

## **EXPLANATORY STATEMENT**

### **Select Legislative Instrument No. 243, 2015**

Issued by the Minister for Immigration and Border Protection

*Migration Act 1958*

*Migration Legislation Amendment (2015 Measures No. 4) Regulation 2015*

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 in effect provides that the Governor-General may make regulations prescribing matters required or permitted by the Migration Act 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 of the Migration Act listed in Attachment A.

The *Migration Legislation Amendment (2015 Measures No. 4) Regulation 2015* (the Regulation) amends the *Migration Regulations 1994* (the Migration Regulations) to strengthen immigration policy and make technical amendments.

In particular, the Regulation amends the Migration Regulations to:

- provide that a valid application for a Child or Adoption visa cannot be made on the basis of a claimed adoption by an Australian citizen, a permanent resident or an eligible New Zealand citizen living overseas and where the claimed adoption is occurring in a country specified in an instrument and during a time period specified in the instrument. It is intended that the instrument would list countries where, for example, the adoption or removal of a child from that country is unlawful under the domestic legislation of that country;
- make consequential and other amendments to reflect that seven existing personal identifier collection powers in the Migration Act will be replaced with a broad, discretionary power to require one or more personal identifiers for the purposes of the Migration Act or the Migration Regulations on commencement of Schedule 1 to the *Migration Amendment (Strengthening Biometrics Integrity) Act 2015*;
- provide that the Immigration Assessment Authority (IAA) can remit protection visa applications to the Minister with a direction that the grant of the visa is not prevented by section 91W or section 91WA of the Migration Act; and

- make a technical consequential amendment to the application requirements for a Subclass 417 (Working Holiday) visa which was overlooked in the amendments made on 18 April 2015 by the *Migration Amendment (2015 Measures No 1) Regulation 2015* (the April 2015 Amendment Regulation).

A Statement of Compatibility with Human Rights (the Statement) has been completed, in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The overall assessment is that the Regulation is compatible with human rights. A copy of the Statement is at [Attachment B](#).

The Office of Best Practice Regulation (the OBPR) has been consulted in relation to the amendments made by the Regulation except for the technical amendment to the application requirements for a Subclass 417 (Working Holiday) visa. The OBPR considers that the proposals are expected to have nil or minor regulatory impacts on businesses, individuals or community organisations. The OBPR consultation reference numbers for the proposals are 18945 (Schedule 1 Part 1), 19619 (Schedule 1 part 2), and 17870 (Schedule 2). In relation to Schedule 1 Part 3, OBPR was not consulted as those amendments are technical in nature and do not substantially alter existing arrangements. However, OBPR was consulted for the April 2015 Amendment Regulation (OBPR ref 17108) and the amendments made by Schedule 1 Part 3 make minor consequential amendments that were overlooked at that time.

In relation to the amendments made by Schedule 1 Part 1, the Department of Foreign Affairs and Trade (DFAT) and the Attorney-General's Department (AGD) have been consulted.

In relation to the amendments made by Schedule 1 Part 2, the IAA was consulted on the proposed regulation changes. No further consultations were considered necessary, as the amendments related solely to the IAA's remittal power and are beneficial in nature.

In relation to the amendments made by Schedule 1 Part 3, consultation was unnecessary, as the amendments are technical in nature and do not substantially alter existing arrangements.

In relation to the amendments made by Schedule 2, consultation occurred during the drafting of the *Migration Amendment (Strengthening Biometrics Integrity) Act 2015*, which included consultation with AGD and the Department of the Prime Minister and Cabinet, and further consultation was unnecessary, as the amendments are consequential.

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

Details of the Regulation are set out in [Attachment C](#).

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

Schedule 1 and item 1 of Schedule 3 to the Regulation commence on 14 December 2015.

Schedule 2 and item 2 of Schedule 3 to the Regulation commence on 16 February 2016.

**AUTHORISING PROVISIONS**

Subsection 504(1) of the *Migration Act 1958* (the Migration Act) relevantly provides that the Governor-General may make regulations, not inconsistent with the Migration Act, prescribing all matters which by the Migration Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to the Migration Act.

In addition, the following provisions of the Migration Act may apply:

- subsection 31(3) provides that the regulations may prescribe criteria for a visa or visas of a specified class;
- subsection 40(1) provides that the regulations may provide that visas or visas of a specified class may only be granted in specified circumstances;
- subsection 46(3) provides that 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 46(4)(a) provides that, without limiting subsection 46(3), the regulations may also prescribe the circumstances that must exist for an application for a visa of a specified class to be a valid application;
- subsection 258B(1) provides that before an authorised officer carries out an identification test on a person, the authorised officer must inform the person of such matters as are prescribed;
- subsection 258D(2) provides that the regulations may prescribe the procedure and requirements that apply if a personal identifier is provided by a person otherwise than by way of an identification test; and
- subsection 473CC(2) provides that the Immigration Assessment Authority may affirm a fast track reviewable decision; or remit the decision for reconsideration in accordance with such directions or recommendations of the Authority as are permitted by regulation.

