# EXPLANATORY STATEMENT

Issued by the Minister for Immigration, Citizenship and Multicultural Affairs

*Migration Act 1958*

*Migration Amendment (Transitioning TPV/SHEV Holders to Resolution of Status Visas) Regulations 2023*

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

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

Other regulation-making powers in the Migration Act that support the *Migration Amendment* (*Transitioning TPV/SHEV Holders to Resolution of Status Visas*) *Regulations 2023* (the Amendment Regulations) are section 46 (authorising criteria and requirements to make a valid application for a visa), section 31 (authorising classes of visa and criteria for visa grant), and section 45AA, which provides a framework to allow an application for a visa of a particular class to be converted into an application for a visa of a different class. This is achieved by making a *conversion regulation* (see subsection 45AA(3)).

The purpose of the Amendment Regulations is to amend the *Migration Regulations 1994* (the Migration Regulations) to facilitate the transition to permanent residence of persons who arrived in Australia before the commencement date (defined as the *TPV/SHEV transition day*) and who applied for or obtained temporary protection in Australia through a Subclass 785 (Temporary Protection) visa (TPV) or a Subclass 790 (Safe Haven Enterprise) visa (SHEV).

Certain persons who hold or have held a TPV or a SHEV, as well as certain children born in Australia to those persons, will be able to make an application for the Subclass 851 Resolution of Status visa (RoS). The criteria for making a valid application for that visa are amended accordingly. In addition, the Minister's intention is to exercise the Minister's personal powers to lift any relevant application bars that would prevent an application being made. This will require the exercise of the power in subsection 46A(2) of the Migration Act to lift the bar on applications in subsection 46A(1). In some cases, other relevant application bars may also need to be lifted.

Applicants who have an unresolved TPV or SHEV application on the *TPV/SHEV transition day* will have that application automatically converted, pursuant to section 45AA of the Migration Act, into an application for a RoS in the circumstances set out in the Amendment Regulations.

The RoS is an existing subclass of permanent visa. There are no substantive criteria for the RoS other than the public interest criteria relating to health, national security and character.

The TPV and SHEV allow certain persons who entered Australia without a valid visa, or who were not immigration cleared on arrival, to stay temporarily in Australia for a period of three years holding a TPV or five years holding a SHEV. The visa is granted following an assessment that Australia owes protection obligations in respect of a visa applicant, and the visa is granted to that applicant and to members of the same family unit, subject to the satisfaction of certain public interest criteria. The measures in the Amendment Regulations recognise that the indefinite temporary status of this group exacerbates mental health issues and creates poor integration outcomes given their limited access to services and uncertainty over their long-term futures. The majority of TPV or SHEV holders and applicants arrived in Australia prior to 19 July 2013 and have now been in Australia for almost a decade.

The amendments will assist Australia to meet its international obligations in respect of those who have been found to be refugees or are otherwise in need of protection, and to provide a more certain future, family reunification, pathway to Australian citizenship and better integration outcomes. The amendments will also reduce the significant social and economic costs associated with managing the caseload of temporary visa holders on an ongoing basis.

The Government maintains its commitment to safe and effective pathways for people who are seeking safety, strong border protection, deterrence of maritime people smuggling to Australia, and preservation of safety of life at sea, alongside Operation Sovereign Borders policies.

The matters dealt with in the Amendment Regulations are appropriate for implementation in regulations rather than by Parliamentary enactment. It has been the consistent practice of the Government of the day to provide for detailed visa criteria and conditions in the Migration Regulations rather than in the Migration Act itself. The Migration Act expressly provides for these matters to be prescribed in regulations, as can be seen in the authorising provisions. Providing for these details to be in delegated legislation rather than primary legislation gives the Government the ability to effectively manage the operation of Australia's visa program and respond quickly to emerging needs.

A Statement of Compatibility with Human Rights has been prepared in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The overall assessment is that the Amendment Regulations are compatible with human rights. A copy of this Statement is at Attachment A.

The then Office of Best Practice Regulation, now Office of Impact Analysis, was consulted prior to making the Amendment Regulations, and advised that a regulatory impact statement was not required. The OBPR reference number is OBPR22-02182.

Formal public consultation was not considered necessary as the amendments are beneficial and take into account representations from the public and advocacy groups.

This accords with subsection 17(1) of the *Legislation Act 2003* (the Legislation Act) which requires that appropriate and reasonably practicable consultation be undertaken.

The Migration Regulations are exempt from sunsetting pursuant to item 38A of the table in section 12 of the *Legislation (Exemptions and Other Matters) Regulation 2015*.

