

# Migration Reform (Transitional Provisions) Regulations 1994 No. 261

## EXPLANATORY STATEMENT

### STATUTORY RULES 1994 No. 261

Issued by the Authority of the Minister for Immigration and Ethnic Affairs

Subject - Migration Reform Act 1992

Migration Reform (Transitional Provisions) Regulations

Section 42 of the Migration Reform Act 1992 ("the Reform Act") provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to the Act. In addition, regulations are prescribed pursuant to the following powers:

- subsection 40(2) of the Reform Act provides that the regulations may provide that a specified provision of the Migration Act 1958 as in force immediately before 1 September 1994 ("the old Act") repealed or amended by the Reform Act is to continue to apply to specified persons, in specified circumstances, or in relation to visas in a specified class of the Migration Act 1958 as in force on and after 1 September 1994 ("the amended Act");
- subsection 40(3) of the Reform Act provides that the regulations may provide that a specified provision of the amended Act is not to apply to specified persons or in specified circumstances;
- subsection 40(4) of the Reform Act provides that regulations made under subsections 40(2) or (3) may provide that a specified provision is to apply or not apply:
  - to a specified extent; or
  - with specified modifications (not being the modification of a penalty); or
  - as if a specified status or specified situation were another specified status or specified situation; or
  - as if a person who had a specified status, specified visa or prescribed permit had another specified status, specified visa or prescribed permit;
- subsection 40(5) of the Reform Act provides that the regulations may provide that, from 1 September 1994, visas or entry permits in a specified old Act class held by specified persons immediately before that date are to continue in effect as visas in a specified amended Act class;
- subsection 40(6) of the Reform Act provides that the regulations may provide that, from 1 September 1994, specified persons are to be taken to have been granted visas in a specified amended Act class;
- subsection 40(7) of the Reform Act provides that the regulations may provide that, from 1 September 1994, applications made after a specified date, or other specified applications, for visas or entry permits in a specified old Act class are to be taken to be applications for visas in a specified amended Act class;
- subsection 40(8) of the Reform Act provides that the regulations may provide that applications made before a specified date or other specified applications for visas or entry

permits in a specified old Act class may continue to be dealt with under the pre-1 September 1994 legislation, and that the old Act class visas or entry permits consequently granted are to be taken to be visas in a specified amended Act class; and

- subsection 40(8B) of the Reform Act provides that the regulations may provide that, from 1 September 1994, a certificate issued under a section of the old Act that is in force in relation to specified persons is taken to be a certificate issued under a specified section of the amended Act.

Sections 40 and 42 of the Reform Act will not commence until 1 September 1994. However, subsection 4(1) of the Acts Interpretation Act 1901 provides that where an Act that is not to come into operation immediately upon its enactment is expressed to confer power to make regulations, then, unless the contrary intention appears, that power may be exercised before the Act comes into operation as if it had come into operation.

The purpose of the Regulations is twofold:

- to repeal the Migration (1993) Regulations and the Migration (Review) (1993) Regulations with effect from 1 September 1994; and
- to make the regulations necessary to ensure a smooth transition from migration legislation in force immediately before 1 September 1994 to migration legislation in force from that date. These transitional arrangements

aim to ensure that, subject to specific changes effected by the Reform Act, and as far as is practicable, persons with a particular status or particular rights and liabilities before the commencement of the Reform Act on 1 September 1994 continue to have an equivalent status, or equivalent rights and liabilities after 1 September 1994.

These Regulations form part of a Package of regulations which contain the regulatory changes required to reflect the changes to the Migration Act 1958 that commence on 1 September 1994. All of the Regulations commence on 1 September 1994.

Other regulations that are being made or amended are the Migration Regulations, the Australian Citizenship Regulations, the Migration Agents Regulations, the Immigration Education (Charge) Regulations, the Migration (Iraq -United Nations Security Council Resolutions) Regulations, the Migration (Yugoslavia (Serbia and Montenegro) - United Nations Security Council Resolutions) Regulations, and the Migration (Haiti - United Nations Security Council Resolutions) Regulations.

Details of the Regulations are set out in the Attachment.

## ATTACHMENT

### **PART 1 - PRELIMINARY**

#### Regulation 1 - Citation

This regulation provides that these Regulations may be cited as the Migration Reform (Transitional Provisions) Regulations,

#### Regulation 2 - Commencement

This regulation provides that these Regulations commence on 1 September 1994.

