

2017

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

**AUSTRALIAN PASSPORTS AMENDMENT (2017 MEASURES NO.1)
DETERMINATION 2017**

EXPLANATORY STATEMENT

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

AUSTRALIAN PASSPORTS AMENDMENT (2017 MEASURES NO. 1) DETERMINATION 2017

Outline

The *Australian Passports Amendment (2017 Measures No. 1) Determination 2017* (the Amendment Determination) amends the *Australian Passports Determination 2015* (the Determination) consistent with the intention and application of the existing provisions, including:

- confirming that reduced passport validities apply to persons who have lost or have had stolen more than one Australian travel document in the preceding five years, even if they can produce their most recent travel document at lodgement (usually an emergency passport)
- clarifying the disclosure provisions with the Department of Immigration and Border Protection (DIBP) and the registries of births, deaths and marriages (BDMs), consistent with longstanding practice
- providing for the waiver of the priority processing fee on compassionate grounds, similar to the existing refund provision
- providing that a fee waiver or refund does not apply to persons subject to a passport refusal/cancellation request.

In addition, the Amendment Determination provides for a number of minor amendments to simplify the Determination following the implementation of a number of new measures on 1 January 2016, now that this date has passed.

Financial impact

Nil

Regulatory impact

The Amended Determination will impose no additional regulatory impact on Australian citizens or businesses. The Office of Best Practice Regulation advised that no Regulation Impact Statement is required (reference number 21233).

Consultation

The following agencies were consulted: the Department of Immigration and Border Protection; and the New South Wales Registry of Births, Deaths and Marriages, in its capacity as historical hub for verification of all state/territory births, deaths and marriages documents.

Australian Passports Amendment (2017 Measures No.1) Determination 2017

Preliminary

Notes on Clauses

Clause 1 - Name of determination

1. Clause 1 provides that the name of this determination will be the *Australian Passports Amendment (2017 Measures No. 1) Determination 2017* (Amendment Determination).

Clause 2 - Commencement

2. Subclause 2(1) provides that the Amendment Determination will commence the day after this instrument is registered.
3. Subclause 2(2) provides that any information in column 3 of the table in subclause 2(1) is not part of the Amendment Determination. However, information may be inserted in this column, or information in it may be edited, in any published version of this Determination.

Clause 3 - Authority

4. The *Australian Passports Act 2005* (Passports Act) empowers the Minister to issue Australian travel documents and perform related functions. Section 57 gives the Minister the authority to specify matters provided in the Passports Act in a determination. The Australian Passports Determination 2015 (Determination) supports the operation of, and provides functional detail to, the Passports Act.

Clause 4 - Schedules

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

Schedule 1—Amendments

Australian Passports Determination 2015

Item 1 – Section 5 (paragraph (d) of the note)

1. Section 5 provides definitions for a number of terms used in the Determination. The Note explains that some terms have already been defined in the Passports Act and do not need to be defined again in the Determination. This amendment adds *contactless integrated circuit*, *refusal/cancellation request* and *travel-related document* to the list of expressions defined in the Passports Act (Item 4 refers).

Item 2 – Section 5 (definition of *business day*)

2. Section 5 provides for a definition of *business day* that refers to the *Acts Interpretation Act 1901* (AIA) definition of that term. Under paragraph 13(1)(a) of the *Legislation Act 2003*, that definition in the AIA will apply in the Determination. This amendment repeals the definition of *business day* as it is not necessary.

Item 3 - Section 5

3. Item 3 inserts a definition for compassionate grounds in section 5. Compassionate grounds are currently considered in relation to the refund of the priority processing fee in section 28 of the Determination. This definition is being moved from section 28 to section 5 as it will now relate to both the waiver (section 27) and refund (section 28) of the priority processing fee (Item 27 refers). The wording has also been made more inclusive, for example: ‘mother, father’ has been replaced with ‘parent’.

Item 4 – Section 5 (definition of *contactless integrated circuit*)

4. This item repeals the definition of *contactless integrated circuit* as this is already defined in the Passports Act (Item 1 refers).

Item 5 - Section 5

5. Item 5 inserts a definition for *Immigration Department* so that the wording of the Determination remains current should the Department of Immigration and Border Protection (DIBP) change its name.

