



1994

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

MIGRATION LEGISLATION AMENDMENT BILL 1994

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for
Immigration and Ethnic Affairs,
Senator Nick Bolkus)

MIGRATION LEGISLATION AMENDMENT BILL 1994

OUTLINE

1 The Migration Legislation Amendment Bill 1994 (hereafter referred to as the 'MLAB 1994') is a Bill dealing with consequential and technical matters (some involving minor policy refinements) arising from the commencement, on 1 September 1994, of the majority of the provisions of the *Migration Reform Act 1992* ('the Reform Act').

2 The *Reform Act* effected a major overhaul of the *Migration Act 1958* ('the Migration Act'). Preparations for implementation of the *Reform Act* indicated a need for a significant amount of fine-tuning of the Act. The commencement of the majority of the provisions of the *Reform Act*, originally intended to be 1 November 1993, was deferred until 1 September 1994 by the *Migration Laws Amendment Act 1993*.

3 A comprehensive review of the *Migration Act*, as amended by the *Reform Act*, has identified the need for amendments to sections of the *Migration Act* in addition to the sections amended by the *Reform Act*. Therefore, for drafting convenience, all of the required amendments have been drafted as amendments to the *Migration Act*, to take effect immediately after the commencement of the *Reform Act*.

4 The most important of the amendments are as follows:

- . three new classes of visa are created (special purpose visas, absorbed person visas, and ex-citizen visas - see the relevant clause notes for further explanation);
- . the dichotomy between 'approval' and 'grant' is removed so that there is one decision making process leading to the grant of a visa; and
- . provision is made so that protection visas may be granted as permanent visas. This reflects the decision of the Government, on 1 November 1993, that persons recognised by Australia as refugees, under the Refugee Convention, would be granted permanent residence, rather than temporary residence which was the policy when the *Reform Act* was enacted.

5 The MLAB 1994 also makes some amendments to those sections of the *Reform Act* which do not amend the *Migration Act*. These are mostly technical amendments. However, the regulation-making power in section 40 of the *Reform Act* has been amended to deal with some additional matters and a new section 41 has been inserted to provide for transitional arrangements in relation to non-citizens who are illegal entrants because of the to be repealed section 20. The amendments are set out in Schedule 2 of the MLAB 1994.

6 Finally, the MLAB 1994 makes consequential technical amendments to a number of other Commonwealth Acts, primarily to reflect the changed terminology introduced by the *Reform Act*.

7 The most significant of the consequential amendments are those made to the *Australian Citizenship Act 1948 (ACA)*, including amendments to:

- . ensure that New Zealand citizens resident in Australia continue to be regarded as permanent residents for the purpose of acquiring Australian citizenship;
- . ensure New Zealand citizen parents of Australian-born children will be treated as permanent residents for the purposes of the ACA;
- . allow deferral of consideration of citizenship applications for 12 months (consistent with the new cancellation regime introduced by the *Reform Act*) while a person is under investigation which may lead to visa cancellation or to criminal charges; and
- . amend the discretionary power to grant citizenship to spouses and widow(er)s of Australian citizens to ensure that citizenship is granted only to permanent residents.

FINANCIAL IMPACT STATEMENT

8 The amendments made by the MLAB 1994 will have no financial impact.

NOTES ON INDIVIDUAL CLAUSES**CLAUSE 1 SHORT TITLE**

1 This clause provides that the Act may be cited as the *Migration Legislation Amendment Act 1994*.

CLAUSE 2 COMMENCEMENT

2 This clause provides that the short title and commencement sections commence on the day on which the MLAB 1994 receives the Royal Assent.

3 The clause also provides that section 84, and Schedule 2 (which amends provisions of the *Reform Act*), are taken to have commenced immediately after the *Reform Act* received the Royal Assent.

4 The clause also provides that the remaining provisions of the MLAB 1994 commence immediately after the commencement of section 3 of the *Reform Act*, ie 1 September 1994.

PART 2 - AMENDMENTS OF THE MIGRATION ACT 1958**CLAUSE 3 PRINCIPAL ACT**

5 This clause provides that, in Part 2 of the Act, the expression 'Principal Act' is a reference to the *Migration Act*.

CLAUSE 4 INTERPRETATION

6 This clause amends, omits, substitutes, and inserts a number of definitions in section 4 of the Principal Act:

- . the definition of 'holder' is amended to reflect the new concept of 'visa period' (see definition below);
- . the definition of 'immigration detention' is broadened to include, in relation to a non-citizen who is prevented under section 87 from leaving a vessel, detention on the vessel;
- . the definition of 'master' is amended to reflect the fact that the definition of 'vessel' is being amended to include an 'installation';

- . the definition of 'non-disclosable information' is amended. 'Non-disclosable information' is information which does not have to be released as part of the statutory natural justice process which applies to visa applications and some visa cancellations (see section 26Y and section 50AF). Paragraph (c) of the definition refers to 'information or matter that was given to the Minister or an officer in confidence'. A literal interpretation of this limb of the definition would encompass information which was not inherently confidential and information provided by other Commonwealth Departments. To avoid this outcome the definition has been amended to refer to information or matter 'whose disclosure would found an action by a person, other than the Commonwealth, for breach of confidence'. This approach is the same as that taken in the *Freedom of Information Act 1982*;
- . the definition of 'old visa' is amended in paragraph (c) by omitting the word 'force' and substituting the word 'effect';
- . the definition of 'Territory' is amended to remove a redundant reference to a previously repealed section of the Principal Act;
- . the definition of 'vessel' is expanded to include 'an installation'. This ensures that persons entering Australian ports on an installation are subject to the same immigration clearance regime as persons entering Australian ports on other vessels;
- . the definition of 'allowed inhabitant of the Protected Zone' is replaced by a definition which will place fewer restrictions on the inhabitants of the Protected Zone (an area between Australia and Papua New Guinea). Rather than an automatic exclusion of inhabitants with serious health problems or criminal records, which is the effect of the existing definition, the new definition creates a discretion to exclude such persons by means of a ministerial declaration under section 17;
- . the definitions of 'applicable pass mark' and 'assessed score' are amended to reflect amendments made to the Principal Act by the *Migration Amendment ("Points System") Act 1993*;
- . the definition of 'health criterion' has been amended to more accurately reflect the range of matters covered by the health criteria set out in the *Migration (1993) Regulations*;
- . the second occurring definition of 'visa' is omitted because the term is already defined;

- . the definition of 'approve' has been omitted. This relates to the removal of the two stage process of approval and grant, and its replacement by a single process of grant;
- . 'absorbed person visa', 'ex-citizen visa' and 'special purpose visa' are defined to have the meanings given, respectively, by section 26AB, section 26AC, and section 26AA; and
- . a definition of 'visa period' has been included. The purpose of this definition is to provide a logical and consistent method for referring to the operation of visas. The existing references to visas being 'in force' and 'in effect' were confusing. All references to visas being 'in force' have been removed. However there is a need to have a distinction between the visa being in existence (ie between grant and ceasing to be in effect) and the visa being in effect. This reflects the fact that a visa may be granted on one date but not come into effect until a later date. The definition of 'visa period' provides that the visa period begins when the visa is granted and ends when the visa ceases to be in effect. However an exception is made for bridging visas which may enter into effect and cease to be in effect on more than one occasion (see the explanation in relation to subsection 26ZK(4)).

CLAUSE 5 LAWFUL NON-CITIZENS

7 This clause amends subsection 14(1) to ensure that it is only a visa which is 'in effect' that causes a non-citizen in the migration zone to be a lawful non-citizen.

8 The clause also omits subsection 14(3). It is not necessary to provide special status for the persons covered by that subsection as they are taken to have been granted an absorbed person visa (see section 26AB). As such they are lawful non-citizens by virtue of subsection 14(1).

CLAUSE 6 EFFECT OF CANCELLATION OF VISA ON STATUS

9 This clause amends section 16 to clarify that a non-citizen whose visa is cancelled does not become an unlawful non-citizen if the non-citizen holds another visa that is in effect immediately after the cancellation.

CLAUSE 7 CLASSES OF VISAS

10 This clause adds a new subsection (4) to section 26 which provides that 'the regulations may prescribe whether visas of a class are visas to travel to and enter Australia, or to remain in Australia, or both'. These visa types are described in section 24. However there was a doubt about whether a regulation-making power could be exercised in relation to these matters. The new subsection puts beyond doubt the capacity of the regulations to determine which visas are to be visas to travel and enter, which visas are to be visas to remain, and which visas are to be both.

11 This clause also adds a new subsection (5) to section 26 which provides that 'a visa is a visa of a particular class if this Act or the regulations specify that it is a visa of that class'. This amendment is intended to make it clear that 'class' is used as a term of art in the Migration Act and is not to be constrained by a dictionary definition of the term 'class'. In particular, it is intended that the regulations made under the Migration Act will provide for a class of visa to include one or more subclasses, containing alternative sets of criteria to be met as preconditions to grant.

12 As a corollary to this amendment, there are various consequential amendments in the MLAB 1994 to replace references to 'visa in a class' with the expression 'visa of a class'. As both expressions can be found in the Migration Act as presently in force, the amendments will bring about a consistent use of terminology.

