



Migration Amendment (Border Integrity) Bill 2006

Moira Coombs
Law and Bills Digest Section

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Migration Amendment (Border Integrity) Bill 2006

Date introduced: 11 October 2006

House: House of Representatives

Portfolio: Immigration and Multicultural Affairs

Commencement: Sections 1 to 3 on Royal Assent; Schedules 1 to 3 on a day fixed by proclamation or 6 months after date of Royal Assent.

Purpose

The purpose of the Bill is:

- to enable the Minister to specify a time either within the day a declaration is made (rather than midnight) or at a specified future time when a special purpose visa will cease to be in effect,
- to enable certain persons with an eligible passport to choose an automated system or a clearance officer in immigration clearance and to define who may use an automated system

Background

Special Purpose Visas

Schedule 1 amends the provisions relating to subsection 33(9) of the *Migration Act 1958* which allows the Minister to make declarations that it is undesirable for a person or persons in a class of persons to travel to, enter or remain in Australia. Amendments are made to section 33(5) of the Migration Act which deals with visas ceasing to have effect.

Special purpose visas do not require the person to apply for a visa, that is, there is no visa application process as the “visa is granted by the operation of law to non-citizens who come within either a prescribed class of persons, or are a person, or class of persons, declared by the Minister to hold special purpose visas.”¹ The Bill provides that the Minister can specify a time when the declaration will take effect. At present the special purpose visa does not cease until midnight on the day on which the declaration is made.

Special purpose visas are a class of substantive temporary visas. Section 33(2)(a) of the *Migration Act 1958* provides that a non-citizen is taken to have been granted a special purpose visa if the person has a prescribed status, or who is a member of a prescribed class, or the Minister declares that a non-citizen is taken to have been granted a special purpose visa. Regulation 2.40(1) prescribes the classes of persons to whom such visas are

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granted. Other classes of persons are also prescribed in other sub-regulations of R2.40. The persons having a prescribed status are as follows:

2.40 Persons having a prescribed status — special purpose visas (Act, s 33 (2) (a))

Persons who hold prescribed status

(1) For the purposes of paragraph 33 (2) (a) of the Act (which deals with persons who are taken to have been granted special purpose visas), and subject to this regulation, each non-citizen who is included in one of the following classes of person has a prescribed status:

- (a) members of the Royal Family;
- (b) members of the Royal party;
- (c) guests of Government;
- (d) SOFA forces members; (Status of Forces Agreement defined in R 1.03)
- (e) SOFA forces civilian component members; (Status of Forces Agreement defined in R. 1.03)
- (f) Asia-Pacific forces members;
- (g) Commonwealth forces members;
- (h) foreign armed forces dependants;
- (j) foreign naval forces members;
- (k) members of the crew of non-military ships (other than ships being imported into Australia);
- (kaa) spouses and dependent children of members of the crew of non-military ships (other than ships being imported into Australia);
- (ka) members of the crew of ships being imported into Australia;
- (l) airline positioning crew members;
- (m) airline crew members;
- (n) transit passengers who belong to a class of persons specified in a Gazette Notice for the purposes of this paragraph;
- (p) persons visiting Macquarie Island;
- (q) children born in Australia;

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- (i) of a mother who at the time of the birth holds a special purpose visa, if only the mother is in Australia at that time; or
- (ii) to parents both of whom, at the time of the birth, hold special purpose visas, if at that time both parents are in Australia;
- (t) Indonesian traditional fishermen visiting the Territory of Ashmore and Cartier Islands.

Special Category Visas

The bill provides that selected New Zealand citizens arriving in Australia will be granted a special category visa by means of an automated system in immigration clearance. Such persons will require an ePassport.

Special category visas, subclass 444 is a temporary visa enabling New Zealand citizens to be lawful non-citizens. Special category visas may be granted in immigration clearance or in the migration zone after immigration clearance. The criteria are that the person must be a New Zealand citizen and hold a New Zealand passport that is in force and the person is neither a behaviour concern non-citizen nor a health concern non-citizen.

The Act also makes provision for other classes of persons for whom a visa of another class would be inappropriate (s.32(2)(b) and (c)).

