



Australian Government
Department of Home Affairs

Submission

For decision
PDMS Ref. Number: MS24-002313
Date of Clearance: 5/11/2024

To Minister for Immigration and Multicultural Affairs
Subject s. 47C(1) for the Migration Amendment (Bridging Visa Conditions) Regulations 2024

Timing

s. 47C(1)

Recommendations

That you:

1.

s. 47C(1)

☒ agreed ☐ not agreed

2. sign and date the letter to the Prime Minister at
Attachment A.

☒ signed ☐ not signed

Minister for Home Affairs, Minister for Immigration and
Multicultural Affairs, Minister for Cyber Security

Signature.....

Date.....5/11/2024

Minister's Comments

Key Issues

1. On 6 November 2024, the High Court will deliver its judgment in the matter of YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs (S27/2024) (**YBFZ**), in which the plaintiff has sought to challenge the constitutional validity of the electronic monitoring and curfew conditions of his Subclass 070 (Bridging (Removal Pending)) visa (**BVR**). The plaintiff submitted that both conditions are punitive and therefore cannot be imposed by the Executive.

2.

s. 47C(1)

3.

s. 34(3)

4.

5.

s. 42(1)

6.

s. 42(1)

7.

8.

Background

s. 47C(1)

9. On 6 August 2024, the High Court heard the oral submissions in the matter of YBFZ, in which the plaintiff sought to challenge the constitutional validity of the electronic monitoring and curfew conditions of his Subclass 070 (Bridging (Removal Pending)) visa. The plaintiff submitted that both conditions are punitive and therefore cannot be imposed by the Executive, in accordance with a line of authority extending back to *Chu Keng Lim v Minister for Immigration and Ethnic Affairs* (1992) 176 CLR 1.
10. The Minister's submissions argued that neither condition should attract a default characterisation as punitive. In the alternative, the Minister submitted that the conditions are reasonably capable of being seen as necessary for a legitimate non-punitive purpose, that being the protection of the Australian community.

11.

s. 42(1)

12.

s. 47E(d)

Proposed Regulations

13. A further submission will be presented to you as soon as possible after judgment on 6 November 2024 with details of the final version of the proposed Regulations for your consideration and approval. s. 34(3)

15. s. 42(1), s. 47C(1)

16. s. 47C(1)

Timing/making

17. s. 42(1)
s. 34(3)

Consultation – internal/external

18. s. 47C(1)
19. s. 47C(1)

Consultation – Secretary / Associate Secretary Immigration / ABF Commissioner

20. s. 47C(1)
21. s. 47C(1)
22. s. 47C(1)

Client service implications

23. s. 47E(d)

Risks and Sensitivities

24. s. 47E(d)

25. The information contained in this submission is classified and should not be publicly released without the authority of the Department of Home Affairs. In accordance with our long-standing practices, should you wish for unclassified media lines to be prepared in relation to this issue please contact the Home Affairs Media Operations team – media@homeaffairs.gov.au.

Financial/systems/legal/deregulation/media implications

26. Nil

Attachments

Attachment A Letter to the Prime Minister

Authorising Officer
Cleared by:
Kevin Cunnington Assistant Secretary Legislation Branch
Date: 5/11/2024 Mob: s. 22(1)(a)(ii)

Contact Officer: Kevin Cunnington, Assistant Secretary, Legislation Branch, Ph: s. 22(1)(a)(ii) / Mob: s. 22(1)(a)(ii)

CC Assistant Minister for Immigration
Assistant Minister for Citizenship and Multicultural Affairs
Secretary
Associate Secretary Immigration
ABF Commissioner
Group Manager Legal
Group Manager Immigration Policy
Group Manager Immigration Compliance
First Assistant Secretary Immigration Policy
Assistant Commissioner Immigration Compliance Operations
Assistant Secretary Compliance & Community Protection Policy
Assistant Secretary Migration & Citizenship Litigation



Australian Government
Department of Home Affairs

Submission

For decision

PDMS Ref. Number: MS24-001352

Date of Clearance: 6/11/2024

To Minister for Home Affairs, Minister for Immigration and Multicultural Affairs, Minister for Cyber Security

Subject For approval and making of the Migration Amendment (Bridging Visa Conditions) Regulations 2024

Timing

S. 47C(1)

Recommendations

That you:

- S. 47C(1)**

☒ agreed / not agreed / please discuss
- S. 47C(1)** the Migration Amendment (Bridging Visa Conditions) Regulations 2024 at Attachment A;

☒ signed / not signed
- S. 47C(1)** the Federal Executive Council Minute Paper at Attachment B;

☒ signed / not signed
- initial** each page of the Explanatory Memorandum on the bottom right corner at Attachment C;

☒ initialled / not initialled
- approve** the Explanatory Statement, including the Statement of Compatibility with Human Rights at Attachment D.