#### Regulation 3 - Interpretation

Subregulation (1) provides definitions for terms used throughout these Regulations. In particular, "the old Act" is defined to mean the Migration Act 1958 as in force immediately before 1 September 1994, and "the amended Act" is defined to mean the Migration Act 1958 as in force on and after 1 September 1994.

Subregulation (2) provides that, unless the contrary intention appears, expressions used in other migration legislation specified in this subregulation have the same meaning in these Regulations as in that legislation.

Subregulation (3) provides that, if an expression used in these Regulations has different meanings in the provisions referred to in subregulation (2), the meaning in the Migration Regulations is to be preferred.

### **PART 2 - ENTRY PERMITS AND VISAS GRANTED BEFORE 1 SEPTEMBER 1994**

This Part is designed to ensure that, from 1 September 1994, all visas and entry permits held immediately before that date are converted into one of two transitional visa classes by operation of law. Transitional (permanent) and transitional (temporary) visas are created by the Migration Regulations (regulation 2.01).

As far as practicable, all conditions and periods of validity of the former visas and entry permits will carry over to the transitional visas (with the exception of those pertaining to travelonly visas, some return visas, and some permanent entry permits and entry visas).

#### Regulation 4 - Entry permits in force before 1 September 1994 to continue in effect

Subregulation (1) provides that, subject to regulation 5 (which makes specific provision in respect of certain permanent entry permits granted on or after 1 September 1992), a permanent entry permit held immediately before 1 September 1994 continues in effect on and after that date as a transitional (permanent) visa that permits the holder to remain indefinitely in Australia.

Subregulation (2) provides that a temporary entry permit held immediately before 1 September 1994 continues in effect on and after that date as a transitional (temporary) visa that permits the holder to remain in Australia, is subject to any conditions to which the entry permit was subject, and has a visa period ending on the day on which the entry permit would have stopped being in force.

#### Regulation 5 - Certain Permanent entry permits, etc., granted on or after 1 September 1992

This regulation qualifies regulation 4. It provides that if a non-citizen:

- was in Australia immediately before 1 September 1994 either as the holder of a permanent entry permit granted on or after 1 September 1992, or as the holder of a permanent entry visa who first entered Australia on or after that date; and
- has not held, and is not an applicant for, a return visa, Class A (under the Migration (1989) Regulations) or a resident return (Class A) visa (under the Migration (1993) Regulations);

he or she is taken, on 1 September 1994, to hold a transitional (permanent) visa.

That visa permits the non-citizen to travel to and enter Australia for the remainder of three years from either the date of the grant (in the case of the holder of an entry permit) or from the date of first entry (in the case of the holder of an entry visa), and to remain indefinitely in Australia.

#### Regulation 6 - Visas granted before 1 September 1994 to continue in effect

Subregulation (1) provides that if, immediately before 1 September 1994, a person held a permanent visa other than a permanent return visa, that visa continues in effect on and after that date as a transitional (permanent) visa. The transitional (permanent) visa is subject to the same conditions to which the permanent visa was subject (if any). It permits the holder to travel to and enter Australia within the period of validity of the permanent visa held immediately before 1 September 1994, and to remain in Australia indefinitely.

The subregulation also specifically provides that, if the permanent visa held immediately before 1 September 1994 was subject to a requirement that first entry must be by a certain date and the holder has not entered Australia by that date, the permanent (transitional) visa ceases to be in effect on that date.

Subregulation (2) provides that if, immediately before 1 September 1994, a person held a temporary visa (other than a diplomatic visa granted under the Migration (1989) Regulations or the Migration (1993) Regulations), that visa continues in effect on and after that date as a transitional (temporary) visa. The transitional (temporary) visa is subject to the same conditions to which the temporary visa was subject and permits the holder to travel to, enter and remain in Australia within the visa period referred to in paragraph (c) of this subregulation.

#### Regulation 7 - Permanent return visas

This regulation provides that if, immediately before 1 September 1994, a non-citizen held a permanent return visa, that visa continues in effect on and after 1 September 1994 as a transitional (permanent) visa permitting the holder to travel to and enter Australia for the same period as that permitted by the permanent return visa, and to remain in Australia indefinitely.

#### Regulation 8 - Persons to whom section 37 of the old Act applied

This regulation provides for section 37 of the old Act (which imposed certain restrictions regarding the making of further entry permit applications by persons previously refused an entry permit) to continue to apply, subject to specified modifications, to a non-citizen who was in Australia on 1 September 1994 and who was, immediately before that date, a person to whom section 37 of the old Act applied.

While such a person is in Australia, he or she may, subject to the Migration Regulations, apply for a visa of a class prescribed for the purposes of section 48 of the amended Act, but not for a visa of any other class.

