



INFORMATION, ANALYSIS  
AND ADVICE FOR THE PARLIAMENT

INFORMATION AND RESEARCH SERVICES

Bills Digest  
No. 23 2003–04

## Aviation Transport Security Bill 2003

ISSN 1328-8091

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I N F O R M A T I O N   A N D   R E S E A R C H   S E R V I C E S

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No. 23 2003–04

Aviation Transport Security Bill 2003

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Law and Bills Digest Group  
19 August 2003

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# **Aviation Transport Security Bill 2003**

**Date Introduced:** 27 March 2003

**House:** House of Representatives

**Portfolio:** Transport and Regional Services

**Commencement:** The Act itself commences on Royal Assent. However, the main provisions (sections 3 to 122) commence on a day to be fixed by proclamation, or failing that, 12 months after Royal Assent.

## **Purpose**

To update the Commonwealth regulatory framework governing aviation security.

## **Background**

A long gestation

The Department of Transport and Regional Services (DOTARS) has been continuously working on revising the legislative framework for aviation security for over four years. The following provides a short history of this process and other related matters.

In 1998, the Australian National Audit Office (ANAO) released a report, [\*Aviation Security in Australia\*](#).<sup>1</sup> The overall conclusion of the report was that DOTARS (then DoTRD) had

established a regulatory regime which ensures Australia's compliance with the standards embodied in Annex 17 [of the 1944 Convention on International Civil Aviation - the so-called 'Chicago Convention'<sup>2</sup>]. However, there are areas where Australia's aviation security regime can be strengthened even further.<sup>3</sup>

Partly as a consequence of the ANAO report, DOTARS started a revision of Part 3 of the *Air Navigation Act 1920*. Part 3, which provides most of the legislative framework for aviation security along with associated regulations, covers matters such as the following:

- screening of passengers and baggage
- reporting requirements for unlawful interference with aviation, and

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- aviation and airport security programs

This work resulted in the *Aviation Legislation Amendment Bill (No.2) 2001* being introduced into Parliament in April 2001. The 2001 Bill largely proposed to repeal the existing Part 3 and replace it with regulations, although some provisions on information gathering were to be put into Part 3. The Bill was never debated and no draft regulations were released. Ultimately the Bill lapsed with the proroguing of Parliament in October 2001 that year. The Bill (then called the *Aviation Legislation Amendment Bill 2002*) was reintroduced into Parliament an unchanged form in March 2002. The relevant [Bills Digest](#) comments:

In December 2001, Federal Cabinet directed [DOTARS] to conduct reviews on four aviation security areas - passenger screening, baggage screening, airport access control and additional security measures (ASMs). These reviews have incorporated discussions with an established industry consultative group - whose membership includes the peak airline and airports groups, Qantas and Virgin Blue and all airports that handle international traffic - and are likely to be progressively finalised in May and June 2002, probably enabling drafting instructions [for regulations] to be developed by around July 2002.<sup>4</sup>

The 2002 Bill was not debated by Parliament until December 2002. The proposal to repeal existing Part 3 was rejected. Instead, the provisions on information gathering were added as a new Part 3A and substantive provisions of Part 3 left unchanged. It is unknown whether any draft regulations were ever developed. However, the *Explanatory Memorandum* to the (2003) Bill comments that:

The outcome of these reviews was the preparation of advice to the Government. The resultant Submissions were considered in December 2002. The recommendations of these Submissions are to be implemented in the new legislative framework.<sup>5</sup>

Under the Aviation Security (Consequential Amendments and Transitional Provisions) Bill 2003, both Part 3 and the new Part 3A of the Air Navigation Act are to be repealed.<sup>6</sup> If passed, all major Aviation Security provisions will be contained in the *Aviation Transport Security Act 2003* and associated regulations.

## Developments in Australian aviation security since 2001

The existing regulatory framework for aviation security is contained in the *Air Navigation Act 1920*, the Air Navigation Regulations and Air Navigation (Baggage Screening) Regulations. The *Air Navigation Act 1920* provides for certain airlines and airports to have security programs.<sup>7</sup>

These programs contain what are called 'standard security measures' (SSMs) tailored for the relevant airline or airport. Typically, these SSMs cover matters such as passenger, baggage and cargo screening and the controlling of access to areas of the airport and

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aircraft themselves. The DOTARS Secretary may also direct that these programs be varied in a particular fashion and within a prescribed timeframe. This variation power allows for the imposition of 'additional security measures' (ASMs) when required. According to a 2003 ANAO report (discussed later in this Digest), the first set of post 11 September 2001 ASMs were issued on 12 September, with further ASMs periodically issued later in 2001 and 2002. Although details of these ASMs are not on the public record, presumably for security reasons, the Government has publicised that these have required an upgrading of passenger and baggage screening in particular. For example:

The Government will require all airports that handle scheduled jet operations to conduct passenger and carry-on baggage screening for all passengers, including those flying on propeller services...The Government has further decided to mandate upgrades to the screening capability at all domestic and international passenger screening points. The upgraded equipment will be at the cutting edge of international standards for screening technology. Australia has screened checked baggage on selected international flights since June 2000...we consider that it is now appropriate to introduce 100 percent checked bag screening, using the latest equipment, for all international services. My department will work closely with the industry to bring it into effect by 31 December 2004, a full year ahead of the deadline imposed by the International Civil Aviation Organisation (ICAO). The Government will also require the operators of Australia's major domestic terminals to introduce checked bag screening for domestic services, on the same timetable.<sup>8</sup>

Other security measures have included air marshalls and deployment of additional protective service officers at 11 airports.<sup>9</sup>

In the face a number of security incidents during 2003,<sup>10</sup> the Government has come under some criticism, mainly in relation to the number of regional airports that do not have passenger / carry-on baggage screening<sup>11</sup> and questions about the effectiveness of screening of airport ground staff that have access to sensitive areas.<sup>12</sup> On 5 June, it was announced that Federal Parliament's Public Accounts and Audit Committee was to conduct an inquiry reviewing aviation security arrangements in Australia. The Committee's terms of reference are to examine:

- regulation of aviation security by the Commonwealth Department of Transport and Regional Services
- compliance with Commonwealth security requirements by airport operators at major and regional airports
- compliance with Commonwealth security requirements by airlines
- the impact of overseas security requirements on Australian aviation security
- cost imposts of security upgrades, particularly for regional airports

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- privacy implications of greater security measures, and
- opportunities to enhance security measures presented by current and emerging technologies.

According to the Committee Chairman, Bob Charles MP, the committee:

...does not intend to apportion blame for recent security breaches but instead will seek ways to strengthen Australian aviation security...The Committee will examine the effect of overseas security requirements on Australian aviation security. Strengthening security, in particular at regional airports, will have cost implications. The Committee will examine those implications, as well as how current and emerging technologies present opportunities to enhance security measures in a cost-effective way. While it will review these technologies, the Committee has neither the expertise nor intention to recommend the adoption of particular technologies.<sup>13</sup>

No reporting date has been released by the Committee as yet.

## Developments in the international regulation of Aviation Security

Since the terrorist attacks on the United States in September 2001, the International Civil Aviation Organisation (ICAO) has examined ways of improving aviation security. In February 2002, a Ministerial level meeting endorsed the *ICAO Aviation Security Plan of Action*. The Plan includes measures such as:

- regular, mandatory, systematic and harmonized audits to enable evaluation of aviation security in place in all Member States of ICAO
- identification, analysis and development of an effective global response to new and emerging threats, integrating timely measures to be taken in specific fields including airports, aircraft and air traffic control systems
- strengthening of the security-related provisions in the Annexes to the Convention on International Civil Aviation, using expedited procedures where warranted and subject to overall safety considerations, notably to provide for protection of the flight deck
- close coordination and coherence with audit programmes at the regional and subregional level
- processing of the results by ICAO in a way which reconciles confidentiality and transparency, and
- a follow-up programme for assistance, with rectification of identified deficiencies.<sup>14</sup>

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In terms of strengthening the Chicago Convention Annex 17, a range of issues has been incorporated into Annex 17 with effect from 1 July 2002:

- applicability of Annex 17 to domestic operations where practicable
- international cooperation relating to threat information
- certification of screeners
- access control relating to air crew and airport personnel
- in-flight security personnel and protection of the cockpit
- joint response to acts of unlawful interference
- definition of aircraft security check and security restricted area
- measures relating to special categories of passengers (eg. cooperative approach to armed personnel)
- security controls in relation to catering supplies and operators' stores
- training programs, and
- baggage control.

