



Migration Legislation Amendment (Information and Other Measures) Bill 2007

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Law and Bills Digest Section

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Migration Legislation Amendment (Information and Other Measures) Bill 2007

Date introduced: 1 March 2007

House: House of Representatives

Portfolio: Immigration and Citizenship

Commencement: Sections 1 to 3 and Schedule 3 commence on Royal Assent. The key provisions of Part 1 of Schedule 1 commence on a date fixed by proclamation, or failing that, six months after Royal Assent. Other provisions start at various times [none are retrospective].

Purpose

The main purpose is to amend the *Migration Act 1958* ('the Migration Act') and certain related legislation to broaden the circumstances in which certain personal information may be lawfully accessed or disclosed.

Background

Personal Identifiers - problematic access and disclosure restrictions

In early 2004, the Parliament passed the *Migration Legislation Amendment (Identification and Authentication) Act 2004*. The operative provisions of that Act amended the Migration Act and came into force in August 2004. They strengthened the powers of government officials to collect 'personal identifiers' (signatures, photographs, height and weight measurements, fingerprints, iris scans, audio or video recordings etc) under the Migration Act in respect of non-citizens in certain situations. These situations might include routine circumstances – such as when a person is applying for an Australian visa or going through immigration clearance – or circumstances when the person is suspected of being an unlawful non-citizen. The amended Migration Act contained various restrictions on accessing and disclosing such personal identifiers except where expressly permitted. Contravention of these restrictions constituted criminal offences carrying significant penalties, including up to two years imprisonment.

Similar powers for the collection of personal identifiers from suspected illegal foreign fishers were introduced into the *Fisheries Management Act 1991* and the *Torres Strait Fisheries Act 1984* in 2005¹ and came into force in the *Environment Protection and Biodiversity Conservation Act 1999* in February 2007.² Restrictions and penalties relating to unlawful access and disclosure, consistent with those in the Migration Act, are also contained in these Acts.

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In the second reading speech for the Migration Legislation Amendment (Information and Other Measures) Bill 2007, the Minister stated:³

Since the provisions were inserted, it has become clear that there have been some unintended consequences of the access and disclosure provisions which need to be rectified.

The provisions impose criminal penalties in relation to the access and disclosure of personal information, unless that access or disclosure is expressly permitted. It has become apparent that the list of permitted disclosures and access grounds is too limited. My department's ability to continue normal working practices is being seriously hampered and in some instances activities have been discontinued as a result. For example, my department can no longer disclose photos and signatures to investigate and prosecute some Migration Act offences. My department can also no longer disclose photos and signatures to law enforcement agencies or the Commonwealth Director of Public Prosecutions for the prosecution of crimes that are not immigration related.

An independent review of these provisions is scheduled to commence on the third anniversary of the provisions in the second half of this year. It is expected that this review will address many of the difficulties which have been identified with the personal identifier provisions. However, in light of the serious problems presently being faced by my department, it is essential that certain amendments be made as soon as possible. These are expected to resolve the most urgent problems being experienced.

It appears this is the first time that the problems referred to by the Minister above have been publicly disclosed by the Government. As mentioned earlier in this Digest, the problematic provisions in the Migration Act have been in force since August 2004. However, it is understood that 'unintended consequences' only came to light in late 2005.⁴ Given the Minister has stated these consequences have been quite serious, it is unclear why it took over 12 months for them to become apparent. No information is available on whether any unlawful disclosures might have inadvertently been made during the August 2004-late 2005 period, although the answer is presumably no. It is also somewhat curious that it took well over 12 months, from late 2005, to introduce remedial legislation. This is particularly so when the last package of access and disclosure amendments (those contained in the *Environment and Heritage Legislation Amendment Act (No.1) 2006*) to which this Bill is directed was only introduced in to Parliament in October 2006 and passed in December 2006. There may be a sound rationale for this, but neither the second reading speech nor the Explanatory Memorandum address this issue.

