



Transport Security Legislation Amendment (2010 Measures No.1) Bill 2010

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Law and Bills Digest Section

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Transport Security Legislation Amendment (2010 Measures No.1) Bill 2010

Date introduced: 11 March 2010

House: House of Representatives

Portfolio: Infrastructure, Transport, Regional Development and Local Government

Commencement: The day after Royal Assent

Links: The relevant [links](#) to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bills page, 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/>.

Purpose

The Bill amends the *Aviation Transport Security Act 2004* (Cth) (ATSA) and the *Maritime Transport and Offshore Facilities Security Act 2003* (Cth) (MTOFSA):

- the ATSA amendments are designed to increase the flexibility of the aviation transport security framework to rapidly respond to an aviation security incident, and
- the MTOFSA amendments, amongst other things, give (or allow for) increased powers to various maritime security officials for various purposes.

Background

Since the terrorist attacks in the United States on 11 September 2001, significant efforts have been made around the world to improve transport security. Consistent with this, the Australian Government has, within its constitutional limitations, made ongoing efforts to ensure Australia has a security regime suitable for the protection against potential terrorist threats and attacks. The original introduction of the ATSA and the MTOFSA are part of these efforts. Several amendments have been made since their commencement to improve their effectiveness.

Australian Transport and Securities Act 2004

The main purpose of the ATSA is to establish a regulatory framework to safeguard against unlawful interference with civil aviation operations. The ATSA achieves this by:

...establish[ing] minimum security requirements for civil aviation in Australia by imposing obligations on persons engaged in civil aviation related activities. In

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particular, it obliges certain aviation industry participants to develop, and comply with, aviation security programs.¹

Prohibited items list

The attempted terrorist attack on a flight bound for the United States on Christmas Day 2009 has indicated to the Government that Australia is in need of stronger measures to prevent unlawful interference with aviation in Australia. The Bill has been introduced as part of an attempt to achieve this.² The Commonwealth Government continues to identify Australia as being at real risk of terrorist attacks, as indicated in the Counter-Terrorism White Paper.³

The first major proposed amendment to the ATSA is to allow the Minister for Infrastructure, Transport, Regional Development and Local Government (the Minister) to alter the 'prohibited items' (PI) list by issuing a legislative instrument rather than by regulation. The term 'prohibited item' is currently defined in section 9 of the ATSA to mean an item that could be used for unlawful interference with aviation and is prescribed in the Aviation Transport Security Regulations 2005 (ATSR) for the purposes of this definition. More specifically, the list of PIs appears in regulation 1.07 of the ATSR. Some examples of items currently on the PI list are:

- meat cleavers
- aerosol containers
- golf clubs
- letter openers, and
- handcuffs.⁴

The *maximum* penalty for being in unauthorised possession⁵ of a PI in a specified area⁶ under the ATSA is 20 penalty units (\$2 200 fine)⁷ or two years' imprisonment.

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1. Section 3 of the *Aviation Transport Security Act 2004* (Cth) (ATSA).
 2. Department of Prime Minister and Cabinet, 'Counter-Terrorism White Paper', Department of Prime Minister and Cabinet Website, viewed 22 April 2010, http://www.dpmc.gov.au/publications/counter_terrorism/docs/counter-terroris_m_white_paper.pdf
 3. A Albanese (Minister for Infrastructure, Transport, Regional Development and Local Government), *Strengthening Australia's Transport Security*, media release, 11 March 2010, viewed 20 April 2010, http://www.minister.infrastructure.gov.au/aa/releases/2008/november/AA182_2008.htm
A Albanese, 'Second Reading Speech: Transport Security Legislation Amendment (2010 Measures No.1) Bill 2010, House of Representatives, *Parliamentary Debates*, p. 2215–2217.
 4. Regulation 1.07 of the *Aviation Transport Security Regulations 2005* (Cth).

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The Government has stated that enabling the PI list to be amended by legislative instrument rather than by regulation will allow this list to remain responsive to ‘emerging threats to aviation security while preserving Parliamentary scrutiny’⁸ via the usual disallowance procedure.⁹

Delegation of powers

The second major amendment to the ATSA is to allow the Secretary of the Department of Infrastructure, Transport, Regional Development and Local Government (the Secretary) to delegate, by writing, all or any of his or her powers to a Senior Executive Service (SES) employee of the Attorney-General’s Department.