**Statement of Compatibility with Human Rights**

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

**Migration Legislation Amendment (2015 Measures No. 4) Regulation 2015**

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– Part 1 of Schedule 1 – Child and adoption visa requirements**

Part 1 of Schedule 1 to the Legislative Instrument inserts additional requirements in items 1108 (Child (Migrant)(Class AH)) and 1108A (Child (Residence)(Class BT)) of Schedule 1 to the *Migration Regulations 1994* (the Migration Regulations). In particular, the amendments specify new requirements for making a valid application for a Subclass 102 (Adoption) visa and a Subclass 802 (Child) visa. The new requirements apply to applicants who have been adopted by Australian citizens, permanent residents, or eligible New Zealand citizens who have lived overseas for more than 12 months prior to the visa application (in the case of a Subclass 102 visa), or 12 months prior to the adoption (in the case of a Subclass 802 visa). For both visas, this document uses the term “expatriate adoptions”.

Expatriate adoptions are distinct from intercountry adoptions which are available to Australian citizens, permanent residents and eligible New Zealand citizens, and are managed by state and territory central authorities (STCAs). Intercountry adoptions involve extensive checks and balances to ensure they are conducted in accordance with the principles of the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (Hague Convention), to which Australia is a signatory.

Expatriate adoptions are available to Australian citizens, permanent residents and eligible New Zealand citizens who have lived overseas for more than 12 months, as outlined above, and who, because of their residence overseas, were unable to access an STCA managed intercountry adoption programme.

The checks and safeguards under the Migration Regulations in relation to expatriate adoptions include the following:

- adoption must be in the best interests of the child;
- adoption from the child’s country must be lawful; and
- the laws of the child’s country must allow the child to be removed.

Sometimes, as a result of either temporary or permanent suspension of new applications for adoption by foreign nationals in a particular country, a lawful adoption cannot occur and an application for a visa will therefore not meet Australia’s visa requirements. In addition, there are some countries where adoptions may be lawful at particular times, however the removal of an adopted child from that country was or is unlawful at that time.

This amendment to the Migration Regulations allows the Minister to specify, by legislative instrument, countries from which expatriate adoption visa applications will not be accepted. It is intended that countries will be specified in the instrument if adoption and/or removal of a child from that country is unlawful under the domestic legislation of that country. The amendment will also provide the Minister with the flexibility to confine the bar on applications from specified countries so that it only applies during specified periods of time. This will allow the Minister to ensure that the instrument reflects changes in the adoption policies of a country over time.

This measure provides certainty around the expatriate adoption processes. It prevents the adoptive parents from pursuing a visa application which cannot be approved, and sends a clear message that Australia will not entertain visa applications in cases where the adoption or removal of the child is unlawful. STCA intercountry adoption arrangements remain unchanged.

### **Human rights implications**

Article 2(1) of the Convention on the Rights of the Child (CRC) requires that States parties shall respect and ensure the rights in the CRC to ‘each child within their jurisdiction’. Similarly, the International Covenant on Civil and Political Rights (ICCPR) provides that States Parties owe obligations under the ICCPR to individuals within the State’s ‘territory and subject to its jurisdiction’. The amendments in respect to the Subclass 102 visa do not engage Australia’s human rights obligations in respect of individual children in a foreign country or expatriates seeking to adopt them in that country and / or remove them to Australia. This is because expatriate adoptions occur outside of Australia’s territory, under the domestic laws of foreign countries, with the child being outside of Australia at all relevant times.

While Australia’s human rights obligations are not engaged in respect of children and expatriates involved in expatriate adoptions for the Subclass 102 visa, the proposed amendments to the Subclass 802 do affect children inside Australia and engage the following rights:

- Article 3(1) of the Convention on the Rights of the Child (CRC) relating to consideration of the best interests of the child
- Articles 11 and 35 of the CRC, which relate to illicit transfers of children and child abduction, sale and trafficking
- Article 21 of the CRC, which relates to adoptions.

In countries where adoption of children by foreign nationals or removal of children from that country is unlawful, there may be an increased risk that expatriate adoptions could be linked to child abduction or child trafficking. Specifying the countries from which expatriate adoption visas to enter Australia will not be accepted is consistent with Australia’s obligations as a State party to the CRC to consider the best interests of the child as a primary consideration in administrative or legislative actions (article 3(1) of the CRC) and to take measures to combat the illicit transfer and non-return of children abroad (article 11 of the CRC) and measures to prevent the abduction of, sale of or traffic in children (article 35 of the CRC). In addition, the existing framework under the Migration Regulations requires that an expatriate adoption be in the best interests of the child.

The measures are also consistent with Australia's obligations with respect to adoptions including intercountry adoption (article 21 of the CRC), to the extent that these obligations could be considered apply to expatriate adoptions.

