

The Senate

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Standing  
Committee on  
Regulations and  
Ordinances

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Delegated legislation monitor

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# Introduction

The *Delegated legislation monitor* (the monitor) is the regular report of the Senate Standing Committee on Regulations and Ordinances (the committee). The monitor is published at the conclusion of each sitting week of the Parliament, and provides an overview of the committee's scrutiny of instruments of delegated legislation for the preceding period.<sup>1</sup>

## The committee's terms of reference

Senate Standing Order 23 contains a general statement of the committee's terms of reference:

- (1) A Standing Committee on Regulations and Ordinances shall be appointed at the commencement of each Parliament.
- (2) All regulations, ordinances and other instruments made under the authority of Acts of the Parliament, which are subject to disallowance or disapproval by the Senate and which are of a legislative character, shall stand referred to the committee for consideration and, if necessary, report.

The committee shall scrutinise each instrument to ensure:

- (a) that it is in accordance with the statute;
- (b) that it does not trespass unduly on personal rights and liberties;
- (c) that it does not unduly make the rights and liberties of citizens dependent upon administrative decisions which are not subject to review of their merits by a judicial or other independent tribunal; and
- (d) that it does not contain matter more appropriate for parliamentary enactment.

## Work of the committee

The committee scrutinises all disallowable instruments of delegated legislation, such as regulations and ordinances, to ensure their compliance with non-partisan principles of personal rights and parliamentary propriety.

The committee's longstanding practice is to interpret its scrutiny principles broadly, but as relating primarily to technical legislative scrutiny. The committee therefore does not generally examine or consider the policy merits of delegated legislation. In cases where an instrument is considered not to comply with the committee's scrutiny principles, the committee's usual approach is to correspond with the responsible minister or instrument-maker seeking further explanation or clarification of the matter

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1 Prior to 2013, the monitor provided only statistical and technical information on instruments scrutinised by the committee in a given period or year. This information is now most easily accessed via the authoritative Federal Register of Legislative Instruments (FRLI), at [www.comlaw.gov.au](http://www.comlaw.gov.au).

at issue, or seeking an undertaking for specific action to address the committee's concern.

The committee's work is supported by processes for the registration, tabling and disallowance of legislative instruments, which are established by the *Legislative Instruments Act 2003*.<sup>2</sup>

## **Structure of the report**

The report is comprised of the following parts:

- Chapter 1, 'New and continuing matters', sets out new and continuing matters about which the committee has agreed to write to the relevant minister or instrument-maker seeking further information or appropriate undertakings;
- Chapter 2, 'Concluded matters', sets out any previous matters which have been concluded to the satisfaction of the committee, including by the giving of an undertaking to review, amend or remake a given instrument at a future date; related (non-confidential) correspondence is included at Appendix 3;
- Appendix 1 provides an index listing all instruments scrutinised in the period covered by the report;
- Appendix 2 contains the committee's guideline on addressing the consultation requirements of the *Legislative Instruments Act 2003*.
- Appendix 3 contains correspondence relating to concluded matters.

## **Acknowledgement**

The committee wishes to acknowledge the cooperation of the ministers, instrument-makers and departments who assisted the committee with its consideration of the issues raised in this report.

**Senator Sean Edwards**

**Chair**

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2 For further information on the disallowance process and the work of the committee see *Odger's Australian Senate Practice*, 13<sup>th</sup> Edition (2012), Chapter 15.



# Chapter 1

## New and continuing matters

This chapter lists new matters identified by the committee at its meeting on 25 June 2014, and continuing matters in relation to which the committee has received recent correspondence. The committee will write to relevant ministers or instrument makers in relation to substantive matters seeking further information or an appropriate undertaking within the disallowance period.

Matters which the committee draws to the attention of the relevant minister or instrument maker are raised on an advice-only basis and do not require a response.

### Privacy (International Money Transfers) Temporary Public Interest Determination 2014 (No. 2) [F2014L00534]

<b>Purpose</b>	Provides that the Reserve Bank of Australia is taken not to breach section 15 of the <i>Privacy Act 1988</i> in relation to certain acts and practices involved in the overseas disclosure of an individual's personal information in the processing of an international money transfer
<b>Last day to disallow<sup>1</sup></b>	17 July 2014
<b>Authorising legislation</b>	<i>Privacy Act 1988</i>
<b>Department</b>	Attorney-General's

#### Issue:

##### *Drafting*

This instrument is made by the Privacy Commissioner under subsection 80A(2) of the *Privacy Act 1988*. It authorises the Reserve Bank of Australia (RBA) to do certain things that would otherwise be in breach of Australian Privacy Principle (APP) 8.1. The authority is given on the basis that the public interest in collecting the relevant information outweighs adherence to the relevant APP.

The acts and practices of the RBA that are authorised are set out in section 7 of the instrument of the instrument. They include circumstances where:

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1 'Last day to disallow' refers to the last day on which notice may be given of a motion for disallowance in the Senate.

...the RBA, in **conduction** its banking business under the *Banking Act 1959* (section 8(1)), and under the *Reserve Bank Act 1959* (sections 26 and 27), processes an international money transfer (IMT) on behalf of one of its customers [emphasis added].

The committee notes that the apparent typographical error ('in conduction' for 'in conducting') suggests a want of care in the drafting of the instrument. While it may not lead to ambiguity in the operation or interpretation of the instrument, the provision is part of a legislative mechanism authorising what would otherwise be a breach of an APP. In the committee's view, particular care should be taken in the drafting of provisions which authorise intrusions into the personal rights or liberties of individuals (under scrutiny principle (b), the committee is required to ensure that legislative instruments do not unduly trespass on personal rights and liberties). **The committee therefore draws this issue to the attention of the Privacy Commissioner.**

### **Multiple instruments identified in Appendix 1**

The committee has identified a number of instruments, marked by an asterisk (\*) in Appendix 1, that appear to rely on subsection 33(3) of the *Acts Interpretation Act 1901*, which provides that the power to make an instrument includes the power to vary or revoke the instrument. If that is the case, the committee considers that it would be preferable for the ES for any such instrument to identify the relevance of subsection 33(3), in the interests of promoting the clarity and intelligibility of the instrument to anticipated users. **The committee therefore draws this issue to the attention of ministers and instrument-makers responsible for the instruments identified in Appendix 1. The committee provides the following example of a form of words which may be included in an ES where subsection 33(3) of the Acts Interpretation Act 1901 is relevant:**

Under subsection 33 (3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.<sup>2</sup>

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2 For more extensive comment on this issue, see *Delegated legislation monitor* No. 8 of 2013, p. 511.

## Chapter 2

### Concluded matters

This chapter lists matters previously raised by the committee and considered at its meeting on **25 June 2014**. The committee has concluded its interest in these matters on the basis of responses received from ministers or relevant instrument-makers.

Correspondence relating to these matters is included at Appendix 3.

#### **Migration Amendment (Bridging Visas—Code of Behaviour) Regulation 2013 [F2013L02102] (with reference to Code of Behaviour for Public Interest Criterion 4022 - IMMI 13/155 [F2013L02105])**

<b>Purpose</b>	Amends the Migration Regulations 1994 to establish an enforceable code of behaviour for certain Bridging E (Class WE) visa holders (instrument F2013L02105 specifies the code of behaviour for applicants seeking to satisfy the criteria for the grant of a Subclass 050 Bridging (General) visa)
<b>Last day to disallow</b>	13 May 2014
<b>Authorising legislation</b>	Migration Regulations 1994
<b>Department</b>	Immigration and Border Protection

**[The committee first reported on this instrument in Monitor No. 1 of 2014, and subsequently in Monitor No. 5 of 2014. The committee raised concerns and sought further information in relation to:**

- (a) matters more appropriate for parliamentary enactment (this matter was concluded in Monitor No. 5 of 2014);**
- (b) insufficiently defined power;**
- (c) exemption of instrument from disallowance;**
- (d) retrospective effect of instrument; and**
- (e) consultation (this matter was concluded in Monitor No. 5 of 2014).**

**All previous comments on these matters above are reproduced below, followed by the committee's responses to the minister's most recent correspondence (where relevant)].**

#### **Background**

Together, these two instruments establish and specify an enforceable code of behaviour as a visa condition for certain Bridging E (Class WE) visa (BVE) holders.

The first instrument (the regulation) provides that the minister must approve a code of behaviour (the code), compliance with which is made a condition of the BVE. The failure of a relevant visa holder to comply with the code enables the minister to cancel the visa. The consequence of cancellation is that the person 'will be returned to immigration detention and may be transferred to an offshore processing centre'. A person whose visa is cancelled in such circumstances is unable to apply for a further BVE.

The code of behaviour (the code) subsequently made under the authority of the regulation requires BVE holders to comply with the laws of Australia and prescribes certain behaviour, including that a BVE holder must not 'harass, intimidate or bully any other person or group of people or engage in anti-social or disruptive activities that are inconsiderate, disrespectful or threaten the peaceful enjoyment of other members of the community [sic]'. The committee notes that the code is itself not disallowable. However, the committee notes that the content of the code has informed its assessment of the regulation for compliance with the committee's scrutiny principles.

#### **ISSUE:**

##### *(a) Matters more appropriate for parliamentary enactment*

Scrutiny principle (d) of the committee's terms of reference require the committee to consider whether an instrument contains matters more appropriate for parliamentary enactment (that is, matters that should be enacted via principal rather than delegated legislation). This may include instruments which are intended or would have the effect of bringing about 'radical changes in relationships or community attitudes'.<sup>1</sup>

It is noted that, while visa BVE holders do not enjoy the full rights of Australian citizens, such persons are equally subject to Australian law. However, the regulation appears to create potential for such persons to be subject to behavioural standards not applicable to Australian citizens. To this extent, there would appear to be a reasonable possibility that the application of such a code could have the effect of bringing about significant changes in the relationship of Australian citizens to BVE holders. Further, the application of the code to BVE holders could conceivably influence community attitudes if, for example, the community were to regard BVE holders as being subject to standards of behaviour other than might be countenanced or expected of fellow citizens. In light of these considerations, the committee considers there is a question as to whether the changes effected by this instrument are appropriate for inclusion in delegated legislation, and should instead be contained in primary legislation. **[the committee requested further information from the minister (Monitor No. 1 of 2014)].**

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1 Senate Standing Committee on Regulations and Ordinances website, 'Application of the committee's scrutiny principles', [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Regulations\\_and\\_Ordinances/guidelines/principles](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Regulations_and_Ordinances/guidelines/principles), accessed 10 February 2013.

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**MINISTER'S RESPONSE:**

The committee has raised concerns about whether the legislative instrument contains matters more appropriate for parliamentary enactment. In particular, it has raised concerns that the regulation appears to create the potential for Bridging E (Class WE) visa (BVE) holders to be subjected to behavioural standards not applicable to Australian citizens and that the application of the Code of Behaviour (the Code) could have the effect of bringing about significant changes in the relationship of Australian citizens to BVE holders as being subject to standards of behaviour other than might be countenanced or expected of fellow citizens.

The wording contained within the Code was made into a legislative instrument to provide for greater flexibility in its contents and to allow me to respond and change its content where I consider it necessary. The cancellation powers, prescribed grounds and visa condition framework that support the Code of Behaviour amendment already exist within the Migration Regulations 1994 (the Regulations).

Under the *Migration Act 1954* (the Act), unlawful non-citizens (i.e. non-citizens who do not hold a valid visa) are subject to mandatory detention. In general, IMAs (who, under the Act, are referred to as Unauthorised Maritime Arrivals) are barred by the Act from making a valid application for a visa. If I wish to grant a BVE to such non-citizens in detention, I must use my personal, non-delegable powers under section 195A of the Act where I think it is in the public interest to do so.

The grant of a BVE in these circumstances is not a right, and there is no right for such BVEs to be renewed where they expire. They are granted to non-citizens in the expectation that they will abide by the law, will respect the values important in Australian society, participate in resolving their status, and will not cause or threaten harm to individuals or groups in the Australian community. These considerations contribute to my judgement as to whether it is in the public interest to use my powers to allow these people to hold a BVE.

Since November 2011, BVEs have been granted to more than 20,000 IMAs in immigration detention, significantly increasing the numbers of BVE holders in the community and resulting in IMAs comprising the majority of BVE holders in Australia. I am of the view that it is reasonable to hold these non-citizens to a higher standard of behaviour than was previously the case, where I have granted them a BVE in the public interest. This is because, if not for my decision, these individuals would continue to be unlawful non-citizens subject to mandatory detention under the Act. They do not hold and have not been assessed as meeting the statutory criteria for grant of any substantive visa.

There are already other longstanding areas of migration legislation which apply constraints to non-citizens, which do not apply more broadly to members of the community, for example relating to study, work and reporting of address information. I consider it reasonable that these non-citizens, particularly persons who have not lived in the Australian community previously, are given clear guidance on our expectation of them

and I maintain that if we are going to release or allow people to remain in the community from a range of backgrounds, language groups and cultures we should have a process in place that explains what is expected of them, and be prepared to remove them from the community if those expectations are not met.

The Code provides a mechanism for the education of BVE holders on behavioural expectations, the importance of following public health related directives made by my department and to encourage ongoing engagement and compliance with my department whilst their immigration status is being resolved. The Code also provides for early warning and preventative measures through education on behavioural expectations before more serious behavioural problems arise that could otherwise threaten the safety of the Australian community, something that was previously not available. In addition, the Code provides a mechanism to ensure the protection of the Australian community through visa cancellation and re-detention of a person who engages in certain types of behaviour generally not considered to be acceptable in the Australian community.

There is no evidence that the Code is having an adverse impact on the treatment of BVE holders in the community, or that it will have an adverse impact in the future. I would be briefed accordingly should any such evidence be received by my department and I would consider any appropriate action at that time. There is evidence through media and public expression of concern over instances where BVE holders in the community might have posed a risk to the community or a member of the community.

The Code provides a valuable form of reassurance to the community that risks associated with placing non-citizens in the community instead of in detention can be responded to expeditiously.

