EXPLANATORY STATEMENT

Migration Act 1958

CLASS OF PERSONS DEFINED AS A FAST TRACK APPLICANT 2016/049

(Paragraph 5(1AA)(b))

1. Instrument IMMI 16/049 is made under paragraph 5(1AA)(b) of the *Migration Act 1958* (the Act).

2. The Instrument revokes IMMI 16/007 (F2016L00455) under subsection 33(3) of the *Acts Interpretation Act 1901*, which states where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character, the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

3. The purpose of the Instrument is for the Minister to correctly reflect the policy intention in subparagraph 2(a)(iv) of the Instrument when specifying a class of persons for the purposes of paragraph (b) of the definition of 'fast track applicant' in subsection 5(1) of the Act. The parent specified in subparagraph 2(a)(iv) of the Instrument, who is an unauthorised maritime arrival must have entered the migration zone before 13 August 2012.

4. Consultation was undertaken with the Immigration Assessment Authority within the Administrative Appeals Tribunal and with the Minister's Advisory Council on Asylum Seekers and Detention.

5. The Office of Best Practice Regulation (OBPR) has advised that a Regulatory Impact Statement is not required (OBPR Reference 20066).

6. Under section 42 of the *Legislation Act 2003*, the Instrument is subject to disallowance and therefore a Statement of Compatibility with Human Rights is attached.

7. The Instrument, IMMI 16/049, commences on the day after it is registered on the Federal Register of Legislation.

Statement of Compatibility with Human Rights

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

Class of Persons Defined as Fast Track Applicants 2016/049

(*Paragraph 5(1AA)(b)*)

Legislative Instrument IMMI 16/049

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

The Legislative Instrument (the Instrument) is made under paragraph 5(1AA)(b) of the *Migration Act 1958* (the Act). The Instrument specifies classes of persons so that, in accordance with paragraph (b) of the definition of fast track applicant in subsection 5(1) the Act, a person included in that class is a fast track applicant.

A *fast track applicant* is defined as:

(a) A person:

(i) who is an unauthorised maritime arrival who entered Australia on or after 13 August 2012, but before 1 January 2014, and who has not been taken to a *regional processing country*; and

(ii) to whom the Minister has given written notice under subsection 46A(2) of the Act determining that subsection 46A(1) of the Act does not apply to an application by the person for a protection visa; and

(iii) who has made a valid application for a protection visa in accordance with the determination; or

(b) a person who is, or who is included in a class of persons who are, specified by legislative instrument under paragraph 5(1AA)(b) of the Act.

This instrument specifies the following class of persons to be fast track applicants:
Persons who:

- were born in the migration zone on or after 1 January 2014;
- are the child of a person who falls within the definition of fast track applicant in paragraph 5(1)(a) of the Act;
- have made a valid application for a protection visa; and
- have not, prior to the Instrument's commencement, been included in a valid protection visa application made by a parent who is an unauthorised maritime arrival who entered Australia before 13 August 2012.

The fast track assessment process was established by the *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (the RALC Act). The definition of *fast track applicant* in the RALC Act is restricted to unauthorised maritime arrivals (UMAs) who entered Australia on or after 13 August 2012 and before 1 January 2014. An unintended consequence of this restriction is that the fast track process does not apply to infants born on or after 1 January 2014 to unauthorised maritime arrival parents who are subject to the fast track processing framework. Under the Act, these infants are regarded as entering Australia on the date of their birth.

Specifying that these infants are fast track applicants will allow them to have their protection claims and immigration status managed as part of a family unit with their parents and any siblings.

A very small number of infants may have a parent who is covered by the definition of *fast track applicant* and a parent who is not a *fast track applicant* because they are an UMA who entered Australia before 13 August 2012. Where the infant has already made a valid protection visa application with a parent who arrived before 13 August 2012, this Instrument does not make the infant a *fast track applicant* or affect their existing application. However, where the infant has not made an application at the time this Instrument commences or is not born before that date, any future application will be assessed under the fast track process.

Human rights implications

This instrument has been assessed against the seven core treaties that comprise Australia's human rights obligations.

Best interests of the child

Article 3 of the Convention on the Rights of the Child (CRC) states:

> *In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.*

The instrument defines children born in Australia on or after 1 January 2014, to a parent who is an UMA and a *fast track applicant*, as fast track applicants. As a consequence, if the Minister lifts the application bar in section 46A of the Act, these children will have their claims for protection assessed under the fast track assessment process. Such children may be included in a parent or parents' application, allowing their protection claims to be considered and processed together.

The Government is committed to acting in accordance with Article 3 of the CRC. In making this instrument, the Minister considered the best interests of the child as primary consideration. Allowing children to remain with their parents is generally in their best interests and providing children with the same status and process as their parents facilitates this.

Family unity

Article 17(1) of the International Covenant on Civil and Political Rights (ICCPR) states:

> *No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation*.

Article 23(1) of the ICCPR states:

> *The family is the natural and fundamental group unit of society and is entitled to protection by society and the State*.

The Instrument positively engages Article 17(1) and Article 23(1) of the ICCPR. The Instrument provides a mechanism for children specified as fast track applicants to have their protection claims processed in Australia under the fast track assessment process along with other members of their family unit. By ensuring these children's claims can be assessed with

their immediate family members', the measure will operate to prevent the possible separation of family members and is consistent with the principle of family unity.

The human rights compatibility of the fast track assessment process is extensively addressed in the Statement of Compatibility for the *Migration and Maritime Powers Legislation Amendment (Resolving the Legacy Caseload) Act 2014*.

Conclusion

The Legislative Instrument is compatible with human rights because it is consistent with Australia's human rights obligations.

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