Currently, the Secretary is able to delegate all or any of his or her powers to:

- (a) an acting SES employee, or acting SES employee, in the Department [of Infrastructure, Transport, Regional Development and Local Government]
- (b) the Agency Head of an Agency that carries on activities that relate to national security.¹⁰

The object of the amendment is:

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5. Examples of authorised persons are: law enforcement officer, airport security guards, Australian Defence Force members on duty and aviation security inspectors: Part 4, Division 4 of the ATSA.
 6. Specified areas where the ATSA does not permit individuals to be in possession of a PI are: sections 54(1) and 54(3): airside security and event zone (for example, the outdoor area where the planes load passengers and their baggage); landside security and event zone (for example, the part of the terminal beyond the screening point); sections 55(1) and 55(3): screening point; sections 56(1) and 57(1): on board an aircraft.

Department of Infrastructure, Transport, Regional Development and Local Government, ‘Airport Areas and Zones’, Department of Infrastructure, Transport, Regional Development and Local Government website, viewed 27 April 2010, <http://www.infrastructure.gov.au/transport/security/aviation/legislation/overview/airport.aspx>
 7. One penalty unit is defined as \$110 under section 4AA of the *Crimes Act 1914* (Cth).
 8. Explanatory Memorandum, Transport Security Legislation Amendment (2010 Measures No.1) Bill 2010, viewed 20 April 2010, http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4317_ems_17c1214f-7753-42e9-a678-1f4f3290eeb5/upload_pdf/340277.pdf;fileType=application%2Fpdf, p. 3.
 9. A legislative instrument can be enforced much quicker than amendments to regulations. An amendment to the PI list is not likely to be controversial. As a result, it is an appropriate use of resources.
 10. Section 127 of the ATSA.

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... for the preparation of the establishment of the ‘Commonwealth Incident Coordinator’ position within the Attorney-General’s Department from 1 July 2010. The creation of the position of the Commonwealth Incident Coordinator forms part of the Australian Government’s all-hazards approach to crises and consequence management.¹¹

The second reading speech for the Bill described the proposed Commonwealth Incident Coordinator (CIC) as a role that will respond quickly and efficiently to security incidents, coordinate response planning and implement crisis management decisions. The following example was provided to illustrate the role of the CIC:

... as part of a coordinated response to a terrorist incident, the Commonwealth Incident Coordinator could use the powers to direct an aircraft subject to a bomb threat to land at a particular airport, or park in a specific part of an airport, where emergency services are best placed to respond to the threat.¹²

The creation of the CIC is part of the Government’s plan to create an integrated crisis management centre (also flagged in the Counter-Terrorism White Paper).¹³ Whilst it is unclear whether the CIC will be a statutory role, there does not appear to be anything obvious on the public record to suggest that it will be. At the time of writing, there was no a Bill to establish this role. Indeed, there is very little information on the position.

Maritime Transport and Offshore Facilities Security Act 2003

The purpose of the MTOFSA is to protect against unlawful interference with maritime transport or offshore facilities. This is achieved by ‘establish[ing] a regulatory framework centred around the development of security plans for ships, other maritime transport operations and offshore facilities’.¹⁴

Some of the amendments to the MTOFSA are in response to reviews by the Office of Transport Security which recommended that stronger maritime security measures are needed for passenger ships.¹⁵

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11. A Albanese, ‘Second Reading Speech: Transport Security Legislation Amendment (2010 Measures No.1) Bill 2010, op. cit., p. 2215–2216.
 12. Ibid, p. 2216. At the time of writing it does not appear that there is any further information on the role of the CIC on the public record.
 13. Department of Prime Minister and Cabinet, ‘Counter-Terrorism White Paper’, op. cit., p. 62
 14. Section 3 of the *Maritime Transport and Offshore Facilities Security Act 2003* (Cth) (MTOFSA).
 15. Second Reading Speech, p. 2215. At the time of writing, it does not appear that documentation on the review conducted by the Office of Transport Security is on the public record. The reviews may however be internal documents to the Office of Transport Security.

