**EXPLANATORY STATEMENT**

###### **Select Legislative Instrument No. 144, 2014**

Issued by the Minister for Immigration and Border Protection

*Migration Act 1958*

*Migration Amendment (Bridging Visas) Regulation 2014*

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 *Migration Amendment (Bridging Visas) Amendment Regulation 2014* (Regulation) is to amend the *Migration Regulation*s *1994* (the Principal Regulations) to introduce a new visa condition that allows holders of a Class WE visa to engage in approved activities specified in a legislative instrument made by the Minister. Class WE is comprised of two visa subclasses, being the Subclass 050 (Bridging (General)) visa and the Subclass 051 (Bridging (Protection Visa Applicant)) visa.

In particular the Amendment Regulation amends the Principal Regulations to:

* introduce a new visa condition 8116 that the visa holder must not work in Australia other than by engaging in an activity specified in a legislative instrument made by the Minister;
* provide for the application of new condition 8116 that may be imposed as a condition of the Class WE visa as an alternative to mandatory condition 8101, which provides that the holder must not engage in work in Australia;
* provide that the new visa condition 8116 must not be imposed unless the visa applicant is in a class of persons specified by the Minister by legislative instrument;
* provide for the application of the new visa condition 8116 in circumstances where visa conditions may be applied on a discretionary basis;
* apply in relation to Class WE visas granted as a result of an application for the visa, granted by the Minister under subsection 195A(2) of the Act or under regulation 2.25 of the Regulations.

A Statement of Compatibility with Human Rights (Statement) has been completed for the Regulation, in accordance with *Human Rights (Parliamentary Scrutiny) Act 2011*. The Statement’s overall assessment is that the Amendment Regulation is compatible with human rights as it provides positive opportunities for Class WE holders living in the community to participate and contribute to society whilst they resolve their immigration status, in the absence of the ability to work.

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 and advises that the amendment appears to have a nil or minor regulatory impact on individuals. The OBPR consultation references are 16877 and 17490.

The policy proposal formed part of a number of proposals considered and agreed to by Government. These proposals formed part of an extensive consultation process with a number of government agencies including: the Department of Prime Minister and Cabinet, the Department of Employment and the Department of Social Services. Further, for the purposes of the development of the policy and implementation arrangements, the department engaged with selected service providers in the locations of the proposed Community Engagement Activities Pilot. These service providers have also engaged with potential employers and local councils to ensure that the proposed implementation arrangements are feasible. The outcome of this process has enabled the department to determine the feasibility of the activities to be specified in a legislative instrument by the Minister.

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

The Regulation commences on 6 October 2014.

**ATTACHMENT A**

**AUTHORISING PROVISIONS**

Subsection 504(1) of the *Migration Act 1958* (the Act) relevantly provides 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 (the *Migration Regulations 1994*) may prescribe criteria for a visa or visas of a specified class (which without limiting the generality of this subsection, may be a class provided for by section 32, 36 (Protection visas), 37 (Bridging visas), 37A or 38B but not by section 33, 34, 35, 38 or 38A)
* subsection 40(1) of the Act, which provides that the regulations (the *Migration Regulations 1994*) may provide that visas or visas of a specified class may only be granted in specified circumstances;

* subsection 41(1) of the Act, which provides that the regulations may provide that visas, or visas of a specified class, are subject to specified conditions;
* subsection 41(2) of the Act, which provides that without limiting subsection 41(1), the regulations may provide that a visa, or visas of a specified class, are subject to:
  + a condition that, despite anything else in this Act, the holder of the visa will not, after entering Australia, be entitled to be granted a substantive visa (other than a protection visa or a temporary visa of a specified kind) while he or she remains in Australia; or
  + a condition imposing restrictions about the work that may be done in Australia by the holder, which, without limiting the generality of this paragraph, may be restrictions on doing:
    - any work; or
    - work other than specified work; or
    - work of a specified kind;
* subsection 41(3) of the Act, which provides that, in addition to any conditions specified under subsection 41(1) or in subsection 41(2B) the Minister may specify that a visa is subject to such conditions as are permitted by the regulations for the purposes of this subsection.

**ATTACHMENT B**

**Statement of Compatibility with Human Rights**

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

*Migration Amendment (Bridging Visas) Regulation 2014*

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 regulation amendment**

The *Migration Regulations 1994* are being amended to:

* introduce a new visa condition 8116 that the visa holder must not work in Australia other than by engaging in an activity specified in a legislative instrument made by the Minister;
* provide for the application of new condition 8116 that may be imposed as a condition of the Class WE visa as an alternative to mandatory condition 8101, which provides that the holder must not engage in work in Australia;
* provide that the new visa condition 8116 must not be imposed unless the visa applicant is in a class of persons specified by the Minister by legislative instrument;
* provide for the application of the new visa condition 8116 in circumstances where visa conditions may be applied on a discretionary basis;
* apply in relation to Class WE visas granted as a result of an application for the visa, granted by the Minister under subsection 195A(2) of the Act or under regulation 2.25 of the Regulations.

