EXPLANATORY STATEMENT

Select Legislative Instrument 2012 No. 230

Issued by the Minister for Immigration and Citizenship

Migration Act 1958

Migration Amendment Regulation 2012 (No. 5)

Subsection 504(1) of the *Migration Act 1958* (the Act) provides, in part, that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters which by the Act are required or permitted to be prescribed, or which are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

In addition regulations may be made pursuant to the provisions listed in Attachment A.

The purpose of the Regulation is to amend the *Migration Regulations 1994* (the Principal Regulations) to further implement recommendations made in the Report of the Expert Panel on Asylum Seekers (the Report) and accepted by the Government by:

- preventing persons who became 'irregular maritime arrivals' from being eligible to propose family members for entry to Australia under the Humanitarian Program, and specifically, the Refugee and Humanitarian (Class XB) visa (Class XB visa);
- amending the criteria to be considered when determining whether there are compelling reasons for certain people applying for a Class XB visa to be given special consideration to grant them that visa; and
- preventing persons from being able to make a valid application for a Class XB visa if they became an irregular maritime arrival (IMA) on or after 13 August 2012.

The Regulation also inserts into the Principal Regulations a definition of the term 'irregular maritime arrival'. The definition provides that the term 'irregular maritime arrival' means a person who, on or after 13 August 2012: (a) became an offshore entry person (as defined in section 5 of the Act); or (b) was taken to a place outside Australia under paragraph 245F(9)(b) of the Act. IMAs are the specific group of people to whom this Regulation relates.

The Regulation gives effect to Recommendations 1 (in part), 11 and 12 of the Report of the Expert Panel on Asylum Seekers (the Report).

In summary, recommendation 1 relates to the application of a 'no advantage' principle to ensure that no benefit is gained by IMAs through them circumventing regular migration arrangements.

Recommendation 11 relates to the Panel's recommendation that the current backlog in the Special Humanitarian Program (SHP) be addressed through removing family reunion concessions for proposers who arrive through irregular maritime voyages.

Recommendation 12 relates to the Panel's recommendation that future IMAs should not be eligible to sponsor family under the Special Humanitarian Program (SHP). Instead, family reunion for IMAs should be achieved through the family stream of the Migration Program.

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

A Statement of Compatibility with Human Rights has been completed for the Regulation, in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The Statement's overall assessment is that the measures in the Regulation are compatible with human rights because they are consistent with Australia's human rights obligations and, to the extent that they may also limit human rights, those limitations are reasonable, necessary and proportionate. A copy of the Statement is at Attachment B.

Details of the Regulation are set out in Attachment C.

The Office of Best Practice Regulation (the OBPR) has been consulted in relation to the amendments made by the Regulation and advises that the amendments have a 'minor' impact on business or the not-for-profit sector and no further analysis (in the form of a Regulation Impact Statement) is required. The OBPR consultation reference is 14252.

Given that the Regulation is required as a matter of urgency to give effect to the recommendations of the Report of the Expert Panel on Asylum Seekers, no further consultation beyond that done by the Expert Panel on Asylum Seekers was undertaken.

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

ATTACHMENT A

POWERS OF DELEGATION

Subsection 504(1) of the *Migration Act 1958* (the Act) provides, in part, that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters which by the Act are required or permitted to be prescribed, or which are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

In addition, the following provisions may apply:

- subsection 31(3) of the Act, which provides that the regulations may prescribe criteria for a visa or visas of a specified class (which, without limiting the generality of this subsection, may be a class provided for by sections 32, 36, 37, 37A or 38B but not by sections 33, 34, 35, 38 or 38A of the Act); and
- subsection 40(1) of the Act, which provides that the regulations may provide that visas or visas of a specified class may only be granted in specified circumstances.
- paragraph 46(1)(b) of the Act, which relevantly provides that an application for a visa is valid if, and only if, it satisfies the criteria and requirements prescribed under section 46.

ATTACHMENT B

Statement of Compatibility with Human Rights

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

Removal of provisions for irregular maritime arrivals who arrived on or after 13 August 2012, to propose persons for Refugee and Humanitarian (Class XB) visas, removing concessions for existing applications where the proposer arrived as an irregular maritime arrival and preventing persons transferred to an offshore regional processing location from being eligible to apply for a Class XB visa.

