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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

**FOREIGN PASSPORTS (LAW ENFORCEMENT AND SECURITY) DETERMINATION 2015**

EXPLANATORY STATEMENT

(Circulated by authority of the Minister for Foreign Affairs,
the Hon Julie Bishop MP)

**EXPLANATORY STATEMENT**

**FOREIGN PASSPORTS (LAW ENFORCEMENT AND SECURITY) DETERMINATION 2015**

**Issued by the authority of the Minister for Foreign Affairs and Trade**

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**FOREIGN PASSPORTS (LAW ENFORCEMENT AND SECURITY) DETERMINATION 2015**

### Outline

The Foreign Passports (Law Enforcement and Security) Determination 2015 (Foreign Passports Determination) amends and remakes the Foreign Passports Determination 2005 (2005 Foreign Passports Determination) in accordance with its sunset date of 1 October 2015, under the *Legislative Instruments Act 2003*.

The *Foreign Passports (Law Enforcement and Security) Act 2005* (Foreign Passports Act) provides powers for responding to law enforcement matters that involve foreign travel documents. The Foreign Passports Determination remains a critical instrument for the implementation of the Foreign Passports Act.

The Foreign Passports Determination covers:

* competent authorities for requesting an order to surrender foreign travel documents for matters relating to law enforcement, international law enforcement or potential for harmful conduct; and
* offences for the purpose of making a request for an order to surrender foreign travel documents.

The Foreign Passports Determination reorders and renumbers the provisions in the 2005 Foreign Passports Determination consistent with the Foreign Passports Act. The Foreign Passports Determination is substantially the same as the 2005 Foreign Passports Determination with some minor updates.

**Regulation Impact**

The Office of Best Practice Regulation (OBPR) has advised that the proposed changes to the passports determinations are likely to have a minor regulatory impact on businesses or individuals and as such a Regulation Impact Statement is not required. The OBPR reference number is ID 17161.

**Consultation**

The following entities were consulted on the proposed amendments to the passports legislation: Attorney-General’s Department; Austrade; Australian Crime Commission; Australian Customs and Border Services Agency; Australian Federal Police; Australian Government Solicitor; Australian Privacy Commissioner; Australian Security and Intelligence Organisation; Australian Transaction Reports and Analysis Centre; Commonwealth Director of Public Prosecutions; Commonwealth Ombudsman; Department of Finance; Department of Human Services; Department of Immigration and Border Protection; Department of Prime Minister and Cabinet; Standing Councils on Health, Community, Housing and Disability Services and Advisory Councils; State and Territory registrars of births, deaths and marriages; and State and Territory police.

# Foreign Passports (Law Enforcement and Security) Determination 2015

### Notes on Sections

### Part 1 Preliminary

**Section 1 - Name**

1. This determination will be named the *Foreign Passports (Law Enforcement and Security) Determination 2015*.

**Section 2 - Commencement**

1. The Foreign Passports Determination will commence on 1 October 2015.

**Section 3 – Authority**

1. The Foreign Passports Determination is made under the *Foreign Passports (Law Enforcement and Security) Act 2005*.

**Section 4 – Schedules**

1. Each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

**Section 5 – Definitions**

1. The Foreign Passports Determination includes a definition of ‘Act’.

**Part 2 – Enforcement officers’ powers in relation to foreign travel documents**

**Division 1 – Requesting the Minister to order surrender of foreign travel documents**

**Competent authorities and related offences**

1. Mirroring provisions in the *Australian Passports Act 2005* (sections 12,13 and 14 of the Passports Act), the Foreign Passports Act (Division 1) sets out the circumstances in which a competent authority may make a request to the Minister to order the surrender of foreign travel documents for reasons relating to:
* Australian law enforcement matters (section 13 of the Foreign Passports Act);
* international law enforcement cooperation (section 14 of the Foreign Passports Act); or
* potential for harmful conduct (section 15 of the Foreign Passports Act).
1. Sections 6, 7 and 9 of the Foreign Passports Determination specify competent authorities for the purpose of requesting that the Minister order the surrender of a person’s foreign travel documents on the grounds set out above (sections 13 to 15 and paragraph 16(1) of the Foreign Passports Act). Section 8 of the Foreign Passports Determination specifies offences for the purposes of making a request to the Minister to order the surrender of foreign travel documents.

