



Migration Amendment (Biosecurity Contraventions and Importation of Objectionable Goods) Regulations 2019

I, General the Honourable Sir Peter Cosgrove AK MC (Ret'd), Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following regulations.

Dated 04 April 2019

Peter Cosgrove
Governor-General

By His Excellency's Command

David Coleman
Minister for Immigration, Citizenship and Multicultural Affairs

Contents

1	Name.....	1
2	Commencement	1
3	Authority.....	1
4	Schedules	1
Schedule 1—Amendments		2
<i>Migration Regulations 1994</i>		<i>2</i>

1 Name

This instrument is the *Migration Amendment (Biosecurity Contraventions and Importation of Objectionable Goods) Regulations 2019*.

2 Commencement

- (1) 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.

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. The whole of this instrument	17 April 2019.	17 April 2019

Note: This table relates only to the provisions of this instrument as originally made.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.

- (2) 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.

3 Authority

This instrument is made under the *Migration Act 1958*.

4 Schedules

Each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1—Amendments

Migration Regulations 1994

1 At the end of subregulation 2.43(1)

Add:

; (s) in the case of a holder of:

- (i) a Subclass 600 (Visitor) visa; or
- (ii) a Subclass 601 (Electronic Travel Authority) visa; or
- (iii) a Subclass 651 (eVisitor) visa; or
- (iv) a Subclass 676 (Tourist) visa; or
- (v) a Subclass 771 (Transit) visa;

who is in Australia and who has not been immigration cleared—that the Minister reasonably believes that the visa holder has contravened subsection 126(2), 128(2), 532(1) or 533(1) of the *Biosecurity Act 2015*;

- (t) in the case of the holder of a temporary visa—that the Minister reasonably believes that the visa holder:
 - (i) has imported goods to which regulation 4A of the *Customs (Prohibited Imports) Regulations 1956* applies; and
 - (ii) has not been granted a permission under subregulation 4A(2) of those Regulations to import the goods.

2 Paragraph 4013(2)(d) of Schedule 4

Omit “or (ob)”, substitute “, (ob), (s) or (t)”.

EXPLANATORY STATEMENT

Issued by the Minister for Immigration, Citizenship and Multicultural Affairs

Migration Act 1958

Migration Amendment (Biosecurity Contraventions and Importation of Objectionable Goods) Regulations 2019

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. Paragraph 116(1)(g) of the Migration Act permits grounds for cancellation of visas under section 116 of the Migration Act to be prescribed.

The *Migration Amendment (Biosecurity Contraventions and Importation of Objectionable Goods) Regulations 2019* (the Regulations) amend the *Migration Regulations 1994* (the Migration Regulations) to:

- **insert a new cancellation ground** allowing cancellation of visitor visas where:
 - the holder is in Australia and has not been immigration cleared; and
 - the Minister reasonably believes that the visa holder has contravened subsection 126(2), 128(2), 532(1) or 533(1) of the *Biosecurity Act 2015* (the Biosecurity Act);
- **insert a new cancellation ground** allowing cancellation of temporary visas where:
 - the Minister reasonably believes that the visa holder has imported goods to which regulation 4A of the *Customs (Prohibited Imports) Regulations 1956* applies; and
 - the visa holder has not been granted a permission under subregulation 4A(2) of those Regulations to import the goods; and
- **amend public interest criterion 4013** so that applicants for affected visas, who have had a previous visa cancelled under one of the new grounds in the **last 3 years**, cannot satisfy the criterion unless there are compelling reasons to justify the grant of the visa.

Contraventions of the Biosecurity Act pose an unacceptable threat to Australia's agriculture industry. Recently the Department of Agriculture and Water Resources detected both African Swine Fever and Foot and Mouth Disease in meat products intercepted at airports. Studies have estimated \$50 billion of economic losses over ten years if there was a large to medium outbreak of Foot and Mouth Disease in Australia. In light of such risk, it is appropriate to strengthen the compliance tools available to deter and respond to behaviour that is in contravention of Australia's biosecurity laws. **The new cancellation ground gives decision-makers the discretion to cancel a visitor visa at the point of arrival in cases where there has been an attempt to deceive a Biosecurity officer about the presence of prohibited items in the person's luggage or possessions.** In making a decision, decision-makers will weigh up a number of factors, including the seriousness of the breach and the consequences to the passenger.

