

# **Monitor 3 of 2023 – Ministerial Response**

## **Contents**

Migration Amendment (Biosecurity Contravention) Regulations 2023.....	1
---	---



**THE HON ANDREW GILES MP**  
MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS

Ref No: MC24-005576

Ms Hannah Dibley  
Committee Secretary  
Parliament House  
CANBERRA ACT 2600

Dear Ms Dibley

Thank you for your correspondence of 29 February 2024, to the Minister for Home Affairs and Minister for Cyber Security, the Hon Clare O'Neil MP, concerning the *Migration Amendment (Biosecurity Contravention) Regulations 2023* (the Instrument). Your correspondence has been referred to me as the matter falls within my portfolio responsibilities.

**Further background to the Instrument**

Since 2019, the migration legislative framework has enabled visa cancellation for contraventions of the *Biosecurity Act 2015* (Biosecurity Act) to strengthen compliance tools available to deter and respond to behaviour that is in contravention of Australia's biosecurity laws. The *Migration Regulations 1994* (Migration Regulations) provide for visa cancellation for a number of contraventions under the Biosecurity Act, including where a person:

- fails to answer questions about goods (subsection 126(2));
- fails to comply with a direction in relation to the movement of goods (subsection 128(2)); or
- provides false or misleading information or documents (subsections 532(1) or 533(1)) (including failing to declare goods that pose an unacceptable biosecurity risk when entering Australia).

The Biosecurity Act was amended in December 2022 by the *Biosecurity Amendment (Strengthening Biosecurity) Act 2022* to include a new civil penalty provision at section 186A. It provides that a person is liable to a civil penalty if:

- they bring or import conditionally non-prohibited goods into Australian territory without complying with the conditions that apply to such goods; and
- the goods are concealed for the purpose of preventing the goods from being found, or preventing the true nature of the goods from being determined, by a biosecurity official.

Conditionally non-prohibited goods are goods that pose an unacceptable risk to Australia's biosecurity if imported into Australian territory. This includes goods such as live animals and animal reproductive material, live plants, animal material and goods made of or containing animal material, plant products and goods containing or made of plants, infectious agents and microorganisms, and fungi and goods containing or made of fungi.

These amendments were introduced to capture behaviours that represent a serious contravention of the Biosecurity Act that could lead to biosecurity risks not being able to be appropriately managed, potentially causing devastating effects on Australia's environment, economy, or plant, animal or human health. The comparative seriousness of contravening section 186A of the Biosecurity Act is reflected in the high penalty that is payable for a civil penalty (1,200 penalty units, which is currently equal to \$375,600).

These amendments additionally expand the grounds for discretionary visa cancellation to include circumstances where a specified visa holder is reasonably believed to have contravened subsection 186A(1) of the Biosecurity Act, notably by **deliberately concealing** conditionally non-prohibited goods in order to bring or import them into Australian territory. It is important to ensure that the consequences under the Migration Regulations for this more serious flouting of biosecurity laws are not more lenient than those for lesser breaches (such as failing to declare goods), which already enliven a cancellation power.

Providing for the contravention of section 186A of the Biosecurity Act as an available ground for visa cancellation is an important means of strengthening the compliance tools available to deter and respond to the behaviour of persons purposefully concealing goods that pose an unacceptable biosecurity risk thereby protecting Australia's environment, economy, or plant, animal or human health. The amendments also appropriately ensure that contraventions involving concealment behaviours have the same potential migration consequences as similar contraventions of the Biosecurity Act that do not involve concealment.

### **Consultation**

The Committee has requested my advice as to:

- whether public consultation can now be undertaken with members of the public, peak bodies and industry stakeholders likely to be affected by this Instrument, noting that such consultation should in the ordinary course take place prior to the making of an instrument; and
- whether following this consultation I will consider if it is appropriate for this additional ground for visa cancellation to remain in force, or if further amendments are required to the Migration Regulations to address the feedback provided through the consultation process.

The Committee further states that:

- noting the various stakeholders likely to be impacted by the instrument, the committee requests the Minister's advice as to what is the expected impact of the instrument on each class of visa mentioned in paragraph 2.43(1)(s) of the Migration Regulations, taking into account an assessment of the biosecurity risk and risk profile of international travellers under each visa class.

### ***Response:***

As indicated in the Explanatory Statement, broader public consultation was not considered necessary or appropriate because the amendments do not substantially alter the operation of the existing legislation.

