



Aviation Legislation Amendment (2008 Measures No. 1) Bill 2008

PaoYi Tan and Monica Biddington
Law and Bills Digest Section

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Aviation Legislation Amendment (2008 Measures No. 1) Bill 2008

Date introduced: 26 June 2008

House: House of Representatives

Portfolio: Infrastructure, Transport, Regional Development and Local Government

Commencement: On 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

To relocate the power to enable Air Security Officers to lawfully discharge firearms on board aircrafts from the *Civil Aviation Act 1988* to the *Aviation Transport Security Act 2004*.

Background

The *Aviation Transport Security Act 2004* (the ATS Act), and its associated Regulations, contain all major provisions relating to aviation security in Australia. It establishes the bases for aviation security programs in Australia, including screening of goods and people; information gathering and incident reporting for security purposes; and gives the Departmental Secretary extensive powers to direct the aviation industry regarding security measures. For more background about the ATS Act, refer to the [Bills Digest](#) prepared by the Parliamentary Library.¹

Air Security Officer Program

The Air Security Officer program commenced in December 2001 with Air Security Officers (ASOs) flying on domestic flights. To date, the program has expanded to also cover some international flights to Singapore, the Philippines and the United States.

1 Angus Martyn, Aviation Transport Security Bill 2003, *Bills Digest*, available at <http://www.aph.gov.au/library/pubs/bd/2003-04/04bd023.htm> [accessed 2 September 2008].

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ASOs are specially trained Australian Federal Police (AFP) officers who are armed when travelling and travel in teams of two or more. The pilot is the only person on board, other than the ASOs themselves, who is aware that there are armed ASOs on board a flight. According to the AFP, the integrity of the program relies on the ASOs blending in with other travellers.² The random and covert nature of deployments is considered to be an important deterrent to any attack on board a flight.³ Media reports suggest that the number of ASOs regularly travelling on flights in, out and around Australia is between 130 and 170.⁴

Jurisdiction

ASOs only fly on Australian registered aircraft. In order for ASOs to travel with firearms onboard an Australian aircraft to an international destination, an agreement or arrangement between Australia and the other country is necessary. Such an agreement or arrangement would establish the boundaries for the carriage of weapons on board a flight; this is necessary, as it is contrary to international law to travel with a loaded firearm in the cabin of an aircraft.⁵

Presently, an ASO requires written permission from the Civil Aviation Safety Authority (CASA) to discharge a firearm while on board an aircraft. Regulation 144 of the Civil Aviation Safety Regulations, made under the *Civil Aviation Act 1988*, prohibits the discharge of a firearm in or from an aircraft. Subregulation 144 (2) provides that it is a defence to any prosecution for the discharge of a firearm if the person has written permission from CASA to do so.

Basis of policy commitment

The basis for the Bill is to address the problem outlined by the Minister in his second reading speech:

Existing regulations do not allow an Air Security Officer to lawfully discharge a firearm in an aircraft without the risk of prosecution. This problem is currently being addressed through periodic notices issued under regulation 144 of the Civil Aviation Regulations 1988, which effectively allow on duty Air Security Officers to lawfully discharge a firearm in an aircraft without the risk of prosecution.

2 Australian Federal Police, 'Air Security Officers: making our skies safe', *Platypus Magazine*, Edition 99, July 2008, available at http://www.afp.gov.au/_data/assets/pdf_file/81747/34_airsecurityofficersmakingourskiessafe.pdf [accessed on 19 August 2008].

3 *ibid.*

4 *ibid.*

5 International Convention on Civil Aviation, Annex 17: the carriage of weapons requires special authorisation in accordance with the laws of the States involved.

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There have been some concerns that the issuing of these exemptions under the Civil Aviation Regulations 1988 is inconsistent with the purpose of safety legislation as it inherently implies that it is safe to discharge a firearm on board an aircraft.⁶

To address this issue of perceived misconception, the Bill proposes to move the exemption for ASOs to the relevant aviation security legislation.

Financial implications

The Explanatory Memorandum states that ‘the amendments would have no significant financial impact on Government expenditure’.⁷

Key issues

A regulation that has extraterritorial application is unusual but appropriate in these circumstances. Given that a security incident could occur in-flight and in another country’s jurisdiction, the regulations are necessary to ensure that ASOs are able to confidently discharge a weapon, in the course of their duties, without fear of prosecution.