### The 2003 Australian National Audit Office report

In January 2003, the ANAO released a further [report](#) on aviation security.<sup>15</sup> According to ANAO, this report was relatively narrow in scope and only examined DOTARS progress against the key recommendations of the 1998 audit.<sup>16</sup> The 2003 report concluded:

Overall, the ANAO found that DOTARS responded well to the events of 11 September 2001 with a prompt escalation of the aviation security measures and effective oversight of their implementation. The regulatory framework for aviation security is comprehensive. Although DOTARS' monitoring regime is essentially sound, the quality of monitoring in practice is variable. In addition, the action DOTARS takes to correct non-compliance could be improved. **As the body with regulatory responsibilities, DOTARS could show more pro-active leadership to effectively engage the various organisations and people involved in delivering aviation security, particularly as security relies on everyone playing their part to ensure an effective outcome. The greatest challenge for DOTARS, particularly in light of recent events, is to effectively encourage a strong security culture throughout the industry. DOTARS can demonstrate stronger leadership by setting, monitoring and reviewing performance targets for industry, and by using a wider range of management strategies to encourage industry to achieve**

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**them.** In this context, progress in implementing the recommendations from the 1998 audit has been limited. Instead, DOTARS efforts have been focused on modernising the aviation security regulatory framework. The ANAO makes no comment on policy priorities [emphasis added].<sup>17</sup>

DOTARS agreed with all six specific ANAO recommendations in the 2003 report and as of January 2003 had ‘already commenced following up’.<sup>18</sup> The ANAO report did not comment on the appropriateness of the existing legislative framework. However, the Government has taken the view that this framework has:

resulted in unnecessary complications in the administration of laws and difficulty in ensuring compliance. [and the]... current complexities inhibit full accountability and transparency of security providers (including airlines and airports).<sup>19</sup>

## Consultation

According to the *Explanatory Memorandum*,<sup>20</sup> as at March 2003 consultation with various parties was done through two processes.

- Firstly, through the circulation of ‘consultative documents’ to around 40 Australian airports, the major Australian airlines, foreign international airlines serving Australia, and peak industry bodies. These documents covered issues including airport access control, passenger and checked bag screening, airport measures, and Departmental powers. The *Explanatory Memorandum* states that ‘substantial comment[s]’ were received in response to the circulated documents.
- Secondly, the ‘proposed changes’ were presented at the Aviation Security Industry Consultative Group meeting held in late February 2003. This body includes representatives of the major Australian airlines, the major airport operators, and some peak industry bodies, but does not include union or contracting company representatives.

The *Explanatory Memorandum* notes several ‘concerns’ raised by industry members during the reform process. These include:

- the lack of a specific offence for aviation security-related hoaxes
- airlines and airport operators lack of legislative power to prevent unscreened persons from entering ‘sterile’ areas
- obtaining personal information from police about persons who have been detained by airlines in order to assess the persons security risk, and
- the proposed demerit point scheme.<sup>21</sup>

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The *Explanatory Memorandum* says in some cases the Bill was amended to accommodate these concerns. It also states ‘the Department has received favourable comment from industry on the overall direction of the proposed aviation security regulatory framework’.

On 26 March, the Bill was referred to Senate Rural and Regional Affairs and Transport Legislation Committee for inquiry. Only four submissions were received by the committee in relation to the Bill. Notably, the submission from the Australian Airports Association (AAA) stated:

There has been widespread prior industry consultation with regard to the 'substance' of the Bill...[however]... There has not been widespread prior industry consultation on the 'detail' of the proposed legislation. Initial impressions suggest that it has been developed without due regard to the industry by embracing 'bits and pieces' from former sections of the Air Navigation Act 1920, various Additional Security Measures (ASMs) and some from the minutes of Aviation Industry Security meetings.<sup>22</sup>

In Senate Committee hearings, Departmental officials said the criticism of the AAA regarding the detail of the Bill and the (lack of) consultation was ‘of considerable surprise’.<sup>23</sup> There was also some criticism by the opposition at the hearings that there had been no direct consultation by ‘aviation security workers’.<sup>24</sup>

In addition, specific consultations regarding regulations under the Bill were commenced by DOTARS in May 2003. According to information supplied by DOTARS, a series of meetings in Sydney, Melbourne and Coolangatta were held to discuss the issues of persons in custody, screening, clearing, the demerit points scheme, airport areas and zones, transport security programs, infringement Notices, ASICs, and powers of officials. As yet the issues of weapons / prohibited items and onboard security have not been discussed. Again according to information from DOTARS, a broader range of organisations have been invited to these meetings than the Industry Consultative Group referred to earlier. Notably, this wider group includes a large number of regional local government councils, State government departments and the security companies, SNP security, Group 4 Security and Chubb Security. It is not known what views were expressed by the various groups either at meetings or through written comments.

## Main Provisions

### Part 1: Preliminary Matters

**New section 6** provides that ‘extended geographical jurisdiction – category B’ of section 15.2 of the *Criminal Code* applies to offence provisions of the Bill. Thus an offence may still be committed where all the relevant conduct and/or result of conduct occurs outside Australia, but there is still some Australian connection – eg involving an Australian

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aircraft or the offending conduct is committed by an Australian citizen, resident or company. Regulations made under the Act will have similar extended geographical jurisdiction. As noted by the *Explanatory Memorandum*, no offence will occur if the relevant conduct is done by a non-Australian person or company and the conduct is not a crime under the law of the foreign country where it occurs: see subsection 15.2(2) of the *Criminal Code*.<sup>25</sup>

**New section 7** is a standard provision that although the Commonwealth, State and Territory governments are bound by the Bill, they cannot be prosecuted for an offence under it.

**New section 8** establishes a presumption that, unless otherwise indicated, the Bill will not apply to defence force, customs or police aircraft of any country ('State aircraft'). Civil aircraft chartered by the Australian Defence Force (ADF) will be similarly excluded. The Bill will not affect various diplomatic immunities and privileges conferred by other legislation: **new section 131**.

Amongst other terms, **new section 9** defines 'aviation industry participant'. This covers

- (a) an airport operator; or
- (b) an aircraft operator; or
- (c) a regulated air cargo agent; or
- (d) a person who occupies or controls an area of an airport (whether under a lease, sublease or other arrangement); or
- (e) a person (other than an aviation security inspector) appointed by the Secretary under this Act to perform a security function; or
- (f) a contractor who provides services to a person mentioned in paragraphs (a) to (e).

The ADF cannot be an aviation industry participant.

**New section 10** defines the meaning of 'unlawful interference with aviation'. The *Explanatory Memorandum* comments

The definition is integral to the understanding and application of the Bill. It determines the parameters of what unlawful interference with aviation is, how it may occur and thus the harm or threat that this Bill safeguards against.<sup>26</sup>

Apart from key actions such as 'taking control of an aircraft by force, or threat of force, or by any other form of intimidation' (ie hijacking), the definition includes in **new paragraph 10(h)**:

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committing an act at an airport, or causing any interference or damage, that puts the safe operation of an airport, or the safety of any person at the airport at risk.