☒ approved / not approved

Minister for Home Affairs, Minister for Immigration and Multicultural Affairs, Minister for Cyber Security

Signature.....

Date: 6/11/2024

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Minister's Comments

Key Issues

1. On 6 November 2024, the High Court delivered its judgment in the matter of *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* [2024] HCA 40 (**YBFZ**), in which the plaintiff sought to challenge the constitutional validity of conditions 8620 (**curfew condition**) and 8621 (**electronic monitoring condition**) of his Subclass 070 (Bridging (Removal Pending)) visa (**BVR**). The plaintiff submitted that both conditions are punitive and therefore cannot be imposed by the Executive.
2. The majority of the Court found that paragraphs 070.612A(1)(a) and (d) of Schedule 2 to the Migration Regulations - that is both the provisions which imposed conditions 8621 and 8620 respectively - are invalid as they are prima facie punitive, are not reasonably capable of being seen as necessary for a legitimate and non-punitive purpose, and thus infringe Ch III of the Constitution.
3. The existing clause 070.612A(1) of Schedule 2 of the *Migration Regulations 1994* (**the Migration Regulations**), as discussed further in 'Background', operates to require the Minister to impose certain conditions on BVR holders on a mandatory basis, unless the Minister is satisfied that it is not reasonably necessary to impose that condition for the protection of any part of the Australian community (emphasis added) (**the community protection test**).
4. The *Migration Amendment (Bridging Visa Conditions) Regulations 2024* (**the proposed Regulations**) would change the existing community protection test on all four conditions under subclause 070.612A(1) to a much higher 'serious harm' threshold test, where the Minister must impose each of the conditions only if the Minister is satisfied, on the balance of probabilities, that the BVR holder poses a substantial risk of seriously harming any part of the Australian community by committing a serious offence, and the imposition of such condition is reasonably necessary, reasonably appropriate and adapted for the purpose of protecting any part of the Australian community from serious harm.
5. A 'serious offence' would be an offence punishable by a maximum sentence of imprisonment for life or for more than 5 years, and which involves certain specified conduct (provided for a new definition of 'serious offence' in clause 070.111). s. 42(1)

s. 34(3)

s. 34(3)

7.

s. 42(1)

8.

s. 47C(1)

9.

s. 47C(1)

10. The documents for your signature, approval and initials (where indicated) are the:

- Proposed Regulations for your signature s. 47C(1) at Attachment A;
- Minute Paper for your signature s. 47C(1) at Attachment B;
- Explanatory Memorandum for the proposed Regulations for your initials on each page on the bottom right corner at Attachment C;
- Explanatory Statement, including the Statement of Compatibility with Human Rights for your approval at Attachment D.

Background

s. 47C(1)

11. On 8 November 2023, the High Court in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCA 37 (**NZYQ**) unanimously held that indefinite detention of an unlawful non-citizen cannot be seen as necessary for a legitimate and non-punitive purpose if there was no real prospect of their removal from Australia becoming practicable in the reasonably foreseeable future.

12

s. 47E(d)

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s. 47E(d)

13. On 6 August 2024, the Full Bench of the High Court of Australia heard the matter of YBFZ. There, the plaintiff challenged the validity of the community protection test, as well as the power for the Minister to impose both curfew and electronic monitoring conditions, arguing that they are properly characterised as punitive and therefore invalid because it is contrary to Ch III of the Constitution.
14. On 6 November 2024, the majority of the High Court found that both electronic monitoring and curfew conditions are punitive and cannot be justified as being reasonably capable of being seen as necessary for a legitimate and non-punitive purpose, and therefore paragraphs 070.612A(1)(a) and (d) of Schedule 2 to the Migration Regulations infringe Ch III of the Constitution and are invalid.

