

EXPLANATORY STATEMENT

Issued by authority of the Minister for Home Affairs

Customs Act 1901

Migration Act 1958

Home Affairs Legislation Amendment (Australia Travel Declaration and Other Matters) Regulations 2024

Legislative authority

The *Customs Act 1901* (the Customs Act) concerns customs-related functions and is the legislative authority that sets out the customs requirements for the importation of goods into, and the exportation of goods from Australia.

Subsection 270(1) of the Customs Act provides, in part, that the Governor-General may make regulations, not inconsistent with the Customs Act, prescribing all matters, which by the Customs Act are required or permitted to be prescribed, or which are necessary or convenient to be prescribed for giving effect to the Customs Act.

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.

In addition, regulations may be made pursuant to the provisions listed in **Attachment A**.

Purpose and background

The *Home Affairs Legislation Amendment (Australia Travel Declaration and Other Matters) Regulations 2024* (the Amendment Regulations) amend the *Customs Regulation 2015* (the Customs Regulation) and the *Migration Regulations 1994* (the Migration Regulations) to support the trial of the Australia Travel Declaration (ATD) as a digital version of the passenger card, also known as the ‘incoming passenger card’.

In accordance with section 172 of the Migration Act, passengers arriving in Australia are required to comply with the requirements set out in section 166 of the Migration Act to be immigration cleared. For the purposes of complying with section 166, further requirements are outlined in Division 3.1 of Part 3 of the Migration Regulations. This includes the requirement to complete an incoming passenger card, unless specifically exempt from doing so.

Clearance officers collect incoming passenger cards from passengers on arrival in Australia. The information in the passenger card enables travellers, including Australian citizens, to meet immigration clearance requirements under paragraph 166(1)(b) of the Migration Act. The cards also assist clearance officers with directing passengers through the correct exit pathway, or referral to further examination points.

The amendments contained in the Amendment Regulations support the use of the ATD on a trial basis as an alternative to completing the incoming passenger card. A passenger who voluntarily and correctly completes and submits an ATD will be exempt from the requirement to complete a paper passenger card on arrival under both the Migration Act and the Customs Act.

During the COVID-19 pandemic and the closure of the Australian border, the Digital Passenger Declaration (DPD) was introduced which required individuals to declare their COVID-19 vaccination status before travelling to Australia. The DPD was also intended to exempt travellers from completing an incoming passenger card for immigration and customs purposes. Regulation changes were made to both the Migration Regulations and Customs Regulation (through the *Home Affairs Legislation Amendment (Digital Passenger Declaration) Regulations 2021*) to recognise the DPD as a digital alternative to the paper passenger card. However with the opening of the Australian border and changes to the *Biosecurity Act 2015*, from 6 July 2022, people travelling to Australia were no longer required to declare their COVID-19 vaccination status. This led to the DPD being decommissioned and the digital functionality to exempt passengers from completing an incoming passenger card for immigration and customs purposes was never implemented. The associated legislative amendments were specific to the DPD and do not support the use of another digital incoming passenger card.

As the provision of a digital option to the incoming passenger card is an essential component of the border modernisation program to provide a more effective, responsive and future-proofed travel declaration, the Department of Home Affairs, in collaboration with Qantas, have developed a new digital incoming passenger card. The ATD has been developed as a module to the Qantas Frequent Flyer mobile application (Qantas app) allowing select passengers arriving on certain flights at Brisbane Airport with the option to complete an ATD instead of an incoming passenger card, during the trial period. The trial is optional for passengers, with participants able to withdraw at any time and instead complete a paper passenger card.

Details and operation

The Amendment Regulations make the following amendments.

Schedule 1 amends the Customs Regulation to update and prescribe the specific information, circumstances, time, manner and form for the purposes of providing information under section 71AAAB of the Customs Act about accompanied or unaccompanied personal or household effects of a passenger or member of a crew of a ship or aircraft imported, or intended to be imported into Australia. The updated information has the effect of making expressly clear the information in the incoming passenger card and crew declaration that is requested for customs purposes.

The amendments under Schedule 1 also replace the references to DPD with the ATD to provide travellers with a digital alternative to completing the incoming passenger card if they meet the related requirements to provide evidence of submission, update information, and confirm the correctness of the ATD if requested to do so.

Schedule 2 amends the Migration Regulations to include a new definition for the ATD and ensures only the most recently submitted ATD is considered. The amendments exempt passengers from completing an incoming passenger card if they instead complete an ATD, and substitutes all references to 'digital passenger declaration' with 'Australia Travel Declaration'. The amendments further introduce a new deeming provision for making a valid application for a Special Category (Temporary) (Class TY) visa (SCV) in circumstances where an eligible New Zealand citizen has

completed an ATD, and provide discretionary grounds for visa cancellation if a non-citizen submits incorrect information in their ATD or in relation to their ATD.

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

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, including the requirements for making a valid application for a visa, 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 listed at Attachment A.

The current Migration Regulations have been in place since 1994, when they replaced regulations made in 1989 and 1993. Providing for these details to be in delegated legislation rather than primary legislation gives the Government the ability to respond quickly to emerging situations such as the COVID-19 pandemic.

Consultation

Consultation in relation to the Amendment Regulations was undertaken with the Department of Agriculture, Fisheries and Forestry. The consultation undertaken is consistent with the requirements of subsection 17(1) of the *Legislation Act 2003* (the Legislation Act).

The Office of Impact Analysis (OIA) has been consulted in relation to the amendments and has advised that a detailed Impact Analysis is not required. The OIA reference number is OIA24-07977.

Other matters

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

The Amendment Regulations commence on the day after they are registered on the Federal Register of Legislation.

A Statement of Compatibility with Human Rights (the Statement) has been completed in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The Statement concludes the Amendment Regulations are compatible with human rights. A copy of the Statement is at **Attachment C**.

The Amendment Regulations will be repealed by operation of Division 1 of Part 3 of Chapter 3 of the Legislation Act. Specifically, that Division (under section 48A) operates to automatically repeal a legislative instrument that has the sole purpose of amending or repealing another instrument. As the Amendment Regulations will automatically repeal, they do not engage the sunseting framework under Part 4 of the Legislation Act.

Authorising Provisions

Customs Act 1901

Subsection 270(1) of the *Customs Act 1901* (Customs Act) provides, in part, that the Governor-General may make regulations, not inconsistent with the Customs Act, prescribing all matters which by the Customs Act are required or permitted to be prescribed, or which are necessary or convenient to be prescribed for giving effect to the Customs Act.

In addition, the following provisions are relevant:

- section 71 has the effect of requiring a person to whom section 71AAAB applies to give information to the Department. Information so given is in relation to Subdivision AA goods (within the meaning of the Customs Act) and is given to enable consideration of the Collector (within the meaning of the Customs Act) on whether to grant or refuse to grant an authority to deal with the goods;
- section 71AAAB has the effect of requiring a person who is an owner of Subdivision AA goods, in the circumstances specified in the regulations, to provide information specified in the regulations, at the time, and in the form and manner specified in the regulations.