Item 6 – Paragraph 10(3)(a)

6. Section 10 provides special circumstances in which the Minister may issue an Australian travel document to a child even though a person who has parental responsibility for the child has not consented to the child having an Australian travel document.
7. Paragraph 10(3)(a) provides for the issue of an Australian travel document to a child where neither the applicant nor the Minister has been able to contact the non-consenting person for a reasonable period. This amendment removes reference to the applicant not being able to

contact the non-consenting person to ensure that the wording of paragraph 10(3)(a) is consistent with its practical application.

8. In practice, the Minister is unable to verify or test whether the lodging person has been able to contact the non-lodging person if the Minister is unable to establish contact with the non-lodging person. Therefore, it only matters whether the Minister is able to contact the non-lodging person directly to verify whether they consent or not, or whether any of the other special circumstances may be relevant.
9. The amendment also simplifies the paragraph by removing the words ‘if the application is made by or on behalf of the child’ which are unnecessary because all paragraphs in the section relate to a situation where an application has been made by or on behalf of the child.

Item 7 - Paragraph 12(2)(b)

10. Item 7 amends paragraph 12(2)(b) to update the name of the Australian Trade and Investment Commission.

Item 8 - Section 13 (heading)

11. Item 8 amends the heading of section 13 consistent with its application to all Australian travel documents, not just passports, under section 14 of the Passports Act.

Item 9 – Paragraph 14(1)(a)

12. Consistent with item 5, this amendment will ensure the Determination remains current if the Immigration Department changes its name.

Item 10 – Paragraph 14(1)(c)

13. Consistent with item 7, this amendment updates the name of the Australian Trade and Investment Commission.

Item 11 – Subsection 17(2) (cell at table item 3, column 1)

14. The table in subsection 17(2) sets out the maximum validity for different passport types and circumstances. Table item 3 provides for the maximum validity for a passport issued to a child aged 16 or 17.
15. This amendment simplifies table item 3 by removing unnecessary references to the applicable fee and to applications lodged on or after 1 January 2016, now that this date has passed.

Item 12 – Subsection 17(2) (cell at table item 4, column 1)

16. Table item 4 in subsection 17(2) provides for an optional five-year validity passport for a person who is aged 75 or over.

17. Consistent with item 11, this amendment simplifies table item 4 by removing the unnecessary reference to the applicable fee.

Item 13 - Subsection 17(2) (table item 10)

18. Table item 10 in subsection 17(2) provides for reduced passport validities for persons who have lost or have had stolen two or more travel documents in the five year period preceding a new passport application.
19. Currently, this provision applies if an applicant cannot present their most recent Australian travel document. However, persons are routinely issued an emergency or limited validity passport when their passport is lost or stolen. Under the current provision, if the person is able to present this short validity document on application for a new full validity passport, this provision will not apply even if the person has lost or has had stolen multiple passports in the preceding five years. This impedes the intended purpose of the provision—to take into account passports at greater risk of being lost or stolen, thereby reducing opportunities for fraudulent use.
20. This amendment clarifies that the provision is to apply whether or not the person can present their most recent Australian travel document when applying for a new full validity passport.
21. Consistent with item 11, this amendment also simplifies table item 10 by removing the reference to applications lodged on or after 1 January 2016, now that this date has passed.

Item 14 – Subsection 17(2) (cell at table item 11, column 1)

22. Table item 11 in subsection 17(2) provides for the maximum validity for a replacement passport issued to replace a lost or stolen passport.
23. Consistent with item 11, this amendment simplifies table item 11 by removing the reference to applications lodged on or after 1 January 2016, now that this date has passed.

Item 15 – Subsection 17(2) (cell at table item 13, column 1)

24. Table item 13 in subsection 17(2) provides for the maximum validity for a replacement passport issued to replace a passport with no more blank visa pages.
25. Consistent with item 11, this amendment simplifies table item 13 by removing the reference to applications lodged on or after 1 January 2016, now that this date has passed.

Item 16 – Paragraph 21(2)(a)

26. Consistent with item 5, this amendment will ensure the Determination remains current if the Immigration Department changes its name.

