

EXPLANATORY STATEMENT

Issued by the Minister for Immigration, Citizenship and Multicultural Affairs

Migration Act 1958

Migration Amendment (Resolution of Status Visa) Regulations 2023

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.

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

Other regulation-making powers in the Migration Act that support the *Migration Amendment (Resolution of Status Visa) Regulations 2023* (the Amendment Regulations) are section 46 (authorising criteria and requirements to make a valid application for a visa), section 31 (authorising classes of visa and criteria for visa grant), and section 45AA, which provides a framework to allow an application for a visa of a particular class to be converted into an application for a visa of a different class.

Schedule 1 to the Amendment Regulations

On 14 February 2023, the *Migration Amendment (Transitioning TPV/SHEV Holders to Resolution of Status Visas) Regulations 2023* (the Transition Regulations) amended the *Migration Regulations 1994* (the Migration Regulations) to facilitate the transition to permanent residence of persons who arrived in Australia before the *TPV/SHEV transition day* (14 February 2023) and who applied for or obtained temporary protection in Australia through a Subclass 785 (Temporary Protection) visa (TPV) or a Subclass 790 (Safe Haven Enterprise) visa (SHEV).

In general terms, the effect of the Transition Regulations is that:

- persons who have an unresolved TPV or SHEV application on the *TPV/SHEV transition day* are to have that application automatically converted to an application for a Subclass 851 Resolution of Status visa (RoS visa), which is a permanent visa; and
- persons who hold or held a TPV or a SHEV that was not subsequently cancelled, as well as children born in Australia to those persons, are able to make an application for the RoS visa by completing the relevant application form.

Subsequent to the commencement of the Transition Regulations, it was identified that further amendments were required to address gaps in the legislative scheme, to ensure that all intended eligible persons are covered. Schedule 1 to the Amendment Regulations makes the necessary amendments. The amendments make provision for the following groups of applicants:

- persons who held a TPV or SHEV on the *TPV/SHEV transition day*, but who failed to apply for a RoS visa before their TPV or SHEV ceased, who were previously unable to apply for a RoS visa;
- initial TPV or SHEV applicants (who do not have their own claims for protection, but are a family member of a person who does) who were previously unable to have their TPV or SHEV application converted to a RoS visa application if the family member is found to engage protection obligations;
- persons who did not hold a TPV or SHEV on the *TPV/SHEV transition day*, but who had held a TPV or SHEV before that day, who were previously unable to have their TPV or SHEV application converted to a RoS visa application; and
- persons who have previously made a valid application for a TPV or SHEV which was finalised, but who have never held a TPV or SHEV, and who were previously unable to have the current TPV or SHEV application converted to a RoS visa application.

Schedule 2 to the Amendment Regulations

Schedule 2 to the Amendment Regulations inserts new time-of-decision criteria in the RoS visa to allow the Minister to investigate and respond to identity related concerns. These criteria will apply in cases where the identity of the applicant for the RoS visa requires further investigation. In the context of the transition to permanent residence, the intention is to take action prior to the grant of permanent residence to resolve, as far as possible, any doubts that may exist in relation to an applicant's identity. This will facilitate the applicant's future dealings with the Australian Government in relation to such matters as acquisition of Australian citizenship and an Australian passport.

The new criteria are also an important integrity measure, with the following features:

- clause 851.228 of Schedule 2 to the Migration Regulations - the RoS visa application must be refused in cases where an invitation to give identity information is issued, and the applicant either does not provide the requested information, or provides a bogus document or false or misleading information (and does not have a reasonable explanation for doing so and does not take reasonable steps to provide the information); and
- clause 851.229 of Schedule 2 to the Migration Regulations - in cases where there are substantial concerns with previous identity findings (e.g. the applicant has falsely claimed to be from a particular country and this was accepted by a previous decision-maker) the applicant will only be eligible for the grant of the RoS visa if the applicant would be eligible for a protection visa, or if there are compassionate or compelling circumstances for granting the RoS visa, or if the applicant is a family member of a person who holds a RoS visa;
- clause 851.229 has the effect that the additional criteria only need to be considered if the Minister is satisfied that there are *substantial identity-related concerns*. This term is not defined. The intention is to limit the application of the additional visa criteria to serious or substantial cases, where an identity was contrived for the

purpose of qualifying for a TPV or SHEV. A finding about this issue will depend on an evaluation of the facts of each case.

The new criteria have been inserted in recognition of the importance of a clearly established and recorded identity for persons who, in many cases, arrived in Australia without any identity documentation, and who are now progressing to permanent residence and potentially Australian citizenship. The criteria also reflect the legitimate concern of the Australian government to detect and deter fraud by visa applicants. Balanced with these factors is a recognition that this cohort of RoS visa applicants have now lived in Australia for several years and the government is committed to resolution of their status. In particular, it is accepted that, in many cases, asylum seekers have difficulty in providing appropriate evidence of identity and may have legitimate reasons, at least initially, for disguising their identity. While the benefit of the doubt must go to asylum seekers in this situation, ongoing identity fraud by a visa applicant is not acceptable. The Department of Home Affairs has identified numerous instances of suspected identity fraud in this caseload.

The matters dealt with in the Amendment Regulations are appropriate for implementation in regulations rather than by Parliamentary enactment. It has been the consistent practice of the Government of the day to provide for detailed visa criteria and conditions in the Migration Regulations rather than in the Migration Act itself. The Migration Act expressly provides for these matters to be prescribed in regulations, as can be seen in the authorising provisions. Providing for these details to be in delegated legislation rather than primary legislation gives the Government the ability to effectively manage the operation of Australia's visa program and respond quickly to emerging needs.

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

The Office of Impact Analysis, was consulted prior to making the Amendment Regulations, and advised that an impact analysis was not required. The OIA reference number is OIA23-05388.

In relation to Schedule 1, formal public consultation was not considered necessary as the amendments are entirely beneficial. In relation to Schedule 2, public consultation was not considered necessary or appropriate as the amendments seek to establish the identity of persons seeking permanent residence in Australia and contribute to the protection of the Australian community. The amendments do not substantially alter the operation of the existing legislative scheme.

This accords with subsection 17(1) of the *Legislation Act 2003* (the Legislation Act) which requires that appropriate and reasonably practicable consultation be undertaken.

The Migration Regulations are exempt from sunseting pursuant to item 38A of the table in section 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015*.

