2013

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

MIGRATION AMENDMENT BILL 2013

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Immigration and Border Protection,
the Hon. Scott Morrison MP)

Migration Amendment Bill 2013

OUTLINE

The Migration Amendment Bill 2013 (the Bill) amends the *Migration Act 1958* (the Migration Act) to:

- put beyond doubt that a decision on review, or a visa refusal, cancellation or revocation decision by the Minister or his delegate, is taken to be made on the day and at the time when a record of it is made, and not when the decision is notified or communicated to the review applicant, visa applicant or the former visa holder;
- clarify the operation of the statutory bar on making a further protection visa application; and
- make it a criterion for the grant of a protection visa in section 36 of the Migration Act that the applicant is not assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security (within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*) and associated measures.

Schedule 1 of the Bill amends the Migration Act to put it beyond doubt that a decision by the Minister or delegate on an application for a visa, cancellation of a visa, or revocation of the cancellation of a visa, is taken to be finally made, and the decision-maker is taken to be *functus officio*, at the time and on the day a record of the decision is made. The Bill also puts beyond doubt that a decision by the Refugee Review Tribunal or the Migration Review Tribunal on an application for review is taken to be made, other than an oral decision, by the making of the written statement, and to have been made on the day, and at the time, the written statement is made. The Bill also puts beyond doubt that an oral decision by the Refugee Review Tribunal or the Migration Review Tribunal is taken to be made and becomes final on the day and at the time it is given. The Refugee Review Tribunal and the Migration Review Tribunal is taken to be *functus officio* at that relevant time.

Schedule 1 of the Bill also amends the Migration Act to clarify that, if a review of a decision in respect of an application has been instituted under Part 5 or 7 as prescribed, that application is "finally determined", i.e. no longer subject to a form of review under Part 5 or 7 of the Migration Act, when a decision on the review is taken to have been made by the Migration Review Tribunal or the Refugee Review Tribunal, as the case requires.

On 12 September 2012, the Full Federal Court delivered its judgement in *Minister for Immigration and Citizenship v SZQOY* [2012] FCAFC 131, in which the Court held that a decision by the Refugee Review Tribunal on an application for review under Part 7 of the Migration Act did not become final until the review decision was notified outside the Refugee Review Tribunal, "externally and irrevocably".

On 11 September 2013, the Full Federal Court delivered its judgement in *Minister for Immigration, Multicultural Affairs and Citizenship v SZRNY* [2013] FCAFC 104, in which the Court held that notification of a review decision by the Refugee Review Tribunal forms part of the "core function of review", and that until both the review applicant and the Secretary of the Department of Immigration and Border Protection are notified of the review decision according to law, the decision on the relevant application remains subject to review and is not "finally determined" within the meaning of subsection 5(9) of the Migration Act. Subsection 5(9) provides that an application is not "finally determined" until it is "no longer subject to any form of review under Part 5 or Part 7" of the Migration Act.

The amendments in Schedule 1 address the judgments in SZQOY and SZRNY to clarify and provide certainty as to when a decision on review (other than an oral decision), or a visa refusal, cancellation or revocation decision by the Minister or his delegate, is taken to be made on the day and at the time when a record of it is made. That finalisation is not dependent upon when the decision is notified or communicated to the review applicant, the visa applicant or the former visa holder.

Clarity and certainty as to when an application is finally determined is essential for the proper administration of the Migration Act, including identifying when a person may become an unlawful non-citizen.

Schedule 2 of the Bill amends the Migration Act to clarify that section 48A of the Migration Act prevents a non-citizen who has been refused a protection visa (or has had a protection visa cancelled) from applying for a further protection visa while in the migration zone.

The amendments address issues arising from the judgment of the Full Federal Court in *SZGIZ v Minister for Immigration and Citizenship* [2013] FCAFC 71 (3 July 2013). In that judgment, the Court held that there were effectively different sets of criteria by which a protection visa can be applied for and granted. The Court concluded that section 48A of the Migration Act does not prevent a non-citizen making a further protection visa application based on a criterion which did not form the basis of a previous unsuccessful protection visa application. This outcome is contrary to the policy intention of section 48A, which is that a non-citizen should not be able to make a further protection visa application in the migration zone after a previous protection visa application has been refused or a protection visa held by the person has been cancelled, irrespective of the grounds on which their earlier protection visa application was refused or the grounds on which the cancelled visa was originally granted, and whether or not the grounds or criteria existed earlier.

Schedule 3 of the Bill amends the Migration Act to insert a specific criterion for the grant of the class of visas known as protection visas, which includes a protection (Subclass 866) visa (permanent protection visa), that the applicant is not assessed by the Australian Security Intelligence Organisation (ASIO) to be directly or indirectly a risk to security, within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979* (the ASIO Act).

The amendments made by the Bill also put beyond doubt that the Refugee Review Tribunal and the Administrative Appeals Tribunal do not have the power to review a visa refusal decision relying on, or a visa cancellation decision because of, an assessment by ASIO that the applicant for, or holder of, a protection visa is directly or indirectly a risk to security (within the meaning of section 4 of the ASIO Act). A protection visa includes a permanent protection visa.

In the matter of *Plaintiff M47/2012 v Director-General of Security & Ors* [2012] HCA 46 (5 October 2012) (*Plaintiff M47*) the High Court held public interest criterion (PIC) 4002 of Part 1 of Schedule 4 to the *Migration Regulations 1994* was not a valid criterion for the grant of a protection visa because doing so was inconsistent with the Migration Act. The amendments will introduce a specific criterion for a protection visa in section 36 of the Migration Act to reflect the terms of PIC 4002 so that an applicant will be refused a protection visa if they are assessed by ASIO to be directly or indirectly a risk to security (within the meaning of section 4 of the ASIO Act).

As a result of the amendments to section 36, consequential amendments will be made to paragraph 411(1)(c), paragraph 411(1)(d) and section 500 of the Migration Act to put beyond doubt that the Refugee Review Tribunal and the Administrative Appeal Tribunal do not have the power to review a visa refusal or visa cancellation decision regarding a protection visa because of an adverse security assessment by ASIO. An amendment will also be made to paragraph 411(1)(c) and

paragraph 411(1)(d) to reflect existing paragraph 500(4)(c) that the Refugee Review Tribunal does not have the power to review a decision to refuse to grant or to cancel a protection visa relying on one or more of Articles 1F, 32 or 33(2) of the Convention Relating to the Status of Refugees as amended by the Refugees Protocol.

FINANCIAL IMPACT STATEMENT

The financial impact of the amendments in Schedule 1 is low. The estimated costs associated with the implementation of the proposed amendments insofar as it relates to decisions by the Minister or delegates will be met from within the Department's existing funding. Insofar as the amendments relate to review decisions by the Migration Review Tribunal and the Refugee Review Tribunal, they have estimated the costs associated with the implementation of the amendments to be approximately $132,000.

The financial impact of the amendments in Schedules, 2, and 3 is low. Any costs will be met from within existing resources of the Department of Immigration and Border Protection.

REGULATION IMPACT STATEMENT

The Office of Best Practice Regulation has been consulted and assessed that a regulation impact statement is not required. The advice reference for Schedule 1 is 14506 and 16200, Schedule 2 is 16200 and Schedule 3 is 16199.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

A Statement of Compatibility with Human Rights has been completed in relation to the amendments in this Bill and assesses that the amendments are compatible with Australia's human rights obligations. A copy of the Statement of Compatibility with Human Rights is at Attachment A.

MIGRATION AMENDMENT BILL 2013

NOTES ON INDIVIDUAL SECTIONS

Section 1 Short title

1. Section 1 provides that the short title by which this Act may be cited is the *Migration Amendment Act 2013*.

Section 2 Commencement

2. Subsection 2(1) provides that each provision of this Act 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 2 has effect according to its terms.

3. Table item 1 provides that sections 1 to 3 of this Act and anything in this Act not elsewhere covered by the table will commence on the day this Act receives the Royal Assent.

4. Table item 2 provides that Schedule 1 will commence the day after this Act receives the Royal Assent.

5. Table item 3 provides that items 1 and 2 of Schedule 2 will commence the day after this Act receives the Royal Assent.

6. Table item 4 provides that item 3 of Schedule 2 will commence immediately after the start of the day after this Act receives the Royal Assent.

7. Table item 5 provides that item 4 of Schedule 2 will commence immediately after the commencement of item 10 of Schedule 1 to the *Migration Amendment (Regaining Control Over Australia's Protection Obligations) Act 2013* (the Regaining Control Act). However, the provision(s) do not commence at all if that item commences before or on the same day as the provision(s) covered by table item 4.

8. The commencement provision in item 5 of this table is to ensure that if the Regaining Control Act commences after this Act, the amendment at item 4 of Schedule 2 will supersede the amendment made to the same provision of the Act by the Regaining Control Act. If the Regaining Control Act commences before, or on the same day as, this Act, the amendment in item 4 of Schedule 2 will not be required because in that case, the amendment in item 3 of Schedule 2 would be effective.

9. Table item 6 provides that item 5 of Schedule 2 will commence the day after this Act receives the Royal Assent.

10. Table item 7 provides that item 1 of Schedule 3 will commence the day after this Act receives the Royal Assent.

11. Table item 8 provides that item 2 of Schedule 3 will commence the day after this Act receives the Royal Assent. However item 2 does not commence at all if item 17 of Schedule 1 to the Regaining Control Act commences before or on the same day as item 1 of Schedule 3 to this Act.

12. Table item 9 provides that item 3 of Schedule 3 will commence on the later of the start of the day after this Act receives the Royal Assent and immediately after the commencement of

item 17 of Schedule 1 to the Regaining Control Act. However item 3 does not commence at all if item 17 of Schedule 1 to the Regaining Control Act does not commence.

13. Table item 10 provides that item 4 of Schedule 3 will commence the day after this Act receives the Royal Assent. However item 4 does not commence at all if item 17 of Schedule 1 to the Regaining Control Act commences before or on the same day as item 1 of Schedule 3 to this Act.

14. Table item 11 provides that item 5 of Schedule 3 will commence on the later of the start of the day after this Act receives the Royal Assent and immediately after the commencement of item 17 of Schedule 1 to the Regaining Control Act. However item 5 does not commence at all if item 17 of Schedule 1 to the Regaining Control Act does not commence.

15. Table item 12 provides that items 6 and 7 of Schedule 3 will commence the day after this Act receives the Royal Assent.

16. The note in subsection 2(1) makes it clear that the table relates only to the provisions of this Act as originally enacted. The table will not be amended to deal with any later amendments of this Act.

17. Subsection 2(2) provides that any information in column 3 of the table is not part of this Act. It provides that information may be inserted in column 3, or information in it may be edited, in any published version of this Act.