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The Special Humanitarian Program (SHP) is part of the offshore component of Australia's Humanitarian Program. The SHP provides resettlement in Australia for people who are living outside their home country, are subject to substantial discrimination amounting to a gross violation of their human rights in their home country and who have family or community ties to Australia. It also provides resettlement for immediate family of persons who have been granted protection in Australia.

On 13 August, the Expert Panel on Asylum Seekers (the Panel) released its report. The Panel made a number of recommendations, with the overall aim of preventing Irregular Maritime Arrivals (IMAs) from risking a hazardous and dangerous journey to Australia by boat.

Recommendation 11 is that:

> *'The current backlog in the SHP be addressed as a means of reducing the demand for family reunion through irregular and dangerous maritime voyages to Australia, and that this be achieved through removing family reunion concessions for proposers who arrive through irregular maritime voyages – with these proposers to instead seek reunion through the family stream of the Migration Program'.*

Recommendation 12 is that:

> *"It is proposed that the SHP visa criteria be amended such that in the future, any person who was an IMA cannot be a proposer under the SHP. Persons who were IMAs would need to seek family reunion through the family stream of the Migration Program."*

The report also recommended that:

> *"Irrespective of whether IMAs stay in Nauru for the period of their status determination or are moved to Australia, the same principle would apply to all. Their position in relation to refugee status and resettlement would not be advantaged over what it would*

> *have been had they availed themselves of assessment by UNHCR within the regional processing arrangement."(* paragraph 3.50)

To implement Recommendation 11, the *Migration Regulations 1994* (the Regulations) are amended so that SHP applicants with proposers who were IMAs, who arrived before 13 August 2012 are assessed against four compelling reasons criteria, which includes an assessment against the applicants discrimination or persecution they face in their home country, as well as their connection to Australia, their protection options elsewhere, and Australia's capacity to help. Those applicants with proposers who are unaccompanied humanitarian minors (UHMs) who arrived before 13 August 2012 or who are proposed by non-IMAs will be assessed against their connection to Australia alone.

Recommendation 12 will be implemented through an amendment to the Regulations to prevent people (including UHMs) who entered Australia through irregular maritime means on or after 13 August 2012, from being eligible to propose their family members under the Refugee and Humanitarian (Class XB) visa.

Implementation of the third recommendation will be an amendment to the Regulations to prevent persons who are transferred to a place outside Australia (under paragraph 245F (9) (b) of the *Migration Act 1958*), from being able to apply for a Class XB visa, unless invited by the Minister (or a delegate) to do so. Previously, any persons transferred to Manus or Nauru islands would be eligible to apply for an offshore Class XB visa.

Human rights implications

The Legislative Instrument engages the following human rights:

Family Rights

Under the International Covenant on Civil and Political Rights (ICCPR), Article 17 states that no one shall be subjected to arbitrary or unlawful interference with his family and that everyone has the right to protection of the law against such interference. Article 23 states that the family is the natural and fundamental group unit of society and is entitled to protection by society and the state.

The protection of the family unit under Articles 17 and 23 does not amount to a right to enter Australia where there is no other right to do so. Avoiding interference with the family or protecting the family can be weighed against other countervailing considerations including the integrity of the migration system and the national interest.

As refugees are unable to return to their country of origin, if family reunification is not available there is the potential that some refugees may be permanently separated from their family. However, Australia considers that changes to family reunification do not amount to a separation of the family as there has been no positive action on the part of Australia to separate the family. An IMA becomes separated from their family when they choose to travel to Australia without their family. To this end, Australia does not consider that Articles 17 and 23 are engaged. Even if Articles 17 and 23

were engaged, the change does not seek to remove the ability of IMAs in Australia to achieve family reunification; it simply places IMAs on an equal footing with all other Australian citizens and permanent residents wanting their family to join them in Australia. Australia considers that this is a necessary, reasonable and proportionate measure to achieve the legitimate aim of preventing IMAs from making the dangerous journey to Australia by boat. To the extent that this might amount to interference with the family, Australia maintains that any interference is not arbitrary and thus is consistent with the rights contained under Articles 17 and 23 of the ICCPR.

