**EXPLANATORY STATEMENT**

###### **Select Legislative Instrument No. 252, 2013**

###### Issued by the Minister for Immigration and Border Protection

*Migration Act 1958*

*Migration Amendment (Internet Applications and Related Matters) Regulation 2013*

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 of the Act in Attachment A.

The purpose of the Regulation is to amend the *Migration* *Regulations 1994* (‘the Principal Regulations’) to allow clients to use Internet application forms to apply for the following visas: Partner (Migrant) (Class BC), Partner (Provisional) (Class UF), Partner (Residence) (Class BS), Partner (Temporary) (Class UK), and Prospective Marriage (Temporary)

(Class TO). The Regulation clarifies the circumstances in which the non-Internet application charge, particularly is payable. The Regulation also amends the Principal Regulations to correct a number of minor typographical errors that were made in the *Migration Amendment (Visa Application Charge and Related Matters) Regulation 2013*.

A Statement of Compatibility with Human Rights (‘the Statement’) has been completed for the Regulation, in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The Statement’s overall assessment is that the Regulation amendments are compatible with human rights they do not raise any human rights issues. 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 (‘OBPR’) has been consulted in relation to amendments made by the Regulation.

OBPR considers that the changes in the Regulation have a minor impact on business or the not-for-profit sector and no further analysis (in form of a Regulation Impact Statement) is required. The OBPR consultation reference is 14523.

No other consultations were undertaken because the amendments are not likely to have a direct, or a substantial indirect, effect on business or restrict competition, or impact significantly on other government departments, non-government organisations, businesses or other interested parties.

The Act does not specify conditions that need to be satisfied before the power to make the Regulation may be exercised.

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

The Regulation commences on 23 November 2013.

**ATTACHMENT A**

Subsection 504(1) of the *Migration Act 1958* (‘the Act’), which 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:

* subparagraph 504(1)(a)(i) of the Act, which relevantly 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 the Act or the *Migration Regulations 1994* (‘the Principal Regulations’), including the fees payable in connection with the review of decisions made under the Act or the Regulations, whether or not such review is provided for by or under the Act;
* paragraph 504(1)(b) of the Act, which provides that the Governor-General may make regulations making provision for the remission, refund or waiver of fees of a kind referred to in paragraph 504(1)(a) or for exempting persons from the payment of such fees;
* paragraph 504(1)(e) of the Act, which provides that the Governor-General may make regulations making provision for and in relation to:
	+ the giving of documents to;
	+ the lodging of documents with; or
	+ the service of documents on;

the Minister, the Secretary or any other person or body, for the purposes of the Act;

* subsection 31(3) of the Act, which provides that the Principal Regulations may prescribe criteria for a visa or visas of a specified class (which, without limiting the generality of that subsection, may be a class provided for by section 32, 36, 37, 37A or 38B but not by section 33, 34, 35, 38 or 38A of the Act);
* section 45A of the Act, which provides that a non-citizen who makes an application for a visa is liable to pay visa application charge (‘VAC’) if, assuming the charge were paid, the application would be a valid visa application;
* subsection 45B(1) of the Act, which provides that the amount of VAC is the amount, not exceeding the VAC limit, prescribed in relation to the application;
* subsection 45B(2) of the Act, which provides that the amount prescribed in relation to an application may be nil;
* subsection 45C(1) of the Act, which provides that the Principal Regulations may:

	+ provide that VAC may be payable in instalments; and
	+ specify how those instalments are to be calculated; and
	+ specify when instalments are payable;
* subsection 45C(2) of the Act, which relevantly provides that the Principal Regulations may also:

	+ make provision for and in relation to:

		- the recovery of VAC in relation to visa applications; or
		- the way, including the currency, in which VAC is to be paid; or
		- working out how much VAC is to be paid; or
		- the time when VAC is to be paid; or
		- the persons who may be paid VAC on behalf of the Commonwealth; or
* subsection 46(1) of the Act, which relevantly provides that, subject to subsections 46(1A), (2) and (2A), an application for a visa is valid if, and only if:

	+ it is for a visa of a class specified in the application; and
	+ it satisfies the criteria and requirements prescribed under this section; and
	+ subject to the Principal Regulations providing otherwise, any VAC that the Regulations require to be paid at the time when the application is made, has been paid; and
	+ any fees payable in respect of it under the Principal Regulations have been paid;
* subsection 46(2) of the Act, which provides that, subject to subsection 46(2A), an application for a visa is valid if:
	+ it is an application for a visa of a class prescribed for the purposes of this subsection; and
	+ under the Principal Regulations, the application is taken to have been validly made.
* subsection 46(3) of the Act, which provides that the Principal Regulations may prescribe criteria that must be satisfied for an application for a visa of a specified class to be a valid application; and
* subsection 46(4) of the Act, which provides that, without limiting subsection 46(3), the Regulations may also prescribe:

	+ the circumstances that must exist for an application for a visa of a specified class to be a valid application; and
	+ how an application for a visa of a specified class must be made; and
	+ where an application for a visa of a specified class must be made; and
	+ where an applicant must be when an application for a visa of a specified class is made.