Biometric Technology

The current Bill amends and introduces provisions to allow citizens and non-citizens to use an automated system in immigration clearance. Certain past legislative developments enable the operation of the current Bill which allows persons who are citizens or non-citizens to use an automated system when entering or leaving Australia. The *Migration Legislation Amendment (Electronic Transactions and Methods of Notification) Act 2001* enabled the *Migration Act 1958* and the *Australian Citizenship Act 1948* to be brought into line with the *Electronic Transactions Act 1999*. The purpose of that Act was to remove legal obstacles to the use of electronic transactions. It ensured that transactions were not invalid merely because they took place by means of an electronic form of communication. The Act provides a framework to facilitate the use of electronic transactions, to promote business and community confidence in such transactions and to enable business and the community to use electronic communications in their dealings with government.² The Electronic Transactions Act applied to all Commonwealth legislation from 1 July 2001.

The Migration Legislation Amendment (Electronic Transactions and Methods of Notification) Act established a framework to allow for the use of computer programs to make decisions in the migration and citizenship context.³ The Explanatory Memorandum to this Bill explains the insertion of section 495A by this Act into the Migration Act and its significance in enabling decisions to be made electronically.

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In 2003 the *Migration Legislation Amendment (Identification and Authentication) Bill 2003* (now Act no. 2 of 2004) was introduced into the House of Representatives on 26 June 2003. See the [Bills Digest](#) for detailed information concerning the introduction of provisions relating to biometric identifiers and the setting up of a personal identifiers database. The Bill introduced a definition of *personal identifiers* to the Migration Act and the general circumstances in which non-citizens may be required to supply personal identifiers and the safeguards applying to those procedures. The collection of those identifiers would then form a database of such information. The Bill also included privacy safeguards.

Australian ePassport

The use of Smartgate is dependent on having an eligible passport, in other words an ePassport. The bill refers to the fact that an eligible passport will be determined by **proposed new section 175A**. The use of these automated systems by travellers will rely on the ePassport.

The 'biometrically-enabled ePassport' was launched on 25 October 2005. The passport has a microchip embedded in the centre page which contains the digitised facial image and personal details of the passport holder. The microchip can be read electronically and will enable the implementation of cutting-edge facial recognition technology.⁴ As ePassport processing facilities are progressively introduced in Australia and at overseas airports, the new technology will strengthen border security and streamline the movement of passengers through airports.⁵

The advantages of the ePassport over the previous Australian passport as stated on the Department of Foreign Affairs and Trade website are stated as follows:

- provides greater protection against fraudulent misuse and tampering,
- reduces the risk of identity fraud, currently estimated to cost the Australian economy more than \$1 billion each year,
- enhances the protection of Australia's border through speedy and secure verification of incoming Australian passport holders.⁶

Use of ePassports is being introduced internationally. The Australian ePassport complies with changes in the Visa Waiver program for example. The Visa Waiver program in the United States enables travellers from certain countries to travel to the United States for tourism or business purposes and who stay for 90 days or less to do so without a visa. Australia is a participating country in the program.⁷ The Australian ePassport complies with new US requirements for ePassports introduced on 26 October 2006. The Australian ePassport has been extensively tested at Los Angeles International Airport and has met all US requirements. It has received initial US Department of Homeland Security Certification.⁸

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Smartgate

The Minister for Immigration and Multicultural Affairs and the Minister for Justice and Customs in a joint press release stated that the legislation will allow for the introduction of the SmartGate system that will begin operations in selected Australian international airports from early in 2007.⁹

The Australian Customs Service annual report 2005-06 states that SmartGate is an automated border processing system which enables travellers with the appropriate eligible passports to move through passport control by means of using SmartGate. The focus at present is to implement the full version of SmartGate known as SmartGate Series 1 for incoming travellers. The system will be progressively implemented in 2007 commencing in Brisbane and will be available initially to holders of Australian ePassports. Subsequently it will be made available to holders of eligible passports from other countries.

