



Aviation Legislation Amendment (2007 Measures No. 1) Bill 2007

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Law and Bills Digest Section

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Aviation Legislation Amendment (2007) Measures No. 1) Bill 2007

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House: Senate

Portfolio: Transport and Regional Services

Commencement: The day after 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/>.

Purpose

The Aviation Legislation Amendment (2007 Measures No. 1) Bill 2007 (the Bill) amends the *Aviation Transport Security Act 2004* (the ATS Act) and the *Civil Aviation Act 1988* (the CAA).

The amendments to the ATS Act are to:

- allow regulations to be made to prohibit activities or conduct performed outside a security controlled airport that disrupts or interferes with the operations of the airport
- increase powers of customs officers
- allow regulations to be made to provide ‘for the most senior dignitaries, their spouses and minors to be exempt from aviation security screening’,¹ and
- rationalise the administration of the transport security program to mirror the maritime security legislation.

The amendments to the CAA are to:

- create an offence in the situation where a person does an act to interfere with a crew member or threatens the safety of an aircraft or of persons on board whether or not the offender is in or out of the aircraft, and
- insert a new Part to enable regulations so the Civil Aviation Safety Authority (CASA) can introduce a mandatory drug and alcohol regime which will have 2 elements:

1. Senate Hansard, *Second Reading Speech*, 21 June 2007, p. 17.

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- companies in the industry will be required to have programmes that will be regulated and audited by CASA
- CASA will carry out its own testing programme, to test people in the industry who are not covered by a company programme.

Background

The regulatory scheme for mandatory drug and alcohol testing is a measure to improve the safety of the civil aviation industry. On 2 May 2006 the Minister for Transport and Regional Services [announced](#) that the aviation sector will be required to have a mandatory scheme based on the report² prepared jointly by the Department of Transport and Regional Services (DOTAR) and CASA. According to the report:³

Drug and alcohol abuse are estimated to generate enormous economic and social costs internationally. Whilst figures vary considerably, published estimates include well over \$140 billion in annual losses in the United States across all industry sectors; approximately \$20 billion per annum in Canada; and \$10 billion per annum in Australia. Given such an impact, it is not surprising that serious consideration has been given to preventative and remedial measures.

The other significant changes in the Bill derive in part from the recommendations of the [Wheeler Report](#) in September 2005.⁴ These recommendations related to many aspects of improved security, policing, terrorism responses, background checking and expanded closed circuit television systems, to mention a few. Recommendation 16 of the Report said that all police, Australian Federal Police Protective Service and Customs officers at airports ‘need clear and unambiguous powers to stop, search, detain and arrest where necessary within the airport and its curtilage’.⁵ The increased powers of customs officers will be implemented by this Bill on its passage.

2. Department of Transport and Regional Services & CASA, *Review into Safety Benefits of Introducing Drug and Alcohol Testing, Joint Report*, 2006.

3. *ibid.*

4. Wheeler, the Rt Hon Sir John, *An Independent Review of Airport Security and Policing for the Government of Australia*, Airport Security and Policing Review, September 2005.

5. *ibid*, Recommendation 16, p. xii.

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Financial implications

According to the Explanatory Memorandum, there are no financial implications for the amendments to the ATS Act. A detailed analysis of the financial implications for the amendments to the CAA relating to mandatory drug and alcohol testing regime are contained in the Regulatory Impact Statement in the Explanatory Memorandum.

The preferred option in the report prepared by the Allen Consulting Group on the alcohol and drugs scheme was Option 3 where the 'net present value benefit to the community is \$219,867,589 and the benefit cost ratio is 4.55'.

Main provisions

Schedule 1 – Amendments to the *Aviation Transport Security Act 2004*

Item 1 repeals and substitutes **subsection 7(2)** to provide that only the Crown in right of the Commonwealth will not be liable to be prosecuted for an offence under the Act. The existing provision just says that the Crown is not liable to be prosecuted. The effect of the change is to ensure that State or Territory agencies operating airports are subject to the Act in the same way as any other operator.

Items 3-5 amend section 10 to extend the meaning of unlawful interference with an aircraft. The section as amended will apply not only to acts done but to attempted acts (**amended subsection 10(1)**). **Subsection 10(1)(a)** is amended to bring into the subsection the taking control of an aircraft by any 'trick or false pretence' and **subsection 10(1)(g)** is extended to encompass 'false or misleading' information.