The Migration Regulations are exempt from sunseting on the basis that the repeal and remaking of the Migration Regulations:

- is unnecessary as the Migration Regulations are regularly amended numerous times each year to update policy settings for immigration programs;
- would require complex and difficult to administer transitional provisions to ensure, amongst other things, the position of the many people who hold Australian visas, and similarly, there would likely be a significant impact on undecided visa and sponsorship applications; and
- would demand complicated and costly systems, training and operational changes that would impose significant strain on Government resources and the Australian public for insignificant gain, while not advancing the aims of the Legislation Act.

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

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

The amendments commence on the day after registration.

Further details of the Amendment Regulations are set out in [Attachment B](#).

ATTACHMENT A

Statement of Compatibility with Human Rights

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

Migration Amendment (Resolution of Status Visa) Regulations 2023

This Disallowable 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 Disallowable Legislative Instrument

Persons who arrive in Australia without a valid visa or who were not immigration cleared on arrival, who make a claim for asylum, and who, if they are eligible or permitted to apply for a protection visa, are found to engage Australia's international protection obligations, are only eligible to be granted a temporary protection visa. The relevant visa subclasses are the Subclass 785 (Temporary Protection) visa (TPV) and the Subclass 790 (Safe Haven Enterprise) visa (SHEV), which have a validity period of three and five years, respectively. A TPV or SHEV is granted to an applicant and members of the same family unit in Australia included in the application following an assessment that Australia has protection obligations in respect of the applicant and satisfaction of public interest criteria.

The *Migration Amendment (Transitioning TPV/SHEV holders to Resolution of Status Visas) Regulations 2023* (the Transition to RoS Regulations), which commenced on 14 February 2023, amended the *Migration Regulations 1994* (the Migration Regulations) to provide a clear and permanent visa pathway to resolving the migration status of TPV and SHEV holders, applicants, and certain former holders, who had arrived in Australia prior to the commencement of the Transition to RoS Regulations, and who have been or are found to engage Australia's protection obligations (or are members of the same family unit as someone who does).

The measures in the Transition to RoS Regulations allow existing TPV and SHEV holders to either lodge an application for a permanent Subclass 851 (Resolution of Status) visa (RoS visa), or, if they had already made an application for a TPV or SHEV, operate to convert that existing application to an application for a RoS visa. The RoS visa is an existing permanent visa.

Applications for a TPV or SHEV which were unresolved as at 14 February 2023 (the *TPV/SHEV transition day*, as per the Transition to RoS Regulations) were intended to be automatically converted, pursuant to section 45AA of the *Migration Act 1958* (the Migration Act), into an application for a RoS visa in the circumstances set out in the Transition to RoS Regulations.

The RoS visa did not include any time of decision criteria to be satisfied in relation to an applicant's identity. There are TPV/SHEV holders and former holders who were granted a

temporary protection visa because they were found to engage Australia's protection obligations, despite the fact that the Department was unable to completely establish or confirm all elements of their identity at the time of visa grant. In some cases those persons are now able to confirm further elements of their identity to the degree that it would be appropriate for them to obtain permanent residence, and have a potential pathway to Australian citizenship, while in other cases there is information to suggest that their identity may be substantially different and may affect whether they would have or would still engage Australia's protection obligations.

This disallowable legislative instrument, the *Migration Amendment (Resolution of Status Visa) Regulations 2023* (the Amendment Regulations), amends the Migration Regulations to:

- Include certain additional cohorts as being able to apply for, or have their existing TPV/SHEV application converted to an application for, a RoS visa (Schedule 1); and
- Add additional visa criteria relating to identity for RoS applicants transitioning from the TPV/SHEV caseload (Schedule 2).

Schedule 1 - Amendments relating to certain visa applications

Overview

Following the commencement of the Transition to RoS Regulations, a number of issues were identified with the operation of the regulations, in that certain groups of people who were intended to be able to either apply for a RoS or have an existing application converted, were inadvertently excluded from the intended operation of the relevant provisions. Schedule 1 of the Amendment Regulations includes a number of amendments which rectify the following issues:

- Persons who held a TPV/SHEV on the *TPV/SHEV transition day*, but who failed to apply for a RoS visa before their TPV/SHEV expired, were unable to apply for a RoS,
- Initial TPV/SHEV applicants who do not have their own claims for protection, but are a family member of a person who does, were unable to have their TPV/SHEV application converted to a RoS visa application if the family member is found to engage protection obligations,
- Persons who did not hold a TPV/SHEV on the *TPV/SHEV transition day*, but who had held a TPV/SHEV before that day, were unable to have their TPV/SHEV application converted to a RoS visa application,
- Persons who have previously made a valid application for a TPV/SHEV, but who have never held a TPV/SHEV, were unable to have their current TPV/SHEV application converted to a RoS visa application.

Providing a permanent pathway for the TPV and SHEV caseload and including the above cohorts who were inadvertently excluded from the intended operation of the Transition to RoS Regulations provides a more certain future; a pathway to family reunification, a pathway to Australian citizenship, and promotes better integration outcomes. Transition to permanency can further support economic activity and address skill shortages. It will also

reduce the significant social and economic costs associated with managing the large caseload of temporary visa holders on an ongoing basis.

Human rights implications

Schedule 1 of the Amendment Regulations may engage the following rights:

- A range of economic and social rights under the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), including rights relating to work (Article 6), social security (Article 9), health (Article 12) and education (Article 13).
- Rights relating to families and children including Articles 23(1) and 24 of the *International Covenant on Civil and Political Rights* (ICCPR) and Article 10 of the *Convention on the Rights of the Child* (CRC).
- Freedom of movement in Article 12(2) of the ICCPR.
- Equality and non-discrimination in Article 2(1) and Article 26 of the ICCPR and Article 2(2) of the ICESCR.
- Non-refoulement obligations arising under Article 3 of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* and Articles 6 and 7 of the ICCPR.

Economic and social rights

Schedule 1 to the Amendment Regulations is intended as a positive measure that will benefit the cohorts who had been inadvertently excluded from being able to apply for, or have their existing application converted to, the RoS visa, by giving them access to a permanent visa pathway. While TPV and SHEV holders are able to work, study, and access Medicare and certain social security payments, if they are granted the permanent RoS visa, they will have access to additional publicly-funded services and benefits, including additional social security payments, the National Disability Insurance Scheme, and enhanced access to tertiary study through becoming eligible for higher education assistance. RoS visa holders, as permanent residents, may also be able to more easily grow their businesses and secure long-term employment opportunities. Therefore, the access to the RoS visa for additional cohorts implemented by Schedule 1 to the Amendment Regulations will promote the human rights of those who are granted a RoS visa, including rights under the ICESCR relating to work, education, social security, and access to health services.