#### **COMMITTEE RESPONSE:**

**[The committee thanked the minister for his detailed response and concluded its interest in this matter (Monitor No. 5 of 2014)].**

#### **ISSUE:**

##### *(b) Insufficiently defined power*

As noted above, the regulation provides that the minister must approve a code of behaviour. However, the regulation provides no criteria for any such code, effectively establishing a broad power for executive regulation of the behaviour of relevant visa holders. This concern is informed by scrutiny of the code, which prescribes a number of potentially vague and subjective behaviours, such as behaviour which is 'anti-social', 'disruptive', 'inconsiderate' or 'disrespectful', or which 'threatens the peaceful enjoyment of other members of the community [sic]'. Given the serious consequences which may flow from a breach of the code, a question arises as to whether the regulation should provide specific criteria in relation to the content of any code approved by the minister **[the committee requested further information from the minister (Monitor No. 1 of 2014)].**

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**MINISTER'S RESPONSE:**

The committee raised concerns that the Code prescribes a number of potentially vague and subjective behaviours such as 'anti-social', 'disruptive', 'inconsiderate' or 'disrespectful' behaviour, or behaviour which 'threatens the peaceful enjoyment of other members of the community'. The committee questions whether, given the serious consequences which may flow from a breach of the Code, the specific criteria in relation to content of the Code should be provided for in the Regulations.

The terms used in the Code such as 'anti-social', 'disruptive', 'inconsiderate' and 'disrespectful' are commonly used terms in the Australian community and the supporting Code of Behaviour framework provides clear descriptions on the definition of these terms and how a breach of these elements would be assessed and a decision on a breach applied.

The existing visa condition framework within the Regulations also already contains subjective elements. For example, condition 8303 requires the holder must not become involved in activities disruptive to, or violence threatening harm to, the Australian community or a group with the Australian community. Much decision making in relation to visas is based on subjective judgments relating to terms set out in the Regulations. The codified natural justice processes for visa decision making provide an opportunity for the visa holder to challenge and/ or respond to potentially adverse conclusions.

As noted in my media release after the BVE Regulation commenced, similar behaviour codes are currently enforced in held and community detention under the Act and it makes sense that a similar code be applied to those living in the community on a BVE whose status is also not yet determined.

Although the Regulations provide scope to cancel BVEs held by non-citizens where they were charged or convicted of a criminal offence, this does not adequately capture repeated anti-social activities that do not attract a charge or conviction, but which interfere with the right of the community to peaceful enjoyment. Issues already emerging relate to, for example, intimidation and harassment of service provider staff members.

The Code now addresses such broader issues and focusses on such public safety issues as harassment, intimidation and bullying, as behaviours that may now invoke visa cancellation consideration.

As stated previously, the Code is both an enforceable tool providing a basis for visa cancellation and an educative tool for BVE holders to make behavioural expectations clear. The Code is not written in such a way as to regulate a BVE holder's legitimate freedom of expression and religion. It does, however, identify that certain types of behaviour could be viewed as harassment, intimidation or a form of bullying of other persons or groups of persons and are not considered to be tolerable in Australian society, and therefore could be seen as a breach of the Code. One of the important purposes of the Code is to provide the opportunity for early warning and for preventative measures to be taken in relation to less than criminal matters, before more serious behavioural problems may arise. In that regard, I

consider it reasonable that BVE holders are given clear guidance about the behaviours that are considered acceptable and reasonable in Australian society.

My department has put in place a number of processes to ensure that the Code is clearly understood prior to the need to sign the Code. For example, IMAs in held and community detention have been assisted by case managers and interpreters when signing the Code to ensure that they understand the Code and what it contains. Supporting information explaining key terms used in the Code is being translated into twelve community languages and people in the community can seek support from my department to sign the Code where necessary. In addition, an initial information session has been held for IMA BVE holders who receive Community Assistance Support (CAS) services or Asylum Seeker Assistance Scheme (ASAS) services through the Adult Multicultural Education Services in Melbourne, with further information sessions planned for other locations.

Although the legislation provides a trigger for considering cancellation of the visa, the decision to cancel a bridging visa remains discretionary, allowing the decision maker to take into account the individual merits of a case. The discretionary cancellation process requires that a visa holder be notified if there appear to be grounds for cancellation and given particulars of those grounds and the information because of which the grounds appear to exist under the principle of natural justice. The visa holder must be provided with the opportunity to show that the grounds do not exist, or that there are other reasons why the visa should not be cancelled.

In addition, while the cancellation ground may be enlivened, there are a number of other responses that can be applied where a breach of the Code has occurred (or is alleged to have occurred), which can be tailored to suit individual circumstances and allow for flexible application. These responses include the use of counselling and warning letters for less serious matters, which are aimed at educating BVE holders further on the terms of the Code and reinforcing behavioural expectations.

#### **COMMITTEE RESPONSE:**

**[The committee thanked the minister for his detailed response.**

However, the committee noted that the minister's department has prepared 'supporting information explaining key terms used in the Code'.

**Given the committee's concerns regarding the subjective nature of the terms used in the code, the committee requested from the minister a copy of any such supporting information.**

**The committee also requested the minister's advice as to whether departmental policy manuals and/or guidance material contain guidance for decision-makers on the application of key terms in decision-making, consistent with the supporting information provided to visa holders (Monitor No. 5 of 2014)].**



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## MINISTER'S RESPONSE:

The committee noted that my department has prepared supporting information that explains key terms used in the code of behaviour and has requested a copy of any such supporting information. The committee has also sought advice as to whether departmental policy manuals and/or guidance material contains guidance for decision-makers on the application of key terms in decision-making, consistent with the supporting information provided to visa holders.

A range of supporting information and advices have, and are, being prepared for persons subject to the code of behaviour which explain the terms used within the Code, their relative meanings and the possible consequences with non-compliance of the Code. This information is designed to be consistent with the intention of the new Regulations and Legislative Instrument and the overall educational message to people being released from detention on a Bridging E (Class WE) visa (BVE) granted by me in the public interest.

Form 1443 is included at back of this letter and contains the code of behaviour and explanatory information for affected individuals. The form explains what the code of behaviour is about, and explains some of the terms in the code of behaviour, such as 'harass', 'intimidate', 'bully', 'antisocial' and 'disruptive'. For persons required to sign and abide by the code of behaviour, Form 1444i - *Code of Behaviour for Subclass 050 Bridging (General) visa holders Supporting Information* contains this explanatory information in a translated form, and is available on my department's external website at

<http://www.immi.gov.au/About/Pages/ima/info.aspx>.

Form 1444i is available in Arabic, Bengali, Dari, Farsi (Persian), Kurdish (Kurmanji), Kurdish (Sorani), Myanmar language (Burmese), Pashto, Sinhalese, Tamil, Urdu, and Vietnamese.

Illegal Maritime Arrivals (IMAs) in community detention and held detention sign the code of behaviour with the support of departmental case managers and accredited interpreters to explain the code of behaviour and its effect on BVE eligibility. IMAs in held detention and community detention commenced signing the code of behaviour in January 2014. More than 1900 IMAs who were in held or community detention when they signed the code of behaviour have been released from detention following BVE grant (as at 29 May 2014).

In mid-February 2014, signature of the code of behaviour by IMAs who had previously been released on a BVE commenced at information sessions run by service providers. All Community Assistance Support (CAS) and Asylum Seeker Assistance Scheme (ASAS) service providers have been involved in organising information sessions about the code of behaviour and behaviour expected in Australia. Most service providers have also provided staff to act as witnesses to signature of the code of behaviour. The department has also distributed the code of behaviour in small targeted mail-outs to bridging visa holders in selected regional and rural locations. Some 1000 IMAs who were living in the community have signed the code of behaviour and been granted a further BVE. More than 5000 code of

behaviour forms have been received from IMAs who have signed them while in the community. These are being processed (as at 29 May 2014).

Service providers have been provided with supporting documents about the code of behaviour to use in their information sessions for IMAs, and in their ongoing engagement with IMAs in the community. An example of these documents is the *Communication Guide: Code of Behaviour information for clients*, included at the back of this letter, which is produced by my department and provided to service providers.

A Policy Advice Manual (PAM), Ministerial Direction and other internal documents are also being finalised, which will support departmental staff responsible for assessing and triaging any alleged breaches of the code of behaviour. These documents will also provide guidance on the terms of the code of behaviour consistent with existing documentation, and will inform the guiding principles to be considered on whether the discretion to cancel a person's BVE should be exercised, or whether an alternative response is more appropriate in that circumstance.

### **COMMITTEE RESPONSE:**

**The committee thanks the minister for his response and has concluded its interest in this matter.**

### **ISSUE:**

*(c) Exemption of instrument from disallowance*

As noted above, the regulation provides that the minister must approve a code of behaviour for BVE holders. The code is to be made by instrument in writing. The authority for the making of such an instrument has been provided for by the addition of Part 4.1 to Schedule 4 of the migration regulations. Instruments made under this schedule are exempt from disallowance. Despite the apparently legislative character of such an instrument, and the potentially significant consequences for individuals affected by the code, the committee notes that the ES contains no information on the exemption of the code from disallowance, including:

- the broader justification for the exemption of instruments made under Schedule 4;
- the extent to which any such justification applies to the code; and
- whether, taking into account the nature of the code, it is appropriate to exempt such an instrument from disallowance (and therefore remove it from the effective oversight of the Parliament).

**[the committee requested further information from the minister (Monitor No. 1 of 2014)].**

**MINISTER'S RESPONSE:**

The committee has noted that the Explanatory Statement contains no information on the exemption of the Code from disallowance. Under item 26 of section 44 of the Legislative Instruments Act 2003, legislative instruments under Part 1, 2, or 5 or Schedule 1, 2, 4, 5A, 6, 6A, or 8 of the Regulations made under the Act are not subject to disallowance. As the Code is made under Schedule 4 to the Regulations it is not subject to disallowance by operation of the Legislative Instruments Act 2003.

**COMMITTEE RESPONSE:**

**[The committee thanked the minister for his response.**

However, the committee noted that the minister's response did not address the issues raised. **The committee therefore requested further information from the minister regarding:**

- **the broader justification for the exemption of instruments made under Schedule 4;**
- **the extent to which any such justification applies to the code; and**
- **whether, taking into account the nature of the code, it is appropriate to exempt such an instrument from disallowance (and therefore remove it from the effective oversight of the Parliament) (Monitor No. 5 of 2014)].**

**MINISTER'S RESPONSE:**

The committee has noted that my previous response did not address the issues raised by the committee, and has requested further information regarding:

the broader justification for the exemption of instruments made under Schedule 4;

the extent to which any such justification applies to the code; and

whether, taking into account the nature of the code, it is appropriate to exempt such an instrument from disallowance (and therefore remove it from the effective oversight of the Parliament).

As the committee is aware, section 44 of the *Legislative Instruments Act 2003* (LI Act) provides that Legislative Instruments made under Parts 1, 2, 5 and 9 and Schedules 1, 2, 4, 5A, 6, 6A or 8 to the Migration Regulations 1994 (Migration Regulations) are not subject to disallowance. The LI Act was enacted by Parliament in 2003 and is administered by the Attorney's General Department. I note that Schedule 4 to the Migration Regulations relates to public interest criteria and is the appropriate and relevant Schedule under which to make the instrument in question.

I considered it appropriate that the code of behaviour be contained in a legislative instrument in order to provide more flexibility to change the content of the code of behaviour as required. I also note that the Regulations made in support of the code of behaviour framework are subject to parliamentary scrutiny.

I would reiterate that an IMA in detention can only be granted a BVE where I exercise my personal powers to grant a visa in the public interest. Given that I grant these visas using my personal powers it is appropriate that I determine the conditions under which these people may live in the community. The grant of a visa in these circumstances is not a right, and is conferred on these non-citizens in the expectation that they will be law abiding, considerate, compliant, and will not cause or threaten harm to the Australian community. Without my intervention these non-citizens would remain in immigration detention and would return to immigration detention at the expiry of their BVEs.

#### **COMMITTEE RESPONSE:**

**The committee thanks the minister for his response and has concluded its interest in this matter.**

#### **ISSUE:**

##### *(d) Retrospective effect of instrument*

The application of the new visa criterion relating to the code of behaviour applies to applications for BVEs made, but not finally determined, before the commencement of the instrument (14 December 2013), as well as applications made on or after that day. This means that otherwise valid applications not determined at 14 December 2013 may, by virtue of the new criterion, now be invalid, giving the instrument an element of retrospectivity in its effect. The ES provides no justification for this apparent removal of the entitlement in relation to current applications for BVEs [**the committee requested further information from the minister (Monitor No. 1 of 2014)**].

#### **MINISTER'S RESPONSE:**

The committee raised concerns about the retrospective effect of the BVE Regulation and the Explanatory Statement's justification for the apparent removal of pre-existing entitlements in relation to applications for a BVE. In particular, the Committee noted that this Instrument introduced new visa criterion relating to the Code which has the effect of invalidating otherwise valid BVE applications not determined on the commencement date (14 December 2013).

The BVE Regulation has no effect on the validity of otherwise valid applications. Under the migration legislation, a visa application is assessed against validity criteria and where that application is valid, against criteria that is to be met at the time of the visa application and at the time of the visa decision. This instrument introduces a new visa criterion related to the time of decision criteria only. Consistent with the government's policy intention to ensure that people who were granted a BVE as a result of the exercise of my powers under section 195A of the Act are held to a higher level of accountability, the new time of decision criterion requires certain persons being considered for the grant of a BVE to have signed a Code of Behaviour. This new criterion does not affect the validity of a BVE application. Any applications that were determined to be valid prior to the

commencement of the Instrument remain valid after the commencement of the Instrument. The Explanatory Statement does not contain justifications about the apparent retrospectivity of the Instrument given it only affects decisions made after the date of the regulation.

Under this amendment any person who has had a BVE cancelled for reason of failure to comply with condition 8564 or 8566, or where the visa was cancelled under a ground specified in 2.43(1)(p) or (q) is barred from applying for a further BVE.

#### **COMMITTEE RESPONSE:**

##### **[The committee thanked the minister for his response.**

However, the committee noted that its inquiry related to the retrospective effect of the instrument, as opposed to retrospectivity in the strict sense. Although the instrument is not strictly retrospective, the new criterion (signing the code) prescribes a rule for the future based on antecedent facts (that is, the existence of an earlier visa application). As a consequence, it appears that an otherwise valid application not determined at 14 December 2013 may now be subject to a new criterion (the code) at the time of the visa decision. The committee noted that its usual approach to such cases is to regard them as being retrospective in effect, and to assess such cases against the requirement to ensure that instruments of delegated legislation do not unduly trespass on personal rights and liberties (scrutiny principle (b)) **[the committee therefore requested further information from the minister (as to the justification for this approach) (Monitor No. 5 of 2014)].**

#### **MINISTER'S RESPONSE:**

The committee has noted that, as a result of this instrument, an otherwise valid application not determined at 14 December 2013 may now be subject to a new criterion (the code) at the time of the visa decision. As such, the committee considered the instrument to be retrospective in effect and requested further information as to the justification for this approach.