Section 48 of the amended Act is similar to section 37 of the old Act in that it imposes limitations on the rights of a non-citizen in Australia (who is not the holder of a substantive visa) to make a

further application for a visa after having had a visa refused or cancelled. A further application may only be made for a class of visa prescribed in regulation 2.12 of the Migration Regulations.

### **PART 3 - AUTHORITIES TO RETURN AND RETURN ENDORSEMENTS**

#### Regulation 9 - Authorities to Return etc. granted before 19 December 1989

This regulation provides that a non-citizen who, immediately before 1 September 1994, held an Authority to Return or a Return Endorsement is taken, on 1 September 1994, to have been granted a transitional (permanent) visa permitting the holder to travel to and enter Australia within three years after each departure from Australia, and to remain indefinitely in Australia.

### **PART 4 - STATUS OF CERTAIN NON-CITIZENS ON 1 SEPTEMBER 1994**

This Part is designed to ensure that, generally, non-citizens who, on 1 September 1994, have an unresolved entry permit application hold, by operation of law, a bridging visa. This provides such persons with lawful status for the period of validity of the bridging visa.

#### Regulation 10 - Non-citizens in Australia with applications not finally determined as at 1 September 1994

Subregulation (1) provides that this regulation applies to a non-citizen in Australia (other than an illegal entrant in custody within the meaning of section 11 of the old Act) who was in Australia immediately before 1 September 1994 and who:

- on or after 19 December 1989 and before 1 September 1994, applied for an entry permit (other than a processing entry permit) and that application has not been finally determined; or
- before 19 December 1989, applied for an entry permit and no decision had been made on that application; or
- is eligible to apply, as specified, for reconsideration of a decision in respect of an entry permit application made before 19 December 1989; or
- before 1 September 1994, had applied for reconsideration of a decision in respect of an entry permit application made before 19 December 1989, and no decision had been made on the reconsideration before 1 September 1994.

Sub regulation (2) provides that a non-citizen to whom this regulation applies is taken to have been granted a bridging visa on 1 September 1994. It also sets out the different classes of bridging visas that are taken to have been granted to persons referred to in subregulation (1), and the circumstances in which the different classes are taken to have been granted.

Subregulation (3) deals with a situation where a non-citizen has, as a consequence of the operation of regulations providing for "deemed applications" (regulations 22A, **22B**, **22C** or **22E** of the Migration (1989) Regulations and regulation 2.29 of the Migration (1993) Regulations), more than one entry permit application on 1 September 1994 which remains unresolved. Subregulation (3) has the effect that the person is not taken to have been granted a bridging visa under this regulation in respect of any of the deemed applications.

#### Regulation 11 - Visa Period, etc., of bridging visa taken to have been granted under regulation 10

Subregulation (1) provides for the start and the end of the visa period of a bridging visa taken to have been granted under regulation 10. The visa period is the period in which a bridging visa is

in effect (the definition of "visa period" in section 5 of the amended Act, as well as section 68 of the amended Act, refer).

If the relevant entry permit application was made before 19 December 1989, the visa period starts on 1 September 1994 and ends:

- 28 days after notification of the decision on the entry permit application or, if the non-citizen has applied or applies for reconsideration, 28 days after the non-citizen is notified of the decision following the reconsideration; or
- in the case of a bridging visa A or B, on cancellation of a substantive visa held by the non-citizen; or
- on the grant of another bridging visa to the non-citizen in respect of that application ; or
- on the grant of a transitional visa to the non-citizen; or
- if the application is withdrawn, on that withdrawal.

In any other case the visa period starts on 1 September 1994 and ends in accordance with the relevant provisions in the amended Act and the Migration Regulations.

Subregulation (2) makes specific provision in respect of the travel and entry permission attaching to a bridging visa B taken to have been granted under regulation 10.

#### Regulation 12 - Non-citizens outside Australia with applications not finally determined on 1 September 1994

This regulation provides that a non-citizen who:

- was outside Australia on 1 September 1994; and
- immediately before that date, held a visa permitting travel and re-entry to Australia; and
- would have been provided for under regulation 10 or 13 of these Regulations had the person been in Australia on 1. September 1994;

is taken to have been granted a bridging visa Class B permitting the non-citizen to travel to and enter Australia during the same period as that provided for in the visa held, and to remain in Australia until 28 days after the person's substantive visa application is finally determined.

