

## **EXPLANATORY STATEMENT**

Issued by the Minister for Immigration and Border Protection

*Migration Act 1958*  
*Australian Citizenship Act 2007*  
*Customs Act 1901*  
*Migration Agents Registration Application Charge Act 1997*

*Migration Legislation Amendment (2017 Measures No. 3) Regulations 2017*

The *Migration Act 1958* (the Migration Act) is an Act relating to the entry into, and presence in, Australia of aliens, and the departure or deportation from Australia of aliens and certain other persons.

The *Australian Citizenship Act 2007* (the Citizenship Act) provides for the process of becoming an Australian citizen, the circumstances in which citizenship may cease, and some other matters related to citizenship.

The *Customs Act 1901* (the Customs Act) relates to customs functions and provides, amongst other things, for the importation and exportation of goods, to and from Australia.

Subsection 504(1) of the Migration Act, section 54 of the Citizenship Act and subsection 270(1) of the Customs Act relevantly provide that the Governor-General may make regulations prescribing matters required or permitted by the relevant Act to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Migration Act, the Citizenship Act or the Customs Act.

The *Migration Agents Registration Application Charge Act 1997* (the Migration Agents Registration Application Charge Act) imposes a charge on an individual making an application to be registered as a migration agent under Part 3 of the Migration Act. Section 8 of the Migration Agents Registration Application Charge Act provides that the Governor-General may make regulations for the purposes of section 6 of that Act. Section 6 provides that the amount of charge payable on an individual's registration application is the amount prescribed by the regulations for an individual of that kind.

In addition, regulations may be made pursuant to the provisions in the Migration Act, the Citizenship Act, the Customs Act and the Migration Agents Registration Application Charge Act listed in Attachment A.

The purpose of the *Migration Legislation Amendment (2017 Measures No. 3) Regulations 2017* (the Regulations) is to amend the *Migration Regulations 1994* (the Migration Regulations), the *Australian Citizenship Regulation 2016* (the Citizenship Regulation), the *Customs Regulation 2015* (the Customs Regulation) and the *Migration Agents Registration Application Charge Regulations 1998* (the Migration Agents Registration Application Charge Regulations) to strengthen and update immigration, citizenship, and migration agents policy.

In particular, Schedules 1-3, 5-6 and 8, 9 and 11 to the Regulations amend the Migration Regulations to:

- enable a further Retirement visa (subclasses 405 and 410) to be granted to a current or former Retirement visa holder where the applicant is in Australia and is unable to meet certain criteria because of compassionate and compelling circumstances. The relevant criteria are:
  - criteria relating to the applicant's visa status;
  - the requirement to have substantially complied with certain previous visa conditions;
  - the requirement to have access to a specified annual income and to have maintained designated investments (where applicable); and
  - the requirement to have maintained health insurance;
- streamline the operation of the subclass 405 and 410 Retirement visas by removing restrictions on where the applicant must be located at the time the visa is granted;
- include a reference to the new Frequent Traveller Stream (which was introduced into the Visitor visa (subclass 600) by the *Migration Legislation Amendment (2016 Measures No. 5) Regulation 2016*) in the provisions which relate to the cancellation of visas. This is consequential to the introduction of the new stream;
- strengthen the integrity of the Medical Treatment visa (subclass 602) by requiring certain applicants to provide information about the proposed medical treatment as a precondition to a valid application, and increase the flexibility of the visa by broadening the eligibility of non-citizens needing medical treatment, regardless of their visa status;
- amend a definition, ‘eligible New Zealand citizen’, which identifies a cohort of New Zealand citizens who were resident in Australia by early 2001 and who have equivalent status to Australian permanent residents under the Migration Regulations and the Citizenship Act. The definition is rationalised by aligning the cohort with the similar but slightly larger cohort who are considered residents under the *Social Security Act 1991*;
- align the entitlement of ‘eligible New Zealand citizens’ to sponsor family members for Australian visas with the entitlement of Australian permanent residents. It does this through the alignment with the Social Security Act 1991, and by removing eligibility for family members of eligible New Zealand citizens to apply for the New Zealand Citizen Family Relationship visa (subclass 461);
- strengthen the integrity, and enhance the benefits of, the skilled migration programme by:
  - requiring that all employers nominating a position for a permanent visa application must also identify a person who will work in the position as a visa holder, and must identify a need for the person to work in the position. The amendment clarifies that the need must be a genuine need;
  - targeting younger migrants who will be productive for a longer period. The regulation does this by requiring that applicants for Employer Nomination Scheme and Regional Sponsored Migration Scheme visas (subclasses 186 and

187) in the Direct Entry stream, Skilled – Nominated visas (subclass 190), and Skilled – Regional (Provisional) visas (subclass 489) must not have turned 45 years at the time of application (unless exempted) lowering the maximum age from the former 50 years;

- requiring applicants for permanent Employer Nomination Scheme and Regional Sponsored Migration Scheme visas (subclasses 186 and 187) in the Temporary Residence Transition stream to have ‘competent English’. This is higher than the former required level of ‘vocational English’ and reflects the importance of English language skills for migrants seeking to settle permanently in Australia;
- providing for refunds of the first instalment of the visa application charge (VAC) for Employer Nomination Scheme and Regional Sponsored Migration Scheme visas if the visa application is withdrawn in certain circumstances where nomination requirements cannot be met through no fault of the visa applicant;
- improve the efficiency of passenger processing by removing the requirement to stamp the passports of arriving New Zealand citizens who are granted a Special Category visa (subclass 444). The requirement to stamp passports only applies to visas which are not granted by an authorised system (SmartGate). In those cases the Minister (or delegate) will orally notify applicants that the visa has been granted. This gives effect to the Government’s deregulation and low contact, automated border clearance agenda;
- assist in resolving the legacy caseload of unauthorised maritime arrivals more quickly by providing more Safe Haven Enterprise visa (SHEV) holders with the opportunity to apply for a prescribed substantive visa. SHEV holders are eligible to apply for certain substantive visas if they have worked and/or studied in a specified regional area for a specified time. The amendment ensures that time spent working and/or studying in a regional area may still be counted even if the regional area was not specified until after they commenced that activity. This ensures that as regional areas are added to the list, persons already working and/or studying in that area may benefit and be eligible to apply for a prescribed substantive visa;
- update the list of visas for which SHEV holders can apply by removing a reference in subregulation 2.06AAB(1) to the repealed Training and Research visa (subclass 402) and replacing it with a reference to the new Training visa (subclass 407);
- implement the Community Support Programme (CSP) for offshore humanitarian entrants, to replace the previous Community Proposal Pilot programme, with the following changes:
  - permitting an approved proposing organisation (APO) to propose an application for a Global Special Humanitarian visa (subclass 202) only;
  - allowing the Minister to require an ‘assurance of support’ (covering future social welfare costs) for subclass 202 visa applicants whose applications include a proposal by an APO; and

- allowing the settlement priorities of the Commonwealth to be considered as a criterion for a subclass 202 visa grant for applicants who are proposed by an APO; and
- facilitate the expansion of the Working Holiday Maker programme to increase the maximum age of visa applicants from 30 to 35 for countries which enter into bilateral arrangements with Australia to allow that age parameter. The amendments to the Working Holiday visa (subclass 417) and Work and Holiday visa (subclass 462) allow these arrangements to be specified in a legislative instrument made by the Minister.

Schedule 4 to the Regulations amends the Migration Regulations, the Customs Regulation and the Citizenship Regulation to impose a surcharge to recover merchant fees charged for the China UnionPay credit card. This is consequential to recent changes to accept payment of fees, duties and taxes by the China UnionPay credit card. This is consistent with the approach to cost recovery of merchant fees approach in relation to other credit cards and PayPal.

Schedule 7 to the Regulations amends the Migration Agents Registration Application Charge Regulations to ensure that the general registration charge is imposed on all applicants for registration as a migration agent unless the migration agent intends to provide immigration assistance solely on a non-commercial or non-profit basis in conjunction with an organisation that operates in Australia as a charity or for the benefit of the Australian community, in which case a lower non-commercial charge is payable.

Schedule 10 to the Regulations amends the Citizenship Regulation to make routine changes to refer to updated foreign countries, foreign currencies and exchange rates applicable to the payment and refund of Citizenship application fees.

The Office of Best Practice Regulation (the OBPR) has been consulted in relation to the amendments made by the Regulations. The OBPR considers that the amendments have minor regulatory impacts, and no further analysis in the form of a Regulation Impact Statement is required. The OBPR consultation references are as follows:

- 20698 (Schedule 1)
- 19030 (Schedule 2)
- 21837 (Schedule 3)
- 21721 (Schedule 4)
- 21788 and 21761 (Schedule 5)
- 21681 and 21964 (Schedule 6)
- 21815 (Schedule 7)
- 19898 and 21711 (Schedule 8)
- 22248 (Schedule 9)
- 20910 (Schedule 10)
- 21903 (Schedule 11)

In relation to the amendments made by Schedules 2-5, 7-8 and 10, no further consultation was considered necessary or appropriate because the amendments do not substantially alter existing arrangements. This accords with subsection 17(1) of the *Legislation Act 2003* (the Legislation Act) which envisages consultations where appropriate and reasonably practicable.

In relation to the amendments made by Schedule 1, relating to Retirement visas, while there has been no consultation specifically on these measures, the advocacy group BERIA (the British Expatriate Retirees Association in Australia) has been consulted regarding general

changes to policy to address their concerns. Options for developing these changes have been informed through ministerial correspondence from visa holders and issues that have arisen through the processing network.

In relation to the amendments made by Schedule 6, lowering the maximum age for certain skilled visas, the following departments and agencies were consulted through an Inter-Departmental Committee: Attorney Generals Department; Austrade; Department of Education and Training; Department of Employment; Department of Finance; Department of Foreign Affairs and Trade; Department of Health; Department of Human Services; Department of Social Services; Department of Infrastructure and Regional Development; Department of Industry, Innovation and Science; Department of the Prime Minister and Cabinet; and Treasury.

The decision to lower the age limit followed recommendations made by the Productivity Commission in their 2016 report *Migrant Intake into Australia*. Specifically, recommendation 13.1 was that the Australian Government consider reducing the age limit of 50 years for skilled permanent migration. Additionally, the reduction in age supports broader Government initiatives to better target Australia's skilled migrants, leading to longer term productivity from the skilled migration programme. No other consultation was considered to be appropriate.

In relation to the amendments made by Schedule 9, modifying the Working Holiday Maker programme, the Department consulted in December 2016 and April 2017 with tourism industry stakeholders through the Tourism Visa Advisory Group. In May 2017, the Department convened an interdepartmental committee to consult on implementation of this measure. The committee comprised representatives from the following departments and agencies: Immigration and Border Protection; Employment; Foreign Affairs and Trade; Finance; Treasury; Prime Minister and Cabinet; Austrade; Agriculture and Water Resources; and Tourism Australia.

In relation to the amendments made by Schedule 11, implementing the CSP for offshore humanitarian entrants, the following agencies were consulted: Department of the Prime Minister and Cabinet; Department of Foreign Affairs and Trade; Attorney General's Department; Department of Treasury; Department of Infrastructure and Regional Development; Department of Defence; Department of Employment; Department of Social Services; Department of Education and Training; Department of Human Services; Australian Taxation Office; and Australian Bureau of Statistics.

A Statement of Compatibility with Human Rights (the Statement) has been completed in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The overall assessment is that the Regulations are compatible with human rights. A copy of the Statement is at [Attachment B](#).

The Principal Acts specify no conditions that need to be satisfied before the power to make the Regulations may be exercised.

Details of the Regulations are set out in [Attachment C](#).

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulations commence on 1 July 2017.

**AUTHORISING PROVISIONS**

Subsection 504(1) of the *Migration Act 1954* (Migration Act), section 54 of the *Citizenship Act 2007* (Citizenship Act) and subsection 270(1) of the *Customs Act 1901* (Customs Act) relevantly provide that the Governor-General may make regulations prescribing matters required or permitted by the relevant Act to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Migration Act, the Citizenship Act or the Customs Act.

Section 8 of the *Migration Agents Registration Application Charge Act 1997* (the Migration Agents Registration Application Charge Act) provides that the Governor-General may make regulations for the purposes of section 6 of that Act. Section 6 provides that the amount of charge payable on an individual's registration application is the amount prescribed by the regulations for an individual of that kind.

In addition, in relation to Schedules 1 - 3, 5 - 6, 9, 11 and 12, the following provisions of the Migration Act may apply:

- subsection 31(3), which provides that the regulations may prescribe criteria for a visa or visas of a specified class;
- subsection 40(1), which provides that the regulations may provide that visas or visas of a specified class may only be granted in specified circumstances;
- paragraph 45C(2)(b), which provides that the regulations may make provision for the remission, refund or waiver of visa application charge or an amount of visa application charge;
- subsection 46(3) of the Act, which provides that the regulations may prescribe criteria that must be satisfied for an application for a visa of a specified class to be a valid application;
- paragraph 46A(1A)(c), which provides that the regulations may prescribe employment, educational and social security benefit requirements in relation to the Safe Haven Enterprise visa for the purposes of that paragraph;
- subsection 66(1), which provides that when the Minister grants or refuses to grant a visa, he or she is to notify the applicant of the decision in the prescribed way;
- paragraph 116(1)(g), which provides that the regulations may prescribe grounds for cancelling a visa;
- paragraph 175(1)(b) which provides that persons departing Australia must provide to a clearance authority any information (including the person's signature, but not any other personal identifier) required by the Migration Act or the regulations;
- subsection 175(2), which provides that a person is to comply with subsection 175(1) in a prescribed way;

- paragraph 504(1)(a), which provides that the Governor-General may make regulations making provision for and in relation to:
  - the charging and recovery of fees in respect of any matter under this Act or the regulations, including the fees payable in connection with the review of decisions made under this Act or the regulations, whether or not such review is provided for by or under this Act; or
  - the charging and recovery of fees in respect of English language tests conducted by or on behalf of the Department;
  - the way, including the currency, in which fees are to be paid; or
  - the persons who may be paid fees on behalf of the Commonwealth;
- paragraph 504(1)(b), that the Governor-General may make regulations making provision for the remission, refund or waiver of fees of a kind referred to in paragraph (a) or for exempting persons from the payment of such fees;

In relation to Schedule 4 of the Regulations the following provisions of the Customs Act may apply:

- subsection 270(1A) of the Customs Act, which provides that the regulations may make provision for and in relation to:
  - the charging and recovery of fees in respect of any matter under that Act or the regulations;
  - the way in which fees are to be paid;
  - the persons who may be paid fees on behalf of the Commonwealth; and
  - the remission, refund or waiver of fees of a kind referred to in paragraph (a) or the exempting of persons from the payment of such fees.

In relation to Schedule 7 of the Regulations the following provisions in the *Migration Agents Registration Application Charge Act 1997* may apply:

- section 8, which provides that the Governor-General may make regulations for the purposes of section 6 of that Act; and
- section 6, which provides that the amount of charge payable on an individual's registration application is the amount prescribed by the regulations for an individual of that kind.