While the *Explanatory Memorandum* comments that ‘this subclause would cover destruction of key facilities or infrastructure’<sup>27</sup>, it is arguable that the drafting allows for a rather broad range of activities to come within the unlawful interference with aviation. For example, an unauthorised on-site demonstration that impedes vehicle traffic flow would fall within the definition. **New paragraph 10(h)** is at least an incremental expansion of equivalent existing paragraph 3AE(1)(j) of the *Air Navigation Act* which includes the

using [of] a weapon, or any other thing...to disrupt the operation of an airport...if the use of the weapon or thing endangers, or is likely to endanger, the safe operation of the airport;

The *Explanatory Memorandum* also states that the proposed meaning of unlawful interference with aviation is ‘based upon guidance from the...ICAO Vocabulary’.<sup>28</sup> According to information supplied by DOTARS, the relevant excerpt from ICAO Document 9713 is:

**Acts of Unlawful Interference (Definition given for guidance purposes)**

These are acts or attempted acts such as to jeopardize the safety of civil aviation and air transport, i.e.

- unlawful seizure of aircraft in flight,
- unlawful seizure of aircraft on the ground,
- hostage-taking on board aircraft or on aerodromes,
- forcible intrusion on board an aircraft, at an airport or on the premises of an aeronautical facility,
- introduction on board an aircraft or at an airport of a weapon or hazardous device or material intended for criminal purposes,
- communication of false information such as to jeopardize the safety of an aircraft in flight or on the ground, of passengers, crew, ground personnel or the general public, at an airport or on the premises of a civil aviation facility.

The ICAO document does not appear to support the breadth of the proposed (or current) definition of ‘unlawful interference with aviation’. That said, there may well be good reasons for going beyond the ICAO meaning: after all, it is only meant as ‘guidance’.

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## Part 2: Transport security programs

Whilst ‘transport security programs’ are not defined as such, their content is dealt with in **new section 16**.

**New section 12** sets out who must have a transport security program. These include an operator of an airport declared a ‘security controlled airport’ by the DOTARS Secretary<sup>29</sup> (the Secretary), the operator of an air service prescribed in regulations, or any other ‘aviation industry participant’ prescribed in regulations. As previously noted, an aviation industry participant includes persons who lease sections of the airports and contractors, including contractors who carry out baggage, security or any support functions. The issue of who should be required to have security programs was discussed in Senate Committee hearings into the Bill:

**Ms Lynch [DOTARS]** - At the moment all airports fall under our regulatory cloak. All participating airports have to have an aviation security program as it is and all operating airlines have to have an aviation security program. So it will not actually pull in many more airports or airlines than are currently covered by the programs. What it does do is seek to extend the use of programs to aviation industry participants. We have broadened out that definition so that we can possibly pick up other groups of people at the moment who may well be delivering security services under somebody else’s program. But where we think that they are of sufficient input to the security process and it would be useful for them to have their own program against which they can be held accountable, we are holding out that opportunity for those people to either come to us to have a program put together or for us to work with them to put a program together....

At the moment the cargo industry has a lot of participants—I gather there are around 800— who range from the size of something, for example, like FedEx down to very, very small operators. I think working with that particular section of the industry will be a very big thing. Moving all of those people at the same pace towards them all having agreed security programs will be quite a large task. So we may well look at prescribing in regulations programs required perhaps at a certain level of operation or something like that. We are seeking to make sure that that industry is consulted about and included in the way that their programs are going to work and operate. We want to make sure that we are able to do that.

**Senator O’BRIEN** - So there will be a two-tiered system?

**Ms Lynch** - There could be, yes.

**Senator O’BRIEN** - How is that justified? Is it just too hard and that is why you are setting two tiers, or is there some real security reason why two tiers is acceptable?

**Mr Dolan [DOTARS]** - I think that question gets to the overall approach to the security system itself, which is to say that it is based on threat and risk. The level of risk and exposure does vary with different scales of operation, among other things. Rather than just having a two-tiered system on some comparatively arbitrary basis, we would have to

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take a look at the overall level of threat and see how it applies to the freight industry as a whole and come to a view as to what the appropriate interventions are to get the appropriate level of security.<sup>30</sup>

If an aviation industry participant fails to have in force a program they are required to have by **new section 12**, they face a fine of up to 200 penalty units (\$22 000)<sup>31</sup> if an individual or \$110 000 if a company: **new section 13**. However, if required to have a program, no offence occurs unless the participant is actually operating the relevant business ('operates as a participant of that kind' is the actual wording). There is no specific guidance as to the dividing line between operating and not operating. A similar fine applies if a participant has a program in force but 'fails to comply' with it: **new section 14**. **New section 13** and **14** offences are offences of strict liability (ie there is no requirement to prove fault or culpability, eg intention, recklessness etc) but they do not apply if the participant has a reasonable excuse. In commenting upon the meaning of reasonable excuse as a statutory defence to an offence, the High Court has said that:

the reality is that when legislatures enact defences such as "reasonable excuse" they effectively give, and intend to give, to the courts the power to determine the content of such defences. Defences in this form are categories of indeterminate reference that have no content until a court makes its decision. They effectively require the courts to prescribe the relevant rule of conduct after the fact of its occurrence.<sup>32</sup>

The *Explanatory Memorandum* comments in relation to **new section 14** that 'in this context, a reasonable excuse may be unforeseen infrastructure damage caused by extreme weather'.<sup>33</sup> The defence of reasonable excuse exists for the equivalent provisions in the *Air Navigation Act 1920*.

**New section 15** sets out the responsibilities of participants in relation to the security programs of other participants. There are two broad responsibilities.

Firstly, a participant 'must not engage in conduct that hinders or obstructs compliance with the program of another participant'. Presumably this means compliance of any participant that potentially comes within the scope of the program. But what if the participant's conduct is reasonable but has a side-effect of a (minor) hindrance?

Secondly, if the program of a first participant 'covers the activities' of any other participants, these other participants must 'take all reasonable steps to comply with the program' if they have been given all the relevant parts of the program. As noted by the *Explanatory Memorandum*, 'due to paragraph 16(2)(g), these participants will have been consulted in the development of the program'.<sup>34</sup> However, they still might disagree with the program in terms of its implications for them. A breach of **new section 15** may be remedied either by an enforcement order by the Secretary<sup>35</sup> under **new section 119** (though these can only be made in limited circumstances) or through a court injunction under **new section 124**.

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There is no equivalent requirement of **new section 15** in the *Air Navigation Act 1920* or regulations.

**New section 16** sets out the required content of transport security programs. They are extensive. Regulations may be made to extend the list of required contents for all programs or certain types of programs. Regulations may also be made to set out how and / or what form the program is to be prepared: **new section 17**. The required scope of transport security programs is broader than the equivalent provisions in the *Air Navigation Act 1920*, eg existing section 22P.

**New sections 18-26** deal with how transport security programs are to be approved, varied, cancelled etc.

Under **new section 19**, the Secretary *must* approve the program if they are satisfied it ‘adequately addresses’ the requirements of **new sections 16-17**: if not, he/she must refuse approval. In making this decision, the Secretary ‘may take account of existing circumstances as they relate to aviation security’. Refusal of approval may be reviewed by the Administrative Appeals Tribunal (AAT) as are several other decisions related to security programs: **new section 126**. If once the program is approved and in force,<sup>36</sup> and the Secretary is no longer satisfied that it adequately addresses the **new sections 16-17** requirements, he or she may direct it be *varied* by the participant in a specified way within a set timeframe: **new section 21**. If the participant fails to comply, the program must be cancelled by the Secretary.<sup>37</sup>

The Secretary may also direct the program be *revised* by the participant if the Secretary feels that it no longer adequately addresses the **new sections 16-17** requirements: **new section 23**. Unlike the variation direction, there is no provision in the revision direction allowing the Secretary to specify how the program should be changed. If the participant fails to comply with the **new section 23** direction, the program must be cancelled by the Secretary. Whilst it’s not clear whether an unsatisfactory revision could allow the Secretary to cancel the program, presumably if the Secretary wants particular changes to a program they would elect for a variation rather than a revision.