Regulation 4A of the *Customs (Prohibited Imports) Regulations 1956* contains a broad definition of objectionable goods, including goods that describe, depict, express or deal with matters of sex, drug misuse or addiction, crime, cruelty and violence or material offending morality, decency and propriety, for instance, child exploitation material and material inciting or advocating crime, violence, or terrorist activity. While some existing visa cancellation grounds may be utilised in cases where such goods are imported, a specific cancellation ground linked to the action of importing the goods strengthens the framework and provides a strong deterrent. The cancellation ground is limited to temporary visa holders only.

Public interest criterion 4013 provides for a temporary exclusion period for visa applicants who are affected by one or more of the risk factors mentioned in that section, which relate to previous visa cancellations. **The amendments to the criterion mean that, once a person's visitor visa is cancelled on one of the new cancellation grounds, that person cannot be granted a visa subject to that criterion within three years of the cancellation.** A decision-maker could nevertheless grant the visa if satisfied, in the applicant's particular case, that there are compelling circumstances that affect the interests of Australia, or compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen, justifying the granting of the visa within three years after the cancellation.

Section 17 of the *Legislation Act 2003* (the Legislation Act) requires consultations which are appropriate and reasonably practicable to be undertaken. The Department of Agriculture and Water Resources was consulted in relation to the proposed amendments.

A Statement of Compatibility with Human Rights has been completed in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*, and is at [Attachment A](#). Details of the Regulations are set out in [Attachment B](#).

The Office of Best Practice Regulation (OBPR) advised that a Regulation Impact Statement is not required (OBPR Ref ID 25096).

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

The Regulations are a legislative instrument for the purpose of the Legislation Act.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Migration Amendment (Biosecurity Contraventions and Importation of Objectionable Goods) Regulations 2019

This amendment 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 Amendment

The Australian Government remains committed to protecting the Australian community from the biosecurity risks posed by non-citizens to Australia's agricultural systems and the risks posed by the illegal importation of certain goods and materials through Australian ports of entry. These amendments will introduce measures that enhance the Government's ability to protect the Australian community from these risks.

The amendment adds two discretionary cancellation grounds to regulation 2.43 of the *Migration Regulations 1994* (Migration Regulations) to provide that a temporary visa may be cancelled where:

- the Minister reasonably believes that the person has contravened subsections 126(2), 128(2), 532(1) or 533(1) of the *Biosecurity Act 2015* (Biosecurity Act). This ground will only apply to specified visitor visa subclasses where the visa holder is in Australia but has not yet been immigration cleared; or
- the Minister reasonably believes that the person has imported objectionable goods as defined by Regulation 4A of the *Customs (Prohibited Imports) Regulations 1956* (Prohibited Imports Regulations), for which permission to import has not been given. This ground will apply to all persons on a temporary visa.

In practice, the new cancellation grounds give decision-makers the discretion to cancel a temporary visa at the point of arrival in cases where there has been an attempt to deceive a Biosecurity officer about the presence of prohibited items in the person's luggage or possessions, or where they have in their possession specific goods, which they have not been granted permission to import, which are prohibited under the Prohibited Imports Regulations.

These regulations also amend public interest criterion 4013 so that applicants for affected visas, who have had a previous visa cancelled under the new grounds in the last 3 years, cannot satisfy the criterion unless there are compelling reasons to justify the grant of the visa. **Practically, this means that once a person's temporary visa is cancelled because of a contravention of the Biosecurity Act or the Prohibited Imports Regulations, that person cannot be granted another visa that is subject to criterion 4013 within three years of the cancellation.** A decision-maker could nevertheless grant the visa if satisfied, in the applicant's particular case, that there are compelling circumstances that affect the interests of Australia, or compassionate or compelling circumstances that affect the interests of an

Australian citizen, an Australian permanent resident or an eligible New Zealand citizen, justifying the granting of the visa within three years after the cancellation.

