



This is a revised edition of a Bills Digest (Nos. 16–18, 2004–05) previously prepared for the 40th Parliament

Australian Passports (Transitionals and Consequential) Bill 2004

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Australian Passports Bill 2004, Australian Passports (Application Fees) Bill 2004 and Australian Passports (Transitionals and Consequentials) Bill 2004

Date Introduced: 2 December 2004

House: House of Representatives

Portfolio: Foreign Affairs

Commencement: The formal provisions of the three Acts commence on Royal Assent; the substantive provisions commence on a day to be fixed by Proclamation or nine months after Royal Assent (whichever occurs first).

Purpose

Currently the *Passports Act 1938* ('the Passports Act') deals with the issue and cancellation of Australian passports. It also deals with offences relating to foreign passports and identity documents (such as improper use or possession, and falsification of those documents).

The Australian Passports Bill 2004 ('the Australian Passports Bill'), the Australian Passports (Application Fees) Bill 2004 ('the Fees Bill'), and the Australian Passports (Transitionals and Consequentials) Bill 2004 ('the Transitionals and Consequentials Bill'), together with the *Anti-terrorism Act (No. 3) 2004* (which received Royal Assent on 16 August 2004), are designed to split the Passports Act into two parts: Australian passports and foreign passports.

The **Australian Passports Bill** sets out the regime for the issue and administration of Australian passports. It is designed to combat identity fraud and the possible misuse of passports, particularly by creating new offences, widening the scope of old offences, and significantly increasing penalties for those offences.¹

The **Fees Bill** provides for the Minister for Foreign Affairs ('the Minister') to make a determination in relation to application fees. It also provides a formula for indexing the fees.

The **Transitionals and Consequentials Bill** removes reference to Australian passports from the Passports Act and renames that Act as the Foreign Passports (Law Enforcement and Security) Act 2004 ('the Foreign Passports Act'). It operates in concert with the *Anti-terrorism Act (No. 3) 2004*, which inserts new substantive provisions into the Passports Act (that is, the Foreign Passports Act when renamed). Particularly, Schedule 1 to the Anti-terrorism Bill (No. 2) 2004 (which was excised from that Bill and inserted as Schedule 1 to the *Anti-terrorism Act (No. 3) 2004*) amends the Passports Act to empower a 'competent authority' such as an Australian law enforcement agency to demand,

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confiscate and seize foreign passports. It also creates offences for foreign travel documents.² A detailed discussion of the proposed provisions relating to foreign passports can be found in the [Bills Digest](#) for the Anti-terrorism Bill (No. 2) 2004.³

Background

The three Bills are part of the Government's stance on national security and law enforcement, particularly the need to prevent identity fraud. They were originally introduced in the 40th Parliament but lapsed when Parliament was prorogued. The current Bills are substantially the same as the earlier Bills, but some minor amendments have been made to allay concerns on the part of the Opposition in relation to privacy (see, for example, **the note to subclause 47(1)** and **new subclause 47(3)**). Also, references to ministerial determinations being disallowable instruments for the purposes of section 46A of the *Acts Interpretation Act 1901* have been replaced with references to them being legislative instruments for the purposes of the *Legislative Instruments Act 2003* (see **new subclause 52(3)** and **clause 57**).

Some recent facts related to passports, and which seem to provide a reason for the measures contained in the Bills, include:

- in 2003, the Department of Foreign Affairs and Trade ('DFAT') issued almost one million passports
- 4000 of those passports (or less than half a per cent) contained mistakes, including wrong photographs, names, sex and dates of birth
- Australians lost 30 000 passports in 2003, and
- the United States of America ('the US') is requiring international visitors to carry machine-readable passports containing biometric information.⁴

Specifically, according to Mr Bob Nash, Assistant Secretary, Passports Branch, DFAT, 23 289 passports were lost in 2002-03 and 9190 passports were stolen. A report by the Auditor-General in 2003 also revealed that 2079 passports disappeared after being posted to applicants by DFAT. Mr Nash said that the number of passports lost in the mail has been reduced by 85 per cent following a decision to send passports only by registered mail.⁵

Further, in December 2003, DFAT introduced a 'floating kangaroo' laminated image (known as 'Skippy') to Australian passports, presumably in an attempt to combat identity fraud and to deter the fabrication of Australian passports.⁶ According to the Minister, identity fraud costs Australia \$1.1 billion a year.⁷ DFAT received \$2.2 million in the 2004-05 federal budget to test a prototype biometric passport; it has already received \$6.6 million in research funding.⁸ The Australian Customs Service also received an extra \$3.1 million in the 2004-05 federal budget to help complete its facial-recognition passport system known as Smartgate.⁹

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According to an editorial in the *Herald Sun* (Melbourne) newspaper on 6 April 2004:

Terrorists use doctored passports to move around the world. Some have deliberately reported their passports lost to get a replacement that does not reveal details of their earlier travels. Opportunist members of the public falsely report their passports stolen then sell them for up to \$10,000—a heaven-sent source of a false identity for a terrorist.¹⁰

Such comments may cause concern, particularly when coupled with a statement in an article in the *Sunday Age* newspaper on 6 June 2004 to the effect that the passport crackdown:

... comes as the Government is investigating how Saleh Jamal, who was arrested last weekend in Lebanon on terrorist charges, was able to leave Australia despite being on bail over a shooting at a Sydney police station. It is believed Jamal fled Australia using a genuine passport belonging to someone else.¹¹

DFAT acknowledges that there is a growing problem of ‘impostors’ using legitimate passports. Mr Nash said: ‘It happens when somebody who happens to look a bit like the bearer, simply assumes that identity. They don’t do anything to the document and this is happening in increasing numbers’. DFAT is hopeful that the use of facial recognition technology will overcome the problem.¹²

The Australian Passports Bill is designed to address such issues. For example, **clause 15** provides that the Minister may refuse to issue an Australian passport to a person who has lost (or had stolen from him or her) two or more passports in the five years before the passport application under consideration. **Subclause 20(2)** provides that the Minister may, by a determination, specify the time at which an Australian passport ceases to be valid. Presumably the Minister could use this power to specify a short validity period for a passport issued to a person who has lost two or more passports. Further, and most importantly, **clause 47** provides that the Minister may determine particular methods and technologies that are to be used for the purposes of ‘confirming the validity of evidence of the identity’ of an Australian passport applicant or holder.