If the Secretary feels that the program no longer adequately addresses the **new sections 16-17** requirements and ‘is satisfied that it is not appropriate’ to direct either a variation or revision, they must cancel the program: **new section 25**. There is no guidance in the Bill on the circumstances in which a variation or revision would not be appropriate. The *Explanatory Memorandum* merely comments that **new section 25** would likely come into play when a variation or revision ‘would not solve the problem’.<sup>38</sup>

Under **new section 26**, cancellation of the program can also occur through the accumulation of a certain number of demerit points. **New section 125** allows for regulations to be made establishing a system whereby demerit points may be incurred either when a participant is convicted of an offence under the Act or otherwise pays a fine in lieu of being prosecuted for an offence. The regulations will prescribe the number of

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points required before the Secretary can cancel the program. Note that the Secretary has the discretion to take no action even when a participant exceeds the critical number of points. The Secretary also has the discretion whether not to give the participant an opportunity to ‘show cause’ why the program should not be cancelled.

**New sections 18-25** are broadly similar to the existing provisions under the *Air Navigation Act 1920*. However the *Air Navigation Act 1920* contains no demerit point scheme. Nor does the Secretary currently have the power to direct a revision (as opposed to a variation) of a transport security program.

### Part 3: Airport areas and zones.

**New section 28** allows the Secretary to declare via gazettal that any airport, or part of an airport, is a ‘security controlled airport’. This may include any area ‘controlled by the airport operator’ that is contiguous<sup>39</sup> with the land or water area forming the airport. Any airport area exclusively controlled<sup>40</sup> by Australian Defence Force cannot be declared.

If an airport is gazetted under **new section 28**, the Gazettal must also establish ‘airside’<sup>41</sup> and ‘landside’ areas within its boundaries: **new section 29**. The purpose of airside areas is ‘to control access to operational areas of a security controlled airport’: **new subsection 29(2)**. Landside areas are areas within the airport boundaries that are not airside areas. The Air Navigation Regulations 1947 do contain the term ‘airside controlled areas’ (existing clause 56), but these are fairly limited in what they can cover – for example, they cannot include a building. **New section 29** landside areas are potentially much more flexible in terms of coverage.

The Secretary may establish one or more airside or landside ‘security zones’ within any part of the airside or landside areas: **new sections 30 and 32**. Under **new sections 31 and 33**, the types of security zones may be prescribed by regulation. The Air Navigation Regulations 1947 does have a somewhat similar-sounding term of ‘security sensitive area’ (existing clause 57), but again these seem limited in the scope of what they may cover and so are unlikely to be directly comparable to the role of the proposed airside or landside security zones.

When establishing airside / landside areas and security zones within them, **new section 34** obliges the Secretary to have regard to the purpose of the area or zone and take into account the views of the airport operator, the physical features of the airport and the operational features of the airport. Presumably ‘the purpose of the area or zone’ means the purposes for which they may be established under **new sections 29-33**. The *Explanatory Memorandum* comments that **new section 34**:

is necessary to ensure that the zones or areas are established with regard to the differing needs and features that exist at Australian airports and recognises that unique circumstances need to be considered in establishing physical access control systems.<sup>42</sup>

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**New sections 35-38** provide that, ‘for the purposes of safeguarding against unlawful interference with aviation’, regulations may set out ‘requirements’ for airside / landside areas and security zones. These regulations may include matters such as:

- access to, and patrolling of, the areas / zones
- the approval of building works within, or adjacent to, the areas / zones
- the screening of people, vehicles or goods for entry to the areas / zones
- the security checking (including background checking) of persons who have access to the areas / zones
- access to aircraft (including unattended aircraft) from the areas / zones, and
- the management of people and goods (including the management of unaccompanied, unidentified or suspicious goods) in the areas / zones.

On the issue of regulations to establish security checking requirements (fourth dot point above) the *Explanatory Memorandum* says that:

this category will allow for the establishment of the Aviation Security Identification Card (ASIC) scheme that provides background checking for ASIC card holders. The ASIC is the key identification measure for aviation personnel who have access to security restricted areas at airports.<sup>43</sup>

ASIC matters are currently provided for in existing Division 7 of Part 7 of the Air Navigation Regulations 1947. Under Division 7, the Secretary may authorise a person (the ‘issuing body’) to issue ASICs to appropriate persons. Under existing clause 79, issuing bodies must have ASIC programs which seem to essentially control the issuing and use of ASICs issued by that body. There is no explicit requirement for background checks in clause 79, although presumably these are required as part of a program before the Secretary authorises a person as an issuing authority under clause 81.

In the second reading speech for the Bill, the Minister stated:

Changes to the aviation security identification card regime will impose stricter controls upon those with access to security sensitive areas at an airport. The addition of politically motivated violence<sup>44</sup> background checks goes a long way towards preventing potential terrorists from accessing these critical facilities.<sup>45</sup>

This issue was discussed in hearings in the Senate inquiry into the Bill:

**Mr Dolan** - To the extent that there were tightened arrangements for the issue of ASICs against a broader range of things than criminal background checking, which is the current arrangement, the intention is that the appropriate character assessments

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will be made by the Australian Security Intelligence Organisation. There are arrangements set out in the ASIO legislation for undertaking such checking, which is the basis upon which that system will be used.

**Senator ALLISON** - So how will this work? ASIO will take on this check for every employee landside and airside in an airport. Is this correct?

**Mr Dolan** - Everyone who is required to possess and display an ASIC will be subjected to an enhanced system of checking....

**Senator ALLISON** - The employee who previously had a security pass based on no criminal convictions and whatever else, could check the criminal record and assess whether it was a fair decision or not. What process is available to employees who might get a no instead of a yes to check and see whether the decision was reasonable?

**Mr Dolan** - My understanding—and again, as I am not responsible for this legislation, I will have to confirm it—is that there are appropriate appeal provisions in the ASIO legislation against an unfavourable assessment. The two key points are that were someone to be given an unfavourable assessment, first, they would know of that and, second, there are provisions in a separate piece of legislation, the ASIO Act, to deal with that if they wish to appeal....

**Senator ALLISON** -The union submission makes the point that difficulties could arise in terms of unfair dismissal laws if someone who is currently in a job then does not survive the ASIO check and is not able to be provided with an ASIC. What arrangements are in place for dealing with unfair dismissal cases? Does this override the unfair dismissal laws and, in that case, how? Secondly, is there compensation for someone who might have lost their job in these circumstances?

**Mr Dolan** -I am not aware, but we will get formal advice to you about whether this legislation overrides unfair dismissal laws and other elements of the legislative framework. That being the case, the current arrangements that relate to unfair dismissal would apply. The compensation arrangements that sometimes are associated with that will continue to apply. But we will get formal confirmation of that.<sup>46</sup>

**New subsections 36(3) and 38(3)** of the Bill allow for regulations to provide for pecuniary penalties in relation to the above requirements. The maximum penalties attaching to offences under the regulations varies according to the offender. For an airport operator or an aircraft operator, the maximum fine is 200 penalty units. For an aviation industry participant who is not an aircraft operator or airport operator, it is 100 penalty units. For others, the maximum is 50 penalty units. Under section 4B of the *Crimes Act*, if the offenders are corporations, the penalties may be five times these amounts - ie up to 1000 penalty units.

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## Part 4: Other Security Measures

**New sections 41-44** deal with screening and clearing of people, goods and vehicles. It appears the details of when and how people, goods and vehicles are to be screened, who may conduct the screening etc will be set out in regulations: **new section 44**. The Secretary also has certain powers to specify that certain people, goods and vehicles can pass through screening points without being screened. Importantly, regulations may give additional powers to the Secretary, such as the ability to specify what equipment must be used in the screening process: **new subsection 44(3)**.

The regulations may also provide for offences for breaches of screening and clearance requirements, with maximum penalties ranging from 200 penalty units for an airport operator or an aircraft operator down to 50 penalty units for non-aviation industry participants.<sup>47</sup>

**New sections 45-52** deal with weapons. Weapons are defined as firearms or anything prescribed as a weapon by regulations. A defective weapon or something that is 'reasonably capable of being converted' into a weapon also falls within the definition: **new section 9**.

