

## **EXPLANATORY STATEMENT**

Issued by the Minister for Immigration, Citizenship and Multicultural Affairs

*Migration Act 1958*

*Migration Amendment (Seamless Traveller) Regulations 2018*

The *Migration Act 1958* (the Act) is an Act relating to the entry into, and presence in, Australia of aliens, and the departure or deportation from Australia of aliens and certain other persons.

Subsection 504(1) of the Act in summary provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or which are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

In addition, regulations may be made pursuant to the provisions of the Act listed in Attachment A.

The *Migration Amendment (Seamless Traveller) Regulations 2018* (the Regulations) amend the *Migration Regulations 1994* to create greater efficiencies in border processing at international ports in line with the digital transformation agenda.

In particular, the amendments will reduce the processing burden for travellers at international ports using a SmartGate (or other authorised system) by removing the requirement to present a physical passport if details of their passport are already held electronically and can be used to establish identity.

Prior to these amendments, an image of the traveller's face and shoulders had to be compared with the image and details in the physical passport to establish identity, citizenship and visa status, as applicable. Under these amendments, in certain circumstances, the image of the person's face and shoulders can instead be compared with electronic passport details already held, saving the inefficient burden of presenting the physical document and more quickly clearing travellers in increasingly busy ports. For non-citizens, the electronic passport details are obtained the first time a person travels on that passport. For Australian citizens, these details may be obtained either the first time a person travels on that passport or they may also be able to be obtained from the Department of Foreign Affairs and Trade.

The physical passport will still be required in some circumstances, for example, if identity or visa status cannot be established using the new method or if there are integrity or other issues. The physical passport will also be required at ports that have not rolled out the new technology and in circumstances where travellers are processed manually (by a clearance officer).

The new approach may be used for the processing of travellers at certain international ports for the purposes of:

- immigration clearance on arrival in Australia (under section 166 of the Act);
- the grant of a Special Category visa (a visa for New Zealand citizens) at the border (under section 32 of the Act); and

- verifying the identity of domestic travellers who are travelling on an overseas vessel with international travellers (under section 170 of the Act), for example, where domestic travellers embark on an aircraft carrying international travellers and all travellers disembark at the same port in Australia. Previously, such travellers had to show a required form of identification (not necessarily a passport). Under these amendments, their facial image can be compared with previously stored identity information, if available.

The amendments will provide greater efficiency and security at the relevant ports, and give effect to the digital transformation agenda, by allowing reliance on existing digital information rather than requiring presentation of a physical document. Use of a SmartGate remains voluntary however, and travellers can choose to be processed manually by a clearance officer using their physical documentation.

Details of the Regulations are set out in [Attachment C](#).

A Privacy Impact Statement has been completed and no privacy risks are identified in relation to the Regulations. The proposal is compliant with the Australian Privacy Principles contained in the *Privacy Act 1988*.

A Statement of Compatibility with Human Rights (the Statement) has been completed in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The overall assessment is that the Regulations are compatible with human rights. A copy of the Statement is at [Attachment B](#).

The Office of the Australian Information Commissioner and the Office of International Law in the Attorney-General's Department were consulted on the Regulations and had no concerns.

The Office of Best Practice Regulation (the OBPR) were consulted on the Regulations and no Regulation Impact Statement is required. The OBPR consultation reference is 23662.

The Regulations were drafted in consultation with government and industry stakeholders either directly or through peak industry and government bodies and via departmental lead consultative fora such as Industry Summit and the National Passenger Facilitation Committee. Members and participants of these fora include major airlines and airline representative bodies, industry and Government tourism bodies, airport owners and key Government agencies. Government and Industry participants are highly supportive of the Seamless Traveller Project and of the outcomes to be achieved from the project.

The Act specifies no conditions that need to be satisfied before the power to make the Regulations may be exercised.

The Regulations are a legislative instrument for the purposes of the Legislation Act.

The Regulations commence on 17 November 2018.

**AUTHORISING PROVISIONS**

Subsection 504(1) of the *Migration Act 1958* (the Act) relevantly provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing all matters which by the Act are required or permitted to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

In addition, the following provisions of the Act may apply:

- paragraph 32(2)(c), which provides that a criterion for a special category visa is that the Minister is satisfied the applicant is a person in a class of persons declared by the regulations to be persons for whom a visa of another class would be inappropriate;
- subsection 46(3), which provides that the regulations may prescribe criteria that must be satisfied for an application for a visa of a specified class to be a valid application;
- subparagraph 166(1)(a)(i), which provides that a citizen who enters Australia must, without unreasonable delay, present to a clearance authority the person's Australian passport or prescribed other evidence of the person's identity and Australian citizenship;
- subsection 166(3), which provides that, subject to section 167, a person is to comply with paragraphs 166(1)(a) and (b) in a prescribed way;
- paragraph 170(1)(a), which provides that a person, whether a citizen or non-citizen, who travels, or appears to intend to travel, on an overseas vessel from a port to another port may be required by a clearance officer at either port or by officers at both ports to present to a clearance authority prescribed evidence (which might include a personal identifier) of the person's identity;
- subsection 170(2), which provides that a person is to comply with paragraphs 170(1)(a) and (b) in a prescribed way.