ALP/Australian Democrat/Green policy position/commitments

In debate on 4 August 2004 during the 40th Parliament, both Mr Kevin Rudd MP, Shadow Minister for Foreign Affairs and International Security, and Mr Stephen Smith MP, then Shadow Minister for Immigration, supported the Bills (subject to some reservations).¹³ Earlier, on 5 April 2004, Mr Rudd said that he thought facial recognition technology had bipartisan support. He went on to question what border security measures Australia should have in place in relation to passports, saying:

... what should we be doing here? Well, Mr Downer has been developing biometric passports here in Australia—tick for him, tick for the government, I think that’s the right thing to go. But what I have to say, what I’m unclear on, Joe [Mr Joe Hockey,

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then Minister for Small Business and Tourism], is will we in Australia now be requiring all incomings from around the world to use biometric passports and do like the Americans in the meantime, which is to conduct these photographic and fingerprint tests for people coming in to check them against international terrorism or crime databases?¹⁴

Neither the Australian Democrats nor the Greens has commented on the Bills directly—although on 29 November 2004, Senator Stott-Despoja mentioned the Australian Passports Bill during debate on the Telecommunications (Interception) Amendment (Stored Communications) Bill 2004 in the context of identity technologies and privacy concerns.¹⁵

Main Provisions: Australian Passports Bill

As mentioned, the Australian Passports Bill replicates provisions in the Passports Act applicable to Australian passports and other travel documents. It is a more organised, less convoluted piece of legislation than the present Act. For example, it clarifies and simplifies the language used in the Passports Act.

However, the Australian Passports Bill makes four substantive changes to the present law:

- it allows the Minister to adopt particular methods or technologies for purposes such as identification
- it changes the grounds and processes for the refusal and/or cancellation of Australian passports
- it adds new offences and substantially increases penalties for offences, and
- it contains new measures concerning the use of information and privacy.

It may be convenient to deal now with these issues in turn.

Particular methods or technologies for identification

As mentioned in the Background section to this Digest, **clause 47** provides that the Minister may determine particular methods and technologies that are to be used to confirm ‘the validity of evidence of the identity’ of an applicant for an Australian travel document or the holder of such document or for performing other functions connected with the Bill.

The Minister has said that the Australian Passports Bill ‘provides for the introduction of facial biometric technology as an effective means of verifying identity’.¹⁶ While the use of such technology may lie behind the inclusion of clause 47, biometric technology (howsoever described) is not mentioned at all in the Bill. The Explanatory Memorandum suggests that the phrase ‘methods (and technologies)’ in clause 47 could include ‘facial biometrics’ (being measurements of a person’s face that can allow a computer to verify the identity of a person). However, given the breadth of the language used in clause 47 (or rather, the lack of any specificity as to what method or technology might be used), the

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phrase could also include fingerprinting or the use of genetic information (such as DNA testing and comparison).

In terms of biometrics (which includes facial recognition, fingerprinting and iris scanning), 'the validity of evidence of the identity' of a person could be confirmed by two means: Machine Readable Travel Documents (MRTDs) and a database of biometric details.¹⁷

Machine Readable Travel Documents

This method uses a MRTD in which a data-chip is embedded. A computer can then access biometric data from the chip, matching the data with the biometrics of the person purporting to be the passport-holder. In some ways, this is an automated version of the current system of identity confirmation whereby a Customs or Immigration (or like) officer manually matches a traveller with his or her photographic identification. This method does not rely on a database of passport-holders' biometric details. Biometric details are stored in the data-chip; the traveller is photographed by a camera at a Customs or Immigration or like entry or exit point; and the machine 'reading' the travel document compares the traveller's facial characteristics shown in the photograph with the information stored on the data-chip in order to verify the person's identity.

In May 2003, the International Civil Aviation Organization (known as ICAO) adopted a 'global, harmonized blueprint for the integration of biometric identification into passports' and other MRTDs, saying:

The increased use of biometric-enhanced MRTDs will lead to speedier passage of travellers through airport controls, heightened aviation security and added protection against identity theft.¹⁸

ICAO's blueprint relies on facial recognition as the 'globally interoperable biometric for machine-assisted identity confirmation with MRTDs'. According to a press release issued by ICAO in May 2003, in an analysis of various available biometrics, 'the face rated highest in terms of compatibility with key operational considerations, followed by fingers and eyes'.¹⁹ By February 2004, ICAO had adopted facial recognition as the global standard for biometric identifiers in passports. Originally, the US required travellers from Visa Waiver Program (VWP) countries to hold MRTDs with embedded biometric identifiers that complied with the ICAO standard if they wished to enter the US after 26 October 2004.²⁰ That deadline has now been extended to 26 October 2005.²¹

DFAT has announced that it is looking at this method and has produced a prototype MRTD 'that stores an electronic image of a person on a passport-inserted computer chip that would be matched with a photograph taken of the traveller at customs checkpoints'. DFAT is seeking tenders for the technical aspects of the MRTD.²² As mentioned earlier, the Australian Customs Service has also been trialling a facial recognition model known as Smartgate at Sydney International Airport. The trial is currently limited to the verification of the identity of Qantas aircrew who have volunteered to participate in the trial.²³ The

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Government now plans to ‘extend the automated system to holders of prototype Australian biometric passports, selected passengers [such as frequent flyers] and enrolled aircrew at two international airports’.²⁴