Rights relating to families and children

Another key benefit of access to permanent residence is the ability to sponsor family members for family reunification. The Amendment Regulations may promote the rights relating to the protection of the family contained in Article 23(1) of the ICCPR and rights relating to applications for reunification of children and their parents in Article 10(1) of the CRC for persons in the additional cohorts who will now have access to the RoS. This is because TPV and SHEV holders are not, as temporary visa holders, eligible to sponsor family members for Australian visas, and the Amendment Regulations would, by providing access to a permanent visa, enable those persons granted a permanent RoS visa to sponsor family members (including children) for migration to Australia.

Schedule 1 to the Amendment Regulations also assists in maintaining the family unity of additional cohorts of TPV/SHEV applicants who are progressing to a RoS visa. This is

because the amendments ensure that members of the same family unit of an applicant for an initial TPV or SHEV who is found to engage protection obligations are able to have their TPV/SHEV applications converted to a RoS visa application along with that applicant, as was intended in the Transition to RoS Regulations.

Freedom of movement

Article 12(2) of the ICCPR provides that everyone shall be free to leave any country.

TPV and SHEV holders are subject to a condition on their visa that requires them not to travel to the country in respect of which they were found to engage protection obligations and to obtain written approval for travel to any other country, which will be given if the Minister or their delegate is satisfied that there are compelling or compassionate circumstances for the travel. Breach of this visa condition may result in the cancellation of the person's visa. While this does not prevent TPV and SHEV holders from leaving Australia, they may be dissuaded from doing so because of this possible consequence if they have not complied with this condition. The RoS visa does not have any visa conditions relating to where a RoS visa holder may travel or obtaining approval for travel. Therefore, the amendments may promote the freedom of movement of those who are granted a RoS visa as a result of these amendments.

Equality and non-discrimination

Schedule 1 to the Amendment Regulations may engage the rights of equality and non-discrimination contained in Article 2(1) and Article 26 of the ICCPR and Article 2(2) of the (ICESCR). This is because the amendments will extend the benefit of being able to apply for, or have an application converted to an application for, a RoS visa to certain additional cohorts who were intended to have been included in the Transition to RoS Regulations. As explained in the Statement of Compatibility with Human Rights for the Transition to RoS Regulations, the Government considers it necessary, reasonable and proportionate to objectives relating to the integrity of the migration program and border security to not also extend this benefit to certain other cohorts, such as those who have previously held a TPV or SHEV which has been cancelled or to future unauthorised arrivals.

Non-refoulement

It is expected that the vast majority of RoS applicants, including those additional cohorts included by Schedule 1 to the Amendment Regulations, will satisfy the criteria for the grant of a RoS visa. Persons who are refused the grant of a RoS visa will remain on their bridging visa, TPV or SHEV until it ceases 35 days after the RoS visa application is finally determined (which usually includes the completion of merits review processes), unless it is cancelled prior to this on, for example, character or national security grounds. Where the person's bridging visa, TPV or SHEV ceases, or is cancelled, or their RoS visa is subsequently cancelled, and they become liable for removal from Australia as an unlawful non-citizen, the Migration Act (subsection 197C(3)) ensures that removal to the country by reference to which a 'protection finding' was made in the course of considering the person's most recent TPV or SHEV application is not required or authorised unless the unlawful non-citizen requests voluntary removal or is found, under section 197D of the Migration Act, to be a person in respect of whom a protection finding would no longer be made. This could be in circumstances where, for example, country conditions have significantly improved such that

the person no longer faces a real risk of the relevant harm. Removal to the country by reference to which a ‘protection finding’ was made is also not authorised or required while merits review of a decision under section 197D of the Migration Act is ongoing.

Since ‘protection finding’ reflects the circumstances in which Australia’s *non-refoulement* obligations are engaged, this ensures that TPV/SHEV holders or former holders who have a ‘protection finding’ and are not successful in obtaining a RoS visa will not be removed from Australia in breach of Australia’s *non-refoulement* obligations. For any TPV/SHEV applicant, holder or former holder who does not have a ‘protection finding’ and would be liable for removal, the Government will ensure that removal will be consistent with Australia’s *non-refoulement* obligations, including through consideration of ministerial intervention pathways, if it appears that the person may engage those obligations.

Conclusion

Schedule 1 to the Amendment Regulations is compatible with human rights because it promotes the protection of human rights for the affected cohorts of visa applicants.

Schedule 2 – Amendments relating to the identity of certain visa applicants

Overview

There are persons in the TPV/SHEV caseload who arrived in Australia undocumented, or with limited identity information to enable the Department to establish or confirm their identity. Due to the fact they were found to engage Australia’s protection obligations these persons were granted a temporary protection visa based on the information available, however the Government considers it appropriate to require a greater degree of satisfaction in relation to identity in order to grant a person permanent residence in Australia. For example, there may be unresolved concerns about an applicant’s identity which require further clarification. Alternatively, there may be new information about an applicant’s identity that has emerged subsequent to the grant of the TPV or SHEV. In addition, the Department of Home Affairs has identified instances of suspected identity fraud in this caseload.

Although the Migration Act enables the Minister to invite a person to provide any information that the Minister considers relevant to an application for a visa (including information to establish or confirm an applicant’s identity), there were no grounds available to refuse an application for a RoS visa in circumstances where an applicant does not provide the identity information they were invited to provide (without a reasonable explanation, or taking reasonable steps to provide such information), or provides a bogus document in relation to their application (without a reasonable explanation), or provides false or misleading information in relation to the application (without a reasonable explanation). In some cases, the information that is provided, or which the Department has become aware of since the person’s TPV or SHEV was granted, may indicate that the person has a substantially different identity than the identity that was the basis for the protection obligations finding and the TPV/SHEV visa grant.

Schedule 2 to the Amendment Regulations amends the Migration Regulations to introduce the following identity-related requirements for the grant of a RoS visa to the TPV/SHEV caseload:

- if the applicant has been invited to provide information relating to their identity, a requirement that the applicant must provide that information, unless the applicant has a reasonable explanation for why they did not provide that information and has taken reasonable steps to provide that information; and
- a requirement that there is no evidence that the applicant has provided bogus documents or false or misleading information relating to their identity in relation to the application, unless the applicant has a reasonable explanation for why they provided the bogus documents or false or misleading information; and
- in cases where the applicant was invited to provide information relating to their identity (and the applicant has provided the information or is not required to because they have a reasonable explanation and have taken reasonable steps to provide the information) and there are substantial identity-related concerns with a previous protection finding, visa grant or record, a requirement that:
 - Australia has protection obligations to the person, or
 - there is a compelling or compassionate reason to grant the visa, or
 - the person is a member of the same family unit as a RoS visa holder.