13 The clause also includes in section 26 a reference to the new classes of visa which are provided for by the MLAB 1994, ie the special purpose visa, ex-citizen visa, and absorbed person visa. The amendment also makes it clear that the criteria for the grant of these new visas are contained within the Migration Act, and, unlike all other visas (except criminal justice visas), those criteria may not be supplemented by criteria contained in the Regulations.

CLAUSE 8 INSERTION OF NEW SECTIONS

14 This clause inserts new sections, as set out below, in the Migration Act.

Section 26AA Special purpose visas

15 This section provides for a class of temporary visas to be known as special purpose visas. Under the Migration Act, as currently in force, there are various categories of persons who do not require entry permits to remain lawfully in Australia, eg New Zealand citizens, permanent residents of Norfolk Island, ships crew on shore leave, diplomatic and consular representatives, members of armed forces of the Crown. These persons are defined by the Migration Act (section 4) as 'exempt non-citizens'.

16 The *Reform Act*, in introducing a universal visa requirement, dealt with 'exempt non-citizens' by creating a visa class known as 'special category visa' which would be subject to all the usual provisions relevant to visas such as the need for an application, the need for an administrative grant of the visa, and the need for the grant to be evidenced. The creation of special purpose visas reflects a recognition that the administrative procedures required to apply the special category visa regime to all 'exempt non-citizens' would be unduly complex. The special category visa class will be retained, specifically for New Zealand citizens. Other categories of 'exempt non-citizen' will be brought within the special purpose visa class, with the exception of permanent residents of Norfolk Island who will be eligible for another class of visa to be created in the regulations.

17 Special purpose visas will, by operation of law, be granted to non-citizens who have a prescribed status or are members of a class of persons having a prescribed status. A prescribed status means a status provided for in the regulations. In addition, to cater for unusual or unanticipated situations which require an immediate humanitarian response by Australia (eg admitting an otherwise ineligible person to attend a funeral, and humanitarian cases in time of war or emergency), provision is made for the Minister to declare in writing that a person or a class of persons are to be taken to have been granted a special purpose visa.

18 The ministerial declaration power mirrors the existing power for the Minister to afford exempt non-citizen status, by an instrument published in the gazette, to named persons or classes of persons (see paragraph (e) of the definition of 'exempt non-citizen' in section 4 of the *Migration Act* as currently in force). The requirement for gazettal has been replaced by a requirement for tabling in Parliament of a statement setting out the contents of, and reasons for, the declaration (without disclosing the name of the person to whom the declaration applies or, if appropriate, the name of any other person). This is identical to the approach taken to the Minister's other public interest discretionary powers under the *Migration Act* (see sections 115G, 121, 150L, 166BE and 166HL).

19 In addition to grant occurring by operation of law rather than requiring administrative action on each occasion, special purpose visas are exempt from other provisions regulating the visa application and cancellation process. In place of these processes, subsection 26AA(9) provides that the Minister may make a written declaration that it is undesirable that a person, or any persons in a class of persons, travel to and enter Australia or remain in Australia. The effect of such a declaration is that the non-citizen(s) cannot be granted a

special purpose visa (subsection 26AA(3)). However, if the non-citizen(s) had previously been deemed to have been granted a special purpose visa, the visa ceases to be in force on the day that the declaration is made.

20 The declaration power is identical to the power under section 16 of the *Migration Act*, prior to amendment by the *Reform Act*, in relation to the termination of the status of exempt non-citizen. The power is complementary to the special purpose visa provisions introduced by the MLAB 1994 and allows for the termination of the special purpose visa where necessary.

21 Subsections 26AA(4) and 26AA(5) otherwise provide for the commencement and cessation of a special purpose visa to be linked to the acquisition and loss of a prescribed status, or the making and revocation of a ministerial declaration.

Section 26AB Absorbed person visas

22 This section provides for the deemed grant of a permanent visa, called an absorbed person visa, to non-citizens in the migration zone who:

- . on 2 April 1984 were in Australia; and
- . before that date had ceased to be immigrants; and
- . on or after that date, had not left Australia, where left Australia has the meaning it had in this Act before 1 September 1994; and
- . immediately before 1 September 1994, were not persons to whom section 20 of the Act as in force then applied.

23 Absorption is a constitutional doctrine developed by the High Court in the interpretation of placitum 51(xxvii) of the Constitution (the 'immigration and emigration' power). The doctrine holds that a person who arrives in Australia as an immigrant does not remain an immigrant for all time. At some point the immigrant will be 'absorbed' into the Australian community and will cease to be an immigrant. When this occurs, the person will have moved beyond the scope of legislation which depends on the immigration power in the Constitution.

24 Because of problems caused by the absorption doctrine for the administration of the *Migration Act*, the constitutional basis of the Act was altered, with effect from 2 April 1984 (see the *Migration Amendment Act 1983*), so that it henceforth rested on placitum 51(xix) (the 'naturalization and aliens' power). An alien only ceases to be an alien by becoming an Australian citizen.

25 There remains a small number of absorbed persons, who are lawfully in Australia as permanent residents despite not holding an entry permit. The *Reform Act* provided that these persons were an exception to the universal visa requirement introduced by that Act (see subsection 14(3) of the *Migration Act* as amended by the *Reform Act*).

26 This section takes the further step of bringing absorbed persons within the visa system by deeming them to hold a permanent visa. They are thereby placed in the same position as all other permanent visa holders, eg their visas will be subject to the exercise of the cancellation power in section 180A of the *Migration Act*.

27 The absorbed person visa is a visa to remain in, but not re-enter, Australia. However a person holding an absorbed person visa would be eligible to apply for a resident return visa on the same basis as other permanent residents.

Section 26AC Ex-citizen visas

28 This section provides for the deemed grant of a class of permanent visa, to be known as an ex-citizen visa, to non-citizens in the migration zone (see definition of 'migration zone' in section 4) who were Australian citizens and cease to be Australian citizens while in the migration zone.

29 The need for this class of visa arises from the introduction, by the *Reform Act*, of the requirement that non-citizens hold a visa to be lawfully in Australia, and the requirement for mandatory detention of non-citizens who do not have visas (see section 54W). Australian citizenship may be lost by renunciation or by deprivation. Deprivation occurs automatically in many cases where an Australian citizen acquires a foreign citizenship (see section 17 of the *ACA*). Many citizens who lose citizenship while in Australia would not, if not for this section, hold a visa (either because they were citizens by birth and never held a visa or because their permanent visa had ceased to be in force after they became citizens).

30 The section also includes a transitional provision (subsection 26AC(2)) which deems the grant of ex-citizen visas to persons who ceased, before 1 September 1994, to be Australian citizens while in the migration zone and who have not left Australia since that time.

CLAUSE 9 PROTECTION VISAS

31 This clause amends section 26B. It provides for the omission of the word 'temporary' from section 26B which creates protection visas. Protection visas will be available for persons to whom Australia has protection obligations under the 1951 Refugees Convention as amended by the 1967 Refugees Protocol. The omission of the word 'temporary' reflects the recent decision of the Government that refugees be able to

access permanent residence in Australia, rather than temporary residence which was the policy at the time of enactment of the Reform Act.

32 The provisions of section 26B do not impose any disadvantage on those seeking asylum in Australia compared with the provisions applying for protection of refugees under current legislation. The cessation and exclusion clauses of Article 1 of the Refugees Convention and Protocol continue to apply in respect of the protection visa as they now apply to the Domestic Protection (temporary) entry permit and will apply to Permanent Protection Entry Permits from when they commence operation on 1 March 1994 until they are superceded by protection visas on 1 September 1994.

CLAUSE 10 BRIDGING VISAS

33 This clause amends section 26C to allow for more than one class of bridging visa. This reflects the fact that bridging visas will serve a number of different purposes with different criteria (to be set out in the regulations) and it is more logical to create separate classes of bridging visa rather than having one class with a number of subclasses.

CLAUSE 11 CIRCUMSTANCES FOR GRANTING VISAS

34 This clause amends section 26F to reflect the fact that a person who is refused immigration clearance will nevertheless be taken to have been immigration cleared if a substantive visa is later granted. Regulations controlling the granting of visas may need to employ this distinction which is absent from subsection 26F(2) as currently drafted.

CLAUSE 12 CONDITIONS ON VISAS

35 A visa granted under the *Migration Act* includes whatever conditions are imposed on the visa when the visa is granted. This clause amends section 26G to restore the flexibility in relation to the imposition of conditions on visas which exists under the *Migration Act* (subsection 24(5) prior to amendment by the Reform Act), and which was inadvertently removed by that Act.

36 The amended section makes provision for the imposition of discretionary conditions, subject to the regulations, by the officer granting the visa. It is a requirement that the range of conditions which may be imposed be prescribed in the regulations, but it is not the intention that the regulations comprehensively detail which conditions attach to each visa granted. It is intended rather that, within the range of conditions permitted by the regulations, the officer granting the visa may impose such conditions as appear, having regard to relevant policy instructions, to be appropriate in the individual case.

CLAUSE 13 VISA ESSENTIAL FOR TRAVEL

37 This clause amends section 26H by inserting the words 'that is in effect' after 'visa'. The objective is to ensure that only visas that are in effect are valid for travel to Australia (see the explanation of the distinction between visas being in existence - the 'visa period' - and their being 'in effect' in the last dot point of paragraph 6, above).