However, there may be cases where, as a consequence of the amendment and ineligibility for other visas, family reunion will not be possible. For instance, unlike adult proposers of partners or children, UHMs will not have ready access to family reunion through the Family Migration stream. This is because Parent visa applications will be subject to either long visa processing times or a significant Visa Application Charge, depending on which subclass of visa is applied for. In addition, applications for family reunion under the Parent visa stream must meet eligibility requirements such as the balance of family test which requires that the majority of the parent's children reside permanently and lawfully in Australia rather than in any country overseas. The test is intended to ensure that the limited number of parent places available go to those who have the strongest connection with Australia.

UHMs already in Australia will receive concessions (under Recommendation 11) so as to be able to propose their family under the Humanitarian Program. However family reunion prospects for future UHMs (and those arriving on or after 13 August 2012) are likely to become more difficult with the proposed changes. It is envisioned, however, that the removal of a straightforward family reunification pathway for UHMs, will reduce the likelihood of minors taking dangerous boat journeys alone with the intention of establishing themselves as an "anchor" then relatively easily proposing their parents and siblings under the Humanitarian Program. Australia considers that limiting the family reunification available to UHMs is necessary, reasonable and proportionate to the legitimate aim of preventing unaccompanied minors being sent by their families on the dangerous boat journey to Australia. As stated above, Australia does not consider that changes to family reunification amount to separation of the family as there has been no positive action on the part of Australia to separate the family. To the extent that this might amount to interference with the family, Australia maintains that for the above reasons any interference is not arbitrary and is thus consistent with the rights contained under Articles 17 and 23 of the ICCPR.

Rights of the Child

Article 3 of the Convention on the Rights of the Child (CROC) requires that the best interests of the child are treated as a primary consideration in all actions concerning children. However, other considerations may also be primary considerations. While it may be in the best interests of UHMs to be reunited with their family, it is clearly not in their best interests to be placed in the hands of people smugglers to take the dangerous journey by boat to Australia. The amendments seek to prevent minors from taking potentially life threatening avenues to achieve resettlement for their families in Australia. This goal, as well as the need to maintain the integrity of

Australia's migration system and protect the national interest, are also primary considerations. Australia considers that on balance other primary considerations outweigh the best interests of the child in seeking family reunification. Therefore, Australia considers that this Legislative Instrument is consistent with Article 3 of the CROC.

Australia recognises that those UHMs who have already arrived in Australia who have been granted Protection visas and are seeking to propose their family to Australia, should not be unduly disadvantaged by this Legislative Instrument. To this effect, those UHMs who arrived prior to 13 August 2012, will receive concessions (applications will be assessed on family connection alone) to propose their family and will also receive priority processing. However, with the aim of preventing more minors risking their lives at sea, Australia is committed to removing these concessions for UHMs who arrive on or after 13 August 2012.

Article 10 of the CROC requires that applications for family reunification made by minors or their parents are treated in a positive, humane and expeditious manner. However, Article 10 does not amount to a right to family reunification. Although there is currently a considerable waiting time for the processing of Parent visa applications, this is comparable to the waiting times that could be expected under the SHP given the recent reduction in available places and the large number of outstanding applications. Further, while family reunification was given priority under the SHP, UHMs are not able to be prioritised under the Parent visa stream. However, given the vast majority of applications under the SHP are for family reunification, prioritisation means little in terms of shortening the waiting times. Therefore UHMs will not be significantly disadvantaged by this change in terms of the waiting times involved in processing visa applications. As mentioned above, those already in Australia will receive priority processing under the SHP and additional concessions against the compelling reasons criteria. While there may be lengthy waiting times for UHMs seeking family reunification, the integrity of Australia's migration program requires that the Australian Government limits the number of persons who migrate to Australia each year in various categories in order to ensure the community is able to adequately fund the consequential demands on health and social services.

