

EXPLANATORY STATEMENT

Issued by the Minister for Immigration and Border Protection

Customs Act 1901

Migration Act 1958

Customs and Migration Legislation Amendment (2016 Measures No. 1) Regulation 2016

The *Customs Act 1901* (the Customs Act) relates to customs functions and provides for, among other things, the importation and exportation of goods to and from Australia.

More specifically, section 28 of the Customs Act provides for the charging of fees by the Commonwealth for the provision of customs officers at the request of a person, so that they are available to perform a function outside their prescribed duties or standard hours.

Subsection 270(1) of the Customs Act provides, in part, that the Governor-General may make regulations, not inconsistent with the Customs Act, prescribing all matters which by the Customs Act are required or permitted to be prescribed, or which are necessary or convenient to be prescribed, for giving effect to the Customs Act.

Subsection 270(1A) of the Customs Act provides that the regulations may make provision for and in relation to the charging and recovery of fees in respect of any matter under the Customs Act or the regulations.

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 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.

More specifically, subparagraph 504(1)(a)(i) of the Migration Act provides for the making of regulations by the Governor-General which make provision for and in relation to the charging and recovery of fees in respect of any matter under the Migration Act or the regulations.

The *Customs and Migration Legislation Amendment (2016 Measures No. 1) Regulation 2016* (the Regulation) amends the *Customs Regulation 2015* (the Customs Regulation) and the *Migration Regulations 1994* (the Migration Regulations) to create a mechanism which allows the Commonwealth to charge fees for performing functions relating to certain international travellers using gateway airports in a special processing area, at the request of a person or persons.

In particular, the Regulation amends the Customs Regulation and the Migration Regulations to:

- Allow the Secretary of the Department of Immigration and Border Protection or the Comptroller-General of Customs to arrange for the provision of statutory functions relating to certain international travellers in a special processing area of a gateway airport within Australia at the request of a person or persons. In exchange for the provision of this service, the person or persons must pay the Commonwealth an agreed fee in respect of the performance of the statutory function and any other statutory functions in relation to those international travellers;
- Allow the agreed fee in respect of the performance of the statutory function and other statutory functions at the request of the person or persons to be paid in anticipation of the performance of the function, where necessary; and
- Allow the Secretary of the Department of Immigration and Border Protection or the Comptroller-General of Customs to make agreements relating to the amount and payment of fees for the provision of the function.

A Statement of Compatibility with Human Rights 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 A](#).

The Customs Act and the Migration Act specify 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 B](#).

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

The Regulation commences the day after the instrument is registered.

The Office of Best Practice Regulation (the OBPR) has been consulted regarding the Regulation. The OBPR consultation reference is **20367**. The OBPR advised that, although the Regulation would only have a minor regulatory impact on business, a Regulation Impact Statement (RIS) was required. A short-form RIS was prepared as set out in [Attachment C](#).

Consultation was also undertaken with the Department of Agriculture and Water Resources as amendments to their subordinate legislation are also required to allow that department to establish similar mechanisms to perform their respective border clearance functions.

Statement of Compatibility with Human Rights

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

Customs and Migration Legislation Amendment (2016 Measures No. 1) Regulation 2016

This Disallowable 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 Disallowable Legislative Instrument

This Disallowable Legislative Instrument gives the Department of Immigration and Border Protection (the Department of Immigration) the power to charge fees for performing particular functions relating to certain international travellers using gateway airports in a special processing area, at the request of a person or persons.

Travellers using these services will be assessed and processed by the Department of Immigration and the Department of Agriculture and Water Resources (the Department of Agriculture) in accordance with established traveller clearance procedures. Travellers will not be exempt from existing customs, immigration and biosecurity clearances or aviation security screening.

The fees associated with providing the functions will assist the Department of Immigration to recover the costs of recruiting and deploying dedicated teams of officers to deliver these services without adversely impacting existing border clearance activities.

Australia's international airport operators, international airlines, and/or ground handling operators are not required to provide these specialised services, but operators that seek to provide this option will enter into an agreement with the Department of Immigration and the Department of Agriculture for the provision of these functions. Industry stakeholders may enter into commercial agreements with other entities to deliver these services to their passengers; however the Department of Immigration and the Department of Agriculture will only have the authority to enter into an agreement with the principal owner of the service. The Department of Immigration's power to charge for border clearance services will be limited and will not impact travellers who do not request these services.

Human rights implications

This Disallowable Legislative Instrument does not engage any of the applicable rights or freedoms.

Conclusion

This Disallowable Legislative Instrument is compatible with human rights as it does not raise any human rights issues.