The SmartGate system was trialled initially. The trial was launched in November 2002 at Sydney International Airport with Qantas International crew. The system was installed in Melbourne International Airport in 2004 and Qantas Premium Frequent Flyers were invited to enrol. Over 10,000 trial users conducted some 295,000 transactions during the trial period. The trial ended on 30 June 2005.¹⁰

“On the strength of this successful trial, in the 2004 Budget the Government pledged \$61.7 million over four years towards the phased introduction of biometric technology to improve identity management for border processing at Australia’s major international airports.”¹¹

There have been criticisms of the SmartGate system in relation to the reliability of the technology. According to certain media reports, industry insiders have identified gaps in biometrics such as “excessive error rates, a poor ability to find database matches and high sensitivity to varying conditions. A senior policy analyst at the White House Office of Science and Technology has estimated that the accuracy rate for facial scanning is 90 per cent, for fingerprints it’s 99 per cent and for iris scanning it’s 97 per cent.”¹²

Some question the reliability and effectiveness of the SmartGate technology. Dr Roger Clarke, a visiting fellow in the faculty of Engineering and Information Technology at the Australian National University commented in a recent interview that “SmartGate is destined to fail because it’s built on the assumption that a person’s face will always appear the same, when in reality that’s rarely the case.”¹³ He says that it is quite likely that actions like laughing and smiling may confuse the device.¹⁴ Australian Customs maintains that although there were problems initially, “by the time SmartGate comes into full operation next year, all the creases will be ironed out.”¹⁵ In the same interview the National Director of Border Intelligence for the Australian Customs Service commented that the technology is urgently needed to deal with the increasing numbers arriving at Australian airports. The Director says that the facial recognition technology has high

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accuracy levels.¹⁶ Senator Joe Ludwig Shadow Minister for Justice and Customs, also commented “if it’s all about just cutting labour, then it’s not a very good idea and what it might do is add extra labour intensive work because if the technology doesn’t work, people will queue and then they’ll have to be processed manually in any event. And that doesn’t seem smart to me.”¹⁷

In 2005, the Office of the Privacy Commissioner conducted an audit of the ePassport and SmartGate trial. The purpose was to find out whether Customs and the Department of Foreign Affairs were handling the personal information collected in the course of the ePassport and SmartGate trials in accordance with the Information Privacy Principles (IPPs) of the *Privacy Act 1988*. Generally it was found that the personal information collected was managed in accordance with the IPPs. It was thought that potentially significant changes are presented by the contactless chip in Australian passports and the use of images on those passports for facial recognition at the border by SmartGate. The Auditors therefore recommended a cautious approach “in the future implementation of ePassports and associated biometric systems, allowing for significant data entry controls and limitations on information use.” The Department of Foreign Affairs and Trade has recently increased security controls built into the ePassport chip.¹⁸

Financial implications

In 2004-05 the Australian Government provided \$9.7 million dollars to DFAT, the Australian Customs Service and the Department of Immigration and Multicultural and Indigenous Affairs for the development of biometric technologies and their application to border control.¹⁹

The Australian Government in the 2005-06 budget allocated \$74.6 million dollars for the “phased introduction of biometric technology to improve identity management for border processing at Australia’s international airports... It is anticipated that the efficiencies arising from automated border processing will achieve savings of \$12.9 million dollars over this period, resulting in a fiscal impact on the Budget of \$61.7 million dollars.”²⁰

Main provisions

Schedule 1 – Special Purpose Visas

Items 1 and 2, proposed new subparagraphs 33(5)(a)(iii) and 33(5)(b)(v) provide that declarations by the Minister under subsection 33(9) will come into effect at a time specified in the declaration.

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Item 3, proposed new subsection 33(5A) provides that a declaration made by the Minister will take effect at a time specified in the declaration or if there is no time specified in the declaration, the end of the day on which the declaration is made.

Item 4 relates to the application of these provisions which only apply to declarations made after the commencement of this Act.

Schedule 2 – Immigration Clearance

Item 1 inserts a definition of *authorised system* which refers to an automated system authorised by the Minister or the Secretary. **Item 7** inserts a definition of *clearance authority* which means either a clearance officer or an authorised system which is an automated system.