CLAUSE 14 VISA HOLDERS MUST USUALLY ENTER AT A PORT

38 This clause inserts a new subsection in section 26J which provides that a visa holder who travels to and enters Australia on an aircraft is taken to enter Australia when the aircraft lands. This amendment is necessary to reconcile the definitions of 'enter Australia', which means enter the migration zone, with section 26J which requires entry to occur at a port. In the case of an aircraft flying into Australia, the result would be that entry may occur some hours before the aircraft actually lands (eg where an aircraft bound for Melbourne enters the migration zone in Western Australia or the Northern Territory).

39 The clause also makes a technical amendment to section 26J by inserting the words 'travel to and' before the first occurrence of the word 'enter'. This reflects the fact that visas may be visas to travel to and enter Australia but are never merely visas to 'enter' (see section 24). The clause also amends section 26J by inserting the words 'that is in effect' after 'Australia' (first occurring) to ensure that only visas that are in effect are valid to enter Australia (see the explanation of the distinction between visas being in existence - the 'visa period' - and their being 'in effect' in the last dot point of paragraph 6, above).

CLAUSE 15 APPLICATION FOR VISA

40 This clause amends subsection 26L(1) which provides that subject to this Act and the regulations a non-citizen who wants a visa must apply for it. The amendment is intended to reflect the fact that not all visas are relevant to an applicant. Administrative workability requires that an applicant apply for a visa of a particular class.

41 The clause also amends subsection 26L(3) to reflect the fact that a person who is refused immigration clearance will nevertheless be taken to have been immigration cleared if a substantive visa is later granted.

42 The clause also makes technical amendments to section 26L to ensure consistent use of terminology.

CLAUSE 16 VALID VISA APPLICATION

43 This clause amends section 26M to allow flexibility in the regulations to grant a visa to a person without the need for that person to make an application. For example, there may be situations where an unlawful non-citizen refuses to apply for a visa. This would result in the mandatory detention of that person under section 54W even though good grounds may exist for that not to occur. There is therefore a need for the capacity to grant a visa, in prescribed situations, without the need for an application.

44 The clause also makes technical amendments to section 26M to ensure consistent use of terminology.

CLAUSE 17 CONSIDERATION OF VALID VISA APPLICATION

45 This clause makes technical amendments to section 26N. In particular, the amendments reflect the removal from the *Migration Act* of the two step process of approval and grant which was introduced by the *Reform Act* (see section 26ZF and section 26ZI of the *Migration Act* as amended by the *Reform Act*). This reflects more accurately the administrative processes involved in decision-making on visas. The reversion to a single statutory step involving the grant of a visa (section 26ZF of the *Migration Act* as amended by the MLAB 1994) necessitates amendments to terminology to remove expressions such as 'approved or refused' and substitution of expressions such as 'grant, or refusal to grant'.

CLAUSE 18 REPEAL OF SECTION AND SUBSTITUTION OF NEW SECTION

46 This clause provides for the repeal and substitution of section 26P to overcome technical problems with the section.

Section 26P Non-citizen refused a visa or whose visa cancelled may only apply for particular visas

47 The substituted section 26P has the same substantive effect as the repealed section. The section is intended to limit repeat applications by persons seeking to delay departure or removal from Australia, where there is no serious basis for making a further application.

48 The major technical defect in the to-be-repealed section is in subsection 26P(2) which provides that one of the criteria in a class prescribed for the purposes of section 26P is that there has been a prescribed change in circumstances since the events referred to in subsection 26P(1) occurred. It is arguable that the effect of the section is that all relevant visas must have a criterion to the effect that 'there has been a prescribed change in circumstances since the refused application or cancellation'. This would introduce a complexity into the regulations which was not intended. The amendment ensures that there is scope to prescribe classes of

visa for the purposes of section 26P, the criteria for which may particularise the changes of circumstances that must have occurred since the happening of the events referred to in subsection 26P(1).

49 The classes to be prescribed for the purposes of section 26P will include the protection visa.

50 The other technical defect in the section which is remedied by the amendment is the inclusion of a reference to the cancellation power in section 180A in subsection 26P.

CLAUSE 19 WITHDRAWAL OF VISA APPLICATION

51 The clause amends section 26Q. It makes technical amendments to section 26P to ensure consistent use of terminology.

CLAUSE 20 COMMUNICATION OF APPLICANT OR INTERESTED PERSON WITH MINISTER

52 This clause amends section 26T. It makes a technical change to terminology in section 26Q.

53 This clause expands the scope of section 26T so that, in addition to requiring an applicant to communicate with the Minister in the prescribed way, the section also requires any 'interested person' to communicate with the Minister in the prescribed way. 'Interested person' is defined to mean a person who wants or is requested to give information about the applicant to the Minister.

CLAUSE 21 COMMUNICATION OF MINISTER WITH APPLICANT

54 This clause amends section 26U to modify the regime governing communication by the Minister with the applicant. Where an applicant nominates a specified person (eg a solicitor, migration agent, friend, or relative) to receive notifications it will be mandatory to send those notifications to that person. As a counter-balance to this obligation, the section will also provide that, subject to the regulations, only one person may be specified to receive the notifications at any particular time. The section will also provide that the Minister may communicate directly with the applicant provided that the specified person is informed about the communication.

CLAUSE 22 REPEAL OF SECTION AND SUBSTITUTION OF NEW SECTION

55 This clause repeals section 26V and substitutes a new section 26V.

Section 26V Minister must have regard to all information in application

56 Section 26V has been redrafted to clarify its intended operation. The section makes it clear that the Minister must have regard to all information provided by an applicant in his or her application. This overcomes a possible confusion about the Minister's obligations arising from the use of the word 'may' in the repealed subsection 26V(1).

57 The section also makes it clear that the Minister must have regard to any additional information provided by the applicant in accordance with section 26W.

CLAUSE 23 REPEAL OF SECTION AND SUBSTITUTION OF NEW SECTION

58 This clause repeals section 26Y and substitutes a new section 26Y.

Section 26Y Certain information must be given to applicant

59 This section has been redrafted to describe with greater clarity the information which must be given to applicants for visas which can be granted in the migration zone and which are subject to merits review if refused. In addition, the redrafted section has the effect that information which has been provided to the Department by a third party with the permission of the applicant must nevertheless be provided to the applicant. This is a departure from the repealed section, and reflects a view that it would be fairer and simpler for the Department to provide an applicant with all relevant information even if that information could be obtained from the third party who had provided the information with the permission of the applicant.

CLAUSE 24 INVITATION TO GIVE FURTHER INFORMATION OR COMMENTS

60 This clause amends section 26Z to reflect the fact that further information may be sought, under section 26X, from persons other than the applicant.

CLAUSE 25 WHEN DECISION ABOUT VISA MAY BE MADE

61 This clause amends section 26ZE to reflect the removal of the approval/grant dichotomy. The clause also amends the section to make it clear that the Minister may grant or refuse a visa at any time subject to:

- . section 26E (criterion limiting number of visas);
- . section 26Y (give applicant information);
- . section 28B (effect of limit on visas);

- . . . section 28 (no further processing);
- . . . section 31 (put aside under points system); and
- . . . the limitations set out in subsection 26ZE(2) and subsection 26ZE(3).

CLAUSE 26 INSERTION OF NEW SECTION

62 This clause inserts a new section 26ZEA.

Section 26ZEA Notice of assessment

63 As a consequence of the removal of the approval/grant dichotomy, it is necessary to include a new statutory mechanism as the 'trigger' for the payment of relevant taxes and charges. Section 26ZEA provides for a 'written notice' to be provided to applicants who have satisfied all prescribed criteria for the grant of the visa and who must pay, before a visa can be granted, monies imposed by one or more of the following Acts:

- . . . *Migration (Health Services) Charge Act 1991;*
- . . . *Immigration (Education) Charge Act 1992; or*
- . . . *Migration (Delayed Visa Applications) Tax Act 1992.*

64 The intention is that the notice of the assessment would allow a reasonable time in which to pay applicable charges or taxes. A decision on the application would generally only be taken after that time expired.

CLAUSE 27 OMISSION OF HEADING AND SUBSTITUTION OF NEW HEADING

65 This clause omits the heading and substitutes a new heading to reflect the removal of the approval/grant dichotomy.

CLAUSE 28 DECISION TO GRANT OR REFUSE TO GRANT VISA

66 This clause amends section 26ZF to reflect the elimination of the approval/grant dichotomy, and to make technical amendments to take account of the *Migration Amendment ("Points System") Act 1993*.

CLAUSE 29 NOTIFICATION OF DECISION

67 This clause amends section 26ZG to reflect the elimination of the approval/grant dichotomy.

68 The clause also amends paragraph 26ZG(4)(c) to make it clear that the reasons which must be given are written reasons. The paragraph will then attract the operation of section 25D of the *Acts Interpretation Act 1901* which provides that a reference to reasons (where they are required to be written) also requires that findings of fact be set out and reference made to the evidence or other material on which those findings were based. It is intended that the notice provided under section 26ZG will avoid the necessity to provide separate statements of reasons under the *Administrative Decisions (Judicial Review) Act 1977*.