**Section 6 – Competent authorities – Australian law enforcement matters**

1. Section 6 of the Foreign Passports Determination specifies competent authorities for the purpose of making a request to order the surrender of a foreign travel document on the grounds of Australian law enforcement matters under section 13 of the Foreign Passports Act.
2. Competent authorities relating to Australian law enforcement, such as the Australian Federal Police (AFP) and State and Territory police, do not need to be specified as they are described in paragraph 13(2)(a) of the Foreign Passports Act (***competent authority***).
3. The competent authorities specified in paragraphs 6(a) to 6(c) of the Foreign Passports Determination have responsibility for functions or duties in relation to law enforcement matters. These are the Attorney-General, the Secretary of the Attorney-General’s Department, and Senior Executive Service employees of the Attorney-General’s Department.

Section 7 – Competent authorities – international law enforcement cooperation

1. Section 7 of the Foreign Passports Determination specifies competent authorities for the purpose of making a request to order the surrender of a foreign travel document on the grounds of international law enforcement cooperation under section 14 of the Foreign Passports Act. The power under the Foreign Passports Act to demand the surrender of a foreign travel document for reasons relating to international law enforcement cooperation complements Australian law enforcement objectives to offer full and reciprocal assistance to counterparts around the world.
2. Competent authorities relating to international law enforcement cooperation matters are limited to an agency or an employee of the Commonwealth. In this way, the Foreign Passports Act and the Foreign Passports Determination only give standing to Australianofficials and entities to make these requests.
3. Paragraphs 14(2)(a) and 14(2)(aa) of the Foreign Passports Act specify the following competent authorities for the purpose of making a request to order the surrender of a foreign travel document on the grounds of international law enforcement cooperation: a member of the diplomatic staff of an Australian mission (within the meaning of the Vienna Convention on Diplomatic Relations 1961); and a consular officer (but not an honorary consular officer) of an Australian consulate (within the meaning of the Vienna Convention on Consular Relations 1963).
4. The competent authorities specified in section 7 of the Foreign Passports Determination have responsibility for functions or duties in relation to international law enforcement cooperation matters.

Section 8 – Reasons relating to potential for harmful conduct

1. Section 8 of the Foreign Passports Determination provides that the offences specified in subsections 13(1) and 13(2) of the *Australian Passports Determination 2015* are specified for the purpose of a competent authority request to demand the surrender of a foreign travel document pursuant to subparagraph 15(1)(a)(v) of the Foreign Passports Act.

**Section 9 – Competent authorities – potential for harmful conduct**

1. Subsection 15(2) of the Foreign Passports Act defines competent authorities for the purpose of making requests in relation to circumstances in Australia and circumstances in a foreign country. Competent authorities may include: a person who has responsibility for, or powers, duties or functions in relation to, the circumstance under a law of the Commonwealth, a State or Territory; an employee of the Commonwealth or a non-corporate Commonwealth entity specified in a Minister’s Determination.
2. Section 9 of the Foreign Passports Determination specifies competent authorities for the purpose of making a request to the Minister to order the surrender of a person’s foreign travel documents on the grounds of potential for harmful conduct under subsection 15(1) of the Foreign Passports Act.

Circumstances relating to Australia

1. Subsection 9(1) amends the 2005 Foreign Passports Determination to specify the following competent authorities for the purpose of making a surrender request in relation to the circumstances mentioned in subsection 15(1) of the Foreign Passports Act that relate to Australia: (a) the Director-General of Security (within the meaning of the *Australian Security Intelligence Organisation Act 1979* (the ASIO Act); and (b) a Deputy Director-General of Security (within the meaning of the ASIO Act). These persons are specified because they have responsibility for, or powers, functions and duties under the ASIO Act in relation to Australia’s national security.

Circumstances relating to a foreign country

1. Subsection 9(2) of the Foreign Passports Determination specifies competent authorities for the purpose of making a surrender request in relation to circumstances mentioned in subsection 15(1) that relate to a foreign country.
2. The Secretary of Attorney-General’s Department and Senior Executive Service employees in the Attorney-General’s Department are specified because they have responsibility for, or powers, functions or duties in relation to international law enforcement cooperation matters and these interests are often engaged when seeking to prevent potentially harmful conduct.
3. The Director-General of Security and a Deputy Director-General of Security are specified because they have responsibility for, or powers, functions and duties under the ASIO Act in relation to the carrying out of Australia’s responsibilities to foreign countries in relation to threats to security.
4. The reference to the Department of Immigration and Border Protection in paragraph 9(3)(a) replaces the reference to the Australian Customs Service in the 2005 Foreign Passports Determination, following the integration of these two agencies. The Department of Immigration and Border Protection has responsibility for, or powers, functions or duties in relation to indictable offences under the *Migration Act 1958* which are specified in subparagraph 13(2)(e) of the Australian Passports Determination 2015 (section 8 of the Foreign Passports Determination).
5. ASIO is specified as a competent authority because one of its functions is to advise the Minister on security matters—either relating to circumstances in Australia or in a foreign country—that are relevant to the Minister’s functions and responsibilities (paragraph 17(1)(c) of the ASIO Act). This advice may be provided in the form of a competent authority request to the Minister to order the surrender of a foreign travel document.