Clause 050.225 states if the applicant: (a) is at least 18 at the time of application; and (b) holds, or has previously held, a BVE granted under section 195A of the Act; the applicant satisfies Public Interest Criterion 4022 (PIC 4022) containing a requirement to sign a code of behaviour. It is unlikely that there were any undecided valid BE applications as at 14 December 2013, where the applicant would become subject to PIC 4022 under clause 050.225. This is because any person who held or had held a BVE granted to them by a Minister under s195A on 14 December 2013 would have been either barred from lodging a BVE application under the Regulations due to the effect of section 91K or section 46A of the Act, or because they were not recognised under the Act as an eligible non-citizen under the Act.

In any event, I had made it clear in my public statements that no further BVEs would be granted to IMAs, either to those non-citizens in immigration detention or those who were already living in the community, without an enforceable code of behaviour in place.

**COMMITTEE RESPONSE:**

**The committee thanks the minister for his response and has concluded its interest in this matter.**

However, the committee's usual expectation where an instrument has retrospective effect is that explanatory statements provide an explanation of the justification for the relevant measures, so as to allow the committee to ensure that instruments of delegated legislation do not unduly trespass on personal rights and liberties (scrutiny principle (b)). In this instance, the committee notes the minister's advice that 'it is unlikely that there were any undecided valid BVE applications as at 14 December 2013' when signing the code became applicable.

**The committee therefore draws the minister's attention to its expectations regarding the requirement that explanatory statements provide a justification for instruments that are, or have the potential to be, retrospective in effect.**

**ISSUE:***(e) Consultation*

The ES for the regulation states that consultation was not undertaken because the changes were considered to be 'of a machinery nature as they add to the existing cancellation framework under the migration legislation'. Given the substantive effect and consequences which may arise from the application of a code of behaviour on BVE holders, the characterisation of the instrument as machinery in nature on this basis is open to question. This gives rise to a concern that the minister's determination that consultation was unnecessary or inappropriate in this case may not have taken account of, or provided appropriate opportunity for comment by, persons likely to be affected by the instrument. The committee notes that, while the ES states that 'continuing consultation on the draft code' was being undertaken, the ES for the code indicates that consultation was only undertaken internally and with other government departments and agencies, and did not involve consultation with persons likely to be affected by the instrument or with stakeholders more generally [**the committee requested further information from the minister (Monitor No. 1 of 2014)**].

**MINISTER'S RESPONSE:**

The committee is concerned that my determination that consultation was unnecessary or inappropriate in this case may not have taken account of, or provided appropriate opportunity for comment by, persons likely to be affected by the instrument.

Relevant government departments and the Australian Federal Police were consulted about the Code of Behaviour and where possible I have taken these agency's comments and concerns into account when crafting the content of the instruments. Contracted service providers are involved in ongoing consultation with my department with regards to the implementation process.

The Code of Behaviour amendment reflects community concerns and the policy articulated by the government prior to the election. Ongoing media

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coverage continues to reflect the community's concerns to ensure IMA BVE holders are given clear guidance on the behaviours expected of them and that government has enforceable powers to remove IMA BVE holders to immigration detention where these expectations are breached.

Under the existing visa framework most temporary visa holders, including BVE holders, in Australia are subject to a variety of visa conditions set out in the Regulations. Many of these set out requirements that the visa holder must abide by or which set restrictions on what the visa holder is permitted to do while in Australia. As noted in my media release after the instruments commenced, similar behaviour codes are currently enforced in held and community detention and it makes sense that a similar code be applied to those living in the community whose status is also not yet determined.

An IMA in detention can only be granted a BVE where I exercise my personal powers to grant a visa in the public interest. Given that I grant these visas using my personal powers it is appropriate that I determine the conditions under which these people may live in the community. The grant of a visa in these circumstances is not a right, and is conferred on these non-citizens in the expectation that they will be law abiding, considerate, compliant, and will not cause or threaten harm to the Australian community. Without my intervention these non-citizens would remain in immigration detention and would return to immigration detention at the expiry of their BVEs.

When I announced the implementation of the Code on Friday 20 December 2013, I noted that an average of two IMAs had been charged with criminal offences every week since the election. Charges laid against IMAs at that time included murder, assault, acts of indecency, stalking, rape, shoplifting and drink-driving. As at 31 January 2014, 50 IMAs have had their BVEs cancelled and been re-detained, and 24 whose BVE had ceased have been re-detained following involvement in a criminal matter.

I consider it reasonable that non-citizens being released into the community on a BVE, particularly where they have not lived in the Australian community previously, are given clear guidance about the behaviours that are considered acceptable and reasonable in Australian society.

The Code is designed to support BVE holders whilst they live in the community by educating them in acceptable standards of behaviour. Information sessions have been held for IMA BVE holders who receive CAS services or ASAS services through the Adult Multicultural Education Services in Melbourne, with further information sessions planned for other locations. IMA BVE holders who are receiving support under the CAS and/or ASAS programmes are given orientation to Australian society by their service providers. The Code will reinforce information provided during these orientation sessions. The educative aspect of the Code is intended to assist people to understand the behaviour expected of them while they live lawfully in the community and to encourage cooperation with authorities while they are awaiting resolution of their visa status.

The Code of Behaviour amendment does not affect the capacity of all IMAs to choose not to sign the Code.

**COMMITTEE RESPONSE:**

[The committee thanked the minister for his response and concluded its interest in this matter (Monitor No. 5 of 2014)].

**Migration Amendment (2014 Measures No. 1) Regulation 2014 [F2014L00286]**

<b>Purpose</b>	Amends the Migration Regulations 1994 requirements relating to public interest criterion 4020, English requirements for applicants of the Subclass 457 (Temporary Work (Skilled)) visa, requirements in Part 202 of Schedule 2 and provisions dealing with disclosure of information under regulation 5.34F
<b>Last day to disallow</b>	26 June 2014
<b>Authorising legislation</b>	<i>Migration Act 1958</i>
<b>Department</b>	Immigration and Border Protection

[The committee first reported on this instrument in Monitor No. 5 of 2014.

The committee raised concerns and sought further information in relation to the retrospective effect of the instrument. Those comments are reproduced below, followed by the committee's response to the minister's correspondence].

**ISSUE:***Retrospective effect of instrument*

Schedules 2 and 5 of this instrument add new criteria to the Subclass 202 and Subclass 457 visas, respectively. Under Schedule 6 of the instrument, the amendments made by the schedules apply to applications for the relevant visas made, but not finally determined, before the commencement of the instrument (22 March 2014), as well as applications made on or after that day. This means that otherwise valid applications not determined at 22 March 2014 are, by virtue of the new criteria, now invalid, giving the instrument an element of retrospectivity in its effect. The ES provides no justification for this apparent removal of the entitlement in relation to current applications for the visas in question.

Similarly, the amendments made by Schedules 1 and 3 make amendments in relation to Public Interest Criterion (PIC) 4020 and the application of PIC 4020, to introduce 'a specific identity requirement' in relation to the grant of certain visas. Again, the amendments made by the schedules apply to applications for the relevant visas made, but not finally determined, before the commencement of the instrument (22 March 2014), as well as applications made on or after that day. This means that otherwise



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valid applications not determined at 22 March 2014 are, by virtue of the new requirements, now invalid, giving the instrument an element of retrospectivity in its effect. Again, the ES provides no justification for this apparent removal of the entitlement in relation to current applications for the visas in question [**the committee requested further information from the minister (Monitor No. 5 of 2014)**].

#### **MINISTER'S RESPONSE:**

The Committee notes that Schedules 1, 2, 3 and 5 to the Instrument makes amendments to the criteria that must be met for certain visa subclasses to be granted. The Committee notes that the Instrument provides that these amendments apply to unfinalised applications made before the commencement of the Instrument on 22 March 2014 as well as to new applications made on or after commencement.

The Committee has concluded that, as a result of these amendments, otherwise valid applications not determined at 22 March 2014 are, by virtue of the new requirements, now invalid, giving the Instrument an element of retrospectivity in its effect. The Committee notes that the Explanatory Statement provides no justification for this apparent removal of entitlement and seeks further information.

I note that the amendments made by Schedules 1, 2, 3 and 5 to the Instrument do not affect the validity of any visa applications. Any applications that were valid prior to the commencement of this Instrument remain valid after its commencement. Under the Migration Regulations 1994 (the Migration Regulations), a visa application must meet certain criteria in order to be a valid application. The amendments made by these Schedules do not amend or impact any criteria that relate to the validity of an application.

As the Committee has noted, these Schedules do make amendments (to the criteria for grant of certain visa subclasses) that apply to applications decided on or after the commencement of the Instrument, regardless of the date of application.

Relevantly, I note that section 504 of the Migration Act authorises the making of regulations that are necessary or convenient to carry out or give effect to the objectives of the Migration Act, which include regulating the entry and stay of non-citizens in Australia in the national interest. Accordingly, these regulations apply to all relevant applications decided on or after the commencement of the Instrument.

#### Schedules 1 and 3

Schedules 1 and 3 make amendments regarding Public Interest Criterion 4020 (PIC 4020) which relates to the provision false or misleading information to my department.

The amendments made by Schedule 1 strengthen the pre-existing requirement in PIC 4020 for visa applicants to provide genuine documents, including documents relating to their identity. The amendments made by Schedule 3 insert PIC 4020 into a number of visa subclasses, providing a mechanism to refuse to grant those visas where an applicant has provided false or misleading information.

PIC 4020 is intended to deter persons from providing false or misleading information or falsified documents in visa applications. My department has a responsibility to ensure that visas are granted to genuine and correctly identified applicants. The amended PIC 4020 imposes new consequences on applicants who fail to meet the identity requirements by preventing them from being granted certain visas for ten years from the date of refusal (commonly referred to as 'exclusion period'). This new consequence is necessary for the integrity of Australia's migration programme which is important for the following reasons:

my department's identity information is the foundational source for subsequent identity documents provided by other Commonwealth and State/Territory agencies (e.g., Medicare, Centrelink and driver's licences) as well as the private sector. Because of the importance of identity to the integrity of Australia's migration, security and other programmes, it is appropriate that the exclusion period is greater where a visa is refused due to identity fraud; and

the strengthening of the identity requirements under PIC 4020 would be expected to have positive flow-on benefits in the medium to longer term on the integrity of Australia's citizenship program. In addition, it would reduce Australia's potential status as a country of 'last resort', where an individual has exhausted their options for migration to other Five Country Conference countries (the United Kingdom, the United States, Canada and New Zealand) as it would better align with the policies of those countries.

Given the importance of accurate identity verification to national security and the public interest it is appropriate to ensure these new safeguards apply to all visas granted after the commencement of the Instrument.

#### Schedule 2

The amendments made by Schedule 2 amend criteria for the grant of a subclass 202 (Global Special Humanitarian) visa (subclass 202 visa). The amendments relate to the requirement that there must be compelling reasons for the grant of a permanent visa to the applicant and the factors to be considered in determining whether there are compelling reasons.

Before 28 September 2012, all applicants for a subclass 202 visa were assessed against the same factors in determining whether there are compelling reasons for granting the applicant a permanent visa (compelling reasons criterion). As a result of the recommendations of the Expert Panel on Asylum Seekers (see Report of the Expert Panel on Asylum Seekers, Australian Government, August 2012), on 28 September 2012, the former government made a number of amendments to the Class XB visas. The key principle behind these measures, expressed in recommendation 1, was that Illegal Maritime Arrivals (IMAs) should not gain any benefit from circumventing regular migration arrangements.

The amendments prevented persons, who on or after 13 August 2012 became IMAs, from proposing an applicant for entry to Australia. However, the amendments also provided a concession that the compelling reasons criterion was assessed at a lower threshold for applicants proposed

by persons who were global special humanitarian visa holders or who were under 18 years of age at the time of application (including IMAs who arrived before 13 August 2012). Most minor proposers affected by this criterion arrived illegally as unaccompanied minors before the Report of the Expert Panel on Asylum seekers was released.

The government's policy now is to remove this concession for applicants proposed by person's under 18 years of age because it is inconsistent with the principle that IMAs should not benefit from their illegal mode of arrival. Removing the concession puts those applicants back on an equal footing with applicants proposed by visa holders over 18 years of age.

Most affected applicants made their applications before the Report of the Expert Panel on Asylum Seekers. As such, for these applicants, this amendment effectively returns the 'compelling reasons' criterion to the form it took at the time of their application.

A Statement of Compatibility with Human Rights has been completed for these amendments, in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The Statement's overall assessment is that the amendment is compatible with human rights because it advances the protection of human rights and, to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate in achieving the legitimate aims of maintaining the integrity of Australia's borders and preventing minors risking their lives to secure resettlement of their families in Australia. These goals are primary considerations.

#### Schedule 5

The amendments made by Schedule 5 amend criteria relating to the subclass 457 (Temporary Work (Skilled) visa (subclass 457 visa)).

The amendments made by Schedule 5 do not add any new requirements to be met for the grant of a subclass 457 visa. Prior to the commencement of the instrument certain English language proficiency requirements (the type of test to be taken and scores to be achieved) were set out in the Migration Regulations. The amendments made by Schedule 5 provide that these English language proficiency requirements are now set out in a legislative instrument made by a Minister under the regulations. The actual requirements to be met by applicants did not change.

My department has become aware of industry stakeholders' concerns that the minimum English language proficiency requirements are too high and do not reflect industry requirements. This limits the ability of industries to obtain qualified temporary skilled workers as subclass 457 visa applicants are unable to meet the minimum test score across all four test components (speaking, reading, listening and writing). However, the minimum requirements have not been amended in this instrument because the subclass 457 programme is currently the subject of a review. If any amendments to the minimum English language proficiency requirements are made, the changes will occur after the conclusion of the review and will take into consideration the recommendations of the review panel and relevant industry stakeholders.

The purpose of moving the English language proficiency requirements into a legislative instrument made by a Minister is to ensure English proficiency requirements are easily adaptable to changing workforce requirements or visa integrity concerns in the future. The subclass 457 visa programme needs to be responsive to changes in economic demands and enable industries to obtain appropriately qualified temporary skilled workers to address skilled labour shortages in Australia.