Current clause 070.612A of Schedule 2 of the Migration Regulations 1994

15. Clause 070.612A of Schedule 2 to the Migration Regulations applies to all BVR holders who are granted BVRs under regulations 2.25AA or 2.25AB of the Migration Regulations (see subclause 070.612A(3) of Schedule 2).
16. Subclause 070.612A(1) currently provides that the following conditions must be imposed by the Minister, unless the Minister is satisfied that it is not reasonably necessary to impose that condition for the protection of any part of the Australian community, including because of any other conditions imposed by or under provisions of Division 070.6 of Schedule 2 (emphasis added) ("**community protection test**"):
 - condition 8621 (electronic monitoring);
 - condition 8617 (change in financial circumstances reporting);
 - condition 8618 (bankruptcy reporting);
 - condition 8620 (curfew).
17. The Minister is required to decide on whether each of those condition(s) should be imposed based on the order listed, pursuant to subclause 070.612A(2).

Measure in this proposed Regulations

18. The proposed Regulations would change the existing community protection test under subclause 070.612A(1) of Schedule 2 of the Migration Regulations for all four conditions by introducing a new 'substantial risk of serious harm' requirement that the Minister must consider prior to imposing BVR conditions to BVR visa holders.

19.

s. 47E(d)

20.

s. 42(1)

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s. 42(1)

21.

s. 47E(d)

22. Each limb would need be satisfied by the Minister in the sequential order provided in the proposed clause as required under subclause 070.612A(2) of Schedule 2. All of the limbs must be satisfied before the Minister can impose each BVR condition(s) on the non-citizen.
23. Current subclause 070.612A(3) of Schedule 2 to the Migration Regulations provides that the subclause applies to a BVR visa if that visa was granted under regulation 2.25AA of the Migration Regulations and, at the time of grant, there was no real prospect of the removal of the BVR holder from Australia becoming practicable in the reasonably foreseeable future; or if that visa was granted under regulation 2.25AB. This provision would not change under the new community protection test.
24. For the purposes of the new paragraph (b), the proposed Regulations would insert a definition provision under clause 070.111 of Schedule 2, by providing that 'serious offence' means an offence against a law of the Commonwealth, a State or a Territory that is punishable by imprisonment for life or for a period, or a maximum period of, at least 5 years, and the conduct constituting the offence involves or would involve the below:
 - (i) loss of a person's life or serious risk of loss of a person's life; or
 - (ii) serious personal injury or serious risk of serious personal injury; or
 - (iii) sexual assault; or
 - (iv) the production, publication, possession, supply or sale of, or other dealing in, child abuse material (within the meaning of Part 10.6 of the *Criminal Code*); or
 - (v) consenting to or procuring the employment of a child, or employing a child, in connection with material referred to in subparagraph (iv); or
 - (vi) acts done in preparation for, or to facilitate, the commission of a sexual offence against a person under 16; or
 - (vii) domestic or family violence (including in the form of coercive control); or
 - (viii) threatening or inciting violence towards a person or group of persons on the ground of an attribute of the person or one or more members of the group; or
 - (ix) people smuggling; or
 - (x) human trafficking.

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31.

s. 42(1), s. 47E(d)

32.

33. The proposed Regulations will also insert subclause 070.612A(4) into Schedule 2, by noting that nothing in subclause 070.612A(1) requires the Minister to decide whether or not to impose the new community protection test, if the visa must be granted without it being subject to that condition under subsection 76E(4) of the Migration Act.

- Subsection 76E(4) of the Migration Act provides that the Minister must grant the BVR visa holder their second visa, under a prescribed provision of the regulations, that is not subject to any one or more of the conditions prescribed for the purposes of paragraph 76E(1)(a), if the non-citizen makes representations in accordance with the invitation, and the Minister is satisfied that those conditions are not reasonably necessary for the protection of any part of the Australian community.
- Relatedly, paragraph 76E(1)(a) provides that section 76E applies to a decision to grant a non-citizen their first BVR visa, if the first visa is subject to one or more prescribed conditions, and at the time the first visa is granted, there is no real prospect of the removal of the non-citizen from Australia becoming practicable in the reasonably foreseeable future. Regulation 2.25AD of the Migration Regulations prescribes conditions 8617, 8618, 8620 and 8621 for the purposes of paragraph 76E(1)(a) of the Migration Act.

- s. 42(1)

34.

s. 47C(1)

Consultation – internal/external

35.

s. 47C(1)

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s. 47E(d)

43. s. 42(1), s. 47E(d)
44.