A database of biometric details

Under this method, authorised persons could access the database via network-connected computers at Australian ports, both when passengers enter and leave Australia. The database does not require a MRTD—the authorised person simply accesses the biometric data on demand from the central database. This is the model the US intends to use in its US-VISIT scheme, whereby the US will use biometrics to verify the identity of visitors from non-VWP states and visitors from VWP states that have not yet developed a biometric MRTD. After 30 September 2004, it will apply to visitors from VWP states too:

US-VISIT requires that most foreign visitors traveling to the U.S. on a visa have their two index fingers scanned and a digital photograph (PDF) taken to verify their identity at the port of entry. Visas are required for most students, business travelers (depending on their length of stay) and millions of other visitors, regardless of where they live. Currently, US-VISIT will not enroll visitors seeking admission under the Visa Waiver Program. However, by September 30, 2004, US-VISIT procedures will be expanded to include visitors traveling under the Visa Waiver Program arriving at air and sea ports of entry. It does not apply to U.S. citizens.²⁵

According to the US Department of Homeland Security (which administers the US-VISIT program), the US is using biometrics ‘to expedite processing at our borders’. When a person applies for a visa to travel to the US, his or her biometrics are ‘collected and checked against a database of known criminals and suspected terrorists’. On arrival in the US:

... biographic and biometric data are used to verify [the visitor’s] identity against the data captured by the State Department at the time the visa was issued to ensure that [the visitor is] the same person who received the visa. In addition, [a] digital picture [of the visitor] that was taken at the visa-issuing point is displayed to the [Customs and Border Protection Officer] for visual comparison and confirmation;²⁶

Comment

The language of the Bill may be broad enough to allow either of these two methods to be used. Indeed, the language is sufficiently broad to permit other methods to be used too—either alone or in concert. If the Minister chooses to use a database-based method, a database of biometric information for every holder of an Australian passport or travel document will need to be created. Except for **new subclause 47(3)** (which provides that a determination that relates to the use of personal information must specify the nature of the personal information and the purposes for which it may be used), the Australian Passports Bill provides no rules governing how such information is to be collected, stored, protected or used. However, the Minister could determine such rules under **subclause 47(2)**. The

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Privacy Act 1988 ('the Privacy Act') would also impose limitations on the collection, use and disclosure of personal information. **Clause 47** would give the Minister a very broad power to make rules for the collection of information, including the adoption of biometric technology. Parliament would have little role in developing particular technological standards or privacy safeguards applicable to those standards. However, any ministerial determination would be a 'legislative instrument' (under **new clause 57**) and subject to parliamentary scrutiny.

In the absence of any particular legislative provision (or ministerial determination) dealing with the use or management of information collected under the proposed Australian Passports Act, the information would be governed by the Information Privacy Principles (IPPs) set out in the Privacy Act.²⁷ (This accords with the **note to subclause 47(1)** in the revised Australian Passports Bill which provides that any personal information collected as part of using a method specified in a determination 'must be dealt with in accordance with section 14 of the *Privacy Act 1988* (including Information Privacy Principles 1 and 4).') The IPPs place limits on the collection, storage, use and disclosure of information collected by the Government. Particularly, IPP 11 provides that information can only be disclosed where 'reasonably necessary for the enforcement of the criminal law or of a law imposing a pecuniary penalty, or for the protection of the public revenue', regardless of the purpose for which the information was collected.

Clause 46 is in similar but more specific terms, enumerating the circumstances where the Minister may disclose personal information for law enforcement, family law or other Commonwealth law purposes. (The previous Australian Passports Bill also mentioned 'national security' but that reference has been removed in the revised Bill.) Accordingly, a database of passport-holders' biometric information (including fingerprints) could become a *de facto* national biometric database for use by the Government in a broad range of circumstances.

On one view, it may be appropriate for the legislation to refer to a specific identification method or technology in order to maintain the integrity of the passport/travel document system. Alternatively, the legislation could specify what types of biometrics can be used and the purposes for which any personal information can be used. Specific limitations on the use of such technology could be provided in the legislation. However, given the pace at which new technologies are developed, it may not in fact be appropriate for the legislation to name any particular technologies or methods—although it may be appropriate for the legislation to specify that an independent person or body (such as the Privacy Commissioner or the Australian National Audit Office) is responsible for ensuring that information is collected, used and disclosed in an appropriate manner.

Recently, the Migration Legislation Amendment (Identification and Authentication) Bill 2003 raised similar privacy issues. That Bill was considered by the Senate Legal and Constitutional Legislation Committee. The [report](#) of that Committee canvasses some of the privacy issues associated with the use of biometric information. Importantly, the Committee recommended that one identification method only should form the framework

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for the legislative regime, although that recommendation is not reflected in the *Migration Legislation Amendment (Identification and Authentication) Act 2004*.

Changes to the grounds and processes for refusal or cancellation of travel documents

Entitlement to a passport

Currently, the Minister (or an authorised officer) may issue a passport to Australian citizens. The Minister must not refuse to issue a passport unless a ground for refusal applies. The situation is unchanged under the Australian Passports Bill, although the language of the Bill emphasises the entitlement of Australian citizens to hold a passport unless a ground for refusal applies.

Grounds for refusal

There are two key features of the changes:

- the grounds for refusal of a passport have been expanded to include international law enforcement co-operation and where there are grounds to believe the person is likely to engage in conduct that would constitute a specified Commonwealth indictable offence, and
- there are clearer lines of decision-making, including some fetters on the use of the Minister's discretion. For example, the Minister may now require advice from a specified 'competent authority' before taking action to refuse a passport.

