

EXPLANATORY STATEMENT

Issued by the Minister for Immigration, Citizenship and Multicultural Affairs

Migration Act 1958

Migration Amendment (Giving Documents) Regulations 2023

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 matters required or permitted 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 listed in Attachment A.

The *Migration Amendment (Giving Documents) Regulations 2023* (the Regulations) amend the *Migration Regulations 1994* (the Migration Regulations) to clarify the requirements relating to the giving of a document relating to the proposed cancellation, cancellation or revocation of the cancellation of a visa (cancellation-related documents). In particular, the Regulations clarify the circumstances in which regulation 2.55 applies to the giving of a document, and expressly reference the provisions of the Migration Act for which Division 2.10 of Part 2 of the Migration Regulations is made.

The matters dealt with in the Regulations are appropriate for implementation in regulations rather than by Parliamentary enactment. It has been the consistent practice of the Government of the day to provide for detailed matters of the way in which cancellation documents can be given in the Migration Regulations rather than in the Migration Act itself. The Migration Act expressly provides for these matters to be prescribed in regulations.

The current Migration Regulations have been in place since 1994, when they replaced regulations made in 1989 and 1993. Providing for these details to be in delegated legislation rather than primary legislation gives the Government the ability to effectively manage the operation of Australia's visa program and respond quickly to emerging needs.

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 Regulations are compatible with human rights. The Statement is at Attachment B.

The Office of Impact Analysis (the OIA) has been consulted in relation to the amendments. No Impact Analysis is required. The OIA consultation reference number is OIA23-04983.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003* (the Legislation Act).

Section 17 of the Legislation Act provides that the rule-maker must be satisfied that there has been undertaken any consultation that is appropriate and reasonably practicable before

making a legislative instrument. Consultations were not considered necessary or appropriate as the Regulations would have no disadvantageous effect on visa holders or former visa holders.

The Regulations are consequential to the amendments made by Schedule 1 to the *Migration Amendment (Giving Documents and Other Measures) Act 2023* (the Amendment Act), which will commence on the earlier of a single day to be fixed by proclamation or 6 months from the day the Amendment Act received Royal Assent. The Regulations commence on the same date.

Further details of the Regulations are set out in Attachment C.

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

AUTHORISING PROVISIONS

Subsection 504(1) of the *Migration Act 1958* (the Migration Act) relevantly provides that the Governor-General may make regulations prescribing matters required or permitted to be prescribed, or 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, including those that are amended or inserted by the *Migration (Giving Documents and Other Measures) Act 2023*, are also relevant:

- subsection 107(1C), which provides the notice given under subsection 107(1) must be given in the prescribed way;
- subsection 109(4), which provides the notice given under subsection 109(3) must be given in the prescribed way;
- subsection 119(2), which provides the notification given under subsection 119(1) must be given in the prescribed way;
- subsection 120(3), which provides the notice given under subsection 120(2) must be given in the prescribed way;
- subsection 127(2A), which provides that the notice given under subsection 127(1) must be given in the prescribed way;
- subsection 129(2), which provides that the notice given under subsection 129(1) must be given in the prescribed way;
- subsection 132(2), which provides that the notification given under subsection 132(1) must be given in the prescribed way;
- subsection 133E(2), which provides the notice given under subsection 133E(1) must be given in the prescribed way;
- paragraph 133F(3)(a), which provides the written notice and particulars given under subparagraphs 133F(3)(a)(i) and (ii) must be given in the prescribed way;
- paragraph 134E(3)(b), which provides the notice given under subsection 134E(1) must be given in the prescribed way;
- subsection 134(7A), which provides the notice given under subsection 134(7) must be given in the prescribed way;
- subsection 135(6), which provides the notice given under subsections 135(1) or 135(5) must be given in the prescribed way;

- subsection 137R(4), which provides the notice given under subsections 137R(1) or 137R(3) must be given in the prescribed way;
- subsection 137S(1A), which provides the notice given under subsection 137S(1) must be given in the prescribed way;
- subsection 500A(10A), which provides the notice given under subsection 500A(10) must be given in the prescribed way;
- subsection 501C(3A), which provides the notice given under subsection 501C(3) must be given in the prescribed way;
- subsection 501CA(3A), which provides the notice given under subsection 501CA(3) must be given in the prescribed way;
- subsection 501G(3), which provides the notice given under subsection 501G(1) must be given in the prescribed way.

