

## **EXPLANATORY STATEMENT**

### **Select Legislative Instrument No. 170**

Subject - *Electronic Transactions Act 1999*  
*Electronic Transactions Amendment (Migration Exemptions) Regulation 2013*

Section 16 of the *Electronic Transactions Act 1999* (the Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

The objects of the Act include facilitating the use of electronic transactions and enabling business and the community to use electronic communications in their dealings with the government.

Sections 14, 14A and 14B of the Act provide default rules for determining the time and place of dispatch and receipt of electronic communications.

Section 7A of the Act provides that the regulations may provide that all or specified provisions of the Act do not apply to transactions, requirements, permissions, electronic communications or other matters specified, or of classes or circumstances specified, or to specified laws of the Commonwealth.

Schedule 1 to the *Electronic Transactions Regulations 2000* (the Principal Regulations) currently specifies the transactions and laws that are exempt from certain provisions of the Act.

The Regulation inserts references to specified provisions of the *Migration Act 1958* and the *Migration Regulations 1994* into Schedule 1, so that the specified provisions are exempt from the operation of sections 14, 14A and 14B of the Act.

Subsections 379A(5), 441A(5) and 494B(5) of the Migration Act and paragraphs 2.55(3)(d), 2.55(3A)(d) and 2.55(3A)(f) of the Migration Regulations (the 'specified provisions') provide for the transmission of a document by electronic means. The specified provisions refer to the giving of documents under the Migration Act by the Department of Immigration and Citizenship or the Migration Review Tribunal/ Refugee Review Tribunal relating to matters arising under the Migration Act (including merits review of decisions) which, among other things, trigger the cessation of associated bridging visas held by the recipient of the document, and/or the commencement of a non-extendable period for seeking merits review of a decision (as relevant).

The Migration Act and the Migration Regulations contain 'deemed receipt' provisions applicable to the specified provisions, which provide that the relevant electronic communication is taken to be received at the end of the day on which it was transmitted.

The application of section 14A of the Act to the specified provisions could potentially produce a variable outcome because the determining factor (in most cases) is when the electronic communication has become ‘capable of being retrieved by the addressee’. The alternative deemed receipt provisions contained in the Migration Act and the Migration Regulations provide an administrative certainty that is vital to the effective operation of various functions under the Migration Act and the Migration Regulations.

The application of section 14 of the Act could potentially produce a variable and uncertain outcome because the determining factor is when the electronic communication leaves the information system under the control of the originator. Instead, the deemed receipt provisions contained in the Migration Act and the Migration Regulations provide that the time of receipt of the specified electronic communication is at the end of the day on which it was transmitted. This is irrespective of any delay in the actual transmission of the electronic communication.

The application of section 14B, which provides that for the purposes of a law of the Commonwealth, an electronic communication is taken to have been dispatched from the place of business of the originator and received at the place of business of the addressee may produce an outcome whereby an electronic communication dispatched from an office of the Department of Immigration and Citizenship in another country could potentially be deemed to be dispatched from Australia.

The effect of the Regulation is that the default rules for determining the time and place of dispatch and receipt of electronic communications provided under the Act, do not apply to electronic communications undertaken pursuant to these specified provisions. These transactions are governed by the respective deeming provisions provided for in the Migration Act and the Migration Regulations.

Consultation was unnecessary as this instrument is machinery in nature and does not substantially alter existing arrangements. It has no direct or substantial indirect effect on business.

Details of the Regulation are provided in the [Attachment](#).

The Regulation commences on the day after it is registered.

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

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Minute recommends that the Regulation be made in the form proposed.

Authority: Section 16 of the *Electronic Transactions Act 1999*

**Details of the *Electronic Transactions Amendment (Migration Exemptions) Regulation 2013***

**Section 1 – Name of Regulation**

This section provides that the title of the Regulation is the *Electronic Transactions Amendment (Migration Exemptions) Regulation 2013*.

**Section 2 – Commencement**

This section provides that the Regulation commences on the day after it is registered.

**Section 3 – Authority**

This section provides that the Regulation is made under the *Electronic Transactions Act 1999*.

