

1992

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**MIGRATION REFORM BILL 1992**  
**MIGRATION (DELAYED VISA APPLICATIONS) TAX BILL 1992**  
**EXPLANATORY MEMORANDUM**

(Circulated by authority of the Minister for  
Immigration, Local Government and Ethnic Affairs,  
The Hon. Gerry Hand MP)



**Migration Reform Bill 1992**  
**Migration (Delayed Visa Applications) Tax Bill 1992**

**OUTLINE**

1 The Migration Reform Bill 1992 (the Reform Bill) will effect major changes to the *Migration Act 1958* (the Principal Act).

2 The Reform Bill continues the process of modernising Australia's immigration law. Major amendments were introduced in 1989, following the Report of the Committee to Advise on Australia's Immigration Policies, to allow the Government to more effectively control the composition of, and overall numbers in, Australia's immigration program.

3 Subsequent amendments in 1991 and 1992 have continued the process of reform and streamlining of the Principal Act.

4 The major themes behind the changes to be made by Reform Bill are simplicity, clarity, certainty and fairness.

5 The changes will replace the legislative framework which currently underpins the regulation of entry to and stay in Australia as well as the detention and removal of non-citizens here unlawfully. It will provide a new and greatly extended basis for merits review of immigration decisions and, for the first time, provide independent determinative merits review of refugee related decisions.

6 The Migration (Delayed Visa Applications) Tax Bill 1992 imposes a tax on an application for the grant of a visa or entry permit to a non-citizen who has been unlawfully in Australia for 12 months or more. The tax must be paid before that person may be granted a visa or entry permit. The tax is payable by the applicant. The amount of the tax will be \$3,000 for each completed year of unlawful status. The Bill also provides for indexation of this amount for years following 1992-93. Unlawful non-citizens who are granted refugee status will be exempt from the tax. The Bill also provides for the Minister to exclude the tax where the Minister determines that payment of the tax would cause an applicant extreme hardship.

7 The amendments to be effected by the Reform Bill fall into the following areas:

**ENTERING AND REMAINING LAWFULLY IN AUSTRALIA**

**Visas**

8 In order to simplify travel and entry arrangements, the Reform Bill provides for a single form of authority (to be called a 'visa') to travel to, enter and remain in Australia. Currently the Principal Act provides for one form of authority, a visa, which permits a person to travel to Australia, and for another form of authority, an entry permit, which permits a person to enter and remain.

9 Given the computerisation of control systems within the Department of Immigration, Local Government and Ethnic Affairs (DILGEA), this two-stage process is no longer necessary. Indeed, a hybrid facility, called an entry visa, serving both functions, has been used in some circumstances since 1989.

10 The current reforms are a logical extension of the entry visa concept and will enable a significant simplification of the legislative and administrative procedures applying to travel, entry to, and authority to remain, in Australia.

#### **Persons not formerly required to hold visas or entry permits**

11 The Principal Act presently provides for certain persons to be 'exempt non-citizens'. Such people do not need visas or entry permits to travel to, enter and remain in Australia. Exempt non-citizens are, in general, the subject of either bilateral or international agreements which provide for facilitation of entry and the limitation of immigration controls.

12 The streamlining of Australia's entry procedures has reached a point where being an exempt non-citizen no longer confers any facilitation advantage. Furthermore, the existence of categories of exempt non-citizen has inappropriately placed certain persons in those categories beyond the controls in the Principal Act which are applicable to visa and entry permit holders.

13 The Reform Bill therefore provides for the creation of a 'special category visa' which may be electronically issued on arrival in Australia. This will be applicable to persons who were previously exempt non-citizens, including New Zealand citizens. As far as New Zealand citizens are concerned, the new arrangements will preserve the traditional travel facilitation provided under the Trans-Tasman Travel Arrangements. No prior authorisation for travel will be required and the electronic record of entry will be the visa. The benefit of this change is that exempt non-citizens will be brought within the simplified single visa system. They may also be able to be issued with a visa label prior to travel, where this would facilitate their travel arrangements. Finally, and most importantly, the holders of special category visas will be subject to the same controls as all other non-citizens in Australia and their obligations will be clearly set out in the Principal Act.

14 The only group of exempt non citizens who have not been brought within the special category visa scheme are traditional inhabitants of the Protected Zone (i.e. Torres Strait). The Bill contains a special provision permitting their free travel within the Protected Zone.

## **Applications for Refugee Status**

15 The Reform Bill makes a technical change in the way applications for protection as a refugee are dealt with. In future claimants will not apply separately for recognition as a refugee and permission to stay in Australia. Both processes will be combined in an application for a protection visa.

## **Meaning of 'entry' and immigration status**

16 The Principal Act currently provides for a number of different statuses which may be applicable to persons who are in Australia, eg illegal entrants, prohibited entrants, unprocessed persons, designated persons. The proliferation of statuses has resulted in part from the existing definition of entry to Australia which deems some persons not to have entered Australia, for the purposes of the Principal Act, notwithstanding that they are physically present in Australia.

17 The Reform Bill addresses this situation by simplifying the definition of entry to Australia - the Bill redefines "entry" to occur when a person lands in an aircraft in the 'migration zone', or, if in a boat, when the boat enters a port or attaches to land in the 'migration zone'. The 'migration zone' is defined to mean the area consisting of the States, the Territories, Australian resource installations and Australian sea installations. This will eliminate the present distinction between physical arrival in Australia and entry as defined in the Act, which leads to the result that a person can be in Australia for a significant period without legally 'entering'.

18 Following from this, the Reform Bill will provide that a person in Australia will have one of two statuses - lawful non-citizen (ie a person in the Migration Zone who holds a valid visa) or unlawful non-citizen (ie a person in the Migration Zone who does not hold a valid visa). This amendment will represent a significant simplification and clarification of the existing law. It should be noted, however, that there are two exceptions: 'boat people' who arrive in Australia up to 1 December 1992 who become designated persons under the provisions of the Principal Act (who will retain that status until the period for which they are detained expires or until they are granted a visa or leave Australia, if this occurs before the period expires); and deportees who are permanent residents ordered deported under the residual deportation power.

## **Immigration clearance**

19 The Reform Bill will enhance the powers in the Principal Act to control the processing and identification of persons arriving in or departing from Australia. At present the Principal Act does not explicitly state the requirement that persons arriving in Australia must undergo immigration clearance. The Reform Bill provides that upon entry, all persons, including Australian citizens, will be required to present themselves for immigration clearance.

20 The Reform Bill also provides immigration authorities with the power to identify, and collect information from, persons arriving in or departing from Australia and persons

on the domestic sectors of international flights who may have mixed with uncleared international passengers. In relation to persons on domestic sectors this will be a discretionary power which will be applied where necessary.

21 Appropriate control of Australia's border necessitates that Australian citizens submit to immigration clearance. The Reform Bill will formalise that process by requiring Australian citizens arriving in or departing from Australia to present an Australian passport or other prescribed evidence of Australian citizenship. Non-production of evidence will attract an administrative fee for assisting the person to prove their citizenship. This is intended to reduce the prospect of persons evading certain entry and exit controls, for example in relation to the departure of minors, by using alternative passports. It will also add to the integrity of the movement records by avoiding the creation of multiple records for the same person. There will be an onus on all non-citizens to provide evidence of identity and lawful status.

22 These reforms will streamline the identification process at immigration control points, ensuring the fast processing of Australian citizens. As well, there are important national security benefits in being able to more accurately identify persons and their movements in and out of the country.

#### **Pre-cleared flights**

23 To further streamline the processing of people travelling to Australia, the Reform bill provides for the extension of the provisions of the Act relating to pre-cleared flights. Pre-clearance involves the collection of passenger details prior to the departure of a flight, so that when it arrives in Australia no immigration processing is required. This is an important amendment which will enable appropriate processing of the projected increase in the number of tourists wishing to travel to Australia, while also maintaining effective screening procedures. The Reform Bill provides for scheduled services to be designated as pre-cleared flights. It also provides for the pre-cleared status to be withdrawn for a particular flight on that service where an authorised officer considers this is appropriate.

#### **CODIFICATION OF DECISION-MAKING AND REVIEW OF DECISIONS**

24 The Reform Bill contains an integrated package of amendments which will codify decision-making processes relating to the grant and cancellation of visas, greatly expand the availability of determinative merits review, and ensure that judicial review of migration decisions is available only on grounds which take into account the special nature of decisions on the status of non-citizens. The package of amendments addresses concerns about the making of decisions under the Principal Act. These concerns relate, on the one hand, to the fairness of procedures currently followed by decision-makers and, on the other hand, the potential for abuse of those procedures by non-citizens seeking to delay departure from Australia.

#### **Codification of decision-making procedures**

25 Over two million Migration Act decisions are made each year by officers of DILGEA. Uncertainty exists concerning what is required to make a legally valid decision

because of the uncertain content of natural justice, or procedural fairness, as that concept has evolved and continues to evolve in the courts. The Reform Bill provides for a code for decision-making, to replace the current common law rules of natural justice.

26 The Reform Bill provides for codified procedures which will apply to all decisions made under the Principal Act in relation to grant and cancellation of visas. The Reform Bill sets out the legal requirements governing the making of applications, the conduct of written communications between the applicant and the Minister during the decision-making process, and notification of the decision. While an applicant will not be prevented from presenting further relevant information in support of an application, there shall be no requirement to defer the making of a decision because an applicant foreshadows the intention to provide further information.

27 The Reform Bill will also contain provisions which emphasise that it is the responsibility of the applicant who is seeking the benefit of a visa, and not the decision-maker, to ensure that all relevant information is before the decision-maker. If an applicant fails to respond in the prescribed time to a reasonable request to provide further information or to attend an interview, the decision maker will be lawfully entitled to proceed to make the decision.

28 As noted above, the codified procedures to be established by the Reform Bill will replace the common law rules of natural justice or procedural fairness. Those rules require that a person has a reasonable opportunity to present his or her case and, in most circumstances, be given an opportunity to respond to relevant and credible information which is adverse to that case. The rules are embodied in the codified provisions set out in the Reform Bill which will also delineate precisely what is required to comply with the rules.

29 These procedures will be required in all cases where the applicant is in Australia or where the applicant is overseas and is sponsored or nominated by an Australian citizen, permanent resident or business.

### **Persons who mislead the Department when making applications**

30 The Bill inserts a new structured legislative scheme into the Act to deal with non-citizens who provide incorrect information about their circumstances in an application. The onus is on all non-citizens to ensure all questions asked in an application form or passenger card are answered accurately. The primary information requested will relate to identity, eligibility to come to Australia, personal circumstances such as health, character and prior exclusions or deportations from any country. The onus is on the non-citizen to advise the Department of changes in circumstances in situations which would affect the grant of a visa or immigration clearance.

31 Where it is found that information which should have been disclosed but has not there is a procedure which will allow the non-citizen to correct the misinformation and to explain why his or her visa should not be cancelled. There will be situations prescribed in regulations which will mitigate the cancellation procedure and there will be situations set out in regulations which will make it obligatory for cancellation to take place. If a

person is found to be an unlawful non-citizen the decision will be prospective, and not retrospective as in the past. The decision that a person is an unlawful non-citizen will be reviewable on the merits.

32 The proposed amendments aim to simplify current arrangements under Section 20 and to prevent non-citizens from benefiting from the failure to disclose or provide accurate and truthful information in a visa application.

### **Cancellation of visas**

33 The Reform Bill makes substantial changes to the current arrangements for the cancellation of visas and entry permits. There are two significant changes in particular. The first is the replacement of the existing absolute power to cancel visas and temporary entry permits with a power to cancel a visa only on a ground specified in the Act or the regulations. the second is the replacement of the existing section 20 of the Act, under which an entry permit is cancelled by operation of law when the holder has given false or misleading statements, by a power to make a decision whether or not to cancel a visa in such circumstances.

34 A visa can be cancelled under one or four powers. These are:

- the general power to cancel visas on prescribed grounds;
- the power to cancel visas in Australia where incorrect information has been given to obtain the visa or to obtain permission to remain;
- the power to cancel criminal justice visas; and
- the power to cancel business visas, which will be the same as the current power to cancel business permits and visas.

35 The procedures for exercise of the general cancellation power and the incorrect information power will require that the Minister takes action to give the visa holder a reasonable opportunity to comment on the grounds for cancelling the visa and to put forward any arguments on why the visa should not be cancelled.

### **Merits Review**

36 The Bill extends the current merits review regime in Australia so that there are broad merits review rights for decisions which affect the capacity of a non-citizen to remain in Australia. The only exception is in relation to those decisions on visa applications and visa cancellations made in immigration clearance. Applications for refugee-related visas made in immigration clearance will attract review rights. Importantly, the decisions which attract independent and determinative merits review and the persons who may apply for review will be specified in the Act itself.

37 The Immigration Review Tribunal (IRT) and the Migration Internal Review Office (MIRO) will now have jurisdiction to review decisions on applications by unlawful non-

citizens and decisions on applications made in Australia for all visa classes in relation to which applications could be made in Australia, other than refugee-related visas, which will be reviewed on a separate basis, and applications made in or before immigration clearance. Certain decisions will be reviewed directly by the IRT and others will be reviewed firstly by MIRO before being reviewed by the IRT.

38 The regime for reviewing decisions made overseas will remain unchanged.

39 The broadening of review rights for visa applicants in Australia is intended to simplify access to review by applicants, to address community concerns about the impartiality of immigration decision-making in Australia in areas where no independent merits review is currently available, and to lessen the scope for "merits" review by the Federal Court by providing for merits issues to be determined by an independent administrative review tribunal. It should also reduce the number of applications for judicial review by channelling the relevant cases into the immigration merits review system.

40 The Bill creates the Refugee Review Tribunal (RRT), in place of the Refugee Status Review Committee, to provide determinative independent merits review of refugee status matters.

41 The creation of the RRT completes an initiative begun in 1989 to provide for independent and determinative review of Migration Act decisions. The new Refugee Review Tribunal will provide quality independent merits review at a low cost.

42 Where an IRT or RRT case involves an important principle of general application, the Principal Member of the IRT or of the RRT will have the power to refer the case to the Administrative Appeals Tribunal (AAT) for a review with the concurrence of the President of the AAT. These cases will be considered by a Presidential Bench of the AAT which would include the Principal Member of the relevant tribunal who would be cross-appointed for this purpose (The relevant Principal Member will not be cross appointed where he or she had been previously involved in hearing the case).

43 It is expected that only a very small number of cases will be referred in any year, but the decisions made by the AAT will have an important normative effect for Departmental and review decision-makers dealing with similar principles in other cases. This mechanism will provide some of the benefits of a judicial legal interpretation without the disadvantages of delay and expense associated with Court appeals.

## **Judicial Review**

44 In acknowledgment of the special nature of immigration decisions and as a result of the widened availability of merits review the Reform Bill amends the Act to set down reformulated grounds for judicial review. To ensure procedural fairness, procedures for decision making which embody the principles of natural justice have been set out in the Reform Bill.



45 The specific codified procedures in the Reform Bill, and those to be set out in the *Migration Regulations*, replace the current uncertain rules with regard to natural justice and statutory criteria for decision-making will clarify the matters which must be considered in making a decision. An applicant will be able to appeal to the Federal Court if the codified procedures and criteria have not been followed by decision-makers, but a Court appeal will only be permitted where the appellant has first pursued all merits review rights.

46 Codification of procedures will enable a balance between obligations on applicants - for instance in relation to time limits on applications and requirements to co-operate in processing of applications - and obligations on the Department - for example to provide applicants with an opportunity to comment on adverse material and take decisions only after prescribed periods have passed.

## **DETENTION, DEPORTATION AND REMOVAL OF UNLAWFUL NON-CITIZENS**

47 In recent years, the increasing frequency of unauthorised boat arrivals at Australia's northern frontier, the need to protect Australia's international fishing zones from being illegally exploited, and the close scrutiny by the Federal Court directed towards relevant sections of the Principal Act, have exposed a need to provide a uniform regime for the detention of persons illegally in Australia and for the recovery of costs associated with such detention and removal.

48 The Principal Act currently provides for a number of ways to deal with persons who have no authority to be in Australia. How the person is dealt with depends on how the person arrived in Australia. This is undesirable and has led to complexity and uncertainty. As noted above, the Reform Bill will provide generally for one category of 'unlawful non-citizen' which will subsume all other statuses of illegal and unauthorised presence in Australia subject to the designated person exception which will apply only to persons who arrive in particular circumstances before 1 December 1992.

### **Detention**

49 The Reform Bill provides for a system of mandatory detention to be imposed on unlawful non-citizens. To effect this power the Reform Bill also provides a power to require non-citizens to produce evidence, within a prescribed period, of being lawful non-citizens. The Reform Bill also provides a power to detain lawful persons whose visas may be liable to cancellation because of incorrect statements in applications, breach of conditions etc. The permitted detention is only for the purpose of questioning such persons about their status. The aggregate period of detention, after excluding certain interruptions, permitted pursuant to this power is four hours.

50 The mandatory detention requirement for unlawful non-citizens does not necessarily mean that any more persons than in the past will be kept in detention. Unlawful non-citizens who satisfy certain minimum criteria will be eligible for the grant of a 'bridging visa' upon application.

## **Bridging visas**

51 The grant of a bridging visa will provide an unlawful non citizen with temporary lawful status so that detention or continued detention is no longer mandatory. A bridging visa will generally be granted to eligible persons while an application for another visa is being processed and/or to allow the non-citizen to finalise their affairs before departing Australia. The criteria for the grant of bridging visas will be set out in the Migration Regulations. The criteria will restrict grant to those unlawful non-citizens who are considered unlikely to abscond after the grant of a bridging visa. Persons arriving in Australia without prior authorisation and those who have evaded immigration clearance will generally not be entitled to the grant of a bridging visa but there will be a power to prescribe situations in which eligibility for grant may be expanded.

52 Immediate consideration will be given to applications for bridging visas and the refusal to grant a bridging visa will be reviewable. The creation of bridging visas will ensure that the release from immigration detention of persons unlawfully in Australia is controlled by the requirement to satisfy certain criteria for the issue of the visa. The criteria will also be binding on the courts.

## **Removal and Deportation**

53 The Reform Bill provides for a single deportation power which will restrict the scope for deportation to the circumstances currently provided for in sections 55, 56, and 57 (criminal deportations, deportations on security grounds, and deportation of non-citizens convicted of certain serious offences). The power to deport illegal entrants will be replaced by a power to remove unlawful non-citizens (see section 54ZF). This is essentially a change in terminology, to reflect an appropriate distinction between 'deportation', as the ultimate sanction for non-citizens who commit serious crimes or are a threat to national security, and 'removal' of persons who have no legal entitlement to remain in Australia.

54 Removal from Australia will be by force of law rather than as a result of a decision. A person will become subject to removal as soon as he or she becomes unlawful. If there is any available avenue for applying to remain they will have a limited period to apply for it. Once all available application and merits review entitlements are exhausted the applicant will be removed as soon as practicable.

55 The aim of these amendments is to simplify the removal process so that all persons unlawfully in Australia will be subject to removal from the country.

## **Costs of Detention Removal and Deportation**

56 The Bill provides that non-citizens unlawfully in Australia be liable for the costs of their maintenance, detention and removal. The Bill contains a power to waive such costs which will be exercised by the Minister for Immigration, Local Government and Ethnic Affairs.

57 At present not all persons unlawfully in Australia are so liable and it is the intention of these changes to ensure that all unlawful non-citizens bear primary responsibility for the costs associated with their detention, deportation or removal.

58 Masters, owners, agents and charterers of vessels (carriers) will continue to be jointly and severally liable for costs associated with the removal of any unvisaed or improperly documented persons who are brought to Australia by them. However, this will be limited to such costs, where an unvisaed or improperly documented person is detected at the time of immigration clearance or if immigration clearance has been avoided at any time after the prescribed time for immigration clearance has expired.

59 The new arrangements will help to minimise the costs to the Australian community of the detention, maintenance and removal or deportation of unlawful non-citizens.

60 The Bill provides a power to seize, confiscate or dispose of boats providing passage to unlawful non-citizens. Carriers' property may be frozen to secure payment for costs associated with detention, maintenance and removal and, where necessary, sold to offset such costs. Vessels used to transport unlawful non-citizens may be seized and sold to meet costs, and the aircraft of carriers who also engage in bringing persons unlawfully into Australia will be subject to detention (lien) so that costs of detention, maintenance and removal may be recovered.

61 This will ensure that carriers are made more responsible for bringing unlawful persons to Australia. The power to dispose of boats which bring unlawful persons to Australia (e.g. boat people), will ensure that the Commonwealth does not have to pay the maintenance and other associated costs of these vessels (such as harbour fees) while applications are being processed.

#### **Persons required in Australia to facilitate the administration of criminal justice**

62 The Bill replaces the current Statutory Visitors Scheme, which facilitates entry into Australia of witnesses or defendants covered by the Extradition and Mutual Assistance in Criminal Matters Acts, with the new Criminal Justice Visitors Scheme which also deals with cases involving criminal justice purposes not currently covered by these Acts. The new scheme will enable State and Territory law enforcement and prosecutorial agencies to seek a visa authorising the entry and stay of a non-citizen required for criminal proceedings in their jurisdiction, and will enable the stay of removal or deportation action against an unlawful non-citizen who is required for a criminal justice purpose.

#### **Tax on visa applications lodged by unlawful non-citizens**

63 The Reform Bill requires that a non-citizen who has been unlawful for over 12 months will, in addition to satisfying the normal criteria for grant of a substantive visa, have to pay a tax before they can be granted that visa. The tax is imposed by the Migration (Delayed Visa Applications) Tax Bill 1992. At present there is little incentive for an unlawful person to come forward to immigration authorities. The longer that person remains in the community the better links he or she can build, and the better chance they will have of ultimately qualifying to remain. The tax is intended to serve as

a disincentive to becoming illegal, and an incentive to come forward at an early stage rather than remaining unlawful indefinitely.