69 The clause also omits and substitutes a new subsection 26ZG(5) to reflect the policy intention which is that reasons for decisions do not have to be provided, under section 26ZG, if the application is for a visa which cannot be granted in the migration zone unless the application is one which entails a right to merits review of the decision.

CLAUSE 30 EFFECT OF COMPLIANCE OR NON-COMPLIANCE

70 This clause amends section 26ZH to:

- . clarify that the section only operates in respect of actions by the Minister rather than the applicant or any other person; and
- . reflect the removal of the approval/grant dichotomy.

71 This clause provides for section 26ZH to be renumbered as section 26ZKA and relocated so that it appears after section 26ZK in Subdivision AE of Division 2 of Part 2.

CLAUSE 31 OMISSION OF HEADING

72 This clause provides for the omission of the heading to Subdivision AD of Division 2 of Part 2.

CLAUSE 32 REPEAL OF SECTION

73 This clause provides for the repeal of section 26ZI, which is consequential upon the elimination of the approval/grant dichotomy. The section which now deals with the grant of visas is section 26ZF.

CLAUSE 33 WHEN VISA IS IN EFFECT

74 This clause omits and substitutes subsection 26ZK(2) to provide greater flexibility in relation to the coming into effect of visas. The effect of subsection 26ZK(1) is that, if there is no indication in the visa of the date on which a visa is intended to come into effect, it will come into effect on the date that it is granted. However, subsection 26ZK(2) provides that a visa may provide that it is to come into effect from a date, being a date after its grant:

- (a) specified in the visa; or
- (b) when an event, specified in the visa, happens.

75 It should be noted that references to 'the visa' are not references to the document (traditionally a label placed in a passport) which is created as evidence of the visa (see section 26ZL). In accordance with section 26ZJ, a visa is granted by the Minister causing a record of it to be made. This means that the specification of a date or event for the purpose of subsection 26ZK(2) will be part of that record, which may, for example, be a record in a computer database. The information would usually be included, but does not necessarily have to be included, in the physical document (if any) which is given to evidence the grant of the visa.

76 The clause also inserts a new subsection 26ZK(3) which puts it beyond doubt that a visa can only be in effect during the visa period for the visa. 'Visa period' is defined in section 4.

77 The clause also inserts a new subsection 26ZK(4) which provides a special regime in relation to the effect of bridging visas. It is intended that the visa period of a bridging visa will continue until it ceases to be in effect in accordance with section 26ZW (other than subsection 26ZW(2A)) and that it may enter into effect, and cease to be in effect, as necessary having regard to whatever substantive visas or any other bridging visas the non-citizen holds during the visa period of the bridging visa.

CLAUSE 34 REPEAL OF SECTION AND SUBSTITUTION OF NEW SECTION

78 This clause provides for the repeal and substitution of section 26ZN. That section is an interpretation section which defines who is eligible for the grant of a bridging visa, the purpose of which is to avoid mandatory detention of unlawful non-citizens under section 54W.

Section 26ZN Interpretation

79 The repealed section 26ZN referred to 'detention non-citizens' which was inappropriate terminology given that there will be no likelihood of detention in relation to the vast majority of non-citizens who require bridging visas, eg to maintain lawful status while a substantive visa application is being processed, or to allow additional time in which to depart Australia after the expiry of a substantive visa. Section 26ZN now refers to 'eligible non-citizens'.

80 An 'eligible non-citizen' means a non-citizen who:

- (a) has been immigration cleared; or
- (b) is in a prescribed class of persons.

81 The effect of this definition is that all non-citizens in Australia will, subject to the satisfaction of prescribed criteria, be eligible for the grant of a bridging visa, with the exception of persons who arrive in Australia without authority and who are refused immigration clearance or bypass immigration clearance (see section 54HS). The section therefore has the effect of requiring the detention of unauthorised arrivals. However, there is a mechanism available to confer eligibility for bridging visas on such persons (the capacity, in paragraph (b) of the definition, to prescribe a class of persons as 'eligible non-citizens').

CLAUSE 35 REPEAL OF SECTION AND SUBSTITUTION OF NEW SECTIONS

82 This clause provides for the repeal of section 26ZP ('Further applications for bridging visa') and for the substitution of the following sections.

Section 26ZP Further application for bridging visa

83 Section 26ZP has been redrafted to provide for consistent terminology having regard to the elimination of the approval/grant dichotomy.

Section 26ZPA When eligible non-citizen in immigration detention granted visa

84 This section will allow the regulations to establish a procedural safeguard for applicants for bridging visas who are in detention. The scheme created by the *Reform Act* provided for mandatory detention of unlawful non-citizens but did not require applications for bridging visas (the mechanism for obtaining release from detention) to be processed within a specified timeframe.

85 The section provides that if a decision on an application is not made within a prescribed time (which may be extended by agreement between the applicant and the Minister), the applicant is taken to have been granted a bridging visa of a prescribed class on prescribed conditions (if any) at the end of that period.

CLAUSE 36 VISAS HELD DURING VISA PERIOD

86 This clause amends section 26ZR to reflect the new concept of the "visa period" (see the last dot point in paragraph 6 above).

CLAUSE 37 CHILDREN BORN IN AUSTRALIA

87 This clause amends section 26ZS so that a child born in Australia to a lawful non-citizen (other than the holder of a special purpose visa) is taken to hold a visa or visas, rather than being included in any visa or visas held by the parents. This better reflects the general position, although it is not a universal rule (see section 27, section 50F, and the definition of 'holder' in section 4), that under the *Migration Act* every lawful non-citizen holds a visa and that a visa does not apply to more than one person.

CLAUSE 38 REPEAL OF SECTION AND SUBSTITUTION OF NEW SECTION

88 This clause provides for the repeal and substitution of section 26ZU.

Section 26ZU Certain persons taken not to leave Australia

89 The section has been redrafted to better express the policy intention which is that passengers and crew on round trip cruises, fishermen, and others who leave Australia and return within a prescribed time are taken not to leave Australia provided that they do not go to a foreign country (other than for transit purposes).

CLAUSE 39 WHEN VISAS CEASE TO BE IN EFFECT

90 This clause amends section 26ZW to make a number of minor and technical amendments:

the wording of the section has been clarified to reflect the elimination of references to visas being 'in force'. Those references are replaced by references to visas being 'in effect';

subsection 26ZW(2) has been amended to provide that the deemed grant of a special purpose visa does not cause any other visa held by a non-citizen to cease to be in effect. Special purpose visas are for limited and temporary purposes and are granted by operation of law. It would be inappropriate if another visa, eg a visitor visa or a visa for temporary residence, was to cease to be in effect because the holder entered Australia with a status which caused a special purpose visa to be granted;

a new subsection 26ZW(2A) provides that a bridging visa ceases to be in effect if another visa (other than a special purpose visa) for the non-citizen comes into effect. This relates to the special regime for bridging visas contained in section 26ZK;

at present it is necessary to take cancellation action, under section 26 of the *Migration Act*, in relation to resident return visas (or other return facilities) held by deportees. A new subsection 26ZW(2B) has been inserted to provide that a visa ceases to be in effect when the holder leaves Australia because of a deportation order made under section 55A. This provision reflects the policy (to be implemented by regulations made under section 180C) that persons deported from Australia in pursuance of the criminal and security deportation powers are not permitted to return to Australia; and

terminology has been amended to ensure consistency with section 24 and section 25.

CLAUSE 40 CHANGES IN CIRCUMSTANCES TO BE NOTIFIED

91 This clause amends section 40 by omitting subsection 40(4). Incoming passengers must complete passenger cards so that all questions on the card are answered correctly (see section 38). Subsection 40(4) does not add anything to this requirement, because it refers to notifying changes in circumstances which occur after the passenger card is completed. As passenger cards are completed on arrival at Australian ports, the only changes in circumstances which were being addressed by subsection 40(4) are changes which occur during the brief time between filling in the passenger card and immigration clearance at the port. It is not the intention that persons who apply for visas overseas are to be required to notify changes in circumstances after they have been immigration cleared.

CLAUSE 41 NOTICE OF INCORRECT APPLICATIONS

92 This clause amends section 43 which describes the first step in the process leading to cancellation under section 45. Section 43 requires the Minister to give a non-citizen (who has been immigration cleared) who did not comply with section

37, 38, 39, 40, 41, or subsection 43(2), a notice giving particulars of the alleged non-compliance. The purpose of the amendment is to make it clear that not only a person who accepts that there was non-compliance, but also a person who responds to a notice under section 43 by attempting to show that there was compliance, has an opportunity to show why the visa should not be cancelled if non-compliance is found.

93 The clause also amends section 43 so that the Minister, rather than being obliged to wait for 14 days, may consider cancellation of the visa as soon as a written response is received from the visa holder or as soon as the visa holder indicates that no written response will be provided. In other cases the 14 day period will apply.

94 The clause also provides for consistent terminology by changing references to 'officer' to references to 'Minister'.

CLAUSE 42 CANCELLATION OF VISA IF INFORMATION INCORRECT

95 This clause amends the section 45 regulation-making power which deals with matters that the Minister must have regard to before cancelling a visa under section 45. Rather than referring to 'any prescribed circumstances of the non-compliance', the amended section refers to 'any prescribed circumstances'. This makes it clear that matters apart from the particular instance of non-compliance may be prescribed as matters which the Minister must consider, eg the extent to which the visa holder has breached immigration laws on other occasions.