In relation to Schedule 10 of the Regulations, the following provisions of the Citizenship Act may apply:

- paragraph 46(1)(d), which provides that an application under a provision of the Citizenship Act must be accompanied by the fee (if any) prescribed by the regulations; and

- subsection 46(3) of the Citizenship Act, which provides that the regulations may make provision for and in relation to the remission, refund or waiver of any fees of a kind referred to in paragraph 46(1)(d) of the Citizenship Act.



**Statement of Compatibility with Human Rights**

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

***Migration Legislation Amendment (2017 Measures No. 3) Regulation 2017***

The *Migration Legislation Amendment (2017 Measures No. 3) Regulation 2017* (the Regulations) are 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*.

**Schedule 1 – Retirement visas****Overview**

There are a number of retirees residing in Australia on long-term temporary visas (Subclass 410 (Retirement) visa and Subclass 405 (Investor Retirement) visa, with the majority aged between 60 and 90 years old.

Since 1 July 2005, the Subclass 410 visa has only been available to applicants who already hold a Subclass 410 visa, or who last held a Subclass 410 visa and have not held another substantive visa since last entering Australia (referred to as rollover applicants). It is granted for a period of ten years and visa holders are then eligible for a further Subclass 410 visa if they continue to meet the relevant criteria for grant. The Subclass 405 visa, which has more restrictive eligibility criteria and higher visa application charges, is granted for four years.

There are a growing number of retirees on these visas who are experiencing difficulties with meeting the criteria for renewing their visa due to changes in circumstances beyond their control. For example, there are retirees who are suffering from medical ailments or disabilities associated with aging (such as dementia) and others who are experiencing reduced financial capacity, often due to the death of their spouse or partner. It is possible for a person in this situation to inadvertently breach a visa condition or become unlawful, for example, if they forget to renew their private health insurance or fail to apply for a new visa.

As a result, there may be a number of non-citizen retirees who are in Australia as unlawful non-citizens due to circumstances beyond their control. Notwithstanding the requirement in the *Migration Act 1958* (the Migration Act) to remove an unlawful non-citizen as soon as reasonably practicable, it may be neither practicable nor appropriate to remove an unlawful non-citizen who is aged and frail. This is further complicated in cases where the person is permanently unfit to depart Australia.

Currently, the only avenue to regularise the immigration status of these individuals is to go through the Ministerial Intervention process and request the Minister to exercise his personal, non-compellable power to grant a visa.

The amendments to the Subclass 405 and 410 visas permit certain criteria to be waived for onshore “rollover” applicants, where the Minister’s or delegate is satisfied that there are compassionate and compelling circumstances, and that waiver is appropriate. This will ensure a more efficient and timely resolution of these cases, thereby reducing uncertainty and stress on a vulnerable cohort.

Some examples where such an applicant's circumstances may be found to be "compassionate and compelling" include: the applicant has a permanent or deteriorating health condition that prevents them from meeting the criteria for the grant of the visa; the applicant is unable to complete the visa application process because they have dementia; or the applicant no longer has enough resources to meet the financial requirements of the visa due to circumstances beyond their control (but they have sufficient funds to cover their living costs or have the support of family or relatives who are Australian citizens, permanent residents or eligible New Zealand citizens).

### **Human rights implications**

These amendments engage the following rights:

- right to the enjoyment of the highest attainable standard of health under Article 12(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR); and
- protection against arbitrary or unlawful interference of family under Articles 17(1) and 23(1) of the International Covenant on Civil and Political Rights (ICCPR).

#### *Right to the enjoyment of the highest attainable standard of health*

Article 12(1) of the ICESCR recognises:

*The right of everyone to the enjoyment of the highest attainable standard of physical and mental health.*

These amendments positively engage these rights because they extend the opportunity for non-citizens of advanced age to remain lawfully in Australia.

These amendments will provide a more efficient channel for regularising the immigration status of vulnerable individuals who would otherwise become unlawful non-citizens because they no longer have the ability to meet the criteria for the grant of another retirement visa.

#### *Protection against arbitrary or unlawful interference of family*

Article 17(1) of the ICCPR states:

*No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home State or correspondence, nor to unlawful attacks on his honour and reputation.*

Article 23(1) 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.*

These amendments positively engage these rights because as they extend the opportunity for non-citizens of advanced age to remain lawfully in Australia and as a result, it is likely to have a positive effect on the unity of affected families.

### **Conclusion**

These amendments are compatible with human rights because they positively engage and supports the rights set out in Article 12(1) of the ICESCR and Articles 2(1) and 23(1) of the ICCPR.

## **Schedule 2 – Grounds for cancellation of visa in Frequent Traveller stream**

### **Overview**

In December 2016, the Government introduced a 10-year validity Visitor visa for Chinese nationals. This was achieved through the creation of a Frequent Traveller stream in the Subclass 600 (Visitor) visa, to facilitate the grant of a Subclass 600 with up to 10 years validity. The new visa stream permits visitor and business visitor activities. Certain consequential amendments to visa cancellation powers were overlooked when the new stream was introduced.

In the absence of a specific reference to the Frequent Traveller stream in subparagraph 2.43(1)(j)(i), which sets out grounds for cancellation of a Visitor visa where the holder is not a genuine visitor, a visa in the Frequent Traveller stream could be cancelled if the holder engages in business visitor activities. This is contrary to the intention of the new visa stream, which permits both visitor and business visitor activities. Accordingly, a reference to the Frequent Traveller stream has been added to subparagraph 2.43(1)(j)(i).

In addition, a new cancellation ground has been added in paragraph 2.43(1)(ja) to permit the cancellation of a visa in the Frequent Traveller stream where the holder has engaged, or intends to engage, in activities other than those permitted by the visa.

The amendments allow the cancellation provisions to operate as intended.

### **Human rights implications**

These amendments do not engage any of the applicable rights or freedoms.

### **Conclusion**

These amendments are compatible with human rights as they do not raise any human rights issues.

## **Schedule 3 – Subclass 602 (Medical Treatment) visas**

### **Overview**

The Subclass 602 (Medical Treatment) visa is a temporary visa, which is designed to enable non-citizens to enter or remain in Australia for medical treatment, including consultation. This is one of a small number of visas which do not prevent visa applications being made in Australia by non-citizens who have had a visa application refused, or a visa cancelled, since their arrival. This reflects the need to accommodate situations where a non-citizen needs to remain in Australia in order to undertake medical treatment.

The amendments remove visa grant requirements relating to a Subclass 602 applicant's prior visa status. This requirement is replaced with a new visa application validity requirement whereby non-citizens who are in Australia and do not hold a substantive visa must provide

additional documentation in order to make a valid visa application. The additional information is specified in a legislative instrument and is described in more detail below.

The changes are intended to strengthen the integrity and efficiency of the Subclass 602 by:

- removing the immigration history and status requirement which currently prevent some genuine applicants from being granted an MTV; and
- preventing non-citizens, who do not have health concerns and make no claims to require medical treatment, from lodging a valid MTV application in order to lengthen their stay in Australia.

These amendments have removed the requirement for Subclass 602 applicants to meet the Schedule 3 Criteria 3001, 3003, 3004 and 3005. These requirements relate to a non-citizen's visa status prior to the lodgement of their Subclass 602 application. For example, previously visa applicants were required to hold a substantive visa within the 28 days prior to lodging the application. This was a difficult or impossible requirement for some applicants to meet if a medical condition affected their capacity to lodge an application in a timely manner.

These amendments have also introduced a new visa validity requirement for applicants who are in Australia and do not hold a substantive visa. Such applicants must include, with their visa application, an additional form signed by a registered medical practitioner (Form 1507). This requirement is designed to facilitate Subclass 602 applications by non-citizens who require the visa for genuine medical reasons (regardless of their immigration history and status), while preventing non-citizens who do not have health concerns from lodging a valid Subclass 600 visa application.

### **Human rights implications**

These amendments engage the following rights:

- right to the enjoyment of the highest attainable standard of health under Article 12(1) of the ICESCR; and
- freedom from non-discrimination and equality under Articles 2(1) and 26 of the ICCPR.

#### *Enjoyment of the highest attainable standard of health*

As previously outlined, Article 12(1) of the ICESCR recognises:

*The right of everyone to the enjoyment of the highest attainable standard of physical and mental health.*

These amendments positively engage this right because the removal of the Schedule 3 requirements enables more Subclass 600 applicants with genuine medical issues to be granted the visa, regardless of their immigration history or status.

The new requirement that a Subclass 600 application, made by a non-citizen who does not hold a substantive visa, must be accompanied by Form 1507 signed by a registered medical practitioner, does not interfere with the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. This is because applicants with genuine

health concerns, as detailed in the completed form 1507, can still make a valid application and subsequently be granted a Subclass 600 visa provided they also meet the other visa criteria.

*Freedom from non-discrimination and equality*

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 recognised 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.*

As the removal of Schedule 3 provisions will enable genuine applicants to be granted a Subclass 600 visa so long as they meet eligibility requirements, the changes positively engage and support this right by broadening the eligibility of non-citizens needing medical treatment in Australia for the Subclass 600 visa, regardless of their immigration history or status.

## **Conclusion**

These amendments are compatible with human rights because they positively engage and supports the rights set out in Article 12(1) of the ICESCR and Article 2(1) and 26 of the ICCPR.

## **Schedule 4 – Surcharge for payments made by China UnionPay credit cards**

### **Overview**

The Department of Immigration and Border Protection is focused on encouraging clients to utilise its electronic and online systems and facilities for the payment of customs, visa and Australian citizenship related charges, fees, duties or taxes. However, where payments are made by credit card a merchant fee is charged to the Department.

The Department already allows payments to be made, and has measures in place to recover the merchant fees for payment by Visa, MasterCard, American Express, Japan Credit Bureau, Diners Club International and PayPal. In order for the Department to provide clients with increased options and flexibility, the Department intends to implement the option for clients to pay by China UnionPay credit card in 2017. The *Customs Regulation 2015*, the *Australian Citizenship Regulation 2016* (Citizenship Regulation), and the *Migration Regulations 1994* (Migration Regulations) will be amended to enable the Department to impose a surcharge of 1.9%, which is the rate of the merchant fee for payments made with China UnionPay.

The recovery of merchant fees is allowed under the Reserve Bank of Australia surcharging standards and the surcharge will be consistent with the cost recovery guidelines issued by the

Department of Finance. The Department plans to fully recover the merchant fee costs. Recovery of these costs is now commonplace across the Commonwealth. Alternative options, such as bank transfers, which do not attract a surcharge, remain available for clients to pay customs, immigration and Australian citizenship fees and charges.

### **Human rights implications**

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

### **Conclusion**

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

## **Schedule 5 – Eligible New Zealand citizens and Subclass 444 and 461 visas**

### **Overview**

Schedule 5 of the Regulations amends the Migration Regulations to:

- align the definition of “eligible New Zealand Citizen” (ENZC) in the Migration Regulations with the definition of “protected SCV holder” in the *Social Security Act 1991* (the Social Security Act); and
- amend the criteria for grant of the Subclass 461 (New Zealand Family Relationship) visa to remove access to this visa by the family members of ENZCs.

The changes rationalise the definition of ENZC and better reflect the policy intention that ENZCs have the same entitlements as Australian citizens and permanent residents in relation to the sponsorship of family members for Australian visas.

Schedule 5 also removes the requirement to stamp the passports of arriving New Zealand citizens who are granted a Subclass 444 (Special Category) visa. The requirement to stamp passports currently applies only to visas which are not granted by an authorised system (SmartGate). From 1 July 2017, the Minister will orally notify those applicants that the visa has been granted. This amendment is intended to improve the efficiency of passenger processing.

### *Amending the definition of ENZC*

A definition of ENZC has been used in the Migration Regulations since 1994. It originally referred to a New Zealand citizen who was residing in Australia as the holder of a Subclass 444 (Special Category) visa. The Subclass 444 visa is the visa granted on arrival to New Zealand citizens travelling on New Zealand passports.

Until 2001, Subclass 444 visa holders had the same status as Australian citizens and Australian permanent residents in relation to the sponsorship of family members for Australian visas.

A bilateral social security arrangement between Australia and New Zealand, announced on 26 February 2001, set out arrangements for payment of age pension, disability support pension and carer payment to New Zealand citizens in Australia. The agreement also recognised the right of each country to determine access to social security benefits not covered by the

agreement, and to set related residence and citizenship rules according to the respective country's national legislative and policy frameworks. In line with that principle, Australia introduced a number of supplementary changes.

As a result, the Social Security Act requires New Zealand citizens who arrived in Australia after 26 February 2001 or, in some cases, who arrived more than three months after that date, to be Australian citizens or Australian permanent residents in order to access certain social security payments (including income support payments) that are not covered by the bilateral agreement.

Legislative amendments were made to grandfather the entitlements of New Zealand citizens who were residing in Australia at that time:

- in the Social Security Act, these people are defined as “protected Special Category visa holders”; and
- in the Migration Regulations, the definition of ENZC was amended with similar effect.

In the Migration Regulations, an ENZC was defined as a New Zealand citizen who at the time of last entry to Australia would have met certain health and character criteria and:

- held an Subclass 444 visa on 26 February 2001; or
- held an Subclass 444 visa that was in force for at least one year in the two years before 26 February 2001; or
- has a certificate, issued under the Social Security Act, that states that the citizen, for the purposes of the Social Security Act, was residing in Australia on a particular date.

The definition of ENZC differed, in minor respects, from the definition of protected Special Category visa holder. In particular, certain New Zealand citizens who commenced residing in Australia in the three months after 26 February 2001 were able to become protected Special Category visa holders but did not fall within the definition of ENZC. Further, the requirement to meet certain health and character public interest criteria at the time of last entry to Australia was not included in the definition of protected Special Category visa holder.

This amendment addresses these discrepancies by aligning the definition under the Migration Regulations with the definition under the Social Security Act. As a result of this amendment, any protected Special Category visa holders who were not also ENZCs become ENZCs on 1 July 2017. In addition, ENZCs are no longer required to meet additional health criteria as part of the family sponsorship process. The removal of the requirement to meet health criteria aligns the position of ENZCs with the position of Australian citizens and Australian permanent residents in relation to family sponsorship. The changes have no impact on the requirement for ENZCs to meet the health and character requirements which apply to all New Zealand passport holders each time they are granted an SCV on arrival in Australia.

#### *Amending the Subclass 461 (New Zealand Family Relationship) visa requirements*

An ENZC can sponsor family members for an Australian permanent visa, access social security payments and obtain Australian citizenship. The status of an ENZC is equivalent to an Australian permanent resident under the Migration Regulations.

ENZCs have access to the same visa processes as Australian permanent residents and Australian citizens. This means, for example, that they are able to sponsor family members for a permanent visa through the Family Stream of the Migration Programme.

However, ENZCs have also been able to utilise an additional method for bringing family members, who are not New Zealand citizens, to Australia on a temporary basis. The Subclass 461 visa allows a non-New Zealand citizen family member of an Subclass 444 visa holder to live and work in Australia for up to five years. This visa was created in 2001 so that family members of New Zealand citizens, who were not themselves New Zealand citizens, could join Subclass 444 visa holders in Australia. The creation of the Subclass 461 visa was ancillary to the changes to the status of newly arrived New Zealand citizens in Australia, from 26 February 2001, which removed the entitlement of Subclass 444 visa holders to sponsor family members for a permanent visa. As noted above, those changes did not apply to ENZCs. However, the visa criteria for the Subclass 461 visa did not expressly exclude Subclass 444 visa holders who were also ENZCs.