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Security Assessment Inspectors

The first main proposed amendment to the MTOFSA is the creation of ‘security assessment inspectors’ (SAIs). The SAIs will assess the security of maritime industry participants for the effectiveness of security policies to identify possible security threats and implement policies to address weaknesses. For the purpose of administering the MTOFSA, the Act does not currently permit access to security-regulated areas¹⁶ by persons other than Departmental officers and law enforcement officers.

Secretary’s delegation of powers

Currently, the Secretary may:

- (1) ... by writing, delegate all or any of his or her powers and functions under this Act to an SES employee, or acting SES employee, in the Department.
- (2) ... by writing, delegate all or any of his or her powers and functions under this Act, other than powers or functions under Division 3 of Part 11, to an APS employee who holds, or is acting in, an Executive Level 2, or equivalent, position in the Department.¹⁷

The Bill seeks to widen the Secretary’s delegation powers ‘under the MTOFSA to Agency Heads with national security responsibilities and an SES employee of the Attorney General’s Department’.¹⁸ The aims of this amendment are similar to those in relation to delegation of powers under the ATSA discussed above.

Modernisation of image recording

Currently under the MTOFSA, a maritime security inspector can take photographs of the equipment of a security related ship and security-regulated offshore facility.¹⁹ The Bill seeks to extend this power to include the taking of moving images and any other recording, and also seeks to broaden the circumstances in which a maritime security inspector can exercise these powers.

16. For example, ‘regulated Australian ships’ such as a passenger ship that is used for overseas or inter-state travel and a cargo ship of 500 tonnes or more (sections 16, 140 and 148 of the MTOFSA), a ‘regulated offshore facility’ such as an offshore facility used for the extraction of petroleum (sections 17A, 140A, 140B, 148A and 152A of the MTOFSA).

17. Section 202 of the MTOFSA.

18. Explanatory Memorandum, Transport Security Legislation Amendment (2010 Measures No.1) Bill 2010, op. cit., p. 6–7.

19. Paragraphs 139(2)(b) and 140A(2)(b) of the MTOFSA.
Ibid, p. 10.

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Frisk searches

The MTOFSA does not currently allow a screening officer to perform a frisk search of passengers passing through the screening point when boarding a security-regulated ship. The powers that a screening officer has to detect weapons and prohibited items currently are as follows:

1. the power to use screening equipment. The Maritime Transport and Offshore Facilities Security Regulations (MTOFSR) state that screening equipment can include a ‘walk-through metal detector, hand-held metal detector, trace explosive detection device and x-ray equipment’ with the requirement that they are ‘capable of detecting weapons and prohibited items on persons or in baggage’.²⁰ A ship or port facility operator that fails to screen a person and their baggage, and goods that are required to be screened and cleared before entry onto the ‘cleared zone’ may receive a maximum penalty of 200 penalty units (\$22 000 fine).²¹
2. the ability to *request* a person to remove any item of their clothing in order to properly screen a person. If the person refuses the request and ‘refuses to be screened in a private room by a screening officer of the same sex’, ‘the screening officer must refuse to allow the person to pass through the screening point’. If a screening officer *requires* or *removes* a person’s item of clothing, the screening officer may receive a maximum penalty of 50 penalty units (\$5 500 fine).²²
3. the power to physically restrain a person if ‘the screening officer reasonably suspects that the person is committing, or has committed an offence against’ the MTOFSA, and ‘the screening officer reasonably believes it is necessary to do so in order to ensure that [the] person’ does not enter the cleared area or to ‘maintain the integrity of [the] cleared area’.²³

The screening officer, in exercising these powers, ‘must not use more force, or subject a person to greater indignity, than is necessary and reasonable’.²⁴

The Bill will, at **Items 21** and **22**, allow a screening officer to *request* a person to be subject to a frisk search in order to properly screen that person in certain circumstances.

20. Regulation 7.30 of the Maritime Transport and Offshore Facilities Security Regulations 2003 (MTOFSR) via section 119 of the ATSA.

21. Regulation 7.35 of the MTOFSR op. cit. One penalty unit is defined as \$110 under section 4AA of the *Crimes Act 1914* (Cth).