As such, the new provisions in items 1108 and 1108A of Schedule 1 of the Migration Regulations are consistent with those obligations under Article 3, 11 and 21 and 35 of the CRC.

## **Conclusion**

The proposed amendments to the Migration Regulations do not limit any of the rights or freedoms expressed in Australia's international obligations; and are compatible with human rights for the reasons outlined above.

## **Overview of the Legislative Instrument – Part 2 of Schedule 1 – Immigration Assessment Authority remittal to the Minister**

Part 2 of Schedule 1 to the Legislative Instrument amends the Migration Regulations to allow the Immigration Assessment Authority (IAA) to remit protection visa applications to the Minister with a direction that the grant of the visa is not prevented by section 91W or 91WA of the *Migration Act 1958* (the Migration Act).

The *Migration Amendment (Protection and Other Measures) Act 2015* (POM Act) introduced strengthened powers to refuse protection visa applications on identity grounds. These powers are set out in sections 91W and 91WA of the Migration Act.

Section 91W of the Migration Act stipulates that the Minister must refuse to grant a protection visa to an applicant who, in response to a request under the provision to provide documentary evidence of identity, nationality or citizenship, fails or refuses to comply with the request or provides a bogus document. The section does not require refusal of the visa application if the applicant has a reasonable explanation and produces documentary evidence or takes reasonable steps to do so. Section 91WA of the Migration Act stipulates that the Minister must refuse to grant a protection visa to an applicant who provides a bogus document as evidence of identity, nationality or citizenship, or has destroyed or disposed, or caused the destruction or disposal, of such evidence. As with section 91W, there is no obligation to refuse the visa application under section 91WA if the applicant has a reasonable explanation and provides documentary evidence or takes reasonable steps to do so.

The *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (RALC Act) established the IAA to review protection visa refusal decisions relating to certain persons who arrived in Australia without authority and whose protection visa applications were assessed under a fast track assessment process which was also established by the RALC Act.

The Migration Regulations provide the IAA with the power to make a number of directions in relation to cases remitted to the Department of Immigration and Border Protection but, prior to this amendment, the permitted directions did not include directions that a visa should not be refused under section 91W or 91WA. This gap had the potential to create difficulties in resolving cases where the IAA forms a view that the visa should not be refused under section 91W or 91WA.

This amendment to the Migration Regulations provides the IAA with the power to remit matters to the Department with a direction that a visa should not be refused under section 91W or 91WA.

### **Human rights implications**

The amendment to the Migration Regulations has been assessed against the seven core human rights treaties. The amendments engage the following human rights.

Article 14(1) of the ICCPR states:

*All persons shall be equal before the courts and tribunals... everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.*

The amendments implement measures relating to the processing and administration of cases by the IAA, by creating a power for them to be able to remit certain cases back to the department where they make a different finding to the department.

These measures apply to all individuals within the IAA's jurisdiction. The amendments do not limit a person's right to equality before the IAA or the right to a fair hearing by a competent, independent and impartial body established by law. Rather, they ensure that the IAA has the necessary power to remit cases in which it makes a different finding to the Department and for the Department to process to finalisation these cases in accordance with the IAA's direction.

### **Conclusion**

The amendments to the Migration Regulations do not limit any of the rights or freedoms expressed in Australia's international obligations; and are compatible with human rights for the reasons outlined above.

### **Overview of the Legislative Instrument – Part 3 of Schedule 1 – Technical amendments**

Part 3 of Schedule 1 to the Legislative Instrument amends the Migration Regulations to make a technical consequential amendment to the application requirements for a Subclass 417 (Working Holiday) visa which was not made in the amendments made on 18 April 2015 by the *Migration Amendment (2015 Measures No 1) Regulation 2015*. The amendments do not alter the substantive operation of the relevant provisions and therefore do not have any human rights implications.

### **Human rights implications**

The amendment has been assessed against the seven core international human rights treaties and does not engage any of the applicable rights or freedoms.

### **Conclusion**

The amendments to the Migration Regulations are compatible with human rights as they do not raise any human rights issues.

**Overview of the Legislative Instrument – Schedule 2 – Amendments commencing 16 February 2016**

Schedule 2 to the Legislative Instrument amends the Migration Regulations to make amendments required as a consequence of the *Migration Amendment (Strengthening Biometrics Integrity) Act 2015* (the Biometrics Act).

On commencement, the Biometrics Act will introduce section 257A into the Migration Act. Section 257A streamlines seven existing personal identifier collection powers into a broad, discretionary power to collect one or more personal identifiers from non-citizens, and citizens at the border, for the purposes of the Migration Act and the Migration Regulations.

The Biometrics Act will provide flexibility on the types of personal identifiers (as defined in the existing legislation) that may be required, the circumstances in which they may be collected, and the places where they may be collected. Under section 257A, personal identifiers can be provided either by way of an identification test, or by another way specified by the Minister or officer (such as live scan of fingerprints on a handheld device). Under section 257A, personal identifiers may be required by the Minister or an officer, either orally, in writing, or through an automated system, and allow for existing deemed receipt provisions in the Migration Act to apply in relation to requests in writing.