The Migration Regulations are exempt from sunsetting on the basis that the repeal and remaking of the Migration Regulations:

- is unnecessary as the Migration Regulations are regularly amended numerous times each year to update policy settings for immigration programs;

- would require complex and difficult to administer transitional provisions to ensure, amongst other things, the position of the many people who hold Australian visas, and similarly, there would likely be a significant impact on undecided visa and sponsorship applications; and

- would demand complicated and costly systems, training and operational changes that would impose significant strain on Government resources and the Australian public for insignificant gain, while not advancing the aims of the Legislation Act.

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

The Amendment Regulations are a legislative instrument for the purposes of the Legislation Act.

The amendments commence on the day after registration.

Further details of the Amendment Regulations are set out in Attachment B.

**ATTACHMENT A**

# Statement of Compatibility with Human Rights

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

**Migration Amendment (Transitioning TPV/SHEV holders to Resolution of Status Visas) Regulations 2023**

This Disallowable Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

## Overview of the Disallowable Legislative Instrument

Persons who arrive in Australia without a valid visa or who were not immigration cleared on arrival, who make a claim for asylum and who are found to engage Australia's international protection obligations, are only eligible to apply for and be granted a temporary protection visa. Unauthorised arrivals are able to access the Subclass 785 (Temporary Protection) visa (TPV) or the Subclass 790 (Safe Haven Enterprise) visa (SHEV), which have a validity period of three and five years, respectively. These visas are granted following an assessment that Australia has protection obligations in respect of a visa applicant, and the visa is granted to that applicant and members of the same family unit, subject to the satisfaction of certain public interest criteria.

In line with existing policy settings, there is a group of approximately 18,500 people who have been found to engage protection obligations (or to be members of the same family unit as someone who has) and who have been granted temporary protection visas, most of whom have been living in Australia temporarily for almost a decade and have no realistic prospects for permanency. This asylum caseload includes irregular maritime arrivals and unauthorised air arrivals.

The *Migration Amendment (Transitioning TPV/SHEV holders to Resolution of Status Visas) Regulations 2023* (the Amendment Regulations) amend the *Migration Regulations 1994* (the Regulations) to provide a clear and permanent pathway to resolving the status of TPV and SHEV holders, applicants, and certain former holders, who had already arrived in Australia prior to the commencement of the Amendment Regulations, and who engage protection obligations (or are members of the same family unit as someone who does).

The measures in the Amendment Regulations implement the Government's commitment to resolving the status of the existing TPV and SHEV caseload, by allowing existing TPV and SHEV holders to either lodge an application for a permanent Subclass 851 (Resolution of Status) visa (RoS visa), or, if they have already made an application for a subsequent TPV or SHEV, to convert that existing application to an application for a RoS visa. The RoS visa is an existing subclass of permanent visa. All members of the family unit who hold a TPV or SHEV will be able to apply for a RoS visa in their own right, regardless of whether they are still members of that same family unit.

Certain former TPV/SHEV holders (who have not had their latest TPV or SHEV refused or cancelled), such as those whose visas have lapsed and who have not reapplied, will also be eligible to apply for a RoS visa, once the relevant visa application bar has been lifted. In addition, persons who applied for their first TPV or SHEV visa prior to the commencement of the Amendment Regulations will have that application converted to an application for a RoS visa if they are found to engage Australia's protection obligations, or to be a member of the same family unit of an applicant who does, as part of the consideration of their TPV or SHEV application (and provided they satisfy the other criteria for the grant, such as public interest criteria relating to health, character and national security). Certain other persons, being those who previously applied or could have applied for a TPV or SHEV prior to the commencement of the Amendment Regulations, and who are successful in obtaining a TPV or SHEV after commencement, will also be able to apply for a RoS visa.

There is no further assessment of protection obligations as part of the consideration of whether to grant a RoS visa to a person who holds or has previously held a TPV or SHEV, however applicants will be required to satisfy public interest criteria relating to health, character and national security. The existing health criteria for the RoS visa, which are the same as those for protection visas, are being amended by the Amendment Regulations to ensure that a risk-based approach can be taken as to whether the applicant is required to undergo a medical examination and/or a chest X-ray in order to meet the health criteria. The amendments provide that the applicant will not be required to undergo a medical examination or a chest X-ray where the Minister (or their delegate) is satisfied it would be unreasonable for them to do so. Under policy, this is intended to include circumstances where the applicant has already satisfied that criteria as part of their previous TPV or SHEV application, or for example, where a child was born in Australia and has not travelled to a high risk tuberculosis country. The Amendment Regulations make no changes to the existing character and national security criteria for the RoS visa, which are effectively the same as those for protection visas.