#### Regulation 13 - Members of the family unit

Subregulations (1) and (2) provide that a non-citizen who:

- is a member of the family unit of another non-citizen ("the family head") who is taken to have been granted a bridging visa under regulation 10 or 12 because he or she has applied for review of a decision; and
- was in Australia on 1 September 1994; and
- was not in immigration detention; and
- was included in the family head's entry permit application, or who applied for an entry permit at the same time as the family head;

is taken to have been granted a bridging visa of the same class and, subject to subregulation (3), with the same visa period and conditions as that taken to have been granted to the family head.

Subregulation (3) provides for work restrictions or reporting conditions that were operative immediately before 1 September 1994 to be continued after that date.

#### Regulation 14 - illegal entrants who have applied for judicial review

This regulation applies to a non-citizen who was in Australia immediately before 1 September 1994 who was an illegal entrant but not in immigration detention who had applied for judicial review of a decision before that date and within the period allowed (subregulation (1)).

Subregulation (2) provides that the non-citizen is taken to have been granted, on 1 September 1994 and depending on the circumstances specified in subregulation (2), a bridging visa, Class A, C or E, as appropriate.

Subregulation (3) provides that the visa period of a bridging visa taken to have been granted under subregulation (2) starts on 1 September 1994 and ends 28 days after the non-citizen is notified of the Court's decision, or 28 days after any appeal against that decision is finally disposed of.

#### Regulation 15 - Conditions of bridging visa under regulation 10, 12, 13 or 14

Subregulation (1) provides that a bridging visa taken to be granted to a non-citizen under regulation 10, 12, 13 or 14 of these Regulations is subject to the same reporting conditions as any to which the non-citizen was subject immediately before 1 September 1994.

In respect of an illegal entrant who had applied for a specified class of (refugee-related) entry permit and who had been given written permission to work under subsection 83(2) of the old Act, subregulation (2) provides for the continuation of the work conditions on a bridging visa taken to be granted under regulation 10, 12, 13 or 14 of these Regulations.

Subregulation (3) provides that, subject to this regulation, the conditions of a bridging visa taken to be granted to a non-citizen under regulation 10, 12, 13 or 14 of these Regulations are the conditions set out in Schedule 2 of the Migration Regulations in relation to a bridging visa of that subclass.

#### Regulation 16 - Non-citizens who became illegal entrants because of s. 20 of the old Act

Section 14, in conjunction with section 20, of the old Act provided that a person became an illegal entrant if the person had produced a bogus document, made a statement that was false or misleading in a material particular, or otherwise misled an officer. Any visa or entry permit the person in question may have held was, pursuant to subsection 35(2) of the old Act, cancelled by operation of law from the time of grant or from the time that the person entered Australia (whichever was the later).

These provisions are repealed by the Reform Act. Under this regulation, all non-citizens affected by section 14 and section 20 who are in Australia on 1 September 1994 are taken, subject to certain exceptions, to have been granted the transitional visa they would have otherwise held but for the operation of subsection 35(2). They will therefore be lawful noncitizens.

The transitional visas will be subject to the discretionary cancellation provisions of the amended Act, including cancellation under Subdivision C of Division 3 of Part 2 on the basis of the actions which caused section 20 to apply. Rather than unlawful status by operation of law, the new provisions will involve an actual consideration of the visa holder's circumstances in determining whether the visa should be cancelled.

Subregulations (1) and (2) provide that, subject to certain exceptions specified in subregulation (1), a non-citizen:

- who was in Australia on 1 September 1994; and
- to whom, immediately before that date, section 20 of the old Act applied; and
- who did not, immediately before that date, hold an entry permit or entry visa endorsed as required by subsection 20(5) or (5A) of the old Act;

is taken to have been granted, on 1 September 1994, a transitional visa of the same class as he or she would hold under regulation 4 or 5 of these Regulations, if section 20 had not applied to him or her immediately before that date.

Subregulation (3) provides that a transitional visa taken to have been granted under subregulation (2) is subject to the same conditions as the entry permit or entry visa that the non-citizen would have held but for the effect of subsection 35(2) of the old Act before 1 September 1994.

Subregulation (4) provides that the visa period for a transitional (temporary) visa taken to have been granted under subregulation (2) begins on 1 September 1994 and ends on the day that the entry permit or entry visa that the non-citizen would have held but for the effect of subsection 35(2) of the old Act before 1 September 1994 would have ceased but for the effect of section 20 and subsection 35(2) of the old Act.