What is a compelling or compassionate reason to grant the visa will be set out in policy but is intended to include family circumstances or a positive contribution to Australian society, for example, being in a relationship with an Australian permanent resident or citizen, having children or extended family who are ordinarily resident in Australia; contributing to Australian society through paid employment, or operating a business, and paying tax; contributing to Australian society through community participation and volunteering; or compassionate reasons relating to the applicant's health and need for medical support services, including in relation to mental health issues.

Where an applicant's initial identity is confirmed following their response to a request from the Minister for identity information, or there are identity changes identified through this process that do not raise a substantial identity-related concern (for example minor changes that do not bring into question a previous protection finding), no further consideration of whether the person is a member of the same family unit as a RoS visa holder, protection obligations or compelling or compassionate reasons to grant the visa is required.

The aim of these amendments is to allow the Department to assure itself, as far as possible, of the identity of the persons transitioning to the RoS visa and to ensure that members of the caseload transition in the circumstances that reflect the broad policy objectives of the transition – that is to transition to permanent residence those persons in the TPV/SHEV caseload who have been found to engage Australia's protection obligations, or to be a member of the same family unit of someone who does, and/or who have established lives in Australia as TPV/SHEV holders. The amendments recognise that people who have fled their countries of nationality or former habitual residence may not always be able to provide the level of identity documentation that would otherwise be required from visa applicants.

In the context of the transition to permanent residence, the intention of the amendments is to help resolve, as far as possible, any doubts that may exist in relation to an applicant's identity prior to the grant of permanent residence. This will facilitate the applicant's future dealings with the Australian government in relation to such matters of acquisition of Australian citizenship and an Australian passport.

Human rights implications

Schedule 2 to the Amendment Regulations may engage the following rights:

- Rights relating to privacy in Article 17 of the *International Covenant on Civil and Political Rights* (ICCPR).
- *Non-refoulement* obligations arising under Article 3 of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* and Articles 6 and 7 of the ICCPR.
- Rights relating to families and children, including Articles 17 and 23(1) of the ICCPR.

Rights relating to privacy

Schedule 2 to the Amendment Regulations may engage the rights relating to privacy in Article 17 of the ICCPR. This is because the amendments relating to identity, as well as existing powers under the Migration Act, allow the Minister to invite RoS visa applicants to provide personal information (including in relation to confirming or establishing their identity, in relation to the applicant's claims for Australia's protection, or in relation to establishing a compelling or compassionate reason to grant the visa), and provide consequences for not providing the information.

Under section 56 of the Migration Act, the Minister may invite a visa applicant to give further information or to comment on information, including for the purposes of establishing or confirming the applicant's identity. For example, this may be an invitation to give a specific identity document, or to give information about an element of the applicant's identity, or an invitation for the applicant to comment on identity information that has come to the attention of the Department of Home Affairs since the grant of the TPV or SHEV.

Where a person does not provide the information they were invited to give in response to a request by the Minister, the effect of the amendments is that the person needs to provide a reasonable explanation as to why they could not or cannot provide such information, and take reasonable steps to provide the information. There may be instances where a person's reasonable explanation means that they will not be able to take reasonable steps to provide the information, in which case the new requirement to provide identity information in response to an invitation to do so will be taken to be satisfied. The amendments made by Schedule 2 are intended to give applicants from the TPV/SHEV caseload a fair opportunity to establish their identity, and recognise that obtaining information from the country against which they have claimed protection may not always be possible.

Under the amendments made by the Amendment Regulations, if a person does not provide the identity information they were invited to give in response to a request by the Minister (or does not respond at all), and they do not have a reasonable explanation for why they could not provide such information, and (if applicable) they do not take reasonable steps to provide the information, their application must be refused. The Amendment Regulations operate in this manner because the identity criteria are intended to incentivise applicants to establish or confirm their identity.

However the person can seek merits review of the decision to refuse a RoS visa and/or make a subsequent application for a RoS visa and provide the necessary information, or a reasonable explanation for why they cannot provide it. While most applicants in the TPV/SHEV caseload are unauthorised maritime arrivals and therefore prevented from making a further visa application unless the Minister allows them to do so (known as 'lifting

the bar'), the application bar lift for the RoS visa is currently open ended, and the online application form serves as notification of the bar lift.

The Government considers that the introduction of identity-related criteria for the TPV/SHEV caseload who are progressing to a RoS visa is therefore reasonable, necessary and proportionate to legitimate aims given that the primary objective of the criteria is to ensure that any person granted a permanent visa has properly established their identity, in line with the expectations of the Australian community. The amendments also strike an appropriate balance where the person cannot reasonably provide the requested information as well as providing options for grant of the visa even where there have been significant changes to an applicant's identity.

Non-refoulement

It is expected that the vast majority of RoS visa applicants will satisfy the criteria for the grant of a RoS visa, including the new criteria relating to identity. The new criteria are intended to help resolve identity issues and a visa will only be refused for failing to provide identity information in response to an invitation if the person does not have a reasonable explanation for doing so and has not taken reasonable steps to obtain the information, or has provided bogus or misleading information without a reasonable explanation.

As explained above in relation to the amendments made by Schedule 1 to the Amendment Regulations, those persons who are refused the grant of a RoS visa will remain on their bridging visa, TPV or SHEV until it ceases 35 days after the RoS visa application is finally determined (which usually includes the completion of merits review processes), unless it is cancelled prior to this on, for example, character or national security grounds. Where the person's bridging visa, TPV or SHEV ceases, or is cancelled, or their RoS visa is subsequently cancelled, and they become liable for removal from Australia as an unlawful non-citizen, the Migration Act (subsection 197C(3)) ensures that removal to the country by reference to which a 'protection finding' was made in the course of considering the person's most recent TPV or SHEV application is not required or authorised unless the unlawful non-citizen requests voluntary removal or is found, under section 197D of the Migration Act, to be a person in respect of whom a protection finding would no longer be made. This could be in circumstances where, for example, country conditions have significantly improved such that the person no longer faces a real risk of the relevant harm. Removal to the country by reference to which a 'protection finding' was made is also not authorised or required while merits review of a decision under section 197D of the Migration Act is ongoing.

Since 'protection finding' reflects the circumstances in which Australia's *non-refoulement* obligations are engaged, this ensures that TPV/SHEV holders or former holders who have a 'protection finding' and are not successful in obtaining a RoS visa will not be removed from Australia in breach of Australia's *non-refoulement* obligations. For any TPV/SHEV applicant, holder or former holder who does not have a 'protection finding' and would be liable for removal, the Government will ensure that removal will be consistent with Australia's *non-refoulement* obligations, including through consideration of ministerial intervention pathways, if it appears that the person may engage those obligations.