A decision to refuse to grant a RoS visa is in most cases merits-reviewable by the Administrative Appeals Tribunal except for some decisions made personally by the Minister or where a conclusive certificate is issued, which may happen in rare cases. Judicial review is also available, including where a Minister has made the decision personally or where a conclusive certificate is issued.

Anyone that enters Australia irregularly on or after the day the amendments made by the Amendment Regulations commence will not be eligible for a RoS visa. This maintains the Government's commitment to strong border protection helping to reduce maritime people smuggling ventures and deaths at sea.

Providing a permanent pathway for the TPV and SHEV caseload assists Australia to meet its international protection obligations and provides a more certain future; a pathway to family reunification, a pathway to Australian citizenship, and promotes better integration outcomes. Transition to permanency can further support economic activity and address skill shortages. It will also reduce the significant social and economic costs associated with managing the large caseload of temporary visa holders on an ongoing basis.

**Human rights implications**

This Disallowable Legislative Instrument may engage the following rights:

- A range of economic and social rights under the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), including rights relating to work (Article 6), social security (Article 9), health (Article 12) and education (Article 13).

- Rights relating to families and children including Articles 23(1) and 24 of the *International Covenant on Civil and Political Rights* (ICCPR) and Article 10 of the *Convention on the Rights of the Child* (CRC).
- Freedom of movement in Article 12(2) of the ICCPR.
- Equality and non-discrimination in Article 2(1) and Article 26 of the ICCPR and Article 2(2) of the ICESCR.
- Non-refoulement obligations arsing under Article 3 of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* and Articles 6 and 7 of the ICCPR.

*Economic and social rights*

The Amendment Regulations are intended as a positive measure that will benefit the existing cohort of TPV and SHEV holders (and certain former TPV and SHEV holders and applicants) by giving them access to a permanent visa pathway. While TPV and SHEV holders are currently able to work, study, and access Medicare and certain social security payments, if they are granted the permanent RoS visa, they will have access to additional publicly-funded services and benefits, including additional social security payments, the National Disability Insurance Scheme, and enhanced access to tertiary study through becoming eligible for higher education assistance. RoS visa holders, as permanent residents, may also be able to more easily grow their businesses and secure long-term employment opportunities. Therefore, the access to the RoS visa implemented by the Amendment Regulations will promote the human rights of the TPV and SHEV holders who are granted a RoS visa, including rights under the ICESCR relating to work, education, social security, and access to health services.

*Rights relating to families and children*

Another key benefit of access to permanent residence is the ability to sponsor family members for family reunification. The Amendment Regulations may promote the rights relating to the protection of the family contained in Article 23(1) of the ICCPR and rights relating to applications for reunification of children and their parents in Article 10(1) of the CRC. This is because TPV and SHEV holders are not, as temporary visa holders, eligible to sponsor family members for Australian visas, and the Amendment Regulations would, by providing access to a permanent visa, enable those persons granted a permanent RoS visa to sponsor family members (including children) overseas for migration to Australia.

The Amendment Regulations may promote the rights of children more broadly, including in accordance with Article 24 of the ICCPR. This is because the Amendment Regulations will allow for the resolution of the uncertain, temporary status of the children of TPV and SHEV holders (who themselves hold TPVs or SHEVs), many of whom were born in Australia and have therefore established close ties with the Australian community, including commencing or continuing their education within Australian schools.

*Freedom of movement*

Article 12(2) of the ICCPR provides that everyone shall be free to leave any country.

TPV and SHEV holders are subject to a condition on their visa that requires them not to travel to the country in respect of which they were found to engage protection obligations and to obtain written approval for travel to any other country, which will be given if the Minister or their delegate is satisfied that there are compelling or compassionate circumstances for the travel. Breach of this visa condition may result in the cancellation of the person's visa. While this does not prevent TPV and SHEV holders from leaving Australia, they may be dissuaded

from doing so because of this possible consequence if they have not complied with this condition. The RoS visa does not have any visa conditions relating to where a RoS visa holder may travel or obtaining approval for travel. Therefore, the amendments may promote the freedom of movement of those TPV and SHEV holders who are granted a RoS visa as a result of these amendments.

*Equality and non-discrimination*

The Amendment Regulations may engage the rights of equality and non-discrimination contained in Article 2(1) and Article 26 of the ICCPR and Article 2(2) of the (ICESCR). This is because the amendments will only extend the benefit of being able to apply for or be granted a RoS visa to those who held, had applied for or could have applied for a TPV or SHEV prior to the commencement of the Amendment Regulations, and children of such persons born in Australia including after the commencement of the Amendment Regulations. Persons who have previously held a TPV or SHEV which has been cancelled, or who applied for a subsequent TPV or SHEV which was refused, will not be able to benefit from this measure.

