IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M150 of 2013

B E T W E E N

PLAINTIFF M150 OF 2013 BY HIS LITIGATION GUARDIAN SISTER BRIGID MARIE ARTHUR

Plaintiff

and

10 **MINISTER FOR IMMIGRATION AND BORDER PROTECTION**

First Defendant

THE COMMONWEALTH OF AUSTRALIA

Second Defendant

PLAINTIFF'S ~~OUTLINE OF~~ SUBMISSIONS ANNOTATED

PART 1 – FORM OF SUBMISSIONS

1. These submissions are suitable for publication on the Internet.

PART 2 – ISSUES

20 2. The issue is whether clause 866.222 of Schedule 2 of the *Migration Act Regulations 1994* (Cth) is invalid or of no effect.

PART 3 – SECTION 78B NOTICES

3. The plaintiff does not consider that notice is required by section 78B of the *Judiciary Act 1903* (Cth).

Date of document: 3 February 2014
Filed on behalf of: The plaintiff

Allens
Lawyers
Deutsche Bank Place
126 Philip Street
Sydney NSW 2000

Tel (02) 9230 4828
Ref 12041600.ymss.rtrs
Contact Name: Malcolm Stephens

PART 4 – MATERIAL FACTS

4. The material facts for the purpose of this case are, by reason of the respondents' demurrer, as set in the statement of claim found at DB 336. The allegations of fact therein are to be taken to be admitted for the purpose of the disposal of that demurrer.

5. The plaintiff is an unlawful non-citizen who has made a valid application for a protection visa and is a person to whom Australia owes protection obligations pursuant to the Refugees Convention.[1] The plaintiff has done all things necessary for the purpose of having his application determined by the Minister in accordance with s 65 of the Migration Act.[2] Neither the Minister, nor his delegate, has made a decision to grant, or to refuse to grant, a protection visa to the plaintiff.[3]

6. On 12 December 2013 the *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013* (Cth) (the **PPV Regulation)** was made. The PPV Regulation purported to take effect on 14 December 2013.[4] The PPV Regulation introduced new clause 866.222 into Schedule 2 of the *Migration Regulations 1994* (Cth) (the **Regulations**), which purportedly provided for additional criteria for the grant of a protection visa.

7. If the PPV is wholly valid or valid insofar as it purported to add the criteria in subclauses 866.222(a) and 866.222(c), the plaintiff stands to have his application for a protection visa refused on the basis that the plaintiff fails to satisfy the new criteria in Schedule 2 to the Regulations.[5]

PART 5 - ARGUMENT

A: SUMMARY OF THE PLAINTIFF'S SUBMISSIONS

8. The effect of the criteria in clause 866.222 is to exclude a class of persons from eligibility for a protection visa not by reference to the primary question of whether Australia owes them protection obligations but by the discrimen of the circumstances in which they came to be "non-citizens in Australia". The effect is that the class in s 36(2) (non-citizens in Australia) is narrowed to persons who are, or have been, lawful non-citizens in Australia who were immigration cleared on their last entry into Australia, other than unauthorised maritime arrivals. That involved an invalid exercise of power in the following respects:

---

1 DB 339, para [13] of the statement of claim..
2 DB 340, para [16] of the statement of claim.
3 DB 340, para [17] of the statement of claim.
4 *Migration Amendment (Unauthorised Maritime Arrival) Regulation 2013* (Cth), s2.
5 DB 342, para [30] of the statement of claim.

a. The Migration Act evinces an intention that the requirement in s 36(2)(a) that an applicant for a protection visa be "in Australia" is to apply as the sole rule regulating the relevant subject matter (presence in Australia and the circumstances associated with that presence). Subclauses 866.222(a) and (c) are necessarily inconsistent with the Migration Act in that respect;

b. properly construed the Migration Act does not permit the imposition of exclusionary criteria in addition to those founded upon Articles 1, 32 or 33 of the Convention. Clause 866.222 involves the imposition of such criteria in a manner inconsistent with the Migration Act; and

c. the making of subclauses 866.222(a) and (c) involved an unreasonable and therefore invalid exercise of power in that the prescription of those criteria was not capable of being considered to be proportionate to the pursuit of the relevant enabling purpose or object.

9. Further or alternatively, the PPV Regulation was made in contravention of s 48(1) of the *Legislative Instruments Act 2003* (Cth) and, by operation of s 48(2) of that Act is of no effect.

B: SUBMISSIONS

Regulation-making power

10. The resolution of the first and second issues turns on the limits to be discerned from the Migration Act upon the power conferred by ss 504 and 31(3) to make regulations prescribing criteria for the grant of protection visas. Section 504 is the source of that regulation-making power but does not in terms provide that the regulations may prescribe criteria for visas; that function is played by s 31(3) which provides that regulations (made pursuant to the power under s 504) may prescribe criteria for a visa or visas of a specified class, including protection visas.

11. It was held by a majority of this Court in *Plaintiff M47/2012 v Director General of Security* (2012) 86 ALJR 1372 (**M47**) that, although the power there conferred may be "expressed as a textually unbounded power to prescribe criteria for the grant of a protection visa", that is not its legal meaning.[6] Attention is rather required to the scheme of the Act as a whole and to the words of limitation in s 504, which make clear that the power extends only to making regulations "not inconsistent with" the Migration Act.

---

6 *M47* at 1412-1413, [171], [173] per Hayne J.

12. It is "settled" that a provision in the terms of s 504(1) precludes the making of regulations that vary or depart from positive provisions made by the relevant Act or regulations that "go outside the field of operation which the Act marks out for itself".[7]

13. As regards the latter possibility (which bears some obvious analogy with so called "indirect" inconsistency in the context of s 109 of the Constitution), the question of whether such limits have been exceeded requires, as an important consideration, analysis of the degree to which the legislature has disclosed an 'intention'[8] of dealing with the subject with which the statute is concerned.[9] In that regard, and as with s109, the metaphor of "covering the field" is apt to mislead and does not sufficiently describe the underlying principle.[10] Rather, the question is one of construction. As King CJ observed in *Tucker v Dickson*[11]:

> ...it is a question of ascertaining the meaning and effect of the legislation which is to prevail in case of inconsistency. If its true meaning and effect is that it is to apply as the sole rule regulating the particular subject matter and to the exclusion of all other rules, then the other rules are necessarily inconsistent with it and must give way.

14. In other words, there is, for the purposes of both 'species' of inconsistency, but one inquiry, being whether the regulation alters, impairs or detracts from the provisions of the enactment,[12] the object being to discern whether there exists a 'real conflict'.[13]

15. In undertaking that enquiry, a wider ambit for the regulation making power may be discerned if the enactment "lays down only the main outlines of policy and indicates an intention of leaving it to the Governor-General to work out that policy by specific regulation".[14] On the other hand, a more narrowly drawn power may be evident where Parliament deals in detail with the subject matter to which the statute is addressed.

---

7 See, referring to *Morton v Union Steamship Co of New Zealand Limited* (1951) 83 CLR 403 (**Morton**), *M47* at 1393, [54] per French CJ, 1413, [174] per Hayne J; 1452-1453, [382] per Crennan J and see also Kiefel J at 1461, [434].

8 As with s109, the "intention" of the legislature is determined objectively. See, in the context of s 109 *Momcilovic* (2011) 245 CLR 1 at 120-121 [271], read with 85 [146](v) (Gummow J, with Bell J agreeing), 133-134 [315] (Hayne J, dissenting and with French CJ agreeing on this point), 189 [474] (Heydon J), 235 [638] (Crennan and Kiefel JJ); see also *Dickson v R* (2010) 241 CLR 491 at 506-507 [32] (the Court).

9 *M47* at 1393, [54] per French CJ, *Morton at* 410.

10 *M47* at 1413, [174] per Hayne J.

11 [1981] 27 SASR 315 at 329 (with Sangster J agreeing and Legoe J agreeing on this point).

12 *M47* at 1413, [174] per Hayne J and note *Momcilovic* at 111, [242] (Gummow J, with Bell J agreeing on this point).

13 See, by way of analogy, *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508 at 525, [42] (the Court).

14 *Morton* at 410.

16. Naturally, such an analysis involves the construction of the enactment as a whole and requires attention to the broader features of the legislative scheme, to which it is convenient to turn.

Section 36(2)(a) contains an exhaustive statement of the protection visa criteria regarding presence in Australia and the circumstances associated with that presence

17. The scheme of the Migration Act provides, in essence and subject to a number of presently unimportant qualifications, for binary outcomes in relation to non-citizens present in Australia. A non-citizen in Australia is either a lawful non-citizen or an unlawful non-citizen. A lawful non-citizen is a non-citizen in the migration zone who holds a visa that is in effect.[15] An unlawful non-citizen is any non-citizen in the migration zone who is not a lawful non-citizen.[16] That strict dichotomy was erected by the *Migration Reform Act 1992* (Cth) (**1992 Reform Act**), which eliminated an earlier intermediate category of "exempt non-citizens".[17] For reasons developed below, that historical context is important.

18. In its current form, the Migration Act provides no middle ground between being a lawful non-citizen (entitled to remain in Australia in accordance with any applicable visa requirements) and being an unlawful non-citizen, who generally must be detained and who (assuming there is no pending consideration of a valid visa application) must be removed from Australia as soon as reasonably practicable.[18] An individual's status as a lawful or unlawful non-citizen is conditioned by the power reposed in the Minister, or his or her delegate, to determine any application made by the individual for the issue of a visa, including an application for a protection visa.[19]

19. Provision for that visa class was also added to the Migration Act by the 1992 Reform Act - see now s 36 of the Act, formerly s 26B(2) of the Act. Section 36(2)(a) prescribes a criterion for the grant of such a visa that the applicant is:

> ...a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol.

20. That criterion involves a compound of concepts. First, as has been said by this Court, it focuses upon the definition of 'refugee' in the Refugees

---

15 *Migration Act 1958* (Cth), s 13.
16 *Migration Act 1958* (Cth), s 14.
17 As to which, see *Migration Act 1958* (Cth) (Act No. 62 of 1958 as amended, taking into account amendments up to Act No. 61 of 1989) ss 4, 9, 14, 15, 16, 47, 64, 77, 78.
18 *M47* at 1413-1414 [176]-[178] per Hayne J; *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 304 ALR 135 at 161, [116]-[118] per Hayne J.
19 *Migration Act 1958* (Cth), s 65.

Convention as the 'criterion of operation of the protection visa system'.[20] The Minister or her or his delegate must arrive at the specified state of satisfaction concerning that matter. That state of satisfaction is a jurisdictional fact[21] and requires that attention is directed to article 1 of the Convention (as amended by the Protocol) is engaged.

21. But there is a second aspect to the criterion in s 36(2), being one that assumes some importance in the current matter. It requires attention to a particular circumstance – that is, whether the applicant is '*a non-citizen in Australia*'. That, this Court has said, means no more than that the applicant must be 'present in Australia'.[22]

22. It is necessary to notice a number of matters as regards that requirement. First, it embraces both sides of the binary divide entrenched by the 1992 Reform Act. Given that the s 36(2) criterion was introduced by way of the same amending enactment as entrenched that divide, it can be concluded that the omission of any limitation of the protection visa class to lawful non-citizens was deliberate.

23. Secondly, the criterion embraces any non-citizen 'in Australia', regardless of the circumstances in which the particular applicant came to be present in Australia.

24. A starkly different approach was adopted in the 1992 Reform Act to the bridging visa class. Such visas were only to be granted to a 'detention non-citizen' which term was defined to be a person who, amongst other things, 'has been immigration cleared' or was in a prescribed class (see former s26ZN(a)(i)).[23]

25. As recorded in the extrinsic materials, that reflected an approach whereby 'people who arrive in Australia without authority' would not be eligible for a bridging visa and thus would be required to be detained 'until any claim they wish to make has been resolved'.[24] During the Senate Debates, there was discussion of the position of those arriving without lawful authority and who later sought to apply for protection visas. The Minister representing the Immigration Minister observed in that regard that:

---

20 *M47* at 1383 [12] per French CJ and *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1 (***QAAH***) at 14-15 [34] per Gummow ACJ, Callinan, Heydon and Crennan JJ.

21 *Minister for Immigration and Ethnic Affairs v Eshetu* (1999) 197 CLR 611 at 651 per Gummow J.

22 *QAAH* at 6 [4].

23 The concept of 'immigration clearance' and the procedures governing the circumstances in which a person is immigration cleared or refused immigration clearance were also added to the Act by the 1992 Reform Act (see former Division 4 of Part 2, now Division 5 of Part 2). The object of those amendments was identified in the explanatory memorandum as being to 'enhance the powers in the Principal Act to control the processing and identification of persons arriving in or departing from Australia'.

24 See the Second Reading Speech to the Bill that became the 1992 Reform Act, House of Representatives Hansard, 4 November 1992, 2620, Mr Hand.

> ...under this Bill most of those who are initially detained under the provisions of the Act, as it will become, will be able to apply for a bridging visa and therefore move into the general Australian community. Those who will be unable to do so are a very small group of those who arrive without any lawful authority and are held in custody while their application—usually for recognition of refugee status—is considered.[25]

26. That observation reflects an assumption that, in contrast to applications for a bridging visa, applications for 'recognition of refugee status' (such 'recognition' involving the grant of a protection visa) would be 'considered' under the Act, notwithstanding the fact that a person entered Australia without 'any lawful authority'.

27. Such an assumption also came to be reflected in the text of other provisions of the Migration Act.

28. For example, the Act now provides for the grant of a bridging visa to an 'eligible non-citizen' (see s 73). As was the case when that visa class was first introduced in 1992, that term is defined to include a non-citizen who has been immigration cleared (s 72(1)(b)). However, it also includes a person the Minister has 'determined to be an eligible non-citizen' (s 72(1)(c)).[26] The Minister can only make such a determination if, amongst other things:

    a. The non-citizen was an unlawful non-citizen when she or he entered the migration zone - necessarily meaning that that person did not hold a visa that was in effect on that entry and would therefore be unable to have been immigration cleared: see s 172(1) and (3) read with s 166(1)(a)(ii)); and

    b. The non-citizen made a valid application for a protection visa after she or he arrived in Australia. [27]

29. That is, the express terms of the Act contemplate that a person may apply for a protection visa, notwithstanding that their entry involves the very circumstances to which the exclusionary criteria in subclauses 866.222 (a) and (c) of Schedule 2 to the Regulations are directed.