The following table sets out a comparison of the grounds for the Minister to refuse to issue a passport in the current Act and the Australian Passports Bill:

Ground	<i>Passports Act 1938</i>	Australian Passports Bill 2004
No proof of citizenship or identity	No equivalent provision	Minister must not issue a passport unless satisfied of the identity of the applicant and that the applicant is an Australian citizen (clause 8)
Minors	Without consent of each parent or guardian or a court order, except in special circumstances at the discretion of the Minister (section 7A).	Similar to Passports Act, although the Minister would be able to refuse to exercise his/her discretion to issue the passport because the matter should be dealt with by a court (clause 11)

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Ground	<i>Passports Act 1938</i>	Australian Passports Bill 2004
Law enforcement	Persons under warrant for arrest or persons required to remain in Australia under a court order or parole or bail condition etc (section 7A)	Minister <i>must not</i> issue a passport if he or she receives a request from a ‘competent authority’ to the effect that the applicant is believed on reasonable grounds to be the subject of an arrest warrant, or required to remain in Australia under a court order, parole or bail condition (or like condition) or under an Australian law (clause 12)
International law enforcement co-operation	No equivalent provision	Minister <i>may refuse</i> to issue a passport if he or she receives a request from a ‘competent authority’ to the effect that the applicant is believed to be the subject of an arrest warrant (etc) in respect of a <i>serious foreign offence</i> in a foreign country (clause 13)
Persons who owe money to the Commonwealth	Officers may not, unless directed by the Minister or in special circumstances, grant passports to persons who owe money to the Commonwealth in respect of debts involving loans from the Commonwealth while abroad (section 7C)	Similar to Passports Act, although Minister may only intervene to grant a passport where satisfied that debtor’s welfare would be adversely affected if unable to travel overseas or if debtor urgently needs to travel overseas because of family crisis (clause 16)
Concurrently valid passports	Passports cannot be issued where a valid passport for the person remains in force, unless directed by the Minister or there are special reasons to do so (section 7D)	Similar to Passports Act, although no provision for Minister to intervene, except according to circumstances specified in a Minister’s determination (clause 17)

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Ground	<i>Passports Act 1938</i>	Australian Passports Bill 2004
Potential for harmful conduct	Minister may prevent passport being issued to a person where he or she has formed the opinion that, if issued a passport, the person would be likely to engage in conduct that might prejudice national security, endanger the health or physical safety of other persons, or interfere with rights and freedoms of other persons (section 7E)	Similar to Passports Act, but a passport may also be refused where a person is likely to engage in conduct that might constitute an indictable offence against the Bill or another Commonwealth law specified in Minister's determination. Also a 'competent authority' must request refusal before the Minister may refuse a passport (although the Minister may define competent authorities by a determination, so retains control of the process) (clause 14)
Repeated loss or theft	No equivalent	Minister may refuse a passport to a person who has lost, or had stolen, 2 or more passports within 5 years (clause 15) .

Compiled by Jacob Varghese, Law and Bills Digest Section, 27 July 2004.

Cancellation of passports

Under the current Act, the Minister may cancel a passport if he or she becomes aware of circumstances which, had they existed immediately before the passport was issued, may have or would have prevented the issue of the passport (being also the grounds for refusing a passport set out in sections 7A-7B of the Passports Act). That is, a passport may be cancelled if the person was an unmarried minor without the necessary consents to obtaining a passport; if the person is subject to an arrest warrant or court order or other similar circumstance; if the person owes money to the Commonwealth; and if the person already holds a valid passport. The Minister may also cancel a passport where he or she forms the opinion that the person, if granted a passport, would be likely to engage in conduct of the type listed in section 7E of the Passports Act (such as conduct prejudicial to national security or which may endanger the health or physical safety of other persons).

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Further, the Minister retains a general power to cancel a passport for any other reason, although this is subject to review by the Administrative Appeals Tribunal ('the AAT').

The Australian Passports Bill expands this list of grounds for cancellation to include:

- the death of the passport-holder (**proposed paragraph 22(2)(c)**)
- a request for cancellation by a competent authority (**subclauses 12(1), 13(1), 14(1) or 16(1)**), and
- the existence of circumstances specified in a ministerial determination.

The Minister may also make a determination outlining the time and circumstances in which passports cease to be valid. This power could allow the making of additional rules for cancellation. The Minister also retains a general discretion to cancel travel documents (**subclause 22(1)**).

Review (appeals)

The Australian Passports Bill provides that the Minister can review certain decisions made by his or her delegate. The types of decisions reviewable by the Minister are set out in **clause 48**. They include a decision to issue an Australian travel document (including a passport, but excluding a child's passport); a decision to refuse to issue an Australian travel document; a decision to cancel an Australian travel document; and a decision to waive or refund an application fee payable under the proposed Australian Passports (Application Fees) Act 2004.

The AAT may review decisions made by the Minister: **clause 50** (formerly **clause 51**). Where the decision involves a decision in relation to a refusal or cancellation request from a competent authority under subsection 13(1) or 14(1) (either by a delegate or by the Minister at first instance or on review), the Minister may certify that the decision 'involved matters of international relations or criminal intelligence': **subclause 50(2)**. If the Minister has given such a certificate, the AAT may only affirm the Minister's decision or remit the decision to the Minister for reconsideration 'in accordance with any directions or recommendations of the Tribunal': **subclause 50(3)**.

Offences and penalties

Proposed Part 4 contains offences. Many of these offences are substantively similar to those under the Passports Act, although worded to comply with modern criminal law drafting practices. The effect of the redrafting may sometimes broaden the scope of the offence (for example, the current offence of providing false and misleading statements in relation to an application is extended to cover false and misleading statements, information and documents). In other cases, there are subtle changes to the mental element required for an offence (for example, intentionally destroying a passport becomes intentionally engaging in conduct reckless as to whether the document might be destroyed by that conduct).

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However, there are some notable substantive changes in the Bill:

- offences will apply with *extended geographical jurisdiction* (that is, a person may be liable for prosecution for an offence against the Bill regardless of whether or not the conduct constituting the alleged offence occurs in Australia and whether or not a result of the conduct constituting the alleged offence occurs in Australia' (**clause 28**, applying section 15.4 of the *Criminal Code Act 1995*)
- penalties have been significantly increased from a maximum fine of \$5000 and/or a maximum of two years' imprisonment to a maximum fine of \$110,000 and/or a maximum of 10 years' imprisonment (**clauses 29–40**), and
- some new crimes have been created including:
 - selling an Australian travel document (**clause 33**)
 - obtaining an Australian travel document through dishonesty or theft (**clause 35**)
 - bringing, taking or sending across international borders a false travel document or a document issued to someone else (**clause 37**),²⁸ and
 - abuse of public office (involving the dishonest use of powers under the Bill for personal benefit or to the benefit or detriment of another person) (**clause 40**).