Section 23 – Disclosure of Information

27. Section 23 provides for the disclosure of specified personal information to specified persons for the purposes set out in sections 45 and 46 of the Passports Act, including:
- a. to inform about the status of an Australian travel document, for example whether it is lost, stolen or invalid
 - b. to confirm or verify information relating to an applicant for, or holder of, an Australian travel document
 - c. to facilitate the international travel of an Australian travel document holder.
28. The disclosure of this information is regulated by sections 45 and 46 of the Passports Act and the *Privacy Act 1988*. It is intended that disclosure of personal information be subject to memoranda of understanding (MOU), or similar arrangements. For example, the Department of Foreign Affairs and Trade (DFAT) has an MOU with DIBP which includes a schedule of officers authorised by the Secretary of DIBP to receive this information from DFAT. The principle governing these arrangements is that the minimum necessary information is disclosed to meet the requirements of the legislated purpose.
29. Disclosure of personal information for these purposes is important to maintaining the security and integrity of the Australian passports system and to facilitating Australian travellers at borders.

Items 17 and 18 - Subsection 23(2) (table item 1, column 3, paragraphs (d), (j), (k) and (l))

30. Table item 1, column 3 provides for the disclosure of data page and status (e.g. lost, stolen or invalid) information about an Australian travel document (as defined in subsection 23(3)).
31. Paragraphs (d) and (j)-(l) provide for disclosure to: registrars of births, deaths and marriages (BDM); the Secretary of DIBP; the Commissioner of the Australian Border Force (ABF); and to a person who is working in the National Border Targeting Centre (NBTC). The latter three all fall within DIBP (the NBTC is now called the Border Intelligence Fusion Centre).
32. Disclosure of data page and status information is important in protecting the integrity and security of the Australian passport system. It helps prevent lost, stolen or invalid documents from being used fraudulently. Fraudulently obtained lost or stolen travel documents can provide criminals with the potential to assume another identity to carry out criminal activity in another name and to travel illegally.
33. With around 40,000 Australian travel documents lost or stolen each year it is not possible for BDM registrars, the Secretary of DIBP or the Commissioner of the ABF to personally manage this volume and frequency of information. The intention and longstanding practice is for the information to be disclosed directly to the relevant officers within these agencies.
34. To avoid doubt, and consistent with longstanding practice, the amendments in items 17 and 18 clarify the intention of these provisions—that data page and status information may be

disclosed to the relevant officer receiving the information for BDM/DIBP, to inform of the status of an Australian travel document.

35. Consistent with item 5, the amendments in item 18 ensure the Determination remains current if the Immigration Department changes its name.

Items 19 and 20 - Subsection 23(2) (table item 2, column 3, paragraphs (a), (g), (h) and (i))

36. Table item 2, column 3 provides for the disclosure of data page, status and authenticity information to confirm or verify information relating to an applicant for, or holder of, an Australian travel document.
37. Paragraphs (a) and (g)-(i) provide for disclosure to: registrars of BDMs; the Secretary of DIBP; the Commissioner of the ABF; and a person who is working in the NBTC.
38. This provision is primarily used to verify the identity or citizenship of a passport applicant, for example by checking the validity of a birth, marriage, change of name or citizenship certificate presented to DFAT in support of a passport application. While these checks are mostly automatic, some will not validate automatically and require manual validation. With over 8,000 passport applications received daily, the number of manual validation requests to BDM/DIBP is too great for BDM registrars, the Secretary of DIBP or the Commissioner of the ABF to personally manage this volume and frequency of information and this was never the intention.
39. This provision is also used by organisations when a person has presented their passport as identification for another service.
40. The disclosure of information between DFAT and BDM/DIBP is vital to robust and coordinated identity verification processes across Government, to prevent identity theft and the creation of fraudulent identities.
41. Similar to items 17 and 18, to avoid doubt and consistent with longstanding practice, these amendments clarify the intention of these provisions—that data page, status and authenticity information may be disclosed to the relevant officer receiving the information for BDM/DIBP to verify or confirm information relating to an Australian travel document applicant or holder.
42. Consistent with item 5, the amendments in item 20 ensure the Determination remains current if the Immigration Department changes its name.