As mentioned above, a further obstacle for UHMs who arrive on or after 13 August 2012 is that applicants for the Parent visa stream will be required to meet the eligibility requirements, including the balance of family test which some applicants may not meet. However, while there are considerable limitations on the family reunification options available to UHMs, these exist for the legitimate purpose of maintaining the integrity of Australia's migration program and deterring minors from risking their lives by travelling to Australia by irregular means in order to sponsor their family to Australia. The Australian Government will not provide a separate pathway to family reunification that will allow people smugglers to exploit children and encourage them to risk their lives on dangerous boat journeys. Creating a priority channel and/or an exemption from the balance of family test in the Parent visa stream of the Migration Program would be counter to achieving this policy goal by recreating the incentive for children to be used as 'anchors' for their family to migrate to Australia. As such, to the extent that the rights under Article 10 are limited by this Legislative Instrument, Australia considers that these limitations are necessary,

reasonable and proportionate.

Changes to the Offshore Humanitarian Program

Australia is amending the Regulations to prevent persons who are transferred to a regional processing country from being able to apply for a Class XB visa. This change does not engage human rights as Australia does not owe obligations to persons outside its territory nor is there any right to apply for a particular visa under international law.

Conclusion

The Legislative Instrument is compatible with human rights because it is consistent with Australia's human rights obligations and to the extent that it may also limit human rights, those limitations are reasonable, necessary and proportionate.

The Hon Chris Bowen MP, Minister for Immigration and Citizenship

ATTACHMENT C

Details of the *Migration Amendment Regulation 2012 (No. 5)*

Section 1 – Name of Regulation

This section provides that the title of the Regulation is the *Migration Amendment Regulation 2012 (No. 5)*.

Section 2 – Commencement

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

Section 3 – Amendment of *Migration Regulations 1994*

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

Schedule 1 – Amendments

Item [1] – Regulation 2.07AM

This item substitutes regulation 2.07AM in Part 2 of the Principal Regulations.

Regulation 2.07AM provides that an application made under paragraph 1402(3)(a) of Schedule 1 to the Principal Regulation is taken to have been made outside Australia.

New subregulation 2.07AM(1) provides that, for subsection 46(2) of the Act, a Refugee and Humanitarian (Class XB) visa (Class XB visa) is a prescribed class of visa. Subsection 46(2) of the Act relevantly provides that an application for a visa is valid if it is an application for a class of visa prescribed for the purposes of subsection 46(2) and, under the Principal Regulations, the application is taken to be validly made.

New subregulation 2.07AM(2) provides that an application for a Class XB visa is taken to have been validly made by a person only if the requirements in subregulation 2.07AM(3) or item 1402 of Schedule 1 to the Principal Regulations have been met.

New subregulation 2.07AM(3) provides that the requirements are that:

- the person is an irregular maritime arrival; and
- the Minister has invited the person to make an application for a Class XB visa; and
- the person indicates to an authorised officer that he or she accepts the invitation; and
- the authorised officer endorses, in writing, the person's acceptance of the invitation.

New subregulation 2.07AM(4) mirrors previous regulation 2.07AM.

New subregulation 2.07AM(5) defines the term 'irregular maritime arrival' to mean a person who, on or after 13 August 2012:

- became an offshore entry person; or
- was taken to a place outside Australia under paragraph 245F(9)(b) of the Act.

Subsection 5(1) of the Act defines offshore entry person as a person who: (a) has, at any time, entered Australia at an excised offshore place after the excision time for that offshore place; and (b) became an unlawful non-citizen because of that entry. Subsection 5(1) also defines the term 'excised offshore place' and also the time that each place became an excised offshore place.

Paragraph 245F(9)(b) of the Act provides that if an officer detains a ship or aircraft under subsection 245F(8), the officer may: (a) detain any person found on the ship or aircraft and bring the person, or cause the person to be brought, to the migration zone; or (b) take the person, or cause the person to be taken, to a place outside Australia. Paragraph 245F(9)(b) provides an officer with the authority to take people intercepted at sea to a place outside Australia.

The purpose of this item is to implement the 'no advantage' principle in Recommendation 1 of the Report of the Expert Panel on Asylum Seekers. The Panel relevantly recommended the application of a 'no advantage' principle, among others, to ensure that no benefit is gained by irregular maritime arrivals through them circumventing regular migration arrangements. This was one of the principles that the Panel recommended should shape Australian policy making on asylum seeker issues.