Requirement to be immigration cleared

Section 172 of the Migration Act requires all persons entering Australia, whether citizens or non-citizens, to be immigration cleared. Persons are immigration cleared if they enter Australia at a port or a place other than a port and if they comply with the requirements of section 166 and leave from the port or prescribed place at which they complied with entry conditions. Section 166 relates to the evidence required of persons entering the country to verify their identity.

Item 9 repeals section 166 and replaces it with **proposed new section 166** *Persons entering to present certain evidence of identity etc.* **Proposed new subsection 166(1)(a)** requires that any person who enters Australia must present evidence of identity which may include personal identifiers. A citizen must present an Australian passport or other evidence of citizenship. A non-citizen must present evidence of their identity and an appropriate visa. **Proposed new subsection 166(1)(b)** provides that both citizens and non-citizens provide any information required by the Act or regulations, apart from personal identifiers, to the clearance officer or the authorised system. **Proposed new subsection 166(1)(c)** provides that non-citizens must comply with any requirement to provide personal identifiers to the clearance officer in accordance with subsection (5) before being immigration cleared, that is, leaving a port, prescribed place or being granted a substantive visa.

Who may use an authorised system

Proposed new subsection 166(2) provides that a person may choose only to present evidence or information to an automated system if the person has an eligible passport and that no further information or evidence or personal identifiers are required either by the automated system or the clearance officer. If a person is required to present further

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evidence or information, a clearance officer will determine whether the person has complied with subsection 166(1).

Proposed new subsection 166(5) provides a list of the personal identifiers which a person may be required to present or provide. They include a photograph, a signature, any personal identifier contained in a person's passport or travel documents or any other prescribed personal identifiers. **Proposed new subsection 166(6)** provides that paragraph 166(1)(c) does not limit the clearance authority's power under subparagraph 166(1)(a)(ii) to require a non-citizen to present evidence of identity which may include personal identifiers. **Proposed new subsection 166(7)** provides that a non-citizen will not have complied with a requirement under paragraph (1)(c) unless the person has provided the personal identifiers by means of identification tests specified under section 5D and carried out by an authorised officer. **Proposed new subsection 166(8)** provides an exception to new subsection 166(7) where a non-citizen can provide prescribed personal identifiers other than by identification tests and complies with further requirements for personal identifiers.

Who may use an Authorised System

Section 170 deals with certain persons, either citizens or non-citizens who travel between ports in Australia on a foreign vessel and who may be required to present evidence to a clearance officer. **Item 14 proposed new subsection 170(2AA)** provides that a person may present evidence or information to an authorised system only if the person holds an eligible passport and the person chooses to provide that information to the authorised system; and either before the person completes immigration clearance, that is before that person leaves the port, the person is not required to present any further information, evidence or personal identifiers, or a clearance officer has determined that they have complied with subsection 170(1). **The wording of proposed new subsection 170(2AA) is somewhat unclear logically. Subsection 170(2AA) is meant to indicate how a person complies with 170(1) when using the automated system. The meaning and intention is explained more clearly in the Explanatory Memorandum.**

“The purpose of new subsection 170(2AA) is to provide that, where a person has used the automated system to satisfy the requirements under subsection 170(1), a clearance officer can undo that person's previous satisfaction of those requirements where that clearance officer believes it necessary to ask the person for further information (irrespective of whether the automated system successfully processed the person). An example of this might be where the automated system has incorrectly processed a person due to a computer error, and a clearance officer wishes to manually process that person again.”²¹

Section 172(3) deals with a person who is refused immigration clearance and is with a clearance officer for the purposes of s.166 (Person who enters Australia to present certain evidence of identity) and where a person satisfies one or more of the following criteria set

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out in item 20. **Item 20 substitutes paragraph 172(3)(b)** where a person has his or her visa cancelled, the person refuses or is unable to present to the clearance officer evidence referred to in paragraph 166(1)(a) (passport or prescribed evidence of identity, visa); the person refuses or is unable to provide information to the clearance officer referred to in paragraph 166(1)(b) (any information other than personal identifiers); the person refuses or is unable to provide one or more personal identifiers referred to in paragraph 166(1)(c) (photograph or other image of the person's face and shoulders, signature, any other personal identifier contained in the person's passport or any other prescribed personal identifier).