#### Regulation 17 - New Zealand citizens in Australia

Subregulation (1) provides that this regulation applies to a non-citizen who is a New Zealand citizen who:

- was in Australia lawfully immediately before 1 September 1994; or
- was, immediately before 1 September 1994, an illegal entrant because of section 20 of the old Act; and
- is not taken to hold a transitional visa under Part 2 or 3 of these Regulations, a Norfolk Island Permanent Resident visa under regulation 18 of these Regulations, a Subclass 995 (Diplomatic) visa under regulation 19 of these Regulations, a special purpose visa or an absorbed person visa; and
- was not the subject of a deportation order immediately before 1 September 1994.

Subregulation (2) provides that a non-citizen to whom this regulation applies is taken to have been granted a special category visa on 1 September 1994.

#### Regulation 18 - Non-citizens having right of permanent residence on Norfolk Island

This regulation provides that a non-citizen who was in Australia on 1 September 1994 and who has the right of permanent residence on Norfolk Island is taken to have been granted a Norfolk Island Permanent Resident visa on 1 September 1994.

#### Regulation 19 - Diplomats

Subregulation (1) provides that a non-citizen who, immediately before 1 September 1994, was in Australia and was an exempt non-citizen by virtue of being a diplomatic or consular



representative of a country other than Australia, a member of the staff of such a representative, or the spouse or dependent relative of such a representative, is taken to have been granted a Subclass 995 (Diplomatic) visa on that date.

Subregulation (2) provides that the visa period of a Subclass 995 (Diplomatic) visa that is taken to have been granted to a non-citizen under subregulation (1) ends when the noncitizen ceases to have the status of a diplomatic or consular representative in Australia of a country other than Australia.

Subregulation (3) provides that a non-citizen who was outside Australia immediately before 1 September 1994 and who held a diplomatic visa granted under the Migration (1993) Regulations or under the Migration (1989) Regulations, is taken to have been granted a Subclass 995 (Diplomatic) visa on that date. This visa authorises travel and entry to Australia until the date specified in the visa held immediately before 1 September 1994, and permits stay in Australia until the non-citizen, or the non-citizen of whose family unit he or she is a member, ceases to have the status of a diplomatic or consular representative in Australia of a country other than Australia.

## **PART 5 - APPLICATIONS UNRESOLVED ON 1 SEPTEMBER 1994**

### Regulation 20 - Interpretation

This regulation defines the term "application" for the purposes of this Part. The definition excludes applications for entry permits for which it is a criterion that the applicant has been determined to be a refugee. Transitional arrangements in relation to those applications are provided for in section 39 of the Reform Act.

### Regulation 21 - Visa and entry Permit applications made before 19 December 1989

Subregulation (1) provides that this regulation applies to an application for the grant of a visa or entry permit made by a non-citizen before 19 December 1989 if the Minister had not made a decision on the application before 1 September 1994.

Subregulation (2) provides that if, on or after 1 September 1994, the Minister decides that a non-citizen is entitled to be granted a visa or entry permit under the provisions continued in effect by subsection 6(4) of the Migration Legislation Amendment Act 1989, the non-citizen is taken to be granted a transitional (temporary) visa or a transitional (permanent) visa, depending on whether the application was for a temporary or permanent visa or entry permit.

Subregulation (3) sets out, in respect of transitional (permanent) visas, the entitlements of the holder to travel to, enter and remain in Australia. It also provides that the visa is subject to the conditions (if any) that the Minister imposes (being such conditions as the Minister could have imposed had the application been decided under the Migration Act 1958 as in force at the date of the application).

Subregulation (4) sets out, in respect of transitional (temporary) visas, the entitlements of the holder to travel to, enter and remain in Australia. It also provides that the visa is subject to the same conditions as would have been the case had the application been decided under the Migration Act 1958 as in force at the date of the application.

### Regulation 22 - Visa applications made on or after 19 December 1989 and before 1 September 199

Subregulation (1) provides that, except as specified, the provisions in the old Act and Regulations dealing with the general operation of the visa system (including the capping provisions) continue

to apply to the processing of an application for a visa made on or after 19 December 1989 and before 1 September 1994.

Subregulation (2) provides that successful applications will result in the grant of a transitional (temporary) visa or a transitional (permanent) visa, depending on whether the application was for a temporary or permanent visa.

Subregulation (3) sets out, in respect of transitional (permanent) visas, the entitlements of the holder to travel to, enter and remain in Australia. It also provides that the visa is subject to the conditions (if any) that the Minister imposes (being such conditions as the Minister could have imposed had the application been decided under the Migration Act 1958 as in force at the date of the application).

Subregulation (4) sets out, in respect of transitional (temporary) visas, the entitlements of the holder to travel to, enter and remain in Australia. It also provides that the visa is subject to the same conditions as would have been the case had the application been decided under the Migration Act 1958 as in force at the date of the application.