The Biometrics Act will enable personal identifiers to be collected from minors and incapable persons for the purposes of the Migration Act and the Migration Regulations under section 257A without the need to obtain the consent, or require the presence of a parent, guardian or independent person during the collection of personal identifiers.

The Biometrics Act will also omit provisions which are unused and no longer necessary.

The consequential amendments to the Migration Regulations made by this legislative instrument reflect that section 257A is replacing seven separate personal identifier collection powers in the Migration Act with a broad discretionary power.

This legislative instrument will also expressly include in the Migration Regulations the power to withdraw a requirement for a personal identifier which has been made in respect of a person who has applied for a visa. New regulation 2.04 provides that a requirement to provide personal identifiers made under section 257A can be withdrawn. The reasons for withdrawing such a requirement will be detailed in policy but would include in-country crisis situations and situations where compassionate or compelling individual circumstances apply.

The legislative instrument will also amend regulation 3.21 and remake it under a different authorising power in the Migration Act. For persons who apply for a visa offshore, new regulation 3.21 sets out procedures and requirements that apply where personal identifiers are collected otherwise than by way of an identification test. In particular they ensure a person is informed of certain matters, including their rights under the *Privacy Act 1988* and the *Freedom of Information Act 1982* before they provide their personal identifiers. This legislative requirement does not extend to persons who are in Australia because such requirements would limit the capacity to utilise new paragraph 257A(5)(b) to conduct quick and efficient ‘verification checks’ using hand held finger scanners of persons at Australia’s border, and of non-citizens in other circumstances. As a matter of policy, where a ‘verification



check' is conducted, if requested, individuals will be given or directed to the Department's Form 1442i – Privacy Notice and advised that they can obtain further information from the Department's website.

### **Human rights implications**

The amendments to the Migration Regulations in Schedule 2 are consequential to Schedule 1 to the Biometrics Act. As such the Statement of Compatibility with Human Rights made in relation to Schedule 1 of the Biometrics Act addresses any human rights implications of the amendments in Schedule 2 to the Regulation.

### **Conclusion**

The amendments to the Migration Regulations do not limit any of the rights or freedoms expressed in Australia's international obligations; and are compatible with human rights for the reasons outlined above.

**The Hon. Peter Dutton MP, Minister for Immigration and Border Protection**

**ATTACHMENT C****Details of the *Migration Legislation Amendment (2015 Measures No. 4) Regulation 2015***Section 1 – Name

This section provides that the title of the Regulation is the *Migration Legislation Amendment (2015 Measures No. 4) Regulation 2015*.

Section 2 – Commencement

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

The table states that sections 1 to 4 and anything in the Regulation not elsewhere covered by this table commence on the day after the Regulation is registered on the Federal Register of Legislative Instruments.

The table states that Schedule 1 and Schedule 3 item 1 commence on 14 December 2015.

The table states that Schedule 2 and Schedule 3 item 2 commence on 16 February 2016.

A note clarifies that this table relates only to the provisions of this instrument as originally made. It will not be amended to deal with any later amendments of this instrument.

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

The purpose of this section is to provide for when the amendments made by the instrument commence.

Section 3 – Authority

This section provides that the Regulation is made under the *Migration Act 1958* (the Migration Act).

The purpose of this section is to set out the Acts under which the Regulation is made.

Section 4 – Schedule(s)

This section provides that each instrument that is 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.

The effect of this section is that the *Migration Regulations 1994* (the Migration Regulations) are amended as set out in the applicable items in Schedule 1 to the Regulation.

The purpose of this section is to provide for how the amendments in this Regulation operate.

**Schedule 1 – Amendments commencing 14 December 2015**

*Part 1 - Child and adoption visa requirements*

Item 1 – At the end of subitem 1108(3) of Schedule 1

This item adds a new paragraph (c) at the end of subitem 1108(3) in Schedule 1 to the Migration Regulations.

New paragraph 1108(3)(c) provides that an application for a Subclass 102 (Adoption) visa (Subclass 102 visa) by an applicant seeking to meet the requirements of subclause 102.211(2) of Schedule 2 to the Migration Regulations is not a valid application in certain circumstances. The circumstances are that the applicant claims to have been adopted in a country specified by the Minister in a legislative instrument and the adoption occurred during a specified period, if a period is specified in the instrument in relation to that country.

Item 1108 (Child (Migrant)(Class AH)) in Schedule 1 prescribes the requirements for making a valid application for a Subclass 102 visa (as well as other subclasses), where the applicant is outside Australia. The criteria for the grant of a Subclass 102 visa are set out in Schedule 2 to the Migration Regulations.

To satisfy the requirements of subclause 102.211(2) of Schedule 2, an applicant must be under 18 years and must have been adopted overseas by an Australian citizen, permanent resident or eligible New Zealand citizen who had been residing overseas for at least 12 months before the visa application is made. In addition, the residence of the adoptive parent overseas must not have been contrived to circumvent the requirements for entry to Australia of children for adoption, and the adoptive parent must have lawfully acquired full and permanent parental rights under the adoption.

