained or detained thing, or to a person who had possession or control of the thing.”
150. Section 79 is a guide to Part 4 of the Maritime Powers Act. This amendment alters the guide to clarify the person to whom written notice must be given to better reflect operational reality.

Item 21 Paragraph 80(1)(b)

151. This item omits the words “the person” and substitutes “a person”. The effect of this is to provide greater flexibility in providing notice of seizure, retention or detention to a person, as it may not always be clear that a single person is the owner or person in possession.

Item 22 At the end of section 81

152. This item adds “(3) if a detained vessel or aircraft is taken to a destination under paragraph 69(2)(a), the information must also explain the effect of subsection 69A(3).” at the end section 81 of Division 2 of Part 4 of the Maritime Powers Act.
153. Division 2 of Part 4 of the Maritime Powers Act provides for the provision of notice and information about a seized or detained thing to the owner, or person in possession of the thing when it was seized or detained. New subsection 81(3) creates a requirement for information to be provided when powers are exercised to take a detained vessel or aircraft to a destination under paragraph 69(2)(a) the effect of 69A(3) must also be explained. This is significant because new subsection 69A(3) has the effect that the time covered by subsection 69A(1) (such as the period it takes to travel to the destination) do not count towards the 28 day limit.

Item 23 Paragraphs 86(1)(b) and 87(1)(b)

154. This item omits “the person” and substitutes “a person”. The effect of this item is to clarify to whom seized, retained and detained things should be returned, to better reflect operational reality.

Item 24 At the end of subsection 87(2)

155. This item adds a new note which states “In the case of a detained vessel or aircraft that is taken to a destination under paragraph 69(2)(a), days in periods covered by subsection 69A(1) (such as the period it takes to travel to the destination) do not count towards the 28 day limit: see subsection 69A(3).” at the end of subsection 87(2) in Division 4 of Part 4 of the Maritime Powers Act.
156. The purpose of this note is to direct the reader to newly inserted subsections 69A(1) and 69A(3), which may impact the calculation of periods of time of detention.

Item 25 Subsection 93(1)

157. This item repeals the subsection and substitutes:
1. If the thing is disposed of under paragraph 91(1)(a), (b) or (c) (reasons for disposal), the Minister must give written notice, as soon as practicable after the disposal, to:
 - the person who owned the thing; or
 - a person who had possession or control of the thing immediately before it was seized, retained or detained.
158. The effect of this provision is to clarify to whom written notice must be given, to better reflect operational reality.

Item 26 Subsection 93(3)

159. This item omits the words “the person” and substitutes “any person to whom the notice may be given under that subsection”. The effect of this item is to clarify to whom written notice must be given, to better reflect operational reality.

Item 27 Section 94

160. This item omits “Persons from detained vessels and aircraft may be required to remain on the vessel or aircraft, or may be taken to another place.” from section 94 of Division 1 of Part 5 of the Maritime Powers Act.
161. Section 94 is a guide to Part 5 of the Maritime Powers Act. This amendment alters the guide to reflect changes made to the operation of Part 5 by item 28, which are described further below.

Item 28 Section 97

162. This item repeals section 97 of Division 2 of Part 5 of the Maritime Powers Act.

163. Current subsection 97(1) provides that if a person is detained and taken to another place under subsection 72(4) (persons on detained vessels and aircraft), the detention ends at that place.
164. Current subsection 97(2) provides that subsection (1) does not prevent:
- the person being taken to different places on the way to the other place; or
 - the arrest of the person; or
 - the detention of the person under another Australian law; or
 - the exercise of any other power in relation to the person.
165. The purpose of repealing section 97 is because provision for persons on, or from, detained vessels or aircraft taken to other places is now provided for by section 72A which is inserted by this Act. The intention of those new provisions is explained by item 18 above.

Item 29 Section 107

166. This item inserts “, whether civil or criminal,” after proceeding in section 107 of Division 1 of Part 7 of the Maritime Powers Act.
167. Current section 107 states that none of the following is liable to an action, suit or proceeding for or in relation to an act done, or omitted to be done, in good faith in the exercise or performance, or the purported exercise or performance, of a power or function under this Act: an authorising officer, a maritime officer, a person assisting, any other person acting under the direction or authority of a maritime officer. The note to current section 107 states that for **person assisting** see subsection 38(5).
168. The purpose of this amendment is to make it clear that actions in good faith are excluded from liability to actions, suits or proceedings of both a civil and criminal nature. While this was always Parliament’s intent, this amendment puts the matter beyond doubt.

Item 30 Subsection 121(1)

169. This item inserts “, other than the powers under section 75D, 75F or 75H,” after “this Act” in subsection 121(1) in Division 6 of Part 7 of the Maritime Powers Act.
170. Current subsection 121(1) provides that the Minister may, by writing, delegate any or all of his or her functions and powers under this Act to:
- the Chief of the Defence Force, the Chief of Navy, the Chief of Army or the Chief of Air Force; or
 - the Commissioner or a Deputy Commissioner of the Australian Federal Police; or
 - an Agency Head (within the meaning of the *Public Service Act 1999*); or

- an officer of the Australian Navy who holds a rank not below Commodore; or
- an officer of the Australian Army who holds a rank not below Brigadier; or
- an officer of the Australian Air Force who holds a rank not below Air Commodore; or
- an SES employee with a classification not below Senior Executive Band 1 or equivalent.

171. The effect of this amendment is that the general power of delegation in subsection 121(1) does not apply to powers created by sections 75D, 75F and 75H. This reflects the policy intention that those powers can only be exercised by the minister personally.

Part 2—Other amendments

Administrative Decisions (Judicial Review) Act 1977

Item 31 After paragraph (p) of Schedule 1

172. This item inserts “(pa) decisions under section 75D, 75F or 75H of the *Maritime Powers Act 2013*,” after paragraph (p) of Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977*.
173. Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) lists classes of decisions that are not decisions to which the ADJR act applies. This item adds decisions under section 75D, 75F or 75H to the list of such classes of decision. The effect is that such decisions are not reviewable under the ADJR Act.

Immigration (Guardianship of Children) Act 1946

Item 32 At the end of paragraph 6(2)(d)

174. This item adds “or under Division 7 or 8 of Part 3 of the *Maritime Powers Act 2013*” at the end of paragraph 6(2)(d) of the *Immigration (Guardianship of Children) Act 1946* (the Guardianship of Children Act).
175. Current subsection 6(1) provides that the Minister shall be the guardian of the person, and of the estate in Australia, of every non-citizen child who arrives in Australia after the commencement of the Guardianship of Children Act to the exclusion of the parents and every other guardian of the child, and shall have, as guardian, the same rights, powers, duties, obligations and liabilities as a natural guardian of the child would have, until the child reaches the age of 18 years or leaves Australia permanently, or until the provisions of the Guardianship of Children Act cease to apply to and in relation to the child, whichever first happens.
176. Current paragraph 6(2)(d) provides that a non-citizen child leaves Australia permanently if the child is taken to a place outside Australia under paragraph 245F(9)(b) of the Migration Act.
177. The effect of this amendment is that powers to take a child to a place outside Australia under Division 7 or 8 of the Maritime Powers Act will result in a child leaving Australia permanently within the meaning of subsection 6(1) of the Guardianship of Children Act.
178. This amendment is a result of the creation of new powers to take a child to a place outside Australia under Divisions 7 and 8 of the Maritime Powers Act.

Item 33 Paragraph 8(2)(b)

179. This item inserts “or the *Maritime Powers Act 2013*” after “migration law” in paragraph 8(2)(b) of the Guardianship of Children Act.
180. Current paragraph 2(a) provides that nothing in the Guardianship of Children Act affects the operation of the migration law.

181. The effect of this amendment is to provide that nothing in the Guardianship of Children Act will affect the operation of the Maritime Powers Act 2013. This reflects the creation in this bill of powers in the Maritime Powers Act which are not intended to be affected by this Act.

Item 34 Paragraph 8(2)(c)

182. This item repeals paragraph 8(2)(c) of the Guardianship of Children Act and substitutes “(c) imposes any obligation on the Minister or another Minister to exercise, or to consider exercising, any power conferred by or under the migration law or the *Maritime Powers Act 2013*”.
183. Current paragraph 8(2)(c) of the Guardianship of Children Act provides that nothing in that act imposes any obligation the Minister to exercise, or to consider exercising, any power conferred on the Minister by or under the migration law.
184. The effect of this amendment is to make clear that the Guardianship of Children Act is not intended to impose an obligation to exercise or consider exercising a power under the Maritime Powers Act, and that that exemption also applies to other ministers.

Item 35 At the end of paragraph 8(3)(d)

185. This item adds “, or under Division 7 or 8 of Part 3 of the *Maritime Powers Act 2013*” in paragraph 8(3)(2) of the Guardianship of Children Act.
186. Current paragraph 8(3)(d) provides that without limiting subsection 8(2), nothing in the Guardianship of Children Act affects the performance or exercise, or the purported performance or exercise, of any function, duty or power relating to the taking of a non-citizen child to a place outside Australia under paragraph 245F(9)(b) of the Migration Act.
187. The effect of this amendment is to include the powers to take a non-citizen child to a place outside Australia under Division 7 or 8 of Part 3 of the Maritime Powers Act in the exemption under paragraph 8(3)(d). Those powers will not be affected by any provision of the Guardianship of Children Act.

Migration Act 1958

Item 36 Subsection 5(1) (paragraph (b) of the definition of transitory person)

188. This item omits the words “or paragraph 72(4)(b) of the Maritime Powers Act 2013”, and substitutes “or under Division 7 or 8 of Part 3 of the Maritime Powers Act 2013”. The effect of this item is to clarify the powers under the Maritime Powers Act which are to be included in the definition of transitory person.

Item 37 Paragraph 5AA(2)(ba)

189. This item repeals the paragraph and substitutes “the person entered the migration zone as a result of the exercise of powers under Division 7 or 8 of Part 3 of the Maritime Powers Act 2013; or”. The effect of this item is to clarify the powers under the Maritime Powers Act which are to be included in the definition of *entered Australia by sea*.

Item 38 Subparagraph 42(2A)(c)(i)

190. This item omits the words “or 72(4) of the Maritime Powers Act 2013” and substitutes the words “or under Division 7 or 8 of Part 3 of the Maritime Powers Act 2013”. The effect of this item is to clarify the powers under the Maritime Powers Act under which a person may be brought to the migration zone.

Part 3—Application**Item 39 Application of amendments of the *Maritime Powers Act 2013***

191. This item provides that the amendments made by Part 1 of this schedule (the amending Part) apply in relation to the exercise of powers under the Maritime Powers Act after the commencement of the amending Part, even if
- the authorisation for the exercise of the powers was given under Division 2 of Part 2 of that Act before that commencement; or
 - the powers are being exercised in a situation in relation to which powers were (or could have been) exercised under that Act before that commencement
192. The amendment of the Maritime Powers Act made by item 10: new sections 22A and 22B applies in relation to authorisations given after the commencement of the amending Part.
193. The amendments of the Maritime Powers Act made by the amending Part do not, by implication, affect the interpretation of that Act, as in force before the commencement of the amending Part, in relation to the exercise of powers, or the giving of authorisations, under that Act before that commencement.

SCHEDULE 2 – Protection visas and other measures

Part 1 – Protection visas generally

Division 1 – Protection visas

Migration Act 1958

Item 1 Subsection 5(1)

194. This item inserts a new definition for ***protection visa*** into subsection 5(1) of the Migration Act. Current subsection 5(1) contains definitions for terms used in the Migration Act.
195. Currently, subsection 36(1) provides that there is a class of visas to be known as protection visas. However, amendments made by items 5 and 7 of Schedule 2 to the Bill repeal current subsection 36(1) and insert new section 35A which provides for protection visas.
196. The new definition of ***protection visa*** in subsection 5(1) provides that ***protection visa*** has the meaning given by new section 35A of the Migration Act. This definition is a signpost to guide readers as the term “***protection visa***” is used throughout the Migration Act.
197. A note is inserted after the new definition of ***protection visa*** in subsection 5(1). The note provides that new section 35A covers the following:
 - permanent protection visas (classified by the Migration Regulations as Protection (Class XA) visas when this definition commenced);
 - other protection visas formerly provided for by subsection 36(1);
 - temporary protection visas (classified by the Migration Regulations as Temporary Protection (Class XD) visas when this definition commenced);
 - any additional classes of permanent or temporary visas that are prescribed as protection visas by the regulations.

See also section 36 and Subdivision AL of Division 3 of Part 2.

198. Subdivision AL of Division 3 of Part 2 of the Migration Act sets out other provisions about protection visas.
199. The effect of this amendment is to define the term “***protection visa***” to mean all the protection visas covered by new section 35A, which include the protection visas that can be prescribed by the Migration Regulations and historic classes of protection visas which were formerly provided for by section 36 of the Migration Act. Accordingly, a reference to “***protection visa***” under the Migration Act can mean any one of the visas covered in section 35A or under previous s36.
200. The amendments also provide for how the Migration Regulations classify the permanent and temporary protection visas at the time that the definition of ***protection visa*** commenced. However, this classification may be changed by the Migration Regulations in future.

201. The purpose of this amendment is to ensure that “*protection visa*” is used as an umbrella term to capture all the protection visas provided for under the Migration Act and the Migration Regulations.

Item 2 At the end of subsection 31(1)

202. This item inserts a note at the end of subsection 31(1) of the Migration Act.
203. Current subsection 31(1) provides that there are to be prescribed classes of visas.
204. The new note to subsection 31(1) provides: see also new subsection 35A(4), which allows additional classes of permanent and temporary visas to be prescribed as protection visas by regulations made for the purposes of subsection 31(1).
205. The new note under subsection 31(1) acts as a signpost to new subsection 35A(4) of the Migration Act. New section 35A will be discussed in item 5 of Schedule 2 to the Bill.

Item 3 Subsection 31(2)

206. This item omits “sections 32, 33, 34, 35, 36, 37, 37A, 38, 38A and 38B” from subsection 31(2) of the Migration Act and substitutes “the following provisions:
- section 32 (special category visas);
 - section 33 (special purpose visas);
 - section 34 (absorbed person visas);
 - section 35 (ex-citizen visas);
 - subsection 35A(2) (permanent protection visas);
 - subsection 35A(3) (temporary protection visas);
 - section 37 (bridging visas);
 - section 37A (temporary safe haven visas);
 - section 38 (criminal justice visas);
 - section 38A (enforcement visas);
 - section 38B (maritime crew visas).”
207. The effect of this amendment is to omit reference to section 36 and insert reference to new subsections 35A(2) (permanent protection visas) and 35A(3) (temporary protection visas), which provide for the classes of protection visas made by the Migration Act. The opportunity has also been taken to modernise the drafting style of current subsection 31(2) of the Migration Act and specify, by name, the classes of visas made by the Migration Act.
208. This amendment is consequential to the repeal of subsection 36(1) of the Migration Act in item 7 of Schedule 2 to the Bill. Current subsection 36(1) provides for a class of visas to be known as protection visas.
209. The purpose of this amendment is to make clear that new subsections 35A(2) and 35A(3) are provisions which provide for classes of protection visas made by the Migration Act.

Item 4 Subsection 31(3)

- 210. This item amends subsection 31(3) of the Migration Act to omit reference to “36” and substitute with “35A”.
- 211. Current subsection 31(3) of the Migration Act provides that the regulations may prescribe criteria for a visa or visas of a specified class (which, without limiting the generality of subsection 31(3), may be a class provided for by section 32, 36, 37, 37A or 38B but not by section 33, 34, 35, 38 or 38A).
- 212. New subsection 31(3) of the Migration Act provides that the regulations may prescribe criteria for a visa or visas of a specified class (which, without limiting the generality of subsection 31(3), may be a class provided for by section 32, 35A, 37, 37A or 38B but not by section 33, 34, 35, 38 or 38A).
- 213. This amendment is consequential to the repeal of subsection 36(1) of the Migration Act in item 7 of Schedule 2 to the Bill.

Item 5 After section 35

- 214. This item inserts new section 35A after section 35 of the Migration Act.
- 215. The effect of new section 35A is to provide for multiple classes of protection visas that may be either a permanent visa or a temporary visa. New section 35A creates a class of permanent protection visa, a class of temporary protection visa and covers classes of visas prescribed by the Migration Regulations under subsection 31(1) to be protection visas. In addition, new section 35A also covers the protection visas formerly provided for by subsection 36(1) before its repeal, as a protection visa for the purposes of Migration Act and the Migration Regulations.
- 216. The purpose of this amendment is to allow for multiple classes of protection visas to be created under the Migration Act and the Migration Regulations and, in particular, to introduce a class of temporary visas known as temporary protection visas. All classes of visas provided for by new section 35A are considered to be a ***protection visa***, within the meaning of the new definition of ***protection visa*** inserted into subsection 5(1) of the Migration Act (see item 1 of Schedule 2 to the Bill).
- 217. New subsection 35A(1) provides that a ***protection visa*** is a visa of a class provided for by section 35A.
- 218. The effect of new subsection 35A(1) is that a visa is a ***protection visa*** if it is a visa of a class that is provided for by new subsections 35A(2), 35A(3), 35A(4) or 35A(5). The purpose of new subsection 35A(1) is to make clear that there is now more than one class of protection visas and that these visas can be provided for under the Migration Act and the Migration Regulations.
- 219. New subsection 35A(2) provides that there is a class of permanent visas to be known as permanent protection visas.
- 220. A note is inserted after new subsection 35A(2). The new note provides that these visas were classified by the Migration Regulations as Protection (Class XA) visas when this section commenced.

221. The amendments also provide for how the Migration Regulations classify the permanent and temporary protection visas at the time that new section 35A commenced. However, this classification may be changed by the Migration Regulations in future.
222. New subsection 35A(3) provides that there is a class of temporary visas to be known as temporary protection visas.
223. A note is inserted after new subsection 35A(3). The new note provides that these visas were classified by the Migration Regulations as Temporary Protection (Class XD) visas when this section commenced.
224. The amendments also provide for how the Migration Regulations classify the permanent and temporary protection visas at the time that new section 35A commenced. However, this classification may be changed by the Migration Regulations in future.
225. New subsection 35A(4) provides that regulations made for the purposes of subsection 31(1) may prescribe additional classes of permanent and temporary visas as protection visas.
226. Current subsection 31(1) of the Migration Act allows for the Migration Regulations to prescribe classes of visas. The effect of new subsection 35A(4) is to make clear that if the Migration Regulations prescribe a temporary or permanent visa, as allowed for under subsection 31(1), that visa can be a class of protection visa. The purpose of this amendment is to provide for the flexibility to introduce additional classes of protection visas in the Migration Regulations.
227. New subsection 35A(5) provides that a class of visas that was formerly provided for by subsection 36(1), as subsection 36(1) was in force before the commencement of section 35A, is also a class of protection visas for the purposes of the Migration Act and the Migration Regulations.
228. An example is inserted after new subsection 35A(5). The new example provides that an example of a class of visas for subsection 35A(5) is the class of visas formerly classified by the Migration Regulations as Protection (Class AZ) visas. These visas can no longer be granted.
229. A note is inserted after the example to new subsection 35A(5). The new note provides that new section 35A commenced, and subsection 36(1) was repealed, on the commencement of Part 1 of Schedule 2 to the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*.
230. The purpose and effect of new subsection 35A(5) is to recognise the classes of protection visas that existed before the commencement of new section 35A as also being protection visas under new section 35A.

231. New subsection 35A(6) provides that the criteria for a class of protection visas are:
- the criteria set out in section 36; and
 - any other relevant criteria prescribed by regulation for the purposes of section 31.
232. A note is inserted after new subsection 35A(6). The new note provides to see also Subdivision AL. Subdivision AL of Division 3 of Part 2 of the Migration Act sets out other provisions about protection visas.
233. The effect and purpose of new subsection 35A(6) is to make clear that an applicant for a ***protection visa*** must satisfy both the criteria set out in section 36 of the Migration Act and any other relevant criteria prescribed by the Migration Regulations, to be eligible for the grant of a ***protection visa***.

Item 6 Section 36 (heading)

234. This item repeals the current heading “Protection visas” and substitutes the new heading “Protection visas – criteria provided for by this Act”.
235. This amendment is consequential to the repeal of subsection 36(1) in item 7 of Schedule 2 to the Bill. New section 35A provides for protection visas and therefore, the heading of section 36 is amended to reflect that new section 36 provides the criteria for protection visas.

Item 7 Subsection 36(1)

236. This item repeals subsection 36(1) of the Migration Act.
237. This amendment is consequential to the insertion of new section 35A in item 5 of Schedule 2 to the Bill.

Item 8 Subparagraph 36(2)(b)(ii)

238. This item amends subparagraph 36(2)(b)(ii) of the Migration Act to insert reference to “of the same class as that applied for by the applicant” after the reference to “protection visa”.
239. Current subparagraph 36(2)(b)(ii) provides that a criterion for a ***protection visa*** is that the applicant for the visa is a non-citizen in Australia who is a ***member of the same family unit*** as a non-citizen who is mentioned in paragraph 36(2)(a) and holds a ***protection visa***.
240. Current section 5 of the Migration Act provides that one person is a ***member of the same family unit*** as another if either is a ***member of the family unit*** of the other or each is a ***member of the family unit*** of a third person.
241. Current paragraph 36(2)(a) provides that a criterion for a ***protection visa*** is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol.

242. New subparagraph 36(2)(b)(ii) provides that a criterion for a *protection visa* is that the applicant for the visa is a non-citizen in Australia who is a *member of the same family unit* as a non-citizen who is mentioned in paragraph 36(2)(a) and holds a *protection visa* of the same class as that applied for by the applicant.
243. The purpose of this amendment is to ensure that a protection visa applicant, who is a *member of the same family unit* as a non-citizen who is mentioned in paragraph 36(2)(a) and that non-citizen holds a *protection visa*, will only obtain the same class of *protection visa* as their family member.

Item 9 At the end of subparagraph 36(2)(c)(ii)

244. This item amends subparagraph 36(2)(c)(ii) of the Migration Act to insert reference to “of the same class as that applied for by the applicant” at the end of subparagraph 36(2)(c)(ii).
245. Current subparagraph 36(2)(c)(ii) provides that a criterion for a *protection visa* is that the applicant for the visa is a non-citizen in Australia who is a *member of the same family unit* as a non-citizen who is mentioned in paragraph 36(2)(aa) and holds a *protection visa*.
246. Current paragraph 36(2)(aa) provides that a criterion for a *protection visa* is that the applicant for the visa is a non-citizen in Australia (other than a non-citizen mentioned in paragraph 36(2)(a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm.
247. New paragraph 36(2)(c)(ii) provides that a criterion for a *protection visa* is that the applicant for the visa is a non-citizen in Australia who is a *member of the same family unit* as a non-citizen who is mentioned in paragraph 36(2)(aa) and holds a *protection visa* of the same class as that applied for by the applicant.
248. The purpose of this amendment is to ensure that a protection visa applicant, who is a *member of the same family unit* as a non-citizen who is mentioned in paragraph 36(2)(aa) and that non-citizen holds a *protection visa*, will only obtain the same class of *protection visa* as their family member.

Item 10 Subsection 48A(2) (definition of application for a protection visa)

249. This item omits “includes” and substitutes “means” in the definition of ‘application for a protection visa’ in current subsection 48A(2).
250. The current chapeau in subsection 48A(2) provides that “In this section: application for a protection visa includes:”.
251. Following this amendment, the new chapeau provides that “In this section: application for a protection visa means:”.
252. This amendment clarifies that for the purposes of section 48A of the Migration Act, the new definition of ‘application for a protection visa’ is exhaustive, rather than inclusive.

253. In general terms, current section 48A prevents a non-citizen in the migration zone from making a protection visa application in circumstances where he or she has previously had a protection visa application refused while in the migration zone, or previously had a protection visa cancelled while in the migration zone.
254. This amendment complements the amendment made by items 11 and 12 of Schedule 2 to the Bill.

Item 11 Subsection 48A(2) (paragraph (aa) of the definition of *application for a protection visa*)

255. This item repeals current paragraph 48A(2)(aa) and substitutes new paragraph 48A(2)(aa).
256. Under current paragraph 48A(2)(aa), an *application for a protection visa* includes an application for a visa that, under the Migration Act or the regulations as in force at any time, is or was a visa of the class known as protection visas.
257. Under new paragraph 48A(2)(aa), an *application for a protection visa* means an application for a visa of a class provided for by section 35A (protection visas – classes of visas), including (without limitation) an application for a visa of a class formerly provided for by subsection 36(1) that was made before the commencement of new paragraph 48A(2)(aa).
258. The note under paragraph 48A(2)(aa) provides that visas formerly provided for by subsection 36(1) are provided for by subsection 35A(5). Subsection 36(1) was repealed by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*, which also inserted section 35A and paragraph 48A(2)(aa).
259. The note mentions visas formerly provided for by subsection 36(1). That subsection is repealed by item 7 of Schedule 2 to the Bill.
260. The remaining paragraphs in current subsection 48A(2) set out other meanings of *application for a protection visa*.
261. New paragraph 48A(2)(aa) mentions new section 35A, which is inserted in the Migration Act by item 5 of Schedule 2 to the Bill.
262. The amendment in this item clarifies that for the purposes of section 48A, the term *application for a protection visa* has the meaning set out in new paragraph 48A(2)(aa) as well as the meanings set out in the other paragraphs in subsection 48A(2), as amended by items 10 and 12 of Schedule 2 to the Bill.

Item 12 Subsection 48A(2) (paragraphs (a) and (b) of the definition of *application for a protection visa*)

263. This item omits “; and” from current paragraphs 48A(2)(a) and (b) and substitutes “; or”.
264. This amendment complements the amendment to subsection 48A(2) made by item 10 of Schedule 2 to the Bill. That amendment clarifies that for the purposes of section

48A of the Migration Act, the new definition of *application for a protection visa* is exhaustive, rather than inclusive.

265. Consistent with subsection 48A(2) setting out an exhaustive definition of the term “*application for a protection visa*”, each paragraph of subsection 48A(2) is amended to be disjunctive.
266. The amendment in this item clarifies that for the purposes of section 48A, an *application for a protection visa* means each type of application described in each paragraph of subsection 48A(2), as amended by this Bill.

Division 2 – Safe haven enterprise visas

Migration Act 1958

Item 13 Subsection 5(1) (after paragraph (b) of the note at the end of the definition of *protection visa*)

267. This item inserts new paragraph (ba) immediately after new paragraph (b) of the note at the end of the definition of *protection visa*, as inserted by item 1 of Schedule 2 to the Bill, in subsection 5(1) of the Migration Act.
268. This amendment is in addition to the amendments to current subsection 5(1) of the Migration Act made by item 1 of Schedule 2 to the Bill.
269. The purpose and effect of this amendment is to make clear that a safe haven enterprise visa is also a *protection visa*.

Item 14 After paragraph 31(2)(f)

270. This item inserts new paragraph 31(2)(fa) immediately after new paragraph 31(2)(f), which is inserted by item 3 of Schedule 2 to the Bill.
271. This amendment is in addition to the amendments to current subsection 31(2) of the Migration Act made by item 3 of Schedule 2 to the Bill.
272. The purpose and effect of this amendment is to provide that, in addition to the provisions listed in new subsection 31(2), new subsection 35A(3A) can provide for a class of visas to be known as safe haven enterprise visas. .

Item 15 After paragraph 31(3A)(c)

273. Item 15 inserts new paragraph 31(3A)(ca) after new paragraph 31(3A)(c).
274. Following this amendment new subsection 31(3A) provides that to avoid doubt, subsection 31(3) does not require criteria to be prescribed for a visa or visas including, without limitation, visas of the following classes:
- special category visas (see section 32);
 - permanent protection visas (see subsection 35A(2));
 - temporary protection visas (see subsection 35A(3));
 - safe haven enterprise visas (see subsection 35A(3A));

- bridging visas (see section 37);
- temporary safe haven visas (see section 37A);
- maritime crew visas (see section 38B).

275. This item relates to current subsection 31(3) of the Migration Act. That subsection 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).
276. Current subsection 31(3) will be amended by item 4 of Schedule 2 to the Bill to omit the reference to section 36 and insert a reference to new section 35A. New section 35A provides for permanent protection visas, temporary protection visas, and safe haven enterprise visas.
277. The amendment in this item clarify that the regulations may, but need not, prescribe criteria for the classes of visa covered by subsection 31(3) including the classes provided for by current sections 32, 37, 37A, 38B, and by new section 35A.
278. The amendment in this item complements the amendment made at item 7 of Schedule 3 to the Bill. The effect of that amendment is that, for each of the visa classes mentioned in new subsection 31(3A), if regulations do not prescribe any criteria which relate to making a valid application for the visa and being granted the visa, non-citizens cannot make a valid application for the visa. Another effect of that amendment is that, for each of the visa classes mentioned in new subsection 31(3A), if regulations prescribe criteria which relate to making a valid application for the visa or being granted the visa, an application for the visa must satisfy those criteria as well as any criteria set out in the Migration Act.
279. The amendments at item 7 of Schedule 3 to the Bill prevent non-citizens from applying directly under the Migration Act for one of the classes of visa provided for by current sections 32, 37, 37A, and 38B, and new section 35A.
280. Further amendments to new subsection 31(3A) can be found at item 1 of Schedule 3 to the Bill.

Item 16 After subsection 35A(3)

281. This item inserts a new subsection 35A(3A) after new subsection 35A(3), which is inserted by item 5 of Schedule 2 to the Bill.
282. New subsection 35A(3A) provides that there is a class of temporary visas to be known as safe haven enterprise visas.
283. The purpose and effect of this amendment is to provide for a new class of protection visa, provided for by the Migration Act, to be known as safe haven enterprise visas. This visa will be a class of temporary visa.

Item 17 After paragraph 46(5)(c)

284. Item 17 inserts new paragraph 46(5)(ca) after new paragraph 46(5)(c).

285. Following this amendment new subsection 46(5) provides that to avoid doubt, subsections 46(3) and 46(4) do not require criteria to be prescribed in relation to the validity of visa applications, including, without limitation, applications for visas of the following classes:
- special category visas (see section 32);
 - permanent protection visas (see subsection 35A(2));
 - temporary protection visas (see subsection 35A(3));
 - safe haven enterprise visas (see subsection 35A(3A));
 - bridging visas (see section 37);
 - temporary safe haven visas (see section 37A);
 - maritime crew visas (see section 38B).
286. This item relates to current subsections 46(3) and 46(4) of the Migration Act. Current subsection 46(3) 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. Current subsection 46(4) provides that without limiting current subsection 46(3), the regulations may also prescribe:
- the circumstances that must exist for an application for a visa of a specified class to be a valid application; and
 - how an application for a visa of a specified class must be made; and
 - 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.
287. The amendment in this item will clarify that regulations may, but need not, prescribe criteria for the classes of visa covered by current subsections 46(3) and 46(4) including the class provided for by new subsection 35A(3A).
288. The amendment in this item complements the amendments made at item 7 of Schedule 3 to the Bill. The effect of that amendment is that, for each of the visa classes mentioned in new subsection 46(5), if regulations do not prescribe any criteria which relate to making a valid application for the visa and being granted the visa, non-citizens cannot make a valid application for the visa. Another effect of that amendment is that, for each of the visa classes mentioned in new subsection 46(5), if regulations prescribe criteria which relate to making a valid application for the visa or being granted the visa, an application for the visa must satisfy those criteria as well as any criteria set out in the Migration Act.
289. The amendments at item 7 of Schedule 3 to the Bill prevent non-citizens from applying directly under the Migration Act for one of the classes of visa provided for by current sections 32, 37, 37A, 38B, and by new section 35A.
290. Further amendments to new subsection 46(5) can be found at item 6 of Schedule 3 to the Bill.

Item 18 After paragraph 46AA(1)(c)

291. Item 18 inserts new paragraph 46AA(1)(ca) after new paragraph 46AA(1)(c).

292. Following this amendment new subsection 46AA(1) provides that the following classes of visas are covered by new section 46AA:

- special category visas (see section 32);
- permanent protection visas (see subsection 35A(2));
- temporary protection visas (see subsection 35A(3));
- safe haven enterprise visas (see subsection 35A(3A));
- bridging visas (see section 37);
- temporary safe haven visas (see section 37A);
- maritime crew visas (see section 38B).

293. The purpose of new subsection 46AA(1) is to ensure that new section 46AA applies only to the classes of visas set out in new subsection 46AA(1).

294. Further amendments to new section 46AA can be found at item 7 of Schedule 3 to the Bill.

Division 3 – Application

Item 19 Application of amendments

295. This item provides for the application of amendments to the Migration Act made by Divisions 1 and 2 of Part 1 of Schedule 2 to the Bill.

296. Subitem 19(1) provides that the amendments of the Migration Act made by Division 1 of Part 1 of Schedule 2:

- apply in relation to an application for a visa that had not been finally determined immediately before the commencement of Division 1 of Part 1 of Schedule 2; and
- apply in relation to an application for a visa made on or after the commencement of Division 1 of Part 1 of Schedule 2;
- in the case of the amendments of section 48A of that Migration Act made by Division 1 of Part 1 of Schedule 2 – apply in relation to an application for a protection visa mentioned in paragraph 48A(1)(a) or 48A(1)(b), or 48A(1AA)(a) or 48A(1AA)(b), of that Migration Act that was made, or taken to have been made:
 - on or after the commencement of Division 1 of Part 1 of Schedule 2; or
 - at any time before the commencement of Division 1 of Part 1 of Schedule 2 (whether or not the application had been finally determined at that time).

297. The purpose of subitem 19(1) is to provide for the visa applications to which the amendments made by Division 1 of Part 1 of Schedule 2 to the Bill apply.

298. Subitem 19(2) provides that the amendments of the Migration Act made by Division 2 of Part 1 of Schedule 2 apply in relation to an application for a visa made on or after the commencement of Division 2 of Part 1 of Schedule 2.

299. The purpose of subitem 19(2) is to provide for the visa applications to which the amendments made by Division 2 of Part 1 of Schedule 2 to the Bill apply.

Part 2 – Visa applications taken to be applications for a different visa

Division 1 – Amendments

Migration Act 1958

Item 20 After section 45

300. This item inserts new section 45AA after section 45 of the Migration Act. The heading for new section 45AA is “Application for one visa taken to be an application for a different visa”.
301. The purpose of new section 45AA is to allow for an application for a visa of a particular class to be ‘converted’ into an application for a visa of a different class. New section 45AA provides for the situations in which:
- a conversion regulation can be made to ‘convert’ a visa application;
 - the effects of the conversion regulation; and
 - the consequences of the conversion on the first instalment of visa application charges paid in relation to the pre-conversion application, bridging visas, and any accrued rights of a person.

Situation in which conversion regulation can be made

302. New subsection 45AA(1) provides that section 45AA applies if:
- a person has made a valid application (a pre-conversion application) for a visa (a pre-conversion visa) of a particular class; and
 - the pre-conversion visa has not been granted to the person, whether or not a migration decision has been made in relation to the pre-conversion application; and
 - since the application was made, one or more of the following events has occurred:
 - the requirements for making a valid application for that class of visa change;
 - the criteria for the grant of that class of visa change;
 - that class of visa ceases to exist; and
 - had the application been made after the event (or events) occurred, because of that event (or those events):
 - the application would not have been valid; or
 - that class of visa could not have been granted to the person.
303. New subsection 45AA(1) sets out the conditions that must be satisfied for new section 45AA of the Migration Act to apply. All the conditions in subsection 45AA(1) must be met before a conversion regulation can be made under new section 45AA.
304. In particular, new paragraph 45AA(1)(b) provides that a pre-condition to the conversion regulation being made is that the visa originally applied for (the pre-conversion visa) has not been granted to the person, whether or not a migration decision has been made in relation to the pre-conversion application. New paragraph 45AA(1)(b) is intended to apply before a decision has been made on the visa

application and to cover the circumstances that could occur after a visa application has been refused.

305. For example, where the applicant seeks judicial review of a decision in relation to the pre-conversion application, or where the application is not finally determined within the meaning of subsections 5(9) and 5(9A) of the Migration Act, then new paragraph 45AA(1)(b) is intended to apply.
306. The effect of new paragraph 45AA(1)(b) is to ensure that regulations can be made to convert a pre-conversion application so long as the pre-conversion visa has not been granted to the person.
307. The effect of new paragraph 45AA(1)(c) is to ensure that a conversion regulation can only be made if, since the pre-conversion application was made, one or more of the events described in new paragraph 45AA(1)(c) has occurred.
308. The effect of new paragraph 45AA(1)(d) is to clarify that a conversion regulation can only be made in circumstances where a pre-conversion application, if such an application was to be made after the event (or events) described in new paragraph 45AA(1)(c) occurred, would either not have been valid or the class of visa could not have been granted to the person.
309. For example, an applicant applies for a class of visa on 1 September 2014. On 17 September 2014, the applicant has not been granted that class of visa and the requirements for making a valid application for that class of visa change. If the applicant had made the same visa application on 18 September 2014 then the application would not have been valid (due to the 17 September 2014 changes to the application criteria for that visa class). In this situation, subject to the other conditions in new subsection 45AA(1) being met, a conversion regulation could be made under new section 45AA.
310. New subsection 45AA(2) provides that to avoid doubt, under new subsection 45AA(1) new section 45AA may apply in relation to:
 - classes of visas, including protection visas and any other classes of visas provided for by the Migration Act or the regulations; and
 - classes of applicants, including applicants having a particular status; and
 - applicants for a visa who are taken to have applied for the visa by the operation of the Migration Act or the regulations.
311. An example is inserted after new subsection 45AA(2). The example provides that if a non-citizen applies for a visa, and then, before the application is decided, gives birth to a child, in some circumstances the child is taken, by the operation of the regulation 2.08 of the Migration Regulations, to have applied for a visa of the same class at the time the child is born (see regulation 2.08 of the Migration Regulations).
312. New subsection 45AA(2) is intended to clarify the operation of new subsection 45AA(1), which provides for the situation when new section 45AA can apply. The intention is for new subsection 45AA(1) to apply in relation to any classes of visas, to any classes of applicants for a visa, and to those applicants who are taken to have applied for a visa by the operation of the Migration Act or the regulations.

313. The purpose and effect of new paragraph 45AA(2)(a) is to make clear that new subsection 45AA(1) may apply in relation to any classes of visas provided for by the Migration Act or the regulations. For example, a pre-conversion application and a pre-conversion visa (referred to in new paragraph 45AA(1)(a)) can be a visa of any class, such as a Temporary Business Entry (Class UC) visa, provided for by the Migration Act or the regulations.
314. The purpose and effect of new paragraph 45AA(2)(b) is to make clear that new subsection 45AA(1) may apply in relation to any classes of applicants, including applicants having a particular status. An example of an applicant with a particular status is an *unauthorised maritime arrival*.
315. The purpose and effect of new paragraph 45AA(2)(c) is to make clear that new subsection 45AA(1) may apply in relation to applicants who are taken to have applied for the pre-conversion visa. The example under paragraph 45AA(2)(c) clarifies the intended the operation of paragraph 45AA(2)(c).
316. The purpose of new subsections 45AA(1) and 45AA(2) is to put beyond doubt that where the circumstances set out in subsection 45AA(1) are met, new section 45AA applies to any classes of visas, to any classes of applicant for a visa, and to those applicants that are taken to have applied for a pre-conversion visa due to the operation of the Migration Act or the regulations.

Conversion regulation

317. New subsection 45AA(3) provides that for the purposes of the Migration Act, a regulation (a conversion regulation) may provide that, despite anything else in the Migration Act, the pre-conversion application for the pre-conversion visa:
- is taken not to be, and never to have been, a valid application for the pre-conversion visa; and
 - is taken to be, and always to have been, a valid application (a converted application) for a visa of a different class (specified by the conversion regulation) made by the applicant for the pre-conversion visa.
318. A note is inserted under new subsection 45AA(3). The note provides that new section 45AA may apply in relation to a pre-conversion application made before the commencement of new section 45AA (see the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*). For example, a conversion regulation (made after the commencement of new section 45AA) could have the effect that a pre-conversion application for a particular type of visa made on 1 August 2014 (before that commencement):
- is taken not to have been made on 1 August 2014 (or ever); and
 - is taken to be, and always to have been, a converted application for another type of visa made on 1 August 2014.
319. The effect of new subsection 45AA(3) is to provide for the effects of the conversion regulation on a pre-conversion application. Specifically, a conversion regulation invalidates the pre-conversion application so that it is taken never to have been made. The pre-conversion application will be taken to always have been a converted

application. The conversion regulation can be made that converts a pre-conversion application of a specified visa class into a converted application for a different specified visa class.

320. The purpose of this provision is to ensure that a clear power is available in the Migration Act to allow regulations to be made that convert an application for a visa of a particular class to be an application for a different class of visa.
321. New subsection 45AA(4) provides that without limiting new subsection 45AA(3), a conversion regulation may:
 - prescribe a class or classes of pre-conversion visas; and
 - prescribe a class of applicants for pre-conversion visas; and
 - prescribe a time (the conversion time) when the regulation is to start to apply in relation to a pre-conversion application, including different conversion times depending on the occurrence of different events.
322. The effect of new subsection 45AA(4) is to make clear that the conversion regulation may provide for:
 - the class, or classes, of pre-conversion visas that are being converted; and
 - the class of applicants who have applied for that pre-conversion visa; and
 - the time, or times, when the conversion regulation starts to apply to convert the pre-conversion application.
323. New subsection 45AA(4) is not intended to limit the breadth of matters that a conversion regulation may prescribe under new subsection 45AA(3).
324. In particular, new paragraph 45AA(4)(c) makes clear that a conversion regulation may prescribe the time from which the conversion regulation starts to apply (the conversion time). The conversion time is the point in time when the conversion regulation converts the pre-conversion application. The intention is that the conversion time may be specified by reference to the occurrence of an event or multiple events.

Visa Application charge

325. New subsection 45AA(5) provides that if an amount has been paid as the first instalment of the visa application charge for a pre-conversion application, then, at and after the conversion time in relation to the application:
 - that payment is taken not to have been paid as the first instalment of the visa application charge for the pre-conversion application; and
 - that payment is taken to be payment of the first instalment of the visa application charge for the converted application, even if the first instalment of the visa application charge that would otherwise be payable for the converted application is greater than the actual amount paid for the first instalment of the visa application charge for the pre-conversion application; and
 - in a case in which the first instalment of the visa application charge payable for the converted application is less than the actual amount paid for the first instalment of the visa application charge for the pre-conversion application, no refund is payable in respect of the difference only for that reason.

326. A note is inserted under new subsection 45AA(5). The new note provides: for the visa application charge, see sections 45A, 45B and 45C.
327. The effect of new subsection 45AA(5) is to ensure that, if the first instalment of the visa application charge for the pre-conversion application has been paid by the applicant, then that visa application charge is taken to have been paid for the converted application.
328. If the first instalment of the visa application charge for the pre-conversion application is less than the first instalment of the visa application charge for the converted application, then the amount paid will be taken to be payment for the first instalment of the visa application charge for the converted application. The applicant will not be required to pay the difference between the first instalment of the visa application charge for the pre-conversion application and the converted application.
329. If the first instalment of the visa application charge for the pre-conversion application is greater than the first instalment of the visa application charge for the converted application, the difference between the first instalment of the visa application charge for the pre-conversion application and the converted application will not be refunded to the applicant on the basis of the conversion. However, depending on the applicant's particular circumstances, other grounds for the refund of the first instalment of the visa application charge under the Migration Act and the Migration Regulations may apply.
330. The purpose of this provision is to ensure that, despite any differences in amount, any first instalment of the visa application charge paid for the pre-conversion application is 'transferred across' to be the first instalment of the visa application charge for the converted application.

Effect on bridging visas

331. New subsection 45AA(6) provides that for the purposes of the Migration Act, if, immediately before the conversion time for a pre-conversion application, a person held a bridging visa because the pre-conversion application had not been finally determined, then, at and after the conversion time, the bridging visa has effect as if it had been granted because of the converted application.
332. New subsection 45AA(7) provides that for the purposes of the Migration Act, if, immediately before the conversion time for a pre-conversion application, a person had made an application for a bridging visa because of the pre-conversion application, but the bridging visa application had not been finally determined, then, at and after the conversion time:
- the bridging visa application is taken to have been applied for because of the converted application; and
 - the bridging visa (if granted) has effect as if it were granted because of the converted application.
333. A note is inserted after new subsection 45AA(7). The new note provides that the Migration Act and the regulations would apply to a bridging visa to which new subsection 45AA(6) or 45AA(7) applies, and to when the bridging visa would cease to have effect, in the same way as the Migration Act and the regulations would apply in

relation to any bridging visa. For example, such a bridging visa would generally cease to be in effect under section 82 of the Migration Act if and when the substantive visa is granted because of the converted application.

334. The effect and purpose of new subsection 45AA(6) is to ensure that the conversion of the pre-conversion application will not adversely affect the migration status of the applicant who made the pre-conversion application. This amendment is intended to ensure that, despite the conversion occurring, the applicant for the pre-conversion visa will continue to hold the bridging visa granted in association with the pre-conversion application. This is because the bridging visa granted in association with the pre-conversion application will have effect as if it had been granted because of the converted application.
335. The effect and purpose of new subsection 45AA(7) is to ensure that the conversion of the pre-conversion application will not invalidate an application for a bridging visa that was made because of the pre-conversion application and had not been finally determined immediately before the conversion time. A bridging visa application that is made because of the pre-conversion application, but is not finally determined, is taken to be made because of the converted application. If such a bridging visa is granted, it will be taken to have been granted because of the converted application.
336. The relevant provisions in the Migration Act and the Migration Regulations which affect the cessation of a bridging visa will apply normally to a bridging visa covered by new subsections 45AA(6) or 45AA(7). For example, a bridging visa to which new subsection 45AA(6) or 45AA(7) applies will cease upon cancellation, in accordance with current subsection 82(1) of the Migration Act. It is the intention for a bridging visa to which new subsections 45AA(6) or 45AA(7) applies to be subject to the same provisions as a bridging visa to which new subsections 45AA(6) and 45AA(7) do not apply.

Conversion regulation may affect accrued rights etc.

337. New subsection 45AA(8) provides that to avoid doubt:
 - subsection 12(2) of the *Legislative Instruments Act 2003* does not apply in relation to the effect of a conversion regulation (including a conversion regulation enacted by the Parliament); and
 - subsection 7(2) of the *Acts Interpretation Act 1901*, including that subsection as applied by section 13 of the *Legislative Instruments Act 2003*, does not apply in relation to the enactment of new section 45AA or the making of a conversion regulation (including a conversion regulation enacted by the Parliament).
338. Current subsection 12(2) of the *Legislative Instruments Act 2003* provides that a legislative instrument, or a provision of a legislative instrument, has no effect if, apart from subsection 12(2), it would take effect before the date it is registered and as a result:
 - the rights of a person (other than the Commonwealth or an authority of the Commonwealth) as at the date of registration would be affected so as to disadvantage that person; or

- liabilities would be 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.
339. Current subsection 7(2) of the *Acts Interpretation Act 1901* provides that if an Act, or an instrument under an Act, repeals or amends an Act (the affected Act) or a part of an Act, then the repeal or amendment does not:
- revive anything not in force or existing at the time at which the repeal or amendment takes effect; or
 - affect the previous operation of the affected Act or part (including any amendment made by the affected Act or part), or anything duly done or suffered under the affected Act or part; or
 - affect any right, privilege, obligation or liability acquired, accrued or incurred under the affected Act or part; or
 - affect any penalty, forfeiture or punishment incurred in respect of any offence committed against the affected Act or part; or
 - affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment.
340. New subsection 45AA(8) has the effect of excluding the operation of subsection 12(2) of the *Legislative Instruments Act 2003* and subsection 7(2) of the *Acts Interpretation Act 1901*. The purpose of this subsection is to ensure that a conversion regulation made under new section 45AA may affect the accrued rights of an applicant and is, nonetheless, not prevented for doing so by subsection 12(2) of the *Legislative Instruments Act 2003* and subsection 7(2) of the *Acts Interpretation Act 1901*.

Division 2 – Application

Item 21 Application of amendments

341. Item 21 provides that the amendment of the Migration Act made by Division 1 of Part 2 of Schedule 2 to the Bill, to insert new section 45AA of the Migration Act, applies in relation to an application for a pre-conversion visa made before, on or after the commencement of Part 2.
342. The effect and purpose of this item is to ensure that new section 45AA applies in relation to a visa application that is made before, on or after the commencement of Part 2 of Schedule 2 to the Bill.

Part 3 – Deemed visa applications

Division 1 - Amendments

Migration Act 1958

Item 22 At the end of section 48

343. This item inserts new subsection 48(4) in current section 48 of the Migration Act.
344. Current section 48 limits further applications by a person in the migration zone whose visa has been cancelled, or whose application for a visa has been refused, since they last entered Australia.
345. New subsection 48(4) mentions paragraphs 48(1)(b) and 48(1A)(b), as inserted in the Migration Act by Item 1 of Schedule 1 to the *Migration Legislation Amendment Act (No. 1) 2014*.
346. Under subsection 48(1), a non-citizen in the migration zone who meets the requirements of paragraphs 48(1)(a) and 48(1)(b) may, subject to the regulations, apply for a visa of a class prescribed for the purposes of section 48 or have an application for such a visa made on his or her behalf, but not for a visa of any other class.
347. The requirement in paragraph 48(1)(a) is that the non-citizen does not hold a substantive visa.
348. The requirement in paragraph 48(1)(b) is that the non-citizen is a person who, after last entering Australia:
- was refused a visa, other than a refusal of a bridging visa or a refusal under section 501, 501A or 501B, for which the non-citizen had applied (whether or not the application has been finally determined); or
 - held a visa that was cancelled under section 109 (incorrect information), 116 (general power to cancel), and 134 (business visas), 137J (student visas) or 137Q (regional sponsored employment visas).
349. Under subsection 48(1A), a non-citizen in the migration zone who meets the requirements of paragraphs 48(1A)(a) and 48(1A)(b) may, subject to the regulations, apply for a visa of a class prescribed for the purposes of section 48 or have an application for such a visa made on his or her behalf, but not for a visa of any other class.
350. The requirement in paragraph 48(1A)(a) is that the non-citizen does not hold a substantive visa.
351. The requirement in paragraph 48(1A)(b) is that the non-citizen is a person who, after last entering Australia, was refused a visa (other than a refusal of a bridging visa or a refusal under section 501, 501A or 501B) for which an application had been made on the non-citizen's behalf, whether or not:
- the application has been finally determined; or

- the non-citizen knew about, or understood the nature of, the application due to any mental impairment; or
 - the non-citizen knew about, or understood the nature of, the application due to the fact that the non-citizen was, at the time the application was made, a minor.
352. A person who is affected by section 48 may only apply for a class of visa that is prescribed in regulation 2.12 of the Migration Regulations.
353. New subsection 48(4) provides that in paragraphs 48(1)(b) and 48(1A)(b):
- a reference to an application for a visa made by or on behalf of a non-citizen includes a reference to an application for a visa that is taken to have been made by the non-citizen by the operation of the Migration Act or a regulation; and
 - a reference to the cancellation of a visa includes a reference to the cancellation of a visa for which an application is taken to have been made by the operation of the Migration Act or a regulation.
354. This amendment clarifies that an application for a visa referred to in subparagraph 48(1)(b)(i) and paragraph 48(1A)(b) includes an application for a visa that is taken to have been made by the non-citizen by the operation of the Migration Act or a regulation.
355. An application for a Temporary Protection (Class XD) visa that is taken to have been made under new regulation 2.08F is an example of an application that is taken to have been made by a non-citizen by the operation of a regulation. New regulation 2.08F is inserted by item 38 of Schedule 2 to this Bill.
356. Under new regulation 2.08F, certain Protection (Class XA) visa applications that were made by prescribed applicants are taken not to be, and never to have been, a valid application for a Protection (Class XA) visa application; and are taken to be, and to always have been, a valid application for a Temporary Protection (Class XD) visa, made by the prescribed applicant.
357. If a Temporary Protection (Class XD) visa application which the non-citizen is taken to have made under new regulation 2.08F is refused (other than a refusal under current section 501, 501A or 501B), the non-citizen would only be able to apply for a visa in accordance with section 48.
358. This amendment also clarifies that a reference to the cancellation of a visa referred to in subparagraph 48(1)(b)(ii) includes a reference to the cancellation of a visa for which an application is taken to have been made by the operation of the Migration Act or a regulation.
359. This amendment puts beyond doubt that section 48 operates to allow a non-citizen to only apply for a visa in accordance with section 48, in circumstances where the previous cancelled visa was a visa that the person was taken to have applied for, or the previous visa refusal was in relation to an application that the person was taken to have made.

Item 23 After subsection 48A(1C)

360. This item inserts new subsections 48A(1D) and 48A(1E) in current section 48A of the Migration Act.
361. Current section 48A prevents further protection visa applications by a person in the migration zone whose protection visa has been cancelled, or whose application for a protection visa has been refused.
362. Current subsection 48A(1) is amended by Items 2 and 3 of Schedule 1 to the *Migration Legislation Amendment Act (No. 1) 2014*. Item 3 inserted subsection 48A(1AA).
363. Current subsection 48A(1) provides that subject to section 48B, a non-citizen who, while in the migration zone, has made:
- an application for a protection visa, where the grant of the visa has been refused (whether or not the application has been finally determined); or
 - applications for protection visas, where the grants of the visas have been refused (whether or not the applications have been finally determined);

may not make a further application for a protection visa, or have a further application for a protection visa made on his or her behalf, while the non-citizen is in the migration zone.

364. Subsection 48A(1AA) provides that subject to section 48B, if:
- an application for a protection visa is made on a non-citizen's behalf while the non-citizen is in the migration zone; and
 - the grant of the visa has been refused, whether or not:
 - the application has been finally determined; or
 - the non-citizen knew about, or understood the nature of, the application due to any mental impairment; or
 - the non-citizen knew about, or understood the nature of, the application due to the fact that the non-citizen was, at the time the application was made, a minor;

the non-citizen may not make a further application for a protection visa, or have a further application for a protection visa made on his or her behalf, while the non-citizen is in the migration zone.