Details of the Customs and Migration Legislation Amendment (2016 Measures No. 1) Regulation 2016

Section 1 – Name

This section provides that the title of the Regulation is the *Customs and Migration Legislation Amendment (2016 Measures No. 1) Regulation 2016*.

Section 2 – Commencement

Subsection 2(1) provides that each provision of this instrument 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 provides that the whole instrument commences the day after the instrument is registered.

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 this instrument. Information may be inserted in this column, or information in it may be edited, in any published version of this instrument.

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 instrument is made under the *Customs Act 1901* (the Customs Act) and the *Migration Act 1958* (the Migration Act).

The purpose of this section is to set out the authority under which the instrument 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 purpose of this section is to provide for how the amendments in this instrument operate.

Schedule 1 – Fees

Part 1 - Migration

Migration Regulations 1994

Item 1 – Regulation 1.03

This item inserts new definitions for the terms *gateway airport*, *international traveller*, *overseas flight*, *special processing area* and *statutory function* in the Definitions section of

the Migration Regulations at Regulation 1.03. Each of these terms is defined as having the meaning given to them by new subregulation 5.41C(3).

The purpose of this amendment is to highlight that these terms are now defined for the purpose of the Migration Regulations and that they have the meaning as set out in subregulation 5.41C(3).

Item 2 – Subregulation 5.36(4) (at the end of paragraph (c) of the definition of fee)

This item inserts the words “except regulation 5.41C” at the end of paragraph 5.36(4)(c).

Paragraph 5.36(4)(c) currently specifies that for the purposes of Regulation 5.36 “fee” means an instalment of visa application charge, or an amount of visa evidence charge, or a fee payable under the Migration Regulations.

The purpose of this amendment is clarify that for the purposes of the Migration Regulations the definition of “fee” in paragraph 5.36(4)(c) does not include fees under new regulation 5.41C.

Item 3 – At the end of Division 5.7 of Part 5

This item inserts new regulation 5.41C after regulation 5.41B, at the end of Division 5.7 of Part 5 of the Migration Regulations.

Division 5.7 provides for charges and fees under the Migration Regulations.

Regulation 5.41C - Fees for performing functions relating to certain international travellers using gateway airports

New regulation 5.41C provides for the circumstances under which fees can be charged by the Department of Immigration and Border Protection (the Department of Immigration) for performing functions relating to certain international travellers using gateway airports. In general, new regulation 5.41C has the effect of enabling the Secretary of the Department of Immigration to:

- Arrange for a statutory function or functions to be performed in a special processing area of a gateway airport, at the request of a person;
- Charge an agreed fee in respect of the provision of the statutory function or functions; and
- On behalf of the Commonwealth, make agreements in relation to the amount and payment of the fee in exchange for the provision of the statutory function or functions.

Fee for performance of statutory function

New subregulation 5.41C(1) provides that if, at the request of a person, the Secretary of the Department of Immigration arranges for a statutory function to be performed in a special processing area for the performance of the function at a gateway airport, and in relation to one or more international travellers using the gateway airport, the person must pay the Commonwealth an agreed fee in respect of the performance of the statutory function and any other statutory functions in relation to those international travellers.

A note clarifies that an agreed fee in respect of the performance of the statutory function and other statutory functions may be paid in anticipation of the performance of the function.

Agreements relating to the amount and payment of fees

New subregulation 5.41C(2) provides that, on behalf of the Commonwealth, the Secretary of the Department of Immigration may make, with a person making a request described in subregulation 5.41C(1), an agreement relating to the amount and payment of a fee that is or will be payable under subregulation 5.41C(1).

Definitions

New subregulation 5.41C(3) inserts new definitions for the terms ***gateway airport***, ***international traveller***, ***overseas flight***, ***special processing area*** and ***statutory function***. The purpose of this subregulation is to define the meaning of these new terms for the purposes of the Migration Act and the Migration Regulations.

The definition of ***gateway airport*** provides that this type of airport means an aerodrome (whether a proclaimed airport or not) used by aircraft on overseas flights. The purpose of this definition is to ensure that both proclaimed airports and unproclaimed airports are included in the definition of ***gateway airport***.

International traveller is defined as a person using a gateway airport who arrives at the gateway airport aboard an aircraft on an overseas flight, or is due to depart from the gateway airport aboard an aircraft on an overseas flight. The purpose of this definition is to make clear that the definition of ***international traveller*** includes both arriving and departing passengers using a gateway airport.

Overseas flight is defined as a flight from a place outside Australia to a place in Australia, or a flight from a place in Australia to a place outside Australia (whether or not after calling at other places in Australia). The purpose of this definition is to specify that ***overseas flight*** does not include domestic flights within Australia.