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Financial implications

The Explanatory Memorandum states that some ‘moderate savings to resource costs’ are expected ‘as a result of the amendments to section 488 relating to movement records’ (Schedule 2 of the Bill).⁵

Main provisions

Schedule 1 – Personal identifiers

Part 1 – Main amendments

Part 1 contains some 61 items. **Items 1-59** make four sets of essentially identical amendments to four Acts: the *Migration Act 1958*, the *Fisheries Management Act 1991*, the *Torres Strait Fisheries Act 1984*, and the *Environment Protection and Biodiversity Conservation Act 1999*. For the sake of brevity, only the amendments to the *Migration Act 1958* (**items 31-44**) are described and analysed below.

Seven of the amendments (**items 31-32, 37-39, 42 and 44**) replaces the existing term ‘non-citizen’ with ‘person’. This change is to deal with the situation when a person, from whom a personal identifier is taken when they were not an Australian citizen, subsequently becomes an Australian citizen. For example, **item 37** makes the replacement in subparagraph 336E(2)(a)(i). That subparagraph currently allows disclosure of identifying information (which is essentially personal identifiers or related information derived from them) for the purpose of data-matching in order to identify, or authenticate the identity of, a non-citizen. The Explanatory Memorandum comments that:

This amendment ensures that no offence is committed under section 336E if identifying information, collected from a non-citizen, is disclosed after the person has become an Australian citizen (and so no longer fits the description of ‘non-citizen’). There is a particular risk that this may occur where there is a large-scale disclosure of identifying information for the purposes of data-matching.

Item 33 amends the definition of *disclosure* in section 336A by making two changes. The effect is to narrow the range of circumstances where disclosure of identifying information may be an offence.

The first change replaces the existing phrase ‘includes provide access to the personal identifier’ with ‘includes provide unauthorised access to the personal identifier’. The Explanatory Memorandum comments:

The amendment makes clear the intention that providing an authorised access to a personal identifier (under section 336D) is not a ‘disclosure’ within the meaning in section 336E (which makes it an offence to disclose identifying information where the disclosure is not a permitted disclosure).

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However, it is arguable that the amendment does not actually do this. If this was the intent, it would have been better to substitute the phrase ‘does not include authorised access’.

The second change provides that disclosure only relates to the disclosure of personal identifiers that have been provided under specified sections of the Act – currently the definition covers any personal identifier, however it was provided.

The intent of **item 34** is similar to the second change in **item 33** described above. It amends the definition of ‘identifying information’ in section 336A such that it only relates to a personal identifier provided under specified sections of the Act. Again the effect is to narrow the range of circumstances where disclosure of identifying information may be an offence.

Item 35 inserts **new subsection 336C(1A)**. This creates a new exception to what would otherwise be an offence of unauthorised access to identifying information. Under item 35, no offence will occur if a person who accesses the information believes on reasonable grounds that the access is necessary to prevent or lessen a serious and imminent threat to the life or health of the person or of any other person. It is up to the person who accessed the information to demonstrate that they had that reasonable belief. As noted by the Explanatory Memorandum, this exception ‘mirrors’ that contained in Information Privacy Principles 10.1(b) and 11.1(c) of the *Privacy Act 1988*.

Item 36 inserts **new section 336(1A)**. It is essentially the same amendment as item 35, except that the offence to which the new exemption relates is unauthorised disclosure of, rather than unauthorised access to, identifying information.

Item 40 inserts **new paragraph 336E(2)(da)**. This creates a new circumstance in which a disclosure of identifying information is a permitted (ie lawful) disclosure - where the disclosure is to a Commonwealth, State or Territory agency for the purpose of verifying the relevant person is an Australian citizen or holds a visa of a particular class.

Item 41 inserts **new paragraphs 336E(2)(ea) and (eb)**. This creates another two new circumstances in which a disclosure of identifying information is a permitted disclosure - where the disclosure is reasonably necessary for the enforcement of the criminal law of a Commonwealth or of a State or Territory (**paragraph 336E(2)(ea)**) or required by or under a law of the Commonwealth or of a State or Territory (**paragraph 336E(2)(eb)**). The Explanatory Memorandum states that new **paragraph 336E(2)(eb)**:

is similar to a provision which permits disclosure of personal information under the *Privacy Act 1988*.