The overarching intent of these changes is to ensure that ENZCs are aligned with Australian citizens and Australian permanent residents for the purposes of sponsoring family to join them in Australia. As such, the eligibility of family members of ENZCs to obtain a Subclass 461 visa has been removed. Access to Subclass 461 by that cohort was an anomaly, having regard to the original purpose of the Subclass 461 visa as outlined above.

ENZCs will continue to be able to sponsor their family members in the same way as Australian citizens and Australian permanent residents.

*Removing the requirement to stamp the passports of arriving New Zealand citizens who are granted a Subclass 444 visa*

Schedule 5 of the Regulations omits subparagraph 2.16(2B) of the Migration Regulations so that, from 1 July 2017, New Zealand citizens can be orally notified of the grant of a Subclass 444. A Subclass 444 visa is a visa that can be granted to New Zealand citizens in immigration clearance. Subclass 444 visas can be granted by an authorised system (SmartGate), or by a delegate of the Minister.

Prior to 1 July 2017, where an incoming New Zealand citizen is unable to be granted a Subclass 444 visa by SmartGate, they are referred to a delegate of the Minister. Subparagraph 2.16(2B) of the Migration Regulations requires delegates to notify these applicants of a Subclass 444 visa grant by an imprint stamped in the applicant's passport. This requirement adversely impacts the Department's ability to efficiently manage border flow and increases traveller wait periods.

The imprint notification method is obsolete, due to improvements in border operations, and unnecessary as Subclass 444 applicants can be notified verbally of their visa grant.

### **Human rights implications**

These amendments engage the following rights:

- protection against arbitrary or unlawful interference of the family under Articles 17(1) and 2(1) of the ICCPR;
- right to social security under Article 9 ICESCR; and



- freedom from non-discrimination and equality under Articles 2(1) and 26 of the ICCPR.

*Protection against arbitrary or unlawful interference of the family*

As previously outlined, 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(1) 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.*

The amendments engage Articles 17 and 23(1) of the ICCPR as changes will be made to the Subclass 461 visa to limit Subclass 461 eligibility to only those who are family of non-ENZC Subclass 444 visa holders. That is, as a result of the amendments made by Schedule 5 of the Regulations, family members of ENZCs will no longer be eligible to be granted a Subclass 461 visa. As stated above, the Subclass 461 visa was designed primarily so that family members could join Subclass 444 visa holders who are not ENZCs in recognition that those Subclass 444 visa holders cannot sponsor their family members for a permanent visa through the Family Stream.

The removal of eligibility for a Subclass 461 visa does not prevent family members of ENZCs from spending time together or permanently living together in Australia. If family members are also New Zealand citizens, they may be eligible to be granted a Subclass 444 visa in their own right. ENZC family members who are not New Zealand citizens may still be eligible for other temporary visitor visas and are still able to be sponsored by ENZCs for permanent visas in the Family Stream of the Migration Programme. It should be noted that a permanent visa holder has greater eligibility for government services and benefits, such as social services and health benefits, as well as the capacity to apply for Australian citizenship.

Therefore, the amendment to remove the eligibility for a Subclass 461 visa does not arbitrarily or unlawfully interfere with the family and to the extent that this amendment may limit the rights discussed above by removing eligibility for a particular visa, this limitation is justified. The limitation is reasonable and proportionate because it does not prevent ENZC families from living together in Australia, it places ENZCs on equal footing with Australian permanent residents and Australian citizens in terms of how they may sponsor family members for Australian visas and so facilitates equal treatment of ENZCs, Australian permanent residents and Australian citizens. This in turn aligns family sponsorship eligibility with the original legislative intent and supports the maintenance of the integrity of the migration programme.

*Right to social security*

Article 9 of the ICESCR states:

*The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.*

The amendment to the definition of ENZC will not result in changes to eligibility for welfare under the Social Security Act. However, it will ensure that New Zealand citizens who have been assessed as eligible for welfare on the basis of being protected Special Category visa holders, will also be considered ENZCs for the purposes of the Migration Regulations. Schedule 5 of the Regulations positively engages Article 9 of the ICESCR. Family members of ENZCs who are sponsored for a permanent visa will have broader eligibility for welfare, than they would have otherwise had if they had arrived in Australia as Subclass 461 visa holders. As the Subclass 461 visa is a temporary visa, there would have been only very limited eligibility for welfare support.

*Freedom from non-discrimination and equality*

As previously outlined, 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 recognised 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 also 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.*

Schedule 5 of the Regulations may engage Articles 2(1) and 26 of the ICCPR. The amendments will remove the ability of family members of ENZCs to be granted a Subclass 461 visa. To the extent that this change may limit the rights discussed above by providing different visa opportunities for family members on the basis of migration status and/or nationality compared with Subclass 444 visa holders who are not ENZCs, this limitation is justified. This is because whilst ENZCs will no longer be able to have access to Subclass 461 visas for their family members, an ENZC will still be able to sponsor family members for a permanent visa through the Family Stream of the Migration Programme and other temporary visas. These opportunities to sponsor family members are the same as those available to Australian permanent residents and Australian citizens. As such, the amendments create an equitable environment for all permanent residents and persons with a largely equivalent status, namely ENZCs, and thus contributes to maintaining the consistency in the framework of the migration programme.

Therefore, to the extent that Schedule 5 of the Regulations may limit Articles 2(1) and 26 of the ICCPR the limitation is reasonable, necessary and proportionate, as it provides for equality of opportunity for all permanent residents and those of largely equivalent status to sponsor family through the Family Stream of the Migration Programme.

## **Conclusion**

These amendments are compatible with human rights because, to the extent that human rights considerations arise, the amendments are reasonable, necessary and proportionate.

In relation to the amendment to subparagraph 2.16(2B) of the Migration Regulations, the amendment will not limit or affect an individual's human rights or impede Australia's international obligations. The amendment will simply ensure the Department of Immigration and Border Protection can efficiently manage border operations and ensure a seamless traveller experience. The amendment does not engage any of the applicable rights or freedoms, and therefore does not raise any human rights issues.

## **Schedule 6 – Nominated and sponsored skilled visas**

### **Overview**

Schedule 6 of the Regulations amends the Migration Regulations to make changes to the criteria for the following visas:

- employer nominated skilled visas: the Subclass 186 (Employer Nomination Scheme) visa, and the Subclass 187 (Regional Sponsored Migration Scheme) visa; and
- points tested skilled visas: the Subclass 190 (Skilled – Nominated) visa, and the Subclass 489 (Skilled – Regional (Provisional)) visa.

The Subclass 186 visa and Subclass 187 visa are demand-driven programmes which allow employers to nominate skilled workers for permanent residence to fill genuine vacancies in their business.

The Subclass 190 visa is a permanent points-tested visa for highly skilled people who are invited to apply for the visa through the SkillSelect system following nomination by a state or territory government agency.

The Subclass 190 visa requires all applicants to have lodged an Expression of Interest (EOI) in SkillSelect and be invited to apply before they are able to lodge a visa application. SkillSelect controls access to Australia's skilled migration programme through minimum threshold requirements. Only those potential migrants who meet the necessary requirements are invited to apply for a skilled migration visa and invitations are issued at levels which match the needs of the Australian economy. As a minimum requirement, all applicants must be able to demonstrate they have the ability to meet the points-test pass mark (currently set at 60 points) to be eligible for an invitation.

The Subclass 489 visa is a provisional points-tested visa for highly skilled people who want to live and work in a specified designated area in Australia. The Subclass 489 comprises two streams, the First Provisional Visa stream and the Second Provisional Visa stream. References to the Subclass 489 in this Statement refer to the First Provisional Visa stream only.

Visa applicants must be invited to apply for the visa through the SkillSelect system and must be sponsored by an eligible Australian relative living in a designated area of Australia or be nominated by a state or territory government agency. The process for invitations to apply for a visa through SkillSelect for the Subclass 489 visa in the First Provisional Visa stream is the same as the process outlined above for the Subclass 190 visa. The Subclass 489 visa provides a pathway to permanent residence through the Subclass 887 (Skilled-Regional (Residence)) visa.

Schedule 6 amends the Migration Regulations to:

- require that all employers nominating a position in relation to a permanent visa application must identify a person who will work in the position as a visa holder, and must identify a need for the person to work in the position;
- clarify that an identified need for a person to work in a nominated position must be genuine and that the nomination will be refused if the need is assessed as non-genuine;
- require that applicants for Subclass 186 and Subclass 187 visas in the Direct Entry stream generally must not have turned 45 years at the time of application, lowering the maximum age from the current 50 years;
- require that applicants for Subclass 186 and Subclass 187 visas in the Temporary Residence Transition stream must demonstrate “competent English” at the time they apply;
- require that applicants for Subclass 190 and Subclass 489 visas must not have turned 45 years at the time they are invited to apply for a visa, lowering the maximum age from the current 50 years; and
- provide for refunds of the visa application charge for applicants for permanent nominated skilled visas if the visa application is withdrawn in certain circumstances where nomination requirements cannot be met through no fault of the visa applicant.

### **Human rights implications**

These amendments engages the following right:

- freedom from non-discrimination and equality in relation to the right to work under Articles 2(1) and 26 of the ICCPR and Articles 2(2) and Article 6(1) of the ICESCR.

As previously outlined, 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 recognised 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 also 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.*

Article 6(1) of the ICESCR states:

*The State Parties to the Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.*

Article 2(2) of the ICESCR also states:

*The State parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

The amendments to change the maximum age of visa applicants for the subclass 186, 187, 190 and 489 visas at the time of application engages the right to non-discrimination under Articles 2(1) and 26 of the ICCPR. It also engages the right to non-discrimination in relation to the right to work under Articles 2(2) and Article 6(1) of the ICESCR respectively.

In its General Comment 18, the UN Human Rights Committee stated that:

*The Committee observes 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.*

Similarly, in its General Comment on Article 2 of the ICESCR (E/C.12/GC/20), UNCESCR has stated (at 13) that:

*Differential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective. This will include an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the Covenant rights and solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realized and the measures or omissions and their effects.*

Neither the ICCPR nor the ICESCR give a right for non-citizens to enter Australia for the purposes of seeking permanent residence or employment. The UN Human Rights Committee, in its General Comment 15 on the position of aliens under the Covenant, stated 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. However, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.*

*Consent for entry may be given subject to conditions relating, for example, to movement, residence and employment. A State may also impose general conditions upon an alien who is in transit. However, once aliens are allowed to enter the territory of a State party they are entitled to the rights set out in the Covenant.*

As such, Australia is able to set requirements for the entry of non-citizens into Australia and conditions for their stay, and does on the basis of reasonable and objective criteria. The aim of

the skilled migration programme is to maximise benefits of migration to the Australian economy.

For those persons who are in Australia and who wish to apply for the subclass 186, 187, 190 or 489 visas while in Australia, the right to work may additionally be engaged. Article 6(1) of the ICESCR states:

*The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.*

The amendments to change the maximum age of visa applicants for the subclass 186, 187, 190 and 489 visas from 50 to 45 at the time of application are reasonable because they are directed to increasing the economic contribution of skilled migrants to Australia.

The Productivity Commission, in their inquiry report *Migrant Intake Into Australia* released in 2016, acknowledges the importance of applying an age limit to Australia's skilled migration programme. The Productivity Commission notes, at page 24, that "given that the objective of the skill stream is largely economic, this [the economic impacts on Australia] should be given primacy in determining eligibility criteria for that stream".

The Productivity Commission notes that "permanent immigrants who arrive at a relatively young age, particularly those who are highly educated, generally contribute more tax revenue over their lifetime and make comparatively lower use of government-funded services. In contrast, those who arrive at an older age have lower rates of labour force participation and contribute to higher costs due to their use of government-subsidised health care and other support services" (Productivity Commission, p. 13). In particular, they note that:

*'Government expenditure per person increases rapidly after the age of 60 years, labour market participation falls precipitously and taxes paid decrease. The steep rise in such net costs to taxpayers after age 60 years means that the present value of the future stream of net transfers to immigrants required from existing Australians is positive at ages much earlier than 60 years (and under any realistic scenarios at an age less than 50 years).'* (Productivity Commission, p. 444-5)

The Productivity Commission utilises their analysis and findings as "strong grounds for reducing the current age limit [50] for eligibility for permanent residency" (Productivity Commission, p. 445), resulting in Recommendation 13.1 of their report.

In respect of the Subclass 489 visa, while it is a provisional visa, it provides a pathway to permanent residence through the Subclass 887 (Skilled-Regional (Residence)) visa. The Subclass 887 visa does not have a maximum age requirement.

In addition, the reduction in the maximum age requirement will not prevent any current holders of subclass 186, 187, 190 and 489 visas, from accessing work or impede on their right to work.

## **Conclusion**

These amendments are compatible with human rights. Where such amendments engage Australia's human rights obligations in relation to non-discrimination and the right to work, those limitations are reasonable, necessary, and proportionate to achieve the legitimate

objective. This objective, as recommended by the Productivity Commission, is to maximise the economic benefit of the skilled migration programme to Australia.

## **Schedule 7 – Migration agents – registration application charges**

### **Overview**

The purpose of the amendments to the *Migration Agents Registration Application Charge Regulations 1998* (the Charge Regulations) is to set the commercial registration application fee as the default fee payable by an applicant for registration as a migration agent, unless the applicant can meet all eligibility requirements to pay the non-commercial registration application fee.

The amendments will align the Charge Regulations with the policy intention, which is that all applicants must pay the commercial registration application fee, unless they meet all of the following elements: they will be providing immigration assistance, on a non-commercial or non-profit basis, and as a member of or in association with a non-commercial organisation.

Section 4 of the *Migration Agents Registration Application Charge Act 1997* (the Charge Act) imposes a charge on an individual who makes an application for registration as a migration agent. Section 6 provides that the amount of the charge is the amount prescribed in the regulations. Subsection 6(2) provides that the regulations may prescribe different amounts for different kinds of individuals making registration applications.

Regulation 4 currently prescribes a charge applicable to an individual who acts, as disclosed in the individual's registration application, on a commercial, or for-profit, basis; or as a member of, or a person associated with, an organisation that operates on a commercial, or for-profit, basis. The prescribed charge is \$1,760 for initial registration or \$1,595 for repeat registration.

Regulation 5 currently prescribes the charge applicable to an individual who acts, as disclosed in the individual's registration application, solely on a non-commercial or non-profit, basis; and as a member of, or a person associated with, an organisation that operates in Australia solely on a non-commercial, or non-profit, basis. The prescribed charge for these applicants is \$160 for initial registration or \$105 for repeat registration.

The current drafting of the regulations has led to an ambiguous situation where some agents do not appear to be covered by either regulation. For example, an applicant for registration who intends to act solely on a non-commercial or non-profit basis, but not as a member of, or in association with any organisation, may not come within regulation 5. Such applicants may not come within regulation 4 either, as they do not intend to act on a commercial or for-profit basis. Other applicants may attempt to access the lower fee in order to maintain their registration, while not providing immigration assistance at all, such as during a career break. All of these situations are contrary to the policy intention.

