



Migration Legislation Amendment (Protected Information) Act 2003

No. 75, 2003

**An Act to amend the *Migration Act 1958*, and for
other purposes**

Note: An electronic version of this Act is available in SCALEplus
(<http://scaleplus.law.gov.au/html/comact/browse/TOCN.htm>)

Contents

1	Short title.....	1
2	Commencement.....	2
3	Schedule(s).....	2
Schedule 1—Amendment of the Migration Act 1958		4
Schedule 2—Amendment of the Freedom of Information Act 1982		16



Migration Legislation Amendment (Protected Information) Act 2003

No. 75, 2003

An Act to amend the *Migration Act 1958*, and for other purposes

[Assented to 15 July 2003]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Migration Legislation Amendment
(Protected Information) Act 2003*.

2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, on the day or at the time specified in column 2 of the table.

Commencement information		
Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day on which this Act receives the Royal Assent	15 July 2003
2. Schedule 1, items 1 to 5	The day on which this Act receives the Royal Assent	15 July 2003
3. Schedule 1, items 5A to 5D	The day after this Act receives the Royal Assent	16 July 2003
4. Schedule 1, item 6	The day on which this Act receives the Royal Assent	15 July 2003
5. Schedule 1, item 6A	The day after this Act receives the Royal Assent	16 July 2003
6. Schedule 1, item 7	The day on which this Act receives the Royal Assent	15 July 2003
7. Schedule 1, item 8	The day after this Act receives the Royal Assent	16 July 2003
8. Schedule 2	The day after this Act receives the Royal Assent	16 July 2003

Note: This table relates only to the provisions of this Act as originally passed by the Parliament and assented to. It will not be expanded to deal with provisions inserted in this Act after assent.

- (2) Column 3 of the table is for additional information that is not part of this Act. This information may be included in any published version of this Act.

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule

concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Amendment of the Migration Act 1958

1 At the end of subsection 476(2)

Add “or subsection 503A(3)”.

2 After subsection 503A(3)

Insert:

- (3A) The Minister does not have a duty to consider whether to exercise the Minister’s power under subsection (3).

3 After subsection 503A(4)

Insert:

- (4A) If a person divulges or communicates particular information to a Commonwealth officer in accordance with a declaration under subsection (3):
- (a) the officer must not be required to divulge or communicate the information to the Federal Court or the Federal Magistrates Court; and
 - (b) the officer must not give the information in evidence before the Federal Court or the Federal Magistrates Court.
- The information may only be considered by the Federal Court or the Federal Magistrates Court if a fresh disclosure of the information is made in accordance with:
- (c) a declaration under subsection (3); or
 - (d) subsection 503B(6).

4 After subsection 503A(5)

Insert:

- (5A) If a person divulges or communicates particular information to a tribunal in accordance with a declaration under subsection (3):
- (a) the member or members of the tribunal must not be required to divulge or communicate the information to the Federal Court or the Federal Magistrates Court; and

- (b) the member or members of the tribunal must not give the information in evidence before the Federal Court or the Federal Magistrates Court.

The information may only be considered by the Federal Court or the Federal Magistrates Court if a fresh disclosure of the information is made in accordance with:

- (c) a declaration under subsection (3); or
(d) subsection 503B(6).

5 Paragraph 503A(6)(a)

After “this Act”, insert “(other than sections 503B and 503C)”.

5A At the end of subsection 503A(8)

Add:

Note: This section is specified in Schedule 3 to the *Freedom of Information Act 1982* with the effect that documents containing information protected from disclosure by this section are exempt documents under that Act.

5B Subsection 503A(9)

Insert:

Australian law enforcement or intelligence body means a body, agency or organisation that is responsible for, or deals with, law enforcement, criminal intelligence, criminal investigation, fraud or security intelligence in, or in a part of, Australia.

5C Subsection 503A(9)

Insert:

foreign law enforcement body means a body, agency or organisation that is responsible for, or deals with, law enforcement, criminal intelligence, criminal investigation, fraud or security intelligence in a foreign country or a part of a foreign country.

5D Subsection 503A(9) (definition of gazetted agency)

Repeal the definition, substitute:

gazetted agency means:

- (a) in the case of an Australian law enforcement or intelligence body—a body specified in a notice published by the Minister in the *Gazette*; or
- (b) in the case of a foreign law enforcement body—a body in a foreign country, or a part of a foreign country, that is a foreign country, or part of a foreign country, specified in a notice published by the Minister in the *Gazette*; or
- (c) a war crimes tribunal established by or under international arrangements or international law.