**Section 4 – Schedule(s)**

This section provides that each instrument specified in a Schedule to this instrument 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 – Amendments**

**Item [1] – Schedule 1 (after table item 80)**

This item inserts Items 80AA and 80AB into Schedule 1 to the Principal Regulations so that subsections 379A(5), 441A(5) and 494B(5) of the *Migration Act 1958* and paragraphs 2.55(3)(d), 2.55(3A)(d) and 2.55(3A)(f) of the *Migration Regulations 1994* are exempt from the operation of sections 14, 14A and 14B of the Act.

## Statement of Compatibility with Human Rights

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

### Electronic Transactions Amendment (Migration Exemptions) Regulation 2013

This 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 Legislative Instrument

##### *Background*

Under the *Migration Act 1958* (the Migration Act) and the *Migration Regulations 1994* (the Migration Regulations), there are a number of methods by which a document required or permitted to be given to a non-citizen under the Migration Act, such as a notice of decision on a visa application, may be given.

Where a document has been given using one of the prescribed methods and in accordance with any requirements specified for that method, the non-citizen (or their authorised recipient) will be taken to have received the document at the time prescribed in the Migration Act or the Migration Regulations, as the case may be, for that method, whether or not they in fact receive that document.

For example, subsection 494B(4) of the Migration Act provides that the Minister (for Immigration) may give a document to a person by dating and then dispatching it:

- (a) within 3 working days (in the place of dispatch) of the date of the document; and
- (b) by prepaid post or other prepaid means; and
- (c) to:
  - (i) the last address for service provided to the Minister by the recipient for the purposes of receiving documents; or
  - (ii) the last residential or business address provided to the Minister for the purposes of receiving documents; or
  - (iii) if the recipient is a minor – the last address for a carer of the minor that is known to the Minister.

Subsection 494C(4) of the Migration Act then provides:

- (4) If the Minister gives a document to a person by the method in subsection 494B(4) (which involves dispatching the document by prepaid post or by other prepaid means), the person is taken to have received the document:

- (a) if the document was dispatched from a place in Australia to an address in Australia – 7 working days (in the place of that address) after the date of the document; or
- (b) in any other case – 21 days after the date of the document.

Deemed receipt provisions in the Migration Act and the Migration Regulations, such as subsection 494C(4) referred to above, are necessary because they provide administrative certainty to various ‘operation of law’ functions under the Migration Act that rely on deemed receipt of documents and notifications (of decisions) as the trigger. For instance, where a non-citizen holds a bridging visa in association with an application for the grant of a substantive visa and that visa application is refused, the bridging visa will cease 28 days after the non-citizen is notified of the decision to refuse. Similarly, if the decision to refuse is merits reviewable at the Migration Review Tribunal or the Refugee Review Tribunal, the non-citizen’s (non-extendable) timeframe for seeking merits review will close X number of days after they are notified of the decision.

Without the certainty provided by deemed receipt, it would be administratively very difficult to precisely determine the point in time when particular migration functions, in this instance the cessation of the non-citizen’s associated bridging visa and the close of merits review period, have occurred. It would potentially also mean that non-citizens who wish to evade the consequences of those migration functions could do so by avoiding the receipt of documents or notifications given to them (for example, by not complying with their obligation under subsection 52(3A) of the Migration Act to tell the Minister the address at which they intend to live while their visa application is being dealt with; or (if they are a visa holder) by not complying with any visa condition that requires them to inform the Minister of a change of address).

However, where a document is transmitted electronically (such as by email) to a non-citizen or their authorised recipient, that document will be subject to the *Electronic Transactions Act 1999* (the ET Act), which has its own provision governing deemed receipt of electronic communication.

Unlike deemed receipt under the Migration Act and the Migration Regulations which is ‘fixed’ (such as in the example of subsection 494C(4) referred to above), the time of deemed receipt under the ET Act is variable and uncertain, depending on when the electronic communication by which a document has been transmitted becomes capable of being retrieved by the addressee at the electronic address designated by the addressee.