Special processing area is defined as, in the case of a gateway airport that is commonly used for overseas flights, an area of the airport other than an area in which that function is performed in relation to a majority of international travellers arriving at the airport aboard aircraft on overseas flights, or a majority of international travellers due to depart from the airport aboard aircraft on overseas flights; or, in the case of a gateway airport that is not commonly used for overseas flights, an area of the airport in which that function is, or is to be, performed in relation to international travellers using the airport. The purpose of this definition is to specify that ***special processing area*** does not include a commonly used area of the airport and is separate from areas frequented by a majority of international travellers.

Statutory function is defined to mean a function under the Migration Act or the Migration Regulations. The purpose of this definition is to exclude functions that do not fall under the Migration Act or the Migration Regulations.

Part 2 - Customs

Customs Regulation 2015

Item 4 – Section 4

This item inserts new definitions for the terms *gateway airport*, *international traveller*, *overseas flight*, *special processing area* and *statutory function* in the Definitions section of the Customs Regulation at Section 4. Each of these terms is defined as having the meaning given to them by new subsection 150A(3).

The purpose of this amendment is to highlight that these terms are now defined for the purpose of the Customs Regulation and that they take the meaning as set out in subsection 150A(3).

Item 5 – At the end of Part 17

This item inserts new Division 5 ('Fees') and new section 150A at the end of Part 17 of the Customs Regulation.

Section 150A - Fees for performing functions relating to goods of certain international travellers using gateway airports

New section 150A provides for the circumstances under which fees can be charged by the Department of Immigration for performing functions relating to certain international travellers using gateway airports. In general, new section 150A has the effect of enabling the Comptroller-General of Customs to:

- Arrange for a statutory function or functions to be performed in a special processing area of a gateway airport, at the request of a person;
- Charge an agreed fee in respect of the provision of the statutory function or functions; and
- On behalf of the Commonwealth, make agreements in relation to the amount and payment of the fee in exchange for the provision of the statutory function or functions.

Fee for performance of statutory function

New subsection 150A(1) provides that if, at the request of a person, the Comptroller-General of Customs arranges for a statutory function to be performed in a special processing area for the performance of the function at a gateway airport, and in relation to one or more international travellers using the gateway airport, the person must pay the Commonwealth an agreed fee in respect of the performance of the statutory function and any other statutory functions in relation to those international travellers.

A note clarifies that an agreed fee in respect of the performance of the statutory function and other statutory functions may be paid in anticipation of the performance of the function.

Agreements relating to the amount and payment of fees

New subsection 150A(2) provides that, on behalf of the Commonwealth, the Comptroller-General of Customs may make, with a person making a request described in subsection

150A(1), an agreement relating to the amount and payment of a fee that is or will be payable under subsection 150A(1).

Definitions

New subsection 150A(3) inserts new definitions for the terms **gateway airport**, **international traveller**, **overseas flight**, **special processing area** and **statutory function**. The purpose of this subsection is to define the meaning of these new terms for the purposes of the Customs Act and the Customs Regulation.

The definition of **gateway airport** provides that this type of airport means an aerodrome (whether a proclaimed airport or not) used by aircraft on overseas flights. The purpose of this definition is to ensure that both proclaimed airports and unproclaimed airports are included in the definition of **gateway airport**.

International traveller is defined as a person using a gateway airport who arrives at the gateway airport aboard an aircraft on an overseas flight, or is due to depart from the gateway airport aboard an aircraft on an overseas flight. The purpose of this definition is to make clear that the definition of **international traveller** includes both arriving and departing passengers using a gateway airport.

Overseas flight is defined as a flight from a place outside Australia to a place in Australia, or a flight from a place in Australia to a place outside Australia (whether or not after calling at other places in Australia). The purpose of this definition is to specify that **overseas flight** does not include domestic flights within Australia.

Special processing area has been defined as, in the case of a gateway airport that is commonly used for overseas flights, an area of the airport other than an area in which that function is performed in relation to a majority of international travellers arriving at the airport aboard aircraft on overseas flights, or a majority of international travellers due to depart from the airport aboard aircraft on overseas flights; or, in the case of a gateway airport that is not commonly used for overseas flights, an area of the airport in which that function is, or is to be, performed in relation to international travellers using the airport. The purpose of this definition is to specify that **special processing area** does not include a commonly used area of the airport and is separate from areas frequented by a majority of international travellers.

Statutory function is defined to mean a function under the Customs Act or the Customs Regulation. The purpose of this definition is to exclude functions that do not fall under the Customs Act or the Customs Regulation.