This item provides that an irregular maritime arrival may not make a valid application for a Class XB visa unless the person is invited by the Minister to apply and that invitation is accepted. For a Class XB visa applicant who is not an irregular maritime arrival, the previous requirements to lodge a valid application under item 1402 in Schedule 1 to the Principal Regulations continue to apply.

Item [2] – Schedule 1, item 1402, after heading

This item inserts a note after the heading to item 1402 in Schedule 1 to the Principal Regulations to provide that subregulation 2.07AM(3) sets out the requirements for the making of applications by persons who are irregular maritime arrivals.

The purpose of this item is also to implement the 'no advantage' principle from the Report of the Expert Panel on Asylum Seekers outlined above. The amendment in this item clarifies that, for a person who is an irregular maritime arrival, the requirements for making a valid application for a Class XB visa are set out in new subregulation 2.07AM(3).

Item [3] – Schedule 1, after paragraph 1402(3)(b)

This item inserts a new paragraph 1402(3)(ba) in Schedule 1 to provide that an applicant for a Class XB visa must not be an irregular maritime arrival. This new requirement is in addition to those currently in item 1402.

The purpose of this item is also to implement the 'no advantage' principle recommended in the Report of the Expert Panel on Asylum Seekers outlined above. This new paragraph provides that an applicant who is an irregular maritime arrival will not be able to meet the requirements prescribed in item 1402 and therefore could not make a valid application for a Class XB visa. Consistent with the amendments above, an irregular maritime arrival will be taken to have made a valid application for a Class XB visa if they meet the requirements in regulation 2.07AM.

Item [4] – Schedule 1, after subitem 1402(4)

This item inserts new subitem 1402(5) in Schedule 1 which provides for a new definition of the term 'irregular maritime arrival'.

New definition for 'irregular maritime arrival' provides that an irregular maritime arrival means a person who, on or after 13 August 2012:

- became an offshore entry person; or
- was taken to a place outside Australia under paragraph 245F(9)(b) of the Act.

Subsection 5(1) of the Act defines the term 'offshore entry person' and paragraph 245F(9)(b) provides authority to take people intercepted at sea under subsection 245F(8) to a place outside Australia.

The purpose of this item is also to implement the 'no advantage' principle from the Report of the Expert Panel on Asylum Seekers outlined above. This item defines the cohort of people that cannot lodge a valid application under new paragraph 1402(3)(ba).

Item [5] – Schedule 2, clause 200.111

Item [9] – Schedule 2, clause 202.111

Item [14] – Schedule 2, clause 203.111

Item [18] – Schedule 2, clause 204.111

These items insert a new definition of the term 'irregular maritime arrival' into clauses 200.111, 202.111, 203.111 and 204.111 in Schedule 2 to the Principal Regulations.

The new definition for 'irregular maritime arrival' provides that an irregular maritime arrival means a person who, on or after 13 August 2012:

- became an offshore entry person; or
- was taken to a place outside Australia under paragraph 245F(9)(b) of the Act.

Subsection 5(1) of the Act defines the term 'offshore entry person' and paragraph 245F(9)(b) provides authority to take people intercepted at sea under subsection 245F(8) to a place outside Australia.

The purpose of this item is to define the cohort of people to whom the amendments below apply. The term 'irregular maritime arrival' is not defined elsewhere in the Act or the Principal Regulations.

Item [6] – Schedule 2, paragraph 200.211(2)(d)

Item [10] – Schedule 2, paragraph 202.211(2)(d)

Item [15] – Schedule 2, paragraph 203.211(2)(d)

Item [19] – Schedule 2, paragraph 204.211(2)(d)

These items amend paragraphs 200.211(2)(d), 202.211(2)(d), 203.211(2)(d) and 204.211(2)(d) in Schedule 2 by omitting 'Immigration.' and inserting 'Immigration; and'.

This technical amendment facilitates the insertion of a new paragraph (e) in subclauses 200.211(2), 202.211(2), 203.211(2) and 204.211(2).