**ATTACHMENT B****Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

***Migration Amendment (Seamless Traveller) Regulations 2018***

This legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

**Overview of the Legislative Instrument**

This legislative instrument amends the *Migration Regulations 1994* (Migration Regulations) to create greater efficiencies in border processing at international ports in line with the digital transformation agenda.

In particular, the amendments will reduce the processing burden for travellers at some international ports using a SmartGate (or other authorised system) by removing the requirement to present a physical passport if details of their passport are already held electronically and can be used to establish identity.

Prior to the amendments, an image of the traveller's head and shoulders had to be compared with the image and details in the physical passport to establish identity, citizenship and visa status, as applicable. Under these amendments, in certain circumstances, the image of the person's head and shoulders can instead be compared with electronic passport details already held, saving the inefficient burden of presenting the physical document and more quickly clearing travellers in increasingly busy ports. The electronic passport details will be obtained either the first time a person travels on that passport or, for Australian citizens, they may also be able to be obtained from the Department of Foreign Affairs and Trade. This is colloquially referred to as 'Contactless Processing' as little contact is made with clearance authorities other than presenting to a SmartGate for the purpose of having a facial image taken and compared with existing data.

The physical passport will still be required in some circumstances, for example, if identity or visa status cannot be established using the new method or if there are integrity or other issues. The physical passport will also be required at ports that have not rolled out the new technology and in circumstances where travellers are processed manually (by a clearance officer).

The new approach may be used for the processing of travellers at certain international ports for the purposes of:

- immigration clearance on arrival in Australia (under section 166 of the *Migration Act 1958* (the Migration Act));
- the grant of a Special Category visa (a visa for New Zealand citizens) at the border (under section 32 of the Migration Act); and
- Verifying the identity of domestic travellers who are travelling on an 'overseas vessel' with international travellers (under section 170 of the Migration Act). An

overseas vessel includes aircraft and refers to the situation where there is a domestic component within Australia as part of the vessel's international journey, for example, where domestic travellers embark on an aircraft carrying international travellers and all travellers disembark at the same port in Australia. Previously, such travellers had to show a required form of identification (not necessarily a passport). Under these amendments, instead of showing one of these forms of identification, the person can instead provide an image of their head and shoulders which can be compared with previously stored identity information, if available.

Travellers are notified about the collection of personal information by the SmartGates in advance. This notification occurs through dedicated signage which contains the Department of Home Affairs' (the Department's) privacy statement, which, amongst other things, informs individuals why their personal information is being collected and how it may be used by the Department. Further information is available in pamphlets at the airport and on the Departmental website.

The amendments will provide greater efficiency and security at the relevant ports, and give effect to the digital transformation agenda, by allowing reliance on existing digital information rather than requiring presentation of a physical document. Use of a SmartGate remains voluntary however, and travellers can choose to be processed manually by a clearance officer using their physical documentation.

### **Human rights implications**

The measures included in this legislative instrument engage the right to freedom of movement and the right to freedom from interference with privacy.

#### *Right to freedom of movement - Article 12 - International Covenant on Civil and Political Rights (ICCPR)*

Article 12(1) and (2) provides as follows:

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.

Contactless Processing maintains the current requirements on travellers, other than not requiring the presentation of a passport where previously collected passport information is available. It does not limit or impose any new conditions on the rights of persons to enter or leave Australia and hence does not substantively affect this right.

This advancement in technology does, however, assist in facilitating the efficient exercise of the right to freedom of movement. A greater number of travellers will be able to self-process through Contactless Processing and enter the country more quickly and efficiently.

However, travellers will also retain the option of choosing manual processing, with the physical identity document, by a clearance officer if preferred.

*Right to freedom from interference with privacy - Article 17 – ICCPR*

Article 17 states that:

1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

Article 17 of the ICCPR prohibits arbitrary or unlawful interference with privacy. Interferences which are lawful may nonetheless be arbitrary where those interferences are not in accordance with the objectives of the ICCPR and are not reasonable in the circumstances. The United Nations Human Rights Committee has interpreted the requirement of reasonableness to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances.

In the case of the current amendments, any interference with privacy is neither unlawful nor arbitrary.