The purpose of subclause 102.211(2) is to facilitate the grant of a Subclass 102 visa to a child adopted under the law of a foreign country by an Australian citizen, permanent resident or eligible New Zealand citizen who has been resident overseas (an expatriate adoption). To satisfy this subclause, evidence of the foreign adoption is sufficient. The visa application is not required to demonstrate that the adoption has been approved by an Australian or other competent authority, or that it otherwise complies with the Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption signed at The Hague on 29 May 1993 (the Hague Convention).

Children adopted or allegedly adopted by Australian citizens, permanent residents or eligible New Zealand citizens have previously been able to apply for Subclass 102 (Adoption) visas under the expatriate adoption provisions even though the adoption and/or removal of the child was or is unlawful under the law of the relevant country. These applications do not meet the eligibility requirement for the grant of a Subclass 102 visa, and are therefore refused.

The purpose of new paragraph 1108(3)(c) is to enable the Minister to specify in a legislative instrument, countries from which applications for the Subclass 102 (Adoption) visa will not be accepted if the application is based on an expatriate adoption. This will allow the Minister to specify countries where adoption and/or removal of a child is unlawful under the domestic legislation of the country. New paragraph 1108(3)(c) also enables the legislative instrument to specify periods within which an expatriate adoption in a specified country will not be acceptable for the purposes of meeting the requirements of subclause 102.211(2). This provision allows changes in the adoption law of the relevant countries to be taken into account. For instance, adoption orders made up until a certain date may not be acceptable because either adoption and/or removal of a child is unlawful under that country's domestic legislation, however after that date relevant changes in the law of that country under which an expatriate adoption order is made may result in those expatriate adoptions being acceptable. This would be reflected in the legislative instrument.

Item 2 – At the end of subitem 1108A(3) of Schedule 1

This item adds a new paragraph (f) at the end of subitem 1108A(3) in Schedule 1 to the Migration Regulations.

This amendment mirrors the amendment in item 1. It makes equivalent changes to the application requirements for the Subclass 802 (Child) visa which is a subclass of the Child (Residence)(Class BT) visa at item 1108A of Schedule 1 to the Migration Regulations. Whereas the Subclass 102 visa can only be applied for by an applicant who is outside Australia, the Subclass 802 visa can only be applied for by an applicant who is in Australia. In other respects, the visas include the same substantive criteria for visa grant of the basis of an overseas adoption, including an expatriate adoption. The purpose and effect of the amendments is as described at item 1.

*Part 2 – Immigration Assessment Authority remittal to the Minister*

Item 1 – Subregulation 4.43(4)

This item amends subregulation 4.43(4) to insert references to sections 91W and 91WA of the Migration Act.

Regulation 4.43 sets out the directions which the Immigration Assessment Authority (IAA) is permitted to give to the Minister in relation to a fast track reviewable decision which has been referred to the IAA by the Minister pursuant to section 473CA of the Migration Act. A fast track reviewable decision is a decision to refuse to grant a protection visa which is subject to the fast track review process conducted by the IAA under Part 7AA of the Migration Act. Section 473CC of the Migration Act provides that the IAA may affirm the fast track reviewable decision or remit the decision for reconsideration in accordance with such directions or recommendations of the IAA as are permitted by regulation.

The purpose of referring to section 91W and section 91WA in subregulation 4.43(4) is to ensure that the IAA has all of the powers required to perform its statutory task of reviewing fast track reviewable decisions. The effect of the amendment is that the IAA is empowered to remit a fast track reviewable decision to the Minister with a direction that the grant of the visa is not prevented by section 91W or section 91WA. Section 91W requires the Minister to refuse to grant a visa in specified circumstances relating to refusal or failure to provide

identity documents or production of bogus identity documents. Section 91WA requires the Minister to refuse to grant a visa in specified circumstances relating to production of bogus identity documents or destruction or disposal of identity documents.

In cases where the IAA has jurisdiction to review such matters, the IAA requires a power to give directions to give effect to a conclusion which is different from the conclusion of the Minister or his delegate. For example, the Minister's delegate might refuse a visa under section 91WA on the basis that the visa applicant had destroyed his or her identity documents. The IAA might conclude that the documents were not destroyed but were lost or stolen. In that case, the IAA would, unless it decided to affirm the refusal decision on other grounds, remit the decision to the Minister with directions that would include a direction that the grant of the visa is not prevented by section 91WA. Such directions might also be required in cases where issues about identity documents were not the reason for the Minister or delegate's decision, but arise before the IAA and are dealt with by the IAA. In this scenario, the power to give directions will avoid the need for the Minister or delegate to further investigate and decide those matters in cases remitted by the IAA.