45. The information contained in this submission is classified and should not be publicly released without the authority of the Department of Home Affairs. In accordance with our long-standing practices, should you wish for unclassified media lines to be prepared in relation to this issue please contact the Home Affairs Media Operations team – media@homeaffairs.gov.au.

Financial/systems/legal/deregulation/media implications

46. Nil.

Attachments

- Attachment A Migration Amendment (Bridging Visa Conditions) Regulations 2024
- Attachment B Federal Executive Council Minute Paper
- Attachment C Explanatory Memorandum
- Attachment D Explanatory Statement, including the Statement of Compatibility with Human Rights for the proposed Regulations
- Attachment E MS24-002313 - Letter to the Prime Minister, including Prime Minister signed MC24-142630

Authorising Officer
Cleared by: Kevin Cunnington Assistant Secretary Legislation Branch Date: 6 November 2024 Mob: s. 22(1)(a)(ii)

Contact Officer: Kevin Cunnington, Assistant Secretary, Legislation Branch, Ph: s. 22(1)(a)(ii) Mob: s. 22(1)(a)(ii)

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CC

Assistant Minister Immigration
Secretary
ABF Commissioner
DS Executive
Group Manager Legal
Group Manager Immigration Policy
Group Manager Immigration Operations
FAS Executive Coordination
Assistant Secretary Compliance and Community Protection
Assistant Secretary Immigration Reform
Assistant Secretary Legislation
Assistant Secretary Migration & Citizenship Law
Assistant Secretary Migration & Citizenship Litigation
Assistant Secretary CSO Taskforce

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Migration Amendment (Bridging Visa Conditions) Regulations 2024

I, the Honourable Sam Mostyn AC, Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following regulations.

Dated 2024

Sam Mostyn AC
Governor-General

By Her Excellency's Command



Tony Burke
Minister for Immigration and Multicultural Affairs

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Contents

1	Name.....	1
2	Commencement	1
3	Authority.....	1
4	Schedules	1
Schedule 1—Amendments		2
	<i>Migration Regulations 1994</i>	<i>2</i>

1 Name

This instrument is the *Migration Amendment (Bridging Visa Conditions) Regulations 2024*.

2 Commencement

- (1) Each provision of this instrument specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. The whole of this instrument	Immediately after this instrument is registered.	

Note: This table relates only to the provisions of this instrument as originally made. It will not be amended to deal with any later amendments of this instrument.

- (2) Any information in column 3 of the table is not part of this instrument. Information may be inserted in this column, or information in it may be edited, in any published version of this instrument.

3 Authority

This instrument is made under the *Migration Act 1958*.

4 Schedules

Each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1—Amendments

Migration Regulations 1994

1 Clause 070.111 of Schedule 2

Insert:

serious offence means an offence against a law of the Commonwealth, a State or a Territory where:

- (a) it is an offence punishable by imprisonment for life or for a period, or maximum period, of at least 5 years; and
- (b) the particular conduct constituting the offence involves or would involve:
 - (i) loss of a person's life or serious risk of loss of a person's life; or
 - (ii) serious personal injury or serious risk of serious personal injury; or
 - (iii) sexual assault; or
 - (iv) the production, publication, possession, supply or sale of, or other dealing in, child abuse material (within the meaning of Part 10.6 of the *Criminal Code*); or
 - (v) consenting to or procuring the employment of a child, or employing a child, in connection with material referred to in subparagraph (iv); or
 - (vi) acts done in preparation for, or to facilitate, the commission of a sexual offence against a person under 16; or
 - (vii) domestic or family violence (including in the form of coercive control); or
 - (viii) threatening or inciting violence towards a person or group of persons on the ground of an attribute of the person or one or more members of the group; or
 - (ix) people smuggling; or
 - (x) human trafficking.

2 Subclause 070.612A(1) of Schedule 2

Repeal the subclause, substitute:

- (1) For each of conditions 8621, 8617, 8618 and 8620, the Minister must impose the condition if:
 - (a) subclause (3) applies to the visa; and
 - (b) despite the other conditions imposed on the visa by or under this subclause or another provision of this Division, the Minister is satisfied on the balance of probabilities that the holder poses a substantial risk of seriously harming any part of the Australian community by committing a serious offence; and
 - (c) the Minister is satisfied on the balance of probabilities that the imposition of the condition (in addition to the other conditions imposed by or under this subclause or another provision of this Division) is:
 - (i) reasonably necessary; and
 - (ii) reasonably appropriate and adapted;for the purpose of protecting any part of the Australian community from serious harm by addressing that substantial risk.