The relevant provision in the *Privacy Act 1988* is Information Privacy Principles 11.1(d):

(d) the disclosure is required or authorised by or under law

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However, the 1996 Privacy Commissioner's publication, [*Plain English Guidelines to Information Privacy Principles 8 – 11*](#) specifically states that State law is not 'law' for the purposes of Information Privacy Principle 11.1(d), except where a State/Territory has validly legislated to bind the Commonwealth.⁶ Thus, on the face of it, the assertion in Explanatory Memorandum quoted above is somewhat imprecise. The Explanatory Memorandum does note that **new paragraph 336E(2) (eb)**:

uses the higher standard of 'required' rather than the Privacy Act standard of 'required or authorised' due to the nature of the information that may be disclosed under section 336E. It is also consistent with existing paragraph 336D(2)(h) of the Act, which allows access of identifying information to be authorised for the purpose of complying with the laws of the Commonwealth or the States or Territories.

Item 43 repeals existing paragraph 336E(2)(g), substituting **new paragraphs 336E(2)(g) and (ga)**. Existing paragraph 336E(2)(g) states that disclosure of identifying information is a permitted disclosure where it is for the purpose of an investigation by the Privacy Commissioner or the Ombudsman into the carrying out of an identification test or the requiring of the provision of a personal identifier. The amendments broaden permitted disclosure to include for the purposes of investigations of the Privacy Commissioner or Ombudsman relating to any action taken by the administering department⁷ (**paragraph 336E(2)(g)**) or of facilitating or expediting the exercise of powers, or performance of functions, of the Migration Agents Registration Authority ('the MARA') (**paragraph 336E(2)(ga)**). In relation to the later, the Explanatory Memorandum comments:

[this will allow] for the disclosure of material, which contains identifying information, to the MARA. For example, where the MARA is investigating the conduct of a migration agent, it had been DIAC's normal practice to provide to the MARA files relating to the clients of the agent, to assist the MARA in its investigations. Those files will often contain signatures and photographs of the clients, collected, for example, for the purposes of visa applications for which the agent was representing the clients. The disclosure of those photos and signatures is an offence under current section 336E. This amendment will ensure such disclosures are not an offence.

Part 2 - Amendments contingent on the *Australian Citizenship (Transitional and Consequential) Act 2007*

Division 1 makes amendments to the *Migration Act 1958* that commence if the *Australian Citizenship (Transitional and Consequential) Act 2007* has not yet commenced. The *Australian Citizenship (Transitional and Consequential) Act 2007* passed through both Houses on 26 February and received Royal Assent on 15 March. The Bills Digest 73 (2005-06) dated 6 December 2005 can be accessed [here](#).

The *Australian Citizenship (Transitional and Consequential) Act 2007* repeals the *Australian Citizenship Act 1948* at the time when the new *Australian Citizenship Act 2007* commences.

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Depending on when the new Citizenship Acts commence, either **item 62** or **item 69** will apply. **Item 64** also makes transitional arrangements for authorisations made under section 336D of the Act to reflect the amended paragraph (g).

Existing section 336D ('Authorising access to identifying information') provides that the Secretary may, in writing, authorise a specified person to access identifying information of the kind specified in the authorisation but has to state in the authorisation a specified person from an enumerated list.

Currently, paragraph (g) provides that a specified purpose is 'making decisions under this Act or the regulations, or under the *Australian Citizenship Act 1948* or the regulations made under that Act'.

Item 62 substitutes **new paragraph 336D(2)(g)** to permit authorisation of access to identifying information for the purposes of the Migration Act or regulations or for the purposes of the *Australian Citizenship Act 1948* or regulations made under that Act.