Migration Act 1958

Subsection 504(1) of the Migration Act provides that the Governor-General may make regulations not inconsistent with that Act prescribing all matters which by the Migration Act are required or permitted to be prescribed or as may be necessary or convenient to be prescribed for carrying out or giving effect to this Act. Without limiting the generality of the foregoing, may make regulations:

...

- (c) making provision for or in relation to the furnishing or obtaining of information with respect to:
 - (i) persons on board a vessel arriving at a port in Australia in the course of, or at the conclusion of, a voyage or flight that commenced at, or during which the vessel called at, a place outside Australia; and
 - (iii) persons on board an aircraft arriving at or departing from an airport in Australia, being an aircraft operated by an international air carrier;

In addition, the following provisions are relevant:

- subsection 31(1) provides that there are to be prescribed classes of visas;
- section 32 provides for a class of visas to be known as special category visas, a criterion for which includes the applicant is a non-citizen who is a New Zealand citizen and holds, and has presented to an officer or an authorised system, a New Zealand passport that is in force and is neither a behaviour concern non-citizen nor a health concern non-citizen;
- section 45 provides that, subject to the Act and the regulations, a non-citizen who wants a visa must apply for a visa for a particular class;
- subsection 46(1) imposes general requirements for valid visa applications, and is subject to subsection 46(2);
- subsection 46(2) provides that an application for a visa is valid if it is an application for a visa of a class prescribed for the purposes of this subsection and under the regulations, the application is taken to have been validly made;

- subsection 46(3) provides the regulations may prescribe criteria that must be satisfied for an application for a visa of a specified class to be a valid application;
- paragraph 116(1)(g) provides that the Minister may cancel a visa if he or she is satisfied that a prescribed ground for cancelling a visa applies to the holder;
- paragraph 166(1)(b) provides that a person, whether a citizen or non-citizen, who enters Australia must, without unreasonable delay provide to a clearance authority any information (including the person's signature, but not any other personal identifier) required by this Act or the regulations;
- subsection 166(3) provides that, subject to section 167, a person is to comply with paragraph 166(1)(b) in a prescribed way;
- section 167 provides when and where the evidence required by section 166 is to be presented;
- subsection 172(1) provides that a person is immigration cleared, if (among other things) the person complies with section 166;
- subsection 506(1) provides that regulations under paragraph 504(1)(c) may provide for the giving of different information about different classes of people;
- subsection 506(2) provides that the regulations are to provide for the giving of information, in the form of answers to questions on a form, to be known as a passenger card, by non-citizens travelling to Australia, other than non-citizens exempted by the regulations;
- subsection 506(3) provides that the questions for a non-citizen required by subsection 506(2) may include, but are not limited to, questions about any or all of the following:
 - the non-citizen's health;
 - any criminal convictions in Australia or a foreign country of the non-citizen;
 - the purpose of the new arrival's going to Australia;
 - any unpaid debts to the Commonwealth of the non-citizen;
 - any removal or deportation from, or refusal of admission into, Australia or a foreign country of the non-citizen.

Details of the *Home Affairs Legislation Amendment (Australia Travel Declaration and Other Matters) Regulations 2024*

Section 1 – Name

This section provides that the name of the instrument is the *Home Affairs Legislation Amendment (Australia Travel Declaration and Other Matters) Regulations 2024* (the Amendment Regulations).

Section 2 – Commencement

This section provides for the commencement of the Amendment Regulations.

Subsection 2(1) has the effect that, each provision of the Amendment Regulations specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table, and that any other statement in column 2 has effect according to its terms.

The table under subsection 2(1) has the effect that the whole of the Amendment Regulations commence on the day after those Regulations are registered on the Federal Register of Legislation.

The note at the end of subsection 2(1) clarifies that this table relates only to the provisions of the Amendment Regulations as originally made, and that those Regulations will not be amended to deal with any later amendments of the Amendment Regulations.

Subsection 2(2) provides that any information in column 3 of the table is not part of the Amendment Regulations. Information may be inserted in this column, or information in it may be edited, in any published version of the Amendment Regulation. Column 3 of the table provides for the date/details of the commencement date.

Section 3 – Authority

This section provides that the Amendment Regulations are made under the *Customs Act 1901* (the Customs Act) and the *Migration Act 1958* (the Migration Act).

Section 4 – Schedules

This section enables the legislation referred to in the Schedules to be amended, and provides that each instrument that is specified in a Schedule to the Amendment Regulations is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1 and 2 amend the *Customs Regulation 2015* (Customs Regulation) and the *Migration Regulations 1994* (Migration Regulations), respectively.

Schedule 1—Customs amendments

Customs Regulation 2015

Introductory Comments

Section 68 of the Customs Act requires certain goods to be entered for home consumption or warehousing. An entry for home consumption is made by submitting an import declaration, in respect of the goods, to the Department of Home Affairs (the Department).

Under paragraph 68(1)(d) of the Customs Act, goods that are accompanied or unaccompanied personal or household effects of a traveller are excluded from the requirement to enter the goods for home consumption or warehousing under section 68. However, under section 71AAAA of the Customs Act, goods covered by paragraph 68(1)(d) are defined as Subdivision AA goods.

Subdivision AA goods are subject to customs control, under paragraph 30(1)(ad) of the Customs Act, from the time of their importation until they are delivered into home consumption in accordance with section 71 of the Customs Act, or they are exported to a place outside Australia, whichever happens first.

Section 71 of the Customs Act requires a person, as the owner of Subdivision AA goods, to give information to the Department in the circumstances specified in section 71AAAB of the Customs Act, and requires a Collector to either authorise, or refuse to authorise, the delivery of the goods into home consumption under section 71.

A Collector, as a matter of course, is defined under subsection 8(1)(b) of the Customs Act as any officer of Customs doing duty in the matter in relation to which the expression is used.

The information to be given under section 71AAAB of the Customs Act is information specified in the regulations, in the circumstances specified, and at the time and in the manner and form specified; see subsection 71AAAB(1) of the Customs Act.

Under subsection 71AAAB(2), the release of Subdivision AA goods from customs control and into home consumption first requires an authority to deal to be given by a Collector, having regard to information given by the owner of the goods to a Collector under subsection 71AAAB(1).

Item 1 Section 4

Section 4 of the Customs Regulation provides definitions to assist in the interpretation of its provisions. This item inserts a definition of ***Australia Travel Declaration*** into section 4 of the Customs Regulation.

Under the new definition, Australia Travel Declaration (ATD), in relation to the importation of Subdivision AA goods by a person into Australia, means the digital declaration known by that name that is:

- (a) submitted by the person in respect of that importation to the departmental system that processes such declarations; or

- (b) if the person has submitted one or more subsequent declarations in respect of that importation—the most recently submitted declaration.

Subdivision AA goods are defined under section 71AAAA of the Customs Act to mean:

- (a) goods that are accompanied or unaccompanied personal or household effects of a passenger, or a member of a crew, of a ship or aircraft; and
- (b) goods that are prescribed by regulations made for the purposes of subsection 71AAAE(1) of the Customs Act.