Only certain persons may have a weapon in their possession in an airside area or landside security zone<sup>48</sup>: **new section 46**. These persons are:

- law enforcement officers (Federal, State or territory police, protective or special protective service officers)
- ADF personnel on duty, and
- a person so authorised by regulations or permitted by the Secretary to have the particular weapon.<sup>49</sup>

Persons not falling with these categories commit an offence punishable by either up to 100 penalty units or seven years imprisonment. According to the *Explanatory Memorandum*, a prison term can only be imposed if the person *intentionally* possesses the weapon and is *reckless* as to the fact they are in an airside area or landside security zone.<sup>50</sup> The fine can be imposed in cases of strict liability.<sup>51</sup> With one very limited exception,<sup>52</sup> existing weapons provisions in the *Air Navigation Act 1920* do not create strict liability offences.

**New section 47** is similar to **new section 46** but it relates to possession of weapons whilst passing through a screening point. Only law enforcement officers and persons so authorised by regulations or permitted by the Secretary to have the particular weapon may do this. The same offence provisions and penalties apply as for **new section 46**.

**New sections 48-49** cover carrying or possessing weapons on board 'prescribed aircraft'.<sup>53</sup> Prescribed aircraft are those used on air services described in regulations. As for **new**

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**section 47**, law enforcement officers and persons so authorised by regulations or permitted by the Secretary are not subject to the offence provisions of **new sections 48-49**. ‘Possession’ in the context of **new sections 48-49** includes having the weapon stowed in a place that is accessible to the person whilst they on board the plane – eg in cabin lockers, toilets etc. Weapons ‘under the control’ of the commanding pilot may also be carried or possessed if they are carried for certain reasons, eg forming part of the official aircraft equipment. Again there is a strict liability offence (**new section 48**) and offence that requires some fault element of intention (**new section 49**), with the latter carrying a penalty of up to seven years imprisonment.

Where a person is authorised by regulations or the Secretary to have weapons (so as to make them exempt from **new sections 46-49**, for example), such authorisation will of course be subject to conditions. **New section 50** imposes a fine of up to 50 penalty units if such conditions are not complied with, unless for a reasonable excuse.

‘For the purpose of safeguarding against unlawful interference with aviation’, **new section 52** gives a general regulation-making power for the carriage and use of weapons on prescribed aircraft or security controlled airports. **New paragraph 52(2)(b)** says this would include regulations for ‘dealing with a person...who is suspected of [unlawfully] carrying or using a weapon’.

**New sections 54-60** largely duplicate **new sections 46-52** except they concern ‘prohibited items’ rather than weapons.<sup>54</sup> A prohibited item is ‘an item that could be used for unlawful interference with aviation and is prescribed by regulations for the purposes of [defining prohibited items]’: **new section 9**. The penalties for prohibited item offences are less than for weapon offences – the maximum penalty is two years imprisonment rather than seven, with 20 penalty units for a strict liability offence.

Again ‘for the purpose of safeguarding against unlawful interference with aviation’, **new section 62** gives a general regulation-making power for the control of passengers, preflight aircraft checks, baggage handling etc. Regulations for baggage handling can only be made for prescribed aircraft. Other types of regulations made under **new section 62** may apply to any aircraft.<sup>55</sup>

**New sections 64-65** provide a similar general-regulation making power as for **new section 62** but relating to ‘persons in custody’ on a prescribed aircraft or at a security controlled airport. A person in custody is someone who has been placed in custody under an Act other than the Bill, eg a person detained on criminal charges who is to be transferred between states to face interrogation, trial etc. The *Explanatory Memorandum* comments that:

This clause allows regulations to be made about the transport of persons in custody on certain aircraft or through security controlled airports...[it] recognises the fact that aircraft operators or pilots in command need adequate information about a person so they can prepare a risk assessment to determine whether he or she can be carried

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without compromising the safety of the aircraft or other persons on-board, and require the implementation of appropriate security controls.<sup>56</sup>

**New sections 66-74** cover ‘special security directions’. The *Explanatory Memorandum* comments that these are:

designed to allow the Government to respond quickly to threats of unlawful interference with aviation where the current standards or measures are insufficient, inappropriate or do not adequately address an emerging situation or technology.<sup>57</sup>

There are no equivalent provisions in either the *Air Navigation Act 1920* or Air Navigation Regulations 1947.

The power to issue special security directions lies with the Secretary. These can only be issued where ‘a specific threat of unlawful interference is made or exists or is a change in the nature of an existing general threat of unlawful interference with aviation’: **new paragraphs 67(1)(a)-(b)**. Presumably the decision where these circumstances exist lies with the Secretary. There is no requirement for the decision to be made on reasonable grounds.

Under **new section 69**, special security directions may be issued to a very wide range of persons, including airport or airline employees, airline passengers or anyone at a security controlled airport. In the latter two categories, notices of the direction will be taken to have been given by clearly displaying a sign in the place the direction applies. **New section 69** provides that the maximum penalty for failing to comply with special security directions ranges from 200 penalty units for an airport or aircraft operator down to 50 penalty units for say an airport employee or passenger.<sup>58</sup> The offence is one of strict liability, but does not apply if a person has a reasonable excuse.

A direction can only be in continuous force for 3 months, unless extended for a further maximum of 3 months: **new subsections 70(6) and 71(1)-(2)**. In order to extend the notice, the Secretary must ‘consult with the person to whom the direction has been given’ other than passengers or persons within the airport: **new subsections 71(1) and (3)**. A direction may be revoked at any time by the Secretary, but must be revoked if made under **new paragraph 67(1)(a)** and ‘the specific threat no longer exists’: **new subsection 70(5)**. Again presumably the Secretary is the judge of whether the threat has ceased to exist or not.

If a direction has been in continuous force for 6 months, the Secretary cannot reissue the direction or one that is ‘substantially similar’ until another 6 months have passed: **new section 72**. According the *Explanatory Memorandum*:

The purpose of this clause to ensure that the Government does not seek to use the special security directions power on an ongoing basis instead of referring to more appropriate regulatory measures to apply to industry.<sup>59</sup>

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There is nothing stopping the Secretary revoking a direction just short of the 6 month limit and then reissuing it with immediate effect.

A direction may set out restrictions in relation to disclosure of the direction: **new section 68**. There are no limitations given in the Bill on what those restrictions may be, with exception that no criminal offence occurs if a person to whom the direction is given breaks the restrictions before a court or tribunal or where an ‘authority or person has the power to require the production of documents or the answering of questions’: **new paragraph 74(1)(d)**. Other than these exceptions, a failure to comply with restrictions carries a penalty up to 20 penalty units.<sup>60</sup> The offence is one of strict liability, but does not apply if a person has a reasonable excuse.

## Part 5: Powers of officials

**Part 5** deals with the powers of various classes of officials with aviation security functions. There are four classes of officials:

- aviation security inspectors
- law enforcement officers
- airport security guards, and
- screening officers.

**New sections 76-80** deal with aviation security inspectors. Such inspectors are appointed by the Secretary and must be a Department of Transport APS officer or law enforcement officer. Such inspectors appear to have a similar role to ‘authorised officers’ in existing clauses 53-54 of the Air Navigation Regulations.

Under **new section 79**, aviation security inspectors may, for the purposes of determining compliance with the Bill or investigating any possible contravention, enter and inspect a security controlled airport or an area, building, vehicle or equipment under the control of an aviation industry participant.<sup>61</sup> As part of their inspection, they may observe the operating procedures of a participant<sup>62</sup> and discuss those procedures with an employee of the participant or with another aviation industry participant. They may inspect, photograph or copy a document or record made or kept by a participant and operate equipment at a place which they enter for the purposes of gaining access to a document or record made or kept by the. A person who hinders or obstructs – including by failing to do something - an inspector in exercising their power is subject to a fine of up to 50 penalty units. The offence is of strict liability, but does not apply if a person has a reasonable excuse.

If the entry and inspection takes places outside a security controlled airport, inspectors must give the participant ‘reasonable notice’. Otherwise, the inspector’s powers may be exercised at any time and with no notice. An inspector ‘must not subject a person to

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greater indignity than is necessary and reasonable for the exercise' of a **new section 79** power.