### *Part 3 – Technical amendments*

#### Item 1 – Subitem 1225(3) of Schedule 1

This item amends subitem 1225(3) of Schedule 1 to the Migration Regulations. The amendment is consequential to items 2 and 3 below. The purpose of the amendment is to make it clear that a legislative instrument specifying where and how to apply for a Subclass 417 (Working Holiday) visa may specify different arrangements for different classes of persons, and an applicant must comply with the arrangements for the class of which he or she is a member.

#### Item 2 – Subitem 1225(5) of Schedule 1 (definition of *working holiday eligible passport*)

This item amends subitem 1225(5) of Schedule 1 to the Migration Regulations (definition of *working holiday eligible passport*). The purpose of the amendment is to correct a cross-reference which was overlooked in the *Migration Amendment (2015 Measures No 1) Regulation 2015* (SLI 2015, No. 34). That instrument, which commenced on 18 April 2015, amended numerous provisions in Schedule 1 of the Migration Regulations, including subitem 1225(3), to enable certain procedural requirements for making visa applications to be consolidated in a legislative instrument. In amending subitem 1225(3), a necessary consequential amendment to subitem 1225(5) was overlooked.

#### Item 3 – Clause 417.111 of Schedule 2 (definition of *working holiday eligible passport*)

This item amends clause 417.111 of Schedule 2 to the Migration Regulations (definition of *working holiday eligible passport*). The purpose of the amendment is to correct a cross-reference. The background is outlined in item 2 above. When subitem 1225(3) of Schedule 1 was amended on 18 April 2015 a necessary consequential amendment to clause 417.111 of Schedule 2 was overlooked.

## **Schedule 2 – Amendments commencing 16 February 2016**

### **Item 1 – Regulation 2.04**

This item repeals regulation 2.04 and replaces it with new regulation 2.04.

Current regulation 2.04 is made under section 40 of the Migration Act. Subregulation 2.04(1) relevantly provides that applications for particular visas are required to meet the criteria in Schedule 2 of the Migration Regulations in order for the visa to be granted.

Current subregulation 2.04(1) also provides that visas of a class mentioned in subregulation 2.04(2) or 2.04(3) may be granted to a person if they meet the criteria in Schedule 2 and the person has complied with any requirement of an officer to provide one or more personal identifiers in relation to the application for the visa (see subparagraph 2.04(1)(b)(ii)). The particular visa classes are a:

- Protection (Class XA) visa;
- Temporary Safe Haven (Class UJ) visa where the applicant is in Australia at the time of application; or
- visa of a class where the applicant is not in Australia at the time of application.

Current subregulations 2.04(2) and 2.04(3) set out the circumstances for paragraphs 40(3)(a) and subsection 40(5) of the Migration Act. Subsection 40(3) provides that, in prescribed circumstances, and if the Minister has not waived the operation of the subsection, the circumstances under subsection 40(1) may be, or may include, that the person has complied with a requirement of an officer to provide one or more personal identifiers in relation to the application for the visa. Subsection 40(5) of the Migration Act provides that subsection 40(4), which provides that a person is taken not to have complied with a requirement to provide personal identifiers unless the personal identifiers are provided to an authorised officer by way of an identification test, does not apply in prescribed circumstances.

Current subregulation 2.04(4) prescribes the fingerprints of a person (including those taken using paper and ink or digital liveness scanning technologies) for the purposes of paragraph 40(3C)(a). Paragraph 40(3C)(a) provides that the regulations may prescribe other types of personal identifiers.

Current subregulation 2.04(5) prescribes, for subsection 40(5) of the Migration Act, the types of personal identifiers for the circumstances mentioned in subregulation 2.04(2). Subregulation 2.04(6) prescribes, for subsection 40(5) of the Migration Act, the types of personal identifiers for the circumstances mentioned in subregulation 2.04(3).

New regulation 2.04 provides that for subsection 40(1) of the Act, a visa may be granted to a person who has satisfied the criteria in the relevant Part of Schedule 2 only if:

- the circumstances set out in that Part exist; and
- if the person has been required under section 257A of the Act to provide one or more personal identifiers – the person has complied with the requirement, or the requirement has been withdrawn.

New regulation 2.04 sets out circumstances in which a visa may be granted. The effect of the regulation is that for a person who has applied for a visa, in addition to having to satisfy the criteria in the relevant Part of Schedule 2 of the Migration Regulations, they may be required to provide one or more personal identifiers under section 257A of the Migration Act before a visa may be granted to the person.

If a person who has applied for a visa has been required under section 257A to provide one or more personal identifiers, unless the requirement has been withdrawn, the person must comply with the requirement before the visa may be granted.

New regulation 2.04 applies to all persons who apply for a visa, including persons who apply:

- for a visa and at the time of application the person is outside Australia;
- for a class of visa known as a protection visa;
- for a visa and at the time of application the person is inside Australia.