365. Current subsection 48A(1B) provides that subject to section 48B, a non-citizen in the migration zone who held a protection visa that was cancelled may not make a further application for a protection visa while in the migration zone.
366. In general terms, current subsection 48B allows the Minister to determine that section 48A does not prevent an application for a protection visa within a particular period, if the Minister thinks that it is in the public interest to do so.
367. New subsection 48A(1D) provides that in current paragraphs 48A(1)(a) and 48A(1)(b) and 48A(1AA)(a) and 48A(1AA)(b), a reference to an application for a protection visa made by or on behalf of a non-citizen includes a reference to an application for a

protection visa that is taken to have been made by the non-citizen by the operation of the Migration Act or a regulation.

368. New subsection 48A(1E) provides that in current subsection 48A(1B), a reference to the cancellation of a protection visa includes a reference to the cancellation of a protection visa in relation to which an application for a protection visa is taken to have been made by the operation of the Migration Act or a regulation.
369. An application for a Temporary Protection (Class XD) visa that is taken to have been made under new regulation 2.08F is an example of an application that is taken to have been made by a non-citizen by the operation of a regulation. New regulation 2.08F is inserted by Item 38 of Schedule 2 to this Bill.
370. Under new regulation 2.08F, certain Protection (Class XA) visa applications that were made by prescribed applicants are taken not to be, and never to have been, a valid application for a Protection (Class XA) visa application; and are taken to be, and to always have been, a valid application for a Temporary Protection (Class XD) visa, made by the prescribed applicant.
371. If a Temporary Protection (Class XD) visa application which the non-citizen is taken to have made under new regulation 2.08F is refused, the non-citizen would be prevented from making a further application for any class of protection visa by section 48A.
372. This amendment puts beyond doubt that section 48A prevents a non-citizen from making a further application for a protection visa, in circumstances where the previous cancelled protection visa was a visa that the person was taken to have applied for, or the previous protection visa refusal was in relation to an application that the person was taken to have made.
373. New subsections 48A(1D) and 48A(1E) do not limit the effect of current subsections 48A(1C) and 48A(2).
374. In general terms, current subsection 48A(1C) sets out a non-exhaustive list of circumstances when current subsections 48A(1) and 48A(1B) apply in relation to a non-citizen.
375. Current subsection 48A(2) is amended by items 10, 11 and 12 of Schedule 2 to the Bill. Following amendment, subsection 48A(2) sets out an exhaustive definition of *application for a protection visa*.

Item 24 After subsection 501E(1A)

376. This item inserts new subsection 501E(1B) in current section 501E of the Migration Act.
377. Current section 501E prevents applications for certain visas by a person whose visa has been cancelled or whose visa application has been refused in certain circumstances.
378. Current section 501E is amended by Items 4 and 5 of Schedule 1 to the *Migration Legislation Amendment Act (No. 1) 2014*. Item 5 inserted subsection 501E(1A).

379. Current subsection 501E(1) provides that a person is not allowed to make an application for a visa, or have an application for a visa made on the person's behalf, at a particular time (the application time) that occurs during a period throughout which the person is in the migration zone if the requirements in current paragraphs 501E(1)(a) and 501E(1)(b) are met.
380. The requirement in current paragraph 501E(1)(a) is that at an earlier time during that period, the Minister made a decision under section 501, 501A or 501B to refuse to grant a visa to the person or to cancel a visa that has been granted to the person.
381. The requirement in current paragraph 501E(1)(b) is that the decision mentioned in current paragraph 501E(1)(a) was neither set aside nor revoked before the application time.
382. Current subsection 501E(1A) provides that in relation to the Minister's decision to refuse to grant a visa to the person, as mentioned in current paragraph 501E(1)(a), it does not matter whether:
- the application for the visa was made on the person's behalf; or
 - the person knew about, or understood the nature of, the application for the visa due to:
 - any mental impairment; or
 - the fact that the person was, at the time the application was made, a minor.
383. Current subsection 501E(2) provides that current subsection 501E(1) does not prevent a person, at the application time, from making an application for a protection visa or a visa specified in the regulations for the purposes of subsection 501E(2).
384. Current regulation 2.12AA of the Migration Regulations specifies the Bridging R (Class WR) visa for the purposes of current paragraph 501E(2)(b).
385. New subsection 501E(1B) provides that in current paragraph 501E(1)(a) and subsection 501E(1A), the reference to a refusal to grant a visa, or to the cancellation of a visa, includes a reference to such a refusal or cancellation in relation to a visa for which an application is taken to have been made by the operation of the Migration Act or a regulation.
386. An application for a Temporary Protection (Class XD) visa that is taken to have been made under new regulation 2.08F is an example of an application that is taken to have been made by a non-citizen by the operation of the Migration Regulations. New regulation 2.08F is inserted by Item 38 of Schedule 2 to this Bill.
387. Under new regulation 2.08F, certain Protection (Class XA) visa applications that were made by prescribed applicants are taken not to be, and never to have been, a valid application for a Protection (Class XA) visa application; and are taken to be, and to always have been, a valid application for a Temporary Protection (Class XD) visa, made by the prescribed applicant.
388. If a Temporary Protection (Class XD) visa application which the non-citizen is taken to have made under new regulation 2.08F is refused under section 501, 501A or 501B, the

non-citizen would be prevented from making an application for a visa in accordance with current section 501E.

389. This amendment puts beyond doubt that section 501E prevents a non-citizen from making an application for a visa (except in accordance with section 501E), in circumstances where the previous cancelled visa was a visa that the person was taken to have applied for, or the previous visa refusal was in relation to an application that the person was taken to have made.

Division 2 - Application

Item 25 Application of amendments

390. The amendments made by Division 1 of Part 3 of Schedule 2 to the Bill apply in relation to an application for a visa that is taken to have been made before, on or after the commencement of Part 3 of Schedule 2 to the Bill.

Part 4 – Permanent protection visas and temporary protection visas

Division 1 – Main amendments

Migration Regulations 1994

Item 26 Regulation 1.03

391. This item inserts a definition of *protection visa* into regulation 1.03 of the Migration Regulations. Regulation 1.03 contains definitions for terms used in the Migration Regulations.
392. The new definition of *protection visa* in regulation 1.03 provides that *protection visa* has the meaning given by new section 35A of the Migration Act. This definition is a signpost to guide readers as the term “*protection visa*” is used throughout the Migration Regulations.
393. A note is inserted after the new definition of *protection visa* in regulation 1.03. The new note provides that new section 35A covers the following:
- permanent protection visas (classified by these Migration Regulations as Protection (Class XA) visas) when this definition commenced); and
 - other protection visas formerly provided for by subsection 36(1) of the Migration Act;
 - temporary protection visas (classified by these Migration Regulations as Temporary Protection (Class XD) visas when this definition commenced);
 - any additional classes of permanent or temporary visas that are prescribed as protection visas by the regulations.

See also section 36 and Subdivision AL of Division 3 of Part 2 of the Migration Act.

394. Subdivision AL of Division 3 of Part 2 of the Migration Act sets out other provisions about protection visas.
395. The new definition of *protection visa* and the associated note mirrors the definition of protection visa and the note inserted into the Migration Act by item 1 of Schedule 2 to the Bill.
396. The effect of this amendment is to define the term “*protection visa*” to mean all the protection visas covered by new section 35A, including the protection visas that can be prescribed by the Migration Regulations, and historic classes of protection visas which were formerly provided for by subsection 36(1) of the Migration Act. Accordingly, a reference to “*protection visa*” in the Migration Regulations can mean any one of the visas covered in section 35A or under previous section 36.
397. The purpose of this amendment is to ensure that “*protection visa*” is used as an umbrella term to capture all the protection visas provided for under the Migration Act and the Migration Regulations.

Item 27 Subparagraph 1401(2)(a)(i) of Schedule 1

- 398. This item repeals subparagraph 1401(2)(a)(i) of Schedule 1 to the Migration Regulations.
- 399. Current subparagraph 1401(2)(a)(i) of Schedule 1 to the Migration Regulations provides for the first instalment of visa application charge (payable at the time the application is made) for an application for a Protection (Class XA) visa made by an applicant who is in immigration detention and has not been immigration cleared.
- 400. This repeal is consequential to the amendments made in item 29 of Schedule 2 to the Bill, which prevent a person who has not been immigration cleared from making a valid application for a Protection (Class XA) visa. Consequently, subparagraph 1401(2)(a)(i) is no longer necessary.

Item 28 Subparagraph 1401(2)(a)(ii) of Schedule 1

- 401. This item repeals subparagraph 1401(2)(a)(ii) of Schedule 1 to the Migration Regulations.
- 402. Current subparagraph 1401(2)(a)(ii) of Schedule 1 to the Migration Regulations provides for the first instalment of visa application charge (payable at the time the application is made) for an application for a Protection (Class XA) visa for any applicant other than an applicant who is in immigration detention and has not been immigration cleared.
- 403. This repeal is consequential to the amendments made in item 27 of Schedule 2 to the Bill. The repeal of subparagraph 1401(2)(a)(i) of Schedule 1 to the Migration Regulations removes the distinction in visa application charge payable by different cohorts of applicants. Consequently, all applicants will be required to pay the same visa application charge in order to make a valid application for a Protection (Class XA) visa.

Item 29 At the end of subitem 1401(3) of Schedule 1

- 404. This item adds new paragraph 1401(3)(d) to the end of subitem 1401(3) of Schedule 1 to the Migration Regulations.
- 405. Item 1401 of Schedule 1 to the Migration Regulations provides the requirements for making a valid application for a Protection (Class XA) visa, which is the class of permanent visas provided for by new subsection 35A(2) of the Migration Act.
- 406. In accordance with new subsection 35A(6) of the Migration Act, as inserted by item 5 of Schedule 2 to the Bill, an applicant for a Protection (Class XA) visa must meet all of the criteria set out in item 1401 to make a valid application for a Protection (Class XA) visa.
- 407. Subitem 1401(3) sets out the other criteria that must be met by an applicant to make a valid application for a Protection (Class XA) visa. The criteria in subitem 1401(3) are in addition to the criteria contained in subitems 1401(1) and 1401(2).

408. New paragraph 1401(3)(d) provides that an application by a person for a Protection (Class XA) visa is valid only if the person:
- does not hold, and has not ever held, a Subclass 785 (Temporary Protection) visa, including such a visa granted before 2 December 2013; and
 - does not hold, and has not ever held, a Temporary Safe Haven (Class UJ) visa; and
 - does not hold, and has not ever held, a Temporary (Humanitarian Concern) (Class UO) visa; and
 - held a visa that was in effect on the person's last entry into Australia; and
 - is not an unauthorised maritime arrival; and
 - was immigration cleared on the person's last entry into Australia.
409. The effect of new paragraph 1401(3)(d) is that a person can only make a valid application for a Protection (Class XA) visa if they meet the requirements in new paragraph 1401(3)(d) of Schedule 1 to the Migration Regulations.
410. New subparagraph 1401(3)(d)(i) makes clear that a person can only make a valid application for a Protection (Class XA) visa if they do not hold, and have not ever held, a Subclass 785 (Temporary Protection) visa, including such a visa granted before 2 December 2013.
411. The purpose of this amendment is to account for the Subclass 785 (Temporary Protection) visa, which was a subclass of the Protection (Class XA) visa prior to 2 December 2013. On 9 August 2008, Subclass 785 (Temporary Protection) visas were repealed from the Migration Regulations. The *Migration Amendment (Temporary Protection Visas) Regulation 2013* re-introduced Subclass 785 (Temporary Protection) visas on 18 October 2013 as a subclass of the Protection (Class XA) visa. The *Migration Amendment (Temporary Protection Visas) Regulation 2013* was disallowed by the Senate on 2 December 2013.
412. The Subclass 785 (Temporary Protection) visa is reintroduced by item 31 of Schedule 2 to the Bill. The new Subclass 785 (Temporary Protection) visa is a subclass of the Temporary Protection (Class XD) visa rather than being a subclass of the Protection (Class XA) visa as it was prior to 2 December 2013.
413. The purpose of new paragraph 1401(3)(d) is to implement the government's intention that an applicant to whom paragraph 1401(3)(d) applies, will not be eligible to make a valid application for a Protection (Class XA) visa.

Item 30 At the end of Schedule 1

414. This item adds new item 1403 at the end of Schedule 1 to the Migration Regulations. The heading for the new Item 1403 is "Temporary Protection (Class XD)".
415. In accordance with new subsection 35A(3) of the Migration Act, as inserted by item 5 of Schedule 2 to the Bill, temporary protection visas are classified by the Migration Regulations as Temporary Protection (Class XD) visas. New paragraph 35A(6)(b) of the Migration Act allows for criteria for protection visas to be prescribed by regulation for the purposes of section 31 of the Migration Act.

416. In particular, subsection 31(3) of the Migration 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 section 35A).
417. Item 1403 of Schedule 1 to the Migration Regulations provides the requirements for making a valid application for a Temporary Protection (Class XD) visa. The effect of this amendment is that a person making an application for a Temporary Protection (Class XD) visa will only be able to make a valid application if they meet the requirements in new Item 1403 of Schedule 1.
418. Subitem 1403(1) provides that Form 866 applies to Temporary Protection (Class XD) visas. The effect of this provision is that an application for a Temporary Protection (Class XD) visa must be made using a Form 866 visa application form. An application for a Protection (Class XA) visa must also be made using Form 866.
419. Subitem 1403(2) provides that the visa application charge is payable in two instalments as follows:
- first instalment (payable at the time the application is made):
 - for an applicant who is in immigration detention and has not been immigration cleared, the amount is 'nil';
 - for any other applicant, the base application charge is \$35 and the additional applicant charge (whether the applicant is over or under 18 years of age) is 'nil';
 - the second instalment (payable before grant of visa) is nil.
420. A note is inserted after paragraph 1403(2)(a). The new note provides that regulation 2.12C explains the components of the first instalment of visa application charge and specifies the amounts of subsequent temporary application charge and non-internet application charge. Not all of the components may apply to a particular application. Additional applicant charge is paid by an applicant who claims to be a member of the family unit of another applicant and seeks to combine the application with that applicant's application.
421. The effect of this amendment is that an applicant must have paid the required visa application charge for the Temporary Protection (Class XD) visa application to be valid.
422. Subitem 1403(3) provides for other requirements for a valid Temporary Protection (Class XD) visa application as follows:
- Application must be made in Australia.
 - Applicant must be in Australia.
 - Application by a person claiming to be a *member of the family unit* of a person who is an applicant for a Temporary Protection (Class XD) visa may be made at the same time and place as, and combined with, the application by that person.
 - An application by a person for a Temporary Protection (Class XD) visa is valid only if the person:

- holds, or has ever held, a Temporary Protection (Class XD) visa or a Subclass 785 (Temporary Protection) visa, including such a visa granted before 2 December 2013; or
 - holds, or has ever held, a Temporary Safe Haven (Class UJ) visa; or
 - holds, or has ever held, a Temporary (Humanitarian Concern) (Class UO) visa; or
 - did not hold a visa that was in effect on the person's last entry into Australia; or
 - is an unauthorised maritime arrival; or
 - was not immigration cleared on the person's last entry into Australia.
423. The criteria in items 1401 and 1403 of Schedule 1 to the Migration Regulations operate so that an applicant who is eligible to apply for a Protection (Class XA) visa will not be eligible to apply for a Temporary Protection (Class XD) visa and vice versa. The purpose is to implement the Government's intention that an applicant to whom new paragraph 1403(3)(d) applies, will not be eligible to make a valid application for a Protection (Class XA) visa. Such an applicant will only be eligible to make a valid application for a Temporary Protection (Class XD) visa.
424. New subitem 1403(4) provides that the relevant subclass for the Temporary Protection (Class XD) visa is 785 (Temporary Protection). The subclass number for this visa is the same as the subclass number for the Subclass 785 (Temporary Protection) visa that was repealed on 9 August 2008, re-introduced by the *Migration Amendment (Temporary Protection Visas) Regulation 2013* on 18 October 2013 and then disallowed by the Senate on 2 December 2013. However, as noted above, the new Subclass 785 (Temporary Protection) visa is a visa subclass of the Temporary Protection (Class XD) visa. The Subclass 785 (Temporary Protection) visa that existed on and before 2 December 2013 is a visa subclass of the Protection (Class XA) visa.

Item 31 After Part 773 of Schedule 2

425. This item inserts new Subclass 785 after Part 773 of Schedule 2 to the Migration Regulations. The heading is "Subclass 785 – Temporary Protection". This item provides for:
- the criteria for the grant of the new Subclass 785 (Temporary Protection) visa;
 - the circumstances applicable to grant;
 - when the visa is in effect; and
 - the conditions to be attached to the visa.

785.1 – Interpretation

426. New clause 785.111 provides that for the purposes of Part 785, a person (A) is a ***member of the same family unit*** as another person (B) if:
- A is a member of B's family unit; or
 - B is a member of A's family unit; or
 - A and B are members of the family unit of a third person.

785.2 – Primary criteria

427. New clause 785.2 provides for the primary criteria for the grant of a Subclass 785 (Temporary Protection) visa. The new note after new clause 785.2 provides that all applicants must satisfy the primary criteria.
428. The purpose of the new note is to make clear that all applicants seeking to satisfy the criteria for the grant of a Subclass 785 (Temporary Protection) visa must satisfy the primary criteria.
429. The primary criteria for the grant of a Subclass 785 (Temporary Protection) visa largely replicate the primary criteria for the grant of a Subclass 866 (Protection) visa.

785.21 – Criteria to be satisfied at time of application

430. New clause 785.21 provides for the primary criteria to be satisfied at the time of application for the Subclass 785 (Temporary Protection) visa.
431. New subclause 785.211(1) provides that new subclause 785.211(2) or 785.211(3) is satisfied.
432. New subclause 785.211(2) provides that the applicant:
 - claims that a criterion mentioned in paragraph 36(2)(a) or 36(2)(aa) of the Migration Act is satisfied in relation to the applicant; and
 - makes specific claims as to why that criterion is satisfied.
433. The new note after new subclause 785.211(2) provides that paragraphs 36(2)(a) and 36(2)(aa) of the Migration Act set out criteria for the grant of protection visas to non-citizens in respect of whom Australia has protection obligations.
434. New subclause 785.211(3) provides that the applicant claims to be a ***member of the same family unit*** as a person:
 - to whom subclause 785.211(2) applies; and
 - who is an applicant for a Subclass 785 (Temporary Protection) visa.
435. A new note is inserted after new subclause 785.211(3). The note provides: see paragraphs 36(2)(b) and 36(2)(c) of the Migration Act.
436. The purpose of new clause 785.21 is to provide that, at the time of application, the applicant must claim to be a person, or a ***member of the same family unit*** as a person in respect of whom Australia has protection obligations under paragraphs 36(2)(a) or 36(2)(aa) of the Migration Act.

785.22 – Criteria to be satisfied at time of decision

437. New clause 785.22 provides for the primary criteria to be satisfied at the time of decision for a Subclass 785 (Temporary Protection) visa.
438. New subclause 785.221(1) provides that new subclause 785.221(2) or 785.221(3) is satisfied.

439. New subclause 785.221(2) provides that the Minister is satisfied that a criterion mentioned in paragraphs 36(2)(a) or 36(2)(aa) of the Migration Act is satisfied in relation to the applicant.
440. A new note is inserted after new subclause 785.221(2). The new note provides that paragraphs 36(2)(a) and 36(2)(aa) of the Migration Act set out criteria for the grant of protection visas to non-citizens in respect of whom Australia has protection obligations.
441. New subclause 785.221(3) provides that the Minister is satisfied that:
- the applicant is a *member of the same family unit* as an applicant mentioned in subclause 785.221(2); and
 - the applicant mentioned in subclause 785.221(2) has been granted a Subclass 785 (Temporary Protection) visa.
442. The new note after subclause 785.221(3) provides: see paragraphs 36(2)(b) and 36(2)(c) of the Migration Act.
443. The purpose of new clause 785.221 is to provide that, at the time of decision, the Minister must be satisfied that the applicant is either:
- a person in respect of whom Australia has protection obligations under paragraph 36(2)(a) or 36(2)(aa) of the Migration Act; or
 - a *member of the same family unit* as a person in respect of whom Australia has protection obligations under paragraph 36(2)(a) or 36(2)(aa) of the Migration Act and that person has been granted a Subclass 785 (Temporary Protection) visa.
444. New clause 785.222 provides that the applicant has undergone a medical examination carried out by any of the following (a *relevant medical practitioner*):
- a Medical Officer of the Commonwealth;
 - a medical practitioner approved by the Minister for the purposes of paragraph 785.222(b);
 - a medical practitioner employed by an organisation approved by the Minister for the purposes of paragraph 785.222(c).
445. The purpose of new clause 785.222 is to ensure that an applicant must meet health requirements. The health requirements are the same as those for Subclass 866 (Protection) visas.
446. New subclause 785.223(1) specifies that one of new subclauses 785.223(2) to 785.223(4) must be satisfied.
447. New subclause 785.223(2) provides that the applicant has undergone a chest x-ray examination conducted by a medical practitioner who is qualified as a radiologist in Australia.

448. New subclause 785.223(3) provides that the applicant is under 11 years of age and is not a person in respect of whom a relevant medical practitioner has requested the examination mentioned in subclause 785.223(2).
449. New subclause 785.223(4) provides that the applicant is a person:
- who is confirmed by a relevant medical practitioner to be pregnant; and
 - who has been examined for tuberculosis by a chest clinic officer employed by a health authority of a State or Territory; and
 - who has signed an undertaking to place herself under the professional supervision of a health authority in a State or Territory and to undergo any necessary treatment; and
 - who the Minister is satisfied should not be required to undergo a chest x-ray examination at this time.
450. The purpose of new clause 785.223 is to ensure that an applicant meets the required health standards. The health requirements are the same as those for Subclass 866 (Protection) visas.
451. New subclause 785.224(1) provides that a relevant medical practitioner has considered:
- the results of any tests carried out for the purposes of the medical examination required under clause 785.222; and
 - the radiological report (if any) required under clause 785.223 in respect of the applicant.
452. New subclause 785.224(2) provides that if the relevant medical practitioner:
- is not a Medical Officer of the Commonwealth; and
 - considers that the applicant has a disease or condition that is, or may result in the applicant being, a threat to public health in Australia or a danger to the Australian community;
- the relevant medical practitioner has referred any relevant results and reports to a Medical Officer of the Commonwealth.
453. The purpose of new clause 785.224 is to ensure that an applicant meets the required health standards. The health requirements are the same as those for Subclass 866 (Protection) visas.
454. New clause 785.225 provides if a Medical Officer of the Commonwealth considers that the applicant has a disease or condition that is, or may result in the applicant being, a threat to public health in Australia or a danger to the Australian community, arrangements have been made, on the advice of the Medical Officer of the Commonwealth, to place the applicant under the professional supervision of a health authority in a State or Territory to undergo any necessary treatment.
455. The purpose of new clause 785.225 is to ensure that an applicant meets the required health standards. The health requirements are the same as those for Subclass 866 (Protection) visas.

456. New clause 785.226 provides that the applicant:
- satisfies public interest criteria 4001 and 4003A; and
 - if the applicant had turned 18 at the time of application – satisfies public interest criterion 4019.
457. Public interest criterion 4001 is a mechanism by which the character test in subsection 501(6) of the Migration Act is taken into account for an applicant.
458. Public interest criterion 4003A requires that the applicant is not determined by the Foreign Minister, or a person authorised by the Foreign Minister, to be a person whose presence in Australia may be directly or indirectly associated with the proliferation of weapons of mass destruction.
459. Public interest criterion 4019 requires that the applicant sign a values statement relevant to the visa subclass or, if compelling circumstances exist, the Minister has decided that the applicant is not required to sign a values statement.
460. The purpose of new clause 785.226 is to replicate the public interest criteria that currently apply to the Subclass 866 (Protection) visa.
461. New clause 785.227 provides that the Minister is satisfied that the grant of the visa is in the national interest.
462. The purpose of new clause 785.227 is that the Minister is able to refuse to grant a Subclass 785 (Temporary Protection) visa where the Minister is not satisfied that the grant is in the national interest.
463. New subclause 785.228(1) provides that if the applicant is a child to whom subregulation 2.08(2) applies, subclause 785.228(2) is satisfied.
464. New subclause 785.228(2) provides the Minister is satisfied that:
- the applicant is a *member of the same family unit* as an applicant to whom subclause 785.221(2) applies; and
 - the applicant to whom subclause 785.221(2) applies has been granted a Subclass 785 (Temporary Protection) visa.
465. Two notes are inserted after new clause 785.228. New note 1 provides that subregulation 2.08(2) applies, generally, to a child born to a non-citizen after the non-citizen has applied for a visa but before the application is decided.
466. New note 2 provides that new subclause 785.221(2) applies if the Minister is satisfied that Australia has protection obligations in respect of the applicant as mentioned in paragraph 36(2)(a) or 36(2)(aa) of the Migration Act.
467. Current subregulation 2.08(1) provides:
- if a non-citizen applies for a visa; and
 - after the application is made, but before it is decided, a child, other than a contributory parent newborn child, is born to that non-citizen; then

- the child is taken to have applied for a visa of the same class at the time he or she was born; and
- the child's application is taken to be combined with the non-citizen's application.

468. Current subregulation 2.08(2) provides that despite any provision in Schedule 2 to the Migration Regulations, a child referred to in subregulation 2.08(1):

- must satisfy the criteria to be satisfied at time of decision; and
- at the time of decision, must satisfy a criterion (if any) applicable at the time of application that an applicant must be sponsored, nominated or proposed.

469. The effect of new clause 785.228 is to ensure that a child who is taken to have applied for a Subclass 785 (Temporary Protection) visa due to subregulation 2.08(1) is only eligible for the grant of the visa if they are a ***member of the same family unit*** as a person who was granted a Subclass 785 (Temporary Protection) visa on the basis of being a person to whom Australia has protection obligations, as mentioned in paragraph 36(2)(a) and 36(2)(aa) of the Migration Act.

470. The purpose of new clause 785.228 is to ensure that a child is eligible to be granted the same visa that is held by a ***member of the same family unit***.

785.3 – Secondary criteria

471. New clause 785.3 provides for secondary criteria which must be satisfied for the grant of a Subclass 785 (Temporary Protection) visa. The new note to new clause 785.3 provides that all applicants must satisfy the primary criteria.

472. The purpose of the note is to make clear that all applicants seeking to satisfy the criteria for the grant of a Subclass 785 (Temporary Protection) visa must satisfy the primary criteria.

785.4 – Circumstances applicable to grant

473. New clause 785.4 provides for the circumstances applicable to the grant of a Subclass 785 (Temporary Protection) visa.

474. New clause 785.411 provides that the applicant must be in Australia when the visa is granted.

475. The purpose of new clause 785.411 is to make clear that an applicant must be in Australia to be granted a Subclass 785 (Temporary Protection) visa. This requirement is the same as the current requirement for a Subclass 866 (Protection) visa.

785.5 – When visa is in effect

476. New clause 785.5 provides for when the Subclass 785 (Temporary Protection) visa is in effect.

477. New clause 785.511 provides that a temporary visa permitting the holder to remain in Australia until:

- if the holder of the temporary visa (the first visa) makes a valid application for another Subclass 785 (Temporary Protection) visa within 3 years after the grant of the first visa – the day when the application is finally determined or withdrawn; or
- in any other case – the earlier of:
 - the end of 3 years from the date of grant of the first visa; and
 - the end of any shorter period, specified by the Minister, from the date of grant of the first visa.

478. The effect of this amendment is that if the Subclass 785 (Temporary Protection) visa holder does not apply for another Subclass 785 (Temporary Protection) visa before the cessation of their temporary visa, then the temporary visa will cease at the earlier of:

- the end of 3 years from the date of grant of the first visa; and
- the end of any shorter period, specified by the Minister, from the date of grant of the first visa.

479. A Subclass 785 (Temporary Protection) visa can be granted for any period, with a maximum period of 3 years.

480. If the person applies for another Subclass 785 (Temporary Protection) visa ('second visa') while they are the holder of a Subclass 785 (Temporary Protection) visa ('first visa'), then the first visa will continue to be in effect until the day the application for the second visa is finally determined or withdrawn.

481. For example, a person is granted a first visa on 17 September 2014, and the Minister has specified for that visa to cease 1 year from the date of grant (i.e. on 17 September 2015). The person makes a valid application for a second visa 10 months after the date of grant (i.e. on 17 July 2015), while still being the holder of the first visa. The application for the second visa is finally determined on 17 July 2016. Under new clause 785.511, the person's first visa will cease on 17 July 2016.

482. If the person makes an application for a second visa on 1 January 2016, then the first visa will have already ceased on 17 September 2015 because the person did not apply for the second visa before the cessation of the first visa.

483. The purpose of new clause 785.511 is to encourage a holder of a Subclass 785 (Temporary Protection) visa to apply for the second visa before the cessation of the first visa. This will ensure that the first visa will not cease until the day the second visa application is finally determined or withdrawn, and that the person will continue to receive any benefits associated with a Subclass 785 (Temporary Protection) visa. If the person's first visa ceases, then the person would be required to apply for, and be granted, a bridging visa in order to become a lawful non-citizen. The bridging visa may not have the same benefits as a Subclass 785 (Temporary Protection) visa.

785.6 – Conditions

484. New clause 785.6 provides for the conditions to be attached to a Subclass 785 (Temporary Protection) visa.

485. New clause 785.611 provides for conditions 8503 and 8565 to apply.

- 486. The effect of new clause 785.611 is that those conditions apply by operation of law to a Subclass 785 (Temporary Protection) visa. If a visa holder does not comply with a condition of the visa, their visa may be cancelled under paragraph 116(1)(b) of the Migration Act.
- 487. Condition 8503 provides that the visa holder will not, after entering Australia, be entitled to be granted a *substantive visa*, other than a *protection visa*, while the holder remains in Australia.
- 488. A *substantive visa* is defined in subsection 5(1) of the Migration Act as a visa other than a bridging visa, criminal justice visa, or an enforcement visa.
- 489. The effect of this condition is that, unless the Minister waives the condition under current subsection 41(2A) of the Migration Act, a person who holds, or who held, a visa with condition 8503 attached cannot make a valid application for a visa (other than a protection visa) while they remain in Australia (see current subsection 46(1A) of the Migration Act).
- 490. Condition 8503 allows a visa holder to be eligible for the grant of a protection visa. However, a holder of a Temporary Protection (Class XD) visa is only eligible for the grant of a Temporary Protection (Class XD) visa because they cannot validly apply for a Protection (Class XA) visa. In other words, the imposition of condition 8503 on a Subclass 785 (Temporary Protection) visa would not allow the visa holder to have access to all classes of protection visas.
- 491. The purpose of making condition 8503 a mandatory condition for a Subclass 785 (Temporary Protection) visa is to implement the government's intention that a Subclass 785 (Temporary Protection) visa holder is not able to apply for any substantive visas aside from a protection visa. Specifically, such a person may apply for a Temporary Protection (Class XD) visa.
- 492. New condition 8565, inserted by item 37 of Schedule 2 to the Bill, provides that the holder must notify Immigration of any change in the holder's residential address within 28 days after the change occurs.
- 493. The purpose of condition 8565 is to ensure that the Department of Immigration and Border Protection is made aware of any change in address of a Subclass 785 (Temporary Protection) visa holder.

Item 32 Clause 866.211 of Schedule 2

- 494. This item repeals current clause 866.211 of Schedule 2 to the Migration Regulations and substitutes a new clause 866.211 of Schedule 2. Clause 866.211 provides for criteria to be satisfied at time of application.
- 495. Current subclause 866.211(1) provides that one of the subclauses 866.211(2) to 866.211(5) is satisfied.
- 496. Current subclause 866.211(2) of Schedule 2 to the Migration Regulations provides that the applicant:

- claims to be a person to whom Australia has protection obligations under the Refugees Convention; and
 - makes specific claims under the Refugees Convention.
497. Current subclause 866.211(3) provides that the applicant claims to be a *member of the same family unit* as a person who is:
- mentioned in subclause 866.211(2); and
 - an applicant for a Protection (Class XA) visa.
498. New subclause 866.211(1) provides that new subclause 866.211(2) or 866.211(3) is satisfied.
499. New subclause 866.211(2) provides that the applicant:
- claims that a criterion mentioned in paragraph 36(2)(a) or 36(2)(aa) of the Migration Act is satisfied in relation to the applicant; and
 - makes specific claims as to why that criterion is satisfied.
500. A new note is inserted after new subclause 866.211(2). The new note provides that paragraphs 36(2)(a) and 36(2)(aa) of the Migration Act sets out criteria for the grant of protection visas to non-citizens in respect of whom Australia has protection obligations.
501. The purpose of this amendment is to take the opportunity to update the language used in subclause 866.211(2) and to reflect the language used in subsection 36(2) of the Migration Act.
502. New subclause 866.211(3) provides that the applicant claims to be a *member of the same family unit* as a person:
- to whom subclause 866.211(2) applies; and
 - who is an applicant for a Subclass 866 (Protection) visa.
503. A new note is inserted after new subclause 866.211(3). The new note provides: see paragraphs 36(2)(b) and 36(2)(c) of the Migration Act.
504. The purpose of this amendment is to substitute the reference to “Protection (Class XA) visa” with “Subclass 866 (Protection) visa”. The effect of this amendment is to make clear that only a *member of the same family unit* as a person who has been granted a Subclass 866 (Protection) visa is eligible for the grant of a Subclass 866 (Protection) visa. The amendments do not substantially alter current clause 866.211 of Schedule 2 to the Migration Regulations.
505. Current subclauses 866.211(4) and 866.211(5) are repealed by this amendment. These subclauses are repealed because the amendment to subclause 866.211(2), to refer to a criterion mentioned in paragraph 36(2)(a) or 36(2)(aa) of the Migration Act, covers those matters that are included in current subclauses 866.211(4) and 866.211(5).

Item 33 Clause 866.221 of Schedule 2

506. This item repeals current clause 866.221 of Schedule 2 to the Migration Regulations and substitutes new clause 866.221 of Schedule 2. Clause 866.221 provides for criteria to be satisfied at time of decision.
507. Current subclause 866.221(1) provides that one of subclauses 866.221(2) to 866.221(5) is satisfied.
508. Current subclause 866.221(2) provides that the Minister is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention.
509. Current subclause 866.221(3) provides that the Minister is satisfied that:
- the applicant is a person who is a *member of the same family unit* as an applicant mentioned in subclause 866.221(2); and
 - the applicant mentioned in subclause 866.221(2) has been granted a Protection (Class XA) visa.
510. New subclause 866.221(1) provides that subclause 866.221(2) or 866.221(3) is satisfied.
511. New subclause 866.221(2) provides that the Minister is satisfied that a criterion mentioned in paragraph 36(2)(a) or 36(2)(aa) of the Migration Act is satisfied in relation to the applicant.
512. A new note is inserted after new subclause 866.221(2). The new note provides that paragraphs 36(2)(a) and 36(2)(aa) of the Migration Act set out criteria for the grant of protection visas to non-citizens in respect of whom Australia has protection obligations.
513. The purpose of this amendment is to take the opportunity to update the language used in subclause 866.221(2) and to reflect the language used in subsection 36(2) of the Migration Act.
514. New subclause 866.221(3) provides that the Minister is satisfied that:
- the applicant is a *member of the same family unit* as an applicant mentioned in subclause 866.221(2); and
 - the applicant mentioned in subclause 866.221(2) has been granted a Subclass 866 (Protection) visa.
515. A new note is inserted after new subclause 866.221(3). The new note provides: see paragraphs 36(2)(b) and 36(2)(c) of the Migration Act.
516. The effect of this amendment is to ensure that only a *member of the same family unit* as a person who has been granted a Subclass 866 (Protection) visa is eligible for the grant of a Subclass 866 (Protection) visa. The amendments do not substantially alter the effect of current clause 866.221 of Schedule 2 to the Migration Regulations.
517. The purpose of this amendment is to substitute the reference to “Protection (Class XA) visa” with “Subclass 866 (Protection) visa”.

518. Current subclauses 866.221(4) and 866.221(5) are repealed by this amendment. These subclauses are repealed because the amendment to subclause 866.221(2), to refer to a criterion mentioned in paragraph 36(2)(a) or 36(2)(aa) of the Migration Act, covers those matters that are included in current subclauses 866.221(4) and 866.221(5).

Item 34 Clause 866.223 of Schedule 2

519. This item omits “relevant medical practitioner” from clause 866.223 of Schedule 2 to the Migration Regulations and substitutes “***relevant medical practitioner***”.
520. This amendment is makes clear that the term “***relevant medical practitioner***” has a particular meaning for the purposes of clause 866.223. The meaning of “***relevant medical practitioner***” is the same in clause 866.223 and in clause 785.222, as inserted by item 31 of Schedule 2 to the Bill.

Item 35 Paragraph 866.225(a)

521. This item omits reference to “, 4002” from paragraph 866.225(a).
522. This amendment is consequential to the amendments made by the Migration Amendment Bill 2013 which inserted subsection 36(1B) into the Migration Act. This was to address the finding of the High Court in the matter of *Plaintiff M47/2012 v Director-General of Security & Ors [2012] HCA 46* (Plaintiff M47). In Plaintiff M47, the High Court held that paragraph 866.225(a) of Part 866 of Schedule 2 to the Migration Regulations is invalid to the extent that it makes public interest criterion 4002 a criterion for the grant of a protection visa.
523. The majority of the High Court in Plaintiff M47 found that the Migration Regulations could not validly prescribe public interest criterion 4002 as a criterion for the grant of a protection visa because doing so was inconsistent with the scheme provided in the Migration Act for the making of a decision to refuse a protection visa relying on Articles 32 and 33(2) of the Convention Relating to the Status of Refugees as amended by the Refugees Protocol. Current subsection 36(1B) of the Migration Act provides that a criterion for the grant of a protection visa is 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*).

Item 36 Clause 866.230 of Schedule 2

524. This item repeals current clause 866.230 of Schedule 2 to the Migration Regulations and substitutes new clause 866.230 of Schedule 2. Clause 866.230 provides for criteria to be satisfied at time of decision.
525. Current subclause 866.230(1) provides that if the applicant is a child mentioned in paragraph 2.08(1)(b), subclause 866.230(2) or 866.230(3) is satisfied.
526. Current subclause 866.230(2) provides both of the following apply:
- the applicant is a ***member of the same family unit*** as an applicant mentioned in subclause 866.221(2);

- the applicant mentioned in subclause 866.221(2) has been granted a Subclass 866 (Protection) visa.
527. Current subclause 866.230(3) provides both of the following apply:
- the applicant is a member of the same family unit as an applicant mentioned in subclause 866.221(4);
 - the applicant mentioned in subclause 866.221(4) has been granted a Subclass 866 (Protection) visa.
528. New subclause 866.230(1) provides if the applicant is a child to whom subregulation 2.08(2) applies, subclause 866.230(2) is satisfied.
529. New subclause 866.230(2) provides the Minister is satisfied that:
- the applicant is a *member of the same family unit* as an applicant to whom subclause 866.221(2) applies; and
 - the applicant mentioned in subclause 866.221(2) has been granted a Subclass 866 (Protection) visa.
530. Two notes are inserted after new subclause 866.230(2). New note 1 provides that subregulation 2.08(2) applies, generally, to a child born to a non-citizen after the non-citizen has applied for a visa but before the application is decided.
531. New note 2 provides that subclause 866.221(2) applies if the Minister is satisfied that Australia has protection obligations in respect of the applicant as mentioned in paragraph 36(2)(a) or 36(2)(aa) of the Migration Act.
532. Current subregulation 2.08(1) provides:
- if a non-citizen applies for a visa; and
 - after the application is made, but before it is decided, a child, other than a contributory parent newborn child, is born to that non-citizen; then
 - the child is taken to have applied for a visa of the same class at the time he or she was born; and
 - the child's application is taken to be combined with the non-citizen's application.
533. Current subregulation 2.08(2) provides that despite any provision in Schedule 2 to the Migration Regulations, a child referred to in subregulation 2.08(1):
- must satisfy the criteria to be satisfied at time of decision; and
 - at the time of decision, must satisfy a criterion (if any) applicable at the time of application that an applicant must be sponsored, nominated or proposed.
534. The effect of new clause 866.230 is to ensure that a child who is taken to have applied for a Subclass 866 (Protection) visa due to subregulation 2.08(1) is only eligible for the grant of the visa if they are a *member of the same family unit* as a person who was granted a Subclass 866 (Protection) visa on the basis of being a person to whom Australia has protection obligations, as mentioned in paragraph 36(2)(a) and 36(2)(aa) of the Migration Act.

535. The purpose of new clause 866.230 is to ensure that a child is eligible to be granted the same visa that is held by a *member of the same family unit*.

Item 37 After clause 8564 of Schedule 8

536. This item inserts new condition 8565 after condition 8564 into Schedule 8 to the Migration Regulations.
537. New condition 8565 provides that a visa holder must notify Immigration of any change in the holder's residential address within 28 days after the change occurs.
538. The purpose of new condition 8565 is to require the visa holder to inform the Department of Immigration and Border Protection of any change to their residential address.

Division 2 – Main amendments commencing immediately after Division 1

Migration Regulations 1994

Item 38 After regulation 2.08E

539. This item inserts new regulation 2.08F after regulation 2.08E of the Migration Regulations. The heading for new regulation 2.08F is "Certain applications for Protection (Class XA) visas taken to be applications for Temporary Protection (Class XD) visas".

Conversion regulation

540. New subregulation 2.08F(1) provides that for new section 45AA of the Migration Act, despite anything else in the Migration Act, a valid application (a pre-conversion application) for a Protection (Class XA) visa made before the commencement of regulation 2.08F by an applicant prescribed by subregulation 2.08F(2) is, immediately after regulation 2.08F starts to apply in relation to the application under subsection 2.08F(3):
- taken not to be, and never to have been, a valid application for a Protection (Class XA) visa; and
 - taken to be, and always to have been, a valid application for a Temporary Protection (Class XD) visa, made by the prescribed applicant.
541. Two notes are inserted after new subregulation 2.08F(1). New note 1 provides: as a result, the Minister is required to make a decision on the pre-conversion application as if it were a valid application for a Temporary Protection (Class XD) visa.
542. New note 2 provides: if the first instalment of the visa application charge for the pre-conversion application had been paid before regulation 2.08F starts to apply, the first instalment of visa application charge for an application for a Temporary Protection (Class XD) visa (if any) is taken to have been paid. See new section 45AA of the Migration Act.

543. New subregulation 2.08F(1) operates in accordance with new subsection 45AA(3) and new paragraph 45AA(4)(a) of the Migration Act, as inserted by item 20 of Schedule 2 to the Bill.
544. New subsection 45AA(3) allows a conversion regulation to provide that the pre-conversion application for the pre-conversion visa is taken not to be, and never to have been a valid application for the pre-conversion visa. Rather the pre-conversion application for the pre-conversion visa is taken to be, and always to have been, a valid application (the converted application) for a visa of a different class (specified by the conversion regulation), made by the applicant for the pre-conversion visa.
545. New paragraph 45AA(4)(a) allows for a conversion regulation to prescribe a class or classes of pre-conversion visas, such as the Protection (Class XA) visa, without limiting the operation of subsection 45AA(3).
546. The effect of new subregulation 2.08F(1) is that a valid application for a Protection (Class XA) visa, made by an applicant prescribed in subregulation 2.08F(2) is, upon conversion, taken not to be, and never to have been, a valid application for a Protection (Class XA) visa. Rather, upon conversion, the application for the Protection (Class XA) visa is taken to be, and always to have been, a valid application for a Temporary Protection (Class XD) visa, made by the applicant prescribed in subregulation 2.08F(2).
547. For example, an application for a Protection (Class XA) visa was made by an applicant prescribed in subregulation 2.08F(2) on 17 September 2014. The conversion regulation starts to apply on 1 October 2014. In such a scenario, the application for the Protection (Class XA) visa is taken to be invalid from 17 September 2014 and instead an application for a Temporary Protection (Class XD) visa is taken to have been, and always to have been, validly made on 17 September 2014. This is the outcome achieved by regulation 2.08F, regardless of the fact that Part 1, Division 1 and Part 4, Division 1 of Schedule 2 to the Bill, which introduce the Temporary Protection (Class XD) visa, were not in effect on 17 September 2014.
548. The purpose and effect of new note 1 after subregulation 2.08F(1) is to make clear that, as a result of the conversion regulation, the Minister must treat the Protection (Class XA) visa application as a Temporary Protection (Class XD) visa application. Accordingly, the Minister must make a decision as if the Protection (Class XA) visa application was, and had always been, a valid application for a Temporary Protection (Class XD) visa.
549. The purpose and effect of new note 2 after subregulation 2.08F(1) is to make clear that if the first instalment of the visa application charge has been paid for the Protection (Class XA) visa application, then upon the conversion regulation starting to apply, that visa application charge is taken to have been paid for an application for a Temporary Protection (Class XD) visa application.
550. The intention of new note 2 is to reiterate the effect of new subsection 45AA(5) of the Migration Act on the first instalment of visa application charges paid in relation to a pre-conversion application in the context of a Protection (Class XA) visa that is 'converted' into a Temporary Protection (Class XD) visa.

Prescribed applicants

551. New subregulation 2.08F(2) provides that the following are prescribed applicants:

- an applicant who holds, or has ever held, any of the following visas:
 - a Subclass 785 (Temporary Protection) visa granted before 2 December 2013;
 - a Temporary Safe Haven (Class UJ) visa;
 - a Temporary (Humanitarian Concern) (Class UO) visa;
- an applicant who did not hold a visa that was in effect on the applicant's last entry into Australia;
- an applicant who is an unauthorised maritime arrival;
- an applicant who was not immigration cleared on the applicant's last entry into Australia.

552. Subregulation 2.08F(2) operates in accordance with new paragraph 45AA(4)(b) of the Migration Act, as inserted by item 20 of Schedule 2 to the Bill, which allows for a conversion regulation to prescribe a class of applicants for pre-conversion visas to be covered by the conversion regulation.

553. The purpose of new subregulation 2.08F(2) is to identify the classes of applicants, including applicants having a particular status, for a Protection (Class XA) visa to whom new regulation 2.08F applies. If a person prescribed in new subregulation 2.08F(2) applies for a Protection (Class XA) visa and new regulation 2.08F starts to apply (as outlined in new subregulation 2.08F(3)) then the Protection (Class XA) visa is taken not to be, and never to have been, a valid application. Rather, the Protection (Class XA) visa is taken to be, and always to have been, a valid application for a Temporary Protection (Class XD) visa made by the person prescribed in new subregulation 2.08F(2).

554. Subregulation 2.08F(2) is consistent with and supports the implementation of the government's policy intention that certain applicants for a Protection (Class XA) visa, such as an unauthorised maritime arrival, will not be granted permanent protection in Australia.

When this regulation starts to apply

555. New subregulation 2.08F(3) provides that new regulation 2.08F starts to apply in relation to a pre-conversion application immediately after the occurrence of whichever of the following events is applicable to the application:

- if, before the commencement of regulation 2.08F, the Minister had not made a decision in relation to the pre-conversion application under section 65 of the Migration Act – the commencement of regulation 2.08F;
- in a case in which the Minister had made such a decision before the commencement of regulation 2.08F – one of the following events, if the event occurs on or after the commencement of regulation 2.08F:
 - the Refugee Review Tribunal remits a matter in relation to the pre-conversion application in accordance with paragraph 415(2)(c) of the Migration Act;

- the Administrative Appeals Tribunal remits a matter in relation to the pre-conversion application in accordance with paragraph 43(1A)(c) of the Administrative Appeals Tribunals Act 1975 (as substituted in relation to an RRT-reviewable decision by section 452 of the Migration Act);
 - a court quashes a decision of the Minister in relation to the pre-conversion application and orders the Minister to reconsider the application in accordance with the law.
556. New subregulation 2.08F(3) operates in accordance with new paragraph 45AA(4)(c) of the Migration Act, as inserted by item 20 of Schedule 2 to the Bill. New paragraph 45AA(4)(c) makes clear that a conversion regulation may prescribe a time when the conversion regulation is to start to apply in relation to the pre-conversion application, including different conversion times depending on the occurrence of different events. The intention behind new paragraph 45AA(4)(c) (as inserted by item 20 of Schedule 2 to the Bill) is that the time when the conversion regulation starts to apply in relation to a pre-conversion application may be specified by reference to the occurrence of an event or events.
557. The effect of new subregulation 2.08F(3) is that if a person prescribed in new subregulation 2.08F(2) applied for a Protection (Class XA) visa and one of the events outlined in new subregulation 2.08F(3) occurs then, immediately after the occurrence of the applicable event to the Protection (Class XA) visa application, new regulation 2.08F starts to apply.
558. The purpose of new subregulation 2.08F(3) is to specify the point in time when regulation 2.08F starts to apply and ‘converts’ a Protection (Class XA) visa application to a Temporary Protection (Class XD) visa application.

Division 3 – Consequential amendments

Migration Regulations 1994

Item 39 Regulation 2.06AA

559. This item repeals regulation 2.06AA of the Migration Regulations.
560. Regulation 2.06AA is made for current sections 65A and 91Y of the Migration Act and those sections are being repealed by Schedule 7 to the Bill. The repeal of regulation 2.06AA is consequential to the amendment to repeal sections 65A and 91Y of the Migration Act.

Item 40 Subregulation 2.07AQ(3) (table item 1, column headed “Criterion 2”, paragraph (c))

561. This item omits the word “or” from between paragraphs (c) and (d) of subregulation 2.07AQ(3) in table item 1, column headed “Criterion 2”.
562. This amendment is consequential to the amendment made by item 41 of Schedule 2 to the Bill. Currently there are four paragraphs in subregulation 2.07AQ(3) table item 1, column headed “Criterion 2” and item 41 repeals paragraph (d).

Item 41 Subregulation 2.07AQ(3) (table item 1, column headed “Criterion 2”, paragraph (d))

563. This item repeals paragraph (d) from subregulation 2.07AQ(3) table item 1, column headed “Criterion 2”.
564. Current subregulation 2.07AQ(2) provides that an application for a Resolution of Status (Class CD) visa is taken to have been validly made by a person only if the requirements of subregulation 2.07AQ(3) or Item 1127AA of Schedule 1 to the Migration Regulations have been met.
565. Current subregulation 2.07AQ(3), table item 1, column headed “Criterion 2”, paragraph (d), provides that a criterion for making a valid application for a Resolution of Status (Class CD) visa is that the person holds a Subclass 785 (Temporary Protection) visa.
566. New subregulation 2.07AQ(3), table item 1, column headed “Criterion 2” provides that a criterion for making a valid application for a Resolution of Status (Class CD) visa is that the person holds a Subclass 447 (Secondary Movement Offshore Entry (Temporary)) visa, or a Subclass 451 (Secondary Movement Relocation (Temporary)) visa or a Subclass 695 (Return Pending) visa.
567. The effect of this amendment is that a person who holds a Subclass 785 (Temporary Protection) visa that is in effect will no longer be eligible to be taken to have made a valid application for a Resolution of Status (Class CD) visa.
568. The purpose of this amendment is to clarify the Government’s intention that a holder of a Subclass 785 (Temporary Protection) visa cannot be taken to have validly made an application for a Resolution of Status visa (Class CD).

Item 42 Subregulation 2.07AQ(3) (table item 2, column headed “Criterion 1”)

569. This item omits “Protection (Class XA)” and substitutes “protection” in subregulation 2.07AQ(3), table item 2, column headed “Criterion 1”.
570. Current subregulation 2.07AQ(3), table item 2, column headed “Criterion 1” provides that a criterion for making a valid application for a Resolution of Status (Class CD) visa is that the person makes a valid application for a Protection (Class XA) visa.
571. New subregulation 2.07AQ(3), table item 2, column headed “Criterion 1” provides that a criterion for making a valid application for a Resolution of Status (Class CD) visa is that the person makes a valid application for a protection visa.
572. The effect of this amendment is to provide an applicant who held, but no longer holds, a visa of a kind mentioned in subregulation 2.07AQ(3) table item 1, column headed “Criterion 2” with a pathway to the Resolution of Status (Class CD) visa. The amendments provide that if such an applicant makes a valid application for any class of protection visa, then they would meet Criterion 1 in table item 2 of subregulation 2.07AQ(3) for a Resolution of Status (Class CD) visa. Item 1 of Schedule 2 to the Bill discusses the new definition of *protection visa* in subsection 5(1) of the Migration Act.

Item 43 Subregulation 2.07AQ(3) (table item 2, column headed “Criterion 2”)

573. This item inserts “or a Subclass 785 (Temporary Protection) visa granted before 9 August 2008” after “item 1,” in subregulation 2.07AQ(3), table item 2, column headed “Criterion 2”.
574. Current subregulation 2.07AQ(3), table item 2, column headed “Criterion 2” provides that the person held, but no longer holds, a visa of a kind mentioned in criterion 2 of item 1, and the visa was not cancelled.
575. New subregulation 2.07AQ(3), table item 2, column headed “Criterion 2” provides that a criterion for making a valid application for a Resolution of Status (Class CD) visa is that the person held, but no longer holds, a visa of a kind mentioned in criterion 2 of item 1, or a Subclass 785 (Temporary Protection) visa granted before 9 August 2008, and the visa was not cancelled.
576. The purpose of this amendment is to allow a former holder of a Subclass 785 (Temporary Protection) visa granted before 9 August 2008 to be eligible to be taken to have applied for a Resolution of Status (Class CD) visa. The Government does not intend to limit those visa holders from being eligible to apply for, and be granted, a Resolution of Status (Class CD) visa.

Item 44 Subregulation 2.07AQ(5)

577. This item omits “Protection (Class XA)” (wherever occurring) and substitutes “protection” in subregulation 2.07AQ(5).
578. This amendment is consequential to the amendments in item 42 of Schedule 2 to the Bill.