Section 3 Schedule(s)

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

Schedule 1 – When decisions are made and finally determined

Migration Act 1958

Item 1 Subsection 5(1)

1. This item inserts a definition of “finally determined” in subsection 5(1) of Part 1 of the Migration Act.

2. The definition refers to subsections 5(9) and 5(9A) of the Migration Act for the meaning of when an application is “finally determined” under the Migration Act. New subsection 5(9A) is inserted in the Migration Act by item 3 of this Schedule.

3. The purpose of this amendment, in conjunction with the amendment made by item 2 of this Schedule, is to emphasise that the point at which an application becomes “finally determined” is defined under the Migration Act.

Item 2 Subsection 5(9)

4. This item omits the words “finally determined” in subsection 5(9) of Part 1 of the Migration Act and substitutes “*finally determined*”.

5. The purpose of this amendment, in conjunction with the amendment made by item 1 of this Schedule, is to make it clear that the meaning of the term “finally determined” is defined under the Migration Act.

Item 3 After subsection 5(9)

6. This item inserts new subsections 5(9A) and 5(9B) after subsection 5(9) of Part 1 of the Migration Act.

7. Section 5(9) provides that an application is finally determined when either a decision that has been made in respect of the application is not, or is no longer, subject to any form of review under Part 5 or Part 7 of the Migration Act, or the decision that has been made in respect of the application was subject to some form of review under Part 5 or Part 7, but the period within which such a review could be instituted has ended without a review having been instituted as prescribed.

New subsection 5(9A)

8. New subsection 5(9A) provides that, without limiting subsection 5(9), if a review of a decision has been instituted under Part 5 or Part 7 of the Migration Act, the application is finally determined when a decision on the review in respect of the application is taken to have been made under any of the following provisions:

   - subsection 368(2) (Migration Review Tribunal (MRT) written decisions), as amended by item 17 of this Schedule;

   - subsection 368D(1) (MRT oral decisions), as amended by item 20 of this Schedule;

   - subsection 430(2) (Refugee Review Tribunal (RRT) written decisions), as amended by item 26 of this Schedule;

   - subsection 430D(1) (RRT oral decisions), as amended by item 29 of this Schedule.

9. The purpose of new subsection 5(9A) is to refer directly to provisions under which the MRT and the RRT are taken to have made a decision, at a particular day and time, which is final and which renders the application finally determined for the purposes of the Migration Act. As a result of the amendments referred to above, these decisions are taken to be made on the day and at the time recorded in a written statement if the decision is given in writing, or on the day and at the time the decision is given if the decision is given orally.

New subsection 5(9B)

10. New subsection 5(9B) provides that subsection 5(9A) does not apply in relation to the following decisions:

    - a decision of the MRT under paragraph 349(2)(c);

    - a decision of the RRT under paragraph 415(2)(c).

11. A note after new subsection 5(9B) states that the decisions listed in subsection 5(9B) are for the remission of some matters by the relevant Tribunal. These exceptions from the decisions listed in new subsection 5(9A) are necessary because an application is not intended to be finally determined if it is remitted by the MRT or the RRT to the Minister or delegate for further consideration.

Item 4 Section 67

12. This item repeals section 67 of Subdivision AC of Division 3 of Part 2 of the Migration Act and substitutes a new section 67.

13. Section 67 currently provides that a visa is to be granted by the Minister causing a record of it to be made.

14. This item substitutes a new heading for section 67 – "Grant and refusal of visa – how and when".

15. New subsection 67(1) provides that both decisions to grant a visa and decisions to refuse to grant a visa are taken to be made by the Minister causing a record to be made of the decision.

16. New subsection 67(2) provides that the record of the decision must state the time and day of its making.

17. New subsection 67(3) provides that the decision is taken to be made on the day and at the time the record is made.

18. New subsection 67(4) provides that the Minister has no power to vary or revoke the decision after the day and time the record is made.

19. New subsection 67(5) provides that failure to state the day and time of the making of the record, as required by subsection 67(2), does not affect the validity of the decision, or the operation of subsection 67(4) which prevents variation or revocation of the decision after the day and time on which the record is made.

20. The purpose of new section 67 is to provide that a decision by the Minister or delegate on a visa application, either to grant or to refuse to grant a visa, becomes final on the day and at the time a record of the decision is made. The decision-maker may not consider any

submissions made by the applicant or any other person from that time, and the decision may not be varied or revoked.

21. Subsection 67(4), preventing variation or revocation of a decision after it is made, applies only to a decision that has been validly made and that does not involve legal error. A decision that is later found to be legally defective and to involve jurisdictional error may still be set aside, and remade according to law.

Item 5 Subsection 134(1)

22. This item omits ", by written notice given to its holder," in subsection 134(1) of Subdivision G of Division 3 of Part 2 of the Migration Act.

23. Subsection 134(1) of the Migration Act currently provides that certain business visas may be cancelled by written notice given to the holder of the visa. This amendment omits the words "by written notice given to its holder" from subsection 134(1) because it is no longer the intention that a business visa is to be cancelled by giving written notice to the visa's holder. Business visas are to be cancelled by a decision that is taken to be made on the day and at the time a record of the decision is made, in accordance with section 138 of the Migration Act as amended by item 9 of this Schedule.

24. The purpose of this amendment is to bring certainty to the time a business visa is cancelled. Cancellation of the visa will now occur on the day and at the time the decision to cancel the visa is recorded, rather than when the visa holder is taken to have been notified under the Migration Act. Subsection 134(7), as amended by item 8 of this Schedule requires written notice of the cancellation decision to be given to the holder of the visa.

Item 6 Subsection 134(3A)

25. This item omits ", by written notice to its holder," in subsection 134(3A) of Subdivision G of Division 3 of Part 2 of the Migration Act.

26. Subsection 134(3A) of the Migration Act currently provides that certain investment-linked visas may be cancelled by giving written notice to the holder of the visa. The words "by written notice to its holder" are omitted from subsection 134(3A) because it is no longer the intention that an investment-linked visa is to be cancelled by giving written notice to the holder of the visa. Investment-linked visas are to be cancelled by a decision that is taken to be made on the day and at the time a record of the decision is made, in accordance with section 138 of the Migration Act as amended by item 9 of this Schedule.

27. The purpose of this amendment is to bring certainty to the time a certain investment-linked visa is cancelled. Cancellation of the visa will now occur on the day and at the time the decision to cancel the visa is recorded, rather than when the visa holder is taken to have been notified under the Migration Act. Subsection 134(7), as amended by item 8 of this Schedule, requires written notice of the cancellation decision to be given to the holder of the visa.

Item 7 Subsection 134(4)

28. This item omits ", by giving written notice to that person" in subsection 134(4) of Subdivision G of Division 3 of Part 2 of the Migration Act.

29. Subsection 134(4) of the Migration Act currently provides that if the Minister cancels a business visa under subsection 134(1) or subsection 134(3A), the Minister must also cancel any business visa held by a member of the family unit of the holder of the cancelled visa by

giving written notice to that person. These words "by giving written notice to the person" are omitted from subsection 134(4) because it is no longer the intention that a business visa held by a family unit member is to be cancelled by giving written notice to the visa's holder. These visas are to be cancelled by a decision that is taken to be made on the day and at the time a record of the decision is made, in accordance with section 138 of the Migration Act as amended by item 9 of this Schedule below.

30. The purpose of this amendment is to bring certainty to the time a business visa is cancelled. Cancellation of the visa will now occur on the day and at the time the decision to cancel the visa is recorded, rather than when the visa holder is taken to have been notified under the Migration Act. Subsection 134(7), as amended by item 8 of this Schedule below requires written notice of the cancellation decision to be given to the holder of the visa.

Item 8 Subsection 134(7)

31. This item omits the words "include in the notice given to its holder" in subsection 134(7) of Subdivision G of Division 3 of Part 2 of the Migration Act, and substitutes the words "give written notice of the cancellation decision to its holder, including".

32. This amendment is consequential to the amendments made by items 5, 6 and 7 of this Schedule the effect of which is that a cancellation of a business visa or investment-linked visa under section 134 will occur when the decision to cancel the visa is recorded and not when written notice is given to the holder of the visa. This amendment ensures that the visa holder will now be given written notice of the cancellation decision, after the cancellation decision is taken to be made.

Item 9 Section 138

33. This item repeals section 138 of Subdivision H of Division 3 of Part 2 of the Migration Act and substitutes a new section 138.

34. Section 138 currently provides that a visa is cancelled by the Minister causing a record of the cancellation to be made. Section 138 also currently provides that a cancellation of a visa is revoked under section 131 (relating to the revocation of the cancellation of a visa held by a person outside Australia) by the Minister causing a record of the revocation to be made.

35. New subsection 138(1) provides that decisions to cancel a visa or not to cancel a visa, or to revoke the cancellation of a visa or not to revoke the cancellation of a visa, are taken to be made by the Minister causing a record to be made of the decision.

36. New subsection 138(2) provides that the record of the decision must state the time and day of its making.

37. New subsection 138(3) provides that the decision is taken to have been made on the day and at the time the record is made.

38. New subsection 138(4) provides that the Minister has no power to vary or revoke the decision after the day and time the record is made.

39. New subsection 138(5) provides that failure to state the day and time of the making of the record of the decision, as required by subsection 138(2), does not affect the validity of the decision, or the operation of subsection 138(4), which prevents variation or revocation of the decision after the day and time on which the record is made.

40. The purpose of new section 138 is to make it clear that a decision by the Minister or delegate to cancel a visa or not to cancel a visa, or to revoke the cancellation of a visa or not to revoke the cancellation of a visa, becomes final on the day and at the time a record of the decision is made. The decision-maker may not consider any submissions made by the visa holder or any other person after that time, and the decision may not be varied or revoked.

41. Subsection 138(4), preventing variation or revocation of a decision after it is made, applies only to a decision that has been validly made and that does not involve legal error. A decision that is later found to be legally defective and to involve jurisdictional error may still be set aside, and remade according to law.

Item 10 After subsection 355(1)

42. This item inserts new subsection 355(1A) after subsection 355(1) of Division 4 of Part 5 of the Migration Act.

43. Section 355 deals with the appointment of a new member to constitute the MRT for the purposes of a particular application for review when a member who originally constituted the MRT for the particular review is no longer able to continue with the review.

44. New subsection 355(1A) provides that, to avoid doubt, section 355 does not apply after a decision on the review is taken to have been made as provided by subsection 368(2), if the decision is a written decision, or subsection 368D(1), if the decision is an oral decision.

45. The purpose of this amendment is to put beyond doubt that after a decision is taken to be made and becomes final under subsections 368(2) and (2A), as amended and inserted by item 17 of this Schedule, respectively, and subsections 368D(1) and (2), as amended by item 20 of this Schedule, the MRT has no further power in respect of the decision. Section 355 does not therefore apply to enable the MRT to be reconstituted after a final decision is taken to be made.

Item 11 Paragraph 355A(2)(a)

46. This item repeals paragraph 355A(2)(a) of Division 4 of Part 5 of the Migration Act, and substitutes a new paragraph 355A(2)(a).