Prior to these amendments, there was no specific cancellation ground that could be used to cancel the visa of a non-citizen who brings prohibited goods or materials through a port of entry of Australia. **Prior to these amendments, there was only a power to cancel a person's visa on the basis they made a false declaration on their incoming passenger card**, or that the person poses a risk to the health, safety or good order of the Australian community, a segment of the Australian community or an individual.

While a person may make a correct declaration on their incoming passenger card, they may then make deliberately false or misleading statements to biosecurity officers about the declared material. For example, a person may declare on their incoming passenger card that they are bringing in goods that fall under the category of “*meat, poultry, fish, seafood, eggs, dairy, fruit and vegetables*”. When questioned by a biosecurity officer, they may state that they only have fruit in their luggage when in fact they are also carrying meat products. In doing so, they have not made a false declaration on the incoming passenger card as meat is covered under the category of goods that the passenger has declared. The power to cancel a person's visa on the basis that they made a false declaration on their incoming passenger card is therefore not available in these circumstances.

False declarations to a biosecurity officer may result in the issue of an infringement notice by the biosecurity officer, but this is not currently a ground for visa cancellation and infringement notices have not been a strong deterrent. Upon payment of the fine associated with the infringement notice, civil and criminal liability is discharged and the person may still enter Australia despite their disregard for Australia's biosecurity laws. If the person leaves Australia without paying the fine associated with the infringement notice, they are not prevented from re-entering Australia as the infringement notice amount is not a debt and cannot be included in the concept of a 'debt owed to the Commonwealth'.

The possibility of visa cancellation for a false declaration on an incoming passenger card, where a visa holder brings objectionable goods and materials without permission, has not been sufficient to deter this behaviour. For a number of reasons a declaration may not have been made, for example a person may not fill out that part of the passenger card, or not understand the questions posed. This amendment ensures that in all cases where a person imports abhorrent material, a visa cancellation ground linked to that action is available.

Although goods and items are seized as part of issuing the infringement notice, this does not provide strong deterrent messaging to the non-citizen. The person may still re-enter Australia without appropriately understanding the standards of morality, decency and propriety generally accepted by reasonable adults within the Australian community.

The amendments provide an important deterrent to non-citizens who fail to make the required declarations, or provide false information to a biosecurity officer in relation to goods and/or material that could present a risk to Australia's biosecurity. They provide further measures to a suite of existing measures to address the threat that particular goods present to Australia's biosecurity, particularly in cases where seeking criminal prosecution or civil penalties would not be practical or appropriate.

Recently the Department of Agriculture and Water Resources detected African Swine Fever and Foot and Mouth Disease in meat products intercepted at airports. Studies have estimated \$50 billion of economic losses over ten years if there was a large to medium outbreak of foot and mouth disease in Australia. In light of such risk, it is appropriate to strengthen the compliance tools available to deter and respond to behaviour that is in contravention of Australia's biosecurity laws. The amendment will ensure that the Australian community and Australia's agricultural industry is protected from the unacceptable risks posed by non-citizens who knowingly provide false information to biosecurity officers.

The amendment also provides an important deterrent to non-citizens considering bringing in objectionable goods. There have been recent cases of arriving non-citizens whose baggage has been examined and found to contain images and videos of child abuse and exploitation on mobile phones, laptops and USB sticks.

The *Customs Act 1901* imposes strong penalties on individuals importing objectionable goods without prior approval. The maximum penalty for an offence is imprisonment for 10 years and/or 2,500 penalty units. Decisions to prosecute depend on a range of factors and are made on a case-by-case basis. The protection of the Australian community is always a priority for the Australian Border Force. In some cases, visa cancellation and subsequent removal from Australia would be the most appropriate course of action rather than seeking criminal prosecution.

This discretionary cancellation ground will assist in preventing a range of goods such as abhorrent or revolting pornography, child exploitation material, terrorism-related material and material advocating crime and violence, being disseminated into the Australian community. The new discretionary cancellation ground will be implemented in addition to existing measures that deal with the issue, to strengthen the range of measures that are available to Australian Border Force officers who detect this material.