Item 45 Subregulation 2.07AQ(7)

579. This item, after the reference to “Subclass 785 (Temporary Protection) visa” inserts reference to “granted before 9 August 2008”.
580. Current subregulation 2.07AQ(7) provides that subregulation 2.07AQ(2) applies whether or not the applicant holds, or held, a Subclass 447 (Secondary Movement Offshore Entry (Temporary)) visa, a Subclass 451 (Secondary Movement Relocation (Temporary)) visa, a Subclass 695 (Return Pending) visa or a Subclass 785 (Temporary Protection) visa that is, or was, subject to a condition mentioned in paragraph 41(2)(a) of the Migration Act relating to the making of applications for other visas.
581. New subregulation 2.07AQ(7) provides that subregulation 2.07AQ(2) applies whether or not the applicant holds, or held, a Subclass 447 (Secondary Movement Offshore Entry (Temporary)) visa, a Subclass 451 (Secondary Movement Relocation (Temporary)) visa, a Subclass 695 (Return Pending) visa or a Subclass 785 (Temporary Protection) visa granted before 9 August 2008, that is, or was, subject to a condition mentioned in paragraph 41(2)(a) of the Migration Act relating to the making of applications for other visas.

582. The purpose of this amendment is to make clear the intention that a person who was granted the Subclass 785 (Temporary Protection) visa after 9 August 2008 cannot be taken to have validly made an application for a Resolution of Status (Class CD) visa.

Item 46 Subregulation 2.43(3) (paragraph (i) of the definition of *relevant visa*)

583. This item repeals paragraph 2.43(3)(i) and substitutes new paragraph 2.43(3)(i) into the definition of *relevant visa* for the purposes of regulation 2.43. Regulation 2.43 provides for the grounds for cancellation of visa for the purposes of paragraph 116(1)(g) of the Migration Act.
584. Paragraph 116(1)(g) of the Migration Act generally provides that the Minister may cancel a visa if he or she is satisfied that a prescribed ground for cancelling a visa applies to the holder. Regulation 2.43 generally prescribes the grounds for cancelling a visa for the purposes of paragraph 116(1)(g) of the Migration Act.
585. One of the prescribed grounds for cancelling a visa in subparagraph 2.43(1)(a)(ii) is that the Foreign Minister has personally determined that, in the case of a *relevant visa* – the holder of the visa is a person whose presence in Australia may be directly or indirectly associated with the proliferation of weapons of mass destruction.
586. In regulation 2.43, *relevant visa* means a visa listed in subregulation 2.43(3).
587. Current paragraph 2.43(i) provides that *relevant visa* means a Subclass 785 (Temporary Protection) visa.
588. New paragraph 2.43(i) provides that a *relevant visa* means a Subclass 785 (Temporary Protection) visa, including a Subclass 785 (Temporary Protection) visa granted before 2 December 2013.
589. The purpose of this amendment is to make clear that any Subclass 785 (Temporary Protection) visa, including a Subclass 785 (Temporary Protection) visa granted before 2 December 2013, is included in the list of relevant visas for the purposes of subparagraph 2.43(1)(a)(ii) of the Migration Regulations.

Item 47 Subitem 1127AA(3) of Schedule 1 (table item 1, column headed “Criterion 1”, paragraph (c))

590. This item omits the word “or” from between paragraphs (c) and (d) of subitem 1127AA(3) of Schedule 1 to the Migration Regulations in table item 1, column headed “Criterion 1”.
591. This amendment is consequential to the amendment made by item 48 of Schedule 2 to the Bill. Currently there are four paragraphs in subitem 1127AA(3) of Schedule 1 in table item 1, column headed “Criterion 1” and this item repeals paragraph (d).

Item 48 Subitem 1127AA(3) of Schedule 1 (table item 1, column headed “Criterion 1”, paragraph (d))

592. This item repeals paragraph (d) in subitem 1127AA(3) of Schedule 1 to the Migration Regulations, table item 1, column headed “Criterion 1”.
593. Item 1127AA sets out some of the circumstances in which a person is taken to have made a valid application for a Resolution of Status (Class CD) visa. Currently, paragraph (d) of subitem 1127AA(3), table item 1, column headed “Criterion 1” provides that a person is taken to have made a valid application for a Resolution of Status (Class CD) visa where the person holds a Subclass 785 (Temporary Protection) visa.
594. New subitem 1127AA(3), table item 1, column headed “Criterion 1” provides that an applicant meets the requirements of “Criterion 1” if the applicant holds a Subclass 447 (Secondary Movement Offshore Entry (Temporary)) visa, or a Subclass 451 (Secondary Movement Relocation (Temporary)) visa or a Subclass 695 (Return Pending) visa.
595. The effect of this amendment is that a person who holds a Subclass 785 (Temporary Protection) visa will no longer be eligible to make a valid application for a Resolution of Status (Class CD) visa.
596. The purpose of this amendment is to clarify the Government’s intention that a person who holds a Subclass 785 (Temporary Protection) visa cannot make a valid application for a Resolution of Status (Class CD) visa.

Item 49 Subitem 1127AA(3) of Schedule 1 (table item 2, column headed “Criterion 1”)

597. This item inserts “or a Subclass 785 (Temporary Protection) visa granted before 9 August 2008” after “item 1” in subitem 1127AA(3), table item 2, column headed “Criterion 1”.
598. Current subitem 1127AA(3), table item 2, column headed “Criterion 1” provides that a criterion for making a valid application for a Resolution of Status (Class CD) visa is that the applicant held, but no longer holds, a visa of a kind mentioned in criterion 1 of item 1, and the visa was not cancelled.
599. New subitem 1127AA(3), table item 2, column headed “Criterion 1” provides that a criterion for making a valid application for a Resolution of Status (Class CD) visa is that the applicant held, but no longer holds, a visa of a kind mentioned in criterion 1 of item 1, or a Subclass 785 (Temporary Protection) visa granted before 9 August 2008, and the visa was not cancelled.
600. The purpose of this amendment is to allow a former holder of a Subclass 785 (Temporary Protection) visa granted before 9 August 2008 to be eligible to make a valid application for a Resolution of Status (Class CD) visa. The Government does not intend to limit those visa holders from being eligible to apply for, and be granted, a Resolution of Status (Class CD) visa.

Item 50 Subparagraphs 1302(3)(bb)(i) and (ii) of Schedule 1

601. This item inserts the reference “, including a Subclass 785 (Temporary Protection) visa granted before 2 December 2013” after the reference to “visa”.
602. Item 1302 sets out some of the circumstances in which a person is taken to have made a valid application for a Bridging B (Class WB) visa. Current paragraph 1302(3)(bb) provides that an applicant for a Bridging B (Class WB) visa must not be:
- the holder of a Subclass 785 (Temporary Protection) visa; or
 - a person whose last substantive visa was a Subclass 785 (Temporary Protection) visa.
603. New paragraph 1302(3)(bb) provides that an applicant for a Bridging B (Class WB) visa must not be:
- the holder of a Subclass 785 (Temporary Protection) visa, including a Subclass 785 (Temporary Protection) visa granted before 2 December 2013; or
 - a person whose last substantive visa was a Subclass 785 (Temporary Protection) visa, including a Subclass 785 (Temporary Protection) visa granted before 2 December 2013.
604. The purpose of this amendment is to make clear that the holder of any Subclass 785 (Temporary Protection) visa, including a Subclass 785 (Temporary Protection) visa granted before 2 December 2013, cannot be taken to have made a valid application for a Bridging B (Class WB) visa.

Item 51 Paragraphs 773.213(2)(zf) and (zfa) of Schedule 2

605. This item repeals paragraphs 773.213(2)(zf) and (zfa) of Schedule 2 to the Migration Regulations and substitutes new paragraph 773.213(2)(zf), which provides for the classes of visa referred to in sub-subparagraph 773.213(1)(d)(i)(B) of Schedule 2 to the Migration Regulations to include protection visas (including Protection (Class AZ) visas, see new subsection 35AA(5) of the Migration Act).
606. Clause 773.2 provides for the primary criteria that all applicants for a Subclass 773 (Border) visa must meet. Subparagraph 773.213(1)(d)(i)(B) relevantly provides that the applicant is a person who is a dependent child of the holder of a visa of a class set out in subclause 773.213(2) who arrives in Australia in the care of a person who is an Australia citizen or the holder of a visa. This amendment provides that subclause 773.213(2) is amended to repeal the reference to Protection (Class AZ) and Protection (Class XA) are repealed and replaced with a reference to protection visas generally. This amendment is consequential to the amendments made by item 5 of Schedule 2 to the Bill to insert new section 35A which provides for protection visas generally.

Item 52 Amendments of listed provisions – protection visas

607. This item makes minor amendments to the Migration Regulations that are consequential to the amendments made by item 5 of Schedule 2 to the Bill to insert new section 35A which provides for protection visas.

608. The following table items omit reference to “Protection (Class XA)” and substitute with reference to “protection”:

- table item 1 amends regulation 1.03 (paragraph (a) of the definition of *relative*);
- table item 2 amends paragraph 1.05A(2)(d);
- table item 3 amends paragraph 2.04(2)(a);
- table item 5 amends regulation 2.20;
- table item 6 amends paragraphs 4.31A;
- table item 7 amends subregulation 4.33(1);
- table item 8 amends paragraph 010.211(4)(b) of Schedule 2;
- table item 9 amends paragraphs 010.611 of Schedule 2;
- table item 10 amends paragraphs 020.611 of Schedule 2;
- table item 11 amends paragraph 030.612(a) of Schedule 2 to omit “Protection (Class XA)” and substitute “protection”;
- table item 12 amends paragraph 050.212(8)(c) of Schedule 2;
- table item 13 amends paragraph 050.613A(1)(a) of Schedule 2;
- table item 14 amends paragraph 050.614(1)(a) of Schedule 2; and
- table item 15 amends paragraph 051.611A(1)(a) of Schedule 2.

609. Table item 4 amends paragraph 2.12(1)(c) to omit “Protection (Class XA)” and substitute “protection visas”.

Division 4 – Amendments relating to application

Migration Regulations 1994

Item 53 At the end of Schedule 13

610. This item adds new Part 50 – Amendments made by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* at the end of Schedule 13 to the Migration Regulations.

611. New regulation 5000 of Part 50 of Schedule 13 to the Migration Regulations provides that the amendments of these Migration Regulations made by Division 1 and 3 of Part 4 of Schedule 2 to the *Migration Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* apply in relation to:

- a visa application made on or after the commencement of Division 1 of Part 4 of Schedule 2; and
- a visa application that is taken to be, and always to have been, a valid application for a Temporary Protection (Class XD) visa by the operation of paragraph 2.08F(1)(b) of these Migration Regulations (as inserted by Division 2 of Part 4 of Schedule 2).

612. This item adds a note after new regulation 5000(b). The new note provides that new regulation 2.08F applies, by its own terms, in relation to some protection visa applications made before the commencement of Part 4. The new note refers to new subregulation 2.08F(1), which has the effect of applying to applications for a Protection (Class XA) visa that were made before the commencement of new regulation 2.08F.

613. Schedule 13 to the Migration Regulations makes transitional arrangements in relation to amendments to the Migration Regulations. For visa applications made on or after the commencement of Division 1 of Part 4 of Schedule 2, the amendments made to the Migration Regulations by Divisions 1 and 3 of Part 4 apply in relation to such a visa application.
614. For a visa application that is taken to be a valid application for a Temporary Protection (Class XD) visa by operation of new regulation 2.08F, the amendments made to the Migration Regulations by Divisions 1 and 3 of Part 4 apply to such an application. New regulation 2.08F applies in relation to some protection visa applications made before the commencement of these amendments. The intention is that the amendments made to the Migration Regulations by Divisions 1 and 3 of Part 4 apply to an application for a visa captured by new regulation 2.08F (i.e. an application for a Protection (Class XA) visa that is, as a result of regulation 2.08F, taken to be an application for a Temporary Protection (Class XD) visa).

SCHEDULE 3 – Act-based visas

Part 1 – Amendment of the Migration Act 1958

Division 1 - Amendments

Migration Act 1958

Item 1 After subsection 31(3)

615. This item inserts new subsection 31(3A).
616. This item provides that to avoid doubt, subsection 31(3) does not require criteria to be prescribed for a visa or visas including, without limitation, visas of the following classes:
- special category visas (see section 32);
 - permanent protection visas (see subsection 35A(2));
 - temporary protection visas (see subsection 35A(3));
 - bridging visas (see section 37);
 - temporary safe haven visas (see section 37A);
 - maritime crew visas (see section 38B).
617. Note 1 to new subsection 31(3A) provides that an application for any of these visas is invalid if criteria relating to both the application and the grant of the visa have not been prescribed (see new subsection 46AA(2)).
618. Note 2 to new subsection 31(3A) provides that if criteria are prescribed by the regulations for any of these visas, the visa cannot be granted unless any criteria prescribed by the Migration Act, as well as any prescribed by regulation, are satisfied (see new subsection 46AA(4)).
619. This item refers to current subsection 31(3) of the Migration Act. That subsection 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).
620. Current subsection 31(3) will be amended by item 4 of Schedule 2 to the Bill to omit the reference to section 36 and insert a reference to new section 35A. New section 35A provides for permanent protection visas and for temporary protection visas.
621. The amendment in this item clarifies that the regulations may, but need not, prescribe criteria for the classes of visa covered by current subsection 31(3) including the classes provided for by current sections 32, 37, 37A, 38B, and by new subsections 35A(2) and 35A(3).
622. The amendment in this item complements the amendment made at item 7 of Schedule 3 to the Bill. The effect of that amendment is that, for each of the visa classes mentioned in new subsection 31(3A), if regulations do not prescribe any criteria which relate to making a valid application for the visa and being granted the visa, non-citizens cannot make a valid application for the visa. Another effect of that amendment is that, for

each of the visa classes mentioned in new subsection 31(3A), if regulations prescribe criteria which relate to making a valid application for the visa or being granted the visa, an application for the visa must satisfy those criteria as well as any criteria set out in the Migration Act.

623. The amendments at item 7 of Schedule 3 to the Bill prevent non-citizens from applying directly under the Migration Act for one of the classes of visa provided for by current sections 32, 37, 37A, and 38B, and new subsections 35A(2) and 35A(3).

Item 2 Before subsection 46(1)

624. This item inserts the subheading “*Validity – general*” before current subsection 46(1).
625. This amendment is technical in nature. It clarifies that current subsections 46(1), 46(1A) and 46(2) deal with general matters relating to making valid visa applications.
626. The amendment in this item complements the amendment made by item 3 of Schedule 3 to the Bill. That amendment repeals current paragraph 46(1)(d) and inserts new paragraphs 46(1)(d) and 46(1)(e) into current subsection 46(1), which increases the size of current section 46. The inclusion of the new subheading is intended to make current section 46 easier to read.

Item 3 Paragraph 46(1)(d)

627. This item repeals current paragraph 46(1)(d) and substitutes new paragraphs 46(1)(d) and 46(1)(e) into current subsection 46(1).
628. Currently, subsection 46(1) provides that, subject to subsections 46(1A), 46(2) and 46(2A), an application for a visa is valid if, and only if:
- it is for a visa of a class specified in the application; and
 - it satisfies the criteria and requirements prescribed under this section; and
 - subject to the regulations providing otherwise, any visa application charge that the regulations require to be paid at the time when the application is made, has been paid; and
 - any fees payable in respect of it under the regulations have been paid; and
 - it is not prevented by section 48 (visa refused or cancelled earlier), section 48A (protection visa), section 91E (CPA and safe third countries), section 91K (temporary safe haven visa), section 91P (non-citizens with access to protection from third countries), section 161 (criminal justice), section 164D (enforcement visa), section 195 (detainees) or section 501E (visa refused or cancelled on character grounds).
629. Current paragraph 46(1)(d) lists the sections which prevent or invalidate an application for a visa under the Migration Act. The opportunity is taken in the amendment in this item to modernise and clarify the drafting of current paragraph 46(1)(d) by splitting it into two paragraphs, one that deals with provisions that prevent the making of a valid application (new paragraph 46(1)(d)) and one that deals with provisions that make applications invalid (new paragraph 46(1)(e)). This item also lists four additional

provisions (three current provisions and new section 46AA) that make visa applications invalid.

630. In addition to the requirements in current subsection 46(1), new paragraph 46(1)(d) provides that subject to subsections 46(1A), 46(2) and 46(2A), an application for a visa is valid if, and only if it is not prevented by any provision of the Migration Act, or of any other law of the Commonwealth, including, without limitation, the following provisions of the Migration Act:
 - section 48 (visa refused or cancelled earlier);
 - section 48A (protection visa refused or cancelled earlier);
 - section 161 (criminal justice visa holders);
 - section 164D (enforcement visa holders);
 - section 195 (detainee applying out of time);
 - section 501E (earlier refusal or cancellation on character grounds).
631. New paragraph 46(1)(d) lists the sections already listed in current paragraph 46(1)(d) that prevent an application for a visa. New paragraph 46(1)(d) no longer lists provisions that make an application invalid, because those provisions are now listed in new paragraph 46(1)(e).
632. The descriptions of each section listed in new paragraph 46(1)(d) are amended to more clearly explain the matters that each section deals with.
633. For example, in current paragraph 46(1)(d), section 195 is described using the term “(detainees)”, whereas in new paragraph 46(1)(d) section 195 is described using the phrase “(detainee applying out of time)”.
634. The new descriptions are not intended to alter the effect of the sections listed in subsection 46(1).
635. The opportunity is also taken to modernise the drafting of subsection 46(1) to provide that new paragraphs 46(1)(d) and 46(1)(e) are non-exhaustive lists and provide for further grounds for prevention or invalidity of applications without the necessity for subsection 46(1) to be amended to list the relevant specific provisions. This is provided for by inserting “any provision of this Act, or of any other law of the Commonwealth, including, without limitation, the following provisions of this Act” into both new paragraphs 46(1)(d) and 46(1)(e) of the Migration Act.
636. In addition to the application validity requirements set out in current subsection 46(1), new paragraph 46(1)(e) provides that subject to section 46(1A), 46(2) and 46(2A), an application for a visa is valid if, and only if it is not invalid under any provision of the Migration Act, or of any other law of the Commonwealth, including, without limitation, the following provisions of the Migration Act:
 - section 46AA (visa applications, and the grant of visas, for some Act-based visas);
 - section 46A (visa applications by *unauthorised maritime arrivals*);
 - section 46B (visa applications by *transitory persons*);
 - section 91E or 91G (CPA and safe third countries);

- section 91K (temporary safe haven visas);
 - section 91P (non-citizens with access to protection from third countries).
637. New paragraph 46(1)(e) mentions new section 46AA of the Migration Act. That section is inserted in the Migration Act by item 7. New section 46AA will prevent non-citizens from applying directly under the Migration Act for one of the visa classes provided for by current sections 32, 37, 37A, 38B, and by new subsections 35A(2) and 35A(3).
638. New paragraph 46(1)(e) mentions current sections 46A and 46B of the Migration Act.
639. Current section 46A deals with visa applications by *unauthorised maritime arrivals*. Current subsection 46A(1) provides that an application for a visa is not a valid application if it is made by an *unauthorised maritime arrival* who:
- is in Australia; and
 - is an unlawful non-citizen.
640. Current subsection 46A(2) provides that if the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to an *unauthorised maritime arrival*, determine that subsection 46A(1) does not apply to an application by the *unauthorised maritime arrival* for a visa of a class specified in the determination.
641. The remaining subsections in current section 46A deal with other matters, including that the power in current subsection 46A(2) may only be exercised by the Minister personally, and that the Minister does not have a duty to consider whether to exercise the power under current subsection 46A(2).
642. This amendment does not alter the effect of current section 46A.
643. Current section 46B deals with visa applications by *transitory persons*. Current subsection 46B(1) provides that an application for a visa is not a valid application if it is made by a *transitory person* who:
- is in Australia; and
 - is an unlawful non-citizen.
644. Current subsection 46B(2) provides that if the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to a *transitory person*, determine that subsection 46B(1) does not apply to an application by the person for a visa of a class specified in the determination.
645. The remaining subsections in current section 46B deal with other matters, including that the power in current subsection 46B(2) may only be exercised by the Minister personally, and that the Minister does not have a duty to consider whether to exercise the power under current subsection 46B(2).
646. This amendment does not alter the effect of current section 46B.
647. New paragraph 46(1)(e) mentions current section 91G of the Migration Act.

648. In general terms, current section 91G deals with valid visa applications made during a transitional period that begins at a cut off day and ends immediately before a regulation that prescribes a country as a safe third country takes effect. If current section 91G applies to a non-citizen and the non-citizen had not been immigration cleared at the time of making the application, any visa application made by the non-citizen during the transitional period ceases to be a valid application when the regulation takes effect. If current section 91G applies to a non-citizen and the non-citizen had been immigration cleared at the time of making the application, any protection visa application made by the non-citizen during the transitional period ceases to be a valid application when the regulation takes effect.
649. This amendment does not alter the effect of current section 91G.
650. New paragraph 46(1)(e) mentions current sections 91E, 91K and 91P of the Migration Act.
651. Sections 91E, 91K and 91P were originally listed in current paragraph 46(1)(d) but are moved to new paragraph 46(1)(e) because they are provisions that make visa applications invalid rather than provisions that prevent valid visa applications as is now dealt with by new paragraph 46(1)(d). This amendment does not alter the effect of current sections 91E, 91K and 91P.

Item 4 Before subsection 46(2A)

652. This item inserts the heading “*Provision of personal identifiers*” before current subsection 46(2A).
653. This amendment is technical in nature. It clarifies that current subsections 46(2A), 46(2AA), 46(2AB), 46(2AC), 46(2B) and 46(2C) deal with the provision of personal identifiers with visa applications.
654. The amendment in this item complements the amendment made by item 3 of Schedule 3 to the Bill. That amendment inserts new paragraphs 46(1)(d) and 46(1)(e) into current subsection 46(1), which increases the size of current section 46. The inclusion of the new subheading is intended to make current section 46 easier to read.

Item 5 Before subsection 46(3)

655. This item inserts the heading “*Prescribed criteria for validity*” before current subsection 46(3).
656. This amendment is technical in nature. It clarifies that current subsections 46(3) and 46(4), and new subsection 46(5) deal with the prescribed criteria for making valid visa applications.

Item 6 At the end of section 46

657. This item adds new subsection 46(5).

658. New subsection 46(5) provides that to avoid doubt, subsections 46(3) and 46(4) do not require criteria to be prescribed in relation to the validity of visa applications including, without limitation, applications for visas of the following classes:
- special category visas (see section 32);
 - permanent protection visas (see subsection 35A(2));
 - temporary protection visas (see subsection 35A(3));
 - bridging visas (see section 37);
 - temporary safe haven visas (see section 37A);
 - maritime crew visas (see section 38B).
659. This item refers to current subsections 46(3) and 46(4) of the Migration Act. Current subsection 46(3) 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. Current subsection 46(4) provides that without limiting current subsection 46(3), the regulations may also prescribe:
- the circumstances that must exist for an application for a visa of a specified class to be a valid application; and
 - how an application for a visa of a specified class must be made; and
 - 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.
660. The amendment in this item clarifies that regulations may, but need not, prescribe criteria for the classes of visa covered by current subsections 46(3) and 46(4) including the classes provided for by current sections 32, 37, 37A, 38B, and by new subsections 35A(2) and 35A(3).
661. The amendment in this item complements the amendment made at item 7 of Schedule 3 to the Bill. The effect of that amendment is that, for each of the visa classes mentioned in new subsection 46(5), if regulations do not prescribe any criteria which relate to making a valid application for the visa and being granted the visa, non-citizens cannot make a valid application for the visa. Another effect of that amendment is that, for each of the visa classes mentioned in new subsection 46(5), if regulations prescribe criteria which relate to making a valid application for the visa or being granted the visa, an application for the visa must satisfy those criteria as well as any criteria set out in the Migration Act.
662. The amendments at item 7 prevent non-citizens from applying directly under the Migration Act for one of the classes of visa provided for by current sections 32, 37, 37A, 38B, and by new subsections 35A(2) and 35A(3).

Item 7 After section 46

663. This item inserts new section 46AA.
664. New subsection 46AA(1) provides that the following classes of visas are covered by new section 46AA:

- special category visas (see section 32);
 - permanent protection visas (see subsection 35A(2));
 - temporary protection visas (see subsection 35A(3));
 - bridging visas (see section 37);
 - temporary safe haven visas (see section 37A);
 - maritime crew visas (see section 38B).
665. The purpose of new subsection 46AA(1) is to ensure that new section 46AA applies only to the classes of visas set out in new subsection 46AA(1).
666. New subsection 46AA(2) provides that an application for a visa of any of the classes covered by new section 46AA is invalid if, when the application is made, both of the following conditions are satisfied:
- there are no regulations in effect prescribing criteria that must be satisfied for a visa of that particular class to be a valid application;
 - there are no regulations in effect prescribing criteria that must be satisfied for a visa of that particular class to be granted.
667. The note for new subsection 46AA(2) provides that new subsection 46AA(2) does not apply if regulations are in effect prescribing criteria mentioned in new paragraph 46AA(2)(a) or 46AA(2)(b) (or both) for a visa.
668. The effect of new subsection 46AA(2) is that, for each of the visa classes mentioned in new subsection 46AA(1), if regulations do not prescribe any criteria which relate to making a valid application for the visa and being granted the visa, non-citizens cannot make a valid application for the visa.
669. The purpose of this amendment is to ensure that non-citizens cannot make a valid application for one of the visa classes mentioned in new subsection 46AA(1), in circumstances where regulations do not prescribe any criteria which relate to making a valid application for the visa and being granted the visa.
670. This item clarifies that for each of the classes of visa provided for by current sections 32, 37, 37A, 38B, and by new subsections 35A(2) and 35A(3), the criteria in regulations made under the Migration Act are inextricably linked to the visa provided for by the Migration Act.
671. New subsection 46AA(3) provides that the criteria mentioned in new subsection 46AA(2) do not include prescribed criteria that apply generally to visa applications or the granting of visas.
672. The example for new subsection 46AA(3) provides that the criteria mentioned in new subsection 46AA(2) do not include the criteria set out in current regulation 2.07 of the Migration Regulations (application for a visa – general).
673. The effect of new subsection 46AA(3) is that criteria in regulations made under the Migration Act that apply generally to visa applications or to the granting of visas are not considered to be criteria for the purposes of new subsection 46AA(2).

674. An example of such a criterion is current regulation 2.07 of the Migration Regulations. That regulation prescribes general matters relating to making an application for a visa including, but not limited to, the visa classes mentioned in new subsection 46AA(1). Because current regulation 2.07 also applies to visas other than the visa classes mentioned in new subsection 46AA(1), its existence would not cause new subsection 46AA(2) not to apply to an application.
675. New subsection 46AA(4) provides that if regulations are in effect prescribing criteria mentioned in new paragraph 46AA(2)(a) or 46AA(2)(b) (or both) for a visa covered by this section:
- an application for the visa is invalid unless the application satisfies both:
 - any applicable criteria under the Migration Act that relate to applications for visas of that class; and
 - any applicable criteria prescribed by regulation that relate to applications for visas of that class; and
 - the visa must not be granted unless the application satisfies both:
 - any applicable criteria under the Migration Act that relate to the grant of visas of that class; and
 - any applicable criteria prescribed by regulation that relate to the grant of visas of that class.
676. The note for new subsection 46AA(4) provides that for visa applications generally, see current section 46 of the Migration Act. For the grant of a visa generally, see current section 65 of the Migration Act.
677. The effect of new subsection 46AA(4) is that, for each of the visa classes mentioned in new subsection 46AA(1), if regulations prescribe criteria which relate to making a valid application for the visa or being granted the visa, an application for the visa must satisfy those criteria as well as any criteria set out in the Migration Act.
678. The purpose of this amendment is to ensure that for each of the visa classes mentioned in new subsection 46AA(1), if regulations prescribe criteria which relate to making a valid application for the visa or being granted the visa, non-citizens cannot apply for, or be granted, any of those visas without satisfying the criteria prescribed in the regulations as well as any criteria set out in the Migration Act.
679. New section 46AA creates a link between the classes of visa that are provided for by the Migration Act for which criteria can be prescribed in the Migration Regulations, and the criteria prescribed in the Migration Regulations for those classes of visa. The amendments do not affect the classes of visa that are provided for by the Migration Act for which criteria cannot be prescribed in the Migration Regulations.

Division 2 - Application**Item 8 Application of amendments**

680. The amendments made by Division 1 of Part 1 of Schedule 3 to the Bill apply in relation to an application for a visa made on or after the commencement of the amendments.

Part 2 – Amendment of the Migration Regulations 1994

Migration Regulations 1994

Item 9 Regulation 2.01 (heading)

- 681. This item repeals the heading of current regulation 2.01 and substitutes a new heading and a new subheading.
- 682. The current heading is “Classes of visas (Act, s31)”. The new heading is “Classes of visas”, and the new subheading, which appears immediately under the new heading, is “*Classes of visas prescribed by section 31 of the Act*”.
- 683. This amendment is technical in nature, and complements the amendment made by item 12 of Schedule 3 to the Bill. It clarifies that current paragraph 2.01(a) deals with matters relating to applications for classes of visas prescribed by current section 31 of the Migration Act. The inclusion of the new subheading is intended to make regulation 2.01 easier to read.

Item 10 Regulation 2.01

- 684. This item amends current regulation 2.01 to insert “(1)” before “For”.
- 685. This amendment is technical in nature. It is consequential to the insertion of new subregulation 2.01(2) in current regulation 2.01. It causes current paragraphs 2.01(a) and 2.01(b) to become new paragraphs 2.01(1)(a) and 2.01(1)(b).

Item 11 Paragraph 2.01(a)

- 686. This item amends current paragraph 2.01(a) by omitting “created by the Act” and substituting “identified by an item in the table in subregulation (2)”.
- 687. Following this amendment, new paragraph 2.01(1)(a) provides that for the purposes of current section 31 of the Migration Act, the prescribed classes of visas are such classes (other than those identified by an item in the table in new subregulation 2.01(2)) as are set out in the respective items in Schedule 1 to the Migration Regulations.
- 688. Current subsection 31(1) of the Migration Act provides that there are to be *prescribed* classes of visas. Under current subsection 5(1) of the Migration Act, *prescribed* means prescribed by the regulations.
- 689. The effect of the amendment is that new paragraph 2.01(1)(a) prescribes the classes of visas set out in the respective items of Schedule 1 to the Migration Regulations, other than the classes of visas identified in an item in the table in new subregulation 2.01(2).
- 690. New paragraph 2.01(1)(a) does not prescribe the classes of visas identified in an item in the table because those visa classes are provided for by the provisions of the Migration Act mentioned in new subsection 46AA(1).

Item 12 Regulation 2.01 (note)

691. This item repeals the current note. The current note explains that for the classes created by the Migration Act, see sections 32 to 38B.
692. This amendment is consequential to the amendment that inserts new subregulation 2.01(2). New subregulation 2.01(2) contains a table that sets out the classes of visas provided for by the Migration Act, so the current note is unnecessary.
693. As well as repealing the current note after current regulation 2.01, this item inserts a new subheading which reads “*Classes of visas provided for by the Act*”.
694. This amendment is technical in nature, and complements the amendment that inserts new subregulation 2.01(2). This amendment clarifies that new subregulation 2.01(2) deals with matters relating to the classes of visas provided for by the Migration Act.
695. New subregulation 2.01(2) provides that a class of visas provided for by the Migration Act that is identified by an item in the table in new subregulation 2.01(2) is classified under the Migration Regulations, by Class and Subclass, as indicated in the item.
696. Table item 1 identifies special category visas as a class of visa provided for by section 32 of the Migration Act. The classification by Class under the Migration Regulations is “Special Category (Temporary) (Class TY)”. The classification of the Subclass under the Migration Regulations is “Subclass 444 (Special Category)”.
697. Table item 2 identifies permanent protection visas as a class of visa provided for by new subsection 35A(2) of the Migration Act. The classification of the Class under the Migration Regulations is “Protection (Class XA)”. The classification of the Subclass under the Migration Regulations is “Subclass 866 (Protection)”.
698. Table item 3 identifies temporary protection visas as a class of visa provided for by new subsection 35A(3) of the Migration Act. The classification of the Class under the Migration Regulations is “Temporary Protection (Class XD)”. The classification of the Subclass under the Migration Regulations is “Subclass 785 (Temporary Protection)”.
699. Table items 4, 5, 6, 7, 8, 9, 10, 11 and 12 identify bridging visas as a class of visa provided for by section 37 of the Migration Act. The classifications of the Classes under the Migration Regulations are, respectively:
- Bridging Visa A (Class WA)
 - Bridging Visa B (Class WB)
 - Bridging Visa C (Class WC)
 - Bridging Visa D (Class WD) (table items 7 and 8)
 - Bridging Visa E (Class WE) (table items 9 and 10)
 - Bridging Visa F (Class WF)
 - Bridging Visa R (Class WR)
700. The classifications of the Subclasses under the Migration Regulations are, respectively:
- Subclass 010 (Bridging A)

- Subclass 020 (Bridging B)
 - Subclass 030 (Bridging C)
 - Subclass 040 (Bridging (Prospective Applicant))
 - Subclass 041 (Bridging (Non-applicant))
 - Subclass 050 (Bridging (General))
 - Subclass 051 (Bridging (Protection Visa Applicant))
 - Subclass 060 (Bridging F)
 - Subclass 070 (Bridging (Removal Pending))
701. Table item 13 identifies temporary safe haven visas as a class of visa provided for by section 37A of the Migration Act. The classification of the Class under the Migration Regulations is “Temporary Safe Haven (Class UJ)”. The classification of the Subclass under the Migration Regulations is “Subclass 449 (Humanitarian Stay (Temporary))”.
702. Table item 14 identifies maritime crew visas as a class of visa provided for by section 38B of the Migration Act. The classification of the Class under the Migration Regulations is “Maritime Crew (Temporary) (Class ZM)”. The classification of the Subclass under the Migration Regulations is “Subclass 988 (Maritime Crew)”.
703. The table clarifies how each class of visa that is provided for by the Migration Act and identified in the table is classified, by visa Class and Subclass, in the Migration Regulations.
704. The first note for the table provides that new subsection 35A(4) of the Migration Act provides that additional classes of permanent and temporary visas may be prescribed as protection visas for the purposes of section 31.
705. The purpose of this note is to make the reader aware that new subsection 35A(4) of the Migration Act provides for additional classes of permanent and temporary visas, and that those additional classes may be prescribed as protection visas for the purposes of section 31 of the Migration Act.
706. New section 35A will be inserted by item 5 of Schedule 2. New section 35A provides for permanent protection visas and temporary protection visas, and allows the Migration Regulations to prescribe additional classes of permanent and temporary visas as protection visas.
707. The second note for the table provides that for table items 4 to 12, section 37 of the Migration Act provides that there are classes of temporary visas, to be known as bridging visas.
708. The purpose of this note is to make the reader aware of the effect of section 37 of the Migration Act.

SCHEDULE 4 – Amendments relating to fast track assessment process

Part 1 – Fast track assessment process

Migration Act 1958

Item 1 Subsection 5(1)

709. This item inserts new defined terms *excluded fast track review applicant*, *fast track applicant*, *fast track decision*, *fast track reviewable decision*, *fast track review applicant* and *Immigration Assessment Authority* into subsection 5(1) of Part 1 of the Migration Act.
710. The new defined term *excluded fast track review applicant* means a fast track applicant:
- who, in the opinion of the Minister:
 - is covered by section 91C or 91N; or
 - has previously entered Australia and who, while in Australia, made a claim for protection relying on a criterion mentioned in subsection 36(2) in an application that was refused or withdrawn; or
 - has made a claim for protection in a country other than Australia, that was refused by that country; or
 - has made a claim for protection in a country other than Australia that was refused by the Office of the United Nations High Commissioner for Refugees in that country; or
 - makes a manifestly unfounded claim for protection relying on a criterion mentioned in subsection 36(2) in, or in connection with, his or her application; or
 - without reasonable explanation provides, gives or presents a bogus document to an officer of the Department or to the Minister (or causes such a document to be so provided, given or presented) in support of his or her application; or
 - who is, or who is included in a class of persons who are, specified by legislative instrument made under paragraph 5(1AA)(a).
711. The purpose of this amendment is to specify which fast track decisions made in respect of excluded fast track review applicants cannot be referred to the Immigration Assessment Authority (the IAA) by the Minister under new section 473CA of new Part 7AA inserted by item 21 below. In addition, excluded fast track review applicants would not be entitled to apply for review to the Migration Review Tribunal (MRT) and the Refugee Review Tribunal (RRT) under Part 5 or Part 7 of the Migration Act.
712. The intention is to exclude fast track decisions from merits review for those fast track applicants who, after an assessment of their protection claims, are determined to have put forward disingenuous information in support of their application or have access to

protection elsewhere. This measure is also aimed at discouraging the making of non-genuine, unmeritorious claims for protection as a means of delaying an applicant's departure from Australia. It is the Government's position that such cases warrant being channelled towards a direct immigration outcome rather than access merits review in order to delay the finalisation of their cases and prolong their stay in Australia.

713. Subparagraph (a)(i) of this definition provides that an excluded fast track review applicant means a fast track applicant who, in the opinion of the Minister is covered by section 91C or 91N. Section 91C deals with non-citizens who are covered by the Comprehensive Plan of Action approved by the International Conference on Indo-Chinese Refugees or those in relation for whom there is a safe third country. Section 91N deals with non-citizens who have a right to re-enter and reside in another third country.
714. This provision captures those fast track applicants who hold nationality or a right to enter and reside in a third country and therefore, can access protection elsewhere. It is the Government's position that such persons do not warrant access to review because Australia's protection framework should be dedicated towards identifying and granting protection to asylum seekers who have no alternative country which they can claim protection from and safely reside in.
715. Subparagraph (a)(ii) of this definition provides that an excluded fast track review applicant means a fast track applicant who, in the opinion of the Minister has previously entered Australia and who, while in Australia, made a claim for protection relying on a criterion mentioned in subsection 36(2) in an application that was refused or withdrawn.
716. This provision captures those fast track applicants who have previously made a valid protection visa application in Australia which was refused or withdrawn and have subsequently re-entered and been refused protection as a fast track applicant. It is the Government's position that such persons have already accessed and been refused protection under Australia's framework and should be excluded from merits review as it will unnecessarily delay the finalisation of their cases.
717. Subparagraph (a)(iii) of this definition provides that an excluded fast track review applicant means a fast track applicant who, in the opinion of the Minister has made a claim for protection in a country other than Australia, that was refused by that country.
718. This provision captures those fast track applicants who have had their asylum claims assessed and refused in a third country and have now received a further assessment and refusal under Australia's protection visa framework. It is the Government's position that persons who have had the benefit of accessing protection determination procedures both overseas and in Australia should be excluded from further 'forum shopping' where they have again had their application refused because merits review will unnecessarily delay the finalisation of their cases.
719. Subparagraph (a)(iv) of this definition provides that an excluded fast track review applicant means a fast track applicant who, in the opinion of the Minister has made a claim for protection in a country other than Australia that was refused by the Office of the United Nations High Commissioner for Refugees (UNHCR) in that country.

720. This provision captures those fast track applicants who have had their asylum claims assessed and refused in a third country by the UNHCR and have now received a further assessment and refusal under Australia's protection visa framework. It is the Government's position that persons who have had the benefit of accessing protection determination procedures both overseas and in Australia should be excluded from further 'forum shopping' where they have again had their application refused because merits review will unnecessarily delay the finalisation of their cases.
721. Subparagraph (a)(v) of this definition provides that an excluded fast track review applicant means a fast track applicant who, in the opinion of the Minister makes a manifestly unfounded claim for protection relying on a criterion mentioned in subsection 36(2) in, or in connection with his or her application.
722. This provision is intended to capture those fast track applicants who have put forward claims that are without any substance (such as having no fear of mistreatment), have no plausible basis (such as where there is no objective evidence supporting the claimed mistreatment) or are based on a deliberate attempt to deceive or abuse Australia's asylum process in an attempt to avoid removal. It is the Government's position that such persons should not have access to merits review because the nature of their claims are so lacking in substance that further review would waste resources and unnecessarily delay their finalisation.
723. Subparagraph (a)(vi) of this definition provides that an excluded fast track review applicant means a fast track applicant who, in the opinion of the Minister without reasonable explanation provides, gives or presents a bogus document to an officer of the Department or to the Minister (or causes such a document to be so provided, given or presented) in support of his or her application.
724. This provision captures those fast track applicants who have used a bogus document in an attempt to support any part of their protection visa application and where, after being confronted regarding the authenticity of the document, do not have a reasonable explanation for having done so. The Government considers it is not reasonable for an asylum seeker to continue presenting or relying on bogus documents beyond the time when those documents may have facilitated the asylum seeker's safe passage until such a time as they could claim protection at the first available opportunity. To continue to rely on them is considered purposefully misleading. The intention is to encourage applicants to comply with requirements and assist with providing authentic documents and evidence which support their protection claims.
725. Paragraph (b) of this definition further provides that an excluded fast track review applicant is a person who is, or who is included in a class of persons who are, specified by legislative instrument made under paragraph 5(1AA)(a).
726. This provision captures a fast track applicant, or a fast track applicant who is included in a class of persons, who are specified by the legislative instrument in new paragraph 5(1AA)(a) which is inserted by item 2 below. New paragraph 5(1AA)(b) will provide that the Minister may make a legislative instrument for the purposes of paragraph (1)(b) of the definition of excluded fast track applicant in subsection 5(1). The intention is to exclude from merits review other persons who do not fall within the definition of paragraph (a) of excluded fast track review applicant but have also put forward disingenuous information in support of their application or have access to

protection elsewhere. Any persons brought within the definition of excluded fast track applicant would still need to be fast track applicants as defined below.

727. The new defined term *fast track applicant* means:

- a person:
 - who is an unauthorised maritime arrival and who entered Australia on or after 13 August 2012; and
 - to whom the Minister has given a written notice under subsection 46A(2) determining that subsection 46A(1) does not apply to an application by the person for a protection visa; and
 - who has made a valid application for a protection visa in accordance with the determination; or
- a person who is, or who is included in a class of persons who are, specified by legislative instrument made under new paragraph 5(1AA)(b).

728. The note to the new defined term **fast track applicant** further states that some unauthorised maritime arrivals born in Australia on or after 13 August 2012 may not be fast track applicants even if paragraph (a) applies: see subsection (1AC).

729. The purpose of this amendment is to set out the criteria for fast track applicants who will be subject to the fast track assessment process. The Government believes the faster a case can be finally determined, the better outcomes it can deliver for both the applicant and those who support them in the Australian community - eliminating long periods of uncertainty and allowing people to move on and make decisions about the next stage of their lives. The Government's intention is to include non-citizens who arrived in Australia unauthorised, circumventing regular, lawful migration channels in this cohort.

730. Subparagraph (a)(i) of this definition provides that a fast track applicant means a person who is an unauthorised maritime arrival (UMA) and who entered Australia on or after 13 August 2012. The term UMA is defined in section 5AA of the Migration Act. Non-citizens who entered Australia by sea, and became an unlawful non-citizen because of that entry, on or after 13 August 2012 would be subject to the fast track assessment process.

731. Subparagraph (a)(ii) and (a)(iii) of this definition provides that a fast track applicant means a person who, in addition to subparagraph 5(1)(a)(i), the Minister has given a written notice under subsection 46A(2) determining that subsection 46A(1) does not apply to an application by that person for a protection visa and who has made a valid application for a protection visa in accordance with the determination. Currently, while UMAs are in Australia and are unlawful non-citizens, they are prevented from making a valid application for a visa under subsection 46A(1) unless the Minister determined by written notice under subsection 46A(2) that he or she thinks it is in the public interest to allow them to apply for a visa. The intention is that only those UMAs who entered Australia on or after 13 August 2012 and who have made a valid protection

visa application in accordance with a determination made by the Minister would be subject to the fast track assessment process.

732. Paragraph (b) of this definition further provides that a fast track applicant includes a person who is, or which is included in a class of persons who are, specified by legislative instrument made under paragraph 5(1AA)(b).
733. This provision covers a person who is, or which is included in a class of persons, who are specified by the legislative instrument in new paragraph 5(1AA)(b) which is inserted by item 2 below. New paragraph 5(1AA)(b) will provide that the Minister may make a legislative instrument for the purposes of paragraph (b) of the definition of fast track applicant in subsection 5(1). The intention is to include in the fast track assessment process, other persons who are not specified in paragraph (a) of the definition of fast track applicant within this definition. Any persons brought within the definition of fast track applicant will either be an excluded fast track review applicant or a fast track review applicant.
734. Where a fast track applicant is also determined to be an excluded fast track review applicant under paragraph 5(1AA)(a), that person would not have access to any form of review. A person who is determined to be a fast track applicant under a legislative instrument made in new paragraph 5(1AA)(b) would also be a fast track review applicant. A fast track reviewable decision made in respect of a fast track review applicant would be referred to the IAA under new Part 7AA inserted by item 21 below.
735. The note provides there may be some unauthorised maritime arrivals who entered Australia on or after 13 August 2012 but will not meet the definition of **fast track applicant** because of new subsection 5(1AC). New subsection 5(1AC) further provides that a person will not fulfil the requirements of paragraph (a) of the definition of **fast track applicant** only because they were born in Australia on or after 13 August 2012 and are the child of an unauthorised maritime arrival who entered Australia before 13 August 2012.
736. The purpose of the combined effect of the note and new subsection 5(1AC) is to ensure that children born on or after 13 August 2012 to unauthorised maritime arrivals who entered Australia before 13 August 2012 will have their immigration status processed consistently with that of their parents. It is intended that only those children born on or after 13 August 2012 to unauthorised maritime arrivals who entered Australia on or after 13 August 2012 be processed under the Fast Track Assessment process.
737. The new defined term *fast track decision* means a decision to refuse to grant a protection visa to a fast track applicant, other than a decision to refuse to grant such a visa:
 - because the Minister or a delegate of the Minister is not satisfied that the applicant passes the character test under section 501; or
 - relying on:
 - subsection 5H(2); or
 - subsection 36(1B) or (1C) of the Migration Act; or

- paragraph 36(2C)(a) or 36(2C)(b) of the Migration Act.
738. The purpose of this amendment is to define certain decisions made in respect of fast track applicants as fast track decisions. Fast track decisions broadly cover a decision to refuse to grant a protection visa to a fast track applicant. Paragraph (b) will carve out from this definition, decisions to refuse to grant protection visas to an applicant on character and security related grounds. Decisions which fall within these exceptions cannot be fast track decisions even if they are made in respect of a fast track applicant. It is intended that these types of decisions continue to have access to review in accordance with section 500 of the Migration Act noting that some decisions, including some decisions made by the Minister personally, are not subject to any form of review.
 739. Fast track decisions made in respect of fast track review applicants are fast track reviewable decisions. Both the terms fast track review applicants and fast track reviewable decisions are defined below. Fast track reviewable decisions must be referred to the IAA by the Minister under new section 473CA of new Part 7AA inserted by item 21 below. These fast track review applicants would not be entitled to apply for review under Part 5 or Part 7 of the Migration Act to the MRT or the RRT in respect of their fast track reviewable decision. Fast track decisions made in respect of excluded fast track review applicants will not be subject to review by the MRT, RRT or IAA under Part 5, Part 7 or Part 7AA.
 740. The note to the new defined term *fast track decision* provides that some decisions made in the circumstances mentioned in paragraph (a), or subparagraphs (b)(i) or (iii), of the definition of *fast track decision* are reviewable by the Administrative Appeals Tribunal in accordance with section 500.
 741. The new defined term *fast track reviewable decision* has the meaning given by section 473BB.
 742. This definition will refer the reader to new section 473BB inserted by item 21 below for the definition of *fast track reviewable decision*.
 743. The new defined term *fast track review applicant* means a fast track applicant who is not an excluded fast track review applicant.
 744. This definition provides that fast track review applicants are fast track applicants who are not excluded fast track review applicants. The intention is for all fast track applicants who are not captured by the definition of excluded fast track review applicant to be eligible for review in relation to fast track decisions made in respect of them. Fast track decisions made in respect of fast track review applicants are to be referred to the IAA by the Minister under new section 473CA of new Part 7AA inserted by item 21 below. Fast track review applicants would not be entitled to apply for review under Part 5 or Part 7 of the Migration Act to the MRT or the RRT in respect of their fast track reviewable decision.
 745. The new defined term *Immigration Assessment Authority* means the Authority established by section 473JA.
 746. This definition refers the reader to new section 473JA inserted by item 21 below which establishes the *Immigration Assessment Authority*.

747. The new definition of **referred applicant** has the meaning given by section 473BB.
748. This definition refers the reader to new section 473BB inserted by item 21 below which inserts a definition of **referred applicant**.

Item 2 After subsection 5(1)

749. This item inserts new subsection 5(1AA) after subsection 5(1) of Part 1 of the Migration Act.
750. New subsection 5(1AA) provides that the Minister may make a legislative instrument for the purposes of the following provisions:
- paragraph (b) of the definition of *excluded fast track review applicant* in subsection 5(1);
 - paragraph (b) of the definition of *fast track applicant* in subsection 5(1).
751. New subsection 5(1AB) provides that a legislative instrument made under subsection 5(1AA) may apply, adopt or incorporate, with or without modification, the provisions of any other legislative instrument, whether or not the other legislative instrument is disallowable, as in force at a particular time or as in force from time to time.
752. The purpose of this amendment is to provide the Minister with the flexibility and ability to include other cohorts in paragraph (b) of the definition of *excluded fast track review applicant* and *fast track applicant* by way of legislative instruments.
753. Only fast track decisions made in respect of fast track review applicants can be referred to the IAA under new section 473CA. The definition of fast track applicant inserted by item 1 above only captures UMAs who entered Australia on or after 13 August 2012 that made a valid application for a protection visa. Where it is determined that certain other persons should also be subject to the fast track assessment process, including certain other unauthorised arrivals, new subsection 5(1AA) would provide the Minister with the ability to bring these persons into the fast track process by way of legislative instrument.
754. As an example, the instrument could be used to specify unauthorised air arrivals. An unauthorised air arrival does not have a visa that is in effect when they enter Australia or has had their visa cancelled in immigration clearance. While some of these persons may have arrived in Australia by lawful means, they may have been refused entry at Australian airports or ports for reasons including that they are found not to intend to abide by the visa conditions (for example, where the reason for the grant of the visa no longer exists) or on the basis of document fraud.
755. All fast track applicants are either excluded fast track review applicants or fast track review applicants. Where it is determined that certain fast track decisions in relation to certain fast track applicants (who are specified in an instrument made under paragraph 5(1AA)(a)) should not have access to any form of review, new paragraph 5(1AA)(b) will also allow the Minister to include those persons in the definition of *excluded fast track review applicant* in that legislative instrument.

756. The intention is to exclude from merits review other fast track applicants who do not fall within the definition of paragraph 5(1)(a) of excluded fast track review applicant but have also put forward disingenuous information in support of their application or have access to protection elsewhere.
757. As an example, this instrument could be used to specify those fast track applicants who had previously arrived in Australia, but were not exempted from the statutory bar in subsection 46A(1) as they did not make claims that prima facie engaged Australia's protection obligations, and who subsequently departed or were removed from Australia only to re-enter Australia and be refused protection as a fast track applicant.
758. As this instrument would be made under Part 1 of the Migration Act, it would be exempt from disallowance under item 26 of the table in subsection 44(2) of the *Legislative Instruments Act 2003*. These instruments would be revised frequently to ensure that only those persons who should be subject to the fast track assessment process are put through that process.
759. The purpose of subsection 5(1AB) is to overcome any potential issues under subsection 14(2) of the *Legislative Instruments Act 2003* and not prevent an instrument created under new subsection 5(1AA) from referring to any instrument, whether it is a disallowable or non-disallowable instrument, that is in force at a particular time or as in force from time to time.
760. Subsection 5(1AC) provides that a person is not a fast track applicant only because of paragraph (a) of the definition of **fast track applicant** in subsection (1) if:
- the person is born in Australia on or after 13 August 2012; and
 - the person is the child of an unauthorised maritime arrival who entered Australia before 13 August 2012.
761. The purpose of the combined effect of the note at the definition of **fast track applicant** and new subsection 5(1AC) is to ensure that children born on or after 13 August 2012 to unauthorised maritime arrivals who entered Australia before 13 August 2012 will have their immigration status processed consistently with that of their parents. It is intended that only those children born on or after 13 August 2012 to unauthorised maritime arrivals who entered Australia on or after 13 August 2012 be processed under the Fast Track Assessment process.

.Item 3 Subsection 5(9)

762. This item omits the word “either” from subsection 5(9) of Part 1 of the Migration Act.
763. This amendment is consequential to the amendment made by item 4 below. Currently there are only two paragraphs in subsection 5(9) of the Migration Act. Item 4 inserts new paragraph (c) into subsection 5(9) of the Migration Act.

Item 4 At the end of subsection 5(9)

764. This item adds new paragraph 5(9)(c) at the end of subsection 5(9) of Part 1 of the Migration Act.

765. Currently, subsection 5(9) provides that for the purposes of the Migration Act, an application under this Act is finally determined when either:
- a decision that has been made in respect of the application is not, or is no longer, subject to any form of review under Part 5 or Part 7; or
 - a decision that has been made in respect of the application was subject to some form of review under Part 5 or Part 7, but the period within which such a review could be instituted has ended without a review having been instituted as prescribed.
766. Part 5 of the Migration Act relates to review of decisions by the MRT. Part 7 of the Migration Act relates to review of protection visa decision by the RRT.
767. New paragraph 5(9)(c) provides that for the purposes of the Migration Act, an application under this Act is finally determined when in relation to an application for a protection visa by an excluded fast track review applicant – a decision has been made in respect of the application.
768. The purpose of this amendment is to clarify that a decision in relation to an application for a protection visa by an excluded fast track review applicant is finally determined when a decision has been made in respect of the application. As excluded fast track review applicants are not eligible for review under Part 5, 7 or new Part 7AA, a fast track decision made in respect of them is finally determined for the purposes of the Migration Act.

