



Migration Amendment (Maritime Crew) Bill 2007

Moira Coombs
Law and Bills Digest Section

Contents

Purpose.....	2
Background.....	2
Special Purpose Visas	2
Maritime Crew Visa.....	4
Offences under the Bill	5
Amendments contingent on the passage of Migration Amendment (Visa Integrity) Act 2007.....	5
Financial implications.....	6
Main provisions	6
Schedule 1 – Amendments	6
Part 1 – Main amendments.....	6
Maritime Crew Visa.....	6
Declaration.....	6
Detention.....	7
Part 2 – Amendments contingent on the Migration Amendment (Visa Integrity) Act 2007	8
Concluding comments	8
Endnotes.....	8

Migration Amendment (Maritime Crew) Bill 2007

Date introduced: 15 February 2007

House: House of Representatives

Portfolio: Immigration and Citizenship

Commencement: Sections 1 to 3 commence on Royal Assent, Schedule 1 Part 1 commence on a day fixed by Proclamation or 6 months after Royal Assent; Schedule 1 items 15 and 16 commence at the same time as table item 2 however these provisions do not commence at all if items 4 and 5 of Schedule 1 to the *Migration Amendment (Visa Integrity) Act 2007* have commenced at or before that time. Schedule 1 item 17 commences immediately after table item 2, however if items 4 and 5 of Schedule 1 to the Visa Integrity Act do not commence at the same time or before the provisions covered by table item 2, the provision does not commence at all. Schedule 1 item 18 commences immediately before the commencement of item 4 of Schedule 1 to the Visa Integrity Act. However, if item 4 commences at or before table item 2 commences, item 18 does not commence at all.

Purpose

The bill amends the *Migration Act 1958* by creating a new temporary visa called a maritime crew visa. The new visa will apply to foreign crew of non-military ships, ships being imported into Australia and foreign supernumerary crew and their accompanying spouses and dependent children. This new visa will replace the special purpose visa and other similar visas granted by operation of the law to this category of persons. The purpose of creating this new visa is to ensure an appropriate level of security checking prior to the grant of the visa in order to enhance border security.

Background

Special Purpose Visas

Maritime crews and their families are currently included under regulation 2.40(1) of the *Migration Regulations 1994* as a class of persons with a prescribed status in accordance with section 33(2) of the *Migration Act 1958*. Persons or classes of persons who have such a prescribed status are taken to have been granted a special purpose visa. The following classes are listed in regulation 2.40(1):

- (a) members of the Royal Family;

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

- (b) members of the Royal party;
- (c) guests of Government;
- (d) SOFA forces members; (Status of Forces Agreement as defined in Regulation 1.03)
- (e) SOFA forces civilian component members;
- (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:
 - (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.

Note the terms used in paragraphs (1) (a) to (n) are defined in regulation 1.03.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Special purpose visas provide lawful status to non-citizens in the above categories who need to travel to, enter and remain in Australia but to whom Australia's standard visa regime and immigration clearance processes do not apply.¹ At present maritime crew 'are granted special purpose visas on arrival in Australia following checks against DIMIA's (now the Department of Immigration and Citizenship (DIAC)) Movement Alert List.'²

New arrangements were put in place from 1 July 2004 to increase identity checking for maritime crews arriving in Australia. Ships' crew were required to hold a valid passport together with a document linking them to the ship on which they were employed. Prior to 1 July 2004, there had been a transitional period from 1 November 2003 to 30 June 2004 to enable the shipping industry to meet the new documentary requirements. 'Enforcement action included penalties for carriers in relation to crew arriving without adequate documentation, the prevention of shore leave for crew and the restriction of crew onboard a vessel.'³ Compliance with the provisions has been high, for example in the 2005-06 reporting year, of the 320,000 crew who arrived in Australia, only 110 arrived without the required documentation.⁴

Maritime Crew Visa

The Australian Government announced on 22 December 2005 that it would provide funding of \$100.3 million over five years to introduce a maritime crew visa that would enable tougher checks of maritime crews entering Australia. The then DIMIA received \$55.3 million for IT systems associated with the new visa and to record sea crew movement records, employ 19 additional Regional seaports officers and additional staff for the then DIMIA's Entry Operations Centre to support the shipping industry. The Australian Customs Service received \$39.5m and the Australian Security Intelligence Organisation received \$5.5 under the package. In 2005, approximately 585,000 crew travelled to Australia.⁵

Currently ships' crew do not pay for special purpose visas which are granted by operation of the law. There will be no charge for the maritime crew visa. The second reading speech emphasises that 'care will be taken to minimise the impact and cost to the industry after the new maritime crew visa regime commences.'⁶ The crew of non-military ships are required to make a formal visa application for the new visa while they are outside Australia. Applications for a visa can be made electronically and shipping agents will be able to apply on behalf of crew members.⁷