New regulation 2.04 expressly provides for the Minister or an officer to withdraw a requirement to provide personal identifiers under section 257A which has been issued to a person who has applied for a visa. If a requirement has been withdrawn, the person is no longer required to comply with the requirement before a visa may be granted to the person. An example of when the Minister or an officer may withdraw a requirement for personal identifiers for the purposes of paragraph 2.04(b) is when there are exceptional and compelling circumstances, such as an in-country crisis situation, that prevent the person who has applied for a visa from providing the personal identifiers.

The ability to withdraw a requirement is to replace the waiver power that is to be repealed from subsection 40(3) of the Migration Act on commencement of the Biometrics Act.

Subregulations 2.04(2) to 2.04(6) are repealed as a consequence of no longer being supported by powers in the Migration Act due to amendments to subsection 40(3) and the repeal of subsections 40(4) to 40(5) of the Migration Act.

#### Item 2 – Regulations 2.08AB and 2.08AC

This item repeals regulations 2.08AB and 2.08AC.

Regulation 2.08AB prescribes circumstances for the purposes of paragraph 46(2A)(a) of the Migration Act. As the Biometrics Act repeals the power to prescribe circumstances under paragraph 46(2A)(a), regulation 2.08AB is no longer supported by a power in the Migration Act and as a consequence is repealed.

Regulation 2.08AC prescribes personal identifiers and circumstances for paragraphs 46(2AC)(a), 46(2AC)(b) and subsection 46(2C) of the Migration Act. As the Biometrics Act will repeal paragraphs 46(2AC)(a), 46(2AC)(b) and subsection 46(2C) of the Migration Act, regulation 2.08AC is no longer supported by a power in the Migration Act and as a consequence is repealed.

#### Item 3 – Subregulations 3.03(1A) and (1B)

This item repeals subregulations 3.03(1A) and (1B).

Subregulation 3.03(1A) prescribes a circumstance for paragraph 166(1)(c) of the Migration Act.

The *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* made amendments to paragraph 166(1)(c) of the Migration Act such that the paragraph no longer includes the power to prescribe circumstances in the Migration Regulations. Subregulation 3.03(1A) is therefore no longer supported by a power in the Migration Act and as a consequence is repealed.

Subregulation 3.03(1B) prescribes circumstances and personal identifiers for subsection 166(8) of the Migration Act. As the Biometrics Act will repeal subsection 166(8), subregulation 3.03(1B) is no longer supported by a power in the Migration Act and as a consequence is repealed.

#### Item 4 – Regulations 3.03A and 3.19A

This item repeals regulations 3.03A and 3.19A.

Regulation 3.03A prescribes personal identifiers for paragraph 166(5)(d) of the Migration Act. As the Biometrics Act will repeal paragraph 166(5)(d), regulation 3.03A is no longer supported by a power in the Migration Act and as a consequence is repealed.

Regulation 3.19A prescribes circumstances for subsection 188(4) in which an officer must require personal identifiers from a person whom the officer knows or reasonably suspects is a non-citizen. As the Biometrics Act will repeal subsection 188(4), regulation 3.19A is no longer supported by a power in the Migration Act and as a consequence is repealed.

New subsection 257A(4) to be introduced into the Migration Act by the Biometrics Act will provide a power to prescribe circumstances for when the Minister or an officer must require a person to provide one or more personal identifiers under subsection 257A(1).

#### Item 5 – Subregulation 3.20(1)

This item omits the words “paragraph 258B(1)(b)” and substitutes the words “subsection 258B(1)”.

Subregulation 3.20(1) prescribes matters for paragraph 258B(1)(b) of the Migration Act, in particular information that must be provided when authorised officers are carrying out identification tests.

The Biometrics Act will replace subsection 258B(1) such that the provision will no longer contain paragraphs (a) and (b) and the power to prescribe matters in the regulations will exist in subsection (1). As a consequence of these amendments, subregulation 3.20(1) is amended to reflect that the enabling power in the Migration Act is subsection 258B(1).

#### Item 6 – Subregulation 3.20(1) (note)

This item repeals the note at the end of subregulation 3.20(1).



The note to subregulation 3.20(1) directs the reader's attention to subsections 261AL(4) and 261AM(3) of the Migration Act. As the Biometrics Act will repeal subsections 261AL(4) and 261AM(3), the note is no longer required and is repealed.

#### Item 7 – Regulation 3.21

This item repeals the existing regulation 3.21 and replaces it with a new regulation 3.21.

Current regulation 3.21 prescribes matters for the purposes of subsection 258C(1) of the Migration Act. A non-citizen must be informed of these matters in writing. The Biometrics Act will repeal section 258C, and as a consequence the current regulation 3.21 is repealed.

The new regulation 3.21 is titled “Procedure and requirements – identification test not carried out”.

New subregulation 3.21(1) provides that for subsection 258D(2) of the Migration Act, subregulation 3.21(2) prescribes the procedures and requirements that apply if:

- a person has applied for a visa; and
- at the time of making the application the person is outside Australia; and
- the person is required to provide a personal identifier under section 257A of the Migration Act otherwise than by way of an identification test, in relation to the application.