The purpose of the amendments introduced by items [3], [4], [5], [6], [7], [8], [9], [10] and [11] is to enable a trial, commencing in October 2024, permitting certain persons (being people hereon referred to as ‘travellers’) travelling to Australia to submit a digital declaration through the Qantas Frequent Flyer mobile device application (Qantas app) providing information to the Department about the traveller’s Subdivision AA goods. The information required to be provided electronically is the same information otherwise provided to the Department through the incoming passenger card by existing travellers who do not complete a digital declaration.

During the trial, travellers will complete the digital declaration on the Qantas app which provides almost instantaneous transfer of that declaration (and submitted information) to departmental information technology systems. For the establishment of a more permanent digital declaration system, if this were to proceed, it is intended that additional applications will be developed and supported by other air and sea carriers, in addition to a platform or online portal directly hosted by the Department.

The purpose of the amendments introduced by this item is to make clear the intended meaning of ATD referred to by sections 27 and 27A of the Customs Regulation, as amended by items contained in Schedule 1 to the Amendment Regulations.

Item 2 Section 27

Previously, section 27 had the effect that, if a Collector required a person to provide particular information under subsection 71AAAB(1) of the Customs Act, the person was to provide the information on an approved form, and sign it in the manner required by the form. The completed form is then to given to a Collector for consideration on whether to authorise the person’s Subdivision AA goods to be delivered into home consumption.

This item repeals existing section 27 and substitutes it with new section 27, to update the information that must be provided before the Subdivision AA goods to which the information relates, may be authorised by a Collector (within section 8 of the Customs Act) under section 71 of the Customs Act to be delivered into home consumption.

New subsection 27(1) establishes that new section 27 sets out the matters specified for the purposes of subsection 71AAAB(1) of the Customs Act.

New subsection 27(2) sets out the information that a person is required to provide to a Collector in respect of the importation of Subdivision AA goods for the purposes of subsection 71AAAB(1), as follows:

- The person’s name and passport number.
- The name of the ship or the flight number of the aircraft carrying the goods.

- Whether the goods are prohibited or subject to restrictions (a note to the subsection is included to provide examples of such goods).
- Whether the goods include more than 2.25L of alcoholic beverages.
- Whether the goods include more than 25 cigarettes or 25g of tobacco products.
- Whether goods obtained overseas or purchased duty free have a combined value of more than \$900 for a passenger, and more than \$450 for crew.
- Whether the goods include samples intended for business or commercial use.

The questions seeking the specified information continue to be contained in the form administered by the Department known as the incoming passenger card and the crew declaration. Specifying the information in the Customs Regulation makes clear which parts of the incoming passenger card and the crew declaration are included for customs purposes.

New subsection 27(3) specifies that the circumstance in which a person is required to provide the above information is if they are requested to do so by a Collector. This is when the person is requested to give a completed incoming passenger card or crew declaration to enable a Collector to make an assessment about whether to authorise the goods to be delivered into home consumption.

New subsection 27(4) specifies that the time at which a person is required to give information about their Subdivision AA goods is at the time they are requested to do so by a Collector.

New subsection 27(5) specifies the manner and form for the provision of the information. The manner for providing the information is on a paper form given to a Collector. The form for providing the information is as answers to questions on the paper form which elicit the information set out in new subsection 27(2). It must be signed in conformity with the requirements of the form and include a declaration, by the person signing the form, that the information given is true and correct. A note to the new subsection explains that the form to be used for passengers is the incoming passenger card, and that the form to be used by crew is the crew declaration.

New subsection 27(6) provides for an exemption to the requirement to provide information to a Collector when requested to do so under new section 27 if a person has submitted an ATD in compliance with new paragraph 27A(2)(a) (inserted by item 5 of Schedule 1 to the Amendment Regulations) in relation to Subdivision AA goods. New paragraph 27A(2)(a) replaces the requirements for the existing digital passenger declaration with those for the ATD.

However, a person will still need to provide the information in an incoming passenger a card in accordance with subsection 27(1) when requested to do so by a Collector, where the Collector has not made a decision about whether to authorise the goods for entry into home consumption and reasonably suspects that the ATD was not, or was no longer, complete or accurate. This is a discretionary power allowing a Collector to require a person to complete the incoming passenger card to ensure that information in respect of the importation of goods is correct.

Item 3 Section 27A (heading)

This item omits the expression “digital passenger declaration” from the heading to section 27A and substitutes it with the expression “Australia Travel Declaration” to reflect the new nomenclature of the digital declaration.

The effect of this provision is that the heading to section 27A correctly reflects the subject matter with which it deals, being the provision of information about Subdivision AA goods in respect of the ATD.

Item 4 Paragraph 27A(1)(b)

This item omits the phrase “a digital passenger declaration about the goods to a departmental system that processes digital passenger declarations” from paragraph 27A(1)(b) and substitutes it with the phrase “an *Australia Travel Declaration* about the importation of the goods”.

Subsection 27A(1) is in substantially the same terms as it existed previously, aside from the reference to the ATD rather than the digital passenger declaration. It has the effect that, if a person advises a Collector that they have submitted an ATD (for the purpose of not being required to complete an incoming passenger card outlined in section 27, as amended by item 2 of Schedule 1 to the Amendment Regulations), the person must meet the requirements relating to ATDs set out in new subsection 27A(2) as amended by the Amendment Regulations.

The requirements relating to ATDs set out in subsection 27A(2) are:

- The person must present a Collector with an electronic message stating that the person has submitted an ATD (paragraph 27A(2)(a) as amended by item 5 of Schedule 1 to the Amendment Regulations). This electronic message is about the importation of their goods, and contains information about the goods the Collector would be able to access including via machine readable code.
- The person must provide any information required to complete or correct their ATD if necessary (paragraph 27A(2)(b) as amended by item 6 of Schedule 1 to the Amendment Regulations).
- The person must provide any information requested by a Collector orally or in writing to clarify whether their goods are eligible to be authorised for entry into home consumption under section 71 of the Customs Act (existing paragraph 27A(2)(c)).
- The person must confirm whether the information in their ATD is correct if requested by a Collector to do so (new paragraph 27A(2)(d) as inserted by item 7 of Schedule 1 to the Amendment Regulations).

While various provisions in subsection 27A are amended to reflect the different operations of the ATD, subsection 27A(3) remains unchanged. This is so that a person in charge of another person on the relevant flight or voyage into Australia, such as a parent or carer, can submit an ATD on behalf of that person.

Item 5 Paragraph 27A(2)(a)

The amendments to subsection 27A(2) set out the requirements that relate to making an ATD as an alternative to the incoming passenger card.

Previously, paragraph 27A(2)(a) set out the requirements for providing a Collector with proof of completion of a digital passenger declaration (namely through a code generated by Department information technology systems that processes digital passenger declarations).