CLAUSE 43 REPEAL OF SECTION AND SUBSTITUTION OF NEW SECTION

96 This clause provides for the repeal and substitution of section 50AD.

section 50AD Cancellation powers do not limit or affect each other

97 Section 50AD was intended to put beyond doubt that the cancellation powers in the *Migration Act* are not limited or otherwise affected by each other. Therefore, the fact that a particular visa can, or cannot, be cancelled under one of the specified powers does not affect any power to cancel that visa under another of those specified powers. However, the section was not a comprehensive listing of visa cancellation powers in the *Migration Act*. The substituted section 50AD refers to all of the cancellation powers:

- . section 45 (incorrect information);
- . section 50AB (general power to cancel);
- . section 50AN (when holder outside Australia);

- . section 50A (cancellation of business visas);
- . section 50G (consequential cancellation of other visas); and
- . section 180A (special power to refuse or cancel).

CLAUSE 44 REPEAL OF SECTION AND SUBSTITUTION OF NEW SECTION

Section 50AF Certain information must be given to visa holder

98 This clause repeals and substitutes section 50AF which has been redrafted to describe with greater clarity the information which must be given to a visa holder if the Minister is considering cancellation of the visa (note also the equivalent amendment of section 26Y in relation to applications for visas).

99 In addition, the redrafted section has the effect that information which has been provided to the Department by a third party with the permission of the visa holder must nevertheless be provided to the visa holder. This is a departure from the repealed section, and reflects a view that it would be fairer and simpler for the Department to provide the visa holder with all relevant information even if that information could be obtained from the third party who had provided the information with the permission of the visa holder. This also mirrors the position in section 26Y in relation to applications for visas.

CLAUSE 45 NOTICE OF CANCELLATION

100 This clause amends section 50AO. It makes a technical correction to section 50AO.

CLAUSE 46 EFFECT OF REVOCATION OF CANCELLATION

101 This clause amends section 50AS. It makes technical corrections to section 50AS. In particular the amendment makes it clear that subsection 50AS(2) is subject to subsection 50AS(1). The purpose of this amendment is to ensure that a visa 'granted on the revocation' pursuant to subsection 50AS(1) cannot be determined to operate from a date prior to revocation pursuant to subsection 50AS(2).

CLAUSE 47 CANCELLATION OF VISA RESULTS IN OTHER CANCELLATION

102 This clause amends section 50G to ensure that a visa which is taken to have been granted to a child born in Australia, under section 26ZS, is cancelled if the equivalent visa of a parent is cancelled. This is consistent with the general principle, reflected in subsection 50G(1) that where a person holds a visa because he or she is a member of the

family unit of a person whose visa has been cancelled under section 45 (incorrect information) or section 50AB (specified grounds for cancellation), the visa of the family unit member is also cancelled. However, new subsection 50G(2A) is not limited to particular cancellation actions under the *Migration Act*. The new subsection applies when a parent's visa is cancelled under any of the cancellation powers.

CLAUSE 48 DELEGATION BY ATTORNEY-GENERAL

103 This clause amends section 53 to allow the Attorney-General to delegate his power under section 54C to a member of the Australian Federal Police, of a rank not lower than Superintendent. Section 54C provides a power to issue a certificate staying removal or deportation of a non-citizen for the purposes of the administration of criminal justice. The amendment addresses the operational difficulty which would occur at airports if an urgent stay of removal or deportation was required. Section 53 only allows a delegation to the Secretary of the Attorney-General's Department or to officers of the Senior Executive Service in that Department. Access to a delegate at short notice may therefore be difficult.

104 The power delegated to members of the Australian Federal Police will, pursuant to subsection 53(3), be subject to certain restrictions:

- . the power may only be exercised in relation to a person at a port; and
- . any certificate that is issued by the member is to remain in force for no longer than five days.

Subsection 53(4) provides that the Attorney-General may at any time, by written notice, revoke such a certificate.

CLAUSE 49 REMOVAL OR DEPORTATION NOT CONTEMPT ETC. IF NO STAY CERTIFICATE OR WARRANT

105 This clause amends section 54HA to ensure that the section does not authorise action in contravention of an order of the High Court or the Federal Court.

106 Section 54HA reflects the priority to be given to removal or deportation of non-citizens when that action is required by the *Migration Act*. The section provides that the only mechanism for staying removal or deportation is the issue of a criminal justice stay certificate or a criminal justice stay warrant. However, on a literal reading, the section would also have permitted removal or deportation in contravention of an order of the Federal Court or the High Court, eg where the Federal Court had made an interlocutory order staying removal or deportation pending the hearing of an application for judicial review. This was not the policy intention.

107 The amendment will preserve the powers of the Federal Court and the High Court to stay removal or deportation. However, State and Territory courts will only be able to stay deportation or removal via the statutory scheme, ie a court may issue a criminal justice stay warrant under section 54G.

108 The amendment does not interfere with the principle contained in section 54HA that it would not be a contempt of court to remove or deport a non-citizen unless there is in force a criminal justice stay warrant or stay certificate or an order of the Federal Court or High Court. For example, the fact that a deportee or removee was a defendant or witness in pending criminal proceedings would not, without a stay warrant or stay certificate, or an order of the Federal Court or High Court, prevent removal or deportation.

CLAUSE 50 INSERTION OF NEW SECTION

109 This clause inserts a new section 54HAA.

Section 54HAA Officer not liable - criminal justice stay certificates or warrants

110 This section provides that an officer, who acts in good faith (which would be assessed objectively), is not liable to any civil or criminal action in relation to acts or things done, or omitted to be done, in the exercise of the power to keep a person, who is the subject of a criminal justice stay certificate or criminal justice stay warrant, in immigration detention. The section does not make the Commonwealth immune from liability for wrongful acts. Rather the clause merely ensures that officers, acting in good faith, are not involved in a personal capacity in any resulting legal action.

CLAUSE 51 PERSONS ENTERING TO GIVE CERTAIN EVIDENCE OF IDENTITY ETC.

111 This clause amends section 54HM to provide that the requirement placed on Australian citizens to show an Australian passport or prescribed evidence of identity and citizenship is taken to have been complied with if a clearance officer knows or reasonably believes that the person is an Australian citizen. The purpose of this amendment is to allow for the efficient processing of persons who cannot provide, or are unwilling to provide, the required documentation, but who an officer knows or reasonably believes to be Australian citizens.

112 The clause also makes technical amendments, including omitting from subparagraph 54HM(1)(a)(ii) the words 'any visas' and substituting the words 'a visa that is in effect and is' - see the last dot point in paragraph 6 above.

CLAUSE 52 IMMIGRATION CLEARANCE

113 This clause makes a number of technical amendments to section 54HS to ensure that the section operates as originally intended. The section provides for a non-citizen in Australia to have one of four statuses in relation to immigration clearance:

- . in immigration clearance (while the non-citizen is being processed on arrival at a port);
- . refused immigration clearance (where a visa is cancelled at the port, or the non-citizen does not have a visa and a visa is not granted at the port);
- . bypassed immigration clearance (where the non-citizen enters Australia without complying with immigration clearance procedures); and
- . immigration cleared (where a person has complied with immigration clearance procedures and is not placed in immigration detention).

114 The particular amendments made by the clause are as follows:

- . a new paragraph 54HS(1)(c) is inserted. The paragraph provides that a person, who was refused immigration clearance or bypassed immigration clearance, is taken to be immigration cleared if the person is later granted a substantive visa. This reflects the fact that, for example, a non-citizen who had been refused immigration clearance, or who bypasses immigration clearance, is not disqualified from eligibility to apply for or be granted certain visas, eg protection visas in the case of refugees. When the visa is granted, the non-citizen is taken to be immigration cleared;
- . paragraph 54HS(2)(a) and paragraph 54HS(2)(b) have been amended to make it clear that a person is in immigration clearance if he or she is with an officer for the purposes of section 54HM. It is not necessary that the person be with the particular officer who was first approached by the person, ie immigration clearance procedures are not affected by a change in shifts among officers at a port;

subsection 54HS(3) has been omitted and substituted to ensure that a person who does not comply with immigration clearance procedures is refused immigration clearance. The subsection ensures that, in addition to situations where a visa is cancelled, a non-citizen is refused immigration clearance if he or she refuses or is unable to show a visa, or refuses or is unable to provide information required by the Act or regulations; and

a technical amendment is made to subsection 54HS(4).

CLAUSE 53 NON-COMPLIANCE WITH IMMIGRATION CLEARANCE BASIS OF DETENTION

115 This clause makes technical amendments to section 54X to provide for terminology which is consistent with the terminology used in section 54HS, ie references to 'evading' an officer (which are a carry-over from repealed section 20) are replaced by references to bypassing immigration clearance.

CLAUSE 54 END OF CERTAIN DETENTION

116 This clause amends section 54Y to mirror the amendment which is made to section 54HM by clause 51 (see paragraph 111 above). The effect of the amendment is that an officer must release a person from immigration detention as soon as the officer knows or reasonably believes that the person is an Australian citizen. The clause also makes technical amendments.