Lawful interference with privacy

The collection, storage, use and disclosure of personal information by the Department is undertaken in accordance with the Australian Privacy Principles contained in the *Privacy Act 1988* (Privacy Act). Information that has been provided to the Department pursuant to a statutory obligation is also subject to the disclosure provisions in the *Australian Border Force Act 2015* (ABF Act). In addition, biometric information (including photographs and signatures) and information derived from biometric information is subject to requirements in Part 4A of the Migration Act, “Obligations relating to identifying information”, which provides for a range of rules and offences relating to the access, disclosure and use of identifying information. This is consistent with the United Nations Human Rights Committee General Comment 16 in which the Committee stated that the gathering and holding of personal information on computers, databanks and other devices (that is, the use of information technology) must be regulated by law and that effective measures must be taken to ensure that the information collected is not accessed by persons who are not authorised by law to receive, process or use it.

Under the *Privacy Act*, biometric information is considered ‘sensitive’ information. Sensitive information is afforded a higher level of protection than other types of personal information. Sensitive information must only be collected with the consent of the individual unless one of the listed exceptions applies. Those exceptions include where the collection is authorised or required by law. Existing mechanisms in the Migration Act (sections 5A, 166, 170, 175, 257A, 258A-G, 336A-L) and Migration Regulations provide legislative authority for identity assessment, collection, storage and disclosure of personal identifiers (which includes biometric information). The measures in this regulation amendment are relevantly authorised by sections 166 and 170 of the Migration Act.

Sections 166 and 170 require travellers (citizens and non-citizens) to present evidence of identity, which may include personal identifiers (biometrics) to a clearance authority (a clearance officer or an authorised system). Obligations for managing personal identifiers (and

information derived from them) are set out in Part 4A of the Migration Act. Travellers are also notified in advance of attending a SmartGate about the collection of personal information and can choose to be manually processed instead.

Collection of personal identifiers is permitted for a range of purposes set out in section 5A of the Migration Act, including:

- Identification and authentication of identity.
- improving the integrity of Australia's entry programs,
- improving passenger processing at Australia's border;
- enhancing the Department's ability to identify non-citizens who have a criminal history or who are of national security or character concern;
- To assist in determining whether a person is an unlawful non-citizen or a lawful non-citizen.

Disclosure of information is permitted under Part 4A of the Migration Act in specified circumstances including for the purpose of data-matching in order to identify, or authenticate the identity of a person and facilitate the processing of persons entering or departing from Australia (s336E(2)). The Migration Act and the ABF Act also contain offences for using and disclosing certain information if it is not a permitted or authorised disclosure.

The measures in this amendment are authorised by sections 166 and 170 of the Migration Act for the purpose of establishing identity at the border, and will be implemented in accordance with Part 4A of the Migration Act, the Privacy Act and the ABF Act. Therefore any interferences with privacy for those persons who choose to self-process through Contactless Processing are lawful.

#### Reasonableness of interference with privacy

The Department already collects biometric data, which relevantly includes images, for the lawful purpose of border clearance processing. The Department, in conjunction with other agencies, has a critical role in protecting Australia's borders and national security efforts to combat terrorism, trans-national crime and irregular migration.

The ability to accurately collect, store, use and disclose biometric identification of all persons increases the integrity of identity, security, and immigration checks of people entering and departing Australia. The primary purpose of the collection of an image of a person's face and shoulders is to identify individuals at the border and to verify their identity for border clearance and control.

These amendments remove the requirement for travellers to present a physical passport if the traveller chooses to instead have their image used to establish their identity where it can be compared to existing holdings, for the purpose of more efficient processing at the border.

Contactless Processing will not take more information from the person than is reasonably necessary to achieve the legitimate objective of confirming the person's identity.

Any interference with a person's privacy when a traveller chooses to self-process through Contactless Processing is for a lawful border protection objective and is proportionate to the outcome sought, which is to mitigate the threat posed by persons seeking to enter Australia undetected as impostors or using fraudulent documents to conduct criminal or terrorist activities. The ability to lawfully collect, use, store and disclose information collected

through Contactless Processing is necessary, reasonable and proportionate in order to improve traveller facilitation through Australia's border clearance processes and supports border protection and national security objectives. Therefore any interference with the privacy of persons who choose to self-process through Contactless Processing is not arbitrary.

### **Conclusion**

The border clearance measures in this legislative instrument are compatible with human rights. The right to freedom of movement is engaged, but is not restricted. Any limitation on the right to freedom from interference with privacy of persons who choose to self-process through Contactless Processing is lawful, reasonable, necessary, and proportionate to achieving the legitimate aim of maintaining the integrity and security of Australia's borders, while improving the facilitation of travellers to Australia.

**The Hon David Coleman MP, Minister for Immigration, Citizenship and Multicultural Affairs**



**ATTACHMENT C****Details of the Migration Amendment (Seamless Traveller) Regulations 2018**Section 1 – Name

This section provides that the title of the legislative instrument is the *Migration Amendment (Seamless Traveller) Regulations 2018* (the Regulations).