A further issue is that Regulation 5, as currently drafted, does not specify the intended nature of a non-commercial or non-profit organisation. The policy intention is that the non-commercial charge is to be applicable only where it is clear that the relevant organisation has a charitable purpose, and/or is operating to the benefit of the community in Australia. The amendments to the regulations make it clear that a non-commercial organisation must be a charity, as defined by Part 2 of the *Charities Act 2013*, or otherwise be operating to the benefit of the community.

## **Human rights implications**

These amendments set the commercial registration application fee as the default fee payable by an applicant for registration as a migration agent, unless the applicant can meet all eligibility requirements to pay the non-commercial registration application fee.

The amendments do not engage any of the applicable rights or freedoms.

## **Conclusion**

These amendments are compatible with human rights as they do not raise any human rights issues.

## **Schedule 8 – SHEV pathway**

### **Overview**

The Subclass 790 (Safe Haven Enterprise) visa is a type of temporary protection visa valid for up to five years. Unlike the Subclass 785 (Temporary Protection) visa, the Subclass 790 visa holders may make a valid application for prescribed substantive visas if they study and/or work in a regional area specified by the Minister for Immigration and Border Protection (Minister) by legislative instrument, without accessing social security benefits for a period, or periods totalling 42 months. A Subclass 790 holder who meets these requirements (set out in subparagraph 2.06AAB(2)(a) of the Migration Regulations) may apply for a prescribed substantive visa, which may provide an opportunity to obtain Australian permanent residence.

States and Territories must opt-in to the Subclass 790 visa arrangements for the Minister to specify areas as “regional” for the above purposes. While all States and Territories have opted-in, some may still seek to have additional areas specified as “regional” in the future.

Previously, regulation 2.06AAB provided that only time spent by a Subclass 790 visa holder working and/or studying in a regional area after it was specified as a “regional area” could count towards meeting the requirements of subparagraph 2.06AAB(2)(a). This precluded any period that a Subclass 790 visa holder may have spent working and/or studying in a location prior to the legislative instrument specifying the location as a “regional area” coming into effect.

The amendment to regulation 2.06AAB provides that work and/or study undertaken in an area, prior to the area being specified as a regional area by the Minister, may nonetheless count towards the requirements set out in subparagraph 2.06AAB(2)(a).

The amendment to regulation 2.06AAB is expected to increase the number of illegal maritime arrivals (IMA) eligible to apply for the prescribed substantive visas. This will contribute to a more expedient and sustainable resolution of the IMA legacy caseload and therefore benefits a greater number of IMAs including the opportunity for them to become Australian permanent residents.

Schedule 8 also makes a technical amendment to subparagraph 2.06AAB(1) which lists the visa subclasses for which a Subclass 790 visa holder or former holder may apply. The amendment rectifies an inadvertent failure to include the Subclass 407(Training) visa, replacing the repealed Subclass 402 (Training and Research) visa.



## Human rights implications

The amendments engage the following rights:

- right to work under Article 6 of the ICESCR;
- right to education under Article 13(1) of the ICESCR; and
- freedom of movement under Article 12(1) of the ICCPR.

### *Right to work*

Article 6 of the ICESCR states:

1. *The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.*
2. *The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and productive employment under conditions safeguarding fundamental political and economic freedom to the individual.*

The amendment positively engages Article 6 of the ICESCR. The Subclass 790 visa does not impose restrictions on a Subclass 790 visa holder's right to work; Subclass 790 visa holders are able to freely participate in the labour market whilst they remain in Australia. However, in order to make a valid application for one of the prescribed substantive visas listed in subparagraph 2.06AAB(1), Subclass 790 visa holders must work (and/or study) in an area specified as a "regional area". The amended regulation 2.06AAB contributes to improving the right to work by expanding the scope of regional areas where Subclass 790 visa holders may work, and therefore the opportunities to work, in meeting the criteria under subparagraph 2.06AAB(2)(a).

### *Right to education*

Article 13(1) of the ICESCR states:

*The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.*

The amendment positively engages Article 13(1) of the ICESCR. The Subclass 790 visa does not impose restrictions on a Subclass 790 visa holder's right to education. However, in order to make a valid application for one of the prescribed substantive visas listed in regulation 2.06AAB(1), Subclass 790 visa holders must study in an area specified as a "regional area". The amended regulation 2.06AAB contributes to improving the right to education by

expanding the scope of regional areas where Subclass 790 visa holders may study, and therefore expanding the opportunities to study, in meeting the criteria under subparagraph 2.06AAB(2)(a).

### *Freedom of Movement*

Article 12(1) of the ICCPR states:

*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.*

The amendment positively engages Article 12(1) of the ICCPR. Whilst the criteria of the Subclass 790 visa does not place any restrictions on a Subclass 790 visa holders' ability to move within Australia or choose where to live, it does expand the number of places where a SHEV holder may work and/or study in order to meet the criteria under regulation 2.06AAB in relation to making a valid application for a prescribed visa. This greater choice supports the freedom of movement of Subclass 790 visa holders.

### **Conclusion**

To the extent that the amendments to regulation 2.06AAB engage the applicable human rights, the amendments are compatible with human rights because they promote the protection of human rights.

## **Schedule 9 – Changes to age limits for working holiday maker visas**

### **Overview**

On 27 September 2016, the Government announced a Working Holiday Maker (WHM) reform package. This included a measure to expand the eligible age for Subclass 417 (Working Holiday) visa and Subclass 462 (Work and Holiday) visa applicants from 18-30 years to 18-35 years to improve the supply of WHMs in Australia. This amendment reflects the expanded age range.

Currently, individuals aged 18 to 30 years, who hold a valid passport issued by a specified country, may be granted one of two WHM visas. For Subclass 417 visa applicants, the age limitation is set out in subparagraph 417.211(2)(b) of Schedule 2 to the Migration Regulations. For Subclass 462 visa applicants, the age limitation is set out in clause 462.212 of Schedule 2 to the Migration Regulations.

The new 18-35 year age range will apply to Subclass 417 or 462 visa applicants from countries with whom Australia has negotiated an amendment to an existing bilateral arrangement, or with whom Australia has entered into a new bilateral arrangement, which allows for this change.

The intention is to implement the WHM age increase in a phased manner, negotiating bilateral arrangements on a country by country basis, while seeking reciprocity for Australian citizens. Negotiating WHM arrangements, which are reciprocal and agreeable to both parties, can take some time as any such arrangement needs to reflect the legal and administrative frameworks of both countries. For this reason, the amendment would see the new WHM eligible age range of 18-35 years specified in the Regulations in a manner that allows for country-specific age requirements to be specified by the Minister in a subordinate instrument.

## Human rights implications

These amendments engage the following rights:

- freedom from non-discrimination and equality under Articles 2(1) and 26 of the ICCPR and Article 2(2) of the ICESCR; and
- right to work under International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).

### *Freedom from non-discrimination and equality*

As previously outlined, 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 recognised 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 also 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.*

Article 2(2) of the ICESCR also states:

*The State parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

The amendments made by Schedule 9 engage the right to non-discrimination set out in Articles 2 and 26 of the ICCPR, as the increased age limit is intended to be for Subclass 417 or 462 visa applicants only from certain countries. Likewise, the amendments engage Article 2 of the ICESCR in relation to the right to work under Article 6(1) of the ICESCR. It is noted that Articles 2(1) and 26 of the ICCPR and Article 2(2) of the ICESCR encompass the notion of indirect discrimination, and that this measure may have the effect of indirectly discriminating against Subclass 417 or 462 visa applicants from countries with whom Australia has not entered into new arrangements, and so who remain restricted to the current, lower maximum age of 30 years. Additionally, negotiating relevant bilateral international arrangements may take some years to progress to finalisation, and there will be periods of time when certain Subclass 417 or 462 visa applicants are able to benefit from the increased age limit, while others are not.

However, in its General Comment 18, the UN Human Rights Committee relevantly stated 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 [ICCPR]'. In its General Comment on Article 2 of the ICESCR (E/C.12/GC/20), the UNCESCR has made similar statements.

The Government considers that any such limitation is reasonable and proportionate to the legitimate objective of seeking to improve the supply of WHMs in Australia in a prudent manner, noting the bilateral nature of each WHM arrangement and the consequent legitimate need to seek agreement from individual partner countries. Additionally, as a cultural exchange programme, there is a clear objective of increasing reciprocal arrangements for Australian WHMs who wish to travel to other countries. Reciprocal arrangements benefit Australia's international relationships and Australia's tourism industry.

### *Right to work*

As previously outlined, Article 6(1) of the ICESCR states:

*The State Parties to the Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.*

Article 5(e)(i) of the ICERD:

*...State parties undertake to prohibit and to eliminate racial discrimination in all forms and guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of... the right to work...*

The amendments also engage the right to work, such as Article 6(1) of ICESCR as outlined above and Article 5(e)(i) of the ICERD. However, the Government considers that this right is positively engaged as the amendments broaden the scope within which certain Subclass 417 or 462 visa holders may work in Australia.

### **Conclusion**

The amendments made by Schedule 6 are compatible with human rights as although the amendments engage human rights, they do not entail the breach of Australia's international human rights obligations.

### **Schedule 10 – Updating references to instruments about payment of fees in foreign countries and currencies**

#### **Overview**

Regulation 16 of the Citizenship Regulation provides for the payment of Australian citizenship application fees in foreign countries and foreign currencies, including the calculation of exchange rates.

The acceptable foreign currencies and countries are set out in legislative instruments made under subparagraphs 5.36(1) and (1A) of the Migration Regulations. In order to facilitate the lawful collection (and refund where appropriate) of Australian citizenship application fees in foreign currencies, subparagraph 16(7) of the Citizenship Regulation incorporates by reference instruments made under the Migration Regulations in relation to foreign currencies and countries.

The relevant instruments regarding places and currencies for paying of fees and payment of visa application charges and fees in foreign currencies, are updated in January and July each year and are given a new instrument number each time.

Consequently, to ensure that Australian citizenship application fees can continue to be paid in foreign currencies and countries, subparagraph 16(7) of the Citizenship Regulation must be amended to specify the updated instrument numbers.

Schedule 10 also inserts regulation 20 into Part 4 of the Citizenship Regulation to provide that the amendments apply to applications made under the *Citizenship Act 2007* on or after 1 July 2017. The effect and purpose of regulation 20 is to clarify to whom and when the amendments to subparagraph 16(7) of the Citizenship Regulation apply.

The amendments to the Citizenship Regulation are the updating of the instrument numbers in subparagraph 16(7). These changes are technical in nature and there are no changes to the substantive content of the instrument.

### **Human rights implications**

These amendments do not engage any of the applicable rights or freedoms.

### **Conclusion**

These amendments are compatible with human rights as they do not raise any human rights issues.

## **Schedule 11 – Assurance of support for humanitarian visa applicants**

### **Overview**

Schedule 11 of the Regulation amends the Migration Regulations to establish the Community Support Programme (CSP). The CSP replaces the Community Proposal Pilot (the Pilot), which commenced in 2013.

The CSP enables Approved Proposing Organisations (APOs) to “propose” someone outside of Australia to make an application for a Subclass 202 (Global Special Humanitarian) visa. A person can only make a valid application under the CSP if they have been proposed by an APO. APOs are organisations that have entered into a deed with the Department relating to the proposal of an applicant and the provision and management of resettlement services to that applicant.

Community groups and businesses may apply to become APOs. To be approved as an APO, an organisation must demonstrate that it has the capacity to provide appropriate settlement support and other services to CSP entrants. These services may be delivered by the organisation itself, or on its behalf by expert service providers.

In practice, it is expected that community members (individuals and families), businesses and community organisations will work with APOs and enter into arrangements to propose, and support, particular Subclass 202 visa applicants. Such arrangements would be a matter for the individuals and the APOs involved.

APOs are required to enter into a deed with the Department indicating that they will provide adequate support to enable the entrant to settle in Australia and achieve financial self-sufficiency within the first year of arrival in Australia.

Under the deed, APOs are required to support the settlement of the visa holder in Australia for a period of 12 months. They are required to provide or fund:

- airfares to Australia;
- medical screening, as part of the visa application process;
- settlement services upon the participants' arrival in Australia which can include initial accommodation, orientation and linking to essential services; and
- visa application charges.

APOs will be legally responsible for overseeing the delivery of support services and for ensuring high quality settlement outcomes to reduce settlement risks. APOs must demonstrate their capacity to ensure that appropriate settlement support is provided for each CSP entrant they propose. This support can be provided by the APO or on its behalf and must be equivalent to that provided under the Humanitarian Settlement Services provided to other humanitarian entrants. Where an APO fails to deliver the required services at an appropriate standard, their "approved" status may be withdrawn, which would prevent them from making any further CSP applications.

Under the Pilot, APOs could propose applicants under any of the five Refugee and Humanitarian (Class XB) Subclasses of visa. Under the CSP, APOs can only propose applicants for Global Special Humanitarian (Subclass 202) visas. This change reflects that applicants for the other Class XB Subclasses of visa generally have more complex or significant settlement needs and are not suitable for the CSP.

The amendments require that for Subclass 202 visa applications that include a proposal by an APO:

- an applicant must provide an assurance of support (AoS) where requested; and
- the settlement priorities of the Commonwealth are considered as a criterion for visa grant.

The AoS bond makes the assurer financially responsible for the cost of any working age social security payments provided to the CSP entrant during the first twelve months after arrival in Australia. The assurer would generally be the individual, family, business or community organisation proposing the visa applicant. The AoS does **not** limit access to social security payments by CSP entrants. Rather, it transfers any working age social security payments costs to the assurer. CSP entrants continue to have access to Medicare, English language tuition and employment services on the same basis as other Humanitarian entrants. Requiring decision-makers to consider the settlement priorities of the Commonwealth allows consideration to be given, as a matter of policy, to whether applicants with complex and more significant settlement needs should be granted a visa under the CSP. For example, applicants with complex or significant settlement needs or elderly applicants may be better suited to other categories in the Humanitarian Programme, for which they may remain eligible, and for which they would receive support under the Australian Government's Humanitarian

Settlement Services programme. The new visa criterion will also allow decision-makers to consider such factors as whether the applicant is of working age, and whether they have the personal attributes, or an offer of employment, that make them likely to become financially self-sufficient within 12 months of arrival.

These amendments do not affect the existing Class XB criteria for applicants who do not have an APO proposal and are not applying for a visa under the CSP.

### **Human rights implications**

These amendments engage the following rights:

- right to social security under Article 9 ICESCR; and
- freedom from non-discrimination and equality under Articles 2(1) and 26 of the ICCPR and Article 2(2) of the ICCPR regarding Article 9 of the ICESCR.

#### *Right to Social Security*

As previously outlined, Article 9 of the ICESCR states:

*The States parties to the present Covenant recognize the right of everyone to social security, including social insurance.*

These amendments do not limit Article 9 of the ICESCR, as the visa holder will have full access to social security benefits, just like any other permanent visa holder. However, it is worth noting that the amendments introduce an AoS, which requires that a designated assurer cover the cost of any working age social security payments that were paid to the visa holder. CSP entrants continue to have access to Medicare, disability and employment services on the same basis as other Humanitarian entrants and permanent visa holders.

