***Australian Passports Act 2005***

**AUSTRALIAN PASSPORTS AMENDMENT DETERMINATION 2014 (NO. 1)**

**Issued by the Authority of the Minister for Foreign Affairs**

**Authority**

The *Australian Passports Act 2005* (the Act) empowers the Minister for Foreign Affairs to issue Australian travel documents and perform related functions. Section 57 gives the Minister the authority to specify matters provided in the Act in a determination. The current determination made under this power is the *Australian Passports Determination 2005* (the Determination). The Determination supports the operation of, and provides functional detail to, the Act.

**Purpose**

*Summary of purpose*

The *Australian Passports Amendment Determination 2014 (No.1)*  (the Amendment Determination) amends the Determination to enable the Minister to disclose to foreign border authorities the personal information of persons who have applied for, or been issued, with an Australian travel document. The purpose of the disclosure is to protect the integrity and security of Australian travel documents by preventing their fraudulent use while facilitating international travel by genuine Australian travel document holders.

*Elaboration of purpose*

Foreign border authorities are added (and will replace the existing specified national border agencies) to the list of persons to whom information may be disclosed for the purpose of section 45 of the Act (Part 1). Under section 45, the Minister may disclose personal information about the status of an Australian travel document, for example, whether a passport has been reported as lost or stolen or is otherwise revoked.

Foreign border authorities are also added to the list of persons to whom information may be disclosed for the purpose of paragraph 46(a) of the Act (Part 2). Paragraph 46(a) allows the Minister, on request, to disclose information for the purpose of confirming or verifying personal information relating to an applicant for an Australian travel document, or a person to whom an Australian travel document has been issued. Similarly, foreign border authorities are added to the list of persons to whom disclosure of information may be made, on request, for the purposes of paragraph 46(b) of the Act, enabling the disclosure of personal information for the purpose of facilitating or otherwise assisting the international travel of a person to whom an Australian travel document has been issued.

The Regional Movement Alert System (RMAS) is an initiative of the Asia-Pacific Economic Cooperation (APEC) process. In 2005, APEC leaders endorsed an initiative of the APEC Business Mobility Group to develop a Regional Movement Alert List, the forerunner to the current RMAS, with the objective of combating terrorist threats through strengthening the capacity of participating economies to detect lost, stolen and otherwise invalid travel documents before the passenger arrives at their destination. Under RMAS, passport data of persons from participating countries travelling to the territory of another participating country is verified prior to entry. RMAS does not involve countries directly accessing or transferring each other’s passport data. Data is not exchanged. The response provided is limited to a “Y” for a valid passport or an “N” for an invalid passport. If a passport does not match, sufficient information is disclosed by the passport issuing country to enable a decision to be taken as to the bona fides of the traveller. The disclosure of information is discretionary and the minimum necessary to achieve the specified purpose.

The addition of foreign border authorities will enable implementation of RMAS with new APEC participants. Expanding RMAS participation is a key border protection strategy of the Department of Immigration and Border Protection (DIBP) which has played a leadership role on RMAS within APEC and provided the technical support to some ASEAN countries to make their participation possible. Currently, only the United States, New Zealand and the Philippines participate in RMAS with Australia but Thailand has signalled its wish to participate and other countries are expected to follow. Amending the Determination in the manner proposed will enable Australia to enter into new agreements with APEC members as they seek to join without the need to amend the Determination on each occasion to provide for disclosure to the particular new participant.

Australia provides a round-the-clock service to respond to situations where an Australian travel document which has been reported as lost or stolen is presented by a passenger travelling to a participating member of RMAS. Where a lost or stolen passport is being used illegally, the disclosure facilitates the detection of fraud, protects the genuine holder and enables the passport to be removed from circulation. For genuine travellers, where there has been a human or data error which would cause them to be detained on entry, disclosure of information can assist in confirming identity and minimising inconvenience.

Policy and procedural guidance about disclosures under RMAS is provided to the Minister’s delegates. Terms of Arrangement must be negotiated and in place between Australia and the participating country before any information is shared. The United States Secretary of Homeland Security, the Secretary of the New Zealand Department administering the Immigration Act 2009 (NZ) and the Philippines Commissioner for Immigration are already included in Schedule 3 parts 1, 2 and 3 of the Determination but the amendment would delete them from the Determination as they would be covered by the “generic” inclusion of foreign border authorities.