Subregulation (5) sets out the visa holder's entitlements to travel to, enter and remain in Australia where the application referred to in subregulation (1) was for a permanent return visa.

Subregulation (6) is a technical provision designed to ensure the continuation of appropriate terminology in circumstances where Division 2 of Part 2 of the old Act continues to apply to a primary visa application being considered on or after 1 September 1994.

Subregulation (7) provides that the code of procedures contained in Subdivision AB of Division 3 of Part 2 of the amended Act does not apply to an application referred to in this regulation. It also provides that the code of procedures (as applied by section 342 of the amended Act) applies to an application for review of a primary decision if the review application is made on or after 1 September 1994.

#### Regulation 23 - Entry Permit applications made on or after 19 December 1989 and before 1 September 1994

Subregulation (1) provides that this regulation applies to an application for an entry permit made on or after 19 December 1989 and before 1 September 1994 if the application had not been finally determined before 1 September 1994.

Subregulation (2) provides that such an application is taken, on 1 September 1994, to be an application for a transitional (temporary) visa or a transitional (permanent) visa, depending on whether the application was for a temporary or permanent entry permit.

Subregulation (3) provides that an application taken to be an application for a transitional visa under subregulation (2) is to be decided according to the criteria that applied to the entry permit for which application was made.

Subregulation (4) provides for the capping provisions of the old Act to continue to apply to transitional visas granted as a result of this regulation.

Subregulation (5) provides that a transitional (temporary) visa that is granted to a noncitizen on the basis of an application to which this regulation applies is, in the case of an application for a temporary entry permit other than a processing entry permit, to be a visa to travel to, enter and remain in Australia. A transitional (temporary) visa that is granted to an applicant on the basis of an application for one of the specified processing entry permits is to be a visa to remain in Australia only.

Subregulation (6) sets out, in respect of transitional (permanent) visas, the entitlements of the holder to travel to, enter and remain in Australia. It also provides that the visa is subject to the conditions (if any) that the Minister imposes (being such conditions as the Minister could have imposed had the application been decided under the Migration Act 1958 as in force at the date of the application).

Subregulation (7) sets out, in respect of transitional (temporary) visas, the entitlements of the holder to travel to, enter and remain in Australia. It also provides that the visa is subject to the same conditions as would have been the case had the application been decided under the Migration Act 1958 as in force at the date of the application.

Subregulation (8) provides that the code of procedures contained in Subdivision AB of Division 3 of Part 2 of the amended Act does not apply to an application referred to in this regulation. It also provides that the code of procedures (as applied by section 342 of the amended Act) applies to an application for review of a primary decision if the review application is made on or after 1 September 1994.

## **PART 6 - RECONSIDERATION OF CERTAIN DECISIONS**

### Regulation 24 - Reconsideration under 1989 or 1993 Regulations

This regulation provides that the old Act and regulations, as in force on 31 August 1994, continue to apply to the reconsideration of a decision in the circumstances specified in subregulation (1) (subregulations (1) and (2)). The regulation further provides that a fee of \$240 which is payable on an application for reconsideration of a decision (subregulation (3)) is to be refunded if, on reconsideration, the applicant is granted a visa (subregulation (4)).

## **PART 7 - REVIEW OF DECISIONS**

The purpose of this Part is to ensure that:

- eligibility for review of decisions made before 1 September 1994 in respect of primary applications made between 19 December 1989 and 31 August 1994 is maintained in accordance with the pre-1 September 1994 law; and
- eligibility for review of decisions made after 1 September 1994 in respect of such primary applications is determined in accordance with the post-1 September 1994 law.

The Migration (Review) (1993) Regulations cease to have effect on 1 September **1994** (their repeal is effected by Part 11 of these Regulations). Provisions relating to merits review for primary applications made on or after 1 September 1994 are contained in Part 4 of the Migration Regulations.

## **Division 1 - Offshore applications for visas made on or after 19 December 1989 and before 1 September 1994**

### Regulation 25 - Application of Division

This regulation provides that this Division applies to a decision of the Minister or a review authority on an application for a visa made on or after 19 December 1989 and before 1 September 1994 at a time when the applicant was outside Australia, if the application had not been finally determined before 1 September 1994.

### Regulation 26 - Application of Code of Procedure

This regulation provides that the code of procedures contained in Subdivision AB of Division 3 of Part 2 of the amended Act (as applied by section 342 of the amended Act) applies to an application for internal review referred to in this Division only if the review application is made on or after 1 September 1994.