64 The Minister will be able to waive payment of the tax where he or she believes that it would cause extreme hardship.

#### **FINANCIAL IMPACT STATEMENT**

65 Establishment of the Refugee Review Tribunal (RRT) will cost \$3.2 million in 1992/93. However, the increased credibility of the independent merit review procedures embodied by the RRT is likely to lead to a significant reduction in the numbers of unsuccessful applicants seeking judicial review. It is anticipated that 5% of unsuccessful applicants from the RRT will be likely to seek judicial review, compared with approximately 20% of unsuccessful applicants under the existing refugee determination system being expected to seek judicial review.

66 Judicial review is expensive; each case costing the Commonwealth approximately \$30,000. Reduction in judicial review applicants of the level outlined above could lead to savings of approximately \$72 million from the anticipated costs of \$296 million, over the next four years, for the existing refugee determination system.

67 There are no significant financial implications arising from the other changes proposed by the Bill.

68 The tax to be raised by the Migration (Delayed Visa Applications) Tax Bill 1992 is intended to serve as a disincentive to becoming an unlawful non-citizen and an incentive for persons to come forward at an early stage to regularise their status, rather than remaining unlawful indefinitely. As the prime objective is not related to raising revenue, it is expected that the Bill will have a minimal financial impact.

## NOTES ON INDIVIDUAL CLAUSES

**CLAUSE 1            SHORT TITLE**

1     Provides that the Act may be cited as the *Migration Reform Act 1992* and that in it the term 'Principal Act' is a reference to the *Migration Act 1958*. In this document the term 'Reform Act' is used in relation to the former and 'Principal Act' in relation to the latter.

**CLAUSE 2            COMMENCEMENT**

2     Provides that sections 1, 2 and 31 of the Reform Act commence on the day it receives Royal Assent; sections 6 and 32 commence on 1 July 1993 and the remaining provisions on 1 November 1993. (A considerable number of new regulations will need to be made and administrative procedures put in place.)

**CLAUSE 3****Section 3A            Object of Act**

3     This clause inserts a new provision, section 3A, for the purpose of expressly setting out the overall object of the Principal Act - to regulate, in the national interest, the coming into, and presence in, Australia of persons who are not Australian citizens ('non-citizens').

4     The new section 3A states that, in order to advance that object:

- visas are provided for permitting non-citizens to enter or remain in Australia and the Principal Act is the only source of the right of non-citizens to so enter or remain; and
- all persons, including citizens, on entering Australia are required to identify themselves so that non-citizens can be readily identified; and
- the Act provides for the removal or deportation from Australia of non-citizens whose presence in Australia is not permitted by the Act.

**CLAUSE 4            INTERPRETATION**

5     This clause omits, substitutes and inserts various definitions into section 4 of the Principal Act. Several omissions result from the fact that there will no longer be a dual documentation system for travelling to Australia (visas) and entering and remaining in Australia (entry permits). The two documents were merged in practice in many cases with the introduction of entry visas in 1989. Under the Reform Act, entry permits will be omitted altogether and visas will become the only authority to travel to, enter and remain in Australia.

6 Notable among the new definitions are:

- . **'behaviour concern non-citizen'** which means a non-citizen who has been, among other things, sentenced to imprisonment in relation to certain crimes. This definition, together with its health equivalent **'health concern non-citizen'** is needed in relation to: the definition of **'allowed inhabitant of the protected zone'**; and in describing which New Zealand citizens are to be granted **'special category visas'** (see section 26A below)
- . **'enter Australia'** which means the person enters the **'migration zone'** which is also defined (see below). The purpose of these definitions and associated definitions is to end the artificial distinction between **'arrival'** in Australia and **'entry'** to it, and to set out a clearly delineated area, the **'migration zone'**, within which a non-citizen's status and entitlements will depend, in nearly all cases, on whether that person holds a visa.
- . **'immigration detention'** replaces current section 11 of the Principal Act and sets out when a person is in immigration detention.
- . **'lawful non-citizen'** and **'unlawful non-citizen'** - see under sections 14 and 15 below, but in short this replaces a number of immigration statuses no longer necessary largely as a result of the ending of the distinction between arrival and entry.
- . **'leave Australia'** which means to leave the **'migration zone'** (subject to new section 26ZU - see below).
- . **'migration zone'** which in essence means the States, the Territories, Australian resources installations (see section 6 of Principal Act) and Australian sea installations (see section 7 of Principal Act). Note that this definition does not mean that the Principal Act is limited in its application to the **'migration zone'** - see clause 5 on new section 4A.
- . **'non-disclosable information'** means information, the disclosure of which would, in the Minister's opinion, be contrary to the national interest because it would prejudice the security, defence or international relations of Australia, involve the disclosure of Cabinet deliberations or Cabinet decisions, or otherwise would result in a breach of legal professional privilege or confidentiality.
- . **'remove'** means remove from Australia and **'removee'** means an **'unlawful non-citizen removed, or to be removed, from Australia under Division 4D of Part 2.** That Division, generally speaking, requires the removal of unlawful non-citizens.
- . **'substantive visa'** which means a visa other than a **'bridging visa'** (see new section 26C) or a **'criminal justice visa'** (see new section 26D).

**CLAUSE 5****Section 4AA            Effect of limited meaning of enter Australia etc**

7        This clause inserts new section 4AA which makes it clear that the Principal Act's application is, among other things, not limited to the 'migration zone'. See, for example, new section 54W at subsection (2).

**CLAUSE 6****Section 13            Period of grace**

8        Section 13 of the Principal Act is amended to insert reference to the Refugee Review Tribunal (in addition to existing reference to other merits review). This provision will operate from 1 July 1993, the date on which the RRT commences operation, until 1 November 1993, when section 13 as a whole will be repealed.

**CLAUSE 7**

9        This clause repeals the headings to Part 2 and Division 1 of Part 2, and repeals sections 14 to 18, of the Principal Act. Those sections (which deal with redundant matters: illegal entrants, exempt non-citizens and entry visas) are replaced by sections which set out who are lawful and unlawful non-citizens. The terms lawful and unlawful non-citizen replace the many immigration statuses currently in the Principal Act, for example, 'unprocessed person', 'illegal entrant' and 'exempt non-citizen'. Some of those many terms reflect the current legal distinction between arrival in Australia and entry to it - a distinction ended by the Reform Act. The distinction between lawful and unlawful non-citizens is particularly relevant to the requirement that non-citizens be detained or removed from Australia.

**PART 2 - CONTROL OF ARRIVAL AND PRESENCE OF NON-CITIZENS****Division 1 - Immigration status****Section 14            Lawful non-citizens**

10       New section 14 states who is a 'lawful non-citizen'. The following are lawful non-citizens:

- a non-citizen (of Australia) in the migration zone who holds a visa;
- an allowed inhabitant of the 'Protected Zone' who is in a 'protected area' engaged in 'traditional activities' (see definitions at subsection 4(1) of the Principal Act);
- certain persons who had ceased to be unlawfully in Australia prior to the commencement of the *Migration Amendment Act 1983* and who have remained in Australia since then, who do not hold a permanent entry

permit, but who are nevertheless equivalent to permanent residents. (Read in conjunction with clause 16 of the *Migration Laws Amendment Bill (No.2) 1992.*)

## **Section 15                      Unlawful non-citizens**

11      New section 15 provides that a non-citizen in the migration zone who is not a lawful non-citizen is an unlawful non-citizen. There will be just the two main statuses in comparison with the many currently in the Principal Act. Illegal entrants prior to the commencement of the Reform Act, become unlawful non-citizens on 1 November 1993 because they will be persons who do not hold a visa.

## **Section 16                      Effect of cancellation of visa on status**

12      New section 16 makes it clear that cancellation of a visa causes its former holder to then become an unlawful non-citizen if that person is then in the migration zone. (New section 50E means that a visa is cancelled when the Minister causes a record of that cancellation to be made.)

## **Section 17                      Removal of immigration rights of inhabitant of Protected Zone**

13      Because there is no visa to be cancelled in this case, this section allows for an inhabitant of the Protected Zone to lose, by the Minister's declaration, the special status given by the new subsection 14(2) of the Principal Act.

## **CLAUSE 8                      PRE-CLEARED FLIGHTS**

14      This clause amends section 19 by extending the existing scheme in the Principal Act for the streamlining of processing of people travelling to Australia. Section 19 is expanded to allow for specified classes of flights to be declared pre-cleared flights. Pre-cleared means that passenger details are collected prior to the departure of the flight so that no immigration processing on arrival is required.

15      There is provision at new subsection 19(3) to allow for an authorised officer to effectively end such status in relation to a particular flight, before the passengers on it disembark in Australia. This would mean that passengers on the flight would undergo normal immigration formalities on arrival in Australia.

## **CLAUSE 9                      REFUGEES**

16      This clause repeals Division 1AA of Part 2 of the Principal Act. That Division deals with the determination of refugee status and is to be replaced by the 'protection visa' mechanism. For details see under section 26B below.



## CLAUSE 10

17 This clause repeals some headings and sections 23 to 26 of the Principal Act, which deal with the old-style visas, and inserts new sections 23 to 26ZW which deal with the new-style visas. The new-style visas replace the current scheme of travel-only visas, entry permits and entry visas. They will be the single form of authority to travel to, enter and remain in Australia.

### Division 2 - Visas for non-citizens

#### Subdivision A - General provisions about visas

##### Section 23 Interpretation

18 This section makes it clear that 'specified period' in this Division includes the period until a specified date.

##### Section 24 Visas

19 This new section sets out the kinds of authority which a visa can confer, being authority to travel to, enter and remain in Australia. A visa can give a non-citizen permission to:

- . travel to and enter Australia and/or remain in Australia;
- . enter Australia during a specified period and, only if entry is made during that period, remain in Australia during a specified period or indefinitely (in the case of permanent visas);
- . enter Australia during a specified period and, only if entry is made during that period, remain in Australia during a specified period or indefinitely (in the case of 'permanent visas' - see section 25 below) and if the holder leaves during it, to re-enter during a specified period or at any time.

20 See too new section 26ZV below on extent of visa authority.

##### Section 25 Kinds of visas

21 This new section sets out the two 'kinds' of visas:

- . a 'permanent visa' which allows a person to remain in Australia indefinitely; and
- . a 'temporary visa' which allows a person to remain temporarily in Australia:
  - during a specified period; or
  - until a specified event happens; or

- while the holder has a specified status.

## **Section 26                      Classes of visas**

22     This new section deals with the various 'classes' of visas. There are 2 main groups - those that are specified by new sections in the Principal Act and those created by regulations. The classes in the Act are specified in new sections 26A, 26B, 26C and 26D.

23     Subsection 26(3) allows for the regulations to prescribe criteria for all classes of visas except the section 26D 'criminal justice visas' which will have their criteria set out in what will be Division 3 of Part 2 of the Principal Act.

## **Section 26A                      Special category visas**

24     This is a class of temporary visas designed to replace the current provisions in the Principal Act which allow for certain persons to be exempt from the requirement to hold a visa and/or an entry permit. The section covers:

- non-citizens of Australia who present a New Zealand passport that is in force and who are not of behaviour or health concern (they will be able to travel to, enter and remain in Australia with the same degree of convenience as at present); and

- other categories to be prescribed.

## **Section 26B                      Protection visas**

25     This is another temporary visa class. Subsection 26B(2) makes it a criterion for the visa that the applicant is a non-citizen who is in Australia to whom Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol.

26     A protection visa is intended to be the mechanism by which Australia offers protection to persons who fall under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees.

27     Clause 9 (above) provides for the repeal of Division 1AA of Part 2 of the Principal Act, which contains the present mechanism for providing protection to such persons. In the future persons seeking the protection of the Australian Government on the basis that they are refugees will not apply initially, as now, for recognition as a refugee, but directly for the protection visa. This change is consistent with the general principle contained in the Reform Act that the visa should be the basis of a non-citizen's right to remain in Australia lawfully. The change will end the present duplication of processing whereby separate applications are required for recognition of refugee status and grant of formal authority to remain (presently an entry permit).

## **Section 26C            Bridging visas**

28     Another temporary visa class. This visa is needed because of the provision that all persons known or reasonably suspected to be unlawful non-citizens be detained - see new section 54W. Generally, such non-citizens (other than those who arrive in Australia without prior authority and those who are refused entry to the country) will be able to apply for, and usually be granted (see new section 26ZO), a 'bridging visa' if they satisfy the relevant prescribed criteria for the visa. The grant of the bridging visa will give the grantee a temporary lawful status so that the requirement to hold the person in detention no longer applies - see new section 54ZD.

29     Bridging visas are primarily aimed at unlawful non-citizens who have made an application for a substantive visa or for those who are prepared to leave Australia and seek time to first put their affairs in order before leaving the country.

## **Section 26D            Criminal justice visas**

30     The last of the temporary visa classes expressly created by the Reform Act. For the purpose of this visa class see below under 'Division 3 - Criminal justice visitors'.

## **Section 26E            Criterion limiting number of visas**

31     This reinserts current sections 23(3A) and (3B) of the Principal Act which are to be repealed by clause 10.

32     Those provisions were introduced by the *Migration Amendment Act (No.2) of 1991*. In the Minister's second reading speech to that Act, the Minister stated that the power was, in effect, an extension of the visa and entry permit capping powers already in the then Act. The Minister stated in the speech that while the (then) new power was principally intended to give effect to the (then) new special assistance category visas, the possibility of its use in relation to other humanitarian responses was not ruled out. The Minister also stated in the speech that the power would not be used in relation to preferential family cases. (Note that section 26E excludes protection visas.)

## **Section 26F            Circumstances for granting visas**

33     This new section expressly allows for regulations to be made to provide that visas or visas in a specified class may only be granted in specified circumstances. It is important that different classes of visas may only be granted in certain places. For example, some classes of visas should only be granted to persons who are not yet in Australia in order to maintain a difference between the off-shore and the on-shore migration programs. It is also necessary in relation to border control so that where persons arrive unauthorised in Australia it is possible to restrict the range of visas available to them. Without such a power it would be impossible to effectively control Australia's borders. (There are currently regulations in place which restrict the classes of visas that can be applied for at the border.) This section is complemented by new section 26L - see below.

34 It is also necessary to identify classes which can be granted inside or outside Australia for the purpose of determining which decisions are merits reviewable and who may seek review of those decisions (see new sections 115A, 115B, 116 and 117).

#### **Section 26G                      Conditions on visas**

35 This new section replaces and reflects the express power now in sections 23 and 33 of the Principal Act (which sections will be repealed by the Reform Act) to impose conditions on visas and entry permits. It is an essential control mechanism that there is a power to make visas or specified classes of visas subject to conditions. For example, certain classes of visas will have a condition prohibiting their holders from working in Australia. New paragraph 54AB(b) expressly makes non-compliance with a visa condition a ground for cancellation of a visa.

#### **Section 26H                      Visas essential for travel**

36 This new section states that a non-citizen must not travel to Australia without a visa. The only exceptions are:

- .            allowed inhabitants of the Protected Zone; and
- .            where the regulations allow it - for example, special category persons - see new section 26A above.

#### **Section 26J                      Visa holders must usually enter at a port**

37 This new section makes it clear that (for reasons of border control) a visa is not permission for the holder to enter Australia wherever the holder chooses, but only at specified places unless the holder travels to Australia on a vessel and the health or safety of the person or another good reason beyond the control of the master of the vessel makes it necessary to enter in another way.

#### **Subdivision AA - Applications for visas**

38 This Subdivision covers such matters as the need to make a valid visa application, the content of a valid visa application and restrictions on further visa applications following refusal. For reasons of good administration and certainty, it is essential that what constitutes a valid visa application be clearly defined.

#### **Section 26K                      Extent of Subdivision**

39 Section 26K makes this Subdivision and most of the following Subdivisions in the Division inapplicable to criminal justice visas because applications are not required for those visas and they are granted for law enforcement purposes and not the private purposes of the person to whom they are granted.

#### **Section 26L                      Application for visa**

40 It is essential for the proper administration of the Principal Act and for reasons of certainty, that a person who wants a visa should make an actual application for one. This

section expressly allows for the making of regulations to set out how applications for particular visas and in particular circumstances are to be made. To avoid abuses of immigration laws, the regulations may also specify where a intending applicant must be in order to make a valid application.

## **Section 26M            Valid visa application**

41    This section should be read in conjunction with new sections 26L and 26N. Section 26N prevents the Minister considering a visa application that is not a 'valid' visa application - see subsection 26N(3). Section 26M sets out the pre-conditions to there being a valid visa application. These are:

- that the application must specify a class of visa for which the person is applying;
- that the application is made in the way prescribed by subsection 26L(2) including any way that is prescribed by subsection 26L(3);
- that any prescribed fee is paid;
- where the regulations require that the applicant must be in a particular place when the application is made; such as outside Australia, the applicant is in that place; and
- that the applicant, if in Australia, has not held since last entering Australia a visa which has as a condition that the holder may not be granted another visa in Australia (this does not apply to applications for bridging or protection visas).

The application is not to be regarded as made unless and until all the requirements are met.

## **Section 26N            Consideration of valid visa application**

42    This section expressly requires the Minister to consider a 'valid' visa application until it is withdrawn, approved or refused, or until further consideration is prevented by section 26E (limiting of visas) or section 28 (suspension of consideration).

43    Importantly, it is made clear that the Minister is not to consider a visa application that is not a valid application - see section 26M above on what is a valid application.

44    Subsection 26N(4) states that a decision by the Minister that a visa application is not a valid visa application is not a decision that the application is refused. Therefore, such a decision may not be reviewed under Part 3 or 3A of the Principal Act.

## **Section 26P            Non-citizens whose application refused or cancelled may only apply for particular visas**

45    This provision 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. Non-citizens in Australia affected by this provision will have no general right to apply for another visa. Affected non-citizens are unlawful non-citizens and bridging visa or criminal justice visa holders, who have been refused a visa, other than a bridging visa, since entering Australia, or have had a visa cancelled under sections 45, 50A or 50AB.

46 A small number of visas classes will be created to cater for those circumstances where it would be inappropriate to require the non-citizen to leave Australia. A non-citizen will be able to apply for one of these classes or for a bridging visa. One of the criteria for each of these classes is that the applicant has had a specified change of circumstances since the last application. This criterion will allow quick determination of applications which have no serious basis.

#### **Section 26Q                      Withdrawal of visa application**

47 To provide greater certainty in dealing with applications, this section expressly allows for the applicant to withdraw a visa application and makes it clear that following that withdrawal the application is taken to have been disposed of but not refused for the purposes of section 26P. Unless the regulations provide otherwise, the fees paid in respect of the application are not refundable.

#### **Section 26R                      Only new information to be considered in later protection visa applications**

48 This new section limits the information that the Minister is required to consider in any further application for a protection visa. Where an earlier application or applications have been refused and finally determined, the Minister, in relation to any further application:

- is not required to reconsider earlier information; and
- may have regard to and take to be correct earlier decisions made about or because of that information.

#### **Section 26S                      Order of consideration**

49 It is essential for good administration that the Minister has the flexibility to consider and dispose of applications as the Minister considers appropriate. This may occur, for example, in circumstances where an applicant has a pressing need to travel quickly to Australia, or where an applicant may be using the application process to delay or avoid leaving Australia.

50 This section expressly allows the Minister this flexibility and makes it clear that there is no unreasonable delay, and hence no breach of law, where an application has not yet been considered or disposed of even though an application made later has been.

#### **Subdivision AB -      Code of procedure for dealing fairly, efficiently and quickly with visa applications**

51 This new subdivision is intended to end the uncertainty about what is required to make a fair decision on a visa application. It will replace the uncoded principles of natural justice with clear and fixed procedures which are drawn from those principles.

52 The basic principles underpinning this Subdivision are that the Minister is under a duty to give a visa application fair and proper consideration and an applicant, who is seeking the benefit of the visa, has the obligation of doing everything reasonable to assist in the speedy consideration and determination of the application. It is essential that the proper administration of migration decision making is not frustrated by delays in the decision making process. Such delays increase the cost of making decisions encourage unmerited applications in Australia to avoid removal and result in delays in processing applications from legitimate applicants. Note that new section 166LB provides specifically that the Federal Court may not review a migration decision on the ground that the decision maker has not followed natural justice. Instead, it provides for judicial review on the ground that procedures that were required by the Principal Act, as amended, or the regulations, to be observed in connection with the making of the decision, were not observed.

#### **Section 26T                      Communication of applicant with Minister**

53 This section requires the applicant to communicate with the Minister in the prescribed way. This provision is to ensure that the Minister actually receives comments, further information and changes of address which an applicant may have purported to have communicated. If the applicant communicates in the prescribed way, the Minister will be taken to have received the communication. If the applicant does not communicate in the prescribed way, for example by sending the communication to the wrong office, the decision maker will not be taken to have received the communication unless it was actually received by the decision-maker.

#### **Section 26U                      Communication of Minister with applicant**

54 It is essential, for the efficient processing of an application, that the Minister has an address for the applicant to which notifications can be sent and be regarded as having been received by the applicant. This section places the onus on the applicant, as the person seeking the benefit of the visa to ensure that the Minister has the correct address.

55 Therefore, a visa applicant is to tell the Minister the address at which the applicant intends to live while the application is being dealt with. If the applicant proposes to live at a new address for at least 14 days, the applicant must tell the Minister the address and the period of proposed residence. The applicant is taken to have received any notification the Minister sends to or leaves at the address given by the applicant, whether or not the applicant was at the address. This means that the applicant and not the effectiveness of the decision-making process will bear the consequences if the applicant fails to ensure that the minister has the correct address.

56 There is also provision for the applicant to tell the Minister that a specified person at a specified address, such as an agent, may be given notifications for the applicant about the application. The Minister may, but is not required to, give notifications to the specified person at that address, but if the Minister does do so, it is taken to have been received by the applicant.

57 Finally, when a number of applicants, such as a family, apply together, a notification to the person indicated as the main applicant is taken to be a notification to them all.