30. It would be a strange result if the Act were to be construed so as to permit the prescription of such exclusionary criteria. Such a construction would mean that the terms of the Act require (as a condition for the grant of a

---

25 Commonwealth, *Parliamentary Debates,* Senate, 8 December 1992, 4462, Senator Tate.

26 That determination making power was added to the Migration Act by the *Migration Legislation Amendment Act No 5* 1995 (Cth), and was said to further implement recommendations 10 and 11 made by the Joint Standing Committee on Migration in its report entitled *Asylum, border control and detention* AGPS (1994) regarding the release of unauthorized arrivals from immigration detention (see para [4] of the explanatory memorandum).

27 See s72(2) (a) and (b) of the *Migration Act 1954* (Cth).

bridging visa) participation in an application process that may be rendered entirely futile by the regulations. Parliament should not readily be assumed to have legislated for a procedural charade of that nature.

31. A similar textual indicia suggesting that the regulation making power does not extend to the prescription of subclauses 866.222 (a) and (c) of Schedule 2 to the Regulations may be seen in the exclusionary provisions in subdivision AI of Part 2, Division 3 of the Act (dealing with safe third countries). Those provisions are directed, inter alia, to the validity of an application for a protection visa made by a non-citizen 'who has not been immigration cleared at that time': 91E(a).[28] If the subdivision applies to a non-citizen at the time she or he makes an application for a protection visa, the effect of s 91E is that, subject to 91F, the application is not a valid one.

32. Again, that reflects an understanding that a protection visa could otherwise be required by s 65(1) to be granted to a person who has entered Australia without being immigration cleared (including those who were refused immigration clearance because they were unable to present evidence to a clearance authority of a visa that was in effect).

33. Taken together, the matters identified above indicate that the requirement in s 36(2)(a) that an applicant for a protection visa be "in Australia" is to apply as the sole rule regulating the relevant subject matter, being presence in Australia and the circumstances associated with that presence.

34. Subclauses 866.222 (a) and (c) Schedule 2 to the Regulations speak directly to one of the criteria that the Act provides namely that the person be a "non-citizen in Australia", which the context shows was deliberately wide enough to catch all non citizens in Australia. They derogate from the amplitude of the criterion by limiting the scope to non-citizens whose presence in Australia is attended by particular circumstances in connection with their last entry. They are necessarily inconsistent with the rule and must give way as being repugnant to it.

35. Subclauses 866.222 (a) and (c) do not erect additional or independent criteria to those in s 36(2) which must be satisfied when s 65 is applied, rather they cut down the terms of the express criterion enacted in the first part of s 36(2)(a) of the Act. The Act provides that a person will meet that criterion if he or she is a non-citizen but subclauses 866.222(a) and (c) provide otherwise if the applicant was, at the time of entry, an unlawful non-citizen.[29]

---

28 See also, although operating more generally upon all applications for visas, s91P (1) (which appears in sub-division AK – non-citizens with access to protection from third countries).

29 By reason of the definition of the term "unauthorised maritime arrival" in s5AA (see particularly s5AA(1)(b)) a similar argument is available in respect of subclause 866.222(b) of Schedule 2 of the Regulations. However, as submitted above, that criterion has no application to the plaintiff.

36. There are deeper substantive considerations that both explain why the Act is framed on the basis of the assumption identified above and further support the construction for which the plaintiff contends. As this Court said in Plaintiff *M61/2010E v The Commonwealth*[30] (**M61**) (in a passage that has been reiterated in *Plaintiff M70 v The Commonwealth and Another* (2011) 244 CLR 144 (**M70**) and in M47):

> Read as a whole, the Migration Act contains an elaborated and interconnected set of statutory provisions directed to the purpose of responding to the international obligations which Australia has undertaken in the Refugees Convention and the Refugees Protocol. The Migration Act proceeds, in important respects, from the assumption that Australia has protection obligations to individuals.
>
> Consistent with that assumption, the text and structure of the Act proceed on the footing that the Act provides power to respond to Australia's international obligations by granting a protection visa in an appropriate case and by not returning that person, directly or indirectly, to a country where he or she has a well-founded fear of persecution for a Convention reason.

37. Although it is well established that the Convention does not impose an obligation on Contracting States to grant asylum to refugees arriving at their borders or a right to reside in those states, Australia has protection obligations under the Convention to persons who answer the description "refugee" even if those persons are non-citizens who entered Australia without a visa in effect and were therefore unable to be immigration cleared.[31] In particular, subject only to the condition in article 33(2), those protection obligations include the obligation of non-refoulement – an obligation that applies to refugees whether lawfully or unlawfully within the host territory.[32]

38. The notion that the Act provides power to respond to those obligations by granting a protection visa in an appropriate case points to the reason Parliament did not require, in s 36(2)(a), that an applicant's presence have originated with lawful entry or have been regularized by the grant of a visa under the Act after unlawful entry. To do so would have hampered rather than facilitated Australia's capacity to respond to and comply with those obligations. In that regard, it is notorious that many people seeking to invoke Australia's protection obligations enter the migration zone without a visa that is in effect (see also, in that regard, the allegations in the statement

---

30 (2010) 243 CLR 319 at [27].

31 James C Hathaway, *The Rights of Refugees under International Law* (2005) 657; Guy S Goodwin Gill and Jane McAdam, *The Refugee in International Law* (3rd Ed, 2007) 524; *Minister for Immigration v Khawar* (2002) 210 CLR 1 at 15-16 [43]-[44].

32 See, for example, *M47* per French CJ at 1390 [39].

of claim at [34] and [35], DB 343). Indeed, as the extrinsic materials extracted above indicate, that was understood to be the case from the time protection visas came to be provided for in the Act (the 'very small group' of those arriving 'without any lawful authority' were said to make applications 'usually for recognition of refugee status'). The legislative mischief to which the Migration Act was addressed in that regard encompassed the capacity to respond to protection claims made by the very class of people subclauses 866.222 (a) and (c) now purport to exclude.

39. Accordingly, and for that further reason, the regulation making power should not be construed as authorizing regulations in the nature of subparagraphs 866.222 (a) and (c). To do so would be inconsistent with the legislative intention evident from the Act as a whole: that its provisions are intended to facilitate Australia's compliance with the obligations under the Convention.[33]

40. None of that is altered by the terms of s 40, which provides that the regulations may provide that visas of a specified class may only be granted in specified circumstances. Amongst the non-exhaustive examples given in s 40(2) is the circumstance that when the person was granted the visa the person is in the migration zone and on last entering Australia was immigration cleared. However, that provision is to be read in a harmonious fashion with the more specific provisions of the Act identified above, which plainly contemplate that a protection visa may be granted notwithstanding the absence of such a circumstance. Equally, the circumstance identified in s 40(2)(a) ('the person...is outside Australia') could have no application to the class of protection visas.

The Act does not authorise exclusionary criteria other than those founded in Articles 1F, 32 or 33 of the Convention

41. If the argument outlined above is accepted, then the only provisions of clause 866.222 that are potentially applicable to the plaintiff's visa application are invalid and the plaintiff is entitled to the relief he seeks. Alternatively, there is a further, broader, argument arising from the proper construction of the Act, which would have the effect that the whole of clause 866.222 is invalid. That is, that properly construed, the Act does not permit the imposition of exclusionary criteria for protection visas in addition to those founded upon Articles 1, 32 or 33 of the Convention at all, or alternatively, at least to the extent that they apply to all visas within the class erected by s 36.

42. That submission commences with the observation that the criterion in s 36(2)(a) is to be accorded primacy amongst the other criteria that apply to that visa class. As submitted above, the reference in that section to the Minister's state of satisfaction concerning Australia's protection obligations

---

[33] *Plaintiff M70 v The* Commonwealth *and Another* (2011) 244 CLR 144 at [98] per Gummow, Hayne, Crennan and Bell CJ.

under the Convention in the particular case supplies what this Court has termed 'the criterion of operation of the protection visa system'.[34]

43. The importance of that criterion also follows from the acceptance by this Court that there is an obligation under the Convention to determine whether an asylum seeker is a refugee for the purposes of the Refugees Convention and that the Migration Act may be seen to give effect to that obligation.[35] Indeed, the power of removal in s 198 cannot be engaged until such a determination is made.[36] The course 'contemplated by the Migration Act'[37] for the making of that determination is for the Minister or her or his delegate to consider whether to grant a protection visa.

44. Of course, s 65 of the Migration Act conditions the grant of protection visas on the satisfaction of various other requirements, all of which are important.[38] However, that does not mean that each of those requirements is of the same nature or of the same importance in the scheme of the Act.

45. The primary criterion in s 36(2) is one that involves the application of a discrimen to differentiate between particular classes of people - those to whom the Minister is satisfied Australia owes protection obligations are to be differentiated from those in respect of whom the Minister does not hold that state of satisfaction. As was held in *NAGV*, amongst those who are potentially thereby excluded are those in respect of whom article 1F of the Convention is engaged.[39]

46. The Act also expressly recognises, in s 501(1), that protection visas may be refused 'relying on' one or more of articles 1F, 32 or 33(2). Different views were expressed in *M47* as to whether a decision under s 501 to refuse to grant a protection visa invoking an aspect of the character test in s 501(6)(d)(v)[40] (or perhaps that in s 501(6)(c)(ii)[41]) could be a decision that meets that description, or whether the power to refuse a protection visa relying on one or more of those articles was rather to be implied from the text of the Act.[42] If the former, then, in a case to which s 500(1)(c) applies, the Minister could not be satisfied that the grant of the visa was not prevented by s 501 for the purposes of s 65(1)(a)(iii). If the latter, then in such a case the Minister could not be satisfied that the grant of the visa was

---

34 See again *M47* at 1383 [12] per French CJ and *Minister for Immigration and QAAH* at 14-15 [34] per Gummow ACJ, Callinan, Heydon and Crennan JJ (emphasis added).

35 *Minister for Immigration and Ethnic Affairs v Mayer* (1985) 157 CLR 209 at 300, 304-306; *M70* at [215], [217]-[218] per Kiefel J and *M47* at [435] per Kiefel J.

36 *M47* at 1461 per Kiefel J; *M70* at 178 [54] per French CJ; 192 [98] per Gummow, Hayne Crennan and Bell JJ and Kiefel J at [239].

37 See *M47* at 1461 [436], per Kiefel J.

38 *M47* at 1414 [180] per Hayne J.

39 *NAGV and NAGW of 2002 v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 222 CLR 161 at 177, [47].

40 French CJ at [36]-[45]; Hayne J at [188]-[194] and Crennan J at 1453-1454, [389].

41 Crennan J at 1454, [389].

42 Kiefel J at 1463, [443].

not prevented by "any other provision of this Act" for the purposes of that same sub-section.[43]

47. On either analysis, what is involved are criteria that:

(a) like the criterion in s36(2)(a), have their genesis in the provisions of the Convention;

(b) also like the criterion in s36(2)(a), involve the application of a discrimen to exclude a particular class of people from the grant of a protection visa; and

(c) where relied upon for the purposes of a decision to refuse a protection visa, are subject to specific rights of review: as to which see ss 500(1)(c), 502(1)(a)(iii), 503(1)(c) and 500(4)(c).

48. As French CJ observed in *M47* at [65], taken together, those features of the Migration Act may be regarded as creating a statutory scheme the purpose of which is to:

> ... give effect to Australia's obligations under the Convention and to provide for cases in which those obligations are limited or qualified. It provides, in ss 36 and 65, for the grant of protection visas to persons to whom Australia owes protection obligations. It provides for the refusal or cancellation of such visas in respect of persons to whom Australia owes obligations where:
>
> - the person may nevertheless be expelled from the country for "compelling reasons of national security" pursuant to Art 32;
>
> - the person may be removed from the country where "there are reasonable grounds for regarding [the person] as a danger to the security of the country in which [the person] is" pursuant to Art 33(2).

49. The criterion in s 36 and the exclusionary criteria described above are an exhaustive traverse of the Convention criteria prescribing the circumstances in which Australia owes protection obligations, and the limitations imposed on, and the exceptions and qualifications to, those obligations. The making of regulations which provide for additional exclusionary criteria, unrelated to Australia's obligations under the Convention, departs from the statutory object, and thereby goes outside the field of operation which the Act marks out for itself.

---

[43] Kiefel J at 1462 [440].

50. The criteria in 866.222 do not relate to, and operate independently of the circumstances in which a protection visa might be refused in reliance on criteria deriving from Article 1, 32 or 33. In circumstances where the scheme of the Act is intended to give effect to Australia's obligations, including limitations imposed on, and exceptions to, those obligations, the criteria in clause 866.222 alters, impairs or detracts from the provisions of the Act read as a whole. Accordingly, that provision is invalid for repugnancy.

51. Indeed, were it otherwise, anomalous results would follow. In particular, the nature of the criteria in clause 866.222 has the consequence that an assessment of whether or not a person is one to whom Australia owes protection obligations need not necessarily be undertaken, and may in fact not be undertaken, in the course of considering a person's protection visa application. Yet, as submitted above, the removal of such a person from Australia that would otherwise be required by s 198(2)(c)(ii)[44] could not take place until such an assessment is made. It follows that the effect of clause 866.222 (if valid) would be to chart a different course to that which, as was submitted above, is the course 'contemplated by the Migration Act'.[45] That is, instead of the necessary determination of refugee status being made by the Minister or her or his delegate in the course of considering whether to grant a protection visa, that determination would presumably be made in an ad hoc fashion by the "officer" (who cannot be the Minister and may be a relatively junior public official– see s 5) exercising power under s 198(2).