It should be noted that in many cases conduct that would become an offence under these provisions could already amount to criminal conduct under existing offences. That said, the main effects of these new provisions would be to (a) make prosecutions simpler where evidence is difficult to obtain for existing offences, particularly where ancillary offences (aiding, conspiracy, attempt) are involved and (b) spell out offences with greater clarity. However, the stark increase in penalties may be cause for concern.

Privacy

Clauses 42 to 46 provide rules allowing the Minister to obtain, use and disclose personal information for various purposes. The Minister may determine the specific methods for the disclosure and use of information. The rules provide more specific circumstances for the collection, use and disclosure of information than those contained in the Privacy Act.

The Minister would be allowed to request and receive personal information for the purpose of performing functions under this Bill from any person specified in a Minister's determination in relation to an applicant for a travel document, a person connected with an application (for example, a witness to an application) or a person who holds a travel document.

The Minister would be allowed to disclose personal information to any person specified in a Minister's determination for the purposes outlined in **clause 46**, including verifying information provided by an applicant, facilitating international travel by the applicant; law enforcement; and the operation of family law. These broad purposes are extended further

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by the inclusion of **paragraph 46(e)** which refers to ‘the purposes of a law of the Commonwealth specified in a Minister’s determination’.

These provisions could make the passports system a process by which the Commonwealth could obtain and centralise a large amount of personal information about Australian passport-holders which could be put to a very broad range of uses with minimal parliamentary scrutiny.

According to a media release issued by the Minister on 17 February 2004 (four months before the Australian Passports Bill was originally introduced), a Passports Legislation Consultation Group had been established. The intention was to form a consultation group drawn from ‘privacy, human rights, consumer and citizenship groups and from travel, financial and biometrics industries with ex officio participation by Australia’s Privacy Commissioner’.²⁹ The consultation group is not mentioned in the Second reading speeches or the Explanatory Memorandum for the Bills, and it is not clear what role the group played in the drafting of the legislation. Indeed, some stakeholders were less than impressed by the level of consultation. For example, the Australian Privacy Foundation, which proclaims itself to be ‘the primary association dedicated to protecting the privacy rights of Australians’, was concerned that the consultation was ‘not as effective as it should be’.³⁰ In submissions made to DFAT, it complained about not being provided with materials, the insufficiency of the information that DFAT did provide and the time frame for consultation. In fact, the Privacy Foundation went so far as to suggest to DFAT:

Because of the lack of information and the lack of any chance of discussion affecting the proposal, your process could not and did not meet [DFAT’s] professed objective of ‘providing Ministers with confidence that all issues have been identified through the legislative process’.³¹

On 24 February 2004, the Australian Privacy Foundation warned that passports containing biometric identifiers could develop into ‘a de-facto Australia card’.³² Similarly, Australian Consumers’ Association IT policy adviser, Charles Britton, is concerned about ‘the “great rush” to develop something that’s going to affect some 8 million passport holders’. Mr Britton said:

The discussion paper [released by DFAT] is certainly pretty light on ... You’d think something that has such serious implications for citizens would be worthy of greater justification. As always, the quality of discussion is dictated by the nature of documentation. It’s a bit like painting if you haven’t done the surface preparation.³³

The Southern Cross Group is another organisation which was involved in a consultation process, but it is not clear if it was actually involved in the Passports Legislation Consultation Group. According to its website, the Southern Cross Group is:

... an international non-profit advocacy and support organisation for the Australian diaspora. The Group works for changes to existing law and policy where these

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adversely impact the Australian expatriate community, which now numbers some 860,000 people in all corners of the globe.³⁴

The Southern Cross Group ‘believes that there is potential for the new Act to adversely impact overseas Australians’. In an e-Bulletin issued on 15 March 2004, the Group noted that its representative was the sole registrant for a public consultation meeting with DFAT in Canberra. At that meeting, the DFAT representative apparently indicated that there would be little change to the present passport application arrangements, insofar as the DFAT’s intended biometric process ‘uses photos submitted by the applicant as is the case now—people will not have to attend an Embassy or Consulate to have a special photo taken’. Nonetheless, the Group had reservations after the meeting, particularly about increased fees or shorter documents for persons who lose more than two passports; whether applicants have to travel to embassies or consulates; and issues surrounding passports for children born to Australians overseas. The e-Bulletin does not mention privacy concerns.³⁵

Other issues in the Australian Passports Bill

Powers of officers

Proposed Part 3 outlines the powers of officers. The term ‘officers’ includes DFAT staff, diplomatic staff of overseas missions, Customs officers, AFP officers, state and territory police, and any person authorised by the Minister. **Proposed Part 3** also includes offences relating to failure to obey (lawful) demands of officers.

Under the Passports Act, the powers of officers are contained in section 9 and other relevant provisions. These powers are retained in substance in the Bill, but are structured differently (**clauses 23 and 24**).

The Bill also empowers officers to demand that a person owing money to the Commonwealth for financial assistance received while abroad surrender his or her Australian travel document (**clause 25**).

Further, the Bill empowers a Customs officer to seize a document that is not in the possession or control of any individual where the officer suspects on reasonable grounds that the document has been used in the commission (or attempted commission) of an offence against the Bill (**subclause 26(1)**). A Customs officer may also search a container (including baggage) not in the possession or control of any individual where the officer suspects on reasonable grounds that the container contains a document used in the commission of an offence against the Bill (**subclause 26(2)**).