### Schedule 1 – Repeals

1. Schedule 1 provides that the *Foreign Passports Determination 2005* will be repealed.

# Statement of Compatibility with Human Rights

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

**Foreign Passports (Law Enforcement and Security) Determination 2015**

This 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 Foreign Passports (Law Enforcement and Security) Determination 2015 (Foreign Passports Determination) amends and remakes the Foreign Passports Determination 2005 (2005 Foreign Passports Determination) in accordance with its sunset date of 1 October 2015, under the *Legislative Instruments Act 2003*.

The *Foreign Passports (Law Enforcement and Security) Act 2005* (Foreign Passports Act) provides powers for responding to law enforcement matters that involve foreign travel documents. The Foreign Passports Determination is a critical instrument for the implementation of the Foreign Passports Act.

### The Foreign Passports Determination covers:

* competent authorities for requesting an order to surrender foreign travel documents for matters relating to law enforcement, international law enforcement or potential for harmful conduct; and
* offences for the purpose of making a request for an order to surrender foreign travel documents.

### Human rights implications

The Foreign Passports determination engages the right to freedom of movement under Article 12 of the ICCPR.

Part 2 of the Foreign Passports Act sets out the circumstances in which a competent authority may request the Minister to order the surrender of a person’s foreign travel documents (Division 1) and enforcement officers may demand the surrender of foreign travel documents if authorised by the Minister (Division 2).

A competent authority may request the Minister to order the surrender of a person’s foreign travel documents in circumstances including:

* for reasons relating to Australian law enforcement matters (section 13 of the Foreign Passports Act);
* for reasons relating to international law enforcement cooperation (section 14 of the Foreign Passports Act); or
* for reasons relating to potential for harmful conduct (section 15 of the Foreign Passports Act).

Competent authorities are listed in the Foreign Passports Act for each of sections 13, 14 and 15 and provision is also made for the Minister to specify additional competent authorities under each of these sections in the Foreign Passports Determination.

Sections 6, 7 and 9 of the Foreign Passports Determination specify additional competent authorities for the purpose of requesting the Minister to order the surrender of a foreign travel document pursuant to sections 13, 14 and 15 of the Foreign Passports Act respectively. Section 8 of the Foreign Passports Determination provides that the offences specified in subsections 13(1) and 13(2) of the *Australian Passports Determination 2015* are specified for the purposes of a competent authority request that the Minister order the surrender of a foreign travel document pursuant to subparagraph 15(1)(a)(v) of the Foreign Passports Act.

These provisions of the Foreign Passports Act and the Foreign Passports Determination engage the freedom to leave any country, including one’s own in Article 12(2) of the ICCPR and the right not to be arbitrarily deprived of the right to enter one’s own country in Article 12(4) of the ICCPR by requiring the surrender of foreign travel documents held by a person in Australia, thereby effectively preventing their voluntary departure from Australia.

Article 12(3) expressly provides that the right in Article 12(2) may be subject to restrictions which are provided for by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognised in the ICCPR.

These sections of the Foreign Passports Act and Foreign Passports Determination are a permissible limitation on the rights protected by Article 12 of the ICCPR. The restrictions are provided by law, and are necessary to facilitate law enforcement, to protect public order and Australia’s national security.

The safeguards put in place by the Department and in the legislation ensure the use of these powers is reasonable and proportionate. These are set out in more detail below in relation to the different circumstances.

*Reasons relating to Australian law enforcement*

Section 13 of the Foreign Passports Act, combined with section 6 of the Foreign Passports Determination, ensures any restrictions on movement are necessary, reasonable and proportionate to achieving the objective of supporting Australian law enforcement measures. They only apply where a ‘competent authority’ believes on reasonable grounds that a person is the subject of an Australian arrest warrant for an indictable offence or is prevented from travelling internationally by reason of an Australian court order, parole or bail condition, or a law of the Commonwealth or an order or direction made under such a law (subsection 13(1) of the Foreign Passports Act).