52. A further specific anomaly arises as regards clause 866.222(c). A person may be refused immigration clearance (so as to not be immigration cleared on their last entry into Australia) by a 'clearance officer', who may be an 'officer' (see again the definition in s 5) or 'any person' authorized by the Minister to perform duties for the purposes of Part 2, Division 5. As in *M47*,[46] the effect of the imposition of that exclusionary criteria is therefore to effectively repose the determination of a person's application for a protection visa in the hands of that officer, rather than in the hands of the Minister or her or his delegate. Further, the outcome of that determination thereby comes to rest upon the essentially mechanical process in s 172(1) and (3), which involves no assessment of Australia's protection obligations or whether those obligations are limited or qualified in the particular case. Again, this outcome departs from the course 'contemplated by the Migration Act'.

53. That is not to say that there is no room for the prescription of additional criteria under s 31(3) (including a "health criterion" within the meaning of ss 5 and 65(1)(a)(i)) for the purposes of the class of protection visas. In the first

---

44 Their visa application having been finally determined, after being foreclosed by the application of the exclusionary provisions of cl 866.222.

45 See again *M47* at 1461 [436], per Kiefel J.

46 See French CJ at 1397 [71], Crennan J at 1455 [396] and Kiefel J at 1465 [456], [458].

place, but subject to the limitations identified in *M47*, the power would extend to criteria involving decisions that "rely upon" articles 32 or 33 of the Convention. Such decisions would attract the review rights identified above.[47] Further, it may be (as was the case when there existed a sub-class of temporary protection visas) that a particular criterion applicable to only one sub-class of protection visa does not result in an applicant being "excluded from protection" and therefore does not depart from the legislative scheme.[48]

54. In addition, the regulation making power extends to the prescription of incidental administrative, facilitative or process requirements, such as the existing health criterion that requires applicants to undergo medical and chest x-ray examinations.[49] As Kiefel J observed in *M47*, that may result in the applicant being placed under medical supervision if she or he presents a threat to public health in Australia. But a visa is not required to be refused on the basis of the results of such an examination.

The criteria in subclauses 866.222 (a) and (c) are void for unreasonableness

55. Further or alternatively to the plaintiff's first argument, the plaintiff contends that the making of subclauses 866.222 (a) and (c) was not sufficiently connected with the subject matter of the enabling power and therefore void for unreasonableness. That test of unreasonableness, in the context of delegated legislation, has been said to bear an obvious affinity with a test of proportionality and involves an analysis of means and ends.[50] In that regard, it requires consideration of whether the regulation is 'capable of being considered to be proportionate to the pursuit of the relevant enabling purpose or object'.[51]

56. The first step in that analysis is the identification of the true nature and purpose of the regulation making power.[52]

57. It is true, at a level of generality, that the objects of the Migration Act (including the regulation making power conferred by ss 504 read with s31(3)) include the regulation, in the national interest, of the presence in Australia of aliens.[53] However, more precision is required as regards that

---

47 An issue that does not arise in these proceedings, but which was the subject of some controversy during the drafting of the Convention, was whether public health could fall within the notion of "public order" so as to enliven the exception in article 32. The better view appears to be that it does not (see Hathaway, op cit at 687).

48 See the reasoning of Crennan J at first instance, extracted with approval by the Full Federal Court, in *VWOK v Minister for Immigration* (2005) 147 FCR 135 at [140].

49 Clauses 866.223-866.224B of Schedule 2 to the Regulations.

50 *Attorney-General (SA) v Adelaide CC* (2013) 87 ALJR 289 (***Corneloup***) at 334-335 [198]-[201] per Crennan and Kiefel JJ.

51 *South Australia v Tanner* (1989) 166 CLR 161 at 165 and *Corneloup* at 309 [58] per French CJ and at 334-335 [198]-[201] per Crennan and Kiefel JJ.

52 *Williams v Melbourne Corporation* (1933) 49 CLR 142 at 155 per Dixon J.

53 *M47* at 1406 [133] per Gummow J (in dissent on the issue of the validity of the impugned provision).

aspect of the regulation making power in issue in the current matter, dealing as it does with the prescription of criteria for 'visas of a specified class': s31(3). The relevant object is that identified by French CJ in the passage extracted above from his Honour's reasons in *M47* – that is, to give effect to Australia's obligations under the Convention and to provide for cases in which those obligations are limited or qualified.

58. The matters identified above in connection with the plaintiff's first and second arguments are sufficient to conclude that subclauses 866.222 (a) and (c) are incapable of being considered to be proportionate to the pursuit of that object. There is simply no rational relationship between that object and the impugned subclauses of 866.222, given that they do not relate to and operate independently of the circumstances in which a protection visa might be refused in reliance on criteria deriving from the Convention. Nor could those subclauses be said to bear some form of rational relationship to that object by providing for matters that may be regarded as incidental or ancillary to its achievement – the requirement for a medical assessment which could form the basis for the supervisory arrangements the subject of clause 866.224B is an example of a provision of that nature. In contrast, the impugned subclauses potentially preclude consideration of Australia's obligations under the Convention, and the limitations or qualifications to those obligations.

59. The lack of such a relationship is further revealed by an examination of the operation of those provisions in the area they are intended to apply.[54] In that regard, as submitted above, the class of persons whose claims are potentially excluded from that assessment includes people who would be, or might reasonably be expected to be, the subject of protection obligations under the Act.[55]

60. The fact that such people are unable to be removed under s198 until a determination of their protection claims is made negates any possible argument that the prescription of those criteria is capable of being considered as incidental (and therefore proportionate) to the of some more broadly defined object of achieving the more effective administration of the Act.[56] The relocation of the locus of determination of Australia's protection obligations (such that that matter potentially falls to be determined by the officer exercising power under s 198(2)) rather demonstrates that the result is to disrupt the effective administration of the Act by departing from the course contemplated by its terms.

---

54 In that regard, as Crennan and Kiefel JJ observed in *Comeloup* at 334, [199], it is often necessary to examine the operation of the delegated legislation in the area in which it is intended to apply.

55 See again the statement of claim at [34] [35] (DB 343).

56 See, for example, *Morton* at 410.

Invalid by operation of section 48 of the *Legislative Instruments Act 2003* (Cth)

61. The plaintiff also contends that the PPV Regulation is of no effect by reason of s 48 of the *Legislative Instruments Act 2003* (Cth) (the **LIA**), in that it is the same in substance as clause 9 of the TPV Regulation, being a legislative instrument disallowed by the Senate pursuant to s 42 of the LIA.

62. Section 48 of the LIA is at page 55 of Annexure A to these submissions. It has existed in its present form since the LIA was enacted. The LIA was introduced in response to the recommendations of the Rule Making by Commonwealth Agencies Report[57] and was intended, among other things, to provide a comprehensive regime for Parliamentary scrutiny (via tabling and disallowance mechanisms) of legislative instruments.[58]

63. In relation to disallowance, the LIA substantially re-enacted those parts of the *Acts Interpretation Act* 1901 (Cth) (the **AIA**) as related to regulations and disallowable instruments and extended their operation to all legislative instruments.[59] Section 48 of the LIA is a reenactment of sub-s 48(1) of the AIA (as it then was) and is in materially identical terms. Following the passage of the LIA, the AIA was consequentially amended such that the comparative provision applied thereafter only to non-legislative instruments.

64. Relevantly, s 48(1) of the LIA operates to prohibit, in specified circumstances and subject to two exceptions, the making, within 6 months, of a legislative instrument (or provision) that is the same in substance as an instrument or provision disallowed by a House of the Parliament. Section 48(2) prescribes the consequence that follows from making an instrument or provision in contravention of the prohibition in s 48(1), being that the later instrument is of no effect.

65. Section 48(1) of the LIA directs attention to four points of enquiry: the first as to the instruments or provisions to be compared, the second as to whether s 48 is capable of applying to those instruments or provisions, the third as to whether the instruments or provisions to be compared are 'the same in substance' and the fourth as to whether the exceptions contained in sub-ss 48(1)(a) or (b) apply.

66. The necessary first step is to identify the instruments or provisions to be compared. The instruments or provisions that may be the subject of the enquiry are not constrained by the singular terms of s 48(1), both by reason of the presumption that the singular includes the plural[60] and by a purposive

---

57 Administrative Review Council, *Rule Making by Commonwealth Agencies,* Commonwealth of Australia (1992).

58 Explanatory Memorandum, Legislative Instruments Bill 2003 (Cth), 1.

59 Ibid.

60 As to which see *Blue Metal Industries Limited v Dilley* (1969) 117 CLR 651; [1970] AC 827.

construction of the provision. It is permissible to have regard to a number of later instruments which, when taken as a whole, might be the same in substance as the earlier instrument.[61]

67. Further, the comparison need not be of instruments as a whole; rather, the comparison may be made as between particular provisions of the relevant instruments. An instrument and its provisions are not entirely separate constructs. It can readily be conceived that the later instrument might be cast in wider or narrower terms than the earlier. In the case of a later instrument that is wider in its terms that the earlier, such an instrument might nonetheless be relevantly the 'same in substance' as an earlier instrument notwithstanding that the later instrument has both the same operation as the earlier instrument and an additional operation.[62] Were it otherwise, s 48 could be wholly defeated by the simple expedient of reintroducing the disallowed instrument with the inclusion of any additional term of different substance or effect. That construction would render s 48 otiose.

68. Where a later instrument is narrower in its terms than the earlier instrument and is, within its narrower terms, the same in substance as part of the disallowed instrument (as in the present case) s 48 operates to render the later instrument of no effect.[63] That conclusion is compelled by the presence of the exceptions in sub-ss 48 (a) and (b). The effect, in the case of s 48(a), of rescinding a disallowance motion is not that the disallowed instrument is revived.[64] It follows that the purpose of sub-ss 48(a) (and 48(b) in an appropriate case) is to establish a mechanism by which the legislature can, within the prohibited period, remedy the objection that brought about the disallowance by, for example, narrowing the terms of the instrument or widening them.[65]

69. That construction finds further support in the proposition that it is impermissible to have regard, or to enquire into, the intention or motivation of the legislature in disallowing the earlier instrument.[66] Absent making such an impermissible enquiry, there is no mechanism for determining whether or not the later, narrower, instrument offends against the objection to the particular characteristic of the delegated legislation that led to the disallowance.

70. In the present case, these principles admit of a comparison between the PPV Regulation, which is narrower in its terms than the TPV Regulation, and the relevant parts of the TPV Regulation to which it is said that the PPV

---

61 *Victorian Chamber of Manufactures v Commonwealth (Women's Employment Regulations)* [1943] HCA 21; (1943) 67 CLR 347, per Latham CJ at 361, [1943] ALR 294, 17 ALJ 195.

62 Ibid.

63 Ibid.

64 *Acts Interpretation Act 1904* (Cth), 7.

65 *Victorian Chamber of Manufactures v Commonwealth (Women's Employment Regulations)* [1943] HCA 21; (1943) 67 CLR 347, per Latham CJ at 362, [1943] ALR 294, 17 ALJ 195.

66 (1943) 67 CLR 347, per Latham CJ at 361, [1943] ALR 294, 17 ALJ 195.

Regulation is the same in substance. In practical terms, the comparison is as between clause 9 of the TPV Regulation and clause 1 of Schedule 1 to the PPV Regulation.

71. The second enquiry directs attention to whether the earlier instrument or provision has been disallowed, or taken to have been disallowed, under 42 of the LIA and to whether the later instrument was made within 6 months after the day on which the earlier instrument or provision was disallowed or was taken to have been disallowed. In the present case, the Senate disallowed pursuant to s 42, the TPV Regulation, on 2 December 2013. The PPV Regulation was made on 13 December 2014, being within 6 months of the disallowance.

72. The instruments being thus identified, the third enquiry directs attention as to whether they are "the same in substance". The words "in substance" indicate that, in making the necessary comparison, form should be disregarded.[67] The expression "the same in substance" does not fix precisely the limits of the prohibition.[68] However, a later regulation would be the "same in substance" as a disallowed regulation if, irrespective of form or expression, it were so much like the disallowed regulation in its general legal operation that it could be fairly said to be the same law as the disallowed regulation.[69] The enquiry must go behind the mere form of the regulations and ascertain their real purpose and effect.[70] A later regulation will be the same in substance if its material provisions, as are operative, produce the 'same substantial result'.[71]

73. The TPV Regulation, disallowed in whole by the Senate on 2 December 2013, amended the Regulations to, inter alia:

    (a) introduce new criteria for the grant of subclass 866 (Protection) visas; and

    (b) introduce a new subclass of visa, subclass 785 (Temporary Protection) visas; and

    (c) prescribe criteria for the grant of the new subclass 785 (Temporary Protection) visas.

74. Clause 9 of the TPV Regulation, being the relevant provision for the purposes of the comparison, introduced new criteria for the grant of a subclass 866 (Protection) visa, being:

---

67 (1943) 67 CLR 347 at 377.
68 (1943) 67 CLR 347 at 389.
69 (1943) 67 CLR 347 at 361.
70 (1943) 67 CLR 347 at 406.
71 (1943) 67 CLR 347 at 364.

866.222

The applicant:

(a) does not hold a Subclass 785 (Temporary Protection) visa; and

(b) has not held a Subclass 785 (Temporary Protection) visa; and

(c) held a visa that was in effect on the applicant's last entry into Australia; and

(d) is not an unauthorised maritime arrival; and

(e) was immigration cleared on the applicant's last entry into Australia.

75. The substance and effect of cl 9 of the TPV Regulation was that applicants for a Protection (Class XA) visa who were unable to meet one or more of the criteria in sub-cl 866.222(c), (d) and (e) of Schedule 2 to the Regulations would not be eligible for the grant of a subclass 866 (Protection) visa.

76. The PPV Regulation, made on 13 December 2013 and with purported effect from 14 December 2013, did not contain provisions creating a subclass 875 (Temporary Protection) visas. Rather, the sole substantive provision of the PPV Regulation amended subclause 866 of Schedule 2 to the Regulations to reintroduce, in identical terms, the additional criteria provided for in clause 9 of the TPV Regulation for the grant of a subclass 866 (Protection) visa, save for those criteria that pertained only to temporary protection visas (being the criteria in 866.222(a) and (b) of cl 9).

77. The substance and effect of the PPV Regulation is that applicants for a Protection (Class XA) visa who are unable to meet one or more of the criteria in sub-cls 866.222 (a), (b) and (c) are not eligible for the grant of a subclass 866 (Protection) visa. The PPV Regulation is, to that extent, of same effect and therefore the same in substance, as clause 9 of the TPV Regulation.