To ensure certainty regarding when an electronically transmitted document or notification is taken to be received, the Migration Act contains provisions expressly excluding the deemed receipt provision under the ET Act (the excluding provisions) from applying to migration documents which are electronically transmitted. An example of such an excluding provision is found in subsection 494C(6) of the Migration Act, which provides that subsection 494C(5) (which prescribes that a migration document transmitted electronically pursuant to subsection 494B(5) is taken to be received at the end of the day on which the document is transmitted) applies despite section 14 of the ET Act.

## *Issue*

The ET Act was amended in 2011, when several of its provisions were restructured and renumbered. In particular, the deemed receipt provision in the ET Act was separated out from then section 14 (which dealt with time and place of dispatch and receipt of electronic communications), and made into a provision of its own and renumbered as section 14A. However, due to an oversight no consequential amendment was made at the time to the Migration Act. This has resulted in an unintended disconnect between the excluding provisions in the Migration Act and the ET Act, with the consequence that the certainty provided by the excluding provisions in the Migration Act regarding deemed receipt of electronically transmitted migration documents was inadvertently removed.

To restore the longstanding and necessary certainty surrounding the deemed receipt of electronically transmitted migration documents, it is proposed that the Migration Act be amended so that the relevant excluding provisions contained therein will again refer to the deemed receipt provision under the ET Act by its correct section number (i.e. section 14A instead of section 14).

As an interim and a more expeditious measure for achieving the same objective, Schedule 1 of the *Electronic Transactions Regulations 2000* (the ET Regulations) is amended. The amendment will exempt documents given under the Migration Act and which have been transmitted electronically, from operation of the deemed receipt provision in section 14A of the ET Act. This will enable the 'fixed' deemed receipt provisions under the Migration Act and the Migration Regulations relating to electronically transmitted documents (such as subsection 494C(5) referred to above) to apply instead. In turn, this will ensure that the 'operation of law' functions under the Migration Act which rely on deemed receipt of (electronically transmitted) documents as the trigger, can operate correctly and with certainty.

In addition, the amendment will exempt electronic documents given under the Migration Act from section 14 of the ET Act (which deals with the time of dispatch of an electronic communications), and section 14B of the ET Act (which deals with place of dispatch and place of receipt of electronic communications). Although exemption from sections 14 and 14B are incidental to the primary amendment sought, i.e. exemption from section 14A, they are nevertheless necessary in order to give proper effect to the exemption from section 14A.

- **Exemption from section 14.** Section 14 of the ET Act provides that an electronic communication is taken to be dispatched when the electronic communication leaves an information system under the control of the originator; or if the electronic communication has not left the information system (because the originator and the addressee exchange communication through the same information system), when the electronic communication is received by the addressee.
- If electronically transmitted migration documents are only exempt from section 14A (deemed receipt) but not section 14 (deemed dispatch), it could lead to an absurd result whereby an electronically transmitted migration document is taken (under the Migration Act or the Migration Regulations) to be received at the end of the day on

which the document is transmitted, even though under section 14 of the ET Act, the document has not yet been dispatched because the electronic communication by which the document is transmitted has not yet left the information system under the control of the Department of Immigration and Citizenship (DIAC). This could result in the amendment being found by a court to be invalid in the event that the amendment is challenged.

- It is possible to read the amendment together with section 14 of the ET Act to mean that an electronically transmitted migration document will be taken to be received at the end of the day on which it is actually transmitted (i.e. leaves DIAC's information system). However, this interpretation is inconsistent with intended outcomes under the Migration Act, and re-introduces uncertainty that renders 'notification-dependent' migration functions unworkable.
- That is, in order to determine when a non-citizen is deemed to receive the electronic communication that triggered the cessation of their bridging visa and/or the commencement of the timeframe for them to seek merits review, it would first be necessary to ascertain when the electronic communication actually left DIAC's information system. Whilst this would usually be the same day that it was 'sent', this cannot be assumed, with the consequence that the transmission log of DIAC's information system must be checked by a systems engineer in every instance. Given the high number of electronic communications generated by DIAC, this would create an unreasonable and unmanageable administrative difficulty.
- Whilst deeming receipt of an electronic communication at the end of the day on which it was transmitted will operate harshly in the rare circumstances where the electronic communication actually leaves the information system under the control of the DIAC at a later date, the term 'transmit' (in the context of examining how the migration legislation interacted with the ET Act prior to its amendment in 2011) has been found by the court to simply mean 'to send', rather than 'to leave the information system under the control of the sender'.
- In *Sainju v Minister for Immigration and Citizenship* [2010] FCA 461 (*Sainju*), which discussed whether subregulation 2.55(8) of the Migration Regulations (an analogous provision of subsection 494C(5) of the Migration Act) had the effect that the recipient is taken to receive an electronic communication at the end of the day on which it was transmitted, Jacobson J endorsed the view that 'transmit' simply means 'to send', and stated [at 52 – 58]:

52. *The underlying assumption in each of the deeming provisions is that the act taken by the Minister is sufficient to bring the document to the attention of the person, regardless of whether this has actually occurred.*

53. *Thus, when a document is handed to the person, it is assumed that the person will open the envelope and read it, regardless of whether he or she actually does. Also, when a document is handed to another person at the addressee's residence or*

*place of business, it is assumed that the other person will give it to the named person. So too, it is assumed that the postal system will work in the ordinary way and that the addressee will receive the document within the time stated.*

54. *The same assumption is made in the deeming provision which deals with electronic communications. Thus, an email is taken to be received at the end of the day on which the Minister transmits, or sends it, to the addressee.*

55. *It may be that in an unusual case there will be unfairness because the assumption which underlies the deeming provision is not fulfilled. The other person may not hand the document to the addressee, the postal system may produce inordinate delay or the email may be lost for a period of time in cyberspace. Perhaps the document will never find its way to the addressee.*

56. *But the authorities dealing with deeming provisions in relation to non-electronic communications make it clear that the effect of those provisions is not to create a rebuttable presumption of fact. They are not to be read as if they were subject to a proviso that the person is not taken to have received the document if the contrary is proved: *Xie v Minister for Immigration and Multicultural and Indigenous Affairs* [2005] FCAFC 172 (“Xie”) at [13] – [14] per Spender, Kiefel and Dowsett JJ; see also the review of the authorities by Sundberg J in *Minister for Immigration and Citizenship v Abdul Manaf* [2009] FCA 963 at [21] – [24]; and see *Tay v Minister for Immigration and Citizenship* [2010] FCAFC 23 at [16] – [19] per Dowsett, Stone and Bennett JJ.*

57. *The same reasoning applies to the statutory deeming provision relating to electronic communications in reg 2.55(8). There is nothing in the language of the paragraph, particularly when read in its full context, or in the evident statutory or regulatory purpose, to suggest a different view. That is to say “by transmitting” means by sending and the person is taken to have received the document at the end of the day on which it is sent.*

58. *The purpose of provisions such as these is to achieve administrative certainty as to whether a document has been given to a person, and as to the time at which this has occurred. It affects time limits for review of administrative decisions and may, in some instances, foreclose that possibility.*

- The approach taken by Jacobson J in *Sainju* was applied in *Chidbundid v Minister for Immigration & Anor* [2012] FMCA 59, in which the applicant was sent a notice of decision to cancel his visa by an email that did not leave DIAC’s internal mail server until 4 days after it was transmitted. The court found that the act of transmitting (i.e. sending) the email was sufficient to engage subregulation 2.55(8) of the Migration Regulations to deemed receipt of the email at the end of that day, and it was irrelevant that available evidence indicated the email was in fact dispatched from DIAC’s mail server at a later date.
- In summary, exempting electronically transmitted migration documents from section 14 as well as section 14A of the ET Act will ensure administrative certainty, i.e. by



creating a non-rebuttable presumption of receipt, and enable relevant functions under the Migration Act to operate as Parliament intended.