**New section 80** governs an inspector's power in relation to aircraft. Such powers are broadly similar to **new section 79** with some additional restrictions. The inspection / entry may only take place at a security controlled airport and reasonable notice must be given. The inspector may not operate any equipment for the purpose of gaining access to documents or records. Any documents etc inspected or copied must relate to a passenger or item of cargo. The same offence provisions apply.

**New sections 81-89** cover law enforcement officers. These are Federal, State or territory police, protective or special protective service officers who are on duty at a security controlled airport.

The various powers contained in **new sections 81-89** are additional to any another legislative or common law power law enforcement officers may have. The two main sets of powers in the Bill are a stop and search power and a removal power.

The stop and search power (**new sections 84-85**) may be exercised in relation to both people and vehicles in airside areas<sup>63</sup> if the officer 'reasonably believes that it is necessary to do so for the purposes of safeguarding against unlawful interference in aviation'. The search of a person may be an 'ordinary search or a frisk search'.<sup>64</sup> These searches can only be done on persons or vehicles that have been stopped in an airside area. The officer must identify themselves and inform the person why they are being stopped and / or searched. A person who hinders or obstructs – including by failing to do something - an officer in exercising their stop and search power is subject to imprisonment of up to 2 years imprisonment. For such an offence to have occurred, the person must have intended to engage in the hindering or obstruction conduct and been reckless as to its effect on the ability of the officer to stop and search.

There is no stop and search power in the existing *Air Navigation Act 1920* or *Air Navigation Regulations 1947*. Indeed, the power to conduct a search of a person without the need by the relevant officer to reasonably believe that the person has committed or is committing an offence is unusual. Even the proposed 'stop and search' section 18B of the Australian Protective Service Amendment Bill 2003 has the requirement of the 'likely...commission of an offence'. The effect of the key phrase 'purposes of safeguarding against unlawful interference in aviation' in **new subsection 84(1)** of the Bill is potentially rather broad, particular given the comments made earlier in this digest about the definition of 'unlawful interference in aviation'. The *Explanatory Memorandum* states:

this power is required is required because [airside areas] are high risk in terms of potential unlawful interference with aviation.<sup>65</sup>

Under **new sections 86-87**, if an officer 'reasonably suspects that a person on a prescribed aircraft, or in an area or zone of a security controlled airport' is committing or committed

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an offence under the Act, they may ask them to leave the aircraft, area zone or airport. If they fail to comply, they commit an offence, but the officer may also remove them to ensure compliance. The officer must not use any more force, or subject the person to any greater indignity than is necessary and reasonable to effect the removal. **New section 88** gives a similar power of removal of a vehicle if they believe it ‘presents a risk to aviation security or [lacks] proper authorisation’ to be the relevant area / zone’.

**New sections 90-92** deal with airport security guards. The training and qualification requirements for airport security guards are to be prescribed in the regulations.

The only substantive power given to such guards is to restrain a person and if necessary detain them until they can be handed over to a law enforcement officer. They may only physically restrain a person if the guard reasonably suspects (presumably on the balance of probabilities) the person is committing, or has committed, an offence under the Bill *and* reasonably believes that it is necessary to detain / remove them in order to *either* ensure that a person who is not cleared is not in a cleared area or a cleared zone or maintain the integrity of a landside security zone, an airside area or airside security zone. If so restrained (which presumably includes removal from a cleared area), a person may then be detained ‘until [they] can be dealt with by a law enforcement officer’. There is no set time limit on detention, nor are there any requirements that a guard contact law enforcement agencies as soon as practicable. The guard must not use any more force, or subject the person concern to greater indignity, ‘than is necessary or reasonable’.

**New sections 93-97** cover screening officers. The training and qualification requirements for screening officers are to be prescribed in the regulations. In addition, a person must be ‘authorised or required’ to conduct screening to be deemed a screening officer.

A screening officer may request a person to remove any item of clothing if they think it necessary for proper screening. However, they cannot require its removal, remove it, or cause its removal – do so carries a penalty of up 50 penalty units unless the officer has a reasonable excuse. The offence is one of strict liability. If a person refuses either removal or screening in a private room by an officer of the same sex with the result that it ‘is not possible to screen the person properly’, the screening officer *must* refuse to allow the person to proceed through the screening point. Screening officers have a similar power of restraint and detention as do airport security guards.

## Part 6: Reporting aviation security incidents

An ‘aviation security incident’ is defined in **new section 99** as either a threat of, or an act of, unlawful interference with aviation. Reporting requirements are currently covered by existing Division 2 of Part 3 of the *Air Navigation Act 1920*. **New Part 6** is not substantially different from existing Division 2 of Part 3.

The following have reporting responsibilities for such incidents:

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- an airport operator
- an employee of the Department
- a member of the staff of CASA<sup>66</sup>
- a member of the staff of Airservices Australia
- an aviation industry participant
- a law enforcement officer, and
- an airport security guard.

Airport and aircraft operators have the most extensive reporting requirement in terms of to whom they must report incidents. However, incidents that relate to a specific airport or aircraft must always be reported to the operator of the airport / aircraft.

Where there is an obligation to report under **new sections 104-106**, it must be done as 'soon as possible' otherwise an offence occurs. However, no offence is committed if either the person either believes on reasonable grounds that the person to whom the report must be made 'is already aware of the incident' or they have a reasonable excuse for not reporting as required. The offence is one of strict liability. Penalties are the graduated scale from 200 down to 50 penalty units.<sup>67</sup> Employees of participants must report to their employer as soon as possible, unless they have a reasonable excuse for not doing so.

The information to be included in the report, and how it is to be made, is to be prescribed by the Secretary via a notice in the Gazette: **new subsection 107(1)**. The Secretary's notice is a disallowable instrument. A report that 'does not comply any requirements' in place under **new subsection 107(1)** is deemed not to have been made and hence an offence may occur. There is an equivalent provision in the *Air Navigation Act 1920*: existing subsection 22K(3). Presumably strict compliance with all the requirements is necessary to avoid the committing of an offence.

## Part 7: Information gathering

**Part 7** largely replicates existing Part 3A in the *Air Navigation Act 1920*.

**New section 109** allows the Secretary to require an aviation industry participant to provide him or her with security compliance information<sup>68</sup> 'if [he or she] believes on reasonable grounds' that the participant has information of a kind that is prescribed in the regulations. The Secretary must allow the participant at least 14 days to respond. A person failing to comply with a notice is liable to a fine of up to 45 penalty units.<sup>69</sup>

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The fact that the requested information might lead to self-incrimination cannot be used as a reason for not providing it (**new section 110**), although the information can generally only be used for particular purposes (see **new sections 112-113** below). This maintains the current position in existing Part 3A in the *Air Navigation Act 1920*.

**New section 111** defines when aviation security information is 'protected information' and the person providing it a 'protected person'. **New subsection 111(1)** establishes a presumption that these definitions apply when a person gives such information to a Department official, regardless of whether it is provided in response to a **new section 109** notice. However, **new subsection 111(2)** modifies this by stating subsection (1) does not apply if:

- (a) the information is given to the Departmental official in the course of an *investigation* by the official that relates to compliance with this Act [emphasis added] and
- (b) the information is not given in compliance with a notice under section 109.

The term *investigation* is not defined. Hence, unless the information given is specifically in response to a new section 109 notice, it seems difficult to anticipate whether any information will be protected information.

**New subsection 112(1)** restricts the use or disclosure of protected information by Departmental officials to the purposes of this Bill – ie the safeguarding against unlawful interference and compliance with the Chicago convention. Such officials face a fine of 45 penalty units for breaching this restriction. However, **new subsection 112(1)** does not apply where the information is disclosed or used in the course of prosecuting or defending either an alleged **new section 112(1)** offence or an offence under sections 137.1 or 137.2 of the Criminal Code.<sup>70</sup> It also does not apply to disclosures to coroners in the course of their official duties.