**Section 26V      Application may be decided on the basis of information in application**

58 This reflects the current section 178 in the Principal Act. Subsections (2) and (3) of section 178 will be repealed - see Part 1 of the Schedule - and section 26V will ensure that visa applications:

- may be decided on the basis of the information in the application, and information is in a visa application if, and only if, it is set out in the application or in a document attached to it when the application is made; and
- may be decided without giving the applicant an opportunity to make oral submission or further written submissions.

This provision gives effect to the principle that the person seeking the visa should put all his or her claims for the visa forward at the time of the application.

**Section 26W      Further information may be given**

59 This section provides for the Minister to take into account any relevant additional information which the applicant puts forward before the decision is made, but makes it clear that the Minister does not have to wait for that information to be provided, except under sections 26ZD and 26ZE, before the decision is made. This provision strikes an appropriate balance between the requirements of fairness and administrative efficiency. If the applicant actually presents further relevant information, it is fair that the Minister consider this information. However it would be unreasonable to stop the decision-making process on the basis that the applicant proposes to give further information to the Minister.

**Section 26X      Further information may be sought**

60 This section expressly allows the Minister orally or in writing to seek any further information the Minister considers relevant, from any source, including the applicant. It allows the Minister to specify how the information will be provided. Except as provided in section 26Y, the Minister is not required in any circumstances to seek further information.

**Section 26Y      Certain information must be given to the applicant**

61 This section imposes a requirement on the Minister to give the applicant particulars about certain adverse information the Minister has and to invite a response.



62 Information which the Minister must provide the applicant is information which the Minister considers:

- . would be the reason, or part of the reason, for refusing the visa application; and
- . is specifically about the applicant or another person and not just a class of persons which includes the applicant or another person; and
- . was not given by, or with the permission of, the applicant for the purpose of the application.

63 The Minister is not required to give non-disclosable information (see definition in section 4) under this section.

64 The particulars and the invitation are to be given in a way that the Minister considers appropriate and the Minister is to ensure, as far as practicable, that the visa applicant understands why the information is relevant to the application.

65 The section does not apply to an application for a visa if the application must be made when the applicant is outside Australia (see new section 26L above) and there is no review of a refusal decision under Part 3 of the Principal Act.

66 This provision is to give effect to the obligation for the Minister to give the applicant an opportunity to comment on adverse information about the applicant personally, which will lead to the visa application being refused. The requirement takes into account the need to protect other persons and the national interest. Together with the right of the applicant to present her or his case in the application, this provision reflects the natural justice principle that the applicant has a right to be heard before the decision is made. The codified procedure takes into account the special nature of migration decision making.

#### **Section 26Z Invitation to give further information or comments**

67 This section sets out how section 26X and section 26Y invitations are to be given and responded to and when. The response may be required to be in writing, or at an interview or by telephone. There is a power to prescribe the time within which the response may be made, including any additional period and the place where the interview is to be held. If there is no prescribed period or place, the Minister may specify a reasonable time and place.

#### **Section 26ZA Interviews**

68 This section makes it clear that the applicant has an obligation to assist the quick processing of the application by taking every reasonable effort to make her or himself available to be interviewed personally or on the telephone about the application as the Minister so requires.

#### **Section 26ZB Medical examination**

69 The health of an applicant is usually a critical matter to be taken into account in deciding the application for a visa. This section makes it express that where the health or physical or mental condition of an applicant is relevant to the approval of a visa application, the Minister may require the applicant to be examined by a specified person, such as a doctor employed by the Commonwealth.

#### **Section 26ZC Prescribed periods**

70 This section states that the prescribed periods required or allowed by this Subdivision may prescribe different time limits in different circumstances in relation to:

- . applications in a specified class; or
- . applications in specified circumstances; or
- . applicants in a specified class; or
- . applicants in a specified class in specified circumstances.

#### **Section 26ZD Failure to receive information not require action**

71 This section deals with the consequence of the applicant not giving additional information or commenting on information, within the allowed time, in response to an invitation to do so. The Minister may make the decision without taking any further action to obtain the additional information or comment. It is necessary for effective administration that inaction by the applicant not be allowed to delay the processing of the application.

#### **Section 26ZE When a decision about visa application may be given**

72 This section states that the Minister may approve or refuse to approve an application for a visa at any time after the application is made, subject to the requirement to give the applicant an opportunity to comment on adverse information (section 26Y) and the procedure in section 31 which requires that some applications, which depend on the points test, be put aside for later reconsideration. It makes it clear, however, that the Minister cannot refuse to approve an application while the time period is running on an invitation to the applicant to give further information or comment on information unless the applicant has, inside that time period, given the information, told the Minister that he or she does not wish to give the information or does not have it or, in the case of comment, given the comment or said that he or she does not wish to comment.

#### **Subdivision AC - Decision about application**

73 This Subdivision deals with approval or refusal of a visa application, and notification of that decision. It makes it clear that the Minister is bound to decide the application in accordance with whether or not the applicant satisfies prescribed criteria for the class applied for, unless the Act otherwise prevents the application from being approved.

#### **Section 26ZF Decision about application**

74 This section carries on the 'non-discretionary' nature of decision-making under current sections 24 and 34 of Principal Act (being repealed by the Reform Act). It provides that if the Minister is satisfied that the applicant meets the health criteria and the other prescribed criteria for the approval of the application, there is no statutory bar on approval and any visa tax or charges have been paid, the Minister is to approve the application. Otherwise the application is to be refused, unless the application has been pooled under section 31 (points test) and has not been reconsidered for the last time. The Minister will not be required to reach a definite conclusion that the applicant has failed to satisfy the criteria in order to refuse the application; it is sufficient that the Minister be satisfied that it has not been established that the applicant satisfies the criteria.

#### **Section 26ZG            Notification of decision**

75 This section requires notification, in the prescribed way, of a decision to approve or refuse the visa application. In the case of approval, where there are additional requirements to be met before grant, for example payment of visa tax, the time for payment is to be specified in the notification and that time cannot be longer than 12 months.

76 Where it is notification of refusal, the particular prescribed criterion or provision of the Act that caused the refusal is to be specified. And, subject to subsection 26ZG(5) (where the application must be made when applicant outside Australia and there is no review) reasons are to be given as to why the particular prescribed criterion or provision of the Act prevented approval. Notice of merits review rights, where they exist, will also have to be given. (The notice is to advise the applicant where the review application can be made, who may make it and the time in which it must be made.) Failure to give notification of the decision will not affect the validity of the decision.

#### **Section 26ZH            Effect of compliance or non-compliance**

77 This section makes it clear that non-compliance with Subdivision AA (applications for visas) or AB (the code of procedure), does not mean that the decision to approve or refuse the application is not a valid decision.

78 In addition, it makes it clear that if the Minister complies with Subdivisions AA, AB and AC, that is all the action the Minister need take in dealing with the application lawfully. As indicated above, this should be seen in the light of the grounds of review by the Federal Court set out at new section 166LB - note that there is no (at large) ground of natural justice, but rather the ground that procedures required by the Principal Act, as amended, or the regulations, to be observed in connection with the making of the decision were not observed.

#### **Subdivision AD - Grant of visa**

79 This Subdivision covers the post-approval grant of a visa, the way grant occurs and when a visa operates.

#### **Section 26ZI            Grant of visa**

80 This section states that where the Minister has approved the application for a visa and all of any pre-grant requirements have been met on time, the visa is to be granted or any other barring provision of the Principal Act or any other law of the Commonwealth.

81 It is made express that the visa cannot be granted if the time periods for any pre-grant requirements being satisfied are not met and such is not a decision to refuse the application, but the application is taken to have been finally determined.

#### **Section 26ZJ            Way visa is granted**

82 A visa is to be granted simply by the Minister causing a record of it to be made - in practice this will usually be a departmental computer record. (The grantee will be given physical evidence of the grant where necessary - see Subdivision AE below.)

#### **Section 26ZK            When visa operates**

83 This section states that unless the visa provides that it is to have effect from a (post-grant) date specified in it, it has effect as soon as it is granted.

#### **Subdivision AE - Evidence of visas**

84 This Subdivision deals with the ways of visa evidencing.

#### **Section 26ZL            Evidence of visa**

85 This section states that, subject to the regulations, a non-citizen is to be given evidence of the visa grant. (It will not be necessary in all cases, for example special category cases, to give the visa grantee physical evidence of the grant.)

#### **Section 26ZM            Ways of giving evidence**

86 This section allows for the making of regulations to prescribe the ways of giving evidence of the visa grant.

87 Where the prescribed way is endorsement of the non-citizen's passport or other valid travel document, the Minister may direct that a particular type of passport or travel document is not one that can be endorsed. One reason for that may be that Australia does not recognise the agency or government that issued the document.

#### **Subdivision AF - Bridging visas**

88 This Subdivision deals with bridging visas which are a temporary class of visa the grant of which will give temporary lawful status so that detention or continued detention under section 54W is unnecessary. (See new section 26C above.)

#### **Section 26ZN            Interpretation**

89 This section defines 'detention non-citizen' to describe who may be eligible for the grant of a bridging visa. An unlawful non-citizen or a person who is about to become an unlawful non-citizen who is being detained, liable to detention or will, within a prescribed period become liable to detention, will be eligible for the grant of such a visa if prescribed criteria are satisfied. Persons who avoid immigration clearance will not generally be eligible for bridging visas.

90 As a general rule, bridging visas are intended for persons who have sought prior authority to come to Australia and who have overstayed their visas. There will be a power to make regulations to allow for other situations to allow eligibility.

#### **Section 26ZO Bridging visas**

91 This section deals with the grant of bridging visas to detention non-citizens. Detention non-citizens must make an application under section 26L, before the Minister will grant the visa where the person satisfies the criteria for the grant.

#### **Section 26ZP Further applications for bridging visa**

92 This section provides that applications for bridging visas are to be set 30 days from final determination of the preceding application. (Although provision is made for a shorter period in prescribed circumstances.)

#### **Section 26ZQ Bridging visa not affect visa applications**

93 This section states that the holding of a bridging visa does not prevent or affect the person making an application for another class of visa or the approval or grant of that application. It is made clear that the holding of a bridging visa is not, in relation to an application for another class of visa, the same as holding a visa.

#### **Subdivision AG - Other provisions about visas**

94 This Subdivision deals with such matters as the extent of the visa authority, when visas cease and the effect leaving Australia has on a visa. It is most important that there is certainty in such matters given the consequences of not holding a visa that is in force.

#### **Section 26ZR Only visas in force are held**

95 Many provisions refer to the holder of a visa. This section makes it clear that a non-citizen does not hold a visa unless the visa is in force. (See section 26ZW below on what 'in force' means.)

#### **Section 26ZS Children born included in parents visa**

96 This section deals with the inclusion of children born in Australia as non-citizens, on the parents visa. This replaces existing section 39 of the Principal Act. It has substantially the same effect as the to be repealed provision and is intended that a child born to non-citizen parents, in Australia, is regarded as being included in the parents' or parent's visa.

## **Section 26ZT            Effect on visa of leaving Australia**

97    This section makes it clear that after leaving Australia, the holder of a visa may only re-enter Australia if the visa is permission for that re-entry and it is still in force at that time. (See too new section 24 above and new section 26ZW below.)

## **Section 26ZU            Certain persons taken not to leave Australia**

98    This section states that a person is taken not to have left Australia if that person goes outside the migration zone for no longer than the prescribed period and while outside does not go to a foreign country nor an external Territory to which the Principal Act does not extend. For example, fishermen.

## **Section 26ZV            Extent of visa authority**

99    This section delimits visa authority. It makes it plain that a visa is not permission to:

- .        travel to Australia outside the period it allows; or
- .        enter Australia outside the period it allows; or
- .        remain in Australia outside the period it allows.

## **Section 26ZW            When visas cease**

100   This section deals with when visas cease to be in force. For example, when the visa is cancelled or when another visa comes into force. (See too new section 50E on when the cancellation occurs.)

## **CLAUSE 11**

101   This clause changes the heading to Division 3 of Part 2 and repeals sections 33 to 50 of the Principal Act (which deal with the to-be-redundant entry permits). The following headings are sections are substituted.

### **Subdivision C - Visas based on incorrect information may be cancelled**

102   This Subdivision replaces the to be repealed section 20 of the Principal Act with an entirely new process while maintaining its broad thrust. Section 20 provides by operation of law, for a non-citizen to acquire illegal entrant status retrospectively if the non-citizen gave false or misleading information about his or her circumstances in order to gain entry to Australia or to obtain a visa or entry permit.

103   Under the new regime provided for in Subdivision C, there will be an obligation for all non-citizens entering Australia to provide accurate information in application forms and passenger cards and to answer questions asked in those forms correctly. If an inaccuracy is discovered the visa holder will be asked to explain the inaccuracy and to show why his or her visa should not be cancelled. If cancellation of a visa does occur, a

non-citizen will acquire unlawful non-citizen status from the date of cancellation. Cancellation decisions will be reviewable on their merits.

### **Section 33                      Interpretation**

104 This section defines the key terms, 'application form', 'passenger card' and 'bogus document', for the purposes of their use in Subdivision C.

### **Section 34                      Completion of visa application**

105 This section makes it clear that a non-citizen who does not personally do so, is taken to have filled in his or her application form or passenger card if he or she:

causes it to be filled in; or

it is otherwise filled in on his or her behalf.

### **Section 35                      Information is answer**

106 This section makes it clear that certain information is to be taken as an answer to a question in the non-citizen's application form.

### **Section 36                      Incorrect answers**

107 This makes it express that an answer is taken to be incorrect even if the person who gave it, or caused it to be given, did not know it was incorrect. Subdivision C is a 'strict liability' control mechanism, however, there is discretion not to cancel a visa in prescribed circumstances - see section 45 below.

### **Section 37                      Visa applications to be correct**

108 This section requires the non-citizen to fill in the application form in such a way that all its questions are answered and no incorrect answers are given.

### **Section 38                      Passenger cards to be correct**

109 This is the passenger card equivalent to section 37.

### **Section 39                      Bogus documents not to be given**

110 This section requires bogus documents (defined at section 33) not to be given or caused to be given by the non-citizen to an officer.

### **Section 40                      Changes in circumstances to be notified**

110 This section imposes an obligation on the non-citizen to inform an officer of changes of circumstances in certain situations. In cases where a non-citizen overseas

applies for a visa, it is intended that if the non-citizen's circumstances change after applying and before entry to Australia (immigration clearance), the non-citizen should advise of the change. Similarly, if a visa application is made by a non-citizen in Australia, and a change in the person's circumstances occur before grant of the visa, the change should be notified. The obligation to notify of the changes which have taken place will persist until corrected. In addition, persons whose circumstances change after leaving Australia will be required to be notified on re-entry on a passenger card.

#### **Section 41                      Particulars of incorrect answers to be given**

112 This section details the applicant's continuing obligation to correct information given in applications and passenger cards. The obligation persists until corrected.

#### **Section 42                      Obligations to give information is not affected by other sources of information**

113 This section makes it clear that the non-citizen obligation to comply with sections 37, 38, 39, 40 and 41 is not removed or otherwise affected by the Minister's or an officer's access to other information. The intention behind this provision is to make a non-citizen giving information primarily responsible. The non-citizen would not, for example, be able to say that information in a previous application or passenger card should be taken into account.

#### **Section 43                      Notice of incorrect applications**

114 This section describes the first step in the process leading to the cancellation of a visa under section 45. The section 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 non-citizen has 14 days to respond to the notice to show that the information provided was correct information and give reasons why incorrect information was supplied. The non-citizen will have an opportunity to explain why the visa should not be cancelled. The notice is to point out that if no response is received within the specified time, then her or his visa may be cancelled on the basis of the information already held.

#### **Section 44                      Decision about non-compliance**

115 Under this section the Minister must consider any response from the non-citizen and decide whether the allegation is correct that misinformation was given by the non-citizen.

#### **Section 45                      Cancellation of visa if information is incorrect**

116 This gives the Minister the power to cancel the visa of a non-citizen after considering all the circumstances in which information was given. It also provides that cancellation must occur if there are prescribed circumstances requiring cancellation.



117 Note that cancellation occurs when a record of the cancellation is caused to be made by the Minister - see new section 50E below.

**Section 46                      Cancellation provisions apply whatever source of knowledge of non-compliance**

118 This section makes it clear that the cancellation process under sections 43, 44 and 45 applies whether or not it was information given by the holder that caused the awareness of non-compliance. In other words, if information given by a non-citizen is discovered to be incorrect by a source other than the non-citizen, the non-citizen will be subject to the processes set out in Subdivision C.

**Section 47                      Cancellation provisions apply whether or not non-compliance deliberate**

119 This section makes it clear that it does not matter whether the non-compliance by the visa holder was deliberate or inadvertent.

**Section 48                      Action because of one non-compliance does not prevent action because of another non-compliance**

120 This section makes it plain that more than one notice can be given if there is more than one instance of non-compliance by the visa holder. And, that the non-cancellation of a visa in respect of one instance of non-compliance, does not prevent action which can result in cancellation in relation to another.

So, if not all inaccuracies are discovered at one time, they may be processed separately.

**Section 49                      No cancellation if full disclosure**

121 This section indicates that the cancellation of a visa is not appropriate under Subdivision C if in respect of any matter that was fully disclosed by the non-citizen and fully complied with sections 37, 38, 39, 40 and 41.

**Section 50                      Effect of setting aside decision to cancel visa**

122 This section deals with the effect of the setting aside by the Federal Court, the Administrative Appeals Tribunal or the Immigration Review Tribunal or a review officer of a section 45 decision to cancel the visa under Subdivision C.

123 The visa is taken never to have been cancelled. However, any detention of the non-citizen between the original cancellation and the decision to set it aside, is deemed lawful and the non-citizen has no claim against the Commonwealth or an officer because of the detention.

**Section 50AA                      Application of Subdivision**

124 The overall intention of this section is to ensure that the new procedures apply, not only to applications and passengers cards completed after the commencement of the Migration Reform Act 1992 but also to applications completed before the commencement and only resolved afterwards, to passenger cards completed before commencement and

also to all of those persons in respect of whom section 20 of the pre-1 November 1993 Migration Act was deemed to have operated. The objective with respect to persons who are within the scope of section 20 is to do away with its retrospective nature, but make the person liable for the actions or conditions described under section 20 in a way which allows their circumstances to be considered under the processes provided by Subdivision C.

125 Section 50AA provides for all of the provisions of Subdivision C to apply to applications for visas made, and passenger cards completed, on or after 1 November 1992 (conveyed by subsection (1)).

126 In addition, the intention of subsection 50AA(2) is to make all the processes, responsibilities/obligations and powers provided under Subdivision C, other than the obligations provided under sections 37 and 38, apply to -

- any application for a visa or entry permit made under the pre-1 November 1993 Migration Act which, because it was unresolved by that date, is treated as an application for a visa under the post 1 November 1993 Migration Act (conveyed by the words in paragraph (2)(a) "applications for visas, or entry permits, within the meaning of the Migration Act 1958 as in force before 1 November 1993, that under the regulations are taken to be applications for visas that have not been finally resolved before that date"; and

- any passenger card completed before 1 November 1993 (conveyed by paragraph (2)(b)).

127 The exclusion of the application of sections 37 and 38 in these circumstances does not mean that persons who have completed such applications or passenger cards in these circumstances have no obligation to provide accurate information. Rather it means that they are responsible for the information or documents given or condition suffered in the manner and circumstances set out in section 20 of the pre-1 November 1993 Migration Act - see subsection 50AA(3). This applies equally to the information given in passenger cards completed before 1 November 1993.

128 Sections 37 and 38 make it obligatory for a person completing an application or passenger card to answer all questions asked and ensure that no incorrect answers are given. This is fundamentally different to the obligations under section 20 of the pre-1 November 1993 Migration Act which generally provides that a person must not give information which is false or misleading in a material particular. The latter will continue to apply to persons who are within the scope of section 20 before 1 November 1993 but who only come to official notice on and after that date. They will however be subject to the notice procedures and cancellation process which are provided for under sub-division C. It should be noted that reference in sub-section 50AA(3) to "applies to a visa" and "the application for the visa" includes entry permits. This is because an entry permit granted before 1 November 1993 will, on and after that date, be called a visa.

#### **Subdivision D - Visas may be cancelled on certain grounds**

129 This Subdivision provides a general but structured power to cancel visas, other than permanent visas where the holder is in Australia and was immigration cleared after entry. It replaces the existing cancellation powers at section 26 and subsection 35(1) of the Principal Act. Unlike in those provisions, which provide for cancellation at the absolute discretion of the Minister, there will be no power to cancel under section 50AB except on the grounds specified in new section 50AB or regulations made under that section. It is made clear that the various cancellation powers under the Act do not limit each other.

## **Section 50AB      Power to cancel**

130 This section sets out the grounds on which the Minister may cancel a visa. The grounds specified in the Act are:

- the holder's circumstances which permitted the approval of the visa no longer exist;
- the holder has not complied with a visa condition, or another person required to comply with a visa condition has not done so;
- the holder, not having entered Australia or been immigration cleared, would be liable to have the visa cancelled under section 45 (incorrect information) if the holder had entered and been immigration cleared.
- the holder's presence in Australia is, or would be, a risk to the health, safety or good order of the Australian community; or
- the visa should not have been granted because of the operation of the Migration Act or another Act.

There will be power to prescribe in the regulations other grounds for cancelling a visa.

131 In general, the Minister will have a discretion whether or not to cancel a visa if one or more of the specified grounds exist, although that discretion will be guided by government policy. However, this section provides for the regulations to specifically identify circumstances in which the Minister must, or must not, cancel a visa.

## **Section 50AC      When a visa may be cancelled**

132 This section sets out when a visa may be cancelled. Similar to the present position under subsection 35(1) of the Principal Act, a temporary visa is always within the cancellation powers, but a permanent visa cannot be cancelled under section 50AB while the holder is in the migration zone, provided that the person has been immigration cleared in relation to that entry. Note however, that such a person's permanent visa may be cancelled while the holder is in Australia under section 45 (see above) and, in the case of a permanent business visa, under section 50A.

133 There will be power to cancel any visa while the holder is:

- . outside Australia;
- . in immigration clearance; or
- . departing Australia.