I appreciate the Committee's consideration of my earlier response and their suggestions to undertake consultation now. While I agree on the importance of a consultative approach to policy making, in this instance broader public consultation is not feasible or appropriate for the following reasons:

1. Temporary visa holders are not an easily identifiable group and, with the exception of students, are not represented by a peak body. As such, it would be impractical to consult with the range of temporary visa holders covered by regulation 2.43(1)(s). The absence of any representative bodies means that there would be no way of knowing whether a consultation process conducted through a departmental website reached the target audience without expending significant resources and using personal information that was collected for purposes unrelated to consultation processes. On the other hand, the main industry group affected by the amendments are primary producers, who are protected by Australia's robust biosecurity laws and this measure. Consultation was not required with this group because they are clear beneficiaries of the protection provided by this measure.
2. It is not possible to target consultations at a specific sub-group of temporary visa holder, because the measure will only impact those who deliberately flout Australia's biosecurity laws. Since the biosecurity-related cancellation provisions were introduced into the Migration Regulations in 2019, **fewer than 30 visa holders have had visas cancelled**. The inclusion of contraventions of section 186A of the Biosecurity Act through this Instrument is not expected to increase the total number of likely visa cancellations; rather it will ensure that those temporary visa holders who commit this more serious offence face the same migration consequences as those who commit the lesser offences. For this reason, it is not possible to identify which sub-groups might be more or less affected by the amendments made by this Instrument.
3. It is unclear how the Australian Government would progress a process of seeking the views of potential offenders who may commit the more serious contravention of concealing goods about the consequences of their offending, including how it would identify potential offenders.

The Government takes very seriously our commitment to ensuring that Australia's biosecurity laws provide the appropriate level of protection and this measure has a role in fulfilling that commitment. While I am committed to genuine and informed consultation, I do not think consultation is practical or necessary in this instance.

#### **Availability of independent merits review**

The Committee has also requested further justification as to why it is not considered appropriate to provide for independent merits review in relation to this cancellation decision with reference to the Administrative Review Council's guidance document, *What decisions should be subject to merits review?*

**Response:**

As set out in the further background (above), the Instrument amends the Migration Regulations to enliven a power to cancel certain temporary visas where the visa holder has been found to have breached section 186A of the Biosecurity Act, namely by **concealing** goods that pose a risk to Australia's biosecurity to **prevent them from being found** by quarantine officers.

As per the above, the amendment ensures this more serious contravention of Australia's biosecurity laws attracts the same migration consequence as those less serious contraventions that were already covered by regulation 2.43(1)(s) before this Instrument was made.

This includes the discretion to cancel the visa while in immigration clearance at the relevant port. This possible administrative action reflects that the Government takes seriously the need to protect the Australian community from the risk of harm by those who purposefully breach Australia's biosecurity laws.

It is important to note, however, that while this Instrument amends the Migration Regulations to enliven the power at section 116(1)(g) of the Migration Act to cancel certain temporary visas, a decision to cancel a visa is made only after consideration of the full circumstances of the case and after affording natural justice to the visa holder.

The visa holder is provided with a written 'Notice of Intention to Consider Cancellation' Form (Form 1111), which explains the grounds and reasons for considering cancellation. Form 1111 provides the person with relevant information about the potential cancellation of their visa, including that the delegate will, in considering the visa cancellation, take into account matters such as:

- the purpose of their travel to or stay in Australia;
- compliance with any visa conditions;
- the degree of hardship that may be caused to the visa holder and any family members if the visa is cancelled;
- the circumstances in which the ground for cancellation arose, for instance, any extenuating circumstances;
- the visa holders past and present behaviour towards the Department;
- any consequential cancellation of dependants;
- Australia's international obligations;
- any other relevant factors.

The visa holder is given the opportunity to provide reasons as to why their visa should not be cancelled. Careful consideration is given to the circumstances in accordance with guidelines before any cancellation occurs.

It has been a long-held view by successive Australian governments that non-citizens who are subject to adverse visa decisions in immigration clearance are not provided with access to merits review. This is because certainty of visa status is essential when managing non-citizens at the border. However, this does not mean that a non-citizen does not have any review rights – a non-citizen may seek judicial review of the decision before the Courts.

This is why the Migration Act expressly precludes a decision to cancel a visa to a person who is in immigration clearance from being merits reviewable.

Paragraph 338(3)(b) provides:

“(3) A decision to cancel a visa held by a non-citizen who is in the migration zone at the time of the cancellation is a Part 5-reviewable decision unless the decision:  
(b) is made at a time when the non-citizen was in immigration clearance”

Given merits review is limited by the Migration Act, it is not open for the delegated legislation to provide otherwise.

As noted above, this instrument only adds to an existing scheme to ensure the same consequences follow for the breach of a more serious offence, involving the deliberate concealment of goods, as already applies for less serious breaches of the Biosecurity Act.

I thank the Committee for its interest in this matter.

Yours sincerely

A large black rectangular redaction box covering the signature area.

ANDREW GILES

15 / 3 / 2024