47. Paragraph 355A(2)(a) currently provides that the Principal Member of the MRT must not give a direction reconstituting the MRT for the purposes of a particular application for review unless the MRT's decision on the review has not been recorded in writing or given orally.

48. New paragraph 355A(2)(a) provides that a reconstitution direction must only be given by the Principal Member if the MRT's decision on the review is not taken to have been made under subsection 368(2) if a written decision, or subsection 368D(1) if an oral decision. The effect of this amendment is to make it clear that the Principal Member does not have the power to reconstitute the MRT if a final decision on the review is taken to have been made under subsection 368(2), as amended by item 17 of this Schedule, if a written decision, or subsection 368D(1), as amended by item 20 of this Schedule, if an oral decision, rather than when the decision is simply recorded in writing or given orally. This reflects the new scheme introduced by these amendments which is intended to ensure that a decision is taken to be made and to become final on the day and at the time recorded in a written statement or is given orally.

Item 12 Section 368 (heading)

49. This item repeals the current heading of section 368 of Division 6 of Part 5 of the Migration Act, “Tribunal to record its decisions etc”, and substitutes a new heading, “Tribunal’s decision and written statement”. This item also inserts a new descriptive sub-heading, “*Written statement of decision*” before subsection 368(1) of the Migration Act.

50. The purpose of this amendment is to reflect more clearly the operation of section 368 following the amendments made by items 13 to 19 of this Schedule. The new sub-heading, “*Written statement of decision*” describes the operation of subsection 368(1), as amended by items 13 to 16 of this Schedule, which sets out the requirements for the MRT to make a written statement of its decisions.

Item 13 Subsection 368(1)

51. This item omits the word “prepare” in subsection 368(1) of Division 6 of Part 5 of the Migration Act, and substitutes the word “make”.

52. This amendment is consequential to the amendment made by item 17 of this Schedule to subsection 368(2), which has the effect that the MRT’s decision on a review, other than an oral decision, is taken to have been made by the making of a written statement.

Item 14 Paragraph 368(1)(a)

53. This item omits the word “review” in paragraph 368(1)(a) of Division 6 of Part 5 of the Migration Act, and substitutes “review; and”.

54. This amendment is a drafting rectification to insert the word “and” between the paragraphs of subsection 368(1).

Item 15 Paragraph 368(1)(b)

55. This item omits “decision;” in paragraph 368(1)(a) of Division 6 of Part 5 of the Migration Act, and substitutes “decision; and”.

56. This amendment is a drafting rectification to insert the word “and” between the paragraphs of subsection 368(1).

Item 16 At the end of subsection 368(1)

57. This item adds two additional paragraphs 368(1)(e) and 368(1)(f) at the end of subsection 368(1) of Division 6 of Part 5 of the Migration Act.

58. New paragraph 368(1)(e) provides that, unless the MRT’s decision is given orally, the written statement made in accordance with subsection 368(1) must record the day and time the statement is made.

59. New paragraph 368(1)(f) provides that if the MRT’s decision is given orally, the written statement made in accordance with subsection 368(1) must record the day and time the decision is given orally. Section 368D of the Migration Act, as amended by item 20 of this Schedule, provides that if a decision is given orally, it is taken to have been made and notified to the applicant on the day and at the time the decision is given orally.

60. The purpose of this amendment is to ensure that the written statement of the MRT's decision records the day and time the decision is taken to be made, and when the decision becomes final.

Item 17 Subsection 368(2)

61. This item repeals subsection 368(2) of Division 6 of Part 5 of the Migration Act and substitutes new subsections 368(2) and 368(2A). This item also inserts a new descriptive sub-heading before new subsections 368(2) and 368(2A), "*How and when written decisions are taken to be made*".

62. Subsection 368(2) currently provides that a decision on a review by the MRT, other than an oral decision, is taken to have been made on the date of the written statement prepared in accordance with subsection 368(1).

63. New subsection 368(2) provides that a decision on a review (other than an oral decision) is taken to have been made by the making of the written statement, and to have been made on the day, and at the time, the written statement is made.

64. The note after new subsection 368(2) states that for oral decisions, see section 368D. Item 20 contains an explanation for new section 368D.

65. New subsection 368(2A) provides that the MRT has no power to vary or revoke a decision to which subsection 368(2) applies after the day and time the written statement is made.

66. The purpose of new subsections 368(2) and 368(2A) is to put beyond doubt that a written decision is taken to be made when the written statement is made, on the day and at the time recorded on the written statement, and the decision becomes final at that time.

67. New subsection 368(2A), preventing variation or revocation of a decision after it is made by the MRT, applies only to a decision that has been validly made and that does not involve legal error. A decision that is later found to be legally defective and to involve jurisdictional error may still be set aside, and remade according to law.

68. This item also inserts a new descriptive sub-heading "*Return of documents etc.*" before subsection 368(3) of the Migration Act.

Item 18 Subsection 368(3)

69. This item omits the words "Where the Tribunal has prepared the written statement, the Tribunal shall" in subsection 368(3) of Division 6 of Part 5 of the Migration Act, and substitutes the words "After the Tribunal makes the written statement, the Tribunal must".

70. This amendment is consequential to the amendment made by items 13, 16 and 17 of this Schedule, the effect of which is that under section 368, a written statement of a decision of the MRT is now "made" rather than "prepared".

Item 19 At the end of section 368

71. This item adds a new subsection 368(4) in section 368 of Division 6 of Part 5 of the Migration Act. This item also adds a descriptive sub-heading "*Validity etc. not affected by procedural irregularities*" before new subsection 368(4).

72. New subsection 368(4) provides that the validity of a decision of the MRT, and the operation of new subsection 368(2A), inserted in section 368 by item 17 of this Schedule, are not affected by a failure to record in the written statement the day and time of the making of the written statement, in accordance with new paragraph 368(1)(e) inserted by item 16 of this Schedule, or to record in the written statement the day and time that an oral decision was given, in accordance with new paragraph 368(1)(f) inserted by item 16 of this Schedule. The validity of the decision is also not affected by a failure to comply with subsection 368(3) of the Migration Act, which requires that after the written statement is made, the MRT must return certain specified documents to the Secretary of the Department of Immigration and Border Protection.

73. The purpose of this amendment is to make it clear that a decision of the MRT remains valid even if the relevant day and time are not recorded on the written statement, and if the required documents are not returned to the Secretary as required.

Item 20 Section 368D

74. This item repeals section 368D of Division 6 of Part 5 of the Migration Act and substitutes a new section 368D.

75. The current heading of section 368D is “Notifying parties when Tribunal gives an oral decision”. The heading of new section 368D is “Tribunal’s decision given orally”. The new heading is a consequence of the amendments made by this item which expand the scope of new section 368D to provide that an oral decision by the MRT is taken to be made and becomes final on the day and at the time it is given, as well as providing that the applicant is taken to be notified on the day and at the time the decision is given orally.

76. New subsection 368D(1) provides that a decision on a review that is given orally by the MRT is taken to have been made, and the applicant is taken to have been notified, on the day and at the time the decision is given orally.

77. New subsection 368D(2) provides that the MRT has no power to vary or revoke a decision after the day and time the decision is given orally. Subsection 368D(2) applies only to a decision that has been validly made and that does not involve legal error. A decision that is later found to be legally defective and to involve jurisdictional error may still be set aside, and remade according to law.

78. New subsection 368D(3) provides that the MRT must give the applicant and the Secretary of the Department of Immigration and Border Protection a copy of the statement made under subsection 368(1) within 14 days after the decision is given orally.

79. New subsection 368D(4) provides that a failure to comply with subsection 368D(3) does not affect the validity of the decision or the operation of subsection 368D(2) in making the decision final.

Item 21 After subsection 422(1)

80. This item inserts a new subsection 422(1A) after subsection 422(1) of Division 3 of Part 7 the Migration Act.

81. Section 422 deals with the appointment of a new member to constitute the RRT for the purposes of a particular application for review, when a member who originally constituted the RRT for the particular review is no longer able to continue with the review.

82. New subsection 422(1A) provides that, to avoid doubt, section 422 does not apply after a decision on the review is taken to have been made as provided by subsection 430(2), if the decision is a written decision, or subsection 430D(1), if the decision is an oral decision.

83. The purpose of this amendment is to put it beyond doubt that after a decision is taken to be made and becomes final under subsections 430(2) and (2A), as amended and inserted by item 26 of this Schedule, respectively, and subsections 430D(1) and (2), as amended by item 29 of this Schedule, the RRT has no further power in respect of the decision. Section 422 does not therefore apply to enable the RRT to be reconstituted after a final decision is taken to be made.

Item 22 Paragraph 422A(2)(a)

84. This item repeals paragraph 422A(2)(a) of Division 3 of Part 7 the Migration Act, and substitutes a new paragraph 422A(2)(a).

85. Paragraph 422A(2)(a) currently provides that the Principal Member of the RRT must not give a direction reconstituting the RRT for the purposes of a particular application for review unless the RRT's decision on the review has not been recorded in writing or given orally.

86. New paragraph 422A(2)(a) provides that a reconstitution direction must only be given by the Principal Member if the RRT's decision on the review is not taken to have been made under subsection 430(2) if a written decision, or subsection 430D(1) if an oral decision. The effect of this amendment is to make it clear that the Principal Member does not have the power to reconstitute the RRT if a final decision on the review is taken to have been made under subsection 430(2), as amended by item 26 of this Schedule, if a written decision, or subsection 430D(1), as amended by item 29 of this Schedule, if an oral decision, rather than when the decision is simply recorded in writing or given orally. This reflects the new scheme introduced by these amendments which is intended to ensure that a decision is taken to be made and to become final on the day and at the time recorded in a written statement or is given orally.

Item 23 Section 430 (heading)

87. This item repeals the current heading of section 430 of Division 5 of Part 7 of the Migration Act, "Refugee Review Tribunal to record its decisions etc", and substitutes a new heading, "Refugee Review Tribunal's decision and written statement". This item also inserts a new descriptive sub-heading, "*Written statement of decision*" before subsection 430(1).

88. The purpose of this amendment is to reflect more clearly the operation of section 430 following the amendments made by items 24 to 28 of this Schedule. The new sub-heading, "*Written statement of decision*" describes the operation of subsection 430(1), as amended by items 24 and 25 of this Schedule, which sets out the requirements for the RRT to make a written statement of its decisions.

Item 24 Subsection 430(1)

89. This item omits the word "prepare" in subsection 430(1) of Division 5 of Part 7 of the Migration Act, and substitutes the word "make".

90. This amendment is consequential to the amendment made by item 26 of this Schedule to subsection 430(2), which has the effect that the RRT's decision on a review, other than an oral decision, is taken to have been made by the making of a written statement.

Item 25 At the end of subsection 430(1)

91. This item adds two additional paragraphs 430(1)(e) and 430(1)(f) at the end of subsection 430(1) of Division 5 of Part 7 of the Migration Act.