Item 21 - Subsection 23(2) (table item 3, column 3, paragraphs (a), (b) and (c))

43. Table item 3, column 3 provides for the disclosure of data page, status and authenticity information to facilitate the international travel of an Australian travel document holder.

44. Paragraphs (a)-(c) provide for disclosure to: the Secretary of DIBP; the Commissioner of the ABF; and a person who is working in the NBTC.
45. Traveller facilitation describes arrangements that make immigration processing faster and simpler for travellers and which more effectively ensure passenger safety and border security. This disclosure means that the vast majority of international travellers can be processed with minimal intervention and delay, and it enables Australia to meet its obligations under Annex 9 of the Convention on International Civil Aviation relating to traveller facilitation.
46. DFAT discloses personal information to DIBP daily to facilitate the international travel of Australian travel document holders. This disclosure is essential for the efficient operation of border movements. With around 20 million border movements each year it was never the intention that this information could only be disclosed only to the Secretary of DIBP. It is not possible for the Secretary of DIBP to personally manage this volume and frequency of information.
47. Similar to items 18 and 20, to avoid doubt and consistent with longstanding practice, these amendments clarify the intention of the provisions—that data page, status and authenticity information may be disclosed to the relevant officer receiving the information for DIBP to facilitate travel.
48. Consistent with item 5, the amendments in item 21 ensure the Determination remains current if the Immigration Department changes its name.

Items 22 and 23 – Section 27 (after the heading)

49. Section 27 provides for the waiver of fees relating to Australian travel documents in certain circumstances. Item 23 provides that section 27 is subject to new section 28A (item 31 refers).
50. These amendments also allow for section 27 to comprise two subsections. New subsection 27(1) relates to general fee waivers. New subsection 27(2) relates to the waiver of the priority processing fee.

Item 24 – Paragraph 27(b)(iv)

51. Paragraph 27(b)(iv) provides for the waiver of a fee for a replacement passport to be issued in a different name following the death of a person's spouse or partner. This amendment clarifies that the waiver applies to both a partner in a registered relationship and a partner in a de facto relationship.

Item 25 – Paragraph 27(g)

52. Paragraph 27(g) is repealed as an Australian travel document is no longer required for Australian citizens travelling between Norfolk Island and mainland Australia.

Item 26 – Paragraph 27(h)

53. Paragraph 27(h) provides for the waiver of a fee for a replacement passport to replace a passport that is faulty as a result of error by the Department. This amendment provides that the fee waiver applies to any Australian travel document that is faulty as a result of error by the Department, not just a passport.

Item 27 – At the end of section 27

54. Item 27 adds a new provision for the priority processing fee to be waived on compassionate grounds, for example if a person needs to travel urgently because of the death or serious illness of a close relative. The priority processing fee is an optional fee for a passport to be issued within two business days plus delivery times.
55. The fee waiver corresponds to the existing provision for the priority processing fee to be refunded on compassionate grounds in paragraph 28(3)(b). It is more efficient to waive the priority processing fee than to require a person to apply for, and be administered, a refund.
56. This fee waiver is also subject to new section 28A (item 31 refers).

Item 28 – Subsection 28(1)

57. Section 28 provides for the refund of fees relating to Australian travel documents in certain circumstances. Item 28 provides that section 28 is subject to new section 28A (item 31 refers).

Item 29 – Subsections 28(2) and (3)

58. Item 29 removes the references to applications lodged before 1 January 2016, now that this date has passed.

Item 30 – Subsection 28(4)

59. Subsection 28(4) provides a definition for compassionate grounds on which the priority processing fee may be refunded.
60. Consistent with item 3, this amendment repeals subsection 28(4) as the definition of compassionate grounds has been moved to section 5 ‘Definitions’ as it now applies to both sections 27 and 28.