- **Exemption from section 14B.** Section 14B of the ET Act provides that an electronic communication is taken to have been dispatched at the place where the originator has its place of business, and received at the place where the addressee has its place of business.
- The assumed place of business from or at which an electronic communication is taken to be dispatched or received, does not apply easily to electronic communications given in migration context. For example, the place of business of DIAC is Australia, even though DIAC has presence in certain overseas countries (e.g. Germany). It would not make much sense if a document transmitted electronically by DIAC in Germany is taken to be dispatched from Australia (being its place of business), and therefore taken to be received at the end of the day on which it was transmitted (according to Australian time). Due to the time difference between Germany and Australia, it means that the addressee of the electronic communication could be taken to have received it much earlier than if the document was taken to be dispatched from Germany (and according to German time).
- Therefore, to give proper effect to the exemption from section 14A, it is necessary to exempt electronically transmitted migration documents from section 14B as well as section 14A of the ET Act.

In conclusion, the amendment does not seek to alter the substantive policy in any way. Rather, it is a consequential amendment to restore the longstanding and necessary administrative certainty regarding deemed receipt of electronically transmitted migration documents previously provided for under the Migration Act and the Migration Regulations, pending consequential amendment to the Migration Act to remedy the inadvertent removal of this administrative certainty caused by amendment of the ET Act in 2011.

### **Human rights implications**

This amendment engages the following human rights:

- Article 9(1) of the International Covenant on Civil and Political Rights.
- Article 13 of the International Covenant on Civil and Political Rights.

#### *Article 9(1)*

Article 9(1) provides:

‘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 amendment seeks to restore the certainty required for correct and effective operation of ‘notification-dependent’ functions under the Migration Act, particularly the cessation of

bridging visas. By facilitating the ability to precisely determine when a bridging visa held by a non-citizen is triggered to cease, it enables the non-citizen's immigration status to be determined with greater accuracy and confidence. In turn, this will assist to avoid the potential unlawful detention of a lawful non-citizen that might otherwise occur due to an erroneous determination about their immigration status caused by uncertainty over whether they have been notified of the visa decision and whether they still hold a bridging visa. This ensures the Government is acting consistently with its obligation to exercise power of detention in accordance with established procedures under law.

To the extent that the amendment provides certainty to non-citizens so they are aware of the terms of any notification and the implications it has on their immigration status, and thus can seek to ensure their immigration status remains lawful, it also assists to uphold and protect the right in Article 9(1). That is, because a lawful non-citizen cannot, by law, be subject to mandatory immigration detention, knowing precisely when the bridging visa they hold will be triggered to cease by the notification they have been given, means they can take steps to ensure they obtain a further visa prior to the cessation of their bridging visa and maintain their ongoing lawful status.

### *Article 13*

Article 13 provides:

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 the Migration Act, a lawful non-citizen (i.e. one who holds a visa that is in effect) cannot lawfully be removed; only an unlawful non-citizen is subject to mandatory removal from Australia.

The amendment purports to ensure that any deemed receipt periods for electronically transmitted notifications can be clearly understood by non-citizens who have been notified of visa refusal decisions, and therefore when their bridging visa will cease (making them an unlawful non-citizen), unless they applied for merits review of the refusal decision. To the extent that the notification serves to also trigger commencement of the (non-extendable) merits review timeframe, the amendment will assist to ensure that a non-citizen who chooses to exercise that right of review knows exactly by when they must make the review application, which will in turn 'halt' the cessation of the bridging visa and cause it to remain in effect until the review decision is notified.

In other words, applying for review within time (determined by reference to deemed receipt of the decision notification) has the effect of 'extending' the bridging visa and keeping the non-citizen lawfully in Australia, so that they will not be subject to mandatory removal before the review application is decided by the Migration Review Tribunal or the Refugee Review Tribunal, as the case may be.

Therefore, the amendment is consistent with Article 13 insofar as it ensures that the process affecting the lawful status (and any consequential removal) of a non-citizen will operate with certainty, and assist affected non-citizens to exercise their right of review within the legislatively prescribed timeframes prior to any proposed removal.

### **Conclusion**

The amendment to the ET Regulations is compatible with human rights as it is both consistent with and assists to support the Government's observance of the rights identified in Articles 9(1) and 13 of the International Covenant on Civil and Political Rights.