This item repeals existing paragraph 27A(2)(a) and replaces it with new paragraph 27A(2)(a). This sets out what a person must do in order to be exempt from the requirements of section 27 (as amended by item 2 of Schedule 1 to the Amendment Regulations) in accordance with new

subsection 27(6), if they have indicated to a Collector that they have submitted an ATD under new paragraph 27A(1)(b).

To comply with new paragraph 27A(2)(a), a person is obliged to present to a Collector an electronic message which is generated once the person submits their ATD. For the purposes of the trial of the ATD, the electronic message is transmitted by the Departmental system to the Qantas app of persons who choose to take part in the trial.

Item 6 Paragraph 27A(2)(b)

This item omits the expression “digital passenger declaration” where it occurs in paragraph 27A(2)(b) and substitutes it with the expression “Australia Travel Declaration” to reflect the new nomenclature of the digital declaration.

The effect of this amendment is that requirements in existing paragraph 27A(2)(b) pertain to the ATD. This means that if the ATD is not, or becomes no longer, accurate or complete, the person must provide any information required to correct or to complete the declaration to a Collector orally or in writing.

Item 7 At the end of subsection 27A(2)

This item inserts new paragraph (d) into subsection 27A(2) to empower a Collector to ask a person to confirm that the information in their ATD is correct. This is a reference to the information about a person’s accompanied or unaccompanied personal or household effects which is accessed by a Collector using a machine readable code. The item also adds a note to the bottom of subsection 27A(2) directing the reader to paragraph 234(1)(d) of the Customs Act, which sets out four customs offences in relation to false and misleading statements made to an officer of customs.

These offences are committed by a person who intentionally makes a false or misleading statement to an officer of Customs, reckless as to the fact it is false or misleading in a material particular or who, by omitting something from a statement made to an officer of Customs, makes a false or misleading statement, reckless as to the fact that without the thing the statement is misleading in a material particular. These two circumstances are mirrored when a person intentionally gives another person false or misleading information, or gives it by omission, knowing that other person will include it in a statement to an officer.

Consequently, if a person were asked by a Collector under new paragraph 27A(2)(d) whether their ATD is correct, and the person intentionally replied in the affirmative knowing it was not correct, this may be a false or misleading statement for the purposes of new paragraph 234(1)(d), and the person would have contravened subsection 234(1) of the Customs Act which is punishable upon conviction. The principles governing a person’s intention to engage in conduct in the context of Commonwealth offence provisions are explained in section 5.2 of the Criminal Code, found in the Schedule to the *Criminal Code Act 1995*.

Item 8 After subsection 27A(2)

This item inserts new subsections 27A(2A) and (2B) after subsection 27A(2) to explicitly provide for:

- the time at which at which a person is to present the electronic message generated by the departmental system which processes ATDs to a Collector (subsection 27A(2A)); and

- the manner and form for presenting the electronic message to a Collector (subsection 27A(2B)).

New subsection 27A(2A) specifies that the electronic message mentioned in new paragraph 27A(2)(a) (as amended by item 5 of Schedule 1 to the Amendment Regulations) is to be presented to a Collector at the time the person is requested to do so by the Collector. This makes clear the time at which information about Subdivision AA goods is to be provided to a Collector for the purposes of subsection 71AAAB(1) of the Customs Act.

New subsection 27A(2B)(a) specifies that the manner and form for providing the information to a Collector is the electronic message mentioned in new paragraph 27A(2)(a) presented on a phone, tablet, or other electronic device, or as a copy of that message printed on paper. For the purposes of the trial of the ATD, the electronic message is transmitted by the Departmental system to the Qantas app of persons who choose to take part in the trial.

Consequently, participants in the trial present the message as displayed by the Qantas app on their mobile device to a Collector when requested to do so. It is anticipated that some travellers may, occasionally, print out the message. That is also an acceptable form for showing the electronic message to the Collector. For the more permanent establishment of the ATD, the message would be displayed on the systems of relevantly approved carriers or through email notification.

New paragraph 27A(2B)(b) provides that the electronic message must confirm the person has submitted an ATD about the importation of their goods. The confirmation that a person has submitted an ATD also serves to confirm that the declaration includes the information about their goods which is specified at new subsection 27(2).

Following this, the Collector then accesses the machine readable (QR) code embedded within the message to retrieve the information a person has provided in their ATD about their goods. This information is provided as answers to the same questions asked on the incoming passenger card, and which is specified at new subsection 27(2).

For the Collector to rely on the ATD, rather than the incoming passenger card, the Collector must be able to access the information submitted as part of the ATD under new paragraph 27A(2B)(c). This recognises that there may be occasions during which information technology systems are down and the Collector would not be able to access the information submitted to retrieve the information a person has provided about their Subdivision AA goods in the ATD. If this were to occur, the person would be unable to comply with new subsection 27A(2B) for the purposes of complying with section 71AAAB of the Customs Act. The person in this circumstance will need to provide information by completing an incoming passenger card for the purposes of complying with section 71AAAB of the Customs Act in respect of the person's Subdivision AA goods. The same result would be reached if any of the time, manner and form requirements introduced by new subsections (2A) and (2B) are not complied with.

If passengers choose to use the ATD, they are asked to give their consent to certain collections and disclosures of their personal and / or sensitive information, in accordance with the *Privacy Act 1988*, before they submit their ATD. They will only be able to submit an ATD if they provide their consent. If a traveller chooses not to submit an ATD, they will be required to submit an incoming passenger card on arrival in Australia, unless exempt under the applicable legislation.

Item 9 Subsection 27A(3)

Existing subsection 27A(3) allows a person who has charge of another person to provide information to a Collector on the other person's behalf.

An aspect of the digital passenger declaration is that the Departmental system that processes the declaration generates a code which itself indicates whether or not the goods a person is importing, or intending to import, are eligible for entry into home consumption. Consequently, a person in charge of another person may present this code, or an indication or information, to a Collector on behalf of the other person.

This item replaces the words "indication, a code" with the words "Australia Travel Declaration, an electronic message" to reflect the new process for the ATD which requires presenting to a Collector an electronic message for the purposes of subsection 71AAAB(1) rather than a code.

Item 10 Subsection 65(2)

Section 65 requires a proprietor of an inwards duty free shop to display signs in the shop in the approved form that clearly state the conditions with which, for the purposes of the *Customs Acts* (within the meaning of the Customs Act), a traveller must comply in relation to the purchase of goods at the shop, and related matters.

Customs Acts means the Customs Act and instruments (including rules, regulations or by-laws) made under the Customs Act and any other Act, and any instruments (including rules, regulations or by-laws) made under any other Act, relating to customs in force within the Commonwealth or any part of the Commonwealth.

Under subsection 65(2), if confectionary is available for sale in an inwards duty free shop the proprietor of the shop must display signs that clearly state "The confectionery you have purchased from this outlet has been approved for entry to Australia by Quarantine and does not need to be declared on your incoming passenger card or digital passenger declaration. However, please remember you must declare any other items of food or anything which you can eat, which you have purchased before arriving in Australia".

