



Aviation Legislation Amendment (2008 Measures No. 2) Bill 2008

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Law and Bills Digest Section

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Aviation Legislation Amendment (2008 Measures No. 2) Bill 2008

Date introduced: 3 December 2008

House: House of Representatives

Portfolio: Infrastructure, Transport, Regional Development and Local Government

Commencement: Schedule 1 of Part 2, and Schedule 1 of Part 3, commence on 1 July 2009. The remainder of the Act commences on the day of Royal Assent.

Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Key

<i>Aviation Transport Security Act 2004</i>	ATSA
<i>Civil Aviation Act 1988</i>	CAA
Civil Aviation Safety Authority	CASA
Cockpit Voice Recorder	CVR
<i>Transport Safety Investigation Act 2003</i>	TSIA
Australian Transport Safety Bureau	ATSB

Purpose

To amend the ATSA, the CAA and the TSIA to make four amendments relating to transport security and safety:

- To enable the Secretary of the Department of Infrastructure, Transport, Regional Development and Local Government (the Department) to require certain prescribed aviation security information from aviation industry participants,
- To allow for the delegation of the Secretary's functions and responsibilities under ATSA to the Agency Head of an agency with national security responsibilities,

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- To clarify the position on allowing the copying and disclosure of CVR information for testing and maintenance, and
- To change the penalties for failing to report aviation, rail and marine safety matters.

Background

Aviation security in Australia is governed by a range of different Acts and Regulations.

The ATSA, and its associated Regulations, contain all major provisions relating to aviation security in Australia. It establishes the basis for aviation security programs in Australia, including screening of goods and people; information gathering and incident reporting for security purposes; and gives the Departmental Secretary extensive powers to direct the aviation industry regarding security measures. For more background about the ATSA, refer to the [Bills Digest](#) prepared by the Parliamentary Library.¹

The CAA establishes the CASA which is responsible for aviation safety through setting aviation standards and rules, licensing aerodromes, pilots and aviation engineers, and certifying aircraft and operators. It dictates the treatment of CVR information, and clarifies its status as evidence in an investigation.

The TSIA aims to maintain and improve transport safety in the aviation marine and rail transport systems by providing for the reporting of transport safety matters, conduct of safety investigations by ATSB, making of safety action statements (including safety recommendations to address safety deficiencies identified by investigations) and publication of investigation results.²

Key issues

Collecting information and privacy issues

The Bill aims to widen the scope of information that can be requested by the Secretary of the Department under ATSA. While currently empowered by ATSA to collect 'security compliance information' from industry participants (which is defined as information that relates to compliance or failure to comply with the Act), the amendment would enable the Secretary to collect other information which currently falls outside of the scope of that definition.

Although the new provisions outline some examples of what might be prescribed as *aviation security information* (such as statistics relating to screening and information about

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1. Angus Martyn, Aviation Transport Security Bill 2003, *Bills Digest*, available at <http://www.aph.gov.au/library/pubs/bd/2003-04/04bd023.htm> [accessed 29 January 2009]
 2. Explanatory Memorandum, Transport Safety Investigation Bill 2002, p. 1.

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clearance activities) the proposed provisions do not limit the kinds of information that may be prescribed by regulation to be collected. As Regulations are not subject to full Parliamentary debate, the resulting scope of *aviation security information* could ultimately become very wide under this provision, and might enable the Government to require the provision of personal information of individuals (such as airline passengers). Therefore, care should be taken when drafting the Regulations under the proposed provisions. The Commonwealth agencies, as well as private industry, is required to abide by sets of Privacy Principles contained in the *Privacy Act 1988* when collecting personal information from or about individuals. Particular attention should be paid to those Principles relating to collection and disclosure, as well as the exceptions for emergencies and disasters set out in Part VIA of the Privacy Act.

The Explanatory Memorandum states that ‘the Department will consult widely on the scope of *aviation security information* before regulations are finalised’ and that there is no immediate intention to exercise the regulation-making power on commencement.³

Penalties for failing to report transport safety matters

The Lockhart River accident, a fatal airplane crash occurring in Northern Queensland in 2005, brought to attention the limitation periods relating to offences that can be prosecuted under the TSIA. Following the accident, a lengthy investigation occurred, however [reports](#)⁴ indicate that no prosecution was commenced as the investigation concluded outside of the statutory limitation period. Statutory limitation periods for commencing prosecutions for Commonwealth offences are set by section 15B of the *Crimes Act 1914* (the Crimes Act). The periods are set out as follows:

Penalties of up to 6 months imprisonment = 12 month statutory limitation period

Penalties of more than 6 months imprisonment = any time after the offence

Separate from the [formal investigation](#)⁵ into the Lockhart River accident, a review of the penalties, in Part 3 of the TSIA (dealing with compulsory reporting of accidents), and the limitation periods attached to those penalties, was subsequently conducted. A number of changes are now proposed in this Bill:

3. Explanatory Memorandum, Aviation Legislation Amendment (2008 Measures No. 2) Bill 2008, p. 3.
4. ABC, ‘Too Late to Prosecute Lockhart River Airline: DPP’, *ABC News Online*, 17 April 2007, available at <http://www.abc.net.au/news/newsitems/200704/s1898825.htm> [accessed 29 January 2009]
5. Australian Transport Safety Bureau, *Aviation Safety Investigation Report – Final: Collision with Terrain; 11km NW Lockhart River Aerodrome*, 12 November 2007, available at http://www.atsb.gov.au/publications/investigation_reports/2005/AAIR/aaair20050197_7.aspx [accessed 29 January 2009]

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- The penalty for failing to report an immediately reportable matter under subsection 18(1) is doubled to 12 months imprisonment
- The penalty for failing to submit a written report within 72 hours of discovering an immediately reportable matter or routine reportable matter under subsection 19(1) is halved to 30 penalty units⁶ (which is statutorily equivalent to 6 months imprisonment⁷); however, the statutory limitation period for prosecution of this offence is set at 6 years (rather than allowing it to default to 12 months), and
- The penalty for hindering an investigation under subsection 24(1) is doubled to 12 months imprisonment.

In relation to the amendments to sections 18 and 24 of the TSIA, several justifications are given in the Explanatory Memorandum:⁸

- The penalty of 12 months imprisonment would immediately remove the limitation period for prosecuting that offence, rather than the current limitation period of 12 months for commencing prosecution, which is considered to be insufficient time given the difficulty in gathering evidence:

The change in penalty is proposed to be made as a result of a review of the penalties in Part 3 of the TSIA following the referral to the Australian Federal Police (AFP) of a number of alleged failures to report IRMs and RRM's ... it became apparent that the 6 month penalty in subsection 18(1) was difficult to enforce because, when read with the statutory limitation period in section 15B of the *Crimes Act 1914*, a prosecution cannot be commenced more than 12 months after the occurrence of the offence... Changing the penalty to 12 months imprisonment in subsection 18(1) will alleviate this problem.⁹

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6. 30 penalty units is equivalent to a fine of \$3 300. This provision should also be read in the context of subsection 4B(3) of the Crimes Act, which allows a court to multiply the pecuniary penalty for an offence by up to five times, when prosecuting a body corporate. For a full chart of conversions for penalty units, see page 45 of *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, available at http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_GuidetoFramingCommonwealthOffences,CivilPenaltiesandEnforcementPowers [accessed 30 January 2009]
 7. Subsection 4B(2) of the Crimes Act states that where a natural person is convicted of an offence against a law of the Commonwealth punishable by imprisonment only, the court may, if the contrary intention does not appear and the court thinks it appropriate in all the circumstances of the case, impose, instead of, or in addition to, a penalty of imprisonment, a pecuniary penalty not exceeding the number of penalty units calculated using the formula: Term of Imprisonment x 5.
 8. Explanatory Memorandum, p. 1112.
 9. *ibid.*

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- An inability to impose penalties due to quickly expiring limitation periods has significant safety implications, as it weakens the deterrent effect of the penalty provision, and
- The 12 month imprisonment penalty is considered appropriate for the offence in comparison to existing penalties for similar offences relating to evidence and investigations. For example, section 43 of the TSIA which prohibits interfering with evidence covered by a protection order, is also punishable by 12 months imprisonment. Offences which deal with improper use of information, or making fraudulent statements, tend to attract 2 years imprisonment under the Act (see sections 42, 53 and 60 for examples).

In relation to the proposed amendments to section 19, the Explanatory Memorandum argues that the current penalty of 60 penalty units (or 12 months imprisonment) is disproportionately large, and should be reduced by half (which would bring the statutory limitation period for that offence down to 12 months); however, that the statutory limitation issues faced by sections 18 and 24 also apply to section 19, and that 12 months is insufficient for effective use of the penalty provision to be a deterrent. The Explanatory Memorandum states that ‘a limitation period of 6 years was considered appropriate for the offence in subsection 19(1)’ in the context of the timelines experienced with the Lockhart River investigation.¹⁰

Financial implications

The Explanatory Memorandum states that:

The amendments would have no significant financial impact on Government expenditure, therefore a Financial Impact Statement is not required.¹¹

Main provisions

Schedule 1, Part 1 of the Bill contains amendments to the *Aviation Transport Security Act 2004*. **Item 7** inserts a **new Division 3** into the ATSA Act to deal with circumstances where the Secretary may require aviation security information. **New section 111** defines **aviation security information** as ‘information that is not security compliance information and is prescribed by the regulations for the purposes of this section’. (Note that **security compliance information** is defined under section 109 of ATSA as ‘information that relates to compliance, or failure to comply, with this Act’.)