#### *Freedom from non-discrimination and equality*

As previously outlined, 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 recognised 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 also 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.*

Article 2(2) of the ICESCR also states:

*The State parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

As a matter of policy, decision-makers will consider whether the applicant is work ready with good prospects of becoming financially self-sufficient within 12 months of arrival. Decision-makers will also consider the complexity of the applicant's settlement needs and may refuse to grant the visa if they conclude that the applicant's needs would be better met under the Australian Government's Humanitarian Settlement Services programme rather than by the APO. These considerations may distinguish between people of certain ages and personal characteristics. Accordingly, they engage Articles 2 and 26 of the ICCPR and Article 2 of the ICESCR in relation to right to social security under Article 9.

In General Comment 18, the UN Human Rights Committee stated that:

*The Committee observes 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.*

Similarly, in its General Comment on Article 2 of the ICESCR (E/C.12/GC/20), UNCESCR has stated (at 13) that:

*Differential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective. This will include an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the Covenant rights and solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realized and the measures or omissions and their effects.*

Neither the ICCPR nor the ICESCR give a right for non-citizens to enter Australia for the purposes of seeking permanent residence or employment. The UN Human Rights Committee, in its General Comment 15 on the position of aliens under the Covenant, stated 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. However, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.*

*Consent for entry may be given subject to conditions relating, for example, to movement, residence and employment. A State may also impose general conditions upon an alien who is in transit. However, once aliens are allowed to enter the territory of a State party they are entitled to the rights set out in the Covenant.*

As such, Australia is able to set requirements for the entry of non-citizens into Australia and conditions for their stay, and does so on the basis of reasonable and objective criteria.

The CSP aims to be a sustainable model of private sponsorship of Subclass 202 visa applicants, building on the willingness of the Australian business community to support these



visa applicants in practical ways. The programme helps Australian businesses to fulfil their corporate social objectives and make a difference to the lives of new Australians. The programme provides incentives to quickly facilitate entrants into employment and financial independence, which benefits both the entrant and the broader Australian community. To realise these benefits, the programme prioritises work ready entrants with good prospects of becoming financially self-sufficient within 12 months.

Applicants who are not work ready and do not have good prospects of becoming financially self-sufficient within 12 months are not suitable for the CSP. These applicants generally have more complex settlement needs and require the support of the Government's Humanitarian Settlement Services programme. These applicants may still apply for a Subclass 202 visa outside the CSP, and can continue to apply for any of the other categories of visa within the Class XB offshore Humanitarian Programme.

### **Conclusion**

These amendments are compatible with human rights. Where the amendments engage Australia's human rights obligations in relation to non-discrimination, those limitations are reasonable, necessary, and proportionate to achieve the legitimate objective, which is to harness the capacity of the Australian community to provide a substantial financial contribution towards the costs of humanitarian settlement and practical support to assist these humanitarian entrants to settle successfully.

**The Hon Peter Dutton MP, Minister for Immigration and Border Protection**

**Details of the *Migration Legislation Amendment (2017 Measures No. 3) Regulation 2017*****Section 1 – Name**

This section provides that the title of the Regulations is the *Migration Legislation Amendment (2017 Measures No. 3) Regulation 2017* (the Regulations).

**Section 2 – Commencement**

This section provides that the instrument commences on 1 July 2017.

**Section 3 – Authority**

This section provides that the Regulations are made under the *Migration Act 1958* (the Migration Act).

The purpose of this section is to set out the Migration Act under which the Regulations is made.

**Section 4 – Schedule(s)**

This section provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

The effect of this section is that the *Migration Regulations 1994* (the Migration Regulations) are amended as set out in the applicable items in the Schedules to the Regulations.

The purpose of this section is to provide for how the amendments in this Regulation operate.

**Schedule 1 – Retirement visas*****Migration Regulations 1994*****Item 1 – Clause 405.211 of Schedule 2**

This item amends the Migration Regulations to substitute clause 405.211 of Schedule 2 to the Migration Regulations.

The amendment introduces an exception into the requirement to meet certain Schedule 3 criteria, which relate to the applicant's visa status and immigration history. The exception applies to applicants who are in Australia and who cannot meet the criterion because of compassionate and compelling circumstances.

The purpose of this amendment is to allow the grant of a further Subclass 405 (Investor Retirement) visa to an applicant in Australia who has previously held a Subclass 405 visa and who is unable to satisfy clause 405.211, only if there are compassionate and compelling reasons which led to the inability to meet the criterion.

The amendment does not permit the grant of the visa if the applicant does not meet the criterion and there are no compassionate and compelling reasons why they cannot meet the

particular criterion. Any other compassionate and compelling reasons submitted about why they should be granted the visa, which are not related to why they could not meet the particular criterion, are not relevant and are not reasons to permit the grant of the visa.

#### Item 2 – Clause 405.223 of Schedule 2

This item amends the Migration Regulations to substitute clause 405.223 of Schedule 2 to the Migration Regulations.

The amendment introduces an exception into the criterion requiring the applicant to have complied substantially with any Schedule 8 visa conditions imposed on a previous visa. The exception applies to applicants who are in Australia and who cannot satisfy the criterion because of compassionate and compelling circumstances. It does not permit condition 8303, which relates to violence within the Australian community, to be subject to this exception.

The purpose of this amendment is to allow the grant of a further Subclass 405 (Investor Retirement) visa to an applicant in Australia who holds, or has previously held, a Subclass 405 visa and who is unable to satisfy clause 405.223, only if there are compassionate and compelling reasons which led to the inability to meet the criterion. Clause 405.223 requires an applicant for a Subclass 405 visa to have complied substantially with any Schedule 8 visa conditions that applied to a previous visa held by the applicant.

The amendment does not permit the grant of the visa if the applicant does not meet the criterion and there are no compassionate and compelling reasons why they cannot meet the particular criterion. Any other compassionate and compelling reasons submitted about why they should be granted the visa, which are not related to why they could not meet the particular criterion, are not relevant and are not reasons to permit the grant of the visa.

#### Item 3 – Paragraphs 405.228(2)(b) and (3)(b) of Schedule 2

This item amends subclauses 405.228(2) and (3).

The amendment introduces an exception into the criteria requiring certain applicants to have access to a specified annual income level and to have maintained a specified investment level. The exception applies to applicants who are in Australia and who cannot satisfy the criteria because of compassionate and compelling circumstances.

The purpose of this amendment is to allow the grant of a further Subclass 405 (Investor Retirement) visa to an applicant in Australia who holds or has previously held, a Subclass 405 visa and who is unable to satisfy the relevant criteria, only if there are compassionate and compelling reasons which led to the inability to meet the criteria.

The amendment does not permit the grant of the visa if the applicant does not meet the criterion and there are no compassionate and compelling reasons why they cannot meet the particular criterion. Any other compassionate and compelling reasons submitted about why they should be granted the visa, which are not related to why they could not meet the particular criterion, are not relevant and are not reasons to permit the grant of the visa.

#### Item 4 – Subclause 405.228(4) of Schedule 2

This item amends subclause 405.228(4) of Schedule 2 to the Migration Regulations to add the words “if any” after a reference to the resources required to be maintained.

This amendment is consequential to the changes made by item 3 above and is intended to make it clear that subclause 405.228(4) does not apply where the compassionate and compelling criterion in item 3 has been exercised in favour of the applicant.

Item 5 – Subparagraph 405.228(5)(a)(ii) of Schedule 2

This item amends paragraph 405.228(5)(a).

The amendment introduces an exception into the criteria requiring an applicant (and their spouse or de facto partner, if any) to have maintained adequate health insurance cover in Australia. The exception applies to applicants who are in Australia and who cannot satisfy the criteria because of compassionate and compelling circumstances.

The purpose of this amendment is to allow the grant of a further Subclass 405 (Investor Retirement) visa to an applicant in Australia who holds or has previously held, a Subclass 405 visa and who is unable to satisfy the relevant criterion, only if there are compassionate and compelling reasons which led to the inability to meet the criterion. The amendment allows the Minister to grant a visa to a person who might not have maintained adequate health insurance, for example because of dementia or other illness.

The amendment does not permit the grant of the visa if the applicant does not meet the criterion and there are no compassionate and compelling reasons why they cannot meet the particular criterion. Any other compassionate and compelling reasons submitted about why they should be granted the visa, which are not related to why they could not meet the particular criterion, are not relevant and are not reasons to permit the grant of the visa.

Item 6 – Paragraph 405.228(5)(b) of Schedule 2

This item omits the words “continue to” from paragraph 405.228(5)(b).

This amendment is consequential to the amendment made by item 5 above. Its purpose is to take account of those applicants who might have failed to maintain health insurance cover for reasons which arise from compassionate and compelling circumstances.

Item 7 – Clause 405.325 of Schedule 2

This item amends the Migration Regulations to substitute clause 405.325 of Schedule 2 to the Migration Regulations.

The amendment mirrors item 2 above. Whereas item 2 applies to primary applicants, this item applies to secondary applicants (family members of the primary applicant).

Item 8 – Subclause 405.330(2) of Schedule 2

This item amends subclause 405.330(2) to introduce an exception for applicants who could not comply with paragraph 405.330(2)(a) because of compassionate and compelling circumstances.

New subclause 405.330(2) essentially mirrors item 5 above. Whereas item 5 applies to primary applicants, this item applies to secondary applicants (family members of the primary applicant).

In addition, new subclause 405.330(2A) mirrors item 6 above, but is consequential to new subclause 405.330(2).

### Item 9 – Clauses 405.411 and 405.412 of Schedule 2

This item substitutes clauses 405.411 and 405.412 with new clause 405.411.

The effect of this amendment is to remove distinctions relating to the location of the applicant when the visa is granted.

The purpose of this amendment is to simplify the grant provisions and avoid complications for applicants who have travelled between application and grant. The new provision allows an applicant to be in or outside Australia at the time of grant, but not in immigration clearance.

### Item 10 – Clause 410.211 of Schedule 2

This item amends the Migration Regulations to substitute clause 410.211 of Schedule 2 to the Migration Regulations.

The amendment introduces an exception into the requirement to meet certain Schedule 3 criteria, which relate to the applicant's visa status and immigration history. The exception applies to applicants who are in Australia and who cannot meet the criterion because of compassionate and compelling circumstances.

The purpose of this amendment is to allow the grant of a further Subclass 410 visa to an applicant in Australia who has previously held a Subclass 410 visa and who is unable to satisfy clause 410.211, only if there are compassionate and compelling reasons which led to the inability to meet the criterion.

The amendment does not permit the grant of the visa if the applicant does not meet the criterion and there are no compassionate and compelling reasons why they cannot meet the particular criterion. Any other compassionate and compelling reasons submitted about why they should be granted the visa, which are not related to why they could not meet the particular criterion, are not relevant and are not reasons to permit the grant of the visa.

### Item 11 – Subclause 410.221(1) of Schedule 2

This item substitutes subclause 410.221(1) to remove a reference to a repealed provision.

The amendment is technical in nature and is consequential to the previous repeal of subparagraph 1217(2)(a)(i).

### Item 12 – Subclause 410.221(6) of Schedule 2

This item amends the Migration Regulations to substitute subclause 410.221(6) of Schedule 2 to the Migration Regulations.

The amendment introduces an exception into the criterion requiring the applicant to have complied substantially with any Schedule 8 visa conditions imposed on a previous visa. The exception applies to applicants who are in Australia and who cannot satisfy the criterion because of compassionate and compelling circumstances. It does not permit condition 8303, which relates to violence within the Australian community, to be subject to this exception.

The purpose of this amendment is to allow the grant of a further Subclass 410 visa to an applicant in Australia who holds, or has previously held, a Subclass 410 visa and who is unable to satisfy subclause 410.221(6), only if there are compassionate and compelling

reasons which led to the inability to meet the criterion. Subclause 410.221(6) requires an applicant for a Subclass 410 visa to have complied substantially with any Schedule 8 visa conditions that applied to a previous visa held by the applicant.

The amendment does not permit the grant of the visa if the applicant does not meet the criterion and there are no compassionate and compelling reasons why they cannot meet the particular criterion. Any other compassionate and compelling reasons submitted about why they should be granted the visa, which are not related to why they could not meet the particular criterion, are not relevant and are not reasons to permit the grant of the visa.

#### Item 13 – Subclause 410.321(1) of Schedule 2

This item substitutes subclause 410.321(1) to remove a reference to a repealed provision.

The amendment is technical in nature and is consequential to the previous repeal of subparagraph 1217(2)(a)(i).

#### Item 14 – Subclause 410.321(5) of Schedule 2

This item amends the Migration Regulations to substitute subclause 410.321(5) of Schedule 2 to the Migration Regulations.

The amendment mirrors item 12 above. Whereas item 12 applies to primary applicants, this item applies to secondary applicants (family members of the primary applicant).

#### Item 15 – Clauses 410.411 and 410.412 of Schedule 2

This item substitutes clauses 410.411 and 410.412 with new clause 410.411.

The effect of this amendment is to remove distinctions relating to the location of the applicant when the visa is granted.

The purpose of this amendment is to simplify the grant provisions and avoid complications for applicants who have travelled between application and grant. The new provision allows an applicant to be in or outside Australia at the time of grant, but not in immigration clearance.

#### Item 16 – Clause 410.511 of Schedule 2

This item substitutes clause 410.511 to remove a reference to a repealed provision.

The amendment is technical in nature and is consequential to the previous repeal of subparagraph 1217(2)(a)(i).

### **Schedule 2 – Grounds for cancellation of visa in Frequent Traveller Stream**

#### ***Migration Regulations 1994***

#### Item 1 – Subregulation 2.43(1)

This item amends subregulation 2.43(1) to insert the words “the following” at the start of the paragraphs because the provision contains no conjunctions between any of the paragraphs.

This is a minor technical amendment to update drafting practices.

Item 2 – Paragraph 2.43(1)(ia)

This item makes a technical amendment.

Item 3 – Subparagraph 2.43(1)(j)(i)

This item inserts a reference to the Frequent Traveller stream in subparagraph 2.43(1)(j)(i).

This amendment is consequential to the introduction of the Frequent Traveller stream in the *Migration Legislation Amendment (2016 Measures No. 5) Regulation 2016*. The Frequent Traveller stream permits both visitor and business visitor activities.

The purpose and effect of this amendment is to ensure that a visa in the Frequent Traveller stream is not inadvertently subject to cancellation for failure to adhere to the genuine visitor criteria if the holder conducts business visitor activities which are permitted by the visa.

Item 4 – After paragraph 2.43(1)(j)

This item inserts a new ground for cancellation of a visa under paragraph 116(1)(g) of the Migration Act, which provides that the regulations may prescribe grounds for cancelling a visa. This amendment is consequential to the introduction of the Frequent Traveller stream in *Migration Legislation Amendment (2016 Measures No. 5) Regulation 2016*.

The purpose and effect of this amendment is to ensure that a visa in the Frequent Traveller stream may be cancelled for failure to adhere to the visa criteria applicable to the Frequent Traveller stream.