Australian travel documents: a person’s name

Clause 53 (formerly **clause 54**) deals with the form of Australian travel documents. **Subclause 53(3)** provides that the name of the person to whom the document (including a

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passport) is issued must appear on the document. Except in circumstances specified by a ministerial determination, the name must be:

- the name on the person's birth certificate
- the name on the person's certificate of Australian citizenship
- the name on a certificate, entry or record of the person's marriage, being a certificate granted or entry or record made by the relevant state or territory Registrar of births, deaths and marriages, or
- the name included, 'by way of effecting a name change of the person' on a register kept by the state or territory Registrar of births, deaths and marriages.

The effect of the clause is that women who marry overseas will have to change their name by deed poll if they wish to use their married name on Australian travel documents. Already two women (at least) have been affected by this new policy, which has been contained in a DFAT directive. One woman changed her name by deed poll at the cost of \$180, while the other paid a \$400 fee to Qantas to reissue in her maiden name a ticket booked in her married name. A DFAT spokesperson said that the policy was 'aimed at combating identity fraud'; and that it did not 'call into question the legitimacy of overseas marriages'.³⁶ According to the Explanatory Memorandum for the Bills, the circumstances to be specified by ministerial determination as exceptions to subclause 53(3) are those 'most commonly due to legal processes in States, Territories or overseas'. Presumably this phrase includes overseas marriages, but the only circumstances noted in the Explanatory Memorandum are 'a court order changing a child's name, a person reverting to a previous name after divorce or death of the spouse and name changes by Indigenous Australians'.³⁷

Main provisions: Australian Passports (Application Fees) Bill

Primarily, the Fees Bill empowers the Minister to specify application fees for Australian passports by way of a determination. The fees are for applications for passports, travel-related documents, endorsements on Australian travel documents and 'the making of observations on Australian travel documents': **clause 4**.

Sub-clause 4(5) provides that the fees specified by the Minister are 'imposed as taxes'. According to the second reading speech for the Fees Bill (when it was first introduced in the 40th Parliament), this statement overcomes the 'longstanding technical constitutional debate' over whether passport fees are a tax or a cost recovery.³⁸ It is not entirely clear what debate is being referred to, except insofar as the question of whether a fee for service (or cost recovery measure) generally is a tax has often been the subject of High Court challenges to legislation. Nonetheless, applying the reasoning of Brennan J (as he then was) of the High Court of Australia in *Cunliffe and Another v The Commonwealth of Australia* (1994) 182 CLR 272 (1994) 124 ALR 120, it is likely that taxing the issue of a passport or other travel document is within parliamentary power to legislate.

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As the Bill imposes taxation, it can only deal with that issue: section 55 of the Constitution.

Subclause 5(1) provides that a determination made under **proposed section 4** ‘may specify different application fees for different circumstances’. There is no need for the fee to be fair and reasonable. Indeed, **subclause 5(3)** provides that the application fee ‘need not bear any relationship to the cost’ of issuing the passport or endorsing or making an observation on an Australian travel document. The fee is therefore clearly not a fee for service but is a tax (as stated in **subclause 4(5)**).

Proposed paragraph 5(2)(a) provides that the maximum fee for the first financial year of the Bill’s operation is \$1,000. It is not clear how this amount is calculated. It seems somewhat high, indeed exorbitant, when regard is had to present application fees:

- standard passport: \$150 (child or senior over 75 years: \$75)
- frequent traveller passport: \$226 (child or senior over 75 years: \$113)
- other products: \$9 to \$90 (depending on type).³⁹

While the Minister has said that he may impose higher fees ‘on people who persistently lose passports’, it is not clear what amount that fee may be, nor what fee he might impose on a first-time passport applicant.⁴⁰

Clause 6 sets out the formula for calculating the indexation figure applicable to the maximum fee in **clause 5(2)**. It is calculated by reference to the Consumer Price Index and is similar to formulae used in the *Income Tax Assessment Act 1936* and the *Social Security Act 1991*.

Clause 7 provides that the fee is payable when the application is made.

The Bill does not specifically provide for the waiver or refund of application fees—although by virtue of **clauses 48 and 56** of the Australian Passports Bill, waiver or refund (in whole or part) must be possible.

Main provisions: Australian Passports (Transitionals and Consequentials) Bill

Clause 5 of the Transitionals and Consequentials Bill provides that a passport issued under the Passports Act is taken to be a passport issued under the proposed Australian Passports Act 2004. Unless cancelled by the Minister, the passport continues to be valid until the expiry date specified in the passport. Likewise, **clause 6** provides that travel-related documents (being convention travel documents, certificates of identity or documents of identity) issued under the Passports Act are taken to be issued under the proposed Australian Passports Act. Unless cancelled by the Minister, such documents are also valid until the expiry date specified in the document.

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Clause 8 provides that an application for an Australian passport made but not yet determined under the Passports Act is taken to be an application made under the proposed Australian Passports Act. Likewise, **clause 9** provides that an application for a convention travel document, certificate of identity or document of identity made under the old regulations is taken to be an application made under the proposed Australian Passports Act.

Clause 10 provides that section 11A of the Passports Act (which deals with the review of certain decisions relating to the issue and cancellation of passports) continues to apply to decisions made under the old Act even after it is repealed. The retention of the provision should make it easier to determine a review of a decision made under the Passports Act.

Clause 11 provides that the Governor-General may make regulations prescribing matters of a transitional nature ‘arising out of the repeal of Part 1A of the old Act and the commencement of the new Act’. Part 1A was recently inserted by the *Anti-terrorism Act (No. 3) 2004* and deals with Australian passports.

Schedule 1 to the Transitionals and Consequentials Bill contains consequential amendments to various Acts following the passage of the proposed Australian Passports Act 2004. **Items 1 to 7** replace references to the Passports Act with references to the proposed Australian Passports Act 2004 in the *Administrative Appeals Tribunal Act 1975*, the *Australian Security Intelligence Organisation Act 1979*, the *Crimes Act 1914*, the *Criminal Code Act 1995* and the *Migration Act 1958*.

Items 8 to 31 amend the Passports Act.