#### Regulation 27 - Certain decisions in respect of visas that can be granted in Australia

This regulation provides that, in relation to review of decisions (other than those decisions specifically dealt with in regulations 28 or 29 of these Regulations) on a primary application to which Part 5 of the amended Act applies, that Part has effect as if subparagraphs (e)(i), (f)(i), (9)(i) and (h)(i) were omitted from the definition of "Part 5 reviewable decision" in section 337 of the amended Act. Those subparagraphs refer to decisions to refuse to grant a person a visa where the visa is a visa that could not be granted while the applicant is in Australia.

#### Regulation 28 - Review of decision - Class 124 or 419 visa

The effect of this regulation is to preserve a review right which existed before 1 September 1994 and which would otherwise be lost.

Subregulation (1) provides that this regulation applies to a decision to refuse a non-citizen a distinguished talent (Australian support) visa or a visiting academic visa under the Migration (1989) Regulations or the Migration (1993) Regulations if the primary application included:

- in the case of an application for a distinguished talent (Australian support) visa -particulars of a third party (being an Australian citizen, an Australian permanent resident, an eligible New Zealand citizen or an Australian organisation) who had given written testimony to the applicant's standing;
- in the case of an application for a visiting academic visa - particulars of a third party (being an Australian tertiary or research institution) that had invited the applicant to visit it.

Subregulation (2) makes provision for the third parties referred to in subregulation (1) to exercise review rights.

#### Regulation 29 - Review of certain visa decisions

This regulation provides that specified decisions made under the Migration (1989) Regulations and the Migration (1993) Regulations, are not "Part 5 reviewable decisions" for the purposes of the amended Act. This ensures that merits review is not available in respect of such decisions as an unintended consequence of the way in which eligibility for review is determined. These decisions were not reviewable before 1 September 1994 and are not intended to be reviewable after that date.

### **Division 2 - Review of cancellation**

#### Regulation 30 - Cancellation of visas

This regulation provides that, in its application to a decision to cancel a visa made before 1 September 1994, Part 5 of the amended Act has effect as if the definition were amended as described. The effect of this provision is that merits review is not available in respect of cancellation decisions made before 1 September 1994. This reflects the pre-1 September 1994 position.

### **Division 3 - Other matters concerning review**

#### Regulation 31 - Decision of review officer affirming decision

Subregulation (1) provides for a decision by a review officer affirming a primary decision made before 1 September 1994 to be able to be prescribed as an Immigration Review Tribunal (IRT) - reviewable decision by providing for Part 5 of the amended Act to have the effect set out in this subregulation.

Subregulation (2) provides that a decision of a review officer affirming a primary decision made before 1 September 1994 is an IRT-reviewable decision.

#### Regulation 32 - Criterion regarding section 47 temporary entry Permit

This regulation provides that a criterion that the applicant hold a section 47 temporary entry permit, or an equivalent criterion, does not apply to a review or to a reconsideration of a decision to refuse a visa where that criterion was a criterion for the grant of the visa.

This reflects the repeal of section 47 of the old Act on 1 September 1994, and the consequent inability to grant section 47 temporary entry permits after that date. Prior to 1 September 1994, if an applicant's section 47 temporary entry permit expired during the processing of an application it was possible to grant a further section 47 temporary entry permit (usually a processing entry permit). Without this regulation some applicants whose section 47 temporary entry permit had expired would be unable to be granted a visa on the basis of a pre-1 September 1994 entry permit application.

### **PART 8 - STATUTORY VISITORS UNDER THE OLD ACT**

#### Regulation 33 - Justice certificate issued under old Act

This regulation provides that a certificate that was issued before 1 September 1994 under subsection 51 (1) of the old Act is taken to continue in effect from that date as a Commonwealth criminal justice entry certificate issued under section 145 of the amended Act. A non-citizen in relation to whom such a certificate is taken to be in force is taken to hold a criminal justice entry visa from 1 September 1994.

#### Regulation 34 - Statutory visitor visas

This regulation provides that a statutory visitor visa under the Migration (1989) Regulations or the Migration (1993) Regulations, granted in respect of a non-citizen who, immediately before 1 September 1994, was outside Australia is taken, after 1 September 1994 to continue in force as a criminal justice entry visa under subsection 155(1) of the amended Act.