#### **Section 50AD          Cancellation powers not limit each other**

134 This makes express that the cancellation powers in the 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.

#### **Subdivision E -          Procedure for cancelling visas under Subdivision D in or outside Australia**

135 This Subdivision sets out the basic procedure to be followed where the Minister proposes to cancel a visa under section 50AB. It covers such matters as notice to the visa holder, information to be given to the holder and invitation to respond, and when the visa may be cancelled. Subdivision E is applicable regardless of where the visa holder is. Note that Subdivision F allows for an alternative procedure where the visa holder is outside the migration zone. Where the holder is outside the migration zone, the Minister may elect whether to apply the procedure in Subdivision E or the procedure in Subdivision F.

#### **Section 50AE          Notice of proposed cancellation**

136 This section requires that the visa holder be given a notice by the Minister that her or his visa is liable to be cancelled if there appears to be a ground for cancellation of the visa under section 50AB. If the Minister is considering cancelling under section 50AB, the Minister must notify the holder of the apparent ground or grounds for cancellation giving:

- . particulars of the grounds and of the information (other than non-disclosable information) because of which the grounds appear to exist; and
- . invite the holder to show that:
  - the grounds do not exist; or
  - there is a reason why the visa should not be cancelled.

137 The visa holder is to be notified in the prescribed way and, in the absence of a prescribed way, in a way that the Minister considers to be appropriate. Subsection 50AE(3) makes it clear that the way of notifying the applicant may be orally.

138 Subsection 50AE(4) states that the other provisions of this Subdivision apply only to cancellations under section 50AB, and then only where the Minister has not decided to use the procedure under Subdivision F.

#### **Section 50AF      Certain information to be given to the visa holder**

139 This section requires the Minister to give certain information to the visa holder about the proposed cancellation and invite a response. The particulars of the information and the invitation are to be given in the prescribed way or, if no way is prescribed, in a way that the Minister considers appropriate in the circumstances. The information may be given orally. Note that this section will only apply to any adverse information which has not been provided to the visa holder in the notification under section 50AE.

140 The information to be given is that which the Minister considers:

- . would be the reason, or part of the reason, for cancelling the visa; and
- . is specifically about the visa holder or another person and not just a class of persons which includes the visa holder or another person; and
- . was not given by, or with the permission of, the visa holder for the purpose of considering the cancellation;
- . was not disclosed in the notification under section 50AE; and
- . is not non-disclosable information.

#### **Section 50AG      Invitation to give comments etc**

141 This section allows the Minister to specify how the notification under section 50AE or the invitation under section 50AF is to be responded to:

- . in writing; or
- . at an interview between the visa holder and an officer; or
- . by telephone.

142 The notification or invitation is to specify the time within which the response is to be made.

#### **Section 50AH      Prescribed periods**

143 This section allows for regulations to be made prescribing periods or time limits relating to a step in considering the cancellation of a visa.

#### **Section 50AI      Failure to accept invitation not require action**

144 This section makes it clear that if the visa holder does not respond to the invitation under sections 50AE or AF in the time allowed or tells the Minister that he or she does

not wish to respond, the Minister may make the cancellation decision without taking any further action about the information.

**Section 50AJ                      When decision about visa cancellation may be made**

145 This provision makes clear that the Minister may proceed to make a decision at any time after notification under section 50AE, provided that the visa holder has responded to the notification, or told the Minister that he or she does not wish to respond, or the time for responding has passed, whichever happens first. Where the Minister has invited comment under section 50AF, the Minister may make a decision after the holder has commented, or has advised that he or she does not wish to comment, or the time allowed for commenting has passed, whichever happens first.

**Section 50AK                      Application of Subdivision to non-citizen in immigration clearance**

146 This section deals with the time limit for response of non-citizens in immigration clearance, but not in questioning detention, where an invitation has been given under sections 50AE or 50AF. That time ends when or before he or she ceases to be in immigration clearance. This section is intended to ensure that the immigration clearance process can operate effectively, while still providing the visa holder with the right to comment on a proposed decision to cancel the visa.

**Section 50AL                      Application of Subdivision to non-citizen in questioning detention**

147 This section fixes the time limit for response of non-citizens who are in questioning detention, or who have been taken into questioning detention, where an invitation has been given under section 50AE or 50AF. It provides that the period in which the person may respond can be no greater than the remaining period in which the person can be held in questioning detention. This limitation will apply even if the person had earlier been given a longer time to give comments. It will ensure that the questioning detention process can operate effectively, and that the limited time available under the questioning detention process to determine the person's status and entitlements is not used by the visa holder to defeat the effective enforcement of migration law.

**Section 50AM                      Notification of decision**

148 This section requires the Minister to notify the visa holder in the prescribed way and to:

- specify the ground of cancellation; and
- give notice of the right to have the decision reviewed if it is reviewable under Part 3 or 4A.

## **Subdivision F - Other procedure for cancelling visas under Subdivision D outside Australia**

149 This Subdivision provides an alternative cancellation procedure, where there is a section 50AB ground and where the visa holder has not entered Australia. This Subdivision provides for cancellation of a visa without prior notice. It is intended to be used in circumstances where there is a risk that a visa holder would respond to a notice by travelling to Australia in the belief that it would be more difficult for the person's visa to be cancelled and the person removed.

150 While there is no pre-cancellation notice, notification provisions will apply after the visa has been cancelled and there is an express power to revoke the cancellation if the former visa holder shows that the ground did not exist or there was a reason why the visa should not be cancelled.

### **Section 50AN Cancellation of visas of people outside Australia**

151 This section provides that, in cases where the visa holder has not entered Australia and there is a section 50AB cancellation ground, the Minister can cancel the visa, under this section, without prior notice to the holder. The requirement that the holder not have entered Australia applies only to future travel authorised by the visa and section 50AN will also apply to non-citizens who have previously been in Australia but are now outside it.

### **Section 50AO Notice of cancellation**

152 This section requires that, after a section 50AL cancellation, the Minister must give the former visa holder a notice, in the prescribed way:

- . stating the ground on which the visa was cancelled; and
- . giving particulars of that ground and the relevant information, other than non-disclosable information, about it; and
- . inviting the holder to show that:
  - (i) the ground does exist; or
  - (ii) there is a reason why the visa should not have been cancelled.

The notice must also specify a prescribed time for response and advise the former visa holder that the visa cancellation will be revoked if the former holder shows that the cancellation ground does not exist, and that it might be revoked if the former visa holder can show a reason why it should not have been cancelled.

### **Section 50AP Prescribed periods**

153 This section allows for the prescribing of periods for the purpose of setting the time for response to a section 50AN invitation and sets out some examples in which different periods may be prescribed.

#### **Section 50AQ          Decision about cancellation of visa**

154 This section requires the Minister to revoke the cancellation if, after considering the response to the section 50AN invitation, the Minister:

- . is not satisfied that there was a ground for the cancellation; or

- . is satisfied that there is another reason why the cancellation should be revoke, and cancellation was not specifically required by a regulation made under section 50AB.

#### **Section 50AR          Notification of decision about revocation of cancellation**

155 This section requires the Minister to notify the visa holder or former holder of the decision to revoke or not to revoke.

#### **Section 50AS          Effect of revocation**

156 This section deals with the effect of revocation of a cancellation - the visa has effect as if it had been granted at the date of revocation. (And revocation occurs when the Minister causes a record of it to be made - see new section 50E.) This will allow additional time to the visa holder to make fresh preparations to travel to Australia.

157 Subsection (2) allows the Minister to make additional changes to the validity period of a visa following revocation to ensure that the holder has adequate time to prepare for travel to Australia.

### **CLAUSE 12**

158 This clause repeals Divisions 4 and 4A of Part 2 of the Principal Act and substitutes the following headings, sections and Divisions. The to-be-repealed Divisions deal with Statutory visitors - replaced by new Division 3 (see below) - and Unprocessed persons - not appropriate in relation to the ending of the distinction between arrival and entry.

#### **Subdivision H -          General provisions on cancellation**

159 This Subdivision fixes the time cancellation or revocation of cancellation occurs and the effect of cancellation where:

- . more than one person holds the visa; or



a separate visa is held because the holder is a member of the family unit of the person whose visa was cancelled.

#### **Section 50E                      Way visa cancelled or cancellation revoked**

160 This section, in effect, fixes the time that cancellation of a visa, or revocation of cancellation occurs. That is, when the Minister causes a record of the cancellation or revocation is made.

#### **Section 50F                      Visa held by 2 or more**

161 This section provides that, where a visa includes more than one person, the visa can be cancelled if grounds of cancellation are made out in respect of any one of those persons. Where a visa is cancelled in those circumstances, the visa ceases to be in force in respect of all the persons who held the visa.

#### **Section 50G                      Cancellation of visa results in other cancellation**

162 This section provides for the cancellation of a visa where the holder has that visa because another person held a visa which has been cancelled subsequently. Where a person holds a visa because she or he is a member of the family unit of a person whose visa has been cancelled under Subdivision C (incorrect information) or section 50AB (specified grounds for cancellation), the visa of the family unit member is also cancelled. In other circumstances where a person holds a visa only because a person whose visa has been cancelled under Subdivision C or section 50AB, the Minister may cancel that person's visa without notice.

163 In either case, if the visa cancellation is revoked under section 50AQ, the consequential cancellation of the other visa(s) is/are also revoked.

### **Division 3 - Criminal Justice Visas**

#### **Subdivision A - Preliminary**

#### **Section 51                      Object of Division**

164 This section states the object of Division 3 which is to facilitate the bringing to, and presence in, Australia of non-citizens for purposes connected with the administration of criminal justice. At present the Principal Act provides (Part 2, Division 4) for the grant of visas and entry permits to 'statutory visitors'. Statutory visitors are non-citizens required in Australia for purposes connected with the *Extradition Act 1988* or the *Mutual Assistance in Criminal Matters Act 1987*. The Principal Act does not, at present, make provision for non-citizens who may be required in Australia for other criminal justice or law enforcement purposes.

165 Division 3 supersedes the provisions in the Principal Act relating to statutory visitors and makes comprehensive provision for those non-citizens who are required in Australia for criminal justice purposes. There are several categories of such persons, eg:

- . non citizens being extradited to face criminal proceedings, or to serve a sentence of imprisonment;
- . non-citizens who agree to come to Australia to appear as witnesses in court proceedings or to otherwise assist in official investigations or inquiries (and who cannot meet the statutory criteria for entry to, or continued presence in, Australia which are set out in the Principal Act and the Migration Regulations); and
- . non-citizens unlawfully in Australia and liable to deportation or removal whose presence is required in relation to a criminal investigation or in relation to court proceedings in Australia (either as witness or accused) and whose deportation or removal should accordingly be stayed in the interests of the administration of justice.

## **Section 52                      Interpretation**

166 This section defines the terms which are used in Division 3. In particular, the 'administration of criminal justice' is defined to mean an investigation to find out whether an offence has been committed; or the prosecution of a person for an offence; or the punishment by way of imprisonment of a person for the commission of an offence. This definition is the basis for the exercise of the power to grant visas to non-citizens under Division 3.

## **Section 53                      Delegation by Attorney-General**

167 This section provides that the Attorney-General may delegate any of his or her powers under Division 3 to the Secretary of the Attorney-General's Department or an officer of the Senior Executive Service in the Attorney-General's Department. The powers which may be delegated are the power to grant a Commonwealth criminal justice entry certificate (see section 54A) or a Commonwealth criminal justice stay certificate (see section 54C). These powers are the trigger for the exercise by the Minister of his or her powers under Division 3.

## **Section 54                      Authorised Officials**

168 This section provides that the Attorney-General may appoint, in writing, the State Attorney-General, and/or a State official equivalent to the Commonwealth Director of Public Prosecutions, and/or the highest ranking member of the police force of the State, as authorised officials for the purposes of Division 3. An authorised official is responsible for issuing State criminal justice entry certificates (see section 54B) and State criminal justice stay certificates (see section 54D). These powers are the trigger for the exercise by the Minister of his or her powers under Division 3.

## Subdivision B - Criminal justice certificates for entry

### Section 54A Commonwealth criminal justice entry certificate

169 This section enables the Attorney-General (or his or her delegate - see section 53 above) to certify that a non-citizen, who is outside Australia, is required in Australia for the purposes of the administration of criminal justice. The power of the Attorney-General is limited to non-citizens whose presence in Australia is required in relation to offences against Commonwealth laws or matters arising under the *Extradition Act 1988* or the *Mutual Assistance in Criminal Matters Act 1987* (which may include the investigation and prosecution of State or Territory offences).

170 The section also provides that the Attorney-General may only grant a certificate if he or she considers that the presence of the non-citizen in Australia for the relevant purpose would not hinder the national interest to such an extent that the non-citizen should not be present in Australia, eg where the need for a person to be present in Australia as a witness is outweighed by the risk that the person would engage in illegal activities while in Australia.

171 The power of the Attorney-General is also limited by the requirement that he or she be satisfied that the relevant agency or the non-citizen will be responsible for the cost associated with bringing the non-citizen to Australia.

### Section 54B State criminal justice entry certificate

172 This section provides a similar mechanism in relation to State (which, as defined in section 52, includes the Territories) offences as that which section 54A provides in relation to Commonwealth offences. An authorised state official (see section 54 above) may give the certificate.

173 A certificate given by an authorised State official becomes a certificate for the purpose of Division 3 if it is endorsed by the Commonwealth Attorney-General. The Commonwealth Attorney-General may decline to endorse a certificate if the presence of the non-citizen would hinder the national interest to such an extent that the non-citizen should not be present in Australia.

## Subdivision C - Criminal justice certificates etc. staying removal or deportation

### Section 54C Commonwealth criminal justice stay certificate

174 This section parallels section 54A above. Whereas that section refers to non-citizens who are outside Australia, this section refers to unlawful non-citizens who are in Australia and who are to be, or are likely to be, removed or deported.

175 The section provides that the Attorney-General may give a certificate that the stay of an unlawful non-citizen's removal or deportation is required for the administration of criminal justice.

176 As in the case of section 54A, the power of the Attorney-General is limited by the requirement that he or she be satisfied that the relevant agency or the non-citizen will be responsible for the costs associated with keeping the non-citizen in Australia.

#### **Section 54D State criminal justice stay certificate**

177 This section complements section 54B above. Whereas that section refers to non-citizens who are outside Australia, this section refers to non-citizens who are in Australia and who are to be, or are likely to be, removed or deported.

178 An authorised official of a State may give a certificate that the stay of a non-citizen's removal or deportation is required for the administration of criminal justice in that State.

179 Because the non-citizen is already in Australia a certificate by an authorised official under this section does not require endorsement by the Commonwealth Attorney-General (unlike the section 54B power). However the authorised official who gives the certificate must ensure that the relevant agency or the non-citizen will be responsible for the costs associated with keeping the non-citizen in Australia.

#### **Section 54E Application for visa not to prevent certificate**

180 This section makes it clear that the power (in sections 54C and 54D) to give a criminal justice stay certificate, whether the certificate is given by the Attorney-General or an authorised official of a State, is not affected by the fact that the non-citizen affected by the certificate has made an application for a visa which has not been finalised.

#### **Section 54F Criminal justice stay certificates stay removal or deportation**

181 This section provides that a non-citizen shall not be removed or deported while a criminal justice stay certificate about that non-citizen is in force. This does not prevent voluntary departure by a non-citizen who is granted a criminal justice visa (see section 54HH below). However, if the Minister refuses to grant a visa (see section 54HE and section 54HF below), the effect of the criminal justice stay certificate will be to cause the non-citizen to remain in custody until the certificate is cancelled. There is no limit specified for the duration of custody under Division 3, however the certificate must be cancelled when the non-citizen is no longer required for the purposes of the administration of criminal justice (see section 54HI below).

#### **Section 54G Certain warrants stay removal or deportation**

182 This section ensures that the powers created by Division 3 do not interfere with the power of a court to issue a warrant requiring that a non-citizen not be removed or deported. Where a court issues a warrant, the affected non-citizen is not to be removed or deported while the warrant is in force. However, the non-citizen can leave voluntarily. The section also makes it clear that the applicant to the court for the warrant (ie the relevant law enforcement agency) is responsible for any accommodation, maintenance, or migration detention costs associated with requiring that non-citizen to remain in Australia.

**Section 54H**                      **Certain subjects of stay certificates and stay warrants may be detained etc.**

183 This section ensures that powers under the Principal Act permitting the arrest or custody of an unlawful non-citizen, are not limited by the existence of a criminal justice stay certificate (see sections 54C and 54D) or a criminal justice stay warrant (see section 54G). The section thereby ensures that it would not amount to unlawful arrest or wrongful imprisonment if a person were to be taken into custody, or kept in custody, despite the issue of a stay certificate or a stay warrant, ie it is only upon the grant of a visa that a person is entitled to be released from custody

**Section 54HA**                      **Removal or deportation not contempt etc. if no stay**

184 This section ensures that, apart from the Division 3 provisions relating to the administration of criminal justice, there is no power under any Australian law which may be used to prevent removal or deportation of a non-citizen which is otherwise required by the Principal Act. In particular, the section ensures that it is not a contempt of court to remove or deport a non-citizen from Australia even if there are orders by a court (other than a warrant under section 54G) that the non-citizen not be removed or deported.

**Subdivision D -              Criminal Justice Visas**

**Section 54HB**                      **Criminal Justice Visas**

185 This section provides that there are to be two classes of visa for the purposes of Division 3, to be called a criminal justice entry visa and a criminal justice stay visa.

**Section 54HC**                      **Criterion for Criminal Justice Entry Visas**

186 This section provides that it is a criterion for the grant of a criminal justice entry visa that a criminal justice entry certificate about the non-citizen is in force.

**Section 54HD**                      **Criterion for Criminal Justice Stay Visas**

187 This section provides that it is a criterion for the grant of a criminal justice stay visa that either a criminal justice stay certificate, or a criminal justice stay warrant, about the non-citizen is in force.

**Section 54HE**                      **Criteria for Criminal Justice Visas**

188 This section provides that, apart from the criteria outlined in section 54HC and section 54HD, the Minister has an absolute discretion to decide whether to grant a criminal justice visa. The section provides that the Minister, in exercising this discretion, must have regard to whether the presence of the non-citizen in Australia will pose a threat to the safety of any person and also whether it will be possible to remove the non-citizen (after entry has been allowed under a criminal justice entry visa). The Minister may also have regard to any other matter that he considers relevant.

189 The effect of the section is that, although removal or deportation of a non-citizen may be prohibited because of the existence of a criminal justice stay certificate (see

section 54F), the Minister has a discretion as to whether the non-citizen shall be allowed to remain in, or enter, the community or, alternatively, shall be detained in custody. If a visa is not granted, and the non-citizen does not hold another visa, the non-citizen shall be kept in custody. There is no limitation on the duration of custody which is permitted in these circumstances while the stay certificate is in force and the person remains in Australia. It should be noted that the non-citizen would, subject to any other court orders or warrants, be entitled to leave Australia at any time (see section 54HH below).

#### **Section 54HF            Procedure for obtaining criminal justice visa**

190    This section provides that the Minister may consider the grant of a criminal justice visa to a non-citizen if a criminal justice certificate or a criminal justice stay warrant is in force. The Minister may grant the visa if the criteria for it are met.

#### **Section 54HG            Conditions of Criminal Justice Visa**

191    This section provides that a criminal justice visa is granted subject to the conditions that the non-citizen must not do any work in Australia (whether for reward or otherwise). The section also provides that other conditions may be prescribed in the Regulations.

#### **Section 54HH            Effect of Criminal Justice Visas**

192    This section spells out the effect of a criminal justice entry visa as being permission for the non-citizen to travel to Australia, enter Australia, and remain in Australia while the visa is in force. The section also spells out the effect of a criminal justice stay visa as being permission for the non-citizen to remain in Australia while the visa remains in force.

193    As a corollary to section 54HG the section provides that the grant of a criminal justice stay visa entitles the non-citizen who is being held in immigration detention to be released from that detention.

194    The section also provides that the grant of a criminal justice visa to a non-citizen does not prevent that non-citizen from leaving Australia, ie although there may be a prohibition on removal or deportation from Australia (see section 54F), that does not prevent a non-citizen, who has a criminal justice visa, from choosing to depart Australia voluntarily, providing that there is no court order or warrant preventing the non-citizen from leaving Australia.

195    The section also provides that the holder of a criminal justice entry visa may not apply for a visa other than a protection visa. This prohibition also applies to a non-citizen who remains in Australia after a criminal justice entry visa has been cancelled.

#### **Subdivision E -        Cancellation etc. of criminal justice certificates and criminal justice visas**

#### **Section 54HI            Criminal justice certificates to be cancelled**

196 This section requires a criminal justice certificate to be cancelled, by the Attorney-General or authorised official who gave it, when it is no longer required. The section also provides that the Secretary of the Department of Immigration, Local Government and Ethnic Affairs is to be advised of an intended cancellation including the expected whereabouts of the non-citizen when it is cancelled and the arrangements for the non-citizen's departure from Australia.

#### **Section 54HJ Stay warrant to be cancelled**

197 This section provides that a criminal justice stay warrant which is no longer required (and which has not expired) must be the subject of an application to the court for the warrant's cancellation.

198 The section also requires the applicant for a criminal justice stay warrant to advise the Secretary of the Department of Immigration, Local Government and Ethnic Affairs of the time that the warrant will expire, the expected whereabouts of the non-citizen at the time of expiry, and the arrangements for the non-citizen's departure from Australia. The Secretary is also to be advised of an intended application for cancellation including the expected whereabouts of the non-citizen when it is cancelled and the arrangements for the non-citizen's departure from Australia.

#### **Section 54HK Effect of cancellation etc. on criminal justice visa**

199 The effect of this section is to automatically cancel a criminal justice visa when the criminal justice certificate or criminal justice stay warrant is cancelled or expires. The section also requires the Minister to make a record of the cancellation.