Item [7] – Schedule 2, after paragraph 200.211(2)(d)

Item [11] – Schedule 2, after paragraph 202.211(2)(d)

Item [16] – Schedule 2, after paragraph 203.211(2)(d)

Item [20] – Schedule 2, after paragraph 204.211(2)(d)

These items insert new paragraphs 200.211(2)(e), 202.211(2)(e), 203.211(2)(e) and 204.211(2)(e) in Schedule 2 to provide that the proposer is not an irregular maritime arrival.

Subclauses 200.211(2), 202.211(2), 203.211(2) and 204.211(2) are time of application criteria designed to allow certain visa holders to propose family members for entry to Australia (the split family criterion). Except for the Subclass 202 visa, applicants would be granted the same visa that their proposer holds, or has held.

The new paragraphs amend the criteria to be satisfied at the time of application to provide that, for applicants who are proposed by a member of their immediate family, the proposer is not an irregular maritime arrival. If the person purporting to propose the applicant is an irregular maritime arrival, then the applicant could not be granted that visa on that basis.

The purpose of these items is to implement recommendation 12 of the Report of the Expert Panel on Asylum Seekers. The Panel recommended:

In the future those who arrive in Australia through irregular maritime means should not be eligible to sponsor family under the SHP [Special Humanitarian Program] *but should seek to do so within the family stream of the Migration Program.*

These new paragraphs implement the Panel's recommendation by providing that, in addition to the requirements set out in current subclauses 200.211(2), 202.211(2), 203.211(2) and 204.211(2), persons who are irregular maritime arrivals are not eligible to propose family members for entry into Australia using Class XB visas.

Item [8] – Schedule 2, clause 200.222

Item [17] – Schedule 2, clause 203.222

Item [21] – Schedule 2, clause 204.224

These items substitute clauses 200.222, 203.222 and 204.224 in Schedule 2.

Clauses 200.222, 203.222 and 204.224 currently provide that the Minister must be satisfied that there are compelling reasons for giving special consideration to granting the applicant a permanent visa, having regard to:

- the degree of persecution to which the applicant is subject in the applicant's home country; and
- the extent of the applicant's connection with Australia; and
- whether or not there is any suitable country available, other than Australia, that can provide for the applicant's settlement and protection from persecution; and
- the capacity of the Australian community to provide for the permanent settlement of persons such as the applicant in Australia.

New clauses 200.222, 203.222 and 204.224 provide that the Minister is satisfied that there are compelling reasons for giving special consideration to granting the applicant a permanent visa having regard to:

- in the case of an applicant who met the requirements of subclauses 200.211(2), 203.211(2) and 204.211(2) (the split family criterion) at the time of application – the extent of the applicant's connection with Australia; or
- in any other case:
    - the degree of persecution to which the applicant is subject in the applicant's home country; and
    - the extent of the applicant's connection with Australia; and

- whether or not there is any suitable country available, other than Australia, that can provide for the applicant's settlement and protection from persecution; and

- the capacity of the Australian community to provide for the permanent settlement of persons such as the applicant in Australia.

The purpose of this item is to implement recommendation 11 of the Report of the Expert Panel on Asylum Seekers. The Panel recommended:

…that the current backlog in the Special Humanitarian Program (SHP) be addressed as a means of reducing the demand for family reunion through irregular and dangerous maritime voyages to Australia, and that this be achieved through removing family reunion concessions for proposers who arrived through irregular maritime voyages – with these proposers to instead seek reunion through the family stream of the Migration Program.

The 'family reunion concession' referred to in the Report of the Expert Panel on Asylum Seekers means the current policy whereby 'split family' applications are considered to satisfy the 'compelling reasons' criterion on the strength of the family link alone, rather than with regard to all of the four factors in that criterion.

The Panel believes that this concession should be removed for applicants currently in the backlog whose proposers have arrived in Australia through irregular maritime voyages unless the proposer was under the age of 18 at the time the visa application was lodged. Applicants who are now not likely to be granted a Class XB visa can seek family reunion under the existing provisions of the family stream within the overall Migration Program. It is intended that this measure will reduce the current backlog of Special Humanitarian Program applications.