The new visa will operate from 1 July 2007 for foreign crew of non-military ships, their accompanying spouses and dependent children. 'This will allow security checking of foreign crew and align them with other categories of temporary entrants who travel to Australia.'⁸

There will be a transitional period to allow the shipping industry to adjust to the new arrangements. This will commence on 1 July 2007 until 31 December 2007. Until

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

December, special purpose visa arrangements will still continue to ensure that crews who arrive without a maritime crew visa will arrive lawfully into Australia. Customs and Immigration officers will advise operators, ships agents and ships' crew where there has been non-compliance with the new arrangements. The requirements will become mandatory as of 1 January 2008.⁹ Those requirements must include:

- Valid passport
- Maritime crew visa
- Document establishing the crew member's employment on the vessel.¹⁰

Offences under the Bill

An offence is created under **new subsection 229(1A)** of the Bill. A master, owner, agent, charterer or operator of an aircraft who brings to Australia a non-citizen who is the holder of a maritime crew visa that is in effect will commit an offence. Subsection 229(3) is amended to include a reference to **new subsection 229(1A)** which makes the offence in (1A) an offence attracting **absolute liability** under section 6.2 of the Criminal Code. This means that there are no fault elements for any of the physical elements of the offence and the defence of mistake of fact under section 9.2 of the Criminal Code is not available. The offence is not dependent on any particular state of mind. However, specific circumstances are provided for in **new subsection 229(5A)** as a defence to a prosecution under **new subsection 229(1A)**. They include:

- that the non-citizen was in possession of another class of visa that was in effect and permitted him or her to travel to and enter Australia; or
- the aircraft entered Australia from overseas because the person was ill, or there were adverse weather conditions or other circumstances beyond the control of the master.

Amendments contingent on the passage of Migration Amendment (Visa Integrity) Act 2007

The current status of the *Migration Amendment (Visa Integrity) Bill 2007* is that it was introduced into the Senate on 21 June 2006. A report by the Senate Legal and Constitutional Affairs committee on the provisions of the Bill was tabled on 11 September 2006. The [bills digest](#) to the bill can be found through this link.

The *Migration Amendment (Maritime Crew) Bill 2007* contains provisions amending section 173. Section 173 of the *Migration Act 1958* provides that if a visa holder enters Australia contrary to section 43, the visa ceases to have effect. **Items 16 and 17** are confusing, as their effect appears to be the same, contrary to the intention in the Explanatory Memorandum. **Item 16** does not commence if items 4 and 5 of Schedule 1 of the Visa Integrity Bill 2007 commences **at the same time or before** Part 1 of Schedule 1

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

of the Maritime Crew Bill. So logically if the Visa Integrity Bill does not commence before item 16, item 16 will commence. Item 17 is identical to item 16 and does not commence if items 4 and 5 of Schedule 1 of the Visa Integrity Bill do not **commence at the same time** or before Part 1 of Schedule 1 of the present bill. The provisions are quite confusing as item 16 will commence or not commence depending on the outcome of the Visa Integrity Bill. It is not clear if item 17 is necessary.

Financial implications

The Australian Government has committed \$100.3 million over five years for the introduction and management of the new maritime crew visa class.

Main provisions

Schedule 1 – Amendments

Part 1 – Main amendments

Maritime Crew Visa

Item 5, new section 38B creates a new maritime crew visa. **New subsection 38B(1)** provides for a new temporary visa to allow maritime crew to travel to and enter Australia by sea, and remain in Australia for a specified period. **New subsection 38B(2)** provides that the maritime crew visa does not allow the non-citizen to travel to Australia by air unless the non-citizen holds another class of visa and is authorised to do so under subsection 43(1B).

Declaration

New subsection 38B(3) provides that the Minister may make written declarations that a person or persons are undesirable to travel to, enter or remain in Australia. **New subsection 38B(4)** provides that the Minister can specify a time when the declaration takes effect or if not specified the declaration takes effect at the end of the day on which the declaration is made. At that time the visa ceases to have effect. **New subsection 38B(5)** provides that if the Minister revokes a declaration under new subsection 38B(4), it is as if the declaration was never made. Section 33(3) of the *Acts Interpretation Act 1901* states that where a power is conferred in an Act to make an instrument, that power can be construed, unless there is a contrary intention, to include a power to revoke, rescind, amend any such instrument.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Detention

New subsection 38B(6) provides that while the declaration is in effect and the non-citizen has been kept in detention, that when the declaration is subsequently revoked, the detention is considered lawful and the non-citizen is not entitled to make a claim against the Commonwealth.

Item 8, new subsection 43(1A) provides that a person with a maritime crew visa must enter at a proclaimed port, or if there is a health or safety reason or other prescribed reason, which makes it necessary for the person to enter another way or in a way that is authorised by an authorised officer. **New subsection 43(1B)** provides that a person may enter Australia by air if the person is authorised to do so.