6 After section 503A

Insert:

503B Protection of confidential information disclosed to the Federal Court or the Federal Magistrates Court—permanent non-disclosure orders

Court may make non-disclosure orders

- (1) If:
 - (a) either:
 - (i) information is communicated to an authorised migration officer by a gazetted agency on condition that it be treated as confidential information and the information is relevant to the exercise of a power under section 501, 501A, 501B or 501C; or
 - (ii) information is communicated to the Minister or an authorised migration officer in accordance with paragraph 503A(1)(a) or (b); and
 - (b) the information is relevant to proceedings (the *substantive proceedings*) before the Federal Court or the Federal Magistrates Court that relate to section 501, 501A, 501B or 501C; and
 - (c) no declaration is in force under subsection 503A(3) authorising the disclosure of the information to the Federal Court or the Federal Magistrates Court for the purposes of the substantive proceedings;

the Federal Court or the Federal Magistrates Court may, on application by the Minister, make such orders as the Federal Court

or the Federal Magistrates Court considers appropriate for the purpose of ensuring that, in the event that such a declaration comes into force and the information is disclosed to the Federal Court or the Federal Magistrates Court, the information is not divulged or communicated to:

- (d) the applicant in relation to the substantive proceedings; or
 - (e) the legal representative of the applicant in relation to the substantive proceedings; or
 - (f) any other member of the public.
- (2) The Federal Court's or Federal Magistrates Court's orders under subsection (1) include:
- (a) an order that some or all of the members of the public are to be excluded during the whole or a part of the hearing of the substantive proceedings; or
 - (b) an order that no report of the whole of, or a specified part of, or relating to, the substantive proceedings is to be published; or
 - (c) an order for ensuring that no person, without the consent of the Federal Court or the Federal Magistrates Court, has access to a file or a record of the Federal Court or the Federal Magistrates Court that contains the information.
- (3) Subsection (2) does not limit subsection (1).
- (4) The powers of the Federal Court under this section are to be exercised by a single Judge, and the powers of the Federal Magistrates Court under this section are to be exercised by a single Federal Magistrate.

Criteria for making non-disclosure order

- (5) In exercising its powers under subsection (1), the Federal Court or the Federal Magistrates Court must have regard to all of the following matters:
- (a) the fact that the information was communicated, or originally communicated, to an authorised migration officer by a gazetted agency on condition that it be treated as confidential information;
 - (b) Australia's relations with other countries;

- (c) the need to avoid disruption to national and international efforts relating to law enforcement, criminal intelligence, criminal investigation and security intelligence;
- (d) in a case where the information was derived from an informant—the protection and safety of informants and of persons associated with informants;
- (e) the protection of the technologies and methods used (whether in or out of Australia) to collect, analyse, secure or otherwise deal with, criminal intelligence or security intelligence;
- (f) Australia's national security;
- (g) the fact that the disclosure of information may discourage gazetted agencies and informants from giving information in the future;
- (h) the effectiveness of the investigations of official inquiries and Royal Commissions;
- (i) the interests of the administration of justice;
- (j) such other matters (if any) as are specified in the regulations; and must not have regard to any other matters.

Disclosure of information for the purposes of deciding whether or not to make a non-disclosure order

- (6) If an application is made under subsection (1) in relation to particular information, subsections 503A(1) and (2) do not prevent the disclosure of the information to the Federal Court or the Federal Magistrates Court for the purposes of enabling the Federal Court or the Federal Magistrates Court to make a decision on the application.
- (7) If information is disclosed to the Federal Court or the Federal Magistrates Court under subsection (6):
 - (a) the information is not to be treated as having been disclosed to the Federal Court or the Federal Magistrates Court for the purposes of the substantive proceedings; and
 - (b) the information may only be considered by the Federal Court or the Federal Magistrates Court for the purposes of the substantive proceedings if a fresh disclosure of the information is made in accordance with a declaration under subsection 503A(3).

Variation or revocation of non-disclosure order

- (8) The Federal Court or the Federal Magistrates Court may, by order, vary or revoke an order made by it under subsection (1) if both:
- (a) the Minister; and
 - (b) the applicant in relation to the substantive proceedings; consent to the variation or revocation.

Withdrawal of application for non-disclosure order

- (9) The Minister may withdraw an application under subsection (1) at any time.

Declarations under subsection 503A(3)

- (10) This section does not prevent the Minister from making a declaration at any time under subsection 503A(3) authorising the disclosure of the information to the Federal Court or the Federal Magistrates Court for the purposes of the substantive proceedings, even if that time occurs while the Federal Court or the Federal Magistrates Court is considering whether to make an order under subsection (1).
- (11) To avoid doubt, the Minister may refuse to make a declaration under subsection 503A(3) even if the Federal Court or the Federal Magistrates Court has made an order under subsection (1) of this section in relation to the information concerned.