The Explanatory Memorandum states that:

[T]he new, wider ground will ensure identifying information can be accessed for the purposes of exercising powers or performing functions under the legislation, including where the power or function is not strictly concerned with making a decision under the legislation.

The Secretary must not authorise access under section 336D that is for the purpose of investigating an offence against a law of the Commonwealth or a State or Territory; or prosecuting a person for such an offence if the identifying information in question relates to a personal identifier of a prescribed type.

The [Bills Digest](#) for the Migration Legislation Amendment (Identification and Authentication) Bill 2003 noted in relation to section 336D that

The international obligations mentioned above are implemented in domestic law through the *Privacy Act 1988*. The protection of personal information is set out in the [Information Privacy Principles](#) (IPPs).⁽⁴⁶⁾ Section 16 of the Privacy Act states that an agency, defined to include Commonwealth Departments, shall not collect, use and disclose personal information inconsistently with the IPPs.⁽⁴⁷⁾

IPP 1 states that personal information should only be collected if it is necessary for a lawful purpose directly related to a function or activity of the collector. As noted above, the purposes for collection of identifying material are very generic. For example, the purposes in the Bill for the collection of identifying material is stated to be mere identification both in the present and future.⁽⁴⁸⁾ Without further elaboration of the *circumstances* in which identification is required, this would allow information to be collected in cases where there was rarely if ever immigration fraud. It gives rise to the question whether the creation of a 'just-in-case' database is a proportionate response to the scale of identity fraud by non-citizens.

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Moreover, the low level of generality of the purposes for the Bill facilitating sharing of information with agencies outside the immigration context, for example, domestic or foreign enforcement agencies. While the Bill prohibits disclosures of certain types of identifiers for the purposes of investigating an offence against an Australian law,⁽⁴⁹⁾ the prohibition is not absolute and no such limitation is imposed on sharing of information in relation to foreign offences. Indeed, the Bill itself contemplates the provision of data to foreign law enforcement agencies.⁽⁵⁰⁾ Yet there is no guarantee that the use of the identifying information by the law enforcement agency will have any connection with the purpose for which the data was collected in the first instance by the Department of Immigration and Multicultural and Indigenous Affairs.

In addition, it is unclear whether information sharing arrangements with foreign countries would be subject to a consideration of the consequences of that disclosure, for example, whether they would lead to prosecutions under laws that do not have any equivalent in Australian law.⁸

The Digest also points to the guidelines of the Senate Regulations and Ordinances Committee for delegated legislation, which suggest that regulations:

- must not lessen the operation of provisions protecting human rights
- must show sensitivity to personal matters, and
- must protect privacy.

Furthermore, the Administrative Review Council in its report *Rulemaking by Commonwealth Agencies*, recommends that measures which affect individual rights and liberties, including powers of search, should be enacted in primary legislation.⁹

Item 69 inserts **new paragraph 336E(2)(ha)** to permit the disclosure of audio and video recordings where the disclosure is for the purposes of the Migration Act or regulations or for the purposes of the *Australian Citizenship Act 1948* or regulations made under that Act. The disclosure must be for the purpose of transcribing or translating the recording, or conducting language or accent analysis of the recording.

The Explanatory Memorandum states that:

[t]his new permitted disclosure ground will allow the Department to disclose tapes of interviews with detainees to companies providing transcription and translation services, so that the tape of interview can be transcribed and translated or both. Currently, such a disclosure would constitute an offence under section 336E.

If the Citizenship Acts do not commence, the amendment is made by **item 71**. The application provisions are contained in **items 65 and 72**. The amendments do not apply to conduct taken before commencement.

Therefore, in summary, Part 2 of Schedule 2 sets out a complex commencement pattern to cover all contingencies of the parent acts coming into operation. **Items 62 and 63** will not

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commence if Schedule 1 to the *Australian Citizenship (Transitionals and Consequential) Act 2007* commences before the main personal identifier amendments. The equivalent provisions to **items 62 and 63**, should the Act commence first, are **items 68, 69 and 70**, and the application provision (equivalent to **item 65**) is **item 72** of Schedule 1 to the Bill.