Section 2 – Commencement

Subsection 2(1) provides that each provision of the Regulations specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms. The table states that the whole of the instrument commences on 17 November 2018. A note clarifies that this table relates only to the provisions of this instrument as originally made. It will not be amended to deal with any later amendments of this instrument.

Subsection 2(2) provides that any information in column 3 of the table is not part of the Regulations. Information may be inserted in this column, or information in it may be edited, in any published version of this instrument. Column 3 of the table provides the date/details of the commencement date.

The purpose of this section is to provide for when the amendments made by the Regulations commence.

Section 3 – Authority

This section provides that the Regulations are made under the *Migration Act 1958* (the Act).

The purpose of this section is to set out the Act under which the Regulations are made.

Section 4 – Schedules

This section provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

The effect of this section is that the *Migration Regulations 1994* (the Migration Regulations) are amended as set out in the applicable items in the Schedules to the Regulation.

The purpose of this section is to provide for how the amendments in these Regulations operate.

Item 1 – Before subregulation 3.03(1)Item 3 – Before subregulation 3.03(2)

Upon entry to Australia, a person (unless exempted) must be immigration cleared under section 172 of the Act. One of the requirements in section 172 is that the person complies with section 166. Section 166 outlines, among other things, the evidence of identity requirements for persons entering Australia.

Subparagraph 166(1)(a)(i) of the Act provides, in effect, that an Australian citizen who enters Australia must, without unreasonable delay, present to a clearance authority the person's Australian passport *or prescribed other evidence* of the person's identity and Australian citizenship.

Subsection 166(3) relevantly provides that a person is to comply with paragraph 166(1)(a) in *a prescribed way*.

Prior to these amendments there was nothing prescribed under subparagraph 166(1)(a)(i) or subsection 166(3) for this purpose, and therefore the only way to meet the requirement was to present a physical passport.

Item 1 inserts new subregulation 3.03(1A) to prescribe an image of the person's face and shoulders (facial image) as prescribed other evidence of the person's identity and Australian citizenship under subparagraph 166(1)(a)(i). This provides an alternative to presenting a passport.

Item 2 inserts new subregulation 3.03(2A) to prescribe that the way to comply with the requirement to present a facial image under subparagraph 166(1)(a)(i) is by presenting oneself to an authorised system.

The effect of these amendments is that eligible persons at certain ports may seek to comply with subparagraph 166(1)(a)(i) using an authorised system without presenting a physical passport. The intention is to provide greater efficiency in border processing and remove the burden of presenting a passport where possible.

Prior to these amendments, a person entering Australia at a port and using an authorised system (SmartGate) would present their physical passport to the SmartGate under subparagraph 166(1)(a)(i). A facial image would then be taken by the SmartGate, allowing the person to satisfy paragraph 166(1)(d). The SmartGate would compare the image on the physical passport with the digital image of the person's face. This is colloquially referred to as 'contact mode'. This process may continue to be used at ports using the earlier version SmartGates or on newer SmartGates that are set to 'contact mode'.

Under new subregulations 3.03(1A) and (2A), at ports with the latest version SmartGates, a citizen may be able to satisfy subparagraph 166(1)(a)(i) by presenting themselves to the SmartGate in order to present an image of their face and shoulders. By the same action, the person would also satisfy the requirement to provide a facial image under paragraph 166(1)(d). The facial image would be compared with electronic passport information obtained either the first time the person travelled on that passport or from the Department of Foreign Affairs and Trade.

This supports the digital transformation agenda by allowing reliance on electronic information already collected and removing the need to present a physical document, where possible. This is colloquially referred to as ‘contactless processing’ as little contact is made with clearance authorities other than presenting to a SmartGate for the purpose of having a facial image taken and compared with existing data.

If a person’s identity or visa status cannot be ascertained by comparing the facial image with existing data, then the person may be required to present their physical passport to the SmartGate. If the person’s identity or visa status still cannot be ascertained using the authorised system, or there is another concern, then a clearance officer may require the passport to be presented to a clearance officer under subsection 166(2). Once a clearance officer requires a passport to be presented under subsection 166(2), this negates any previous attempt to comply with section 166 using an authorised system and the person must comply with section 166 by presenting evidence to a clearance officer.

The amendments will provide greater efficiency and security at the relevant ports, and give effect to the digital transformation agenda, by allowing reliance on existing digital information rather than requiring presentation of a physical document. Use of a SmartGate remains voluntary however, and travellers can choose to be processed manually by a clearance officer using their physical documentation.

#### Item 2 – Subregulation 3.03(1) (note)

This item repeals the note in subregulation 3.03(1) in order to tidy up this provision. No substantive change is intended.

#### Item 4 – Paragraph 3.03(3)(a)

Upon entry to Australia, a person (unless exempted) must be immigration cleared under section 172 of the Act. One of the requirements in section 172 is that the person complies with section 166. Section 166 outlines the evidence of identity requirements for persons entering Australia.

