EXPLANATORY STATEMENT

Migration Act 1958

MIGRATION (IMMI 17/015: PERSON WHO IS A FAST TRACK APPLICANT) INSTRUMENT 2017

(Paragraph 5(1AA)(b))

1. Instrument IMMI 17/015 is made under paragraph 5(1AA)(b) of the *Migration Act 1958* (the Act) for paragraph (b) of the definition of fast track applicant in subsection 5(1) of the Act.

2. The instrument operates to specify a person who is a fast track applicant. The specification will become relevant if the person makes an application for a protection visa as they will be subject to processing of the visa and any available review rights as a fast track applicant.

3. The purpose of the instrument is to include in the definition of a fast track applicant those persons specified by reference to their Department Immigration and Border Protection Person Identification Digit in Schedule 1 to this instrument. This is provided for in section 6 of the instrument.

4. It is the intention of the instrument to ensure that those persons specified by reference to their Department of Immigration and Border Protection Person Identification Digit in Schedule 1 to the instrument who make an application for a protection visa will be classified as a fast track applicant and a decision to refuse to grant a protection visa to that person may be a fast track decision as defined in subsection 5(1) of the Act.

5. This meets the intention of paragraph (b) of the definition of fast track applicant in subsection 5(1) to give the Minister the flexibility and ability to include other cohorts in the definition of fast track applicant by way of a legislative instrument. Paragraph 5(1AA)(b) of the Act enables the Minister to make a legislative instrument to specify a person who is to be included in the definition. The specification of this cohort by reference to their Person Identification Digit protects the identity of the relevant people.

This practice of protecting the identity of those persons is consistent with previous instruments made under subsection 5(1AA) of the Act.

6. Consultation was undertaken with the Immigration Assessment Authority and the Attorney-General's Department.

7. The Office of Best Practice Regulation (OBPR) has confirmed that a Regulatory Impact Statement is not required (OBPR Reference 21767).

8. Under subsection 5(1AD) of the Act, section 42 of the *Legislation Act 2003* applies to an instrument made under subsection 5(1AA) despite subsection 44(2) of the *Legislation Act 2003*. The instrument is disallowable and therefore a Statement of Compatibility with Human Rights has been attached.

9. The instrument commences on the day after registration on the Federal Register of Legislation.

Statement of Compatibility with Human Rights

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

Fast Track Applicant Instrument

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

This Disallowable Legislative Instrument (the Instrument) is made under paragraph 5(1AA)(b) of the *Migration Act 1958* (the Act). The Instrument specifies persons who are included as fast track applicants for the purpose of the definition of that term in subsection 5(1) of the Act:

A fast track applicant is defined in s 5(1) of the Act as:

(a) A person:

(i) who is an unauthorised maritime arrival who entered Australia on or after 13 August 2012, but before 1 January 2014, and who has not been taken to a regional processing country; and

(ii) to whom the Minister has given written notice under subsection 46A(2) of the Act, determining that subsection 46A(1) of the Act does not apply to an application by the person for a protection visa; and

(iii) who has made a valid application for a protection visa in accordance with the determination; or

(b) a person who is, or who is included in a class of persons who are, specified by legislative instrument under paragraph 5(1AA)(b) of the Act.

Under paragraph 5(1AA)(b), the Instrument specifies persons who have a departmental Person Identification Digit listed in the Instrument to be fast track applicants. The persons whose identification numbers are listed in the Instrument are those unauthorised maritime arrivals (UMAs) and non-UMAs who do not fall within the current definition of fast track applicant and who:

- have raised claims in relation to an unintentional disclosure of their personal information on the departmental website (data breach) on 11 February 2014.

These persons are currently barred from making a valid application for a Protection visa by either the section 46A bar, because they are UMAs, or by section 48B as they have previously made a Protection visa application which was refused (in some cases they are barred by both).

The Government wishes to provide access to the Australian Protection visa assessment process for these persons. The Government considers that the 'fast track process' is the appropriate mechanism for the consideration of these persons' Protection visa applications.

The effect of this Instrument is that if the Minister lifts the relevant application bars in the Act, the persons mentioned in this Instrument will have their claims for protection assessed in Australia through the fast track assessment process.

Human rights implications

This Instrument engages the following rights:

- *non-refoulement*
- privacy.

Non-refoulement

Australia has obligations under the International Covenant on Civil and Political Rights (ICCPR) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) not to return a person to a country in certain circumstances.

Article 3 of the CAT states:

> *No State party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.*

Non- refoulement obligations also arise, by implication, in relation to Articles 6 and 7 of the ICCPR.

Article 6 of the ICCPR states:

> *Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*

Article 7 of the ICCPR states:

> *No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.*

The Government wishes to assess the protection claims of the people specified in the Instrument and considers the fast track process to be the appropriate mechanism. All fast track applicants will have their protection claims fully assessed to determine whether they meet the Protection visa criteria set out in the Act. This assessment allows for the consideration of claims that may engage Australia's *non-refoulement* obligations under the ICCPR and the CAT, as well as under the Refugee Convention.

There is no express requirement under the ICCPR or the CAT or under the Refugee Convention, for any particular process or procedure for the assessment of *non-refoulement*

obligations. In relation to the Refugee Convention, the UNHCR has recognised that it is for each State to establish the most appropriate procedures for processing claims, including review mechanisms, although it recommends that certain minimum requirements should be met including access to competent officials that will act in accordance with the principle of *non-refoulement*, access to necessary facilities such as a competent interpreter to submit their case and being permitted to remain in the country pending a decision on their initial request to the competent authority.

All fast track applicants are afforded an opportunity to have their claims determined in an open and transparent statutory assessment process while ensuring priority is given to identifying applications that present legitimate claims and in turn, persons who require Australia's protection. While merits review can be an important safeguard, there is no express requirement under the ICCPR or the CAT, or under the Refugee Convention, for merits review in the assessment of *non-refoulement* obligations. Fast track applicants are afforded a different form of merits review to persons who are not fast track applicants. It is the Government's view that it is reasonable and proportionate for this cohort of UMAs and non-UMAs, who have already been through a number of processes to assess the majority of their claims, to have their new claims assessed in a process which has a more limited form of merits review This more limited form of merits review is intended to be efficient, quick, cost effective and to uphold the overall integrity of Australia's protection status determination process as well as being competent, independent and impartial. Fast track applicants also have access to judicial review of their Protection visa decisions.

A more detailed explanation of the international obligations relating to the review of *non-refoulement* decisions and the implications of the fast track process on human rights can be found in the Statement of Compatibility for the *Migration and Maritime Powers Legislation Amendment* (Resolving the Legacy Caseload) Act 2014 which established the framework for this process.

Privacy

Article 17(1) of the ICCPR states:

> *No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*

The Instrument positively engages Article 17(1) of the ICCPR. The Instrument specifies persons by reference to the departmental Person Identification Digit rather than their names. This will ensure that their names, and the fact that they are claiming protection, will not become a matter of public record, thus protecting their privacy.

Conclusion

This Instrument is compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.