This item amends subsection 65(2) of the Customs Regulation to replace the words 'digital passenger declaration' after the words 'passenger card or' with the words 'Australia Travel Declaration' to reflect the new nomenclature of the digital declaration.

The effect of this amendment is that the sign in the inwards duty free shop specifies that confectionary purchased in the shop has been approved for entry to Australia by Quarantine and does not need to be declared on an ATD.

Item 11 In the appropriate position in Part 18

This item inserts a transitional provision into the Customs Regulation such that, if at a time in the period:

- (a) starting on the day (the commencement day) that Schedule 1 to the Amendment Regulations were to commence; and
- (b) ending 3 months after the commencement day;

a proprietor displays a sign that meets the requirements in subsection 65(2) of the Customs Regulation, as in force immediately before the commencement day, then the proprietor would be taken to have complied with new subsection 65(2), as amended by that Schedule, in relation to that time.

In effect, this item gives the proprietor of an inwards duty free shop a 3 month period during which the relevant sign may be updated to insert the new wording. During that 3 month period, they will not be regarded as having failed to comply with the requirement to include the amended wording.

Schedule 2—Migration Amendments

Migration Regulations 1994

Item 1 Regulation 1.03

This item inserts a new definition for *Australia Travel Declaration* (ATD) into regulation 1.03 of the *Migration Regulations 1994* (the Migration Regulations). It defines the ATD in relation to the arrival of a person into Australia, as the digital declaration submitted by the person in respect of that arrival to the departmental system that processes such declarations. If the person has submitted one or more subsequent declarations, it refers means only to their most recently submitted declaration.

Item 2 After regulation 2.07AR

This item inserts new regulation 2.07AS into Part 2 of the Migration Regulations, which specifies when a valid application for a Special Category (Temporary) (Class TY) visa (SCV) has been made for the purposes of sections 45 and 46 of the Migration Act. (Section 45 of the Migration Act specifies that a non-citizen who wants a visa must apply for a visa of a particular class. Section 46 provides when a valid application for a visa is made.)

This item provides that an application for an SCV is taken to have been validly made if an applicant:

- presents to a clearance officer a New Zealand passport that is in force; and
- is not the holder a permanent visa; and
- has submitted an ATD; and
- has provided answers to the health and character questions in the ATD; and
- complies with the requirements under regulation 3.03AB in relation to the provision of the ATD.

Previously, one of the ways in which an application for an SCV visa could be validly made, included, presenting to a clearance officer a valid New Zealand passport and a completed paper incoming passenger card (Form 15). The amendments now also support a valid SCV application being made where an applicant instead completes an ATD. The amendments do not otherwise alter existing arrangements for making a valid SCV application.

The requirements for making a valid application support the criteria an applicant must meet to be granted an SCV. The criteria for the grant of the visa, as set out in section 32 of the Migration Act includes, amongst other things, that the applicant is a New Zealand citizen who holds a valid New Zealand passport and the applicant is neither a behaviour concern non-citizen nor a health concern non-citizen. Requiring an applicant to hold a valid New Zealand passport and answering the health and character questions at the time an application is made, assists an assessment being made as to whether the applicant meets the requirements for the grant of the visa.

Item 3 Paragraph 2.43(1)(na)

This item repeals and replaces paragraph 2.43(1)(na) as a ground for visa cancellation. This cancellation ground is prescribed under subsection 116(1)(g) of the Migration Act, which provides that the Minister may cancel a visa if he or she is satisfied that a prescribed ground for cancelling a visa applies to the holder.

The purpose of this item is to establish a discretionary cancellation ground if a passenger has completed an ATD and any of the following apply:

- the ATD was incorrect at the time it was submitted to the departmental system that processes declarations;
- the ATD was incorrect at the time the passenger (or a person in charge of the passenger) presented the electronic message generated by the system to a clearance authority;
- the passenger (or a person in charge of the passenger) has provided incorrect information in relation to the ATD.

This visa cancellation ground is only available if the ATD has not been withdrawn prior to the passenger being immigration cleared. If the ATD is withdrawn prior to immigration clearance, the non-citizen is required to provide a completed incoming passenger card.

The discretionary cancellation ground in paragraph 2.43(1)(na) is complementary to the existing grounds for cancellation of visas on the basis that incorrect answers have been provided in a passenger card. The visa cancellation powers relating to passenger cards are contained in section 109 and paragraph 116(1)(d) of the Migration Act. The power in section 109 is available if the visa holder has been immigration cleared (see subsection 107(1)) and allows cancellation if the Minister is satisfied the non-citizen has not complied with section 102 of the Migration Act. (Section 102 of the Migration Act requires a non-citizen to fill in their passenger card in such a way that all questions on it are answered and no incorrect answers are given.) The cancellation power in paragraph 116(1)(d) of the Migration Act operates in similar circumstances except that it allows cancellation if the holder has not entered Australia, or has entered Australia and has not been immigration cleared. (This means the visa may be cancelled if the visa would be liable to be cancelled under Subdivision C (incorrect information given by the holder) if its holder had entered and been immigration cleared.)

The new discretionary visa cancellation ground is necessary to avoid inconsistent outcomes based on a non-citizen's choice of whether to provide an ATD or incoming passenger card. Without this cancellation ground, the provision of incorrect information in a passenger card would be a basis for cancellation of the non-citizen's visa, but the provision of incorrect information in an ATD would not be a basis for cancellation. It would lead to different outcomes and weaken the integrity of the visa cancellation regime.

A decision to cancel a visa under the new cancellation ground at paragraph 2.43(1)(na) will be subject to merits review by the Administrative Review Tribunal if the visa holder is in the migration zone and has been immigration cleared. Merits review is not available if the visa holder is in immigration clearance. This is an existing distinction set out in subsection 338(3) of the Migration Act.

A decision to cancel a visa under the new cancellation ground at paragraph 2.43(1)(na) will be judicially reviewable.

Item 4 Regulation 3.03AB (heading)

This item substitutes ‘digital passenger declaration’ with ‘Australia Travel Declaration’ in the heading to regulation 3.03AB which contains the exemption from completing a paper passenger card if an ATD is provided. This has the effect of removing obsolete references to the former digital passenger declaration.

Item 5 Paragraph 3.03AB(1)(a)

This item substitutes paragraph 3.03AB(1)(a) with new paragraphs (a), (aa) and (ab) to provide an exemption from the requirement to complete a paper incoming passenger card.

The requirements relating to the entry of a person at the border are set out in Division 5 of Part 2 of the Migration Act. The process is called ‘immigration clearance’ and is defined in section 172 of the Migration Act. To be immigration cleared, it is necessary to comply with the requirements set out in section 166 of the Migration Act. The passenger card is one component a passenger must comply with to satisfy paragraph 166(1)(b). The other requirements, as set out in section 166, relate to presentation of a passport, visa, and personal identifiers such as a facial image presented to an authorised system.

The passenger card is authorised by section 506 of the Migration Act. In particular, subsection 506(2) of the Migration Act states: ‘The regulations are to provide for the giving of information, in the form of answers to questions on a form, to be known as a passenger card, by non-citizens travelling to Australia, other than non-citizens exempted by the regulations’.

