EXPLANATORY STATEMENT

Migration Act 1958

MIGRATION (FAST TRACK APPLICANT CLASS – TEMPORARY PROTECTION AND SAFE HAVEN ENTERPRISE VISA HOLDERS) INSTRUMENT 2019

(Paragraph 5(1AA)(b))

1. Instrument LIN 19/007 is made under paragraph 5(1AA)(b) of the *Migration Act 1958* (the Act) for paragraph (b) of the definition of *fast track applicant* in subsection 5(1) of the Act.

2. The instrument operates to specify a class of persons who are "fast track applicants". The specification will become relevant if a person in that class of persons makes an application for a protection visa, as they will be subject to the processing of their protection visa and any available review rights as a fast track applicant. A "protection visa" is defined to mean the visa classes provided for in section 35A of the Act, which includes all permanent protection visas and temporary protection visas, including safe haven enterprise visas.

3. The effect of the instrument is to include in the definition of a "fast track applicant" the class of persons specified in this instrument.

4. A person is included in this class of persons if the person holds, or last held, a Subclass 785 (Temporary Protection) visa or a Subclass 790 (Safe Haven Enterprise) visa, and the person makes an application, on or after 2 April 2019, for a protection visa. A person who is the holder of a Temporary Protection visa (TPV) or Safe Haven Enterprise visa (SHEV), or whose last substantive visa was a TPV or SHEV, can only apply for a further TPV or SHEV and is not able to make a valid application for a permanent protection visa.

5. The instrument ensures that a person cannot be included in the definition of "fast track applicant" if their application for a protection visa was made before the commencement of the instrument (2 April 2019).

6. Any person who makes, or is taken to have made, a valid application for a protection visa that is combined with an application made by a person who is a fast track applicant mentioned above, is also a *fast track applicant* under this instrument.

7. A person is also a *fast track applicant* if they are the child of a person who is a fast track applicant mentioned above, and if they are born and apply for a protection visa after their parent's protection visa application has been finally determined. Under the Act, relevantly, an application for a visa is "finally determined" when a decision that has been made in respect of the application is no longer subject to merits review.

8. It is the intention of the instrument to ensure that a person who is included in these classes of person, who makes an application for a protection visa, will be classified as a fast track applicant and a decision to refuse to grant a protection visa to that person will, subject to certain exceptions, be a fast track decision as defined in subsection 5(1) of the Act. The class of persons includes any person who holds a TPV or SHEV and who applies for a further protection visa, including both illegal maritime arrivals and unauthorised air arrivals. The purpose of this instrument is to ensure that all subsequent TPV and SHEV applicants are processed under the fast track arrangements, to ensure consistency in both processes and outcomes.

9. The instrument meets the intention of paragraph (b) of the definition of fast track applicant in subsection 5(1) to give the Minister the flexibility and ability to include in the definition of fast track applicant, by way of a legislative instrument, persons other than those specified in paragraph (a) of the definition. Paragraph 5(1AA)(b) of the Act enables the Minister to make a legislative instrument for the purposes of paragraph (b) of the definition.

10. Consultation was undertaken with the Immigration Assessment Authority and the Attorney-General's Department.

11. The Office of Best Practice Regulation (OBPR) has confirmed that a Regulatory Impact Statement is not required (OBPR Reference 23859).

12. Under subsection 5(1AD) of the Act, section 42 of the *Legislation Act 2003* applies to an instrument made under subsection 5(1AA) of the Act despite subsection 44(2) of the *Legislation Act 2003*. The instrument is disallowable and therefore a Statement

of Compatibility with Human Rights has been attached.

13. The instrument commences on 2 April 2019 and applies to applications for a protection visa made on or after the commencement date.