Offence

- (12) A person is guilty of an offence if:
- (a) an order is in force under subsection (1); and
 - (b) the person engages in conduct; and
 - (c) the person's conduct contravenes the order.

Penalty: Imprisonment for 2 years.

Relationship to other laws

- (13) This section has effect despite anything in:
- (a) any other provision of this Act; or
 - (b) any other law of the Commonwealth.

Applicant

(14) For the purposes of this section, the table has effect:

Applicant		
Item	In the case of these proceedings...	the applicant is...
1	(a) proceedings by way of an application for judicial review; (b) proceedings by way of an appeal to the Federal Court in relation to proceedings mentioned in paragraph (a);	the applicant for judicial review.
2	(a) proceedings under subsection 39B(1) of the <i>Judiciary Act 1903</i> ; (b) proceedings under section 483A of this Act that correspond to proceedings under subsection 39B(1) of the <i>Judiciary Act 1903</i> ; (c) proceedings by way of an appeal in relation to proceedings mentioned in paragraph (a) or (b);	the person who is seeking the writ or injunction concerned.
3	(a) proceedings under subsection 39B(1A) or section 44 of the <i>Judiciary Act 1903</i> ; (b) proceedings under section 483A of this Act that correspond to proceedings under subsection 39B(1A) or section 44 of the <i>Judiciary Act 1903</i> ; (c) proceedings by way of an appeal in relation to proceedings mentioned in paragraph (a) or (b);	the person who is seeking to take the action concerned (whether the action is for declaratory relief, injunctive relief, damages or anything else).
4	(a) proceedings by way of a referral of a question of law arising before the Administrative Appeals Tribunal; (b) proceedings by way of an appeal in relation to proceedings mentioned in paragraph (a);	the person who applied to the Administrative Appeals Tribunal for a review of the decision concerned.

Applicant

Item	In the case of these proceedings...	the applicant is...
5	(a) proceedings by way of an appeal, on a question of law, from a decision of the Administrative Appeals Tribunal; (b) proceedings by way of an appeal in relation to proceedings mentioned in paragraph (a);	the person who applied to the Administrative Appeals Tribunal for a review of the decision concerned.

Definitions

(15) In this section:

authorised migration officer has the same meaning as in section 503A.

engage in conduct means:

- (a) do an act; or
- (b) omit to perform an act.

gazetted agency has the same meaning as in section 503A.

proceeding means a proceeding in a court, whether between parties or not, and includes an incidental proceeding in the course of, or in connection with, a proceeding, and also includes an appeal.

Royal Commission means a Royal Commission (however described) under a law of the Commonwealth, a State or a Territory.

503C Protection of confidential information disclosed to the Federal Court or the Federal Magistrates Court—interim non-disclosure orders

Notice of intention to apply for a permanent non-disclosure order

- (1) At least 7 days before making an application for an order under subsection 503B(1) in relation to particular information, the Minister must give the Federal Court or the Federal Magistrates Court written notice of the Minister's intention to make the application.

- (2) A notice under subsection (1) need not identify any of the attributes of the information.

Interim non-disclosure order

- (3) If:
- (a) a notice is given under subsection (1); and
 - (b) the notice relates to the Minister's intention to make an application for an order under subsection 503B(1) in relation to particular information;
- the Federal Court or the Federal Magistrates Court may, on application by the Minister, make such orders as the Federal Court or the Federal Magistrates Court considers appropriate for the purpose of ensuring that, in the event that the subsection 503B(1) application is made and the information is disclosed to the Federal Court or the Federal Magistrates Court in accordance with subsection 503B(6), the information is not divulged or communicated in circumstances that might, to any extent, undermine, prejudice or pre-empt:
- (c) the Federal Court's or the Federal Magistrates Court's consideration of the subsection 503B(1) application; or
 - (d) the Minister's consideration of whether to make a declaration under subsection 503A(3) authorising the disclosure of the information to the Federal Court or the Federal Magistrates Court.
- (4) The Federal Court's or the Federal Magistrates Court's orders under subsection (3) include:
- (a) an order that some or all of the members of the public are to be excluded during the whole or a part of the hearing of the subsection 503B(1) application; or
 - (b) an order that no report of the whole of, or a specified part of, or relating to, the subsection 503B(1) application is to be published; or
 - (c) an order for ensuring that no person, without the consent of the Federal Court or the Federal Magistrates Court, has access to a file or a record of the Federal Court or the Federal Magistrates Court that contains the information.
- (5) Subsection (4) does not limit subsection (3).

- (6) The powers of the Federal Court under this section are to be exercised by a single Judge, and the powers of the Federal Magistrates Court under this section are to be exercised by a single Federal Magistrate.