78. As observed above, s 48 directs attention to the substance of the instruments and not their form. It follows that the absence in the PPV Regulation of the exclusionary criteria relating to the holding of a temporary protection visa does not negate the conclusion that the PPV Regulation is the same in substance as the relevant part of the TPV Regulation. Rather, it is readily observed that the TPV Regulation dealt with two discrete subjects: the first relating to the introduction of a new class of visa and the second relating to the introduction of new criteria for the grant of an existing class of visa. The TPV Regulation dealt with the interaction between the existing

and the new class of visa as a necessary incidence of the introduction of that new class. Nonetheless that did not detract from the substance and effect of the TPV Regulation as it related to the criteria for the grant of subclass 866 (Protection) visas, namely, that the class of persons described in sub-cls 866.222(c), (d) and (e) would not be eligible for such a grant. In circumstances where the class of persons contemplated by sub-cls 866.222(a) and (b) of clause 9 of the TPV Regulation do not exist and cannot exist, the practical effect is that same class of persons as were excluded from the grant of a subclass 866 (Protection) visa by the TPV Regulation are excluded by the PPV Regulation.

79. It follows that the PPV Regulation produced 'the same result' for the class of persons captured by the TPV Regulation and is thereby 'the same in substance' as the PPV Regulation.

80. The fourth enquiry is as to whether the exceptions in sub-ss 48(1)(a) or (b) of the Migration Act apply. In the present case, the Senate has not rescinded the motion to disallow the TPV Regulation. The relevant exception, that in sub-s 48(1)(a) of the LIA, therefore does not apply.

81. It follows that the PPV Regulation was made in contravention of s 48(1) of the LIA and, by operation of s 48(2) of that Act, is of no effect.

PART 6 – Applicable constitutional provisions, statutes and regulations

82. The applicable provisions of the relevant statutes and legislative instruments are set out in annexure A.

PART 7 – Precise form of orders sought

83. The plaintiff seeks the orders in the prayers for relief in the statement of claim (para 40, DB 344-345).

PART 8 – Estimate of time

84. The plaintiff estimates that he will require 1.5 hours for the presentation of his oral argument.

Richard Niall SC	Craig Lenehan	Siobhan Keating
(03) 9225 7225	Tel 02 8257 2530	Tel 03 9225 6848
richard.niall@mc8.com.au	Craig.lenehan@stjames.net.au	skeating@vicbar.com.au

IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No M150 of 2013

B E T W E E N

PLAINTIFF M150 OF 2013 BY HIS LITIGATION GUARDIAN SISTER BRIGID MARIE ARTHUR

Plaintiff

10

MINISTER FOR IMMIGRATION AND BORDER PROTECTION

First Defendant

THE COMMONWEALTH OF AUSTRALIA
Second Defendant

ANNEXURE A

Applicable Provisions of the Relevant Statutes and Legislative Instruments

20

Migration Act 1958

No. 62, 1958 as amended

Compilation start date: 23 November 2013

Includes amendments up to: Act No. 122, 2013

This compilation has been split into 2 volumes

Volume 1: **sections 1–261K**
Volume 2: sections 262–507
Schedule
Endnotes

Each volume has its own contents

Prepared by the Office of Parliamentary Counsel, Canberra

About this compilation

The compiled Act

This is a compilation of the *Migration Act 1958* as amended and in force on 23 November 2013. It includes any amendment affecting the compiled Act to that date.

This compilation was prepared on 23 November 2013.

The notes at the end of this compilation (the ***endnotes***) include information about amending Acts and instruments and the amendment history of each amended provision.

Uncommenced provisions and amendments

If a provision of the compiled Act is affected by an uncommenced amendment, the text of the uncommenced amendment is set out in the endnotes.

Application, saving and transitional provisions for amendments

If the operation of an amendment is affected by an application, saving or transitional provision, the provision is identified in the endnotes.

Modifications

If a provision of the compiled Act is affected by a textual modification that is in force, the text of the modifying provision is set out in the endnotes.

Provisions ceasing to have effect

If a provision of the compiled Act has expired or otherwise ceased to have effect in accordance with a provision of the Act, details of the provision are set out in the endnotes.

(4) Without limiting section 83 (person taken to be included in visa), the regulations may provide for a visa being held by 2 or more persons.

30 Kinds of visas

(1) A visa to remain in Australia (whether also a visa to travel to and enter Australia) may be a visa, to be known as a permanent visa, to remain indefinitely.

(2) A visa to remain in Australia (whether also a visa to travel to and enter Australia) may be a visa, to be known as a temporary visa, to remain:

(a) during a specified period; or

(b) until a specified event happens; or

(c) while the holder has a specified status.

31 Classes of visas

(1) There are to be prescribed classes of visas.

(2) As well as the prescribed classes, there are the classes provided for by sections 32, 33, 34, 35, 36, 37, 37A, 38, 38A and 38B.

(3) The regulations may prescribe criteria for a visa or visas of a specified class (which, without limiting the generality of this subsection, may be a class provided for by section 32, 36, 37, 37A or 38B but not by section 33, 34, 35, 38 or 38A).

(4) The regulations may prescribe whether visas of a class are visas to travel to and enter Australia, or to remain in Australia, or both.

(5) A visa is a visa of a particular class if this Act or the regulations specify that it is a visa of that class.

32 Special category visas

(1) There is a class of temporary visas to be known as special category visas.

(2) A criterion for a special category visa is that the Minister is satisfied the applicant is:

(a) a non-citizen:

ComLaw Authoritative Act C2013C00679

34 Absorbed person visas

(1) There is a class of permanent visas to remain in, but not re-enter, Australia, to be known as absorbed person visas.

(2) A non-citizen in the migration zone who:
  (a) on 2 April 1984 was in Australia; and
  (b) before that date, had ceased to be an immigrant; and
  (c) on or after that date, has not left Australia, where left Australia has the meaning it had in this Act before 1 September 1994; and
  (d) immediately before 1 September 1994, was not a person to whom section 20 of this Act as in force then applied;

  is taken to have been granted an absorbed person visa on 1 September 1994.

(3) Subdivisions AA, AB, AC (other than section 68), AE and AH do not apply in relation to absorbed person visas.

35 Ex-citizen visas

(1) There is a class of permanent visas to remain in, but not re-enter, Australia, to be known as ex-citizen visas.

(2) A person who:
  (a) before 1 September 1994, ceased to be an Australian citizen while in the migration zone; and
  (b) did not leave Australia after ceasing to be a citizen and before that date;

  is taken to have been granted an ex-citizen visa on that date.

(3) A person who, on or after 1 September 1994, ceases to be an Australian citizen while in the migration zone is taken to have been granted an ex-citizen visa when that citizenship ceases.

(4) Subdivisions AA, AB, AC (other than section 68), AE and AH do not apply in relation to ex-citizen visas.

36 Protection visas

(1) There is a class of visas to be known as protection visas.

  Note: See also Subdivision AL.

ComLaw Authoritative Act C2013C00679

(2) A criterion for a protection visa is that the applicant for the visa is:

(a) a non-citizen in Australia in respect of whom the Minister is satisfied Australia has protection obligations under the Refugees Convention as amended by the Refugees Protocol; or

(aa) a non-citizen in Australia (other than a non-citizen mentioned in paragraph (a)) in respect of whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen being removed from Australia to a receiving country, there is a real risk that the non-citizen will suffer significant harm; or

(b) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:

(i) is mentioned in paragraph (a); and

(ii) holds a protection visa; or

(c) a non-citizen in Australia who is a member of the same family unit as a non-citizen who:

(i) is mentioned in paragraph (aa); and

(ii) holds a protection visa.

(2A) A non-citizen will suffer ***significant harm*** if:

(a) the non-citizen will be arbitrarily deprived of his or her life; or

(b) the death penalty will be carried out on the non-citizen; or

(c) the non-citizen will be subjected to torture; or

(d) the non-citizen will be subjected to cruel or inhuman treatment or punishment; or

(e) the non-citizen will be subjected to degrading treatment or punishment.

(2B) However, there is taken not to be a real risk that a non-citizen will suffer significant harm in a country if the Minister is satisfied that:

(a) it would be reasonable for the non-citizen to relocate to an area of the country where there would not be a real risk that the non-citizen will suffer significant harm; or

(b) the non-citizen could obtain, from an authority of the country, protection such that there would not be a real risk that the non-citizen will suffer significant harm; or

ComLaw Authoritative Act C2013C00679

(c) the real risk is one faced by the population of the country generally and is not faced by the non-citizen personally.

Ineligibility for grant of a protection visa

(2C) A non-citizen is taken not to satisfy the criterion mentioned in paragraph (2)(aa) if:

(a) the Minister has serious reasons for considering that:

(i) the non-citizen has committed a crime against peace, a war crime or a crime against humanity, as defined by international instruments prescribed by the regulations; or

(ii) the non-citizen committed a serious non-political crime before entering Australia; or

(iii) the non-citizen has been guilty of acts contrary to the purposes and principles of the United Nations; or

(b) the Minister considers, on reasonable grounds, that:

(i) the non-citizen is a danger to Australia's security; or

(ii) the non-citizen, having been convicted by a final judgment of a particularly serious crime (including a crime that consists of the commission of a serious Australian offence or serious foreign offence), is a danger to the Australian community.

Protection obligations

(3) Australia is taken not to have protection obligations in respect of a non-citizen who has not taken all possible steps to avail himself or herself of a right to enter and reside in, whether temporarily or permanently and however that right arose or is expressed, any country apart from Australia, including countries of which the non-citizen is a national.

(4) However, subsection (3) does not apply in relation to a country in respect of which:

(a) the non-citizen has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or

(b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in

ComLaw Authoritative Act C2013C00679

subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the country.

(5) Subsection (3) does not apply in relation to a country if the non-citizen has a well-founded fear that:

(a) the country will return the non-citizen to another country; and

(b) the non-citizen will be persecuted in that other country for reasons of race, religion, nationality, membership of a particular social group or political opinion.

(5A) Also, subsection (3) does not apply in relation to a country if:

(a) the non-citizen has a well-founded fear that the country will return the non-citizen to another country; and

(b) the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the non-citizen availing himself or herself of a right mentioned in subsection (3), there would be a real risk that the non-citizen will suffer significant harm in relation to the other country.

Determining nationality

(6) For the purposes of subsection (3), the question of whether a non-citizen is a national of a particular country must be determined solely by reference to the law of that country.

(7) Subsection (6) does not, by implication, affect the interpretation of any other provision of this Act.

37 Bridging visas

There are classes of temporary visas, to be known as bridging visas, to be granted under Subdivision AF.

37A Temporary safe haven visas

(1) There is a class of temporary visas to travel to, enter and remain in Australia, to be known as temporary safe haven visas.

Note: A temporary safe haven visa is granted to a person to give the person temporary safe haven in Australia.

39 Criterion limiting number of visas

(1) In spite of section 14 of the *Legislative Instruments Act 2003*, a prescribed criterion for visas of a class, other than protection visas, may be the criterion that the grant of the visa would not cause the number of visas of that class granted in a particular financial year to exceed whatever number is fixed by the Minister, by legislative instrument, as the maximum number of such visas that may be granted in that year (however the criterion is expressed).

(2) For the purposes of this Act, when a criterion allowed by subsection (1) prevents the grant in a financial year of any more visas of a particular class, any outstanding applications for the grant in that year of visas of that class are taken not to have been made.

40 Circumstances for granting visas

(1) The regulations may provide that visas or visas of a specified class may only be granted in specified circumstances.

(2) Without limiting subsection (1), the circumstances may be, or may include, that, when the person is granted the visa, the person:
  (a) is outside Australia; or
  (b) is in immigration clearance; or
  (c) has been refused immigration clearance and has not subsequently been immigration cleared; or
  (d) is in the migration zone and, on last entering Australia:
    (i) was immigration cleared; or
    (ii) bypassed immigration clearance and had not subsequently been immigration cleared.

(3) Without limiting subsection (1), if:
  (a) prescribed circumstances exist; and
  (b) the Minister has not waived the operation of this subsection in relation to granting the visa to the person;

the circumstances under subsection (1) may be, or may include, that the person has complied with any requirement of an officer to provide one or more personal identifiers in relation to the application for the visa.

ComLaw Authoritative Act C2013C00679

(3A) An officer must not require, for the purposes of subsection (3), a person to provide a personal identifier other than:

(a) if the person is an applicant for a protection visa—any of the following (including any of the following in digital form):

(i) fingerprints or handprints of the person (including those taken using paper and ink or digital livescanning technologies);

(ii) a photograph or other image of the person's face and shoulders;

(iii) an audio or a video recording of the person;

(iv) an iris scan;

(v) the person's signature;

(vi) any other personal identifier contained in the person's passport or other travel document;

(vii) any other personal identifier of a type prescribed for the purposes of paragraph (3C)(a); or

(b) if the person is an applicant for a temporary safe haven visa within the meaning of section 37A, or any other visa of a class that the regulations designate as a class of humanitarian visas—any of the following (including any of the following in digital form):

(i) fingerprints or handprints of the person (including those taken using paper and ink or digital livescanning technologies);

(ii) a photograph or other image of the person's face and shoulders;

(iii) an iris scan;

(iv) the person's signature;

(v) any other personal identifier contained in the person's passport or other travel document;

(vi) any other personal identifier of a type prescribed for the purposes of paragraph (3C)(a); or

(c) if paragraphs (a) and (b) do not apply—any of the following (including any of the following in digital form):

(i) a photograph or other image of the person's face and shoulders;

(ii) the person's signature;

(iii) any other personal identifier contained in the person's passport or other travel document;

ComLaw Authoritative Act C2013C00679

(iv) any other personal identifier of a type prescribed for the purposes of paragraph (3C)(a).

Note: Division 13AB sets out further restrictions on the personal identifiers that minors and incapable persons can be required to provide.

(3B) In requiring, for the purposes of subsection (3), a person to provide a personal identifier, an officer must not contravene regulations made for the purposes of paragraph (3C)(b).