Statement of Compatibility with Human Rights

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

Migration (LIN 19/007: Fast Track Applicant Class – Temporary Protection and Safe Haven Enterprise Visa Holders) Instrument 2019

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 (the Instrument) is made under paragraph 5(1AA)(b) of the *Migration Act 1958* (the Act). The instrument specifies persons who are included as fast track applicants for the purpose of the definition in subsection 5(1) of the Act:

A fast track applicant is defined in s 5(1) of the Act as:

> *(a) a person:*
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> > *(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) determining that subsection 46A(1) 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 made under paragraph (1AA)(b).*

Under paragraph 5(1AA)(b), the Instrument specifies that persons who hold or have held a Subclass 785 or Subclass 790 visa and are applying for a subsequent Subclass 785 or Subclass 790 on or after 2 April 2019 are a class of persons to be fast track applicants:

The effect of this instrument is that a person who arrived in Australia as an Unauthorised Maritime Arrival (UMA) before 13 August 2012 or as an Unauthorised Air Arrivals (UAA), who lodges an application for a subsequent Subclass 785 (temporary protection visa (TPV)) or Subclass 790 (safe haven enterprise visa (SHEV)) will have their claims for protection assessed through the fast track assessment process.

Human rights implications

This disallowable Legislative Instrument engages the following rights:

1. *non-refoulement*
2. rights of children and family unit
3. non-discrimination
4. fair hearing rights
5. privacy

Non-refoulement

Australia has obligations under the *International Covenant on Civil and Political Rights* (ICCPR) and the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) not to return a person to a country in certain circumstances.

Article 3 of the CAT states:

> *No State party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.*

Non-refoulement obligations also arise, by implication, in relation to Articles 6 and 7 of the ICCPR.

Article 6 of the ICCPR states:

> *Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of life.*

Article 7 of the ICCPR states:

> *No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.*

The Government wishes to assess the protection claims of the class of persons defined in the Instrument and considers the fast track process to be the appropriate mechanism. All fast track applicants will have their protection claims fully assessed to determine whether they meet the Protection visa criteria set out in the Act. This assessment allows for the consideration of claims that may engage Australia's *non-refoulement* obligations under the ICCPR and the CAT, as well as under the *1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol* (Refugee Convention).

There is no express requirement under the ICCPR, the CAT or the Refugee Convention, for any particular process or procedure for the assessment of *non-refoulement* obligations. The UNHCR has recognised that it is for each State to establish the most appropriate procedures for processing claims, including review mechanisms. However, the UNHCR recommends that certain minimum requirements should be met including access to competent officials that will act in accordance with the principle of *non-refoulement*, access to necessary facilities such as a competent interpreter to submit their case, and being permitted to remain in the country pending a decision on their initial request to the competent authority.

All fast track applicants are afforded an opportunity to have their claims determined in an open and transparent statutory assessment process while ensuring priority is given to identifying applications that present legitimate claims and, in turn, persons who require Australia's protection. While merits review can be an important safeguard, there is no express requirement under the ICCPR or the CAT for merits review of the assessment of *non-refoulement* obligations. Fast track applicants are afforded a different form of merits review to persons who are not fast track applicants, before the Immigration Assessment Authority (IAA). This is a limited form of merits review, intended to be efficient and cost-effective, and to uphold the integrity of Australia's protection status determination process by being competent, independent and impartial.

Some fast track applicants may be excluded from merits review by the IAA. Where it is determined that a fast track applicant's claims are 'manifestly unfounded' the fast track applicant will be an excluded fast track applicant (EFTRA) and not have access to merits review before the IAA. This applies where the claim has no plausible or credible basis, is based on conditions, circumstances or events not able to be substantiated by objective evidence, or is made for the sole purpose of delaying or frustrating the applicant's removal from Australia. It is the Government's policy that if fast track applicants present manifestly

unfounded claims their cases warrant being accelerated towards an immigration outcome, rather than accessing merits review thereby delaying the finalisation of their cases and prolonging their stay in Australia. EFTRAs will continue to have access to judicial review of their protection visa decisions.

It is the Government's view that it is reasonable and proportionate for the cohort of UMAs who arrived before 13 August 2012 and any UAAs who apply for a subsequent TPV or SHEV on or after 2 April 2019 have their claims assessed through the fast track process. In some instances, circumstances may have changed for current TPV or SHEV holders, and they may no longer engage Australia's *non-refoulement* obligations. In these circumstances, applicants will have access to streamlined review arrangements. The advantages of the fast track model include shortened timeframes and a limited, quicker form of merits review through the IAA. Although a more limited form of merits review, all fast track applicants are provided natural justice. The IAA must be provided with all the information that was before the decision maker and may, in exceptional circumstances, consider new information. Further, the IAA has the power to remit a decision back to the decision maker with directions or recommendations permitted by the Regulations, including that the application is a refugee or does engage protection obligations, including *non-refoulemont*.