The expression 'trick or false pretence' is common parlance in other similar offences in other jurisdictions.⁶ Current subsection 10(1)(a) applies to acts involving violence, threats, intimidation and the like and the inclusion of trick or false pretence widens the definition to include 'peacefully taking control of an aircraft by means of subterfuge or deceit'.⁷

Items 6-12 make amendments to Part 2 of the Act governing transport security programmes.

6. Criminal Code Act 1924 (Tas) section 276D, *Crimes (Aviation) Act 1991*(Cth) section 16, *Crimes Act 1900* (NSW) subsection 154B(4), Criminal Code 1899 (Qld) section 417A and *Aircraft Offences Act 1971* (SA) section 7.

7. Aviation Legislation Amendment (2007 Measures No. 1) Bill 2007, *Explanatory Memorandum*, p. 26.

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Under the Act various industry participants are required to have and to comply with transport security programmes. Other persons also have to comply with the programmes of the aviation industry participants.

Item 6 repeals and substitutes a **new subsection 19(4)** which provides that if the Secretary does not make a decision within the consideration period (60 days, **new subsection 19(7)**) then the Secretary is taken to have refused to approve the programme. The **new note** to the subsection says that the applicant can apply to the Administrative Appeals Tribunal about the decision to refuse to approve a programme under either subsection 19(2) or subsection 19(4). Existing section 126 of the Act already provides that decisions under section 19 are reviewable, so the new drafting clarifies that by failing to do something is taken to be a decision for the purposes of review. **New subsections 19(5) and (6)** allow the Secretary to issue a notice to extend the time allowed to consider an application when he or she has requested further information, but the time extended cannot exceed 45 days.

Item 7 repeals and substitutes **subsection 20(3)** to provide that a program will remain in force for a period of 5 years or less (but for at least 12 months) unless it is replaced under existing subsection 22(2) or cancelled. **Item 11** repeals section 24 which requires a transport safety programme to be revised every 5 years. This is consistent with the changes in **items 8-10** which ensure that when a programme is revised, a variation is not taken to create a new programme and therefore does not affect the time when a programme is to expire.

Item 12 inserts **new section 26A** to allow a programme to be cancelled on the request of a participant to the Secretary. According to the Explanatory Memorandum there has previously been no provision or mechanism for a person to be relieved of their obligations if the person 'no longer wishes to remain in operation'.⁸ Section 12 of the Act states:

Who must have a programme

The following aviation industry participants are required to have a transport security program:

- (a) an operator of a security controlled airport;
- (b) an operator of a prescribed air service;
- (c) a participant of a kind prescribed in the regulations.

If a person is no longer an operator then the obligations under section 12 will no longer be applicable. **New section 26A** does not specify that the participant be no longer a participant or an operator and a consequence might be that when any participant makes a

8. *ibid*, p. 27.

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request to cancel the approval the Secretary must do so. It should be noted that the provision is in the exact terms of the *Maritime Transport and Offshore Facilities Security Act 2003* section 59 which has been in that Act since its introduction in 2003.

Item 14 inserts **New Division 5 – offences for causing disruption or interference in relation to security controlled airports.**

New Division 5 consists of a single section – **new section 38B**. It allows regulations to be made that create offences in relation to the ‘disruption to or interference with the activities of an airport operator of, or aircraft operator at, a security controlled airport’. There are some restrictions regarding when **new section 38B** applies. These reflect constitutional limitations, but the limitations are likely to be fairly minor in practice.

The offences that can be created by regulation do not require that the relevant activity constitute a threat to the safety of persons or aircraft. This contrasts with the concept of unlawful interference with aviation in existing section 10 of the Act. However, unlawful interference with aviation does not include lawful advocacy, protest, dissent or industrial action that does not result in, or contribute to, threat to the safety of persons or aircraft.

Overall, then, a very wide range of activity could be criminalised by virtue of regulations made under **new section 38B**, including activity outside the bounds of an airport. However, penalties are restricted to 50 penalty units, and any regulations will be subject to Parliamentary disallowance in the usual way.

Item 17 inserts **new subsection 84(1A)**. This requires that a search conducted by a law enforcement officer under existing subsection 84(1) powers must, if practicable, be conducted by a person of the same sex as the person being searched. As noted by the Explanatory Memorandum, this is consistent with searches conducted under the provisions of the *Crimes Act 1914* (see section 3ZR).

Item 18 inserts **new Division 3A** into Part 5 of the Act – titled Eligible customs officers.

New section 89B defines eligible customs officer and under **new subsection 89B(b)** customs officers must be on duty to assert the exercise of the stop and search powers. Regulations can be made to provide for the training qualifications for and the use of identity cards by eligible customs officers.