Item 8 amends the title to read ‘[an] Act relating to foreign passports and other foreign travel documents’. **Item 9** amends the short title to read ‘Foreign Passports (Law Enforcement and Security) Act 2004’. **Items 10 to 23** repeal various provisions and definitions relating to Australian passports—such provisions and definitions are not required in an Act dealing only with foreign passports and travel documents.

Item 24 repeals Part 1A (which, as mentioned above, deals with Australian passports). **Items 25 to 31** are said to amend sections 14 to 25 of the Passports Act, as recently inserted by the *Anti-terrorism Act (No. 3) 2004*.

Item 25 replaces the definition of ‘competent authority’ in section 14, which deals with a request relating to international law enforcement co-operation. The effect of the amendment would be to authorise a member of the diplomatic staff of an Australian mission or a consular officer at an Australian consulate to request the Minister to order the surrender of a person’s foreign travel documents (under section 16) where the person is the subject of an arrest warrant issued in a foreign country in respect of a serious foreign offence; is prevented from travelling internationally by force of an order of a foreign court, parole or bail or like condition made by a foreign court; or a foreign law.

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Likewise, **item 27** replaces the definition of ‘competent authority’ in section 15, which deals with a request relating to potential for harmful conduct. The effect of the amendment would be to authorise a member of the diplomatic staff of an Australian mission or a consular officer of an Australian consulate to request the Minister to order the surrender of a person’s foreign travel documents (under section 16) where the competent authority suspects on reasonable grounds that ‘unless a person’s foreign travel documents are surrendered, the person would be likely to engage in conduct’ that might be prejudicial to Australian security (or that of another nation); endanger the health or physical safety of other persons; interfere with rights or freedoms of other persons set out in the International Covenant on Civil and Political Rights; or constitute an indictable offence against an Australian (Commonwealth) law.

Item 29 provides that the Minister may delegate his power to order the surrender of foreign travel documents under section 16 to an ‘SES employee’ who must comply with any directions of the Minister. That term is not defined in the Passports Act nor the three Bills, and presumably has the meaning given by section 34 of the *Public Service Act 1999*, being ‘SES employees are those APS employees who are classified as SES employees under the Classification Rules’.

Items 30 and 31 amend section 25 to provide that the Governor-General may make regulations prescribing matters ‘required or permitted’ by the proposed Foreign Passports (Law Enforcement and Security) Act 2004 or ‘necessary or convenient’ for carrying out or giving effect to that Act.

Concluding Comments

Biometrics and privacy

Biometrics seems to be one area where technological and practical considerations have not been able to keep pace with the law, both in Australia and overseas. The reference in **clause 47** to the use of ‘methods (including technologies)’ may be unnecessarily broad. Given that DFAT is developing a prototype biometric passport (which seems to rely on facial recognition technology), it might be more appropriate for the Australian Passports Bill to refer specifically to that technology.

The Minister’s power to use personal information (and to determine how that information is to be collected, used and disclosed) is broad. Some participants in the public consultation process raised concerns about privacy issues. It may therefore be appropriate to put in place some sort of mechanism, person or independent body for overseeing the use made of the technology, even if the decision about which technology is to be used is left to the Minister.

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Application fees

As discussed in the Main Provisions section of this Digest in relation to the Fees Bill, the calculation of application fees for the issuing and/or endorsing of a passport or travel document may be unfair and unreasonable for two main reasons. The maximum fee of \$1,000 (provided in **subclause 5(2)** of the Fees Bill) appears to be arbitrary, particularly when compared with the fees charged at present. Second, **subclause 5(3)** of the Fees Bill provides that the fee need not bear any relationship to the cost of issuing or endorsing the passport or travel document.

Endnotes

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- 1 The Australian Passports Bill increases the penalties for fraud currently contained in the Passports Act from a maximum of \$5,000 to a maximum of \$110,000; and from a maximum of two years' imprisonment to a maximum of ten years' imprisonment: see **clauses 29-40**. See also: Alexander Downer, Minister for Foreign Affairs, 'Second reading speech: Australian Passports Bill 2004', House of Representatives, *Debates*, 24 June 2004, pp. 31 450–31 451.
 - 2 The term 'foreign travel document' is inserted into the section 5 of the Passports Act by item 7 of Schedule 1 to the *Anti-terrorism Act (No. 3) 2004*. It is defined to mean a foreign passport or a 'document of identity issued for travel purposes by or on behalf of the government of a foreign country (whether or not also issued for another purpose)'.
 - 3 See Jennifer Norberry, 'Anti-terrorism Bill (No. 2) 2004', *Bills Digest*, no. 6, Parliamentary Library, Canberra, 2004-05 and Jennifer Norberry, 'Anti-terrorism Bill (No. 3) 2004', *Bills Digest*, no. 10, Parliamentary Library, Canberra, 2004–05.
 - 4 AAP, 'Passports blunder affects less than half a percent – DFAT', 5 April 2004 at 6.34pm (Category: Australian General News; Story No. 4405).
 - 5 Phillip Hudson, 'Protect your passport or pay the price: Canberra', *Sunday Age*, 6 June 2004, p. 9.
 - 6 John Kerin, 'Ruddock admits US-style passports likely', *The Australian*, 9 January 2004, p. 2. That passport seems to be known as the M-series tamper-proof passport: see Alexander Downer, Minister for Foreign Affairs, 'Boost to passport security', Media Release, FA24, 17 February 2004, available electronically at: http://www.foreignminister.gov.au/releases/2004/fa024_04.html.
 - 7 Alexander Downer, Minister for Foreign Affairs, 'Boost to passport security', Media Release, FA24, 17 February 2004, available electronically at: http://www.foreignminister.gov.au/releases/2004/fa024_04.html.
 - 8 Rachel Lebihan, 'Biometric passports closer to reality', *Australian Financial Review*, 28 June 2004, p. 49.
 - 9 Rachel Lebihan, 'Big bonus for passport system', *Australian Financial Review*, 13 May 2004, p. 29.