CLAUSE 55 REPEAL OF SECTION AND SUBSTITUTION OF NEW SECTION

117 This clause provides for the repeal and substitution of Section 54ZA.

Section 54ZA Sections do not apply

118 The effect of this section is to limit the operation of section 54ZB and section 54ZC, and provide for a consistent approach to all unauthorised arrivals in Australia - persons who arrive without a visa.

119 Section 54ZB provides that detainees detained under section 54W, as soon as is reasonably practical, must be made aware of the provisions of section 54ZC regarding time limits in which a person may apply for a visa and section 54ZD regarding their time for remaining in detention. Section 54ZA has the effect that these obligations do not apply for:

persons detained in the migration zone under subsection 54W(1) on being refused immigration clearance or after bypassing immigration clearance or after being prevented from leaving a vessel under section 87;

- . persons detained in the migration zone under subsection 54W(1) who:
 - (i) have entered Australia after 30 August 1994; and
 - (ii) have not been immigration cleared since last entering; or
- . persons detained outside the migration zone under subsection 54W(2).

120 The rationale for these exclusions is that persons who enter Australia without authorisation, or who have their visas cancelled in immigration clearance or who bypass immigration clearance, should not be accorded the same level of procedural protection as is provided to persons who have become unlawful non-citizens after having been lawfully in the Australian community.

121 Subsection 54ZA(2) provides that nothing in subsection (1) is to be taken to require the Minister or any officer regarding any person who is affected by subsection (1) to:

- . advise whether the person may apply for a visa;
- . give an opportunity for the person to apply for a visa; and
- . allow the person access to advice (whether legal or otherwise) in connection with applications for visas.

122 Subsection 54ZA(2) is designed to prevent any entitlements in relation to the matters provided for being implied from subsection 54ZA(1). Subsection 54ZA(2) does not override section 96 (access to legal advice for persons in immigration detention) or any other entitlement a person may have under the Act.

123 It is not intended that section 54ZA should impact upon the rights that a person has to make an application for refugee status. If a person indicates that he or she is seeking refugee status or is in need of protection, following long standing practice, the person will be treated in accordance with the international obligations that Australia has entered into regarding persons seeking refugee status.

CLAUSE 56 REMOVAL FROM AUSTRALIA OF UNLAWFUL NON-CITIZENS

124 This clause makes a number of technical amendments to section 54ZF which defines the circumstances in which the various categories of unlawful non-citizen are subject to mandatory removal from Australia:

- paragraph 2(a) is omitted and new paragraphs 2(a) and 2(aa) are substituted. The new paragraphs provide for the removal as soon as reasonably practical of an unlawful non-citizen who is covered by subsection 54ZA(1) and who has not subsequently been immigration cleared;
- new subsection (3A) is inserted to provide the same provisions as inserted in subsection 54ZA(2) above. Subsection 54ZF(3A) is designed to prevent any entitlements in relation to the matters provided for being implied from subsection 54ZF(2). Subsection 54ZF(3A) does not override section 96 (access to legal advice for persons in immigration detention) or any other entitlement a person may have under the Act;
- subsection 54ZF(2) and subsection 54ZF(5) have been amended to modify the bar on removal of an unlawful non-citizen who has made an application for a substantive visa. As modified, the subsections only prevent the removal of an unlawful non-citizen who has made an application for a substantive visa which can be granted in the migration zone. It is intended that the regulations will provide, pursuant to section 26F, that certain visas can only be granted outside the migration zone. It would not be logical to allow the application for a visa of that type to prevent the removal of an unlawful non-citizen; and
- subsection 54ZF(5) has also been amended to omit subparagraph (5)(c)(ii). This amendment is consequent upon the elimination of the approval/grant dichotomy.

125 It is not intended that section 54ZF should impact upon the rights that a person has to make an application for refugee status. If a person indicates that he or she is seeking refugee status or is in need of protection, following long standing practice, the person will be treated in accordance with the international obligations that Australia has entered into regarding persons seeking refugee status.

CLAUSE 60 INSERTION OF NEW SECTION

132 This clause inserts a new section 66GA.

Section 66GA Vessels required to convey certain removees

133 This section has been inserted to reflect actual practice in relation to the removal of persons who travel to Australia without a visa or who have their visas cancelled on arrival. The typical situation involves commercial airlines. However, ship arrivals are also covered. As with other removees and deportees the Secretary has the power to require the controller of the vessel to transport the person from Australia to a specified destination (see section 66H). However, in relation to persons who are 'turned around' at ports, the practice is not to specify a destination. In this situation responsibility for removal rests with the carrier and the Department accepts no responsibility or obligation in arranging a receiving country for the person. The new section qualifies section 66H to that extent and thereby restores the position in relation to carriers and their passengers which exists under the *Migration Act* prior to the amendments made by the *Reform Act*.

134 In relation to 'penalty units', see the explanation provided in relation to Schedule 1 of the MLAB 1994.

CLAUSE 61 VESSELS REQUIRED TO CONVEY DEPORTEES OR OTHER REMOVEES

135 This clause makes a technical amendment to section 66H to reflect the introduction of new section 66HA. The clause also corrects a typographical error in subsection 66H(2).

CLAUSE 62 CARRIAGE OF NON-CITIZENS TO AUSTRALIA WITHOUT DOCUMENTATION

136 This clause makes a number of technical amendments to section 76, which makes the carriage of a non-citizen to Australia a criminal offence if the non-citizen is not in possession of evidence of a valid visa.

137 The following amendments are made by the clause:

a reference to special purpose visas has been included in subsection 76(1) and subsection 76(5). Holders and potential holders of special purpose visas and persons eligible to apply for a special category visa do not require a visa before travelling to Australia. However, airlines must ensure that the status of these persons will result in the deemed grant of a special purpose visa or eligibility to apply for a special category visa upon arrival in Australia;

- the language of the section has been sharpened by replacing the reference to arriving in Australia (which means arriving at the outermost limit of Australia's territorial sea) with a reference to entering Australia (which in accordance with the definition of 'enter Australia' in section 4 means entering the migration zone);
- references to 'person' have been replaced by references to 'non-citizen' to make it clear that the criminal offence only relates to the carriage of non-citizens;
- references to visas have been brought into line with section 25, ie to reflect the fact that visas are never merely visas to 'travel to' Australia. Rather a visa will be a visa to 'travel to and enter' Australia; and
- the definition of 'vessel' (subsection 76(7)) has been omitted as an identical definition is being inserted in section 4.

CLAUSE 63 REMOVEES AND DEPORTEES HELD IN OTHER CUSTODY

138 This clause amends section 94 to ensure that it allows for the continued detention of removees who are otherwise in custody (serving a prison sentence) after that detention expires and pending removal from Australia. This reflects current practice under the *Migration Act*, which was not adequately reflected in the *Reform Act*.

139 Prior to amendment by the *Reform Act*, the term 'deportee' applies to both illegal entrants subject to a deportation order, as well as to persons subject to criminal and security deportation orders. The *Reform Act* narrowed the scope of the term 'deportee', so that it applies only to permanent residents who are subject to criminal deportation orders (section 55 and section 57) and persons subject to security deportation orders (section 56). Unlawful non-citizens who are liable to removal were styled 'removees'. The necessary consequential amendment to section 94 was overlooked when the *Reform Act* was drafted.

140 It should also be noted that Special Category Visa holders (New Zealand citizens) will also be liable for deportation under sections 55 to 57, in accordance with the amendments to be made by the MLAB 1994.

CLAUSE 64 REPEAL OF SECTION

141 This section provides for the repeal of section 108 (Proof of certain matters recited in deportation orders). That section allows for the deemed proof of various matters in court proceedings in which the validity or application of a deportation order is in issue. The section is not needed to

assist with litigation in relation to criminal and security deportation orders which, as noted above, will be the only deportation orders made after the commencement of the Reform Act.

**CLAUSE 65 SECRETARY MAY ISSUE DOCUMENTS CONTAINING
 INFORMATION CONCERNING CERTAIN PERSONS**

142 This clause amends section 114 to reflect the amendment to section 54HS which provides that a non-citizen who was not immigration cleared on entering Australia is taken to have been immigration cleared if he or she is later granted a substantive visa.

CLAUSE 66 INTERPRETATION

143 This section makes a number of amendments to section 115 which is an interpretation section for the purposes of defining entitlements to merits review of decisions by the Migration Internal Review Office, the Immigration Review Tribunal, and the Refugee Review Tribunal.