**Schedule 3 – Subclass 602 (Medical Treatment) visas*****Migration Regulations 1994***Item 1 and Item 2

These items insert new provisions in item 1214A of Schedule 1 to the Regulations to require an application for a Medical Treatment visa, made in Australia by a person who is not the holder of a substantive visa, to be accompanied by the documentation (if any) specified by the Minister in a legislative instrument.

The purpose of the amendments is to allow the imposition of a requirement for supporting documents, as a precondition to making a valid application for a Medical Treatment visa. This is intended to prevent applications by persons in Australia who do not have a need for medical treatment and who are seeking to apply for the visa for the sole purpose of extending their stay in Australia through utilising available appeal mechanisms. Such applications have been made by persons who have run out of other visa options to extend their lawful status in Australia. For example, a person in Australia may have been refused a student visa. That person may then have applied for and been refused a protection visa. The person would then be in a position where there are very few visa options remaining. The Medical Treatment visa was attractive to some persons in this position as a final option. In particular, prior to this amendment, there was no requirement, when lodging the application, to outline the proposed medical treatment.

It is intended that a legislative instrument will be issued by the Minister with the effect that, from 1 July 2017, applicants in Australia, who do not hold a substantive visa, are required to provide an additional form when they seek to apply for a Medical Treatment visa. The form, which must be completed and signed by a registered medical practitioner, will require brief

details of the proposed medical treatment. This process will prevent vexatious applications by persons who do not have a need for medical treatment. The provisions inserted in Schedule 1 have been drafted to allow flexibility in relation to the types of documentation which can be required from potential applicants.

#### Item 3 and item 4

These items remove certain criteria for the grant of a Medical Treatment visa from Subclass 602 in Schedule 2 to the Regulations. In general terms, the criteria which have been removed required an applicant for a Medical Treatment visa to apply before his or her current visa ceased or, in limited circumstances, within 28 days of the current visa ceasing. This rule was inappropriate for the Medical Treatment visa because it meant that the visa could not be granted to applicants who had a genuine need to remain in Australia for medical treatment but who, for example, had failed to apply for the visa within 28 days of their last visa ceasing.

The effect of the amendment is that a person's visa status is no longer relevant to eligibility for a Medical Treatment visa. The amendment requires decision-makers to put additional focus on the need for medical treatment. This is consistent with the amendments made by items 1 and 2 above, which will require documentation of the need for medical treatment when the visa application is lodged with the Department.

### **Schedule 4 – Surcharge for payments made by China UnionPay credit cards**

#### ***Australian Citizenship Regulation 2016***

##### Item 1 – Subparagraph 16(1)(b)(iii)

This item omits the word “and” and is consequential to the insertion of a new subparagraph at the end of paragraph 16(1)(b) by item 2 below.

##### Item 2 – At the end of paragraph 16(1)(b)

This item adds new subparagraph 16(1)(b)(iv) to paragraph 16(1)(b).

The purpose of this amendment is to provide for the collection of a surcharge of 1.9% of amounts paid by China UnionPay credit card for fees and charges under the Citizenship Act.

The effect of this amendment is to enable the Department to recover the merchant fee associated with the use the China UnionPay credit card.

#### ***Customs Regulation 2015***

##### Item 3 – At the end of subsection 150B(2)

This item amends the Customs Regulation to include new paragraph 150B(2)(d).

The purpose and effect of this amendment is to provide for the collection of a surcharge of 1.9% of amounts paid by China UnionPay credit card for customs-related charges, fees, duties and taxes.

The effect of this amendment is to enable the Department to recover the merchant fee associated with the use the China UnionPay credit card.



***Migration Regulations 1994*****Item 4 – At the end of subregulation 5.41A(2)**

This item amends the Migration Regulations to include new paragraph 5.41A(2)(d).

The purpose of this amendment is to provide for the collection of a surcharge of 1.9% of amounts paid by China UnionPay credit card for fees and charges under the Migration Act and Regulations.

The effect of this amendment is to enable the Department to recover the merchant fee associated with the use the China UnionPay credit card.

**Schedule 5 – Eligible New Zealand citizens and Subclass 444 and 461 visas*****Migration Regulations 1994*****Item 1 – Regulation 1.03 (definition of *eligible New Zealand citizen*)**

This item repeals the definition of eligible New Zealand citizen in regulation 1.03 of the Regulations and substitutes a new definition which provides that “***eligible New Zealand citizen*** means a New Zealand citizen who is a protected SCV holder within the meaning of section 7 of the *Social Security Act 1991*.”

The definition of eligible New Zealand citizen is used in the Regulations to identify New Zealand citizens who have the same entitlement as Australian citizens and Australian permanent residents to sponsor family members for migration to Australia. The definition relates to historical arrangements, which ended in early 2001. Since those arrangements ended, New Zealand citizens taking up residence in Australia on the Special Category (Subclass 444) visa have been required to obtain Australian permanent residence before they can sponsor family members. These changes supported the new limitations on New Zealand citizens’ access to social welfare, which were introduced at the same time. The cohort of New Zealand citizens whose rights were preserved by the definition of eligible New Zealand citizen was very similar to the cohort whose entitlement to benefits under the *Social Security Act 1991* was preserved in 2001 by the definition of “protected SCV holder”. However, there were minor differences in the effect of the definitions, with the result that some New Zealand citizens whose social welfare entitlements were preserved were not included in the definition of eligible New Zealand citizen.

The effect of the new definition is to align the cohorts of New Zealand citizens whose entitlements were preserved in 2001 under the Regulations and the *Social Security Act 1991*. This means that all ‘protected SCV holders’ now have the same entitlements as Australian citizens and Australian permanent residents in relation to the sponsorship of family members. This is a beneficial change affecting a small number of New Zealand citizens who have been long term residents of Australia.

**Item 2 – Subregulation 2.16(2B)**

This item repeals subregulation 2.16(2B) of the Regulations.

Regulation 2.16 sets out the way of notifying a person of a decision to grant or refuse to grant a visa. Repealed subregulation 2.16(2B) provided that if the visa was a Subclass 444 (Special Category) visa (SCV) and had not been granted using an authorised system (i.e., SmartGate)

then the Minister was required to notify the applicant of the grant of the visa by an imprint in the applicant's passport by an officer.

The amendment removes this requirement, and instead allows the Minister to orally notify the SCV applicant that the visa has been granted. This is consistent with deregulation and efficient border processing agendas.

### Item 3 – Subregulation 2.16(2D)

This item removes the words “none of subregulations (2) to (2B)”, and substitutes them with “neither subregulation (2) nor subregulation (2A)” in the chapeau of subregulation 2.16(2D).

This is a consequential amendment to omit the reference to the repealed subregulation 2.16(2B) of the Regulations (see item 2 above).

### Item 4 – Paragraphs 461.212(2)(a) and (b) of Schedule 2

This item amends paragraphs 461.212(2)(a) and (b) of Subclass 461 in Schedule 2 to the Regulations, to remove the eligibility of family members of eligible New Zealand citizens to obtain a New Zealand Citizen Family Relationship (Subclass 461) visa.

The Subclass 461 visa was created on 26 February 2001 to cater for the non-New Zealand family members of New Zealand citizens taking up residence in Australia from 2001 on the Special Category (Subclass 444) visa. As noted in relation to item 1 above, from 2001 New Zealand citizens taking up residence in Australia no longer had an entitlement to sponsor family members for migration. As an alternative arrangement, the Subclass 461 visa permits those family members to reside in Australia for 5 years. Further visas can be granted as necessary.

The Subclass 461 visa was not intended to cater for the family members of eligible New Zealand citizens, as those family members are eligible to apply for provisional and permanent visas on the same basis as the family members of Australian citizens and permanent residents. However, the drafting of Subclass 461 did not exclude the eligibility of family members of New Zealand citizens who were eligible New Zealand citizens.

The effect of the amendment is that the Subclass 461 visa is only available to the family members of New Zealand citizens living in Australia on Special Category (Subclass 444) visas if they are not also eligible New Zealand citizens. In practice, this change has a small impact on the operation of the Subclass 461 visa. The visa will continue to cater for the family members of New Zealand citizens who have taken up residence in Australia after 2001.

## **Schedule 6 – Nominated and sponsored skilled visas**

### **Part 1 – Employer nominations**

#### ***Migration Regulations 1994***

### Item 1 – At the end of paragraph 5.19(3)(a)

This item adds a new subparagraph 5.19(3)(a)(iv) in regulation 5.19 (Approval of nominated positions (employer nomination)). The new subparagraph applies to applications for approval of an employer nomination for the purpose of the Temporary Residence Transition stream in the Employer Nomination Scheme visa (Subclass 186) and the Regional Sponsored

Migration Scheme visa (Subclass 187). The new subparagraph requires the nominator to identify a need for the nominator to employ the person named in the nomination application to work in the nominated position under the nominator's direct control.

Prior to this amendment, an application for approval of an employer nomination in the Temporary Residence Transition stream was required to identify a person who had been employed as the holder of a Temporary Work (Skilled) visa (Subclass 457), but was not required to identify a need for the nominator to employ the person. The effect of this amendment is that a nominator is now required to provide verifiable evidence of a need to employ the named person in the nominated position. In conjunction with the amendment made by item 2 of this Schedule (below), this requirement will facilitate assessing that the need to employ the person is genuine by placing an onus on the nominator to identify the need.

#### Item 2 – At the end of subregulation 5.19(3)

This item adds a new paragraph 5.19(3)(i) in regulation 5.19 (Approval of nominated positions (employer nominations)). The effect of the new paragraph is to require that for approval of an employer nomination for the purpose of the Temporary Residence Transition streams in Subclass 186 and Subclass 187, the need identified under new subparagraph 5.19(3)(a)(iv) (see item 1, above) for the nominator to employ the identified person in the nominated position must be assessed as genuine.

This amendment was made to address applications for approval of nominated positions which are considered to be high risk, for instance where there is an indication that the position has been fraudulently created for the purpose of facilitating the grant of a permanent visa to the person. The new paragraph therefore improves the integrity of the Temporary Residence Transition streams in Subclass 186 and Subclass 187.

#### Item 3 – Subparagraph 5.19(4)(a)(ii)

This item amends subparagraph 5.19(4)(a)(ii) of regulation 5.19 (Approval of nominated positions (employer nominations)). The amendment applies to applications for approval of an employer nomination for the purpose of the Direct Entry stream in the Employer Nomination Scheme visa (Subclass 186) and the Regional Sponsored Migration Scheme visa (Subclass 187). The amendment requires the nominator to identify a need for the nominator to employ an identified person in the nominated position.

Previously the subparagraph required the nominator only to identify a need to employ any paid employee in the nominated position. A nominator could have the nomination approved without knowing or stating who would be employed in the nominated position as the holder of a Subclass 186 or Subclass 187 visa. This could result in the employer nomination programme being open to the risk of migration fraud through a nominating employer soliciting payment from a visa applicant to be identified as the nominee once the nomination had been approved.

This amendment ensures that the nomination must be linked to an identified employee and another person cannot later be substituted as the visa applicant.

Item 4 – Subparagraph 5.19(4)(h)(i)

This amendment is consequential to the amendment made by item 5, below, which results in more than two requirements to be met under subparagraph 5.19(4)(h)(i).

Item 5 – Before sub-subparagraph 5.19(4)(h)(i)(A)

This item adds a new sub-subparagraph 5.19(4)(h)(i)(AA) in regulation 5.19 (Approval of nominated positions (employer nominations)). The effect of the new sub-subparagraph is to require that for approval of an employer nomination in the Direct Entry stream, where the nomination is in respect of the grant of an Employer Nomination Scheme (Subclass 186) visa (see subparagraph 186.233(1)(a)(i) of Schedule 2 of the Migration Regulations), the need identified under subparagraph 5.19(4)(a)(ii) for the nominator to employ an identified person in the nominated position must be assessed as genuine.

This amendment improves the integrity of employer nominations for the Direct Entry stream of the Employer Nomination Scheme visa (Subclass 186). Previously there was no requirement for the identified need for the nominator to employ the person to be assessed as genuine. This was inconsistent with the requirements for approval of employer nominations for the Direct Entry stream of Regional Sponsored Migration Scheme (Subclass 187) visas, for which the nominator's need must be assessed as genuine (see sub-subparagraph 5.19(4)(h)(ii)(B)). This amendment makes it clear that non-genuine employer nominations (for instance, where the nomination has been fraudulently made for the purpose of grant of a permanent visa) will be refused whether the nomination is for either a Subclass 186 visa or a Subclass 187 visa.

Item 6 – Sub-subparagraph 5.19(4)(h)(ii)(B)

This item amends sub-subparagraph 5.19(4)(h)(ii)(B) in regulation 5.19 (Approval of nominated positions (employer nominations)) to change a reference to “a paid employee” to a reference to “the person identified under subparagraph (a)(ii) as a paid employee”. This amendment is consequential to the amendment made by item 3, above, which now requires an employer nomination to identify a specific person to work in the nominated position rather than, as previously, any paid employee.

The effect of the amendment is that an employer nomination for the purposes of grant of a Regional Sponsored Migration Scheme visa (Subclass 187) in the Direct Entry stream must establish that there is a genuine need for the nominator to employ an identified person in the nominated position, rather than any paid employee. This improves the integrity of employer nominations for the Direct Entry stream of Subclass 187 visas.

Item 7 – After paragraph 186.233(1)(a) of Schedule 2

This item amends the criteria for grant of an Employer Nomination Scheme visa (Subclass 186) in the Direct Entry stream to insert an additional requirement that the nominated position to which the visa application relates must be the position in relation to which the visa applicant was identified under paragraph 5.19(4)(a)(ii) in the application for approval of the employer nomination.

This amendment is consequential to the amendment made by item 3, above, which requires a specific person to be identified to be employed in a nominated position, not just any paid employee. The effect of this amendment is that a Subclass 186 visa in the Direct Entry

stream can only be granted to the person identified in the employer nomination to which the visa application relates.

Item 8 – After paragraph 187.233(1)(a) of Schedule 2

This item amends the criteria for grant of a Regional Sponsored Migration Scheme visa (Subclass 187) in the Direct Entry stream to insert an additional requirement that the nominated position to which the visa application relates must be the position in relation to which the visa applicant was identified under paragraph 5.19(4)(a)(ii) in the application for approval of the employer nomination.

This amendment is consequential to the amendment made by item 3, above, which requires a specific person to be identified to be employed in a nominated position, not just any paid employee. The effect of this amendment is that a Subclass 187 visa in the Direct Entry stream can only be granted to the person identified in the employer nomination to which the visa application relates.

**Part 2 - Nominated and sponsored skilled visas**

***Migration Regulations 1994***

Item 9 – Subitem 1138(4) of Schedule 1 (table item 3)

This item amends Item 1138 (Skilled – Nominated (Permanent)(Class SN)) of Schedule 1 to the Migration Regulations. The effect of the amendment is to require that to make a valid application for a Class SN visa, an applicant seeking to satisfy the primary criteria for the grant of a Skilled – Nominated visa (Subclass 190) must not have turned 45 at the time of the invitation to apply.

Previously an applicant was required not to have turned 50 at the time of invitation. This amendment lowers the maximum age for an applicant to 45 years. The amendment ensures that applicants for permanent working visas will be of a younger age and will be able to make a stronger economic contribution to Australia.