### **PART 9 - IMMIGRATION CLEARANCE OF CERTAIN NON-CITIZENS**

#### Regulation 35 - Modification of section 172

This regulation modifies the operation of section 172 (immigration clearance) of the amended Act, in respect of a non-citizen who was in Australia on 1 September 1994, so that it applies as if its operation extended to:

- a person who entered Australia lawfully before 1 September 1994 and has not left Australia; and
- a person who entered Australia unlawfully before 1 September 1994, was subsequently granted an entry permit under the Migration Act 1958 and the Regulations as in force before that date, and has not left Australia after being granted that entry permit.

The effect of this regulation is to ensure that the persons referred to are not disadvantaged in relation to the operation of provisions which require that a person be immigration cleared. This

ensures for example that access to merits review in Australia is, generally, restricted to persons who have been immigration cleared (section 337 of the amended Act refers).

## **PART 10 - MISCELLANEOUS**

### Regulation 36 - Non-citizens eligible to apply for Class 817 entry permits

Subregulation (1) provides that a non-citizen who was in Australia on 1 September 1994, immediately before that date held one of a number of specified refugee-related entry permits, and had not applied for a Class 817 (protection) entry permit under the Migration (1993) Regulations, is taken to have applied on that date for a Protection (Class AZ) visa.

Subregulation (2) provides that a person referred to in subregulation (1) is also taken to have been granted a bridging visa Class A with the same visa period and subject to the same conditions as if it had been granted under the amended Act and the Migration Regulations.

### Regulation 37 - Special provision for holders of transitional (temporary) visas replacing entry permits

Subregulation (1) allows a non-citizen who, before 1 September 1994, held an entry permit that is continued in effect as a transitional (temporary) visa to apply for a substantive visa equivalent to the entry permit the person held immediately before 1 September 1994. There is no fee for this application. Where the visa sought has a visa period that does not extend beyond the end of the visa period of the transitional (temporary) visa, the non-citizen only needs to satisfy the criterion that the Minister is satisfied that it would be reasonable to grant the substantive visa.

This allows persons to whom this regulation applies to apply for a visa permitting travel without having to satisfy the criteria required to be met in respect of the grant of a further visa to remain temporarily in Australia, and ensures that such persons are in the same position after 1 September 1994 as they were before that date.

The subregulation also limits the period for which the visa can be granted. A visa that is granted on the basis of an application allowed by this subregulation is not to have a visa period extending beyond the date on which the entry permit would have stopped being in force otherwise than by the holder departing Australia.

Subregulation (2) provides that a substantive visa is equivalent to an entry permit if the criteria applicable to the class to which the substantive visa belongs are the same in effect as:

- the grounds for the grant of the entry permit (in the case of an entry permit of a kind available under the Migration Act 1958 as in force before 19 December 1989); or
- the criteria applicable to the class (in the case of a class under the Migration (1989) Regulations or the Migration (1993) Regulations).

### Regulation 38 - Special Provision for grant outside Australia of visas to former holders of temporary entry permits

Subregulation (1) provides that this regulation applies to a non-citizen who was outside Australia on 1 September 1994 and who, before he or she first left Australia, held a temporary entry permit (other than one of a number of entry permits specified in subregulation (4)) which would have been in force immediately before 1 September 1994 if he or she had not left Australia.

Subregulation (2) provides that, despite anything in the Migration Regulations, a non-citizen to whom this regulation applies may apply outside Australia for a substantive visa corresponding to that entry permit.

Subregulation (3) provides that, despite anything in the Migration Regulations, the noncitizen is taken to satisfy the prescribed criteria for the grant of the visa if the non-citizen satisfies the requirements in this subregulation.

Subregulation (4) lists the entry permits which, if held, take the holder outside the scope of this regulation.

Subregulation (5) provides that a substantive visa is equivalent to an entry permit if the criteria applicable to the class to which the substantive visa belongs are the same in effect as:

- the grounds for the grant of the entry permit (in the case of an entry permit of a kind available under the Migration Act 1958 as in force before 19 December 1989); or
- the criteria applicable to the class (in the case of a class under the Migration (1989) Regulations or the Migration (1993) Regulations).

#### Regulation 39 - References to conditions of visas by numbers

This regulation provides that, in the record of a visa, or in the evidence of the visa, a reference to a condition by an old number is taken to be a reference to the condition by the new number, in accordance with the table provided.

### **PART 11 - REPEAL**

#### Regulation 40 - Repeal of Migration (1993) Regulations and Migration (Review) (1993) Regulations

This regulation provides that the Statutory Rules set out in the Schedule to these Regulations are repealed.

### **SCHEDULE**

The Schedule contains the list of the Statutory Rules repealed under regulation 40 of these Regulations and includes the Migration (1993) Regulations and amendments and the Migration (Review) (1993) Regulations and amendments.