The purpose of the amendments is to allow the Government to introduce approved activities for holders of Class WE visas. These activities will allow the participation of holders of Class WE visas to engage in activities such as work readiness, community volunteering and community improvement activities.

**Human rights implications**

*Right to Work*

This amendment provides for a visa condition that the visa holder must not work in Australia other than by engaging in an activity specified in a legislative instrument made by the Minister and is directly relevant to the right to work in Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).  Article 6 provides:

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.

It is a basic element of sovereignty that a nation state can govern who is allowed to work in its territory and the minimum conditions which must apply to that work. While Article 6 recognises the right to work, it does not guarantee a right to work in a country of which a person is not a national - every country restricts the right of non-nationals to work. The object of the Migration Act is to ‘regulate, in the national interest, the coming into, and presence in, Australia of non-citizens’.  In that sense the purpose of the Migration Act is to differentiate on the basis of nationality between non-citizens and citizens.  Most nation-states differentiate on the basis of nationality in some form to regulate the right to work. The UN Human Rights Committee has recognised in the ICCPR context that “The Covenant does not recognize the right of aliens to enter or reside in the territory of a State party.  It is in principle a matter for the State to decide who it will admit to its territory […] Consent for entry may be given subject to conditions relating, for example, to movement, residence and employment” (CCPR General Comment 15, 11 April 1986). Currently the Australian Government imposes the 8101 ‘The holder must not engage in work in Australia’ condition to a wide range of temporary visas.

Imposing limitations and conditions under which non-citizens, such as WE Class visas cannot work on a non-substantive visa engages the right to work, but this restriction is directly supportive of the right to work of Australian citizens and permanent residents, and is a permissible limitation on the rights of non-citizens.

As well as being relevant to the right to work, this amendment is also relevant to Article 2.2 of the ICESCR (non-discrimination). Before any assessment of these obligations takes place, it is instructive to see whether the UNCESCR’s General Comment addresses this issue.  The General Comment relevantly provides (at 18):

‘The principle of non-discrimination as set out in article 2.2 of the Covenant […] should apply in relation to employment opportunities for migrant workers and their families.  In this regard the Committee underlines the need for national plans of action to be devised to respect and promote such principles by all appropriate measures, legislative or otherwise.’

It is the long standing position of the Australian Government that an authority from the Australian Government needs to be granted before a non-citizen is permitted to work. This authority and associated ‘work rights’ are attached to certain types of visas. A person is not permitted to work in Australia unless to work rights have been granted, and even those persons who arrive lawfully in Australia are not entitled work rights in the absence of a visa with work rights.

The Australian Government is of the view that imposing 8116 condition is a positive amendment providing bridging visa holders the opportunity to engage in activities such as work readiness, community volunteering and community improvement activities while they resolve their immigration status.

**Conclusion**

The Legislative Instrument is compatible with human rights as it provides positive opportunities for Class WE holders living in the community to participate and contribute to society whilst they resolve their immigration status, in the absence of the ability to work.

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

**ATTACHMENT C**

**Details of the *Migration Amendment (Bridging Visas) Regulation 2014***

Section 1 – Name of instrument

This section provides that the title of the instrument is the *Migration Amendment (Bridging Visas) Regulation 2014* (the Regulation).

Section 2 – Commencement

This section provides that the instrument commences on 6 October 2014.

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

Section 3 – Authority

This section provides that this instrument is made under the *Migration Act 1958* (the Act).

The purpose of this section is to set out the Act under which the instrument 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 purpose of this section is to provide for how the amendments in this instrument operate.

**Schedule 1 – Amendments**

**Part 1 – Main amendments**

Item 1 – subclause 050.613A(1) of Schedule 2

This item amends subclause 050.613A(1) of Schedule 2 to the Migration Regulations 1994 (the Regulations) to omit the reference to “condition 8101” and in its place substitute with “condition 8101, unless condition 8116 is imposed”.

The effect of this amendment is to prescribe new condition 8116 that may be imposed as a condition of the Subclass 050 (Bridging (General)) visa as an alternative to mandatory condition 8101.

The purpose of this amendment is to restrict the holder of the visa from any work unless the work is an activity approved by the Minister in a legislative instrument where condition 8116 is imposed.

This amendment is subsequent to the amendment made by item 19, which provides for new condition 8116.

Item 2 – subclause 050.613A(2) of Schedule 2

This item amends subclause 050.613A(2) of Schedule 2 to the Regulations to insert a reference to “8116”.