**New subsection 113(1)** restricts the disclosure of protected information by persons in general, including Departmental officials. Essentially, protected information may only be disclosed to Department officials, Commonwealth Ministers, members of a Minister's staff nominated by that Minister, an MP or Senator acting in the course of his or her duties as a Member of Parliament, a coroner, an aviation industry participant or person employed by the Public Service. However, in the later two cases, the information can only be disclosed 'in a form that does not identify, and is not reasonably capable of being used to identify, the protected person': **new paragraph 113(2)(e)**. Again, the offence provisions do not apply where the information is disclosed in the course of prosecuting or defending an alleged **new subsection 113(1)** offence or an offence under sections 137.1 or 137.2 of the Criminal Code. They also do not apply if the disclosure occurs with the consent of the protected person.

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**New section 114** states that a person is not to be required to disclose protected information to a court or tribunal except in a prosecution of an offence mentioned in **new subsection 112(2)** or **paragraph 113B(3)(b)**.

**New section 115** provides that neither giving protected information or any information, document or thing obtained as direct or indirect consequence of giving protected information is admissible as evidence in a criminal proceeding or any other proceeding for recovery of a penalty, other than a proceeding under sections 137.1 or 137.2 of the Criminal Code.

## Part 8: Enforcement

**Part 8 (new sections 116-125)** sets out various options for enforcing the Act. These are:

- infringement notices
- enforcement orders
- injunctions, and
- demerit points.

**Part 8** has no equivalent in the Air Navigation Act or Regulations.

A system of infringement notice may be established by regulations: **new subsection 117(1)**. This will allow a person or corporation to avoid prosecution for an offence under the Bill *if* they agree to pay a fine of up to 20% of the maximum fine payable had they been prosecuted and found guilty.<sup>71</sup> However, this option is not available for the offence of failing to have a transport security program in place<sup>72</sup> and certain ‘possession of weapons’ offences.<sup>73</sup> Provisions for an infringement notice system in lieu of prosecution are not uncommon in Commonwealth legislation: see for example in existing paragraph 26(2)(l) of the *Air Navigation Act 1920*.

**New sections 118-123** covers enforcement orders. These allow the Secretary to direct a specified airline industry participant to do something, not to do something, or place some restrictions on activities. The *Explanatory Memorandum* comments that:

Enforcement orders are a regulatory tool which will be used when the Secretary is of the opinion that there has been a breach of the Act and specific actions need to be taken in order to prevent unlawful interference with aviation. The orders reflect the policy that it is better to fix problems with, and minimise risks to, aviation security when they are identified rather than simply seek to prosecute when breaches of the Act or regulations occur. However, where the orders themselves are contravened, an injunction may be sought.<sup>74</sup>

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Under **new section 119**, orders can only be made by the Secretary if he or she ‘reasonably believes [both] that the person has contravened the Act and it is necessary to make the order to safeguard against unlawful interference with aviation’. As noted by the *Explanatory Memorandum*, a belief of contravention based on the balance of probabilities is sufficient.<sup>75</sup> An order must bear a ‘clear and direct relationship to the contravention and be proportionate to the contravention’. It cannot involve the payment of money other than that already recoverable at law.

Contravention of an order is not an offence but may be subject to a **new section 124** injunction.

**New section 121** provides that enforcement orders must be reviewed by the Secretary at least every 3 months. An order must be revoked unless (presumably on the basis of the review) the Secretary is satisfied that the order is ‘still needed to safeguard against unlawful interference with aviation’.

Under **new section 124**, the Secretary may apply for a Federal Court injunction for an apprehended, current or past breach of the Act (ie Bill). If all parties agree, an injunction may also be granted even if there is no question of a breach of the Bill. Interim injunctions may also be granted. The court must not to require any person give an undertaking as to damages as condition of granting an interim injunction. The *Explanatory Memorandum* states that this provision ‘recognises that the Commonwealth, as represented by the Secretary, does not represent a risk in relation to its ability to pay damages’.<sup>76</sup>

**New section 125** allows for the establishment of a demerit points system. The idea is that the accrual of sufficient points enables (but does not require) the Secretary to cancel a participant’s transport security program approval under **new section 26**. **New section 125** leaves the establishment and operating details of the system to regulations. However, **new subsection 125(2)** provides that points may only be accrued where a participant is either found guilty of an offence against the Act or pays an infringement notice or other alternative to prosecution set out in the regulations.

## Part 9: Review of decisions

**New Part 9** only has one section, **new section 126**. It lists what decisions by the Secretary are amenable to AAT review. These are:

- a refusal to approve a transport security program under clause 19
- a direction to vary a program under clause 21
- a direction to revise a program under clause 23
- a cancellation of program under clauses 25 or 26, or

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- a declaration of a particular airport or part of an airport as a security controlled airport under subclause 28(2).

## Part 10: Miscellaneous

Under **new section 127**, the Secretary may delegate virtually all of his or her powers to Departmental APS officers of Director level or above. Only powers relating to enforcement orders and the extension of special security directions may be delegated to SES officer only.

**New sections 128-129** are standard provisions dealing with compensation for the damage to electronic equipment (see **new section 79**) and compensation for the acquisition of property (paragraph 51(xxxi) of the Commonwealth Constitution).

**New section 130** clarifies that Part 11 of the *Airports Act 1996* (Part 11 regulates various commercial and traffic matters on airport sites) has no effect where it is inconsistent with the Bill. The *Explanatory Memorandum* comments that:

It is intended that the two regulatory regimes should complement each other, nonetheless, if a conflict between the two does arise, the policy is that aviation security concerns should prevail.<sup>77</sup>

**New section 131** provides that various listed Acts that give effect to various diplomatic immunities and privileges are not affected by the Bill when passed.

**New section 132** deals with the situation if the Bill, or sections of it, when passed, are found to be beyond the Commonwealth's constitutional power. In such cases, the Act is to have effect as if it only applied to acts or omissions that may be regulated under certain specified constitution head of power (eg corporations, interstate trade and commerce, territories, or external affairs powers). This ensures that any unconstitutional elements are severed from the Bill rather than the whole Bill being invalid.

**New section 133** is a standard provision regarding the power to make regulations. Regulations can create offences, but in these cases the maximum penalty is 50 penalty units.<sup>78</sup>

## Concluding Comments

The Bill provides extensive powers to the Departmental Secretary to work with, and where necessary, direct the aviation industry in Australia regarding aviation security. Much of the Secretary's power is already in legislation, albeit in the Air Navigation Regulations. However, the Bill incorporates some important additions such as the 'special security directions' (**new sections 66-74**) and, in some cases, setting out very substantial powers

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for aviation security personnel accompanied by prison terms for hindering the exercise of these powers (see particularly the discussion of search powers for **new sections 84-85**). The extent to which such additions are strictly necessary to implement Australia's obligations under Annex 17 of the Chicago Convention is probably open to debate, but there is little doubt that there is a public expectation of stringent control over aviation security post 11 September 2001.

Much of the 'nuts and bolts' of the regulatory framework will still be left to regulations – for example requirements for screening of passengers, staff, baggage etc.

The issue of what happens to existing aviation employees that fail the expanded background checks (see the discussion on **new sections 35-38**) is still unclear, although the Senate Committee is likely to receive more advice on this issue from the Government before issuing its report. That Committee, and the Public Accounts and Audit Committee inquiry into aviation security arrangements will no doubt have much to say about the more operational matters of Australian aviation security.