I note that subsection 504(2) of the Migration Act authorises the making of a regulation which confers a power on the Minister to specify relevant matters, such as these English language proficiency requirements, in a legislative instrument, including after the regulations take effect.

#### **COMMITTEE RESPONSE:**

**The committee thanks the minister for his informative response and has concluded its interest in this matter.**

However, the committee notes that its inquiry related to the retrospective effect of the instrument, as opposed to retrospectivity in the strict sense. Although the instrument is not strictly retrospective, the new criteria (inserting Public Interest Criterion 4020 into a number of visa subclasses; and removing certain concessions for a subclass 202 visa for applicants proposed by person's under 18 years of age;) prescribed a rule for the future based on antecedent facts (that is, the existence of an earlier visa application). As a consequence, it appears that an otherwise valid application not determined at 22 March 2014 would have been subject to a new criterion at the time of the visa decision.

The committee's usual expectation where an instrument has retrospective effect is that explanatory statements provide an explanation of the justification for the relevant measures, so as to allow the committee to ensure that instruments of delegated legislation do not unduly trespass on personal rights and liberties (scrutiny principle (b)).

**The committee therefore draws the minister's attention to its expectations regarding the requirement that explanatory statements provide a justification for instruments that are retrospective in effect.**

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**Migration Regulations 1994 - Tests, Scores, Period, Level of Salary and Exemptions to the English Language Requirement for Subclass 457 (Temporary Work (Skilled)) Visas - IMMI 14/009 [F2014L00327]**

<b>Purpose</b>	Specifies the tests that can be undertaken; the required scores for each of the tests; the period in which the test must have been undertaken; an annual salary at a base rate of pay which is equal to, or greater than, the applicable base salary and the classes of applicants who are 'exempt applicants'
<b>Last day to disallow</b>	7 July 2014
<b>Authorising legislation</b>	Migration Regulations 1994
<b>Department</b>	Immigration and Border Protection

**[The committee first reported on this instrument in Monitor No. 5 of 2014. The committee raised concerns and sought further information in relation to the ES providing no information regarding consultation. Those comments are reproduced below, followed by the committee's response to the minister's correspondence].**

**ISSUE:**

*No information regarding consultation*

Section 17 of the *Legislative Instruments Act 2003* directs a rule-maker to be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have an effect on business. Section 18, however, provides that in some circumstances such consultation may be unnecessary or inappropriate. The ES which must accompany an instrument is required to describe the nature of any consultation that has been carried out or, if there has been no consultation, to explain why none was undertaken (section 26). With reference to these requirements, the committee notes that the ES accompanying this instrument contains no reference to consultation **[the committee requested further information from the minister (Monitor No. 5 of 2014)].**

**MINISTER'S RESPONSE:**

The Minister for Immigration and Border Protection regretted the omission and advised:

No consultation was undertaken in this instance as the nature of the amendments are of a minor or machinery nature and that they do not substantially alter existing arrangements.

The minister further advised that an amended ES incorporating a paragraph addressing the subject of consultation had been drafted and would be tabled as soon as possible.

**COMMITTEE RESPONSE:**

The committee thanks the minister for his response and has concluded its interest in this matter.

**Migration Amendment (Credit Card Surcharge) Regulation 2014  
[F2014L00421]**

<b>Purpose</b>	Amends the Migration Regulations 1994 to allow the department to recover the cost of certain administrative fees, by charging a credit card surcharge on applicants who pay an instalment, or part of an instalment, of their visa application charge with a credit card
<b>Last day to disallow</b>	14 July 2014
<b>Authorising legislation</b>	<i>Migration Act 1958</i>
<b>Department</b>	Immigration and Border Protection

[The committee first reported on this instrument in Monitor No. 5 of 2014. The committee raised concerns and sought further information in relation to:

- (a) drafting; and
- (b) subdelegation of legislative power;

Those comments are reproduced below, followed by the committee's response to the minister's correspondence].

**ISSUE:***(a) Drafting*

Item 2 of Schedule 1 of this instrument inserts a new regulation 5.43 into the Migration Regulations 1994, at the end of Division 5.7 of Part 5. The committee notes that there appears to be a current regulation 5.43 in the Migration Regulations, at the beginning of Division 5.8 of Part 5. As a consequence, there are now two regulations numbered 5.43 in the regulations, and the committee notes that the existence of two regulations with the same number could impact on the clarity and useability of the regulations [the committee brought this matter to the attention of the minister (Monitor No. 5 of 2014)].

**MINISTER'S RESPONSE:**

The Minister for Immigration and Border Protection thanked the committee for drawing his attention to the typographical error. The minister confirmed that the Department was in the process of rectifying the issue. The minister also advised that the Office of Parliamentary Counsel had advised him that 'the regulations operate effectively in the interim despite the typographical error'.

**COMMITTEE RESPONSE:**

**The committee thanks the minister for his response and has concluded its interest in this matter.**

**ISSUE:***(b) Subdelegation of legislative power*

New regulation 5.43 creates a liability for visa applicants to pay a credit card surcharge for visa applications. New subregulation 5.43(4) provides that the minister may specify, in a legislative instrument, circumstances in which the credit card surcharge (a) must be waived, (b) may be waived, (c) must be refunded or (d) may be refunded.

The committee notes that section 504 of the *Migration Act 1958* delegates to the Governor-General the Parliament's power to make regulations under the Act. Paragraph 504(1)(a) provides a specific power to make regulations in relation to the charging of fees, and paragraph 504(1)(b) provides a specific power to make regulations providing for the remission, refund or waiver of specified fees (or for exempting persons from the payment of such fees). In new regulation 5.43 the Governor-General has provided for the imposition of a credit card surcharge. In new subregulation 5.43(4), however, the Governor-General subdelegates to the minister the power (in effect) to determine circumstances in which the credit card surcharge will not apply. In the committee's view, there is a question as to whether this goes to the heart of the power to impose the credit card surcharge (and so offends the rule against subdelegation).

The committee notes that, while subdelegation can be authorised by an empowering Act, there does not appear to be any power in the Migration Act to subdelegate as in this case **[the committee requested further information from the minister (Monitor No. 5 of 2014)].**

**MINISTER'S RESPONSE:**

The committee request further information about new subregulation 5.43(4) of the Migration Regulations 1994, specifically regarding the power in the *Migration Act 1958* (the Migration Act) to subdelegate to the Minister the power (in effect) to determine circumstances in which the credit card surcharge may or must be waived or refunded.

Subsection 504(2) of the Migration Act authorises the making of regulation 5.43(4) conferring a power on the Minister to specify matters in an instrument in writing.

I note that subsection 14(2) of the *Legislative Instruments Act 2003* (the LI Act) provides, in effect, that, *unless a contrary intention appears*, Regulations may not make provision in relation to a matter by applying, adopting or incorporating a matter in a non-disallowable legislative instrument after the empowering regulation is made.

However, subsection 504(2) of the Migration Act provides:

*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.*

The effect of subsection 504(2) of the Migration Act is to provide a contrary intention to section 14 of the LI Act. Subsection 504(2) permits the making of regulations conferring a power on the Minister to specify matters in an instrument after the taking effect of the regulations.

Subregulation 5.43(4) provides in summary that the circumstances in which the credit card surcharge may or must be waived or refunded may be specified by the Minister in a legislative instrument. The circumstances to be specified by the Minister under subregulation 5.43(4) are 'matters' for the purposes of subsection 504(2) of the Migration Act.

Therefore, subsection 504(2) of the Migration Act authorises the making of regulation 5.43(4) conferring a power on the Minister to specify matters in an instrument in writing, including after the regulations take effect.

**COMMITTEE RESPONSE:**

**The committee thanks the minister for his response and has concluded its interest in this matter.**



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**AASB 2013-9 - Amendments to Australian Accounting Standards – Conceptual Framework, Materiality and Financial Instruments - December 2013 [F2014L00370]**

<b>Purpose</b>	Amends numerous instruments as a consequence of the issue of Accounting Framework AASB CF 2013 1
<b>Last day to disallow</b>	14 July 2014
<b>Authorising legislation</b>	<i>Corporations Act 2001</i>
<b>Department</b>	Treasury

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**[The committee first reported on this instrument in Monitor No. 5 of 2014. The committee raised concerns and sought further information in relation to retrospectivity. Those comments are reproduced below, followed by the committee's response to the minister's correspondence].**

**ISSUE:**

*Retrospectivity*

This instrument is dated 13 December 2013, and amends a number of instruments as a consequence of previous amendments to the Australian Accounting Standards Board's (AASB) Framework for the Preparation and Presentation of Financial Statements. The preface to the instrument notes that Part A applies to annual reporting periods ending on or after 20 December 2013, and that the amendments made by Part A may be applied to periods beginning on or after 1 January 2005 but ending before 20 December 2013. Subsection 12(2) of the *Legislative Instruments Act 2003* provides that an instrument that commences retrospectively is of no effect if it would disadvantage the rights of a person (other than the Commonwealth) or impose a liability on a person (other than the Commonwealth) for an act or omission before the instrument's date of registration. Accordingly, the committee's usual expectation is that explanatory statements explicitly address the question of whether an instrument with retrospective effect would disadvantage any person other than the Commonwealth **[the committee therefore requested further information from the minister (Monitor No. 5 of 2014)].**

**MINISTER'S RESPONSE:**

The Minister for Finance and Acting Assistant Treasurer provided advice from the Australian Accounting Standards Board (AASB):

The AASB has advised that the changes identified relate to updating the references to a conceptual framework used by the AASB, which itself is not mandatory, and that the changes are not expected to have an impact in

practice. No entities that have applied the accounting standards for reporting periods after the entry into effect of AASB 2013-9 have informed the AASB of any concerns related to these amendments.

**COMMITTEE RESPONSE:**

**The committee thanks the minister for his response and has concluded its interest in this matter.**

# Appendix 1

## Index of instruments scrutinised

The following instruments were considered by the committee at its meeting on **25 June 2014**.

The Federal Register of Legislative Instruments (FRLI) website should be consulted for the text of instruments and explanatory statements, as well as associated information.<sup>1</sup> Instruments may be located on FRLI by entering the relevant FRLI number into the FRLI search field (the FRLI number is shown in square brackets after the name of each instrument listed below).

Instruments marked with an asterisk (\*) are the subject of the comment on p. 2 of Chapter 1 relating to subsection 33(3) of the *Legislative Instruments Act 2003* (under the heading 'Multiple instruments identified in Appendix 1').

### Instruments received week ending 6 June 2014

<b><i>Agricultural and Veterinary Chemicals Code Act 1994</i></b>	
Agricultural and Veterinary Chemicals Code Instrument No. 4 (MRL Standard) Amendment Instrument 2014 (No. 6) [F2014L00625]	E
<b><i>Airports Act 1996</i></b>	
Airports Amendment (Service Monitoring) Regulation 2014 [SLI 2014 No. 66] [F2014L00623]	
<b><i>Airspace Regulations 2007</i></b>	
CASA OAR 061/14 - Determination of airspace and controlled aerodromes etc [F2014L00620]	E
<b><i>Australian Prudential Regulation Authority Act 1998</i></b>	
Australian Prudential Regulation Authority (confidentiality) determination No. 7 of 2014 [F2014L00613]	
Australian Prudential Regulation Authority (confidentiality) determination No. 6 of 2014 [F2014L00645]	
<b><i>Broadcasting Services Act 1992</i></b>	
Broadcasting Services (Events) Notice (No. 1) 2010 (Amendment No. 6 of 2014) [F2014L00617]	
<b><i>Civil Aviation Regulations 1988</i></b>	
CASA 104/14 - Direction — number of cabin attendants (Capiteq Limited) [F2014L00655]	
<b><i>Civil Aviation Safety Regulations 1998</i></b>	
CASA ADCX 010/14 - Repeal of Airworthiness Directives [F2014L00612]	

1 FRLI is found online at <http://www.comlaw.gov.au/>.

CASA ADCX 011/14 - Repeal of Airworthiness Directive [F2014L00647]	
<b>Currency Act 1965</b>	
Currency (Perth Mint) Determination 2014 (No. 3) [F2014L00637]	
<b>Deed to Establish an Occupational Superannuation Scheme for Commonwealth Employees and Certain Other Persons (the Public Sector Superannuation Scheme)</b>	
Superannuation (PSS) Productivity Contribution (2014-2015) Determination 2014 [F2014L00650]	E
Superannuation (PSS) Maximum Benefits (2014-2015) Determination 2014 [F2014L00651]	E
<b>Environment Protection and Biodiversity Conservation Act 1999</b>	
Amendment of List of Exempt Native Specimens - Northern Territory Demersal Fishery (22/05/2014) [F2014L00616]	
Amendment of List of Exempt Native Specimens - Queensland Gulf of Carpentaria Inshore Fin Fish Fishery (27/05/2014) [F2014L00652]	
<b>Fair Entitlements Guarantee Act 2012</b>	
Fair Entitlements Guarantee (Indexation of Maximum Weekly Wage) Amendment Regulation 2014 [SLI 2014 No. 58] [F2014L00633]	
<b>Farm Household Support Act 2014</b>	
Farm Household Support Secretary's Rule 2014 [F2014L00614]	
<b>Federal Financial Relations Act 2009</b>	
Federal Financial Relations (National Partnership payments) Determination No. 74 (February 2014) [F2014L00654]	E
Federal Financial Relations (General purpose financial assistance) Determination No. 58 (January 2014) [F2014L00656]	E
Federal Financial Relations (General purpose financial assistance) Determination No. 59 (February 2014) [F2014L00657]	E
Federal Financial Relations (General purpose financial assistance) Determination No. 60 (March 2014) [F2014L00658]	E
Federal Financial Relations (General purpose financial assistance) Determination No. 61 (April 2014) [F2014L00659]	E
Federal Financial Relations (General purpose financial assistance) Determination No. 62 (May 2014) [F2014L00660]	E
<b>Financial Management and Accountability Act 1997</b> Financial Management and Accountability Amendment (2014 Measures No. 5) Regulation 2014 [SLI 2014 No. 59] [F2014L00635]	
<b>Financial Sector (Collection of Data) Act 2001</b>	
Financial Sector (Collection of Data) (reporting standard) determination No. 11 of 2014 [F2014L00618]	
<b>Food Standards Australia New Zealand Act 1991</b>	
Australia New Zealand Food Standards Code — Standard 1.4.2 — Maximum Residue Limits Amendment Instrument No. APVMA 5, 2014 [F2014L00621]	E
<b>Health Insurance Act 1973</b>	
Amendment Declaration of Quality Assurance Activities under section 124X of the Health Insurance Act 1973 - QAA 1/2014 [F2014L00640]	*
Declaration of Quality Assurance Activity under section 124X of the Health Insurance Act	