The amendments are an appropriate and proportionate response to protect the Australian community from the risks posed by these types of goods and materials.

Human rights implications

This Amendment engages the following rights:

- Right to liberty – Article 9 of the *International Covenant on Civil and Political Rights* (ICCPR);
- Non-refoulement obligations – Article 3(1) of the Convention against Torture and other Cruel, Inhumane or Degrading Treatment or Punishment (CAT) and Articles 6 and 7 of the ICCPR;
- Expulsion of aliens – Article 13 of the ICCPR;
- Right to respect for the family – Articles 17(1) and 23(1) of the ICCPR;
- Consideration of the best interests of the child – Article 3 of the Convention on the Rights of the Child (CRC); and
- Right to privacy – Article 17(1) of the ICCPR.

The practical effect of these amendments is that the visas of persons who import objectionable goods, or provide false and misleading information to a biosecurity officer may be liable for visa cancellation. This Statement of Compatibility addresses the potential human rights implications that may result from these practical effects along with other possible implications that may arise from this amendment.

Right to liberty

Article 9(1) of the ICCPR states:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

If a non-citizen's visa is cancelled under regulation 2.43, including under the new grounds inserted by these regulations, they may be liable for immigration detention under section 189 of the *Migration Act 1958* (Migration Act) and so in this way may engage the right under Article 9. As set out above, Article 9 of the ICCPR is a prohibition on arbitrary detention. In the context of Article 9, 'arbitrary' means that detention must have a legitimate purpose within the framework of the ICCPR in its entirety. Detention must be predictable in the sense of the rule of law (it must not be capricious) and it must be reasonable (or proportional) in relation to the purpose to be achieved.

Legislative amendments that extend the grounds upon which a person's visa may be cancelled, the result of which may be subsequent detention, add to a number of existing laws that are well established, generally applicable and predictable. This will be the case also for these amendments.

The amendments only apply to:

- those on certain visitor visas who contravene the Biosecurity Act prior to being immigration cleared;
- those on a temporary visa who import objectionable goods without permission

In relation to paragraph 2.43(1)(s), evidence provided by the Department of Agriculture and Water Resources indicates that non-residents constitute 68% of infringements issued for breaches of the Biosecurity Act and 59% of infringement notice fines are unpaid by non-residents. Further, the current biosecurity enforcement framework, which includes criminal prosecution and civil penalty options, allows for management of serious breaches by longer-term residents. Any future amendments to expand the visa subclasses specified in paragraph 2.43(1)(s) would be subject to further scrutiny including the need for a further Statement of Compatibility.

Paragraph 2.43(1)(t) applies to temporary visas only. Permanent residents have spent a considerable length of time in Australia and have established strong links to the Australian community. Reliance on criminal prosecution or infringement notices is the preferred approach in circumstances where long-term visa holders import objectionable goods and materials without permission rather than visa cancellation.

Given the targeted nature of specifying temporary visas on the basis of objective material, the amendment presents a reasonable and proportional response to achieving a legitimate purpose under the ICCPR – the safety of the Australian community and its agriculture industry.

Decision-makers exercising the discretion to refuse or cancel a person's visa will be guided by comprehensive policy guidelines and take into account the individual's circumstances, relevant international obligations, seriousness of the breach and the consequences to the passenger. The visa holder will be given the opportunity to provide reasons why the visa

should not be cancelled and judicial review is available. This means the visa cancellation decision, and any consequent detention, is a proportionate response to the individual circumstances of each case

In light of the above considerations, to the extent the amendments may engage and limit the right under Article 9 of the ICCPR, the proposed amendments are consistent with Article 9(1) of the ICCPR

Non-refoulement obligations

Article 3(1) 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.'

Articles 6 and 7 of the ICCPR also impose on Australia an implied non-refoulement obligation. 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 his 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 amendments potentially engage Article 3(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and Articles 6, and 7 of the ICCPR.

These obligations would only be engaged in circumstances where the cancellation of a visa results in the removal of an individual.