Regulation Impact Statement

Name of department/agency: Department of Immigration and Border Protection,
Department of Agriculture and Water Resources

OBPR Reference number: 20367

Name of proposal: Premium Traveller Facilitation Services

Summary of the proposed policy and any options considered:

The Department of Immigration and Border Protection (the Department of Immigration) and the Department of Agriculture and Water Resources (the Department of Agriculture) propose to undertake international traveller border clearance activities at dedicated locations, separate to existing international traveller clearance areas. These services, referred to as Premium Traveller Facilitation services, would be provided on a user-pays basis, rather than directly funded by Government. Industry would enter into this arrangement, and associated regulatory costs, on a voluntary basis.

Option 1 – offer a premium traveller facilitation service with an agreed level of service to airport operators and other service providers on a commercial charging basis (recommended option)

The Office of Best Practice Regulation assessed this option as having a minor regulatory burden on industry. Under this proposal, the government would enter into contractual arrangements to provide an agreed level of service to clients. Fixed term contracts ensure that the Government can recover the cost of services it provides and that airport operators can reliably offer premium services to international travellers without impacting on existing traveller facilitation rates. This will allow airport operators to develop products which could be marketed to airlines to streamline and enhance their traveller experience during arrival in and departure from Australia.

Option 2 – offer a premium traveller facilitation service with regulatory burden carried by border agencies

This option has a lower regulatory burden on industry. However, there will be a high administrative burden on border agencies that would need to be absorbed. Funding the costs of providing premium traveller clearance services through appropriation would reduce the regulatory impost on airline operators and other service providers seeking to offer premium services, however this is not a viable option as funding biosecurity and border protection services directly through taxation for the benefit of a commercial entity is inconsistent with government policy.

Option 3 – Status quo

Under this option, the Department of Immigration and the Department of Agriculture would continue to assess applications from airport operators and airlines for dedicated traveller facilitation services on a case by case basis. Where there is agreement to provide these services, border agencies will continue to draw resources from other border clearance activities. This is not a recommended option as ‘black-out’ periods (periods where no border

clearance services are available) will continue to apply. Such ad-hoc arrangements would make it difficult for airline operators and other service providers to meet their objectives to provide certainty of services to their clients.

What are the regulatory impacts associated with this proposal? Explain.

Airport operators and businesses offering off-terminal clearances will experience a minimal regulatory impact. Businesses that implement the premium facilitation service offered by border agencies will enter into a contract with government and will be invoiced accordingly. Contracts and invoicing are not required for provision of the current border agency traveller clearance processes. It is expected that the regulatory impact and cost of these additional requirements will be minor in nature as businesses have existing invoice and payment systems for the remittance of other border fees and charges.

What are the regulatory costs/savings associated with this proposal? Explain and quantify.

There will be a small increase in administrative costs for participating businesses. It is assumed that for the initial six months it will take a business approximately 8 hours per month to initiate and maintain the contract, and process, reconcile and finalise the invoice. Once the processes are imbedded in business-as-usual activities, it will take business 4 hours per month to undertake these activities. As such it is estimated that the additional time spent on contract establishment, management and invoice processing will be 72 hours per year per business in the first year and 48 hours per business in every year after that.

The Premium Traveller Facilitation Services New Policy Proposal proposes an initial roll-out of this service to three major airports (Melbourne, Sydney and Perth) with the view to implementation at other major international airports and for off-terminal clearances following successful uptake at these airports. Therefore, initially only three businesses will be affected by the small increase in administrative costs with a gradual increase in the number of businesses participating in the scheme to 35 businesses by the end of 10 years. The cost to business is \$65.45 per hour (from the Regulatory Burden Measurement Framework February 2016 Appendix 2), resulting in a total average increase in regulatory cost to business over a ten year period of \$64 245.72 per year.

Regulatory burden and cost offset estimate table

Average annual regulatory costs (from business as usual)				
Change in costs (\$ million)	Business	Community organisations	Individuals	Total change in cost
Total, by sector	\$0.064	\$0	\$0	\$0.064
Cost offset (\$ million)	Business	Community organisations	Individuals	Total change in cost
Agency	(\$42.2)	\$0	\$0	(\$42.2)
Are all new costs offset?				
<input checked="" type="checkbox"/> Yes, costs are offset <input type="checkbox"/> No, costs are not offset <input type="checkbox"/> Deregulatory—no offsets required				
Total (\$0.064- \$42.2) (\$ million) = (\$42.136)				

What are the offsets for the regulatory costs associated with this proposal?

The Department of Immigration proposes to fully offset the regulatory cost of \$0.064 million per annum from the Trusted Trader Programme (OBPR ID 17409).