Note: See regulation 2.25AE for the period for which the visa is subject to these conditions (if imposed).

3 Subclause 070.612A(2) of Schedule 2

Omit “listed” (wherever occurring), substitute “mentioned”.

4 At the end of clause 070.612A of Schedule 2

Add:

- (4) Nothing in this clause requires the Minister to decide whether or not to impose a condition mentioned in subclause (1) if the visa must, under subsection 76E(4) of the Act, be granted without it being subject to that condition.

5 In the appropriate position in Schedule 13

Insert:

Part 143—Amendments made by the Migration Amendment (Bridging Visa Conditions) Regulations 2024

14301 Operation of amendments

The amendments of these Regulations made by Schedule 1 to the *Migration Amendment (Bridging Visa Conditions) Regulations 2024* apply in relation to a visa granted on or after the commencement of that Schedule.



MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

Departmental No. 446 of 2024.....

Minute Paper for the Executive Council

Executive Council

Meeting No.

Subject

Migration Act 1958

*Migration Amendment (Bridging Visa Conditions) Regulations
2024*

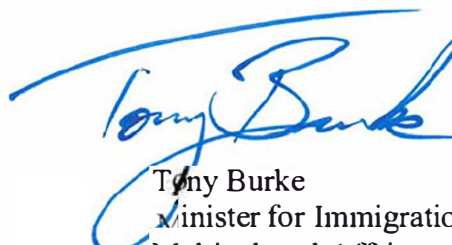
Approved in Council

Recommended for the approval of Her Excellency the Governor-General in Council that she make the Regulations in the attached form.

.....
Sam Mostyn AC
Governor-General

.....
Filed in the Records
of the Council

.....
Secretary to the Executive Council


Tony Burke
Minister for Immigration and
Multicultural Affairs

EXPLANATORY MEMORANDUM

Minute No. 446 of 2024 – Minister for Immigration and Multicultural Affairs

Subject - *Migration Regulations 1994*

Migration Amendment (Bridging Visa Conditions) Regulations 2024

The proposed instrument would amend the community protection test that determines whether certain visa conditions must be imposed on a Subclass 070 (Bridging (Removal Pending)) visa, in response to the High Court's decision in *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* [2024] HCA 40 on 6 November 2024.

The *Migration Act 1958* (the Migration Act) is an Act relating to the entry into, and presence in, Australia of non-citizens, and the departure or deportation from Australia of non-citizens and certain other persons.

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

In addition, subsection 40(1) of Migration Act also provides the power for regulations to be made to prescribe visa conditions.

The *Migration Amendment (Bridging Visa Conditions) Regulations 2024* (the proposed Regulations) would amend the *Migration Regulations 1994* (the Migration Regulations) to require the Minister to impose the following visa conditions in that order when granting a Subclass 070 (Bridging (Removal Pending)) visa (BVR), only if the Minister is satisfied on the balance of probabilities that the BVR holder poses a substantial risk of seriously harming any part of the Australian community - by committing a serious offence (with a new definition of 'serious harm' to be inserted into clause 070.111) - under any Australian law. The proposed Regulations would also provide that the Minister must be satisfied that imposition of each of the four conditions mentioned below is, on the balance of probabilities, reasonably necessary and reasonably appropriate and adapted for the purpose of protecting any part of the Australian community from serious harm by addressing that significant risk:

- condition 8621 (electronic monitoring);
- condition 8617 (financial circumstances reporting);
- condition 8618 (debt or bankruptcy reporting);
- condition 8620 (curfew).

The previous subclause 070.612A(1) of Schedule 2 to the Migration Regulations required the Minister to impose conditions 8621, 8617, 8618 and 8620 on a non-citizen who subclause 070.612A(3) of Schedule 2 applied to, unless the Minister was satisfied that it was

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not reasonably necessary to impose each conditions to protect any part of the Australian community.

On 6 November 2024, the High Court delivered their judgment in the matter of *YBFZ v Citizenship and Multicultural Affairs & Anor* [2024] HCA 40 (*YBFZ*) finding, by majority, that the imposition of each of the current curfew and the monitoring conditions on a BVR is prima facie punitive and cannot be justified. It follows that the High Court held clause 070.612A(1)(a) and (d) infringe Chapter III of the Constitution and are invalid.