Item 5 Subsection 5(9A)

769. This item omits the words “Part 5 and 7” in subsection 5(9A) of Part 1 of the Migration Act, and substitutes the words “Part 5,7 or 7AA”
770. Subsection 5(9A) provides that, without limiting subsection 5(9), if a review of a decision that has been made in respect of an application under this Act is instituted under Part 5 or Part 7 as prescribed, the application is finally determined when a decision on the review in respect of the application is taken to have been made as provided by any of the following provisions:
- subsection 368(2) (MRT written decisions);
 - subsection 368D(1) (MRT oral decisions);
 - subsection 430(2) (RRT written decisions);
 - subsection 430D(1) (RRT oral decisions).
771. Subsection 5(9A) refers directly to provisions under which the MRT and the RRT are taken to have made a decision. Subsection 5(9A) provides these decisions are taken to be finally determined for the purposes of this Act.
772. The purpose of this amendment, in conjunction with the amendment made by item 6 below, is to clarify that a decision made by the IAA under new subsection 473EA(2)

inserted by item 21 below, is finally determined when a decision on the review in respect of the application is taken to have been made.

Item 6 At the end of subsection 5(9A)

773. This item adds new paragraph 5(9A)(e) at the end of subsection 5(9A) of Part 1 of the Migration Act.
774. Subsection 5(9A) refers directly to provisions under which the MRT and the RRT are taken to have made a decision. Subsection 5(9A) provides these decisions are taken to be finally determined for the purposes of this Act.
775. New paragraph 5(9A)(e), in conjunction with the amendment made by item 5 above provides that without limiting subsection 5(9), if a review of a decision has been instituted under 7AA of this Act, the application is finally determined when a decision on the review in respect of the application is taken to have been made under subsection 473EA(2) (IAA decisions).
776. The purpose of this amendment, in conjunction with the amendment made by item 5 above, is to clarify that a decision made under new subsection 473EA(2) inserted by item 21 below, is finally determined when a decision on the review in respect of the application is taken to have been made.

Item 7 At the end of subsection 5(9B)

777. This item adds new paragraph 5(9B)(c) at the end of subsection 5(9B) of Part 1 of the Migration Act.
778. Subsection 5(9B) provides that subsection 5(9A) does not apply in relation to the following decisions:
- a decision of the MRT under paragraph 349(2)(c);
 - a decision of the RRT under paragraph 415(2)(c).
779. The note to subsection 5(9B) states that the decisions listed in subsection 5(9B) are for the remission of some matters by the relevant Tribunal. These exceptions from the decisions listed in new subsection 5(9A) are necessary because an application is not intended to be finally determined if it is remitted by the MRT or the RRT to the Minister or delegate for further consideration.
780. New paragraph 5(9B)(c) provides that subsection 5(9A) does not apply in relation to a decision of the IAA under paragraph 473CC(2)(b).
781. The purpose of this amendment is to clarify that an application is not intended to be finally determined if it is remitted by the IAA to the Minister or delegate for further consideration.

Item 8 Subsection 5(9B) (note)

782. This item omits the word “Tribunal” and substitutes the words “review body” in the note to subsection 5(9B) of Part 1 of the Migration Act.

783. The note to subsection 5(9B) states that the decisions listed in subsection 5(9B) are for the remission of some matters by the relevant Tribunal.
784. The new note to subsection 5(9B) will provide that decisions listed in subsection 5(9B) are for the remission of some matters by the relevant review body.
785. This amendment is consequential to the amendment made by item 7 above. As the IAA is not a Tribunal, the term review body has been used in the note to capture the MRT, the RRT and the IAA.

Item 9 Paragraph 57(1)(a)

786. This item repeals current paragraph 57(1)(a) and substitutes new paragraph 57(1)(a) in Division 3 of Part 2 of the Migration Act.
787. Current paragraph 57(1)(a) provides that in this section, relevant information means information (other than non-disclosable information) that the Minister considers would be the reason, or part of the reason, for refusing to grant a visa.
788. Section 57 of the Migration Act is part of the Code of Procedure in Subdivision AB of Division 3 of Part 2 of the Migration Act for dealing fairly, efficiently and quickly with visa applications. Subdivision AB of Part 2 of the Migration Act sets out procedures for dealing with valid visa applications before a decision is made. Subsection 57(2) provides that certain “relevant information” received by the Minister must be provided to a visa applicant for comment.
789. New paragraph 57(1)(a) provides that in this section, relevant information means information that the Minister considers would be the reason, or part of the reason:
- for refusing to grant a visa; or
 - for deciding that the applicant is an excluded fast track review applicant.
790. The purpose of this amendment is to set out the obligation for the Minister to put information to an applicant that is adverse and would be the reason, or part of the reason for deciding that that applicant is an excluded fast track review applicant and to provide the visa applicant with an opportunity to comment on any such information. It codifies the procedural fairness (natural justice) requirements in relation to adverse information when determining a visa applicant is an excluded fast track review applicant.

Item 10 At the end of subsection 57(1)

791. This item adds a new note at the end of subsection 57(1) in Division 3 of Part 2 of the Migration Act.
792. The new note provides that excluded fast track review applicant is defined in subsection 5(1).
793. The purpose of this amendment is to refer the reader to the definition of *excluded fast track review applicant* in subsection 5(1) of the Migration Act.

Item 11 Paragraph 57(3)(b)

794. This item repeals current paragraph 57(3)(b) and substitutes new paragraph 57(3)(b).
795. Section 57 of the Migration Act is part of the Code of Procedure in Subdivision AB of Division 3 of Part 2 of the Migration Act for dealing fairly, efficiently and quickly with visa applications. Subdivision AB of Part 2 of the Migration Act sets out procedures for dealing with valid visa applications before a decision is made. Current subsection 57(3) provides that section 57 does not apply in relation to an application for a visa unless:
- the visa can be granted when the applicant is in the migration zone; and
 - this Act provides, under Part 5 or 7, for an application for review of a decision to refuse to grant the visa.
796. New paragraph 57(3)(b), together with current paragraph 57(3)(a) provides that section 57 does not apply in relation to an application for a visa unless:
- the visa can be granted when the applicant is in the migration zone; and
 - this Act provides, under Part 5 or 7, for an application for review of a decision to refuse to grant the visa; or
 - the applicant is a fast track applicant.
797. The purpose of this amendment is to clarify that the obligation in subsection 57(2) applies if an applicant is a fast track applicant and is applying for a visa that can be granted when the applicant is in the migration zone.
798. The note under paragraph 57(3)(b) provides that some applicants for protection visas are fast track applicants. The term is defined in subsection 5(1).
799. The purpose of this note is to refer the reader to subsection 5(1) for the definition of fast track applicant.

Item 12 Subsection 65(1) (note)

800. This item omits the reference to “Note” after subsection 65(1) in Division 3 of Part 2 of the Migration Act and substitutes with “Note 1”.

801. This amendment is consequential to the amendment made by item 13 below which adds Note 2 at the end of subsection 65(1).

Item 13 At the end of subsection 65(1)

802. This item adds “Note 2” at the end of subsection 65(1) in Division 3 of Part 2 of the Migration Act.
803. Subsection 65(1) is the power in which the Minister makes a decision to grant a visa or refuse to grant a visa.
804. New note 2 provides that decisions to refuse to grant protection visas to fast track review applicants must generally be referred to the IAA: see Part 7AA.
805. The purpose of this amendment is to refer the reader to Part 7AA of the Migration Act which deals with the fast track review process for certain protection visa decisions in respect of fast track review applicants. Part 7AA is inserted by item 21 below.

Item 14 At the end of subsection 66(2)

806. This item adds new paragraph 66(2)(e) and 66(2)(f) at the end of subsection 66(2) in Division 3 of Part 2 of the Migration Act.
807. Currently subsection 66(2) provides that notification of a decision to refuse an application for a visa must:
- if the grant of the visa was refused because the applicant did not satisfy a criterion for the visa – specify that criterion; and
 - if the grant of the visa was refused because a provision of this Act or the regulations prevented the grant of the visa – specify that provision; and
 - unless subsection 66(3) applies to the application – give written reasons (other than non-disclosable information) why the criterion was not satisfied or the provision prevented the grant of the visa; and
 - if the applicant has a right to have the decision reviewed under Part 5 or 7 or section 500 – state:
 - that the decision can be reviewed; and
 - the time in which the application for review may be made; and
 - who can apply for the review; and
 - where the application for review can be made.
808. New paragraph 66(2)(e) and 66(2)(f) provides that notification of a decision to refuse an application for a visa must:

- in the case of a fast track reviewable decision – state that the decision has been referred for review under Part 7AA and that it is not subject to review under Part 5 or Part 7; and
 - in the case of a fast track decision that is not a fast track reviewable decision – state that the decision is not subject to review under Part 5, 7 or 7AA.
809. The purpose of this amendment is to clarify that when the Minister makes a decision to refuse to grant a visa to a fast track applicant, the notification to the applicant must specify that:
- in the case of a fast track reviewable decision, the applicant’s decision has been referred to the IAA for review and they are not entitled to apply for review before the MRT and RRT; and
 - in the case of a fast track decision that is not a fast track reviewable decision, the applicant is not entitled to review before the MRT, RRT or the IAA.
810. The effect of this amendment is to ensure that fast track applicants are notified about what, if any, review pathways are available to them if the Minister has made a decision to refuse to grant their visa.

Item 15 Section 275 (at the end of the definition of *review authority*)

811. This item adds new paragraph (c) in the definition of *review authority* in section 275 in Division 1 of Part 3 of the Migration Act.
812. Section 275 defines certain terms for the purposes of Part 3. Part 3 deals with migration agents and immigration assistance.
813. Currently, *review authority* means:
- the Migration Review Tribunal; or
 - the Refugee Review Tribunal.
814. New paragraph (c) will include the IAA in the definition of *review authority*.
815. The purpose of this amendment is to include the IAA in the definition of *review authority* for the purposes of Part 3 of the Migration Act.

Item 16 At the end of subsection 338(1)

816. This item adds new paragraph 338(1)(d) at the end of subsection 338(1) in Division 2 of Part 5 of the Migration Act.
817. Currently subsection 338(1) provides that a decision is an MRT-reviewable decision if this section so provides, unless:
- the Minister has issued a conclusive certificate under section 339 in relation to the decision; or

- the decision is an RRT-reviewable decision; or
- the decision is to refuse to grant, or to cancel, a temporary safe haven visa.

818. New paragraph 338(1)(d) provides that a decision is an ***MRT-reviewable decision*** if this section so provides, unless the decision is a fast track decision.

819. The purpose of this amendment is to provide that a fast track decision cannot be reviewed by the MRT. Fast track decisions made in respect of fast track review applicants will be referred to the IAA by the Minister under new section 473CA of new Part 7AA inserted by item 19 below. Fast track decisions made in respect of excluded fast track review applicants will not be subject to review by the MRT, RRT or the IAA.

Item 17 At the end of subsection 411(2)

820. This item adds new paragraph 411(2)(c) at the end of subsection 411(2) in Division 2 of Part 7 of the Migration Act.

821. Currently subsection 411(2) provides that the following decisions are not RRT-reviewable decisions:

- decisions made in relation to a non-citizen who is not physically present in the migration zone when the decision is made;
- decisions in relation to which the Minister has issued a conclusive certificate under subsection 411(3).

822. New paragraph 411(2)(c) provides that the following decisions are not RRT-reviewable decisions: fast track decisions.

823. The purpose of this amendment is to provide that a fast track decision cannot be reviewed by the RRT. Fast track decisions made in respect of excluded fast track review applicants will not be subject to review by the MRT, RRT or the IAA. Fast track decisions made in respect of fast track review applicants will be referred to the IAA by the Minister under new section 473CA of new Part 7AA inserted by item 21 below.

Item 18 At the end of subsection 460(2)

824. This item adds a new note at the end of subsection 460(2) in Division 9 of Part 7 of the Migration Act.

825. Subsection 460(2) provides that the Principal Member is responsible for:

- monitoring the operations of the Tribunal to ensure that those operations are as fair, just, economical, informal and quick as practicable; and
- allocating the work of the Tribunal among the members (including himself or herself) in accordance with guidelines under subsection 460(3).

826. The new note at the end of subsection 460(2) provides that the Principal Member is also responsible for the overall operation and administration of the IAA under Part 7AA.
827. The purpose of this amendment is to clarify that the Principal Member of the RRT is also responsible for the overall operation and administration of the IAA in addition to the functions outlined in paragraph 460(2)(a) and 460(2)(b).

Item 19 At the end of section 470

828. This item adds the words “and the Principal Member’s powers under Part 7AA” at the end of section 470 in Division 9 of Part 7 of the Migration Act.
829. Current section 470 provides that the Principal Member, may, by writing signed by him or her, delegate to a member all or any of the Principal Member’s powers under this Act other than the power under section 443 to refer decisions to the AAT.
830. New section 470 provides that the Principal Member, may, by writing signed by him or her, delegate to a member all or any of the Principal Member’s powers under this Act other than the power under section 443 to refer decisions to the AAT and the Principal Member’s powers under Part 7AA.
831. The purpose of this amendment is to prevent the Principal Member from delegating his or her powers under Part 7AA to a member of the RRT. New subsection 473JF(1) in Division 8 of Part 7AA inserted by item 21 below will provide that the Principal Member may delegate, in writing, all or any of the Principal Member’s powers or functions under Part 7AA to the Senior Reviewer of the IAA.
832. The effect of this amendment and new section 473JF is to confer power on the Principal Member to delegate his or her functions under Part 7AA to only the Senior Reviewer of the IAA.

Item 20 Paragraph 473A(a)

833. This item repeals current paragraph 473A(a) and substitutes new paragraph 473A(a) in Part 7A of the Migration Act.
834. Current paragraph 473A(a) and 473A(b) provide that for the purposes of the *Public Service Act 1999*:
- the Principal Member of the RRT and the persons mentioned in subsection 407(4) and 472(4) together constitute a Statutory Agency; and
 - the Principal Member of the RRT is the Head of that Statutory Agency.
835. The purpose of this provision is to provide that the Principal Member of the RRT together with the Registrar, Deputy Registrar and other officers of the MRT and RRT (including the persons who are made available to the IAA), and reviewers of the IAA together constitute a Statutory Agency for the purposes of the *Public Service Act 1999*. The Principal Member of the RRT is the Head of that Statutory Agency.

836. Both the MRT and RRT comprise members (appointed by the Governor-General under the Migration Act for fixed terms) and tribunal officers (appointed under the Migration Act and employed under the *Public Service Act 1999*). Currently, all members and staff are cross-appointed to both the MRT and the RRT and the Principal Member of the MRT and the RRT is the same person.
837. New paragraph 473A(a) together with current paragraph 473A(b) provides that the following persons constitute a Statutory Agency:
- the Principal Member of the RRT;
 - the persons mentioned in subsection 407(4) (officers of the MRT);
 - the persons mentioned in subsection 472(4), including the persons who are made available to the IAA under subsection 473JE(2) (officers of the RRT);
 - the persons mentioned in subsection 473JE(1) (Reviewers of the IAA); and
 - the Principal Member of the RRT is the Head of that Statutory Agency.
838. New subsection 473JA(1) inserted by item 21 below provides that the IAA is established within the RRT. New subsection 473JE(1) inserted by item 21 below will provide that the Senior Reviewer and the other Reviewers of the IAA are to be persons engaged under the *Public Service Act 1999*. New subsection 473JE(2) will provide that the Principal Member must make available persons employed in the RRT to assist the IAA in the performance of its administrative functions.
839. The purpose of this amendment is to clarify that the Principal Member of the RRT, officers of the MRT and RRT together with the Reviewers of the IAA constitute a Statutory Agency for the purposes of the *Public Service Act 1999*.

Item 21 After Part 7A

840. This item inserts new Part 7AA after Part 7A of the Migration Act. The heading of this new Part is “Fast track review process in relation to certain protection visa decisions”.

Part 7AA – Fast track review process in relation to certain protection visa decisions

841. This Part establishes a new framework to deal with review of decisions to refuse protection visas that are referred by the Minister to the IAA under new section 473CA. These decisions are referred to as fast track reviewable decisions.

Division 1 – Introduction

842. This Division provides for a simplified outline of new Part 7AA and definitions for the purposes of Part 7AA. This Division also provides the power for the Minister to determine, by way of legislative instrument, that certain fast track decisions made in respect of an excluded fast track review applicant are to be reviewed under Part 7AA, and provides the Minister with the ability to issue conclusive certificates in relation to a fast track decision if he or she believes it would be contrary to the national interest for the decision to be changed or reviewed.

Section 473BA Simplified outline of this Part

843. New section 473BA creates a simplified outline of new Part 7AA. The simplified outline provides:

- A limited form of review of fast track decisions to refuse protection visas to some applicants, including unauthorised maritime arrivals who entered Australia on or after 13 August 2012.
- Fast track decisions made in relation to some applicants are excluded from the fast track review process. These applicants are known as ***excluded fast track review applicants***.
- Fast track review applicants and excluded fast track review applicants are collectively known as ***fast track applicants***.
- Fast track reviewable decisions must be referred by the Minister to the IAA as soon as reasonably practicable after the decision is made. A person cannot make an application for review directly to the Authority.
- Decisions to refuse to grant protection visas to fast track applicants are generally not reviewable by any other Tribunal under this Act, although some decisions are reviewable by the Administrative Appeals Tribunal.
- The IAA consists of the Principal Member of the Refugee Review Tribunal, the Senior Reviewer and other Reviewers. The Principal Member is responsible for the overall administration and operation of the IAA. The Reviewers are appointed by the Minister.
- In reviewing fast track reviewable decisions, the Authority is required to pursue the objective of providing a mechanism of limited review that is efficient and quick.
- The IAA does not hold hearings and is required to review decisions on the papers that are provided to it when decisions are referred to it. However, in exceptional circumstances the Authority may consider new material and may invite referred applicants to provide, or comment on, new information at an interview or in writing.
- The IAA may affirm a referred decision or may remit the decision for reconsideration in accordance with directions.
- The Authority may give directions restricting the disclosure of information. There are also specific requirements for the giving and receiving of documents.

844. The purpose of this amendment is to guide the reader on the key aspects of new Part 7AA which deals with the fast track review process in relation to certain protection visa decisions.

Section 473BB Definitions

845. New section 473BB inserts new defined terms ***fast track reviewable decision***, ***new information***, ***Principal Member***, ***referred applicant***, ***Reviewer***, ***review material*** and ***Senior Reviewer*** for the purposes of new Part 7AA of the Migration Act.
846. The new defined term ***fast track reviewable decision*** means:
- a fast track decision in relation to a fast track review applicant; or
 - a fast track decision determined under section 473BC;
- but does not include a fast track decision in relation to which the Minister has issued a conclusive certificate under section 473BD.
847. The note following this defined term provides that ***fast track decisions*** are decisions (subject to some exceptions) to refuse to grant protection visas to certain applicants, known as ***fast track applicants***. Some specified fast track applicants are known as ***excluded fast track review applicants***; all others are known as ***fast track review applicants***. The highlighted terms are defined in subsection 5(1).
848. The purpose of this amendment is to identify which fast track decisions made in respect of fast track applicants must be referred to the IAA by the Minister under new section 473CA. No fast track review applicants will be entitled to apply for review to the MRT and RRT under Part 5 or Part 7 of the Migration Act in relation to fast track decisions.
849. The new defined term ***new information*** has meaning given by subsection 473DC(1).
850. Subsection 473DC(1) provides that new information is any document or information (***new information***) that was not before the Minister when the Minister made the decision under section 65 and the Authority considers may be relevant. The purpose of this amendment is to refer the reader to subsection 473DC(1) for the meaning of ***new information***.
851. The new defined term ***Principal Member*** means the Principal Member of the RRT.
852. The purpose of this amendment is to clarify that a reference to the Principal Member in new Part 7AA is a reference to the Principal Member of the RRT. New subsection 473JB(1) provides that the Principal Member is responsible for the overall operation and administration of the Authority and, for that purpose, may issue directions and determine policies.
853. The new defined term ***referred applicant*** means an applicant for a protection visa in respect of whom a fast track reviewable decision is referred under section 473CA.
854. The purpose of this amendment is to identify all persons who will be referred to the IAA under section 473CA. Section 473CA provides the Minister must refer a fast track reviewable decision to the IAA as soon as reasonably practicable after the decision is made. As such, this defined term will capture:
- fast track decisions made in respect of a fast track review applicants;

- any fast track decisions made in respect of excluded fast track review applicants that the Minister determines under section 473BC should be reviewed under Part 7AA by way of legislative instrument.
855. The new defined term **Reviewer** means a Reviewer engaged in accordance with Division 8, and includes the Senior Reviewer.
856. The purpose of this amendment is to clarify that a reference to a Reviewer is a reference to a Reviewer engaged in accordance with Division 8. Division 8 deals with the establishment of the IAA.
857. The new defined term **review material** has the meaning given by section 473CB.
858. The purpose of this amendment is to clarify references to review material is in Part 7AA. Section 473CB outlines the material that the Secretary must give to the IAA in respect of each fast track reviewable decision referred to the IAA under section 473CA. The items listed in subsection 473CB(1) are collectively known as review material.
859. The new term **Senior Reviewer** means the Senior Reviewer appointed under section 473JC.
860. The purpose of this amendment is to clarify that a reference to the Senior Reviewer is a reference to the Senior Reviewer appointed under section 473JC. Subsection 473JC(1) provides that the Principal Member must, by written instrument, appoint an SES employee to be the Senior Reviewer. Subsection 473JB(2) provides that the Senior Reviewer is to manage the Authority subject to the directions of, and in accordance with policies determined by, the Principal Member.

Section 473BC – Minister may determine that certain decisions are to be reviewed under this Part

861. New section 473BC provides that the Minister may, by legislative instrument, determine that a specified fast track decision, or a specified class of fast track decisions in relation to an excluded fast track review applicant, should be reviewed under this Part.
862. Note 1 to section 473BC provides that an **excluded fast track review applicant** and **fast track decision** are defined in subsection 5(1).
863. Note 2 to section 473BC provides that, if the Minister makes a determination, the fast track decision is a fast track reviewable decision (see paragraph (b) of the definition of **fast track reviewable decision** in section 473BB).
864. The purpose of this amendment is to provide the Minister with the flexibility and ability to determine that certain fast track decisions made in respect of excluded fast track review applicants are to be reviewed by the IAA.
865. It is anticipated that this mechanism would be used where certain excluded fast track review applicants are considered vulnerable and are provided with additional support. This would be outlined by departmental policy and procedures.

866. All fast track applicants are either excluded fast track review applicants or fast track review applicants. Where the Minister is of the view that a fast track decision or decisions made in respect of an excluded fast track review applicant or applicants warrant review by the IAA, the Minister will be able to determine that these decisions should be reviewed under new Part 7AA.
867. The purpose of note 1 is to refer the reader to the definition of excluded fast track review applicant and fast track decision in subsection 5(1). The purpose of note 2 is to clarify that the effect of a determination under new section 473BC is that these fast track decisions become fast track reviewable decisions. Under section 473CA, the Minister must refer a fast track reviewable decision to the IAA as soon as reasonably practicable after the decision is made.

Section 473BD – Minister may issue conclusive certificate in relation to certain decisions

868. New section 473BD provides that the Minister may issue a conclusive certificate in relation to a fast track decision if the Minister believes that:
- it would be contrary to the national interest to change the decision; or
 - it would be contrary to the national interest for the decision to be reviewed.
869. The note to new section 473BD provides that if the Minister issues a conclusive certificate, the fast track decision is not a fast track reviewable decision (see definition of *fast track reviewable decision* in section 473BB).
870. The purpose of this amendment is to exempt certain fast track decisions from review by the IAA under Part 7AA where the Minister has issued a conclusive certificate in relation to that decision.
871. New section 473BD aligns with current subsection 411(3) which provides the Minister with the ability to issue a conclusive certificate in relation to decision which would normally be reviewable by the RRT. Similar to the RRT framework, the Minister would generally only issue a conclusive certificate in relation to a decision on the grounds that changing the decision or reviewing the decision could result in a prejudice to Australia's security, defence, international relations or where a review would require the IAA to consider Cabinet or Cabinet committee documents.

Division 2 – Referral of fast track reviewable decisions to Immigration Assessment Authority

Section 473CA – Referral of fast track reviewable decisions

872. New section 473CA provides that the Minister must refer a fast track reviewable decision to the IAA as soon as reasonably practicable after the decision is made.
873. The purpose of this amendment is to require the Minister to refer fast track reviewable decisions to the IAA as soon as reasonably practicable after the decision is made. As a referred applicant cannot themselves apply for IAA review, new section 473CA will require the Minister to refer the decision to the IAA as soon as reasonably practicable after the decision is made under section 65 of the Migration Act.

Section 473CB – Material to be provided to Immigration Assessment Authority

874. New subsection 473CB provides that the Secretary must give to the IAA the following material (***review material***) in respect of each fast track reviewable decision referred to the Authority under section 473CA:

- a statement that:
 - sets out the findings of fact made by the person who made the decision; and
 - refers to the evidence on which those findings were based; and
 - gives reasons for the decision;
- material provided by the referred applicant to the person making the decision before the decision was made;
- any other material that is in the Secretary’s possession or control and is considered by the Secretary (at the time the decision is referred to the Authority) to be relevant to the review;
- the following details:
 - the last address for service provided to the Minister by the referred applicant for the purposes of receiving documents;
 - the last residential or business address provided to the Minister by the referred applicant for the purposes of receiving documents;
 - the last fax number, email address or other electronic address provided to the Minister by the referred applicant for the purposes of receiving documents;
 - if the address or fax number mentioned in subparagraph (i), (ii) or (iii) has not been provided to the Minister by the referred applicant, or if the Minister reasonably believes that the last such address or number provided to the Minister is no longer correct – such an address or number (if any) that the Minister reasonably believes to be correct at the time the decision is referred to the Authority;
 - if the referred applicant is a minor – the last address or fax number of a kind mentioned in subparagraph (i), (ii), (iii) or (iv) (if any) for a carer of the minor.

875. New subsection 473CB(2) provides that the Secretary must give the review material to the IAA at the same time as, or as soon as reasonably practicable after, the decision is referred to the Authority.

876. The purpose of this amendment is to require the Secretary of the Department to give to the IAA relevant documents, material and details (collectively known as review material) that the IAA will need to conduct review. This is because applicants will not apply for review to the IAA and therefore will not be required to provide certain documents, material and details to the IAA in conjunction with their review. Review

material will include a copy of the notification that was sent to the fast track applicant in relation to the fast track decision.

877. As the IAA will be required to notify the applicant directly of the review outcome, paragraph 473CB(1)(d) will also require the Secretary to provide the IAA details of the referred applicant's address and contact details (including electronic addresses) as provided by the referred applicant to the Minister.
878. When referring a decision to the IAA, the Secretary must also give the review material to the IAA at the same time as, or as soon as reasonably practicable after, that decision is referred.

Section 473CC – Review of decision

879. New subsection 473CC(1) provides that the IAA must review a fast track reviewable decision referred to the Authority under section 473CA.
880. New subsection 473CC(2) provides that the IAA may:
- affirm the fast track reviewable decision; or
 - remit the decision for reconsideration in accordance with such directions or recommendations of the Authority as are permitted by regulation.
881. The purpose of this amendment is to require the IAA to review a decision referred to it by the Minister under section 473CA and set out what it can do in relation to the fast track reviewable decision.
882. Subsection 473CC(2) provides that the IAA may either affirm the fast track reviewable decision or remit the decision for reconsideration in accordance with such directions or recommendations of the Authority as are permitted by regulation.
883. The power to affirm a fast track reviewable decision will permit the IAA to decide that the Minister's fast track decision should not be changed. The effect of this is that the Minister's decision under section 65 remains in force.
884. The power to remit a fast track decision will permit the IAA to decide that the Minister's decision should be reconsidered. The effect of this is that the Minister is required to reconsider the application having regard to any permissible directions or recommendations made by the IAA. The power to remit a fast track decision with directions or recommendations will permit the IAA to review the substantive matters which must be satisfied before the visa application can be approved and, if these are decided in favour of the applicant, to then remit the case back to the Department to consider the more procedural criteria, which would not be appropriate for the IAA to deal with.

Division 3 – Conduct of review

Subdivision A – Natural justice requirements

Section 473DA – Exhaustive statement of natural justice hearing rule

885. New subsection 473DA(1) provides that this Division, together with sections 473GA and 473GB, is taken to be an exhaustive statement of the requirements of the natural justice hearing rule as they apply to the IAA.
886. The purpose of this amendment is to make clear that sections 473GA, 473GB and Division 3 of Part 7AA of the Migration Act are an exhaustive statement of the requirements of the natural justice hearing rule in relation to the matters they deal with. Division 3 sets out how the IAA should conduct its review and outlines how the IAA is to review decisions on the papers and provides limits on the consideration of new information for the purposes of making a decision in relation to a fast track reviewable decision. Section 473GA and 473GB deal with the disclosure of confidential information to and by the IAA.
887. New subsection 473DA(2) provides that to avoid doubt, nothing in this Part requires the IAA to give to a referred applicant any material that was before the Minister when the Minister made the decision under section 65.
888. The purpose of this provision is to put beyond doubt that the IAA is not required to give a referred applicant any material that was before the Minister for comment. This is because under subsection 57(2) of the Migration Act and in relation to their fast track decision, an applicant would have already been provided an opportunity to comment on relevant information that the Minister considered was the reason, or part of the reason for refusing to grant a visa.

Subdivision B – Review on the papers

Section 473DB – Immigration Assessment Authority to review decisions on the papers

889. New subsection 473DB(1) provides that subject to this Part, the IAA must review a fast track reviewable decision referred to it under section 473CA by considering the review material provided to the Authority under section 473CB:
- without accepting or requesting new information; and
 - without interviewing the referred applicant.
890. New subsection 473DB(2) provides that subject to this Part, the IAA may make a decision on a fast track reviewable decision at any time after the decision has been referred to the Authority.
891. The purpose of this amendment is to describe what the limited merits review function of the IAA entails. The intention is for the IAA to review a fast track reviewable decision by only considering the review material provided to the Authority by the Secretary of the Department. The IAA is not required to accept or request new information or interview the referred applicant. This is however subject to Subdivision C – Additional information which sets out the limited circumstances in which the IAA

may consider new information for the purposes of making a decision in relation to a fast track reviewable decision.

892. New section 473FA provides that the IAA, in carrying out its functions under this Act, is to pursue the objective of providing a mechanism of limited review that is efficient and quick. As such, new subsection 473DB(2) puts beyond doubt that the IAA may make a decision any time after the decision has been referred to the Authority. This will enable the IAA to conduct limited review of fast track reviewable decisions on the papers as soon as these decisions have been referred to it by the Minister without accepting or requesting new information or interviewing the referred applicant.
893. The complete package of reforms proposed in this Bill intend to place an emphasis on all fast track applicants to articulate their protection claims in a legitimate and authentic way at the earliest possible opportunity. As such, the IAA's primary function of limited review is underpinned by a presumption that there should be no further requirement to consider new information in a case involving a fast track review applicant. A fast track review applicant has had ample opportunities to present their claims and supporting evidence to justify their request to international protection throughout the decision-making process and before a primary decision is made on their application.
894. It is also proposed to amend the *Migration Regulations 1994* to bring into effect a Code of Procedure with regard to the natural justice obligations and respective timeframes that will apply to reviews conducted by the IAA. By allowing the IAA to complete its limited review role in an efficient and effective manner, this new review body will deliver the Government's policy outcome of improving the efficiency and cost effectiveness of merits review currently experienced by refused protection visa applicants in Australia and ensure timely progress of their cases towards a final and accurate determination regarding their immigration status.
895. The note to subsection 473DB(2) provides that some decisions to refuse to grant a protection visa to fast track applicants are not reviewable by the IAA (see paragraphs (a) and (b) of the definition of ***fast track decision*** in subsection 5(1)).
896. The purpose of this note is to refer the reader to the definition of ***fast track decision*** and clarify that certain decisions made in the circumstances mentioned in paragraph (a), or subparagraphs (b)(i) or (iii), of the definition of ***fast track decision*** are subject to review, if any, in accordance with section 500. These decisions are not reviewable by the MRT, RRT or the IAA.

Subdivision C – Additional information

Section 473DC – Getting new information

897. New subsection 473DC(1) provides that subject to this Part, the IAA may, in relation to a fast track decision, get any documents or information (***new information***) that:
- were not before the Minister when the Minister made the decision under section 65; and
 - the Authority considers may be relevant.

898. New subsection 473DC(2) provides that the IAA does not have a duty to get, request or accept, any new information whether the Authority is requested to do so by a referred applicant or by any other person, or in any other circumstances.
899. New subsection 473DC(3) provides that without limiting subsection (1), the IAA may invite a person, orally or in writing, to give new information:
- in writing; or
 - at an interview, whether conducted in person, by telephone or in any other way.
900. The purpose of this amendment is to provide the IAA with the discretionary ability to get new information that it considers may be relevant. This amendment will also provide the IAA with the discretion to invite, orally or in writing, a person to give new information.
901. New information is defined as documents or information that were not before the Minister when the Minister made the decision under section 65 and information that the Authority considers may be relevant. Section 473CB lists the material to be provided to the IAA by the Secretary. By its definition, new information would not capture review material as defined by section 473CB. This is because generally review material would have been before the Minister before the Minister made the decision to either grant a visa or refuse to grant a visa under section 65 of the Migration Act.
902. New subsection 473DB(1) provides that subject to this Part, the IAA must review a fast track reviewable decision referred to it under section 473CA by considering the review material provided to the Authority under section 473CB:
- without accepting or requesting new information; and
 - without interviewing the referred applicant.
903. While section 473DB provides that the IAA is to conduct limited review by considering the review material provided to it by the Minister, there may be rare instances where on reviewing the review material, the IAA identifies the need to obtain new information that may be relevant to the fast track decision under review. For example, this could include a situation in which the IAA is alerted to a sudden and highly significant change of conditions in the referred applicant's country of origin since the decision under section 65 was made. Accordingly, new subsection 473DC(1) would have the effect of providing the IAA with the discretionary ability to get that new information.
904. The effect of new subsection 473DC(2) is to put beyond doubt that the power for the IAA to get, request or accept, any new information is completely discretionary under all circumstances and the IAA is under no duty to do so even if requested by a referred applicant.
905. New subsection 473DC(3) provides the IAA with the discretionary ability to invite, orally or in writing, a person to give new information. This will provide the IAA with the flexibility to contact a person in the most appropriate way to give new information in the most suitable way. The IAA will be able to ask for a person to give new

information in writing or at an interview. An interview can be conducted in person, by telephone or in any other way (for example, through a videoconference or online). The intention is for the IAA to quickly and flexibly get new information that it may consider relevant in accordance with its objective of providing a mechanism of limited review that is efficient and quick under section 473FA.

906. Section 473DC only gives the IAA the discretionary ability to get new information that it may consider relevant to a fast track decision. Under section 473DD, the IAA cannot consider that new information for the purposes of making a decision in relation to a fast track reviewable decision unless the test in section 473DD is met.

Section 473DD – Considering new information in exceptional circumstances

907. New section 473DD provides that for the purposes of making a decision in relation to a fast track reviewable decision, the IAA must not consider any new information unless:

- the Authority is satisfied that there are exceptional circumstances to justify considering the new information; and
- the referred applicant satisfies the Authority that, in relation to any new information given, or proposed to be given, to the Authority by the referred applicant, the new information was not, and could not have been, provided to the Minister before the Minister made the decision under section 65.

908. New section 473DD specifies the test that must be met in order for the IAA to consider any new information for the purposes of making a decision in relation to a fast track reviewable decision. New information is defined in subsection 473DC(1) as documents or information that were not before the Minister before the Minister made the decision under section 65 and the IAA considers may be relevant.

909. The purpose of this amendment is to set out the test that must be met in order for the IAA to consider new information. If the test in new section 473DD is met, the IAA will be able to consider new information that is not review material for the purposes of remitting a fast track reviewable decision with prescribed directions. However, it is acknowledged that there could also be rare situations where the IAA may consider new information under section 473DD for the purposes of affirming a fast track reviewable decision where the test is met.

910. This amendment is to operate in concert with new sections 473DC and 473FA. New section 473DB provides that subject to this Part, the IAA must review a fast track reviewable decision referred to it under section 473CA by considering the review material provided to the Authority under section 473CB:

- without accepting or requesting new information; and
- without interviewing the referred applicant.

911. In addition, new section 473FA provides that the IAA, in carrying out its functions under this Act, is to pursue the objective of providing a mechanism of limited review that is efficient and quick.

912. Paragraph 473DD(a) provides that for the purposes of making a decision in relation to a fast track reviewable decision, the IAA must not consider any new information unless the Authority is satisfied that there are exceptional circumstances to justify considering the new information.
913. This component of the test would apply to instances where:
- the IAA sought new information at its discretion including where it got new information under new subsection 473DC(1) that it considered relevant; and/or
 - a referred applicant provided new information to the IAA of their own volition.
914. Under this component of the test, the IAA would not be able to consider any new information in relation to making a decision fast track reviewable decision unless the Authority was satisfied that there are exceptional circumstances to justify considering the new information. Exceptional circumstances has not been defined and will provide a reviewer of the IAA with discretion to ascertain what he or she thinks are exceptional dependent on the characteristics of each fast track reviewable decision. It will be a matter for the IAA to develop guidelines to assist in the interpretation of this phrase, which has been deliberately left undefined as circumstances will differ from case to case.
915. Examples of exceptional circumstances that may justify the consideration of new information may include, but are not limited to:
- a material change in the referred applicant's circumstances which occurred after the Minister made the section 65 decision including a factual event, such as significant and rapidly deteriorating conditions emerging in the referred applicant's country of claimed protection, for example, a change in the political or security landscape; or
 - credible personal information that was not previously known has emerged which suggests a fast track review applicant will face a significant threat to their personal security, human rights or human dignity if returned to the country of claimed persecution.
916. Examples of circumstances that **would not** justify the consideration of new information may include, but are not limited to:
- information which was available to the applicant at the primary stage and was not presented for unsatisfactory reasons;
 - a general misunderstanding or lack of awareness of Australia's processes and procedures; or
 - a change in personal circumstances within the control of the applicant.
917. Paragraph 473DD(b) provides that for the purposes of making a decision in relation to a fast track reviewable decision, the IAA must not consider any new information unless, in addition to paragraph 473DD(a), the referred applicant satisfies the Authority that, in relation to any new information given, or proposed to be given, to the Authority

by the referred applicant, the new information was not, and could not have been, provided to the Minister before the Minister made the decision under section 65.

918. Where an applicant provides or seeks to provide the IAA with new information of their own volition, they would also have to satisfy the component of the test outlined in paragraph 473DD(b) in addition to the component in paragraph 473DD(a).
919. The purpose of imposing an additional component where a referred applicant gives or seeks to give new information to the IAA is to reinforce the policy position that fast track applicants must be forthcoming with all of their claims and provide all available information to the Minister before a fast track decision is made under section 65 of the Migration Act.
920. The complete package of reforms proposed in this Bill place an emphasis on all fast track applicants articulating their protection claims accurately and in full at the earliest possible opportunity. As such, the IAA's primary function of limited review is underpinned by a presumption that there should be no requirement to consider new information in a case involving a fast track review applicant. A fast track review applicant has had ample opportunity to present their claims and supporting evidence to justify their claim for international protection throughout the decision-making process and before a primary decision is made on their application.

Section 473DE – Certain new information must be given to referred applicant

921. New subsection 473DE(1) provides that the IAA must, in relation to a fast track reviewable decision:
 - give to the referred applicant particulars of any new information, but only if the new information:
 - has been, or is to be, considered by the Authority under section 473DD; and
 - would be the reason, or part of the reason, for affirming the fast track reviewable decision; and
 - explain to the referred applicant why the new information is relevant to the review; and
 - invite the referred applicant, orally or in writing, to give comments on the new information:
 - in writing; or
 - at an interview, whether conducted in person, by telephone or in any other way.
922. New subsection 473DE(2) provides that the Authority may give the particulars mentioned in paragraph 473DE(1)(a) in the way that the Authority thinks appropriate in the circumstances.
923. New subsection 473DE(3) provides subsection 473DE(1) does not apply to new information that:

- is not specifically about the referred applicant and is just about a class of person of which the referred applicant is a member; or
 - is non-disclosable information; or
 - is prescribed by regulation for the purposes of this paragraph.
924. The note to new section 473DE provides that under subsection 473DA(2) the IAA is not required to give to a referred applicant any material that was before the Minister when the Minister made the decision under section 65.
925. The purpose of this amendment is to set out the obligation for the IAA to put new information to a referred applicant that is adverse to them, and to provide the referred applicant with an opportunity to comment on any such new information. This obligation applies to new information considered under section 473DD that would be the reason, or part of the reason, for affirming the fast track reviewable decision. It codifies the procedural fairness (natural justice) requirements in relation to adverse new information.
926. The obligation under subsection 473DE(1) only applies to new information. New information is defined in subsection 473DC(1) as information and documents that were not before the Minister when the Minister made the decision under section 65 and the IAA considers may be relevant. The obligation under subsection 473DE(1) does not apply to anything other than new information including review material. This is because the Minister would have put certain adverse information to an applicant under section 57 of the Migration Act in relation to information that was before the Minister when the Minister made the decision under section 65. This is made clear by the note.
927. Paragraph 473DE(1)(c) requires the IAA to invite, orally or in writing, the referred applicant, to give comments on the new information. While under paragraph 473DE(1)(c), the IAA must invite a referred person to give comments, the IAA will still have the flexibility to contact a person in the most appropriate way to comment on the new information in the most suitable way. The IAA will be able to ask for a person to comment on adverse new information in writing or at an interview. An interview can be conducted in person, by telephone or in any other way (for example, through a videoconference or online).
928. Subsection 473DE(3) provides exceptions to the obligation for the IAA to put certain adverse new information to a referred applicant.
929. Under paragraph 473DE(3)(a), the obligation under subsection 473DE(1) does not apply to information that is not specifically about the referred applicant and is just about a class of persons of which the referred applicant is a member as this would capture country information.
930. Under paragraph 473DE(3)(b), the obligation under subsection 473DE(1) does not apply to non-disclosable information.
931. Non-disclosable information is defined in subsection 5(1) of the Migration Act and means information or matter:

- whose disclosure would, in the Minister's opinion, be contrary to the national interest because it would:
 - prejudice the security, defence or international relations of Australia; or
 - involve the disclosure of deliberations or decisions of the Cabinet or a committee of the Cabinet; or
- whose disclosure would, in the Minister's opinion, be contrary to the public interest for a reason which could form the basis of a claim by the Crown in right of the Commonwealth in judicial proceedings; or
- whose disclosure would found an action by a person, other than the Commonwealth, for breach of confidence;

and includes any document containing, or any record of, such information or matter.

932. New paragraph 473DE(3)(c) creates a regulation-making power for the Governor-General to prescribe certain types of new information in the *Migration Regulations 1994*. This prescribed information would not be subject to the obligation in subsection 473DE(1).

Section 473DF – Invitation to give new information or comments in writing or at interview

933. New subsection 473DF(1) provides that this section applies if a referred applicant is:
- invited under section 473DC to give new information in writing or at interview; or
 - invited under section 473DE to give comments on new information in writing or at an interview.
934. New subsection 473DF(2) provides that the information or comments are to be given within a period that is prescribed by regulation and specified in the invitation.
935. New subsection 473DF(3) provides that the IAA may determine the manner in which, and the place at which, an interview is to be conducted.
936. New subsection 473DF(4) provides that if the referred applicant does not give the new information or comments in accordance with the invitation, the IAA may make a decision on the review:
- without taking any further action to get the information or the referred applicant's comments on the information; or
 - without taking any further action to allow or enable the referred applicant to take part in a further interview.
937. The purpose of this amendment is to outline the procedures to be followed where the IAA invites a referred applicant to give new information or to give comments on new information in writing or at interview. It is intended that the same procedures are to be followed whether the IAA requests relevant information where it is seeking to determine whether exceptional circumstances might exist in a case or alternatively,

where the IAA has already considered new information in a case which may form part of the IAA's proposed finding to affirm the Minister's primary decision and the IAA needs to put that information to a referred applicant for comment.

938. Subsection 473DF(2) is a regulation-making power. It is intended that amendments would be made to the *Migration Regulations 1994* to prescribe periods within which information or comments are to be given and specified in an invitation made pursuant to section 473DC or section 473DE. It is intended that the prescribed timeframes would, where appropriate, mirror those which will apply to the primary assessment process for fast track applicants.
939. Subsection 473DF(3) gives the IAA flexibility to determine and appropriate time and place in which an interview is to be conducted, if an interview is to be conducted. The time and place in which an interview would be conducted would be dependent on the specific circumstances of the referred applicant.
940. Subsection 473DF(4) makes clear that if a referred applicant does not give new information or comments in accordance with an invitation, the IAA may make a decision on the review without taking any further action.
941. It is the Government's position that such procedures will allow the IAA to be accessible to fast track review applicants by assisting them to provide to the IAA, when requested, relevant, accurate and detailed information pertaining to their protection claims in a medium that best suits their communication abilities and which ultimately, will assist the fast track review applicant to receive a timely and accurate outcome in their case. The intention is for the IAA to pursue an objective of providing a mechanism of limited review that is efficient and quick under section 473FA.

Division 4 – Decisions of Immigration Assessment Authority

Section 473EA – Immigration Assessment Authority's decision and written statement

Written statement of decision

942. New subsection 473EA(1) provides that if the IAA makes a decision on a review under this Part, the Authority must make a written statement that:
 - sets out the decision of the Authority on the review; and
 - sets out the reasons for the decision; and
 - records the day and time the statement is made.

943. The purpose of this amendment is to require the IAA to make a written statement for a decision on review under new Part 7AA.

How and when written decisions are taken to be made

944. New subsection 473EA(2) provides that a decision on a review is taken to have made:
 - by the making of the written statement; and

- on the day, and at the time, the written statement is made.
945. The purpose of this amendment is to clarify when, and how, a decision on review under Part 7AA is taken to have been made by the IAA.
946. New subsection 473EA(3) provides that the IAA has no power to vary or revoke a decision to which subsection (2) applies after the day and time the written statement is made.
947. The purpose of this amendment is to clarify that once the IAA makes a written statement in relation to a decision on review under Part 7AA, the IAA cannot consider the matter further.

Return of documents etc.

948. New subsection 473EA(4) provides that after the IAA makes the written statement, the Authority must:
- return to the Secretary any document that the Secretary has provided in relation to the review; and
 - give the Secretary a copy of any other document that contains evidence or material on which the findings of fact were based.
949. The purpose of this amendment is to clarify that after the written statement is made, the IAA must return certain specified documents to the Secretary of the Department.

Validity etc. not affected by procedural irregularities

950. New subsection 473EA(4) provides that the validity of a decision on a review, and the operation of subsection (3), are not affected by:
- a failure to record, under paragraph 473EA(1)(c), the day and time when the written statement was made; or
 - a failure to comply with subsection 473EA(4).
951. The purpose of this amendment is to clarify that while failure to comply with paragraph (1)(c) and subsection (4) will amount to a procedural irregularity, the decision on a review under Part 7AA itself will not be invalidated. That is, a decision of the IAA remains valid even if the relevant day and time are not recorded on the written statement, and if the required documents are not returned to the Secretary as required.

Section 473EB – Notification of Immigration Assessment’s Authority’s decision

952. New subsection 473EB(1) provides that the IAA must notify the referred applicant of a decision on review by giving the referred applicant a copy of the written statement prepared under subsection 473EA(1). The copy must be given to the applicant:
- within 14 days after the day on which the decision is taken to have been made; and
 - by one of the methods specified in section 473HB.

953. The purpose of this amendment is to require the IAA to give a copy of the written statement to the referred applicant by one of the methods specified in section 473HB of the Migration Act within 14 days. That is, by handing it to the recipient, or to another person apparently at least 16 years old and living or working at the last residential or business address provided by the recipient in connection with the review. Alternatively the IAA can give the document to the recipient by prepaid post or other prepaid means, by fax, e-mail or other electronic means, to the last contact details of the recipient provided to the IAA in connection with the review. Depending on the method used, a statement “given” within 14 days may or may not also be received within that time. There are requirements provided by subsection 473HB(2) if the recipient is a minor.
954. New subsection 473EB(2) provides that a copy of the statement must also be given to the Secretary:
- within 14 days after the day on which the decision is taken to have been made; and
 - by one of the methods specified in section 473HC.
955. The purpose of this amendment is to require the IAA to give a copy of the written statement to the Secretary by one of the methods specified in section 473HC within 14 days. That is, by handing it to the Secretary or an authorised officer or by post or other means or by fax, e-mail or other electronic means, to the last contact details notified to the IAA in writing by the Secretary for the purpose of review applications. Depending on the method used, a statement “given” within 14 days may or may not also be received within that time.
956. New subsection 473EB(3) provides that a failure to comply with this section in relation to a decision on a review does not affect the validity of the decision.
957. The purpose of this amendment is to clarify that although a failure to comply with subsection 473EB(1) and (2) will mean that referred applicant and Secretary will not be validly notified, the decision itself will not be invalid.

Section 473EC – Certain decisions of the Immigration Assessment Authority to be published

958. New subsection 473EC(1) provides that subject to subsection 473EC(2), and to any direction under section 473GD, the IAA may publish any statements prepared under subsection 473EA(1) that the Principal Member thinks are of particular interest.
959. New subsection 473EC(2) provides that the IAA must not publish any statement which may identify a referred applicant or any relative or other dependent of a referred applicant.
960. The note to new section 473EC provides that section 5G may be relevant for determining relationships for the purposes of subsection 473EC(2).
961. The purpose of this amendment is to provide a discretionary power for the IAA to publish decisions that the Principal Member thinks are of particular interest. It is intended that decisions which are regarded as of particular interest are decisions that provide information or insight into:

- the jurisdiction of the IAA;
- the procedures for the conduct of reviews;
- how the IAA interprets and applies the law and policy.

962. However, the published version of a decision statement must not contain any information which may identify the referred applicant or any relative or other dependent of the applicant.

963. The note to subsection 473EC refers the reader to section 5G of the Migration Act which provides clarity on relationships and family members.

Division 5 – Exercise of powers and functions by Immigration Assessment Authority

Section 473FA – How Immigration Assessment Authority is to exercise its functions

964. New subsection 473FA(1) provides that the IAA, in carrying out its functions under this Act, is to pursue the objective of providing a mechanism of limited review that is efficient and quick.

965. The note to new subsection 473FA(1) provides that under section 473DB the IAA is generally required to undertake a review on the papers.

966. New subsection 473FA(2) provides that the IAA, in reviewing a decision is not bound by technicalities, legal forms or rules of evidence.

967. The purpose of this amendment is to outline how the IAA is to exercise its functions. When conducting a review of a fast track reviewable decision, the IAA is to keep in mind its overall functions of providing an efficient and quick limited review.

968. The note to new subsection 47FA(1) refers the reader to new section 473DB which describes what the limited merits review function of the IAA entails. The IAA is to conduct limited review of fast track reviewable decisions on the papers as soon as decisions have been referred to it by the Minister without accepting or requesting new information or interviewing the referred applicant. While the IAA is not bound by the rules of evidence, it is subject to the exhaustive statement of the natural justice hearing rule in section 473DA and the relevant codified requirements of procedural fairness.

Section 473FB – Practice directions

969. New subsection 473FB(1) provides that the Principal Member may, in writing, issue directions, not inconsistent with this Act or the regulations as to:

- the operations of the IAA; and
- the conduct of reviews by the Authority.

970. New subsection 473FB(2) provides that without limiting subsection (1), the directions may:

- relate to the application of efficient processing practices in the conduct of reviews by the IAA; or
- set out procedures to be followed by persons giving new information to the Authority in writing or at interview.

971. New subsection 473FB(3) provides that a member of the IAA must, as far as practicable, comply with the directions. However, non-compliance with any direction does not mean that the Authority's decision on a review is an invalid decision.
972. New subsection 473FB(4) provides that if the IAA deals with a review of a decision in a way that complies with the directions, the Authority is not required to take any other action in dealing with the review.
973. New subsection 473FB(5) provides that the IAA is not required to accept new information or documents from a person, or to hear or continue to hear a person appearing before it, if the person fails to comply with a relevant direction that applies to the person.
974. The purpose of this provision is to confer on the Principal Member the power to issue practice directions that give guidance on processing practices relating to the conduct of reviews. Practice directions may also set out procedures to be followed by a person giving new information to the Authority. Subsection 473FB(2) is not intended to be an exhaustive list of the matters to which directions may relate. The IAA should, as far as practicable, comply with a direction issued by the Principal Member but non-compliance with any direction will not mean that the IAA's decision on a review is an invalid decision.

Section 473FC – Guidance Decisions

975. New subsection 473FC(1) provides that the Principal Member may, in writing, direct that a decision (the **guidance decision**) of the Refugee Review Tribunal or the IAA specified in the direction is to be complied with by the Authority in reaching a decision on a review of a fast track reviewable decision of a kind specified in the direction.
976. New subsection 473FC(2) provides that in reaching a decision on a review of a decision of that kind, the Authority must comply with the guidance decision unless the Authority is satisfied that the facts or circumstances of the decision under review are clearly distinguishable from the facts or circumstances of the guidance decision.
977. New subsection 473FC(3) provides that non-compliance by the Authority with a guidance decision does not mean that the Authority's decision on a review is an invalid decision.
978. Guidance decisions would be issued by the Principal Member of the RRT in relation to identifiable common issues in matters before the Authority. As the RRT also conducts review of protection visa decisions, the Principal Member may direct, where appropriate that guidance decisions of the RRT is to be complied with by the Authority to ensure consistency. The purpose of this provision is therefore to promote consistency in decision-making between different reviewers of the Authority in relation to common issues and/or the same or similar facts or circumstances.