Article 2(1) of the ICCPR states:

> *Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

Article 2(1) of ICCPR requires that Australia ensure the rights recognised in the ICCPR extend to all individuals (citizens, residents and non-citizens) within its territory and subject to its jurisdiction.

Article 26 of the ICCPR provides that:

> *All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

Article 26 requires that all persons are to be treated equally before the law and no law shall discriminate any of the grounds listed in the article. The UN Human Rights Committee in General Comment No. 18 explains that the term ‘discrimination’ as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference on grounds such as nationality or other status.

Article 2(2) of the ICESCR provides that:

> *The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

However, in its General Comment 18, the UN Human Rights Committee stated that:

> *The Committee observes that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant.*

The ICCPR does not give a right for non-citizens to enter Australia for the purposes of seeking residence. The UN Human Rights Committee, in its General Comment 15 on the position of aliens under the ICCPR, stated that:

> *The Covenant does not recognize the right of aliens to enter or reside in the territory of a State party. It is in principle a matter for the State to decide who it will admit to its territory. However, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.*
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> *Consent for entry may be given subject to conditions relating, for example, to movement, residence and employment. A State may also impose general conditions upon an alien who is in transit. However, once aliens are allowed to enter the territory of a State party they are entitled to the rights set out in the Covenant.*

Similarly, in its General Comment on Article 2 of the ICESCR (E/C.12/GC/20), the UN Committee on Economic Social and Cultural Rights has stated (at 13) that:

> *Differential treatment based on prohibited grounds will be viewed as discriminatory unless the justification for differentiation is reasonable and objective. This will include an assessment as to whether the aim and effects of the measures or omissions are legitimate, compatible with the nature of the Covenant rights and solely for the purpose of promoting the general welfare in a democratic society. In addition, there must be a clear and reasonable relationship of proportionality between the aim sought to be realized and the measures or omissions and their effects.*

As such, Australia is able to set requirements for the entry of non-citizens into Australia and conditions of their stay, including access to permanent residence, and does so on the basis of reasonable and objective criteria.

In most cases, children of RoS visa applicants will be able to apply for a RoS visa because they will be TPV or SHEV holders (or former holders) themselves, including, for those children born in Australia, because they were granted a TPV or SHEV by operation of law as they were born to a parent who held a TPV or SHEV at the time of the child's birth. The Amendment Regulations also provide for children born in Australia to parents who are eligible for a RoS visa to be able to apply for a RoS visa as well, generally in circumstances where the children are not and were not themselves TPV or SHEV holders. This ability for certain children born in Australia to apply for a RoS visa is not expected to unduly limit the rights of parents who are RoS visa applicants whose children are born outside Australia as they will be able to sponsor any such child for family reunification once they are granted the RoS visa.

Whilst the Amendment Regulations do not extend the ability to apply for a RoS visa to future unauthorised arrivals, this does not amount to prohibited discrimination. The introduction of a beneficial measure for the existing TPV and SHEV caseload recognises the length of residence and contribution to the community of the majority of this cohort, and the challenges

caused by uncertainty regarding their status in Australia. Future unauthorised maritime ventures remain a threat to Australia's border security, and the Government is committed to discouraging hazardous boat journeys and deterring people smugglers who are willing to put the lives of vulnerable people at risk for financial gain. Ensuring that prospective migrants to Australia, including asylum seekers, utilise lawful migration pathways including Australia's Humanitarian program is critical to maintaining Australia's border security, while supporting our reputation as a global humanitarian partner.

The benefit of being able to apply for a RoS visa is also not being extended to certain former TPV and SHEV holders, being those who have had their visa cancelled or a subsequent TPV or SHEV application refused. This is intended to ensure that those who are able to access the permanent RoS visa are those who were found to engage Australia's protection obligations (or be a member of the same family unit as someone who does) in their most recent protection visa application and that they are not persons who have failed to satisfy public interest criteria relating to character and national security or who have had their visa cancelled on such grounds.

Therefore, to the extent that the Amendment Regulations provide a benefit to the existing TPV/SHEV caseload, and not to certain other cohorts which means that that they may not have access to the additional benefits of permanent residence, these measures are necessary, reasonable and proportionate to the objectives set out above.