The Amendment Determination will also enable the implementation of similar arrangements in the future with non-APEC countries for the same purposes should this be contemplated. Further, the Minister’s delegate would be able to respond to *ad hoc* requests for information from countries which are not participants in the RMAS or a similar arrangement outside RMAS for exactly the same purposes and with the same proviso that information disclosed would be the minimum necessary to resolve doubts about the authenticity of the travel document holder. The Minister’s delegate would need to be satisfied that the information disclosed is accorded appropriate privacy safeguards by the receiving border authority.

**Financial impact**

The Amendment Determination will have minimal direct or indirect financial impact for the Commonwealth.

**Regulatory impact**

The Amended Determination will impose no regulatory impact on Australian citizens or businesses.

**Consultation**

Consultation has been conducted with the Department of Prime Minister and Cabinet (PM&C), the Office of the Australian Information Commissioner, the Department of Immigration and Border Control (DIBP) and the Australian Customs and Border Protection Service.

The Amendment Determination commences on the day after it is registered.

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

**NOTES ON CLAUSES 1-4**

**Clause 1: Name of determination**

1. Clause 1 provides that the name of the Determination is the *Australian Passports Amendment Determination 2014 (No.1)*.

**Clause 2: Commencement**

2. Clause 2 provides that the Determination commences on the day after it is registered on the Federal Register of Legislative Instruments.

**Clause 3: Authority**

3. Clause 3 provides that the Determination is made under section 57 of the *Australian Passports Act 2005.*

**Clause 4: Schedule(s)**

4. Clause 4 provides that each instrument specified in the Schedule to the instrument is amended or repealed as set out in the applicable items in the Schedule, and any other item in the Schedule has effect according to its terms.

**STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS**

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

**Australian Passports Amendment Determination 2014 (No. 1)**

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 instrument**

The *Australian Passports Amendment Determination 2014 (No. 1)* (the Amendment Determination) amends the *Australian Passports Determination 2005* (the Determination) for the purpose of enhancing the integrity and security of Australian travel documents by preventing their fraudulent use at foreign borders for international criminal purposes and terrorism while also facilitating the international travel of genuine travel document holders.

**Human rights implications**

The Amendment Determination engages the following human rights:

* the right to freedom of movement under Article 12 of the ICCPR; and
* the right to family, privacy and reputation under Article 17 of the ICCPR.

***Right to freedom of movement***

Article 12 of the ICCPR protects the right to freedom of movement, specifically that everyone shall be free to leave any country including their own. Paragraph 3 of the Article provides for restriction where necessary *inter alia* to protect national security and the rights and freedom of others. The proposed amendment facilitates the international travel of the genuine travel document holder while countering transnational terrorism and crime.

***Right to privacy and reputation***

Article 17 of the ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with their privacy and that everyone has the right to the protection of the law against such interference. Laws which allow for the collection, use and disclosure of personal information engage the right to privacy.

Section 45 of the Australian Passport Act authorises the Minister to disclose personal information in relation to the status of an Australian travel document, for example, if the travel document is lost, stolen or suspicious. Paragraphs 46(a) and (b) of the Act authorise the Minister to, on request, disclose personal information for the purposes of:

* confirming or verifying information relating to an applicant for an Australian travel document, or a person to whom an Australian travel document has been issued; and
* facilitating or otherwise assisting the international travel of a person to whom an Australian travel document has been issued.

‘Personal information’ is understood to have the same meaning as in the *Privacy Act 1988.*

The Amendment Determination adds foreign border authorities to the list of persons to whom information may be disclosed in Parts 1, 2 and 3 of Schedule 3 of the Determination. This will allow the Minister to disclose information to foreign border authorities for the purpose of informing about the status of an Australian travel document (for example, whether it was reported as lost or stolen or is a suspicious travel document). It will also allow the Minister, on request, to disclose information for the purpose of confirming or verifying information relating to an applicant for, or holder of, an Australian travel document.

The right to privacy may be subject to permissible limitations where those limitations are provided by law and are not arbitrary. In order for limitations not to be arbitrary, they must be aimed at a legitimate objective and be reasonable, necessary and proportionate to that objective.