The proposed Regulations would introduce a new community protection test to ensure that the Minister can only impose visa conditions 8621, 8617, 8618 and 8620 conditions using a new confined and specific test listed in the Amendment Regulations, related to protecting any part of the Australian community from serious harm. The new test requires consideration of risk of particular criminal conduct (a serious offence) occurring and the nature, degree and extent of harm the BVR holder may pose to any part of the Australian community.

The majority of the High Court in their reasoning provides that the existing paragraphs 070.612A(1)(a) and (d) of Schedule 2 of the Migration Regulations, that is both the provisions which imposed conditions 8621 and 8620 respectively, are invalid as they are prima facie punitive, are not reasonably capable of being seen as necessary for a legitimate and non-punitive purpose, and thus infringe Ch III of the Constitution.

s. 42(1), s. 47C(1)

Further details of the proposed Regulations are set out in the Attachment. The proposed Regulations would commence immediately after the instrument is registered on the Federal Register of Legislation.

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

The proposed Regulations would be a legislative instrument for the purposes of the *Legislation Act 2003*. Section 17 of that Act provides that the rule-maker must be satisfied that any consultation that is appropriate and reasonably practicable has been undertaken before making a legislative instrument. In developing the proposed Regulations, consultation has been undertaken with various internal stakeholders within the Department of Home Affairs and also with relevant external government agencies, including the Australian Government Solicitor and Attorney-General's Department.

The Minute recommends that the proposed Regulations be made in the form proposed.

Authority: Sections 504(1) and 41(1) of the
Migration Act 1958

ATTACHMENT**Details of the proposed *Migration Amendment (Bridging Visa Conditions) Regulations 2024*****Section 1 – Name of Regulations**

This section would provide that the name of the instrument is the *Migration Amendment (Bridging Visa Conditions) Regulations 2024* (the proposed Regulations).

Section 2 – Commencement

This section would provide that the proposed Regulations would commence immediately after the instrument is registered on the Federal Register of Legislation.

Section 3 – Authority

This section would provide that the proposed Regulations are made under the *Migration Act 1958* (the Migration Act).

Section 4 – Schedules

This section would provide for how the amendments in the proposed Regulations would operate. The effect of this provision would be that the *Migration Regulations 1994* (the Migration Regulations) would be amended as specified in Schedule 1 to this instrument.



Schedule 1 – Amendments***Migration Regulations 1994*****Item [1] – Clause 070.111 of Schedule 2**

This item would insert a new definition of *serious offence* to assist in interpreting the provision within Division 070.6 of Schedule 2 to the Migration Regulations. Under clause 070.111, serious offence would mean an offence against a law of the Commonwealth, a State or a Territory punishable by imprisonment for life or for a period, or maximum period, of at least 5 years, and that particular conduct constituting the offence involves or would involve:

- (i) loss of a person's life or serious risk of loss of a person's life; or
- (ii) serious personal injury or serious risk of serious personal injury; or
- (iii) sexual assault; or
- (iv) the production, publication, possession, supply or sale of, or other dealing in, child abuse material (within the meaning of Part 10.6 of the *Criminal Code*); or
- (v) consenting to or procuring the employment of a child, or employing a child, in connection with material referred to in subparagraph (iv); or
- (vi) acts done in preparation for, or to facilitate, the commission of a sexual offence against a person under 16; or
- (vii) domestic or family violence (including in the form of coercive control); or
- (viii) threatening or inciting violence towards a person or group of persons on the ground of an attribute of the person or one or more members of the group; or
- (ix) people smuggling; or
- (x) human trafficking.

This definition would primarily apply in the context of 'serious offence' as provided in item 2 of Schedule 1 to the proposed Regulations, where the Minister must impose each of the Subclass 070 (Bridging (Removal Pending)) visa (BVR) conditions if the Minister is, among other things, satisfied that on the balance of probabilities the BVR holder poses a substantial risk of seriously harming any part of the community by engaging in conduct that would constitute a 'serious offence'.

The specific term of imprisonment threshold and exhaustive list of elements in paragraphs 070.111(b)(i) to (x) that constitute a 'serious offence' would reflect the intention that the visa condition(s) have a protective purpose, by providing for an objective assessment of the seriousness of the offences that the Minister must turn their mind to prior to imposing the BVR conditions. It is also intended to ensure that subclause 070.612A(1) as introduced in item [2] are intended to be directed at protecting the community from the risk of harm arising from future offending.