Further, it is expected that a person refused a RoS visa, including on the basis of the new identity-related criteria, will be able to make an application for a further RoS visa, or may choose to pursue merits review.

Schedule 2 to the Amendment Regulations also contains an additional safeguard in relation to *non-refoulement* obligations. A person may be invited to provide further information to

establish their identity if, for example, there is information before the Department to suggest that their identity is different to the identity that was accepted for the purpose of assessing their protection claims in their previous TPV or SHEV application. If the person provides information that confirms a different identity, which could include that they are a national of a different country to what had previously been claimed, the person does not have to have their RoS visa application refused and go through a new protection visa process to assess the protection claims they may have in their ‘new’ identity. Instead, the amendments provide a mechanism for a RoS visa to still be granted if the Minister or delegate assessing the RoS visa application is satisfied that the person would meet the criteria for a protection visa, in particular that they engage Australia’s protection obligations, in that new identity. This mechanism therefore assists Australia to meet its *non-refoulement* obligations to persons who engage those obligations in a different identity to that accepted at the time their TPV/SHEV application was assessed.

Rights relating to families and children

Schedule 2 to the Amendment Regulations positively engages rights relating to family unity and children, because, even if there are substantial identity-related concerns with findings previously made in a TPV or SHEV assessment in relation to the RoS visa applicant, the provisions allow for the RoS visa to be granted if the applicant is a member of the same family unit as a RoS visa holder, or if the applicant engages Australia’s protection obligations in their own right, or if there are compelling or compassionate reasons to grant the visa. The compelling and compassionate reasons will, as noted above, be set out as a matter of policy, but will include reasons such as the applicant being in a relationship with an Australian permanent resident or citizen and/or having children or extended family who are ordinarily resident in Australia.

Conclusion

Schedule 2 to the Amendment Regulations is compatible with human rights because, to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate to achieving legitimate objectives.

The Hon Andrew Giles MP

Minister for Immigration, Citizenship and Multicultural Affairs

ATTACHMENT B

Details of the Migration Amendment (Resolution of Status Visa) Regulations 2023

Section 1 – Title

This section provides that the title of the instrument is the *Migration Amendment (Resolution of Status Visa) Regulations 2023*.

Section 2 – Commencement

This section provides for the commencement of the instrument. Subsection 2(1) provides that each provision of this instrument specified in column 1 of the table commences or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 1 has effect according to its terms.

Item 1 of the table in subsection 2(1) provides that the whole of the instrument commences on the day after it is registered on the Federal Register of Legislation.

A note under the table in subsection 2(1) provides that this table relates only to the provisions of this instrument as originally made and will not be amended to deal with any later amendments of this instrument.

Subsection 2(2) provides that any information in column 3 of the table that is set out in subclause 2(1) will not be part of this instrument.

Section 3 – Authority

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

Section 4 – Schedules

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

Schedule 1 – Amendments relating to certain visa applications

Migration Regulations 1994

[Item 1] – Regulation 2.06A (heading)

[Item 2] – Regulation 2.06A

These items are technical amendments to incorporate a definition of ‘review/court event occurs’ in Division 2.2 of Part 2 of the *Migration Regulations 1994* (the Migration Regulations). The definition is set out in new subregulation 2.08G(1A) (see item 12 below).

[Item 3] – Subregulation 2.08G(1) (table items 1 and 2, column 1, paragraph (a))

This item amends the conversion table in subregulation 2.08G(1) of the Migration Regulations. The amendments ensure that an application for a Subclass 785 (Temporary Protection) visa (TPV) or a Subclass 790 (Safe Haven Enterprise) visa (SHEV), made by a person previously granted one of those visas, was converted to an application for a Subclass 851 Resolution of Status visa (RoS visa) on the *TPV/SHEV transition day* (14 February 2023).

Prior to the amendments, table items 1 and 2 were drafted too narrowly. They covered applicants who held a TPV or SHEV on the *TPV/SHEV transition day*, but did not cover applicants who held a TPV or SHEV that ceased to be in effect before that day.

The background to this issue is that most TPV and SHEV holders arrived in Australia over ten years ago. A TPV is valid for three years and a SHEV is valid for five years. Accordingly, many TPV or SHEV holders needed to make a further application to extend their stay in Australia as refugees or as persons otherwise in need of protection. Most applications were made before the cessation of the previous visa, which was strongly encouraged by the Department of Home Affairs. However, a small number of applicants (approximately 400) only made the further application after becoming unlawful non-citizens (due to their initial visa having ceased to be in effect). If these applicants had applied before the cessation of the previous visa, the previous visa would have continued in effect until the new visa application was resolved (see clauses 785.511 and 790.511 of Schedule 2 to the Migration Regulations) and they would have satisfied table item 1 or table item 2.

[Item 4] – Subregulation 2.08G(1) (cell at table item 2, column 2)

[Item 9] – Subregulation 2.08G(1) (table item 4, column 1, paragraph (d))

These items makes technical amendments to the conversion table at subregulation 2.08G(1) to reflect the fact that text previously set out in the table has been moved to a new definition provision in new subregulation 2.08G(1A) (see item 12 below). This is a drafting change to streamline the conversion table. It does not alter the effect of the conversion table.

[Item 5] – Subregulation 2.08G(1) (table item 3, column 1)

This item makes a technical amendment to the conversion table at subregulation 2.08G(1), which is consequential to the repeal of paragraph (b) in column 1 of table item 3 (see item 6 below).

[Item 6] – Subregulation 2.08G(1) (table item 3, column 1, paragraph (b))

[Item 8] – Subregulation 2.08G(1) (table item 4, column 1, paragraph (b))

These items remove paragraphs in the conversion table that prevent previous applicants for a TPV or SHEV, who had not been granted one of those visas, from having a subsequent application for a TPV or SHEV converted to a RoS visa.

The conversion table, in items 3 and 4, deals with applicants who have never held a TPV/SHEV. Prior to amendment, those table items provided that it is a precondition to the conversion that: “*before the pre-conversion application was made, the applicant had not previously made a valid application for a Subclass 785 (Temporary Protection) visa or a*

Subclass 790 (Safe Haven Enterprise) visa” (paragraph (b) in column 1 of each of table items 3 and 4).