The order to surrender a foreign travel document pursuant to a request under section 13 of the Foreign Passports Act is reasonable and necessary to, for example: protect a child from international parental child abduction; or to protect public order and potentially the rights and freedoms of others. If the foreign travel document was not surrendered a person subject to an arrest warrant for an indictable offence may leave Australia to avoid prosecution and commit further crimes in a foreign country. If a child’s foreign travel document was not surrendered in contravention of a court order that prevented a child from travelling internationally, it may put the child at risk of international parental child abduction. It is appropriate that the Foreign Passports Act and the Foreign Passports Determination are consistent with, and support, the operation of other Commonwealth laws.

Reasonable grounds for a competent authority request under section 13 of the Foreign Passports Act would normally involve the existence of a parenting order for a child, a parole or bail court order or an arrest warrant. It is Departmental practice to require that the competent authority request include a copy of the relevant order or document.

The competent authorities specified in section 6 of the Foreign Passports Determination are the Attorney-General, the Secretary of the Attorney-General’s Department and Senior Executive Service (SES) employees of the Attorney-General’s Department.

The Minister has a discretion as to whether to order the surrender of a foreign travel document under section 13 of the Foreign Passports Act (subsection 16(1) of the Foreign Passports Act). An important safeguard is that all competent authority requests under this section are decided by the Minister. This has been the practice for previous Governments and Foreign Ministers. However, this decision is delegable to an SES officer in the Department under section 23A(1) of the Foreign Passports Act and it is possible that a future Minister may elect to delegate this decision.

The Determination promotes human rights by ensuring that decisions concerning a request to order the surrender of foreign travel documents are taken at the highest levels, in light of their recognised impact on the rights protected by Article 12 of the ICCPR.

In addition, a decision to order the surrender of a foreign travel document pursuant to a request under section 13 of the Foreign Passports Act is reviewable under subsection 23(1) of the Foreign Passports Act.

Section 13 of the Foreign Passports Act, in combination with section 6 of the Foreign Passports Determination, is necessary, reasonable and proportionate for the legitimate objective of supporting law enforcement measures, protecting public order, as well as protecting children and other persons whose rights and freedoms may be interfered with (Art 12(3) of the ICCPR). The administration of these requests and level of seniority in requesting the Minister order the surrender of a foreign travel document further ensures the powers are applied in a reasonable and proportionate manner.

*Reasons relating to international law enforcement cooperation*

Section 14 of the Foreign Passports Act, combined with section 7 of the Foreign Passports Determination, ensures any restrictions on movement are necessary, reasonable and proportionate to achieving the objective of supporting international law enforcement cooperation. They will only apply where a ‘competent authority’ believes on reasonable grounds that a person is the subject of a foreign arrest warrant for a serious offence or is prevented from travelling internationally by reason of a foreign court order, parole or bail condition, or a law of a foreign country, or an order or direction made under such a law (subsection 14(1) of the Foreign Passports Act).

Reasonable grounds for a competent authority request under section 14 of the Foreign Passports Act would normally involve the existence of bail orders from a foreign authority or a foreign arrest warrant. It is Departmental practice to require that the competent authority request include a copy of the relevant order or document.

The competent authorities specified in section 7 of the Foreign Passports Determination for the purpose of section 14 of the Foreign Passports Act are the Secretary of the Attorney-General’s Department, SES employees of the Attorney-General’s Department and the Australian Federal Police. It is Departmental practice to only accept competent authority requests under section 14 of the Foreign Passports Act if they are authorised by an SES (or equivalent) officer.

With respect to requests made under section 14 of the Foreign Passports Act relating to international law enforcement cooperation the Minister has a discretion as to whether to order the surrender of a foreign travel document (subsection 16(1) of the Foreign Passports Act). An important safeguard is that all competent authority requests under this section are decided by the Minister – there is no power to delegate a decision under this section.

The Foreign Passports Determination and Departmental practice promote human rights by ensuring that decisions to order the surrender of foreign travel documents are taken at the highest levels, in light of their recognised impact on the rights protected by Article 12 of the ICCPR.

In addition, a decision to order the surrender of a foreign travel document pursuant to a request made under section 14 of the Foreign Passports Act is reviewable under subsection 23(1) of the Foreign Passports Act.