Part 3 of the Migration Regulations provides for the provision of information under section 166 of the Migration Act. Regulation 3.01 requires all persons arriving in Australia, with certain exceptions, to complete a passenger card and provide the completed passenger card to an officer.

The purpose of this amendment is to provide an exemption from the requirement to provide a completed paper incoming passenger card. The effect of this item is the requirements relating to completing or providing a paper passenger card do not apply to a person arriving in Australia if:

- the person has submitted an ATD (paragraph 3.03AB(1)(a)); and
- the person has received an electronic message generated by the system that processes ATDs confirming their declaration has been submitted (paragraph 3.03AB(1)(aa)).

Further, paragraph 3.03AB(1)(ab) provides that if a clearance officer requests, the person must present the electronic message to the clearance officer and must confirm the information provided in the ATD is correct, in order for the exemption to apply. The purpose of this paragraph is to enable a clearance officer to verify the information provided in the ATD is correct at the time the person enters Australia. If any information provided by a non-citizen is found to be incorrect, it may be grounds for visa cancellation (see item 3 above) or, in some circumstances, it may be considered an offence under sections 234 or 234A of the Migration Act.

Under subregulation 3.03AB(2), a clearance officer may require a person to provide a completed incoming passenger card instead, if circumstances specified in an instrument under subregulation 3.03AB(3) exist.

Item 6 Subparagraph 3.03AB(1)(b)(i)

This item substitutes ‘digital passenger declaration’ with ‘Australia Travel Declaration’. This has the effect of removing obsolete references to the former digital passenger declaration and ensuring the

exemption to completing a paper incoming passenger card only applies if the person has not withdrawn their ATD prior to immigration clearance.

Statement of Compatibility with Human Rights

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

Home Affairs Legislation Amendment (Australia Travel Declaration and Other Matters) Regulations 2024

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

The Home Affairs Legislation Amendment (Australia Travel Declaration and Other Matters) Regulations 2024 (the Amendment Regulations) amend the *Migration Regulations 1994* (Migration Regulations) and the *Customs Regulation 2015* (Customs Regulation) to enable the trial of an electronic Incoming Passenger Card (IPC), to be known as the Australia Travel Declaration (ATD).

Background on the use of passenger cards

In accordance with section 172 of the Migration Act, passengers arriving in Australia are required to comply with the requirements set out in section 166 of the *Migration Act 1958* (Migration Act) to be immigration cleared. For the purposes of complying with section 166, further requirements are outlined in Division 3.1 of Part 3 of the Migration Regulations. This includes the requirement in regulations 3.01 and 3.03 to provide a completed passenger card (known as an Incoming Passenger Card or IPC) to a clearance officer, unless exempt from doing so. Those provisions authorise the collection of information from passengers for the purposes of the Migration Act.

Clearance officers collect the passenger cards from travellers upon arrival in Australia. All information provided by travellers is expected to be current and correct (section 102 and paragraph 105(1)(b) of the Migration Act). The information in the passenger card enables travellers, including Australian citizens, to meet immigration clearance requirements under paragraph 166(1)(b) of the Migration Act. The cards also assist clearance officers with directing passengers through the correct exit pathway, or referral to further examination points.

Under the *Customs Act 1901* (the Customs Act), goods that are accompanied and unaccompanied personal and household goods (called Subdivision AA goods) of a passenger must be authorised to be delivered into home consumption by a Collector in accordance with subsection 71AAAB of the Customs Act before the passenger can leave with the relevant goods. For subsection 71AAAB(1) of the Customs Act, the specified information that is to be considered by a Collector on whether to authorise the delivery of relevant goods into home consumption is information covered by section 27 or 27A of the Customs Regulation. Information about Subdivision AA goods is provided to a Collector on an approved form, which is the incoming passenger card.

The information collected from the incoming passenger card is used by the Department of Home Affairs (the Department) for a range of immigration and customs clearance purposes, including:

- identifying traveller health or character concerns

- identifying goods that may be subject to customs duty (section 68 of the Customs Act)
- identifying goods which may be prohibited or subject to restriction upon arrival in Australia (section 71 Customs Act), and
- as a source of information used to assess a New Zealand citizen's eligibility for the grant of a Subclass 444 (Special Category) Visa (SCV) (section 32 of the Migration Act).

The Department is permitted to share the information collected from passenger cards with other agencies for certain purposes under subregulation 3.10(1) of the Migration Regulations, as well as under the Migration Act, *Australian Border Force Act 2015* and the *Privacy Act 1988* (Privacy Act).

At present agencies accessing passenger card information include the Department of Agriculture, Fisheries and Forestry, the Australian Bureau of Statistics, the Australian Federal Police, the Australian Transaction Reporting and Analysis Centre (AUSTRAC), and other agencies for various purposes including those relating to biosecurity, statistics, law enforcement, currency reporting and intelligence-sharing, as relevant to each of those agencies.

Previously, the IPC was limited to a paper based form. In completing the paper IPC, passengers fill out this form, declare the information given is true and correct, and provide it to a clearance officer/Collector upon arrival. If a person does not complete a 'passenger card' for the purposes of the Migration Act (or does not meet an exemption from doing so), they will not meet the requirements to be immigration cleared. As a result, a non-citizen may, therefore, be denied entry to Australia, and/or be charged with an offence under the Migration Regulations (reg 3.08) for not completing a passenger card.

During the COVID-19 pandemic and the closure of the Australian border, the Digital Passenger Declaration (DPD) was introduced which enabled incoming passengers to submit a digital declaration. Regulation changes were made in both the Migration Regulations and Customs Regulations (through the *Home Affairs Legislation Amendment (Digital Passenger Declaration) Regulations 2021*) to recognise the DPD as an electronic alternative to the paper IPC. The DPD IPC component never went live, has since been decommissioned and no longer provides passengers with the ability to complete an IPC electronically. The existing legislation is also specific to the DPD and does not support the provision of any alternative form of electronic IPC.

The amendments made by the Amendment Regulations

The Amendment Regulations amend the Customs Regulation and the Migration Regulations to facilitate the trial of the ATD as a voluntary alternative to completing the IPC, in situations where, to comply with customs and immigration requirements, the traveller is required to complete a passenger card.

The Department, in collaboration with Qantas, have developed a module to the Qantas Frequent Flyer mobile application that will provide a select cohort of passengers with the option to complete an electronic IPC instead of a paper IPC, during the trial period. The Amendment Regulations allow a passenger who correctly completes and submits an ATD to be exempt from completing a paper IPC under the Migration Regulations.

In addition, the Amendment Regulations amend the Migration Regulations and the Customs Regulation to facilitate the trial by removing references to the decommissioned DPD and replacing these references with the ATD, thus maintaining the existing legislative structure. A new deeming provision is also inserted into the Migration Regulations to facilitate an application for a Subclass

444 visa being made by New Zealand citizens who submit an ATD. The amendments also ensure that visa cancellation powers operate where incorrect information has been provided in the ATD by a non-citizen instead of on a paper IPC. Amendments to the Customs Regulation update and specify the questions that can be asked in relation to Subdivision AA goods and provide for the IPC and ATD to be used to collect such information.

