

**EXPLANATORY STATEMENT**

*Migration Act 1958*

**MIGRATION (IMMI 18/019: FAST TRACK APPLICANT CLASS)  
INSTRUMENT 2018**

*(Paragraph 5(1AA)(b))*

1. Instrument IMMI 18/019 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 class of persons who are fast track applicants. The specification will become relevant if a person in that class of persons 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 the class of persons specified in this instrument.
4. A person is included in this class of persons if:
  - a. they are an unauthorised maritime arrival whose claim for protection was assessed through an administrative process and the person was found not to engage Australia's protection obligations; and
  - b. that assessment was found by the High Court or the Federal Circuit Court as either not being made according to law or the Minister withdrew from the court proceedings before the Court made a decision. This is provided for in section 6 of the instrument.
5. A person is also a *fast track applicant* if they are the child of a person who is a fast track applicant mentioned above.
6. It is the intention of the instrument to ensure that a person who is included in this

class of persons, who makes 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 will, subject to certain exceptions, be a fast track decision as defined in subsection 5(1) of the Act.

7. 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 in the definition of fast track applicant, by way of a legislative instrument, persons other than those specified in paragraph (a) of the definition. Paragraph 5(1AA)(b) of the Act enables the Minister to make a legislative instrument for the purposes of paragraph (b) of the definition.
8. Consultation was undertaken with the Immigration Assessment Authority and the Attorney-General's Department.
9. The Office of Best Practice Regulation (OBPR) has confirmed that a Regulatory Impact Statement is not required (OBPR Reference 22728).
10. Under subsection 5(1AD) of the Act, section 42 of the *Legislation Act 2003* applies to an instrument made under subsection 5(1AA) of the Act 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.
11. 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 Class 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 a class of persons who are included in the definition of ‘fast track applicant’ for the purpose of subsection 5(1) of the Act. The class of persons specified as a fast track applicant in this Instrument are unauthorised maritime arrivals (UMAs) who do not fall within the current definition of fast track applicant and:

- the person has made a protection claim; and
- the person had their protection claim considered or reconsidered through an administrative process that occurred in relation to the Act or Regulations, including (but not limited to) the following processes:
  - Refugee Status Assessment;
  - Protection Obligations Evaluation;
  - Independent Merits Review;
  - Independent Protection Assessment;
  - International Treaties Obligations Assessment; and
- the person has been assessed as not engaging Australia’s protection obligations; and
- the person applied to the High Court or Federal Circuit Court to review the assessment and one of the following occurred:
  - the Court made a declaration that the assessment was not made according to law;
  - the Minister withdrew from the court proceedings before the Court made a decision.

The Instrument will also specify that children of a person described in the class of persons above will also be fast track applicants.

These persons are currently barred from making a valid application for a protection visa by the section 46A(1) bar, because they are UMAs and the Minister has not lifted the bar in respect of them.

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 claims.

The effect of this Instrument is that if the Minister lifts the section 46A(1) application bar in respect of these persons, they will have their claims for protection assessed in Australia through the fast track process.

### **Human rights implications**

This Instrument engages the following rights:

- *non-refoulement*
- rights of children and family unity
- fair hearing rights
- 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 class of persons defined 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 *1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol* (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. It is relevant that the United Nations High Commissioner for Refugees (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 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, who have already been through a number of processes to assess their claims, to have their claims re-assessed in a process which has a more limited form of merits review. This 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.

This Instrument does not affect the substance of Australia's adherence to its *non-refoulement* obligations. Any persons found to engage Australia's *non-refoulement* obligations will not be removed in breach of those obligations.

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.

#### *Rights of children and family unity*

Australia has obligations under the ICCPR and the *Convention on the Rights of the Child* (CRC) to ensure that the rights and best interests of children within its territory are protected. Under the ICCPR, Australia has obligations in relation to the protection of the family unit.

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.*

Article 23(1) of the ICCPR states:

*The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.*

Article 3 of the CRC states:

*In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

Specifying, in paragraph 6(2) of the Instrument, children of persons described in 6(1) of the Instrument – including children who do not themselves meet the definition in 6(1) – as fast track applicants, will allow them to have their protection claims and immigration status managed as part of a family unit with their parents. This ensures that children can be included in a parent or parents' protection visa application, allowing their protection claims to be considered and processed together, and prevent the possible separation of family members. As such, the Instrument positively engages with Article 17(1) and Article 23(1) of the ICCPR, and is consistent with the principle of family unity.

The Government is committed to acting in accordance with Article 3 of the CRC. Allowing children to remain with their parents is generally in their best interests, and providing children of the class of persons described above the ability to have their claims processed by the same process as that of their parents facilitates this.

#### Non-discrimination

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 recognised 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 26 of the ICCPR states:

*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.*

The Instrument positively engages with the obligations in Article 2(1) and Article 26 of the ICCPR, by extending the definition of fast track applicant to these UMAs, who would otherwise be prevented from making an application for a protection visa and thereby prevented from having their claims for protection re-assessed in a statutory process. The Government considers that the fast track process is the appropriate mechanism for the consideration of these persons' protection claims. It will allow this cohort of UMAs, who have already been through a number of processes to assess their claims, to have their claims re-assessed in a process which has a more limited form of merits review, while ensuring that any persons found to engage Australia's *non-refoulement* obligations will not be removed in breach of those obligations.

Fair hearing rights

Article 2(3) of the ICCPR states:

*Each State Party to the present Covenant undertakes:*

- (a) to ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;*
- (b) to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy*

Article 13 of the ICCPR states:

*An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.*

Article 14(1) of the ICCPR states:

*All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.*

To the extent that persons specified as a fast track applicant in this Instrument are unlawful non-citizens, the obligation in Article 13 does not apply to them given they are not lawfully in Australian territory. However, despite this, the class of persons specified in the Instrument, whether lawful or unlawful, will have access to judicial review and, where relevant, merits review before the Immigration Assessment Authority, in satisfaction of the obligation to have review by a competent authority in Article 13.

As previously outlined, the UNHCR recognises 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. There are sufficient

safeguards in place to ensure all fast track applicants are afforded an opportunity to have their claims determined in an open and transparent statutory assessment process. Bringing this class of persons into the fast track process will not affect their ability to seek asylum, or their ability to access judicial review of a refusal decision, nor will it prevent grant of a protection visa for applicants satisfying the criteria for the visa.

### 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 a class of persons by reference to the nature and outcome of their asylum processing in Australia, rather than by a personal identifier. 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.