The effect of this amendment is to prescribe new condition 8116 as a discretionary condition that may be imposed as a condition of the Subclass 050 (Bridging (General)) visa and ensure that the new condition may be imposed as an alternative to condition 8101.

Similar to the amendment made at item 1 above, the purpose of this amendment is to restrict the holder of the visa from any work unless the work is an activity approved by the Minister in a legislative instrument where condition 8116 is imposed.

This amendment is subsequent to the amendment made by item 19, which provides for new condition 8116.

Item 3 – clause 050.613A of Schedule 2

New subclause 050.613A(3) provides that condition 8116 must not be imposed unless the applicant is in a class of persons specified by the Minister, by legislative instrument, for this subclause.

The purpose and effect of this amendment is to prescribe an objective criterion that sets out the circumstances for which condition 8116 may be imposed as a condition for the grant of a Subclass 050 (Bridging (General)) visa.

Item 4 – subclause 050.614(1) of Schedule 2

This item amends subclause 050.614(1) of Schedule 2 to the Regulations by omitting all the words after paragraph 050.614(1)(b) and in their place substitute with “if condition 8101 or 8116 applied to the last visa held by the applicant, that condition”.

The effect of this amendment is to ensure that, where a previous visa had condition 8101 or 8116 imposed, the subsequent Subclass 050 (Bridging (General)) visa must have imposed the same condition that applied to the previous visa.

The purpose of this amendment is to ensure that holders of the relevant visa subclass continue to be prevented from working unless they were previously permitted to engage in activities approved by the Minister. In that event the activities that they must engage with for the purpose of the visa granted would also be an activity approved by the Minister in a legislative instrument.

Item 5 – subclause 050.615(1) of Schedule 2

This item amends subclause 050.615(1) of Schedule 2 to the Regulations by omitting all the words after paragraph 050.615(1)(b)(ii) and in their place substitute with “if condition 8101 or 8116 applied to the last visa held by the applicant, that condition”.

The effect of this amendment is to ensure that, where a previous visa had condition 8101 or 8116 imposed, the subsequent Subclass 050 (Bridging (General)) visa must have imposed the same condition that applied to the previous visa.

The purpose of this amendment is to ensure that the holder of the relevant visa subclass continues to be prevented from working unless the holder was previously permitted to engage in activities approved by the Minister. In that event, the activities that the holder must engage with for the purpose of the visa granted would also be an activity approved by the Minister in a legislative instrument.

Item 6 – subclause 050.615A(1) of Schedule 2

This item amends subclause 050.615A(1) of Schedule 2 to the Regulations immediately after the words “condition 8101” to insert the words “unless condition 8116 is imposed”.

The effect of this amendment is to prescribe new condition 8116 that may be imposed as a condition of the Subclass 050 (Bridging (General)) visa as an alternative to mandatory condition 8101.

The purpose of this amendment is to restrict the holder of the visa from any work unless the work is an activity approved by the Minister in a legislative instrument.

This amendment is subsequent to the amendment made by item 19, which provides for new condition 8116.

Item 7 – subclause 050.615A(2) of Schedule 2

This item amends subclause 050.615A(2) of Schedule 2 to the Regulations to insert a reference to “8116”.

The effect of this amendment is to prescribe new condition 8116 as a discretionary condition that may be imposed as a condition of the Subclass 050 (Bridging (General)) visa and ensure that the new condition may be imposed as an alternative to condition 8101.

Similar to the amendments made above, the purpose of this amendment is to restrict the holder of the visa from any work unless the work is an activity approved by the Minister in a legislative instrument.

Item 8 – clause 050.615A of Schedule 2

New subclause 050.615A(3) provides that condition 8116 must not be imposed unless the applicant is in a class of persons specified by the Minister, by legislative instrument, for this subclause.

The purpose and effect of this amendment is to prescribe an objective criterion that sets out the circumstances for which condition 8116 may be imposed as a condition for the grant of a Subclass 050 (Bridging (General)) visa.

Item 9 – clause 050.617 of Schedule 2

This item amends clause 050.617 to insert (1) before the words “In any”.

The purpose and effect of this amendment is to amend clause 050.617 to provide for subclause 050.617(1), subsequent to the amendment at item 11 which inserts subclause 050.617(2).

Item 10 – clause 050.617 of Schedule 2

This item amends subclause 050.617 of Schedule 2 to the Regulations to insert a reference to “8116” after “8104”.

The effect of this amendment is to prescribe new condition 8116 as a discretionary condition that may be imposed as a condition of the Subclass 050 (Bridging (General)) visa.

Similar to the amendments made above, the purpose of this amendment is to restrict the holder of the visa from any work unless the work is an activity approved by the Minister in a legislative instrument.

Item 11 – clause 050.617 of Schedule 2

New subclause 050.617(2) provides that condition 8116 must not be imposed unless the applicant is in a class of persons specified by the Minister, by legislative instrument, for this subclause.