Item [2] – Subclause 070.612A(1) of Schedule 2

Item 2 would repeal and substitute subclause 070.612A(1) of Schedule 2 to the Migration Regulations by inserting a new community protection test that the Minister must consider before imposing any conditions on a Subclass 070 (Bridging (Removal Pending)) visa (BVR).

The existing subclause 070.612A(1) of Schedule 2 to the Migration Regulations provides that if subclause 070.612A(3) of Schedule 2 applies when granting a BVR visa, each of the following conditions listed below must be imposed by the Minister, unless the Minister is satisfied that it is not reasonably necessary to impose that condition for the protection of any part of the Australian community (including because of any other conditions imposed by or under another provision of Division 070.6 of Schedule 2):

- (a) 8621 (electronic monitoring);
- (b) 8617 (financial circumstances reporting);
- (c) 8618 (debt or bankruptcy reporting);
- (d) 8620 (curfew).

The note under subclause 070.612A(1) currently refers the reader to regulation 2.25AE, which provides that if the above conditions are imposed on a BVR holder, the visa will be subject to those visa conditions for a period of 12 months from the day that visa is granted. This note would remain unchanged under this proposed Regulations.

The new subclause 070.612A(1) as substituted by item 2 of this proposed Regulations would require the Minister to impose each of the conditions 8621, 8617, 8618 and 8620, in that order as required under the current subclause 070.612A(2) of Schedule 2, if:

- (a) subclause 070.612A(3) applies to the visa; and
- (b) notwithstanding any other conditions on the visa, the Minister is satisfied on the balance of probabilities that the BVR holder poses a substantial risk of seriously harming any part of the Australian community by committing a serious offence; and
- (c) on the balance of probabilities, the Minister is satisfied that the imposition of the condition (in addition to other conditions imposed by or under subclause 070.612A(1) or another provision of Division 070.6) is reasonably necessary, and reasonably appropriate and adapted for the purpose of protecting any part of the Australian community from serious harm by addressing that substantial risk.

Each limb must be satisfied by the Minister in the sequential order pursuant to subclause 070.612A(2) of Schedule 2 of the Migration Regulations.

Currently, subclause 070.612A(3) of Schedule 2 to the Migration Regulations provides that the subclause applies to a BVR visa if that visa was granted under regulation 2.25AA of the Migration Regulations and, at the time of grant, there was no real prospect of the removal of the BVR holder from Australia becoming practicable in the reasonably foreseeable future; or if that visa was granted under regulation 2.25AB.

Item 1 of Schedule 1 to the proposed Regulations would provide for the definition and conducts that would constitute a 'serious offence' for the purpose of paragraph 070.612A(1)(b).

Under the proposed paragraphs 070.612A(1)(b) and (c), the Minister would need to be satisfied on the balance of probabilities that the imposition of each condition and the combined effect of the condition(s) imposed is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the community by addressing that risk. This would mean the imposition of any of the conditions should have a link to enhancing community safety and mitigating the risk identified of a 'serious offence' being committed. The proposed item 2 is also intended to ensure that for the Minister is no longer required to impose the conditions after being positively satisfied of the negative, and also to ensure that the conditions are only directed at the purpose of protecting the community from the risk of harm arising from future offending, the BVR conditions must necessarily be directed at that purpose.

Despite the subject of YBFZ being conditions 8621 and 8620] item 2 would impose a new community protection test on all four BVR conditions to ensure consistent test is considered by the Minister when deciding on the conditions. Item 2 would also demonstrate the Australian Government's intention to prescribing a more onerous requirements when granting a BVR, by applying objective criteria of 'serious offence' that the Minister must direct their attention to, as well as ensuring the BVR conditions have a protective purpose against serious harm to the Australian community, having regard to the risk of harm the non-citizen poses.

The policy intention is to also ensure that the interpretation of 'serious harm' under the proposed subclauses 070.612A(1)(b) and (c) of Schedule 2 to the Migration Regulations would also be distinguished to what amounts to 'serious harm' under sections 5J and 233B of the *Migration Act 1958* (the Migration Act), as well as the *Criminal Code* under the *Criminal Code Act 1995*. 'Serious harm', as is interpreted under this proposed Regulations, is intended to apply only to the limited circumstances of when the Minister is considering whether to impose certain BVR conditions under Part 070 of Schedule 2 to the Migration Regulations in the context of protection against serious harm to any part of the Australian community.