Subparagraph 166(1)(a)(ii) of the Act provides, in effect, that a non-citizen who enters Australia must, without unreasonable delay, present to a clearance authority evidence of the person’s identity and of a visa that is in effect and is held by the person.

Subsection 166(3) provides that a person is to comply with paragraph 166(1)(a) in a *prescribed way*.

Subregulation 3.03(3) prescribes the way to comply with subparagraph 166(1)(a)(ii) for certain categories of non-citizens.

Paragraph 3.03(3)(a) prescribes the way to comply with subparagraph 166(1)(a)(ii) for non-citizens taken to hold a Special Purpose visa (SPV holders).

Prior to these amendments, SPV holders were required to:

- Provide a completed passenger card to a clearance officer where required by Part 1 of Schedule 9 (for paragraph 166(1)(b)); and
- Present either of these to a clearance authority (for subparagraph 166(1)(a)(ii)):

- If the person was registered for an automated identification processing system – evidence of his or her identity using the system; or
- Evidence of the person’s identity, as specified in Part 1 of Schedule 9.

These amendments make no change to the requirement relating to providing a passenger card.

The changes made by the amendments are as follows:

- There is no longer a reference to a person being registered for an automated identification processing system. While this registration process has not changed, it is considered unnecessary to refer to it in the regulation because administrative practices guide registered persons to use the SmartGate, while unregistered persons are guided toward manual processing. If an unregistered person attempted to use the SmartGate, they would be referred for manual processing.
- Previously, the regulation provided that a registered person must present “evidence of his or her identity using the system”. In practice, the system (SmartGate) could only accept a passport as evidence. These amendments replace the broad reference to ‘evidence of identity’ with explicit references to a passport or an image of the non-citizen’s face and shoulders, presented by way of presenting oneself to an authorised system (facial image). This reflects the addition of a facial image as an alternative form of evidence of identity, replacing the requirement to present a physical passport.
- If the person does not present their passport, or an image of their face and shoulders, to an authorised system, they must present evidence of their identity, as specified in Part 1 of Schedule 9, to a clearance officer.

The effect of these amendments is that eligible SPV holders at certain ports may be able to comply with subparagraph 166(1)(a)(ii) using an authorised system without presenting a physical passport. The intention is to provide greater efficiency in border processing and remove the burden of presenting a passport where possible.

Prior to these amendments, an SPV holder entering Australia at a port and using an authorised system (SmartGate) would present their physical passport to the SmartGate to meet subparagraph 166(1)(a)(ii) and subregulation 3.03(3)(a). A facial image would then be taken by the SmartGate, allowing the person to satisfy paragraph 166(1)(d). The SmartGate would compare the image on the physical passport with the digital image of the person’s face. This is colloquially referred to as ‘contact mode’. This process may continue to be used at ports using the earlier version SmartGates or on newer SmartGates that are set to ‘contact mode’.

Under new paragraph 3.03(3)(a), at ports with the latest version SmartGates, an SPV holder may be able to satisfy subparagraph 166(1)(a)(ii) by presenting themselves to the SmartGate in order to present an image of their face and shoulders. By the same action, the person would also satisfy the requirement to provide a facial image under paragraph 166(1)(d). The facial image would be compared with electronic passport information held in relation to the person.

This supports the digital transformation agenda by allowing reliance on electronic information already collected and removing the need to present a physical document, where possible. This is colloquially referred to as ‘contactless processing’ as little contact is made with

clearance authorities other than presenting to a SmartGate for the purpose of having a facial image taken and compared with existing data.

If a person's identity or visa status cannot be ascertained by comparing the facial image with existing data, then the person may be required to present their physical passport to the SmartGate. If the person's identity or visa status still cannot be ascertained using the authorised system, or there is another concern, then a clearance officer may require the passport to be presented to a clearance officer under subsection 166(2). Once a clearance officer requires a passport to be presented under subsection 166(2), this negates any previous attempt to comply with section 166 using an authorised system and the person must comply with section 166 by presenting evidence to a clearance officer.

The amendments will provide greater efficiency and security at the relevant ports, and give effect to the digital transformation agenda, by allowing reliance on existing digital information rather than requiring presentation of a physical document. Use of a SmartGate remains voluntary however, and travellers can choose to be processed manually by a clearance officer using their physical documentation.

Item 5 – Subparagraph 3.03(3)(b)(i)

Item 6 – Subparagraphs 3.03(3)(d)(i), (e)(i), (ea)(i), (f)(i), (fa)(i) and (g)(i)

Upon entry to Australia, a person (unless exempted) must be immigration cleared under section 172 of the Act. One of the requirements in section 172 is that the person complies with section 166. Section 166 outlines the evidence of identity requirements for persons entering Australia.