Section 14 of the Foreign Passports Act, in combination with section 7 of the Foreign Passports Determination, is necessary, reasonable and proportionate to the legitimate objective of supporting international law enforcement cooperation, protecting public order and the rights and freedoms of other persons (Art 12(3) of the ICCPR). The administration of these requests and level of seniority in requesting the Minister order the surrender of a foreign travel document further ensures the powers are applied in a reasonable and proportionate manner.

*Reasons relating to potential for harmful conduct*

Section 15 of the Foreign Passports Act, combined with sections 8 and 9 of the Foreign Passports Determination, ensure any restrictions on movement are provided by law and are necessary, reasonable and proportionate to protect national security and to support law enforcement measures. They will only apply where a ‘competent authority’ suspects on reasonable grounds that, unless a person’s foreign travel documents are surrendered, the person would be likely to engage in conduct that might prejudice the security of Australia or a foreign country, or endanger the health or physical safety of other persons, or interfere with the rights or freedoms of other persons set out in the ICCPR, or might constitute an indictable offence against the Foreign Passports Act or another Commonwealth law specified in a Ministerial determination (subsection 15(1) of the Foreign Passports Act).

In practice, most competent authority requests pursuant to subsection 15(1) of the Foreign Passports Act are made by the Director-General of Security/ASIO. These competent authority requests are made when there are reasonable grounds for suspecting that a person would be likely to engage in conduct that might prejudice the security of Australia or a foreign country and that the person should surrender their foreign travel document in order to prevent the person from engaging in the conduct. An adverse security assessment furnished by ASIO under the *Australian Security Intelligence Act 1979* forms the basis of the competent authority request in these situations.

Requests may also be made by a law enforcement agency, such as the Australian Federal Police, on the basis of a reasonable suspicion that a person would be likely to engage in conduct that might constitute an indictable offence against the Foreign Passports Act or a law of the Commonwealth and that the person should surrender their foreign travel document in order to prevent the person from engaging in the conduct. A competent authority request from the Australian Federal Police is made by an SES-equivalent officer for the purpose of section 15 of the Foreign Passports Act. Previous and recent relevant convictions may be considered as reasonable grounds for making a request under subparagraph 15(1)(a)(v) of the Foreign Passports Act.

The competent authorities specified in section 9 of the Foreign Passports Determination for the purpose of section 15 of the Foreign Passports Act ensure the persons and entities able to make such a request are limited. The majority of competent authority requests come from the head of agency or other suitably senior position in the organisation. In practice the Department will only accept competent authority requests if they are authorised by an SES (or equivalent) officer.

With respect to requests made under section 15 the Minister has a discretion as to whether to order the surrender of a foreign travel document (subsection 16(1) of the Foreign Passports Act). An important safeguard is that all competent authority requests under section 15 are decided by the Minister– there is no power to delegate a decision under this section.

The Foreign Passports Determination and Departmental practice promote human rights by ensuring that decisions concerning a request that the Minister order the surrender of foreign travel documents are taken at the highest levels, in light of their recognised impact on the rights protected by Article 12 of the ICCPR.

In addition, a decision to order the surrender of a foreign travel document pursuant to a request made under section 15 of the Foreign Passports Act is reviewable under subsection 23(1) of the Foreign Passports Act.

Section 8 of the Foreign Passports Determination specifies indictable Commonwealth offences for the purposes of a request that the Minister order the surrender of foreign travel documents under paragraph 15(1)(v) of the Foreign Passports Act by reference to the indictable offences specified in section 13 of the *Australian Passports Determination 2015*. These offences are serious and transnational by nature and protect the rights and freedoms of other persons.

In light of the serious nature of the potential for harmful conduct set out in section 15 of the Foreign Passports Act, the restrictions imposed by this section in combination with sections 8 and 9 of the Foreign Passports Determination on the rights protected by Article 12 of the ICCPR are not arbitrary and are considered necessary, reasonable and proportionate to achieve the legitimate objectives of national security, public order and the protection of the rights and freedoms of others. The administration of these requests and level of seniority in requesting the Minister order the surrender of a foreign travel document and decision-making further ensures the powers are applied in a reasonable and proportionate manner.

### Conclusion

The Foreign Passports Determination is compatible with human rights because to the extent that it may limit human rights, those limitations are provided in law and are reasonable, necessary and proportionate.