22. Section 116 of the MTOFSA. One penalty unit is defined as \$110 under section 4AA of the *Crimes Act 1914* (Cth).

23. Section 167 of the MTOFSA.

24. Section 168 of the MTOFSA.

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In addition to addressing the need for tighter maritime security, this option may also be useful when a person has a pacemaker or other medical condition and as a result, cannot be properly screened by walking through a metal detector.²⁵

Committee consideration

The Bill has been considered by the Senate Standing Committee for the Scrutiny of Bills (the Committee).²⁶ Details of the inquiry are at <http://www.aph.gov.au/Senate/committee/scrutiny/alerts/2010/d04.pdf>

The Committee has requested for further clarification from the Minister on a number of matters, namely in relation to the amendments to the MTOFSA:

- the underlying need (other than for modernisation) for maritime security inspectors to have the power to take still or moving images for security purposes or any type of recording as opposed to only still images as it may impose on personal rights and liberties
- the need for the appointment of a security assessment inspector and details on the operation of the role as it may impose on personal rights and liberties, and
- justification for imposing strict liability and placing the onus of proof on the defendant to prove they had a reasonable excuse for their actions under the offences introduced by the Bill.²⁷

Position of significant interest groups/press commentary

At the time of publication, this Bill has not attracted media or political attention.

Financial implications

There are no significant financial implications for Government expenditure.²⁸

25. Explanatory Memorandum, p. 10.

26. Senate Standing Committee for the Scrutiny of Bills, *Alert Digest*, No. 4 of 2010, viewed 20 April 2010, <http://www.aph.gov.au/Senate/committee/scrutiny/alerts/2010/d04.pdf>, p. 11–17.

27. See *Ibid* for further details.

28. Explanatory Memorandum, p. 2.

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Main provisions

Schedule 1— Amendments

Aviation Transport Security Act 2004

Items 1 and 2 allow for the list of prohibited items to be defined (and hence amended) by legislative instrument rather than regulation as discussed earlier in this Digest. The existing list will effectively remain in force until replaced: **item 5**.

Items 3 and 4 allow the Secretary to delegate in the usual way all or any of his or her powers to a SES employee of the Attorney-General's Department.

Maritime Transport and Offshore Facilities Security Act 2003

In general, an Australian registered ship is only subject to the MTOFSA if it is defined as a 'security-regulated ship'. Amongst other things, it must be 'used for overseas or inter-State voyages'. Currently, if such a ship does not usually engage in such voyages, but very occasionally goes overseas for maintenance purposes (the Explanatory Memorandum suggests this might occur every five years or so) it would be required under the MTOFSA to develop a Ship Security Plan and obtain an International Ship Security Certificate (ISSC).

Items 12 and 13 insert **proposed sections 61A and 79A**, which will respectively allow the operator of a regulated Australian ship to seek an exemption from having to hold a Ship Security Plan and/or an ISSC respectively. Regulations will specify what matters that the Secretary must consider in making a decision on an application. An exemption is not a legislative instrument, and hence not subject to parliamentary disallowance.

Item 14 will enable regulations to prescribe certain kinds of foreign registered flagged ships that will not be subject to section 91 requirements. Section 91 requires the holding of a valid ISSC, or an approved ISSC equivalent and what are termed 'ship security records'. The Explanatory Memorandum states that **item 14** will allow:

...foreign flagged ships that have been granted an exemption from holding an ISSC or an ISSC equivalent by their flag State to also be exempt from the requirement to hold an ISSC while in Australia. Such exemptions are usually only granted for 'one-off' voyages for maintenance purposes and they relieve the ship operator of unreasonable compliance costs. These foreign flagged vessels remain regulated foreign vessels under the MTOFSA and are subject to all other relevant provisions.

This amendment has been introduced to make the MTOFSA consistent with the exemption power provided for in the Safety of Life at Sea (SOLAS) Convention, to which Australia is a signatory.

Items 17 and 18 will allow maritime security inspectors to make a 'moving image or any recording' of equipment in certain areas on a ship or offshore facility subject to the Act.