Subparagraph 166(1)(a)(ii) of the Act provides, in effect, that a non-citizen who enters Australia must, without unreasonable delay, present to a clearance authority evidence of the person's identity and of a visa that is in effect and is held by the person.

Subsection 166(3) provides that a person is to comply with paragraph 166(1)(a) in *a prescribed way*.

Paragraphs 3.03(3)(b) to (g) prescribe the way to comply with subparagraph 166(1)(a)(ii) for various categories of non-citizens.

These amendments add an image of the non-citizen's face and shoulders, presented by way of presenting oneself to an authorised system (facial image), as a form of evidence that may be presented to attempt to comply with subparagraph 166(1)(a)(ii). This provides an alternative to presenting a passport.

The effect of these amendments is that these non-citizens, at certain ports, may be able to comply with subparagraph 166(1)(a)(ii) using an authorised system without presenting a physical passport. The intention is to provide greater efficiency in border processing and remove the burden of presenting a passport where possible.

Prior to these amendments, such a non-citizen entering Australia at a port and using an authorised system (SmartGate) would present their physical passport to the SmartGate to meet subparagraph 166(1)(a)(ii) and subregulation 3.03(3). A facial image would then be taken by the SmartGate, allowing the person to satisfy paragraph 166(1)(d). The SmartGate would compare the image on the physical passport with the digital image of the person's face. This

is colloquially referred to as ‘contact mode’. This process may continue to be used at ports using the earlier version SmartGates or on newer SmartGates that are set to ‘contact mode’.

Under these amendments, at ports with later version SmartGates, these non-citizens may be able to satisfy subparagraph 166(1)(a)(ii) by presenting themselves to the SmartGate in order to present an image of their face and shoulders. By the same action, the person would also satisfy the requirement to provide a facial image under paragraph 166(1)(d). The facial image would be compared with electronic passport information obtained the first time they travelled on that passport.

This supports the digital transformation agenda by allowing reliance on electronic information already collected and removing the need to present a physical document, where possible. This is colloquially referred to as ‘contactless processing’ as little contact is made with clearance authorities other than presenting to a SmartGate for the purpose of having a facial image taken and compared with existing data.

If a person’s identity or visa status cannot be ascertained by comparing the facial image with existing data, then the person may be required to present their physical passport to the SmartGate. If the person’s identity or visa status still cannot be ascertained using the authorised system, or there is another concern, then a clearance officer may require the passport to be presented to a clearance officer under subsection 166(2). Once a clearance officer requires a passport to be presented under subsection 166(2), this negates any previous attempt to comply with section 166 using an authorised system and the person must comply with section 166 by presenting evidence to a clearance officer.

The amendments will provide greater efficiency and security at the relevant ports, and give effect to the digital transformation agenda, by allowing reliance on existing digital information rather than requiring presentation of a physical document. Use of a SmartGate remains voluntary however, and travellers can choose to be processed manually by a clearance officer using their physical documentation.

#### Item 7 – Subregulation 3.03(4)

Upon entry to Australia, a person (unless exempted) must be immigration cleared under section 172 of the Act. One of the requirements in section 172 is that the person complies with section 166. Section 166 outlines the evidence of identity requirements for persons entering Australia.

Subparagraph 166(1)(a)(ii) of the Act provides, in effect, that a non-citizen who enters Australia must, without unreasonable delay, present to a clearance authority evidence of the person’s identity and of a visa that is in effect and is held by the person.

Subsection 166(3) provides that a person is to comply with paragraph 166(1)(a) in *a prescribed way*.

Subregulation 3.03(4) prescribes the way to comply with subparagraph 166(1)(a)(ii) for non-citizens (other than those mentioned in subregulation 3.03(3)).

Prior to these amendments, subregulation 3.03(4) prescribed that a non-citizen was required to comply with section 166 by:

- (a) presenting their passport to a clearance authority; and

- (b) presenting their visa label, if they have one and it has been requested, to a clearance officer ; and
- (c) providing a completed passenger card to a clearance officer.

Therefore, the only way to meet the requirement in subparagraph 166(1)(a)(ii) was to present a physical passport and a visa label if applicable.

New subregulation 3.03(4) now provides an alternative way to meet subparagraph 166(1)(a)(ii) and, in effect, provides that a non-citizen must comply with section 166 by:

- (a) Either:
  - i. presenting their passport to a clearance authority; *or*
  - ii. presenting an image of their face and shoulders by presenting themselves to an authorised system; and
- (b) presenting their visa label to a clearance officer if they have one and if it has been requested; and
- (c) providing a completed passenger card to a clearance officer.