Statement of Compatibility with Human Rights

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

Migration Amendment (Giving Documents) Regulations 2023

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

The *Migration Amendment (Giving Documents) Regulations 2023* (the Regulations) amends the *Migration Regulations 1994* (the Migration Regulations) to clarify the requirements relating to the giving of documents relating to the proposed cancellation, cancellation or revocation of the cancellation of a visa (cancellation-related documents).

Schedule 1 to the Regulations contains amendments relating to the giving of documents that are consequential to those made by Schedule 1 to the *Migration Amendment (Giving Documents and Other Measures) Act 2023* (Amendment Act). The Amendment Act amends the Migration Act to improve certainty and consistency in the giving of cancellation-related documents, including by requiring all cancellation-related documents to be given in writing, and to confirm that the regulations can prescribe methods for giving such documents.

Giving documents for character-related cancellation decisions and actions

The amendments made to the Migration Regulations by the Regulations are technical amendments which are consequential to those made by the Amendment Act. They clarify the operation of the relevant regulations and thereby provide transparency and predictability in the operation of the legislation.

Specifically, the Regulations clarify the circumstances in which regulation 2.55 applies to the giving of a document, and expressly reference the provisions of the Migration Act for which Division 2.10 of Part 2 of the Migration Regulations is made. The Regulations also make a number of technical amendments to regulation 2.55 to clarify the operation of the regulation and to simplify the structure of that regulation.

Human rights implications

This disallowable legislative instrument does not engage any of the applicable rights or freedoms.

The previous related amendments to the Migration Act by the Amendment Act engaged human rights related to freedom from unlawful expulsion under Article 13 of the *International Covenant on Civil and Political Rights* (ICCPR). The consequential amendments proposed in this instrument operate to confirm the application of the regulation for specific purposes under the Migration Act but do not independently trigger any other provisions of that Act that have implications for, or engage, applicable human rights or freedoms.

Conclusion

This disallowable legislative instrument is compatible with human rights as it does not raise any human rights issues.

The Hon Andrew Giles MP

Minister for Immigration, Citizenship and Multicultural Affairs

Details of the Migration Amendment (Giving Documents) Regulations 2023

Section 1 - Name

This section provides that the name of the instrument is the *Migration Amendment (Giving Documents) Regulations 2023*.

Section 2 - Commencement

This section provides for the commencement of the instrument.

Subsection 2(1) provides that each provision of the 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 effect of this provision is that the instrument commences on the same day as Schedule 1 to the *Migration Amendment (Giving Documents and Other Measures) Act 2023* (the Amendment Act). Schedule 1 to the Amendment Act commences on the earlier of a single day to be fixed by Proclamation, or 6 months after the Act received Royal Assent.

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

Section 3 - Authority

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

Section 4 - Schedules

This section provides for how the amendments in the Regulations operate.

Schedule 1 – Amendments

Migration Regulations 1994

Item [1] – Regulation 2.42

This item repeals regulation 2.42 of the Migration Regulations. The repealed regulation provides that a notice of cancellation, for a decision to cancel a visa under section 109 of the Migration Act, must be made in writing. As this requirement is made express in new subsection 109(3), which is inserted by item 3 of Schedule 1 to the Amendment Act, this regulation is no longer required.

Item [2] – Subregulation 2.44(3) (note 1)

This item substitutes the phrase ‘revocation of’ with ‘a decision to revoke or not to revoke’ in note 1 to subregulation 2.44(3) of the Migration Regulations. The new wording clarifies that

the Minister can also send a notice in relation to a decision to not revoke the cancellation of a visa.

Item [3] – Regulations 2.45, 2.47 and 2.49

This item repeals regulations 2.45, 2.47 and 2.49 of the Migration Regulations.

Repealed regulation 2.45 provides that for the purposes of subsection 127(1) of the Migration Act, a notice of cancellation for a decision to cancel a visa under section 116 of the Migration Act must be in writing. As this requirement is made express in subsection 127(1) of the Migration Act as amended by item 9 of Schedule 1 to the Amendment Act, this regulation is no longer required.

Repealed regulation 2.47 provides that for the purposes of subsection 129(2) of the Migration Act, a notice of cancellation for a decision to cancel a visa under section 128 of the Migration Act must be in writing. As this requirement is made express subsection 129(1) of the Migration Act as amended by item 11 of Schedule 1 to the Amendment Act, this regulation is no longer required.