979. Guidance decisions are not intended to go to the conduct of the review, but are intended to provide guidance on how to decide factual or evidentiary issues that might arise in review cases, for example guidance on the particular risks and circumstances in a particular country on a particular date. In conducting review, the IAA must comply with the guidance decisions unless the IAA is satisfied that the facts or circumstances of the decision under review are clearly distinguishable from the facts or circumstances in the relevant guidance decision. However, if a reviewer fails to comply with a guidance decision in making a decision, it will not invalidate that decision.
980. Guidance decisions are intended to promote consistency in decision making in matters. Consistency has long been recognised as an issue for all merits review tribunals, but is particularly apparent when a tribunal is dealing with large numbers of cases that *prima facie* raise the same factual claims. Using guidance decisions will help to avoid a situation where applicants with similar circumstances get different outcomes. They will provide factual precedents not legal precedents to aid consistency in decision making.
981. The power of the Principal Member of the RRT to issue guidance decisions is not an exercise of judicial power. Only the courts stipulated in section 71 of the Constitution can exercise the judicial power of the Commonwealth.¹ A person or body which is part of the executive government, such as the Principal Member of the RRT, cannot exercise the judicial power of the Commonwealth. As such, section 473FC will involve the exercise of legislative power by the Principal Member.
982. The guidance decision is an exercise of legislative power, but is not subject to disallowance under the *Legislative Instruments Act 2003* (LIA). Section 7 of the LIA provides for instruments declared not to be legislative instruments. Paragraph 7(1)(a) of the LIA provides that an instrument is not a legislative instrument for the purposes of the LIA if it is included in the table in section 7. Item 24 of that table relevantly provides that instruments that are prescribed by the regulations for the purposes of this table are not legislative instruments.
983. Regulation 7 of the *Legislative Instruments Regulations 2004* (LIR) provides that for item 24 of the table in subsection 7(1) of the LIA, and subject to section 6 and 7 of the LIA, instruments mentioned in Schedule 1 of the LIR are prescribed. Item 6 of Part 1 of Schedule 1 provides that a practice direction made by a court or tribunal are not legislative instruments. As such the direction of a Principal Member in relation to a guidance decision is not an instrument for the purposes of the LIA and is not subject to disallowance.

Division 6 – Disclosure of information

Section 473GA – Restrictions on disclosure of certain information etc.

984. New subsection 473GA(1) provides that despite anything else in this Act, the Secretary must not give to the IAA a document, or information, if the Minister certifies, under subsection (2), that the disclosure of any matter contained in the document, or the disclosure of the information would be contrary to the public interest:

¹ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

- because it would prejudice the security, defence or international relations of Australia; or
- because it would involve the disclosure of deliberations or decisions of the Cabinet or of a committee of the Cabinet.

985. New subsection 473GA(2) provides that the Minister may issue a written certificate for the purposes of subsection (1).

986. The purpose of this provision is to clarify that the Secretary must not give the IAA a document or information, if the Minister has certified its disclosure would prejudice the security, defence or international relations of Australia, or would disclose Cabinet or Cabinet committee deliberations or decisions.

Section 473GB – Immigration Assessment Authority’s discretion in relation to disclosure of certain information etc.

987. New subsection 473GB(1) provides that this section applies to a document or information if:

- the Minister has certified, in writing, that the disclosure of any matter contained in the document, or the disclosure of the information, would be contrary to the public interest for any reason specified in the certificate (other than a reason set out in paragraph 473GA(1)(a) or (b)) that could form the basis for a claim by the Crown in right of the Commonwealth in a judicial proceeding that the matter contained in the document, or the information, should not be disclosed; or
- the document, the matter contained in the document, or the information was given to the Minister, or to an officer of the Department, in confidence.

988. New subsection 473GB(2) provides that if, in compliance with a requirement of or under this Act, the Secretary gives to the IAA a document or information to which this section applies, the Secretary:

- must notify the Authority in writing that this section applies in relation to the document or information; and
- may give the Authority any written advice that the Secretary thinks relevant about the significance of the document or information.

989. New subsection 473GB(3) provides that if the IAA is given a document or information and is notified that this section applies in relation to it, the Authority:

- may, for the purpose of the exercise of its powers in relation to a fast track reviewable decision in respect of a referred applicant, have regard to any matter contained in the document, or to the information; and
- may, if the Authority thinks it is appropriate to do so having regard to any advice given by the Secretary under subsection (2), disclose any matter contained in the document, or the information, to the referred applicant.

990. New subsection 473GB(4) provides that if the IAA discloses any matter to the referred applicant under subsection (3), the Authority must give a direction under section 473GD in relation to the information.
991. New subsection 473GB(5) provides that the Minister may issue a written certificate for the purposes of subsection 473GB(1).
992. The purpose of this amendment is to enable the IAA at its discretion to rely on certain information or documents and to disclose certain information to a referred applicant on the condition that the referred applicant does not contravene the conditions attached to its disclosure. Where the IAA has been so notified, it may rely on the document or information and may disclose to the applicant any matter contained in the document or the information where it thinks it appropriate to do so having regard to any written advice given by the Secretary.
993. This provision deals with a document or information in relation to which the Minister has issued a certificate on the basis that disclosure would be contrary to the public interest (on the basis that material in the document or information could form the basis of a claim for Crown privilege, other than for a reason set out in section 473GA) or the document, or information in the document, or the information, was given in confidence. Where the Secretary gives information or a document to the IAA, the Secretary shall notify the IAA in writing that the section applies and may give the IAA written advice that the Secretary thinks relevant about the significance of the document or information.
994. In exercising the discretion to disclose, the IAA should consider the advice of the Secretary about the significance of the information or document. It is intended that the IAA may rely on such documents or information in making its decision without breaching the rules of natural justice if the referred applicant is not advised of that document or information. It is also intended that if the IAA chooses to release the document or information in full knowledge of the Secretary's advice, it should be responsible for the release.

Section 473GC – Disclosure of confidential information

995. New subsection 473GC(1) provides that this section applies to a person who is or has been:
- a Reviewer; or
 - a person acting as a Reviewer; or
 - a person mentioned in subsection 473JE(2) who is assisting the Authority; or
 - a person providing interpreting services in connection with a review by the Authority.
996. New subsection 473GC(2) provides that this section applies to information or a document if the information or document concerns a person and is obtained by a person to whom this section applies in the course of performing functions or duties or exercising powers under this Act.

997. New subsection 473GC(3) provides that a person to whom this section applies must not:

- make a record of any information to which this section applies; or
- divulge or communicate to any person any information to which this section applies;

unless the record is made or the information is divulged or communicated:

- for the purposes of this Act; or
- for the purposes of, or in connection with, the performance of a function or duty or the exercise of a power under this Act.

998. The relevant penalty is imprisonment for 2 years.

999. New subsection 473GC(4) provides that subsection 473GC(3) applies to the divulging or communication of information whether directly or indirectly.

1000. New subsection 473GC(5) provides that a person to whom this section applies must not be required to produce any document, or to divulge or communicate any information, to which this section applies to or in:

- a court; or
- a tribunal; or
- a House of the Parliament of the Commonwealth, of a State or of a Territory; or
- a committee of a House, or the Houses, of the Parliament of the Commonwealth, of a State or of a Territory; or
- any other authority or person having power to require the production of documents or the answering of questions;

except where it is necessary to do so for the purposes of carrying into effect the provisions of this Act.

1001. New subsection 473GC(6) provides that nothing in this section affects a right that a person has under the *Freedom of Information Act 1982*.

1002. New subsection 473GC(7) provides that for the purposes of this section, a person who is providing interpreting services in connection with a review by the Authority is taken to be performing a function under this Act.

1003. New subsection 473GC(8) provides that in this section ***produce*** includes permit access to.

1004. The purpose of this amendment is to prohibit the use of information or a document in the course of a person performing his/her duties or functions or exercising a power under the Migration Act other than for a purpose of the Migration Act or in the course

of performing that duty or function. It applies to past and present Reviewers of the IAA and to persons providing support services to the IAA.

1005. This amendment also prevents such a person from being compelled to produce a document or divulge or communicate to any court, any information to which this section applies. ‘This also includes any House of Parliament or a committee of a House of Parliament, tribunal or authority possessing the power to compel a person to do such things. This section is subject to the *Freedom of Information Act 1982* in that a person is entitled to personal information under that Act.

Section 473GD – Immigration Assessment Authority may restrict publication or disclosure of certain matters

1006. New subsection 473GD(1) provides that if the Principal Member is satisfied, in relation to a review, that it is in the public interest that:

- any information given to the IAA; or
- the contents of any document produced to the Authority;

should not be published or otherwise disclosed, or should not be published or otherwise disclosed except in a particular manner and to particular persons, the Principal Member may give a written direction accordingly.

1007. New subsection 473GD(2) provides that the direction under subsection (1):

- must be in writing; and
- must be notified in a way that the Principal Member considers appropriate.

1008. New subsection 473GD(3) provides that if the Principal Member has given a direction under subsection 473GD(1) in relation to the publication of any information or of the contents of a document, the direction does not:

- excuse the IAA from its obligations under section 473EA; or
- prevent a person from communicating to another person a matter contained in the evidence, information or document, if the first-mentioned person has knowledge of the matter otherwise than because of the evidence or the information having been given or the document having been produced to the Authority.

1009. New subsection 473GD(4) provides that a person must not contravene a direction given by the Principal Member under subsection 473GD(1) that is applicable to the person.

1010. The relevant penalty is imprisonment for 2 years.

1011. The purpose of this amendment is allow the Principal Member of the IAA to direct that any information given to the IAA or the contents of any document produced to the IAA shall not be published or otherwise disclosed where the Principal Member is satisfied that this would be in the public interest. The Principal Member may also, in the public interest, impose restrictions on publication or disclosure and direct that the publication is to be in a specific manner and to particular persons. Subsection (3) provides that

this does not affect the IAA's obligations to make a written statement under section 473EA. In addition, subsection (3) does not prevent a person who has knowledge of the matter from other sources from disclosing that information. The penalty for a person contravening a direction applicable to them under new section 473GD is 2 years imprisonment.

Division 7 – Giving and receiving review documents etc.

Section 473HA – Giving documents by Immigration Assessment Authority where no requirement to do so by section 473HB or 473HC method

1012. New subsection 473HA(1) provides that if:

- a provision of this Act or the regulations requires or permits the IAA to give a document to a person; and
- the provision does not state that the document must be given:
 - by one of the methods specified in section 473HB or 473HC; or
 - by a method prescribed for the purposes of giving documents to a person in immigration detention;

the Authority may give the document to the person by any method that it considers appropriate (which may be one of the methods mentioned in subparagraph (b)(i) or (ii) of this section).

1013. The note to new subsection 473HA(1) provides that under section 473HG a referred applicant may give the IAA the name of an authorised recipient who is to receive documents on the referred applicant's behalf.

1014. The purpose of this amendment is to authorise the IAA to use any method that it considers to be appropriate in order to give a document to a person in circumstances where the method for giving the document has not been specified by the Migration Act or the Migration Regulations. This new section does not prevent the IAA from opting to use one of the methods specified in new section 473HB or 473HC, or which may have been prescribed by the Migration Regulations.

1015. While only certain documents (notices, invitations, or written statements) are *required* to be given by one of the methods specified in section 473HB or 473HC, other documents might be given in these ways and, if they are, the provisions of new sections 473HD and 473HE may be invoked to determine the time when the document is taken to have been received.

1016. Subsection 473HA(2) provides that if a person is a minor, the IAA may give a document to an individual who is at least 18 years of age if the Authority reasonably believes that:

- The individual has day-to-day care and responsibility for the minor; or

- The individual works in or for an organisation that has day-to-day care and responsibility for the minor and the individual's duties, whether alone or jointly with another person, involve care and responsibility for the minor.

1017. Subsection 473HA(3) provides that if the IAA gives a document to an individual, as mentioned in subsection (2), the Authority is taken to have given the document to the minor. However, this does not prevent the Authority giving the minor a copy of the document.

Section 473HB – Methods by which Immigration Assessment Authority gives documents to a person other than the Secretary

Coverage of section

1018. New subsection 473HB(1) provides that for the purposes of provisions of this Part or the regulations that:

- require or permit the IAA to give a document to a person (the **recipient**); and
- state that the Authority must do so by one of the methods specified in this section;

the methods are as follows.

1019. New subsection 473HB(2) provides that if the recipient is a minor, the IAA may use the methods mentioned in subsections (5) and (6) to dispatch or transmit, as the case may be, a document to an individual (a **carer of the minor**):

- who is at least 18 years of age; and
- who the IAA reasonably believes:
 - has day to day care and responsibility for the minor; or
 - works in or for an organisation that has day-to-day care and responsibility for the minor and whose duties, whether alone or jointly with another person, involve care and responsibility for the minor.

1020. The note to new subsection 473HB(2) provides that if the IAA gives an individual a document by the method mentioned in subsection 473HB(5) or 473HB(6), the individual is taken to have received the document at the time specified in section 473HD in respect of that method.

Giving by hand

1021. New subsection 473HB(3) provides that one method consists of a Reviewer, a person authorised in writing by the Senior Reviewer, or a person mentioned in subsection 473JE(2) handing the document to the recipient.

Handing to a person at last residential or business address

1022. New subsection 473HB(4) provides that another method consists of a Reviewer, a person authorised in writing by the Senior Reviewer, or a person mentioned in subsection 473JE(2), handing the document to another person who:

- is at the last residential or business address of the recipient provided to the IAA in connection with the review; and
- appears to live there (in the case of a residential address) or work there (in the case of a business address); and
- appears to be at least 16 years of age.

Dispatch by prepaid post or by other prepaid means

1023. New subsection 473HB(5) provides that another method consists of a Reviewer or a person mentioned in subsection 473JE(2) dating the document, and then dispatching it:

- within 3 working days (in the place of dispatch) of the date of the document; and
- by prepaid post or by other prepaid means; and
- to:
 - the last address for service of the recipient provided to the IAA in connection with the review; or
 - the last residential or business address of the recipient provided to the IAA in connection with the review; or
 - if the recipient is a minor – the last address for a carer of the minor provided to the Authority.

Transmission by fax, email or other electronic means

1024. New subsection 473HB(6) provides that another method consists of a Reviewer or a person mentioned in subsection 473JE(2), transmitting the document by:

- fax; or
- email; or
- other electronic means;

to:

- the last fax number, email address or other electronic address, as the case may be, of the recipient provided to the Authority; or
- if the recipient is a minor – the last fax number, email address or other electronic address, as the case may be, for a carer of the minor that is provided to the Authority .

Documents given to a carer

1025. New subsection 473HB(7) provides that if the IAA gives a document to a carer of a minor, the Authority is taken to have given the document to the minor. However, this does not prevent the Authority giving the minor a copy of the document.
1026. The purpose of new section 473HB is to specify alternative methods that control the ways in which the IAA is authorised to give documents to any person (other than the Secretary) for the purposes of Part 7AA of the Migration Act (dealing with Fast Track review by the IAA of certain protection visa decisions) or the Migration Regulations. One of these methods must be used whenever a provision of Part 7AA or the Migration Regulations requires the document to be given in conformity with this section. However, the IAA is left free to determine which method to use in any given case.
1027. These methods are intended to operate independently. For example, the IAA is authorised to use the most recent fax number even though it might have been given an even more recent e-mail address.
1028. A person authorised in writing by the Senior Reviewer may also give documents. This will enable the IAA to authorise, for example, process servers to give documents.

*Section 473HC – Methods by which Immigration Assessment Authority gives documents to the Secretary**Coverage of section*

1029. New subsection 473HC(1) provides that for the purposes of provisions of this Part or the regulations that:
- require or permit the IAA to give a document to the Secretary; and
 - state that the Authority must do so by one of the methods specified in this section;
- the methods are as follows.

Giving by hand

1030. New subsection 473HC(2) provides that one method consists of a Reviewer, a person authorised in writing by the Senior Reviewer, or a person mentioned in subsection 473JE(2), handing the document to the Secretary or to an authorised officer.

Dispatch by prepaid post or by other means

1031. New subsection 473HC(3) provides that another method consists of a Reviewer or a person mentioned in subsection 473JE(2), dating the document, and then dispatching it:
- within 3 working days (in the place of dispatch) of the date of the document; and
 - by post or other means; and

- to an address, notified to the IAA in writing by the Secretary, to which such documents can be dispatched.

Transmission by fax, email or other electronic means

1032. New subsection 473HC(4) provides that another method consists of a Reviewer or a person mentioned in subsection 473JE(2), transmitting the document by:

- fax; or
- email; or
- other electronic means;

to the last fax number, email address or other electronic address notified to the Authority in writing by the Secretary for the purpose.

1033. The purpose of new section 473HC is to specify alternative methods that control the ways in which the IAA is authorised to give documents to the Secretary for the purposes of Part 7AA of the Migration Act (dealing with Fast Track review by the IAA of certain protection visa decisions) or the Migration Regulations.

1034. One of these methods must be used whenever a provision of Part 7AA or the Migration Regulations requires the document to be given in conformity with this section. However, the IAA is left free to determine which method to use in any given case.

1035. These methods are the same as those for the giving of document to a person (new section 473HB refers), except that there is no need for a separate provision dealing with giving documents to a person at the Secretary's notified address.

Section 473HD – When a person other than the Secretary is taken to have received a document from the Immigration Assessment Authority

1036. New subsection 473HD(1) provides that this section applies if the IAA gives a document to a person other than the Secretary by one the methods specified in section 473HB (including in a case covered by section 473HA).

Giving by hand

1037. New subsection 473HD(2) provides that if the IAA gives a document to a person by the method in subsection 473HB(3) (which involves handing the document to the person), the person is taken to have received the document when it is handed to the person.

Handing to a person at last residential or business address

1038. New subsection 473HD(3) provides that if the IAA gives a document to a person by the method in subsection 473HB(4) (which involves handing the document to another person at a residential address or business address), the person is taken to have received the document when it is handed to the other person.

Dispatch by prepaid post or by other prepaid means

1039. New subsection 473HD(4) provides that if the IAA gives a document to a person by the method in subsection 473HB(5) (which involves dispatching the document by prepaid post or by other prepaid means), the person is taken to have received the document 7 working days (in the place of that address) after that date of the document.

Transmission by fax, email or other electronic means

1040. New subsection 473HD(5) provides that if the IAA gives a document to a person by the method in subsection 473HB(6) (which involves transmitting the document by fax, email or other electronic means), the person is taken to have received the document at the end of the day on which the document is transmitted.
1041. New subsection 473HD(6) provides that subsection 473HD(5) applies despite sections 14, 14A and 14B of the *Electronic Transactions Act 1999*.

Document not given effectively

1042. New subsection 473HD(7) provides if:

- the IAA purports to give a document to a person in accordance with a method specified in section 473HB (including a case covered by section 473HA) but makes an error in doing so; and
- the person nonetheless receives the document or a copy of it;

then the person is taken to have received the document at the times mentioned in this section as if the Authority had given the document to the person without making an error in doing so, unless the person can show that he or she received it at a later time, in which case, the person is taken to have received it at that time.

1043. New section 473HD provides the rules for determining the time when a person is taken to have received a document if the document was given in accordance with one of the methods in section 473HB, irrespective of whether the person has in fact received the document.
1044. The rules will apply if the IAA uses one of the methods specified in new section 473HB, even where it was not required to do so by the legislation. New subsection 473HD(6) provides that subsection 473HD(5) applies despite sections 14, 14A and 14B of the *Electronic Transactions Act 1999* (ET Act). The effect of this provision is to dis-apply the provisions of the ET Act that affect deemed receipt of documents in favour of the deemed receipt provision in 473HD(5), as this is more certain than relying on sections 14, 14A and 14B of the ET Act to determine deemed receipt. In general terms, sections 14, 14A and 14B of the ET Act provide for the time of dispatch, time of receipt and place of dispatch and place of receipt of electronically transmitted documents that are determined by reference to variable factors such as when the electronic communication leaves or enters an information system. This might never be known by the originator of the communication. There is a need in the migration context for time of receipt of documents to be easily determinable and with certainty for the purposes of establishing, for example, the date on which a person's bridging visa will

cease to be in effect following notification of a decision of the IAA. Given this, it is preferable to expressly provide for deemed receipt and not rely on the default provisions of the ET Act.

Section 473HE – When the Secretary is taken to have received a document from the Immigration Assessment Authority

1045. New subsection 473HE(1) provides that this section applies if the IAA gives a document to the Secretary by one of the methods specified in section 473HC (including in a case covered by section 473HA).

Giving by hand

1046. New subsection 473HE(2) provides that if the IAA gives a document to the Secretary by the method in subsection 473HC(2) (which involves handing the document to the Secretary or to an authorised officer), the Secretary is taken to have received the document when it is handed to the Secretary or to the authorised officer.

Dispatch by post or by other means

1047. New subsection 473HE(3) provides that if the IAA gives a document to the Secretary by the method in subsection 473HC(3) (which involves dispatching the document by post or by other means), the Secretary is taken to have received the document 7 working days (in the place of that address) after that date of the document.

Transmission by fax, email or other electronic means

1048. New subsection 473HE(4) provides that if the IAA gives a document to the Secretary by the method in subsection 473HC(4) (which involves transmitting the document by fax, email or other electronic means), the Secretary is taken to have received the document at the end of the day on which the document is transmitted.
1049. New subsection 473HE(5) provides that subsection 473HE(4) applies despite sections 14, 14A and 14B of the ET Act.
1050. The purpose of this amendment is to provide three rules for determining the time when the Secretary is taken to have received a document from the IAA. The rules will apply if the IAA uses one of the methods specified in new section 473HC, even where it is not required to do so by the legislation. The rules are the same as those for determining the time when a document is taken to have been received by a person other than the Secretary (new section 473HD), except that there is no need for a separate provision dealing with giving documents to a person at the Secretary's notified address.
1051. New subsection 473HE(5) provides that subsection 473HE(4) applies despite sections 14, 14A and 14B of the ET Act, for the same reasons noted above.

Section 473HF – Giving of documents etc. to the Immigration Assessment Authority

1052. New subsection 473HF(1) provides that if, in relation to the review of a fast track reviewable decision, a person is required or permitted to give a document or thing to the IAA, the person must do so:

- by a method set out in the directions under section 473FB; or
- if the regulations set out a method for doing so – by that method.

1053. New subsection 473HF(2) provides that directions under section 473FB may make provision for a person to give a copy of a document, rather than the document itself, to the IAA.

1054. The purpose of new section 473HF is to provide the ways in which a person must give documents to the IAA. Two methods are specified, namely:

- by following a method set out in directions that have been given under section 473FB (relating to directions given by the Principal member of the RRT); or
- if the Migration Regulations set out a method for doing so – by that method.

Section 473HG – Authorised recipient

1055. New subsection 473HG(1) provides that if:

- a fast track reviewable decision in respect of a referred applicant is referred for review; and
- the referred applicant gives the IAA written notice of the name and address of another person (the ***authorised recipient***) authorised by the referred applicant to receive documents in connection with the review;

the Authority must give the authorised recipient, instead of the referred applicant, any document that it otherwise have given to the referred applicant.

1056. The note to new subsection 473HG(1) provides that if the IAA gives a person a document by a method specified in section 473HB, the person is taken to have received the document at the time specified in section 473HD in respect of that method.

1057. The purpose of this amendment is to authorise the referred applicant to notify the IAA in writing that the referred applicant has authorised another person (the ***authorised recipient***) to receive documents in connection with the review. In these cases, the IAA must give such documents to the authorised recipient.

1058. Under this provision, the authorised recipient is only authorised to receive documents in connection with the review and not to do anything else on behalf of the referred applicant (other than update an address as provided for in new subsection 473HG(4)). For example, the authorised recipient cannot unilaterally withdraw their authorisation to receive documents on behalf of the applicant for review. It is the referred applicant who must make arrangements for this to occur.

1059. New subsection 473HG(2) provides that if the IAA gives a document to the authorised recipient, the Authority is taken to have given the document to the referred applicant. However, this does not prevent the Authority giving the referred applicant a copy of the document.

1060. The purpose of this amendment is to clarify that the IAA discharges its obligation to give a document to the applicant if it gives the document to the authorised recipient.
1061. New subsection 473HG(3) provides that subject to subsection 473HG(4), the referred applicant may vary or withdraw the notice under paragraph 473HG(1)(b) at any time, but must not (unless the regulations provide otherwise) vary the notice so that any more than one person becomes the referred applicant's authorised recipient.
1062. The purpose of this amendment is to permit the referred applicant to vary or withdraw the authorisation but prevent the referred applicant from varying the notice of authorisation given under new paragraph 473HG(1)(b) in such a way that the person has more than one authorised recipient at the same time.
1063. New subsection 473HG(4) provides that in addition to the referred applicant being able to vary the notice under paragraph 473HG(1)(b) by varying the address of the authorised recipient, that recipient may also vary that notice by varying that address.
1064. The purpose of this amendment is to ensure that an authorised recipient who is authorised in a notice to receive documents on behalf of the applicant in connection with the review is able to unilaterally vary the address given for the authorised recipient in the notice. This is to avoid the IAA being legally required to send correspondence to an outdated address merely because it was the authorised recipient, rather than the applicant, who had notified of the change in address. This amendment, in conjunction with subsection 473HG(1) (which authorises the authorised recipient to only receive documents) also have the effect of ensuring that the authorised recipient is not able to unilaterally vary or withdraw the notice of authorisation given under paragraph 473HG(1)(b) (other than to vary the authorised recipient's address). This ensures that the authorised recipient cannot abandon their role as the referred applicant's authorised recipient without the knowledge and to the detriment of the referred applicant through unilateral variation or withdrawal of the notice given under paragraph 473HG(1).
1065. New subsection 473HG(5) provides that section 473HG does not apply to the IAA giving documents to, or communicating with, the referred applicant when the referred applicant is appearing at an interview with the Authority.
1066. The purpose of this amendment is to remove a possible source of confusion by providing that new section 473HG does not apply to the giving of documents or communicating directly with the referred applicant when the referred applicant is appearing before the IAA.

Division 8 – The Immigration Assessment Authority

Section 473JA – The Immigration Assessment Authority

1067. New subsection 473JA(1) provides that the IAA is established within the RRT.
1068. New subsection 473JA(2) provides that the Authority consists of the following persons:
- the Principal Member;

- the Senior Reviewer and other Reviewers.

1069. Subsection 473JA(3) provides that the Principal Member, the Senior Reviewer and the other Reviewers are to exercise the powers, and perform the functions, of the Authority under this Part.

1070. The purpose of this amendment is to establish the IAA within the RRT and outline the persons of whom it consists.

1071. The decision to establish the IAA within an existing agency is consistent with the recommendations of the National Commission of Audit. The Audit noted that the need for independent decision making does not alone justify the establishment of a stand-alone operational body. The IAA is to have distinctive branding and quarantined powers, but to be supported within the RRT.

Section 473JB – Administrative arrangements

1072. New subsection 473JB(1) provides that the Principal Member is responsible for the overall operation and administration of the Authority and, for that purpose, may issue directions and determine policies.

1073. The purpose of this amendment is to provide that the head of the IAA is the Principal Member of the IAA and to provide him or her with certain powers.

1074. New subsection 473JB(2) provides that the Senior Review is to manage the Authority subject to the directions of, and in accordance with policies determined by, the Principal Member.

1075. The purpose of this amendment is to provide that the Senior Review is to be responsible for the day-to-day operations of the IAA, subject to the directions and policies determined by the Principal Member of the RRT.

Section 473JC – Appointment of Senior Reviewer

1076. New subsection 473JC(1) provides that the Principal Member must, by written instrument, appoint an SES employee to be the Senior Reviewer.

1077. New subsection 473JC(2) provides that before appointing a person as the Senior Reviewer, the Principal Member must consult the Minister.

1078. The purpose of this amendment is to provide the Principal Member of the RRT with the power to appoint a Senior Reviewer in consultation with the Minister. A reference to a written instrument is not intended to be an instrument made under the *Legislative Instruments Act 2003*.

1079. It is intended that the Senior Reviewer would report directly to the Principal Member. The Principal Member will only be able to appoint a Senior Reviewer if that person is engaged under the *Public Service Act 1999* which is required under subsection 473JE(1).

Section 473JD – Acting Senior Reviewer

1080. New subsection 473JD(1) provides that the Principal Member may appoint a person to act as the Senior Reviewer:

- during a vacancy in the office of Senior Reviewer, whether or not an appointment has previously been made to that office; or
- during any period, or during all periods, when the Senior Reviewer is absent from duty or from Australia or is, for any other reason, unable to perform the duties of the office of Senior Reviewer.

1081. The purpose of this provision is to provide the Principal Member of the RRT with the power to appoint an Acting Senior Reviewer.

Section 473JE – Staff

1082. New subsection 473JE(1) provides that the Senior Reviewer and the other Reviewers are to be persons engaged under the *Public Service Act 1999*.

1083. The purpose of this amendment is to clarify that Reviewers of the IAA, including the Senior Reviewer are to be persons engaged under the *Public Service Act 1999*. While the MRT and RRT comprise members who are appointed by the Governor-General under the Migration Act for fixed terms, given the limited “on the papers” review function of the IAA, it was considered appropriate for Reviewers of the IAA to be persons engaged under the *Public Service Act 1999*. This Act governs the establishment, operation and employment of Reviewers of the IAA. Accordingly, all Reviewers will be subject to the APS Values set out in section 10 of the *Public Service Act 1999*.

1084. New subsection 473JE(2) provides that the Principal Member must make available officers of the RRT to assist the Authority in the performance of its administrative functions.

1085. The purpose of this amendment is to require the Principal Member of the RRT to make corporate and support staff available for the IAA’s purposes. These persons will be made available from the existing Tribunal Office as defined by subsection 473(2).

1086. New paragraph 473A(a) as amended by item 20 above, in conjunction with paragraph 473A(b) will clarify that the Principal Member of the RRT, officers of the MRT and RRT together with the Reviewers of the IAA constitute a Statutory Agency and that the Principal Member of the Refugee Review Tribunal is the Head of that Statutory Agency. Reviewers of the IAA and the persons who are made available to the Authority under subsection 473JE(2) are to form part of the Statutory Agency known as the “MRT-RRT”.

Section 473JF – Delegation by Principal Member

1087. New subsection 473JF(1) provides that the Principal Member may delegate, in writing, all or any of the Principal Member’s powers or functions under Part 7AA to the Senior Reviewer.

1088. New subsection 473JF(2) provides that in exercising a power under a delegation, the Senior Reviewer must comply with any written directions of the Principal Member.
1089. The purpose of this amendment is to confer power on the Principal Member to delegate his or her functions under Part 7AA to the Senior Reviewer of the IAA. The Principal Member's powers under Part 7AA can only be delegated to the Senior Reviewer. This is made clear by the amendments to section 470 made by item 19 above.
1090. New section 470 provides that the Principal Member, may, by writing signed by him or her, delegate to a member all or any of the Principal Member's powers under this Act other than the power under section 443 to refer decisions to the AAT and the Principal Member's powers under Part 7AA.
1091. In exercising a power under a delegation, the Senior Reviewer is required to comply with any written directions of the Principal Member.

Item 22 Subsection 476(4) (at the end of the definition of *primary decision*)

1092. This item adds new paragraph 476(4)(c) at the end of the definition of *primary decision* in subsection 476(4) in Division 2 of Part 8 of the Migration Act.
1093. Section 476 deals with the jurisdiction of the Federal Circuit Court. Current subsection 476(4) provides that in this section, *primary decision* means a privative clause decision or purported privative clause decision:
- that is reviewable under Part 5 or 7 or section 500 (whether or not it has been reviewed); or
 - that would have been so reviewable if an application for such review had been made within a specified period.
1094. New paragraph 476(4)(c) will provide that, in this section, *primary decision* means a privative clause decision or purported privative clause decision:
- that has been, or may be, referred for review under Part 7AA (whether or not it has been reviewed).
1095. The purpose of this amendment is to capture decisions that have or may be referred for review under new Part 7AA in the definition of *primary decision*. Under subsection 476(2), the Federal Circuit Court has no jurisdiction in relation to a primary decision.

Item 23 Subsection 477(3) (after paragraph (c) of the definition of *date of the migration decision*)

1096. This item inserts new paragraph 477(3)(ca) after paragraph 477(3)(c) in Division 2 of Part 8 of the Migration Act.
1097. Section 477 deals with time limits on applications to the Federal Circuit Court. Current subsection 477(3) provides that *date of the migration decision* means:

- in the case of a migration decision made under subsection 43(1) of the *Administrative Appeals Tribunal Act 1975* – the date of the written decision under that subsection ; or
- in the case of a written migration decision made by the MRT or the RRT – the date of the written statement under subsection 368(1) or 430(1); or
- in the case of an oral migration decision made by the MRT or RRT– the date of the oral decision; or
- in any other case – the date of the written notice of the decision or, if no such notice exists, the date that the Court considers appropriate.

1098. New paragraph 477(3)(ca) provides that ***date of the migration decision*** means in the case of a migration decision made by the IAA – the date of the written statement under subsection 473EA(1).

1099. Subsection 477(1) provides that an application to the Federal Circuit Court for a remedy to be granted in exercise of the court’s original jurisdiction under section 476 in relation to a migration decision must be made to the court within 35 days of the date of the migration decision.

1100. The purpose of this amendment is to clarify that an application to the Federal Circuit Court for a remedy in respect of a fast track reviewable decision must be made 35 days after the IAA made a written statement under new subsection 473EA(2).

Item 24 Paragraphs 478(a) and 479(a)

1101. This item inserts a new paragraph (aa) after paragraph 478(a) and 479(a) of Division 2 of Part 8 of the Migration Act.

1102. Section 478 deals with persons who may make an application to the Federal Circuit Court or the Federal Court. Section 479 deals with a party to a review of a migration decision resulting from an application to the Federal Circuit Court or the Federal Court.

1103. Current paragraph 478(a) provides that an application referred to in section 477 or 477A may only be made by the Minister, or where appropriate the Secretary, and if the migration decision concerned is made on review under Part 5 or 7 or section 500 – the applicant in the review by the relevant Tribunal.

1104. Current paragraph 479(a) provides that the parties to a review of a migration decision resulting from an application referred to in section 477 or 477A are the Minister, or where appropriate the Secretary, and if the migration decision concerned is made on review under Part 5 or 7 or section 500 – the applicant in the review by the relevant tribunal.

1105. New paragraph 478(aa) provides that an application referred to in section 477 or 477A may only be made by the Minister, or where appropriate the Secretary, and if the migration decision concerned is made on review under Part 7AA – the referred applicant in the review by the IAA.

1106. New paragraph 479(aa) provides that the parties to a review of a migration decision resulting from an application referred to in section 477 or 477A are the Minister, or where appropriate the Secretary, and if the migration decision concerned is made on review under Part 7AA – the referred applicant in the review by the IAA.

1107. The purpose of this amendment is to ensure the Minister's ability, or where appropriate the secretary's, to make an application on behalf of, and be a party to, judicial review proceedings dealing with migration decisions made on review under new Part 7AA and that a party can be the referred applicant in the review.

Item 25 Subsection 486D(5) (definition of *tribunal decision*)

1108. This item repeals the definition of *tribunal decision* in subsection 486D(5) of Part 8A of the Migration Act and substitutes a new definition of *tribunal decision*.

1109. Currently the term *tribunal decision* means a privative clause decision, or purported privative clause decision, made on review by a Tribunal under Part 5 or 7 or section 500.

1110. The new definition of the term *tribunal decision* means a privative clause decision, or purported privative clause decision, made on review:

- by a Tribunal under Part 5 or 7 or section 500; or
- by the IAA under Part 7AA.

1111. The purpose of this amendment is to capture a decision made by the IAA under Part 7A in the definition of *tribunal decision*.

1112. Section 486D broadly provides that a person must not commence a proceeding in the Federal Circuit Court, Federal Court or High Court in relation to a *tribunal decision* unless the person discloses to the court, when commencing the proceeding, any judicial review proceeding brought by the person in any court in relation to that decision.

1113. The effect of this provision is that when commencing a proceeding, a person must disclose to a court, any judicial review proceedings brought by that person in relation to the *tribunal decision*, which also includes a decision by the IAA under Part 7AA.

Item 26 At the end of subsection 500(1)

1114. This item adds a note at the end of new subsection 500(1) in Part 9 of the Migration Act.

1115. The new note provides that decisions to refuse to grant a protection visa to fast track applicants are generally not reviewable by the Administrative Appeals Tribunal. However, some decisions of this kind are reviewable by that Tribunal, in the circumstances mentioned in paragraph (a), or subparagraphs (b)(i) or (iii), of the definition of *fast track decision* in subsection 5(1).

1116. The purpose of this amendment is to refer the reader to the definition of *fast track decision* and clarify that some decisions made in the circumstances mentioned in paragraph (a), or subparagraphs (b)(i) or (iii), of the definition of *fast track decision*

are reviewable by the Administrative Appeals Tribunal in accordance with section 500. These decisions are not reviewable by the IAA.

Part 2 — Application

Item 27 Application of amendments

1117. This item provides that the amendments made by Part 1 of Schedule 4 to the Bill apply in relation to an application for a protection visa made by a fast track applicant on or after the commencement of Schedule 4.

Item 28 Application of fast track review process in relation to decisions based on complementary protection

1118. Subitem 28(1) provides that a decision made, before the day Part 1 of Schedule 4 to the Bill commences, to refuse to grant a protection visa is not a fast track reviewable decision to the extent that:

- the decision was made relying on paragraph 36(2)(aa) or 36(2)(c) of the Migration Act; and
- the application for the visa is not finally determined before the day that Part 1 of Schedule 4 to the Bill commences; and
- those paragraphs are repealed before the application is finally determined.

1119. The note under subitem 28(1) provides that for when an application is finally determined, see subsection 5(9) and 5(9A) of the Migration Act.

1120. Subitem 28(2) provides that subitem 28(1) does not prevent a decision to refuse to grant a protection visa from being a fast track reviewable decision to the extent that the decision was made relying on another provision in the Migration Act.

SCHEDULE 5 – Clarifying Australia’s international law obligations

Part 1 – Removal of unlawful non-citizens

Division 1 – Amendments commencing on the day after Royal Assent

Migration Act 1958

Item 1 Subsection 5(1)

1121. This item inserts two new defined terms into subsection 5(1) of the Migration Act.

1122. The new defined term *Convention Against Torture* means the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment done at New York on 10 December 1984.

1123. The note to the new defined term *Convention Against Torture* provides that the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is in Australian Treaty Series 1989 No. 21 ([1989] ATS 21) and could in 2014 be viewed in the Australian Treaties Library on the AustLII website (<http://www.austlii.edu.au>).

1124. This definition is consequential to the insertion of the new definition of *non-refoulement obligations*.

1125. The new defined term *non-refoulement obligations* provides that the definition includes, but is not limited to:

- *non-refoulement* obligations that may arise because Australia is a party to:
 - the Refugees Convention; or
 - the *Covenant*; or
 - the *Convention Against Torture*; and
- any obligations accorded by customary international law that are of a similar kind to those mentioned in paragraph (a) of the definition of *non-refoulement obligations*.

1126. The new defined term *non-refoulement obligations* is consequential to the amendment in item 2 below. The new defined term *non-refoulement obligations* is defined in a non-exhaustive manner and is intended to be read broadly to include current and future *non-refoulement* obligations outside the Refugees Convention, the *Covenant* and the *Convention Against Torture*. For example, it is also intended to include non-refoulement obligations about the death penalty, which arise in relation to Article 6 of the *Covenant* for countries which are also a party to its *Second Optional Protocol aiming at the abolition of the death penalty*.

1127. Subsection 5(1) of the Migration Act defines *Covenant* to mean the International Covenant on Civil and Political Rights, a copy of the English text of which is set out in Schedule 2 to the *Australian Human Rights Commission Act 1986*.

Item 2 Before section 198

1128. This item inserts new section 197C before current section 198 of the Migration Act.
1129. New subsection 197C(1) provides that for the purposes of section 198, it is irrelevant whether Australia has ***non-refoulement obligations*** in respect of an unlawful non-citizen.
1130. New subsection 197C(2) provides that an officer's duty to remove as soon as reasonably practicable an unlawful non-citizen under section 198 arises irrespective of whether there has been an assessment, according to law, of Australia's ***non-refoulement obligations*** in respect of the non-citizen.
1131. In general terms, section 198 currently provides for the circumstances in which an unlawful non-citizen is subject to mandatory removal from Australia as soon as reasonably practicable.
1132. The effect of new section 197C is to make it clear that in order to exercise the removal powers under section 198 of the Migration Act an officer is not bound to consider whether or not a person who is subject to removal engages Australia's ***non-refoulement obligations*** before removing that person.
1133. In recent years judicial review of protection visa refusal decisions has led to a number of broad and unintended interpretations of Australia's protection obligations under the Refugees Convention and other international treaties. There has been a trend of jurisprudence favouring an approach whereby the provisions of the Migration Act are construed in light of a presumed legislative intention for the Migration Act as a whole to facilitate Australia's compliance with its obligations under the Refugees Convention.
1134. In *Plaintiff M61/2010E v Commonwealth of Australia & Ors/Plaintiff M69 of 2010 v Commonwealth of Australia & Ors* [2010] HCA 42, the High Court in a unanimous joint judgement said at [27]:
- ... read as a whole, the Migration Act contains an elaborate and interconnected set of statutory provisions directed to the purpose of responding to the international obligation which Australia has undertaken in the Refugees Convention and Refugees Protocol.*
1135. In *Plaintiff M70/2011 v Minister for Immigration and Citizenship* [2011] HCA 32, the majority of the High Court further found that the removal power under section 198 of the Migration Act was to be read in light of, and subject to, the obligations in the Refugees Convention. In the recent decision of *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33 the Full Court of the Federal Court found this principle was extended to the ***non-refoulement obligations*** under the ***Covenant*** and the ***Convention Against Torture***. These decisions have had a significant impact on the Government's ability to remove unlawful non-citizens from Australia under section 198 of the Migration Act.
1136. Prior to this recent jurisprudence, section 198 of the Migration Act created an obligation to remove unlawful non-citizens in the circumstances prescribed in section 198 and this duty was not constrained by reference to Australia's international

obligations (for example, the Full Court of the Federal Court decision in *M38/2002 v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 131). This was because it was understood that Australia's international obligations had already been considered during separate processes prior to removal, for example when considering the persons application for a protection visa or when the Minister was considering the use of his or her personal powers.

1137. In general terms, the amendments in this item are intended to restore the situation to that arising prior to the jurisprudence noted above by making it clear that the removal powers are separate from, unrelated and completely independent of, any provisions in the Migration Act which might be interpreted as implementing Australia's *non-refoulement* obligations.
1138. These amendments seek to provide clarity about the interpretation and implementation of Australia's *non-refoulement* obligations and to ensure that the Parliament is able to control how Australia's *non-refoulement* obligations will be implemented domestically. This amendment seeks to achieve this objective by inserting clear statutory provisions that remove any perceived connection between the removal powers in section 198 and the assessment of Australia's *non-refoulement* obligations.
1139. The amendments in this item are therefore intended to provide that decisions such as *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33 are no longer 'good law' for the purposes of removal from Australia of unlawful non-citizens under section 198 of the Migration Act.
1140. The amendments are intended to put it beyond doubt that the purpose of section 198 is not to respond to international protection obligations, but to provide officers with the duty to remove unlawful non-citizens from Australia in the circumstances as set out in section 198 of the Migration Act.
1141. This means that the duty to remove in section 198 of the Migration Act arises irrespective of whether or not there has been an assessment, according to law or procedural fairness, of Australia's *non-refoulement* obligations in respect of the non-citizen.
1142. Australia will continue to meet its *non-refoulement* obligations through other mechanisms and not through the removal powers in section 198 of the Migration Act. For example, Australia's *non-refoulement* obligations will be met through the protection visa application process or the use of the Minister's personal powers in the Migration Act, including those under sections 46A, 195A or 417 of the Migration Act.
1143. The Minister's personal power under subsection 46A(2) provides that the Minister may determine that an unauthorised maritime arrival may make a valid visa application if the Minister thinks that it is in the public interest to do so. The Minister's lifting of the visa application bar may enable *non-refoulement* obligations to be considered in an appropriate visa application process.
1144. The Minister's personal power under section 195A provides that the Minister has a non-compellable power to grant a visa to a person who is in immigration detention where the Minister thinks that it is in the public interest to do so. In the exercise of this power the Minister is not bound by the provisions of the Migration Act or Migration

Regulations governing application and grant requirements. The Minister has the flexibility to grant any visa that is appropriate to that individual's circumstances. In these circumstances, if the Minister thinks that it is in the public interest to do so, the Minister may grant a visa to a person to ensure that the person is not removed in breach of Australia's *non-refoulement* obligations.

1145. The Minister's personal power under section 417 provides that the Minister has power to substitute a decision more favourable to the applicant than the decision of the Refugee Review Tribunal in relation to a reviewable decision. In these circumstances, the Minister may, if the Minister thinks that it is in the public interest to do so, grant a visa to a person who has had a visa decision affirmed by the Tribunal to ensure the person is not removed in breach of Australia's *non-refoulement* obligations.
1146. The above mechanisms enable *non-refoulement* obligations to be addressed before a person becomes ready for removal. At the removal stage, an officer will not be bound to check whether or not the Minister has considered exercising his or her personal powers when assessing if a person is subject to removal under section 198 of the Migration Act. If an unlawful non-citizen satisfies one of the conditions specified in section 198, the officer must remove the unlawful non-citizen as soon as reasonably practicable and it is not open to the non-citizen to challenge their removal on the basis that there has been no assessment of protection obligations according to law or procedural fairness.

Division 2 – Amendments if this Act commences after the *Migration Amendment (Protection and Other Measures) Act 2014*

Item 3 Subsection 6A(4)

1147. This item repeals subsection 6A(4) and substitutes a new subsection 6A(4) into the Migration Act if this Act commences after the *Migration Amendment (Protection and Other Measures) Act 2014*.
1148. The Migration Amendment (Protection and Other Measures) Bill 2014 provides for new subsection 6A(4) to be inserted into the Migration Act. New subsection 6A(4) of the Migration Amendment (Protection and Other Measures) Bill 2014 provides that in new section 6A ***protection obligations*** means any obligations that may arise because Australia is a party to:
- the ***Covenant***; or
 - the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment done at New York on 10 December 1984.
1149. Item 1 of Division 1 of Part 1 of Schedule 5 of this Bill inserts a definition of ***Convention Against Torture*** into the Migration Act. If the amendments in the *Migration Amendment (Protection and Other Measures) Act 2014* commence before the amendments in Part 1 of Schedule 5 to the Bill, an amendment to new subsection 6A(4) of the Migration Act will be required to recognise the new definition of ***Convention Against Torture***. This item provides for this amendment.

Part 2 – Amendments commencing on Proclamation

Migration Act 1958

Item 4 Subsection 5(1)

1150. This item inserts the new defined terms *refugee* and *well-founded fear of persecution* respectively into subsection 5(1) of Part 1 of the *Migration Act 1958* (the Migration Act).
1151. The new defined term *refugee* has the meaning given by section 5H, inserted by item 7 of Schedule 5 to the Bill below.
1152. The new defined term *well-founded fear of persecution* has the meaning given by section 5J, inserted by item 7 of Schedule 5 to the Bill below.
1153. The new defined terms *refugee* and *well-founded fear of persecution* provide the basis for the new statutory framework which articulates Australia's interpretation of its protection obligations under the Refugees Convention.

Item 5 Paragraph 5A(3)(f)

1154. This item repeals current paragraph 5A(3)(f) of Part 1 of the Migration Act and substitutes new paragraph 5A(3)(f).
1155. Current paragraph 5A(3)(f) provides that a purpose of obtaining personal identifiers is to improve the procedures for determining the claims for protection under the Refugees Convention as amended by the Refugees Protocol.
1156. New paragraph 5A(3)(f) provides that a purpose of obtaining personal identifiers is to improve the procedures for determining claims from people seeking protection as refugees.
1157. This amendment replaces the reference in current paragraph 5A(3)(f) to the Refugees Convention with a reference to the definitions and criteria provided by the new statutory framework relating to refugees, inserted by Part 2 of Schedule 5 to the Bill.
1158. The purpose of this amendment is to ensure that the purpose of obtaining personal identifiers, provided in current paragraph 5A(3)(f) will apply to persons seeking protection as a *refugee* under the new statutory framework relating to refugees.

Item 6 Subparagraph 5A(3)(j)(ii)

1159. This item repeals current subparagraph 5A(3)(j)(ii) of Part 1 of the Migration Act and substitutes new subparagraph 5A(3)(j)(ii)
1160. Current subparagraph 5A(3)(j)(ii) provides that a purpose of obtaining personal identifiers is to ascertain whether an unauthorised maritime arrival who makes a claim for protection under the Refugees Convention as amended by the Refugees Protocol; or

1161. New subparagraph 5A(3)(j)(ii) provides that a purpose of obtaining personal identifiers is to ascertain whether an unauthorised maritime arrival who makes a claim for protection as a refugee; or
1162. This amendment replaces the reference in current subparagraph 5A(3)(j)(ii) to the Refugees Convention with a reference to the definitions and criteria provided by the new statutory framework relating to refugees, inserted by Part 2 of Schedule 5 to the Bill.
1163. The purpose of this amendment is to ensure that the purpose of obtaining personal identifiers for unauthorised maritime arrivals, provided in current subparagraph 5A(3)(j)(ii) will apply to persons seeking protection as a *refugee* under the new statutory framework relating to refugees.

Item 7 After section 5G

1164. This item inserts new sections 5H, 5J, 5K, 5L and 5M after section 5G in Part 1 of the Migration Act.
1165. The purpose of this item is to set out the criteria to be satisfied in order to meet the new definition of a *refugee* and the grounds which either exclude a person from meeting that definition or, where the person satisfies the definition of a refugee, renders the person ineligible for the grant of a protection visa. The new statutory framework relating to refugees provides the Government's interpretation of terms and concepts, derived from the Refugees Convention, as they apply in Australia and in the Migration Act and the regulations.
1166. New subsection 5H(1) provides that for the purposes of the application of the Migration Act and the regulations to a particular person in Australia, the person is a *refugee* if the person:
- in a case where the person has a nationality—is outside the country of his or her nationality and, owing to a well-founded fear of persecution, is unable or unwilling to avail himself or herself of the protection of that country; or
 - in a case where the person does not have a nationality—is outside the country of his or her former habitual residence and owing to a well-founded fear of persecution, is unable or unwilling to return to it.
1167. New subsection 5H(1) is intended to codify Article 1A(2) of the Refugees Convention, as interpreted in Australian case law, into Part 1 of the Migration Act. Article 1A(2), also referred to as the inclusion clause, provides the positive criteria for gaining the benefits afforded to refugees under the Refugees Convention.
1168. Consistent with Article 1A(2) of the Refugees Convention, new subsection 5H(1) is divided into two paragraphs to reflect the different criteria on the basis of the nationality status of the person. New paragraph 5H(1)(a) provides the criteria for a person with a nationality and new paragraph 5H(1)(b) provides the criteria for a person without a nationality, such as a stateless person.
1169. The note to new subsection 5H(1) provides that for the meaning of *well-founded fear of persecution*, see section 5J. The definition of *well-founded fear of persecution*

provided in new section 5J supports the definition of *refugee* in new subsection 5H(1). Read together, new subsection 5H(1) and new sections 5J, 5K and 5L are intended to codify Article 1A(2) of the Refugees Convention and provide the inclusion criteria for determining who is a refugee under the Migration Act.

1170. A person who satisfies the definition of *refugee* in new subsection 5H(1) may be eligible for the grant of a protection visa on the basis of section 36(2)(a), provided that the person is not captured by new subsection 5H(2) or any other provision in the Migration Act or the regulations that renders them ineligible for the grant of a protection visa.
1171. New subsection 5H(2) provides that subsection 5H(1) does not apply if the Minister has serious reasons for considering that:
- the person has committed a crime against peace, a war crime or a crime against humanity, as defined by international instruments prescribed by the regulations; or
 - the person committed a serious non-political crime before entering Australia; or
 - the person has been guilty of acts contrary to the purposes and principles of the United Nations.
1172. New subsection 5H(2) is intended to codify Article 1F of the Refugees Convention into Part 1 of the Migration Act for the purposes of the statutory definition of a *refugee*. Article 1F, also referred to as an exclusion clause, indicates circumstances where a refugee is not to gain benefits that would otherwise be afforded under the Refugees Convention.
1173. New paragraphs 5H(2)(a), 5H(2)(b) and 5H(2)(c) codify Articles 1F(a), 1F(b) and 1F(c) of the Refugees Convention respectively. Consistent with the Refugees Convention, the threshold for a person to satisfy the paragraphs in new subsection 5H(2) is that the Minister has serious reasons for considering the person is captured by the subsection. ‘Serious reasons for considering’ is not intended to be equated with a level of satisfaction ‘beyond reasonable doubt’ or ‘on the balance of probabilities’ but requires strong evidence. New subsection 5H(2) is intended to be interpreted consistently with the existing Australian case law in regards to Article 1F of the Refugees Convention.
1174. A person who is captured by new subsection 5H(2) of the Act will not satisfy the definition of a *refugee* for the purposes of the new statutory framework relating to refugees. This will be the case, irrespective of whether the person satisfies the criteria in new subsection 5H(1).
1175. A person who does not satisfy the criteria for a *refugee* in new subsection 5H(1) will not be eligible for the grant of a protection visa on the basis of section 36(2)(a).
1176. New subsection 5J(1) provides that for the purposes of the application of the Migration Act and the regulations to a particular person in Australia, the person has a *well-founded fear of persecution* if:
- the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion and
 - there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph (a); and

- the real chance of persecution relates to all areas of a receiving country.
1177. This subsection provides the circumstances that must be satisfied for a person to be found to have a ***well-founded fear of persecution***, which is an element of the definition of *refugee*, inserted in new section 5H.
1178. New paragraph 5J(1)(a) provides that a necessary element of the ***well-founded fear of persecution*** is that the person fears being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion. This paragraph codifies the reasons for protection as a *refugee* provided in Article 1A(2) of the Refugees Convention.
1179. New paragraph 5J(1)(b) provides that a necessary element of the ***well-founded fear of persecution*** is that there is a real chance that, if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned in paragraph 5J(1)(a).
1180. New paragraph 5J(1)(b) clarifies that the risk threshold for assessing Australia's obligations in respect of a *refugee* under new section 5H is that there is a real chance of persecution for one or more of the reasons listed in paragraph 5J(1)(a) if the person returned to the receiving country. This is in line with the High Court's decision in *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* [1989] HCA 62 where it was held that the fear of persecution is well-founded, if there is a real chance that the person will be persecuted if he or she returns to the receiving country. This is the same threshold that is currently being applied by decision makers in assessing claims under the Refugees Convention.
1181. New paragraph 5J(1)(c) provides that a necessary element of the ***well-founded fear of persecution*** is that the real chance of persecution relates to all areas of a receiving country. This amendment codifies the 'internal relocation' principle which provides that the fear of persecution is not well-founded in respect of the receiving country if it only relates to some parts of the country. In such cases, the person who could relocate to a safe part of the receiving country upon return would be found not to have a ***well-founded fear of persecution*** for the purposes of the new statutory framework relating to refugees. In considering whether a person can relocate to another area, a decision maker will still be required to take into account whether the person can safely and legally access the area upon returning to the receiving country
1182. Although the 'internal relocation' principle is not explicitly provided for in the Refugees Convention, in the decision of *SZATV v Minister for Immigration and Citizenship* (2007) 233 CLR 18 (*SZATV*), the High Court has held that the text of the Refugees Convention supports the internal relocation principle and is part of Australian law. The High Court has further found that if it is reasonable for an asylum seeker to relocate to another part of their country of nationality, then their fear of persecution is not well-founded and they will not meet the definition of a refugee in the Refugees Convention. Australia has applied the 'internal relocation' principle consistent with this interpretation.
1183. While the Government will continue to adopt the internal relocation principle in the new statutory framework relating to refugees, it is the Government's intention that the

principle will no longer encompass the consideration of whether the relocation is 'reasonable' in light of the individual circumstances of the person. The Government considers that in interpreting the 'reasonableness' element into the internal relocation principle, Australian case law has broadened the scope of the principle to take into account the practical realities of relocation. For example, as a result of cases such as *SZATV* and *Randhawa v MILGEA* (1994) 52 FCR 437, when assessing internal relocation options, decision makers are now required to consider aspects such as a potential diminishment in quality of life or financial hardship which may result from the relocation. As such aspects fall short of the type of harm which amounts to persecution, the Government considers these to be irrelevant to the assessment of a ***well-founded fear of persecution***. For these reasons, it is the Government's intention that new paragraph 5J(1)(c) not be read down by reference to such notions of 'reasonableness'.