These new clauses implement the Panel's recommendation by clarifying that only Class XB visa applicants who are proposed by a member of their immediate family who did not arrive through irregular maritime voyages are able to access the family reunion concession. Applicants for the Class XB visa who are proposed by a member of their immediate family who did arrive through irregular maritime voyages will be assessed against all four factors in the compelling reasons criterion.

Item [12] – Schedule 2, clause 202.222

This item substitutes clause 202.222 in Schedule 2.

Previous clause 202.222 provided that the Minister must be satisfied that there are compelling reasons for giving special consideration to granting the applicant a permanent visa, having regard to:

- the degree of persecution to which the applicant is subject in the applicant's home country; and

- the extent of the applicant's connection with Australia; and

- whether or not there is any suitable country available, other than Australia, that can provide for the applicant's settlement and protection from persecution; and

- the capacity of the Australian community to provide for the permanent settlement of persons such as the applicant in Australia.

New subclause 202.222(1) provides that if the applicant met the requirements of subclause 202.211(2) at the time of application and the applicant's proposer:

- is, or has been, the holder of a Subclass 202 visa; or

- was less than 18 years old at the time of application and is, or has been, the holder of a Subclass 866 (Protection) visa or a Resolution of Status (Class CD) visa

the Minister is satisfied that there are compelling reasons for giving special consideration to granting the applicant a permanent visa having regard to the extent of the applicant's connection with Australia.

New subclause 202.222(2) provides that, if new subclause 202.222(1) does not apply, the Minister is satisfied that there are compelling reasons for giving special consideration to granting the applicant a permanent visa, having regard to all of the factors currently set out in clause 202.222.

The purpose of this item is also to implement the Panel's recommendation 11, as outlined above, by clarifying that family reunion concession are allowed for only those applicants who are proposed by a person who is, or has been, the holder of a Subclass 202 visa (which can only be granted to a person who is not an irregular maritime arrival) or a person who was less than 18 years old at the time of application and is, or has been, the holder of a Subclass 866 (Protection) or a Resolution of Status (Class CD) visa. Any other applicants will be required to be assessed against all four factors in the compelling reasons criterion.

Item [13] – Paragraph 202.225(a)

This item substitutes paragraph 202.225(a) in Schedule 2 to the Principal Regulations.

Previously, paragraph 202.225(a) provided that an applicant for a Subclass 202 (Global Special Humanitarian) visa is proposed for entry to Australia, in accordance with approved form 681, by a person who is an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen.

New paragraph 202.225(a) adds to the existing paragraph that a proposer not be an irregular maritime arrival.

The purpose of this amendment is to amend the time of decision criteria to prevent an applicant for a Subclass 202 (Global Special Humanitarian) visa from satisfying the criteria for the grant of the visa if they have been proposed for entry into Australia by a person who is an irregular maritime arrival.

The purpose of this item is to implement recommendation 12 of the Report of the Expert Panel on Asylum Seekers. This new paragraph will prevent irregular maritime arrivals from proposing any family members for entry to Australia under this visa subclass.

Item [22] – Schedule 13, after Part 4

This item inserts a new Part 5 after Part 4 of Schedule 13 to the Principal Regulations to deal with transitional arrangements in respect of amendments made by this Regulation.

The heading of new Part 5 is 'Amendments made by *Migration Amendment Regulation 2012 (No. 5).*'

New Part 5 provides that the amendments to the Principal Regulations that will be made by items [1] to [7], [10], [11], [14] to [16] and [18] to [20] of Schedule 1 to the *Migration Amendment Regulation 2012 (No. 5)* apply in relation to an application for a visa made on or after the day after the Regulation is registered. The amendments that are made by these items will affect only the visa application validity requirements or the time of application criteria relevant to applications for Class XB visas.

New Part 5 also provides that the amendments to the Principal Regulations made by items [8], [9], [12], [13], [17] and [21] of Schedule 1 to the *Migration Amendment Regulation 2012 (No. 5)* apply in relation to an application for a visa made on or after the day after the Regulation is registered. The amendments that are made by these items will affect the time of decision criteria only relevant to applications for Class XB visas.

The purpose of new Part 5 is to make it clear to whom the amendment made to the Principal Regulations made by Schedule 1 to the Regulation applies.