Australia remains committed to its international obligations concerning non-refoulement. These obligations are considered as part of the decision to cancel a visa. Individuals would not be subject to removal unless and until their claims for protection had been assessed according to law. As such these amendments are consistent with Article 3 of the CAT and Articles 6 and 7 of the ICCPR.

Expulsion of aliens

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 reviewed by,

and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.'

New paragraphs 2.43(1)(s) and 2.43(1)(t) engage the right under Article 13, as the cancellation of a visa held by a non-citizen lawfully in Australia can lead to removal of the visa holder from Australia.

Decisions to cancel a visa for contraventions of certain sections of the Biosecurity Act will be made in accordance with the Act and the Migration Regulations including under new paragraph 2.43(1)(s). Similarly, a decision to cancel a visa for importing an objectionable good without being granted permission will only apply to non-citizens on temporary visas and will be made according to the Act and the Migration Regulations including new paragraph 2.43(1)(t).

To the extent people will have their visa cancelled, the processes are in accordance with Article 13 in that prior to a decision to cancel under the new grounds for cancellation, the visa holder is provided with adequate time to put forward reasons as to why their visa should not be cancelled to a delegated officer. Further, natural justice provisions for visa cancellations are enshrined in Subdivision E of the Act and will apply to these decisions and judicial review in Australian courts is available. As such, this amendment does not infringe on Article 13 of the ICCPR.

Rights relating to children

Article 3(1) 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.'

The creation of new paragraphs 2.43(1)(s) and 2.43(1)(t) engages this obligation in relation to any decision to cancel a visa held by the child themselves or a visa held by a parent or family member of the child. In the former circumstance, the effect would be that the child may be detained or removed pursuant to the Act. In the latter, the effect may be that the parent or family member is detained or removed according to the Act.

The best interests of the child are *a*, not *the*, primary consideration to be taken into account in decisions affecting a child and may be outweighed by other countervailing considerations including the safety of the Australian community. The discretionary decision to cancel a visa under paragraph 2.43(1)(s) will allow the decision-maker to appropriately weigh the best interests of any children against the other primary considerations including the risks to the Australian community from biosecurity hazards and the circulation of particular specified goods under the Prohibited Imports Regulations. Further, there will be policy guidance to assist decision-makers to consider the best interests of the child and how to weigh this against other primary considerations. Accordingly, on the basis that the best interests of the child can be considered as a primary consideration in the exercise of the discretion to cancel a visa, the proposed amendments are consistent with Article 3(1) of the CRC.

As discussed above, the amendment to clause 4013 of Schedule 4 of the Migration Regulations will have the practical effect is that a person making another visa application who has had a previous visa cancelled under the new grounds in the last 3 years, cannot satisfy the criterion unless there are compelling reasons to justify the grant of the visa. This may engage the obligation under Article 3 of the CRC to the extent that the visa applicant is a child or the visa applicant has family members who are children who reside in Australia to whom Australia's international legal obligations apply. The inability to be granted a visa for three years would have an impact on the visa applicant's family members residing in Australia ability to have physical contact with the visa applicant.

However, under subclause 4013(1) of Schedule 4 of the Migration Regulations a decision-maker assessing the subsequent visa application has the discretion to grant the visa if satisfied, in the applicant's particular case, that:

- there are compelling circumstances that affect the interests of Australia; or
- compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen, justifying the granting of the visa within three years after the cancellation.

This discretion allows the decision-maker to consider the best interests of an affected child in determining whether to grant the visa under the exception. Thus, this amendment to the Migration Regulations is consistent with the obligation under Article 3 of the CRC.

Rights in relation to family

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 17 of the ICCPR sets out a prohibition on arbitrary and unlawful interference with the family and Article 23 sets out an obligation about the protection of the family. These obligations may be engaged by the introduction of paragraphs 2.43(1)(s) and 2.43(1)(t) to the extent that a visa holder may be detained or removed from Australia because of their visa being cancelled. In some circumstances, the detention or the removal of a person from Australia may result in the separation of family members as a direct consequence of action taken by the Commonwealth. In other circumstances, separation of family member will be a consequence of the choices made by particular visa holders.