For those who may no longer engage Australia's *non-refoulement* obligations, this instrument provides a fair and efficient process that leads to quicker outcomes for applicants, while ensuring that applicants who continue to engage Australia's *non-refoulement* obligations will not be removed from Australia in breach of those obligations.

A more detailed explanation of the international obligations relating to the review of *non-refoulement* decisions and the implications of the fast track process on human rights can be found in the Statement of Compatibility for the *Migration and Maritime Powers Legislation Amendment (Resolving the Legacy Caseload) Act 2014* which established the framework for this process.

Rights of children and family unity

Australia has obligations under the ICCPR and the *Convention on the Rights of the Child* (CRC) to ensure that the rights and best interests of children within its territory are protected. Under the ICCPR, Australia has obligations in relation to the protection of the family unit.

Article 17(1) of the 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.*

Article 3 of the 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.*

Specifying, in subsections 6(3), 6(4) and 6(5) of the Instrument, children and dependents of persons described in subsection 6(1) of the Instrument – including children who do not themselves meet the definition in subsection 6(1) – as fast track applicants, will allow them to have their protection claims assessed through the same process as part of a family unit with their parents. This ensures that children can be processed consistently with family, and prevent the possible separation of family members. As such, the Instrument positively engages with Article 17(1) and Article 23(1) of the ICCPR, and is consistent with the principle of family unity.

The Government is committed to acting in accordance with Article 3 of the CRC. Allowing children to remain with their parents is generally in their best interests, and providing children of the class of persons described above the ability to be assessed in the same process as that of their parents facilitates this.

Non-discrimination

Article 2(1) of the ICCPR states:

> *Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

Article 26 of the ICCPR states:

> *All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

To the extent that the Instrument engages the obligations in Article 2(1) and Article 26 of the ICCPR, the Government considers that this measure is reasonable and proportionate in achieving a legitimate objective.

It is the Government's view that in order to maintain the overall integrity of Australia's border protection status determination framework and to ensure all UMA and UAA applicants are assessed consistently and under the same statutory process, it is reasonable and proportionate for all UMA and UAA applicants who make subsequent TPV and SHEV applications after 2 April 2019 be assessed under the fast track process.

Where circumstances have changed for current TPV or SHEV holders they may no longer engage Australia's *non-refoulement* obligations. This Instrument ensures those applicants have access to streamlined review arrangements, providing a fair, efficient and more timely resolution of those who no longer engage Australia's protection obligations, while ensuring that any persons who continue to engage Australia's *non-refoulement* obligations will not be removed from Australia in breach of those obligations.

Fair hearing rights

Article 2(3) of the ICCPR states:

> *Each State Party to the present Covenant undertakes:*
>
> > *(a) to ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;*
> >
> > *(b) to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy.*

Article 13 of the ICCPR states:

> *An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case review by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.*

Article 14(1) of the ICCPR states:

> *All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.*

As previously outlined, the UNHCR recognises that is it for each State to establish the most appropriate procedures for processing protection claims, including review mechanisms,

although it recommends that certain minimum requirements should be met including access to competent officials that will act in accordance with the principle of *non-refoulement.* There are sufficient safeguards in place to ensure all fast track applicants are afforded an opportunity to have their claims determined in an open and transparent statutory assessment process. Bringing this cohort of applicants into the fast track process will not affect their ability to seek asylum in Australia, or their ability to access judicial review of a refusal decision, nor will it prevent grant of a protection visa for applicants satisfying the criteria for the visa.

Privacy

Article 17(1) of the 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.*

The Instrument positively engages Article 17(1) of the ICCPR. The Instrument specifies a class of persons by reference to the nature and outcome of their asylum processing in Australia, rather than by a personal identifier. This will ensure that their names and the fact that they are claiming protection, will not become a matter of public record, thus protecting their privacy.

Conclusion

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