144 The amendments made by the clause are as follows:

- . paragraph (a) of the definition of 'Part 3 reviewable decision' is omitted and substituted. The new paragraph excludes visa refusals made under section 180A from review by the Migration Internal Review Office and the Immigration Review Tribunal. This is because there is a separate entitlement to merits review by the Administrative Appeals Tribunal in relation to decisions made under section 180A;
- . paragraph (a) also excludes decisions to refuse to grant a bridging visa to a non-citizen who is in immigration detention because of that refusal. These decisions are referred to separately in the definition of 'Part 3 reviewable decision' (see new paragraph (ba)). The Immigration Review Tribunal will be the merits review body in relation to those decisions (see the amendments to section 116);
- . paragraph (a) is also amended to reflect the amendment made to section 54HS to provide that a non-citizen who was not immigration cleared on entering Australia is taken to have been immigration cleared if he or she is later granted a substantive visa;
- . paragraph (b) is amended to make equivalent amendments to those described in the first dot point above in relation to paragraph (a);

paragraphs (ba) and (bb) are inserted to include within the definition of 'Part 3 reviewable decision decisions' to:

- refuse to grant a bridging visa to a non-citizen; or
- cancel a bridging visa held by a non-citizen

where that person is in immigration detention because of the refusal or cancellation;

paragraph (c) is amended to omit the requirement that, in relation to visas which must be granted overseas, review is only available if the decision on the application was made when the applicant was overseas. This approach is considered to be unduly restrictive;

new paragraphs (d), (e) and (f) are included to reinstate existing review rights which the *Reform Act* has inadvertently removed. The review rights are in respect of overseas decisions on resident return visas, applications by specified relatives of Australian citizens or permanent residents, and points assessments under section 30. In relation to the references to specified relatives in the criteria at paragraph (d)(iii) and (e)(ii), those relationships are regarded as including step-relatives. In other words, the review right is intended to equate with the review right which currently exists under the *Migration (1993) (Review) Regulations*; and

the clause makes other technical and consequential amendments.

CLAUSE 67 INTERNALLY-REVIEWABLE DECISIONS

145 This clause makes a technical amendment to section 115A which defines which decisions are, and which decisions are not, subject to internal review by the Migration Internal Review Office.

146 The purpose of the amendment is to exclude from internal review decisions to refuse to grant, or to cancel, a bridging visa if the non-citizen is in custody because of that decision. Those decisions will be directly reviewable by the Immigration Review Tribunal.

CLAUSE 68 APPLICATION FOR INTERNAL REVIEW

147 This clause amends section 115B which deals with the procedural requirements which apply to applications for internal review by the Migration Internal Review Office.

148 The purpose of the amendment is to ensure that the procedural requirements for applications for review apply to decisions described in new paragraphs (d), (e) and (f) of the definition of 'Part 3 Reviewable Decision'.

CLAUSE 69 INSERTION OF NEW SECTION

149 This clause provides for the insertion of a new section 115DA.

Section 115DA Code of procedure applies to review officer

150 The Code of procedure, set out in Subdivision AB of Division 2 of Part 2, codifies the approach to primary decision-making in relation to applications for visas. This clause inserts a new section 115DA to ensure that the Code of procedure applies to review by the Migration Internal Review Office of a decision to refuse to grant a visa.

CLAUSE 70 NOTIFICATION OF DECISION

151 This clause makes a number of technical amendments to section 115E which sets out procedural matters in relation to the notification of applicants of the outcome of a review by the Migration Internal Review Office.

CLAUSE 71 REVIEW OF ASSESSMENTS MADE UNDER SECTION 30

152 This clause amends section 115F which provides that, for the purposes of the 'points test', a review officer may only assess an applicant by reference to the regulations in force at one of two points in time:

- . the time of the primary assessment; or
- . the time the decision is made by the review officer about the assessment;

whichever is more favourable to the applicant.

153 The purpose of the amendment is to provide for certainty and consistency in the interpretation of this requirement. The amendment does this by providing that, in deciding which regulations are most favourable to the applicant, a review authority is required to:

- . determine the allocation of points under the regulations at one point in time; and
- . compare that allocation to the pool and pass marks at the same point in time.

154 This approach prevents mixing and matching of points and passmarks, eg applying later regulations, which result in a higher points score, to an earlier (lower) pass mark to reach the conclusion that the applicant had satisfied the points test criterion for the grant of a visa.

155 The amendments made by this clause will have effect in relation to all applications for internal review made after 1 September 1994.

CLAUSE 72 DECISION REVIEWABLE BY IMMIGRATION REVIEW TRIBUNAL

156 This clause amends section 116 to provide for review by the Immigration Review Tribunal (without an intervening review by the Migration Internal Review Office) of:

- . decisions to refuse to grant a bridging visa to a non-citizen who is in immigration detention because of that refusal; and
- . decisions to cancel a bridging visa held by a non-citizen who is in immigration detention because of that cancellation.

CLAUSE 73 APPLICATION FOR REVIEW BY IMMIGRATION REVIEW TRIBUNAL

157 This clause makes a number of technical amendments to section 117 which sets out how an application for review by the Immigration Review Tribunal can be made.

158 The clause includes a requirement for approved forms for seeking review of bridging visa decisions, in relation to persons who are in custody, to include a statement that the applicant may:

- (a) request the opportunity to appear before the Tribunal; and
- (b) request the Tribunal to obtain oral evidence from a specified person or persons.

A request must be made in the approved form and must accompany the application for review.

159 The clause also amends section 117 to ensure that the procedural requirements for applications for review apply to decisions described in the new paragraphs (ba), (bb), (d), (e), and (f) of the definition of 'Part 3 reviewable decision' in section 115.

CLAUSE 74 REVIEW OF ASSESSMENTS MADE UNDER SECTION 30

160 This clause amends section 120 in a similar fashion to the amendment made to section 115F. The amended section will apply to all applications for review by the Immigration Review Tribunal which are made after 1 September 1994.

CLAUSE 75 SECRETARY TO BE NOTIFIED OF APPLICATION FOR REVIEW BY IMMIGRATION REVIEW TRIBUNAL

161 This clause amends section 122 which requires the Immigration Review Tribunal to notify the Secretary that an application has been made, and which also requires the Secretary to provide to the Tribunal a statement of reasons in relation to the decision.

162 The purpose of the amendment is to provide an expedited process in relation to applications for review of a decision to refuse to grant, or to cancel, a bridging visa where the non-citizen is in immigration detention because of that refusal or cancellation. In that situation the amended section requires that the Secretary provide the statement of reasons to the Tribunal within 2 working days after being notified of the application for review.

CLAUSE 76 APPLICANT MAY REQUEST TRIBUNAL TO CALL WITNESS

163 This clause amends section 131 so that it does not apply to review of a decision covered by paragraph (ba) or (bb) of the definition of 'Part 3 reviewable decision'. A separate provision is inserted at section 131A to deal with this matter.

CLAUSE 77 INSERTION OF NEW SECTION

164 This clause inserts a new section 131A.

Section 131A Applicant may request Tribunal to call witnesses

165 This section applies to decisions covered by paragraphs (ba) and (bb) of the definition of 'Part 3 reviewable decision'. The purpose of the amendment is to address the situation where an applicant requests the Tribunal to give the applicant an opportunity to appear before it or requests the Tribunal to obtain oral evidence from a specified person or persons. The section provides that the Tribunal is required to have regard to the applicant's wishes but is not required to obtain evidence (oral or otherwise) from any person other than the applicant. It also provides that the Tribunal is not required to adjourn or delay making a decision to enable the applicant or any other person to give evidence.

CLAUSE 78 REVIEW TO BE IN PUBLIC

166 This clause amends section 134 which establishes the general rule that the Tribunal is to take oral evidence in public. Subsection 134(2) and subsection 134(3) provide for a public interest exception to this rule.

167 This clause inserts a new subsection 134(2A) to cater for situations where it is impracticable to take particular oral evidence in public. The impracticability may arise because of the jurisdiction given to the Tribunal to review decisions to refuse to grant, or to cancel, a bridging visa where the non-citizen is in immigration detention because of that refusal or cancellation. Because the liberty of the non-citizen is at stake, the public interest in expeditious review outweighs the public interest in having all oral evidence taken in public.

CLAUSE 79 INSERTION OF NEW SECTIONS

168 This clause provides for the insertion of new sections 134A and 134B.

Section 134A Oral evidence by telephone etc.

169 This section gives the Immigration Review Tribunal a general power to allow a person to appear before the Tribunal or give evidence by telephone, closed circuit television or any other means of communication. The Tribunal is also directed by the new section to take such steps as are reasonably necessary to ensure that the public nature of the review is preserved when evidence is being given by telephone, closed-circuit television or other means of communication.

Section 134B Certain decisions to be made within prescribed period

170 This section provides scope for the regulations to impose a time frame on decision-making by the Immigration Review Tribunal in cases where the decision to be reviewed is a refusal to grant, or a cancellation of, a bridging visa, and where the applicant is in custody as a result of the decision.

171 This section provides that the Immigration Review Tribunal is required to make its decision within the prescribed period and to notify the applicant of the decision in that same period. The prescribed period may be extended with the applicant's consent. The applicant continues to have a right to a written statement of reasons to be provided within 14 days after the decision is made. The right to the statement of reasons is contained in section 135 of the *Migration Act*.

CLAUSE 80 DELEGATE NOT REQUIRED TO PERFORM CERTAIN ADMINISTRATIVE TASKS

172 This clause amends section 177 which provides that a delegate need not personally perform any task except making the decision. This is to cater for situations such as where another officer interviews an applicant and prepares a submission for consideration by a delegate.

173 The purpose of the amendments is to:

- . amend terminology to reflect the elimination of the approval/grant dichotomy; and
- . put beyond doubt that a delegation to cancel visas does not require the delegate to personally perform any task except taking the decision as to whether the visa should be cancelled.

CLAUSE 81 EXCLUSION OF CERTAIN PERSONS FROM AUSTRALIA

174 This clause amends section 180C, so that a person who is needed in Australia for a purpose connected with the administration of criminal justice may be granted a criminal justice visa notwithstanding any exclusion period which applies to that person under section 180C.