The initial trial of the ATD, commencing in October 2024, is for limited passengers (aged 18 years and over) arriving on select flights at Brisbane Airport. Passengers participating in the trial will be able to submit their ATD up to three days before they depart for Australia. The ATD will be submitted via the Qantas Frequent Flyer app to the Department's IT systems. ATD specific information will not be stored in Qantas IT systems. The Department's IT systems will send an electronic message to the passenger via the Qantas Frequent Flyer app as well as by email (to the email address the person provides in their ATD). The electronic message will, among other things, state the person has submitted an ATD.

Use of the ATD will be voluntary, with passengers able to instead complete a paper IPC. If passengers choose to use the ATD, they will be asked to give their consent to the collection, use and disclosure of their personal and / or sensitive information, in accordance with the Privacy Act, before they submit their ATD. They will only be able to submit an ATD if they provide their consent. Passengers who complete an ATD, including the participants in the trial, will be able to withdraw the ATD at any time prior to being immigration-cleared and instead complete a paper IPC. If a traveller chooses not to submit an ATD, they will be required to submit an IPC on arrival in Australia, unless exempt under the applicable legislation.

Providing an electronic option as an alternative to the paper IPC is an essential component of the border modernisation program to provide a more effective, responsive and future proofed travel declaration.

Human rights implications

The Amendment Regulations may engage the following rights:

- Right to equality and non-discrimination – Article 2(1) and Article 26 of the *International Covenant on Civil and Political Rights* (ICCPR), Article 5 of the *Convention on the Rights of Persons with Disabilities* (CRPD);
- Freedom of movement – Article 12 of the ICCPR and Article 18 of the CRPD;
- Right to privacy – Article 17(1) of the ICCPR;
- Right to liberty – Article 9(1) of the ICCPR;
- Rights relating to family and children – Articles 17 and 23 of the ICCPR and Article 3 of the *Convention on the Rights of the Child* (CRC).
- Non-refoulement obligations – Article 3(1) of the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) and Articles 6 and 7 of the ICCPR;
- Expulsion of aliens – Article 13 of the ICCPR.

Right to equality and non-discrimination

Article 2(1) of the ICCPR provides that States undertake to respect and to ensure to all individuals within their territory and subject to their jurisdiction the rights recognised in the ICCPR 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. Similarly, Article 26 of the ICCPR provides that 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.

Further, the CRPD contains a number of principles, obligations and rights, including Article 5, relating to the non-discriminatory treatment of persons with a disability.

The amendments made by the Amendment Regulations allow individuals travelling to Australia to provide customs and migration information to a clearance officer by completing an ATD voluntarily, as an alternative to the paper IPC. The ATD does not impose any new conditions that would limit the rights of a person to equality and non-discrimination. To assist with accessibility of the ATD, the ATD will be available via the Qantas Frequent Flyer App, which is available as a mobile application download on mobile phone and smart devices for both IOS and android systems. The ATD will include explanatory help text that will assist users to navigate the interface and submit information. The initial ATD trial will be in English only. This mirrors the current settings for completion of the paper IPC.

Consistent with the Web Content Accessibility Guidelines, the ATD will also include descriptive labels for all links, buttons, and form fields, sufficient contrast ratio for text and backgrounds, ensuring that all images have text alternatives, and touch targets being large enough for accurate user activation. The ATD will comply with Departmental standards for accessibility, with usability, access and inclusion central to the design. Individuals who are unable or unwilling to access or use a web browser, mobile phone or smart device to complete the ATD can still fulfil their border declaration requirements by using the existing paper form to complete the passenger card.

These measures will help ensure the ATD is usable by all travellers regardless of age or disability, and, together with the continued availability of the paper IPC, the ability to use the ATD as a voluntary alternative way to fulfil border declaration requirements is consistent with the right to equality and non-discrimination.

Right to freedom of movement

Article 12(4) of the ICCPR prohibits the arbitrary deprivation of the right to enter one's own country. Article 18 of the CRPD obliges States to protect the ability of persons with disabilities to exercise their rights relating to freedom of movement on an equal basis with others.

The amendments made by the Amendment Regulations do not impose any greater or additional restrictions or conditions on the right of persons to enter Australia, including on citizens or others for whom Australia may be their 'own' country. The amendments do not require additional information as a condition of entry; but rather provide another mechanism for providing information that is already required. As noted above, persons who are unable to, or do not wish to, use the ATD to provide the information to facilitate their border clearance are able to use the existing paper IPC.

Right to freedom from interference with 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 amendments made by the Amendment Regulations engage the right to privacy to the extent that they allow the collection of personal information in relation to the importation of Subdivision AA goods under the Customs Regulation. They also permit the use of information voluntarily provided in the ATD to meet existing immigration clearance requirements as an alternative to the use of the paper IPC. Although these amendments do not themselves establish the ATD, further information about the privacy-related aspects of the ATD is provided for context.

The ATD will be submitted via the Qantas Frequent Flyer app directly to the Department's IT systems using industry standard message encryption. Although the ATD is submitted to the Department via the Qantas Frequent Flyer app, Qantas does not have access to the information provided in the ATD (noting the distinction between ATD information and information collected by Qantas as part of the Qantas Frequent Flyer app account). Hence the collection, storage, use and disclosure of personal and sensitive information by the Department is undertaken in accordance with the Australian Privacy Principles contained in the Privacy Act (namely APP 3, 5 and 6). This is consistent with the United Nations Human Rights Committee General Comment 16 in which the Committee stated that the gathering and holding of personal information on computers, databanks and other devices (that is, the use of information technology) must be regulated by law and that effective measures must be taken to ensure that the information collected is not accessed by persons who are not authorised by law to receive, process or use it.

The Amendment Regulations do not change the information required to meet immigration clearance requirements under the Migration Act. Likewise, the amendments do not change the way that clearance officers and partner border and law enforcement agencies use the migration and customs information voluntarily provided via the ATD. The information provided through the ATD will be shared with the same border and other relevant agencies for the same purposes as for the existing IPC.

The ATD uses a consent-based approach. The information of persons who choose to complete the ATD will be handled in accordance with the Australian Privacy Principles in the Privacy Act. The ATD Privacy Notice, which will explain how the Department will handle their personal information, will be available to read in the ATD. All data stored in Departmental systems is encrypted to ensure that the information is confidential and secure. In addition to the cyber security policy and procedural framework, the Department has established processes for assessing and reporting data breaches under the Notifiable Data Breaches Scheme in accordance with Part IIIC of the Privacy Act.

The Department, in conjunction with other agencies, has a critical role in protecting Australia's borders and national security efforts to combat terrorism, trans-national crime, irregular migration and unlawful entry of goods into Australia.