92. New paragraph 430(1)(e) provides that, unless the RRT's decision is given orally, the written statement made in accordance with subsection 430(1) must record the day and time the statement is made.

93. New paragraph 430(1)(f) provides that if the RRT's decision is given orally, the written statement made in accordance with subsection 430(1) must record the day and time the decision is given orally. Section 430D of the Migration Act, as amended by item 29 below, provides that if a decision is given orally, it is taken to have been made and notified to the applicant on the day and at the time the decision is given orally.

94. The purpose of this amendment is to ensure that the written statement of the RRT's decision records the day and time the decision is taken to be made, when the decision becomes final.

Item 26 Subsection 430(2)

95. This item repeals subsection 430(2) of Division 5 of Part 7 of the Migration Act and substitutes new subsections 430(2) and 430(2A). This item also inserts a new descriptive sub-heading before new subsections 430(2) and 430(2A), "*How and when written decisions are taken to be made*".

96. Subsection 430(2) currently provides that a decision on a review by the RRT, other than an oral review, is taken to have been made on the date of the written statement prepared in accordance with subsection 430(1).

97. New subsection 430(2) provides that a decision on a review (other than an oral decision) is taken to have been made by the making of the written statement, and on the day, and at the time, the written statement is made.

98. The note after new subsection 430(2) states that for oral decisions, see section 430D. Item 29 contains an explanation for new section 430D.

99. New subsection 430(2A) provides that the RRT has no power to vary or revoke a decision to which subsection 430(2) applies after the day and time the written statement is made.

100. The purpose of new subsections 430(2) and 430(2A) is to put it beyond doubt that a written decision is taken to be made when the written statement is made, and to be made on the day and at the time recorded on the written statement, and the decision becomes final at that time.

101. New subsection 430(2A), preventing variation or revocation of a decision after it is made by the RRT, applies only to a decision that has been validly made and that does not involve legal error. A decision that is later found to be legally defective and to involve jurisdictional error may still be set aside, and remade according to law.

102. This item also inserts a new descriptive sub-heading "*Return of documents etc.*" before subsection 430(3) of the Migration Act.

Item 27 Subsection 430(3)

103. This item omits the words "Where the Tribunal has prepared the written statement, the Tribunal shall" in subsection 430(3) of Division 5 of Part 7 of the Migration Act, and substitutes the words "After the Tribunal makes the written statement, the Tribunal must" in subsection 430(3).

104. This amendment is consequential to the amendment made by items 24, 25 and 26 of this Schedule, the effect of which is that under section 430 a written statement of a decision by the RRT is now "made" rather than "prepared".

Item 28 At the end of section 430

105. This item adds new subsection 430(4) at the end of section 430 of Division 5 of Part 7 of the Migration Act. This item also adds a descriptive sub-heading "*Validity etc. not affected by procedural irregularities*" before new subsection 430(4).

106. New subsection 430(4) provides that the validity of a decision of the RRT, and the operation of new subsection 430(2A), inserted in section 430 by item 26 of this Schedule, are not affected by a failure to record in the written statement the day and time of the making of the written statement, in accordance with new paragraph 430(1)(e) inserted by item 25 of this Schedule, or to record in the written statement the day and time that an oral decision was given, in accordance with new paragraph 430(1)(f) inserted by item 25 of this Schedule. The validity of the decision is also not affected by a failure to comply with subsection 430(3) of the Migration Act, which requires that after the written statement is made, the RRT must return certain specified documents to the Secretary of the Department of Immigration and Border Protection.

107. The purpose of this amendment is to make it clear that a decision of the RRT remains valid even if the relevant day and time are not recorded on the written statement, and if the required documents are not returned to the Secretary as required.

Item 29 Section 430D

108. This item repeals section 430D of Division 5 of Part 7 of the Migration Act and substitutes a new section 430D.

109. The current heading of section 430D is "Notifying parties when Tribunal gives an oral decision". The heading of new section 430D is "Tribunal's decision given orally". The new heading is a consequence of the amendments made by this item which expand the scope of new section 430D to provide that an oral decision by the RRT is taken to be made and becomes final on the day and at the time it is given, as well as providing that the applicant is taken to be notified on the day and at the time the decision is given orally.

110. New subsection 430D(1) provides that a decision on a review that is given orally by the RRT is taken to have been made, and the applicant is taken to have been notified, on the day and at the time the decision is given orally.

111. New subsection 430D(2) provides that the RRT has no power to vary or revoke a decision after the day and time the decision is given orally. Subsection 430D(2) applies only to a decision that has been validly made and that does not involve legal error. A decision that is later found to be legally defective and to involve jurisdictional error may still be set aside, and remade according to law.

112. New subsection 430D(3) provides that the RRT must give that applicant and the Secretary of the Department of Immigration and Border Protection a copy of the statement made under subsection 430D(1) within 14 days after the decision is given orally.

113. New subsection 430D(4) provides that a failure to comply with subsection 430D(3) does not affect the validity of the decision or the operation of subsection 430D(2) in making the decision final.

Item 30 Application –Schedule 2

114. Subitem 30(1) provides that the amendment of the Migration Act made by items 1 to 3 and items 10 to 29 apply in relation to a decision of the MRT or the RRT that is taken to have been made, as provided by that Act as so amended, on or after the commencement of this Schedule.

115. The purpose of subitem 30(1) is to ensure that the amendments made by items 1 to 3 and items 10 to 29 of this Schedule apply to decisions taken to have been made by the MRT or the RRT on or after commencement of these amendments.

116. Subitem 30(2) provides that the amendments of the Migration Act made by items 4 to 9 apply in relation a decision of the Minister that is taken to have been made, as provided by that Act as so amended, on or after the commencement of this Schedule.

117. The purpose of subitem 30(2) is to ensure that the amendments made by items 4 to 9 of this Schedule apply to decisions taken to have been made by the Minister on or after commencement of these amendments.

Schedule 2 – Bar on further applications for protection visas

Migration Act 1958

Item 1 Section 48A (heading)

118. This item repeals the current heading "Non-citizen refused a protection visa may not make further application for protection visa" and replaces it with the heading "No further applications for protection visa after refusal or cancellation" in section 48A of Subdivision AA of Division 3 of Part 2 of the Migration Act.

119. This amendment to the heading better reflects the content of section 48A which prevents further applications for a protection visa after refusal or cancellation of a protection visa (not just refusal of a protection visa).

Item 2 After subsection 48A(1B)

120. This item inserts new subsection 48A(1C) after subsection 48A(1B) in Subdivision AA of Division 3 of Part 2 of the Act.

121. New subsection 48A(1C) provides that subsections 48A(1) and (1B) apply in relation to a non-citizen regardless of any of the following:

- the grounds on which an application would be made or the criteria which the non-citizen would claim to satisfy;
- whether the grounds on which an application would be made or the criteria which the non-citizen would claim to satisfy existed earlier;
- the grounds on which an earlier application was made or the criteria which the non-citizen earlier claimed to satisfy;
- the grounds on which a cancelled protection visa was granted or the criteria the non-citizen satisfied for the grant of that visa.

122. Subsection 48A(1) provides that subject to section 48B, a non-citizen who, while in the migration zone, has made one or more applications for a protection visa, where the grant of the visa or visas have been refused (whether or not the application or applications have been finally determined), may not make a further application for a protection visa while in the migration zone.

123. Subsection 48A(1B) provides that subject to section 48B, a non-citizen in the migration zone who held a protection visa that was cancelled may not make a further application for a protection visa while in the migration zone.

124. Section 48B of the Migration Act allows the Minister to determine that section 48A does not apply to a non-citizen to prevent an application for a protection visa for a limited period of time if the Minister thinks that it is in the public interest to do so. This power may only be exercised by the Minister personally, and the Minister does not have a duty to consider whether to exercise the power under subsection 48B(1) in respect of any non-citizen, whether he or she is requested to do so by the non-citizen or by any other person, or in any other circumstances.

125. The paragraphs in new subsection 48A(1C) apply as relevant to a non-citizen who has been refused a protection visa (subsection 48A(1)), or held a protection visa that was cancelled (subsection 48A(1B)).

126. This amendment clarifies and restores the intended operation of the statutory bar in section 48A of the Migration Act to prevent a non-citizen who has been refused a protection visa, or held a protection visa that was cancelled, from applying for a subsequent protection visa while in the migration zone, irrespective of the grounds or the criteria on which their application would be made; whether or not the grounds or criteria existed earlier; the grounds or the criteria on which their earlier protection visa application was refused; or the grounds on which the cancelled protection visa was granted or the criteria the non-citizen satisfied for the grant of that visa.

Item 3 Subsection 48A(2) (paragraph (aa) of the definition of *application for a protection visa*)

127. This item repeals paragraph (aa) in the definition of "application for a protection visa" in subsection 48A(2) and substitutes new paragraph (aa) in the definition of "application for a protection visa" in subsection 48A(2) in Subdivision AA of Division 3 of Part 2 of the Migration Act.

128. Current paragraph 48A(2)(aa) defines an "application for a protection visa" in section 48A as an application for a visa, a criterion for which is mentioned in paragraph 36(2)(a), (aa), (b) or (c) of the Migration Act. These refer to different criteria for a protection visa including where Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol, where there is a real risk that a non-citizen will suffer significant harm due to being removed from Australia, or where the non-citizen is a member of the family unit of a person who holds a protection visa.

129. New paragraph 48A(2)(aa) provides that in section 48A, an "application for a protection visa" includes an application for a visa that, under the Migration Act or the regulations as in force at any time, is or was a visa of the class known as protection visas.

130. This amendment clarifies the definition of "application for a protection visa" in section 48A of the Migration Act to include an application for a visa that, under the Migration Act or the regulations as in force at any time, is or was a visa of the class known as protection visas. It is a clarification of the position and intended meaning of that phrase. It is expressed broadly to ensure all applications for a visa, that is, or was, a visa of the class known as protection visas, including temporary protection (Subclass 785) visas and permanent protection (Subclass 866) visas, are captured for the purposes of section 48A. Any visa created in the future which is a visa of the class known as protection visas will be captured by this provision.

131. This amendment reinforces the intention that the statutory bar in section 48A of the Migration Act applies to prevent a non-citizen, while in the migration zone, who has been refused a protection visa, or held a protection visa that was cancelled, from making a subsequent protection visa application in the migration zone regardless of whether the further protection visa application would be made based on a different criterion to that which formed the basis of a previous unsuccessful protection visa application, or a criterion or grounds that did not exist earlier.

Item 4 Subsection 48A(2) (paragraph (aa) of the definition of *application for a protection visa*)

132. This item makes the same amendment as item 3 of this Schedule. However, it includes a note that this item does not commence at all if item 10 of Schedule 1 to the *Migration Amendment (Regaining Control Over Australia's Protection Obligations) Act 2013* (the Regaining Control Act) commences before or on the same day as the provision(s) covered by table item 5 in subsection 2(1) of this Act (see table item 6 in subsection 2(1) of this Act).