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- 10 Editorial, 'Passports to terror', *Herald Sun* (Melbourne), 6 April 2004, p. 20.
- 11 See endnote 5 (Hudson); see also Frank Walker, 'Crackdown on security of passports: Tough new penalties for fraud', *Sun-Herald* (Sydney), 20 June 2004, p. 5.
- 12 See endnote 5.
- 13 Kevin Rudd, Shadow Minister for Foreign Affairs and International Security, 'Australian Passports Bill 2004', House of Representatives, *Debates*, 4 August 2004, pp. 32 038–32 046 and Stephen Smith, then Shadow Minister for Immigration, 'Australian Passports Bill 2004', House of Representatives, *Debates*, 4 August 2004, pp. 32 049–32 053.
- 14 Kevin Rudd, Shadow Minister for Foreign Affairs and International Security, 'Kevin Rudd-Colin Powell's comments on WMD, New US Passport laws', ALP News Statements, 5 April 2004, available electronically at: <http://www.alp.org.au/print.html?link=/media/0404/20007204.html> (as at 28 July 2004).
- 15 Senator Stott-Despoja, 'Telecommunications (Interception) Amendment (Stored Communications) Bill 2004', Senate, *Debates*, 29 November 2004, p. 8.
- 16 Alexander Downer, Minister for Foreign Affairs, 'Passport Measures Help Secure Australia', Media Release, FA88, 23 June 2004, available electronically at: http://www.foreignminister.gov.au/releases/2004/fa088_04.html (at 7 December 2004).
- 17 A MRTD has two lines of letters, numbers and chevrons ('>>>>>') as seen in current Australian passports. For further information about MRTDs, see UK Passports Service, 'Visa-Free Travel to the USA for British Visitors', UKPS News, 28 July 2004, available electronically at <http://www.ukpa.gov.uk/news/news.asp?intElement=808> (as at 7 December 2004).
- 18 International Civil Aviation Organization, 'Biometric identification to provide enhanced security and speedier border clearance for travelling public', Press release, No. 9/2003, 28 May 2003, available electronically at: <http://www.icao.int/icao/en/nr/2003/pio200309.htm>. ICAO is 'the specialized agency of the United Nations' whose mandate is to ensure the safe, efficient and orderly evolution of international civil aviation': see http://www.icao.int/cgi/goto_m.pl?/icao/en/anb/mais/index.html (as at 29 July 2004).
- 19 See endnote 18.
- 20 <http://www.state.gov/secretary/rm/31639.htm> (as at 2 August 2004).
- 21 US Department of State, 'Extension of Requirement for Biometric Passport Issuance by Visa Waiver Program Countries', Press Statement (Revised), 10 August 2004, at: <http://www.state.gov/r/pa/prs/ps/2004/35066.htm> (at 7 December 2004).
- 22 See endnote 8.
- 23 See: <http://www.customs.gov.au/resources/Files/media%20background%20smartgate%20information.pdf> (as at 30 July 2004).
- 24 Senator Chris Ellison, Minister for Justice and Customs, Alexander Downer, Minister for Foreign Affairs and Senator Amanda Vanstone, Minister for Immigration and Multicultural

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- and Indigenous Affairs, 'Development of biometrics for border control', Joint Media Release, 12 May 2004, available electronically at: http://www.customs.gov.au/site/index.cfm?nav_id=670&area_id=5 (as at 30 July 2004). See also endnote 9.
- 25 US Department of Homeland Security at: http://www.dhs.gov/dhspublic/interapp/content_multi_image/content_multi_image_0006.xml (as at 30 July 2004).
- 26 US Department of Homeland Security, 'US-VISIT: How Does US-VISIT Work?', at: http://www.dhs.gov/dhspublic/interapp/editorial/editorial_0525.xml (at 7 December 2004).
- 27 See section 16 of the *Privacy Act 1988*.
- 28 A person may be liable for prosecution for a crime under proposed section 37 even if engaged in an innocent purpose. For example, a person may hold dual citizenship and be entitled to travel on an Australian passport or one issued by Country X. The person may depart Australia on the foreign passport and forget to take his or her Australian passport with him or her. If a relative later takes the Australian passport to the person, he or she may be liable for prosecution under this provision.
- 29 See endnote 7.
- 30 Australian Privacy Foundation, 'Background' at <http://www.privacy.org.au/About/Background.html> (as at 29 July 2004); Australian Privacy Foundation, 3rd Letter to DFAT re Passports Act Amendments, 2 March 2004, at <http://www.privacy.org.au/Papers/PassptBiom040302.html> (as at 29 July 2004), and Australian Privacy Foundation, Submission on Passports Act review (4th Letter to DFAT re Passports Act Amendments), 15 March 2004, at <http://www.privacy.org.au/Papers/PassptBiom040315.html> (as at 29 July 2004).
- 31 Australian Privacy Foundation, Submission on Passports Act review, 15 March 2004 (at <http://www.privacy.org.au/Papers/PassptBiom040315.html>).
- 32 Karen Dearne, 'Canberra faces up to security', 24 February 2004 at <http://australianit.news.com.au/articles/0,7204,8767093^15841^^nbv^,00.html> (as at 29 July 2004).
- 33 See endnote 32.
- 34 <http://www.southern-cross-group.org/general/whoarewe.html> (as at 29 July 2004).
- 35 http://www.southern-cross-group.org/archives/Consular%20Material/SCG_E_Bulletin_Passports_15_March_2004.pdf (as at 29 July 2004)
- 36 Michael Pelly, 'Foreign marriage papers not enough', *Sydney Morning Herald*, 6 April 2004, p. 5.
- 37 Explanatory Memorandum to the Australian Passports Bill 2004, p. 28 (paragraph 207).

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- 38 Alexander Downer, Minister for Foreign Affairs, 'Second reading speech: Australian Passports (Application Fees) Bill 2004', House of Representatives, *Debates*, 24 June 2004, p. 31 452.
- 39 See <http://www.passports.gov.au/Web/Queries/fees.aspx> (as at 7 December 2004).
- 40 See endnote 16.

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