**ATTACHMENT B**

**Statement of Compatibility with Human Rights**

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

**Technical amendments to the *Migration Regulations 1994***

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**

This Legislative Instrument amends the *Migration Regulations 1994* (‘the Principal Regulations’) to allow clients to use Internet application forms to:

* apply for five visa classes; and
* to apply to become an approved sponsor.

The five visa classes affected by these amendments are the:

* Prospective Marriage (Temporary) (Class TO) visa;
* Partner (Migrant) (Class BC) visa;
* Partner (Provisional) (Class UF) visa;
* Partner (Temporary) (Class UK) visa; and
* Partner (Residence) (Class BS) visa.

Amendments to specify the new Internet forms

It is intended that the current paper form entitled *Form 40SP* *Sponsorship for a partner to migrate to Australia* will have an Internet equivalent entitled “40SP (Internet)”.

Subparagraph 1124B(3)(e)(ii) of Schedule 1 of the Principal Regulations requires certain applicants for a Partner (Residence) (Class BS) visa to provide a completed *Form 40SP* with their visa application. If they do not comply with this requirement, their application will be invalid. The amendments insert *40SP (Internet)* in to subparagraph 1124B(3)(e)(ii) of Schedule 1 to the Principal Regulations to extend the legal effect of the provision to encompass sponsorship applications that are made using the *Form 40SP (Internet)*.

The current paper form entitled *Form 47SP* *Application for migration to Australia by a partner* will have an Internet equivalent entitled “47SP (Internet)”.

Paragraph 801.221(7)(c) of Schedule 2 of the Principal Regulations provides the criteria that certain applicants for a Partner (Residence) (Class BS) visa must satisfy at the time of decision in order to be granted the visa.

The amendments insert *47SP (Internet)* in to paragraph 801.221(7)(c) of Schedule 2 of the Principal Regulations to extend the legal effect of the provision to encompass applications that are made using the form *47SP (Internet)*.

Amendments to ensure Internet applications can be made in Australia

Applications for the following classes of visas must be made outside of Australia:

* Partner (Migrant) (Class BC) visas;
* Partner (Provisional) (Class UF) visas; and
* Prospective Marriage (Temporary) (Class TO) visas.

The requirement that applications for these classes of visa be made outside Australia means that the applications must be sent to one of the department’s overseas offices, in order to be a valid application. As presently drafted, the provisions would apply to both paper and Internet applications.

These provisions need to be amended to complement the creation of Internet application
form *47SP (Internet)* for Partner (Migrant) (Class BC) visas, Partner (Provisional) (Class UF) visas and Prospective Marriage (Temporary) (Class TO) visas. This is because when an applicant makes an Internet application, that application is sent to the department’s computer systems located in Australia, which means the application is lodged (i.e. made) in Australia. If the above-mentioned provisions of Schedule 1 remain as they are, the applicants to whom those provisions apply will not be able to lodge valid applications using the Internet application forms.

Paragraphs 1129(3)(a), 1220A(3)(a) and 1215(3)(a) of Schedule 1 to the Principal Regulations are to be amended so that they only apply to applications that are made using paper application forms.

The amendments retain the legal effect of paragraphs 1129(3)(a), 1220A(3)(a) and 1215(3)(a) in relation to paper application forms, but also enable applicants to whom those paragraphs apply to make valid visa applications using the form *47SP (Internet)*.

Amendments to ensure Internet applications do not need to be mailed or couriered to the department

Applications for Partner (Residence) (Class BS) visas, Partner (Temporary) (Class UK) visas and Partner (Migrant) (Class BC) visas are required to be mailed or delivered by a courier service to a specified address. If the application is not mailed or delivered to the specified address, it is not a valid visa application. As presently drafted, the provisions would apply to both paper and Internet applications.

These provisions need to be amended to complement the creation of Internet application forms for Partner (Temporary) (Class UK) visas, Partner (Migrant) (Class BC) visas and Partner (Residence) (Class BS) visas. If the provisions remain as they are, they would require Internet applications to be mailed or couriered to the specified address. That outcome would be inconsistent with the efficient use of the Internet to make the visa application.