The Explanatory Memorandum notes that the current notices may imply that it is safe to discharge firearm⁸ but it does not elaborate further. Although it would be more appropriate for the regulations to be made under the ATS Act, it is not clear why these regulations are otherwise not working effectively. While it is not specifically stated in any supporting documentation on the Bill, it is assumed that the written permission of CASA has been an administrative burden and the government has sought to address that. During debate on this Bill, Warren Truss MP noted that ‘it has been suggested that the legal basis for this arrangement is unnecessarily cumbersome [and] the provision of such notices may also be inconsistent with the intent of the *Civil Aviation Act 1988*’.⁹

The proposed legislation does not make it clear whether the new regulations will mirror those under the *Civil Aviation Act 1988*, requiring the same permission notices. The Explanatory Memorandum states that the changes will provide a more ‘appropriate and permanent basis to deal with the lawful discharge of firearms by ASOs’.¹⁰ However, it is

6 The Hon. Anthony Albanese MP, Minister for Infrastructure, Transport, Regional Development and Local Government, Aviation Legislation Amendment (2008 Measures No. 1) Bill 2008, *Second reading speech*, 26 June 2008, p.1.

7 Explanatory Memorandum, Aviation Legislation Amendment (2008 Measures No. 1) Bill 2008, p. 2.

8 Ibid.

9 Warren Truss MP, Main Committee, Aviation Legislation Amendment (2008 Measures No.1) Bill 2008, *Debate*, 27 August 2008, p.107.

10 Explanatory Memorandum, Aviation Legislation Amendment (2008 Measures No.1) Bill 2008, p. 2.

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not clear how this will be a ‘permanent’ solution as turnover or the circumstances of ASOs (and their weapons) might happen frequently, and the permission notice would still need to be specific enough to cover an ASO’s actions. Currently, as noted by Darren Cheeseman MP during debate, the current notice[s] expired on 30 June 2008.¹¹ Thus, it would appear that the ASOs are not currently protected from the risk of prosecution if they were to discharge their firearms on board a flight.

Extra-territoriality

Section 6 of the *Aviation Transport Security Act 2004* provides that the extended geographical jurisdiction in Category B of Section 15.2 of the *Criminal Code* applies to an offence against the Act. Essentially, this provides for extra-territorial application of the Act to offences committed onboard Australian ships and aircraft. This is a legitimate exercise of jurisdiction because:

... under the Australian Constitution, the Commonwealth has the power to enact legislation dealing with matters, things, circumstances and persons outside Australia, provided there is sufficient connexion between Australia and the matters, etc to which the law relates.¹²

Proposed new section 134 of the ATS Act expressly states that regulations under the Act will have extra-territorial application, if they are expressly stated as doing so. The need for an expressed statement of extra-territoriality in proposed section 134 is questionable. Given that the extra-territorial power is already set out in section 6 of the Act, that jurisdiction already applies to the regulations made under the Act.

Main provisions

Items 1–5 and **item 7** insert new definitions of *airline*, *Australian international carriage*, *Australian operator*, *bilateral arrangement* and *foreign country* into the *Aviation Transport Security Act 2004*.

Item 7 inserts a proposed **new section 134** into the ATS Act to expressly provide that regulations made under the Act can apply to an Australian aircraft, or non-Australian aircraft engaged in Australian international carriage, and the people on board those aircrafts, while the aircraft are outside Australian territory.¹³ This extra-territorial power must be expressly stated in the regulation(s) intending to apply it. The scope of the

11. Darren Cheeseman MP, Main Committee, Aviation Legislation Amendment (2008 Measures No.1) Bill 2008, *Debate*, 27 August 2008, p. 110.

12. Nathan Hancock, Border Protection Bill 2001, *Bills Digest*, No. 41 2001-02, Parliamentary Library.

13. The regulation-making power in the Act is currently contained in section 133 of the Act.

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proposed new section extends to non-Australian aircraft that fall under an existing bilateral arrangement or agreement with Australia.

Items 8–10 insert provisions into the *Civil Aviation Act 1988* to exempt those people and aircraft authorised under the *Aviation Transport Security Regulations 2005* from offences relating to carriage of dangerous goods. This provision expressly excludes air ASOs from the application of provisions that make it an offence to carry firearms on board aircrafts.

Concluding comments

Given the discussion regarding jurisdiction and extra-territorial powers above, it is questionable whether the proposed amendment to expressly state the extra-territorial operation of regulations under the Act is necessary at all. The extra-territorial application of the principal Act is sufficient to extend to the associated regulations.

This Bill was debated in the Main Committee on 27 August 2008. During debate, Jason Clare MP and Darren Cheeseman MP noted that the Australian Government Solicitor has advised that the ATS Act, and thereby any regulations made under that Act, does not currently have extraterritorial operation. The Government has acted on that advice in the drafting of this Bill.

Nonetheless, despite the contrary view presented here, there do not appear to be any fundamental flaws in the proposed legislation.

It appears that the Department has presented, in this Bill, an administrative basis for the Air Security Officer Program that reduces the existing administrative burden resulting from the need for regularly drafted permission notices. More informative drafting of explanatory material is recommended in the future.

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