Prior to these amendments, a person entering Australia at a port and using an authorised system (SmartGate) would present their physical passport to the SmartGate to meet subparagraph 166(1)(a)(ii) and subregulation 3.03(4). A facial image would then be taken by the SmartGate, allowing the person to satisfy paragraph 166(1)(d). The SmartGate would compare the image on the physical passport with the digital image of the person's face. This is colloquially referred to as 'contact mode'. This process may continue to be used at ports using the earlier version SmartGates or on newer SmartGates that are set to 'contact mode'.

Under amended subregulation 3.03(4), at ports with the latest version SmartGates, a non-citizen may be able to satisfy subparagraph 166(1)(a)(ii) by presenting themselves to the SmartGate in order to present an image of their face and shoulders. By the same action, the person would also satisfy the requirement to provide a facial image under paragraph 166(1)(d). The facial image would be compared with electronic passport information obtained the first time the person travelled on that passport.

This supports the digital transformation agenda by allowing reliance on electronic information already collected and removing the need to present a physical document, where possible. This is colloquially referred to as 'contactless processing' as little contact is made with clearance authorities other than presenting to a SmartGate for the purpose of having a facial image taken and compared with existing data.

If a person's identity or visa status cannot be ascertained by comparing the facial image with existing data, then the person may be required to present their physical passport to the SmartGate. If the person's identity or visa status still cannot be ascertained using the authorised system, or there is another concern, then a clearance officer may require the passport to be presented to a clearance officer under subsection 166(2). Once a clearance officer requires a passport to be presented under subsection 166(2), this negates any previous attempt to comply with section 166 using an authorised system and the person must comply with section 166 by presenting evidence to a clearance officer.

The amendments will provide greater efficiency and security at the relevant ports, and give effect to the digital transformation agenda, by allowing reliance on existing digital information rather than requiring presentation of a physical document. Use of a SmartGate

remains voluntary however, and travellers can choose to be processed manually by a clearance officer using their physical documentation.

This item also inserts a definition of “authorised system” into new subregulation 3.03(5). This definition provides that a reference to authorised system means an automated system that is authorised for the purposes of section 166 of the Act. Various series of SmartGates are currently authorised for this purpose.

#### Item 8 – Subregulation 3.09(1)

This item inserts a definition of “authorised system” into subregulation 3.09(1) as a consequence of the use of this term is in regulation 3.09. The definition provides that a reference to an authorised system means an automated system that is authorised for the purposes of section 170 of the Act. All arrivals versions of SmartGates are currently authorised for this purpose.

#### Item 9 – Subregulations 3.09(2) to (3)

Paragraph 170(1)(a) of the Act provides, in effect, that when a person travels between ports in Australia on an overseas vessel, a clearance officer may require the person to present *prescribed evidence* of the person’s identity to a clearance authority.

Subsection 170(2) of the Act provides that a person is to comply with paragraph 170(1)(a) in *a prescribed way*.

Regulation 3.09 prescribes the evidence that may be required for paragraph 170(1)(a) and the way to comply under s170(2).

The purpose of section 170 is to verify the identity of persons claiming to be travelling domestically on an overseas vessel. It is intended to capture situations where international and domestic travellers are mixed on an overseas vessel on the domestic leg of a journey (for example, international passengers do not disembark until the second Australian port arrived at, while domestic passengers embark at the first Australian port). Among other things, section 170 is intended to ensure that: international travellers do not by-pass immigration clearance under the pretence of being a domestic traveller; all domestic travellers who have had contact with the international travellers are identified, and any domestic travellers who have not disembarked are identified.

Regulation 3.09 prescribes a range of types of identification as evidence that a clearance officer may require under paragraph 170(1)(a).

New subregulation 3.09(2) adds an image of the person’s face and shoulders (facial image) as a type of prescribed evidence that a clearance officer may require a person to present under paragraph 170(1)(a). The clearance officer may require any one or more of the pieces of evidence listed in subregulation 3.09(2) to be presented to a clearance authority. New subregulation 3.09(3) provides that in the case of a facial image, it must be presented by way of presenting oneself to an authorised system.

These amendments also tidy up the way that regulation 3.09 is presented and expressly states that the regulation is made under paragraph 170(1)(a), however no substantive change other than that mentioned above is intended.



The effect of these amendments is that eligible persons at certain ports may be able to comply with paragraph 170(1)(a) using an authorised system without presenting a physical form of identification. The person would instead present their facial image by way of presenting themselves to an authorised system and the digital image of their face and shoulders would be compared with electronic identity information already held, where available and possible.

If a person's identity cannot be ascertained by comparing the facial image with existing data, then the person may be required to present any one or more of the prescribed forms of evidence to a clearance authority. A clearance officer may also require any one or more of the prescribed forms of evidence to be presented to a clearance officer under subsection 170(2AA).

These amendments give effect to the digital transformation agenda and provide for more efficient border processing by allowing reliance on electronic information already held and removing the need to present a physical document, where possible.