The factors that would be relevant to the Minister's consideration of imposing a BVR condition would continue to include, as it was always required under clause 070.612A(1) of Schedule 2 to the Migration Regulations. but are not limited to:

- the nature, seriousness and frequency of past offending or other serious conduct;
- the extent of rehabilitation (if any) and other matters going to the likelihood of engaging in future serious conduct;
- the extent to which other conditions to which the BVR will be subject address the substantial risk;
- the non-citizen's residential and family circumstances, and any other community support;
- the nature and level of association with and exposure to risk of violent conflict with others (e.g. rivalries, confrontations, etc.);

- the extent to which other factors address the substantial risk (e.g. if the non-citizen is subject to parole conditions, bail conditions, is in criminal detention, is, or is not longer, subject to medical conditions that increase/decrease risk, etc.).

In considering these matters, the Minister would continue to have regard to information relevant to an assessment of the risk of harm the non-citizen poses to any part of the Australian community. This may include things such as:

- the non-citizen's criminal history (if any);
- reports from law enforcement authorities relating to criminal and other serious activities the non-citizen has engaged in or is alleged to have engaged in;
- reports from correctional authorities relating to any time spent by the non-citizen in criminal detention or on parole;
- information about parole conditions or restrictive measures to which the non-citizen will be subject while in the community;
- reports relating to any time spent in immigration detention;
- reports from experts (e.g. psychologists);
- representations from the non-citizen and any representations made on their behalf (e.g. character references).

Item [3] – Subclause 070.612A(2) of Schedule 2

Item 3 would amend subclause 070.612A(2) of Schedule 2 to the Migration Regulations and provide that the Minister must decide whether or not to impose each of the conditions mentioned in subclause (1) in the order in which those conditions are mentioned in that subclause.

Item 3 would be consequential to the proposed amendments to subclause 070.612A(1) of Schedule 2 to the Migration Regulations as mentioned in item 2 of Schedule 1 to this proposed Regulations, as the visa conditions would no longer be 'listed' in that provision, but rather 'mentioned'. It would not affect the substantive operation of the provision.

Item [4] – At the end of clause 070.612A of Schedule 2

Item 4 would insert a new subclause 070.612A(4) of Schedule 2 to the Migration Regulations, clarifying that nothing in this clause would require the Minister to decide whether or not to impose a condition listed in subclause (1) if the visa must, under subsection 76E(4) of the Migration Act, be granted without it being subject to that condition.

Subsection 76E(4) of the Migration Act provides that the Minister must grant the non-citizen another BVR (the second visa), under a prescribed provision of the regulations, that is not subject to any one or more of the conditions prescribed for the purposes of paragraph 76E(1)(a), if the non-citizen makes representations in accordance with the invitation, and the Minister is satisfied that those conditions are not reasonably necessary for the protection of any part of the Australian community.

Paragraph 76E(1)(a) of the Migration Act provides that section 76E applies to a decision to grant a non-citizen a BVR (the first visa), if the first visa is subject to one or more prescribed conditions, and at the time the first visa is granted, there is no real prospect of the removal of the non-citizen from Australia becoming practicable in the reasonably foreseeable future. Regulation 2.25AD of the Migration Regulations prescribes conditions 8617, 8618, 8620 and 8621 for the purposes of paragraph 76E(1)(a) of the Migration Act.

The amendment made by this item would ensure that once the Minister has been satisfied that one or more prescribed conditions are not reasonably necessary for the protection of any part of the Australian community under subsection 76E(4) of the Migration Act, and a second visa must be granted without being subject to that condition, the Minister would not have to decide again under the requirements of subclause 070.612A(1) of Schedule 2 whether or not to impose that condition. This is a technical amendment to clarify the operation of the legislative framework.

Item [5] – In the appropriate position in Schedule 13

Item 5 would insert a new Part 143 in Schedule 13 to the Migration Regulations, “Part [143] Amendments made by the Migration Amendment (Bridging Visa Conditions) Regulations 2024”. The purpose of Part 143 would be to set out the application of the amendments made by the proposed Regulations.

Clause 14301 in the new Part 143 would insert an application provision. The new clause 14301 would provide that the amendments by Schedule 1 to the proposed Regulations apply to a visa granted on or after the commencement of that Schedule. This would mean Schedule 1 would commence immediately after this proposed Regulations is registered onto the Federal Register of Legislation.