Repealed regulation 2.49 provides that for the purposes of section 132 of the Migration Act, a notice of a decision to revoke or not revoke the cancellation of a visa under section 131 of the Migration Act must be in writing. As this requirement is made express in new subsection 132(1) of the Migration Act as amended by item 12 of Schedule 1 to the Amendment Act, this regulation is no longer required.

Item [4] – Before regulation 2.54

This item inserts new regulation 2.53A into the Migration Regulations. New regulation 2.53A provides that Division 2.10 of Part 2 of the Migration Regulations is made for the purposes of the specified provisions of the Act, including all provisions which require the Minister to give a document to a person relating to the proposed cancellation, cancellation, or revocation of a decision to cancel the person's visa. Division 2.10 of the Migration Regulations is concerned with documents relating to the cancellation of visas.

Division 2.10 now contains three regulations:

- regulation 2.53A, which specifies the purpose of Division 2.10;
- regulation 2.54, which provides for the definitions of terms used in the Division; and
- regulation 2.55, which provides for the giving of documents relating to the proposed cancellation, cancellation or revocation of a decision to cancel a visa.

Each of the provisions mentioned in a paragraph of new regulation 2.53A provide that the Minister must give a cancellation-related document in the document in the 'prescribed way.' The majority of the provisions mentioned were either inserted or amended by the Amendment Act to reference the 'prescribed way.' By setting out the provisions of the Migration Act to which Division 2.10 relates, new regulation 2.53A makes clear the circumstances in which the Minister is required to use the methods in regulation 2.55 when giving certain cancellation-related documents.

Item [5] – Regulation 2.54

This item inserts a new definition of designated document. A designated document means:

- a document required by subsection 133E(1) of the Migration Act to be given in relation to a decision to cancel a visa under subsection 133A(1) or 133C(1) of the Migration Act; or
- a document required by subsection 501G(1) of the Migration Act to be given in relation to a decision to:
 - cancel a visa under section 501, 501A, 501B, 501BA or 501F of the Migration Act; or
 - not revoke a decision to cancel a visa under section 501CA of the Migration Act.

This definition captures the documents referenced in current paragraphs 2.55(1)(ab) and (b) of the Migration Regulations. As current subregulation 2.55(1) is being substituted at item 6 of Schedule 1 to the Regulations, inserting the new definition continues to allow for clear reference to the methods (subregulations 2.55(4), (4A) and (4B)) the Minister must use when giving a designated document. Items 7, 8, 10, 11, 12, and 14 of Schedule 1 to the Regulations make amendments to reference the new term ‘designated document’ in regulation 2.55.

Item [6] – Subregulation 2.55(1)

This item substitutes subregulation 2.55(1) of the Migration Regulations to make clear when regulation 2.55 applies. Current subregulation 2.55(1) provides that regulation 2.55 applies to the giving of a document to a holder or former holder of a visa relating to the proposed cancellation, cancellation, or revocation of a decision to cancel a visa under the Migration Act (paragraphs 2.55(1)(a) and (c)), as well as the giving of certain documents under subsections 133E(2) and 501G(3) of the Migration Act (paragraphs 2.55(1)(ab) and (b)).

New subregulation 2.55(1) provides simply that regulation 2.55 applies in relation to a document relating to the proposed cancellation, cancellation, revocation of the cancellation, or decision not to revoke the cancellation of a visa under the Migration Act. This new provision reflects the documents described in new subsection 494A(5) of the Migration Act, inserted by item 22 of Schedule 1 to the Amendment Act. This makes clear that section 494A of the Migration Act does not apply in relation to the giving of these types of documents, and that instead the Minister must use a method of giving a document prescribed by regulation 2.55 of the Migration Regulations.

For clarity, the new provision is also intended to capture cancellation-related documents given under the Act that may be given as a matter of procedural fairness at common law, rather than because the requirement is explicitly provided for in the Migration Act. For example, this includes a notice of intention to cancel a visa that the Minister gives to a visa holder before making a decision to cancel the holder’s visa under subsection 501(2) of the Migration Act.