To the extent that family members are separated as a direct consequence of action taken by the Commonwealth, it will not be an unlawful or arbitrary interference with the family or otherwise impermissibly limit Articles 17 or 23. The protection of the family unit under articles 17 and 23 does not amount to a right to enter Australia where there is no other right to do so. Further, these rights can be subject to proportionate and reasonable limitations that are aimed at legitimate objectives. In the case of these measures, these objectives include the

protection of the Australian community from biosecurity risks and the prevention of circulation of specific prohibited goods under the Prohibited Imports Regulations.

As discussed above, the introduction of the new grounds for cancellation is necessary as additional measures to deter non-citizens bringing in specific goods where existing measures alone have been ineffective or are not practical or appropriate, for example, infringement notices or criminal prosecution or civil liability. It is a reasonable and proportionate measure given its targeted nature based on objective information and given that it will be subject to a number of scrutiny and safeguarding measures.

Further, the impact of a cancellation decision on the visa holder's family members residing in Australia will be taken into account as part of the discretionary decision to cancel the visa. While rights relating to family generally weigh against cancellation, these rights do not grant an absolute right to enter Australia and so they also need to be considered in conjunction with the risk that contraventions of the Biosecurity Act and the illegal importation of objectionable goods will have on Australia's community, agriculture and biosecurity.

The amendments to paragraph 4013 of Schedule 4 of the Migration Regulations engage the rights under Articles 17 and 23 of the ICCPR to the extent that the visa applicant has family members who reside in Australia to whom Australia's international legal obligations apply. This is because it will affect the visa applicant's ability to have physical contact with their family members residing in Australia. The amendments however do not prevent family members from maintaining contact using other means, in particular those they would ordinarily use to maintain contact whilst not visiting each other.

Further, the exclusion from the grant of a subsequent visa following visa cancellation is temporary and subject to a discretion to grant the visa despite the visa applicant not meeting public interest criterion 4013 where:

- there are compelling circumstances that affect the interests of Australia; or
- compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen, justifying the granting of the visa within three years after the cancellation.

This exception allows for the consideration of these rights in the context of the individual circumstances of particular visa holders.

As such, the amendments are consistent with the rights under Articles 17 and 23 of the ICCPR.

Right to 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 amendments engage this right due to the practical application of cancelling a visa holder's visa under the new ground in sub regulation 2.43(1)(s). In practice, it will require biosecurity officers to disclose personal information collected and recorded on infringement

notices to cancellation decision-makers who are staff from the Department of Home Affairs. As such, the inclusion of new sub regulation 2.43(1)(s) in the Migration Regulations is in practice adding a further circumstance in which a visa holder's identifying information may be shared with other officers of the Commonwealth.

Sub regulation 2.43(1)(t) does not require information to be shared between biosecurity officers and staff from the Department of Home Affairs as described above as it is an Australian Border Force officer who detects the objectionable material.

Pursuant to Article 17(1) of the ICCPR, an interference with an individual's privacy must have a lawful basis. The interference with privacy will be lawful at domestic law by virtue of being subject to the requirements of Australian Privacy Principles and the *Privacy Act 1988*.

In addition to requiring a lawful basis for limitation on the right to privacy, Article 17 prohibits arbitrary interference with privacy. Interference that is lawful may nonetheless be arbitrary where that interference is not in accordance with the objectives of the ICCPR and is not reasonable in the circumstances. The United Nations Human Rights Committee has interpreted the requirement of 'reasonableness' such that any interference with privacy must be proportional to the end sought and be necessary in the circumstances.

These amendments are necessary for the reasons discussed above, that is, as additional measures to deter the bringing in of specific goods where existing measures alone have been ineffective or are not practical or appropriate, for example, infringement notices or criminal prosecution or civil liability. They are reasonable and proportionate measures given its targeted nature based on objective information and given that they will be subject scrutiny and safeguarding measures.