(3C) The regulations:

(a) may prescribe other types of personal identifiers; and

(b) may provide that a particular personal identifier referred to in subsection (3A), or a particular combination of such personal identifiers, must not be required except in the circumstances prescribed for the purposes of this paragraph.

(4) A person is taken not to have complied with a requirement referred to in subsection (3) unless the one or more personal identifiers are provided to an authorised officer by way of one or more identification tests carried out by an authorised officer.

Note: If the types of identification tests that the authorised officer may carry out are specified under section 5D, then each identification test must be of a type so specified.

(5) However, subsection (4) does not apply, in circumstances prescribed for the purposes of this subsection, if the personal identifier is of a prescribed type and the person:

(a) provides a personal identifier otherwise than by way of an identification test carried out by an authorised officer; and

(b) complies with any further requirements that are prescribed relating to the provision of the personal identifier.

41 Conditions on visas

(1) The regulations may provide that visas, or visas of a specified class, are subject to specified conditions.

(2) Without limiting subsection (1), the regulations may provide that a visa, or visas of a specified class, are subject to:

(a) a condition that, despite anything else in this Act, the holder of the visa will not, after entering Australia, be entitled to be granted a substantive visa (other than a protection visa, or a

ComLaw Authoritative Act C2013C00679

Subdivision AC—Grant of visas

65 Decision to grant or refuse to grant visa

(1) After considering a valid application for a visa, the Minister:

(a) if satisfied that:

(i) the health criteria for it (if any) have been satisfied; and

(ii) the other criteria for it prescribed by this Act or the regulations have been satisfied; and

(iii) the grant of the visa is not prevented by section 40 (circumstances when granted), 500A (refusal or cancellation of temporary safe haven visas), 501 (special power to refuse or cancel) or any other provision of this Act or of any other law of the Commonwealth; and

(iv) any amount of visa application charge payable in relation to the application has been paid;

is to grant the visa; or

(b) if not so satisfied, is to refuse to grant the visa.

Note: See also section 195A, under which the Minister has a non-compellable power to grant a visa to a person in detention under section 189 (whether or not the person has applied for the visa). Subdivision AA, this Subdivision, Subdivision AF and the regulations do not apply to the Minister's power under that section.

(2) To avoid doubt, an application put aside under section 94 is not taken for the purposes of subsection (1) to have been considered until it has been removed from the pool under subsection 95(3).

65A Period within which Minister must make decision on protection visas

(1) If an application for a protection visa:

(a) was validly made under section 46; or

(b) was remitted by any court or tribunal to the Minister for reconsideration;

then the Minister must make a decision under section 65 within 90 days starting on:

(c) the day on which the application for the protection visa was made or remitted; or

ComLaw Authoritative Act C2013C00679

the Minister may direct, in writing, that a specified document is not to be taken to be a passport or travel document for the purposes of the regulations.

(3) A direction under subsection (2) is not a legislative instrument.

Subdivision AF—Bridging visas

72 Interpretation

(1) In this Subdivision:

eligible non-citizen means a non-citizen who:

(a) has been immigration cleared; or

(b) is in a prescribed class of persons; or

(c) the Minister has determined to be an eligible non-citizen.

(2) The Minister may make a determination under paragraph (1)(c) that a non-citizen is an eligible non-citizen if:

(a) the non-citizen was an unlawful non-citizen when he or she entered the migration zone; and

(b) the non-citizen made a valid application for a protection visa after he or she arrived in Australia; and

(c) the non-citizen has been in immigration detention for a period of more than 6 months after the application for a protection visa was made; and

(d) the Minister has not made a primary decision in relation to the application for a protection visa; and

(e) the Minister thinks that the determination would be in the public interest.

(3) The power to make a determination under paragraph (1)(c) may only be exercised by the Minister personally.

(4) If the Minister makes a determination under paragraph (1)(c), he or she is to cause to be laid before each House of the Parliament a statement that:

(a) sets out the determination; and

(b) sets out the reasons for the determination, referring in particular to the Minister's reasons for thinking that his or her actions are in the public interest.

(5) A statement made under subsection (4) is not to include:
  (a) the name of any non-citizen who is the subject of the determination; or
  (b) any information that may identify the non-citizen; or
  (c) if the Minister thinks that it would not be in the public interest to publish the name of another person connected in any way with the matter concerned—the name of that other person, or any information that may identify the person.

(6) A statement under subsection (4) is to be laid before each House of the Parliament within 15 sitting days of that House after:
  (a) if the determination is made between 1 January and 30 June (inclusive) in a year—1 July in that year; or
  (b) if the determination is made between 1 July and 31 December (inclusive) in a year—1 January in the following year.

(7) The Minister does not have a duty to consider whether to make a determination under paragraph (1)(c) in respect of any non-citizen, whether he or she is requested to do so by the non-citizen or any other person, or in any other circumstances.

73 Bridging visas

If the Minister is satisfied that an eligible non-citizen satisfies the criteria for a bridging visa as prescribed under subsection 31(3), the Minister may grant a bridging visa permitting the non-citizen to remain in, or to travel to, enter and remain in Australia:
  (a) during a specified period; or
  (b) until a specified event happens.

74 Further applications for bridging visa

(1) Subject to subsection (2), if:
  (a) an eligible non-citizen who is in immigration detention makes an application for a bridging visa; and
  (b) the Minister refuses to grant the visa;

the eligible non-citizen may make a further application for a bridging visa.

Division 8—Removal of unlawful non-citizens etc.

Subdivision A—Removal

198 Removal from Australia of unlawful non-citizens

(1) An officer must remove as soon as reasonably practicable an unlawful non-citizen who asks the Minister, in writing, to be so removed.

(1A) In the case of an unlawful non-citizen who has been brought to Australia under section 198B for a temporary purpose, an officer must remove the person as soon as reasonably practicable after the person no longer needs to be in Australia for that purpose (whether or not the purpose has been achieved).

(2) An officer must remove as soon as reasonably practicable an unlawful non-citizen:

(a) who is covered by subparagraph 193(1)(a)(i), (ii) or (iii) or paragraph 193(1)(b), (c) or (d); and

(b) who has not subsequently been immigration cleared; and

(c) who either:

(i) has not made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; or

(ii) has made a valid application for a substantive visa, that can be granted when the applicant is in the migration zone, that has been finally determined.

(2A) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

(a) the non-citizen is covered by subparagraph 193(1)(a)(iv); and

(b) since the Minister's decision (the ***original decision***) referred to in subparagraph 193(1)(a)(iv), the non-citizen has not made a valid application for a substantive visa that can be granted when the non-citizen is in the migration zone; and

(c) in a case where the non-citizen has been invited, in accordance with section 501C, to make representations to the Minister about revocation of the original decision—either:

ComLaw Authoritative Act C2013C00679

(i) the non-citizen has not made representations in accordance with the invitation and the period for making representations has ended; or

(ii) the non-citizen has made representations in accordance with the invitation and the Minister has decided not to revoke the original decision.

Note: The only visa that the non-citizen could apply for is a protection visa or a visa specified in regulations under section 501E.

(3) The fact that an unlawful non-citizen is eligible to apply for a substantive visa that can be granted when the applicant is in the migration zone but has not done so does not prevent the application of subsection (2) or (2A) to him or her.

(5) An officer must remove as soon as reasonably practicable an unlawful non-citizen if the non-citizen:

(a) is a detainee; and

(b) was entitled to apply for a visa in accordance with section 195, to apply under section 137K for revocation of the cancellation of a visa, or both, but did neither.

(6) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

(a) the non-citizen is a detainee; and

(b) the non-citizen made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; and

(c) one of the following applies:

(i) the grant of the visa has been refused and the application has been finally determined;

(iii) the visa cannot be granted; and

(d) the non-citizen has not made another valid application for a substantive visa that can be granted when the applicant is in the migration zone.

(7) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

(a) the non-citizen is a detainee; and

(b) Subdivision AI of Division 3 of this Part applies to the non-citizen; and

ComLaw Authoritative Act C2013C00679

(c) either:
(i) the non-citizen has not been immigration cleared; or
(ii) the non-citizen has not made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; and

(d) either:
(i) the Minister has not given a notice under paragraph 91F(1)(a) to the non-citizen; or
(ii) the Minister has given such a notice but the period mentioned in that paragraph has ended and the non-citizen has not, during that period, made a valid application for a substantive visa that can be granted when the applicant is in the migration zone.

(8) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:
(a) the non-citizen is a detainee; and
(b) Subdivision AJ of Division 3 of this Part applies to the non-citizen; and
(c) either:
(i) the Minister has not given a notice under subsection 91L(1) to the non-citizen; or
(ii) the Minister has given such a notice but the period mentioned in that subsection has ended and the non-citizen has not, during that period, made a valid application for a substantive visa that can be granted when the applicant is in the migration zone.

(9) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:
(a) the non-citizen is a detainee; and
(b) Subdivision AK of Division 3 of this Part applies to the non-citizen; and
(c) either:
(i) the non-citizen has not been immigration cleared; or
(ii) the non-citizen has not made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; and
(d) either:

ComLaw Authoritative Act C2013C00679

(i) the Minister has not given a notice under subsection 91Q(1) to the non-citizen; or

(ii) the Minister has given such a notice but the period mentioned in that subsection has ended and the non-citizen has not, during that period, made a valid application for a substantive visa that can be granted when the applicant is in the migration zone.

(10) For the purposes of subsections (6) to (9), a valid application under section 137K for revocation of the cancellation of a visa is treated as though it were a valid application for a substantive visa that can be granted when the applicant is in the migration zone.

(11) This section does not apply to an unauthorised maritime arrival to whom section 198AD applies.

Subdivision B—Regional processing

198AA Reason for Subdivision

This Subdivision is enacted because the Parliament considers that:

(a) people smuggling, and its undesirable consequences including the resulting loss of life at sea, are major regional problems that need to be addressed; and

(b) unauthorised maritime arrivals, including unauthorised maritime arrivals in respect of whom Australia has or may have protection obligations under the Refugees Convention as amended by the Refugees Protocol, should be able to be taken to any country designated to be a regional processing country; and

(c) it is a matter for the Minister and Parliament to decide which countries should be designated as regional processing countries; and

(d) the designation of a country to be a regional processing country need not be determined by reference to the international obligations or domestic law of that country.

198AB *Regional processing country*

(1) The Minister may, by legislative instrument, designate that a country is a ***regional processing country***.

ComLaw Authoritative Act C2013C00679

(a) a person on whom a power is conferred by or under this or any other Act; or

(b) a delegate of such a person;

is required personally to perform all administrative and clerical tasks connected with the exercise of the power.

498 Exercise of powers under Act

(1) The powers conferred by or under this Act shall be exercised in accordance with any applicable regulations under this Act.

(2) Nothing in this section shall be taken to limit the operation of subsection 29(4).

499 Minister may give directions

(1) The Minister may give written directions to a person or body having functions or powers under this Act if the directions are about:

(a) the performance of those functions; or

(b) the exercise of those powers.

(1A) For example, a direction under subsection (1) could require a person or body to exercise the power under section 501 instead of the power under section 200 (as it applies because of section 201) in circumstances where both powers apply.

(2) Subsection (1) does not empower the Minister to give directions that would be inconsistent with this Act or the regulations.

(2A) A person or body must comply with a direction under subsection (1).

(3) The Minister shall cause a copy of any direction given under subsection (1) to be laid before each House of the Parliament within 15 sitting days of that House after that direction was given.

(4) Subsection (1) does not limit subsection 496(1A).

500 Review of decision

(1) Applications may be made to the Administrative Appeals Tribunal for review of:

ComLaw Authoritative Act C2013C00679

(a) decisions of the Minister under section 200 because of circumstances specified in section 201; or

(b) decisions of a delegate of the Minister under section 501; or

(c) a decision to refuse to grant a protection visa, or to cancel a protection visa, relying on:

(i) one or more of the following Articles of the Refugees Convention, namely, Article 1F, 32 or 33(2); or

(ii) paragraph 36(2C)(a) or (b) of this Act;

other than decisions to which a certificate under section 502 applies.

(2) A person is not entitled to make an application under paragraph (1)(a) unless:

(a) the person is an Australian citizen; or

(b) the person is a lawful non-citizen whose continued presence in Australia is not subject to any limitation as to time imposed by law.

(3) A person is not entitled to make an application under subsection (1) for review of a decision referred to in paragraph (1)(b) or (c) unless the person would be entitled to seek review of the decision under Part 5 or 7 if the decision had been made on another ground.

(4) The following decisions are not reviewable under Part 5 or 7:

(a) a decision under section 200 because of circumstances specified in section 201;

(b) a decision under section 501;

(c) a decision to refuse to grant a protection visa, or to cancel a protection visa, relying on:

(i) one or more of the following Articles of the Refugees Convention, namely, Article 1F, 32 or 33(2); or

(ii) paragraph 36(2C)(a) or (b) of this Act.

(5) In giving a direction under the *Administrative Appeals Tribunal Act 1975* as to the persons who are to constitute the Tribunal for the purposes of a proceeding for review of a decision referred to in subsection (1), the President must have regard to:

(a) the degree of public importance or complexity of the matters to which that proceeding relates; and

ComLaw Authoritative Act C2013C00679

(b) the status of the position or office held by the person who made the decision that is to be reviewed by the Tribunal; and

(c) the degree to which the matters to which that proceeding relates concern the security, defence or international relations of Australia; and

(d) if:

(i) the person to whom the decision relates has been convicted of, or sentenced for, an offence; and

(ii) that conviction or sentence is relevant to the matters to which that proceeding relates;

the seriousness of that offence; and

(e) if:

(i) the person to whom the decision relates has been acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result the person has been detained in a facility or institution; and

(ii) that acquittal is relevant to the matters to which that proceeding relates;

the seriousness of that offence;

and must not have regard to any other matters.

(5A) Section 23B of the *Administrative Appeals Tribunal Act 1975* does not apply in relation to a proceeding for review of a decision referred to in subsection (1) of this section.