Item 10 – Subitem 1230(4) of Schedule 1 (table item 30)

This item amends Item 1230 (Skilled – Regional Sponsored (Provisional)(Class SP)) of Schedule 1 to the Migration Regulations. The effect of the amendment is to require that to make a valid application for a Class SP visa, an applicant seeking to satisfy the primary criteria for the grant of a Skilled – Regional (Provisional) visa (Subclass 489) in the First Provisional stream must not have turned 45 at the time of the invitation to apply.

Previously an applicant was required not to have turned 50 at the time of invitation. This amendment lowers the maximum age for an applicant to 45 years. The amendment ensures that applicants will be of a younger age and will be able make a stronger economic contribution to Australia.

Item 11 – Clause 186.111 of Schedule 2 (note 3)

This item repeals note 3 (vocational English) from the definitional provisions in clause 186.111. This amendment is consequential to the amendment made by item 12, below, the effect of which is that the term “vocational English” is no longer used in Subclass 186.

Item 12 – Paragraph 186.222(a) of Schedule 2

This item amends paragraph 186.222(a) to require that an applicant for an Employer Nomination Scheme (Subclass 186) visa in the Temporary Residence Transition stream must have “competent English” at the time of application, unless the applicant is in a class of persons specified in an instrument by the Minister. Previously paragraph 186.222(a) required an applicant to have “vocational English” at the time of application.

Regulation 1.15C defines a person as having “competent English” if the person undertook a test specified by the Minister in an instrument and achieved a score specified in the instrument, or the person holds a passport of a type specified by the Minister in an instrument. The level of English required for “competent English” is generally that the person has an effective command of the language despite some inaccuracies. The person should be able to use and understand fairly complex language, particularly in familiar situations. This is a higher level than that for “vocational English”, which requires only that the person has a partial command of English and copes with overall meaning in most situations although they are likely to make many mistakes. This amendment highlights the importance of English language skills for migrants seeking a permanent visa to work in Australia.

Item 13 – paragraph 186.231(a) of Schedule 2

This item amends paragraph 186.231(a) to require that an applicant for an Employer Nomination Scheme visa (Subclass 186) in the Direct Entry stream must not have turned 45 years at the time of application. Previously paragraph 186.231(a) required that an applicant must not have turned 50 years at the time of application.

This amendment lowers the maximum age at which an applicant may be granted a Subclass 186 in the Direct Entry stream to 45 years at the time of application. The amendment ensures that applicants will be of a younger age and will be able make a stronger economic contribution to Australia.

Item 14 – Clause 187.111 of Schedule 2 (note 3)

This item repeals note 3 (vocational English) from the definitional provisions in clause 187.111. This amendment is consequential to the amendment made by item 15, below, the effect of which is that the term “vocational English” is no longer used in Subclass 187.

Item 15 – Paragraph 187.222(a) of Schedule 2

This item amends paragraph 187.222(a) to require that an applicant for a Regional Sponsored Migration Scheme visa (Subclass 187) in the Temporary Residence Transition stream must have “competent English” at the time of application, unless the applicant is in a class of persons specified in an instrument by the Minister. Previously paragraph 187.222(a) required an applicant to have “vocational English” at the time of application.

Regulation 1.15C defines a person as having “competent English” if the person undertook a test specified by the Minister in an instrument and achieved a score specified in the instrument, or the person holds a passport of a type specified by the Minister in an instrument. The level of English required for “competent English” is higher than that for “vocational English”. (See item 12 above for further details of required English levels.) This

amendment highlights the importance of English language skills for migrants seeking a permanent visa to work in Australia.

#### Item 16 – paragraph 187.231(a) of Schedule 2

This item amends paragraph 187.231(a) to require that an applicant for a Regional Sponsored Migration Scheme visa (Subclass 187) in the Direct Entry stream must not have turned 45 years at the time of application. Previously paragraph 187.231(a) required that an applicant must not have turned 50 years at the time of application.

This amendment lowers the maximum age at which an applicant may be granted a Subclass 187 in the Direct Entry stream to 45 years at the time of application. The amendment ensures that applicants will be of a younger age and will be able make a stronger fiscal contribution to Australia over a longer period of time.

#### Item 17 – Paragraph 187.234(c) of Schedule 2

This item amends paragraph 187.234(c) to clarify the skills and qualifications assessments required for an applicant to satisfy the criteria for grant of a Regional Sponsored Migration Scheme visa (Subclass 187) in the Direct Entry stream. In particular, the amendment clarifies which visa applicants come within paragraph 187.234(c).

Clause 187.234 provides alternative requirements. Paragraph 187.234(a) can be met by applicants who are in a class of persons specified by the Minister in an instrument for the paragraph. Alternatively, paragraph 187.234(b) provides that applicants whose occupations are specified by the Minister in an instrument and who did not obtain the necessary qualifications in Australia must have their skills assessed as suitable for the occupation by the assessing authority specified by the Minister in the instrument as the assessing authority for the occupation.

Applicants coming within paragraph 187.234(c) are only required to have the qualifications listed in ANZSCO as being necessary to perform the tasks of the occupation. They are not required to have their qualifications or skills assessed by an assessing authority. The intention is that if an applicant comes within paragraph 187.234(b) (and not being an applicant mentioned in paragraph 187.234(a)) the applicant must meet the requirements of paragraph 187.234(b) and cannot satisfy the clause by meeting the less stringent requirements of paragraph 187.234(c).

This intention was unclear in the previous paragraph 187.234(c) as it was implied that the paragraph applied to an applicant to whom neither paragraph (a) or (b) applied. It could be argued from this that if an applicant could not meet the requirements of paragraph 187.234(b), that paragraph did not apply to the applicant and therefore the applicant could be considered against the less stringent requirements of paragraph 187.234(c). This was not the intention.

The amended paragraph 187.234(c) removes this ambiguity by making it clear that the paragraph applies only to applicants whose occupations are not specified for the purposes of paragraph 187.234(b) or who obtained the necessary qualification in Australia. That is, an applicant referred to in paragraph 187.234(b) could not come within paragraph 187.234(c). If such an applicant fails to meet the requirements of paragraph 187.234(a) or (b) the applicant could not satisfy the criterion in clause 187.234 as the applicant could not be considered

under paragraph 187.234(c). The amendment therefore puts the intended operation of the clause beyond doubt.

### **Part 3 – Refunds**

#### ***Migration Regulations 1994***

##### Item 18 – After subregulation 2.12F(3A)

This item adds a new subregulation 2.12F(3B) in regulation 2.12F (Refund of first instalment of visa applicant charge). The purpose of new subregulation 2.12F(3B) is to provide a discretion to make a refund of the first instalment of the visa application charge where:

- the visa application is for an Employer Nomination Scheme visa (Subclass 186) or a Regional Sponsored Migration Scheme visa (Subclass 187); and
- the visa application relates to a position nominated for approval under regulation 5.19.

The effect of new paragraph 2.12F(3B)(c) is that a refund may be made where the visa applicant withdraws the visa application in writing for any of the reasons specified in the paragraph. The general intention is to provide a discretion to make a refund in circumstances where the visa application cannot proceed through no fault of the applicant. The reasons for withdrawal when a refund may be made are:

- the wrong occupation was mistakenly identified in relation to the position nominated;
- the nomination sought to meet the requirements of the Temporary Residence Transition stream when it was more likely to meet the requirements of the Direct Entry stream, or vice versa;
- after the visa application was made, action was taken against the nominator for breach of a sponsorship obligation;
- after the visa application was made, the nominated position ceased to be available to the applicant because the nominator ceased to operate the business in which the position was located;
- if the visa application was in the Temporary Residence Transition stream, after the visa application was made but before the application for approval of the nomination was decided, the visa applicant ceased to be employed by the nominator as the holder of a Subclass 457 visa; and
- if the visa application was in the Temporary Residence Transition stream, the application for approval of the nomination was made before the visa applicant had worked for two years in the position as the holder of a Subclass 457 visa, thus preventing the approval of the nomination.

Paragraph 2.12F(3B)(d) requires that after the visa application is withdrawn, a request for a refund must be made by the payer of the visa application charge, or if that person has died or is incapacitated, their legal representative, or if they have become bankrupt, the trustee of the estate of the payer.



Item 19 – At the end of paragraph 2.12F(7)(b)

This item makes a consequential amendment to paragraph 2.12F(7)(b) by adding relevant references to new paragraph 2.12F(3B)(d). Paragraph 2.12F(7)(b) is a technical provision concerning discharge of any liability to make a refund under regulation 2.12F.

**Schedule 7 – Migration agents – registration application charges*****Migration Agents Registration Application Charge Regulations 1998***Item 1 – Before regulation 1

This item inserts a new heading “Part 1 – Preliminary” in the *Migration Agents Registration Application Charge Regulations 1998* (the Migration Agents Registration Application Charge Regulations). The new heading is part of the restructuring of the Migration Agents Registration Application Charge Regulations into three Parts. Part 1 (Preliminary) consists of regulations 1, 2 and 3. Item 2, below, restructures the remaining regulations into Part 2, and item 10, below, inserts a new Part 3.

Item 2 – Before regulation 4

This item inserts a heading “Part 2 – Amount of registration application charge” before regulation 4. The effect of the heading is that regulations 4, 5 and 6 become Part 2 of the Migration Agents Registration Application Charge Regulations. See item 1 above, and item 10, below, for further details of this restructure.

Item 3 – Regulation 4 (heading)

This item changes the heading of regulation 4 from “Amount of charge: commercial or for-profit assistance (Act s6)” to “Amount of charge: general”. This amendment is consequential to the amendment made to subregulation 4(1) by item 4, below, which has the effect of clarifying that the charge imposed under regulation 4 is not restricted to migration agents acting on a commercial or for-profit basis.

Item 4 – Subregulation 4(1)

This item amends subregulation 4(1) to make it clear that the amount of the migration agents registration application charge set out in regulation 4 applies to all individuals applying for registration unless regulation 5 applies to the individual. (See item 8 below for further details of the application of regulation 5.)

Prior to this amendment, subregulation 4(1) stated that regulation 4 applied to an individual who acted on a commercial or for-profit basis, or as a member of, or a person associated with, an organisation that operates on a commercial or for-profit basis. The intention is that all applicants are required to pay the higher charges set out in regulation 4 unless regulation 5 applies to the applicant, not only registration applicants who intend to provide commercial or for-profit assistance.

Registration applicants who do not intend to act on a commercial or for-profit basis but do not come within regulation 5 are liable to pay the charge as set out in regulation 4. For example, the charge in regulation 4 must be paid by a migration agent who does not intend to practice as

a migration agent (i.e. provide ‘immigration assistance’) for a period but wishes to maintain registration as a migration agent. Similarly, a migration agent who intends to provide immigration assistance on a non-commercial or non-profit basis but not in conjunction with a charitable organisation must also pay the charge set out in regulation 4. This amendment ensures that the provisions operate as intended. The amendment puts it beyond doubt that the only options for persons seeking registration as a migration agent are payment of the general registration charge or payment of the reduced charge applicable to non-commercial and non-profit assistance.

#### Item 5 – Paragraph 4(2)(a)

This item omits the words “made on or after 1 July 2003” from paragraph 4(2)(a). These words are now redundant. They were inserted as a transitional measure when the amount of the charge for an initial registration application was last adjusted on and from 1 July 2003. Unless they come within regulation 5, all applicants for initial registration are required to pay the general charge of \$1, 760. This amount has not been changed since 1 July 2003.

#### Item 6 – Paragraph 4(2)(b)

This item omits the words “made on or after 1 July 2005” from paragraph 4(2)(b). These words are now redundant. They were inserted as a transitional measure when the amount of the charge for a repeat registration application was last adjusted on and from 1 July 2005. All applicants for repeat registration, unless they come within regulation 5, are required to pay the general charge of \$1, 595. This amount has not been changed since 1 July 2005.

#### Item 7 – Regulation 5 (heading)

This item repeals the heading of regulation 5 and substitutes a new heading – “Amount of charge: non-commercial or non-profit assistance”. The only change is to remove the words “(Act s6)” from the previous heading as they are not required. This is a drafting change only.

#### Item 8 – Subregulation 5(1)

This item repeals subregulation 5(1) and substitutes a new subregulation 5(1). New subregulation 5(1) makes it clear that regulation 5 applies only to an individual who intends to provide immigration assistance solely on a non-commercial or non-profit basis as a member of, or in association with, an organisation that operates in Australia solely on a non-commercial or non-profit basis and as a charity, or for the benefit of the Australian community.

An individual to whom the regulation applies is liable to pay the lower non-commercial or non-profit charge set out in regulation 5. The effect of this amendment is to make it clear that regulation 5 applies only where the individual intends to provide immigration assistance in the circumstances described in subregulation 5(1).

The effect of the amendment is that regulation 5 does not apply to individuals who intend to provide immigration assistance on a non-commercial or non-profit basis, but not in conjunction with a charitable body or an organisation that operates solely for the benefit of the Australian community. As these individuals do not come within regulation 5 they must pay the commercial or for-profit charge set out in regulation 4.

The amendments also insert a note which advises that for the purposes of subregulation 5(1),

*charity* has the meaning given by Part 2 of the *Charities Act 2013*, as result of the operation of section 2B of the *Acts Interpretation Act 1901*.

#### Item 9 – Paragraphs 5(2)(a) and (b)

This item omits the words “made on or after 2000” from paragraphs 5(2)(a) and (b). These words are now redundant. They were inserted as a transitional measure when the amounts of the non-commercial or non-profit charge were last adjusted on and from 1 July 2000. All applicants coming within regulation 5 now pay the non-commercial or non-profit charge of \$160 (paragraph 5(2)(a)) for an initial registration application, or \$105 for a repeat registration application (paragraph 5(2)(b)). These amounts have not been changed since 1 July 2000.

### **Schedule 8 —Amendment to SHEV arrangements**

#### ***Migration Regulations 1994***

##### Item 1 and Item 2

These items update the table in subregulation 2.06AAB(1) which lists the substantive visas for which certain holders and former holders of Save Haven Enterprise visas (SHEV) are able to apply. The items omit reference to the repealed Training and Research visa (Subclass 402) and include a reference to the Training visa (Subclass 407). These changes do not affect holders or former holders of SHEVs as they will not be eligible to apply for any of the substantive visa subclasses listed in subregulation 2.06AAB(1) until at least 18 October 2018.

##### Item 3 – Subparagraphs 2.06AAB(2)(a)(i) and (ii)

This item inserts “, at that time or at any later time occurring before the application is made,” after “specified” in subparagraphs 2.06AAB(2)(a)(i) and (ii). These provisions relate to the eligibility of SHEV holders or former holders to apply for prescribed substantive visas in certain circumstances.

SHEV holders are eligible to apply for certain substantive visas if they have worked and/or studied in a specified regional area for a specified time. The amendment ensures that time spent working and/or studying in a regional area may still be counted even if the regional area was not specified until after they commenced that activity. This ensures that as regional areas are added to the list, persons already working and/or studying in that area may benefit and be eligible to apply for a prescribed substantive visa;

This will allow SHEV holders and former holders to satisfy the prescribed substantive visa application requirements at the earliest opportunity if they have been working and/or studying full-time in the regional area.