New subregulation 3.21(2) provides that for subregulation 3.21(1), the person must be informed of the following matters:

- the reason why a personal identifier is required to be provided;
- how a personal identifier may be collected;
- how any personal identifier that is collected may be used;
- the circumstances in which a personal identifier may be disclosed to a third party;
- that a personal identifier may be produced in evidence in a court or tribunal in relation to the person;
- that the *Privacy Act 1988* applies to a personal identifier, and that the person has a right to make a complaint to the Australian Information Commissioner about the handling of personal information;
- that the *Freedom of Information Act 1982* gives a person access to certain information and documents in the possession of the Government of the Commonwealth and its agencies, and that the person has a right under that Act to seek access to that information or those documents under that Act, and to seek amendment of records containing personal information that is incomplete, incorrect, out of date or misleading.

Subregulations 3.21(1) and 3.21(2) ensure that persons who apply for a visa offshore and are required to provide personal identifiers are provided with certain information.

This legislative requirement does not extend to persons who are in Australia because it may limit the ability to use new paragraph 257A(5)(b) to collect personal identifiers in some circumstances, such as by way of a ‘verification check’. A ‘verification check’ is a quick and

efficient method to conduct necessary checks using hand held finger scanners of persons at Australia's border, and of non-citizens in other circumstances.

New subregulation 3.21(3) provides that the person may be informed of the matters in writing or orally. This makes it clear that persons can be advised of the above information either in writing or orally. An example of where a person may be informed of the matters orally is in circumstances where personal identifiers are being collected from visa applicants in a refugee camp by a mobile collection unit and a visa applicant is illiterate.

New subregulation 3.21(4) provides that the manner in which the person is informed of the matters need not involve an officer or authorised officer informing the person of the matters. An example of when a person, other than an officer or an authorised officer, will inform visa applicants of such matters is when a service delivery partner is collecting personal identifiers from offshore visa applicants on behalf of the department, and provides the information to the visa applicant.

### **Schedule 3 – Application and transitional provisions**

#### **Item 1 – Schedule 13**

This item amends Schedule 13 to the Migration Regulations to insert Part 52 entitled “Amendments made by the Migration Legislation Amendment (2015 Measures No. 4) Regulation 2015” and inserts new clause 5201. Schedule 13 is the repository for application and transitional provisions relating to amendments to the Migration Regulations.

The purpose of Part 52 of Schedule 13 is to set out the application and transitional provisions for the amendments made by the Regulation.

Inserted clause 5201, entitled “Operation of Schedule 1”, sets out the application and transitional provisions in relation to the amendments made by Schedule 1 to the Regulation.

Inserted subclause 5201(1) provides that the amendments made by Part 1 of Schedule 1 to the Regulation apply to in relation to an application for a visa made on or after 14 December 2015.

Inserted subclause 5201(2) provides that the amendments made by Part 2 of Schedule 1 to the Regulation apply in relation to:

- a decision (a remittal decision) made by the IAA to remit a fast track reviewable decision for reconsideration, if that decision is made on or after 14 December 2015; and
- a fast track reviewable decision that is the subject of a remittal decision, whether the fast track reviewable decision is made before, on or after 14 December 2015.

Inserted subclause 5201(3) provides that the amendments made by Part 3 of Schedule 1 to the Regulation apply to in relation to an application for a visa made on or after 14 December 2015.

A note clarifies that Schedule 1 to the Regulation commences on 14 December 2015.

Item 2 – At the end of Part 52 Schedule 13

This item amends Schedule 13 to the Migration Regulations to insert new clause 5202. Inserted clause 5202, entitled “Operation of Schedule 2”, sets out the application and transitional provisions in relation to the amendments made by Schedule 2 to the Regulation relating to personal identifiers.

The effect of subitems 5202(1) and 5202(2) is that if before 16 February 2016 a person was required to provide a personal identifier under certain provisions in the Migration Act and Migration Regulations, and immediately before that date the person had not complied with the requirement and the period for complying with the requirement had not ended, the Migration Regulations will apply as if the amendments made by Schedule 2 to the *Migration Legislation Amendment (2015 Measures No. 4) Regulation 2015* had not been made.

The amendments made by Schedule 2 to the *Migration Legislation Amendment (2015 Measures No. 4) Regulation 2015* will apply to any requirement to provide personal identifiers which does not satisfy the conditions in subitem 5202(1).

Subitem 5202(3) provides that amendments to the Migration Regulations made by item 1 of Schedule 2 to the *Migration Legislation Amendment (2015 Measures No. 4) Regulation 2015* apply, subject to subitem 5202(2), to applications for visas:

- made, but not finally determined, before 16 February 2016;
- made on or after 16 February 2016.

This subitem makes it clear which applications for visas new regulation 2.04 will apply to. New regulation 2.04 will apply, subject to subitem 5202(2), to applications for visas made, but not finally determined, before the commencement day; or those made on or after the commencement day.