Item [7] – Before subregulation 2.55(3)

This item inserts new subheading ‘*How to give documents other than designated documents*’ before subregulation 2.55(3) of the Migration Regulations. This makes clear that the Minister must use the methods in subregulations 2.55(3) and (3A) when giving a document

other than a designated document. The new definition of designated document has been inserted by item 5 of Schedule 1 to the Regulations.

Item [8] – Subregulation 2.55(3)

This item substitutes the phrase ‘a document mentioned in paragraphs 2.55(1)(a) or (c)’ with the new term ‘document other than a designated document’. This item is consequential to the substitution of subregulation 2.55(1) of the Migration Regulations at item 6 of Schedule 1 to the Regulations, and the new definition of designated document at item 5 of Schedule 1 to the Regulations.

Item [9] – Subregulation 2.55(3) (note)

This item repeals the note at subregulation 2.55(3) of the Migration Regulations, as it contains references to current paragraphs 2.55(1)(a) and (c) and that subregulation 2.55(3A) applies when giving documents minors. This item is consequential to the substitution of subregulation 2.55(1) of the Migration Regulations at item 6 of Schedule 1 to the Regulations. Additionally, as subregulation 2.55(3A) directly follows the note, the note is not needed for explanatory purposes.

Item [10] – Subregulation 2.55(3A)

This item substitutes the phrase ‘a document mentioned in paragraphs 2.55(1)(a) or (c)’ with the new term ‘document other than a designated document’. This item is consequential to the substitution of subregulation 2.55(1) of the Migration Regulations at item 6 of Schedule 1 to the Regulations, and the new definition of designated document at item 5 of Schedule 1 to the Regulations.

Item [11] – Before subregulation 2.55(4)

This item inserts new subheading, ‘*How to give designated documents*’ before subregulation 2.55(4), to make clear subregulations 2.55(4) and (4A) provide for the method of giving designated documents. The new definition of designated documents has been inserted at item 5 of Schedule 1 to the Regulations.

Item [12] – Subregulation 2.55(4)

This item substitutes the phrase ‘a document mentioned in paragraphs 2.55(1)(ab) or (b)’ with the new term ‘designated document’ in subregulation 2.55(4) of the Migration Regulations. This item is consequential to the substitution of subregulation 2.55(1) at item 6 of Schedule 1 to the Regulations, and the new definition of designated document inserted at item 5 of Schedule 1 to the Regulations.

Item [13] – Subregulation 2.55(4) (note)

This item repeals the note at subregulation 2.55(4) of the Migration Regulations, as it contains references to current paragraphs 2.55(1)(ab) and (b) and that subregulation 2.55(4A) applies when giving a document to a minor. This item is consequential to the substitution of subregulation 2.55(1) of the Migration Regulations at item 6 of Schedule 1 to the Regulations. Additionally, as subregulation 2.55(4A) directly follows the note, the note is not needed for explanatory purposes.

Item [14] – Paragraph 2.55(4A)(a)

This item substitutes the phrase ‘a document mentioned in paragraphs 2.55(1)(ab) or (b)’ with the new term ‘designated document’ at paragraph 2.55(4A)(a) of the Migration Regulations. This item is consequential to the substitution of subregulation 2.55(1) at item 6 of Schedule 1 to the Regulations, and the new definition of designated document inserted at item 5 of Schedule 1 to the Regulations.

Item [15] – Before subregulation 2.55(4B)

This item inserts a new subheading ‘Document given to carer is taken to be given to minor’ before subregulation 2.55(4B) of the Migration Regulations. This clarifies the purpose of the subregulation.

Item [16] – Before subregulation 2.55(5)

This item inserts new subheading ‘When document is taken to be received’ before subregulation 2.55(5) of the Migration Regulations. This clarifies that subregulations 2.55(5), (6), (7) and (8) provide when a visa holder or former visa holder is taken to have received a cancellation-related document given by the Minister in accordance with a method prescribed by regulation 2.55.

Item [17] – In the appropriate position in Schedule 13

This item inserts a new Part 119 (Amendments made by the *Migration Amendment (Giving Documents) Regulations 2023*) into Schedule 13 (Transitional Arrangements) to the Migration Regulations. New Part 119 has one item 11901 which provides for how the amendments made in Schedule 1 to the Regulations are to operate.

The effect of the transitional provision is that the amendments made by Schedule 1 to the Regulations apply in relation to the giving of a document from on or after the commencement of Schedule 1 to the Regulations.