1973 – QAA 2/2014 [F2014L00641]	
Declaration of Quality Assurance Activity under section 124X of the Health Insurance Act 1973 – QAA 3/2014 [F2014L00642]	
<b>Higher Education Support Act 2003</b>	
Higher Education Support Act 2003 - VET Provider Approval (No. 33 of 2014) [F2014L00615]	
Higher Education Support Act 2003 - VET Provider Approval (No. 30 of 2014) [F2014L00653]	
<b>Migration Act 1958</b>	
Migration Amendment (Repeal of Certain Visa Classes) Regulation 2014 [SLI 2014 No. 65] [F2014L00622]	D
Migration Amendment (Offshore Resources Activity) Regulation 2014 [SLI 2014 No. 64] [F2014L00624]	
<b>Migration Regulations 1994</b>	
Migration Regulations 1994 - Specification of Places and Currencies for Paying of Fees - (Places and Currencies Instrument) - IMMI 14/006 [F2014L00646]	E
Migration Regulations 1994 - Specification of Payment of Visa Application Charges and Fees in Foreign Currencies (Conversion Instrument) - IMMI 14/005 [F2014L00648]	E
<b>National Health Act 1953</b>	
National Health (Residential Medication Chart) Amendment Determination 2014 (No. 1) (No. PB 24 of 2014) [F2014L00634]	*
National Health (Pharmaceutical Benefits) Amendment (Price Disclosure) Regulation 2014 [SLI 2014 No. 60] [F2014L00636]	
<b>National Residue Survey (Excise) Levy Act 1998 and National Residue Survey (Customs) Levy Act 1998</b>	
Primary Industries Levies and Charges (National Residue Survey Levies) Amendment (Onions) Regulation 2014 [SLI 2014 No. 57] [F2014L00629]	
<b>Primary Industries (Customs) Charges Act 1999</b>	
Primary Industries (Customs) Charges Amendment (2014 Measures No. 1) Regulation 2014 [SLI 2014 No. 54] [F2014L00626]	
<b>Primary Industries (Excise) Levies Act 1999</b>	
Primary Industries (Excise) Levies Amendment (2014 Measures No. 1) Regulation 2014 [SLI 2014 No. 55] [F2014L00628]	
<b>Primary Industries Levies and Charges Collection Act 1991</b>	
Primary Industries Levies and Charges Collection Amendment (Mushrooms) Regulation 2014 [SLI 2014 No. 56] [F2014L00627]	
<b>Programs and Awards Statute 2013</b>	
Assessment Rules 2014 [F2014L00587]	E
<b>Protection of the Sea (Prevention of Pollution from Ships) Act 1983 and Navigation Act 2012</b>	
Marine Order 91 (Marine pollution prevention — oil) 2014 [F2014L00638]	
Marine Order 93 (Marine pollution prevention — noxious liquid substances) 2014 [F2014L00643]	
<b>Social Security Act 1991</b>	
Social Security (Personal Care Support - NSW Lifetime Care and Support Scheme - direct	

funding of treatment, rehabilitation and care services) Determination 2014 [F2014L00619]	
<b><i>Superannuation Act 1976</i></b>	
Superannuation (CSS) Productivity Contribution (2014-2015) Declaration 2014 [F2014L00649]	
<b><i>Superannuation Industry (Supervision) Act 1993</i></b>	
Superannuation Data and Payment Standards (Contribution Transitional Arrangements) Amendment 2014 [F2014L00608]	E
<b><i>Telecommunications (Consumer Protection and Service Standards) Act 1999</i></b>	
Telecommunications Universal Service Obligation (First Declaration Deferral Period) Declaration 2014 [F2014L00639]	
<b><i>Telecommunications (Interception and Access) Act 1979</i></b>	
Notice of a declaration of a Commonwealth Royal Commission as an eligible Commonwealth authority under section 5AA of the Telecommunications (Interception and Access) Act 1979 [F2014L00644]	
<b><i>Therapeutic Goods (Charges) Act 1989</i></b>	
Therapeutic Goods (Charges) Amendment (2014 Measures No. 1) Regulation 2014 [SLI 2014 No. 61] [F2014L00631]	
Therapeutic Goods Legislation Amendment (Fees and Other Measures) Regulation 2014 [SLI 2014 No. 62] [F2014L00630]	
Therapeutic Goods Legislation Amendment (In Vitro Diagnostic Medical Devices) Regulation 2014 [SLI 2014 No. 63] [F2014L00632]	

## **Appendix 2**

### **Guideline on consultation**







AUSTRALIAN SENATE

## STANDING COMMITTEE ON REGULATIONS AND ORDINANCES

### Addressing consultation in explanatory statements

#### *Role of the committee*

The Standing Committee on Regulations and Ordinances (the committee) undertakes scrutiny of legislative instruments to ensure compliance with [non-partisan principles](#) of personal rights and parliamentary propriety.

#### *Purpose of guideline*

This guideline provides information on preparing an explanatory statement (ES) to accompany a legislative instrument, specifically in relation to the requirement that such statements must describe the nature of any consultation undertaken or explain why no such consultation was undertaken.

The committee scrutinises instruments to ensure, inter alia, that they meet the technical requirements of the [Legislative Instruments Act 2003](#) (the Act) regarding the description of the nature of consultation or the explanation as to why no consultation was undertaken. Where an ES does not meet these technical requirements, the committee generally corresponds with the relevant minister seeking further information and appropriate amendment of the ES.

Ensuring that the technical requirements of the Act are met in the first instance will negate the need for the committee to write to the relevant minister seeking compliance, and ensure that an instrument is not potentially subject to [disallowance](#).

It is important to note that the committee's concern in this area is to ensure only that an ES is technically compliant with the descriptive requirements of the Act regarding consultation, and that the question of whether consultation that has been undertaken is appropriate is a matter decided by the rule-maker at the time an instrument is made.

However, the nature of any consultation undertaken may be separately relevant to issues arising from the committee's scrutiny principles, and in such cases the committee may consider the character and scope of any consultation undertaken more broadly.

### ***Requirements of the Legislative Instruments Act 2003***

Section 17 of the Act requires that, before making a legislative instrument, the instrument-maker must be satisfied that appropriate consultation, as is reasonably practicable, has been undertaken in relation to a proposed instrument, particularly where that instrument is likely to have an effect on business.

Section 18 of the Act, however, provides that in some circumstances such consultation may be 'unnecessary or inappropriate'.

It is important to note that section 26 of the Act requires that explanatory statements describe the nature of any consultation that has been undertaken or, if no such consultation has been undertaken, to explain why none was undertaken.

It is also important to note that requirements regarding the preparation of a Regulation Impact Statement (RIS) are separate to the requirements of the Act in relation to consultation. This means that, although a RIS may not be required in relation to a certain instrument, the requirements of the Act regarding a description of the nature of consultation undertaken, or an explanation of why consultation has not occurred, must still be met. However, consultation that has been undertaken under a RIS process will generally satisfy the requirements of the Act, provided that that consultation is adequately described (see below).

If a RIS or similar assessment has been prepared, it should be provided to the committee along with the ES.

### ***Describing the nature of consultation***

To meet the requirements of section 26 of the Act, an ES must *describe the nature of any consultation that has been undertaken*. The committee does not usually interpret this as requiring a highly detailed description of any consultation undertaken. However, a bare or very generalised statement of the fact that consultation has taken place may be considered insufficient to meet the requirements of the Act.

Where consultation has taken place, the ES to an instrument should set out the following information:

#### ***Method and purpose of consultation***

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An ES should state who and/or which bodies or groups were targeted for consultation and set out the purpose and parameters of the consultation. An ES should avoid bare statements such as 'Consultation was undertaken'.

#### *Bodies/groups/individuals consulted*

An ES should specify the actual names of departments, bodies, agencies, groups et cetera that were consulted. An ES should avoid overly generalised statements such as 'Relevant stakeholders were consulted'.

#### *Issues raised in consultations and outcomes*

An ES should identify the nature of any issues raised in consultations, as well the outcome of the consultation process. For example, an ES could state: 'A number of submissions raised concerns in relation to the effect of the instrument on retirees. An exemption for retirees was introduced in response to these concerns'.

#### *Explaining why consultation has not been undertaken*

To meet the requirements of section 26 of the Act, an ES must *explain why no consultation was undertaken*. The committee does not usually interpret this as requiring a highly detailed explanation of why consultation was not undertaken. However, a bare statement that consultation has not taken place may be considered insufficient to meet the requirements of the Act.

In explaining why no consultation has taken place, it is important to note the following considerations:

#### *Specific examples listed in the Act*

Section 18 lists a number of examples where an instrument-maker may be satisfied that consultation is unnecessary or inappropriate in relation to a specific instrument. This list is not exhaustive of the grounds which may be advanced as to why consultation was not undertaken in a given case. The ES should state why consultation was unnecessary or inappropriate, and explain the reasoning in support of this conclusion. An ES should avoid bare assertions such as 'Consultation was not undertaken because the instrument is beneficial in nature'.

#### *Timing of consultation*

The Act requires that consultation regarding an instrument must take place before the instrument is made. This means that, where consultation is planned for the implementation or post-operative phase of changes introduced by a given instrument,

that consultation cannot generally be cited to satisfy the requirements of sections 17 and 26 of the Act.

In some cases, consultation is conducted in relation to the primary legislation which authorises the making of an instrument of delegated legislation, and this consultation is cited for the purposes of satisfying the requirements of the Act. The committee may regard this as acceptable provided that (a) the primary legislation and the instrument are made at or about the same time and (b) the consultation addresses the matters dealt with in the delegated legislation.

***Seeking further advice or information***

Further information is available through the committee's website at [http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate\\_Committees?url=regord\\_ctte/index.htm](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=regord_ctte/index.htm) or by contacting the committee secretariat at:

Committee Secretary  
Senate Regulations and Ordinances Committee  
PO Box 6100  
Parliament House  
Canberra ACT 2600  
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Phone: +61 2 6277 3066

Fax: +61 2 6277 5881

Email: [RegOrds.Sen@aph.gov.au](mailto:RegOrds.Sen@aph.gov.au)

# **Appendix 3**

## **Correspondence**





**The Hon Scott Morrison MP**  
Minister for Immigration and Border Protection



Senator the Hon. Sean Edwards  
Chair  
Senate Standing Committee on Regulations and Ordinances  
Parliament House  
CANBERRA ACT 2600

Dear Senator Edwards

***Queries raised in Delegated Legislation Monitor No. 5 of 2014***

I thank the Senate Standing Committee on Regulations and Ordinances for its letters of 14 May 2014 concerning Delegated Legislation Monitor No. 5 of 2014, in which the Committee requested a response regarding a number of legislative instruments. The response in relation to the each enquiry is attached, as follows

- *Migration Amendment (Bridging visa – Code of Behaviour) Regulation 2013* [F2013L02102], Attachment A
- *Migration Amendment (2014 Measures No. 1) Regulation 2014* [F2014L00286], Attachment B;
- *Specification of Tests, Scores, Period, Level of Salary, and Exemptions to the English Language Requirement for Subclass 457 (Temporary Work (Skilled)) Visas* [IMMI 14/009] [F2014L00327], Attachment C; and
- *Migration Amendment (Credit Card Surcharge) Regulation 2014* [F2014L00421], Attachment D.

Thank you again for bringing these matters to my attention. I trust the information provided is helpful.

Yours sincerely

The Hon Scott Morrison MP  
**Minister for Immigration and Border Protection**

19/6/2014

***Migration Amendment (Bridging visa – Code of Behaviour) Regulation 2013*****[F2013L02102]**

The Committee has sought further information on the following three issues:

1. The supporting information and policy guidance made available by my department explaining the key terms used in the code of behaviour;
2. The exemption of the relevant instrument from disallowance; and
3. The retrospective effect of the Regulation.

Please find responses on these matters set out below.

**1. Supporting information and policy guidance explaining key terms used in the code of behaviour**

The committee noted that my department has prepared supporting information that explains key terms used in the code of behaviour and has requested a copy of any such supporting information. The committee has also sought advice as to whether departmental policy manuals and/or guidance material contains guidance for decision-makers on the application of key terms in decision-making, consistent with the supporting information provided to visa holders.

A range of supporting information and advices have, and are, being prepared for persons subject to the code of behaviour which explain the terms used within the Code, their relative meanings and the possible consequences with non-compliance of the Code. This information is designed to be consistent with the intention of the new Regulations and Legislative Instrument and the overall educational message to people being released from detention on a Bridging E (Class WE) visa (BVE) granted by me in the public interest.

Form 1443 is included at back of this letter and contains the code of behaviour and explanatory information for affected individuals. The form explains what the code of behaviour is about, and explains some of the terms in the code of behaviour, such as 'harass', 'intimidate', 'bully', 'antisocial' and 'disruptive'. For persons required to sign and abide by the code of behaviour, Form 1444i - *Code of Behaviour for Subclass 050 Bridging (General) visa holders Supporting Information* contains this explanatory information in a translated form, and is available on my department's external website at <http://www.immi.gov.au/About/Pages/ima/info.aspx>. Form 1444i is available in Arabic, Bengali, Dari, Farsi (Persian), Kurdish (Kurmanji), Kurdish (Sorani), Myanmar language (Burmese), Pashto, Sinhalese, Tamil, Urdu, and Vietnamese.

Illegal Maritime Arrivals (IMAs) in community detention and held detention sign the code of behaviour with the support of departmental case managers and accredited interpreters to



explain the code of behaviour and its effect on BVE eligibility. IMAs in held detention and community detention commenced signing the code of behaviour in January 2014. More than 1900 IMAs who were in held or community detention when they signed the code of behaviour have been released from detention following BVE grant (as at 29 May 2014).

In mid-February 2014, signature of the code of behaviour by IMAs who had previously been released on a BVE commenced at information sessions run by service providers. All Community Assistance Support (CAS) and Asylum Seeker Assistance Scheme (ASAS) service providers have been involved in organising information sessions about the code of behaviour and behaviour expected in Australia. Most service providers have also provided staff to act as witnesses to signature of the code of behaviour. The department has also distributed the code of behaviour in small targeted mail-outs to bridging visa holders in selected regional and rural locations. Some 1000 IMAs who were living in the community have signed the code of behaviour and been granted a further BVE. More than 5000 code of behaviour forms have been received from IMAs who have signed them while in the community. These are being processed (as at 29 May 2014).