133. The Regaining Control Act will amend paragraph 48A(2)(aa) of the definition of "application for a protection visa" to remove references to the criteria relating to complementary protection in the Migration Act.

134. The purpose of this amendment is to ensure that if the Regaining Control Act commences after this Act, the amendment in item 4 of this Schedule will supersede the amendment made to the same provision of the Migration Act by the Regaining Control Act. If the Regaining Control Act commences before, or on the same day as, this Act, the amendment in item 4 of this Schedule will not be required because in that case, the amendment in item 3 will be effective.

Item 5 Application of amendments

135. Subitem 5(1) provides that for the purposes of the application of section 48A of the Migration Act after the commencement of item 2 of this Schedule, a non-citizen is prevented from making an application for a protection visa after the commencement of the item, because of a refusal or cancellation referred to in subsection 48A(1) or subsection 48A(1B), whether the refusal or cancellation happened before, on or after that commencement.

136. The purpose of subitem 5(1) is to ensure that, after the commencement of item 2 of this Schedule, an earlier event of a refusal or cancellation of a protection visa will operate to prevent a non-citizen from making a further application for a protection visa whether that event occurred before, on or after the commencement of the amendments.

137. Subitem 5(2) provides that for the purposes of determining whether a non-citizen is prevented, after the commencement of item 2 of this Schedule, from making an application for a protection visa under section 48A of the *Migration Act 1958*, an amendment made by item 3 or 4 of this Schedule applies in relation to any earlier application for a protection visa whether made before, on or after the commencement of item.

138. The purpose of subitem 5(2) is to make clear that after the commencement of the amendments any earlier application for a protection is to be determined by reference to the amended definition in subsection 48A(2) when determining whether a non-citizen is prevented by section 48A from making a further application for a protection visa. This avoids any confusion with the version of the law that should be considered for the purposes of the application of section 48A after the commencement of item 2 of this Schedule.

Schedule 3 – Security Assessments

Migration Act 1958

Item 1 After subsection 36(1)

139. This item inserts new subsections 36(1A) and 36(1B) after subsection 36(1) in Subdivision A of Division 3 of Part 2 of the Migration Act.

140. New subsection 36(1A) provides that an applicant for a protection visa must satisfy the criterion in subsection 36(1B) and at least one of the criteria in subsection 36(2). Subsection 36(2) of the Migration Act sets out criteria for protection visas.

141. New subsection 36(1B) provides that a criterion for the grant of a protection visa is that the applicant is not assessed by the Australian Security Intelligence Organisation (ASIO) to be directly or indirectly a risk to security (within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act)).

142. New subsection 36(1A) and subsection 36(1B) apply to the class of visas known as protection visas which includes, a protection (Subclass 866) visa (permanent protection visa). The permanent protection visa is a specified subclass in Item 1401 of Part 4 of Schedule 1 to the Regulations. The permanent protection visa contains criteria in addition to the criteria provided for in section 36 for the protection visa class of visas in Part 866 of Schedule 2 to the *Migration Regulations 1994* (the Regulations).

143. The purpose of this amendment is to address the finding of the High Court in the matter of *Plaintiff M47/2012 v Director-General of Security & Ors* [2012] HCA 46 (*Plaintiff M47*). In *Plaintiff M47,* the High Court held that paragraph 866.225(a) of Part 866 of Schedule 2 to the Regulations is invalid to the extent that it makes public interest criterion (PIC) 4002 a criterion for the grant of a protection visa.

144. The majority in *Plaintiff M47* found that the Regulations could not validly prescribe PIC 4002 as a criterion for the grant of a protection visa because doing so was inconsistent with the scheme provided in the Migration Act for the making of a decision to refuse a protection visa relying on Articles 32 and 33(2) of the Convention Relating to the Status of Refugees as amended by the Refugees Protocol (Refugees Convention).

145. As PIC 4002 is no longer a valid criterion to prescribe for a protection visa application, where an applicant is assessed by ASIO to be directly or indirectly a risk to security, this amendment will provide a criterion in section 36 that reflects PIC 4002.

Item 2 Paragraph 411(1)(c)

146. This item repeals paragraph 411(1)(c) and substitutes a new paragraph 411(1)(c) in Division 2 of Part 7 of the Migration Act. New paragraph 411(1)(c) provides that a decision reviewable by the Refugee Review Tribunal (RRT) is a decision to refuse to grant a protection visa, other than a decision that was made relying on one or more of Articles 1F, 32 or 33(2) of the Refugees Convention or subsection 36(1B) or paragraph 36(2C)(a) or paragraph 36(2C)(b).

147. The purpose of this amendment is to put beyond doubt that a decision to refuse to grant a protection visa based on a decision that was made relying on new subsection 36(1B) is not a decision reviewable by the RRT. A protection visa includes a protection (Subclass 866) visa (permanent protection visa). The permanent protection visa is a specified subclass in Item

1401 of Part 4 of Schedule 1 to the Regulations. The amendment also reflects current paragraph 500(4)(c) of the Migration Act by confirming that the RRT does not have the power to review a decision to refuse to grant a protection visa relying on one or more of Articles 1F, 32 or 33(2) of the Refugees Convention or paragraph 36(2C)(a) or paragraph 36(2C)(b).

148. Section 411 of the Migration Act lists which decisions are reviewable by the RRT and currently includes decisions to refuse to grant a protection visa (other than a decision that was made relying on paragraph 36(2C)(a) or paragraph 36(2C)(b)).

149. The decision to refuse a protection visa based on new subsection 36(1B) is a decision based on the applicant for a protection visa being assessed by ASIO to be directly or indirectly a risk to security (within the meaning of section 4 of the ASIO Act). New subsection 36(1B) is a binary criterion in that ASIO either has or has not assessed the applicant to be directly or indirectly a risk to security. The Minister or delegate has no involvement in an assessment made by ASIO and no discretion in a decision to refuse a protection visa based on an applicant being the subject of an adverse security assessment. The only decision made regarding new subsection 36(1B) is that the criterion is either met or it is not met.

150. A decision to refuse to grant a protection visa relying on new subsection 36(1B) is not a decision relying on one or more of Articles 1F, 32 or 33(2) of the Refugees Convention or paragraph 36(2C)(a) or paragraph 36(2C)(b) of the Migration Act, which are provided for separately by this item. It is a decision based on an adverse security assessment provided and determined by ASIO.

151. This amendment is a consequential amendment as a result of the amendment made by item 1 above in this Schedule.

152. The note to the item provides that this item does not commence at all if item 17 of Schedule 1 to the *Migration Amendment (Regaining Control Over Australia's Protection Obligations) Act 2013* (Regaining Control Act) commences before or on the same day as table item 7 in subsection 2(1) of this Act, which is the day after this Act receives the Royal Assent.

153. Item 17 of Schedule 1 to the Regaining Control Act will, amongst other things, repeal paragraph 411(1)(c) and will substitute paragraph 411(1)(c) to provide that a decision is reviewable by the RRT when it is a decision to refuse to grant a protection visa (other than a decision that was made relying on one or more of Articles 1F, 32 or 33(2) of the Refugees Convention).

154. In the event that the Regaining Control Act commences before or on the same day as the day after this Act receives Royal Assent, item 3 of this Schedule will come into effect.

Item 3 Paragraph 411(1)(c)

155. This item repeals paragraph 411(1)(c) and substitutes with new paragraph 411(1)(c) in Division 2 of Part 7 of the Migration Act. New paragraph 411(1)(c) provides that a RRT-reviewable decision is a decision to refuse to grant a protection visa other than a decision that was made on the basis of subsection 36(1B) or one or more of Articles 1F, 32 or 33(2) of the Refugees Convention.

156. The purpose of this amendment is to put beyond doubt that a decision to refuse to grant a protection visa based on a decision that was made relying on new subsection 36(1B) is not a decision reviewable by the RRT. A protection visa includes a protection (Subclass 866) visa

(permanent protection visa). The permanent protection visa is a specified subclass in Item 1401 of Part 4 of Schedule 1 to the Regulations.

157. This amendment also reflects current paragraph 500(4)(c) by confirming that the RRT does not have the power to review a decision to refuse to grant a protection visa relying on one or more of Articles 1F, 32 or 33(2) of the Refugees Convention or paragraph 36(2C)(a) or paragraph 36(2C)(b).

158. Section 411 of the Migration Act lists which decisions are reviewable by the RRT and currently includes decisions to refuse to grant a protection visa (other than a decision that was made relying on paragraph 36(2C)(a) or paragraph 36(2C)(b)).

159. The decision to refuse a protection visa based on new subsection 36(1B) is a decision based on the applicant for a protection visa being assessed by ASIO to be directly or indirectly a risk to security (within the meaning of section 4 of the ASIO Act). New subsection 36(1B) is a binary criterion in that ASIO either has or has not assessed the applicant to be directly or indirectly a risk to security. The Minister or delegate has no involvement in an assessment made by ASIO and no discretion in a decision to refuse a protection visa based on an applicant being the subject of an adverse security assessment. The only decision made regarding new subsection 36(1B) is that the criterion is either met or it is not met.

160. A decision to refuse to grant a protection visa relying on new subsection 36(1B) is not a decision relying on one or more of Articles 1F, 32 or 33(2) of the Refugees Convention which are provided for separately by this item. It is a decision based on an adverse security assessment provided and determined by ASIO.

161. This amendment is a consequential amendment as a result of the amendment made by item 1 of this Schedule.

162. The note to this item provides that this item does not commence at all if item 17 of Schedule 1 to the Regaining Act does not commence. This item will commence on the later of the start of the day after this Act receives the Royal Assent and immediately after the commencement of item 17 of Schedule 1 to the Regaining Control Act.

163. Item 17 of Schedule 1 to the Regaining Control Act will, amongst other things, repeal paragraph 411(1)(c) and will substitute paragraph 411(1)(c) to provide that a decision is reviewable by the RRT when it is a decision to refuse to grant a protection visa (other than a decision that was made relying on one or more of Articles 1F, 32 or 33(2) of the Refugees Convention).

Item 4 Paragraph 411(1)(d)

164. This item repeals paragraph 411(1)(d) and substitutes a new paragraph 411(1)(d) in Division 2 of Part 7 of the Migration Act. New paragraph 411(1)(d) provides that a RRT-reviewable decision is a decision to cancel a protection visa, other than a decision that was made because of one or more of Articles 1F, 32 or 33(2) of the Refugees Convention or an assessment by the Australian Security Intelligence Organisation that the holder of the visa is directly or indirectly a risk to security (within the meaning of section 4 of the ASIO Act) or paragraph 36(2C)(a) or paragraph 36(2C)(b).