Paragraphs 1214C(3)(fa), 1215(3)(a), 1129(3)(f), 1124B(ca) and 1129(3)(a) would be amended so that they only apply to applications that are made using paper application forms. The amendments retain the legal effect of these paragraphs in relation to paper application forms.

Amendments to fix minor typographical errors

Amendments to Schedule 1 to the Principal Regulations are required to fix a small number of minor typographical errors*.* The errors are technical in nature only and do not have any legal consequence.

The errors that require amendment are:

* in the table under paragraph 1402(2)(b) of Schedule 1 to the Principal Regulations, item number '3' is there but not numbered;
* subparagraph 1231(2)(a)(ii) of Schedule 1 to the Principal Regulations goes from sub-subparagraph 1231(2)(a)(ii)(A) to (C) without (B);
* item 2 in the table under paragraph 1114B(2)(b) of Schedule 1 contains minor grammatical errors; and
* item 2 in the table under paragraph 1114C(2)(b) of Schedule 1 contains minor grammatical errors.

Amendment to ensure non-Internet application charge (NIAC) is paid under the following circumstances

Paragraph 2.12C(7)(b) of the Principal Regulations which specifies the circumstances in which the NIAC is payable.

The Legislative Instrument repeals paragraph 2.12C(7)(b) and substitutes it with a provision allowing internet applications to ensure that the NIAC is only applied in situations where the regulations provide that a visa application can be made online.

Amendments to include further information relating to the first instalment of the visa application charge, subsequent temporary application charge (STAC) and NIAC

The Legislative Instrument adds the following note at the end of subitem 1128(2) and subitem 1236(2) of Schedule 1 of the Principal Regulations:

*Note: Regulation 2.12C explains the components of the first instalment of visa application charge and specifies the amounts of the subsequent temporary application charge and non-Internet application charge. Not all of the components may apply to a particular application.*

*Additional applicant charge is paid by an applicant who claims to be a member of the family unit of another applicant and seeks to combine the application with that applicant’s application.*

The purpose of this inclusion is to:

* provide visa applicants with more information relating to the visa application charge; specify amounts for the STAC and NIAC; and
* stipulate the circumstances in which visa applicants are liable to pay such charges.

 **Human rights implications**

The Department of Immigration and Border Protection has considered the amendments against the seven key international human rights treaties. As the amendments are technical in nature only and do not substantively affect individuals’ rights or interests, Australia’s obligations under the seven core international treaties are not engaged.

 **Conclusion**

The legislative change in the *Migration Regulations 1994* is compatible with human rights insofar as the rights articulated in the seven core human rights treaties are not engaged.

**The Hon. Scott Morrison MP, Minister for Immigration and Border Protection**

ATTACHMENT C

**Details of the *Migration Amendment (Internet Applications and Related Matters) Regulation 2013***

Section 1 – Name of Regulation

This section provides that this Regulation is the *Migration Amendment (Internet Applications and Related Matters) Regulation 2013* (‘the Regulation’).

Section 2 – Commencement

This section provides that the Regulation commences on 23 November 2013.

The purpose of this section is to provide for when the amendments made by the Regulation would commence.

Section 3 – Authority

This section provides that the Regulation is made under the *Migration Act 1958* (‘the Act’).

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

Section 4 – Schedule(s)

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

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

**Schedule 1 – Amendment of *Migration Regulations 1994***

Item [1] – Paragraph 2.12C(7)(b)

This item repeals paragraph 2.12C(7)(b) and substitute “(b) these Regulations provide that the application may be made as an Internet application; and”.

This amendment clarifies that whether paragraph 2.12C(7)(b) applies will depend on whether the *Migration Regulations 1994* (‘the Principal Regulations’) provide that the application may be made as an Internet application, rather than on whether it is possible for the application to be made as an Internet application.

The purpose of this amendment is to clarify the intended operation of the non-Internet application charge and, specifically, to ensure that the application of paragraph 2.12C(7)(b) is confined to situations where the Principal Regulations provide that the application may be made as an Internet application.

Item [2] –Paragraph 1114B(2)(b) of Schedule 1 (table item 2)

This item repeals table item 2 of paragraph 1114B(2)(b) of Schedule 1 and substitute new table item 2, which would contain substantially the same words as current table item 2 but omit the word “who” after the word “Applicant” and insert the word “who” at the beginning of each of paragraphs (a) and (b) in item 2.

The purpose of this amendment is to correct a typographical error inserted into the Principal Regulations by the *Migration Amendment (Visa Application and Related Matters) Regulation 2013* and ensure that correct grammatical expression is used in this paragraph.