Service providers have been provided with supporting documents about the code of behaviour to use in their information sessions for IMAs, and in their ongoing engagement with IMAs in the community. An example of these documents is the *Communication Guide: Code of Behaviour information for clients*, included at the back of this letter, which is produced by my department and provided to service providers.

A Policy Advice Manual (PAM), Ministerial Direction and other internal documents are also being finalised, which will support departmental staff responsible for assessing and triaging any alleged breaches of the code of behaviour. These documents will also provide guidance on the terms of the code of behaviour consistent with existing documentation, and will inform the guiding principles to be considered on whether the discretion to cancel a person's BVE should be exercised, or whether an alternative response is more appropriate in that circumstance.

## **2. Exemption of instrument from disallowance**

The committee has noted that my previous response did not address the issues raised by the committee, and has requested further information regarding:

- the broader justification for the exemption of instruments made under Schedule 4;
- the extent to which any such justification applies to the code; and
- whether, taking into account the nature of the code, it is appropriate to exempt such an instrument from disallowance (and therefore remove it from the effective oversight of the Parliament).

As the committee is aware, section 44 of the *Legislative Instruments Act 2003* (LI Act) provides that Legislative Instruments made under Parts 1, 2, 5 and 9 and Schedules 1, 2, 4, 5A, 6, 6A or 8 to the *Migration Regulations 1994* (Migration Regulations) are not subject to

disallowance. The LI Act was enacted by Parliament in 2003 and is administered by the Attorney's General Department. I note that Schedule 4 to the Migration Regulations relates to public interest criteria and is the appropriate and relevant Schedule under which to make the instrument in question.

I considered it appropriate that the code of behaviour be contained in a legislative instrument in order to provide more flexibility to change the content of the code of behaviour as required. I also note that the Regulations made in support of the code of behaviour framework are subject to parliamentary scrutiny.

I would reiterate that an IMA in detention can only be granted a BVE where I exercise my personal powers to grant a visa in the public interest. Given that I grant these visas using my personal powers it is appropriate that I determine the conditions under which these people may live in the community. The grant of a visa in these circumstances is not a right, and is conferred on these non-citizens in the expectation that they will be law abiding, considerate, compliant, and will not cause or threaten harm to the Australian community. Without my intervention these non-citizens would remain in immigration detention and would return to immigration detention at the expiry of their BVEs.

### **3. Retrospective effect of instrument**

The committee has noted that, as a result of this instrument, an otherwise valid application not determined at 14 December 2013 may now be subject to a new criterion (the code) at the time of the visa decision. As such, the committee considered the instrument to be retrospective in effect and requested further information as to the justification for this approach.

Clause 050.225 states if the applicant: (a) is at least 18 at the time of application; and (b) holds, or has previously held, a BVE granted under section 195A of the Act; the applicant satisfies Public Interest Criterion 4022 (PIC 4022) containing a requirement to sign a code of behaviour. It is unlikely that there were any undecided valid BVE applications as at 14 December 2013, where the applicant would become subject to PIC 4022 under clause 050.225. This is because any person who held or had held a BVE granted to them by a Minister under s195A on 14 December 2013 would have been either barred from lodging a BVE application under the Regulations due to the effect of section 91K or section 46A of the Act, or because they were not recognised under the Act as an eligible non-citizen under the Act.

In any event, I had made it clear in my public statements that no further BVEs would be granted to IMAs, either to those non-citizens in immigration detention or those who were already living in the community, without an enforceable code of behaviour in place.

***Migration Amendment (2014 Measures No. 1) Regulation 2014 [F2014L00286]***

The Committee notes that Schedules 1, 2, 3 and 5 to the Instrument makes amendments to the criteria that must be met for certain visa subclasses to be granted. The Committee notes that the Instrument provides that these amendments apply to unfinalised applications made before the commencement of the Instrument on 22 March 2014 as well as to new applications made on or after commencement.

The Committee has concluded that, as a result of these amendments, otherwise valid applications not determined at 22 March 2014 are, by virtue of the new requirements, now invalid, giving the Instrument an element of retrospectivity in its effect. The Committee notes that the Explanatory Statement provides no justification for this apparent removal of entitlement and seeks further information.

I note that the amendments made by Schedules 1, 2, 3 and 5 to the Instrument do not affect the validity of any visa applications. Any applications that were valid prior to the commencement of this Instrument remain valid after its commencement. Under the *Migration Regulations 1994* (the Migration Regulations), a visa application must meet certain criteria in order to be a valid application. The amendments made by these Schedules do not amend or impact any criteria that relate to the validity of an application.

As the Committee has noted, these Schedules do make amendments (to the criteria for grant of certain visa subclasses) that apply to applications decided on or after the commencement of the Instrument, regardless of the date of application.

Relevantly, I note that section 504 of the Migration Act authorises the making of regulations that are necessary or convenient to carry out or give effect to the objectives of the Migration Act, which include regulating the entry and stay of non-citizens in Australia in the national interest. Accordingly, these regulations apply to all relevant applications decided on or after the commencement of the Instrument.

**Schedules 1 and 3**

Schedules and 1 and 3 make amendments regarding Public Interest Criterion 4020 (PIC 4020) which relates to the provision false or misleading information to my department.

The amendments made by Schedule 1 strengthen the pre-existing requirement in PIC 4020 for visa applicants to provide genuine documents, including documents relating to their identity. The amendments made by Schedule 3 insert PIC 4020 into a number of visa subclasses, providing a mechanism to refuse to grant those visas where an applicant has provided false or misleading information.

PIC 4020 is intended to deter persons from providing false or misleading information or falsified documents in visa applications. My department has a responsibility to ensure that visas are granted to genuine and correctly identified applicants. The amended PIC 4020 imposes new consequences on applicants who fail to meet the identity requirements by preventing them from being granted certain visas for ten years from the date of refusal (commonly referred to as 'exclusion period'). This new consequence is necessary for the integrity of Australia's migration programme which is important for the following reasons:

- my department's identity information is the foundational source for subsequent identity documents provided by other Commonwealth and State/Territory agencies (e.g., Medicare, Centrelink and driver's licences) as well as the private sector. Because of the importance of identity to the integrity of Australia's migration, security and other programmes, it is appropriate that the exclusion period is greater where a visa is refused due to identity fraud; and
- the strengthening of the identity requirements under PIC 4020 would be expected to have positive flow-on benefits in the medium to longer term on the integrity of Australia's citizenship program. In addition, it would reduce Australia's potential status as a country of 'last resort', where an individual has exhausted their options for migration to other Five Country Conference countries (the United Kingdom, the United States, Canada and New Zealand) as it would better align with the policies of those countries.

Given the importance of accurate identity verification to national security and the public interest it is appropriate to ensure these new safeguards apply to all visas granted after the commencement of the Instrument.

## Schedule 2

The amendments made by Schedule 2 amend criteria for the grant of a subclass 202 (Global Special Humanitarian) visa (subclass 202 visa). The amendments relate to the requirement that there must be compelling reasons for the grant of a permanent visa to the applicant and the factors to be considered in determining whether there are compelling reasons.

Before 28 September 2012, all applicants for a subclass 202 visa were assessed against the same factors in determining whether there are compelling reasons for granting the applicant a permanent visa (compelling reasons criterion). As a result of the recommendations of the Expert Panel on Asylum Seekers (see Report of the Expert Panel on Asylum Seekers, Australian Government, August 2012), on 28 September 2012, the former government made a number of amendments to the Class XB visas. The key principle behind these measures, expressed in recommendation 1, was that Illegal Maritime Arrivals (IMAs) should not gain any benefit from circumventing regular migration arrangements.

The amendments prevented persons, who on or after 13 August 2012 became IMAs, from proposing an applicant for entry to Australia. However, the amendments also provided a concession that the compelling reasons criterion was assessed at a lower threshold for

applicants proposed by persons who were global special humanitarian visa holders or who were under 18 years of age at the time of application (including IMAs who arrived before 13 August 2012). Most minor proposers affected by this criterion arrived illegally as unaccompanied minors before the Report of the Expert Panel on Asylum seekers was released.

The government's policy now is to remove this concession for applicants proposed by person's under 18 years of age because it is inconsistent with the principle that IMAs should not benefit from their illegal mode of arrival. Removing the concession puts those applicants back on an equal footing with applicants proposed by visa holders over 18 years of age.

Most affected applicants made their applications before the Report of the Expert Panel on Asylum Seekers. As such, for these applicants, this amendment effectively returns the 'compelling reasons' criterion to the form it took at the time of their application.

A Statement of Compatibility with Human Rights has been completed for these amendments, in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The Statement's overall assessment is that the amendment is compatible with human rights because it advances the protection of human rights and, to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate in achieving the legitimate aims of maintaining the integrity of Australia's borders and preventing minors risking their lives to secure resettlement of their families in Australia. These goals are primary considerations.

#### Schedule 5

The amendments made by Schedule 5 amend criteria relating to the subclass 457 (Temporary Work (Skilled) visa (subclass 457 visa)).

The amendments made by Schedule 5 do not add any new requirements to be met for the grant of a subclass 457 visa. Prior to the commencement of the instrument certain English language proficiency requirements (the type of test to be taken and scores to be achieved) were set out in the Migration Regulations. The amendments made by Schedule 5 provide that these English language proficiency requirements are now set out in a legislative instrument made by a Minister under the regulations. The actual requirements to be met by applicants did not change.

My department has become aware of industry stakeholders' concerns that the minimum English language proficiency requirements are too high and do not reflect industry requirements. This limits the ability of industries to obtain qualified temporary skilled workers as subclass 457 visa applicants are unable to meet the minimum test score across all four test components (speaking, reading, listening and writing). However, the minimum requirements have not been amended in this instrument because the subclass 457 programme is currently the subject of a review. If any amendments to the minimum English language proficiency requirements are made, the changes will occur after the conclusion of the review

and will take into consideration the recommendations of the review panel and relevant industry stakeholders.

The purpose of moving the English language proficiency requirements into a legislative instrument made by a Minister is to ensure English proficiency requirements are easily adaptable to changing workforce requirements or visa integrity concerns in the future. The subclass 457 visa programme needs to be responsive to changes in economic demands and enable industries to obtain appropriately qualified temporary skilled workers to address skilled labour shortages in Australia.

I note that subsection 504(2) of the Migration Act authorises the making of a regulation which confers a power on the Minister to specify relevant matters, such as these English language proficiency requirements, in a legislative instrument, including after the regulations take effect.

***Specification of Tests, Scores, Period, Level of Salary, and Exemptions to the English Language Requirement for Subclass 457 (Temporary Work (Skilled)) Visas [IMMI 14/009]***

The Committee noted that the Explanatory Statement to this Instrument contains no reference to consultation. The Committee requested further information on consultation undertaken, and that the Explanatory Statement is updated. I regret that this occurred and I assure the Committee that my department is aware of its obligation to explain why consultation was unnecessary or inappropriate as prescribed under the *Legislative Instruments Act 2003*. I understand this omission occurred due to human error.

No consultation was undertaken in this instance as the nature of the amendments are of a minor or machinery nature and that they do not substantially alter existing arrangements. Section 18 of the *Legislative Instruments Act 2003* provides that instruments that are minor or machinery in nature, where they do not substantially alter existing arrangements, allow the rule-maker to be satisfied that consultation is not necessary.

An amended Explanatory Statement incorporating a paragraph addressing the subject of consultation has been drafted and will be tabled as soon as possible.

***Migration Amendment (Credit Card Surcharge) Regulation 2014[F2014L00421]****(a) Drafting*

The committee noted that item 2 of Schedule 1 of this instrument inserts a new regulation 5.43 into the *Migration Regulations 1994* (the Migration Regulations), at the end of Division 5.7 of Part 5. The committee notes that there appears to be another regulation 5.43 in the Migration Regulations, at the beginning of Division 5.8 of Part 5. As a consequence, there are now two regulations numbered 5.43 in the Migration Regulations.

I thank the committee for drawing my attention to this typographical error. I can confirm that the Department of Immigration and Border Protection is in the process of rectifying the issue at the earliest opportunity. The Office of Parliamentary Counsel has advised that the regulations operate effectively in the interim despite the typographical error.

*(b) Subdelegation of legislative power*

The committee request further information about new subregulation 5.43(4) of the *Migration Regulations 1994*, specifically regarding the power in the *Migration Act 1958* (the Migration Act) to subdelegate to the Minister the power (in effect) to determine circumstances in which the credit card surcharge may or must be waived or refunded.

Subsection 504(2) of the Migration Act authorises the making of regulation 5.43(4) conferring a power on the Minister to specify matters in an instrument in writing.

I note that subsection 14(2) of the *Legislative Instruments Act 2003* (the LI Act) provides, in effect, that, *unless a contrary intention appears*, Regulations may not make provision in relation to a matter by applying, adopting or incorporating a matter in a non-disallowable legislative instrument after the empowering regulation is made.

However, subsection 504(2) of the Migration Act provides:

*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.*

The effect of subsection 504(2) of the Migration Act is to provide a contrary intention to section 14 of the LI Act. Subsection 504(2) permits the making of regulations conferring a power on the Minister to specify matters in an instrument after the taking effect of the regulations.

Subregulation 5.43(4) provides in summary that the circumstances in which the credit card



surcharge may or must be waived or refunded may be specified by the Minister in a legislative instrument. The circumstances to be specified by the Minister under subregulation 5.43(4) are 'matters' for the purposes of subsection 504(2) of the Migration Act.

Therefore, subsection 504(2) of the Migration Act authorises the making of regulation 5.43(4) conferring a power on the Minister to specify matters in an instrument in writing, including after the regulations take effect.



Australian Government

Department of Immigration  
and Border Protection

# Code of Behaviour for Subclass 050 Bridging (General) visa holders

Form  
**1443**

The Australian Government has introduced a Code of Behaviour (the code) which will apply to certain adults who are considered for the grant of a Bridging E visa (BVE or bridging visa). The code will apply to all adult illegal maritime arrivals who are considered for the grant of a BVE.

## What is the Code of Behaviour?

The code describes how people are expected to behave while they are living in the Australian community on a bridging visa. It also describes behaviour that will not be accepted.

The code has been introduced to make sure that people who are granted a bridging visa behave appropriately while in the Australian community. The Australian Government and community expect non-citizens to abide by the law, respect Australian values and cooperate with government authorities.