165. This amendment puts beyond doubt that a decision to cancel a protection visa because of an assessment by ASIO that the holder of a protection visa is directly or indirectly a risk to security (within the meaning of section 4 of the ASIO Act) is not a decision reviewable by the RRT. A protection visa includes a protection (Subclass 866) visa (permanent protection

visa). The permanent protection visa is a specified subclass in Item 1401 of Part 4 of Schedule 1 to the Regulations.

166. The amendment also reflects current paragraph 500(4)(c) by confirming that the RRT does not have the power to review a decision to cancel a protection visa because of one or more of Articles 1F, 32 or 33(2) of the Refugees Convention or paragraph 36(2C)(a) or paragraph 36(2C)(b).

167. Section 411 of the Migration Act lists the decisions which are reviewable by the RRT and, in particular, includes decisions to cancel a protection visa other than a decision that was made because of paragraph 36(2C)(a) or paragraph 36(2C)(b).

168. A decision to cancel a protection visa made because of an ASIO assessment that the visa holder is directly or indirectly a risk to security is a decision because of the adverse assessment is not a decision because of Articles 1F, 32 or 33(2) of the Refugees Convention or paragraph 36(2C)(a) or paragraph 36(2C)(b) of the Migration Act, which are provided for separately by this item. It is a decision because of the existence of an adverse security assessment provided by ASIO. The Minister or delegate has no involvement in an assessment made by ASIO and no discretion in a decision to cancel a protection visa based on an applicant being the subject of an adverse security assessment. The only decision made is to cancel a protection visa because ASIO has provided an assessment that the visa holder is directly or indirectly a risk to security.

169. In limited circumstances, an assessment by ASIO that a non-citizen is directly or indirectly a risk to security can be reviewed under Division 4 of Part IV of the ASIO Act.

170. This amendment is a consequential amendment as a result of the amendment made by item 1 above.

171. The note to the item provides that this item does not commence at all if item 17 of Schedule 1 to the Regaining Control Act commences before or on the same day as the provisions covered by table item 7 of subsection 2(1) of this Act, which is the day after this Act receives the Royal Assent.

172. Item 17 of Schedule 1 to the Regaining Control Act will, amongst other things, repeal paragraph 411(1)(d) and will substitute paragraph 411(1)(d) to provide that a decision is reviewable by the RRT when it is a decision to cancel a protection visa (other than a decision that was made because of one or more of Articles 1F, 32 or 33(2) of the Refugees Convention).

173. In the event that the Regaining Act commences before or on the same day as the day after this Act receives Royal Assent, item 5 below will come into effect.

Item 5 Paragraph 411(1)(d)

174. This item repeals paragraph 411(1)(d) and substitutes with new paragraph 411(1)(d) in Division 2 of Part 7 of the Migration Act. New paragraph 411(1)(d) provides that a RRT-reviewable decision is a decision to cancel a protection visa other than a decision that was made because of one or more of Articles 1F, 32 or 33(2) of the Refugees Convention or an assessment by the ASIO that the holder of the visa is directly or indirectly a risk to security (within the meaning of section 4 of the ASIO Act).

175. This amendment puts beyond doubt that a decision to cancel a protection visa because of an assessment by ASIO that the holder of a protection visa is directly or indirectly a risk to

security (within the meaning of section 4 of the ASIO Act) is not a decision reviewable by the RRT. A protection visa includes a protection (Subclass 866) visa (permanent protection visa). The permanent protection visa is a specified subclass in Item 1401 of Part 4 of Schedule 1 to the Regulations.

176. The amendment also reflects current paragraph 500(4)(c) by confirming that the RRT does not have the power to review a decision to cancel a protection visa because of one or more of Articles 1F, 32 or 33(2) of the Refugees Convention or paragraph 36(2C)(a) or paragraph 36(2C)(b).

177. Section 411 of the Migration Act lists the decisions which are reviewable by the RRT and, in particular, includes decisions to cancel a protection visa other than a decision that was made because of paragraph 36(2C)(a) or paragraph 36(2C)(b).

178. A decision to cancel a protection visa made because of an ASIO assessment that the visa holder is directly or indirectly a risk to security is a decision because of the adverse security assessment not a decision because of Articles 1F, 32 or 33(2) of the Refugees Convention which are provided for separately by this item. It is a decision because of the existence of an adverse security assessment provided by ASIO. The Minister or delegate has no involvement in an assessment made by ASIO and no discretion in a decision to cancel a protection visa based on the visa holder being the subject of an adverse security assessment. The only decision made is to cancel a protection visa because ASIO has provided an assessment that the visa holder is directly or indirectly a risk to security.

179. In limited circumstances, an assessment by ASIO that a non-citizen is directly or indirectly a risk to security can be reviewed under Division 4 of Part IV of the ASIO Act.

180. This amendment is a consequential amendment as a result of the amendment made by item 1 above.

181. The note to the item provides that this item will not commence at all if item 17 of Schedule 1 to the Regaining Control Act does not commence. Item 17 of Schedule 1 to the Regaining Control Act will, amongst other things, repeal paragraph 411(1)(d) and will substitute paragraph 411(1)(d) to provide that a decision is reviewable by the RRT when it is a decision to cancel a protection visa (other than a decision that was made because of one or more of Articles 1F, 32 or 33(2) of the Refugees Convention).

Item 6 After subsection 500(4)

182. This item inserts new subsection 500(4A) in Part 9 of the Migration Act.

183. New subsection 500(4A) provides that a decision to refuse to grant a protection visa relying on subsection 36(1B) or a decision to cancel a protection visa because of an assessment by ASIO that the holder of the visa is directly or indirectly a risk to security (within the meaning of section 4 of the ASIO Act) are decisions that are not reviewable under section 500 or under Part 5 or Part 7 of the Migration Act.

184. Section 500 of the Migration Act lists the decisions which may be reviewable by the Administrative Appeals Tribunal (AAT). The reference to Part 5 is specifically to Division 2 of Part 5 of the Migration Act which provides the decisions that may be reviewable by the Migration Review Tribunal (MRT). The reference to Part 7 is specifically to Division 2 of Part 7 of the Migration Act which provides the decisions that may be reviewable by the RRT.

185. The purpose of this amendment is to provide that a decision to refuse to grant a protection visa relying on new subsection 36(1B) or a decision to cancel a protection visa because of an assessment by ASIO that the holder of the visa is directly or indirectly a risk to security are decisions that are not reviewable by the AAT, MRT or RRT. A protection visa includes a protection (Subclass 866) visa (permanent protection visa). The permanent protection visa is a specified subclass in Item 1401 of Part 4 of Schedule 1 to the Regulations.

186. The decision to refuse a protection visa based on new subsection 36(1B) is a decision based on the applicant for a protection visa being assessed by ASIO to be directly or indirectly a risk to security (within the meaning of section 4 of the ASIO Act). As such, a decision to refuse to grant a protection visa relying on new subsection 36(1B) is not a decision relying on one or more of Articles 1F, 32 or 33(2) of the Refugees Convention. Instead, it is a decision based on an adverse security assessment provided and determined by ASIO.

187. A decision to cancel a protection visa because of an adverse ASIO assessment that the holder of the visa is directly or indirectly a risk to security is not a decision because of one or more of Articles 1F, 32 or 33(2) of the Refugees Convention. It is a decision because of an adverse security assessment provided by and determined by ASIO.

188. Decisions relying on one or more of Articles 1F, 32 or 33(2) of the Refugees Convention are provided for separately in section 500 of the Migration Act.

189. The Minister or delegate has no involvement in an assessment made by ASIO. The only decision that has been made is a decision to refuse a protection visa relying on, or cancel a protection visa because of, an assessment provided by ASIO that the applicant for, or holder of, a protection visa is directly or indirectly a risk to security.

190. In limited circumstances, an assessment by ASIO that a non-citizen is directly or indirectly a risk to security can be reviewed under Division 4 of Part IV of the ASIO Act.

Item 7 Application Provision

191. This item provides that an amendment made by an item in Schedule 3 to this Act is to apply in relation to an application for a protection visa made on or after the commencement of the item and to an application for a protection visa made before the commencement of the item but not finally determined as at the commencement of the item and to a decision to cancel a protection visa made on or after the commencement of the item, regardless of whether the protection visa was granted before, on or after the commencement of the item.

192. Subsection 5(9) of the Migration Act provides that an application is finally determined if a decision that has been made in respect of a visa application is not subject to ongoing review under Part 5 or Part 7 of the Migration Act.

193. The purpose of this provision is to clarify that the operative provisions of the amendments made by an item in Schedule 3 to this Act are to apply in relation to an application for a protection visa and a decision to cancel a protection visa. A protection visa includes a protection (Subclass 866) visa (permanent protection visa). The permanent protection visa is a specified subclass in Item 1401 of Part 4 of Schedule 1 to the Regulations.

194. These amendments do not have any retrospective effect but are prospective in nature.

<u>Attachment A</u>

Statement of Compatibility with Human Rights

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

Migration Amendment Bill 2013

This Bill 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 Bill

The Migration Amendment Bill 2013 (the Bill) amends the *Migration Act 1958* (the Migration Act) to:

- put beyond doubt that a decision on review, or a visa refusal, cancellation or revocation decision by the Minister or his delegate, is taken to be made on the day and at the time when a record of it is made, and not when the decision is notified or communicated to the applicant or the former visa holder (Schedule 1);

- clarify the operation of the statutory bar on making a further protection visa application (Schedule 2); and

- make it a criterion for the grant of a protection visa in section 36 of the Migration Act that the applicant is not assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security (within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979*) (Schedule 3) and associated measures.

For the purposes of this statement of compatibility, each Schedule of this Bill is assessed individually and set out below.

Overview of Schedule 1 - When decisions are made and finally determined

Part 7 of the Migration Act sets up a scheme for the review of certain protection visa decisions by the Refugee Review Tribunal (RRT).

Relevantly, section 430 of the Migration Act provides that when the RRT makes its decision on a review, it must prepare a written statement of reasons for its decision, and that a decision on review (other than an oral decision) is taken to have been made on the date of the written statement.

Section 430A then obliges the RRT to notify the applicant and the Secretary of the Department of Immigration and Border Protection (the Department) of its decision on review, by giving the applicant and the Secretary a copy of the written statement prepared under section 430. However a failure to comply with the notification requirements in section 430A does not affect the validity of the decision.

The intended legislative operation of sections 430 and 430A is to set up a structure that separates the making of the review decision, and notification of the review decision, as two different functions. In other words, the RRT's obligation to notify under section 430A does not arise until a decision has been made under section 430.

In *Minister for Immigration and Citizenship v SZQOY [2012] FCAFC 131* the Full Federal Court of Australia found that the RRT is not functus officio (i.e. its power to make a decision on review is not exercised or 'spent'), until the decision is 'notified externally and irrevocably'. Before this point, the decision is not beyond recall and the RRT is free to re-open its decision and consider new information, including information which may have only become available *after* the written statement under section 430 (and therefore the review decision) has already been made.