1184. The note to new subsection 5J(1) provides that for membership of a particular social group, see sections 5K and 5L. Read together, new sections 5K and 5L provide the definition for particular social group for the purposes of new paragraph 5J(1)(a). New section 5K and 5L are inserted by this item and are explained below.
1185. New subsection 5J(2) provides that a person does not have a ***well-founded fear of persecution*** if either or both of the following are available to the person in a receiving country:
 - an appropriate criminal law, a reasonably effective police force and an impartial judicial system provided by the relevant State;
 - adequate and effective protection measures provided by a source other than the relevant State.
1186. New subsection 5J(2) codifies the principle of 'effective State protection' which provides the standard of effective State or non-State protection within the receiving country that is required in order to make a determination of whether a person has a ***well-founded fear of persecution*** in that country. New paragraphs 5J(2)(a) and 5J(2)(b) clarify that for the purposes of new subsection 5J(2), protection may be afforded by States or non-State actors.
1187. In cases where the person could avoid the risk of persecution by availing himself or herself of protection from a State or non-State actor, the person would be found not to have a ***well-founded fear of persecution***. The principle would not apply where protection was available from the State or non-State actor in the receiving country but the person is unable or unwilling to seek that protection because of a ***well-founded fear of persecution***.
1188. It is the Government's intention to codify the 'effective State protection' principle consistent with current case law. In *Minister for Immigration and Multicultural Affairs v S152/2003* (2004) 222 CLR the High Court held that the relevant standard of State protection required under the Refugees Convention is one of "reasonable protection". The High Court further held that reasonable protection requires no more than that the State take reasonable measures to protect the lives and safety of their citizens, and those measures would include an "appropriate criminal law, a reasonably effective and impartial police force and judicial system". This interpretation of effective protection measures provided by a State is codified in new paragraph 5J(2)(a).

1189. New paragraph 5J(2)(b) provides that a person does not have a ***well-founded fear of persecution*** where adequate and effective protection measures are provided by a source other than the relevant State. This paragraph is consistent with relevant case law on effective State protection provided in the receiving country from non-State actors. In *Siaw v Minister for Immigration and Multicultural Affairs* [2001] FCA 953, it was reasoned that there was no difference between cases where adequate protection was provided by:

- government forces alone; or
- a combination of government forces and friendly forces; or
- forces from a neighbouring country or ally; or
- mercenaries (alone or paid to assist government forces); or
- UN forces invited to assist government forces.

New paragraph 5J(2)(b) is intended to be read consistently with this reasoning.

1190. New subsection 5J(3) provides that a person does not have a ***well-founded fear of persecution*** if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country, other than a modification that would:

- conflict with a characteristic that is fundamental to the person's identity or conscience; or
- conceal an innate or immutable characteristic of the person.

1191. The effect of new subsection 5J(3) is that a person who could avoid a real chance of persecution by taking reasonable steps to modify his or her behaviour, would be found not to have a ***well-founded fear of persecution***. This is provided that the modification of behaviour required to avoid the persecution does not conflict with a characteristic that is fundamental to the person's identity or conscience or conceal an innate or immutable characteristic of the person. The reference in new paragraph 5J(3)(a) to "conscience" is intended to encompass aspects such as religion, political opinion and moral beliefs. A modification in behaviour which is contrary to any aspect of 'conscience' will not necessarily indicate that the person could not take reasonable steps to avoid a real chance of persecution. Only a modification of behaviour that is fundamental to the person's conscience will be relevant for the purposes of new paragraph 5J(3)(a).

1192. For example, a person who faces persecution only for evangelising in public about his or her religion might be found not to have a ***well-founded fear of persecution*** because he or she could avoid the persecution by not continuing to evangelise. However, despite new subsection 5J(3), the same person would be assessed as having a ***well-founded fear of persecution*** if evangelism was a fundamental part of the person's religion and therefore fundamental to their conscience.

1193. The reference in new paragraph 5J(3)(b) to an "innate" characteristic is intended to include inborn characteristics, which could be genetic. Innate characteristics could include aspects such as the colour of a person's skin, a disability that a person is born with or a person's gender. The reference in new paragraph 5J(3)(b) to an "immutable" characteristic is intended to encompass a shared common background that cannot be changed. This could be an attribute which the person has acquired at some stage of his

or her life such as the health status of being HIV positive, or a certain experience such as being a child soldier, sex worker or victim of human trafficking. For example, a person who faces persecution only for their history as a prostitute could not avoid that persecution by ceasing prostitution work in the future. New subsection 5J(3) would therefore not preclude a finding of a ***well-founded fear of persecution*** in respect of such a person.

1194. In *Appellant S395/2002 v Minister for Immigration and Multicultural Affairs* [2003] HCA 71 (S395), the High Court held that an assessment under the Refugees Convention does not extend to what a person could or should do if they were returned to their country of origin, but what they would do. New subsection 5J(3) is intended to clarify that any assessment of whether a person has a ***well-founded fear of persecution*** is to take into account not only what a person would do to avoid a real chance of persecution upon returning to a receiving country, but also what reasonable steps they could objectively take to avoid the persecution. As new subsection 5J(3) imports a consideration of “reasonable steps” and is qualified by new paragraphs 5J(3)(a) and 5J(3)(b), the Government considers that new subsection 5J(3) is not inconsistent with the principles enunciated by the majority in the High Court’s finding in S395.
1195. New subsection 5J(4) provides that if a person fears persecution for one or more of the reasons mentioned in paragraph 5J(1)(a):
- that reason must be the essential and significant reason, or those reasons must be the essential and significant reasons, for the persecution; and
 - the persecution must involve serious harm to the person; and
 - the persecution must involve systematic and discriminatory conduct.
1196. This amendment, together with item 12 of Schedule 5 to the Bill below, moves current subsection 91R(1), which provides part of the definition of persecution, to new subsection 5J(4) in Part 1 of the Migration Act.
1197. Current subsection 91R(1) provides that for the purposes of the application of the Migration Act and the regulations to a particular person, Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol does not apply in relation to persecution for one or more of the reasons mentioned in that Article unless:
- that reason is the essential and significant reason, or those reasons are the essential and significant reasons, for the persecution; and
 - the persecution involves serious harm to the person; and
 - the persecution involves systematic and discriminatory conduct.
1198. It is intended that the requirements in current subsection 91R(1) form part of the new statutory framework relating to refugees and, more specifically, part of the definition of ***well-founded fear of persecution*** in new section 5J. This amendment is therefore not intended to change the meaning of current subsection 91R(1). Any difference in text between current subsection 91R(1) and new subsection 5J(4) is to ensure the new provision does not contain grammatical error in the new statutory framework and to remove references to the Refugees Convention – consistent with Part 2 of Schedule 5 to the Bill.
1199. This amendment makes clear that the definition of persecution forms part of the definition of ***well-founded fear of persecution*** in new section 5J and the new statutory

framework relating to refugees.

1200. New subsection 5J(5) provides that without limiting what is serious harm for the purposes of paragraph 5J(4)(b), the following are instances of *serious harm* for the purposes of that paragraph:
- a threat to the person's life or liberty;
 - significant physical harassment of the person;
 - significant physical ill-treatment of the person;
 - significant economic hardship that threatens the person's capacity to subsist;
 - denial of access to basic services, where the denial threatens the person's capacity to subsist;
 - denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.
1201. This amendment, together with item 12 of Schedule 5 to the Bill below, moves current subsection 91R(2), which provides part of the definition of persecution, to new subsection 5J(5) in Part 1 of the Migration Act.
1202. Current subsection 91R(2) provides that without limiting what is serious harm for the purposes of paragraph 91R(1)(b), the following are instances of *serious harm* for the purposes of that paragraph:
- a threat to the person's life or liberty;
 - significant physical harassment of the person;
 - significant physical ill-treatment of the person;
 - significant economic hardship that threatens the person's capacity to subsist;
 - denial of access to basic services, where the denial threatens the person's capacity to subsist;
 - denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist.
1203. It is intended that the requirements in current subsection 91R(2) form part of the new statutory framework relating to refugees and, more specifically, part of the definition of *well-founded fear of persecution* in new section 5J. This amendment is therefore not intended to change the meaning of current subsection 91R(2). Any difference in text between current subsection 91R(2) and new subsection 5J(5) is to ensure the new provision does not contain grammatical error in the new statutory framework.
1204. This amendment makes clear that the definition of persecution forms part of the definition of *well-founded fear of persecution* in new section 5J and the new statutory framework relating to refugees.
1205. New subsection 5J(6) provides that in determining whether the person has a *well-founded fear of persecution* for one or more of the reasons mentioned in paragraph 5J(1)(a), any conduct engaged in by the person in Australia is to be disregarded unless the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee.

1206. This amendment, together with item 12 of Schedule 5 to the Bill below, moves current subsection 91R(3), which provides part of the definition of persecution, to new subsection 5J(6) in Part 1 of the Migration Act.

1207. Current subsection 91R(3) provides that for the purposes of the application of the Migration Act and the regulations to a particular person:

- in determining whether the person has a well-founded fear of being persecuted for one or more of the reasons mentioned in Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol;

disregard any conduct engaged in by the person in Australia unless:

- the person satisfies the Minister that the person engaged in the conduct otherwise than for the purpose of strengthening the person's claim to be a refugee within the meaning of the Refugees Convention as amended by the Refugees Protocol.

1208. It is intended that the requirements in current subsection 91R(3) form part of the new statutory framework relating to refugees and, more specifically, part of the definition of ***well-founded fear of persecution*** in new section 5J. This amendment is therefore not intended to change the meaning of current subsection 91R(3). Any difference in text between current subsection 91R(3) and new subsection 5J(6) is to ensure the new provision does not contain grammatical error in the new statutory framework and to remove references to the Refugees Convention – consistent with Part 2 of Schedule 5 to the Bill.

1209. This amendment makes clear that the definition of persecution forms part of the definition of ***well-founded fear of persecution*** in new section 5J and the new statutory framework relating to refugees.

1210. New section 5K provides that for the purposes of the application of the Migration Act and the regulations to a particular person (the ***first person***), in determining whether the first person has a well-founded fear of persecution for the reason of membership of a particular social group that consists of the first person's family:

- disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in paragraph 5J(1)(a) and
- disregard any fear of persecution, or any persecution, that:
 - the first person has ever experienced; or
 - any other member or former member (whether alive or dead) of the family has ever experienced;

where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph 5J(a) had never existed.

1211. This amendment, together with item 12 of Schedule 5 to the Bill below, moves current section 91S, which provides additional considerations in assessing the ***well-founded fear of persecution*** of a person for reason of membership of a particular social group that consists of the person's family, to new section 5K in Part 1 of the Migration Act.

1212. Current section 91S provides that for the purposes of the application of the Migration Act and the regulations to a particular person (the **first person**), in determining whether the first person has a well-founded fear of being persecuted for the reason of membership of a particular social group that consists of the first person's family:

- disregard any fear of persecution, or any persecution, that any other member or former member (whether alive or dead) of the family has ever experienced, where the reason for the fear or persecution is not a reason mentioned in Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol; and
- disregard any fear of persecution, or any persecution, that:
 - the first person has ever experienced; or
 - any other member or former member (whether alive or dead) of the family has ever experienced;

where it is reasonable to conclude that the fear or persecution would not exist if it were assumed that the fear or persecution mentioned in paragraph 5J(a) had never existed.

1213. It is intended that the requirements in current section 91S form part of the new statutory framework relating to refugees. This amendment is therefore not intended to change the meaning of current section 91S. Any changes in text between current section 91S and new section 5K are to ensure the new provision does not contain grammatical error in the new statutory framework and to remove references to the Refugees Convention – consistent with Part 2 of Schedule 5 to the Bill.

1214. This amendment makes clear that additional considerations relevant to assessing the **well-founded fear of persecution** of a person for reason of membership of a particular social group that consists of the person's family apply in the new statutory framework relating to refugees.

1215. The note to new section 5K provides that section 5G may be relevant for determining family relationships for the purposes of this section. Section 5G provides a non-exhaustive list of relationships which are recognised in the Act to indicate members of a person's family or relatives of the person. The Government recognises that the family is the natural and fundamental group unit of society and acknowledges that the family unit forms a particular social group.

1216. New section 5L seeks to clarify and limit the definition of **membership of a particular social group** which is one of the grounds for a **well-founded fear of persecution** set out in new paragraph 5J(1)(a). . New section 5L is intended to provide additional legislative guidance to decision makers to determine what constitutes a particular social group other than the person's family. The new section applies the test formulated by the High Court in the case of *Applicant S v Minister for Immigration and Multicultural Affairs*[2004] HCA 25 (*Applicant S*): "First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly, the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly, the possession of that characteristic or attribute must distinguish the group from society at large. Borrowing the language of Dawson J in *Applicant A* ... a group that fulfills the first two propositions, but not the third, is merely a 'social group' and not a 'particular social group'." Australia's current application of the Refugees Convention with respect to the Convention reason of

membership of a particular social group is consistent with the High Court's reasoning in *Applicant S*.

1217. The current approach, combined with minimal legislative guidance on what constitutes a particular social group, has resulted in a broad interpretation of the term being taken by the High Court in *Applicant S*. This has resulted in an interpretation of the term 'particular social group' that is broad and complex for decision makers to apply consistently. For this reason, new section 5L also incorporates an additional requirement for 'membership of a particular social group' that the defining characteristic of the particular social group must be a characteristic that is either innate or immutable or so fundamental to the member's identity or conscience, the member should not be forced to renounce it. This is provided in new paragraph 5L(1)(b) inserted by this item and explained below. New section 5L is intended to reduce the incentive and capacity for applicants to advance extensive lists of possible particular social groups which are broader than the Government's understanding of the term. The additional consideration provided in new paragraph 5L(1)(b) draws from the approach taken in other jurisdictions including Canada, the United States of America, New Zealand and the European Union.
1218. New subsection 5L(1) provides that for the purposes of the application of the Migration Act and the regulations to a particular person, the person is to be treated as a member of a particular social group (other than the person's family) if:
- a characteristic is shared by each member of the group; and
 - either
 - the characteristic is an innate or immutable characteristic; or
 - the characteristic is so fundamental to a member's identity or conscience, the member should not be forced to renounce it; and
 - the person shares, or is perceived as sharing, the characteristic; and
 - the characteristic distinguishes the group from society.
1219. The reference to a characteristic that is "shared by each member of the group" in new paragraph 5L(1)(a) intends to codify the requirement from the High Court's decision in *Applicant S* of a "characteristic or attribute common to all members of the group".
1220. New paragraph 5L(1)(b) provides as a requirement for 'membership of a particular social group' that the defining characteristic of the particular social group must be either innate or immutable or so fundamental to the member's identity or conscience, the member should not be forced to renounce it. The reference in new subparagraph 5L(1)(b)(i) to an "innate" characteristic is intended to include inborn characteristics, which could be genetic. Innate characteristics include aspects such as the colour of a person's skin, a disability that a person is born with or a person's gender. The reference in new paragraph 5L(1)(b)(i) to an "immutable" characteristic is intended to encompass attributes of the person which are not capable of change. This could be an attribute which the person has acquired at some stage of his or her life such as the health status of being HIV positive, or a certain experience such as being a child soldier, sex worker or victim of human trafficking.
1221. New paragraph 5L(1)(c) provides as a requirement for 'membership of a particular social group' that the person shares, or is perceived as sharing, the characteristic. The purpose of this paragraph is to ensure that the person either possesses or could be

imputed with the relevant characteristic required to be a member of the particular social group. This is consistent with Australia's current application of the Refugees Convention with respect to assessing whether a Convention reason of race, religion, nationality, membership of a particular social group or political opinion is engaged. In this respect, the Government's position is that a Convention reason may be imputed rather than actual if the persecutor is motivated by a belief that a person possesses an attribute relevant to a Convention reason – even when in reality the person does not possess that attribute.

1222. New paragraph 5L(1)(d) provides as a requirement for 'membership of a particular social group' that the characteristic distinguishes the group from society. This paragraph intends to codify the requirement articulated in the High Court's decision in *Applicant S* that the relevant characteristic or attribute must distinguish the group from society at large. As a result, a group will not be a particular social group, for the purposes of the new statutory framework relating to refugees if it is not capable of being perceived or recognised in social terms.
1223. New subsection 5L(2) provides that for the purposes of subparagraph 5L(1)(b)(i), a well-founded fear of persecution is taken not to be an innate or immutable characteristic. This subsection intends to codify the requirement articulated in the High Court's decision in *Applicant S* that the characteristic or attribute common to all members of the group cannot be the shared fear of persecution.
1224. The note to new section 5L provides that for the meaning of ***well-founded fear of persecution***, see section 5J. New section 5J is inserted by this item and is explained above.
1225. New section 5M provides that for the purposes of the application of the Migration Act and the regulations to a particular person, paragraph 36(1C)(b) has effect as if a reference in that paragraph to a particularly serious crime included a reference to a crime that consists of the commission of:
 - a serious Australian offence; or
 - a serious foreign offence.
1226. This amendment, together with item 12 of Schedule 5 to the Bill below, moves current section 91U, which provides the meaning of ***particularly serious crime***, to new section 5M in Part 1 of the Migration Act.
1227. Current section 91U provides that for the purposes of the application of the Migration Act and the regulations to a particular person, Article 33(2) of the Refugees Convention as amended by the Refugees Protocol has effect as if a reference in that Article to a particularly serious crime included a reference to a crime that consists of the commission of:
 - a serious Australian offence; or
 - a serious foreign offence.
1228. It is intended that the requirements in current section 91U form part of the new statutory framework relating to refugees. This amendment is therefore not intended to change the meaning of current section 91U. Any difference in text between current section 91U and new section 5M is to ensure the new provision does not contain

grammatical error in the new statutory framework and to remove references to the Refugees Convention – consistent with Part 2 of Schedule 5 to the Bill.

1229. This amendment makes clear that the meaning of *particularly serious crime* applies in the new statutory framework relating to refugees.

Item 8 Paragraph 36(1A)(a)

1230. This item repeals current paragraph 36(1A)(a) and substitutes new paragraph 36(1A)(a) in Division 3 of Part 2 of the Migration Act.

1231. Current paragraph 36(1A)(a) provides that an applicant for a protection visa must satisfy the criterion in subsection 36(1B).

1232. New paragraph 36(1A)(a) provides that an applicant for a protection visa must satisfy both of the criteria in subsections 36(1B) and 36(1C).

1233. The purpose of this amendment is to give effect to new subsection 36(1C) as a criterion for the grant of a protection visa. New subsection 36(1C) is explained in item 9 of Schedule 5 to the Bill below.

Item 9 After subsection 36(1B)

1234. This item inserts new subsection 36(1C). New subsection 36(1C) provides that a criterion for a protection visa is that the applicant is not a person whom the Minister considers, on reasonable grounds:

- is a danger to Australia's security; or
- having been convicted by a final judgment of a particularly serious crime, is a danger to the Australian community.

1235. New subsection 36(1C) is therefore a criterion that excludes a *refugee* from the grant of a protection visa.

1236. New subsection 36(1C) is intended to codify Article 33(2) of the Refugees Convention which provides for an exception to the principle of *non-refoulement* in Article 33(1) of the Refugees Convention. As such, a person who is captured by new subsection 36(1C) will not engage Australia's *non-refoulement* obligations under the Refugees Convention or for the purposes of the new statutory framework relating to refugees.

1237. A person who is captured by new subsection 36(1C) will not be eligible for the grant of a protection visa.

1238. The note to new subsection 36(1C) provides that for paragraph 36(1C)(b), see section 5M.

1239. New section 5M which provides a definition of 'particularly serious crime' for the purposes of new paragraph 36(1C)(b) is explained in item 7 of Schedule 5 to the Bill above.

Item 10 Paragraph 36(2)(a)

1240. This item omits “under the Refugees Convention as amended by the Refugees Protocol” and substitutes “because the person is a refugee” in paragraph 36(2)(a) of Subdivision A of Division 3 of Part 2 of the Migration Act.
1241. Current paragraph 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol.
1242. New paragraph 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations because the person is a refugee.
1243. The purpose of this amendment is to replace the reference to the Refugees Convention in current paragraph 36(2)(a) with a reference to the new statutory framework relating to refugees. Provided that a person is not otherwise prevented from being granted a protection visa, a person who satisfies the definition of a *refugee* provided in the new statutory framework will be eligible for a protection visa under paragraph 36(2)(a).

Item 11 Subsection 48A(2) (after paragraph (aa) of the definition of *application for a protection visa*)

1244. This item inserts new paragraph 48A(2)(aaa) in Division 3 of Part 2 of the Migration Act. New paragraph 48A(2)(aaa) provides that in this section, *application for a protection visa* includes:
- an application for a visa, a criterion for which is that the applicant is a non-citizen who is a refugee; or
1245. The purpose of this amendment is to ensure that the application bar in current subsection 48A will apply in respect of a person who has been refused the grant of a protection visa on the basis of protection as a *refugee* for the purposes of new section 5H.
1246. This item does not repeal current paragraph 48A(2)(b). Current paragraph 48A(2)(b) provides that in this section, *application for a protection visa* includes:
- an application for a decision that a non-citizen is a refugee under the Refugees Convention as amended by the Refugees Protocol; and
1247. The new statutory framework relating to refugees will mean that a person will not be able to apply for protection as a refugee directly under the Refugees Convention, as described in current paragraph 48A(2)(b). However, current paragraph 48A(2)(b) will be retained to ensure that a person is barred from making a further application for a protection visa, for the purposes of section 48A, if the person previously made an application for a protection visa as defined in current paragraph 48A(2)(b) and was refused the grant of the protection visa.

1248. The retention of current paragraph 48A(2)(b) is therefore to capture a historical cohort of people who would be prevented from making a further application for a protection visa for the purposes of section 48A.

Item 12 Sections 91R to 91U

1249. This item repeals current sections 91R to 91U of Subdivision AL of Part 2 of Division 3 of the Migration Act.
1250. This item, together with item 4 of Schedule 5 to the Bill above, has the effect of moving current sections 91R to 91U to Part 1 of the Migration Act and co-locating them with other provisions in the new statutory framework relating to refugees.
1251. Each of the sections repealed in this item are inserted in Subdivision AL of Part 2 of Division 3 of the Migration Act. The amendment to and insertion of the sections in this item is explained in item 7 of Schedule 5 to the Bill above.

Item 13 Subsection 228B(2)

1252. This item omits all the words after “the non-citizen” and substitutes “because the non-citizen is or may be a refugee, or for any other reason” in subsection 228B(2) of Subdivision A of Division 12 under Part 2 of the Migration Act.
1253. Current subsection 228B(2) provides that to avoid doubt, a reference in subsection 228B(1) to a non-citizen includes a reference to a non-citizen seeking protection or asylum (however described), whether or not Australia has, or may have, protection obligations in respect of the non-citizen:
- under the Refugees Convention as amended by the Refugees Protocol; or
 - for any other reason.
1254. New subsection 228B(2) provides that to avoid doubt, a reference in subsection 228B(1) to a non-citizen includes a reference to a non-citizen seeking protection or asylum (however described), whether or not Australia has, or may have, protection obligations in respect of the non-citizen because the non-citizen is or may be a refugee, or for any other reason.
1255. This amendment replaces the reference in current subsection 228B(2) to the Refugees Convention with a reference to the definitions and criteria provided by the new statutory framework relating to refugees, inserted by Part 2 of Schedule 5 to the Bill.
1256. The purpose of this amendment is to ensure that the circumstances in which a non-citizen has no lawful right to come to Australia, for the purposes of section 228B, will apply to persons seeking protection as a *refugee* under the new statutory framework relating to refugees.

Item 14 Subparagraphs 336F(3)(a)(ii), (4)(a)(ii) and (5)(c)(i)

1257. This item omits “under the Refugees Convention as amended by the Refugees Protocol” in subparagraphs 336F(3)(a)(ii), 336F(4)(a)(ii) and 336F(5)(c)(i) of Division 3 of Part 4A of the Migration Act and substitutes the words “as a refugee”.

1258. Current subparagraph 336F(3)(a)(ii) provides that a disclosure is taken not to be authorised under this section if:

- the person to whom the identifying information relates is:
 - an *unauthorised maritime arrival* who makes a claim for protection under the Refugees Convention as amended by the Refugees Protocol; or

1259. New subparagraph 336F(3)(a)(ii) provides that a disclosure is taken not to be authorised under this section if:

- the person to whom the identifying information relates is:
 - an *unauthorised maritime arrival* who makes a claim for protection as a refugee; or

1260. This amendment replaces the reference in current subparagraph 336F(3)(a)(ii) to the Refugees Convention with a reference to the definitions and criteria provided by the new statutory framework relating to refugees, inserted by Part 2 of Schedule 5 to the Bill.

1261. Current subparagraph 336F(4)(a)(ii) provides that a disclosure is taken not to be authorised under this section if:

- the person to whom the identifying information relates is:
 - an *unauthorised maritime arrival* who makes a claim for protection under the Refugees Convention as amended by the Refugees Protocol; or

1262. New subparagraph 336F(4)(a)(ii) provides that a disclosure is taken not to be authorised under this section if:

- the person to whom the identifying information relates is:
 - an *unauthorised maritime arrival* who makes a claim for protection as a refugee; or

1263. This amendment replaces the reference in current subparagraph 336F(4)(a)(ii) to the Refugees Convention with a reference to the definitions and criteria provided by the new statutory framework relating to refugees, inserted by Part 2 of Schedule 5 to the Bill.

1264. Current subparagraph 336F(5)(c)(i) provides that however, if:

- the person is an *unauthorised maritime arrival*:
 - who makes a claim for protection under the Refugees Convention as amended by the Refugees Protocol; and

1265. New subparagraph 336F(5)(c)(i) provides that however, if:

- the person is an *unauthorised maritime arrival*:
 - who makes a claim for protection as a refugee; and

1266. This amendment replaces the reference in current subparagraph 336F(5)(c)(i) to the Refugees Convention with a reference to the definitions and criteria provided by the new statutory framework relating to refugees, inserted by Part 2 of Schedule 5 to the Bill.

1267. The amendments made by this item are intended to ensure that the current rules regarding the disclosure of identifying information to foreign countries, for the purposes of section 336F, will continue to apply to unauthorised maritime arrivals seeking protection as a *refugee* under the new statutory framework relating to refugees.

Item 15 Subparagraph 336F(5)(c)(ii)

1268. This item omits “under the Refugees Convention as amended by the Refugees Protocol” in subparagraph 336F(5)(c)(ii) of Division 3 of Part 4A of the Migration Act.

1269. Current subparagraph 336F(5)(c)(ii) provides that however, if:

- the person is an unauthorised maritime arrival:
 - who, following assessment of his or her claim, is found not to be a person in respect of whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or

1270. New subparagraph 336F(5)(c)(ii) provides that however, if:

- the person is an unauthorised maritime arrival:
 - who, following assessment of his or her claim, is found not to be a person in respect of whom Australia has protection obligations; or

1271. This amendment removes the reference in current subparagraph 336F(5)(c)(ii) to the Refugees Convention, consistent with Part 2 of Schedule 5 to the Bill. This reference to the Refugees Convention is not replaced with a reference to the new statutory framework relating to refugees, however, an unauthorised maritime arrival seeking protection under that framework will be covered by this subparagraph. An unauthorised maritime arrival seeking protection under complementary protection, as provided for in subsection 36(2)(aa) will be captured, in this respect, by subparagraph 336F(5)(ca)(ii).

1272. Upon commencement of this Schedule, a person can only engage Australia’s protection obligations, for the purposes of new section 5H as a *refugee*, or under complementary protection. The reference in new subparagraph 336F(5)(c)(ii) is, for this reason, a reference to protection obligations as a *refugee* for the purposes of the new statutory framework relating to refugees.

1273. The purpose of this amendment is to ensure that the current rules regarding the disclosure of identifying information to foreign countries for the purposes of current section 336F of Division 3 of Part 4A of the Migration Act, will continue to apply to unauthorised maritime arrivals seeking protection as a *refugee* under the new statutory framework relating to refugees.

Item 16 Subparagraph 502(1)(a)(iii)

1274. This item repeals current subparagraph 502(1)(a)(iii) and substitutes new subparagraph 502(1)(a)(iii) in Part 9 of the Migration Act.

1275. Current subparagraph 502(1)(a)(iii) provides that if the Minister, acting personally, intends to make a decision:

- to refuse to grant a protection visa, or to cancel a protection visa, relying on one or more of the following Articles of the Refugees Convention, namely, Article 1F, 32, or 33(2);

1276. New subparagraph 502(1)(a)(iii) provides that if the Minister, acting personally, intends to make a decision:

- to refuse under section 65 to grant a protection visa, relying on subsection 5H(2) or 36(1C);

1277. This amendment replaces the reference in current subparagraph 502(1)(a)(iii) to the Refugees Convention with a reference to the definitions and criteria provided by the new statutory framework relating to refugees, more specifically to new subsections 5H(2) and 36(1C), inserted by items 7 and 9 of Part 2 of Schedule 5 to the Bill.

1278. The purpose of this amendment is to ensure that the circumstances in which the Minister may decide in the national interest that certain persons are to be excluded persons for the purposes of current section 502 in Part 9 of the Migration Act will continue to apply to persons seeking protection as a *refugee* under the new statutory framework relating to refugees.

1279. This item also makes amendments to make the new subparagraph consistent with the equivalent amendments in the Migration Amendment (Character and General Visa Cancellation) Bill 2014. In this respect, this item inserts a reference to current section 65 to clarify the authority of the exercise of the power under this subparagraph and removes the reference to the cancellation of a protection visa.

Item 17 Paragraph 503(1)(c)

1280. This item repeals current paragraph 503(1)(c) and substitutes new paragraph 503(1)(c) in Part 9 of the Migration Act.

1281. Current paragraph 503(1)(c) provides that a person in relation to whom a decision has been made:

- to refuse to grant a protection visa, or to cancel a protection visa, relying on one or more of the following Articles of the Refugees Convention, namely, Articles 1F, 32 or 33(2);

1282. New paragraph 503(1)(c) provides that a person in relation to whom a decision has been made:

- to refuse under section 65 to grant a protection visa relying on subsection 5H(2) or 36(1C);

1283. This amendment replaces the reference in current paragraph 503(1)(c) to the Refugees Convention with a reference to the definitions and criteria provided by the new statutory framework relating to refugees, more specifically to new subsections 5H(2) and 36(1C), inserted by items 7 and 9 of Part 2 of Schedule 5 to the Bill.

1284. The purpose of this amendment is to ensure that the circumstances under which certain persons are excluded from Australia for the purposes of current section 503 of Part 9 of

the Migration Act will continue to apply to persons seeking protection as a *refugee* under the new statutory framework relating to refugees.

1285. This item also makes amendments to make the new paragraph with the equivalent amendments in the Migration Amendment (Character and General Visa Cancellation) Bill 2014. In this respect, this item inserts a reference to current section 65 to clarify the authority of the exercise of the power under this subparagraph and removes the reference to the cancellation of a protection visa.

Part 3 – Contingent amendments

Division 1 – Amendments if this Act commences before the Migration Amendment (Protection and Other Measures) Act 2014

Migration Act 1958

Item 18 Subsection 5(1) (definition of *receiving country*)

1286. This item repeals the current definition of *receiving country* under subsection 5(1) of Part 1 of the Migration Act and substitutes a new definition of *receiving country*.

1287. The current definition of *receiving country* under subsection 5(1) provides that *receiving country* in relation to a non-citizen, means:

- a country of which the non-citizen is a national; or
- if the non-citizen has no country of nationality – the country of which the non-citizen is an habitual resident;

to be determined solely by reference to the law of the relevant country.

1288. The new definition of *receiving country* in subsection 5(1) provides that *receiving country* in relation to a non-citizen, means:

- a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or
- if the non-citizen has no country of nationality – a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.

1289. The new definition of *receiving country* is intended to apply in the definition of *well-founded fear of persecution* provided by new section 5J inserted by item 7 of Part 2 of Schedule 5 to the Bill. This item is therefore necessary if Part 2 of Schedule 5 to the Bill commences before the Migration Amendment (Protection and Other Measures) Bill 2014 (Protection and Other Measures Bill).

1290. The purpose of this amendment is to ensure that the new definition of *receiving country* inserted by Part 1, Schedule 2 of the Protection and Other Measures Bill will apply to persons seeking protection as a *refugee* under the new statutory framework relating to refugees.

Division 2 – Amendments if this Act commences before the Migration Amendment (Regaining Control Over Australia's Protection Obligations) Act 2014

Migration Act 1958

Item 19 Subparagraph 411(1)(c)(i) and (ii)

1291. This item repeals current subparagraphs 411(1)(c)(i) and 411(1)(c)(ii) and substitutes new subparagraphs 411(1)(c)(i) and 411(1)(c)(ii) respectively.

1292. Current subparagraphs 411(1)(c)(i) and 411(1)(c)(ii) provide that subject to subsection 411(2), the following decisions are RRT-reviewable decisions:

- a decision to refuse to grant a protection visa, other than a decision that was made relying on:
 - one or more of Articles 1F, 32 or 33(2) of the Refugees Convention; or
 - subsection 36(1B); or

1293. Paragraph 411(1)(c) proposed in the Migration Amendment (Regaining Control over Australia's Protection Obligations) Bill 2014 (Regaining Control Bill) provides that subject to subsection 411(2), the following decisions are RRT-reviewable decisions:

- a decision to refuse to grant a protection visa (other than a decision that was made relying on one or more of Articles 1F, 32 or 33(2) of the Refugees Convention);

1294. New subparagraph 411(1)(c)(i) provides that subject to subsection 411(2), the following decisions are RRT-reviewable decisions:

- a decision to refuse to grant a protection visa, other than a decision that was made relying on:
 - subsection 5H(2), or 36(1B) or 36(1C)

1295. In the event that the Regaining Control Bill passes after Part 2 of Schedule 5 to the Bill, this amendment replaces the reference to the Refugees Convention in proposed paragraph 411(1)(c) of the Regaining Control Bill with a reference to the definitions and criteria provided by the new statutory framework relating to refugees, more specifically to new subsections 5H(2) and 36(1C), inserted by items 7 and 9 of Part 2 of Schedule 5 to the Bill.

1296. This item is necessary if Part 2 of Schedule 5 to the Bill commences before the Regaining Control Bill.

1297. The purpose of this amendment is to ensure that the current provisions in the Migration Act determining which decisions are reviewable by the Refugee Review Tribunal will, for the purposes of current section 411 in Division 2 of Part 7 of the Migration Act, apply to persons seeking protection as a *refugee* under the new statutory framework relating to refugees.

Item 20 Subparagraph 411(1)(d)(i)

1298. This item repeals current subparagraph 411(1)(d)(i) and substitutes new subparagraph 411(1)(d)(i) in Division 2 of Part 7 of the Migration Act.

1299. Current subparagraph 411(1)(d)(i) provides that subject to subsection 411(2), the following decisions are RRT-reviewable decisions:

- a decision to cancel a protection visa, other than a decision that was made because of:
 - one or more of Articles 1F, 32 or 33(2) of the Refugees convention; or

1300. Paragraph 411(1)(d) proposed in the Regaining Control Bill provides that subject to subsection 411(2), the following decisions are RRT-reviewable decisions:

- a decision to cancel a protection visa (other than a decision that was made because of one or more of Articles 1F, 32 or 33(2) of the Refugees Convention).

1301. New subparagraph 411(1)(d)(i) provides that subject to subsection 411(2), the following decisions are RRT-reviewable decisions:
- a decision to cancel a protection visa, other than a decision that was made because of:
 - subsection 5H(2) or 36(1C); or
1302. In the event that the Regaining Control Bill passes after Part 2 of Schedule 5 to the Bill, this amendment replaces the reference to the Refugees Convention in proposed paragraph 411(1)(d) of the Regaining Control Bill with a reference to the definitions and criteria provided by the new statutory framework relating to refugees, more specifically to new subsections 5H(2) and 36(1C), inserted by items 7 and 9 of Part 2 of Schedule 5 to the Bill.
1303. This item is necessary if Part 2 of Schedule 5 to the Bill commences before the Regaining Control Bill.
1304. The purpose of this amendment is to ensure that the current provisions in the Migration Act determining which decisions are reviewable by the Refugee Review Tribunal will, for the purposes of current section 411 in Division 2 of Part 7 of the Migration Act, apply to persons seeking protection as a *refugee* under the new statutory framework relating to refugees.

Item 21 Subparagraph 500(1)(c)(i)

1305. This item repeals current subparagraph 500(1)(c)(i) and substitutes new subparagraph 500(1)(c)(i) in Part 9 of the Migration Act.
1306. Current subparagraph 500(1)(c)(i) provides that applications may be made to the Administrative Appeals Tribunal for review of:
- a decision to refuse to grant a protection visa, or to cancel a protection visa, relying on:
 - one or more of the following Articles of the Refugees Convention, namely, Article 1F, 32 or 33(2); or
1307. Paragraph 500(1)(c) proposed in the Regaining Control Bill provides that applications may be made to the Administrative Appeals Tribunal for review of:
- a decision to refuse to grant a protection visa, or to cancel a protection visa, relying on one or more of Articles 1F, 32 or 33(2) of the Refugees Convention;
1308. New subparagraph 500(1)(c)(i) provides that applications may be made to the Administrative Appeals Tribunal for review of:
- a decision to refuse to grant a protection visa, or to cancel a protection visa, relying on:
 - subsection 5H(2) or 36(1C); or
1309. In the event that the Regaining Control Bill passes after Part 2 of Schedule 5 to the Bill, this amendment replaces the reference to the Refugees Convention in proposed paragraph 500(1)(c) of the Regaining Control Bill with a reference to the definitions and criteria provided by the new statutory framework relating to refugees, more

specifically to new subsections 5H(2) and 36(1C), inserted by items 7 and 9 of Part 2 of Schedule 5 to the Bill.

1310. This item is necessary if Part 2 of Schedule 5 to the Bill commences before the Regaining Control Bill.

1311. The purpose of this amendment is to ensure that the current provisions in the Migration Act determining which decisions are reviewable by the Administrative Appeals Tribunal will, for the purposes of current section 500 in Part 9 of the Migration Act, apply to persons seeking protection as a *refugee* under the new statutory framework relating to refugees.

Item 22 Subparagraph 500(4)(c)(i)

1312. This item repeals current subparagraph 500(4)(c)(i) and substitutes new subparagraph 500(4)(c)(i) in Part 9 of the Migration Act.

1313. Current subparagraph 500(4)(c)(i) provides that the following decisions are not reviewable under Part 5 or 7:

- a decision to refuse to grant a protection visa, or to cancel a protection visa, relying on:
 - one or more of the following Articles of the Refugees Convention, namely, Article 1F, 32 or 33(2); or

1314. Paragraph 500(4)(c) proposed in the Regaining Control Bill provides that the following decisions are not reviewable under Part 5 or Part 7:

- a decision to refuse to grant a protection visa, or to cancel a protection visa, relying on one or more of Articles 1F, 32 or 33(2) of the Refugees Convention;

1315. New subparagraph 500(4)(c)(i) provides that the following decisions are not reviewable under Part 5 or 7:

- a decision to refuse to grant a protection visa, or to cancel a protection visa, relying on:
 - subsection 5H(2) or 36(1C); or

1316. In the event that the Regaining Control Bill passes after Part 2 of Schedule 5 to the Bill, this amendment replaces the reference to the Refugees Convention in proposed paragraph 500(4)(c) of the Regaining Control Bill with a reference to the definitions and criteria provided by the new statutory framework relating to refugees, more specifically to new subsections 5H(2) and 36(1C), inserted by items 7 and 9 of Part 2 of Schedule 5 to the Bill.

1317. This item is necessary if Part 2 of Schedule 5 to the Bill commences before the Regaining Control Bill.

1318. The purpose of this amendment is to ensure that the current provisions in the Migration Act determining which decisions are reviewable by the Administrative Appeals Tribunal will, for the purposes of current section 500 in Part 9 of the Migration Act, apply to persons seeking protection as a *refugee* under the new statutory framework relating to refugees.

Division 3 – Amendments if this Act commences after the Migration Amendment (Regaining Control Over Australia’s Protection Obligations) Act 2014

Migration Act 1958

Item 23 Subsection 5(1) (definition of *receiving country*)

1319. This item repeals the current definition of *receiving country* under subsection 5(1) of Part 1 of the Migration Act and substitutes a new definition of *receiving country*.

1320. The current definition of *receiving country* under subsection 5(1) provides that *receiving country* in relation to a non-citizen, means:

- a country of which the non-citizen is a national; or
- if the non-citizen has no country of nationality – the country of which the non-citizen is an habitual resident;

to be determined solely by reference to the law of the relevant country.

1321. The Regaining Control Bill proposes to repeal the definition of *receiving country* from subsection 5(1) of Part 1 of the Migration Act.

1322. The new definition of *receiving country* in subsection 5(1) provides that *receiving country* in relation to a non-citizen, means:

- a country of which the non-citizen is a national, to be determined solely by reference to the law of the relevant country; or
- if the non-citizen has no country of nationality – a country of his or her former habitual residence, regardless of whether it would be possible to return the non-citizen to the country.

1323. The new definition of *receiving country* is intended to apply in the definition of *well-founded fear of persecution* provided by new section 5J inserted by item 7 of Part 2 of Schedule 5 to the Bill. This item is therefore necessary if Part 2 of Schedule 5 to the Bill commences after the Regaining Control Bill.

1324. The purpose of this amendment is to ensure that the new definition of *receiving country* will apply to persons seeking protection as a *refugee* under the new statutory framework relating to refugees.

Item 24 Paragraph 411(1)(c)

1325. This item omits “relying on one or more of Articles 1F, 32 or 33(2) of the Refugees Convention; or” and substitutes “relying on: subsection 5H(2), or 36(1B) or (1C);” in paragraph 411(1)(c) of Division 2 of Part 7 of the Migration Act.

1326. Current paragraph 411(1)(c) provides that subject to subsection 411(2), the following decisions are RRT-reviewable decisions:

- a decision to refuse to grant a protection visa, other than a decision that was made relying on:
 - one or more of Articles 1F, 32 or 33(2) of the Refugees Convention; or

- subsection 36(1B); or

1327. Paragraph 411(1)(c) proposed in the Regaining Control Bill provides that subject to subsection 411(2), the following decisions are RRT-reviewable decisions:

- a decision to refuse to grant a protection visa (other than a decision that was made relying on one or more of Articles 1F, 32 or 33(2) of the Refugees Convention);

1328. New paragraph 411(1)(c) provides that subject to subsection 411(2), the following decisions are RRT-reviewable decisions:

- a decision to refuse to grant a protection visa, other than a decision that was made relying on:
 - subsection 5H(2), or 36(1B) or 36(1C)

1329. In the event that the Regaining Control Bill passes before Part 2 of Schedule 5 to the Bill, this amendment replaces the reference to the Refugees Convention in proposed paragraph 411(1)(c) of the Regaining Control Bill with a reference to the definitions and criteria provided by the new statutory framework relating to refugees, more specifically to new subsections 5H(2) and 36(1C), inserted by items 7 and 9 of Part 2 of Schedule 5 to the Bill.

1330. This item is necessary if Part 2 of Schedule 5 to the Bill commences after the Regaining Control Bill.

1331. The purpose of this amendment is to ensure that the current provisions in the Migration Act determining which decisions are reviewable by the Refugee Review Tribunal will, for the purposes of current section 411 in Division 2 of Part 7 of the Migration Act, apply to persons seeking protection as a *refugee* under the new statutory framework relating to refugees.

Item 25 Subparagraph 411(1)(d)(i)

1332. This item repeals current subparagraph 411(1)(d)(i) and substitutes new subparagraph 411(1)(d)(i) in Division 2 of Part 7 of the Migration Act.

1333. Current subparagraph 411(1)(d)(i) provides that subject to subsection 411(2), the following decisions are RRT-reviewable decisions:

- a decision to cancel a protection visa, other than a decision that was made because of:
 - one or more of Articles 1F, 32 or 33(2) of the Refugees convention; or

1334. Paragraph 411(1)(d) proposed in the Regaining Control Bill provides that subject to subsection 411(2), the following decisions are RRT-reviewable decisions:

- a decision to cancel a protection visa (other than a decision that was made because of one or more of Articles 1F, 32 or 33(2) of the Refugees Convention).

1335. New subparagraph 411(1)(d)(i) provides that subject to subsection 411(2), the following decisions are RRT-reviewable decisions:

- a decision to cancel a protection visa, other than a decision that was made because of:
 - subsection 5H(2) or 36(1C); or

1336. In the event that the Regaining Control Bill passes before Part 2 of Schedule 5 to the Bill, this amendment replaces the reference to the Refugees Convention in proposed paragraph 411(1)(d) of the Regaining Control Bill with a reference to the definitions and criteria provided by the new statutory framework relating to refugees, more specifically to new subsections 5H(2) and 36(1C), inserted by items 7 and 9 of Part 2 of Schedule 5 to the Bill.
1337. This item is necessary if Part 2 of Schedule 5 to the Bill commences after the Regaining Control Bill.
1338. The purpose of this amendment is to ensure that the current provisions in the Migration Act determining which decisions are reviewable by the Refugee Review Tribunal will, for the purposes of current section 411 in Division 2 of Part 7 of the Migration Act, apply to persons seeking protection as a *refugee* under the new statutory framework relating to refugees.

Item 26 Paragraph 500(1)(c) and 500(4)(c)

1339. This item repeals current paragraphs 500(1)(c) and 500(4)(c) and substitutes new paragraphs 500(1)(c) and 500(4)(c) in Part 9 of the Migration Act.
1340. Current paragraph 500(1)(c) provides that applications may be made to the Administrative Appeals Tribunal for review of
- a decision to refuse to grant a protection visa, or to cancel a protection visa, relying on:
 - one or more of the following Articles of the Refugees Convention, namely, Article 1F, 32 or 33(2); or
 - paragraph 36(2C)(a) or 36(2C)(b) of the Migration Act;
1341. Paragraph 500(1)(c) proposed in Regaining Control Bill provides that Applications may be made to the Administrative Appeals Tribunal for review of:
- a decision to refuse to grant a protection visa, or to cancel a protection visa, relying on one or more of Articles 1F, 32 or 33(2) of the Refugees Convention;
1342. New paragraph 500(1)(c) provides that applications may be made to the Administrative Appeals Tribunal for review of:
- a decision to refuse to grant a protection visa, or to cancel a protection visa, that was made relying on subsection 5H(2) or 36(1C)
1343. In the event that the Regaining Control Bill passes before Part 2 of Schedule 5 to the Bill, this amendment replaces the reference to the Refugees Convention in proposed paragraph 500(1)(c) of the Regaining Control Bill with a reference to the definitions and criteria provided by the new statutory framework relating to refugees, more specifically to new subsections 5H(2) and 36(1C), inserted by items 7 and 9 of Part 2 of Schedule 5 to the Bill.
1344. This item is necessary if Part 2 of Schedule 5 to the Bill commences after the Regaining Control Bill.

1345. The purpose of this amendment is to ensure that the current provisions in the Migration Act determining which decisions are reviewable by the Administrative Appeals Tribunal will, for the purposes of current section 500 in Part 9 of the Migration Act, apply to persons seeking protection as a *refugee* under the new statutory framework relating to refugees.
1346. Current paragraph 500(4)(c) provides that the following decisions are not reviewable under Part 5 or 7:
- a decision to refuse to grant a protection visa, or to cancel a protection visa, relying on:
 - one or more of the following Articles of the Refugees Convention, namely, Article 1F, 32 or 33(2);
 - paragraph 36(2C)(a) or paragraph 36(2C)(b) of the Migration Act
1347. Paragraph 500(4)(c) proposed in the Regaining Control Bill provides that the following decisions are not reviewable under Part 5 or Part 7:
- a decision to refuse to grant a protection visa, or to cancel a protection visa, relying on one or more of Articles 1F, 32 or 33(2) of the Refugees Convention;
1348. New subparagraph 500(4)(c)(i) provides that the following decisions are not reviewable under Part 5 or 7:
- a decision to refuse to grant a protection visa, or to cancel a protection visa, that was made relying on subsection 5H(2) or 36(1C);
1349. In the event that the Regaining Control Bill passes before Part 2 of Schedule 5 to the Bill, this amendment replaces the reference to the Refugees Convention in proposed paragraph 500(4)(c) of the Regaining Control Bill with a reference to the definitions and criteria provided by the new statutory framework relating to refugees, more specifically to new subsections 5H(2) and 36(1C), inserted by items 7 and 9 of Part 2 of Schedule 5 to the Bill.
1350. This item is necessary if Part 2 of Schedule 5 to the Bill commences after the Regaining Control Bill.
1351. The purpose of this amendment is to ensure that the current provisions in the Migration Act determining which decisions are reviewable by the Administrative Appeals Tribunal will, for the purposes of current section 500 in Part 9 of the Migration Act, apply to persons seeking protection as a *refugee* under the new statutory framework relating to refugees.

Part 4 — Application and transitional provisions

Item 27 Application – Part 1

1352. This item provides that the amendments made by Part 1 of Schedule 5 apply in relation to the removal of an unlawful non-citizen on or after the day this item commences.

Item 28 Application – Parts 2 and 3

1353. This item provides that the amendments made by Parts 2 and 3 of this Schedule 5 apply in relation to an application for a protection visa that is made on or after the day this item commences.

Item 29 References to Amended Provisions

1354. This item provides that if a regulation or other instrument made under the Migration Act contains a reference to a provision of the Migration Act listed in column 2 of the following table in relation to an item, the reference in the regulation or other instrument is to be construed as a reference to the provision of the Migration Act listed in column 3 of the item:

References to amended provisions of the <i>Migration Act 1958</i>		
Column 1	Column 2	Column 3
Item	Old reference	New reference
1	section 91R	subsection 5J(4), (5) and (6)
2	section 91S	section 5K
3	section 91U	section 5M

The purpose of this provision is to ensure that relocating current sections 91R, 91S and 91U into Part 1 of the Migration Act does not have the unintended consequence of affecting regulations or other instruments.

SCHEDULE 6 – Unauthorised maritime arrivals and transitory persons: newborn children

Part 1 – Amendments

Migration Act 1958

Item 1 Subsection 5(1) (at the end of the definition of *transitory person*)

1355. This item adds new paragraphs (d) and (e) at the end of the definition of *transitory person* in subsection 5(1) of the Migration Act.

1356. The definition of *transitory person* in subsection 5(1) currently provides that *transitory person* means:

- a person who was taken to another country under repealed section 198A; or
- a person who was taken to a regional processing country under section 198AD; or
- a person who was taken to a place outside Australia under paragraph 245F(9)(b) of the Migration Act, or paragraph 72(4)(b) of the Maritime Powers Act; or
- a person who, while a non-citizen and during the period from 27 August 2001 to 6 October 2001:
 - was transferred to the ship *HMAS Manoora* from the ship *Aceng* or the ship *MV Tampa*; and
 - was then taken by *HMAS Manoora* to another country; and
 - disembarked in that other country.

1357. New paragraph (d) extends the definition of *transitory person* to include:

- the *child* of a *transitory person* mentioned in paragraph (aa) or (b), if:
 - the *child* was born in a regional processing country to which the parent was taken as mentioned in the relevant paragraph; and
 - the *child* was not an Australian citizen at the time of birth.