### **Division 4 - Immigration Clearance**

#### **Section 54HL Interpretation**

200 This section defines the following terms which are used only in the subdivision: 'clearance officer', 'on-port' and 'overseas vessel'. The meaning of these terms is set out in the discussion of the relevant sections (below).

#### **Section 54HM Arriving person to give certain evidence of identity etc.**

201 This section makes express provision in respect of a requirement which has always existed implicitly in the Principal Act, ie that persons arriving in Australia must identify themselves to officers administering Australia's border controls (defined as 'clearance officers' for the purposes of this subdivision).

202 The general rule laid down by the section (which is subject to subsections 54HN(3) and (4), and section 54HO and section 54HP - see below) is that an Australian citizen who enters Australia (ie enters the migration zone - see definition in section 4) must, without unreasonable delay, show an Australian passport or other acceptable evidence of the person's identity and Australian citizenship. The evidence which will be acceptable for this purpose will be prescribed in the Migration Regulations. Other prescribed information may also be required to be provided. The section does not attempt

to remove the right of an Australian citizen to enter Australia. Rather, the amendment seeks to facilitate the overall control of Australia's border and entry to Australia by non-citizens. This necessarily involves placing some procedural restrictions on the manner of entry to Australia by Australian citizens. An Australian citizen who does not comply with this section will not be denied entry to Australia but may be subject to delays in re-entering Australia while the person's identity and citizenship are confirmed. The person may also be required to pay a fee if assistance is required from the Department to obtain required evidence of citizenship (see section 54HR below).

203 The section provides that a non-citizen entering Australia (ie entering the 'migration zone') must, without unreasonable delay, provide evidence of the person's identity and any visas held by the non-citizen. The non-citizen must also give the clearance officer any information which is required to be given by the Principal Act or the regulations (see section 181(1)(c) of the Principal Act and regulation 148AA of the Migration Regulations).

204 The section also provides that the Regulations may prescribe the detailed procedures to apply in relation to compliance with the requirements imposed by this section.

#### **Section 54HN            When and where evidence to be given**

205 This section provides for the evidence required by section 54HM to be given at particular ports, reflecting the fact that 'clearance officers' will be based at particular ports. 'Port' is already defined in the Principal Act (section 4) to mean 'a proclaimed port or a proclaimed airport. A non-citizen who enters Australia at one port may be directed or permitted to comply with section 54HM at an 'on-port', (defined in section 54HL), ie a port in Australia to which the person intends to travel after entering Australia at another port. Similarly, a person who enters Australia otherwise than at a port is required to comply with section 54HM at a prescribed place, and within a prescribed time, after entering Australia.

206 The section also provides that an officer may permit compliance with section 54HM, by a person who has not yet entered Australia, on the vessel on which the person travelled to Australia.

207 The section also provides that a person who travels to Australia on a pre-cleared flight (see section 19 of the Principal Act as amended by section 7 of the Reform Act) must comply with the evidentiary requirements in section 54HM before beginning the flight. The person who does so comply is deemed to have complied with section 54HM. Pre-clearance is a facility used to streamline immigration processing of flights arriving in Australia. It may also be used where a charter flight operator wishes to land at an airport that is not a proclaimed airport. Pre-clearance involves the screening of passengers and the collection of information prior to departure of the flight.

#### **Section 54HO            Section 54HM not to apply**



208 This section provides that certain persons are exempted from having to comply with section 54HM, ie allowed inhabitants of the Protected Zone who enter a protected area in connection with the performance of traditional activities (provided that they do not proceed on to a part of the migration zone which is outside the protected area), and persons in a prescribed class.

209 **'Allowed inhabitant of the Protected Zone'** is defined in section 4 of the Principal Act (as amended by section 4 of the Reform Bill) as referring to an inhabitant of the protected zone who is not subject to a declaration by the Minister under section 17 and who does not have specified health problems or a specified criminal history (see definitions of **'health concern person'** and **'behaviour concern person'** in section 4 of the Principal Act as amended by the Reform Bill). **'Inhabitant of the Protected Zone'** is already defined in section 4 of the Principal Act as referring to a person who is a citizen of Papua New Guinea and who is a traditional inhabitant. The **'Protected Zone'** is also defined, in section 4 of the Principal Act, to mean the zone established under Article 10 of the Torres Strait Treaty, being the area bounded by the line described in Annex 9 to that treaty. **'Protected area'** is defined in section 4 (as amended by the Reform Bill) to mean an area that is part of the migration zone and in, or in an area in the vicinity of, the Protected Zone.

#### **Section 54HP            Section 54HM not usually apply**

210 This section provides that a person can be required (although it would not be usual), to undergo immigration clearance, at the discretion of a clearance officer, despite the person having been deemed (under section 26ZX) not to have left Australia. This applies to fishermen and others who travel outside the migration zone. This power would be used where such a person came into contact with other persons while outside the migration zone. This is an important provision to prevent 'people smuggling' by boat. **'Migration zone'** is defined in section 4 of the Principal Act as amended by the Reform Act.

#### **Section 54HQ            Certain Persons to give evidence of identity**

211 This section provides that a clearance officer can require a person who travels, or appears to intend to travel, on an overseas vessel from one port to another port, to show the officer prescribed evidence of the person's identity. The officer may also require production of other prescribed information. These requirements may be imposed regardless of whether immigration clearance has been completed elsewhere.

212 **'Overseas vessel'** is defined in section 54HL to mean a vessel on which persons travel to a port from outside Australia and then to an on-port. **'Overseas vessel'** is also defined to mean a vessel on which persons travel from a port to another port or ports and then to a place outside Australia. This provision will extend, for example, to domestic passengers travelling on a domestic leg of an international flight whether the flight originates in Australia or overseas. This provision is essential to prevent potential avoidance of immigration control, which exists when immigration cleared and non-

immigration cleared persons are mixed together. The risks are that documents may be switched and persons may be able to enter, or depart, Australia unlawfully.

#### **Section 54HR Assistance with evidence**

213 This section provides that the Department may assist a person to obtain evidence required to satisfy immigration clearance requirements (see section 54HM), but only on the payment of, or agreement to pay, any fee which is prescribed in the Regulations.

#### **Section 54HS Immigration clearance**

214 This section specifies the time at which an immigration clearance is completed, ie after the required evidence has been provided to satisfy section 54HM and after the person has crossed the perimeter of the port or prescribed place (whichever is applicable) with the permission of a clearance officer, ie immigration clearance is a distinct concept as compared to 'entry' to Australia and a person who has entered may nevertheless not be immigration cleared.

215 The section also clarifies situations where a person: is 'in immigration clearance'; is 'refused immigration clearance' (ie visa cancelled and/or visa application refused); and 'bypasses immigration clearance'.

#### **Section 54HT Visa ceases if holder enters in way not permitted**

216 This section provides that if the holder of a visa enters Australia in a way that contravenes section 26J the visa ceases to be in force.

#### **Section 54HU Visa ceased if holder remains without immigration clearance**

217 This section provides that a visa ceases to be in force if the holder of the visa is required to undergo immigration clearance and does not comply.

#### **Section 54HV Departing person to give certain evidence etc.**

218 This section parallels section 54HM. Whereas that section applies to persons arriving in Australia, this section applies to persons (both citizens and non-citizens) on board, or about to board, vessels which are about to leave Australia. Those persons are required to show, upon request by an officer, an Australian passport or other prescribed evidence of identity and citizenship (in respect of Australian citizens) or evidence of the person's identity and permission to remain in Australia (in respect of a non-citizen). In addition those persons may be required to provide any other information required to be given by the Principal Act or the Migration Regulations.

### **CLAUSE 13**

219 This clause inserts the following Divisions

**Division 4C - Detention of unlawful non-citizens**

## **Section 54V                      Lawful non-citizen to give evidence of being so**

220 This section provides that an officer may require a person who the officer knows or reasonably suspects is a non-citizen to show the officer evidence of being a lawful non-citizen. The concept of 'lawful non-citizen' is defined at section 14 of the Principal Act as amended by the Reform Act. Section 54V makes express a requirement which has always been implicit in the Principal Act, ie a person who refuses to provide evidence of lawful presence in Australia may be liable for arrest under section 92 of the Principal Act (to be repealed by the Reform Act) as a suspected illegal entrant.

221 The section also provides increased flexibility to officers who are faced with a decision about whether to take into custody a person who cannot immediately present evidence that the person is a lawful non-citizen. The section allows a person to comply with a requirement to present evidence within a prescribed period (which may be a different period depending upon whether the requirement is made orally or in writing. An officer may also allow a longer time than the prescribed period for compliance.

## **Section 54W                      Detention of unlawful non-citizens**

222 This section provides that if an officer knows or suspects on reasonable grounds that a person in the migration zone (defined in section 4 as amended by the Reform Act) is an unlawful non-citizen, the officer must detain the person. The section also provides that if an officer suspects on reasonable grounds that a person in Australia but outside the migration zone (ie a person within the 'coastal sea') would be an unlawful non-citizen if he or she entered the migration zone, and is seeking to enter the migration zone, the officer must detain the non-citizen. 'Coastal sea' is defined in section 15B(4) of the *Acts Interpretation Act 1901* as meaning the territorial sea of Australia (the 12 mile zone) and the sea on the landward side of the territorial sea of Australia that is not within the limits of a State or internal Territory.

223 The effect of this section is to change the basis for detention under the Principal Act. At present, custody is discretionary (see section 92 of the Principal Act which states that an officer may arrest and keep in custody a person who is reasonably supposed to be an illegal entrant). However the legislative change does not mean that any more people than in the past will be kept in detention. Persons qualifying for bridging visas will assume temporary lawful status and this status will mean there is no obligation to detain or continue to detain them. Eligibility for bridging visas will be set out in the Regulations and will be considered immediately on application.

## **Section 54X                      Non-compliance with immigration clearance basis of detention**

224 This section provides that it is a basis of detention under section 54W if a person evades or refuses to undergo immigration clearance (under section 54HM).

## **Section 54Y                      End of certain detention**

225 This section provides that a person detained under section 54W because of section 54X must be released when he or she gives evidence of his or her identity and Australian citizenship, shows evidence of being a lawful non-citizen or is granted a visa.

## **Section 54Z                      Detention of visa holders whose visas liable to cancellation**

226 This section provides that an officer may detain a non-citizen if the officer has reason to suspect that the visa held by the non-citizen is liable to cancellation under subdivisions C, D, or G of Division 2. After a person has completed immigration clearance the power to detain may only be exercised if the officer suspects on reasonable grounds that, if the non-citizen is not detained, he or she would attempt to evade an officer or otherwise not co-operate with officers in their inquiries about the non-citizen's visa and matters relating to the visa.

227 The section will permit questioning of the non-citizen to enable a decision to be made about whether to cancel his or her visa. Because of this limited purpose the section also provides certain procedural constraints on the exercise of the power to detain visa holders. For example, the section makes it clear that an officer may question a person detained under the section about the visa and matters relevant to the visa. The section also limits to four hours the time that the person can be held in custody. In determining when the four hour period runs, certain interruptions are disregarded, eg while the person is receiving medical attention.

## **Section 54ZA                      Sections not apply**

228 This section provides that section 54ZB, (detainee to be told of the consequences of his detention does not apply to a person detained under section 54W who has been refused immigration clearance or to a person detained because of section 88. A person who arrives in Australia without a visa who has no prior authority to travel to Australia will not be entitled to be informed of his or her entitlement under the Act. In addition, a person detained under section 54Z (person whose visa is liable to cancellation), will similarly not have section 54ZB applied to them.

## **Section 54ZB                      Detainee to be told consequences of detention**

229 This section provides that an officer must ensure that a detainee (other than those detainees mentioned in section 54ZA above) is informed of the period within which to apply for a visa and the fact that the detainee must be kept in immigration detention until he or she is removed, deported, or granted a visa.

## **Section 54ZC                      Detainee may apply for visa**

230 This section provides that a detainee may apply for a visa within 2 days (which may be extended by a further 5 days if requested with the 2 days) of receiving the section 54ZB notification. A non citizen who does not apply within these time limits is only eligible to apply subsequently for a bridging visa or a protection visa.

## **Section 54ZD                      Period of detention**

231 This section provides that a non-citizen detained under section 54W must be kept in immigration detention until he or she is removed, deported, or granted a visa (in which case he or she ceases to be an unlawful non-citizen). Where an application for a visa has been made, release cannot be effected unless and until the visa has been granted. The section also makes it clear that a court may not order the release of an unlawful non

citizen unless the non citizen has made a valid application for a visa and the criteria for a visa have been satisfied by the non-citizen. The section makes it clear that the detention and non-release provision apply only in respect of a non citizen who is an unlawful non citizen.

#### **Section 54ZE                      Effect of escape from immigration detention**

232    This section provides that a person who escapes from immigration detention and is later recaptured and returned to immigration detention is deemed never to have ceased to be in immigration detention and therefore does not have to be re-told his or her entitlements under the Act and be given a further period within which to apply for a visa.

#### **Division 4D -                      Removal of unlawful non-citizens**

#### **Section 54ZF                      Removal from Australia of uncleared unlawful non-citizens**

233    This section provides that an unlawful non-citizen (who must be kept in detention - see section 54W and 54ZD above) must be removed from Australia, as soon as reasonably practicable, if he or she requests, in writing, to be removed. The section also provides that an unlawful non-citizen who has been refused immigration clearance, who has not made a valid visa application or has made an application that has been finally resolved, must be removed as soon as reasonably practicable even if the person is eligible to apply for a visa but has not done so within the time allowed. The section also provides that an unlawful non-citizen in detention must be removed from Australia if the non-citizen has applied for a visa which has been finally refused, cannot be approved or cannot be granted and who has not made a further valid application for a visa.

234    The section also makes provision for detainees who choose not to apply for a visa. Where an application has not been made within the prescribed time the non-citizen must be removed from Australia as soon as reasonably practicable. Unlawful non citizens who have been refused immigration clearance and who have not made a valid visa application which has been resolved must also be removed as soon as practicable.

#### **Section 54ZG                      Dependents of removed non-citizens**

235    This section provides for the removal, on request, of a spouse and dependent child or children of an unlawful non-citizen who has been or is about to be removed. Removal from Australia must take place as soon as reasonably practicable (in most cases the spouse and children would be removed with the unlawful non-citizen who is being removed). Removal of the spouse can only occur at the request of the spouse. Removal of the children of an unlawful non-citizen can be effected at the request of the unlawful non-citizen or a spouse who is also being removed.

#### **CLAUSE 14**

236    This clause inserts the following section into the Principal Act.

#### **Section 55A                      Deportation of certain non-citizens**

237 This section provides the Minister with a single power to order the deportation of a non-citizen in the circumstances which are currently set out in sections 55, 56 and 57 of the Principal Act (residents who have committed crimes or are a security risk).

#### **CLAUSE 15                      Deportation order to be executed**

238 This section amends section 63 of the Principal Act to remove references which will not be required having regard to other changes to the deportation powers, ie the Reform Act will restrict the scope for deportation to the circumstances currently provided for in sections 55, 56, and 57 (criminal deportations, deportations on security grounds, and deportation of non-citizens convicted of certain serious offences). The power to deport illegal entrants will be replaced by a power to remove unlawful non-citizens (see section 54ZF)

239 Subsection 63(3) (deportees who leave voluntarily are deemed to be deported) and the reference, in subsection 63(1), to the consideration of prescribed matters, will continue to apply to non-citizens who become deportees prior to the commencement of the new regime.

#### **CLAUSE 16**

240 This clause repeals sections 64, 65, and 66 of the Principal Act and substitutes the following heading and sections.

#### **Division 5A -                      Costs etc. of detention, removal and deportation**

241 The effect of Division 5A is to rationalise and extend the liability imposed on non-citizens who are unlawfully in Australia and deportees. Currently, the Principal Act only allows for recovery of costs from deportees (apart from the special regime for illegal fishermen set out at Division 8A of the Principal Act). Division 5A extends liability to all unlawful non-citizens and deportees. The Division also consolidates and rationalises the existing obligations placed on carriers.

#### **Section 64                      Interpretation**

242 This section defines terms which are used in Division 5A. In particular 'costs' in relation to detention, means transporting a detainee and custodian to and from the place of detention, and the daily maintenance amount (see section 65) in respect of the detention. In relation to removal or deportation of a non citizen from Australia, these costs mean fares (ie, airfares in most cases) and associated costs of transporting the non-citizen and custodian to his or her destination outside Australia. 'Carrier' means the master, owner, agent or charterer (the controller) of a vessel bringing a non citizen to Australia.

#### **Section 65                      Determination of daily maintenance amount**

243 This section provides that the Minister may determine a daily maintenance amount which is to be not more than the cost of keeping the non-citizen at the specified place of detention. This formulation now permits the Minister to set a maintenance rate for a given place of detention rather than in respect of a particular State or Territory. This will

give the Minister the flexibility to ensure realistic rates are applied to each place of detention.

**Section 66                      Detainees liable for cost of detention**

244    This section provides that a non-citizen who is detained is liable to pay the Commonwealth the costs of his or her detention. There are other provisions relating to the recovery of costs in relation to the removal and the detention of spouses and children.

**Section 66A                      Removed or deported non-citizen liable for costs of removal or deportation**

245    This section provides that a non-citizen who is removed or deported is liable to pay the Commonwealth the costs of his or her removal or deportation. The obligation is qualified by the provisions relating to spouses and children set out at section 66C.

**Section 66B                      Costs of detained spouses and dependents**

246    This section provides that where spouses (including, by virtue of the definition in the Migration Regulations, de facto spouses) are detained at the same time they are jointly and severally liable for the costs of detention. The section also provides that the spouses are liable for the detention costs of their children.

**Section 66C                      Costs of removed or deported spouses and dependents**

247    This section provides that where spouses (including, by virtue of the definition in the Migration Regulations, de facto spouses) are removed or deported they are jointly and severally liable for the costs of removal or deportation. The section also provides that the spouses are liable for the removal or deportation costs of their children.

**Section 66D                      Carriers may be liable for costs of detention, removal and deportation**

248    This section places an obligation on a carrier (as defined in section 64) bringing non-citizens to Australia to meet the costs associated with the detention, removal/deportation of those non-citizens. The section rationalises a number of existing powers in the Principal Act (see section 54B(3), section 54E, section 54F(2), section 54F(3), section 64, subsection 88(7), and subsection 89(7)). The obligation imposed on carriers only applies in relation to non-citizens who are not able to satisfy immigration clearance requirements, eg because they do not have a valid visa or who are refused clearance and taken into detention.

249    Under this section the Secretary is required to serve a notice on the carrier providing particulars of how costs may be calculated and stating that an account for the costs will be rendered to the carrier when they have been incurred. The obligation of the carrier to pay is only activated when an account for the costs is served on the carrier.

### **Section 66E                      Non-citizens and carriers jointly liable**

250 This section ensures that where more than one person is liable for the costs arising under this Division, all persons who are liable are to be jointly and severally liable. The section ensures that unlawful non-citizens and the carriers are each liable for the cost of detaining the non-citizen and of removal or deportation.

### **Section 66F                      Costs are a debt due to the Commonwealth**

251 This section provides that costs due to the Commonwealth under this Division are a debt due to the Commonwealth and may be sued for in any court of competent jurisdiction. The section replaces the equivalent sections in the Principal Act which are sections 65(9) and section 66(7) (those sections are being repealed by the Reform Bill).

### **Section 66G                      Use of existing ticket for removal or deportation**

252 This section provides that any ticket for the travel of a non-citizen from Australia may be used, at the discretion of the Secretary, to offset the costs of the removal or deportation of the non-citizen. The section replaces the equivalent section in the Principal Act which is section 66(6) (that section is being repealed by the Reform Bill).

### **Section 66H                      Vessels required to convey removed or deported non-citizens**

253 This section provides that the Secretary may direct a controller (as defined in section 64) of a vessel to transport a non-citizen, who is being removed or deported, to a destination outside Australia. The controller must comply with the notice and take the removee or deportee from Australia within 72 hours or such further time as the Secretary may allow. Non-compliance is a criminal offence punishable by a maximum fine of \$10 000.

254 This section replaces broadly equivalent provisions in the Principal Act which are found in section 64 and section 89 (those sections are being repealed by the Reform Bill).

### **Section 66J                      Exemption from complying**

255 This section provides that, if a controller of a vessel is prosecuted under section 66H, it is a defence if the controller proves that bad weather or other reasonable excuse prevented the controller from complying. The section also provides that it is a defence if the controller gave reasonable notice of being able to comply with the notice or removal within the 72 hour period but that the non-citizen was not made available for boarding the vessel.

256 This section replaces broadly equivalent provisions in the Principal Act which are found in section 64(6) and section 89(6) (those sections are being repealed by the Reform Act).

### **Section 66K                      Waiver of requirement**

257 This section provides that the Minister must revoke a notice to remove a non-citizen from Australia if the Minister is notified by the government of the country of



destination that the non-citizen will not be admitted to that country. This does not preclude the Minister issuing another notice to remove to an alternative country and the revocation of a notice does not excuse the carrier from liability for costs.

#### **Section 66L                      Cost of removal under notice**

258 This section provides that the cost of transporting a non-citizen from Australia, following a notice from the Secretary under section 66H, is to be met by the controller of the vessel if that controller was the carrier that brought the non-citizen to Australia in circumstances where the non citizen did not or was unable to comply with immigration clearance. Where the notice to remove is given in circumstances where the carrier was not responsible for bringing the non citizen to Australia, the Commonwealth is responsible for the costs of removal.

#### **CLAUSE 17**

259 This clause repeals section 77 of the Principal Act and substitutes the following sections.

#### **Section 77                      Carriage of concealed persons to Australia**

260 This section provides that an offence is committed by the master, owner, agent, and charterer of a vessel if an unlawful non-citizen is concealed on a vessel when the vessel arrives in Australia. The penalty for the offence is a fine not exceeding \$10 000.

261 The section also provides that it is a defence to a prosecution in relation to the offence if the master of the vessel notifies an officer of the presence of the non-citizen and prevents the non-citizen from landing until an officer has an opportunity to question the non-citizen. To make out the defence it is also necessary that the master notify the officer as soon as the vessel arrived at a port.