Table items 3 and 4 were intended to deal with the conversion of applications by applicants who are ‘first time applicants’ for the TPV or SHEV, with the bulk of applicants falling within this group having never submitted a TPV or SHEV application before. However the wording inadvertently and unfairly excluded a number of cohorts from conversion who can also be considered as ‘first time applicants’:

- those who previously made a valid TPV or SHEV application that was later withdrawn (for example, a person who withdrew their TPV application (3 year validity period) in order to lodge a SHEV application (5 year validity period));
- those who made a purportedly invalid TPV or SHEV application which was later found to be valid as a result of a judicial decision (and who have since made another application which is available for conversion); and
- those who have previously been refused a TPV or SHEV, but have been successful or will be successful in having the application bar lifted under a Ministerial intervention process to enable lodgement of a further TPV or SHEV application (due to exceptional circumstances such as changes in country information that warrant the consideration of a further protection visa application).

The amendments cater for these cohorts by removing the disqualification in paragraph (b) in column 1 of each of table items 3 and 4 and thereby providing for the conversion of those applications in accordance with column 2 of those items.

[Item 7] – Subregulation 2.08G(1) (after table item 3)

[Item 10] – Subregulation 2.08G(1) (at the end of the table)

These items add two new items to the conversion table at subregulation 2.08G(1), to cater for the conversion of TPV and SHEV applications by family members of persons whose have satisfied the protection criteria in paragraph 36(2)(a) or (aa) of the Migration Act.

The new items (item 3A and item 5) apply to applicants who have not previously held a TPV or a SHEV. New table item 3A applies to an applicant whose pre-conversion application had not been decided by the Minister before the *TPV/SHEV transition day*. New table item 5 applies to an applicant whose pre-conversion application had been refused by the Minister before the *TPV/SHEV transition day* in circumstances where after the *TPV/SHEV transition day* a review/court event occurs in relation to the pre-conversion application (see item 12 below).

The new items (item 3A and item 5) are necessary because family members were unable to satisfy existing items 3 and 4. This resulted from an oversight in the drafting of the *Migration Amendment (Transitioning TPV/SHEV holders to Resolution of Status Visas) Regulations 2023* (the Transition Regulations).

The Transition Regulations amended the TPV and SHEV criteria to allow family members to qualify for those visas if another family member had been granted a RoS visa. The purpose of the amendments (to clauses 785.221, 785.228, 790.221 and 790.228) was to ensure that there

was no gap in the legislative scheme in relation to family members of TPV and SHEV applicants. Conversion of a family member's TPV or SHEV application into a RoS visa application depended in some circumstances on satisfaction of the criteria for the TPV or SHEV, which required another member of the family to hold a TPV or a SHEV. It was therefore necessary to ensure that family members could satisfy those criteria if a RoS visa had been granted to another member of the family unit rather than a TPV or SHEV. Accordingly, the Transition Regulations inserted references to a RoS visa having been granted to a member of the same family unit as the applicant.

This was understood to have covered off the problem that otherwise arose from subregulation 2.08G(1) (column 2 of table items 3 and 4), which is that it would have been impossible for a family member to satisfy the criteria for the TPV or SHEV because the lead applicant never holds a TPV or SHEV.

The amendments made by the Transition Regulations were not effective because they were inconsistent with subsection 36(2) of the Migration Act, which requires that the lead applicant has been granted a protection visa of the same class as that applied for by the family member. The RoS visa is not a class of protection visa (see section 35A of the Migration Act).

Accordingly, these amendments create a new basis for the conversion of the applications of family members. Rather than refer to the lead applicant holding a RoS visa, the new items 3A and 5 include, in column 2, a reference to the family member satisfying the criteria for the grant of the TPV or SHEV in circumstances where another family member has satisfied the protection criteria in paragraphs 36(2)(a) or (aa) of the Migration Act and it is assumed that the other family member holds a TPV or SHEV, as applicable. This approach avoids the inconsistency with the Migration Act which arose from the earlier provisions. See also items 15 and 16 below, which repeal the provisions that were inconsistent with the Migration Act.

[Item 11] – Subregulation 2.08G(1) (note after the table)

This item amends the note after the conversion table at subregulation 2.08G(1), consequential to the amendments made by items 7 and 10.

[Item 12] – After subregulation 2.08G(1)

This item inserts a new definitional provision, for the purposes of items 2, 4, and 5 of the table in subregulation 2.08(1). The purpose of the definition is to streamline the drafting of the Migration Regulations. The definition of when a “review/court event occurs” simplifies the table in subregulation 2.08G(1) by avoiding unnecessary repetition of text. The meaning and effect of the relevant provisions is unchanged.

[Item 13] – Subitem 1127AA(3) of Schedule 1 (after table item 4)

This item amends the application validity requirement for the RoS visa as set out in item 1127AA of Schedule 1 to the Migration Regulations. A new table item 4A is inserted in the table at subitem 1127AA(3). Table item 4A expands eligibility to apply for the RoS visa to include persons who held a TPV or SHEV on the *TPV/SHEV transition day*, but who did not apply for the RoS visa before that visa ceased.

The background to the need for this change is that table items 4 and 5 did not cover every permutation of persons who had held a TPV or SHEV and who were intended to be able to apply for a RoS visa. Table item 5 covered every person who did not hold a TPV or SHEV on the *TPV/SHEV transition day*, but who had held a TPV or SHEV at an earlier time. However, table item 4 only covered a subset of the cohort who held a TPV or SHEV on the *TPV/SHEV transition day*. The subset is persons who continue to hold the TPV or SHEV when they apply for the RoS visa. The table did not cover persons whose TPV or SHEV ceased on or after the *TPV/SHEV transition day* and before the application for the RoS visa was made. The amendment covers that cohort and ensures that they are able to apply for the RoS visa.

Persons who held a TPV or SHEV on the *TPV/SHEV transition day* which ceased after that day, who have since had an application for a TPV or SHEV refused and finally determined, will not be able to apply for a RoS visa.

[Item 14] – Subitem 1127AA(3) of Schedule 1 (table item 6, column headed “Criterion 1”, paragraph (a))

This item amends table item 6 in subitem 1127AA(3) of Schedule 1 to the *Migration Regulations*. The amendment, which is consequential to item 13 above, allows an application for the RoS visa to be made by a child born in Australia to a person covered by new table item 4A.

[Item 15] – Paragraphs 785.221(3)(b) and 785.228(2)(b) of Schedule 2

[Item 16] – Paragraphs 790.221(3)(b) and 790.228(2)(b) of Schedule 2

These items omit redundant references to the RoS visa in the criteria for the grant of the TPV and SHEV in Schedule 2 to the *Migration Regulations*. Please see the explanation above in relation to items 7 and 10.

Schedule 2—Amendments relating to the identity of certain visa applicants

Migration Regulations 1994

[Item 1] – At the end of Subdivision 851.22 of Schedule 2

This item inserts two new clauses into the criteria for the grant of a RoS visa. These additional criteria must be satisfied at time of decision in relation to the application for the RoS visa.