## Who needs to sign the Code of Behaviour?

If you arrived in Australia illegally by boat and are 18 years of age or older you must sign the code before you can be considered for the grant of a Bridging E visa.

If you have previously been granted a Bridging E visa by the Minister under section 195A of the *Migration Act 1958*, you must also sign the code before you can be granted a new Bridging E visa. This is very important if your bridging visa has ceased or is about to cease. You will not be considered for a further bridging visa until the Department of Immigration and Border Protection (the department) has received a copy of the current code which you have signed and which has been witnessed properly.

Certain other categories of people may also be required to sign the code. The department will tell you if you are in one of those categories.

If you are unsure whether you need to sign the code, please contact the department.

## Why do I need to sign the Code of Behaviour?

Signing the code means that you understand that if you do not abide by the code, your income support could be reduced or ceased or your bridging visa could be cancelled and that you may be detained and transferred to an offshore processing centre.

## What is the Code of Behaviour about?

The code describes the behaviour expected of people who are living in the Australian community on a Bridging E visa.

The code does not contain all the conditions and duties under Australian law of people granted a bridging visa. By signing the code you agree to behave according to values that are important to the Australian community while working towards the resolution of your immigration status.

Australia is a free and democratic country where men and women are equal. People are expected to show respect for one another and not to abuse or threaten others.

You must obey Australian laws while living in Australia. This means, for example, that you must not commit violence or inappropriate sexual contact of any kind. You must not lie to a government official, withhold information or give false identity documents. Your visa may be cancelled due to criminal conduct in Australia.

## What do 'antisocial' and 'disruptive' activities mean?

The terms used in the code take their ordinary meanings.

- To 'harass' another person means to persistently or continually disturb or irritate them.
- To 'intimidate' another person means to cause them fear through your words or actions, including trying to force someone to do something.
- To 'bully' another person means to act in an unwanted or aggressive manner towards them, especially if you are in a more powerful position. Bullying includes making threats, spreading rumours, attacking someone physically or verbally, or excluding someone from a group or place on purpose.
- 'Anti-social' means an action that is against the order of society. This may include damaging property, spitting or swearing in public or other actions that other people might find offensive.
- 'Disruptive' means to cause disorder or to disturb someone or something.

## How do I sign the Code of Behaviour and have it witnessed?

You must sign and date this form 1443 *Code of Behaviour for Subclass 050 Bridging (General) visa holders*, and provide your address and identity details. Your signature should be witnessed and your identity verified by an eligible witness. If you have been issued with photo identification, you should show the witness your photo identification (for example, valid passport, ImmiCard or driver's licence).

Eligible witnesses include:

- officers of the department
- Community Assistance Support (CAS) and Asylum Seeker Assistance Scheme (ASAS) case workers
- Community Detention service providers, and
- registered migration agents.

Other categories of people who may witness your signature and identity are listed on the last page of this form.

## What does the witness need to do?

The role of the witness is to certify that you have signed the code in front of them and are the person whose identity details are given. The witness is not responsible for ensuring that you understand the code or will abide by it.

The witness will check your photo identification to confirm your identity and then watch you sign the form. The witness will also need to sign the form and provide their details.

## Where do I send the signed Code of Behaviour?

The signed code may be scanned and emailed to: [bvreporting@immi.gov.au](mailto:bvreporting@immi.gov.au)

If you are unable to email the signed copy, the original signed document may be sent to the following address:

IMA BVE Processing Team  
Department of Immigration and Border Protection  
GPO Box 9984  
SYDNEY NSW 2001

You are advised to keep a copy for your records.

## What if I do not sign the Code of Behaviour?

If you do not sign the code you will not be eligible to receive a Bridging E visa.

If you do not sign the code and are:

- in immigration detention, you will remain in immigration detention.
- in community detention, you will not be considered for a bridging visa and may be returned to immigration detention.
- in the community having previously been granted a bridging visa, you will not receive a further Bridging E visa. In addition to losing access to services while in the community, such as Medicare and income support payments, as an unlawful non-citizen you will be liable to be returned to immigration detention.

## What happens if I breach the Code of Behaviour?

It will be a condition of your bridging visa that you do not breach the code. If you breach the code, your bridging visa may be cancelled. If your bridging visa is cancelled, you will be returned to immigration detention.

The department may take other actions as appropriate. This includes counselling you on your behaviour and sending a warning letter to remind you of your obligations. The department may also reduce or suspend any income support payments you are receiving through the CAS and ASAS programmes.

## Will I need to sign the Code of Behaviour again if my visa expires?

You will only need to sign the code once, except if there are changes to the code. If the wording of the code is changed you will need to sign the new version before you can be granted a further bridging visa. The department will tell you if this is the case.

## Where can I get help to sign the Code of Behaviour?

If you are receiving support through the Community Assistance Support (CAS) or Asylum Seeker Assistance Scheme (ASAS) programmes, your case worker may be able to assist you to understand the code and to find an appropriate person who can witness your signature.

Information about the code is available in community languages on the department's website [www.immi.gov.au/ima](http://www.immi.gov.au/ima)

If you need further help to understand and sign the code, contact the department on **131 881**.

If you are a community detainee, your Community Detention service provider or departmental case manager may be able to assist you.

## Important information about privacy

Your personal information is protected by law, including the *Privacy Act 1988*. Important information about the collection, use and disclosure (to other agencies and third parties, including overseas entities) of your personal information, including sensitive information, is contained in form 1442i *Privacy notice*. Form 1442i is available from the department's website [www.immi.gov.au/allforms/](http://www.immi.gov.au/allforms/) or offices of the department. You should ensure that you read and understand form 1442i before completing this form.

Home page [www.immi.gov.au](http://www.immi.gov.au)

*General enquiry line* Telephone **131 881** during business hours in Australia to speak to an operator (recorded information available outside these hours).  
If you need the assistance of an interpreter to contact the department, ring the Translating and Interpreting Service (TIS National) on **131 450** during business hours and tell the operator which language you speak.



# Code of Behaviour

This Code of Behaviour contains a list of expectations about how you will behave at all times while in Australia. It does not contain all your rights and duties under Australian law. If you are found to have breached the Code of Behaviour, you could have your income support reduced, or your visa may be cancelled. If your visa is cancelled, you will be returned to immigration detention and may be transferred to an offshore processing centre.

### While you are living in the Australian community:

- you **must not** disobey any Australian laws including Australian road laws; you **must** cooperate with all lawful instructions given to you by police and other government officials;
- you **must not** make sexual contact with another person without that person's consent, regardless of their age; you must never make sexual contact with someone under the age of consent;
- you **must not** take part in, or get involved in any kind of criminal behaviour in Australia, including violence against any person, including your family or government officials; deliberately damage property; give false identity documents or lie to a government official;
- you **must not** harass, intimidate or bully any other person or group of people or engage in any anti-social or disruptive activities that are inconsiderate, disrespectful or threaten the peaceful enjoyment of other members of the community;
- you **must not** refuse to comply with any health undertaking provided by the Department of Immigration and Border Protection or direction issued by the Chief Medical Officer (Immigration) to undertake treatment for a health condition for public health purposes;
- you **must** co-operate with all reasonable requests from the department or its agents in regard to the resolution of your status, including requests to attend interviews or to provide or obtain identity and/or travel documents.

### To be completed by visa holder

I, [full name of Bridging E visa holder]

agree to abide by this Code of Behaviour while I am living in Australia on a Bridging E visa. I understand that if I do not abide by the Code of Behaviour my income support may be reduced or ceased, or my visa may be cancelled and I will be returned to immigration detention.

Signature of visa holder

Day    Month    Year

Date

/ /

Current residential address

Postcode

Day    Month    Year

Date of birth

/ /

Identity number (may use boat identity number, ImmiCard number or Client/ICSE identity number)

### To be completed by witness

Signature of witness

Day    Month    Year

Date

/ /

Full name (block letters)

Current residential address

Postcode

Role/position

Photo ID checked?    No     Yes

Format of ID checked eg. passport, ImmiCard

## Eligible witnesses

The following people can act as a witness for the purposes of signing the attached Code of Behaviour:

- (1) a person who is currently employed as an officer of the Department of Immigration and Border Protection
- (2) a person who is currently employed by a Community Assistance Support (CAS) or Asylum Seeker Assistance Scheme (ASAS) service provider
- (3) a person who is currently employed by a Community Detention (CD) service provider
- (4) a migration agent registered with the Office of the Migration Agents Registration Authority
- (5) a person who is currently licensed or registered under a law to practise in one of the following occupations:
  - Chiropractor
  - Dentist
  - Legal practitioner
  - Medical practitioner
  - Nurse
  - Optometrist
  - Patent attorney
  - Pharmacist
  - Physiotherapist
  - Psychologist
  - Trade marks attorney
  - Veterinary surgeon
- (6) a person who is enrolled on the roll of the Supreme Court of a State or Territory, or the High Court of Australia, as a legal practitioner (however described), or
- (7) a person who is in the following list:
  - Agent of the Australian Postal Corporation who is in charge of an office supplying postal services to the public
  - Australian Consular Officer or Australian Diplomatic Officer (within the meaning of the *Consular Fees Act 1955*)
  - Bailiff
  - Bank officer with 5 or more continuous years of service
  - Building society officer with 5 or more years of continuous service
  - Chief executive officer of a Commonwealth court
  - Clerk of a court
  - Commissioner for Affidavits
  - Commissioner for Declarations
  - Credit union officer with 5 or more years of continuous service
  - Employee of the Australian Trade Commission who is:
    - (a) in a country or place outside Australia, and
    - (b) authorised under paragraph 3 (d) of the *Consular Fees Act 1955*, and
    - (c) exercising his or her function in that place
  - Employee of the Commonwealth who is:
    - (a) in a country or place outside Australia, and
    - (b) authorised under paragraph 3 (c) of the *Consular Fees Act 1955*, and
    - (c) exercising his or her function in that place
  - Fellow of the National Tax Accountants' Association
  - Finance company officer with 5 or more years of continuous service
  - Holder of a statutory office not specified in another item in this list
  - Judge of a court
  - Justice of the Peace
  - Magistrate
  - Marriage celebrant registered under Subdivision C of Division 1 of Part IV of the *Marriage Act 1961*
  - Master of a court
  - Member of Chartered Secretaries Australia
  - Member of Engineers Australia, other than at the grade of student
  - Member of the Association of Taxation and Management Accountants
  - Member of the Australasian Institute of Mining and Metallurgy
  - Member of the Australian Defence Force who is:
    - (a) an officer, or
    - (b) a non-commissioned officer within the meaning of the *Defence Force Discipline Act 1982* with 5 or more years of continuous service, or
    - (c) a warrant officer within the meaning of that Act
  - Member of the Institute of Chartered Accountants in Australia, the Australian Society of Certified Practising Accountants or the National Institute of Accountants
  - Member of:
    - (a) the Parliament of the Commonwealth, or
    - (b) the Parliament of a State, or
    - (c) a Territory legislature, or
    - (d) a local government authority of a State or Territory
  - Minister of religion registered under Subdivision A of Division 1 of Part IV of the *Marriage Act 1961*
  - Notary public
  - Permanent employee of the Australian Postal Corporation with 5 or more years of continuous service who is employed in an office supplying postal services to the public
  - Permanent employee of:
    - (a) the Commonwealth or a Commonwealth authority, or
    - (b) a State or Territory or a State or Territory authority, or
    - (c) a local government authority,with 5 or more years of continuous service who is not specified in another item in this list
  - Person before whom a statutory declaration may be made under the law of the State or Territory in which the declaration is made
  - Police officer
  - Registrar, or Deputy Registrar, of a court
  - Senior Executive Service employee of:
    - (a) the Commonwealth or a Commonwealth authority, or
    - (b) a State or Territory or a State or Territory authority
  - Sheriff
  - Sheriff's officer
  - Teacher employed on a full-time basis at a school or tertiary education institution.

# Communication guide: Code of Behaviour information for clients

As at 28 February 2014

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### **Purpose**

This guide is for service providers working with illegal maritime arrivals (IMAs) who need to sign the Code of Behaviour to be eligible to be considered for a [further] Bridging E visa. This information is designed to support service providers in helping IMAs understand:

- what the Code of Behaviour is
- how to sign the Code of Behaviour
- the role of service providers
- what they need to do to comply with their bridging visa conditions
- consequences of breaching the Code of Behaviour or their other bridging visa conditions.

The Minister for Immigration and Border Protection places a high priority on the implementation of the Code of Behaviour and expects illegal maritime arrivals to behave appropriately and responsibly in the community. An IMA's behaviour in the community is taken into consideration when making visa grant decisions. Please refer to the minister's media release:

[www.minister.immi.gov.au/search/cache.cgi?collection=immirss&doc=2013%2Fsm210412.xml](http://www.minister.immi.gov.au/search/cache.cgi?collection=immirss&doc=2013%2Fsm210412.xml)

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### **Discussion points for clients**

#### ***About the Code of Behaviour***

- Today we're here to tell you more about the Code of Behaviour.
- The immigration minister has decided that asylum seekers who arrived by boat without a valid visa must sign the Code of Behaviour before they can be considered for a bridging visa.
- A bridging visa is a short term temporary visa that allows you to live in the Australian community while your immigration matter is being finalised.
- The Code of Behaviour – the code – outlines how you are expected to behave if you are granted a bridging visa. It lists some key things you must and must not do while you are living in the community on a bridging visa.
- These behaviours are linked to Australian values. This makes sure that Australian society is orderly, free and safe for everyone.
- The requirements listed in the code are also linked to Australian law. Everyone living in Australia is required to obey Australian law, including Australian citizens and people born here.
- It is very important that you understand the code. Signing the code indicates that you understand that if you do not behave in accordance with the code, you will face a sanction.
- Understanding the code will help you understand some of your rights and responsibilities in the Australian community. It will also help you understand that some actions are against the law or not tolerated in Australian society.
- In Australia, you have the right to be treated fairly and with respect. The code sets out your responsibilities in return for the privilege of holding a bridging visa until your immigration status is resolved.
- Certain behaviours, such as threatening or hurting somebody, stealing and making sexual contact with somebody without their permission are against the law. If you break these laws not only can your visa be cancelled, you may be brought before a court and sent to prison.