Variation or revocation of non-disclosure order

- (7) The Federal Court or the Federal Magistrates Court may, by order, vary or revoke an order made by it under subsection (3) if both:
- (a) the Minister; and
 - (b) the applicant in relation to the substantive proceedings concerned;
- consent to the variation or revocation.

Offence

- (8) A person is guilty of an offence if:
- (a) an order is in force under subsection (3); and
 - (b) the person engages in conduct; and
 - (c) the person's conduct contravenes the order.

Penalty: Imprisonment for 2 years.

Relationship to other laws

- (9) This section has effect despite anything in:
- (a) any other provision of this Act; or
 - (b) any other law of the Commonwealth.

Definition

- (10) In this section:

engage in conduct means:

- (a) do an act; or
- (b) omit to perform an act.

6A After section 503C

Insert:

503D Details of gazetted agency to be treated as protected information

- (1) If section 503A or 503B applies to information communicated by a gazetted agency to an authorised migration officer so that the information cannot be divulged or communicated except as provided for in sections 503A, 503B and 503C, then sections 503A, 503B and 503C apply to similarly protect the agency's details from being divulged or communicated as if the details were the information communicated by the agency.
- (2) A reference in subsection (1) to *agency's details* is a reference to any information in relation to the gazetted agency including the agency's name and the conditions on which the communication of information by the agency occurred.
- (3) In this section:

gazetted agency has the same meaning as in section 503A.

7 Application—pre-commencement proceedings

Sections 503B and 503C of the *Migration Act 1958* apply in relation to proceedings before the Federal Court or the Federal Magistrates Court, whether those proceedings were instituted before, on or after the commencement of this item.

8 Application—section 503D of the Migration Act 1958

- (1) Section 503D of the *Migration Act 1958* applies to:
 - (a) agency details in relation to protected information if the information is given to an authorised migration officer on or after the commencement of this item; and
 - (b) agency details in relation to protected information given to an authorised migration officer before the commencement of this item if:
 - (i) the details or information is the subject of a request for access under the *Freedom of Information Act 1982*; and
 - (ii) no decision under the *Freedom of Information Act 1982* in respect of the request has been made, or has been taken to be made, before the commencement of this item; and

- (c) agency details in relation to protected information given to an authorised migration officer before the commencement of this item if the details or information is the subject of a process for the production of documents that has not been completed or complied with before the commencement of this item; and
 - (d) agency details in relation to protected information given to an authorised migration officer before the commencement of this item if, after the commencement of this item, the details or information becomes either:
 - (i) the subject of a request for access under the *Freedom of Information Act 1982*; or
 - (ii) the subject of a process for the production of documents.
- (2) In this item:
- process for the production of documents*** includes discovery and a subpoena for production of documents.
- protected information*** means information that is:
- (a) communicated to an authorised migration officer by a gazetted agency on condition that it be treated as confidential information; and
 - (b) relevant to the exercise of a power under section 501, 501A, 501B or 501C.

Schedule 2—Amendment of the Freedom of Information Act 1982

1 Subsection 38(2)

Omit “Where”, substitute “Subject to subsection (3), if”.

2 At the end of section 38

Add:

- (3) This section applies in relation to a document so far as it contains personal information about a person if:
- (a) the person requests access to the document; and
 - (b) disclosure of the document, or information contained in the document, is prohibited under section 503A of the *Migration Act 1958* as affected by section 503D of that Act.

3 Schedule 3

Insert in its appropriate alphabetical position, determined on a letter-by-letter basis:

Migration Act 1958, section 503A as affected by
section 503D of that Act

4 Application

- (1) The amendments made by this Schedule apply to a request for access to protected information made under the *Freedom of Information Act 1982*:
- (a) on or after the commencement of this Schedule; or
 - (b) before the commencement of this Schedule if no decision under the *Freedom of Information Act 1982* in respect of the request has been made, or has been taken to be made, before the commencement of this Schedule.
- (2) In this item:
protected information means:
-

- (a) information that:
- (i) is communicated to an authorised migration officer by a gazetted agency on condition that it be treated as confidential information; and
 - (ii) is relevant to the exercise of a power under section 501, 501A, 501B or 501C of the *Migration Act 1958*; and
- (b) the agency details in relation to the protected information.
- (3) In the definition of ***protected information*** in subitem (2):
- agency details*** has the meaning given in subsection 503D(2) of the *Migration Act 1958*.
- authorised migration officer*** has the meaning given in subsection 503A(9) of the *Migration Act 1958*.
- gazetted agency*** has the meaning given in subsection 503A(9) of the *Migration Act 1958*.
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[Minister's second reading speech made in—
House of Representatives on 12 December 2002
Senate on 17 June 2003]

(270/02)