(6) Where an application has been made to the Tribunal for the review of a decision under section 200 ordering the deportation of a person, the order for the deportation of the person shall not be taken for the purposes of section 253 to have ceased or to cease to be in force by reason only of any order that has been made by:

(a) the Tribunal; or

(b) a presidential member under section 41 of the *Administrative Appeals Tribunal Act 1975*; or

(c) the Federal Court of Australia or a Judge of that Court under section 44A of that Act; or

(d) the Federal Circuit Court of Australia or a Judge of that Court under section 44A of that Act.

(6A) If a decision under section 501 of this Act relates to a person in the migration zone, section 28 of the *Administrative Appeals Tribunal Act 1975* does not apply to the decision.

ComLaw Authoritative Act C2013C00679

(6B) If a decision under section 501 of this Act relates to a person in the migration zone, an application to the Tribunal for a review of the decision must be lodged with the Tribunal within 9 days after the day on which the person was notified of the decision in accordance with subsection 501G(1). Accordingly, paragraph 29(1)(d) and subsections 29(7), (8), (9) and (10) of the *Administrative Appeals Tribunal Act 1975* do not apply to the application.

(6C) If a decision under section 501 relates to a person in the migration zone, an application to the Tribunal for a review of the decision must be accompanied by, or by a copy of:

(a) the document notifying the person of the decision in accordance with subsection 501G(1); and

(b) one of the sets of documents given to the person under subsection 501G(2) at the time of the notification of the decision.

(6D) If:

(a) an application is made to the Tribunal for a review of a decision under section 501 of this Act; and

(b) the decision relates to a person in the migration zone;

section 37 of the *Administrative Appeals Tribunal Act 1975* does not apply in relation to the decision.

(6E) If:

(a) an application is made to the Tribunal for a review of a decision under section 501 of this Act; and

(b) the decision relates to a person in the migration zone;

the Registrar, a District Registrar or a Deputy Registrar of the Tribunal must notify the Minister, within the period and in the manner specified in the regulations, that the application has been made. Accordingly, subsection 29(11) of the *Administrative Appeals Tribunal Act 1975* does not apply in relation to the application.

(6F) If:

(a) an application is made to the Tribunal for a review of a decision under section 501 of this Act; and

(b) the decision relates to a person in the migration zone;

then:

ComLaw Authoritative Act C2013C00679

(c) the Minister must lodge with the Tribunal, within 14 days after the day on which the Minister was notified that the application had been made, 2 copies of every document, or part of a document, that:

(i) is in the Minister's possession or under the Minister's control; and

(ii) was relevant to the making of the decision; and

(iii) contains non-disclosable information; and

(d) the Tribunal may have regard to that non-disclosable information for the purpose of reviewing the decision, but must not disclose that non-disclosable information to the person making the application.

(6G) If:

(a) an application is made to the Tribunal for a review of a decision under section 501 of this Act; and

(b) the decision relates to a person in the migration zone;

the Tribunal must not:

(c) hold a hearing (other than a directions hearing); or

(d) make a decision under section 43 of the *Administrative Appeals Tribunal Act 1975*;

in relation to the decision under review until at least 14 days after the day on which the Minister was notified that the application had been made.

(6H) If:

(a) an application is made to the Tribunal for a review of a decision under section 501; and

(b) the decision relates to a person in the migration zone;

the Tribunal must not have regard to any information presented orally in support of the person's case unless the information was set out in a written statement given to the Minister at least 2 business days before the Tribunal holds a hearing (other than a directions hearing) in relation to the decision under review.

(6J) If:

(a) an application is made to the Tribunal for a review of a decision under section 501; and

(b) the decision relates to a person in the migration zone;

the Tribunal must not have regard to any document submitted in support of the person's case unless a copy of the document was given to the Minister at least 2 business days before the Tribunal holds a hearing (other than a directions hearing) in relation to the decision under review. However, this does not apply to documents given to the person or Tribunal under subsection 501G(2) or subsection (6F) of this section.

(6K) If:

(a) an application is made to the Tribunal for a review of a decision under section 501 of this Act; and

(b) the decision relates to a person in the migration zone; and

(c) the Tribunal is of the opinion that particular documents, or documents included in a particular class of documents, may be relevant in relation to the decision under review;

then:

(d) the Tribunal may cause to be served on the Minister a notice in writing stating that the Tribunal is of that opinion and requiring the Minister to lodge with the Tribunal, within a time specified in the notice, 2 copies of each of those documents that is in the Minister's possession or under the Minister's control; and

(e) the Minister must comply with any such notice.

(6L) If:

(a) an application is made to the Tribunal for a review of a decision under section 501 of this Act; and

(b) the decision relates to a person in the migration zone; and

(c) the Tribunal has not made a decision under section 42A, 42B, 42C or 43 of the *Administrative Appeals Tribunal Act 1975* in relation to the decision under review within the period of 84 days after the day on which the person was notified of the decision under review in accordance with subsection 501G(1);

the Tribunal is taken, at the end of that period, to have made a decision under section 43 of the *Administrative Appeals Tribunal Act 1975* to affirm the decision under review.

(7) In this section, ***decision*** has the same meaning as in the *Administrative Appeals Tribunal Act 1975*.

ComLaw Authoritative Act C2013C00679

(8) In this section:

business day means a day that is not:

(a) a Saturday; or

(b) a Sunday; or

(c) a public holiday in the Australian Capital Territory; or

(d) a public holiday in the place concerned.

500A Refusal or cancellation of temporary safe haven visas

Refusal or cancellation of temporary safe haven visas

(1) The Minister may refuse to grant to a person a temporary safe haven visa, or may cancel a person's temporary safe haven visa if, in the Minister's opinion:

(a) the person has or has had an association with someone else, or with a group or organisation, whom the Minister reasonably suspects has been or is involved in criminal conduct; or

(b) having regard to either or both of the following:

(i) the person's past and present criminal conduct;

(ii) the person's past and present general conduct;

the person is not of good character; or

(c) in the event the person were allowed to enter or to remain in Australia, there is a significant risk that the person would:

(i) engage in criminal conduct in Australia; or

(ii) harass, molest, intimidate or stalk another person in Australia (see subsection (2)); or

(iii) vilify a segment of the Australian community; or

(iv) incite discord in the Australian community or in a segment of that community; or

(v) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way; or

(d) the person is a threat to national security; or

(e) the person's presence in Australia would prejudice Australia's international relations.

ComLaw Authoritative Act C2013C00679

Natural justice and code of procedure not to apply to decision

(11) The rules of natural justice, and the code of procedure set out in Subdivision AB of Division 3 of Part 2, do not apply to a decision under subsection (1) or (3).

Automatic refusal to grant visa to an immediate family member

(12) If the Minister refuses to grant a person a temporary safe haven visa under subsection (1) or (3), then the Minister is also taken to have refused to grant a temporary safe haven visa to each immediate family member of the person. The immediate family member need not be notified of the refusal.

Automatic cancellation of immediate family member's visa

(13) If a person's temporary safe haven visa is cancelled under subsection (1) or (3), then a temporary safe haven visa held by each immediate family member of the person is also cancelled. The immediate family member need not be notified of the cancellation.

Definitions

(14) In this section:

court includes a court martial or similar military tribunal.

immediate family member of a person means another person who is a member of the immediate family of the person (within the meaning of the regulations).

imprisonment includes any form of punitive detention in a facility or institution.

sentence includes any form of determination of the punishment for an offence.

501 Refusal or cancellation of visa on character grounds

Decision of Minister or delegate—natural justice applies

(1) The Minister may refuse to grant a visa to a person if the person does not satisfy the Minister that the person passes the character test.

ComLaw Authoritative Act C2013C00679

Note: ***Character test*** is defined by subsection (6).

(2) The Minister may cancel a visa that has been granted to a person if:

(a) the Minister reasonably suspects that the person does not pass the character test; and

(b) the person does not satisfy the Minister that the person passes the character test.

Decision of Minister—natural justice does not apply

(3) The Minister may:

(a) refuse to grant a visa to a person; or

(b) cancel a visa that has been granted to a person;

if:

(c) the Minister reasonably suspects that the person does not pass the character test; and

(d) the Minister is satisfied that the refusal or cancellation is in the national interest.

(4) The power under subsection (3) may only be exercised by the Minister personally.

(5) The rules of natural justice, and the code of procedure set out in Subdivision AB of Division 3 of Part 2, do not apply to a decision under subsection (3).

Character test

(6) For the purposes of this section, a person does not pass the ***character test*** if:

(a) the person has a substantial criminal record (as defined by subsection (7)); or

(aa) the person has been convicted of an offence that was committed:

(i) while the person was in immigration detention; or

(ii) during an escape by the person from immigration detention; or

(iii) after the person escaped from immigration detention but before the person was taken into immigration detention again; or

(ab) the person has been convicted of an offence against section 197A; or

(b) the person has or has had an association with someone else, or with a group or organisation, whom the Minister reasonably suspects has been or is involved in criminal conduct; or

(c) having regard to either or both of the following:

(i) the person's past and present criminal conduct;

(ii) the person's past and present general conduct;

the person is not of good character; or

(d) in the event the person were allowed to enter or to remain in Australia, there is a significant risk that the person would:

(i) engage in criminal conduct in Australia; or

(ii) harass, molest, intimidate or stalk another person in Australia; or

(iii) vilify a segment of the Australian community; or

(iv) incite discord in the Australian community or in a segment of that community; or

(v) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or in violence threatening harm to, that community or segment, or in any other way.

Otherwise, the person passes the ***character test***.

Substantial criminal record

(7) For the purposes of the character test, a person has a ***substantial criminal record*** if:

(a) the person has been sentenced to death; or

(b) the person has been sentenced to imprisonment for life; or

(c) the person has been sentenced to a term of imprisonment of 12 months or more; or

(d) the person has been sentenced to 2 or more terms of imprisonment (whether on one or more occasions), where the total of those terms is 2 years or more; or

(e) the person has been acquitted of an offence on the grounds of unsoundness of mind or insanity, and as a result the person has been detained in a facility or institution.

ComLaw Authoritative Act C2013C00679

Periodic detention

(8) For the purposes of the character test, if a person has been sentenced to periodic detention, the person's term of imprisonment is taken to be equal to the number of days the person is required under that sentence to spend in detention.

Residential schemes or programs

(9) For the purposes of the character test, if a person has been convicted of an offence and the court orders the person to participate in:

(a) a residential drug rehabilitation scheme; or

(b) a residential program for the mentally ill;

the person is taken to have been sentenced to a term of imprisonment equal to the number of days the person is required to participate in the scheme or program.

Pardons etc.

(10) For the purposes of the character test, a sentence imposed on a person, or the conviction of a person for an offence, is to be disregarded if:

(a) the conviction concerned has been quashed or otherwise nullified; or

(b) the person has been pardoned in relation to the conviction concerned.

Conduct amounting to harassment or molestation

(11) For the purposes of the character test, conduct may amount to harassment or molestation of a person even though:

(a) it does not involve violence, or threatened violence, to the person; or

(b) it consists only of damage, or threatened damage, to property belonging to, in the possession of, or used by, the person.

Definitions

(12) In this section:

court includes a court martial or similar military tribunal.

ComLaw Authoritative Act C2013C00679

imprisonment includes any form of punitive detention in a facility or institution.

sentence includes any form of determination of the punishment for an offence.

Note 1: *Visa* is defined by section 5 and includes, but is not limited to, a protection visa.

Note 2: For notification of decisions under subsection (1) or (2), see section 501G.

Note 3: For notification of decisions under subsection (3), see section 501C.

501A Refusal or cancellation of visa—setting aside and substitution of non-adverse decision under subsection 501(1) or (2)

(1) This section applies if:

(a) a delegate of the Minister; or

(b) the Administrative Appeals Tribunal;

makes a decision (the ***original decision***):

(c) not to exercise the power conferred by subsection 501(1) to refuse to grant a visa to the person; or

(d) not to exercise the power conferred by subsection 501(2) to cancel a visa that has been granted to a person;

whether or not the person satisfies the delegate or Tribunal that the person passes the character test and whether or not the delegate or Tribunal reasonably suspects that the person does not pass the character test.

Action by Minister—natural justice applies

(2) The Minister may set aside the original decision and:

(a) refuse to grant a visa to the person; or

(b) cancel a visa that has been granted to the person;

if:

(c) the Minister reasonably suspects that the person does not pass the character test (as defined by section 501); and

(d) the person does not satisfy the Minister that the person passes the character test; and

(e) the Minister is satisfied that the refusal or cancellation is in the national interest.

Penalty: Imprisonment for 2 years.

Relationship to other laws

(9) This section has effect despite anything in:
  (a) any other provision of this Act; or
  (b) any other law of the Commonwealth.

Definition

(10) In this section:

engage in conduct means:
  (a) do an act; or
  (b) omit to perform an act.

503D Details of gazetted agency to be treated as protected information

(1) If section 503A or 503B applies to information communicated by a gazetted agency to an authorised migration officer so that the information cannot be divulged or communicated except as provided for in sections 503A, 503B and 503C, then sections 503A, 503B and 503C apply to similarly protect the agency's details from being divulged or communicated as if the details were the information communicated by the agency.

(2) A reference in subsection (1) to ***agency's details*** is a reference to any information in relation to the gazetted agency including the agency's name and the conditions on which the communication of information by the agency occurred.

(3) In this section:

gazetted agency has the same meaning as in section 503A.

