



# **Anti-People Smuggling and Other Measures Act 2010**

**No. 50, 2010**

**An Act to combat people smuggling, and for other purposes**

Note: An electronic version of this Act is available in ComLaw (<http://www.comlaw.gov.au/>)



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# **Anti-People Smuggling and Other Measures Act 2010**

**No. 50, 2010**

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## **An Act to combat people smuggling, and for other purposes**

*[Assented to 31 May 2010]*

The Parliament of Australia enacts:

### **1 Short title**

This Act may be cited as the *Anti-People Smuggling and Other Measures Act 2010*.

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## **2 Commencement**

This Act commences on the day after this Act receives the Royal Assent.

## **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Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.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—Amendments relating to people smuggling**

### **Part 1—Main amendments**

#### ***Criminal Code Act 1995***

##### **1 Paragraph 73.1(1)(c) of the *Criminal Code***

Omit “and”.

##### **2 Paragraph 73.1(1)(d) of the *Criminal Code***

Repeal the paragraph.

##### **3 Subsection 73.2(1) of the *Criminal Code***

Repeal the subsection, substitute:

- (1) A person (the ***first person***) commits an offence against this section if the first person commits the offence of people smuggling (the ***underlying offence***) in relation to another person (the ***victim***) and any of the following applies:
  - (a) the first person commits the underlying offence intending that the victim will be exploited after entry into the foreign country (whether by the first person or another);
  - (b) in committing the underlying offence, the first person subjects the victim to cruel, inhuman or degrading treatment;
  - (c) in committing the underlying offence:
    - (i) the first person’s conduct gives rise to a danger of death or serious harm to the victim; and
    - (ii) the first person is reckless as to the danger of death or serious harm to the victim that arises from the conduct.

Penalty: Imprisonment for 20 years or 2,000 penalty units, or both.

- (2) There is no fault element for the physical element of conduct described in subsection (1), that the first person commits the underlying offence, other than the fault elements (however described), if any, for the underlying offence.

- (2A) To avoid doubt, the first person may be convicted of an offence against this section even if the first person has not been convicted of the underlying offence.

Note: The heading to section 73.2 is replaced by the heading “**Aggravated offence of people smuggling (exploitation, or danger of death or serious harm etc.)**”.

#### **4 Paragraph 73.3(1)(c) of the *Criminal Code***

Omit “and”.

#### **5 Paragraph 73.3(1)(d) of the *Criminal Code***

Repeal the paragraph.

#### **6 After section 73.3 of the *Criminal Code***

Insert:

#### **73.3A Supporting the offence of people smuggling**

- (1) A person (the *first person*) commits an offence if:
- (a) the first person provides material support or resources to another person or an organisation (the *receiver*); and
  - (b) the support or resources aids the receiver, or a person or organisation other than the receiver, to engage in conduct constituting the offence of people smuggling.

Penalty: Imprisonment for 10 years or 1,000 penalty units, or both.

- (2) Subsection (1) does not apply if the conduct constituting the offence of people smuggling relates, or would relate, to:

- (a) the first person; or
- (b) a group of persons that includes the first person.

- (3) To avoid doubt, the first person commits an offence against subsection (1) even if the offence of people smuggling is not committed.

### ***Migration Act 1958***

#### **7 Subdivision A of Division 12 of Part 2 (heading)**

Repeal the heading, substitute:

## **Subdivision A—People smuggling and related offences**

### **8 Sections 232A to 233C**

Repeal the sections, substitute:

#### **233A Offence of people smuggling**

(1) A person (the *first person*) commits an offence if:

- (a) the first person organises or facilitates the bringing or coming to Australia, or the entry or proposed entry into Australia, of another person (the *second person*); and
- (b) the second person is a non-citizen; and
- (c) the second person had, or has, no lawful right to come to Australia.

Penalty: Imprisonment for 10 years or 1,000 penalty units, or both.

(2) Absolute liability applies to paragraph (1)(b).

Note: For absolute liability, see section 6.2 of the *Criminal Code*.

(3) For the purposes of this Act, an offence against subsection (1) is to be known as the offence of people smuggling.