10. *ibid*, p. 15.

11. *ibid*, p. 1.

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The section also allows for regulations under the Act to prescribe what will be classed as *aviation security information*, such as statistics and information relating to screening processes, clearance activities, and different security zones. The scope of what information can be prescribed is not limited.

New subsection 111(3) authorises the Secretary of the Department to give written notice to an aviation industry participant to provide aviation security information. The notice should specify a time period for responding (no less than 14 days) and the form of the response (**new subsections 111(4)** and **(5)**). Failure to comply with the notice is an offence (**new subsection 111(6)**) punishable by 45 penalty units. This penalty is comparable with similar existing offences under the Act, such as failure to provide security compliance information under section 109.

New section 112 states that a person is not excused from giving the information requested under a section 111(3) notice on the grounds that the information is self-incriminating; however, the information given in response to a section 111(3) notice will be inadmissible as evidence in a criminal proceeding (or other proceeding for recovering a penalty), other than a proceeding for giving false or misleading information or documents (under sections 137.1 and 137.2 of the *Criminal Code Act 1995*).

Item 8 repeals existing subsection 127(1), which provides the current delegation power, and replaces it with **new subsections 127(1)** and **(1A)**. The scope of the power is widened to allow the Secretary of the Department to delegate all or any of his or her powers and functions under ATSA to an Agency Head of an agency that carries on national security activities. **New subsection 127(1A)** clarifies that the delegation to another Agency Head has no effect unless that Agency Head agrees to the delegation. Once delegated to another Agency Head, the powers and functions can then in turn be sub-delegated within his or her agency to a Senior Executive Band 3 (Deputy-Secretary level) employee (**item 9, new section 127A**).

Schedule 1, Part 2 of the Bill contains amendments to the *Civil Aviation Act 1988*. **Item 10** amends section 32AP of the CAA which makes it an offence to copy CVR information. The amendment exempts people from committing an offence if they have copied the CVR information for the purposes of checking the equipment involved. The exemption is subject to certain conditions, set out in **new subsection 32AP(3A)** (**item 11**) which includes written notification to the relevant crew members before the recording of the CVR information is made.

Schedule 1, Part 3 of the Bill contains amendments to the *Transport Safety Investigation Act 2003*. The majority of the amendments to the TSIA are to make adjustments to criminal penalties. **Items 16** and **21** adjust the criminal penalties for the offences of failing to report an immediately reportable matter, or IRM (section 18) and hindering an investigation (section 24) respectively. The Bill increases the penalties for both of these offences from 6 months imprisonment to 12 months imprisonment.

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Items 17 and 18 amend section 18 which makes it an offence to fail to report an immediately reportable matter. The amendments expand the range of circumstances where no offence is committed, to account for instances where a matter has not yet been reported, but there is a belief that it will be reported as soon as is reasonably practicable.

Items 19 and 20 amend section 19 of the TSIA which deals with the provision of written reports to the Executive Director (ED) of Transport Safety Investigation within 72 hours. The TSIA currently creates a positive obligation on a person to provide written reports to the ED within 72 hours of discovering a reportable matter (subsection 19(1)) unless that person is exempt from that obligation based on their reasonable belief that another person has done so (subsections 19(2) and (3)). **Item 19** halves the penalty for non-compliance with subsection 19(1), reducing it from 60 to 30 penalty units. The Explanatory Memorandum states that this addresses an anomaly which was discovered during the review of penalties for Part 3 of the TSIA (discussed at **item 16**, above).¹² As 60 penalty units is statutorily equivalent to 12 months imprisonment,¹³ the penalty for subsection 19(1) was judged to be disproportionately high when compared to the offence provision in section 18 of the TSIA.

New subsection 19(4) in **item 20** enables the ED to give written notice to a person requiring them to comply with subsection 19(1). The ED can only give the written notice if satisfied that the person would be required to do so under subsection 19(1), were it not for the exemptions in subsection 19(2) or 19(3), or if they might have extra information. Non-compliance with a notice from the ED is an offence punishable by 30 penalty units (which is consistent with other penalty provisions in the section).

New subsection 19(7) limits prosecution for non-compliance with subsection 19(1) to within 6 years after the commission of the offence. This proposed amendment would displace the default limitation period of 12 months which would be set by section 15B of the Crimes Act (contingent on the passage of **item 19**, above). The Explanatory Statement states that this is to ensure that there is adequate time for discovery of evidence following an accident before prosecuting.¹⁴

12. *ibid*, p. 13.

13. See footnote 7.

14. Explanatory Memorandum, p. 15.

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