Subsequently, in *Minister for Immigration, Multicultural Affairs and Citizenship v SZRNY* [2013] FCAFC 104, the Full Federal Court did not depart from the decision in SZQOY. Rather than addressing the question of when is the RRT considered to be *functus officio*, the Full Federal Court considered the meaning of the term 'finally determined' as defined in subsection 5(9) of the Migration Act instead.

Subsection 5(9) of the Act provides that, for the purpose of the Migration Act, an application under the Migration Act is finally determined when either:

- a decision that has been made in respect of the application is not, or is no longer, subject to any form of review under Part 5 or 7 (Part 5 relates to review of decisions by the Migration Review Tribunal (MRT) and Part 7 relates to review by the RRT); or

- a decision that has been made in respect of the application was subject to some form of review under Part 5 or 7, but the period within which such a review could be instituted has ended without a review having been instituted as prescribed.

The Department has consistently interpreted subsection 5(9) to mean that once a decision in respect of an application has been reviewed (i.e. a review decision has been made) by the MRT under Part 5 or the RRT under Part 7, the application is finally determined. This is so irrespective of whether the MRT or the RRT has correctly notified the review applicant and the Secretary of the Department of its decision.

The Full Federal Court in *SZRNY*, however, found that an application is not 'finally determined', i.e. no longer subject to any form of review (under Part 7) within the meaning of subsection 5(9) of the Migration Act, unless the RRT has notified its decision to both the review applicant and the

Secretary of the Department according to law, and that actual notification to the review applicant of the review decision is not sufficient.

The *SZRNY* judgment is highly problematic for the RRT, and by implication the MRT, because it means that in circumstances where the MRT or the RRT has made an error in notifying either the review applicant or the Secretary of the Department, the application is not finally determined and continues to be subject to merits review.

Consequently, the MRT or the RRT could be required to revisit its decision and take into account any new information provided or new legislation that has since commenced, even though the MRT or the RRT's review decision is otherwise a valid finalised decision that has been 'notified externally and irrevocably'. To that extent, *SZRNY* may be seen as having further extended the judgment in SZQOY in respect of the point at which the MRT or the RRT is considered to be *functus officio*.

More significantly, because of the Full Federal Court's emphasis on notification 'according to law', with actual notification not being sufficient, it is possible that an application in respect of which the MRT or the RRT has made an error in its attempted notification, can never be finally determined.

Sections 368A and 430A, which respectively relate to notification of review decisions by the MRT and the RRT, provide that the review applicant and the Secretary of the Department must be notified of the review decision within 14 days after the day on which the review decision is taken to be made. If the Full Federal Court's reasoning in *SZRNY* is applied, it means the MRT or the RRT would either never be able to properly renotify its review decision within the prescribed 14 day period, or it would be obliged to recall its review decision and remake it at a later date just so that it could renotify the review applicant and the Secretary of the Department 'according to law'.

To remove the administrative uncertainty and put the original policy intention beyond doubt, it is proposed that the Migration Act be amended to clarify:

- the MRT or the RRT's powers of review are exercised when a decision on review has been made, and that once a decision is made, it cannot be re-opened or varied (*functus officio*); and

- in circumstances where review of a decision on an application has been sought, that application will be considered to be finally determined (i.e. no longer subject to a form of merits review) when the MRT or the RRT has made its decision, other than a decision to remit the case back to the Department for reconsideration.

Human rights implications

The amendments in Schedule 1 of the Bill have been assessed against the seven core human rights treaties.

Article 14 of the International Covenant on Civil and Political Rights provides for entitlement to a fair hearing by a competent, independent and impartial tribunal established by law. The amendments do not seek to remove, disturb or otherwise diminish a person's ability to seek merits review of a decision under Part 5 or 7 of the Migration Act, in circumstances where the decision is merits reviewable. Rather, the amendments seek to restore administrative certainty over when the MRT or the RRT's decision making powers for the purpose of conducting review of a decision are exercised, as well as certainty over when an application is considered to be finally determined for the purpose of the Migration Act.

As such, the amendments do not give rise to human rights implications.

Conclusion

The amendments in Schedule 1 of the Bill are compatible with human rights as it does not raise any human rights issues.

Overview of Schedule 2 - Bar on further applications for protection visas

Subsection 36(2) of the Migration Act prescribes the key criterion upon satisfaction of which an applicant may be eligible for the grant of a protection visa.

Subsection 36(2) provides that the applicant must be:

- a person who engages Australia's protection obligations under the Refugees Convention as amended by the Refugees Protocol ('the Refugees Convention'); or
- a person who engages Australia's protection obligations on the basis that as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm ('complementary protection'); or
- a person who is a member of the family unit of a person who meets either of the above criteria and who holds a protection visa ('family unit').

The complementary protection provisions in the Migration Act (to which dot point 2 above refers) were introduced on 24 March 2012.

Section 48A of the Migration Act prohibits the making of further protection visa applications by non-citizens in the migration zone who have had a protection visa refused previously. Section 48B provides that, despite section 48A, the Minister may exercise his or her personal, non-delegable and non-compellable power to lift the section 48A application bar in the public interest.

In *SZGIZ v Minister for Immigration and Citizenship* [2013] FCAFC 71, the Full Federal Court of Australia found that each of the grounds in subsection 36(2) of the Migration Act could found a separate protection visa application. As a result, the Full Federal Court found that section 48A of the Migration Act does not prohibit the making of further protection visa applications that rely on grounds that are different from the one on which the previous protection visa application was refused.

For example, if a non-citizen previously made an application for protection visa relying on claims under the Refugees Convention only and that application was refused, under the Full Federal Court's reasoning in *SZGIZ*, that non-citizen would not be prohibited by section 48A of the Migration Act from making a further protection visa application that relies on claims related to complementary protection.

Issue

Please note the amendments affect persons who have made an application for and were refused a protection visa before 24 March 2012 (including those who applied as family members of another person and who may or may not have raised their own protection claims). Persons who make protection visa applications on or after 24 March 2012 are not affected by the amendments in relation to any complementary protection claims they may make, because if they are determined not to engage Australia's protection obligations under the Refugees Convention, their claims are automatically assessed under the complementary protection provisions of the Migration Act.

The Full Federal Court decision in *SZGIZ* has led to an increase in the number of repeat applications from failed protection visa applicants who were refused the grant of a protection visa on Refugees Convention ground prior to the introduction of the complementary protection provisions. Some applicants have made further applications for protection visa despite not having

any legitimate complementary protection claims and despite the lack of any real prospects of engaging Australia's protection obligations.

As there are effectively four alternative ways of meeting the criterion for the grant of a protection visa under subsection 36(2), a non-citizen who has no meritorious protection claims will have potentially up to four opportunities to apply for a protection visa, before they are conclusively barred under section 48A. This can have significant implications for the Department, the Refugee Review Tribunal and the courts whose resources could be tied up processing and dealing with unmeritorious repeat protection visa applications and associated merits and judicial review applications.

The original policy intention in relation to section 48A was to prohibit the making of further protection visa applications by persons who have already applied for protection and had their application assessed and refused. To ensure section 48A can operate consistently with this original policy intention, it is proposed that the Migration Act be amended to clarify and put this beyond doubt.

If the Migration Act is amended, it will mean that a person who was refused a protection visa on a Refugees Convention ground prior to the introduction of the complementary protection provisions on 24 March 2012, will be unable to make a further protection visa application on complementary protection grounds under the amended section 48A. Persons who were refused as members of another person's family unit (whether before or after 24 March 2012) and who did not raise their own protection claims at the time, will also be prevented from making a further protection visa application relying on their own protection claims.

However, there are certain 'safeguards', discussed below, which are available to ensure that persons who will be affected by the amendment will not be denied the opportunity to have their complementary protection claims (if any) assessed.

Human rights implications

The amendments in Schedule 2 of the Bill have been assessed against the seven core human rights treaties. The amendments engage the following human rights.

Article 3 of the CAT – prohibition against return to torture

Article 3 of the CAT states the following:

No State party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.

Articles 6 and 7 of the ICCPR - arbitrary deprivation of life and prohibition on torture and cruel, inhuman or degrading treatment or punishment

Articles 6 and 7 of the ICCPR also impose on Australia an implied non-refoulement obligation. Article 6 of the ICCPR states that:

Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

Article 7 of the ICCPR states the following:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

The amendments do not substantively alter the rights and interests of persons whom the amendments would affect for the following reasons.

Firstly, and consistent with the Department's practice prior to the introduction of complementary protection provision into subsection 36(2) of the Migration Act, a person who is being removed from Australia will be assessed for any possible risks that might arise under the CAT and ICCPR as a consequence of their removal from Australia. Therefore, a failed protection visa applicant who may have claims going to complementary protection would not be denied the opportunity to have their claims assessed simply by virtue of these amendments.

Secondly, the Minister has a personal, non-compellable power under section 48B of the Migration Act to intervene to allow a person in the migration zone who has been refused a protection visa application to make a further protection visa application, in circumstances where it is in the public interest to do so. The Minister also has personal, non-compellable powers under other relevant provisions in the Migration Act to grant visas to a non-citizen in the public interest. In consideration of the public interest, the Minister may take into account Australia's protection obligations (under the Refugees Convention and complementary protection provisions in the Migration Act) as they relate to the individual in question.

For example, if a person previously applied for a protection visa as the family member of another applicant without raising their own claims and that application was refused, the Minister may exercise his or her personal power under section 48B to enable the person to make a new protection visa application so that their personal claims, which were not raised or assessed previously, can be assessed.

Conclusion

While rights under the CAT and the ICCPR are engaged by the amendments in Schedule 2 of the Bill, the amendments do not seek to remove the opportunity of persons to make claims for protection as against these rights or to have those claims assessed. As such, the amendments are compatible with human rights.

Overview of Schedule 3 - Security assessments

Section 36:

In the matter of *Plaintiff M47/2012 v Director-General of Security & Ors* [2012] HCA 46 (*Plaintiff M47*), the High Court held clause 866.225(a) of Part 866 of Schedule 2 to the *Migration Regulations 1994* (the Regulations) is invalid to the extent that it makes public interest criterion (PIC) 4002 a criterion for the grant of a Protection (Subclass 866) visa (protection visa). The majority of the High Court Bench found that the Regulations could not validly prescribe PIC 4002 as a condition for the grant of a protection visa because doing so was inconsistent with the Act. This was because the clause, so far as it applied PIC 4002 to the grant of a protection visa, was inconsistent with the scheme provided in the Act for the making of decisions to refuse (or cancel) protection visas relying on Articles 32 and 33(2) of the Convention Relating to the Status of Refugees as amended by the Refugees Protocol.

PIC 4002 of Part 1 of Schedule 4 to the Regulations requires that the visa applicant is not assessed by the Australian Security Intelligence Organisation (ASIO) to be directly or indirectly a risk to security, within the meaning of section 4 of the *Australian Security Intelligence Organisation Act 1979* (the ASIO Act).