## Endnotes

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- 1 ANAO Audit Report no. 16 1998-99
- 2 The Chicago Convention has virtually universal membership, with some 188 ratifications. One of the functions of the Chicago Convention is to promote the adoption of international 'standards and recommended practices' or SARPs. These SARPs are contained in Annexes to the Convention. Annex 17 deals with aviation security.
- 3 *op. cit.*, paragraph 6, p. 12.
- 4 Bills Digest no. 144, 2001-02, p. 5
- 5 At p.5.
- 6 Items 30 and 31 of that Bill.
- 7 A domestic airtservice operator using aircraft seating less than 38 people is not required by the *Air Navigation Act* to have a security program. Only airports 'categorised' by the Secretary must have security programs.
- 8 The Hon John Anderson MP, House of Representatives, *Debates*, 11 December 2002 p. 10137.
- 9 *ibid.*
- 10 'Jet drama raises new security concerns' *Daily Telegraph* 30 May 2003, 'Second airport terror link' *Australian* 11 June 2003.
- 11 Martin Ferguson MP, 'All talk and tax, no action on security', *Media release* 14 April February 2003.

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- 12 Martin Ferguson MP, ‘Anderson long on security rhetoric’, *Media release*, 12 February 2003.
- 13 *Media release*, 5 June 2003. See: <http://www.aph.gov.au/house/committee/jpaa/050603.pdf>.
- 14 See: <http://www.icao.int/icao/en/atb/avsec/PlanAction.htm>
- 15 ANAO Audit Report no. 26 2002-03, *Aviation security in Australia*.
- 16 *ibid.*, paragraph 6, p. 10.
- 17 *ibid.*, paragraph 7.
- 18 *ibid.*, Paragraph 19, p. 13.
- 19 *Explanatory Memorandum*, p.4.
- 20 pp. 16–17.
- 21 *Explanatory Memorandum*, p. 17.
- 22 See [http://www.aph.gov.au/senate/committee/rrat\\_ctte/aviation03/submissions/sub03.doc](http://www.aph.gov.au/senate/committee/rrat_ctte/aviation03/submissions/sub03.doc)
- 23 P. 3.
- 24 *ibid.*
- 25 The *Explanatory Memorandum* also states that ‘the practical application of the extended geographical jurisdiction will further be confined by the definition of *prescribed air service* in the regulations’ at p. 23.
- 26 P. 27.
- 27 P. 28.
- 28 P. 28.
- 29 Operators of ‘security controlled airports’ must have a security program. Under new subsection 28(2), it is the Secretary who declares which airports are security controlled airports.
- 30 Senate Rural and Regional Affairs and Transport Legislation Committee, Inquiry into the Aviation Transport Security Bill 2003, *Hansard*, p. 4. See: [http://www.aph.gov.au/senate/committee/rrat\\_ctte/aviation03/hansard/060503.pdf](http://www.aph.gov.au/senate/committee/rrat_ctte/aviation03/hansard/060503.pdf)
- 31 One penalty unit equals \$110.
- 32 *Taikato v The Queen* (1996) 186 CLR 454 at 466.
- 33 P. 29.
- 34 P. 29.
- 35 Only the Departmental Secretary may apply for the order.
- 36 An approval notice will normally nominate a day that the program comes into force.
- 37 The timeframe for compliance can be extended.
- 38 P. 34.

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- 39 That is, around the boundary.
- 40 Joint-user areas can be declared if agreed by the Australian Defence Force.
- 41 The purpose of an airside area is ‘to control access to operational areas of a security controlled airport’: **new subsection 29(2)**.
- 42 At p. 38.
- 43 At p. 39.
- 44 See Appendix 1 for the meaning of this term.
- 45 The Hon John Anderson MP House of Representatives, *Debates*, 27 March 2003, p. 13749.
- 46 Senate Rural and Regional Affairs and Transport Legislation Committee, *op. cit.*, pp. 10–12.
- 47 Section 4B of the *Crimes Act* applies so these penalties may be five times greater for companies, ie up to 1000 penalty units.
- 48 Note that these zones are only found in security controlled airports.
- 49 The Explanatory Memorandum comments at p. 46 that ‘for example, the regulations or the Secretary may allow the carriage of a weapon by a particular class of workers on the airside that require knives to perform their duties. Conditions could also be placed upon this permission under clause 50’.
- 50 As the offence provision does not specify any fault elements for the physical elements involved in the offence (possession of the weapon and being in an airside area or landside security zone), section 5.6 of the Criminal Code applies. Section 5.6 provides that recklessness is the fault element for a *circumstance* (in this case being in an airside area or landside security zone) and intention is the fault element for *conduct* (possession of the weapon). The dividing line between what is a circumstance and what is conduct is not always clear cut. Subsection 4.1(2) of the Criminal Code for example states that conduct includes ‘a state of affairs’. To avoid any ambiguity, it would be helpful if the Bill was explicit which physical elements are circumstances and which are conduct.
- 51 The mistake of fact of defence is still available in offences involving strict liability.
- 52 Existing subsection 22D(3).
- 53 These sections also note that the *Civil Aviation Act 1988* and the *Crimes (Aviation) Act 1991* also contain provisions regarding the carriage of weapons on aircraft.
- 54 There is no equivalent offence in the *Air Navigation Act 1920* or Air Navigation Regulations 1947.
- 55 Although not ADF or State aircraft: **new section 8**.
- 56 P. 52.
- 57 P.53.
- 58 Section 4B of the *Crimes Act* applies.
- 59 P. 55.

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- 60 Section 4B of the *Crimes Act* applies.
- 61 If a participant operates from a residence, the inspectors have entry and inspection powers over the part of the residence connected with the participants business.
- 62 The *Explanatory Memorandum* comments at p. 56 that this might include ‘observing the boarding procedures of a particular flight’.
- 63 See **new section 29**.
- 64 Under section 3 of the *Crimes Act 1914* an ordinary search is a ‘search of a person or of articles in the possession of a person that may include (a) requiring the person to remove his or her overcoat, coat or jacket and any gloves, shoes and hat; and (b) an examination of those items.’ Under the same provision, a frisk search is a ‘search of a person conducted by quickly running the hands over the person's outer garments; and (b) an examination of anything worn or carried by the person that is conveniently and voluntarily removed by the person’.
- 65 P. 58.
- 66 CASA staff do not have specific reporting responsibilities under existing 22J of the *Air Navigation Act 1920*.
- 67 Section 4B of the *Crimes Act* applies.
- 68 This is defined in **new section 9** as ‘information that relates to compliance or failure to comply, with this Act’.
- 69 Section 4B of the *Crimes Act* applies.
- 70 These are offences of providing false or misleading information or documents.
- 71 In the case of offences that prescribe only imprisonment as a penalty, section 4B of the *Crimes Act* allows for a fine to be imposed to lieu of prison, according to a set formula. For example, if as in the case of subsection 54(3) the prison term is 2 years, section 4B allows for a maximum fine of 120 penalty units (\$13 200). Thus the maximum fine for a person under section 117 would be \$2640.
- 72 Subsection 13(1).
- 73 Subsections 46(3) and 47(3) and section 49.
- 74 P. 68.
- 75 *ibid.*
- 76 P. 70.
- 77 P. 72.
- 78 Section 4B of the *Crimes Act* applies.

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## **Appendix 1**

*Australian Security Intelligence Organisation Act 1979*, Section 4, definition of politically motivated violence:

(a) acts or threats of violence or unlawful harm that are intended or likely to achieve a political objective, whether in Australia or elsewhere, including acts or threats carried on for the purpose of influencing the policy or acts of a government, whether in Australia or elsewhere;

(b) acts that:

- (i) involve violence or are intended or are likely to involve or lead to violence (whether by the persons who carry on those acts or by other persons); and
- (ii) are directed to overthrowing or destroying, or assisting in the overthrow or destruction of, the government or the constitutional system of government of the Commonwealth or of a State or Territory;

(c) acts that are offences punishable under the *Crimes (Foreign Incursions and Recruitment) Act 1978*, the *Crimes (Hostages) Act 1989* or Division 1 of Part 2, or Part 3, of the *Crimes (Ships and Fixed Platforms) Act 1992* or under Division 1 or 4 of Part 2 of the *Crimes (Aviation) Act 1991*; or

(d) acts that:

- (i) are offences punishable under the *Crimes (Internationally Protected Persons) Act 1976*; or
- (ii) threaten or endanger any person or class of persons specified by the Minister for the purposes of this subparagraph by notice in writing given to the Director-General

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