#### **233B Aggravated offence of people smuggling (exploitation, or danger of death or serious harm etc.)**

(1) A person (the *first person*) commits an offence against this section if the first person commits the offence of people smuggling (the *underlying offence*) in relation to another person (the *victim*) and any of the following applies:

- (a) the first person commits the underlying offence intending that the victim will be exploited after entry into Australia (whether by the first person or another);
- (b) in committing the underlying offence, the first person subjects the victim to cruel, inhuman or degrading treatment (within the ordinary meaning of that expression);
- (c) in committing the underlying offence:
  - (i) the first person's conduct gives rise to a danger of death or serious harm to the victim; and

- (ii) the first person is reckless as to the danger of death or serious harm to the victim that arises from the conduct.

Penalty: Imprisonment for 20 years or 2,000 penalty units, or both.

Note: Sections 236A and 236B limit conviction and sentencing options for offences against this section.

- (2) There is no fault element for the physical element of conduct described in subsection (1), that the first person commits the underlying offence, other than the fault elements (however described), if any, for the underlying offence.
- (3) To avoid doubt, the first person may be convicted of an offence against this section even if the first person has not been convicted of the underlying offence.
- (4) In this section:

*exploit* has the same meaning as in the *Criminal Code*.

*forced labour* has the same meaning as in section 73.2 of the *Criminal Code*.

*serious harm* has the same meaning as in the *Criminal Code*.

*sexual servitude* has the meaning given by section 270.4 of the *Criminal Code*.

*slavery* has the meaning given by section 270.1 of the *Criminal Code*.

### **233C Aggravated offence of people smuggling (at least 5 people)**

- (1) A person (the *first person*) commits an offence if:
- (a) the first person organises or facilitates the bringing or coming to Australia, or the entry or proposed entry into Australia, of a group of at least 5 persons (the *other persons*); and
  - (b) at least 5 of the other persons are non-citizens; and
  - (c) the persons referred to in paragraph (b) who are non-citizens had, or have, no lawful right to come to Australia.

Penalty: Imprisonment for 20 years or 2,000 penalty units, or both.

Note: Sections 236A and 236B limit conviction and sentencing options for offences against this section.

- (2) Absolute liability applies to paragraph (1)(b).

Note: For absolute liability, see section 6.2 of the *Criminal Code*.

- (3) If, on a trial for an offence against subsection (1), the trier of fact:
- (a) is not satisfied that the defendant is guilty of that offence; and
  - (b) is satisfied beyond reasonable doubt that the defendant is guilty of the offence of people smuggling;
- the trier of fact may find the defendant not guilty of an offence against subsection (1) but guilty of the offence of people smuggling, so long as the defendant has been accorded procedural fairness in relation to that finding of guilt.

### **233D Supporting the offence of people smuggling**

- (1) A person (the *first person*) commits an offence if:
- (a) the first person provides material support or resources to another person or an organisation (the *receiver*); and
  - (b) the support or resources aids the receiver, or a person or organisation other than the receiver, to engage in conduct constituting the offence of people smuggling.

Penalty: Imprisonment for 10 years or 1,000 penalty units, or both.

- (2) Subsection (1) does not apply if the conduct constituting the offence of people smuggling relates, or would relate, to:
- (a) the first person; or
  - (b) a group of persons that includes the first person.
- (3) To avoid doubt, the first person commits an offence against subsection (1) even if the offence of people smuggling is not committed.

### **233E Concealing and harbouring non-citizens etc.**

- (1) A person (the *first person*) commits an offence if:
- (a) the first person conceals another person (the *second person*); and
  - (b) the second person is a non-citizen; and

- (c) the first person engages in the conduct with the intention that the second person will enter Australia in contravention of this Act.

Penalty: Imprisonment for 10 years or 1,000 penalty units, or both.

- (2) A person (the *first person*) commits an offence if:
  - (a) the first person conceals another person (the *second person*); and
  - (b) the second person is an unlawful non-citizen or a deportee; and
  - (c) the first person engages in the conduct with the intention of preventing discovery by an officer of the second person.

Penalty: Imprisonment for 10 years or 1,000 penalty units, or both.

- (3) A person (the *first person*) commits an offence if:
  - (a) the first person harbours another person (the *second person*); and
  - (b) the second person is an unlawful non-citizen, a removee or a deportee.

Penalty: Imprisonment for 10 years or 1,000 penalty units, or both.

Note: The heading to section 234 is replaced by the heading “**False documents and false or misleading information etc. relating to non-citizens**”.