504 Regulations

(1) The Governor-General may make regulations, not inconsistent with this Act, prescribing all matters which by this Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to this Act and,

ComLaw Authoritative Act C2013C00679

without limiting the generality of the foregoing, may make regulations:

(a) making provision for and in relation to:

(i) the charging and recovery of fees in respect of any matter under this Act or the regulations, including the fees payable in connection with the review of decisions made under this Act or the regulations, whether or not such review is provided for by or under this Act; or

(ii) the charging and recovery of fees in respect of English language tests conducted by or on behalf of the Department;

(iii) the way, including the currency, in which fees are to be paid; or

(iv) the persons who may be paid fees on behalf of the Commonwealth;

(b) making provision for the remission, refund or waiver of fees of a kind referred to in paragraph (a) or for exempting persons from the payment of such fees;

(c) making provision for or in relation to the furnishing or obtaining of information with respect to:

(i) persons on board a vessel arriving at a port in Australia in the course of, or at the conclusion of, a voyage or flight that commenced at, or during which the vessel called at, a place outside Australia; and

(ii) persons on board a vessel leaving a port in Australia and bound for, or calling at, a place outside Australia; and

(iii) persons on board an aircraft arriving at or departing from an airport in Australia, being an aircraft operated by an international air carrier;

(d) making provision for and in relation to the use that may be made by persons or bodies other than officers of the Department of information collected pursuant to regulations made under paragraph (c);

(e) making provision for and in relation to:

(i) the giving of documents to;

(ii) the lodging of documents with; or

(iii) the service of documents on;

the Minister, the Secretary or any other person or body, for the purposes of this Act;

ComLaw Authoritative Act C2013C00679

(f) prescribing the practice and procedure in relation to proceedings before a Commissioner or a prescribed authority under this Act, including the summoning of witnesses, the production of documents, the taking of evidence on oath or affirmation, the administering of oaths or affirmations and the payment of expenses of witnesses;

(g) requiring assurances of support to be given, in such circumstances as are prescribed or as the Minister thinks fit, in relation to persons seeking to enter, or remain in, Australia and providing for the enforcement of assurances of support and the imposition on persons who give assurances of support of liabilities in respect of the maintenance of, and other expenditure in connexion with, the persons in respect of whom the assurances of support are given;

(h) making provision for the remission, refund or waiver of charges under the *Migration (Health Services) Charge Act 1991*;

(i) enabling a person who is alleged to have contravened section 137 to pay to the Commonwealth, as an alternative to prosecution, a prescribed penalty, not exceeding $1,000;

(j) enabling a person who is alleged to have contravened section 229 or 230 to pay to the Commonwealth, as an alternative to prosecution, a prescribed penalty, not exceeding:

(i) in the case of a natural person—30 penalty units; and

(ii) in the case of a body corporate—100 penalty units; and

(jaa) enabling a person who is alleged to have committed an offence against subsection 245N(2) to pay to the Commonwealth, as an alternative to prosecution, a prescribed penalty, not exceeding 10 penalty units; and

(ja) enabling a person who is alleged to have committed an offence against subsection 280(1) to pay to the Commonwealth, as an alternative to prosecution, a penalty of 12 penalty units; and

(k) prescribing penalties not exceeding a fine of $1,000 or imprisonment for 6 months in respect of offences against the regulations; and

(l) making provision for matters that, under the *Education Services for Overseas Students Act 2000*, are required or

ComLaw Authoritative Act C2013C00679

permitted to be prescribed in regulations made under this Act.

(2) Section 14 of the *Legislative Instruments Act 2003* does not prevent, and has not prevented, regulations whose operation depends on a country or other matter being specified or certified by the Minister in an instrument in writing made under the regulations after the taking effect of the regulations.

(3) The regulations that may be made under paragraph (1)(e) include, but are not limited to, regulations providing that a document given to, or served on, a person in a specified way shall be taken for all purposes of this Act and the regulations to have been received by the person at a specified or ascertainable time.

(3A) The *Evidence Act 1995* does not affect the operation of regulations made for the purposes of paragraph (1)(e).

(4) Regulations in respect of a matter referred to in paragraph (1)(g) may apply in relation to maintenance guarantees given before the commencement of this Part in accordance with the regulations that were in force under any of the Acts repealed by this Act.

(5) An assurance of support given, after the commencement of this subsection, in accordance with regulations under paragraph (1)(g) continues to have effect, and may be enforced, in accordance with such regulations in spite of any change in circumstances whatsoever.

(5A) The following have effect only in relation to assurances of support that were given before 1 July 2004 and are not assurances of support in relation to which Chapter 2C of the *Social Security Act 1991* applies or applied:

(a) subsection (5) of this section;

(b) regulations made under paragraph (1)(g) (whether before, on or after the commencement of this subsection) providing for:

(i) the enforcement of assurances of support; or

(ii) the imposition on persons who give assurances of support of liabilities in respect of the maintenance of, and other expenditure in connection with, the persons in respect of whom the assurances of support are given.

(6) In this section:

ComLaw Authoritative Act C2013C00679

international air carrier means an air transport enterprise that operates an air service between Australia and a place outside Australia.

505 Regulations about visa criteria

To avoid doubt, regulations for the purpose of prescribing a criterion for visas of a class may provide that the Minister, when required to decide whether an applicant for a visa of the class satisfies the criterion:

(a) is to get a specified person or organisation, or a person or organisation in a specified class, to:

(i) give an opinion on a specified matter; or

(ii) make an assessment of a specified matter; or

(iii) make a finding about a specified matter; or

(iv) make a decision about a specified matter; and

(b) is:

(i) to have regard to that opinion, assessment, finding or decision in; or

(ii) to take that opinion, assessment, finding or decision to be correct for the purposes of;

deciding whether the applicant satisfies the criterion.

506 Regulations about passenger cards

(1) Regulations under paragraph 504(1)(c) may provide for the giving of different information about different classes of people.

(2) The regulations are to provide for the giving of information, in the form of answers to questions on a form, to be known as a passenger card, by non-citizens travelling to Australia, other than non-citizens exempted by the regulations.

(3) The questions for a non-citizen required by subsection (2) may include, but are not limited to, questions about any or all of the following:

(a) the non-citizen's health;

(b) any criminal convictions in Australia or a foreign country of the non-citizen;

(c) the purpose of the new arrival's going to Australia;

(d) any unpaid debts to the Commonwealth of the non-citizen;

ComLaw Authoritative Act C2013C00679

Migration Regulations 1994

Statutory Rules No. 268, 1994 as amended

made under the

Migration Act 1958

Compilation start date: 14 December 2013

Includes amendments up to: SLI No. 280, 2013

This compilation has been split into 7 volumes

Volume 1: regulations 1.01–3.31
Volume 2: regulations 4.01–5.45 and Schedule 1
Volume 3: Schedule 2 (Subclasses 010–410)
Volume 4: Schedule 2 (Subclasses 416–801)
Volume 5: Schedule 2 (Subclasses 802–995)
Volume 6: Schedules 3–13
Volume 7: Endnotes

Each volume has its own contents

Prepared by the Office of Parliamentary Counsel, Canberra

About this compilation

This compilation

This is a compilation of the *Migration Regulations 1994* as in force on 14 December 2013. It includes any commenced amendment affecting the legislation to that date.

This compilation was prepared on 14 December 2013.

The notes at the end of this compilation (the ***endnotes***) include information about amending laws and the amendment history of each amended provision.

Uncommenced amendments

The effect of uncommenced amendments is not reflected in the text of the compiled law but the text of the amendments is included in the endnotes.

Application, saving and transitional provisions for provisions and amendments

If the operation of a provision or amendment is affected by an application, saving or transitional provision that is not included in this compilation, details are included in the endnotes.

Modifications

If a provision of the compiled law is affected by a modification that is in force, details are included in the endnotes.

Provisions ceasing to have effect

If a provision of the compiled law has expired or otherwise ceased to have effect in accordance with a provision of the law, details are included in the endnotes.

Subclass 866—Protection

866.1—Interpretation

866.111

In this Part:

Refugees Convention means the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees.

866.112

For the purposes of this Part, a person (A) is a member of the same family unit as another person (B) if:

(a) A is a member of B's family unit; or

(b) B is a member of A's family unit; or

(c) A and B are members of the family unit of a third person.

866.2—Primary criteria

Note: All applicants must satisfy the primary criteria.

866.21—Criteria to be satisfied at time of application

866.211

(1) One of subclauses (2) to (5) is satisfied.

(2) The applicant:

(a) claims to be a person to whom Australia has protection obligations under the Refugees Convention; and

(b) makes specific claims under the Refugees Convention.

(3) The applicant claims to be a member of the same family unit as a person who is:

(a) mentioned in subclause (2); and

(b) an applicant for a Protection (Class XA) visa.

Federal Register of Legislative Instruments F2013C01002

(4) The applicant claims to be a person to whom Australia has protection obligations because the applicant claims that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm.

(5) The applicant claims to be a member of the same family unit as a person who is:
  (a) mentioned in subclause (4); and
  (b) an applicant for a Protection (Class XA) visa.

866.22—Criteria to be satisfied at time of decision

866.221

(1) One of subclauses (2) to (5) is satisfied.

(2) The Minister is satisfied that the applicant is a person to whom Australia has protection obligations under the Refugees Convention.

Note: See paragraph 36(2)(a) of the Act.

(3) The Minister is satisfied that:
  (a) the applicant is a person who is a member of the same family unit as an applicant who is mentioned in subclause (2); and
  (b) the applicant mentioned in subclause (2) has been granted a Protection (Class XA) visa.

Note: See paragraph 36(2)(b) of the Act.

(4) The Minister is satisfied that the applicant:
  (a) is not a person to whom Australia has protection obligations under the Refugees Convention; and
  (b) is a person to whom Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the person being removed from Australia to a receiving country, there is a real risk that the person will suffer significant harm.

Note: See paragraph 36(2)(aa) of the Act.

Federal Register of Legislative Instruments F2013C01002

(5) The Minister is satisfied that:
  (a) the applicant is a person who is a member of the same family unit as an applicant mentioned in subclause (4); and
  (b) the applicant mentioned in subclause (4) has been granted a Protection (Class XA) visa.

Note: See paragraph 36(2)(c) of the Act.

866.222

The applicant:
  (a) held a visa that was in effect on the applicant's last entry into Australia; and
  (b) is not an unauthorised maritime arrival; and
  (c) was immigration cleared on the applicant's last entry into Australia.

866.223

The applicant has undergone a medical examination carried out by any of the following (a relevant medical practitioner):
  (a) a Medical Officer of the Commonwealth;
  (b) a medical practitioner approved by the Minister for the purposes of this paragraph;
  (c) a medical practitioner employed by an organisation approved by the Minister for the purposes of this paragraph.

866.224

The applicant:
  (a) has undergone a chest x-ray examination conducted by a medical practitioner who is qualified as a radiologist in Australia; or
  (b) is under 11 years of age and is not a person in respect of whom a relevant medical practitioner has requested such an examination; or
  (c) is a person:
    (i) who is confirmed by a relevant medical practitioner to be pregnant; and

Federal Register of Legislative Instruments F2013C01002

(ii) who has been examined for tuberculosis by a chest clinic officer employed by a health authority of a State or Territory; and

(iii) who has signed an undertaking to place herself under the professional supervision of a health authority in a State or Territory and to undergo any necessary treatment; and

(iv) who the Minister is satisfied should not be required to undergo a chest x-ray examination at this time.

866.224A

A relevant medical practitioner:

(a) has considered:

(i) the results of any tests carried out for the purposes of the medical examination required under clause 866.223; and

(ii) the radiological report (if any) required under clause 866.224 in respect of the applicant; and

(b) if he or she is not a Medical Officer of the Commonwealth and considers that the applicant has a disease or condition that is, or may result in the applicant being, a threat to public health in Australia or a danger to the Australian community, has referred any relevant results and reports to a Medical Officer of the Commonwealth.

866.224B

If a Medical Officer of the Commonwealth considers that the applicant has a disease or condition that is, or may result in the applicant being, a threat to public health in Australia or a danger to the Australian community, arrangements have been made, on the advice of the Medical Officer of the Commonwealth, to place the applicant under the professional supervision of a health authority in a State or Territory to undergo any necessary treatment.

866.225

The applicant:

Federal Register of Legislative Instruments F2013C01002

(a) satisfies public interest criteria 4001, 4002 and 4003A; and
(b) if the applicant had turned 18 at the time of application—satisfies public interest criterion 4019.

866.226

The Minister is satisfied that the grant of the visa is in the national interest.

866.227

(1) The applicant meets the requirements of subclause (2) or (3).

(2) The applicant meets the requirements of this subclause if the applicant, or a member of the family unit of the applicant, is not a person who has been offered a temporary stay in Australia by the Australian Government for the purpose of an application for a Temporary Safe Haven (Class UJ) visa as provided for in regulation 2.07AC.

(3) The applicant meets the requirements of this subclause if section 91K of the Act does not apply to the applicant's application because of a determination made by the Minister under subsection 91L(1) of the Act.

866.230

(1) If the applicant is a child mentioned in paragraph 2.08(1)(b), subclause (2) or (3) is satisfied.

(2) Both of the following apply:
(a) the applicant is a member of the same family unit as an applicant mentioned in subclause 866.221(2);
(b) the applicant mentioned in subclause 866.221(2) has been granted a Subclass 866 (Protection) visa.

(3) Both of the following apply:
(a) the applicant is a member of the same family unit as an applicant mentioned in subclause 866.221(4);

Federal Register of Legislative Instruments F2013C01002

(b) the applicant mentioned in subclause 866.221(4) has been granted a Subclass 866 (Protection) visa.

866.231

The applicant has not been made an offer of a permanent stay in Australia as described in item 3 or 4 of the table in subregulation 2.07AQ(3).

866.232

The applicant does not hold a Resolution of Status (Class CD) visa.

866.3—Secondary criteria

Note: All applicants must satisfy the primary criteria.

866.4—Circumstances applicable to grant

866.411

The applicant must be in Australia.

866.5—When visa is in effect

866.511

Permanent visa permitting the holder to travel to and enter Australia for a period of 5 years from the date of grant.

866.6—Conditions

866.611

Condition 8559.

Federal Register of Legislative Instruments F2013C01002

Legislative Instruments Act 2003

No. 139, 2003 as amended

Compilation start date:	1 July 2013
Includes amendments up to:	Act No. 13, 2013

Prepared by the Office of Parliamentary Counsel, Canberra

About this compilation

The compiled Act

This is a compilation of the *Legislative Instruments Act 2003* as amended and in force on 1 July 2013. It includes any amendment affecting the compiled Act to that date.

This compilation was prepared on 9 July 2013.

The notes at the end of this compilation (the ***endnotes***) include information about amending Acts and instruments and the amendment history of each amended provision.

Uncommenced provisions and amendments

If a provision of the compiled Act is affected by an uncommenced amendment, the text of the uncommenced amendment is set out in the endnotes.