In relation to the sharing of identifying information in particular, information-sharing and disclosure for the purposes of visa cancellation under new paragraphs 2.43(1)(s) and 2.43(1)(t) between Commonwealth officers will be guided operationally through comprehensive procedural instructions, including referral guidelines. These will ensure that any disclosure of personal information of a visa holder is done according to law and only where necessary for the purposes of visa cancellation under paragraphs 2.43(1)(s) and 2.43(1)(t) to ensure that the privacy rights of non-citizens are protected.

Permitting the disclosure of identifying information for the purpose of identifying non-citizens who contravene the Biosecurity Act or illegal import objectionable goods is a reasonable and proportionate measure for the purpose of protecting the Australian community. Any interference with the privacy of the person, who has contravened the Biosecurity Act or illegally imports objectionable goods, in order to help identify them, would therefore not be unlawful or arbitrary. As such, the amendments are consistent with the right under Article 17 of the ICCPR.

Conclusion

The amendments are compatible with human rights as, to the extent it may limit some human rights, those limitations are reasonable, necessary and proportionate to the objective of protecting the Australian community from the risk of harm posed by biosecurity threats and the illegal import objectionable goods.

The Hon David Coleman MP, Minister for Immigration, Citizenship and Multicultural Affairs

ATTACHMENT B

Details of the Migration Amendment (Biosecurity Contraventions and Importation of Objectionable Goods) Regulations 2019

Section 1 – Name

This section provides that the title of the Regulations is the *Migration Amendment (Biosecurity Contraventions and Importation of Objectionable Goods) Regulations 2019* (the Regulations).

Section 2 – Commencement

Subsection 2(1) provides that each provision of the Regulations 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 states that the whole of the instrument commences on 17 April 2019.

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 the Regulations. Information may be inserted in this column, or information in it may be edited, in any published version of this instrument. Column 3 of the table provides the date/details of the commencement date.

The purpose of this section is to provide for when the amendments made by the Regulations commence.

Section 3 – Authority

This section provides that the Regulations are made under the *Migration Act 1958* (the Migration Act).

Section 4 – Schedules

The purpose of this section is to provide for how the amendments in these Regulations operate.

Schedule 1 – Amendments

Migration Regulations 1994

Item 1 – At the end of subregulation 2.43(1)

This item inserts new paragraphs 2.43(1)(s) and 2.43(1)(t) in Division 2.9 of Part 2 of the *Migration Regulations 1994* (the Migration Regulations). The paragraphs create new cancellation grounds for the purposes of paragraph 116(1)(g) of the Migration Act.

Cancellation of visitor visas for Biosecurity contraventions

The new ground at paragraph 2.43(1)(s) allows cancellation of certain visitor visas where:

- the holder is in Australia and has not been immigration cleared; and
- the Minister reasonably believes that the visa holder has contravened subsection 126(2), 128(2), 532(1) or 533(1) of the *Biosecurity Act 2015* (the Biosecurity Act).

The amendments would apply from commencement to the following kinds of visitor visa:

- Subclass 600 (Visitor) visa;
- Subclass 601 (Electronic Travel Authority) visa;
- Subclass 651 (eVisitor) visa;
- Subclass 676 (Tourist) visa; and
- Subclass 771 (Transit) visa.

Contraventions of the Biosecurity Act pose an unacceptable threat to Australia's agriculture industry. Recently the Department of Agriculture and Water Resources detected both African Swine Fever and Foot and Mouth Disease in meat products intercepted at airports. Studies have estimated \$50 billion of economic losses over ten years if there was a large to medium outbreak of Foot and Mouth Disease in Australia. In light of such risk, it is appropriate to strengthen the compliance tools available to deter and respond to behaviour that is in contravention of Australia's biosecurity laws. This specific measure targets visitor visa holders because of the high volume of visitors to Australia each year and because sanctions other than visa cancellation are unlikely to be effective. Other visa holders and Australian citizens who contravene the Biosecurity Act will continue to be dealt with via infringement notices, civil penalties, and criminal prosecutions.