1358. New paragraph (e) extends the definition of *transitory person* to include:

- the *child* of a *transitory person* mentioned in paragraph (aa) or (b), if:
 - the *child* was born in the migration zone; and
 - the *child* was not an Australian citizen at the time of birth,

1359. Item 1 inserts three notes after new paragraph (e) of the definition of *transitory person*. Note 1 provides that for the meaning of who is a *child*, see section 5CA of the Migration Act. Note 2 provides that a *transitory person* who entered Australia by sea

before being taken to a place outside Australia may also be an *unauthorised maritime arrival*, see section 5AA of the Migration Act. This provides that the overlap between an *unauthorised maritime arrival* and a *transitory person* is fully intended. Note 3 indicates that paragraphs (d) and (e) apply no matter when the *child* was born, whether before, on or after the commencement of those paragraphs. The note also says to see the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*.

1360. Paragraph (aa) of the definition of *transitory person* provides *transitory person* means a person who was taken to a regional processing country under section 198AD.
1361. Paragraph (b) of the definition of *transitory person* provides that *transitory person* means a person who was taken to a place outside Australia under paragraph 245F(9)(b) of the Migration Act, or paragraph 72(4)(b) of the Maritime Powers Act.
1362. The effect of new paragraph (d) is to make it clear that if a *transitory person* was taken to a regional processing country under section 198AD or taken to a place outside Australia under paragraph 245F(9)(b) of the Migration Act or paragraph 72(4)(b) of the Maritime Powers Act, a *child* of this *transitory person* born in a regional processing country to which the parent was taken will also be a *transitory person* if the *child* was not an Australian citizen at the time of birth.
1363. This amendment is to ensure that a *child* of a *transitory person* is also a *transitory person*. This will ensure, as far as is possible, that all members of a family are treated in the same way and will limit the possibility of separation of the *child* and *parent* due only to the operation of the Migration Act.
1364. The effect of new paragraph (e) is to make it clear that if a *transitory person* was taken to a regional processing country under section 198AD or taken to a place outside Australia under paragraph 245F(9)(b) of the Migration Act or paragraph 72(4)(b) of the Maritime Powers Act, a *child* of this *transitory person* born in the migration zone will also be a *transitory person* if the *child* was not an Australian citizen at the time of birth.
1365. This amendment is to ensure that a *child* of a *transitory person* is also a *transitory person*. This will ensure, as far as is possible, that all members of a family are treated in the same way and will limit the possibility of separation of the *child* and *parent* due only to the operation of the Migration Act.

Item 2 After subsection 5AA(1)

1366. This item inserts new subsections 5AA(1A) and 5AA(1AA) after subsection 5AA(1) of the Migration Act.
1367. Subsection 5AA(1) currently provides that for the purposes of the Migration Act, a person is an *unauthorised maritime arrival* if:

- the person entered Australia by sea:
 - at an excised offshore place at any time after the excision time for that place;
 - or

- at any other place at any time on or after the commencement of section 5AA; and
- the person became an unlawful non-citizen because of that entry; and
- the person is not an *excluded maritime arrival*.

1368. Subsection 5AA(2) currently provides that a person *entered Australia by sea* if:

- the person entered the migration zone except on an aircraft that landed in the migration zone; or
- the person entered the migration zone as a result of being found on a ship detained under section 245F (as in force before the commencement of section 69 of the Maritime Powers Act) and being dealt with under paragraph 245F(9)(a) (as in force before that commencement); or
- the person entered the migration zone as a result of being on a vessel detained under section 69 of the Maritime Powers Act and being dealt with under paragraph 72(4)(a) of that Act; or
- the person entered the migration zone after being rescued at sea.

1369. Subsection 5AA(3) currently provides that a person is an *excluded maritime arrival* if the person:

- is a New Zealand citizen who holds and produces a New Zealand passport that is in force; or
- is a non-citizen who holds and produces a passport that is in force and is endorsed with an authority to reside indefinitely on Norfolk Island; or
- is included in a prescribed class of persons.

1370. New subsection 5AA(1A) provides that for the purposes of the Migration Act, a person is also an *unauthorised maritime arrival* if:

- the person is born in the migration zone; and
- a parent of the person is, at the time of the person's birth, an *unauthorised maritime arrival* because of subsection 5AA(1) (no matter where that parent is at the time of the birth); and
- the person is not an Australian citizen at the time of his or her birth.

1371. The item inserts five notes after new subsection 5AA(1A).

1372. Note 1 provides that for who is a *parent*, see the definition in subsection 5(1) and section 5CA of the Migration Act.

1373. Note 2 provides that a *parent* of the person may be an *unauthorised maritime arrival* even if the parent holds, or has held, a visa.

1374. Note 3 provides that a person to whom subsection 5AA(1A) applies is an ***unauthorised maritime arrival*** even if the person is taken to have been granted a visa because of section 78 (which deals with the birth in Australia of non-citizens).

1375. Note 4 provides that when a person is an Australian citizen at the time of his or her birth, see section 12 of the *Australian Citizenship Act 2007*.

1376. Note 5 provides that subsection 5AA(1A) applies even if the person was born before the commencement of the subsection. See the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*.

1377. Section 12 of the *Australian Citizenship Act 2007* provides that:

- a person born in Australia is an Australian citizen if and only if:
 - a parent of the person is an Australian citizen, or a permanent resident, at the time the person is born; or
 - the person is ordinarily resident in Australia throughout the period of 10 years beginning on the day the person is born;
- however, a person is not an Australian citizen under this section if, at the time the person is born:
 - a parent of the person is an enemy alien; and
 - the place of the birth is under occupation by the enemy;

unless, at that time, the other parent of the person:

- is an Australian citizen or a permanent resident; and
- is not an enemy alien.

1378. The effect of new subsection 5AA(1A) is to put it beyond doubt that a person born in the migration zone, who is not an Australian citizen at the time of birth, and who at the time of birth has at least one parent who is an ***unauthorised maritime arrival*** because of subsection 5AA(1) will also be an ***unauthorised maritime arrival*** at the time of their birth. This will ensure all members of the family are treated in the same way, where possible.

1379. New subsection 5AA(1AA) provides that a person is also an ***unauthorised maritime arrival*** if:

- the person is born in a regional processing country;
- a ***parent*** of the person is, at the time of the person's birth, an ***unauthorised maritime arrival*** because of subsection 5AA(1) (no matter where that parent is at the time of the birth);
- the person is not an Australian citizen at the time of his or her birth

1380. Three notes are inserted after new section 5AA(1AA). Note 1 provides that a ***parent*** of the person may be an ***unauthorised maritime arrival*** even if the ***parent*** holds, or has held, a visa. Note 2 provides that the Migration Act may apply as mentioned in subsection 5AA(1AA) even if either or both parents of the person holds a visa, or is an Australian citizen or a citizen of the regional processing country, at the time of the person's birth. Note 3 provides that subsection 5AA(1AA) applies even if the person was born before the commencement of the subsection. See the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014*.
1381. The effect of new subsection 5AA(1AA) is to put it beyond doubt that a person born in a regional processing country who is not an Australian citizen at the time of birth, and who at the time of birth has at least one parent who is an ***unauthorised maritime arrival*** because of subsection 5AA(1) (no matter where that ***parent*** is at the time of birth) will also be an ***unauthorised maritime arrival*** at the time of their birth. This will ensure that, whenever possible, all members of a family unit are treated in the same way.
1382. The amendments to sections 5 and 5AA of the Migration Act are generally intended to ensure that a ***child*** who comes within the amended definitions of ***unauthorised maritime arrival*** or ***transitory person*** in the Migration Act will be subject to the same rules and processes as other ***unauthorised maritime arrivals*** and ***transitory persons***, including those set out in sections 46A, 189, 198AD, 494AA and the regional processing framework in Subdivision B of Division 8 of Part 2 of the Migration Act generally. If these children were not clearly subject to the same rules and processes as their ***unauthorised maritime arrival parents*** or ***transitory person parents***, this inconsistency would undermine the objectives of the regional processing framework, both in terms of the inapplicability of these rules and processes to the relevant children and the difficulty that would arise in applying these rules and processes to their ***unauthorised maritime arrival parents*** or ***transitory person parents*** when they did not also apply to the relevant children.

Item 3 At the end of section 5AA

1383. This item inserts a note at the end of section 5AA to provide that an ***unauthorised maritime arrival*** who has been taken to a place outside Australia may also be a ***transitory person*** see the definition of ***transitory person*** in subsection 5(1) of the Migration Act.

Item 4 Before subsection 198(1)

1384. Item 4 inserts before subsection 198(1) the new heading *Removal on request*. This is the first of three new headings intended to improve the accessibility of the Migration Act.

Item 5 Before subsection 198(1A)

1385. Item 5 inserts before subsection 198(1A) the new heading *Removal of transitory person brought to Australia for a temporary purpose*.

Item 6 At the end of subsection 198(1A)

1386. Item 6 adds a note at the end of subsection 198(1A) that provides that some unlawful non-citizens are *transitory persons*. Section 198B provides for *transitory persons* to be brought to Australia for a temporary purpose. See the definition of *transitory person* in subsection 5(1) of the Migration Act.

Item 7 After subsection 198(1A)

1387. This item inserts new subsections 198(1B) and 198(1C) after subsection 198(1A) of the Migration Act. Item 7 also inserts before subsection 198(2) the heading *Removal of unlawful non-citizens in other circumstances*.

1388. Subsection 198(1) of the Migration Act currently provides that an officer must remove as soon as reasonably practicable an unlawful non-citizen who asks the Minister, in writing, to be so removed.

1389. New subsection 198(1B) provides that new subsection 198(1C) applies if:

- an unlawful non-citizen who is not an *unauthorised maritime arrival* has been brought to Australia under section 198B for a temporary purpose; and
- the non-citizen gives birth to a *child* while the non-citizen is in Australia; and
- the *child* is a *transitory person* within the meaning of new paragraph (e) of the definition of *transitory person* in subsection 5(1) of the Migration Act.

1390. New subsection 198(1C) provides that an officer must remove the non-citizen and the *child* as soon as reasonably practicable after the non-citizen no longer needs to be in Australia for that purpose (whether or not that purpose has been achieved).

1391. Subsection 198B(1) of the Migration Act provides that an officer may, for a temporary purpose, bring a *transitory person* to Australia from a country or place outside Australia.

1392. The purpose of new subsections 198(1B) and (1C) is to make it clear that a *child* born in Australia to an unlawful non-citizen who is not an *unauthorised maritime arrival* and has been brought to Australia for a temporary purpose is a *transitory person* and must be removed from Australia, along with their *parent*. It is desirable that both the *child* and *parent* in such a situation be subject to the same removal power.

Item 8 After subsection 198AD(2)

1393. This item inserts new subsection 198AD(2A) after subsection 198AD(2) of the Migration Act.

1394. Subsection 198AD(1) currently provides that subject to sections 198AE, 198AF and 198AG, section 198AD applies to an *unauthorised maritime arrival* who is detained under section 189 of the Migration Act. A note following subsection 198AD(1) states that for when section 198AD applies to a *transitory person*, see section 198AH.

1395. Subsection 198AD(2) currently provides that an officer must, as soon as reasonably practicable, take an *unauthorised maritime arrival* to whom this section applies from Australia to a regional processing country.
1396. With changes to the definition of *unauthorised maritime arrival* in item 2 of Schedule 6 to the Bill, if a *child* is born in Australia to a *parent* who is an *unauthorised maritime arrival*, in general terms the *child* and the *parent* are both *unauthorised maritime arrivals* and so both the *parent* and *child* must be taken from Australia to a regional processing country under section 198AD of the Migration Act.
1397. New subsection 198AD(2A) provides that subsection 198AD(2) does not apply in relation to a person who is an *unauthorised maritime arrival* only because of subsection 5AA(1A) or 5AA(1AA) if the person's *parent* mentioned in the relevant subsection entered Australia before 13 August 2012.
1398. Item 8 also inserts two notes after new subsection 198AD(2A). Note 1 provides that under subsection 5AA(1A) or 5AA(1AA) a person born in Australia or in a regional processing country may be an *unauthorised maritime arrival* in some circumstances. Note 2 provides that section 198AD does not apply in relation to a person who entered Australia by sea before 13 August 2012: see the *Migration Legislation Amendment (Regional Processing and Other Measures) Act 2012*.
1399. New subsection 198AD(2A) provides that a *child* cannot be transferred to a regional processing country if their *parent* cannot also be transferred because the *parent* entered Australia prior to 13 August 2012 (the date regional processing commenced under the Migration Act). This provision operates to prevent the arbitrary separation of family groups, due only to the operation of the Migration Act, and contrary to government policy.

Item 9 Subsection 198AH(1)

1400. This item repeals current subsection 198AH(1) of the Migration Act and inserts new subsections 198AH(1), 198AH(1A) and 198AH(1B).
1401. Current subsection 198AH(1) provides that section 198AD applies, subject to sections 198AE, 198AF and 198AG, to a *transitory person* if, and only if:
- the person is an *unauthorised maritime arrival* who is brought to Australia from a regional processing country under section 198B for a temporary purpose; and
 - the person is detained under section 189; and
 - the person no longer needs to be in Australia for the temporary purpose (whether or not the purpose has been achieved).
1402. New subsection 198AH(1) provides that section 198AD applies, subject to section 198AE, 198AF and 198AG, to a *transitory person*, if and only if, the person is covered by subsections 198AH(1A) or 198AH(1B).
1403. New subsection 198AH(1A) provides that a transitory person is covered by this subsection if:

- the person is an *unauthorised maritime arrival* who is brought to Australia from a regional processing country under section 198B for a temporary purpose; and
- the person is detained under section 189; and
- the person no longer needs to be in Australia for the temporary purpose (whether or not the purpose has been achieved).

1404. New subsection 198AH(1A) provides that section 198AD will apply, subject to sections 198AE, 198AF and 198AG, to a *transitory person* in the same circumstances as current subsection 198AH(1).

1405. New subsection 198AH(1B) provides that a *transitory person* (a *transitory child*) is covered by this subsection if:

- a *transitory person* covered by subsection 198AH(1A) gives birth to the *transitory child* while in Australia; and
- the *transitory child* is detained under section 189; and
- the *transitory child* is a *transitory person* because of new paragraph (e) of the definition of *transitory person* in subsection 5(1)

1406. New subsection 198AH(1B) provides for section 198AD to apply, subject to sections 198AE, 198AF and 198AG, to a person who is a *transitory person* within the meaning of paragraph (e) of the definition of *transitory person* in subsection 5(1) who has been detained under section 189, where their *parent* is covered by subsection 198AH(1A).

1407. The purpose of new subsection 198AH(1B) is to make it clear that a *child* born in Australia to a *transitory person* who has been brought to Australia for a temporary purpose must be taken to a regional processing country, along with their parent. It is desirable that both the *child* and parent in such a situation be subject to the same removal power.

Part 2 – Application of amendments

Item 10 Definitions

1408. This item inserts three definitions for the purposes of Part 2 of Schedule 6 to the Bill, namely:

- ***applicable matter*** has the meaning given by item 11 (retrospective application of Part 1 amendments);
- ***commencement day*** means the day this Schedule commences; and
- ***Part 1 amendments*** means the amendments of the Migration Act made by Part 1 of this Schedule.

Item 11 Retrospective application of Part 1 amendments

1409. This item provides that the ***Part 1 amendments*** apply on or after the ***commencement day***, and are taken to have applied before the ***commencement day***, subject to Part 2, in relation to each of the following matters (an ***applicable matter***):

- the entry of a person into Australia at any time, whether before, on or after ***commencement day*** (or that entry as it is taken to have occurred on birth under section 10 of the Migration Act);
- the status of a person as an ***unauthorised maritime arrival*** or a ***transitory person***, at any time;
 - whether before, on or after ***commencement day***; and
 - whether the person is born before, on or after the ***commencement day***;
- the status of a person as an unlawful non-citizen at any time, whether before, on or after ***commencement day***;
- the detention of a person at any time, whether before, on or after ***commencement day***, and the performance or exercise of a function, duty or power in relation to such detention;
- the performance or exercise of a function, duty or power in relation to a person under Division 8 of Part 2 of the Migration Act at any time, whether before, on or after ***commencement day***;
- an application for a visa by a person made at any time, whether before, on or after ***commencement day***, including the performance or exercise of a function, duty or power in relation to such an application.

1410. The intention of applying the amendments retrospectively is to ensure that a ***child*** of a ***parent***, who is an ***unauthorised maritime arrival*** and/or ***transitory person*** as the case may be, will be taken to have had the same status as their ***unauthorised maritime arrival*** and or/ ***transitory person parent*** so that there is no doubt that, prior to the

commencement day, treatment of these children is consistent with the status of their *parents* was valid.

1411. There are two notes inserted at the end of item 11. Note 1 provides that *Part 1 amendments* provide for a person to be an *unauthorised maritime arrival* or a *transitory person*, in some circumstances, if a parent of the person is an *unauthorised maritime arrival* or a *transitory person* for the purposes of the Migration Act. Note 2 provides that Division 8 of Part 2 of the Migration Act provides for:

- the removal of unlawful non-citizens from Australia to a place outside Australia (Subdivision A); and
- the taking of *unauthorised maritime arrivals* from Australia to a regional processing country (Subdivision B); and
- *transitory persons* to be brought to Australia from a place outside Australia (Subdivision C).

Item 12 Applications under the Migration Act 1958 that are finally determined

1412. This item ensures that the *Part 1 amendments* do not apply, and are not taken to have applied, in relation to an application under the Migration Act concerning (or consisting of) an *applicable matter* if the application was finally determined, within the meaning of the Migration Act, before the *commencement day*.

1413. Currently, subsection 5(9) of the Migration Act provides that for the purposes of the Migration Act, an application under this Act is finally determined when either:

- a decision that has been made in respect of the application is not, or is no longer, subject to any form of review under Part 5 or Part 7; or
- a decision that has been made in respect of the application was subject to some form of review under Part 5 or Part 7, but the period within which such a review could be instituted has ended without a review having been instituted as prescribed.

1414. Part 5 of the Migration Act relates to review of decisions by the MRT. Part 7 of the Migration Act relates to review of protection visa decisions by the RRT.

1415. This item applies so that *applicable matters* that are finally determined are not reopened after the commencement of the amendments in the Bill. A matter is finally determined when a decision is made and is no longer subject to review or the period within which such a review could be instituted has ended without a review having been instituted as prescribed under Part 5 or 7 of the Migration Act.

Item 13 Retrospective application of section 46A (visa applications by unauthorised maritime arrivals)

1416. Subitem 13(1) provides that the item applies if the operation of item 11 (retrospective application of *Part 1 amendments*) results in a person being taken to have been an *unauthorised maritime arrival* at a particular time.

1417. Subitem 13(2) provides that subsection 46A(1) of the Migration Act is taken to have applied in relation to the person at that time despite the fact that the person was a lawful non-citizen at that time, if the person was a lawful non-citizen only because he or she held one or more of the following visas:

- a bridging visa;
- a temporary safe haven visa;
- a temporary (humanitarian concern) visa;
- a temporary protection visa granted before 2 December 2013.

1418. A note is inserted under subitem 13(2). The note provides that subsection 46A(1) of the Migration Act prevents visa applications by *unauthorised maritime arrivals* in Australia who are unlawful non-citizens, unless the Minister makes a declaration under subsection 46A(2).

1419. The effect of subitem 13(2) is that despite subsection 46A(1) applying only to an application for a visa made by an *unauthorised maritime arrival* who is in Australia and is an unlawful non-citizen, subsection 46A(1) will also be taken to have applied to an application for a visa by a person who is taken to be an *unauthorised maritime arrival* as a result of the operation of item 11 of Part 2 of Schedule 6 to the Bill if the person was only a lawful non-citizen because he or she held one or more of the following visas:

- a bridging visa;
- a temporary safe haven visa;
- a temporary (humanitarian concern) visa;
- a temporary protection visa granted before 2 December 2013.

1420. The purpose of this amendment is to ensure that, in relation to persons who are *unauthorised maritime arrivals* as a result of the operation of item 11 of Part 2 of Schedule 6 to the Bill, any visa applications they made or make prior to the *commencement day* are taken to have been made invalidly, because these persons were subject to subsection 46A(1) at the time of their application. This is necessary because subsection 46A(1) does not extend to lawful non-citizens and *unauthorised maritime arrivals* may hold or have held the visas specified in this subitem. Without subitem 13(2), therefore, the visa applications of persons who are *unauthorised maritime arrivals* as a result of the operation of item 11 of Part 2 of Schedule 6 to the Bill and who hold or have held the visas specified in subitem 13(2) at the time of their application would be valid, contrary to Government policy.

1421. Subitem 13(3) provides that subsection 46A(1) of the Migration Act does not apply in relation to an application for a visa by the person (the *child*) if:

- the application is made at any time , whether before, on or after the *commencement day*; and

- the Minister has made a determination under subsection 46A(2) of the Migration Act in relation to an application by a parent of the *child*, made before the *commencement day*, for the same kind of visa.

1422. Subsection 46A(2) of the Migration Act provides that if the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to an *unauthorised maritime arrival*, determine that subsection 46A(1) of the Migration Act does not apply to an application for a visa by an unauthorised maritime arrival for a visa of the class specified in the determination.

1423. This subitem ensures that, in relation to a visa application that has been validly made because a determination made under subsection 46A(2) has been made in relation to the applicant, the application of any *child* of the applicant is not invalidated on the commencement of Schedule 6. Whenever possible, it is desirable for members of the same family unit to have a consistent status.

Item 14 Retrospective application of section 46B (visa applications by transitory persons)

1424. Subitem 14(1) provides that the item applies if the operation of item 11 (retrospective application of *Part 1 amendments*) results in a person being taken to have been a *transitory person* at a particular time.

1425. Subitem 14(2) provides that subsection 46B(1) of the Migration Act is taken to have applied in relation to the person at that time despite the fact that the person was a lawful non-citizen at that time, if the person was a lawful non-citizen only because he or she held one or more of the following visas:

- a bridging visa;
- a temporary safe haven visa;
- a temporary (humanitarian concern) visa;
- a temporary protection visa granted before 2 December 2013.

1426. A note is inserted under subitem 14(2). The note provides that subsection 46B(1) of the Migration Act prevents visa applications by *transitory persons* in Australia who are unlawful non-citizens, unless the Minister makes a declaration under subsection 46B(2). The application of two ‘bars’ that prevent applications for visas to such persons is intentional.

1427. The effect of subitem 14(2) is that despite subsection 46B(1) applying only to an application for a visa made by a *transitory person* who is in Australia and an unlawful non-citizen, subsection 46B(1) will also apply to an application for a visa by a person who is taken to be a *transitory person* as a result of the operation of item 11 of Part 2 of Schedule 6 to the Bill if the person was only a lawful non-citizen because he or she held one or more of the following:

- a bridging visa;

- a temporary safe haven visa;
- a temporary (humanitarian concern) visa;
- a temporary protection visa granted before 2 December 2013.

1428. The purpose of this amendment is to ensure that, in relation to persons who are *transitory persons* as a result of the operation of item 11 of Part 2 of Schedule 6 to the Bill, any visa applications they made or make prior to the *commencement day* are taken to have been made invalidly, because these persons were subject to section 46B(1) at the time of their application. This is necessary because section 46B(1) does not extend to lawful non-citizens and *transitory persons* may hold or have held the visas specified in this subitem. Without subitem 14(2), therefore, the visa applications of persons who are *transitory persons* as a result of the operation of item 11 of Part 2 of Schedule 6 to the Bill and who hold or have held the visas specified in subitem 14(2) at the time of their application would be valid, contrary to Government policy.

1429. Subitem 14(2) also ensures that, at any point in time, the restrictions on applying for visas in sections 46A and 46B operated consistently, so that a person may not seek to claim that only one of these provisions applied to the person, and not the other. The application of two ‘bars’ that prevent applications for visas to such persons is intentional.

1430. Subitem 14(3) provides that subsection 46B(1) of the Migration Act does not apply in relation to an application for a visa by the person (the *child*) if:

- the application is made at any time, whether before, on or after the *commencement day* ; and
- the Minister has made a determination under subsection 46B(2) of the Migration Act in relation to an application by a parent of the *child*, made before the *commencement day*, for the same kind of visa.

1431. Subsection 46B(2) of the Migration Act provides that if the Minister thinks that it is in the public interest to do so, the Minister may, by written notice given to a transitory person, determine that subsection 46B(1) of the Migration Act does not apply to an application for a visa by a *transitory person* for a visa of the class specified in the determination.

1432. This subitem ensures that, in relation to a visa application that has been validly made because a determination made under subsection 46B(2) has been made in relation to the applicant, the application of any *child* of the applicant is not invalidated on the commencement of Schedule 6 to the Bill. Whenever possible, it is desirable for members of the same family unit to have a consistent status.

Item 15 Prospective application for some matters

1433. Subitem 15(1) provides that the amendments in Part 1 apply on and after the *commencement day* in relation to any matter apart from an *applicable matter* (for *applicable matters*, see item 11).

1434. Subitem 15(2) provides that for the purposes of the application of the Part 1 amendments on and after the *commencement day* under subitem 15(1):

- a person may be an *unauthorised maritime arrival* because of subsection 5AA(1A) or 5AA(1AA) no matter when the person was born, whether before, on or after the *commencement day*; and
- a person may be a *transitory person* because of paragraph (d) or (e) of the definition of *transitory person* in subsection 5(1) no matter when the person was born, whether before, on or after the *commencement day*.

1435. Subitem 15(3) provides that the Part 1 amendments apply on and after the *commencement day* in relation to the status of a person as an *unauthorised maritime arrival* for the purposes of section 336F of the Migration Act. A note is inserted after subitem 15(3) that provides that section 336F of the Migration Act deals with the disclosure of information to some foreign countries and to some bodies.

SCHEDULE 7 – Caseload management

Part 1 – Amendments

Migration Act 1958

Item 1 Subsection 65(1)

1436. This item omits “After considering” and substitutes “Subject to sections 84 and 86, after considering” in subsection 65(1) in Subdivision AC of Division 3 of Part 2 of the Migration Act.

1437. Currently, subsection 65(1) provides that, after considering a valid application for a visa, the Minister, if satisfied that:

- the health criteria for it (if any) have been satisfied; and
- the other criteria for it prescribed by the Migration Act or the regulations have been satisfied; and
- the grant of the visa is not prevented by section 40 (circumstances when granted), 500A (refusal or cancellation of temporary safe haven visas), 501 (special power to refuse or cancel) or any other provision of the Migration Act or any other law of the Commonwealth; and
- any amount of visa application charge payable in relation to the application has been paid;

is to grant the visa or if not so satisfied, is to refuse to grant the visa.

1438. Current section 84 provides a power for the Minister, by notice in the *Gazette*, to suspend the processing of applications for visas of a specified class until a day specified in that notice.

1439. Current section 85 provides that the Minister may, by notice in the *Gazette*, determine the maximum number of the visas of a specified class or the visas of specified classes that may be granted in a specified financial year.

1440. Section 86 currently provides that the effect of a limit under section 85 is that if:

- there is a determination of the maximum number of visas of a class or classes that may be granted in a financial year; and
- the number of visas of the class or classes granted in the year reaches that maximum number;

no more visas of the class or classes may be granted in the year.

1441. This effect of this amendment is that the requirement in subsection 65(1) for the Minister to grant or refuse to grant a visa after considering a valid application does not apply where that application is affected by the:

- suspended processing of visa applications under section 84; or
- operation of section 86, where no more visas of a class or classes may be granted in the financial year.

Item 2 Subsection 65(1) (before the note)

1442. This item inserts “Note 1: Section 84 allows the Minister to suspend the processing of applications for visas of a kind specified in a determination made under that section. Section 86 prevents the Minister from granting a visa of a kind specified in a determination under section 85 if the number of such visas granted in a specified financial year has reached a specified maximum number” in subsection 65(1) of Subdivision AC of Division 3 of Part 2 of the Migration Act.
1443. This is a consequential amendment. Item 1 of Schedule 7 to the Bill inserted a reference to sections 84 and 86 in subsection 65(1). This note provides an explanation of sections 84 and 86.

Item 3 Subsection 65(1) (note)

1444. This item removes the word “Note” and replaces it with “Note 2” in subsection 65(1) of Subdivision AC of Division 3 of Part 2 of the Migration Act.
1445. This is a consequential amendment as a result of the insertion of new note 1 by item 2 of Schedule 7 to the Bill.

Item 4 Section 65A

1446. This item repeals section 65A of Subdivision AC of Division 3 of Part 2 of the Migration Act.
1447. Subsection 65A(1) currently provides that if an application for a protection visa was validly made under section 46, or was remitted by any court or tribunal to the Minister for reconsideration, then the Minister must make a decision under section 65 within 90 days. This requirement starts on the day on which the application for the protection visa was made or remitted, or in the circumstances prescribed by the regulations, the day prescribed by the regulations.
1448. Current subsection 65A(2) provides that failure to comply with this section does not affect the validity of a decision made under section 65 on an application for a protection visa.
1449. In *Plaintiff S297/2013 v MIBP* [2014] HCA 24 a majority of the High Court interpreted the time limit created by current section 65A for processing protection visas as conflicting with the section 85 power to limit the number of visas that may be granted in a specified financial year. The Court resolved that conflict by finding that section 85 did not apply to protection visas.
1450. The purpose of repealing section 65A is to resolve the conflict identified between section 65A and section 85. Section 85 will now allow the minister to limit the maximum number of protection visas to be granted in a financial year.
1451. The amendment is also made as the initial policy intention for introducing a 90 day processing requirement to support flexible, fair and timely resolution of a protection visa application is no longer an effective mechanism to achieve this outcome. Ministerial directions have been put in place regarding the order of consideration for

processing of protection visa applications which achieve a more effective and responsive approach to processing different caseloads.

Item 5 Subsection 84(1)

1452. This item omits the words “notice in the *Gazette*” and substitutes “legislative instrument” in subsection 84(1) of Subdivision AG of Division 3 of Part 2 of the Migration Act.
1453. Subsection 84(1) currently provides that the Minister may, by notice in the *Gazette*, determine that dealing with applications for visas of a specified class is to stop until a day specified in the notice. That day is called the resumption day in section 84. Item 6 to Schedule 7 to the Bill amends subsection 84(1).
1454. The purpose of this amendment is to prevent the amendment of section 84 in Item 6 of Schedule 7 to the Bill resulting in an unintended new requirement for notices under section 84 to be published in the *Gazette*.
1455. Currently subsection 56(1) of the *Legislative Instruments Act 2003* (Legislative Instruments Act) applies to subsection 84(1) of the Migration Act such that registration in the Federal Register of Legislative Instruments satisfies the requirement for publication in the *Gazette* of a notice made under subsection 84(1).
1456. An amendment to subsection 84 that still required notice in the *Gazette* would fall within the requirements of subsection 56(2) of the Legislative Instruments Act with the result that the notice would need to be published in the *Gazette* in addition to being registered in the Federal Register of Legislative Instruments. This amendment avoids that result by replacing the gazettal requirement with determination by legislative instrument. The result is that notice of a determination under subsection 84(1) is satisfied, as it was prior to this amendment, by registration in the Federal Register of Legislative Instruments.

Item 6 Subsection 84(1)

1457. This item inserts “(including protection visas)” after “visas” in subsection 84(1) of Subdivision AG of Division 3 of Part 2 of the Migration Act.
1458. Subsection 84(1) currently provides that the Minister may, by notice in the *Gazette*, determine that dealing with applications for visas of a specified class is to stop until a day specified in the notice. That day is called the resumption day in section 84.
1459. The purpose of this amendment is to make clear that the power of the Minister to suspend processing of visa applications under subsection 84(1) applies to protection visas.

Item 7 Subsection 84(1)

1460. This item omits the phrase “the notice” and substitutes “the determination” in subsection 84(1) of Subdivision AG of Division 3 of Part 2 of the Migration Act.

1461. Subsection 84(1) currently provides that the Minister may, by notice in the *Gazette*, determine that dealing with applications for visas of a specified class is to stop until a day specified in the notice. That day is called the resumption day in section 84.

1462. Item 5 of Schedule 7 to the Bill amends subsection 84(1) to replace the words “notice in the *Gazette*” with “legislative instrument”. As a consequence of that amendment the phrase “the notice” in subsection 84(1) is replaced with “the determination”.

Item 8 Subsection 84(2)

1463. This item omits “Where a notice under subsection (1) is published in the *Gazette*” and substitutes “On and after the commencement of an instrument made under subsection (1)” in subsection 84(2) of Subdivision AG of Division 3 of Part 2 of the Migration Act.

1464. Currently, subsection 84(2) provides that where a notice under subsection 84(1) is published in the *Gazette*, no act is to be done in relation to any application for a visa of the class concerned until the resumption day. Current subsection 84(1) provides that the resumption day is the day specified in the notice under subsection 84(1) when the stop on dealing with applications for visas of a specified class ends.

1465. Item 5 of Schedule 7 to the Bill amends subsection 84(1) to replace the words “notice in the *Gazette*” with “legislative instrument”. As a consequence of that amendment subsection 84(2) is amended to refer to an instrument rather than publication in the *Gazette*.

Item 9 Subsection 84(3)

1466. This item omits “A notice” and substitutes “A determination” in subsection 84(3) of Subdivision AG of Division 3 of Part 2 of the Migration Act.

1467. Currently subsection 84(3) provides that a notice under section 84 does not have any effect in relation to an application for a visa made by a person on the ground that he or she is the spouse, de facto partner or dependent child of:

- an Australian citizen; or
- the holder of a permanent visa that is in effect; or
- a person who is usually resident in Australia and whose continued presence in Australia is not subject to a limitation as to time imposed by law.

1468. Item 5 of Schedule 7 to the Bill amends subsection 84(3) to replace the words “notice in the *Gazette*” with “legislative instrument”. As a consequence of that amendment the phrase “A notice” in subsection 84(3) is replaced with “A determination”.

Item 10 Subsection 84(4)

1469. This item removes “notice” and replaces it with “determination” in subsection 84(4) of Subdivision AG of Division 3 of Part 2 of the Migration Act.

1470. Currently subsection 84(4) provides that nothing in section 84 prevents an act being done to implement a decision to grant or to refuse to grant a visa if the decision had been made before the date of the notice concerned.

1471. Item 5 of Schedule 7 to the Bill amends subsection 84(1) to replace the words “notice in the *Gazette*” with “legislative instrument”. As a consequence of that amendment the phrase “A notice” in subsection 84(4) is replaced with “A determination”.

Item 11 Section 85

1472. This item omits “notice in the *Gazette*” and substitutes “legislative instrument” in section 85 of Subdivision AH of Division 3 of Part 2 of the Migration Act.
1473. Current section 85 provides that the Minister may, by notice in the *Gazette*, determine the maximum number of the visas of a specified class or the visas of specified classes that may be granted in a specified financial year.
1474. The purpose of this amendment is to prevent the amendment of section 85 in Item 12 of Schedule 7 to the Bill resulting in an unintended new requirement for notices under section 85 to be published in the *Gazette*.
1475. Currently subsection 56(1) of the Legislative Instruments Act applies to section 85 of the Migration Act such that registration in the Federal Register of Legislative Instruments satisfies the requirement for publication in the *Gazette* of a notice made under section 85.
1476. An amendments to section 85 that still required notice in the *Gazette* would fall within subsection 56(2) of the Legislative Instruments Act with the result that notice would need to be published in the *Gazette* in addition to being registered in the Federal Register of Legislative Instruments. This amendment avoids that result by replacing the gazettal requirement with determination by legislative instrument. The result is that notice of a determination under section 85 is satisfied, as it was prior to this amendment, by registration in the Federal Register of Legislative Instruments.

Item 12 Paragraphs 85(a) and (b)

1477. This item inserts “(including protection visas)” after “visas” in paragraphs 85(a) and 85(b) of Subdivision AH of Division 3 of Part 2 of the Migration Act.
1478. Current section 85 provides that the Minister may, by notice in the *Gazette*, determine the maximum number of the visas of a specified class or the visas of specified classes that may be granted in a specified financial year.
1479. The purpose of this amendment is to make it clear that the power of the Minister to place a limit on the maximum number of visas of a specified class or visas of specified classes under section 85 applies to protection visas.

Item 13 Section 91Y

1480. This item repeals section 91Y of Subdivision AL of Division 3 of Part 2 of the Migration Act.
1481. Section 91Y includes provisions regarding the Secretary’s obligation to report to the Minister regarding applications for a protection visa. Section 91Y provides that the Secretary must give periodic reports to the Minister, that the Secretary must give additional reports to the Minister as required and provides for information that must be,

must not be, and may be included in the report. Section 91Y also requires that the reports are tabled in Parliament.

1482. Subsection 91Y(5) specifically provides that a report under section 91Y relating to a reporting period must include information about each application for a protection visa that an applicant has validly made under section 46 or a court or tribunal has remitted to the Minister for reconsideration and for which:

- the Minister has made a decision under section 65 during the reporting period, but has not made the decision within the decision period; or
- the Minister has not made a decision under section 65 before or during the reporting period, and the decision period has ended (whether before or during the reporting period).

1483. Subsection 91Y(10) specifically provides that for 91Y the decision period for an application for a protection visa means the period of 90 days starting on:

- the day on which the application for the protection visa was made or remitted as mentioned in subsection 91Y(5); or
- in the circumstances prescribed by the regulations – the day prescribed by the regulations.

1484. Subsection 91Y(9) also provides that the Minister is to table in each House of the Parliament a copy of a report under section 91Y within 15 sitting days of that House after the day on which the Minister receives the report from the Secretary.

1485. Section 91Y operates to provide a reporting mechanism for the requirement of current subsection 65A(1).

1486. Current subsection 65A(1) provides that if an application for a protection visa was validly made under section 46, or was remitted by any court or tribunal to the Minister for reconsideration, then the Minister must make a decision under section 65 within 90 days. This requirement starts on the day on which the application for the protection visa was made or remitted, or in the circumstances prescribed by the regulations, the day prescribed by the regulations.

1487. Item 4 of Schedule 7 to the Bill repeals section 65A. The purpose of current section 91Y of providing a reporting mechanism for the requirements of current subsection 65A(1) is no longer required and as a consequence section 91Y is repealed.

Item 14 Section 414A

1488. This item repeals section 414A of Division 2 of Part 7 of the Migration Act.

1489. Currently subsection 414A(1) requires that if an application for review of a Refugee Review Tribunal (RRT) reviewable decision was:

- validly made under section 412; or
- was remitted by any court to the RRT for reconsideration;

then the RRT must review the decision under section 414 and record its decision under section 430 within 90 days starting on the day on which the Secretary gave the Registrar the documents that subsection 418(2) requires the Secretary to give to the Registrar.

1490. Currently subsection 414A(2) provides that failure to comply with this section does not affect the validity of a decision made under section 415 on an application for review of an RRT-reviewable decision.

1491. Current section 414A was inserted into the Migration Act together with current section 65A by the *Migration and Ombudsman Legislation Amendment Act 2005*. It created a time limit on the review of decisions by the Refugee Review Tribunal that complements the time limit on the Minister to make a decision under section 65 created in current section 65A.

1492. Item 4 of Schedule 7 to the Bill repeals section 65A. As a consequence the related current section 414A is also repealed.

Item 15 Section 440A

1493. This item repeals Section 440A of Division 7 of Part 7 of the Migration Act.

1494. Section 440A includes provisions regarding the Principal Member's obligation to report to the Minister regarding applications for a review of an RRT-reviewable decision. Section 440A provides that the Principal Member of the Refugee Review Tribunal must give periodic reports to the Minister, that the Principal Member must give additional reports to the Minister as required, provides for information that must be, must not be, and may be included in the report. Section 440A also requires that reports be tabled in Parliament.

1495. Subsection 440A(5) specifically provides that a report under section 440A relating to a reporting period must include information about each application for a review of an RRT-reviewable decision that an applicant has validly made under section 412 or a court or tribunal has remitted to the RRT for reconsideration and for which:

- the RRT has reviewed the decision under section 414 and has recorded its decision under section 430 during the reporting period, but has not made the decision within the decision period; or
- the RRT has not reviewed the decisions under section 414 and has not recorded its decision under section 430 before or during the reporting period, and the decision period has ended (whether before or during the reporting period).

1496. Subsection 440A(10) specifically provides that for 440A the decision period for an application for a protection visa means the period of 90 days starting on the day on which the Secretary has given to the Registrar the documents required to be given by subsections 418(2) and 418(3).

1497. Subsection 440A(9) also provides that the Minister is to table in each House of the Parliament a copy of a report under section 440A within 15 sitting days of that House after the day on which the Minister receives the report from the Principal Member.

1498. Section 440A operates to provide a reporting mechanism for the requirement of current subsection 414A(1).

1499. Currently subsection 414A(1) requires that if an application for review of a Refugee Review Tribunal (RRT) reviewable decision was:

- validly made under section 412; or
- was remitted by any court to the RRT for reconsideration;

then the RRT must review the decision under section 414 and record its decision under section 430 within 90 days starting on the day on which the Secretary gave the Registrar the documents that subsection 418(2) requires the Secretary to give to the Registrar.

1500. Item 14 of Schedule 7 to the Bill repeals section 414A. The purpose of current section 440A of providing a reporting mechanism for the requirements of current subsection 414A(1) is therefore no longer required and as a consequence section 440A is repealed.

Part 2 – Application and savings

Item 16 Application of amendments

1501. Subitem 16(1) provides that the amendments of sections 65, 84 and 85 of the Migration Act made by Part 1 of Schedule 7 apply in relation to an application for a visa:

- made on or after the commencement of that Part; or
- made before the commencement of that Part but not finally determined as at the commencement of that Part.

1502. Subitem 16(2) provides that the repeal of section 65A of the Migration Act made by Part 1 of Schedule 7 to the Bill applies in relation to an application for a protection visa:

- made on or after the commencement of that Part; or
- made before the commencement of that Part but not finally determined as at the commencement of that Part.

1503. Subitem 16(3) provides that the repeals of sections 91Y and 440A of the Migration Act made by Part 1 of Schedule 7 to the Bill apply in relation to reporting periods commencing on or after the commencement of that Part.

1504. Subitem 16(4) provides that the repeal of section 414A of the Migration Act made by Part 1 of Schedule 7 applies in relation to an application for a review:

- made on or after the commencement of that Part; or
- made before the commencement of that Part but not finally determined as at the commencement of that Part.

Item 17 Saving provision – notices in Gazette

1505. Subitem 17(1) provides that a notice in force under subsection 84(1) of the Migration Act immediately before the commencement of Part 1 of Schedule 7 to the Bill continues in force after that commencement as if the amendments of section 84 of the Migration Act made by that Part had not been made.

1506. Subitem 17(2) provides that a notice in force under section 85 of the Migration Act immediately before the commencement of Part 1 of Schedule 7 to the Bill continues in force after that commencement as if the amendments of section 85 of the Migration Act made by that Part had not been made.

Attachment A**Statement of Compatibility with Human Rights**

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

Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014

This Bill 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 Bill

The Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Bill 2014 (the Bill) amends the *Migration Act 1958* (the Migration Act), the *Migration Regulations 1994* (the Migration Regulations); the *Maritime Powers Act 2013* (the Maritime Powers Act), the *Immigration (Guardianship of Children) Act 1946* (IGOC Act) and the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) to support the Government's key strategies for combatting people smuggling and managing asylum seekers both onshore and offshore.

The measures in this Bill are a continuation of the Government's protection reform agenda and make it clear that there will not be permanent protection for those who travel to Australia illegally. The measures will support a robust protection status determination process and enable a tailored approach to better prioritise and assess claims and support the removal of unsuccessful asylum seekers.

The Bill fundamentally changes Australia's approach to managing asylum seekers by:

- clarifying and strengthening Australia's maritime enforcement framework to provide greater clarity to the ongoing conduct of border security and maritime enforcement operations;
- allowing only temporary protection to those who engage Australia's *non-refoulement* obligations and who arrived in Australia illegally;
- creating a different processing model for protection assessments which acknowledges the diverse range of claims from asylum seekers, helping to resolve protection applications more efficiently;
- deterring the making of unmeritorious protection claims as a means to delay an applicant's departure from Australia;
- supporting a more timely removal from Australia of those who do not engage Australia's protection obligations; and

- codifying in the Migration Act Australia's interpretation of its protection obligations under the *1951 Convention relating to the Status of Refugees* and its *1967 Protocol* (the Refugees Convention).

Specifically, the Bill amends the Maritime Powers Act to:

- Clarify the powers provided by sections 69 and 72 to move vessels and persons, and related provisions;
- Explicitly provide the Minister with a power to give specific and general directions about the exercise of powers under sections 69, 71 and 72 to ensure that government has appropriate oversight;
- Ensure that maritime powers may be exercised between Australia and another country, provided the Minister administering the Act has determined this should be the case;
- Provide that the rules of natural justice do not apply to a range of powers in the Act, including the powers to authorise the exercise of maritime powers, the new Ministerial powers and the exercise of powers to hold and move vessels and persons;
- Ensure that the exercise of a range of powers cannot be invalidated because a court considers there has been a failure to consider, properly consider, or comply with Australia's international obligations, or the international obligations or domestic law of any other country;
- Clarify for the purposes of sections 69 and 72 that a vessel or a person may be taken to a place outside Australia whether or not Australia has an agreement or arrangements with any country concerning the reception of the vessel or the persons;
- Clarify that for the purposes of sections 69 and 72 a "place" is not limited to another country or a place in another country;
- Clarify the time during which a vessel or person may be dealt with under sections 69, 71 and 72;
- Clarify that the section 69, 71 and 72 powers (and a range of related provisions) operate in their own right, and that there is no implication to be drawn from the Migration Act, including particularly from the existence of the regional processing provisions;
- Provide an explicit power exempting certain vessels involved in maritime enforcement operations from the application of the Marine Safety (Domestic Commercial Vessel) National Law, the Navigation Act 2012 and the Shipping Registration Act 1981;
- Make a number of minor consequential and clarification amendments to the Maritime Powers Act, Migration Act, and the Immigration (Guardianship of Children) Act 1946; and

- Ensure that decisions relating to operational matters cannot be inappropriately subjected to the provisions of the Legislative Instruments Act 2003 or the Administrative Decisions (Judicial Review) Act 1977.

Specifically, the Bill amends the Migration Act to:

- introduce Temporary Protection visas (TPVs) as a visa product for unauthorised arrivals, whether by air or by sea, who are found to engage Australia's protection obligations;
- create a new visa class to be known as Safe Haven Enterprise Visa (SHEV);
- explicitly authorise the making of regulations that deem an application for one type of visa to be an application for a different type of visa;
- clarify that the application bars in sections 48, 48A and 501E of the Migration Act also apply in relation to persons in the migration zone who have been refused a visa or held a visa that was cancelled, in circumstances where the refused application or the application in relation to which the cancelled visa was granted earlier was an application that was taken to have been made by the person;
- allow for multiple classes of protection visas;
- include a definition of protection visas;
- create an express link between certain classes of visas that are provided for under the Migration Act (including Permanent Protection visas and Temporary Protection visas) and the criteria prescribed in the Migration Regulations in relation to those visas;
- create a new fast track assessment process and remove access to the Refugee Review Tribunal (RRT) for fast track applicants, who are defined as unauthorised maritime arrivals (UMAs) who entered Australia on or after 13 August 2012 and made a valid application for a protection visa; and other cohorts specified by legislative instrument;
- require the Minister to refer fast track reviewable decisions to the Immigration Assessment Authority (the IAA) which will conduct a limited merits review on the papers and either affirm the fast track reviewable decision or remit the decision for reconsideration in accordance with prescribed directions or recommendations;
- create discretionary powers for the IAA to get new information and permit the IAA to consider new information only in exceptional circumstances;
- provide the manner in which the IAA is to exercise its functions, notify persons of its decisions, give and receive review documents and disclose and publish certain information and enable the Principal Member of the RRT to issue practice directions and guidance decisions to the IAA;
- establish the IAA within the RRT, and provide that the Principal Member of the RRT is to be responsible for its overall operation and administration and specify delegation

powers and employment arrangements to apply to the Senior Reviewer and Reviewers of the IAA;

- clarify the availability of the removal powers independent of assessments of Australia's *non-refoulement* obligations;
- remove most references to the Refugees Convention from the Migration Act and replace them with a new statutory framework which articulates Australia's interpretation of its protection obligations under the Refugees Convention;
- clarify, with retrospective effect, that children born to unauthorised maritime arrivals under the Migration Act either in Australia or in a regional processing country are also UMAs for the purposes of the Migration Act;
- clarify, with retrospective effect, that children born to transitory persons either in Australia or in a regional processing country are also transitory persons for the purposes of the Migration Act;
- ensure that children born in Australia to a parent who is a transitory person can also be taken to a regional processing country;
- clarify, with retrospective effect, that any visa application of the child of a UMA or transitory person is invalid, unless the Minister has allowed the application, or the application of that child's parent, to be made; and
- restore the Government's ability to place a statutory limit on the number of protection visas granted in a programme year including repealing of section 65A and section 414A of the Migration Act which require applications for protection visas to be decided in 90 days as well as the associated reporting requirements in section 91Y and 440A, and provide that the requirement for the Minister in section 65 to grant or refuse to grant a visa is subject to sections 84 and 85.

Human rights implications – key obligations relevant to all measures in the Bill

Non- refoulement

Australia has obligations under the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) not to return a person to a country in certain circumstances. The Government is of the view that provided Australia's international obligations are satisfied, the Government can decide how it processes claims. The ICCPR or CAT does not specify how this should occur. Australia's implementation of the below obligations are further complemented by the ability of the Minister of Immigration and Border Protection (the Minister) to exercise his or her non-compellable powers under the Act to grant a visa.

Article 3 of the CAT states:

No State party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

Non- refoulement obligations also arise, by implication, in relation to Articles 6 and 7 of the ICCPR.

Article 6 of the ICCPR states:

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

Article 7 of the ICCPR states:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

The Bill makes several changes to the framework for assessing protection claims; it does not, however, affect the substance of Australia's adherence to its *non- refoulement* obligations. Any persons found to engage Australia's *non- refoulement* obligations will not be removed in breach of those obligations. The form of administrative arrangements in place to support Australia meeting its *non- refoulement* obligations is a matter for the Government.

Best interests of the child

Article 3 of the Convention on the Rights of the Child (CRC) states that:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

The Government is committed to acting in accordance with Article 3 of the CRC. In developing the policies reflected in this Bill, the Government has treated the best interests of the child as a primary consideration. However, it is Government policy to discourage unauthorised arrivals from taking potentially life threatening avenues to achieve resettlement for their families in Australia and this, as well as the integrity of the onshore protection programme, are also primary considerations which may outweigh the best interests of the child in relation to a particular measure.

In addition, the Government has policies and procedures to give effect to the obligation to treat the best interests of a child as a primary consideration in individual cases and is committed to acting in a manner consistent with the CRC.

Schedule 1 - Amendments to the Maritime Powers Act

Overview

Maritime powers are used to respond to a range of threats, including the smuggling of contraband goods, protecting Australia's fisheries, protecting our ocean and coastal ecosystems from environmental damage and countering people smuggling. The amendments to the Maritime Powers Act will strengthen the foundation of maritime enforcement in each of these contexts. Amendment to the Migration Act and Immigration (Guardianship of Children) Act are simply to clarify references to powers to move vessels and people, and update references which were not updated upon commencement of the Maritime Powers Act.

Human Rights Implications

To the extent that this Bill makes amendments to the Maritime Powers Act which are technical in nature, the amendments do not engage human rights as those amendments do not materially alter the Maritime Powers Act. For engagement with human rights in the pre-amendment Maritime Powers Act, please see the explanatory memorandum to the *Maritime Powers Bill 2012*, which included a comprehensive statement of compatibility with human rights.

The following assessment relates to amendments which substantively change the operation of the provisions of the Maritime Powers Act. For the purposes of this statement, it is assumed that in some circumstances the relevant rights may be engaged outside Australian territory. The extent to which some or all of the rights assessed below are engaged will vary according to the circumstances in question.

The Bill engages the following human rights:

Non- refoulement obligations

The *non- refoulement* obligations under the CAT and the ICCPR, as set out in the overview to this Statement, prohibit the arbitrary deprivation of life, the application of the death penalty and torture and other cruel, inhuman or degrading treatment or punishment. Item 19 inserts new Division 8A, which provides in new section 75A that a decision under certain powers cannot be invalidated on the basis of a failure to consider, a failure to properly consider, or a failure to comply with Australia's international obligations when exercising a power under sections 69, 71, 72 and 74 and new sections 69A, 72A, 75D, 75F, 75G or 75H.

Specifically:

- section 69 provides that a maritime officer may detain a vessel and take it to a place, which may be outside Australia;
- section 71 provides that persons may be placed or kept on the vessel;
- section 72 provides for the detention and movement of people, including to a place outside Australia;
- section 74 provides that maritime officers must act safely when placing or keeping persons in places;
- new section 69A clarifies the periods during which a vessel may be detained;
- new section 72A clarifies the periods during which a person may be detained;
- the new Ministerial powers provided by:
 - new section 75D, provides a power for the Minister to determine that maritime powers may be exercised between countries in certain circumstances;
 - new section 75F, provides a power for the Minister to give directions about the exercise of powers under sections 69, 71, and 72 and new sections 69A

and 72A, and new section 75G which requires compliance with directions under new section 75F; and

- new section 75H, provides a power for the Minister to exclude certain vessels from the operation of certain shipping legislation.

Only exercises of power under sections 69 and 72, along with new sections 69A 72A and 75F, are capable of giving rise to engagement with *nonrefoulement* obligations.

While on the face of the legislation as proposed to be amended, these provisions are capable of authorising actions which may not be consistent with Australia's *non-refoulement* obligations, the Government intends to continue to comply with these obligations and Australia remains bound by them as a matter of international law. They will not, however, be capable as a matter of domestic law of forming the basis of an invalidation of the exercise of the affected powers. It is the Government's position that the interpretation and application of such obligations is, in this context, a matter for the executive government.

Prohibition on torture and cruel, inhuman or degrading treatment or punishment

The prohibition on torture and cruel, inhuman or degrading treatment or punishment is contained in Article 7 of the ICCPR, as well as the CAT. Further, Article 10 of the ICCPR provides that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

As noted in the statement of compatibility for the Maritime Powers Bill, section 95 codifies the prohibition on cruel, inhuman or degrading treatment or punishment in the maritime context. It states that "persons arrested, detained or otherwise held must be treated with humanity and respect for human dignity, and must not be subject to cruel, inhuman or degrading treatment." This Bill does not change section 95; as such, this Bill is compatible with Australia's human rights obligations to prohibit torture and cruel, inhuman or degrading treatment or punishment in the same way the Maritime Powers Act is.