262 The offence provision replaces section 79 of the Principal Act (relating to stowaways) which is repealed by the Reform Bill.

#### **Section 77A                      Master of vessel to comply with certain requests**

263 This section provides that the master of a vessel arriving in Australia must comply with any request by an authorised officer to supply a list of persons on the vessel and any other prescribed information about those persons. The master must also present those persons for examination if requested and ensure that persons specified by an authorised officer disembark from the vessel. A person on a vessel whose name is not in the list of names provided under this section is deemed, for the purposes of the offence provision at section 77, to have been concealed on the vessel.

#### **CLAUSE 18**

264 This clause amends section 83 of the Principal Act (which creates offences relating to working in Australia without permission) to reflect the replacement of entry permits by visas and to reflect the repeal of provisions dealing with statutory visitors. The amended

section now provides that it is an offence for the holder of a temporary visa to work in breach of a prescribed condition in the visa which restricts work.

## **CLAUSE 19**

265 This clause repeals section 88 of the Principal Act and substitutes the following section. Essentially, the new section preserves the arrangements to deal with persons who commit offences within Australian Territorial limits, such as illegal fisherman.

### **Section 88                      Detention of suspected offenders**

266 This section provides for detention arrangements of persons such as illegal fisherman brought to Australia for prosecution. Such persons may be detained, pending a decision on whether a prosecution is to be initiated. They may also be detained in Australia while the processes for prosecution are undertaken and are regarded as being in detention while any sentence is served following a conviction. After the period for detention has ended the non citizen must be removed from Australia as soon as possible and may be held in immigration detention until removal takes place.

## **CLAUSE 20**

267 This clause inserts the following section into the Principal Act.

### **Section 100AA              Disposal of dilapidated vessels etc.**

268 This section overcomes a deficiency in the Principal Act whereby there are limited powers to deal with the vessels on which unlawful non-citizens arrive in Australia. This problem arises primarily in relation to boats entering illegally. Those boats often arrive in Australia in very poor condition. The section will allow the Secretary to seize a vessel if it contained a non-citizen who is unable to be immigration cleared or is detained under section 54W (because an unlawful non-citizen). Once seized the Secretary may direct that the vessel be sold, destroyed or otherwise disposed of.

269 The section also provides that, before the Secretary can exercise this power he or she must be satisfied that the vessel is in such poor condition that it is not worth maintaining. The Secretary must also give interested persons an opportunity to make satisfactory arrangements to meet the expenses of maintaining the vessel.

270 The section also provides that the power provided by the section may not be exercised if there are court orders concerning the vessel or if the vessel is ordered to be forfeited and condemned under section 100 (a provision relating to illegal fishermen).

271 The section further provides that the proceeds of a sale are to be applied to meet the costs of the custody and maintenance of the vessel. Any balance is to be paid to the former owner or owners of the vessel (or any other person with a legal claim on the vessel).

## **CLAUSE 21            PROOF OF CERTAIN MATTERS**

272 This clause amends section 111 to add a new paragraph to the definition of "migration proceedings" in that section. As amended, that definition will include proceedings before the RRT.

## **CLAUSE 22            INTERPRETATION**

273 This clause amends section 114A, which contains definitions of terms used in the provisions relating to Migration Agents. The clause inserts a definition of "review authority" which includes the IRT, the RRT, the AAT or a person who is a review authority for the purposes of Part 3 of the Act. This is so that activities of migration agents in respect of proceedings before these review authorities are "immigration assistance" for the purposes of the Migration Agents scheme.

## **CLAUSE 23**

274 This clause repeals existing Divisions 1 and 2 of Part 3 of the Migration Act 1958 and substitutes new Divisions 1A, 1 and 2. These amendments broaden the range of decisions which may be reviewed internally and by the Immigration Review Tribunal (IRT) and set out in the Act itself the range of decisions which are subject to merits review and who may apply for review of those decisions.

### **Division 1A - Interpretation**

#### **Section 115 Interpretation**

275 This section defines terms used in Part 3 of the Act. The terms defined are "company", "member", "nominated", "Part 3 reviewable decision", "presiding member", "Principal Member", "Registrar", "review officer", "Senior member", "sponsored" and "Tribunal".

276 The Tribunal is the Immigration Review Tribunal (the IRT) and the terms member, presiding member, Registrar, Principal Member and Senior Member relate to those positions in the IRT. A review officer is an officer appointed by the Secretary to conduct internal reviews of decisions. "Nominated" and "sponsored" carry the same definitions that they do in the regulations, because they relate to circumstances where an applicant is nominated or sponsored in accordance with a criterion prescribed in the regulations for the approval of the visa application.

277 A Part 3 reviewable decision is one of the following kinds of decisions:

- a decision to refuse a visa application in the migration zone (where both the application and the decision were made in the migration zone), other than a decision made while the applicant was in immigration clearance or after the applicant had been refused immigration clearance, in relation to a visa which could be granted in Australia (an Australian application decision);

- a decision to cancel a visa in the migration zone, other than a decision made while the holder was in immigration clearance (an Australian cancellation decision);
- a decision made outside Australia to refuse an application for a visa which could not be granted in the migration zone, where a criterion for approval of the visa was that the applicant was sponsored or nominated by an Australian person or organisation.

## **Division 1 - Internal review of decisions**

### **Section 115A Internally-reviewable decisions**

278 This section defines "internally-reviewable decisions". The section provides that Part 3 reviewable decisions, other than those specified in subsection (2), are internally-reviewable decisions. The decisions specified in subsection (2) are:

- a decision made personally by the Minister;
- a decision in respect of which the Minister has issued a conclusive certificate stating that it would be contrary to the public interest on the grounds of prejudice to the security, defence or international relations of Australia, for the decision to be changed, or on the grounds that the review would require consideration of Cabinet deliberations or Cabinet decisions.
- a decision which is prescribed to be an IRT-reviewable decision; or
- an RRT-reviewable decision (a decision specified in the Act as reviewable by the Refugee Review Tribunal).

Note that Part 3 reviewable decisions made by the Minister personally or prescribed as IRT-reviewable decisions are reviewable by the IRT, even though they are not internally reviewable.

### **Section 115B Application for internal review**

279 This section sets out how an application for review of an internally-reviewable decision can be made. These requirements are that the application:

- be made in writing in accordance with the form approved by the Secretary;
- be made within a prescribed period after notification of the initial decision: this period cannot be longer than 28 days where the decision is an Australian application decision or an Australian cancellation decision and it cannot be longer than 70 days when the decision is an overseas application decision; and
- must be accompanied by the prescribed fee, if any.

280 This section also specifies who may apply for review of a decision. If the decision is an Australian application decision or an Australian cancellation decision, only the applicant is entitled to apply for review and then only if the applicant is physically present in Australia at the time of the review application. If the decision is an overseas application decision, only the Australian nominator or sponsor is entitled to apply for review.

#### **Section 115C      Review officer must review decision**

281 This section requires a review officer to review a decision once a proper application for review of an internally-reviewable decision is made. However, the review officer cannot review or continue to review a decision in respect of which a conclusive certificate has been issued.

#### **Section 115D      Powers of Review Officer**

282 Proposed subsection 115D(1) sets out the powers of a review officer on the review of an internally-reviewable decision. Subsection (1) provides that the review officer may exercise all the powers and discretions of the original decision maker in the review of the decision. This enables the review officer to provide determinative merits review. Subsection (2) provides that the review officer may affirm or vary the decision, or remit it for further consideration with such recommendations or directions as the regulations permit. The review officer may also set a decision aside and substitute a fresh decision.

283 The power to remit a decision with directions will permit the review officer to review the substantive matters which must be satisfied before the application can be approved and, if these are decided in favour of the applicant, to then send the case back to the Department to get clearance of the more procedural criteria, which would not be convenient for the review officer to deal with.

284 Decisions to vary or set aside and substitute a decision are taken to be (except for the purposes of applications to the IRT) decisions of the Minister. Subsection (4) puts beyond doubt that the review officer cannot purport to make a decision which is not authorised by the Act or regulations. This means that a review officer has no discretion to make a decision on compassionate or humanitarian grounds outside the grounds established under the Act and regulations for the approval and grant of the visa.

#### **Section 115E      Notification of decision**

285 This section requires a review officer to notify the review applicant of the decision in the way prescribed in the regulations. Where the decision is to approve the visa application must set out the matters which would have been required by section 26ZG to be notified if the application had been approved by the Minister. In addition, the review officer is to provide the address of the office of the Department which will be responsible for granting the visa and providing evidence of the visa.

286 If the review decision has the effect of continuing to refuse the visa, or of affirming a cancellation of a visa, the applicant must be notified of the reasons for the review decision and be given details of how a review to the IRT may be made.

287 If the decision is to remit the decision for reconsideration, the applicant must be notified of the directions or recommendations with which the decision is remitted, the address of the Departmental office to which the decision has been remitted and advice of further review rights if the applicant wishes to appeal the decision to remit.

#### **Section 115F            Review of assessments under section 30**

288 This section requires a review officer when reviewing a points assessment under section 30 to apply whichever is the most favourable to the applicant of the regulations in force at the time of the decision and at the time of review. This section is unchanged from current section 121 of the Act.

#### **Section 115G            Minister may substitute more favourable decision**

289 This section provides the Minister with an extraordinary power to substitute a new decision for a decision of a review officer, whether or not the review officer could have made the new decision, when the Minister considers it in the public interest to do so. The new decision may only be the decision which the applicant sought in the primary application or another decision which the applicant agrees to.

290 The extraordinary nature of this power requires it to have special features. Where the Minister has exercised the power, he or she must table a statement about the decision in both Houses of Parliament, within the time limits set out in proposed subsection (5). The statement must set out the reasons for the Minister's decision, referring in particular to the Minister's reasons for thinking that his or her actions are in the public interest.

291 Subsection (2) provides that in exercising his or her powers the Minister is not bound by Subdivision AA or AC of Division 2 of Part 2 of the Act or by the regulations, but is bound by the rest of the Act. This means that the Minister can grant a visa that the person did not apply for, and may grant the visa even if the applicant did not satisfy the prescribed criteria. However, the Minister cannot grant the visa if, to do so, would breach another provision of the Act.

292 The section also makes clear that this power is only exercisable by the Minister personally, and the Minister does not have a duty to consider whether or not to exercise the power in any particular case. This means that the actions of the Minister in declining to consider the exercise of this power, or in declining to exercise the power after considering its exercise, will not give rise to any right of review, whether merits or judicial review.

### **Division 2 - Review of decisions by the IRT**

#### **Section 116            Decisions reviewable by IRT**

293 This section defines "IRT-reviewable decisions". These are:

- a decision made by a review officer under section 115D;
- a Part 3 reviewable decision made by the Minister personally; and

- a Part 3 reviewable decision prescribed as an IRT-reviewable decision.

294 Subsection (2) sets out those decisions which are not IRT-reviewable decisions. These are:

- a decision in respect of which the Minister has issued a conclusive certificate stating that it would be contrary to the public interest on the grounds of prejudice to the security, defence or international relations of Australia, for the decision to be changed, or on the grounds that the review would require consideration of Cabinet deliberations or Cabinet decisions; and
- an RRT-reviewable decision.

### **Section 117                      Application for review by IRT**

295 This section sets out how an application for review of an IRT-reviewable decision can be made. These requirements are that the application:

- be made in writing in accordance with the form approved by the Minister;
- be made within a prescribed period after notification of the initial decision or the review officer's decision, whichever is the latter: this period cannot be longer than 28 days where the reviewable decision is an Australian application decision or an Australian cancellation decision and it cannot be longer than 70 days when the decision is an overseas application decision; and
- must be accompanied by the prescribed fee, if any.

296 Subsection (2) specifies who may apply for review of a decision. If the decision is an Australian application decision or an Australian cancellation decision, only the applicant is entitled to apply for review and then only if the applicant is physically present in Australia at the time of the IRT review application. If the decision is an overseas application decision, only the Australian nominator or sponsor is entitled to apply for review.

### **Section 118                      Immigration Review Tribunal must review decision**

297 This section requires the IRT to review a decision once a proper review application is made. However, the review officer cannot review or continue to review a decision in respect of which a conclusive certificate has been issued.

### **Section 119                      Powers of Immigration Review Tribunal**

298 Proposed subsection 119(1) sets out the powers of the IRT on the review of an IRT-reviewable decision. Subsection (1) provides that the IRT may exercise all the powers and discretions of the original decision maker in the review of the decision. This enables the IRT to provide determinative merits review. Subsection (2) provides that the IRT may affirm or vary the decision, or remit it for further consideration with such

recommendations or directions as the regulations permit. The IRT may also set a decision aside and substitute a fresh decision.

299 The power to remit a decision with directions will permit the IRT to review the substantive matters which must be satisfied before the application can be approved and, if these are decided in favour of the applicant, to then send the case back to the Department to get clearance of the more procedural criteria, which would not be convenient for the IRT to deal with.

300 Decisions to vary or set aside and substitute a decision are taken (except for the purposes of appeals to the Federal Court) to be decisions of the Minister. Subsection (4) puts beyond doubt that the IRT cannot purport to make a decision which is not authorised by the Act or regulations. This means that the IRT has no discretion to make a decision on compassionate or humanitarian grounds outside the grounds established under the Act and regulations for the approval and grant of the visa.

#### **Section 120                      Review of assessments under section 30**

301 This section requires the IRT when reviewing a points assessment under section 30 to apply whichever is the most favourable to the applicant of the regulations in force at the time of the decision and at the time of review. This section is unchanged from current section 121 of the Act.

#### **Section 121                      Minister may substitute more favourable decision**

302 This section provides the Minister with an extraordinary power to substitute a new decision for a decision of the IRT, whether or not the IRT could have made the new decision, when the Minister considers it in the public interest to do so. The new decision must be more favourable to the applicant than the decision of the IRT which is being substituted.

303 The extraordinary nature of this power requires it to have special features. Where the Minister has exercised the power, he or she must table a statement about the decision in both Houses of Parliament, within the time limits set out in proposed subsection (5). The statement must set out the reasons for the Minister's decision, referring in particular to the Minister's reasons for thinking that his or her actions are in the public interest.

304 Subsection (2) provides that in exercising his or her powers the Minister is not bound by Subdivision AA or AC of Division 2 of Part 2 of the Act or by the regulations, but is bound by the rest of the Act. This means that the Minister can grant a visa that the person did not apply for, and may grant the visa even if the applicant did not satisfy the prescribed criteria. However, the Minister cannot grant the visa if, to do so, would breach another provision of the Act.

305 The section also makes clear that this power is only exercisable by the Minister personally, and the Minister does not have a duty to consider whether or not to exercise the power in any particular case. This means that the actions of the Minister in declining to consider the exercise of this power, or in declining to exercise the power after



considering its exercise, will not give rise to any right of review, whether merits or judicial review.

## **Section 122                    Secretary to be notified by IRT**

306 This section provides that the Registrar of the IRT must notify the Secretary as soon as practicable that an application has been made to the IRT. The Secretary is then required to furnish to the IRT, within 10 working days, the prescribed number of copies of a statement about the decision under review that sets out the reasons for the decision, and copies of other relevant documents in the Secretary's possession or control.

## **CLAUSE 24**

307 This clause repeals sections 137 to 140 (inclusive).

## **CLAUSE 25                    PROTECTION OF MEMBERS AND PERSONS GIVING EVIDENCE**

308 This clause amends section 144 to provide that a member of the IRT has the same protection and immunity as a member of the AAT, and that a witness before the IRT has the same protection and, subject to this Part, liabilities, as a witness before the AAT. This provision is a technical amendment only, and has no practical effect on the protection and immunities of members of the IRT.

## **CLAUSE 26**

309 This clause inserts new Division 8 after section 150 of the Migration Act 1958.

## **Division 8 - Referral of decisions to AAT**

310 This Division provides a mechanism to permit the Principal Member of the IRT to refer to a Presidential Bench of the Administrative Appeals Tribunal, which will usually include the Principal Member of the IRT, any case appealed to the IRT which raises an important principle or issue of general application. Where a case is so referred, the AAT takes the place of the IRT in reviewing the decision. The purpose of this power is to enable normative principles to be established without the cost and delay involved in appealing a decision to the Federal Court. It is intended that this power be used only rarely and will not be available as an avenue of review from decisions of the IRT.

## **Section 150A                Interpretation**

311 This section provides that in this Division, "AAT Act" means the Administrative Appeals Tribunal Act 1975.

## **Section 150B                Referral of Decisions to AAT**

312 This section sets out how a decision can be referred to the AAT. the procedure is that, where the Principal Member of the IRT considers that a decision currently under review by the IRT raises an important principle or issue of general application, the Principal Member may refer that decision to the President of the AAT, with a request that

the decision be reviewed by the AAT, a statement of the Principal Member's reasons for concluding that the case raises an important principle or issue of general application, and any relevant documents or records.

313 When a decision is referred, the Principal Member must notify the review applicant and the Secretary accordingly, and the IRT can take no further action on the review until the President of the AAT decides whether the decision should be reviewed by the AAT. If the decision is reviewed by the AAT, the IRT review is taken to be closed.

#### **Section 150C            AAT may accept or decline referral**

314 Subsection (1) requires the President of the AAT to consider a request for a referral and either accept or refuse the referral, while subsection (2) requires the President to notify the Principal Member of the IRT of the decision under (1). If the referral is accepted, the application is regarded as having been properly made by the applicant to the AAT, and the AAT Act applies to the AAT's review of the decision, subject to the modifications to that Act made by this Division.

#### **Section 150D            Modification to Section 3 of the AAT Act**

315 This section modifies the definition of "member" in section 3 of the AAT Act for the purposes of referrals from the IRT to the AAT to include the Principal Member of the IRT for the purposes of the a review of a referred decision.

#### **Section 150E            Modification of section 21 of the AAT Act**

316 This section replaces subsection 21(1) of the AAT Act with a new subsection 21(1) for the purposes of IRT referrals. The replacement subsection deals with the constitution of the AAT for referred cases. The effect of the provision is that the AAT will be presided over by a Judge or by another presidential member and the Principal Member of the IRT will constitute part of the AAT, unless the Principal Member had constituted the IRT (in whole or in part) in respect of the review of the referred decision by the IRT. In such a case, the Principal Member will be replaced by another member of the AAT.

#### **Section 150F            Certain provisions of AAT Act not to apply**

317 This section provides that sections 21A, 27, 28, and 29 of the AAT Act do not apply to IRT-referred decisions.

#### **Section 150G            Modification of section 25 of AAT Act**

318 This section modifies section 25 of the AAT Act for the purposes of IRT-referred decisions so that subsections (6) and (6A) of that section are omitted.

#### **Section 150H            Modification of section 30 of AAT Act**

319 This section modifies section 30 of the AAT Act for the purposes of IRT-referred decisions. The effect of this modification is to make the applicant for review to the IRT

and the Minister administering the Migration Act the parties to the review before the AAT.

**Section 150I          Modification of section 37 of the AAT Act**

320 This section provides that section 37 of the AAT Act applies as if subsections (1) through to (1D) were replaced as provided in proposed paragraph 150I(a), and subsection (4) was omitted. This will permit documents provided to the IRT under section 122 of the Migration Act to be provided to the AAT for the purposes of the review of the referred case.

**Section 150J          Modification of section 38 of the AAT Act**

321 This section provides that section 38 of the AAT Act applies to IRT-referred decisions as though the reference in that section to a section 37(1)(a) statement was a reference to a statement made under section 122 of the Migration Act 1958. There will be no need to provide a new statement of reasons when a decision is referred to the AAT.

**Section 150K          Modification of section 43 of the AAT Act**

322 This section provides that section 43 of the AAT Act applies as though subsection (1) were omitted and replaced as provided. The effect of the replacement provisions is that the AAT the same powers in relation to the decision under review as the IRT had before the referral.

**Section 150L          Minister may substitute more favourable decision**

323 This section provides the Minister with a similar power in respect of an decision referred to the AAT from the IRT as the Minister has under proposed section 121 in respect of decisions reviewed by the IRT. See the explanatory memorandum in respect of that proposed section.

**Section 150M          Provision of material to which section 147 applies**

324 This section requires the IRT when providing to the AAT information to which section 147 applies to advise the AAT that the section applies to that information. This will ensure that the AAT is aware when some of the documentation provided to it is of a confidential or privileged nature.

**Section 150N          Section 9 of AAT Act not to apply to Principal Member**

325 This section provides that in spite of anything in the Migration Act or any other Act, section 9 of the AAT Act does not apply to the Principal Member of the IRT. This means that the Principal Member of the IRT does not become a member of the AAT because he or she is to constitute part of the AAT for the purposes of reviewing a referred decision.

**CLAUSE 27            PERIOD OF APPOINTMENT OF MEMBERS**

326 This clause amends section 154 by inserting in subsections (2) and (3) the words "full-time" before "member". The effect of these changes is to permit the appointment as part-time members of persons over 65.

#### **CLAUSE 28 LEAVE OF ABSENCE**

327 This clause makes a technical amendment to section 157 of the Principal Act.

#### **CLAUSE 29 REMOVAL FROM OFFICE**

328 This clause makes a technical amendment to section 161 of the Principal Act.

#### **CLAUSE 30 DELEGATION**

329 This clause amends section 163 of the Principal Act to ensure that the power of the Principal Member of the IRT to delegate his or her powers does not extend to delegation of the power to refer matters to the AAT.

#### **CLAUSE 31**

330 This clause inserts after section 166 new Part 4A which incorporates a regime for reviewing decisions on visas for which a criterion is that the applicant is a person to whom Australia has protection obligations under the Refugees Convention and Protocol and for the creation of a body, to be known as the Refugee Review Tribunal, to conduct such reviews.

The following clause notes refer to proposed sections to be inserted by this clause.

### **Part 4A - Review of Protection Visa Decisions**

#### **Division 1 - Interpretation**

##### **Section 166A Interpretation**

331 This section defines key terms used in Part 4A. These terms are "Registrar", "member", "Principal Member" and "Tribunal" which mean in Part 4 the Registrar, members and Principal Member of the Refugee Review Tribunal.