*Non-refoulement*

It is expected that the vast majority of TPV and SHEV holders will satisfy the criteria for the grant of a RoS visa. Persons who are refused the grant of a RoS visa will remain on their TPV or SHEV until it ceases 35 days after the RoS visa application is finally determined (which usually includes the completion of merits review processes), unless it is cancelled prior to this on, for example, character or national security grounds. Where the person's TPV or SHEV ceases, or is cancelled, or their RoS visa is subsequently cancelled, and they become liable for removal from Australia, the Migration Act (s 197C(3)) ensures that removal to the country by reference to which a 'protection finding' was made in the course of considering the person's most recent TPV or SHEV application is not required or authorised unless the person requests voluntary removal or is found to be a person in respect of whom a protection finding would no longer be made. Since 'protection finding' reflects the circumstances in which Australia's *non-refoulement* obligations are engaged, this ensures that TPV/SHEV holders or former holders who have a 'protection finding' and are not successful in obtaining a RoS visa will not be removed from Australia in breach of Australia's *non-refoulement* obligations. For any TPV/SHEV applicant, holder or former holder who does not have a 'protection finding' and would be liable for removal, the Government will ensure that removal will be consistent with Australia's *non-refoulement* obligations, including through consideration of ministerial intervention pathways, if it appears that the person may engage those obligations.

**Conclusion**

The Disallowable Legislative Instrument is compatible with human rights because it promotes the protection of human rights and, to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate to achieving a legitimate objective.

**The Hon Andrew Giles MP**

**Minister for Immigration, Citizenship and Multicultural Affairs**

## ATTACHMENT B

## Details of the *Migration Amendment (Transitioning TPV/SHEV Holders to Resolution of Status Visas) Regulations 2023*

Section 1 – Title

This section provides that the title of the instrument is the *Migration Amendment (Transitioning TPV/SHEV Holders to Resolution of Status Visas) Regulations 2023*.

Section 2 – Commencement

This section provides for the commencement of the instrument. Subsection 2(1) provides that each provision of this instrument specified in column 1 of the table commences or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 1 has effect according to its terms.

Item 1 of the table in subsection 2(1) provides that the whole of the instrument commences on the day after it is registered on the Federal Register of Legislation.

A note under the table in subsection 2(1) provides that this table relates only to the provisions of this instrument as originally made and will not be amended to deal with any later amendments of this instrument.

Subsection 2(2) provides that any information in column 3 of the table that is set out in subclause 2(1) will not be part of this instrument.

Section 3 – Authority

This section provides that the instrument is made under the *Migration Act 1958* (the Migration Act).

Section 4 – Schedules

This section provides that each instrument that is specified in the Schedules to this instrument will be amended or repealed as set out in the applicable items in the Schedules, and any other item in the Schedules to this instrument has effect according to its terms.

## Schedule 1 – Amendments

### Part 1 – Amendments

***Migration Regulations 1994***

**[Item 1] – Regulation 1.03**

This item inserts a definition of *TPV/SHEV transition day* in regulation 1.03 of the Migration Regulations. The definition provides that the *TPV/SHEV transition day* is the day that Schedule 1 to the *Migration Amendment (Transitioning TPV/SHEV Holders to Resolution of*

*Status Visas) Regulations 2023* (the Amendment Regulations) commences. As noted in section 2 above, the Amendment Regulations commence on the day after registration on the Federal Register of Legislation. The definition is used in several of the amendments discussed below.

**[Item 2] – After regulation 2.08F**

This item inserts new regulation 2.08G in the Migration Regulations.

Regulation 2.08G is a conversion regulation for the purposes of section 45AA of the Migration Act. The purpose of the regulation is to convert certain applications for Subclass 785 (Temporary Protection) visas (TPV) and Subclass 790 (Safe Haven Enterprise) visas (SHEV) into applications for a permanent visa, the Resolution of Status (Class CD) visa. That visa class contains one subclass, which is the Subclass 851 (Resolution of Status) visa (RoS).

Persons holding the TPV or SHEV have been found to engage Australia's protection obligations or are the family members of those persons. The RoS is a visa used as a vehicle for transitioning persons to permanent residence if they satisfy health, national security and character criteria. There is no reassessment of whether Australia has protection obligations in respect of the applicant.