CLAUSE 82 OTHER AMENDMENTS OF THE MIGRATION ACT 1958

SCHEDULE 1

175 This clause provides for further amendments of the *Migration Act*, as set out in Schedule 1 of the MLAB 1994. These amendments are minor technical amendments, primarily to provide for consistent terminology and correct cross-referencing of sections. However, the following amendments should be noted:

- . section 114A and the following sections set out in the Schedule, up to section 114ZQ, have been amended to bring visa cancellation within the migration agents scheme; and
- . the references to monetary penalties attaching to offences under the *Migration Act* have been replaced by references to 'penalty units' which are defined in the *Crimes Act* 1914. These amendments do not alter the existing levels of the penalties, but will have the result that penalties will be increased automatically in accordance with any future amendment of the central definition in the *Crimes Act*. Currently, a penalty unit equates to \$100.

CLAUSE 83 RENUMBERING AND RELETTERING OF THE MIGRATION ACT 1958

176 This clause provides for the renumbering and re-lettering of the *Migration Act* to occur immediately after the commencement of the other provisions of the MLAB 1994.

PART 3 - AMENDMENT OF OTHER ACTS

CLAUSE 84 AMENDMENT OF THE MIGRATION REFORM ACT 1992

177 This clause provides for amendment of the *Reform Act* as set out in Schedule 2 of the MLAB 1994. These amendments include a refinement of the transitional provision in section 39 relating to refugee applications and an expansion of the regulation making power to deal with other transitional arrangements (section 40 of the *Reform Act*). A new section is inserted to provide transitional arrangements for persons who are affected by the to be repealed section 20. The other amendments made by the Schedule are minor technical corrections and consequential amendments to terminology.

SCHEDULE 2

178 This schedule contains amendments to the *Reform Act*.

Clause 1 Section 33

179 This clause corrects a cross-reference in section 33 of the *Reform Act*.

Clause 2 Section 39

Transitional - refugee applications

180 This clause omits and substitutes section 39. The substituted section provides for outstanding applications for refugee status to become applications for protection visas on 1 September 1994. Similarly, unfinalised applications for Domestic Protection (temporary) entry permits and Permanent Protection entry permits will convert into protection visa applications as of 1 September 1994. The protection visa applications will be determined in accordance with the amended legislation, ie the criteria for grant are those applying to the protection visa, and not those applying to the precursor application.

181 A further purpose of the substituted section is to ensure that an application is translated at whatever stage has been reached in processing the application, eg so that applications which have been refused by a primary decision-maker and are at the review stage are translated to an application at the review stage.

Clause 3 **After subsection 40(1)**

182 This clause inserts a new subsection 40(1A) to rectify an omission in the *Reform Act*, ie the failure to provide a transitional provision in relation to visas and entry permits granted before 19 December 1989.

Clause 4 **Subsection 40(5)**

183 This clause omits the word 'force' and substitutes the word 'effect'.

Clause 5 **Paragraph 40(8)(a)**

184 This clause corrects an omission in paragraph 40(8)(a), by including a reference to entry permits. The clause also makes a technical correction to the subsection.

Clause 6 **After subsection 40(8)**

185 This clause inserts new subsections 40(8A) and 40(8B) which:

- provide that deportation orders issued under section 60 cease to have effect on 1 September 1994 (these deportation orders will not be necessary after that time as unlawful non-citizens will be subject to mandatory removal from Australia in accordance with section 54ZF); and
- to permit regulations to provide that certificates issued under specified sections of the *Migration Act* as in force before 1 September 1994, are to continue in force as certificates issued under specified section of the *Migration Act* as in force after 1 September 1994.

Clause 7 **Subsection 40(9)**

186 This clause omits subsection 40(9). This is to place beyond any doubt that any status conferred, or anything else done, by the transitional regulations is on going. Legal advice has suggested that the operation of the subsection is not entirely clear. Subsection 40(9) may have, in time, removed any status conferred pursuant to the transitional regulations because of the sunset provision in the subsection. This effect could have had adverse and unintended consequences for all non-citizens affected by the transitional regulations.

Clause 8 **After section 40**

187 This clause inserts new sections 41 and 42 into the *Reform Act*.

Section 41 Transitional

188 This section is intended to supplement the operation of subsection 50AA(3) of the *Reform Act* and thereby provide for the application of the Subdivision C cancellation regime to all lawful non-citizens who were, immediately before 1 September 1994 (the date of commencement of the relevant provisions of the *Reform Act*), illegal entrants by virtue of subsection 14(2) or subsection 14(2A) of the *Migration Act* as then in force.

189 The policy intention is that persons who are illegal entrants, because of subsection 14(2) or subsection 14(2A) (which are operation of law provisions), are to become lawful non-citizens on 1 September 1994. This can be achieved by regulations made under section 40 of the *Reform Act*.

190 It is also intended that those persons will be subject to the discretionary cancellation regime in Subdivision C in relation to the matters that caused subsection 14(2) or subsection 14(2A) to apply. This was the intention behind subsection 50AA(3) of the *Reform Act*, however there was some doubt whether that intention had been achieved. New section 41 makes it clear that the trade-off for the restoration of lawful status is that the new discretionary cancellation regime will operate as if documents and statements produced or made before 1 September 1994 are to be taken to have been made in relation to the application for whatever visa is currently held by the non-citizen.

Section 42 Regulations

191 This section provides that the Governor-General may make regulations prescribing matters:

- (a) required or permitted by this Act to be prescribed; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

192 This section is necessary to facilitate the making of regulations dealing with transitional matters.

Clauses 9-18 (inclusive)

193 These clauses make minor technical amendments, including an amendment to Schedule 2 of the *Reform Act* to omit the repeal of section 95. Section 95 provides for the appointment of prescribed authorities who are responsible for reviewing detention of deportees under section 93. Section 95 had been inadvertently omitted by the *Reform Act*.

CLAUSE 85 AMENDMENT OF OTHER ACTS

194 This clause provides for the amendment of other Acts as set out in Schedule 3.

SCHEDULE 3

195 The schedule makes consequential and technical amendments to the following Acts:

Australian Citizenship Act 1948

Commonwealth Electoral Act 1918

Departure Tax Collection Act 1978

Foreign Acquisitions and Takeovers Act 1975

Health Insurance Act 1973

Immigration (Education) Act 1971

Immigration (Education) Charge Act 1992

Migration (Delayed Visa Applications) Tax Act 1992

Migration (Health Services) Charge Act 1991

Veterans' Entitlements Act 1986.

196 Apart from the amendments to the *Australian Citizenship Act 1948*, the amendments are purely technical amendments to terminology and cross-references. The amendments to the *Australian Citizenship Act 1948* are described below.

AMENDMENTS OF THE AUSTRALIAN CITIZENSHIP ACT 1948

197 Subsection 5(1) of the *Australian Citizenship Act 1948* (ACA) has been amended to in respect of the definitions of "illegal entrant", "valid entry permit", "valid permanent entry permit" and "valid visa" by omitting all the words after "force" and substituting the words "immediately before 1 September 1994". Definitions of "permanent visa", "special category" visa, "special purpose visa", "unlawful non citizen" and "visa" have also been inserted in subsection 5(1).

198 A new paragraph 5A(1)(bb) has been inserted to ensure that persons who are permanent visa holders and are present in Australia on or after 1 September 1994 are permanent residents for the purposes of the ACA. This paragraph also ensures that persons to whom a declaration under subsection 5A(2) applies continue to be considered permanent residents for the purposes of the ACA.

199 New paragraphs (d) and (e) have been inserted in subsection 5A(2) of the ACA to ensure that the Minister may make a declaration under subsection 5A(2) in relation to persons who are holders of special category visas or special purpose visas. This amendment is required because exempt non citizen status is being replaced with special category and special purpose visas under the *Migration Act* on 1 September 1994. Paragraph 5A(2)(e) will allow persons who were special category visa holders but are no longer special category visa holders because they are temporarily travelling outside Australia to count time outside Australia as permanent residence under the ACA if they are ordinarily resident in Australia.

200 Subsection 5A(5A) has been inserted to ensure that a person who has travelled to and entered Australia on a criminal justice visa is not to be taken to be a permanent resident while the criminal justice visa is in effect and the person does not hold a permanent visa.

201 Paragraph 13(9)(c) and subparagraph 13(9)(d)(ii) have been amended by the insertion of a requirement that the person is a permanent resident to ensure that citizenship may only be granted to the spouse, widow, or widower of an Australian citizen if they are also a permanent resident.

202 A new section 14A - Deferral of consideration of application under s13 - visa liable to cancellation - has been inserted to allow a discretion to defer consideration of citizenship applications for up to 12 months while the person is under an investigation which may lead to visa cancellation under the *Migration Act* or the laying of criminal charges.

203 Subsection 52A(2) has been amended by omitting the words "subsection 13(9)" and substituting the words "paragraph 13(9)(a) or (b)". As a result, applicants who appeal to the Administrative Appeals Tribunal (AAT) in respect of a decision made under paragraph 13(9)(a) or paragraph 13(9)(b) are not required to be permanent residents at the time of appeal to the AAT.

204 There are also various purely technical amendments to terminology and cross references.