## **9 After section 234**

Insert:

### **234A Aggravated offence of false documents and false or misleading information etc. relating to non-citizens (at least 5 people)**

- (1) A person must not, in connection with:
  - (a) the entry or proposed entry into Australia, or the immigration clearance, of a group of 5 or more non-citizens (which may include that person), or of any member of such a group; or
  - (b) an application for a visa or a further visa permitting a group of 5 or more non-citizens (which may include that person), or any member of such a group, to remain in Australia;

do any of the following:

- (c) present, or cause to be presented, to an officer or a person exercising powers or performing functions under this Act a document that the person knows is forged or false;
- (d) make, or cause to be made, to an officer or a person exercising powers or performing functions under this Act a statement that the person knows is false or misleading in a material particular;
- (e) deliver, or cause to be delivered, to an officer or a person exercising powers or performing functions under this Act, or otherwise give, or cause to be given, for official purposes of the Commonwealth, a document containing a statement or information that the person knows is false or misleading in a material particular.

Penalty: Imprisonment for 20 years or 2,000 penalty units, or both.

Note: Sections 236A and 236B limit conviction and sentencing options for offences against this section.

- (2) A person must not transfer or part with possession of a document or documents:
  - (a) with the intention that the document or documents be used to help a group of 5 or more people, none of whom are entitled to use the document or documents, or any member of such a group, to gain entry into or remain in Australia, or to be immigration cleared; or
  - (b) if the person has reason to suspect that the document or documents may be so used.

Penalty: Imprisonment for 20 years or 2,000 penalty units, or both.

Note: Sections 236A and 236B limit conviction and sentencing options for offences against this section.

## **10 After section 236**

Insert:

**236A No discharge of offenders without proceeding to conviction for certain offences**

The court may make an order under section 19B of the *Crimes Act 1914* in respect of a charge for an offence against section 233B, 233C or 234A only if it is established on the balance of probabilities that the person charged was aged under 18 years when the offence was alleged to have been committed.

**236B Mandatory minimum penalties for certain offences**

- (1) This section applies if a person is convicted of an offence against section 233B, 233C or 234A.
- (2) This section does not apply if it is established on the balance of probabilities that the person was aged under 18 years when the offence was committed.
- (3) The court must impose a sentence of imprisonment of at least:
  - (a) if the conviction is for an offence against section 233B—8 years; or
  - (b) if the conviction is for a repeat offence—8 years; or
  - (c) in any other case—5 years.
- (4) The court must also set a non-parole period of at least:
  - (a) if the conviction is for an offence to which paragraph (3)(a) or (b) applies—5 years; or
  - (b) in any other case—3 years.
- (5) A person's conviction for an offence is for a **repeat offence** if:
  - (a) in proceedings after the commencement of this section (whether in the same proceedings as the proceedings relating to the offence, or in previous proceedings), a court:
    - (i) has convicted the person of another offence, being an offence against section 233B, 233C or 234A of this Act; or
    - (ii) has found, without recording a conviction, that the person has committed another such offence; or
  - (b) in proceedings after the commencement of the *Border Protection (Validation and Enforcement Powers) Act 2001* (whether in the same proceedings as the proceedings relating to the offence, or in previous proceedings), a court:

- (i) has convicted the person of another offence, being an offence against section 232A or 233A of this Act as in force before the commencement of this section; or
- (ii) has found, without recording a conviction, that the person has committed another such offence.

(6) In this section:

***non-parole period*** has the same meaning as it has in Part IB of the *Crimes Act 1914*.

## **11 Application**

Section 236A of the *Migration Act 1958* as amended by this Act applies to offences committed on or after the commencement of this item.

## Part 2—Consequential amendments

### *Migration Act 1958*

#### **12 Subsection 492(3)**

Repeal the subsection, substitute:

- (3) A prosecution for an offence:
  - (a) against section 232A, 233 or 233A of this Act as in force before the commencement of this subsection; and
  - (b) alleged to have been committed after the commencement of the *Migration Legislation Amendment Act (No. 1) 1999*; may be instituted at any time.
- (4) A prosecution for an offence against section 233A, 233B, 233C, 233D, 233E or 234A that is alleged to have been committed after the commencement of this subsection may be instituted at any time.