The purpose of the new clauses (clause 851.228 and 851.229) is to allow the Minister to take action to confirm the identity of applicants for the RoS visa, where this is necessary, and to respond to any cases of identity fraud that are identified or confirmed during this process.

Clause 851.228 imposes an obligation on RoS visa applicants to co-operate in the provision of identity related information, when the applicant has been invited by the Minister to give this information pursuant to section 56 of the Act.

Clause 851.229 imposes additional visa criteria which must be met in those cases where, following the request for, and consideration of, identity related information, the Minister is

satisfied that there are substantial concerns with previous findings in relation to the identity of TPV or SHEV applicants.

Further details are set out below.

Clause 851.228

Clause 851.228 contains two distinct criteria relating to identity. Subclause 851.228(2) deals with a RoS visa applicant's compliance with invitations, under section 56 of the Migration Act, to provide information to establish or confirm the applicant's identity. Subclause 851.228(4) deals with RoS visa applicants who give, or cause to be given, bogus documents or information that is false or misleading in a material particular, in relation to the applicant's identity. These criteria are independent of each other, although they may be related in some cases, for example, an applicant may produce a bogus document in response to a section 56 invitation.

Subclause 851.228(1) has the effect that clause 851.228 applies to all applicants who are part of the TPV/SHEV cohort that is being transitioned to permanent residence, whether via a deemed application under regulation 2.08G or as a result of an application made directly by the applicant.

Subclause 851.228(2) has the effect that if, when considering the RoS visa application, the Minister invites the applicant, under section 56 of the Migration Act, to give information for the purposes of establishing or confirming the applicant's identity, the applicant must give that information, or cause the information to be given, in accordance with the invitation. For example, this may be an invitation to give a specific identity document, or to give information about an element of the applicant's identity, such as name or date of birth. If the applicant does not comply with subclause 851.228(2), and is not covered by subclause 851.228(3), the visa application must be refused.

Paragraph 851.228(3)(a) has the effect that the obligation to give the information does not apply if the applicant has a reasonable explanation for refusing or failing to provide the information, provided that the applicant has taken reasonable steps to give the information. For example, an applicant may only be able to obtain a particular identity document by requesting it directly from the authorities of the country in relation to which they have made protection claims. It may not be reasonable to expect an applicant to contact the authorities of that country to request evidence of their identity, or to request that their family members do so on their behalf.

Paragraph 851.228(3)(b) clarifies that the requirements imposed by subclause 851.228(2) only apply to section 56 invitations issued for converted applications from the time of conversion, i.e. the time when which regulation 2.08G started to apply in relation to the application. This provision has been included because a TPV or SHEV application that is converted to a RoS visa application is taken to have always been a RoS visa application (paragraph 2.08G(1)(b)). The effect of paragraph 851.228(3)(b) is that the obligation under subclause 851.228(2) to give information does not apply if the invitation under section 56 was given before the time of conversion.

Subclause 851.228(4) has the effect that a RoS visa application will be refused if there is evidence before the Minister that the applicant has given, or caused to be given, for the

purposes of the RoS visa application, a bogus document in relation to the applicant's identity or information that, at the time it was given, was false or misleading in relation to the applicant's identity. However, visa refusal will not occur on this basis if the Minister is satisfied that the applicant has a reasonable explanation for giving the bogus document or false or misleading information (see subclause 851.228(6) below). If the bogus document or false or misleading information was given in response to a section 56 invitation that engages subclause 851.228(2), the applicant would still be required to provide genuine documents and true information in response to the invitation or must meet paragraph 851.228(3)(a), in order to avoid visa refusal.

Subclause 851.228(5) provides that subclause (4) applies whether or not the Minister becomes aware of a document or information of a kind referred to in that subclause because of information given by the applicant. The purpose of this provision is to clarify that it is irrelevant to the application of subclause (4) whether the bogus document or false or misleading information is discovered by officers of the Department of Home Affairs or whether the applicant informs the Department about this matter.

Subclause 851.228(6) provides that Subclause (4) does not apply if the Minister is satisfied that the applicant has a reasonable explanation for giving a document or information of a kind referred to in that subclause. For example, a reasonable explanation (if accepted) may be that the applicant was unaware that the document was bogus because the document had been given to them by another member of their family on the understanding that it was genuine.

Clause 851.229

Clause 851.229 imposes additional criteria that will apply when there are substantial identity related concerns in relation to the RoS visa applicant following the process outlined in clause 851.228. This criterion will apply in cases where the RoS visa application is not refused on the basis of subclause 851.228(2) (failure to give information to confirm identity) or subclause 851.228(4) (giving bogus documents or false or misleading information).

Subclause 851.229(1) provides that clause 851.229 applies if both paragraph 851.229(1)(a) and paragraph 851.229(1)(b) are applicable.

Paragraph 851.229(1)(a) applies if the applicant satisfies the criterion in subclause 851.228(2), or is not required to satisfy that criterion because of paragraph 851.228(3)(a). This means that, apart from the applicants who are refused for failure to meet the obligations under 851.228(2) or 851.228(4), applicants who are invited under section 56 to provide identity related information in relation to the application (and for converted applications, only from the time when the regulation 2.08G started to apply in relation to the application) are subject to the additional criteria in clause 851.229 if paragraph 851.229(1)(b) applies.

Paragraph 851.229(1)(b) applies if the Minister is satisfied that there are substantial identity-related concerns in relation to a relevant matter. Subclause 851.229(2) defines a relevant matter as:

- a protection finding (within the meaning of section 197C of the Act) that was previously made for the applicant (paragraph 851.229(2)(a)); or

- a decision to grant a TPV or SHEV on the basis that the applicant satisfied the family membership criteria in paragraph 36(2)(b) or 36(2)(c) of the Migration Act (paragraph 851.229(2)(b)); or
- a record that results in conversion of a family member's TPV or SHEV application to a RoS visa application (paragraphs 851.229(2)(c) and 851.229(2)(d)).

In summary, paragraph 851.229(1)(b) requires an evaluation of the information that exists in relation to the applicant's identity and the extent to which any identity concerns are relevant to the outcome of the TPV or SHEV application. There is no definition of the expression *substantial identity-related concerns*. The words will be interpreted in accordance with their ordinary meaning, having regard to the policy objective which is to respond to identity fraud, i.e. cases where the identity of the visa applicant was deliberately misrepresented in order to establish a claim for protection or to establish membership of the same family unit as a claimant for protection. That is, the cases that will fall within the scope of this paragraph are cases where the applicant has asserted a false identity and has done so for the purpose of establishing eligibility for a TPV or SHEV. For example, this could include cases where an applicant has claimed to be a national of country A for the purposes of establishing a protection claim, but is actually from country B (and may or may not have a legitimate claim for protection from that country).