The purpose and effect of this amendment is to prescribe an objective criterion that sets out the circumstances for which condition 8116 may be imposed as a condition for the grant of a Subclass 050 (Bridging (General)) visa.

Item 12 – paragraph 051.611A(1)(c)

This item amends paragraph 051.611A(1)(c) to omit “paragraph:” and substitute “paragraph;”.

The effect of this amendment is to replace a colon with a semi-colon in paragraph 051.611A(1)(c).

The purpose of this amendment is to clarify that paragraph 051.611A(1)(c) is part of a list of cases where condition 8101 must be imposed (unless condition 8116 is imposed).

Item 13 – subclause 051.611A(1) of Schedule 2

This item amends subclause 051.611A(1) of Schedule 2 to the Regulations to omit the reference to “condition 8101” and in its place substitute with “condition 8101, unless condition 8116 is imposed”.

The effect of this amendment is to prescribe new condition 8116 that may be imposed as a condition of the Subclass 051 (Bridging (Protection Visa Applicant)) visa as an alternative to mandatory condition 8101.

The purpose of this amendment is to restrict the holder of the visa from any work unless the work is an activity approved by the Minister in a legislative instrument.

This amendment is subsequent to the amendment made by item 19, which provides for new condition 8116.

Item 14 – subclause 051.611A(3) of Schedule 2

This item amends subclause 051.611A(3) of Schedule 2 to the Regulations to insert a reference to “8116”.

The effect of this amendment is to prescribe new condition 8116 as a discretionary condition that may be imposed as a condition of the Subclass 051 (Bridging (Protection Visa Applicant)) visa and ensure that the new condition may be imposed as an alternative to condition 8101.

Similar to the amendments made above, the purpose of this amendment is to restrict the holder of the visa from any work unless the work is an activity approved by the Minister in a legislative instrument.

Item 15 – clause 051.611A of Schedule 2

New subclause 051.611(4) provides that condition 8116 must not be imposed unless the applicant is in a class of persons specified by the Minister, by legislative instrument, for this subclause.

The purpose and effect of this amendment is to prescribe an objective criterion that sets out the circumstances for which condition 8116 may be imposed as a condition for the grant of a Subclass 051 (Bridging (Protection Visa Applicant)) visa.

Item 16 – 051.612 of Schedule 2

This item amends clause 051.612 to insert (1) before the words “In any”.

The purpose and effect of this amendment is to amend clause 051.612 to provide for subclause 051.612(1), subsequent to the amendment at item 18 which inserts subclause 051.612(2).

Item 17 – clause 051.612 of Schedule 2

This item amends subclause 051.612 of Schedule 2 to the Regulations to insert a reference to “8116”.

The effect of this amendment is to prescribe new condition 8116 as a discretionary condition that may be imposed as a condition of the Subclass 051 (Bridging (Protection Visa Applicant)) visa.

Similar to the amendments made above, the purpose of this amendment is to restrict the holder of the visa from any work unless the work is an activity approved by the Minister in a legislative instrument.

Item 18 – clause 051.612 of Schedule 2

New subclause 051.612 (2) provides that condition 8116 must not be imposed unless the applicant is in a class of persons specified by the Minister, by legislative instrument, for this subclause.

The purpose and effect of this amendment is to prescribe an objective criterion that sets out the circumstances for which condition 8116 may be imposed as a condition for the grant of a Subclass 051 (Bridging (Protection Visa Applicant)) visa.

Item 19 – Schedule 8

New condition 8116 of Schedule 8 to the Regulations provides a new visa condition that the visa holder must not work in Australia other than by engaging in an activity specified in a legislative instrument made by the Minister.

The effect of this amendment is to introduce a condition that a holder of a visa for which condition 8116 applies is restricted from working in Australia unless the work is an activity approved by the Minister in a legislative instrument.

The purpose of this amendment is to enable the Minister to specify activities for the meaningful engagement of Class WE visas holders while they are living in the community resolving their immigration status.

**Part 2 – Application and transitional provisions**

Item 20 – At the end of Schedule 13

This item amends Schedule 13 of the Regulations to insert new Part 34, entitled “Amendments made by the Migration Amendment (Bridging Visas) Regulation 2014”, which contains a new clause 3301.

New clause 3401, entitled “Operation of Part 1 of Schedule 1”, provides that the amendments of these Regulations made by Part 1 of Schedule 1 to the *Migration Amendment (Bridging Visas) Regulation 2014* apply in relation to a Bridging E (Class WE) visa:

* granted as a result of an application for the visa made on or after 6 October 2014; or
* granted by the Minister under subsection 195A(2) of the Act, or under regulation 2.25, on or after 6 October 2014.

The purpose of these amendments is to clarify to whom the amendments in the Regulation applies.