Subsection 82(2) specifies that a substantive visa held by a non-citizen will cease to have effect if another substantive visa comes into effect for that non-citizen. **Item 9, new subparagraph 82(2AA)(a)** provides that a maritime crew visa does not cease to have effect when another specified visa comes into effect for that person. The classes of visa that will apply will be specified by the Minister in a legislative instrument. **New subparagraph 82(2AA)(b)** provides that a specified substantive visa held by a non-citizen will not cease to have effect when a maritime crew visa comes into effect for that non-citizen.

Item 11, new subsection 229(1A) provides that it is an offence if a master, owner, agent, charterer or operator of an aircraft brings a non-citizen to Australia by air and that non-citizen holds only a maritime crew visa that is in effect. **Item 12** inserts into subsection 229(3) a reference to subsection 229(1A) making the offence subject to absolute liability under section 6.2 of the Criminal Code. The Scrutiny of Bills Committee holds the view that any use of strict or absolute liability should be properly justified. The Committee expects that the justification for the imposition of such offences should be clearly set out in the explanatory memorandum in each case. For example, 'knowledge of law' is one of the justifications for strict liability indicated in the Report 6/2002 of the Senate Standing Committee for the Scrutiny of Bills: [*Application of Absolute and Strict Liability Offences in Commonwealth Legislation*](#).

Item 13, new subsection 229(5A) provides defences to a prosecution under subsection 229(1A) if the non-citizen was in possession of another class of visa that was current and permitted that person to travel to and enter Australia (**new subparagraph 229(5A)(a)**). **New subparagraph 229(5A)(b)** provides a defence if the aircraft entered Australia because the person was ill, reasons relating to adverse weather conditions or other circumstances beyond the control of the master. These defences mirror those contained subsection 229(5)(c) of the *Migration Act 1958*. **Item 14** inserts reference to subsection 229(5A) in subsection 229(6) which states that a defendant bears the legal burden in relation to matters mentioned in subsection 229(5A). This means that the defendant has to prove that these circumstances existed.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

Part 2 – Amendments contingent on the Migration Amendment (Visa Integrity) Act 2007

Item 16, new subsection 173(1A) provides that a maritime crew visa can be concurrent if the non-citizen travels to Australia by air and holds a current visa that is in effect. This item does not commence at all if items 4 and 5 of Schedule 1 of the Visa Integrity Bill commence at the same time or before Part 1 of this Schedule commences. If not, then item 16 will commence. **Item 17** is an identical provision to item 16 except that the item does not commence at all if items 4 and 5 of Schedule 1 of the Visa Integrity Bill do not commence at the same time or before Part 1 of this Schedule commences.

Concluding comments

The Migration Amendment (Visa Integrity) Bill 2007 is amending elements of sections that are also being amended in this Bill. Some confusion therefore arises, particularly with the provisions set out in Part 2 of this Bill that are contingent on the commencement of the Visa Integrity Bill. However, the maritime crew visa regime is due to commence on 1 July 2007.

Endnotes

1. MSI 398, Special Purpose Visas, paragraph 1.1.2 (Migration Series Instructions)
2. Senator Chris Ellison (Minister for Justice and Customs) and Senator Amanda Vanstone (Minister for Immigration and Multicultural and Indigenous Affairs), *Tougher checks for foreign sea crew in \$100m border security boost*, media release, Parliament House, Canberra, 22 December 2005.
3. Department of Immigration and Multicultural and Indigenous Affairs, Annual Report 2004-05, Output 1.3 – Enforcement of Immigration Law.
4. Department of Immigration and Multicultural Affairs, Annual Report 2005-06, p. 136
5. Senator Amanda Vanstone (Minister for Immigration and Multicultural and Indigenous Affairs) and Senator Chris Ellison (Minister for Justice and Customs), *Tougher checks for foreign sea crew in \$100m border security boost*, joint media release, Parliament House, Canberra, 22 December 2005.
6. Hon Kevin Andrews (Minister for Immigration and Citizenship), *Migration Amendment (Maritime Crew) Bill 2007*, second reading speech, 15 February 2007.
7. *ibid.*
8. Department of Immigration and Citizenship, Maritime Crew Visa 1 July 2007: information for the Maritime Industry, 25 January 2007, p. 2.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.

9. *ibid.*

10. *ibid.*

© Copyright Commonwealth of Australia 2007

Except to the extent of the uses permitted under the *Copyright Act 1968*, no part of this publication may be reproduced or transmitted in any form or by any means including information storage and retrieval systems, without the prior written consent of the Department of Parliamentary Services, other than by senators and members of the Australian Parliament in the course of their official duties.

This brief has been prepared to support the work of the Australian Parliament using information available at the time of production. The views expressed do not reflect an official position of the Parliamentary Library, nor do they constitute professional legal opinion.

Members, Senators and Parliamentary staff can obtain further information from the Parliamentary Library on (02) 6277 2795.

Warning:

This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.

This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.