The applications that are converted, and the time at which they are converted, are set out in the table in subregulation 2.08G(1):

> Table item 1 deals with applications by applicants who hold a TPV or a SHEV on the *TPV/SHEV transition day* (see item 1 above) and who have made a further application for a TPV or SHEV which remains before the Minister on the *TPV/SHEV transition day*. This process of making a further application was necessary because most TPV and SHEV holders arrived in Australia before 19 July 2013. A TPV is valid for three years and a SHEV is valid for five years. Accordingly, many TPV or SHEV holders have been required to make a further application to extend their stay in Australia as refugees or as persons otherwise in need of protection. The current application is converted into an application for a RoS on the *TPV/SHEV transition day.* There will be no further assessment of the person's protection claims.
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> Table item 2 deals with applications by applicants who hold a TPV or a SHEV on the *TPV/SHEV transition day* and who have made a further application for a TPV or SHEV which had been refused by the Minister (in practice a delegate of the Minister) before the *TPV/SHEV transition day*. In rare cases, the Minister may have found that the applicant no longer engages Australia's protection obligations. Alternatively, the application may have been refused on other grounds. The application is only converted to a RoS application if the applicant is successful in a challenge to the refusal decision at merits review or judicial review and the application is remitted to the Minister on or after the *TPV/SHEV transition day*. The application will be converted into a RoS application immediately after the order of the tribunal or court. Any remaining character, national security or health issues will be considered in the processing of the RoS. There will be no further assessment of the protection claims.
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> Table item 3 deals with applications by applicants who are first time applicants for the TPV or SHEV, in cases where the Minister has not made a decision on the application

before the *TPV/SHEV transition day*. As there has not yet been any assessment of the protection claims, these applications will continue to be processed as a TPV or SHEV. Health, national security and character requirements will also be assessed for the purposes of the TPV or SHEV application. The applications will be converted to RoS applications if and when the Minister (in practice a delegate of the Minister) is satisfied that the criteria for the grant of the TPV or SHEV are met. The conversion will occur when the Minister's delegate makes a record of being so satisfied.

Table item 4 deals with applications by applicants who are first time applicants for the TPV or SHEV, in cases where the Minister decided to refuse to grant the visa before the *TPV/SHEV transition day* and that refusal decision has been successfully challenged at merits review or judicial review and the application is remitted to the Minister on or after the *TPV/SHEV transition day*. The applications will be converted to RoS applications if and when the Minister (in practice a delegate of the Minister) is satisfied that the criteria for the grant of the TPV or SHEV are met. The conversion will occur when the Minister's delegate makes a record of being so satisfied.

As set out in subregulation 2.08G(1), the effect of the conversion is that, subject to a qualification noted below, the TPV or SHEV application is taken not to be, and never to have been, a valid application for a TPV or a SHEV, and is taken to be, and always to have been, a valid application for a RoS visa. This approach is authorised by subsection 45AA(3) of the Migration Act. It ensures that there is no room for doubt about the effect of the conversion on the status of the visa applications. In particular, it ensures that the TPV or SHEV application (the pre-conversion application) is supplanted by the RoS visa application (the converted application).

The only qualification to the conversion process, as set out in paragraph 2.08G(1)(a), is for the purposes of section 197C of the Migration Act. Section 197C has the effect that removal of an unlawful non-citizen from Australia under section 198 of the Migration Act is not authorised or required to a country in respect of which a 'protection finding', within the meaning given by section 197C, has been made. The term protection finding reflects the circumstances in which Australia has *non-refoulement* obligations in respect of a person.

Paragraph 2.08G(1)(a) preserves the effect of a protection finding made in the course of considering the converted TPV or SHEV application. That is, the fact that the TPV or SHEV application (the pre-conversion application) is taken never to have been a valid application does not negate the effectiveness of a protection finding that was made in the course of considering that application, prior to its conversion. This will only be an issue in rare cases, such as where grant of a RoS visa is refused on character or national security grounds, or a RoS visa is later cancelled on character or national security grounds.

Subregulation 2.08G(2) clarifies that the conversion process described in subregulation 2.08G(1) covers TPV and SHEV applications that are being considered by the Minister as a result of the decision of a tribunal or court made prior to the *TPV/SHEV transition day*. That is, the fact that the Minister had previously refused to grant the visa is irrelevant if that visa application is again before the Minister as a result of the applicant succeeding at merits review or judicial review prior to the *TPV/SHEV transition day*. In those situations, the Minister is taken not to have made a decision. This clarification, included for the avoidance of doubt, is relevant to: table item 1, column 1, paragraph (b); and table item 3, column 1, paragraph (c).

Subregulations 2.08G(3) and (4) ensure that there is no intrusion upon the function of courts undertaking judicial review. If a court has delivered judgment before the *TPV/SHEV transition day*, or has reserved judgment before that day, in a case involving review of a TPV or SHEV refusal decision, the processing of that visa application will be in accordance with the orders of the court. The conversion process set out in regulation 2.08G will not occur. If there are cases in this category where the TPV or SHEV is ultimately granted, the visa holder will then be able to apply for the RoS visa (see item 3, immediately below, which inserts new table item 4 in subitem 1127AA(3) of Schedule 1 to the Migration Regulations).