#### **Division 9 - Establishment and membership of the RRT**

##### **Section 166J Establishment of the RRT**

332 This section establishes the RRT.

##### **Section 166JA Membership of the RRT**

333 This section provides that the RRT is to consist of a Principal Member and other members (not exceeding the prescribed number) as are appointed.

#### **Section 166JB Appointment of members**

334 This section provides that the Governor-General appoints members of the RRT. The Principal Member is to be appointed as a full-time member whereas other members may be appointed as full-time or part-time members.

#### **Section 166JC Principal Member**

335 This section provides that the Principal Member is the executive officer of the Tribunal and is responsible for the overall operation and administration of the RRT. The Principal Member is to monitor the RRT's operations and ensure they are as fair, just, economical, informal and quick as practicable, and allocate the work of the RRT in accordance with written guidelines made under subsection (3), which provides that the Principal member may lay down written guidelines for the allocation of work. The guidelines must give priority to cases where a person is held in custody under the Act.

#### **Section 166JD Period of appointment of members**

336 This section provides that members may be appointed for up to 5 years, and may be reappointed. Persons over the age of 65 may not be appointed as full-time members, and full-time appointments cannot extend past the day on which the appointee turns 65.

#### **Section 166JE Remuneration and allowances of Principal Member**

337 This provision provides that the Remuneration Tribunal is to determine the remuneration of the Principal Member. In default of a determination, the remuneration is to be prescribed. Allowances are also to be prescribed. The section is subject to the Remuneration Act 1973.

#### **Section 166JF Remuneration and allowances of other members**

338 This section provides for members to be paid remuneration and allowances at the level of Senior Executive Service Band 1. Part-time members are to be paid such remuneration and allowances as are determined by the Minister in writing.

#### **Section 166JG Leave of Absence**

339 This section allows the Minister to grant leave of absence to a full-time member.

#### **Section 166JH Other terms and conditions**

340 This section provides that the Minister may determine in writing the other terms and conditions of members' appointments.

## **Section 166JI      Resignation**

341 This section provides that a member may resign by writing to the Governor-General.

## **Section 166JJ      Disclosure of interests**

342 This section provides that members must disclose any conflicts of interest in relation to reviews by the Tribunal in the manner specified, and a member with a conflict of interest is not to participate in the review without consent as specified. Subsection (2) describes what amounts to a conflict of interest for the purposes of the section.

## **Section 166JK      Removal from office**

343 This section describes the circumstances in which the Governor-General may remove a member from office.

## **Section 166JL      Acting appointments**

344 This section describes the circumstances and manner in which the Minister may make acting appointments of members to the RRT. Subsection (1) allows the Minister to appoint a person to act in the office of Principal Member when the office is vacant or when the Principal Member is unavailable to perform duties. A person shall not normally continue to act for longer than twelve months.

345 Subsection (3) provides that the Minister may direct that a person shall continue to act in the office after the normal terminating event occurs. The normal terminating event is either where the vacancy is filled by an appointment or the Principal Member again becomes available to perform duties.

346 The section also provides that any act or direction of the RRT when constituted to include a person who is acting, will not be invalidated because there was some irregularity in the appointment. Anything done by or in relation to a member purporting to act under this section is not invalid merely because of an irregularity in the appointment.

## **Section 166JM      Delegation**

347 This section allows the Principal Member to delegate his or her powers under the Act to a member of the Tribunal, except for the power to refer cases to the Administrative Appeals Tribunal.

# **Division 10 - Registry and officers**

## **Section 166K      Registry**

348 This section requires the Minister to establish a registry of the RRT.

## **Section 166KB      Officers of Tribunal**

349 This section provides for a Registrar and such other officers of the RRT as are required, to be appointed by the Minister under the Public Service Act 1922.

#### **Section 166KC Acting appointments**

350 This section allows the Minister to appoint public servants to act in a Tribunal office during vacancies or temporary absences.

#### **CLAUSE 32 INSERTION OF DIVISIONS 2 TO 8 INCLUSIVE**

351 This clause inserts Divisions 2 to 8 inclusive after section 166A of the Principal Act.

The following clause notes refer to proposed sections to be inserted by this clause.

#### **Division 2 - Review of Decisions by Refugee Review Tribunal**

##### **Section 166B Decisions reviewable by RRT**

352 This section sets out which decisions may be reviewed by the RRT. Proposed paragraph 166B(1)(a) provides that the RRT may review decisions (other than earlier decisions made on review), made before the commencement of new section 26B, that a person is not a refugee under the Refugees Convention. New paragraph 166B(1)(b) provides that the RRT may review decisions (other than decisions made under Part 2A of the Migration (Review) Regulations) to refuse to grant or to cancel entry visas or entry permits for which recognition as a refugee is a criterion where such decisions were taken before the commencement of proposed section 26B. This will allow the RRT to review decisions made prior to the commencement of the new legislative structure for considering applications for protection on refugee grounds, except where a review decision has been made under the review arrangements existing prior to the commencement of this Part.

353 Subparagraph 166B(1)(c) allows for RRT review of decisions not to approve applications for protection visas and decisions to cancel protection visas. From the commencement of section 26B all requests for protection as a refugee will take the form of applications for a protection visa.

354 Subsection 166B(2) has the effect that the RRT may not review decisions in relation to persons outside Australia when the decisions was made, and decisions in respect of which the Minister has issued a conclusive certificate under proposed subsection 166B(3). That subsection provides that the Minister may issue such a certificate on the grounds of prejudice to Australia's security, defence, international relations or that such review would require the RRT to consider Cabinet or Cabinet committee documents.

##### **Section 166BA Application for Review by the Refugee Review Tribunal**

355 This section requires applications to be made in writing in accordance with the approved form. Applications must be made within a prescribed period of notification of the initial decision which cannot exceed 28 days. Differing classes of RRT reviewable

decisions can have differing prescribed periods. For example, persons in detention could be required to submit applications more rapidly than persons in the community. Only the person who is the subject of the decision may apply for review. Only persons who are physically in the migration zone may apply for review.

#### **Section 166BB RRT to Review Decision**

356 This section requires the RRT to review a decision once a valid review application is made. However, the RRT cannot review or continue to review a decision in respect of which a conclusive certificate has been issued.

#### **Section 166BC Refugee Review Tribunal**

357 Proposed subsection 166BC(1) sets out the powers of the RRT on the review of an RRT-reviewable decision. Subsection (1) provides that the RRT may exercise all the powers and discretions of the original decision maker in the review of the decision. This enables the RRT to provide determinative merits review. Subsection (2) provides that the RRT may affirm or vary the decision, or remit it for further consideration with such recommendations or directions as the regulations permit. The RRT may also set a decision aside and substitute a fresh decision.

358 The power to remit a decision with directions will permit the RRT to review the substantive matters which must be satisfied before the application can be approved and, if these are decided in favour of the applicant, to then send the case back to the Department to get clearance of the more procedural criteria, which would not be convenient for the RRT to deal with.

359 Subsection (4) puts beyond doubt that the RRT cannot purport to make a decision which is not authorised by the Act or regulations. This means that the RRT has no discretion to make a decision on compassionate or humanitarian grounds outside the grounds established under the Act and regulations for the approval and grant of the visa.

#### **Section 166BD Only new information to be considered in later applications for review**

360 This section limits the information that the RRT is required to consider in any further application for a protection visa. Where an earlier application or applications have been considered and refused by either the RRT or the AAT, the RRT, in relation to any further application for review:

- is not required to reconsider earlier information; and
- may have regard to and take to be correct earlier decisions made about or because of that information by the RRT or the AAT.

#### **Section 166BE Minister may substitute more favourable decision**

361 This section provides the Minister with an extraordinary power to substitute a new decision for a decision of the RRT, whether or not the RRT could have made the new decision, when the Minister considers it in the public interest to do so. The new decision



must be more favourable to the applicant than the decision of the RRT which is being substituted.

362 The extraordinary nature of this power requires it to have special features. Where the Minister has exercised the power, he or she must table a statement about the decision in both Houses of Parliament, within the time limits set out in proposed subsection (5). The statement must set out the reasons for the Minister's decision, referring in particular to the Minister's reasons for thinking that his or her actions are in the public interest.

363 Subsection (2) provides that in exercising his or her powers the Minister is not bound by Subdivision AA or AC of Division 2 of Part 2 of the Act or by the regulations, but is bound by the rest of the Act. This means that the Minister can grant a visa that the person did not apply for, and may grant the visa even if the applicant did not satisfy the prescribed criteria. However, the Minister cannot grant the visa if, to do so, would breach another provision of the Act.

364 The section also makes clear that this power is only exercisable by the Minister personally, and the Minister does not have a duty to consider whether or not to exercise the power in any particular case. This means that the actions of the Minister in declining to consider the exercise of this power, or in declining to exercise the power after considering its exercise, will not give rise to any right of review, whether on the merits or judicial review.

#### **Section 166BF Secretary to be notified of RRT review**

365 This section provides that the Registrar of the RRT must notify the Secretary as soon as practicable that an application has been made to the RRT. The Secretary is then required to furnish to the RRT the prescribed number of copies of the notification that was sent to the applicant in relation to the decision, within 10 days, and copies of other relevant documents in the Secretary's possession or control, as soon as practicable. The period for providing relevant documents is longer in the case of the RRT than the IRT. This reflects the fact that there may be a need to seek information on the situation in the country of origin of an applicant - a process which may not be able to be completed immediately.

### **Division 3 - Exercise of RRT's Powers**

#### **Section 166C RRT's way of operating**

366 This section provides that the RRT shall have as its objective the providing of a mechanism of review that is fair, just, economical, informal and quick. The RRT in reviewing a decision is not bound by technicalities, legal forms or rules of evidence and shall act according to substantial justice and the merits of the case.

367 "Substantial justice" is used to emphasise that it is the issues raised by the case, rather than the process of deciding it, which should guide the RRT in making its decisions. It is intended that the RRT will operate in an informal non-adversarial way that will facilitate applicants putting their own case in their own words.

## **Section 166CA      Constitution of RRT**

368 This section provides that the RRT sitting in relation to a particular review shall be constituted as a single member panel. This is intended to ensure that the RRT operates as an efficient low-cost review mechanism. The section also provides that the Principal Member of the RRT may give written directions on who is to constitute the Tribunal for particular reviews. This will allow the Principal Member to allocate cases among Tribunal members.

## **Section 166CB      Reconstitution of RRT**

369 This section provides that where a member who constitutes the Tribunal for a particular review becomes unavailable for whatever reason, the Principal Member is to direct another member to constitute the Tribunal and complete the review. The replacement member in finishing the review may have regard to records made by the RRT earlier in the proceedings. In appointing a replacement, the Principal Member is to have regard to the objective of providing a hearing which is fair, just, economical and quick.

## **Division 4 - Conduct of Review**

## **Section 166D      Documents to be given to RRT**

370 This section provides that an applicant may give the RRT a statutory declaration in relation to any fact the applicant wishes the RRT to consider. The applicant and the Secretary may also give written arguments on the issues in the decision under review.

## **Section 166DA      Review "on the papers"**

371 This section provides that if the RRT is prepared, after considering documents given to it, to make a decision which is most favourable to an applicant, it may make such a decision without taking oral evidence. This is intended to facilitate the objective of economical and quick review without disadvantaging applicants in any way. A decision is the "most favourable" if it is the most favourable that the RRT could make and is that which the applicant would, in the RRT's opinion, prefer to be made.

## **Section 166DB      Where "on the papers" review not possible**

372 Proposed paragraph 166DB(1)(a) provides that where a decision on the papers is not possible, the RRT must give the applicant an opportunity to appear before it. Paragraph (b) provides that the RRT may also seek any other evidence it feels necessary to decide the case. Subsection (2) provides that subject to (1)(a), the Tribunal is not required to allow any person to address it orally about the issues involved in the review. This section has the effect that an applicant has an opportunity to put his or her case to the Tribunal in person before any negative decision is reached while the prerogative of the Tribunal to determine the manner in which hearings on a particular review are to be conducted is retained.

## **Section 166DC      Applicant may request RRT to call witnesses**

373 Subsection (1) and (2) provide that where there is no review "on the papers", the RRT must notify the applicant that he or she is entitled to appear before the Tribunal to give evidence and that he or she is entitled to inform the Tribunal within 7 days of notification of persons from whom he or she wants the Tribunal to obtain oral evidence. Subsection (3) provides that while the RRT must have regard to the applicant's wishes it is not required to obtain the evidence requested by the applicant.

#### **Section 166DD Powers of the RRT**

374 Subsection (1) provides that when reviewing a decision, the RRT may take evidence on oath or affirmation; adjourn the review as needed; subject to sections 166GC and 166GE, give information to the applicant and the Secretary; and require the Secretary to arrange any investigation or any medical examination that the RRT thinks necessary and to report to the RRT in relation thereto.

375 Subsection(2) compels the RRT to review all RRT-reviewable decisions in respect of the same applicant concurrently. Subsections (3), (4) and (5) allow the RRT to summon a person who is in Australia to appear to give evidence, produce documents, and require a person appearing to give evidence to take an oath or affirmation that the evidence the person will give will be true. Subsection (6) provides that a person appearing before the RRT has right to representation by any other person and is not entitled to examine or cross examine any other person appearing before the RRT. However, subsection (7) provides that the RRT has a discretion to allow a person appearing before it to give evidence to use an interpreter where the person is not proficient in English.

#### **Section 166DE Tribunal member may authorise another person to take evidence**

376 This section provides that a Tribunal member may authorise another person to take evidence on its behalf and sets out the process by which this is to be done. This provision is intended to deal particularly with situations where evidence needs to be gathered outside Australia.

#### **Section 166DF Review to be in Private**

377 This section provides that the review must be in private. This protects applicants and their families as there is a risk that if refugee claims are dealt with in public they may give rise to difficulties for dependants remaining in the country of origin. At the outset of processing, persons seeking protection on refugee status grounds are assured that all details of their applications will be kept strictly confidential. In particular they are assured that information will under no circumstances be passed to authorities in their own country. This is essential to ensure that applicants are willing to canvass their reasons for seeking protection in an open and frank manner. This section is intended to allow the same guarantee of confidentiality at the review stage.

### **Division 5 - Decisions of RRT**

## **Section 166E      RRT to record decisions and notify parties**

378 Section 166E provides that upon making a decision the RRT is to provide to the Secretary and the applicant a statement of reasons setting out its decision, the reasons for the decision, the findings on any material questions of fact and referring to the evidence or any other material on which the findings of fact were based. The RRT has 14 days after the making of a decision to give the statement to the applicant and the Secretary. Once that statement is prepared the RRT must return to the Secretary any document provided for the review and give the Secretary a copy of any other document that contains evidence or material on which the findings of fact were based.

## **Section 166EA      RRT decisions to be published**

379 This section provides that the decisions of the RRT are to be published, but no information which might serve to identify an applicant or any relative or dependant of an applicant can be included.

## **Division 6 - Offences**

### **Section 166F Failure of witness to attend**

380 This section imposes a penalty of 6 months imprisonment on a person who, having been offered reasonable expenses and without reasonable excuse, fails to appear before the RRT as required by summons, or fails to appear and report from day to day unless excused.

### **Section 166FA      Refusal to be sworn etc or answer questions**

381 Subsection (1) imposes a penalty of imprisonment for 6 months on a person appearing before the RRT who, without reasonable excuse, refuses to take an oath or make an affirmation, or refuses to answer questions.

382 Subsection (2) imposes a penalty of 6 months imprisonment on a person who, without reasonable excuse, does not produce a document that he or she is required to produce by summons. Subsection (3) provides that it is an offence punishable by 12 months imprisonment for a person to knowingly give false or misleading evidence.

### **Section 166FB      Contempt of Tribunal**

383 This section provides that it is an offence punishable by 12 months imprisonment for a person to obstruct or hinder the RRT or a member during a review, or disrupt the taking of evidence by the RRT.

## **Division 7 - Miscellaneous**

### **Section 166G      Protection of Members and persons giving evidence**

384 Subsection (1) provides that RRT members have the same protection and immunity as members of the AAT. Subsection (2) provides that persons appearing before the RRT

have the same protection, and in addition to the penalties in Part 4A, have the same liabilities as a witness before the AAT.

#### **Section 166GA Fees for persons giving evidence**

385 This section provides that witnesses, other than the applicant, summoned before the RRT are entitled to be paid fees and allowances for expenses as provided by the regulations. If the witness is called at the request of the applicant under subsection 166DC(2) these fees and allowances are payable by the applicant, otherwise they are payable by the Commonwealth.

#### **Section 166GB Restrictions on disclosure of certain information etc**

386 This section provides that the Secretary must not give the RRT a document or information the disclosure of which the Minister has certified would prejudice the security, defence or international relations, or would disclose Cabinet or Cabinet committee deliberations or decisions.

#### **Section 166GC Refugee Review Tribunal's discretion in relation to disclosure of certain information etc**

387 This provision enables the RRT at its discretion to rely on certain information or documents and to disclose certain information to an applicant on condition that the applicant does not contravene the conditions attached to its disclosure. Subsection(1) provides that the section applies to a document or information in relation to which the Minister has issued a certificate on the basis that disclosure would be contrary to the public interest (on the basis that material in the document or information could from the basis of a claim for Crown privilege, other than for a reason set out in section 166GB) or that the document or information was given in confidence.

388 Subsection (2) provides that where the Secretary gives such information or such a document to the RRT the Secretary shall notify the RRT in writing that the section applies and may advise the RRT in writing of matters he or she considers relevant to the significance of the document or information. In exercising the discretion to disclose, the RRT should consider the advice of the Secretary on the significance of the information or document. It is intended that the RRT may rely on such documents or information in making its decision without breaching the rules of natural justice if the applicant is not advised of that document or information. It is also intended that if the RRT chooses to release the document or information in full knowledge of the Secretary's advice it should be responsible for the release.

#### **Section 166GD Disclosure of confidential information**

389 Subsection (1) provides that this section applies to persons who are or have been members of the RRT (appointed or acting), officers of the RRT and interpreters to the RRT. Subsection (2) provides that the section applies to personal information or documents obtained in the course of the RRT's functions. Subsection (3) prohibits the persons in (1) from making a record of, or divulging or communicating (directly or indirectly) to another person, information covered by (2) other than in the course of that person's powers, duties, functions or under the Act. The penalty for a breach of

subsection (3) is 2 years' imprisonment. Further, subsection (5) precludes the person from disclosing that information to a court unless it is necessary for the purposes of the Migration Act.

390 Subsection (6) provides that this section does not affect rights under the Freedom of Information Act 1982.

#### **Section 166GE RRT may restrict publication or disclosure of certain matters**

391 This section allows the RRT to direct that any evidence, information or documents given to the RRT shall not be published otherwise disclosed, or shall not be published or disclosed except in a particular manner and to particular persons, where the Tribunal is satisfied that this would be in the public interest. Subsection (2) states that this does not affect the RRT's obligation to publish its decisions, or prevent a person who has knowledge of the matter from other sources from disclosing that information. The punishment for contravening a direction under this section is 2 years imprisonment.

#### **Section 166GF Sittings of the RRT**

392 This section provides that the RRT sittings are to be held as required where convenient within Australia. The section also provides that a number of sittings may occur at the same time and different members may exercise powers at the same time.

### **Division 8 - Referral of decisions to AAT**

393 This Division provides a mechanism to permit the Principal Member of the RRT to refer to a Presidential Bench of the Administrative Appeals Tribunal, which will usually include the Principal Member of the RRT, any case appealed to the RRT which raises an important principle or issue of general application. Where a case is so referred, the AAT takes the place of the RRT in reviewing the decision. The purpose of this power is to enable normative principles to be established without the cost and delay involved in appealing a decision to the Federal Court. It is intended that this power be used only rarely and will not be available as an avenue of review from decisions of the RRT.

#### **Section 166H Interpretation**

394 This section provides that in this Division, "AAT Act" means the Administrative Appeals Tribunal Act 1975.

#### **Section 166HA Referral of Decisions to AAT**

395 This section sets out how a decision can be referred to the AAT. The procedure is that, where the Principal Member of the RRT considers that a decision currently under review by the RRT raises an important principle or issue of general application, the Principal Member may refer that decision to the President of the AAT, with a request that the decision be reviewed by the AAT, a statement of the Principal Member's reasons for

concluding that the case raises an important principle or issue of general application, and any relevant documents or records.

396 When a decision is referred, the Principal Member must notify the review applicant and the Secretary accordingly, and the RRT can take no further action on the review until the President of the AAT decides whether the decision should be reviewed by the AAT. If the decision is reviewed by the AAT, the RRT review is taken to be closed.

#### **Section 166HB AAT may accept or decline referral**

397 Subsection (1) requires the President of the AAT to consider a request for a referral and either accept or refuse the referral, while subsection (2) requires the President to notify the Principal Member of the RRT of the decision under (1). If the referral is accepted, the application is regarded as having been properly made by the applicant to the AAT, and the AAT Act applies to the AAT's review of the decision, subject to the modifications to that Act made by this Division.

#### **Section 166HC Modification to Section 3 of the AAT Act**

398 This section modifies the definition of "member" in section 3 of the AAT Act for the purposes of referrals from the RRT to the AAT to include the Principal Member of the RRT for the purposes of the a review of a referred decision.

#### **Section 166HD Substitution of section 21 of the AAT Act**

399 This section replaces section 21 of the AAT Act with a new section 21 for the purposes of RRT referrals. The replacement section 21 deals with the constitution of the AAT for referred cases. The effect of the provisions is that the AAT will be presided over by a Judge or by another presidential member and the Principal Member of the RRT will constitute part of the AAT, unless the Principal Member had constituted the RRT (in whole or in part) in respect of the review of the referred decision by the RRT. In such a case, the Principal Member will be replaced by another member of the AAT.