Application, saving and transitional provisions for amendments

If the operation of an amendment is affected by an application, saving or transitional provision, the provision is identified in the endnotes.

Modifications

If a provision of the compiled Act is affected by a textual modification that is in force, the text of the modifying provision is set out in the endnotes.

Provisions ceasing to have effect

If a provision of the compiled Act has expired or otherwise ceased to have effect in accordance with a provision of the Act, details of the provision are set out in the endnotes.

Part 5—Parliamentary scrutiny of legislative instruments

37 The purpose of the Part

The purpose of this Part is to facilitate the scrutiny by the Parliament of registered legislative instruments and to set out the circumstances and manner in which such instruments, or provisions of such instruments, may be disallowed, as well as the consequences of such disallowance.

Note: Section 44 provides that certain instruments are exempted from the operation of section 42.

38 Tabling of legislative instruments

(1) The Office of Parliamentary Counsel must arrange for a copy of each legislative instrument registered under Division 2 of Part 4 to be delivered to each House of the Parliament to be laid before each House within 6 sitting days of that House after the registration of the instrument.

(2) For the avoidance of doubt, subsection (1) applies in relation to any legislative instrument made on or after the commencing day even though the enabling legislation for legislative instruments of that kind:

(a) may have been enacted or made before the commencing day; and

(b) may have provided that legislative instruments of that kind are not disallowable.

(3) If a copy of a legislative instrument that is required to be laid before each House of the Parliament is not so laid in accordance with this section, the legislative instrument ceases to have effect immediately after the last day for it to be so laid.

ComLaw Authoritative Act C2013C00347

39 Additional material to be tabled with the legislative instrument

(1) If a rule-maker lodges an explanatory statement relating to a legislative instrument:

(a) at the time of lodging the legislative instrument for registration; or

(b) at a later time before a copy of the legislative instrument is delivered to each House of the Parliament to be laid before it;

the Office of Parliamentary Counsel must also arrange for the delivery to that House, to be laid before it, with the copy of that legislative instrument, a copy of that explanatory statement.

(2) If a rule-maker fails to lodge an explanatory statement relating to a legislative instrument with the Office of Parliamentary Counsel before the Office arranges for a copy of the legislative instrument to be delivered to a particular House of the Parliament, the rule-maker must, as soon as possible, deliver to that House, to be laid before it:

(a) a copy of the explanatory statement; and

(b) a written statement why the explanatory statement was not provided to the Office in time to be delivered to the House with the legislative instrument.

40 Regulations may specify manner of delivery of certain documents

The regulations may specify the manner, which may include delivery by an electronic means, by which documents required to be laid before a House of the Parliament in accordance with section 38 or 39 may be delivered to that House for that purpose.

41 Incorporated material may be required to be made available

A House of the Parliament may, at any time while a legislative instrument is subject to disallowance, require any document incorporated by reference in the instrument to be made available for inspection by that House:

(a) at a place acceptable to the House; and

(b) at a time specified by the House.

ComLaw Authoritative Act C2013C00347

42 Disallowance of legislative instruments

(1) If:

(a) notice of a motion to disallow a legislative instrument or a provision of a legislative instrument is given in a House of the Parliament within 15 sitting days of that House after a copy of the instrument was laid before that House; and

(b) within 15 sitting days of that House after the giving of that notice, the House passes a resolution, in pursuance of the motion, disallowing the instrument or provision;

the instrument or provision so disallowed then ceases to have effect.

(2) If:

(a) notice of a motion to disallow a legislative instrument or a provision of a legislative instrument is given in a House of the Parliament within 15 sitting days of that House after a copy of the instrument was laid before that House; and

(b) at the end of 15 sitting days of that House after the giving of that notice of motion:

(i) the notice has not been withdrawn and the motion has not been called on; or

(ii) the motion has been called on, moved and (where relevant) seconded and has not been withdrawn or otherwise disposed of;

the instrument or provision specified in the motion is then taken to have been disallowed and ceases at that time to have effect.

(3) If:

(a) notice of a motion to disallow a legislative instrument or a provision of a legislative instrument is given in a House of the Parliament within 15 sitting days of that House after a copy of the instrument was laid before that House; and

(b) before the end of 15 sitting days of that House after the giving of that notice of motion, the House of Representatives is dissolved or expires, or the Parliament is prorogued; and

(c) at the time of the dissolution, expiry or prorogation, as the case may be:

ComLaw Authoritative Act C2013C00347

(i) the notice has not been withdrawn and the motion has not been called on; or

(ii) the motion has been called on, moved and (where relevant) seconded and has not been withdrawn or otherwise disposed of;

the legislative instrument is taken, for the purposes of subsections (1) and (2), to have been laid before the first-mentioned House on the first sitting day of that first-mentioned House after the dissolution, expiry or prorogation, as the case may be.

44 Legislative instruments that are not subject to disallowance

(1) Section 42 does not apply in relation to a legislative instrument, or a provision of a legislative instrument, made on or after the commencing day, if the enabling legislation for the instrument (not being the *Corporations Act 2001*):

(a) facilitates the establishment or operation of an intergovernmental body or scheme involving the Commonwealth and one or more States; and

(b) authorises the instrument to be made by the body or for the purposes of the body or scheme;

unless the instrument is a regulation, or the enabling legislation or some other Act has the effect that the instrument is disallowable.

(2) Section 42 does not apply in relation to a legislative instrument, or a provision of a legislative instrument, that is included in the table below unless the instrument or provision is subject to disallowance under its enabling legislation or by means of some other Act:

Legislative instruments that are not subject to disallowance

Item	Particulars of instrument
1	Determinations under subsection 5(2) of the *Australian Citizenship Act 2007*
2	Determinations specifying drugs, made under section 4A of the *Australian Federal Police Act 1979*
3	Statutes made under the *Australian National University Act 1991* or rules or orders made under those statutes

Legislative instruments that are not subject to disallowance	
Item	**Particulars of instrument**
4	Instruments made under section 32 of the *Australian Postal Corporation Act 1989*
5	Rules made under section 60 of the *Australian Research Council Act 2001*
6	Standards issued under section 122 of the *Broadcasting Services Act 1992*
7	Amendments under section 128 of the *Broadcasting Services Act 1992* to standards under Part 9 of that Act
8	Fee waiver principles made under subsection 91(1A) of the *Classification (Publications, Films and Computer Games) Act 1995*
10	Determinations made under paragraph 153L(1)(c), 153P(2)(c) or 153Q(1)(c) or subsection 153ZIH(2) of the *Customs Act 1901*
12	Instruments made under subsection 161J(2) or (3) of the *Customs Act 1901*
13	Tariff Concession Orders made under section 269P or 269Q of the *Customs Act 1901*
14	Instruments made under section 269SC or 269SD of the *Customs Act 1901*
15	By-laws made under section 271 of the *Customs Act 1901* for the purposes of Schedule 4 to the *Customs Tariff Act 1995*
16	Revocations of Commercial Tariff Concession Orders to which section 20 of the *Customs Legislation (Tariff Concessions and Anti-Dumping) Amendment Act 1992* applies
17	Instruments made under section 303CA, 344 or 350 of the *Environment Protection and Biodiversity Conservation Act 1999*
18	By-laws made under section 165 of the *Excise Act 1901* for the purposes of the Excise Tariff within the meaning of section 4 of the *Excise Act 1901*

ComLaw Authoritative Act C2013C00347

Legislative instruments that are not subject to disallowance	
Item	**Particulars of instrument**
22	Proclamations made under section 5, warrants made under section 6 or rules made under section 7, of the *Flags Act 1953*
23	Proclamations made under subsection 31(1) or (3) of the *Great Barrier Reef Marine Park Act 1975*
24	Guidelines issued under section 13 of the *Higher Education Funding Act 1988*
26	Legislative instruments (other than regulations) under Part 1, 2 or 9 of the *Migration Act 1958*, or legislative instruments under Part 1, 2 or 5, or Schedule 1, 2, 4, 5A, 6, 6A or 8, of the regulations made under that Act
27	Declarations made by Ministers under section 32 of the *Mutual Recognition Act 1992*
28	Instruments made under subsection 203AH(1) of the *Native Title Act 1993*
29	Directions issued under section 20 of the *Parliamentary Service Act 1999*
30	Instruments made under section 23 or subsection 24(3) of the *Parliamentary Service Act 1999*
31	Access regimes made under section 12, variations of such access regimes under section 14, revocation of access regimes made under section 15, determinations and variations of standards under section 18, or instruments made under section 25, of the *Payment Systems (Regulation) Act 1998*
32	Directions issued under section 21 of the *Public Service Act 1999*
33	Instruments made under section 23 or subsection 24(3) of the *Public Service Act 1999*
34	Instruments made under section 2A, 2B, or 12, subsection 13(1), section 20B, subsection 26(2) or section 26A of the *Quarantine Act 1908*
35	Instruments made under subsection 60(1) or 106(1) of the *Radiocommunications Act 1992*

Legislative instruments that are not subject to disallowance	
Item	**Particulars of instrument**
36	Instruments made under subsection 463(1) of the *Telecommunications Act 1997*
37	Declarations made by Ministers under section 31 of the *Trans-Tasman Mutual Recognition Act 1997*
38	Instruments made under Annual Appropriation Acts
39	Instruments (other than regulations) relating to superannuation
40	Legislative instruments that, in accordance with the provisions of the enabling legislation, do not commence unless they are approved by either or both of the Houses of the Parliament
41	Ministerial directions to any person or body
42	Proclamations that provide solely for the commencement of Acts or of provisions of Acts
43	Certificates issued by the Attorney-General under section 10 or 11, or under subsection 51(1), of this Act
44	Instruments that are prescribed by the regulations for the purposes of this table

(3) The inclusion of a kind of instrument in the table in subsection (2) does not imply that every instrument of that kind is a legislative instrument.

45 Effect of a legislative instrument ceasing to have effect

(1) If a legislative instrument (the ***affected instrument***), or a provision of a legislative instrument (the ***affected provision***), ceases, at a particular time, to have effect under subsection 38(3) or 42(1) or (2), the operation of that subsection in relation to the affected instrument or provision has the same effect as if the affected instrument or provision had been repealed with effect from that time.

(2) If:

ComLaw Authoritative Act C2013C00347

(a) a legislative instrument (the ***repealing instrument***) or a provision (the ***repealing provision***) of a legislative instrument either:

(i) ceases under subsection 38(3) or section 42 to have effect at a particular time (the ***cessation time***); or

(ii) would so cease to have effect then if it had not already been repealed by section 48A or 48C; and

(b) the repealing instrument or repealing provision wholly or partly repealed another legislative instrument or law, or a provision of another legislative instrument or law, that was in force immediately before the repealing instrument or repealing provision commenced;

the repealed instrument, law or provision revives from the cessation time as if the repealing instrument or repealing provision had not been made.

(3) Subsection (2) does not have the effect of reviving a legislative instrument, law or provision if, before the date when it would have been revived, Part 6 would have repealed it had it not already been repealed by the repealing instrument or the repealing provision.

46 Legislative instruments not to be remade while required to be tabled

(1) If a legislative instrument (the ***original legislative instrument***) has been registered, no legislative instrument the same in substance as the original legislative instrument is to be made during the period defined by subsection (2) unless both Houses of the Parliament by resolution approve the making of an instrument the same in substance as the original legislative instrument.

(2) The period referred to in subsection (1) is the period starting on the day on which the original legislative instrument was registered and ending at the end of 7 days after:

(a) if the original legislative instrument has been laid, in accordance with subsection 38(1), before both Houses of the Parliament on the same day—that day; or

(b) if the original legislative instrument was so laid before both Houses on different days—the later of those days; or

ComLaw Authoritative Act C2013C00347

(c) if the original legislative instrument has not been so laid before both Houses—the last day on which subsection 38(1) could have been complied with.

(3) An instrument made in contravention of this section has no effect.

47 Legislative instruments not to be remade while subject to disallowance

(1) If notice of a motion to disallow a legislative instrument, or a provision of a legislative instrument, has been given in a House of the Parliament within 15 sitting days after the instrument has been laid before that House, a legislative instrument, or a provision of a legislative instrument, that is the same in substance as the first-mentioned instrument or provision, must not be made unless:

(a) the notice has been withdrawn; or

(b) the instrument or provision is taken to have been disallowed under subsection 42(2); or

(c) the motion has been withdrawn or otherwise disposed of; or

(d) subsection 42(3) has applied in relation to the instrument.

(2) If:

(a) because of subsection 42(3), a legislative instrument is taken to have been laid before a House of the Parliament on a particular day; and

(b) notice of a motion to disallow the instrument or a provision of the instrument has been given in that House within 15 sitting days after that day;

a legislative instrument, or a provision of a legislative instrument, that is the same in substance as the first-mentioned instrument or provision must not be made unless:

(c) the notice has been withdrawn; or

(d) the first-mentioned instrument or provision is taken to have been disallowed under subsection 42(2); or

(e) the motion has been withdrawn or otherwise disposed of; or

(f) subsection 42(3) has applied again in relation to the first-mentioned instrument.

ComLaw Authoritative Act C2013C00347

(3) A legislative instrument or a provision of a legislative instrument made in contravention of this section has no effect.

(4) This section does not limit the operation of section 46 or 48.

48 Disallowed legislative instruments not to be remade unless disallowance resolution rescinded or House approves

(1) If, under section 42, a legislative instrument or a provision of a legislative instrument is disallowed, or is taken to have been disallowed, a legislative instrument, or a provision of a legislative instrument, that is the same in substance as the first-mentioned instrument or provision, must not be made within 6 months after the day on which the first-mentioned instrument or provision was disallowed or was taken to have been disallowed, unless:

(a) if the first-mentioned instrument or provision was disallowed by resolution—the resolution has been rescinded by the House of the Parliament by which it was passed; or

(b) if the first-mentioned instrument or provision was taken to have been disallowed—the House of the Parliament in which notice of the motion to disallow the instrument or provision was given by resolution approves the making of a legislative instrument or provision the same in substance as the first-mentioned instrument or provision.

(2) Any legislative instrument or provision made in contravention of this section has no effect.

ComLaw Authoritative Act C2013C00347