**[Item 3] – Subitem 1127AA(3) of Schedule 1 (at the end of the table)**

This item amends the application validity requirement for the RoS visa as set out in item 1127AA of Schedule 1 to the Migration Regulations. These are the requirements, imposed pursuant to section 46 of the Migration Act, which must be satisfied to make a valid application for the RoS visa.

The amendments to the table in subitem 1127AA(3) allow an application to be made for the RoS visa by applicants as identified in new table items 4 to 7:

Table item 4 covers applicants who hold a TPV or a SHEV and first entered Australia before the *TPV/SHEV transition day*. It is also a requirement that, at the time of application for a RoS visa, the applicant has not made another valid application for a TPV or a SHEV that has not been finally determined. (As noted above in item 2, a valid application for a TPV or SHEV made before the *TPV/SHEV transition day* will be automatically converted to a RoS application as set out in new regulation 2.08G.;

Table item 5 covers applicants who did not hold a TPV or SHEV on the *TPV/SHEV transition day* but who previously held one of those visas. It is a requirement that:

- no subsequent application for a TPV or SHEV has been refused and finally determined;
- the most recently held TPV or SHEV was not cancelled; and
- at the time of application for a RoS visa, the applicant has not made another valid application for a TPV or a SHEV that has not been finally determined;

Table item 6 covers applicants who are children born in Australia to persons covered by table items 4 and 5. The only requirement is that, at the time of application for a RoS visa, the applicant has not made a valid application for a TPV or a SHEV that has not been finally determined;

Table item 7 covers applicants who are children born in Australia to persons who hold RoS visas granted on the basis of an application taken to have been made under new regulation 2.08G (inserted by item 2 above). The only requirement is that, at the time of application for a RoS visa, the applicant has not made a valid application for a TPV or a SHEV that has not been finally determined. Note that a child born after the parent has been granted a RoS visa will become an Australian citizen by birth (see paragraph 12(1)(a) of the *Australian Citizenship Act 2007*).

**[Item 4] – Subitem 1127AA(3) of Schedule 1 (at the end of the note)**

This item inserts a note stating that *TPV/SHEV transition day* is defined in regulation 1.03.

**[Item 5] – After paragraph 1403(3)(b) of Schedule 1**
**[Item 6] – At the end of subitem 1403(3) of Schedule 1**
**[Item 7] – After paragraph 1404(3)(b) of Schedule 1**
**[Item 8] – At the end of subitem 1404(3) of Schedule 1**

Items 5 and 7 insert new paragraphs 1403(3)(ba) and 1404(3)(ba) in Schedule 1 to the Migration Regulations.

The effect of those paragraphs is that a valid application for a TPV or SHEV can only be made by a person who first entered Australia on or after the *TPV/SHEV transition day*, or who entered before that day and, as at the *TPV/SHEV transition day*, had not made a TPV or SHEV application, or had made an application that had been finally determined and was not subject to any ongoing judicial review. This amendment is consistent with the policy of transitioning all eligible persons to permanent residence via the RoS visa if they arrived before the *TPV/SHEV transition day*.

There is a small number of persons who have not applied for a TPV or SHEV visa despite being eligible to do so. There may also be cases where a previously unsuccessful applicant has new claims based on changes in personal circumstances or in the person's country of origin. In those circumstances, the Minister may choose to the lift the application bar in section 46A and section 48A to allow another application for a TPV or SHEV to be made. If the TPV or SHEV is granted, the holder would then be eligible to apply for the RoS visa (see item 3 above).

Paragraphs 1403(3)(ba) and 1404(3)(ba) also serve the purpose of satisfying the conditions for making a conversion regulation at paragraph 45AA(1)(c) and (d) of the Migration Act. That is, for applicants covered by the conversion regulation (regulation 2.08G inserted by item 2 above), the effect of paragraphs 1403(3)(ba) and 1404(3)(ba) is that there has been a change in the law such that:

- the requirements for making a valid application for a TPV or SHEV have changed (see subparagraph 45AA(1)(c)(i)); and
- if the applicant had made the application after that change to the law, the application would not be valid (see subparagraph 45AA(1)(d)(i)).

Items 6 and 8 insert a note stating that *TPV/SHEV transition day* is defined in regulation 1.03.