The powers are to stop and search persons (**new section 89C**) and vehicles (**new section 89D**) if the officer reasonably believes it is necessary to do so. **New section 89E** allows an officer to require someone to leave an aircraft, airport or areas or zones if he or she reasonably suspects a person is committing or has committed an offence.

Officers can restrain and detain a person if an offence is suspected until the arrival of a law enforcement officer, and they cannot use unreasonable force in the exercise of these powers (**new section 89F**).

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Item 21 repeals and substitutes **new subsections 131(1) and (2)** to allow certain ‘most senior dignitaries, their spouses and minors to be exempt’ from aviation security screening through regulations.⁹

Schedule 2 – Amendments to the *Civil Aviation Act 1988*

Item 23 adds mention of **new Part IV** drug and alcohol management plans to the functions of the Civil Aviation Safety Authority (CASA), which is to be inserted into the Act by this Bill.

Item 25 inserts **new Part IV** to establish a regulatory regime for the drug and alcohol testing of persons performing safety-sensitive aviation activities at airports. Subject to the regulations, CASA will be able to regulate and monitor compliance with plans and to carry out its own random testing programmes. An outline of the two components is explained in the Regulatory Impact Statement (RIS) in the Explanatory Memorandum as follows:

It is intended that CASA will have oversight of the drug and alcohol testing of safety sensitive personnel in the civil aviation industry and that the regime will consist of two components. The first component will be a drug and alcohol regime to be implemented by the civil aviation industry and those closely associated with its safety sensitive functions and which will include a requirement for industry participants to develop and implement a drug and alcohol programme (Industry Component). While industry participants may elect to randomly test their employees under this first component, it is not intended that such random testing be mandated by CASA. The second component will be a scaleable random testing regime of safety sensitive personnel associated with the civil aviation industry, including those not captured under the drug and alcohol programme conducted by industry (CASA Component). It is proposed that CASA will engage a contractor to undertake random testing on its behalf under this second component.¹⁰

New section 33 provides the definitions including for a drug and alcohol test to detect the presence and level of drugs and alcohol, and safety-sensitive aviation activities. There is no definition of *safety sensitive personnel* but the Explanatory Statement says they will include flight crew, cabin crew, flight instructors, aircraft dispatchers, aircraft maintenance and repair personnel, aviation security personnel including screeners, air traffic controllers, baggage handlers, ground refuellers and other personnel with airside access, and contractors.¹¹

9. Aviation Legislation Amendment (2007 Measures No. 1) Bill 2007, *Second Reading Speech*, Hansard, 21 June 2007, p. 17.

10. Aviation Legislation Amendment (2007 Measures No. 1) Bill 2007, *Explanatory Memorandum*, p. 3.

11. *ibid*, p. 3.

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New sections 34, 35 and 36 will allow regulations to be made for the development, implementation and enforcement of plans, the details of which will be required such as who is required to develop plans and the content of plans, details of who must give samples for testing, the conduct of tests, and authorisation of persons who can take tests. **New subsection 43(3)** limits the scope of regulations that can be made in that regulations cannot be made unless the activities can be adversely affected by alcohol or drugs.

The results of drug and alcohol testing can only be admissible in proceedings under the Act and regulations or other proceedings to be specified in the regulations (**new subsection 36(4)**). The Explanatory Memorandum sets out the other types of proceedings envisaged in which the results could be made admissible, and they are very broad ranging. They include ‘prosecution action (or sentence proceedings) under other Commonwealth and/or State legislation...; the prosecution of Commonwealth offences that follow on from decidedly aviation-related conduct; civil and administrative proceedings involving disciplinary and dismissal action taken in respect of person carrying out safety-sensitive aviation activities (employees and employers)’.¹² **Paragraphs 36(1) (i)-(l)** enable regulations to be made which will set out the procedures for the handling of samples, the giving of results to CASA and to the person undergoing the test, other persons who may receive the results, and the use and disclosure of results. These proposed regulations will need to comply with privacy law principles.

Item 39 specifically provides that the new provisions (35, 36, 37, and 38) do not limit the general regulation-making powers provided in **new section 34**. The CAA has a general regulation making power in section 98 of the Act. The RIS in the Explanatory Memorandum explains that the proposed amendments to ‘section 9 (which sets out CASA’s functions) and section 98 (the regulation –making power) of the Act are required to ensure that CASA’ has all the lawful authority required to give effect to the regime.’¹³ Section 98 however is not amended by the Bill, nor mentioned by the Explanatory Memorandum itself in the main provisions of the Bill.

12. *ibid*, p. 33.

13. *ibid*, paragraph 3.3, p. 12.

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