It is not mandatory for eligible persons to use an authorised system, but the process is offered for speed and efficiency and to reduce congestion at ports, thereby improving security. Instead of using an authorised system, it is always open to a person to seek to comply with section 170 by presenting their physical identification to a clearance officer.

#### Item 10 – At the end of regulation 5.15A

Subsection 32(2) of the Act provides a criterion for the grant of a Special Category visa (SCV).

In summary, it provides that the applicant, either:

- is a New Zealand citizen who holds and has presented a New Zealand passport and is neither a behaviour concern non-citizen nor a health concern non-citizen; or
- is a person, or is in a class of persons, declared by the regulations to be persons for whom another visa would be inappropriate.

In order to provide an alternative to presenting the physical passport, for SCVs applied for at a SmartGate at the border, this amendment declares a class of persons who may meet the criterion for grant without having to present the physical passport required under subparagraph 32(2)(a)(i).

The aim of new subregulation 5.15A(4) is to provide that a declared class of persons for the purposes of paragraph 32(2)(c) is New Zealand citizens who:

- hold a New Zealand passport that is in force and that is eligible for use at a SmartGate (or other authorised system); and
- have presented an image of their face and shoulders (by presenting themselves) to a SmartGate and who have, as a result, been successfully identified; and
- are neither behaviour concern non-citizens nor health concern non-citizens.

New Zealand citizens in the declared class of persons may not be required to present a physical passport for the purposes of being granted a SCV.

The effect of these amendments is that certain New Zealand citizens at certain ports may be able to meet the criteria for the grant of a SCV using an authorised system without presenting a physical passport. The person would instead present their facial image by way of presenting themselves to an authorised system and the digital image of their face and shoulders would be compared with electronic identity information already held, where available and possible.

If the person's identity cannot be ascertained by comparing the facial image with existing data, then the person would be required to present the physical passport to an officer or authorised system under subparagraph 32(2)(a)(i). A clearance officer may also require the passport to be presented under paragraph 32(3)(c).

These amendments complement amendments to implement 'contactless processing' at immigration clearance (see items 1 to 7 above) as, where a New Zealand citizen uses a SmartGate for the purposes of immigration clearance, the SCV would usually be granted at the time the SmartGate matches the identity of the person and allows them to pass through the gate. It would undermine and slow down 'contactless processing' if a physical passport was required for the purpose of the SCV grant, where the person has been successfully identified without it.

This item also inserts a definition of "authorised system" into new subregulation 5.15A(5). This definition provides that a reference to an authorised system means an automated system that is authorised for the purposes of section 32 of the Act. All arrivals versions of SmartGates are currently authorised for this purpose.

The amendments will provide greater efficiency and security at the relevant ports, and give effect to the digital transformation agenda, by allowing reliance on existing digital information rather than requiring presentation of a physical document. Use of a SmartGate remains voluntary however, and travellers can choose to be processed manually by a clearance officer using their physical documentation.

No change is made for SCV applications made in Australia but outside immigration clearance. In such cases, the person must present their physical passport in order to make a valid application for, and to be granted, a SCV.

#### Item 11 – Paragraph 1219(3)(b) of Schedule 1

Item 1219 sets out the requirements to make a valid application for a Special Category visa (SCV).

Prior to these amendments, paragraph 1219(3)(b) provided that an applicant must present a New Zealand passport that is in force.

These amendments provide an exception so that certain persons applying for an SCV at a SmartGate at the border do not need to present a physical passport in order to make a valid application.

The persons excepted from having to present a physical passport are New Zealand citizens who are making the application at an authorised system, who hold a New Zealand passport that is in force, and who are successfully identified as part of the 'contactless' immigration clearance process. If the person's identity is not satisfactorily ascertained by that process,

then a physical passport must be presented to an officer or clearance authority in order to make a valid application.

These amendments complement amendments to implement ‘contactless processing’ at immigration clearance (see items 1 to 7 above), as the SCV is applied for, and granted, at the SmartGate, at the same time as the person is identified for the purposes of immigration clearance. It would undermine and slow down ‘contactless processing’ if a physical passport was required to apply for the SCV, where the person has been successfully identified without it.

The amendments will provide greater efficiency and security at the relevant ports, and give effect to the digital transformation agenda, by allowing reliance on existing digital information rather than requiring presentation of a physical document. Use of a SmartGate remains voluntary however, and travellers can choose to be processed manually by a clearance officer using their physical documentation.

No change is made for SCV applications made in Australia but outside immigration clearance. In such cases, the person must present their physical passport in order to make a valid application for, and to be granted, a SCV.

#### Item 12 – At the end of item 1219 of Schedule 1

This item inserts a definition of “authorised system” into new subitem 1219(5). This definition provides that a reference to authorised system means an automated system that is authorised for the purposes of section 32 of the Act. All arrivals versions of SmartGates are currently authorised for this purpose.