Item [3] –Paragraph 1114C(2)(b) of Schedule 1 (table item 2)

This item repeals table item 2 of paragraph 1114C(2)(b) of Schedule 1 and substitutes new table item 2, which would contain substantially the same words as current table item 2 but omit the word “who” after the word “Applicant” and insert the word “who” at the beginning of each of paragraphs (a) and (b) in item 2.

The purpose of this amendment is to correct a typographical error inserted into the Principal Regulations by the *Migration Amendment (Visa Application and Related Matters) Regulation 2013* and ensure that correct grammatical expression is used in this paragraph.

Item [4] –Paragraph 1124B(3)(ca) of Schedule 1

This item inserts “(not being an Internet application)” after “An application” in paragraph 1224B(3)(ca).

This amendment ensures that the requirement in subitem 1124B(3) of Schedule 1, for an application to be made by one of the methods prescribed in subparagraphs 1124B(3)(ca)(i), (ii) and (iii), will apply only to applications that are not Internet applications.

The purpose of this amendment is to provide that only applications for a Partner (Residence) (Class BS) that are not Internet applications are required to be made by one of the methods prescribed in subparagraphs 1124B(3)(ca)(i), (ii) or (iii).

Item [5] - Item 1124B(3)(e)(ii) of Schedule 1

This item inserts “or 40SP (Internet)” after “form 40SP” in subparagraph 1124B(3)(e)(ii) of Schedule 1.

The effect of this amendment is that it is possible to provide a form 40SP (Internet) to support an application for a Partner (Residence) (Class BS) visa.

This amendment ensures that applicants are able to provide either an approved form 40SP or an approved form 40SP (Internet) to support an application for a Partner (Residence) (Class BS) visa. Form 40SP is the sponsorship form submitted by the spouse or de facto partner of an application for a Partner (Residence) (Class BS) visa. Form 40SP (Internet) is the Internet based version of that form.

Item [6] – At the end of subitem 1128(2) of Schedule 1

This item inserts a note at the end of subitem 1128(2) of Schedule 1.

The note provides that regulation 2.12C explains the components of the first instalment of visa application charge (‘VAC’) in full and specifies the amounts of subsequent temporary application charge and non-Internet application charge.  The note also provides that not all of the components may apply to a particular application, and would clarify that additional applicant charge is paid by an applicant who claims to be a member of the family unit of another application and seeks to combine their application with that applicant’s application.

The purpose of this amendment is to provide, in item 1128, a reference to regulation 2.12C, and to explain the applicability of the non-Internet application charge and the subsequent temporary application charge. This note should have been inserted here in the *Migration Amendment (Visa Application Charge and Related Matters) Regulation 2013* but was erroneously omitted.

Item [7] – Paragraph 1129(3)(a) of Schedule 1

This item inserts “(not being an Internet application)” after “Application” in paragraph 1129(3)(a) of Schedule 1.

The effect of this amendment is to ensure that the requirement in subitem 1129(3) of Schedule 1 to the Principal Regulations, for an application to be made outside Australia if it is made by the holder of a visa prescribed in subparagraphs 1129(3)(a)(i) and (ii), applies only to applications that are not Internet applications.

The purpose of this amendment is to exclude Internet applications from paragraph 1129(3)(a) so that Internet applications made by the holder of one of the visas prescribed in subparagraphs 1129(3)(a)(i) and (ii) are not be required to be made outside Australia.

Item [8] – Paragraph 1129(3)(f) of Schedule 1

This item inserts “(not being an Internet application)” after “An application” in paragraph 1129(3)(f) of Schedule 1.

The effect of this amendment is that the requirement in subitem 1129(3)(f) of Schedule 1 to the Principal Regulations, for an application to be made by one of the methods prescribed in subparagraphs 1129(3)(f)(i), (ii) or (iii), applies only to applications that are not Internet applications.

The purpose of this amendment is to provide that only applications for a Partner (Migrant) (Class BC) (Subclass 100) visa that are not Internet applications are required to be made by one of the methods prescribed in subparagraphs 1129(3)(f)(i), (ii) or (iii).

Item [9] – Paragraph 1214C(3)(fa) of Schedule 1

This item inserts “(not being an Internet application)” after “An application” in paragraph 1214(3)(fa) of Schedule 1.

The effect of this amendment is that the requirement in subitem 1214C(3) of Schedule 1 to the Principal Regulations, for an application to be made by one of the methods prescribed in subparagraphs 1214C(3)(fa)(i), (ii) and (iii), would apply only to applications that are not Internet applications.

The purpose of this amendment is to provide that only applications for a Partner (Temporary) (Class UK) visa that are not Internet applications are required to be made by one of the methods prescribed in subparagraphs 1214C(3)(fa)(i), (ii) or (iii).