There is no direct linkage between the provision of bogus documents or false and misleading information (see clauses 851.228(4) and 851.228(6)) and the applicability of clause 851.229. Applicants who have presented bogus documents or false and misleading information may have done so pursuant to a section 56 invitation that engages subclause 851.228(2). In that circumstance, the application could be refused under subclause 851.228(2) or subclause 851.228(4). In any event, additional section 56 invitations can be given, where required, to provide applicants with another opportunity to satisfy the identity criteria and to bring those applicants within the scope of clause 851.229.

Subclause 851.229(3) provides that an applicant (who is covered by subclause 851.229(1)) must meet one of the three alternative criteria set out in the subclause.

Paragraph 851.229(3)(a) requires that, if the applicant had made a valid application for a protection visa at the same time as the applicant made the application for the RoS visa, the applicant would have satisfied the criteria for the grant of the protection visa. This provision requires an assessment of whether, taking account of the current state of knowledge in relation to the applicant's identity, the applicant would satisfy the criteria for the grant of a protection visa at the time of the assessment of the RoS visa. The intention is to allow a RoS visa to be granted to persons who are found to engage Australia's protection obligations in their true identity, subject to meeting other visa requirements, including requirements relating to character and national security. This approach is consistent with the approach taken to transitioning the broader TPV/SHEV caseload to permanent residence.

For example, an applicant who falsely claimed to be from country A, and was in fact from country B, may nevertheless wish to advance protection claims in relation to country B. Other examples of anticipated scenarios are where a person's name (but not nationality) has changed, which may call into question the validity of the previous protection finding (as the person was accepted to hold a particular profile based on the previous name provided).

Paragraph 851.229(3)(b) requires that there is a compelling or compassionate reason to grant the visa to the applicant. This formula has a broad scope and is intended to deal with the wide range of compassionate or compelling circumstances that may affect RoS visa applicants who, in most cases, have now resided in Australia for over ten years.

Compassionate or compelling circumstances could include family circumstances and a positive contribution to Australian society, for example:

- being in a relationship with an Australian permanent resident or citizen;
- having children or extended family who are ordinarily resident in Australia;
- contributing to Australian society through paid employment, or operating a business, and paying tax;
- contributing to Australian society through community participation and volunteering; or
- compassionate reasons relating to the applicant's health and need for medical support services, including in relation to mental health issues.

Paragraph 851.229(3)(c) requires that the applicant is a member of the same family unit as a person who holds a RoS visa. The effect of this criterion is that genuine family members of a RoS visa holder will be eligible for the RoS visa.

[Item 2] – In the appropriate position in Schedule 13

This item inserts a new Part 121 into Schedule 13 to the Migration Regulations to provide operation provisions in relation to Schedule 2 to these Regulations.

Schedule 13 is the location of application and transitional provisions for amendments to the Migration Regulations.

No application or transitional provisions were required for the amendments made by Schedule 1 to this Regulation. To the extent that the Schedule 1 amendments permit additional applicants to apply for the RoS visa, those applications can be made from the commencement date. To the extent that the amendments allow additional applications for TPV or SHEV to be converted to RoS visa applications, those conversions occur at the time indicated in column 2 of the table set out at subregulation 2.08G(1).

Clause 12101

Clause 12101 inserts definitions used in new Part 121 of Schedule 13:

amending regulations is defined to mean the Migration Amendment (Resolution of Status Visa) Regulations 2023.

identity information criterion is defined to mean subclause 851.228(2) of Schedule 2, as inserted by Schedule 2 to the amending regulations.

Subclauses 12102(1)

Subclause 12102(1) provides that the amendments made by Schedule 2 to the amending regulations, which provide for new criteria relating to identity, apply in relation to an application for a visa made, but not finally determined, before the commencement of these Regulations as well as to applications made on or after the commencement.

In this case, amending time of decision criteria in a way that impacts on existing visa applicants is justified by the strong public interest in maintaining the integrity of Australia's visa system and ensuring that the identity of persons progressing to permanent residence (and then potentially to Australian citizenship) is clearly established. Failure to apply these criteria to applications on hand at commencement would also result in arbitrary decision making, whereby issues relating to identity could be effectively pursued and resolved in some but not all cases. On the other hand, the commencement of these criteria, several months after the commencement of the Transition Regulations, does not result in arbitrary outcomes, as the visa processing undertaken by the Department of Home Affairs during that period has prioritised the cases that do not raise identity issues.

As the amendments commence after registration, subsection 12(2) of the Legislation Act is not engaged.

Subclauses 12102(2) and 12102(3)

Subclauses 12102(2) and 12102(3) have the effect that the identity information criterion applies in relation to an invitation under section 56 of the Migration Act whether given before, on or after the commencement of that criterion. The background to this provision is that a significant number of TPV and SHEV applications were converted to RoS visa applications on the *TPV/SHEV transition day* (14 February 2023) and more were converted in the subsequent months, prior to the commencement of the identity information criterion. A significant number of eligible persons also applied for the RoS visa over that period. Invitations under section 56 seeking information in relation to identity were sent to some of these applicants during the period between 14 February 2023 and the commencement of the identity information criterion. It is intended that those invitations will engage the criterion. However, this is not intended to cover section 56 invitations sent to applicants, who have converted applications, where the invitation was sent before the application was converted. That is, there is no intention to reassess the applicant's response to a section 56 invitation sent prior to conversion. Where there are unresolved identity issues, a new section 56 invitation will be sent after conversion to a RoS application.

This application provision is necessary because a TPV or SHEV application that is converted to a RoS visa application is taken to have always been a RoS visa application (paragraph 2.08G(1)(b)). Without the transitional provision, the new identity information criterion (subclause 851.228(2)) would pick up section 56 invitations sent prior to the time of conversion. The application provision is intended to limit the section 56 invitations that are relevant to the new identity information criterion.

There is no similar limitation in relation to the prior provision of bogus documents or false or misleading information (subclause 851.228(4)). That is, a bogus document, or false or misleading information is provided, for the purpose of subclause 851.228(4), if it was provided for a converted application prior to the time of conversion. This is the effect of the transitional provision at subclause 12102(1) noted above. It is appropriate that any bogus document or false or misleading information that was provided for the purposes of the TPV

or SHEV application, prior to conversion, and which is relevant to the applicant's identity, is able to be considered, or reconsidered, as necessary when assessing the application for the RoS visa.