## DIBP service providers

- Other behaviours, like disturbing your neighbours or being rude or aggressive towards people, while not always against the law, are not acceptable in the Australian community. These are considered 'anti-social behaviours.'
- As a guiding rule, treat people in the same way that you would like them to treat you.
- Signing the code means you are taking responsibility for behaving according to the code at all times, if you are granted a bridging visa.
- Ask us or the immigration department questions if you do not understand.
- While signing the code does not automatically mean you will be granted another bridging visa, you cannot be granted a [\[further\]](#) bridging visa unless you have signed the code.
- If you are granted a bridging visa, read your visa grant letter carefully. It outlines your bridging visa conditions.
- Understanding your bridging visa conditions will also help you make sure you know what you can and cannot do while you are in the Australian community. For example, if your visa grant letter says you are not allowed to work and you do, you would be breaching your bridging visa conditions. The immigration department can take serious action against people who breach their bridging visa conditions.
- It will be a condition of your bridging visa that you abide by the code. If the immigration department finds that you have breached the code, your bridging visa could be cancelled. If your bridging visa is cancelled, you will go back to immigration detention. You will not be eligible for another bridging visa.
- The immigration department may consider other sanctions as appropriate, such as:
  - sending a warning letter to remind you of your obligations
  - asking you to talk to your service provider about behaviour expected in Australia
  - asking you to come into the department to discuss the alleged breach
  - reducing or suspending your income support payments
- If the immigration department is considering these sanctions, you will have the opportunity to explain your actions. Your [\[service provider\]](#) case officer may be able to help you do this.

### ***Signing the Code of Behaviour***

- You can download the Code of Behaviour form – **Form 1443** – from the immigration department's website: [www.immi.gov.au/ima](http://www.immi.gov.au/ima)
- **Form 1444i** is also available in languages other than English on the immigration department's website. The translations are for information only – you **must** sign the Code of Behaviour form in English (Form 1443).
- Print Form 1443 in English.
- Sign and date the Form 1443 where indicated. You also need to write, in English, your full name, current address of where you are living, date of birth and an identity number such as your:
  - Boat identity number.
  - ImmiCard number.
  - Client identification number.
- Have an appropriate person witness you signing it. Eligible witnesses include:
  - A person who is currently employed as an officer of the immigration department

## DIBP service providers

- A person who is currently employed by a CAS or ASAS service provider.
- A migration agent registered with the Office of the Migration Agents Registration Authority (see [www.mara.gov.au](http://www.mara.gov.au))
- A Justice of the Peace
- A person who is currently licensed or registered under a law to practise in one of the following jobs:
  - Chiropractor
  - Dentist
  - Legal practitioner
  - Medical practitioner
  - Nurse
  - Optometrist
  - Patent attorney
  - Pharmacist
  - Physiotherapist
  - Psychologist
  - Trade marks attorney
  - Veterinary surgeon
- A complete list of eligible witness categories is available on **Form 1443**)
- The witness must also write their details on the form as indicated.
- The role of the witness is to certify that you have signed the code in front of them and are the person whose identity details are given. The witness is not responsible for ensuring that you understand the code or will abide by it.
- Just because a person is eligible to be a witness, they do not have to witness your signature. For example, a CAS or ASAS worker may refuse to be a witness, but they may help you to find another person who is eligible and willing to witness your signature of the code.
- Give the form to the Department of Immigration and Border Protection:
  - Scan and email to: [bvereporting@immi.gov.au](mailto:bvereporting@immi.gov.au)
  - Post it to:

IMA BVE Processing Team  
Department of Immigration and Border Protection  
GPO Box 9984  
SYDNEY NSW 2001

### ***Role of service providers***

- We are here to help you understand the Code of Behaviour and how you are expected to behave in the community.
- We are eligible to be a witness to you signing the Code of Behaviour, but we reserve the right to refuse to be a witness.
- Even if we are a witness to you signing the Code, we are **not** responsible for your behaviour in the community.
- It is your choice to sign the Code of Behaviour. However, you will not be eligible to be considered for the grant of a bridging visa until you sign the code. If your bridging visa has ceased you must sign the code before you can be considered for a further bridging visa.
- The immigration department will manage the implementation of the code, including:
  - making sure you have signed it before you are considered for grant of a bridging visa



## DIBP service providers

- finding people who do not sign the code
- imposing sanctions on people who breach the code.

### Frequently asked questions

#### **1. My visa does not expire for some weeks/months, do I have to sign the code now?**

You do not have to sign the code immediately if your visa has not ceased. We encourage you to sign the code, however, even if you hold a valid visa before it ceases.

However, you must sign the code before you can be considered for the grant of a new Bridging E visa. You will not be considered for a further bridging visa until the department has received a copy of the current code which you have signed and which has been witnessed properly.

#### **2. Is there is a timeframe for submitting the code of behaviour? What if I can't get it signed within the timeframe set?**

The immigration department will advise you if there is a specific timeframe in which you are expected to sign the code. The department will also advise you if there will be any consequences from refusing or failing to sign the code in a specific timeframe.

It is important that you let the department know of any changes to your address so that you receive any information sent to you.

If your bridging visa has ceased or is about to cease, it is in your interest to sign the code and return it to the department as quickly as possible. You will not be considered for the grant of a further Bridging E visa until the department has received a signed and appropriately witnessed copy of the code from you.

#### **3. What if I don't have any photo ID?**

You can still sign the code, but you should have sufficient identification for the witness to your signature to be assured about your identity. For this reason, you may wish to visit an immigration office to have the code witnessed by a departmental officer.

#### **4. If I sign the code, will my visa conditions be the same as before?**

Your visa conditions will be determined by the person who decides to grant your bridging visa. For most bridging visas the immigration minister will decide on the visa grant and conditions. If you have signed the code, your visa conditions will include a condition that you abide by the code.

#### **5. If I sign the code, will I keep or get work rights?**

Your visa conditions will be determined by the person who decides to grant your bridging visa. For most bridging visas the immigration minister will decide on the visa grant and conditions.

## DIBP service providers

If you arrived on or after 13 August 2012, the government has already decided that you will not be given permission to work.

### **6. If I sign the code, will I keep or get study rights?**

Your visa conditions will be determined by the person who decides to grant your bridging visa. For most bridging visas the immigration minister will decide on the visa grant and conditions.

### **7. If I sign the code, for how long will my visa be valid?**

The period for which any new visa will be valid will be determined by the person who decides to grant your bridging visa. For those who arrived before 13 August 2012, the length of the visa can vary depending on the status of your protection application.

New bridging visas for people who arrived by boat on or after 13 August 2012, will usually be valid for 12 months.

### **8. If I sign the code, how quickly will I get my new bridging visa?**

You cannot be considered for further bridging visa until your current bridging visa has ceased and the immigration department has received a copy of the current code which you have signed and which has been witnessed properly. Security, health, identity and behavioural issues will also be assessed by the department. Whether you are granted a further bridging visa will be a matter for the relevant decision maker.

If it has been more than six (6) weeks since you sent a signed copy of the code to the department, you may contact the department by email at [bvereporting@immi.gov.au](mailto:bvereporting@immi.gov.au) or call the IMA BVE reporting line 1300 728 662.

### **14. If I sign the code, will it affect my chances of getting another visa? For example, will it mean I won't be considered for a Temporary (Humanitarian Concern) visa or a Humanitarian Stay (Temporary) visa.**

No. If you sign the code it will not have an impact on any other visa application.

However, if you are granted a BVE and that BVE is cancelled because you breach the code or are involved in criminal behaviour, this may mean you will not be granted a further BVE in the future.

### **15. My bridging visa and Medicare card have expired. Will I get access to Medicare if I sign the code?**

If you are granted a further bridging visa, your access to Medicare will be restored. You will need to visit a Medicare office after you receive a further bridging visa to complete any processes required by Medicare, such as being issued with a new Medicare card.

If you have any medical concerns while you are awaiting a further bridging visa, please contact your CAS or ASAS service provider for support.

### **16. I have been invited to a Code of Behaviour information session, do I have to go?**

It is highly recommended that you attend any information sessions offered by your service provider or the department.

You must go to appointments at the immigration department when requested. This is a condition on your bridging visa. If you do not attend appointments your visa may be cancelled.

### **17. If I go to an information session on the code, do I have to sign the code straight away?**

It is highly recommended that you use the opportunity to sign the code, especially if there is an interpreter and a witness to assist you. You may seek further information from your service provider, legal adviser, migration agent or the department, before making arrangements to sign the code in front of an eligible witness.

However if your visa has or will soon cease, you should return a signed and witnessed code as soon as possible so that you can be considered for a further bridging visa.

### **18. If I sign the code, will I be re-detained?**

If you sign the code you may be considered for the grant of a further Bridging E visa. Getting a new bridging visa will mean that you have lawful status and may be less liable for detention.

Any further Bridging E visa granted to you once you sign the code will include a condition that you do not breach the code. If you later are found to have breached the code, the department may take a range of actions, including:

- sending a warning letter to remind you of your obligations,
- asking you to talk to your service provider about behaviour expected in Australia,
- asking you to come into the department to discuss the alleged breach,
- reducing or suspending your income support payments, or
- cancelling your visa and re-detaining you.

If your bridging visa is cancelled, you will be returned to immigration detention.

### **19. If I refuse to sign the code, will I be re-detained?**

If your visa has or will soon cease, you should return a signed and witnessed code as soon as possible so that you can be considered for a further BVE.

If you refuse to sign the code you will not be eligible for the grant of a further BVE. If your bridging visa ceases your immigration status will become unlawful and you would then be liable to be detained.

### **20. What are the consequences if I breach the code?**

Each alleged breach will be investigated by the department.

If you are found to have breached the code, the department may decide to:

Communication guide for service providers: Code of Behaviour information for clients

Page 6 of 8

Originating area: Compliance Status Resolution Communications Section

Approval delegates: Gavin Metcalfe, A/g AS Detention & Services Policy; Paul McCormack, A/g AS IMA BVE Programme & Community Engagement

**DIBP service provider use only**

## DIBP service providers

- send a warning letter to remind you of your obligations,
- ask you to talk to your service provider about behaviour expected in Australia,
- ask you to come into the department to discuss the alleged breach,
- reduce or suspend your income support payments, or
- cancel your visa and re-detain you.

### 21. Will I get an opportunity to put my side of the story (natural justice) if I breach the code?

Yes. There will be opportunities for you to provide information to the department about alleged breaches of the code.

If you are sent a warning letter, it will include information about how to contact the department to provide information about the alleged breach.

If you are asked to talk to your service provider or come to the department to discuss an alleged breach, you will have the opportunity to provide information about the alleged breach.

If the department is considering reducing or suspending your income support payments for a breach of the code, the department will give you notice and provide you with an opportunity to respond. Any information that you provide will be taken into account in making a decision to reduce or suspend your payments.

If the department is considering cancellation of your visa, you will be issued with a Notice of Intention to Consider Cancellation, which will include an opportunity to respond.

### Background information (for DIBP service providers only)

The Code of Behaviour requirement commenced on 14 December 2013 and applies to all illegal maritime arrivals (IMAs) currently in detention being considered for a Bridging (Class WE) visa (BVE) under section 195A of the Migration Act 1958. IMA BVE holders who are already in the community will be required to sign the Code of Behaviour as they become eligible for a further BVE.

The Minister for Immigration and Border Protection (the minister) agreed to amend the *Migration Regulations 1994* (the Regulations) to require non-citizens, including all IMAs who are over 18 years of age at the time of their BVE decision, and who had previously been granted a visa by the minister under section 195A of the *Migration Act 1958* (the Act), to abide by an enforceable Code of Behaviour. These amendments include the creation of a new Public Interest Criteria (PIC) and a new mandatory visa condition, which will link non-compliance with the Code of Behaviour to the existing discretionary cancellation powers under section 116 of the Act.

As part of this Regulations amendment, the minister also agreed to the creation of a new application bar (a newly created Item 1305(3)(f) and (g)) to prevent a person who has breached the Code of Behaviour, and had their visa cancelled on that basis, from being able to apply for a further BVE. This application bar will extend to any persons who have had their visa cancelled under section 116(1)(b) (breach of visa condition) or section 116(1)(g) Regulation 2.43(1)(p) or (q) (certain prescribed grounds) of the Act.

These Regulations amendments will apply in relation to an application for a visa made on or after 14 December 2013. These amendments, other than the amendments relating to paragraphs 1305(3)(f) and (g), apply in relation to an application for a visa made, but not finally determined, before 14 December 2013.

### Implementation

## DIBP service providers

The Department of Immigration and Border Protection is putting in place arrangements to progressively implement the code, taking into account the number of detainees awaiting BVE grant and the volume of previous IMA BVE holders unlawfully in the community awaiting further BVE grant.

From the date of the commencement of the Regulations amendments, all adult IMAs will be required to sign the code before being considered for the grant of a BVE. Where IMAs have signed the code, and are subsequently granted a visa, their visa will include the condition that they must not breach the code.

The existing cohort of BVE holders in the community will be managed as they become eligible for further BVE consideration. Where they have signed the code, their next BVE will be granted with a condition that they not breach the code. They will be provided with information as part of the visa decision process about the implications of not abiding by the code.

### **More Information**

**The form for signature of the code (as amended from time-to-time), translated information and any other resources on the code will be published on the department's website at:**

**[www.immi.gov.au/ima](http://www.immi.gov.au/ima)**





**Minister for Finance  
Acting Assistant Treasurer**

Secretary  
Standing Committee on Regulations and Ordinances  
Room S1.111  
Parliament House Canberra

Dear Secretary

**AASB 2013-9- Amendment to Australian Accounting Standards – Conceptual Framework,  
Materiality and Financial Instruments – December 2013 [F2014L00370]**

Thank you for your letter of 14 May 2014 to the Treasurer concerning the retrospective application of AASB 2013-9. Your letter has been referred to me as I have portfolio responsibility for this matter.

In response to the Committee's observations that this instrument is of no effect if it disadvantaged the rights of a person (other than the Commonwealth) or imposed a liability on a person for an act or omission before the instrument's date of registration (as provided for under subsection 12(2) of the *Legislative Instruments Act 2003*), Treasury contacted the Australian Accounting Standards Board (AASB) for further clarification.

The AASB has advised that the changes identified relate to updating the references to a conceptual framework used by the AASB, which itself is not mandatory, and that the changes are not expected to have an impact in practice. No entities that have applied the accounting standards for reporting periods after the entry into effect of AASB 2013-9 have informed the AASB of any concerns related to these amendments.

Thank you for bringing this matter to the attention of the Government.

Kind regards

**MATHIAS CORMANN**

**23** June 2014