Item 31 – After section 28

61. Item 31 inserts new section 28A to provide that waivers or refunds of application fees do not apply in circumstances where a competent authority has made an Australian travel document refusal/cancellation request under Part 2, Division 2 of the Passports Act. This is consistent with current policy and practice.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Australian Passports Amendment (2017 Measures No. 1) Determination 2017

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in Section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the instrument

The *Australian Passports Amendment (2017 Measures No. 1) Determination 2017* (the Amendment Determination) amends the *Australian Passports Determination 2015* (the Determination) consistent with the intention and application of the existing provisions, including:

- confirming that reduced passport validities apply to persons who have lost or have had stolen more than one Australian travel document in the preceding five years, even if they can produce their most recent travel document at lodgement (usually an emergency passport)
- clarifying the disclosure provisions with the Department of Immigration and Border Protection (DIBP) and the registries of births, deaths and marriages (BDMs), consistent with longstanding practice
- providing for the waiver of the priority processing fee on compassionate grounds, similar to the existing refund provision
- providing that a fee waiver or refund does not apply to persons subject to a passport refusal/cancellation request.

In addition, the Amendment Determination provides for a number of minor amendments to simplify the Determination following the implementation of a number of new measures on 1 January 2016, now that this date has passed.

Human rights implications

The Amendment Determination engages the right not to be subjected to arbitrary or unlawful interferences with privacy (Article 17 of the ICCPR).

The right to privacy

Article 17 of the ICCPR prohibits unlawful or arbitrary interferences with a person's privacy. It provides that persons have the right to the protection of the law against such interferences or attacks. The disclosure of personal information engages the right to privacy. Personal information includes any information relating to a person's identity.

Section 23 of the Determination specifies what personal information may be disclosed to which specified persons for the legitimate purposes provided for in sections 45 and 46 of the Passports Act, including to:

- inform about the status of an Australian travel document
- confirm or verify information relating to an applicant or holder of an Australian travel document
- facilitate the international travel of an Australian travel document holder.

These provisions engage the right not to be subjected to arbitrary or unlawful interferences with privacy in Article 17 of the ICCPR. The UN Human Rights Committee has stated that for interferences with privacy not to be 'arbitrary', any interference must be reasonable in the particular circumstances. Reasonableness, in this context, incorporates the notion of proportionality to the end sought and necessity in the circumstances.

The disclosure of this information is regulated by sections 45 and 46 of the Passports Act and the *Privacy Act 1988*. It is intended that disclosure of personal information be subject to memoranda of understanding (MOU), or similar arrangements. For example, the Department of Foreign Affairs and Trade (DFAT) has an MOU with the Department of Immigration and Border Protection (DIBP) which includes a schedule of officers authorised by the Secretary of DIBP to receive this information from DFAT. The principle governing these arrangements is that the minimum necessary information is disclosed to meet the requirements of the legislated purpose.

These disclosure provisions are necessary to:

- protect the integrity of the Australian passport system by ensuring lost or stolen passports are not used fraudulently and by implementing robust and coordinated identify verification processes across Government
 - fraudulently obtained travel documents are a key enabler for serious crime
 - robust identity verification processes help prevent identity theft—this protects other persons whose rights and freedoms may be interfered with (Article 12(3) of the ICCPR)
- facilitate Australian travel document holders' international travel.

Further, for the efficient and effective functioning of these necessary purposes disclosure must be made to the relevant DIBP and BDM officers directly and not just to the heads of these agencies. With around 20 million border movements and 40,000 lost and stolen passports each year and around 8,000 passport applications lodged every day it is simply not possible for the Secretary of DIBP nor the registrar of a BDM to personally manage the required volume and frequency of information—and this was never the intention. The intention and longstanding practice is for the information to be disclosed directly to the relevant officers within these agencies.

As such, the amendments clarify in the Determination that DFAT may disclose personal information directly to the person receiving the information for DIBP and BDMS, consistent with the intention and longstanding practice. These amendments clarify and support DFAT's necessary, reasonable and proportionate disclosure practices under section 23 of the Determination.

The disclosure of information under section 23 of the Determination is limited by: the type of information; the person to whom the disclosure may be made; and the legitimate purposes provided for in the Passports Act. Only the minimum information necessary is disclosed to meet the requirements of the particular legislated purpose. As such, any interference with privacy occasioned by these provisions will be provided by law and not arbitrary, as well as reasonable and proportionate.

The Department's disclosure of personal information under section 23 of the Determination is necessary, reasonable and proportionate. It is provided for by law (sections 45 and 46 of the Passports Act) and is consistent with the *Privacy Act 1988* and the Australian Privacy Principles.

Conclusion

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