Schedule 2 - Authorisations relating to movement records under the Migration Act 1958

Section 488 of the Act deals with tampering with movements records. A 'movement record' is defined in section 5 as information stored in a notified database, which is any database so declared by the Minister in the *Gazette* under section 489.

Item 1 inserts **new paragraph 488(2)(aa)** into the Migration Act which provides that the Minister may authorise an officer, for the purpose of making a movement record available to, and for the use of either the person to whom the record relates or the duly appointed agent of that person, to perform one or more of the actions listed in subsection 488(1).

Existing subsection 488(1) makes it an offence for a person to read, examine, reproduce by any means, or use or disclose by any means, any part of a client's movement records, otherwise than in accordance with an authority given under subsection 488(2).

The authorisations in subsection 488(2) deal with releasing records to relevant agencies but do not provide for the disclosure of movement records to an individual to whom the record relates or to his or her duly appointed agent.

The Explanatory Memorandum states:

This amendment will authorise the disclosure of movement records to an individual to whom the record relates or to his or her duly appointed agent. This will ensure consistency with the objectives of the Freedom of Information Act 1982 and the Ombudsman's view that government agencies should facilitate access by an individual to his or her own information. The amendment will also ensure the Department can respond to client requests in a more efficient manner.¹⁰

Presumably the Explanatory Memorandum is referencing the March 2006 Ombudsman report entitled *Scrutinising government: Administration of the Freedom of Information Act 1982 in Australian government agencies* which is available [here](#).

Schedule 3- Other amendments to the Migration Act 1958

In 2006 Parliament passed the *Fisheries Legislation Amendment (Foreign Fishing Offences) Act 2006* which inserted new offences into the *Fisheries Management Act 1991* (FMA) and the *Torres Strait Fisheries Act 1984* (TSFA). The Bills Digest is available [here](#).

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The new offences provide for custodial penalties for foreign fishing offences in those parts of Australia's territorial sea that are within the Australian Fishing Zone, within the meaning of the FMA, or within any 'area of Australian jurisdiction', within the meaning of the TSFA.

Items 1 and 2 amend existing paragraphs 5(1)(a) and 5(1)(b) of the Migration Act. These paragraphs list the various fishing offences in the FMA and TSFA respectively that are deemed to fall within the meaning of a 'fisheries detention offence' in the Migration Act. This allows non-citizens on foreign boats that are suspected of involvement in fisheries offences to be granted visas that allow the boats and persons to be taken back to Australia for the purposes of investigating the suspected offence. Items 1 and 2 expand the range of fisheries offences falling within the meaning of a fisheries detention offence to incorporate the offences created by the *Fisheries Legislation Amendment (Foreign Fishing Offences) Act 2006* mentioned above.

Concluding comments

The reader's attention is drawn to comments made towards the end of the background section of this Digest as to the apparent delay in introducing legislation designed to address the problematic access and disclosure restrictions regarding personal identifiers in *Migration Act 1958* and three other related Acts.

Endnotes

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1. These were introduced by the *Border Protection Legislation Amendment (Deterrence of Illegal Foreign Fishing) Act 2005*, and came into effect in August 2005.
 2. These were introduced by the *Environment and Heritage Legislation Amendment Act (No.1) 2006*
 3. The Hon. Kevin Andrews, House of Representatives, *Debates* 1 March 2007, pp. 3–4.
 4. Personal communication, Department of Immigration and Citizenship, 20 March 2007.
 5. The pages of the Explanatory Memorandum are not numbered.
 6. At: p. 41.
 7. The Department of Immigration and Citizenship.
 8. Libby Bunyan, 'Migration Legislation Amendment (Identification and Authentication) Bill 2003' *Bills Digest* No. 14, Parliamentary Library, Canberra, 2003–04, p. 11.
 9. *op. cit.*, p. 13.
 10. *ibid.*

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