### **Schedule 9 – Changes to age limits for working holiday maker visas**

#### ***Migration Regulations 1994***

Prior to these amendments, an applicant for a Subclass 417 (Working Holiday) visa or a Subclass 462 (Work and Holiday) visa (WHM visas) was required to hold an eligible passport and be aged between 18 and 30 years (inclusive).

These amendments introduce a new age criterion allowing for certain WHM visa applicants to be aged between 18 and 35 years (inclusive) of age.

In effect, as a result of these amendments, a person is eligible to be granted a WHM visa (if other relevant criteria are also met) if they are:

- Between 18 and 30 years of age, and hold the relevant passport specified in an instrument by the Minister; or
- Between 18 and 35 years of age, and hold the relevant passport specified in an instrument by the Minister.

### Item 1 and Item 3

#### *Item 1 – Subclause 417.211(2) of Schedule 2*

This item repeals and substitutes subclause 417.211(2) of Schedule 2.

The substituted subclause provides that an applicant must hold a working holiday eligible passport of the kind or of one of the kinds, specified in a legislative instrument made for the purpose of this subclause. The subclause further provides that the applicant must be at least 18 years of age and no more than 35 years of age, or a younger age if that age is specified for the kind of passport that the applicant holds.

A working holiday eligible passport is defined in subitem 1225(5) of Schedule 1 to mean a valid passport held by a person who is a member of a class of persons specified in an instrument mentioned in subitem 1225(3).

#### *Item 3 – Clause 462.212 of Schedule 2*

This item repeals and substitutes subclause 462.212 of Schedule 2.

The substituted subclause provides that an applicant must be at least 18 years of age and no more than 35 years of age or a younger age if a younger age is specified for a person holding a specified passport.

#### *Purpose and effect of amendments*

The purpose of the amendment is to create a new eligible age range from 18 to 35 years, but to retain the option of specifying a younger maximum age in a legislative instrument for specified passport holders. The amendment increases the upper age limit, and enables two age requirements (18-30 and 18-35) to operate in parallel. Therefore, existing WHM arrangements with partnering countries for persons aged 18 to 30 years can be maintained and honoured.

The amendment will add flexibility to Australia's WHM programme by enabling existing bilateral arrangements to be maintained or renegotiated, and allow new bilateral arrangements to be developed.

### Item 2 – Paragraph 417.221(2)(a) of Schedule 2

This item omits the reference to paragraph 417.211(2)(c) and substitutes the reference with paragraph 417.211(2)(a) of Schedule 2.

This is a consequential amendment to the repealed subclause 417.211(2) of Schedule 2 in Item 1. The repealed paragraph 417.211(2)(c) provided that at the time of application, an applicant must hold a working holiday eligible passport. The substituted paragraph 417.211(2)(a) provides that at the time of application, an applicant must hold a working holiday eligible passport of a kind specified in the legislative instrument made for the purpose of the subclause.

The effect of this amendment does not change the requirement for an applicant to hold a working holiday eligible passport. Paragraph 417.221(2)(a) relevantly provides that at the time of decision, the applicant is to continue to satisfy paragraph 417.211(2)(a) by holding a working holiday eligible passport of a kind specified in the legislative instrument.

### **Schedule 10 – Updating references to instruments about payment of fees in foreign countries and currencies**

#### ***Australian Citizenship Regulation 2016***

##### **Item 1 – Subsection 16(7)**

This item repeals and substitutes the previous definitions of “conversion instrument” and “places and currencies instrument” in subsection 16(7) of the *Australian Citizenship Regulation 2016* (the Citizenship Regulation).

##### *New definition of “conversion instrument”*

This item provides that the “conversion instrument” means the instrument titled *Migration (IMMI 17/036: Payment of Visa Application Charges and Fees in Foreign Currencies) Instrument 2017* made under paragraph 5.36(1A)(a) of the *Migration Regulations 1994*.

The “conversion instrument” commences on 1 July 2017 and sets out the exchange rates to be used for prescribed foreign currencies in relation to the payment of fees. The conversion instrument allows a person who makes an application under the Citizenship Act to pay an application fee in a foreign currency at an exchange rate specified in the conversion instrument.

##### *New definition of “places and currencies instrument”*

This item provides that the “places and currencies instrument” means the instrument titled *Migration (IMMI 17/037: Places and Currencies for Paying of Fees) Instrument 2017* made under paragraphs 5.36(1)(a) and (b) of the *Migration Regulations 1994*.

The “places and currencies instrument” commences on 1 July 2017 and sets out the places and foreign country currencies in which application fees may be paid.

##### *Purpose and effect of amendments*

The “conversion instrument” and “places and currencies instrument” are periodically updated in January and July of each year to reflect changes in exchange rates, specified foreign currencies, and the places where application fees may be paid.

The amendment ensures that persons may pay an application fee in a specified foreign country and in a foreign currency at a defined and updated exchange rate.

The Citizenship Act does not allow for the making of an instrument to specify matters in relation to the collection of application fees in foreign countries and foreign currencies.

Accordingly, the Citizenship Regulation addresses this issue by incorporating references to relevant instruments made under the Migration Regulations to specify the foreign countries where a fee may be paid, the currency that can be accepted in each listed country, and the currency exchange rate that must be applied.

Due to the operation of section 14 of the *Legislation Act 2003*, the Citizenship Regulations may not make provision in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time.

This means that the legislative instruments made under paragraphs 5.36(1A)(a), 5.36(1)(a) and (b) of the Migration Regulations can only be incorporated by reference into the Citizenship Regulation, at the time the Citizenship Regulation commences. Accordingly, it is necessary to periodically amend the Citizenship Regulation to reflect changes to the instruments made under the Migration Regulations.

### **Schedule 11—Assurance of support for humanitarian visa applicants**

#### ***Migration Regulations 1994***

##### Items 1 – 4

These items amend item 1402 of Schedule 1 to the Regulations to make changes to the visa application requirements for the Refugee and Humanitarian (Class XB) visa. The changes are consequential to the removal of the subclasses 200, 201, 203 and 204 as visas for which applications can be proposed by an approved proposing organisation (APO). Under the new arrangements, an APO can only propose an application for a Global Special Humanitarian visa (Subclass 202).

##### Items 5 to 22 and items 31 to 48

These items amend the criteria for visa grant in Schedule 2 to the Regulations relating to subclasses 200, 201, 203 and 204. The amendments remove references to APOs from those subclasses and make related consequential amendments. As noted above, the effect of the changes is that APOs can only propose applications for Subclass 202 visas.

##### Item 23 - Clause 202.111 of Schedule 2 (subparagraph (a)(i) of the definition of approved proposing organisation)

This item omits “Refugee and Humanitarian (Class XB)”, and substitutes it with “Subclass 202”.

The purpose and effect of this amendment is to clarify that only applications for subclass 202 visas may be accompanied by a proposal from an APO.

##### Item 24 - Clause 202.111 of Schedule 2 (note at the end of the definition of approved proposing organisation)

The item repeals the note at the end of the clause, which referred to the definition of APO having commenced as part of the Department’s Community Proposal Pilot programme.

The purpose and effect of this amendment is to delete the reference to the Community Proposal Pilot, as the programme is no longer in operation.

Item 25 - Clause 202.223 of Schedule 2

This item numbers the existing clause (1). The purpose and effect of this amendment is to allow for the insertion of subclause (2) at Item 26.

Item 26 - At the end of clause 202.223 of Schedule 2

This item inserts subclause (2), which refers to the assessment of applications for subclass 202 visas that are accompanied by a proposal from an APO.

The purpose and effect of the amendment is to enable the settlement priorities of the Commonwealth to be considered as a criterion for a Subclass 202 visa grant for applicants who are proposed by an APO.

This item also inserts a Note which explains that this subclause commenced on 1 July 2017 as part of the Department's Community Support Programme.

Item 27 - Clause 202.225 of Schedule 2

This item omits "The applicant", and substitutes "If the application does not include a proposal by an approved proposing organisation, the applicant".

The purpose and effect of this amendment is to clarify that there are different criteria for applicants that are proposed by an APO, and the criteria set out in this clause need only be satisfied by applicants who are not proposed by an APO.

Item 28 - After clause 202.227 of Schedule 2

This item inserts a clause relating to the primary criteria that must be met at the time of decision by an applicant who has been proposed by an APO.

The purpose of this amendment is to allow the Minister to request that the applicant provide an assurance of support relating to an application that includes a proposal by an APO.

The effect of this amendment is that the Minister must be satisfied that the assurance has been accepted by the Secretary of Social Services and that any additional applicants are also covered by an assurance of support if requested by the Minister (as set out in Item 29) in order for an applicant who has been proposed by an APO to meet the primary criterion in this clause.

Item 29 - After clause 202.322 of Schedule 2

This item inserts a clause relating to secondary criteria that must be met by applicants who are members of the family unit of an applicant whose application is accompanied by a proposal from an APO.

The purpose of this amendment is that if the Minister requests that the primary applicant must provide an assurance of support relating to an application that includes a proposal by an APO, then:

- the Minister must be satisfied that the assurance has been accepted by the Secretary of Social Services, and;

If the Minister has requested secondary applicants must also have an assurance of support, then:

- the primary applicant's assurance of support must include the secondary applicant, or;
- the secondary applicant must have an assurance of support accepted by the Secretary of Social Services in their own capacity as a secondary applicant.

The effect of this amendment is that, where requested by the Minister, secondary applicants must be covered by an assurance of support that has been accepted by the Secretary of Social Services, by either being included on the assurance of support provided in respect of the primary applicant, or obtaining one in their own right.

#### Item 30 - Clause 202.312 of Schedule 2

This item repeals the clause, which refers to the criteria for a primary applicant in Clause 202.225 of Schedule 2, and replaces it with criteria that acknowledges that applicants applying for a subclass 202 visa may lodge an application with or without a proposal by an APO. This amendment is consequential to the amendment made in Item 27.

The purpose of this item is to acknowledge that applicants for a subclass 202 visa may make applications with or without a proposal from an APO and provide different criteria for secondary applicants in each case.

The effect of this item is to acknowledge that applicants may make applications with or without a proposal from an APO, and the criteria that needs to be satisfied will differ depending on if the application includes a proposal from an APO or not.

### **Schedule 12 – Application and transitional provisions**

#### ***Australian Citizenship Regulation 2016***

##### Item 1 – In the appropriate position in Part 4

This item amends Part 4 of the Citizenship Regulation to insert section 20, titled 'Application of amendments made by the *Migration Legislation Amendment (2017 Measures No. 3) Regulations 2017*', which provides that the amendments of the Citizenship Regulation apply in relation to an application made on or after 1 July 2017.

The purpose and effect of this item is to clarify to whom and when the amendments to the Citizenship Regulation apply.

#### ***Migration Agents Registration Application Charge Regulations 1998***

##### Item 2 – At the end of the Regulations

This item adds a new Part 3, titled 'Transitional and application provisions' at the end of the Migration Agents Registration Application Charge Regulations. The purpose of new Part 3 is



to provide for transitional provisions relevant to amendments to the Migration Agents Registration Application Charge Regulations, and for those provisions to be located within the Regulations themselves rather than in amending regulations.

New regulation 7, ‘Amendments made by the *Migration Legislation Amendment (2017 Measures No. 3) Regulations 2017*’ provides that the amendments to the Migration Agents Registration Application charge Regulations by Schedule 7 apply in relation to a registration application made on or after 1 July 2017.

A note following new regulation 7 advises that Schedule 7 to the *Migration Legislation Amendment (2017 Measures No. 3) Regulations 2017* commences on 1 July 2017.

The purpose and effect of this item is to clarify to whom and when the amendments to the Migration Agents Registration Application Charge Regulations apply.

### ***Migration Regulations 1994***

#### **Item 3 – In the appropriate position in Schedule 13**

This item inserts new Part 65 in Schedule 13 to the Regulations.

New clause 6501 provides that the amendments made by Schedule 1 to the Regulations apply in relation to an application for a visa made, but not finally determined, before 1 July 2017 and an application of a visa made on or after 1 July 2017.

While the amendments made by new clause 6501, which affect time of application criteria may be considered to have retrospective application to applications not finally determined, they are beneficial to applicants. Therefore, these amendments do not engage subsection 12(2) of the *Legislation Act 2003*.

New clause 6502 provides that the amendments made by Schedule 2 to the Regulations apply in relation to cancellation of a visa on or after 1 July 2017, whether the visa was granted before, on or after that day.

New clause 6503 provides that the amendments made by Schedule 3 to the Regulations apply in relation to an application for a Medical Treatment (Visitor)(Class UB) visa made on or after 1 July 2017.

New subclause 6504(1) provides that the amendments of regulation 1.03 and paragraphs 461.212(2)(a) and (b) of Schedule 2 made by Schedule 5 to the Regulations apply in relation to an application for a visa made on or after 1 July 2017.

New subclause 6504(2) provides that the amendments of regulation 2.16 made by Schedule 5 to the regulations apply in relation to the grant of a visa on or after 1 July 2017.

New subclause 6505(1) provides that the amendments made by Part 1 (Employer Nominations) of Schedule 6 to the Regulations apply in relation to an application for the approval of a nomination, if the application is made on or after 1 July 2017.

New subclause 6505(2) provides, subject to subclause 6502(3) that the amendments made by Part 2 (Nominated and sponsored skilled visas) of Schedule 6 to the Regulations apply in relation to any application for a visa made on or after 1 July 2017.

New subclause 6505(3) provides that, despite subclause 6505(2), the amendments of subitems 1138(4) and 1230(4) of Schedule 1 to the Migration Regulations made by Part 2 of Schedule 6 to the Regulations do not apply in relation to an application for a visa (including an application by a secondary applicant which is combined with the application of a primary applicant) if the application was made on or after 1 July 2017 in response to an invitation to apply for the visa that was given before 1 July 2017.

The effect of new subclause 6503(3) is that the amendments made by items 9 and 10 of Part 2 of Schedule 6 to the Regulations, which lowered the age limit for making a valid application for a Skilled – Nominated visa (Subclass 190) and a Skilled – Regional (Provisional) visa (Subclass 489), respectively, from 50 years to 45 years, do not apply to an application for a relevant visa irrespective of when the application was made, if the invitation to apply for the visa was given before 1 July 2017.

New subclause 6505(4) provides that the amendments made by Part 3 (Refunds) of Schedule 6 to the Regulations apply in relation to withdrawing a visa application on or after 1 July 2017, irrespective of whether the visa application was made before, on or after 1 July 2017.

New subclause 6506(1) provides that the amendments made by items 1 and 2 of Schedule 8 to the Regulations apply in relation to an application for a visa made on or after 1 July 2017.

New subclause 6506(2) provides that the amendments made by item 3 of Schedule 8 to the Regulations applies in relation to an application for a visa made on or after 1 July 2017, whether the relevant employment or study occurred before, on or after 1 July 2017.

New clause 6507 provides that the amendments made by Schedule 9 to the Regulations apply in relation to an application for a visa made on or after 1 July 2017.

New clause 6508 provides that the amendments made by Schedule 11 to the Regulations apply in relation to an application for a visa made on or after 1 July 2017.

The purpose and effect of this item is to clarify to whom the amendments made to the Migration Regulations by the relevant schedules of the Regulations apply.