The new visa cancellation ground is enlivened by any attempt to mislead or deceive biosecurity officers. In summary, the relevant provisions of the Biosecurity Act have the following effect:

- Subsection 126(2) – A person who is required, by a biosecurity officer, to answer questions about goods, must comply with the requirement;
- Subsection 128(2) – A person must comply with a direction by a biosecurity officer in relation to the movement of goods;
- Subsection 532(1) – A person must not knowingly give false or misleading information for the purpose of the Biosecurity Act; and
- Subsection 533(1) – A person must not knowingly produce a false or misleading document for the purpose of the Biosecurity Act.

The new visa cancellation ground gives decision-makers the discretion to cancel a visitor visa at the point of arrival in cases where there has been an attempt to deceive a biosecurity officer about the presence of prohibited items in the person's luggage or possessions. The visa decision maker must have a reasonable belief that the contravention has occurred. This is a higher standard than reasonable suspicion. The higher standard is appropriate because the visa decision-maker will be responding to an alleged contravention that has occurred immediately before the referral for possible visa cancellation. The referral will usually be supported by an infringement notice issued by a biosecurity officer under the Biosecurity Act alleging a contravention of one of the four provisions. To issue an infringement notice, the biosecurity officer must have reasonable grounds for believing that the offence has occurred.

In the context of an airport luggage inspection, the facts will usually be clear and uncontested.

In making a decision whether to cancel the visitor visa, the visa decision-maker will provide procedural fairness to the visa holder and will weigh up a number of factors, including the seriousness of the breach, the potential threat posed by the prohibited items, the personal circumstances of the visa holder, and the consequences of visa cancellation for that person and others who may be affected.

In accordance with the merits review entitlements under the Migration Act, there is no provision for merits review by the Administrative Appeals Tribunal (AAT) if the visa is cancelled in immigration clearance. This is because the purpose of visa cancellation in immigration clearance is to provide for the immediate removal of the person from Australia.

Cancellation of temporary visas for importation of objectionable goods

The new ground at paragraph 2.43(1)(t) allows cancellation of temporary visas where the Minister reasonably believes that the visa holder has, without permission, imported goods to which regulation 4A of the *Customs (Prohibited Imports) Regulations 1956* applies.

Regulation 4A contains a broad definition of an objectionable good including publications or other goods that: describe, depict, express or deal with matters of sex, drug misuse or addiction, crime, cruelty, violence or revolting or abhorrent phenomena in such a way that they offend against the standards of morality, decency and propriety generally accepted by reasonable adults; contain child exploitation material; promote or incite crime, violence, or the misuse of a drug specified in Schedule 4; or advocate a terrorist activity.

Although other visa cancellation grounds (e.g. section 501 of the Migration Act – person not of good character), are available in some cases where objectionable goods are found in a passenger's luggage, a specific cancellation ground will strengthen the cancellation framework, assist visa decision-makers dealing with these cases, and provide an additional deterrent to the importation of such material.

The cancellation ground is limited to temporary visa holders as it is considered that the appropriate response to permanent residents who import such goods is criminal prosecution in the first instance.

The cancellation ground is not limited to cancellation during the immigration clearance process. This is because, in some cases, a full assessment of the case may require more time than is available during the immigration clearance process. The timing of visa cancellation may also be affected by any ongoing criminal investigation.

As noted above, in accordance with the merits review entitlements under the Migration Act, there is no provision for merits review by the AAT if the visa is cancelled in immigration clearance. AAT review is available in cases where the person has been immigration cleared and is in Australia.

Item 2 – Paragraph 4013(2)(d) of Schedule 4

This item amends public interest criterion 4013, which provides for a temporary exclusion period for visa applicants who are affected by one or more of the risk factors mentioned in

that section, including in relation to previous visa cancellations. The item adds cancellation under new paragraphs 2.43(1)(s) and 2.43(1)(t) as a 'risk factor' for the purposes of public interest criterion 4013.

The effect of this amendment is that if a person's visa is cancelled under paragraph 2.43(1)(s) or paragraph 2.43(1)(t), they **cannot be granted a visa within 3 years**, unless the Minister is satisfied that there are compelling circumstances that affect the interests of Australia, or compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen, that justify the granting of the visa within 3 years.