#### **Section 166HE Certain provisions of AAT Act not to apply**

400 This section provides that sections 21A, 27, 28, and 29 of the AAT Act do not apply to RRT-referred decisions.

#### **Section 166HF Modification of section 25 of AAT Act**

401 This section modifies section 25 of the AAT Act for the purposes of RRT-referred decisions so that subsections (6) and (6A) of that section are omitted.

#### **Section 166HG Modification of section 30 of AAT Act**

402 This section modifies section 30 of the AAT Act for the purposes of RRT-referred decisions. The effect of this modification is to make the applicant for review to the RRT and the Minister administering the Migration Act the parties to the review before the AAT.

## **Section 166HH      Modification of section 37 of the AAT Act**

403 This section provides that section 37 of the AAT Act applies as if subsections (1) through to (1D) were replaced as provided in proposed paragraph 150I(a), and subsection (4) was omitted. This will permit documents provided to the RRT under section 122 of the Migration Act to be provided to the AAT for the purposes of the review of the referred case.

## **Section 166HI      Modification of section 38 of the AAT Act**

404 This section provides that section 38 of the AAT Act applies to RRT-referred decisions as though the reference in that section to a section 37(1)(a) statement was a reference to a statement made under section 122 of the Migration Act 1958. There will be no need to provide a new statement of reasons when a decision is referred to the AAT.

## **Section 166HJ      Modification of section 43 of the AAT Act**

405 This section provides that section 43 of the AAT Act applies as though subsection (1) were omitted and replaced as provided. The effect of the replacement provisions is that the AAT the same powers in relation to the decision under review as the RRT had before the referral.

## **Section 166HK      Only new information to be considered in later applications for review**

406 This section limits the information that the AAT required to consider in any further application for a protection visa. Where an earlier application or applications have been considered and refused by either the RRT or the AAT, the AAT in relation to any further application for review:

- is not required to reconsider earlier information; and
- may have regard to and take to be correct earlier decisions made about or because of that information by the RRT or the AAT.

## **Section 166HL      Minister may substitute more favourable decision**

407 This section provides the Minister with a similar power in respect of an decision referred to the AAT from the RRT as the Minister has under proposed section 166BE in respect of decisions reviewed by the RRT. See the explanatory memorandum in respect of that proposed section.

## **Section 166HM      Provision of material to which section 166GC applies**

408 This section requires the RRT when providing to the AAT information to which section 147 applies to advise the AAT that the section applies to that information. This



will ensure that the AAT is aware when some of the documentation provided to it is of a confidential or privileged nature.

#### **Section 166HN      Section 9 of AAT Act not to apply to Principal Member**

409 This section provides that in spite of anything in the Migration Act or any other Act, section 9 of the AAT Act does not apply to the Principal Member of the RRT. This means that the Principal Member of the RRT does not become a member of the AAT because he or she is to constitute part of the AAT for the purposes of reviewing a referred decision.

### **CLAUSE 33**

#### **PART 4B - REVIEW OF DECISIONS BY FEDERAL COURT**

##### **Division 1 - Interpretation**

#### **Section 166L      Interpretation**

410 This section provides that the term "judicially-reviewable decision" has the meaning given by section 166LA.

##### **Division 2- Review of decisions by Federal Court**

#### **Section 166LA      Decisions reviewable by Federal Court**

411 Proposed subsection (1) provides that subject to subsection (2), judicially reviewable decisions are those made by the IRT, the RRT and other decisions relating to visas made under the Act or regulations.

412 Subsection (2) provides that decisions in respect of criminal justice visas or criminal justice certificates are not judicially reviewable decisions. Similarly, decisions where internal review, IRT review or RRT review is available and has not been pursued are not reviewable. The effect is to require a person seeking judicial review to undergo determinative merits review under the Act where possible before applying to the Federal Court. Decisions made by the Principal members of the IRT or RRT to refer matters to the AAT, and decisions of the AAT to accept or refuse such a referral, are also not judicially reviewable decisions. A decision of the Minister not to substitute a decision is not judicially reviewable.

#### **Section 166LB      Application for review**

413 New section 166LB sets out the grounds upon which an application for review by the Federal Court of a judicially reviewable decision may be made. Sub-section (1) contains 7 grounds of review. While each ground of review stands separately, they are not mutually exclusive and there may be overlap between some of the grounds:

- (a) That procedures that were required by this Act or the regulations to be observed in connection with the making of the decision were not observed: This ground of review is complementary to the new sub-section

166LB(2)(a), which provides that an application for judicial review of a decision may not be made for a breach of the rules of natural justice, or as it is now called, procedural fairness. The Scheme of decision-making under the amendments made in this Bill will set out with greater certainty the procedural requirements to be followed to ensure that applicants are provided with the protection necessary to receive a fair consideration when decisions are made affecting their right to enter or remain in Australia. The procedural requirements under the existing regime have been governed by the common law rules of natural justice and these rules have not provided the certainty needed for effective administration of the migration program. Accordingly, these common law rules will be replaced by a codified set of procedures which will afford the same level of protection to individuals but will have the additional advantage of greater certainty in the decision-making process. For example, at common law prior notice of an adverse decision is required. Under the procedures established in this Bill, new section 26Y requires the Minister to give the applicant information, if that information would be the reason or part of the reason for refusing the application for a visa. The Minister is to invite the applicant to comment on it and under new section 26ZE, the Minister is not to refuse an application until the applicant has responded, has indicated that he or she will not be responding or the time for responding has passed. The Bill provides for an application for review of a decision where procedures such as these are not observed.

- (b) that the person who purported to make the decision did not have jurisdiction to make the decision: This ground of review corresponds with the ground under section 5(1)(c) of the *Administrative Decisions (Judicial Review) Act 1977* and covers those matters where the tribunal or officer making the decision was not properly authorised to make the decision such as, in the case of the tribunal, where it was not constituted in the proper way or, in the case of an officer, where the officer's statutory authority has been exceeded.
- (c) that the decision was not authorised by this Act or the regulations: This ground of review covers those matters where the Act or regulations requires that a particular matter or matters be satisfied prior to the making of a decision and these matters were not satisfied.
- (d) that the decision was the improper exercise of the power conferred by this Act or the regulations: This ground of review is to be construed according to the matters set out in sub-section 166LB(3). These are:

that the power was exercised for a purpose other than a purpose for which the power was conferred: This will cover those matters where the power was exercised so as to achieve a different purpose than the purpose for which the power was conferred. The powers under the Act or regulations are clearly stated and the purpose of each power is evident from a reading of the Act or regulations. Where a decision-maker uses a power to achieve a different purpose, the decision can be set aside;

that the power was an exercise of a personal discretionary power at the behest of another person: This ground of review deals with the situation where a delegate acts under the direction or at the behest of another person, whether that person is another officer or not. The ground of review directs the decision-maker to exercise his or her powers as the properly empowered delegate of the Minister, and not as the agent of another person;

that the power was an exercise of a discretionary policy in accordance with a rule or policy without regard to the merits of the particular case: This ground of review requires decision makers to exercise discretionary powers having regard to the merits of the case. Decision-makers are not permitted to apply discretionary policy in an inflexible manner but must take into account of the circumstances of the case. Failure to have regard to the merits of a particular case would be grounds for setting the decision aside.

- (e) that the decision involved an error of law, being an error involving an incorrect interpretation of the applicable law or an incorrect application of the law to the facts as found by the person who made the decision, whether or not the error appears on the record of the decision: This ground of review will be made out where the decision-maker has made an error of law in one of two ways. First, the decision-maker has erred in his or her interpretation of the law, so that decision is wrong because of that interpretation of law, and second, the decision-maker has made an error of law in the application of the law to the facts as found by the decision-maker. In keeping with the developments in the area of judicial review, it will not be a requirement that the error appear on the face of the record.
- (f) that the decision was induced or affected by fraud or actual bias: This ground of review will be available where the decision was induced or affected by fraud or actual bias. The essential requirement under this ground of review will be to show that the decision itself was induced or affected by fraud or actual bias. Where there is an allegation of bias directed against the decision-maker or other person involved in the decision-making process, it will be necessary to show that the decision-maker or that other person was actually biased and not that there was simply a reasonable apprehension of bias;
- (g) that there was no evidence or other material to justify the making of the decision: This ground of review will be made out where the person who made the decision was required by the Act or the regulations to reach the decision if a particular matter was established and there was no evidence or other material from which he or she could reasonably be satisfied that the matter was established or where the decision was based on the existence of a particular fact and that fact did not exist.

(Subsection (4) explains the 'no evidence' rule for the purposes of paragraph 166LB(1)(g). The provision is equivalent to subsection 5(3) of the *Administrative Appeals (Judicial Review) Act 1977*.)

414 New sub-section 116LB(2)(a) provides that an application for review of a decision may not be made on the grounds that there was a denial of natural justice. The rules of natural justice have been replaced by a codified set of procedures which will provide greater certainty in the decision-making process (see notes above under new section 166LA(1)(a)).

415 New sub-section 166LB(2)(b) provides that an application for review of a decision may not be made on the grounds that a decision was so unreasonable that no reasonable person could have so exercised that power. This ground of review, commonly known as *Wednesbury* unreasonableness, is currently available where the Court assesses that a decision-maker has made a decision that was so unreasonable that no reasonable person could have made such a decision. It has long been recognised that this ground of review, if not interpreted with great care and precision, will come close to a review of a decision on the merits, especially where review on the merits is not available. The review procedures established in this Bill provide for comprehensive merits review of all visa related decisions and in recognition of this, this ground of review will no longer be available.

#### **Section 166LC      Applications in respect of failures to make decisions**

416 New subsection 166LC(1) provides that an application for judicial review of a decision may be made on the grounds that there has been an unreasonable delay in the making of a decision where the decision-maker has a duty to make a decision, there is no time period within which a decision may be made and the decision-maker has failed to make a decision. The extent of an unreasonable delay will depend on all the circumstances of the case including whether the alleged delay was appropriate or justified in the circumstances or whether it was capricious or irrational.

417 New sub-section 166LC(2) provides that an application for judicial review of a decision may be made on the grounds of a failure to make a decision where the decision-maker has a duty to make a decision, a time period within which a decision may be made has been specified and the decision-maker has failed to make a decision within that time period. Both this sub-section and the previous sub-section apply to decision-makers other than tribunals.

#### **Section 166LD      Application for review by Federal Court**

418 This section requires an applicant under sections 166LB or 166LC to make the application for review in such manner as specified in the Federal Court Rules to lodge the application with a Federal Court Registry within 28 days of being notified of the decision for which review is sought. Subsection (2) prevents the Federal Court from granting an extension of time for the lodgment of review applications.

#### **Section 166LE      Person who may make application**

419 This section provides that an application under sections 166LB or 166LC may only be made by the Minister or the applicant to the Tribunal in respect of decisions which have been reviewed by a Tribunal, or by the person who is the subject of the decision in respect of other decisions under the Act or regulations.

## **Section 166LF      Parties to review**

420 The section provides that the parties to a review of a judicially-reviewable decision are the Minister and, in the case of decisions reviewed by a Tribunal, the applicant to the Tribunal, and in other cases, the person who is the subject of the decision.

## **Section 166LG      Powers of the Federal Court**

421 Subsection (1) provides that in respect of review of a judicially-reviewable decision, the Federal Court may make all or any of the orders described in that subsection. These include:

- orders affirming, quashing or setting aside the decision or part of the decision, with effect from the date of the order or an earlier date specified by the Court;
- orders remitting the matter to the decision-maker with whatever directions the Court believes appropriate;
- orders which declare (ie. identify and recognise) the rights of the parties; and
- orders compelling the parties to do, or not do, whichever specified things the Court thinks are required to ensure a just result.

422 Subsection (2) provides that in respect of review on the basis of a failure to make a decision, the Federal Court may make all or any of the following types of orders:

- orders which compel the making of the decision;
- orders declaring the rights of the parties; and
- orders compelling the parties to do, or not to do, whichever specified things the Court thinks are required to ensure a just result.

423 Subsection (3) allows the Court to revoke, vary or suspend any of its orders made under this section.

## **Section 166LH      Operation of decision subject to review**

424 Subsection (1) has the effect that the decision to be judicially reviewed continues to have legal effect pending the outcome of the application for review. For example, if the decision results in a person becoming or remaining an unlawful non-citizen, any action by the Department to detain or remove that person is lawful, subject to other provisions of the Act. However, subsection (2) permits the Court to make whatever interim orders are necessary in its view to ensure that the outcome of the application can be effective. Subsection (3) provides that the orders that can be made under subsection (2) are orders staying, or otherwise affecting the operation or implementation of the decision under review or any part of that decision. Subsection (4) allows the Court to

revoke, vary or suspend orders made under subsection (2). Subsection (5) explains how an order under subsection (2) may have effect.

#### **Section 166LI      Change in person holding or performing the duties of an office**

425 This section ensures that, where a person has made a judicially reviewable decision and the person no longer holds that office, or the office no longer exists, this Part has effect as if the decision was made by a person specified by the Minister.

#### **Section 166LJ      Intervention by the Attorney-General**

426 This section enables the Attorney-General to intervene on behalf of the Commonwealth in proceedings under this Part. Where the Attorney-General intervenes she or he is taken to be a party to the proceedings. Subsection (2) enables the Court to make an order for costs against the Commonwealth where the Attorney-General has intervened.

#### **Section 166LK      Federal Court does not have any other jurisdiction in relation to judicially-reviewable decisions**

427 Subsection (1) provides that the Federal Court does not have jurisdiction in respect of judicially-reviewable decisions other than that provided by the Principal Act or section 44 of the *Judiciary Act 1944*. Where a matter has been remitted to the Federal Court by the High Court subsection (3) limits the Federal Court to those powers it would have had had the matter been an application to the Federal Court under the review regime contained in the Principal Act.

428 Subsection (2) preserves the jurisdiction of the Federal Court where an appeal has been instituted to that Court under section 44 of the *Administrative Appeals Tribunal Act 1975*.

#### **Section 166LL      Jurisdiction of Federal Court**

429 This section provides that subject only to section 75 of the Constitution, the Federal Court is the only Court with power to review judicially reviewable decisions.

### **CLAUSE 34**

430 This clause amends section 168 of the Principal Act which makes it an offence to tamper with movement records. At present, it is an offence for any person who has authorised access to the movement records, to access those records for purposes other than purposes under the Principal Act, ie persons working for government agencies who are discharging functions arising under other legislation cannot, at present, be given access to the movement records, for the purposes under their portfolio legislation.

431 The amended clause provides for this deficiency to be remedied by permitting the Minister, to authorise officers to read or examine or reproduce by any means or use or disclose by any means, movement records for the purposes of the Migration Act and of a law relating to customs, excise, quarantine or health or law enforcement or to authorise an officer of Customs within the meaning of the *Customs Act 1901* for the purposes of a

law relating to customs or excise or to authorise a quarantine officer within the meaning of the *Quarantine Act 1908* for the purposes of a law relating to quarantine or health or to authorise a member of the Australian Federal Police for the purposes of law enforcement.

432 The clause remedies a further technical deficiency in the section by including references to use or disclosure of information, which are in addition to the existing references to reading, examining and reproducing information. The section enables the Minister to authorise the reading or examining or reproduction or using or disclosing or any combination of these powers and to confine the further use or disclosure of the information read, examined, reproduced, used or disclosed.

### **CLAUSE 35 DELEGATION**

433 This clause amends section 176 of the Principal Act to allow the Minister to delegate the power to consider and decide whether the health criterion is satisfied.

### **CLAUSE 36**

434 This clause inserts new section 179A - restrictions on disclosure of certain information.

### **CLAUSE 37 REGULATIONS**

435 This section amends section 181 of the Principal Act (the regulation-making power) to authorise regulations to facilitate the payment of fees for visa applications and to make other consequential changes, eg enabling a person who is alleged to have contravened section 77 (see paragraph xx above) to pay to the Commonwealth, as an alternative to prosecution, a prescribed penalty, not exceeding \$1000.

### **CLAUSE 38**

436 This clause amends the Principal Act by inserting the following section.

#### **Section 183                      Regulations about passenger cards**

437 This section provides for regulations to be made which will allow more flexibility in the information gathering requirements imposed on persons arriving in and leaving Australia. The section will permit the regulations to distinguish between the information that is required from different classes of persons. For example, citizens need not be required to provide the same information as non-citizens.

438 The section also provides for regulations requiring all non-citizens arriving in Australia (except those exempted by the regulations) to complete a passenger card answering various questions. Non citizens (other than those exempted by regulation will have to answer questions directed at matters concerning their health, character, purpose for coming to Australia and directed at ascertaining whether they are in debt or whether they have been excluded, removed or deported from any country including Australia. This amendment reflects current practice.

**CLAUSE 39            Further Amendments**

439 This clause effects consequential amendments to the Principal Act. The consequential amendments are set out in the Schedule.

**CLAUSE 40            Transitional - Refugee applications**

440 This clause provides for any application for refugee status made prior to 1 November 1993 but not determined by that date, to be an application for a protection visa under the new arrangements.

**CLAUSE 41            Transitional - Application**

441 This clause provides for transitional arrangements which are required as a consequence of the amendments made to the Principal Act by the Reform Bill. The clause provides that regulations may be made which will continue in force provisions of the Principal Act which have been amended or repealed by the Reform Bill. Those provisions may be continued in force in respect of specified persons, persons in a specified class and/or specified circumstances. The regulations may continue in force provisions so that they apply to specified persons, or in specified circumstances, or in relation to visas in a specified class of visas. The regulations may also modify the effect of continued provisions (but not so as to modify a penalty). This may include deeming a persons who had a particular status, visa or permit to have another status visa or permit.

441 The clause also provides that regulations may continue in force visas or entry permits of specified classes which were held immediately before the commencement of the Reform Bill provisions dealing with visas. Related to this provision, the regulations may also deem specified persons to be taken to have been granted visas in a specified class created after the commencement of the Reform Bill provisions dealing with visas.

443 The clause also provides that regulations may provide for specified applications to be deemed to be applications for a specified class of visa created after the commencement of the Reform Bill provisions dealing with visas. Conversely, the regulations may also provide that applications shall be considered under the provisions in force prior to the commencement of the Reform Bill provisions.

444 Regulations made under this section cease to have effect at the end of 90 sitting days of either House of Parliament after the regulation commences. This sunset provision does not affect the statutory tabling and disallowance procedures laid down in the *Acts Interpretation Act 1901*.

**CLAUSE 42            TRANSITIONAL-MODIFICATION**

445 This clause enables regulations to be made to alter references to visas and entry permits in other legislation so that the references are consistent with the terminology to apply after the commencement of the Reform Bill. The regulation making power is only to be available until 1 January 1994, ie any regulations made are to cease to have effect on 1 January 1994.



## **Migration (Delayed Visa Applications) Tax Bill 1992**

### **NOTES ON INDIVIDUAL CLAUSES**

#### **CLAUSE 1 - SHORT TITLE**

1 Provides that the Act is to be cited as the Migration (Delayed Visa Applications) Tax Act 1992.

#### **CLAUSE 2 - COMMENCEMENT**

2 This clause provides for the commencement of the Act on the day on which section 9 of the Migration Reform Bill 1992 commences.

#### **CLAUSE 3 - INTERPRETATION**

3 This clause provides that, unless the contrary intention appears, expressions have the same meaning as in the Migration Act 1958. The terms, "entry permit", "entry visa", "illegal entrant", "prohibited immigrant" and "prohibited non-citizen" have the meanings they had in the Migration Act 1958 prior to the commencement of this Act. The terms "unlawful presence period" and "visa tax" are each defined:

"unlawful presence period", in relation to a non-citizen who applies for a visa, means a period before the application when that person was an unlawful non-citizen, illegal entrant, prohibited immigrant, or prohibited non-citizen, but excludes periods before the grant of a visa on which the visa tax is paid or is not imposed and periods between the making and final determination of an application for a visa or entry permit

"visa tax" means the tax imposed by this Act.

#### **CLAUSE 4 - IMPOSITION OF VISA TAX**

4 This clause imposes tax on an application for a visa where a non-citizen has been unlawfully in Australia for a continuous period of 12 months or periods adding up to at least 12 months.

#### **CLAUSE 5 - EXEMPTIONS**

5 This clause provides for various exemptions from the visa tax. Visa tax is not imposed on an application for a protection visa, an application for a visa which is granted when the applicant is outside Australia, an application which is not approved. The tax is not imposed on an applicant for a visa who leaves Australia before its grant, providing that the leaving is recorded in movement records and the visa is not granted after departure.

6 The Minister may also exclude the tax where the Minister determines in writing that its payment would cause the applicant extreme hardship.

## CLAUSE 6 - AMOUNT OF VISA TAX

7 This clause provides the formula by which the amount of tax is to be calculated. This amount is calculated by multiplying the number of complete years of unlawful presence in Australia by the amount determined for the financial year in which the application is made.

8 Sub-clause 6(2) provides that the amount for 1992-93 is \$3,000. For subsequent years the amount is to be determined by multiplying the amount for the previous financial year by the indexation factor for the later year.

9 Sub-clause 6(3) provides for the calculation of the indexation factor for a later year by dividing the index numbers for the Consumer Price Index quarter for the 12 months ending on 31 March by the index numbers for the Consumer Price Index quarter for the 12 months ending on the previous 31 March.

10 Sub-clause 6(4) provides that the indexation factor is to be calculated to 3 decimal places, but is to be increased by .001 if the fourth decimal place would have been greater than 4. Thus a figure calculated to four decimal places, such as 1.0035 will result in the indexation factor being 1.004.

11 Sub-clause 6(5) provides that in the calculations made under sub-clause 6(3) the most recently published reference base for the Consumer Price Index is to be used, and that revised indexation numbers are to be disregarded, except where the revised numbers are published to take account of changes in the reference base.

12 Sub-clause 6(6) defines "CPI quarter" and "index number" for the purposes of sub-clauses 6(3) and 6(5).

- "CPI quarter" means a period of three months ending on 31 March, 30 June, 30 September or 31 December
- "index number" means the All Groups Consumer Price Index number, being the weighted average of the eight capital cities, published by the Australian Statistician.