Right to security of the person and freedom from arbitrary detention

Article 9 of the ICCPR provides that

1. *Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.*
2. *Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.*
3. *Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.*

4. *Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.*

This Bill does not alter the provisions in the Maritime Powers Act relating to arrest. This Bill may, in certain circumstances, provide for a longer period of detention under 72(4) than was allowed under the original Maritime Powers Act.

Subsection 97(1) of the original Maritime Powers Act provides that “if a person is detained and taken to another place under subsection 72(4) (persons on detained vessels and aircraft), the detention ends at that place.” In certain circumstances new section 72A provides for detention to continue beyond the reaching of the place to which the person is to be taken, including in new paragraph 72A(1)(d) “for any period reasonably required to make and effect arrangements relating to the release of the person.” Section 69A merely clarifies the existing periods during which a vessel may be detained, on which the powers under section 71 and subsections 72(2) and 72(3) are based. In circumstances where the power in 72(4) is used to take a person to a place in the migration zone, this is unlikely to have any effect, although there are circumstances where disembarkation at Christmas Island has been significantly delayed so as to ensure a safe disembarkation once bad weather has passed. Where the power in 72(4) is used to take a person to a place outside Australia, the period provided for in new section 72A(1)(d) could be used for a variety of operational measures, including waiting for weather suitable for a release. Under the original Maritime Powers Act the persons detained would have been automatically released from detention under 72(4) upon arrival at the place to which they were being taken; this would have little practical effect if there was not, for example, another vessel for them to be released onto.

Continuing detention may become arbitrary after a certain period of time without proper justification. The determining factor, however, is not the length of detention, but whether the grounds for the detention are justifiable. In the context of Article 9, ‘arbitrary’ means that detention must have a legitimate purpose within the framework of the ICCPR in its entirety. Detention must be predictable in the sense of the rule of law (it must not be capricious) and it must be reasonable (or proportional) in relation to the purpose to be achieved.

In most cases these more clearly-defined time periods would have been covered by the existing detention provisions. To the extent that 72A is an expansion of the detention power under the Act, it is restricted both by purpose and the provision that the time be “reasonable”, and covers a time when release would not otherwise have been possible in reality. As such it is reasonable and proportionate to the goal of protecting Australia’s borders in the same way as the original provision and therefore compatible with Article 9(1).

With respect to Article 9(4), while new sections 75A and 75B and the exemption under the *Administrative Decisions (Judicial Review) Act 1977* (the ADJR Act) for ministerial decisions limit the bases on which courts may invalidate decisions made and actions taken under certain maritime powers, as noted above these do not materially alter the degree to which the Government understands these matters would be justiciable by reference to the Maritime Powers Act. International law was not intended to be a relevant consideration for the purposes of the Maritime Powers Act; if it was, Parliament would have provided as such explicitly. Equally, natural justice was not intended to be provided beyond the limited extent provided for explicitly in that Act. Decisions will continue to be taken by the executive government in accordance with Australia’s human rights obligations.

The exclusion of review under the ADJR Act is limited to circumstances in which, in the Government's view, review by lower courts and on broader grounds would be inappropriate in respect of complex and highly sensitive operational matters. People who are affected by these measures will still have a judicial pathway through the constitutional writs and as such will continue to be able to challenge the lawfulness of their detention in accordance with Article 9(4).

Schedule 2 and 3 - Protection visas and Other Measures, Act based visas

Overview of the legislative amendments

These schedules reintroduce TPVs, make a number of amendments necessary to support the introduction of TPVs, and introduce two new visas.

The reintroduction of Temporary Protection visas is a key element of the Government's border protection strategy to combat people smuggling and to discourage people from making dangerous voyages to Australia.

Unauthorised Maritime Arrivals (UMAs) and Unauthorised Air Arrivals (UAA) who are found to engage Australia's *non-refoulement* obligations will be granted a Temporary Protection Visa for a period of up to three years at one time. A reassessment will be required to determine if an individual is eligible for a further Temporary Protection visa.

A new visa to be known as a Safe Haven Enterprise Visa (SHEV) will be created. Amendments to the *Migration Regulations 1994* prescribing the requirements for this visa will follow this introduction and a statement of compatibility will be provided with those Regulation amendments.

Application for one visa taken to be an application for another visa

The Migration Act will be amended to provide the authority for regulations to be made that deem an application for a visa to be an application for a different visa if one of more of the specified events occurs, so that had the application been made after the event (or the events) occurred, the application would either have been invalid, or a visa of that type could not have been granted.

The new framework is not protection visa specific and may be used in the future for transitioning other visa applications as well in response to changing Government visa policies and priorities.

A key element of the Government's border protection strategy is to not grant permanent protection visas to protection claimants who arrived in Australia illegally, including as unauthorised maritime arrivals. The Government considers that where such a person is found to engage Australia's protection obligations, it is appropriate for them to instead be granted a temporary visa such as a Temporary Protection visa.

The amendments will thus create the framework that enables unauthorised maritime and other illegal arrivals who have already made a valid application for a protection visa to be transitioned to and processed under a temporary visa arrangement, as if they have made a valid application for a Temporary Protection visa instead.

In addition, the Bill will make amendments to the Migration Regulations (under the new authority conferred as a result of the amendment to the Migration Act) so that protection visa applications made by prescribed classes of applicants before the commencement of the Bill will, when prescribed circumstances exist, be taken not to be, and to never have been, a valid application for a protection visa; and will be taken to be, and to have always been, a valid application for a Temporary Protection visa.

These amendments to the Migration Act and the Migration Regulations engage the *non-refoulement* obligations in Articles 6 and 7 of the ICCPR and Article 3 of CAT, as set out in the overview to the whole Bill.

The amendments to the Migration Act creating the authority to make regulations deeming an application for a visa to be an application for a different visa, and the amendments to the Migration Regulations inserting the regulations to deem protection visa applications made by prescribed classes of applicants to be applications for Temporary Protection visa, are compatible with these obligations.

The amendments do not result in the return or removal of persons who are found to engage Australia's protection obligations in contravention of its *non-refoulement* obligations as implied or articulated in these international instruments. The position of this Government has always been that grant of a protection visa is not the only way of giving protection to persons who engage Australia's protection obligations, and that grant of a temporary visa is a viable alternative.

Sections 48, 48A and 501E also apply to refused applications that were taken to be made and cancelled visas which were granted because of applications that were taken to be made

Sections 48, 48A and 501E of the Act limit or prohibit the making of further visa applications ('application bars') by non-citizens in the migration zone who, since they last entered Australia, have been refused a visa or have had their visa cancelled.

Amendments will be made to the Act to clarify and put it beyond doubt that the application bars will also apply in circumstances where the refused application was taken to have been made by the non-citizen under a provision of the Act or the Regulations, and where the cancelled visa was granted because of an application that the non-citizen was taken to have made.

An application for a Temporary Protection (Class XD) visa that is taken to have been made under new regulation 2.08F is an example of an application that is taken to have been made by a non-citizen by the operation of a regulation. New regulation 2.08F is inserted by item 38 of Schedule 2 to this Bill.

Under new regulation 2.08F, certain Protection (Class XA) visa applications that were made by prescribed applicants are taken not to be, and never to have been, a valid application for a Protection (Class XA) visa application; and are taken to be, and to always have been, a valid application for a Temporary Protection (Class XD) visa, made by the prescribed applicant.

Under this amendment, if a non-citizen who is taken to have made an application for a Temporary Protection (Class XD) visa is refused that visa, the relevant application bar, in this case section 48A, will apply to the non-citizen to prohibit the non-citizen from making another Protection visa application (whether for Protection (Class XA) visa or Temporary

Protection (Class XD) visa, or some other protection visa provided for by section 35A, which is inserted by Schedule 2 of this Bill.

This amendment potentially engages the human rights and freedoms protected under ICCPR and CAT, particularly Articles 6 and 7 of the ICCPR and Article 3 of CAT, as set out in the overview to this Statement, in so far as the amendment to section 48A (which prohibits the making of further Protection visa application) is concerned.

If an unauthorised maritime arrivals is taken to have made an application for a Temporary Protection (Class XD) visa because of the amendment to the Act inserting section 45AA and the amendment to the Regulations inserting regulation 2.08F that enable their Protection (Class XA) visa application to be deemed an application for a Temporary Protection (Class XD) visa instead, and that deemed Temporary Protection (Class XD) visa application is refused because the unauthorised maritime arrival is assessed as not engaging Australia's protection obligations, then it is appropriate and reasonable for the prohibition on further protection visa applications in section 48A to apply to the unauthorised maritime arrival, even if the unauthorised maritime arrival is taken to have made, but did not actually make, the application for a Temporary Protection (Class XD) visa.

There is no material difference between the criteria for a Protection (Class XA) visa (in relation to which an application was actually made) and the criteria for a Temporary Protection (Class XD) visa (in relation to which an application is taken to be made). Applying section 48A to an unauthorised maritime arrival who has been found not to engage *non-refoulement* obligations in the deemed Temporary Protection (Class XD) visa application would ensure the refused unauthorised maritime arrival cannot make unmeritorious repeat protection visa applications.

However, as is the case with all persons who are subject to a bar on further protection visa applications, persons affected by the amendments can have that bar lifted by the Minister if he or she thinks it is in the public interest to allow the person to make another application. This allows new claims that have arisen since the cancellation or refusal to be considered, and for any *non-refoulement* obligations to be assessed that have not already been assessed.

On this basis, the amendments are considered to be compatible with human rights.

Introduction of s35A to allow for multiple classes of temporary and permanent visas

In order to ensure that the Migration Act clearly allows for multiple classes of protection visas, and that said protection visas may be temporary or permanent, new s35A has been inserted. The provision specifies that protection visas may be temporary, and lists the Temporary Protection visa as one such class. It also makes it clear that protection visa requirements exist in both s36 and in regulations.

Amendments to section 5 to include a definition of protection visas

To further support the introduction of Temporary Protection visas in a separate class to Permanent Protection visas, an amendment is also being pursued to s5 of the Act to include a definition of a Protection visa. This is a technical amendment, and will ensure any reference to 'protection visas' in both the Act and Migration Regulations include Permanent Protection visas and Temporary Protection visas.

Human Rights Implications

Family Sponsorship

Article 17(1) of the ICCPR states:

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

Article 23 of the ICCPR states:

The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Refugees granted Temporary Protection visas will not be eligible to sponsor family members to migrate to Australia.

As refugees are unable to return to their country of origin for fear of persecution, if family reunification is not available there is the potential that some Temporary Protection visa holders may remain separated from their family for years until they are either deemed not to engage Australia's protection obligations and removed from Australia or choose to return home.

Temporary Protection visa holders will be able to voluntarily depart and return to their family and country of origin or any other country they have permission to enter at any time, and may particularly wish to do so where circumstances in their country of origin have changed.

There is no right to family reunification under international law. The protection of the family unit under articles 17 and 23 does not amount to a right to enter Australia where there is no other right to do so. Further, these rights can be subject to proportionate and reasonable limitations which are aimed at legitimate objectives. In the case of these measures, these objectives include maintaining the integrity of the migration system and the national interest.

A UMA or UAA becomes separated from their family when they choose to travel to Australia without their family, Australia has not caused that separation, and it is therefore not an interference with the family within the meaning of Article 17. To the extent that Article 23 may be limited, Australia considers that this is a necessary, reasonable and proportionate measure to achieve the legitimate aim of preventing UMAs from making the dangerous journey to Australia by boat. The TPV Regulations were designed as part of a suite of measures, which includes the Regional Resettlement Arrangements (RRA), to act as a deterrent for people making the dangerous journey by boat to Australia. TPVs mean that if someone comes by boat to Australia they are not able to sponsor their family, and the RRA means that if someone comes by boat to Australia after 19 July 2013 they are not processed or settled within Australia. These two policies work in conjunction to provide a disincentive for people who wish to remain united with their families by indicating that travelling to Australia via unauthorised means will not result in the reunification of their family should they choose to travel separately. The measures further the legitimate aim of encouraging people to arrive in Australia via regular means, such as by obtaining a permanent visa under Australia's Refugee and Humanitarian Programme for persons outside Australia, which

allows family groups to migrate together. Therefore, the amendments are consistent with the rights contained under Articles 17 and 23 of the ICCPR.

Rights of the Child

Article 10 of the CRC states:

1. In accordance with the obligation of States Parties under article 9, paragraph 1, applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner. States Parties shall further ensure that the submission of such a request shall entail no adverse consequences for the applicants and for the members of their family.

2. A child whose parents reside in different States shall have the right to maintain on a regular basis, save in exceptional circumstances personal relations and direct contacts with both parents. Towards that end and in accordance with the obligation of States Parties under article 9, paragraph 1, States Parties shall respect the right of the child and his or her parents to leave any country, including their own, and to enter their own country. The right to leave any country shall be subject only to such restrictions as are prescribed by law and which are necessary to protect the national security, public order (ordre public), public health or morals or the rights and freedoms of others and are consistent with the other rights recognized in the present Convention.

Article 3 of the CRC requires that the best interests of the child are treated as a primary consideration in all actions concerning children. However, other considerations may also be primary considerations including:

- seeking to prevent anyone, including minors, from taking potentially life threatening measures to achieve resettlement for their families in Australia;
- maintaining the integrity of Australia's borders and national security;
- maintaining the integrity of Australia's migration system;
- protection of the national interest; and
- encouraging regular migration.

While it may be in the best interests of unaccompanied minors (UAMs) to be reunited with their family, it is clearly not in their best interests to be placed in the hands of people smugglers to take the dangerous journey by boat to Australia.

The reintroduction of Temporary Protection visas seeks to prevent minors from taking potentially life threatening avenues to achieve resettlement for their families in Australia. This goal, as well as the need to maintain the integrity of Australia's migration system and protect the national interest, is also a primary consideration. Australia considers that on balance these and other primary considerations outweigh the best interests of the child in seeking family reunification. Therefore, Australia considers that these amendments are consistent with Article 3 of the CRC.

Article 10 of the CRC requires that applications for family reunification made by minors or their parents are treated in a positive, humane and expeditious manner. However, Article 10 does not amount to a right to family reunification. The Australian Government will not provide a separate pathway to family reunification that will allow people smugglers to exploit children and encourage them to risk their lives on dangerous boat journeys. As such, to the extent that the rights under Article 10 are limited by the introduction of Temporary Protection visas, Australia considers that these limitations are necessary, reasonable and proportionate to achieve a legitimate aim.

Non-discrimination

Article 2(1) of the ICCPR states:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 26 of ICCPR provides that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

However, not all treatment that differs among individuals or groups on any of the grounds mentioned in article 26 will amount to prohibited discrimination. The UN Human Rights Committee has recognised that “not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant”.

The UN Human Rights Committee has recognised in the ICCPR context that “The Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory [...] Consent for entry may be given subject to conditions relating, for example, to movement, residence and employment” (CCPR General Comment 15, 11 April 1986). Unlike permanent visa holders, all temporary visa holders (not just TPV holders) are not able to sponsor family members for residence in Australia. To the extent that the regulations result in differential treatment between permanent protection visa holders and temporary protection visa holders in being unable to sponsor family members for reunification purposes, this treatment is based on reasonable and objective criteria. The criteria being applied is whether or not the individual entered Australia illegally, or applied to come to Australia via lawful means and is aimed at a legitimate purpose, that is the need to maintain the integrity of Australia’s migration system and encouraging the use of regular migration pathways to enter Australia.

Permission to Travel

Article 12 of the ICCPR states:

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

4. No one shall be arbitrarily deprived of the right to enter his own country.

Since 3 June 2013, all persons granted a permanent protection visa must seek permission before travelling to their home country as otherwise their visa is liable for cancellation. TPVs cease automatically if the holder departs Australia. This means that a holder of a Temporary Protection visa will not be able to re-enter Australia if they depart. This raises issues relating to freedom of movement under Article 12 of the ICCPR, in particular the right to leave any country (article 12(2)).

The inability of a Temporary Protection visa holder to re-enter Australia is not a prohibition on departing Australia, although it may discourage Temporary Protection holders from choosing to depart. This restriction on re-entry is designed to maintain the integrity of Australia's borders, encourage regular migration and discourage dangerous voyages by boat. The potential discouraging effect of restricting travel is considered to be reasonable in the circumstances and proportionate to Australia's legitimate aim of offering protection to genuine refugees and those fearing significant harm, while also protecting the integrity of the protection visa regime. The inability to re-enter Australia is not exclusive to Temporary Protection visa holders, several other temporary visas do not allow re-entry to Australia after departure.

The amendment is compatible with human rights because it is consistent with Australia's human rights obligations and to the extent that it may also limit human rights, those limitations are reasonable, necessary and proportionate.

Right to social security/right to an adequate standard of living

TPV holders have permission to work. For those who are unable to work, current legislative arrangements allow TPV holders to be eligible for Special Benefit and Family Tax Benefit. There are also a range of ancillary payments that are available, depending on individual circumstances. Noting that individual TPV holders will not qualify for all the benefits and payments listed below:

- Double Orphan Pension
- Parental Leave Pay (Work test requirements)
- Dad and Partner Pay (Work test requirements)
- Rent Assistance
- Education Entry Payment

- Clean Energy Supplement
- Single Income Family Supplement
- Pharmaceutical Allowance
- Health Care Card
- Pensioner Concession Card
- Low Income Health Care Card
- Pension Supplement
- Remote Area Allowance
- Telephone Allowance
- Family Tax Benefit A & B
- Child Care Benefit

TPV holders also have access under existing arrangements to Medicare.

In addition, TPV holders are entitled to full employment services support. This is commensurate with support provided to permanent residents and citizens in similar circumstances. While not eligible for Settlement Services, TPV holders released from immigration detention are assisted to transition into the community through the Community Assistance Support programme, while those already in the community on BVEs are linked to mainstream services by Asylum Seeker Assistance Scheme providers.

Together, these support services and benefits are intended to ensure that TPV holders in need are able to access a similar level of services and support as permanent visa holders and members of the Australian community more broadly.

Anyone accessing Special Benefit, regardless of whether they are a permanent resident or the holder of a TPV, is required to meet mandatory activity testing requirements (unless exempt) as required under the Social Security legislation. TPV holders are, however exempt from activity testing for the first 13 weeks. This is to allow time to settle into the community and commence supporting themselves.

Right to education

Article 13 of the ICESCR outlines those obligations to which Australia is bound as a State Party to the Covenant (subject to permissible limitations in accordance with article 4).

In Australia, school-age children – usually between 5 and 17 years old – must go to school.

- The children of TPV holders are able to access school education through public schools and through non-government schools.

- The policy on access to public schools for those UMAs granted TPVs are set by state and territory government education departments. This includes any related fees. If granted a TPV, the education and payment arrangements would be an issue for state/territory governments, in consultation with the Commonwealth Department of Education and the Council of Australian Governments on the broader education funding arrangements. In the interim, arrangements have been made directly with the Department of Immigration and Border Protection and most of the state and territory education authorities to fund and enrol the children of TPV holders.
- TPV holders accessing non-government schools and are funded via existing funding arrangements agreed between Commonwealth and State/Territory education authorities administered by the Commonwealth Department of Education.

DIBP will be assisting those families already living in the community (under community detention arrangements or on bridging visas) to continue to attend their local school. Service providers will also assist to enrol those children who are granted a TPV from detention.

Right to work

There are no conditions or work restrictions placed on TPV holders. TPV holders are able to freely participate in the labour market whilst they remain lawfully in Australia.

Right to health

Article 12 of the ICESCR recognises 'the right of everyone to the enjoyment of the highest attainable standard of physical and mental health' and requires steps to be taken to achieve the full realisation of this right.

The Government notes that TPVs offer some certainty in that a person will be able to remain in Australia for three years and if they are still found to engage Australia's protection obligations they will be eligible to be granted a further Temporary Protection visa. In addition, TPV holders are entitled to access to Medicare and Australia's public health system to the same extent as permanent Protection visa holders.

Applying for certain visas under the Act

The Bill also makes amendments to expressly create a link between certain classes of visa that are provided for under the Act that allow criteria to be prescribed in the Regulations (Act based visas) and the criteria prescribed in the Regulations in relation to those classes of visa. These amendments do not affect the classes of visas that are provided for in the Act but for which criteria cannot be prescribed in the Regulations.

The Act based visas for which criteria may be prescribed by the Regulations are the classes of visa provided for by sections 32 (Special Category visas), 37 (Bridging visas), 37A (Temporary Safe Haven visas), 38B (Maritime Crew visas) and section 35A (Permanent Protection visas, Temporary Protection visas and Safe Haven Enterprise visas) of the Migration Act.

The amendments make it clear that where there are no prescribed criteria in the Regulations:

- relating to the requirements that must be satisfied in order to make a valid application for the Act based visa; and
- relating to the criteria that must be satisfied by the applicant in order to be granted the particular class of Act based visa

then an application for the grant of the Act based visa is invalid.

The amendments also make it clear that if there are regulations in effect that prescribe the requirements for making a valid application, or prescribe the criteria that must be met in order for the visa to be granted, then an application will not be valid unless the application in fact meets all the prescribed requirements in the Regulations, and a visa must not be granted unless the applicant satisfies the criteria prescribed in the Regulations, as well as any other criteria provided for in the Act.

The amendments will clarify that for each of the Act based visas, the Regulations may, but need not, prescribe criteria which relate to making a valid application for the visa and being granted the visa.

The purpose of the amendments is to put it beyond doubt that criteria prescribed in the Regulations are an essential and integral element to the application and processing of Act based visas.

The amendments ensure that in the absence of any prescribed criteria in the Regulations relating to application requirements, a person cannot make a valid application for an Act based visa by simply, for example, requesting the visa orally or writing on a piece of paper that they want the visa. The amendments also ensure that if there are prescribed criteria in the Regulations for the grant of the Act based visa, that the applicant must satisfy all the prescribed criteria in addition to those that are provided for by the Act to be granted the visa.

These amendments do not engage any human rights. These amendments are technical in nature. They merely clarify and put beyond doubt the position as it exists currently. That is, that in order for a person to apply for and be granted an Act based visa, the person must satisfy the requirements for making a valid application as prescribed in the Regulations and the criteria prescribed in the Regulations for the grant of the particular Act based visa (in addition to any criteria already provided for under the Act). The amendments also clarify that if there are no prescribed regulations, then a valid application for the relevant Act based visa cannot be made.

Schedule 4 - Fast Track Applicants and Excluded Fast Track Review Applicants

The Government's purpose in establishing the Fast Track assessment process is two-fold: it will enhance the integrity of Australia's protection status determination framework, including by introducing specific measures for responding to unfounded claims for asylum. In addition, it will introduce a new review body for certain cohorts of visa applicants to improve the efficiency and cost effectiveness of merits review for those cohorts. These measures are specifically aimed at addressing the backlog of Unauthorised Maritime Arrivals (UMAs) who entered Australia on or after 13 August 2012 and ensuring their cases progress towards timely immigration outcomes. The Government believes the more efficiently and effectively a case can be resolved, the better outcomes it can deliver for both the applicant and those who support them in the Australian community.

Item 1 of Schedule 4 to the Bill inserts a new defined term *fast track applicant* in subsection 5(1) of the Act. Broadly, fast track applicant means a UMA who entered Australia on or after 13 August 2012, for whom the Minister has lifted the bar preventing the UMA from making a valid visa application under subsection 46A(1) and who has subsequently made a valid application for a protection visa in Australia.

To provide flexibility to include other cohorts who may be made subject to the Fast Track assessment process in the future, a new legislative-making power will provide the Minister with the ability to specify a person or class of persons to fall within the definition of a ‘fast track applicant’ by way of legislative instrument, for example, unauthorised air arrivals. An unauthorised air arrival does not have a visa that is in effect when they enter Australia or has had their visa cancelled in immigration clearance. While some of these persons may have arrived in Australia by lawful means, they may have been refused entry at Australian airports or ports for reasons including that they are found not to intend to abide by the visa conditions (for example, where the reason for the grant of the visa no longer exists) or on the basis of document fraud.

Item 1 of Schedule 4 to the Bill inserts a new defined term *fast track decision* in subsection 5(1) of the Act. Broadly, a fast track decision is defined as a decision to refuse the grant of a protection visa to a fast track applicant on grounds other than decisions relying on subsection 5H(2) of the definition of a refugee; or subsections 36(1B) or (1C), paragraph 36(2C)(a) or (b) or section 501 of the Act. Protection visa decisions that have been refused by delegates on character grounds will continue to be reviewable by the Administrative Appeals Tribunal (AAT) as appropriate.

After a fast track decision has been made in respect of a fast track applicant, they will either become an excluded fast track review applicant or a fast track review applicant as defined by subsection 5(1) of the Bill. Persons defined as excluded fast track review applicants would not be referred for review to the Immigration Assessment Authority (IAA) by the Minister under new section 473CA.

This differentiated approach to review acknowledges the diverse range of claims and unique characteristics brought forward by asylum seekers. This approach forms part of the Government’s broader package of measures in this Bill aimed at encouraging an orderly and well managed humanitarian programme through upholding the integrity of Australia’s protection status determination processes. It is the Government’s policy that if fast track applicants present baseless or unmeritorious claims, or have protection elsewhere, their cases warrant being accelerated towards an immigration outcome rather than accessing merits review in order to delay the finalisation of their cases and prolong their stay in Australia.

Broadly, the definition of an excluded fast track review applicant will capture those fast track applicants whose protection claims have been refused and where, based on the nature of the protection claims and evidence presented, the Minister (or delegate) is of the opinion that the fast track applicant:

- is covered by section 91C or 91N of the Act: this provision captures those fast track applicants who hold nationality or a right to enter and reside in a third country and therefore, can access protection elsewhere. It is the Government’s position that such persons should not have access to review because Australia’s protection framework should be dedicated towards identifying and granting protection to asylum seekers who have no alternative country in which they can receive protection.

- previously entered Australia and made a claim for protection relying on a criterion in s36(2) in an application that was refused or withdrawn; this provision captures those fast track applicants who have previously made a valid protection visa application in Australia which was refused or withdrawn, have departed Australia and subsequently re-entered and been refused protection as a fast track applicant. It is the Government's position that such persons have already accessed and been refused protection under Australia's framework numerous times and should be excluded from merits review as it will unnecessarily delay the finalisation of their cases. Furthermore, while some excluded fast track review applicants may have new protection claims which have emerged since being refused protection, such claims will still receive a full assessment under Australia's primary assessment, thus ensuring Australia can meet any *non-refoulement* obligations towards those who may require its protection.
- made a claim for protection in a country other than Australia, if such a claim was refused by that country; this provision captures those fast track applicants who have had their asylum claims assessed and refused in a third country and have now received a further assessment and refusal under Australia's protection visa framework. It is the Government's position that persons who have had the benefit of accessing protection determination procedures both overseas and in Australia should be excluded from further 'forum shopping' where they have again had their application refused and where merits review will unnecessarily delay the finalisation of their cases.
- made a claim for protection in a country other than Australia that was refused by the Office of the United Nations High Commissioner for Refugees (UNHCR) in that country; this provision captures those fast track applicants who have had their asylum claims assessed and refused in a third country by the UNCHR and have now received a further assessment and refusal under Australia's protection visa framework. It is the Government's position that persons who have had the benefit of accessing protection determination procedures both overseas and in Australia should be excluded from further 'forum shopping' where they have again had their application refused and where merits review will unnecessarily delay the finalisation of their cases.
- makes a manifestly unfounded claim for protection; this provision captures those fast track applicants who have put forward claims that are without any substance (such as having no fear of mistreatment), have no plausible basis (including where there is no objective evidence supporting the claimed mistreatment) or are based on a deliberate attempt to mislead or abuse Australia's asylum process in an attempt to avoid removal. Consistent with the UNHCR's policy on accelerated procedures for manifestly unfounded applications for refugee status or asylum, it is the Government's position that such fast track applicants should not have access to merits review because their claims are so lacking in substance that further review would waste resources and unnecessarily delay their finalisation.
- without a reasonable explanation, provides a bogus document to the Department in support of their application; this provision captures those fast track applicants who have purported to use a bogus document in an attempt to support of any part of their protection visa application and where, after being confronted regarding the

authenticity of the document, continue to rely upon it or to produce further bogus documents without a reasonable explanation. In accordance with the UNHCR's policy on accelerated procedures for manifestly unfounded applications for refugee status or asylum, the Government considers it is not reasonable for an asylum seeker to continue presenting or relying on bogus documents beyond the time in which they facilitate the asylum seeker's safe passage to claim protection at the first available opportunity. This measure is intended to encourage asylum seekers to comply with requirements and assist with providing authentic documents and evidence which supports their protection claims.

To provide flexibility to extend this definition to other cohorts, a new legislative-instrument making power in paragraph (b) of the definition will provide the Minister with the ability to specify a person or class of persons to fall within the definition of an 'excluded fast track review applicant'.

In addition, new section 473BB inserted by item 21 of Schedule 4 to the Bill will provide the Minister with the flexibility and ability to determine via a legislative instrument that certain fast track decisions made in respect of excluded fast track review applicants are to be reviewed by the Immigration Assessment Authority. This will provide certain cohorts who might ordinarily be captured by the definition of an excluded fast track review applicant access to review under Part 7AA, for example those protection visa applicants who are eligible for the Primary Application Information Service (PAIS) .

These measures are consistent with Australia's *non-refoulement* obligations under the ICCPR and the CAT as those obligations are set out in the overview of this statement.

All fast track applicants, like other non-citizens seeking Australia's protection, will have their protection claims fully assessed. While merits review can be an important safeguard, there is no express requirement under the ICCPR or the CAT for merits review in the assessment of *non-refoulement* obligations. It will be open to all fast track applicants to seek assistance with their application by making private arrangements with a Registered Migration Agent. On 31 March 2014 the Government announced the removal of access to the Immigration Advice and Application Assistance Scheme (IAAAS) from all illegal arrivals. The Government will however, provide application support, through PAIS service providers, to those considered most vulnerable including unaccompanied minors.

Moreover, they will have the opportunity to articulate their claims in a full and confidential interview with a specially trained Onshore Protection decision-maker and in the presence of a Registered Migration Agent where engaged. An independent observer is present during the interview process for unaccompanied minors to ensure the minor's physical and emotional wellbeing is respected.

Article 13 of the ICCPR states:

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

As unlawful arrivals, many fast track applicants will not be lawfully in the territory and hence this obligation will not apply to them. The majority of fast track applicants will access review by the IAA and all fast track applicants, whether lawfully or unlawfully in the territory, will remain able to access judicial review which satisfies the obligation in Article 13 to have review by a competent authority.

It is relevant to note that the Refugees Convention does not prescribe procedures to be adopted by States in the processing of protection claims. The UNHCR recognises that it is for each State to establish the most appropriate procedures for processing claims, including review mechanisms, although it recommends that certain minimum requirements should be met including access to competent officials that will act in accordance with the principle of *non-refoulement*, access to necessary facilities such as a competent interpreter to submit their case and being permitted to remain in the country pending a decision on their initial request to the competent authority.

The UNHCR's policy on manifestly unfounded applications for asylum supports national procedures for determining refugee status that may, as part of those processes, include accelerated procedures for manifestly unfounded applications for asylum. In particular, it considers the channelling of manifestly unfounded applications through accelerated processes appropriate where certain procedural safeguards have been afforded to those applicants subject to the accelerated processes. Such procedural safeguards include applicants receiving preliminary counselling in the appropriate language and assisted to submit a written statement and being given a full personal interview by a fully qualified official.

It is the Government's position that there are sufficient procedural safeguards in place for ensuring all fast track applicants are afforded an opportunity to have their claims determined in an open and transparent assessment process while ensuring priority is given to identifying applications that present legitimate claims and in turn, asylum seekers who require Australia's protection.

The introduction of a different process for dealing with unfounded claims will not curtail a fast track applicant's ability to seek protection, nor their ability to access judicial review. Rather, these measures will place an emphasis on the importance for all fast track applicants to fully and truthfully articulate all of their protection claims at the earliest possible opportunity, as this may influence whether or not their case is reviewed by the IAA if they are refused.

Article 2(1) of the ICCPR states:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 26 of the ICCPR states:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against

discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The measures in this Bill are aimed at addressing the backlog of UMAs who entered Australia on or after 13 August 2012 and provide rights of review that are different to those afforded to lawful non-citizens who are refused protection onshore. It is the Government's view that UMAs with unmeritorious claims are often encouraged by private contacts to pursue vexatious merits review to prolong their stay. The length of time a person remains in Australia is relevant to a people smuggler's message. As such, while these measures may be said to engage Articles 2(1) and 26 by facilitating different review rights for certain fast track applicants, they are both reasonable and proportionate in achieving their aim, that is, of limiting access to de novo merits review as provided by the Refugee Review Tribunal to those asylum seekers who seek Australia's protection through lawful channels.

Limited Review by the Immigration Assessment Authority

One key aspect of the Fast Track assessment process will be the establishment of a new review body, the Immigration Assessment Authority (the IAA). Its objective will be to conduct an automatic and limited form of review for fast track reviewable decisions. New section 473FA provides that the Immigration Assessment Authority, in carrying out its functions under this Act, is to pursue the objective of providing a mechanism of limited review that is efficient and quick. The IAA will support the broader objective of the Fast Track assessment process by improving on the efficiency and cost effectiveness of merits review for certain cohorts of refused visa applicants in Australia and prevent the abuse of process by applicants.

To support this objective, new subsection 473CA provides that the Minister must refer a fast track reviewable decision to the IAA as soon as reasonably practicable after the decision is made. In addition, section 473CB will require the Secretary of the Department to give to the IAA relevant documents, material and details that the IAA will need to conduct review. These materials are collectively known as ***review material***.

New section 473DB of the Bill provides that subject to this Part, the IAA must review a fast track reviewable decision referred to it under section 473CA by considering the review material provided to the Authority under section 473CB:

- without accepting or requesting new information; and
- without interviewing the referred applicant.

The purpose of this provision is to stipulate that the default function of the IAA is to conduct a limited form of review, referred to as an 'on the papers' review, by only considering the review material provided to the Authority by the Secretary of the Department, which is the material that is available to the primary decision-maker. The IAA is not required to accept or request new information or interview the referred applicant.

The effect of section 473DB is to clarify that an ‘on the papers’ review will require the IAA to undertake a reconsideration of the review material to determine if a more preferable interpretation should be taken on the previous information. In doing so, section 473CC of the Bill will give the IAA the power to either affirm the previous fast track reviewable decision or remit the decision to the Department for reconsideration with directions regarding the IAA’s new findings.

It is also proposed to amend the *Migration Regulations 1994* to prescribe the timeframes that will apply to reviews conducted by the IAA. By allowing the IAA to complete its limited review role in an efficient and effective manner, this new review body will deliver the Government’s policy outcome of improving on the efficiency and cost effectiveness of merits review currently experienced by refused protection visa applicants in Australia and ensuring timely progress of these cases towards a final and accurate determination of immigration status.

Exception to the IAA’s limited review function

Should new information arise after the fast track applicant has received their primary decision and in keeping with the broader context of this model of limited review, new section 473DC will allow the IAA to consider new information beyond the review material, for the purposes of making a decision in relation to a fast track reviewable decision. This means that any such new information or claims can be fully assessed. This power can only be used where the IAA finds at its discretion that ‘exceptional circumstances’ exist in a case which justify the consideration of the new information. This mechanism in turn, extends the scope of the IAA’s default limited review function. Determining whether or not exceptional circumstances exist rests entirely with the IAA.

Section 473DC in the Bill provides that the IAA must not consider any new information unless it is satisfied that there are exceptional circumstances which justify considering the new information and the fast track review applicant has demonstrated that the new information was not and could not have been provided to the Minister before the Minister made the decision under section 65.

Neither the Bill, nor policy guidance exhaustively lists the range of exceptional circumstances which an IAA reviewer might identify when deciding whether to exercise his or her discretion in a case. The Government intends the IAA to have a broad discretion to assess all possible issues that might have arisen in a case while upholding the high threshold of ‘exceptional circumstances’. Exceptional circumstances should only be recognised if a fast track review applicant’s circumstances may now cause them to engage Australia’s protection obligations.

As such, it is the Government’s expectation that the types of exceptional circumstances the IAA will identify in review cases would generally fall into one of three broad categories of events that have arisen in a fast track review applicant’s case after the section 65 decision has taken place:

- circumstances where significant and rapidly deteriorating conditions have emerged in the fast track review applicant’s country of claimed persecution, for example, a change in the political or security landscape;

- circumstances where new credible personal information has arisen and was not previously known and available which suggests a fast track review applicant will face a significant threat to their personal security, human rights or human dignity if returned to the country of claimed protection; or
- circumstances where there has been a change in the interpretation or application of relevant provisions in the Act after the fast track applicant's section 65 decision which apply to a fast track review applicant's case.

Section 473DBA provides the IAA with the discretionary ability to get new information that it considers may be relevant and provides the IAA with the discretion to invite, orally or in writing a person to give new information. The IAA will be able to ask a person to give new information in writing or at an interview. An interview can be conducted in person, by telephone or in any other way (for example, through a videoconference or online). Section 473DE provides for the IAA to make a decision of the review if the referred applicant does not give the new information or comments in accordance with the invitation. The intention is for the IAA to quickly and flexibly get new information that it may consider relevant in accordance with its objective of providing a mechanism of limited review that is efficient and quick under section 473FA.

Under section 473DC, the IAA cannot consider that new information for the purposes of making a decision in relation to a fast track reviewable decision unless the "exceptional circumstances" test in section 473DC is met.

It will be open to the IAA to use these powers to request relevant information where it is seeking to determine whether exceptional circumstances might exist in a case and it may consider the fast track review applicant to be found to engage Australia's protection or in support of a remittal affirming the Minister's decision.

Such procedures will allow the IAA to be more accessible to fast track review applicants by assisting them to provide to the IAA, when requested, with relevant, accurate and detailed information pertaining to their protection claims in a medium that best suits their communication abilities and which ultimately, will assist the fast track review applicant towards receiving a timely and accurate outcome in their case.

Article 14(1) of the ICCPR states:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

The Executive Committee of the UNHCR has expressed the view that processes for determining refugee status should satisfy basic requirements including, where an asylum

seeker has been found not to engage Australia's protection obligations, the ability to seek a reconsideration of the decision to the same or a different authority and either to an administrative or judicial body, which is largely similar to the obligation in Article 13 of the ICCPR, as set out earlier. In expressing its views, the Executive Committee did not advocate the manner which reconsideration should take but rather, that access to review is consistent with the requirements of States' broader legal systems.

The Government also notes that much of Article 14(1) of the ICCPR expressly relates only to persons facing criminal charges or suits of law and may not be directly applicable to immigration proceedings. Where appropriate, however, the Government seeks to provide comparable arrangements for reviews involving administrative decisions that impact a person's rights, liberties or obligations.

Different models of merits review have evolved in Australia in relation to the review of administrative decisions. Models span from those that deliver a 're-hearing', that is, a review that decides a case based on circumstances at the time of the review through to models that deliver a 'reconsideration' by reviewing what the original decision maker decided and with reference to what was placed before the original decision maker. The Government notes that the key concept common to these models is that a review implements a process for determining whether the decision under review is the correct or preferable one.

It is the Government's view that it is consistent with its international obligations to implement a model of merits review that is efficient, cost effective and ensures a reconsideration of a fast track review applicant's circumstances.

The complete package of reforms proposed in this Bill place an emphasis on all fast track applicants fully and truthfully articulating their protection claims at the earliest possible opportunity. As such, the IAA's primary function of limited review is underpinned by a presumption that there should be no requirement to consider new information in a case involving a fast track review applicant, other than in exceptional circumstances. A fast track review applicant has had ample opportunity to present their claims and supporting evidence to justify their request for international protection throughout the decision-making process and before a primary decision is made on their application.

In addition, should new information later emerge which demonstrates that a fast track review applicant was impeded by their vulnerabilities to present their claims fully at the primary stage, it will be open to the IAA to obtain information or identify whether exceptional circumstances exist suggesting the fast track review applicant engages Australia's protection. Therefore, while the primary function of the IAA will be to conduct a limited form of review, measures in the Bill will allow the IAA to consider new information in only exceptional circumstances and in a manner which ensures protection obligations are identified, without compromising the general principle that all relevant information should be provided at the earliest opportunity

The Government acknowledges that in addressing the backlog of UMAs who entered on or after 13 August 2012 and ensuring they are progressed towards timely immigration outcomes, fast track review applicants will be afforded a different form of review to lawful non-citizens who are refused protection onshore. It is the Government's view that it is reasonable and proportionate to implement a model of merits review that is efficient, quick, cost effective and upholds the overall integrity of Australia's protection status determination

process as well as being competent, independent and impartial, consistently with Article 14(1).

Governance arrangements to establish the IAA as an independent office within the RRT

In accordance with the National Commission of Audit recommendations to curb unnecessary proliferation of government bodies, the Immigration Assessment Authority (IAA) is to be established as an office within the Refugee Review Tribunal (RRT). Accordingly, the IAA will be independent from the Department of Immigration and Border Protection.

The head of the IAA is to be the Principal Member of the RRT, who under new subsection 473JB(1) will be responsible for the overall operation and administration of the Authority and, for that purpose, may issue directions and determine policies. New subsection 473JB(2) will provide that the Senior Reviewer of the IAA is to manage the Authority subject to the directions of, and in accordance with policies determined by, the Principal Member. As such, the Senior Reviewer would be responsible for the day-to-day operations of the IAA. All reviewers, including the Senior Reviewer will be engaged under the *Public Service Act 1999*.

To ensure consistency with practices proposed for the RRT where appropriate, new measures outlined in this Bill will require IAA reviewers to consider the application of Practice Directions and Guidance Decisions issued by the Principal Member in the conduct of reviews before them, which will be similar to requirements for members of the RRT.

Practice Directions will allow for consistency in decision making to be enhanced by the Principal Member of the RRT who will have the power to issue directions regarding the operations of the IAA and the conduct of its review. Similar to jurisdictions such as the United Kingdom and Canada, the Principal Member will also have the power to issue guidance decisions on matters of policy and country information.

These measures help establishment the IAA as a competent, independent and impartial review body, consistently with Article 14(1) to the extent that it may apply. The establishment of the IAA as a separate office within the RRT, will allow it to make findings independent of the Department and therefore the primary assessment process. The applicability of Practice Directions and Guidance Decisions will promote the conduct of reviews in a consistent manner and encourage a consistent application of protection law and policy as it applies across various caseloads and both the jurisdictions of the RRT and the newly established IAA. This will help ensure consistent decision-making practices which will assist the full consideration of protection claims.

The Government has announced that from 1 July 2015, the RRT (along with IAA) will be amalgamated together with the AAT and Social Security Appeals Tribunal to form a single merits review tribunal.

Schedule 5 – Clarifying Australia’s international law obligations

Clarifying the availability of the removal power

In general terms, section 198 currently provides for the circumstances in which an unlawful non-citizen is subject to mandatory removal from Australia as soon as reasonably practicable.

New subsection 197C(1) provides that for the purposes of section 198, it is irrelevant whether Australia has *non-refoulement* obligations in respect of an unlawful non-citizen.

New subsection 197C(2) provides that an officer's duty to remove as soon as reasonably practicable an unlawful non-citizen under section 198 arises irrespective of whether there has been an assessment, according to law, of Australia's *non-refoulement* obligations in respect of the non-citizen.

The purpose of this amendment is to make clear that the removal power is available where a non-citizen meets the circumstances specified in the express provisions of section 198 of the Act and is not constrained by assessments of Australia's *non-refoulement* obligations. The clarification is required so that the Government can effect the rapid return of failed asylum seekers or other non-citizens who do not hold a visa that allows them to remain in Australia and whose protection claims have already been assessed.

Older court authority, for example, in the case of *M38/2002 v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 131), was that the duty to remove was not to be constrained by consideration of *non-refoulement* obligations as it was presumed that that consideration had taken place. A number of more recent authorities, including the Full Federal Court case of *Minister for Immigration and Citizenship v SZQRB* [2013] FCAFC 33, have indicated that the removal power was unavailable where an assessment of those obligations had not occurred in accordance with the law. In making the amendments the Government is not creating any new obligations or seeking to avoid obligations, rather it seeks to make an existing measure work as originally intended.

Whilst on its face the measure may appear to be inconsistent with *non-refoulement* obligations under the CAT and the ICCPR, as set out in the overview to this Statement, anyone who is found through visa or ministerial intervention processes to engage Australia's *non-refoulement* obligations will not be removed in breach of those obligations. There are a number of personal non compellable powers available for the Minister to allow a visa application or grant a visa where this is in the public interest. The form of administrative arrangements in place to support Australia meeting its *non-refoulement* obligations is a matter for the Government. This consideration is separate from the duty established by the removal power.

Creating a statutory framework relating to refugees

Overview of the measure

These provisions amend the *Migration Act 1958* to create a new, independent and self-contained statutory framework which articulates Australia's interpretation of its protection obligations under the Refugees Convention. The amendments set out the Government's intended interpretation of a number of Refugees Convention-related concepts within domestic law when more than one may be valid in international law, and where judicial interpretation of specific provisions has not been consistent with the Government's intended interpretations.

Non-refoulement and freedom from torture or cruel, inhuman or degrading treatment or punishment

The amendments do not substantively alter the rights and interests of persons whom these obligations would affect as their claims will be assessed in light of all of Australia's *non-refoulement* obligations. In some instances, harm that engages *non-refoulement* obligations under the CAT and/or ICCPR, as set out in the overview to this Statement, may also engage the *non-refoulement* obligation under the Refugees Convention and so the new codification may partially affect consideration of those claims in relation to determining whether a person is a refugee. However, claims that do not fall within refugee-related concepts will also be specifically assessed by reference to the separate tests that reflect the CAT and ICCPR *non-refoulement* obligations. Anyone who is found to engage Australia's *non-refoulement* obligations will not be removed in breach of those obligations.

Best interests of the child

Article 3 of the Convention on the Rights of the Child (CRC) states:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

The Government is committed to acting in accordance with Article 3 of the CRC. Policies and procedures give effect to this commitment. The assessment of protection claims made by, or on behalf of, children will continue to be made in an age-sensitive way that recognises the limitations and vulnerabilities of children in order to ensure that all *non-refoulement* obligations are fully assessed.

Modifying behaviour to avoid persecution

According to articles 18 and 19 of the ICCPR, everyone shall have the right to freedom of thought, conscience and religion, and the freedom to hold opinions. However, it is possible to limit certain rights as long as it is reasonable, proportionate and adapted to achieve a legitimate objective. For instance, the right to religious belief is an absolute right, however, the right to exercise one's belief can be limited, by prescription of law, where it can be demonstrated that the limitation is reasonable and proportionate, and is necessary to protect public safety, order, health, morals, or the rights and freedoms of others.

New section 5H(3) provides:

A person does not have a ***well-founded fear of persecution*** if the person could take reasonable steps to modify his or her behaviour so as to avoid a real chance of persecution in a receiving country, other than a modification that would:

- (a) conflict with a characteristic that is fundamental to the person's identity or conscience; or
- (b) conceal an innate or immutable characteristic of the person.

The provision is therefore specifically intended not to limit the rights protected by Articles 18 and 19 as it is intended that a person could not be required to modify his or her behaviour where it relates to the person's religion, political opinion or moral beliefs if such characteristics are fundamental to the person's identity or conscience or are innate or immutable. While this will be assessed by decision-makers on a case-by-case basis, any

modification would also be limited to what is reasonable in the person's individual circumstances.

Although the conduct in question would take place outside Australia's jurisdiction, the intention is for the provision to be broadly consistent with these rights to ensure that individuals are not denied refugee status where they fear persecution for exercising such rights in the receiving country.

This measure engages human rights and is compatible with those rights.

Schedule 6 - Children of Unauthorised Maritime Arrivals

Section 5AA will be amended to clarify that children born to an unauthorised maritime arrival parent, both in Australia and in a regional processing country, also fall within the definition of 'unauthorised maritime arrival'. The purpose of this amendment is to ensure that, consistent with their parents, these children will be liable for offshore processing and unable to make a valid application for a visa in Australia where their parents are unable to do so. The amendments will have retrospective effect, to clarify that all children born to an unauthorised maritime arrival or transitory person were unable to make valid applications for visas and were liable for offshore processing where this is the case for their parents.

The amendments will also give retrospective application to section 46A of the Act, as that section is proposed to be amended by the Migration Amendment (Protection and Other Measures) Bill 2014. This measure will ensure that the retrospective application of the definition of unauthorised maritime arrival will also apply to children who held temporary visas to clarify that such children were also unable to make valid applications for visas. Consequential amendments to the definition of 'transitory person' in the Act are also being made to ensure that the children of unauthorised maritime arrivals born in a regional processing country can be brought to Australia for a temporary purpose.

Family unity and best interests of the child

These amendments clarify that the child of one unauthorised maritime arrival (UMA) parent is also a UMA. The effect of this is to clarify that such children are liable for transfer to a regional processing country for offshore processing and are not able to make valid applications for visas in Australia where their parents are unable to do so.

Article 17 of the ICCPR states that:

No one shall be subjected to arbitrary or unlawful interference with his...family...

Article 23 of the ICCPR states that:

The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Clarifying that children have a status which is consistent with that of their parents will reduce the number of scenarios in which issues of family separation may arise as in most cases both parents are also UMAs.

The amendments will clarify that a child will be a UMA if one of their parents is a UMA and the other parent is not a UMA. However, if the other parent is an Australian citizen or a permanent resident of Australia, the child will continue to acquire Australian citizenship by birth in Australia and will be unaffected by these amendments. In addition, if the other parent holds another type of visa, the child will also hold that visa and will only be liable for transfer to a regional processing country if that visa ceases. The child will also be subject to any bar on further visa applications once that visa ceases, or, if the child holds one of the listed or prescribed visa types, the bar will apply to prevent applications for other visas.

Consistent with current policy and practice, where possible, family units will not be separated by Australia and consideration will be given to family unity and to the best interests of the child on a case-by-case basis to ensure that the obligations in Articles 17 and 23 of the ICCPR and Article 3 of the CRC are met.

Right to acquire a nationality

Article 24 of the ICCPR states that:

Every child has the right to acquire a nationality.

A stateless child's status as a UMA does not alter that child's eligibility for citizenship under the citizenship laws of Australia or any presently designated regional processing country.

Non-discrimination

Article 16(1) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) states that:

States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

...

(d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount....

The amendments do not discriminate in respect of whether a child's mother or father is a UMA.

Schedule 7 –Caseload management provisions

Overview of the measure

Following the recent High Court decision in *Plaintiff S297 of 2013 and Plaintiff M150 of 2013*, there is a need to amend the *Migration Act 1958* (the Act) to enable the Minister for Immigration and Citizenship to place a statutory cap on the number of protection visas granted in a programme year in order to ensure that the onshore component of the Humanitarian programme is appropriately managed.

This amendment will remove provisions within the Act relating to the “90 day rule” which has been in effect since 12 December 2005. The current amendment will remove both the 90 day time limit for deciding a protection visa application before the Department of Immigration and Border Protection and the RRT (sections 65A and 414A respectively), and the associated reporting requirements (sections 91Y and 440A respectively) that oblige the Minister to table a report in Parliament giving reasons explaining why decisions were not made within the prescribed period. While the initial policy intent for introducing this requirement was to support flexible, fair and timely resolution of protection visa applications, it is no longer an effective mechanism to achieve this outcome and as such the Government had planned to repeal these sections prior to the recent decision in the High Court. Ministerial directions have been put in place regarding the order of consideration for processing of protection visa applications which achieve a more effective and responsive approach to different caseloads, without generating resource-intensive reporting.

It is also proposed to amend the Act to put beyond doubt that the visas of the class provided for by section 35A, i.e. protection visas, are a class of visa that may be capped (limit on visas provided in s85) by the Minister. Section 84 of the Act also provides that the Minister may, by notice in the Gazette, determine that dealing with applications for visas of a specified class is to stop until a day specified in the notice. As section 84 also provides a power for suspending the processing of visa applications, it is also proposed to amend the Act to put beyond doubt that the visas of the class provided for by section 35A (protection visas) may be a specified class for which the Minister may suspend processing.

Human rights implications

These amendments will bring the management of the protection visa programme into line with other visa classes to ensure an orderly and well managed migration programme is maintained. Nearly all visa classes are liable for capping. Capping decisions are based on reasonable objective criteria that are proportionate to the legitimate aim of ensuring the integrity of program or orderly processing. Should the Minister choose to use the amended provisions and place a limit on the number of protection visas that can be granted, there will be no effect on Australia’s *non-refoulement* obligations. Persons claiming protection will not be returned while awaiting processing or visa grant. Processing will continue and visa grant will resume at a later date in accordance with the terms of the capping determination.

Should the Minister decide to cap the onshore component of the Humanitarian programme it may be argued that these amendments could result in protracted detention of protection visa applicants and therefore may engage Article 9 of the ICCPR which prohibits unlawful or arbitrary detention. The Act requires people who are not Australian citizens and do not hold a valid visa to be detained unless they are given permission to remain in Australia by being granted a visa. Continuing detention is predicated on consideration of potential risks to the Australian community, including national security, health and character risks, non-processing of claims and these amendments have no bearing or influence on the ability of the Government to grant visas or for applicants to be present in the community while processing occurs. While a section 85 cap is in place, processing of applications continues on applications. Where relevant, the Minister can consider alternative ways to release someone from detention if they are found to engage Australia’s protection obligations but cannot be granted a protection visa because of a cap. For example, a bridging visa could be granted. These amendments are therefore consistent with the prohibition on unlawful and arbitrary detention in Article 9 of the ICCPR.

Conclusion

This Bill and Regulation amendments are compatible with human rights because it is consistent with Australia's human rights obligations and to the extent that it may also limit human rights, those limitations are reasonable, necessary and proportionate.