The Department already collects migration and customs information, for the lawful purpose of border clearance processing, by way of the existing IPC. If a traveller has voluntarily provided relevant information in advance via the ATD, they would not be required to provide a completed IPC on arrival (unless otherwise required by a clearance officer). The ability to use the ATD as an alternative way of meeting existing border clearance requirements, and to store, use and disclose that information voluntarily provided in accordance with relevant legislation, is aimed at ensuring the integrity of identity, security, immigration, customs, biosecurity and other border clearance checks of people entering Australia. Any limitation on the right to freedom from interference with privacy of persons who choose to provide border clearance information through the ATD is lawful, reasonable, necessary, and proportionate to achieving the legitimate aim of maintaining the integrity and security of Australia's borders, while improving the facilitation of travellers to Australia.

Right to liberty

Article 9(1) of the ICCPR states:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

The purpose of the Migration Act is to ‘regulate, in the national interest, the coming into and presence of non-citizens’ in Australia. A visa holder whose visa is liable for cancellation may be detained under s192 of the Migration Act for up to four hours for the purposes of questioning. An officer may then question the individual who has been detained about the person’s visa and matters relevant to that visa. A person whose visa is cancelled becomes an ‘unlawful non-citizen’ under the Migration Act and is liable for removal under s198 and/or immigration detention under s189 of the Migration Act.

Subsection 116(1)(g) of the Migration Act provides that the Minister may cancel a visa if a prescribed ground in the Migration Regulations applies. Relevantly, the amendments to the Migration Regulations made by the Amendment Regulations amend the ground for cancellation (paragraph 2.43(1)(na)) to refer to circumstances where an individual has provided incorrect information in an ATD. As such, the amendments may engage the right to liberty to the extent that a non-citizen who has provided incorrect information on an ATD may be subject to questioning detention if their visa is liable to be cancelled under this cancellation ground or may subject to immigration detention pending removal from Australia if their visa is cancelled on this basis.

The discretionary ability to cancel an individual’s visa in these circumstances is aimed at achieving a legitimate purpose – ensuring the integrity of the border clearance process and the migration program. The cancellation ground reflects the existing ability to cancel a visa under s109 of the Migration Act if the person provides incorrect information on the paper IPC. The cancellation ground ensures that this ability is retained where the person provides the information by way of the ATD, rather than on the paper IPC.

Decision-makers exercising the discretion to cancel a person’s visa are guided by comprehensive policy guidelines and will take into account the individual’s circumstances, relevant international obligations, seriousness of the breach and the consequences for the individual. The individual will be given the opportunity to provide reasons why the visa should not be cancelled, and procedural fairness is afforded in the visa cancellation process. Judicial review of a decision to cancel is available. As such, the visa cancellation decision, and any consequent detention are not arbitrary. Rather they constitute a proportionate response to the individual circumstances of each case.

Rights relating to families and children

Article 3(1) of the CRC states:

In all actions concerning children, whether undertaken by a 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.

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. ’.

This is mirrored in Article 16 of the CRC.

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.

These obligations may be engaged where the amended visa cancellation ground for incorrect information provided by way of the ATD is used in relation to family groups or other cases involving children, and the effect would be that the persons whose visas are cancelled may be detained or removed pursuant to the Migration Act. Temporary visa holders who are members of the family unit (including spouses, partners and children) of a person whose temporary visa is cancelled will have their visas consequentially cancelled by operation of law. In most cases, this means that a family travelling together will be removed together if the primary holder has their visa cancelled.

As noted above, the discretionary ability to cancel an individual's visa in these circumstances is aimed at achieving a legitimate purpose – ensuring the integrity of the border clearance process and the migration program. The cancellation ground reflects the existing ability to cancel a visa under s109 of the Migration Act if the person provides incorrect information on the paper IPC. The amendments to this cancellation ground ensure that that ability is retained where the person provides the information by way of the ATD, rather than on the paper IPC.

The discretionary power to cancel a visa under paragraph 2.43(1)(na) of the Migration Regulations allows the decision-maker to appropriately weigh the best interests of any children and the impact on family members in Australia against other considerations, including the risks to the Australian community from persons who have provided incorrect information as part of border clearance processes, for example in relation to the existence of criminal convictions. Accordingly, on the basis that the best interests of the child are treated as a primary consideration in the exercise of the discretion to cancel a visa under section 116 of the Migration Act, and the impact on family members is appropriately balanced with the risks the person may pose to the Australian community, this amendment is consistent with Articles 3(1) and 16 of the CRC, and Articles 17 and 23 of the ICCPR.

Non-refoulement obligations

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.

Article 3(1) 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.

As a person whose visa is cancelled is liable for removal from Australia under the Migration Act the amendment potentially engages Article 3(1) of the CAT and Articles 6 and 7 of the ICCPR. As noted above, the aim of the new cancellation ground is to replicate the existing ability to cancel a visa

where a person has provided incorrect information on a paper IPC, to the situation where they instead provide that information through the ATD.

Australia remains committed to its international obligations concerning *non-refoulement*. There is scope for these obligations to be considered as part of the decision to cancel a visa or through the protection visa process if the person makes a claim for Australia's protection from these kinds of harm. Individuals would not be subject to removal unless and until any claims for protection they may have had been assessed according to law and, in accordance with s197C of the Migration Act, will not be removed to the relevant country if *non-refoulement* obligations are identified through the protection visa process. As such, this amendment does not affect Australia's commitment to complying with its *non-refoulement* obligations in relation to Article 3 of the CAT and Articles 6 and 7 of the ICCPR.

Expulsion of aliens

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.

Under international law, Australia has the right to take reasonable steps to control the entry and stay of aliens. Decisions to cancel a visa for the provision of incorrect information will be made in accordance with the Migration Act and the Migration Regulations including under paragraph 2.43(1)(na) of the Migration Regulations.

To the extent individuals will have their visa cancelled which leads to their expulsion, the processes are in accordance with Article 13 in that, prior to a decision to cancel, the visa holder is provided with an opportunity to put forward reasons as to why their visa should not be cancelled to a delegated officer. Procedural fairness provisions for visa cancellations are enshrined in Subdivision E of the Migration Act and will apply to these decisions.

A decision to cancel a visa under the amended cancellation ground at paragraph 2.43(1)(na) will be subject to merits review by the Administrative Review Tribunal if the visa holder is in the migration zone and has been immigration cleared. Merits review is not available if the visa holder is in immigration clearance. This is an existing distinction set out in subsection 338(3) of the Migration Act. In these circumstances, judicial review in Australian courts is available. As such, this amendment does not infringe on Article 13 of the ICCPR.

Conclusion

The Amendment Regulations are aimed at aligning the ATD with the existing paper IPC for the legitimate purpose of ensuring the integrity of border clearance processes. Therefore, the amendments are compatible with human rights as, to the extent they may limit some human rights for persons who choose to use the ATD instead of the paper IPC to provide border clearance information, those limitations are reasonable, necessary and proportionate to their objectives, and are not greater than for the existing IPC.

The Hon Tony Burke MP
Minister for Home Affairs