The Bill seeks to rectify the situation by amending section 36 to introduce a specific criterion for a protection visa that reflects the terms of PIC 4002. Section 36 of the Act provides that there is a class of visas to be known as protection visas and provides criteria for a protection visa. If an applicant receives an adverse security assessment from ASIO, the proposed amendment to section 36 will result in the applicant being refused a protection visa.

Amendments to section 411 and section 500

In addition to the amendments to section 36, amendments are made to paragraph 411(1)(c), paragraph 411(1)(d) and section 500 of the Act, to provide that the Refugee Review Tribunal (RRT), the Migration Review Tribunal (MRT) and the Administrative Appeals Tribunal (AAT) will not have the power to review a protection visa refusal or protection visa cancellation decision made on the basis of the applicant having an adverse security assessment from ASIO.

Furthermore, amendments are made to paragraph 411(1)(c) and paragraph 411(1)(d) to put beyond doubt that the RRT will not have the power to review a protection visa refusal or protection visa cancellation decision made on the basis of one or more of Articles 1F, 32 or 33(2) of the Refugees Convention.

The power of the AAT under the ASIO Act to review, in some circumstances, an adverse security assessment by ASIO is unaffected by this amendment. Equally, the amendments do not affect the current arrangements for review by the Independent Reviewer of Adverse Security Assessments.

Human rights implications

Section 36:

Right not to be arbitrarily detained

The Bill amends section 36 to introduce a specific criterion for a protection visa that reflects the terms of PIC 4002. If an applicant receives an adverse security assessment from ASIO, the proposed amendment to section 36 will result in the applicant being refused a protection visa.

This amendment itself does not engage Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR), which provides:

'Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law'.

However, if the criterion is not met and a protection visa is refused, this may mean an applicant whose application for a protection visa has been refused, could consequently be detained under section 189 and subsection 196(1) of the Act would be engaged.

Subsection 196(1) of the Act currently requires that an unlawful non-citizen detained under section 189 must be kept in immigration detention until:

- they are removed from Australia under section 198 or 199;
- an officer begins to deal with the non-citizen under subsection 198AD(3);
- they are deported from Australia under section 200; or
- they are granted a visa.

In the 2004 High Court decision of *Al-Kateb v Godwin & Ors* [2004] HCA 37 (*Al-Kateb*), the majority found that as a matter of construction the immigration detention of an unlawful non-citizen was authorised and required by sections 189, 196 and 198 of the Act while officers seek to find a country to which he or she can be removed (even if there is no present prospect of finding such a country).

Noting the above, the United Nations Human Rights Committee (the Committee) has stated that 'arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. In the Committee's view, this means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable and necessary in all the circumstances. The amendment to section 36 clarifies the criteria that a person must satisfy in order to be granted a protection visa, and that persons will have their protection visa applications refused because they have been assessed by ASIO to be directly or indirectly a risk to security (within the meaning of section 4 of the ASIO Act). Where a person is detained as a result of their protection visa application being refused, or their protection visa being cancelled, because they have received an adverse security assessment from ASIO, their detention would not lack predictability.

The Committee has also stated that, where there are less intrusive measures than detention available that can achieve the same end, they should be used. In some situations, persons who are not able to be removed under section 198 or 199 can be managed in less intrusive forms of immigration detention. However, there may be a cohort of persons for whom, given health, security or character concerns, the less intrusive measures available under the Act may not be appropriate.

It has been the long standing, clear and well publicised position of the Australian Government that persons who pose an unacceptable risk to the Australian community will remain in an immigration detention facility. The obligation on a State Party to the Refugees Convention to provide protection to persons in respect of whom they have protection obligations is subject to reasonable measures taken to control immigration, consistent with a State Party's right to control the entry, residence and expulsion of aliens, and to protect national security. Detaining a person who unlawfully enters Australia or who becomes unlawful once in Australia is possible while that person's status is being resolved if there are particular reasons specific to the individual, such as a likelihood of absconding, a danger of crimes against others or a risk of acts against national security. In these circumstances, taking into account the protection of the Australian community, continued

immigration detention arrangements for people who are assessed by ASIO to be directly or indirectly a risk to security (within the meaning of section 4 of the ASIO Act) are considered reasonable, necessary and proportionate to the security risk that they are found to pose.

Further, arrangements are in place for independent review of the initial issue of and continuing need for an adverse security assessment. To the extent that the adverse security assessment is the basis for visa refusal and consequent detention, review of that basis may be available in individual cases.

In summary, where the consequence of visa refusal or cancellation on the basis introduced by this amendment is detention, that detention is considered to be consistent with Article 9(1) of the ICCPR.

Treated with humanity and respect

Article 10(1) of the ICCPR provides:

'All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.'

This amendment to the Bill makes no change to the treatment and conditions that are currently in place for a person held in immigration detention. Immigration detention arrangements will still reflect the requirements in Article 10(1), namely, the Australian Government will continue to ensure that persons in immigration detention are treated humanely and with respect for their inherent dignity.

Non-refoulement

Under the ICCPR and the Convention Against Torture (CAT), Australia may not return a person where:

- there are substantial grounds for believing that he or she is at a real risk of irreparable harm (that is, the death penalty, arbitrary deprivation of life, torture, or cruel, inhuman or degrading treatment or punishment) under the ICCPR and its Second Optional Protocol[1]; or

- there are substantial grounds for believing that he or she would be in danger of being subjected to torture for the purposes of the CAT.[2]

This Bill does not seek to resile from, or limit, Australia's non-refoulement obligations. Australia's non-refoulement obligations will be assessed regardless of whether or not a person meets the new criterion in subsection 36(1B). Anyone who is found to engage Australia's non-refoulement obligations will not be removed in breach of those obligations. If a person were found to be directly or indirectly a risk to security (within the meaning of section 4 of the ASIO Act) and were refused a protection visa or their protection visa were cancelled, and removal of them would amount to a breach of Australia's non-refoulement obligations, other case management options would be put into place until removal could be effected.

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[1] This is an implied obligation in relation to Articles 6 and 7 of the ICCPR. See Human Rights Committee, *General Comment 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13.

[2] CAT, Article 3(1).

Amendments to section 411 and section 500:

The amendments to section 411 have the effect that merits review is not available at the RRT of a decision to refuse a protection visa application on the basis of the new criterion in section 36 or one or more of Articles 1F, 32 or 33(2) of the Refugees Convention or paragraph 36(2C)(a) or (b), or to cancel a protection visa because of one or more of Articles 1F, 32 or 33(2) of the Refugees Convention or an adverse security assessment from ASIO or paragraph 36(2C)(a) or (b).

The insertion of a reference to one or more of Articles 1F, 32 or 33(2) of the Refugees Convention in section 411 does not represent a change in policy; it puts beyond doubt the fact that a decision to refuse or cancel a protection visa on the basis of one of these Articles is not merits reviewable by the RRT under section 411 of the Act.

The amendments do not affect judicial review of protection visa decisions, including those made relying on new subsection 36(1B) or because the visa holder is the subject of an adverse security assessment from ASIO.

The amendments to section 500 have the effect that a decision to refuse a protection visa relying on subsection 36(1B) or to cancel a protection visa because of an adverse security assessment by ASIO will not be reviewable by the AAT. However, the amendments to section 500 do not impact on the existing rights to seek review at the AAT in subsection 500(1) of the Migration Act, of a decision to refuse or cancel a protection visa.

Expulsion of aliens

Article 13 of the ICCPR deals with expulsion of aliens, and provides:

'An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.'

There are two discrete elements which apply in relation to the expulsion of an alien lawfully within the territory of a State party:

- the expulsion can only occur in pursuance of a decision reached in accordance with law; and
- except where compelling reasons of national security otherwise require, the person being expelled must be provided with procedural guarantees, including being allowed to submit the reasons against the expulsion, and to have his or her case reviewed by a competent authority.

In cases where compelling reasons of national security require, the specific procedural rights identified in the second limb of article 13 do not have to be provided. Whether compelling reasons of national security in fact arise is essentially to be determined by the State that claims that those reasons exist. For the amendments in the Bill, where a person has been assessed by ASIO to be directly or indirectly a risk to security (within the meaning of section 4 of the ASIO Act), that is a matter that falls clearly within the ordinary meaning of 'national security', and so the procedural rights set out in Article 13 do not have to be provided to that person.

To the extent that a person whose protection visa is refused or cancelled, on the basis that the person does not satisfy subsection 36(1B) or is the subject of an adverse security assessment from ASIO, may ultimately be removed from Australia, this amendment is consistent with Article 13.

Administration of Justice

Article 14(1) of the ICCPR deals with the administration of justice, and relevantly provides:

'All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law…'

The right to a fair and public hearing under article 14 is not owed to aliens in relation to proceedings relating to the expulsion of an alien under the ICCPR, and procedural protections are only owed to aliens under article 13 to the extent that compelling reasons of national security do not require those procedural protections to be excluded.

Article 14 does not include the right to merits review of administrative proceedings. If, however, a protection visa refusal or cancellation decision on the basis that the person does not satisfy subsection 36(1B) or is the subject of an adverse security assessment from ASIO were considered a civil proceeding, then the availability of judicial review would satisfy the requirements of article 14.

The protection visa decision is based on the fact of there being an adverse security assessment issued by ASIO in relation to the person. The amendments do not affect the arrangements that are in place for the independent review of ASIO's decision to issue an adverse security assessment.

The Independent Reviewer of Adverse Security Assessments commenced work on 3 December 2012. The Reviewer's role is to review ASIO adverse security assessments given to the Department of Immigration and Border Protection in relation to people who remain in immigration detention and have been found by the Department to:

'engage Australia's protection obligations under international law, and not be eligible for a permanent protection visa, or who have had their permanent protection visa cancelled.'[3]

Further, where an adverse security assessment is issued to a permanent resident, the ASIO Act provides for merits review of that assessment at the AAT.

In addition, a person who has received an adverse security assessment from ASIO retains the right to seek judicial review of the assessment in the High Court's original jurisdiction under section 75(v) of the Constitution or in the Federal Court's original jurisdiction under section 39B of the *Judiciary Act 1903*.

The amendment therefore does not affect existing avenues for merits review or judicial review of the adverse security assessment from ASIO. Additionally, the amendment does not seek to restrict access to judicial review of a decision to refuse an application for a protection visa or to cancel a protection visa based on the applicant having an adverse security assessment from ASIO. Therefore to the extent that Article 14(1) may apply, the amendment is consistent with Article 14(1).

Conclusion

The amendments by Schedule 3 are compatible with human rights because they are consistent with the obligations under Articles 9(1), 13 and 14(1) of the ICCPR.

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

[3]http://www.ag.gov.au/NationalSecurity/Counterterrorismlaw/Pages/IndependentReviewofAdverseSecurityAssessments.aspx