Item 24 Section 175 relates to persons who are about to leave Australia. **Proposed new subsection 175(2AA)** provides for who may use an authorised system when leaving the country. As with other similar provisions, the person is required to hold an eligible passport, the person chooses to present evidence of identity and provide information to the automated system rather than the clearance officer, and before the person leaves Australia, neither the automated system or the clearance officer requires the person to present or provide evidence, information or personal identifiers to a clearance officer, or if the person is required to do so, that the clearance officer has subsequently determined that the person has complied with subsection (1). **A similar problem exists with subsection 175(2AA) as with subsection 170(2AA). The wording of proposed new subsection 175(2AA) is somewhat unclear logically. Subsection 175(2AA) is meant to indicate how a person complies with 175(1) when using the automated system. The meaning and intention is explained more clearly in the Explanatory Memorandum.**

Proposed new section 175A in item 27 provides that the Minister or the Secretary may by means of a legislative instrument, determine what an eligible passport will be.

Item 36 Transitional– Instruments

The table contained in this item provides for certain regulations made previously under the paragraphs or subsections indicated will continue in force under the new paragraph and subsection numbers as indicated in the table. Regulations made under the old provisions are taken as having been made under the equivalent new provisions. The Explanatory Memorandum points out that the regulations do not have to be remade.

Schedule 3 – Special Category Visas

Item 2 proposed new subsection 32(3) provides that a New Zealand citizen may present a New Zealand passport to an automated system if the New Zealand passport is an eligible passport and the person chooses to present the passport to an automated system rather than an officer. Before the special category visa is granted, the New Zealand citizen is not required to be manually processed by an officer.

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Concluding comments

This bill enables the implementation of SmartGate at the border. Other countries have decided to adopt biometric systems in areas such as customs, social services and health. They include Britain, the United States, Germany, Israel, Brazil and Singapore. This will place Australia within that group.

Endnotes

- 1 Explanatory Memorandum, Migration Amendment (Border Integrity) Bill 2006, p. 2
- 2 Mark Tapley, 'Electronic Transactions Bill 1999', *Bills Digest*, no. 64, Parliamentary Library, Canberra, 1999-2000.
- 3 Hon Philip Ruddock, Minister for Immigration and Multicultural Affairs, 'Second reading speech: Migration Legislation Amendment (Electronic Transactions and Methods of Notification) Bill 2001', House of Representatives, *Debates*, 5 April 2001.
- 4 Media release, Hon Alexander Downer MP Minister for Foreign Affairs, 25 October 2005.
- 5 *ibid*
- 6 Department of Foreign Affairs and Trade, The Australian ePassport, www.dfat.gov.au/dept/passports/
- 7 US Department of State, www.travel.state.gov/visa/temp/without/without_1990.html
- 8 Department of Foreign Affairs and Trade, www.dfat.gov.au/dept/passports/
- 9 Senator Hon Amanda Vanstone and Senator Hon Chris Ellison, Border Integrity Bill further Strengthens Security, media release, 11 October 2006.
- 10 Australian Customs Service, Annual Report 2005-06
- 11 *ibid*
- 12 Helene Zampetakis, 'Biometric security gets the nod and a wink', *Australian Financial Review*, 5 September 2006 p.4
- 13 [Biometric 'SmartGate' system to be introduced to Australian airports](#), PM, Friday 5 May 2006, reporter Nick Dole.
- 14 *ibid*
- 15 *ibid*
- 16 *ibid*
- 17 *ibid*

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- 18 Office of the Privacy Commissioner, [ePassport & SmartGate Trial](#) Department of Foreign Affairs and Trade and Australian Customs Service, Unclassified final audit report, October 2005, p. 7
- 19 *ibid*, p. 5
- 20 Attorney-General's Portfolio 2005-06 Budget, Protecting Australia's Borders, Sheet no.5, www.budget.gov.au
21. Explanatory Memorandum, Migration Amendment (Border Integrity) Bill 2006, p. 17–18.

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