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Currently they may only ‘photograph’ such equipment in these same areas.²⁹ **Item 19** will allow maritime security inspectors to make any still or moving images or any recording of equipment ‘in a place, vehicle or vessel under control of a regulated maritime industry participant’.³⁰ The Explanatory Memorandum comments that ‘currently no such power (not even the ability to photograph) exists in these circumstances. This is an oversight from when the powers of maritime security inspectors were first established’.³¹

Item 20 inserts a new Division 2A, ‘Security assessment inspectors’ (SAIs), into Part 8 of the MTOFSA. This division creates such positions under the Act, sets out their powers and when they may be exercised, as well as creating offences for hindering or obstructing such officers. Criteria for appointment as a SAI will be prescribed in regulations. The role of SAIs is to conduct security assessments of areas, buildings (other than residences), vessels and vehicles under the control of maritime industry participants.³² The role is unlike other positions under the Act. The main role of SAIs is to ensure the effectiveness of security policies, whereas the main function of a maritime security inspector is to inspect for contraventions under the Act.³³

A SAI, for the purpose of conducting a security assessment, is permitted to:

- enter and inspect,
- inspect equipment, and
- make still or moving images or any recording of the area, facility, building (other than a residence), vessel or vehicle under the control of maritime industry participants,
- observe operating procedures of the maritime industry participants, and
- discuss these procedures with an employee of the maritime industry participant or with another maritime industry participant.

These powers may be exercised at any time and without notice if exercised within the boundaries of a security-regulated port, or otherwise after giving reasonable notice to the maritime industry participant.³⁴ A person who hinders or obstructs a SAI in the exercise of their powers may receive a maximum of 50 penalty units (\$5 500 fine).³⁵ Similar

29. Proposed paragraphs 139(2)(b) and 140A(2)(b) of the MTOFSA.

30. Proposed paragraphs 141(2)(b) of the MTOFSA.

31. Explanatory Memorandum, p. 10.

32. Proposed subsection 145E(1) of the MTOFSA.

33. Part 8, Division 2 of the MTOFSA.

34. Proposed section 145F of the MTOFSA.

35. One penalty unit is defined as \$110 under section 4AA of the *Crimes Act 1914* (Cth).

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offences appear in the MTOFSA in relation to maritime security inspectors³⁶ and duly authorised officers.³⁷

Items 21 and 22 insert an additional power for screening officers to conduct frisk searches as an alternative screening procedure.³⁸ The procedures available currently to screening officers are discussed above in the background to the MTOFSA.

Under the amendments, a person may choose, or may be *requested* by a screening officer to undergo a frisk search ‘to the extent necessary to screen the person properly’.³⁹ There are restrictions on this power. For example, the ‘screening officer must *not*, unless there is a reasonable excuse to do so,

- *require* a person to undergo a frisk search,
- conduct a frisk search without the person’s consent, and
- when performing the frisk search, go beyond what is necessary to search the person properly.

If a screening officer breaches one of these restrictions, he or she may receive a maximum penalty of 50 penalty units (\$5 500 fine).

A screening officer must refuse to allow a person to pass through the screening point if a request for a frisk search is refused (including in a private room with a screening officer of the same sex) and, as a result, the person cannot be screened properly.

The amendments listed in **item 22** are identical to sections 95A to 95C of the ATSA in relation to screening procedures available to screening officers.

Items 24 and 25 allows the Secretary to delegate all or any of his or her powers under the MTOFSA to an ‘SES employee in the Attorney-General’s Department’ and ‘the Agency Head of an Agency that carries on activities that relate to national security’.⁴⁰ These available delegates are in addition to those already listed in the MTOFSA (discussed above in the background to the MTOFSA). The Bill also allows an Agency Head, who has been delegated powers from the Secretary, to sub-delegate those powers to an SES

36. Section 143 of the MTOFSA.

37. Section 149 of the MTOFSA.

38. See particularly proposed sections 166A to 166C of the MTOFSA in item 22.

39. Proposed section 166A of the MTOFSA.

40. Proposed subsections 202(1), 202(1A), 202(4) of the MTOFSA.

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Band 3 employee in the Agency.⁴¹ The sub-delegation power under the MTOFSA will be identical to that under the ATSA.⁴²

41. Proposed section 202A of the MTOFSA

42. Section 127A of the ATSA.

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