### *Proceeds of Crime Act 2002*

#### **13 Section 338 (subparagraphs (b)(i), (ii) and (iii) of the definition of *serious offence*)**

Repeal the subparagraphs, substitute:

- (i) section 233A (offence of people smuggling);
- (ii) section 233B (people smuggling involving exploitation, or danger of death or serious harm etc.);
- (iii) section 233C (people smuggling at least 5 people);
- (iv) section 233D (supporting the offence of people smuggling);
- (v) subsection 233E(1) or (2) (concealing non-citizens etc.);
- (vi) section 234A (false documents etc. relating to at least 5 non-citizens);

### *Surveillance Devices Act 2004*

#### **14 Subparagraph 30(1)(a)(vi)**

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Omit “73.2”, substitute “73.2, 73.3”.

**15 After subparagraph 30(1)(a)(viii)**

Insert:

; or (ix) an offence against section 233B or 233C of the  
*Migration Act 1958*;

**16 Application**

Section 30 of the *Surveillance Devices Act 2004* as amended by this Act  
applies to investigations begun on or after commencement.

***Telecommunications (Interception and Access) Act 1979***

**17 Section 5 (definition of *immigration offence*)**

Omit “232A, 233, 233A, 234 or”.

**18 Subsection 5D(3A)**

Repeal the subsection, substitute:

*Offences relating to people smuggling, slavery, sexual servitude,  
deceptive recruiting and trafficking in persons etc.*

(3A) An offence is also a ***serious offence*** if it is an offence against:

(a) any of the following provisions of the *Criminal Code*:

(i) section 73.1, 73.2, 73.3, 73.3A, 73.8, 73.9, 73.10 or  
73.11;

(ii) section 270.3, 270.6, 270.7 or 270.8;

(iii) section 271.2, 271.3, 271.4, 271.5, 271.6 or 271.7; or

(b) section 233A, 233B, 233C, 233D, 233E, 234 or 234A of the  
*Migration Act 1958*.

## **Schedule 2—Amendment of the Australian Security Intelligence Organisation Act 1979**

### **1 Section 4 (after paragraph (a) of the definition of *security*)**

Insert:

- (aa) the protection of Australia's territorial and border integrity from serious threats; and

### **2 Section 4 (paragraph (b) of the definition of *security*)**

After “(a)”, insert “or the matter mentioned in paragraph (aa)”.

## **Schedule 3—Amendment of the Telecommunications (Interception and Access) Act 1979**

### **1 Subsection 5(1) (definition of *foreign intelligence*)**

Repeal the definition, substitute;

*foreign intelligence* means intelligence about the capabilities,  
intentions or activities of people or organisations outside Australia.

### **2 Subsection 5(1)**

Insert:

*Minister for Defence* means the Minister administering the  
*Defence Act 1903*.

### **3 Subsection 5(1)**

Insert:

*Minister for Foreign Affairs* means the Minister administering the  
*Diplomatic Privileges and Immunities Act 1967*.

### **4 At the end of section 5**

Add:

- (6) For the purposes of the definition of *foreign intelligence* in  
subsection (1), *Australia* includes the external Territories.

### **5 Paragraph 11A(1)(b)**

Omit all the words from and including “relevant” to and including  
“affairs”, substitute “Minister for Defence or the Minister for Foreign  
Affairs, that the collection of foreign intelligence relating to that matter  
is in the interests of Australia’s national security, Australia’s foreign  
relations or Australia’s national economic well-being”.

### **6 Paragraph 11B(1)(b)**

Omit “relevant Minister”, substitute “Minister for Defence or the  
Minister for Foreign Affairs”.

**7 Subparagraph 11B(1)(b)(i)**

Omit all the words from and including “important” to and including “affairs”, substitute “in the interests of Australia’s national security, Australia’s foreign relations or Australia’s national economic well-being”.

**8 Paragraph 11C(1)(b)**

Omit “relevant Minister”, substitute “Minister for Defence or the Minister for Foreign Affairs”.

**9 Subparagraph 11C(1)(b)(i)**

Omit all the words from and including “important” to and including “affairs”, substitute “in the interests of Australia’s national security, Australia’s foreign relations or Australia’s national economic well-being”.

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*[Minister’s second reading speech made in—  
House of Representatives on 24 February 2010  
Senate on 18 March 2010]*

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(43/10)