**[Item 9] – Paragraphs 785.221(3)(b) and 785.228(2)(b) of Schedule 2**
**[Item 11] – Paragraphs 790.221(3)(b) and 790.228(2)(b) of Schedule 2**

These items make technical consequential amendments to the criteria for grant of a TPV or SHEV, as set out in Part 785 and Part 790 of Schedule 2 to the Migration Regulations. The purpose of the amendments to clauses 785.221, 785.228, 790.221 and 790.228 is to ensure that there is no gap in the legislative scheme in relation to family members of TPV and SHEV applicants. Conversion of the family member's TPV or SHEV application into a RoS visa application depends in some circumstances on satisfaction of the criteria for the TPV or

SHEV (see item 2 above). It is therefore necessary to ensure that family members can satisfy those criteria if a RoS visa has been granted to another member of the family unit. Accordingly, the amendments insert references to a RoS visa having been granted to a member of the same family unit as the applicant.

**[Item 10] – After paragraph 785.511(a) of Schedule 2**
**[Item 12] – After paragraph 790.511(a) of Schedule 2**

These items amend clauses 785.511 and 790.511 in Schedule 2 to the Migration Regulations, which deal with the duration of the TPV and SHEV. The amendments are consequential to the amendments (items 2 and 3 above) which will result in certain TPV and SHEV holders applying for, or being taken to have applied for, the RoS visa.

The TPV is valid for three years and the SHEV is valid for five years (unless, for both visas, the Minister specifies a shorter period when the visa is granted). However, the duration of the visa is extended in cases where the holder applies for a subsequent TPV or SHEV. In that situation, the visa can continue beyond the period for which it was originally granted, and will cease when the subsequent application is withdrawn or otherwise at the end of 35 days after the application is finally determined. This enables the TPV or SHEV holder to remain a lawful non-citizen during the processing of the subsequent application.

The effect of the amendments is to mirror those arrangements in cases where the TPV or SHEV holder applies, or is taken to have applied, for the RoS visa. It will allow applicants for the RoS to continue to reside as a lawful non-citizen on the TPV or SHEV during the processing of the RoS application.

This amendment applies to TPV and SHEV visas granted before, on or after the date of the amendments (see item 18 below). It is appropriate for the amendments to apply to visas granted before the date of the amendments as the amendments are necessary consequential changes to the duration of visas to enable the visa holders to remain lawfully in the community while applications for RoS visas are processed. The amendments do not impose any disadvantage on visa holders.

**[Item 13] – Clause 851.221 of Schedule 2**
**[Item 14] – At the end of clause 851.221 of Schedule 2**
**[Item 15] – Clause 851.222 of Schedule 2**
**[Item 16] – After paragraph 851.222(a) of Schedule 2**
**[Item 17] – At the end of clause 851.222 of Schedule 2**

These items modify certain health criteria for the grant of a RoS visa. Clause 851.221 requires the applicant to have undergone a medical examination by a relevant medical practitioner. Clause 851.222 requires the applicant, except in specified circumstances, to have undergone a chest x-ray examination. The effect of the amendments is that these requirements do not apply if the Minister is satisfied that it would be unreasonable to require the applicant to undergo the medical examination or chest x-ray. This additional flexibility is appropriate because most applicants have been provided with health services and medical treatment in Australia over a period of several years. In many cases, there would be no medical justification for undertaking a further medical examination or chest x-ray.

## Part 2 – Application of Amendments

***Migration Regulations 1994***

**[Item 18] – In the appropriate position in Schedule 13**

This item inserts a new Part 115 into Schedule 13 to the Migration Regulations. Schedule 13 is the location of application and transitional provisions for amendments to the Migration Regulations.

Subclause 11501(1) provides that the amendments made by items 5 to 8 and 13 to 17 of Part 1 of Schedule 1 to the *Migration Amendment* (*Transitioning TPV/SHEV Holders to Resolution of Status Visas*) *Regulations 2023* apply in relation to an application for a visa made, or taken to have been made, on or after the commencement of those items.

Subclause 11501(2) provides that the amendments made by items 9 and 11 of Part 1 of Schedule 1 to the *Migration Amendment* (*Transitioning TPV/SHEV Holders to Resolution of Status Visas*) *Regulations 2023* apply in relation to an application for a visa made, or taken to have been made, before, on or after the commencement of those items. The amendments made by items 9 and 11 are entirely beneficial and it is therefore appropriate to apply the amendments to visa applications made before the commencement of those items.

Subclause 11501(3) provides that the amendments made by items 10 and 12 of Part 1 of Schedule 1 to the *Migration Amendment* (*Transitioning TPV/SHEV Holders to Resolution of Status Visas*) *Regulations 2023* apply in relation to a visa granted before, on or after the commencement of those items. As noted above in relation to items 10 and 12, it is appropriate for the amendments to apply to visas granted before the date of the amendments as the amendments are necessary consequential changes to the duration of visas to enable the visa holders to remain lawfully in the community while applications for RoS visas are processed. The amendments do not impose any disadvantage on visa holders.