1. *Legitimate objective*

*Operation of the Regional Movement Alert System (RMAS)*

The purpose of the amendments is principally to support the operation of the Regional Movement Alert System (RMAS) between Australia and other APEC economies seeking to participate in the arrangement with Australia. RMAS is an initiative of the Asia-Pacific Economic Cooperation (APEC) business forum intended to prevent the use of passports by terrorists or other serious criminals. The United States, New Zealand and the Philippines are participants in RMAS together with Australia, and the heads of border agencies in these countries are already specified in the Determination as persons to whom information may be disclosed under section 45 and subsections 46 (a) and (b) of the Act.

The amendment would provide significant procedural efficiency by enabling the Minister to enter into arrangements with new RMAS participants without the need to amend the Determination on each occasion. Any arrangement would be subject to the negotiation of a Terms of Arrangement with the new participant providing, inter alia, for appropriate privacy protections.

Under RMAS, passport data of persons from participating countries travelling to the territory of another participating country have their passports verified prior to their gaining entry. RMAS enables authorities to detect lost, stolen, invalid and counterfeit travel documents before a passenger arrives at their destination. It also facilitates border processing for genuine travellers, for example, by allowing authorities to resolve data entry or processing errors. RMAS participants do not have direct access to Australian passport data. The system provides a yes/no response that a passport verifies against Australian data holdings. Any further disclosure is discretionary and strictly limited.

*Other purposes*

The Amendment Determination will also enable the implementation of similar arrangements with non-APEC countries for the same purposes should this be contemplated.

Outside the RMAS system, there are occasions when foreign border authorities may have concerns about the authenticity of an Australian travel document and seek information to confirm or allay their suspicions. The amendment would allow disclosure of limited information to resolve such issues by either confirming that there is fraud or by allaying any suspicions and thereby facilitating the travel of the document holder. Disclosure would not be automatic. The Minister’s delegate would need to satisfy himself/herself that the information disclosed is accorded appropriate privacy safeguards by the recipient.

1. *Reasonable, necessary and proportionate*

As noted above, the disclosure of personal information is provided for by law. Sections 45 and 46 of the Act, together with the Determination, set out:

* the purposes for which disclosures may be made;
* the persons to whom disclosures may be made;
* the personal information which may be provided; and
* in the case of disclosures made under section 46, a requirement that the Minister has received a request for the information.

When lodging an application for an Australian travel document, each applicant, or parent in the case of a child applicant, signs an acknowledgement that they have read and understood the “Notice” contained in the information section of the application form about the collection, use and disclosure of personal information (the statement required in accordance with Australian Privacy Principle 5). The Notice already provides for disclosure of personal information to foreign border authorities in the following circumstances:

* if we suspect there is unlawful activity relating to the travel document;
* for law enforcement purposes; and
* with participants in the Regional Movement Alert System.

The disclosure of personal information for these purposes enables government authorities to identify persons who are attempting to travel internationally using a lost, stolen, invalid or counterfeit travel document, and facilitates the movement of genuine travellers. Preventing the movement of persons using such travel documents is critical to combating transnational and other serious crime, and protecting the identity of Australian passport holders.

Memoranda of Understanding are in place between Australia and RMAS participants, the United States, New Zealand and the Philippines, covering, *inter alia*, the need to observe strict privacy requirements. Similar arrangements will be concluded with any new participants before RMAS is implemented with them.

If a passport does not match DFAT’s records prior to or on entry to the foreign country, DFAT will disclose sufficient information to enable a decision to be taken as to the bona fides of the traveller. The power to disclose information is discretionary and is limited to the minimum information necessary to achieve the specified purpose. RMAS and responses to “ad hoc” enquiries, does not involve countries directly accessing or transferring passport data. Data is validated at the source and is not exchanged.

When *ad hoc* requests for disclosure of information are received from border authorities in countries that are not participants in RMAS, the delegate will disclose the minimum information necessary to resolve any doubts about the bona fides of the travel document holder.

**Conclusion**

This instrument is compatible with human rights because it advances the protection of human rights, and to the extent that it limits any human rights, those limitations are reasonable, necessary and proportionate.