Item [10] – Paragraph 1215(3)(a) of Schedule 1

This item would insert “(not being an Internet application)” after “Application” in paragraph 1215C(3)(a) of Schedule 1.

The effect of this amendment is to ensure that the requirement in paragraph 1215(3)(a) of Schedule 1 to the Principal Regulations, for an application to be made outside Australia, applies only to applications that are not Internet applications.

The purpose of this amendment is exclude Internet applications from paragraph 1215(3)(a) so that only applications for a Prospective Marriage (Temporary) (Class TO) visa that are not Internet applications are required to be made outside Australia.

Item [11] – Paragraph 1220A(3)(a) of Schedule 1

This item would insert “(not being an Internet application)” after “Application” in paragraph 1220A(3)(a) of Schedule 1.

The effect of this amendment is to ensure that the requirement in paragraph 1220A(3)(a) of Schedule 1 to the Principal Regulations, for an application to be made outside Australia, would only apply to applications that are not Internet applications.

The purpose of this amendment is to exclude Internet applications from paragraph 1220A(3)(a) so that only applications for a Partner (Provisional) (Class UF) visa that are not Internet applications, are be required to be made outside Australia.

Item [12] – Sub-subparagraph 1231(2)(a)(ii)(C) of Schedule 1

This item is to renumber sub-subparagraph 1231(2)(a)(ii)(C) of Schedule 1 as sub-subparagraph 1231(2)(a)(ii)(B). The purpose of this amendment is to correct a numbering error inserted by *Migration Amendment (Visa Application Charge and Related Matters) Regulation 2013*. This is a technical amendment made to ensure that the numbering of the sub-subparagraphs in subparagraph 1231(2)(a)(ii) is sequential.

Item [13] – At the end of subitem 1236(2) of Schedule 1

This item inserts a note at the end of subitem 1236(2) of Schedule 1.

The note provides that regulation 2.12C provides the components of the first instalment of VAC and specifies the amounts of subsequent temporary application charge and non-Internet application charge.  The note also provides that not all of the components may apply to a particular application, and would clarifies that additional applicant charge is paid by an applicant who claims to be a member of the family unit of another application and seeks to combine their application with that applicant’s application.

The purpose of this amendment is to provide, in item 1236, a reference to regulation 2.12C, and to explain the applicability of the non-Internet application charge and the subsequent temporary application charge. This note should have been inserted here in the *Migration Amendment (Visa Application Charge and Related Matters) Regulation 2013* but was erroneously omitted.

Item [14] - Paragraph 1402(2)(b) of Schedule 1 (table, third item)

This item numbers the third item in the table to paragraph 1402(2)b) of Schedule 1 as number 3. The purpose of this amendment is to correct a typographical error made by the *Migration Amendment (Visa Application Charge and Related Matters) Regulation 2013* that resulted in the third item in the table not being numbered.

Item [15] – Paragraph 801.221(7)(c) of Schedule 2

This item inserts “47SP (Internet)” after “47SP” in paragraph 801.221(7)(c) of Schedule 2 to the Principal Regulations.

The effect of this amendment is to ensure that it is possible to provide a form 47SP (Internet) in association with an application for a Partner (Residence) (Class BS) visa.

Paragraph 801.221(7)(c) relevantly permits the Minister to grant a subclass 801 (Partner) visa less than 2 years after the application is made where the applicant had been granted certain entry permits but where the application for a subclass 801 (Partner) visa was in accordance with approved forms 47SP or 887. Consistent with other measures in the Regulation which permit the making of Internet applications for some visas, paragraph 801.221(7)(c) has been consequently amended to include visa applications made in accordance with approved 47SP (Internet) form. Form 47SP is the form submitted by an applicant for a Partner (Residence) (Class BS) visa. Form 47SP (Internet) is the Internet based version of that form.

Item [16] – At the end of Schedule 13

This amendment inserts a new Part 24 into Schedule 13 to the Principal Regulations to deal with transitional arrangements in respect of amendments made by this Regulation. The heading of new Part 24 would be ‘Amendments made by the *Migration Amendment (Internet Applications and Related Matters) Regulation 2013*’.

This amendment also inserts a new item 2401 into new Part 24. The title of new item 2401 would be ‘Operation of Schedule 1’.

New item 2401 provides that amendments made by Schedule 1 to the *Migration Amendment (Internet Applications and Related Matters) Regulation 2013* apply in relation to an application for a visa made on or after 23 November 2013.

The purpose of new item 2401 is to clarify to whom the amendments in this Regulation apply.