



Aviation Transport Security Amendment (2009 Measures No.1) Bill 2009

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Law and Bills Digest Section

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Aviation Transport Security Amendment (2009 Measures No.1) Bill 2009

Date introduced: 24 June 2009

House: House of Representatives

Portfolio: Infrastructure, Transport, Regional Development and Local Government

Commencement: Sections 1 to 3 commence on Royal Assent. Parts 2–4 of Schedule 1 commence the day after Royal Assent. Part 1 of Schedule 1 – which deals with categories of security controlled airports – commences a day to be proclaimed, or 12 months after Royal Assent, whichever is the earlier.

Links: The [relevant links](#) to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

The Bill amends the *Aviation Transport Security Act 2004* to make modest changes to the existing Commonwealth aviation transport security regime. Specifically the Bill will:

- increase the flexibility in designating an airport as a security controlled airport by enabling regulations to be tailored to match the risk profile relating to respective categories of airports
- allow aviation security inspectors to enter certain off- (security controlled) airport premises without notice
- introduce the option of enforceable undertakings as an compliance measure
- allow aviation security inspectors to issue compliance control directions in a wider range of circumstances

Background

Background to the development of the *Aviation Transport Security Act 2004* (the Act) is contained in the relevant [Bills Digest](#).¹ The main object of the Act is to ‘establish a regulatory framework to safeguard against unlawful interference with aviation’.²

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1. A Martyn, *Aviation Transport Security Bill 2003*, Bills Digest No. 23 2003–04, Parliamentary Library Canberra 2003, viewed 21 July 2009, <http://www.aph.gov.au/Library/pubs/bd/2003-04/04bd023.pdf>
 2. Subsection 3(1) of the Act.

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A brief summary of some of the key features of the current aviation transport security regime can be found at the [relevant part of the website](#) of the administering Commonwealth Department, the Department of Infrastructure, Transport, Regional Development and Local Government.³

The Act has been regularly amended since 2004 to incorporate various changes in the regime. The perceived need for such amendments appears to have in part been generated by operational experience over time, and this is presumably the case with this Bill. However, there have also been specific reviews done on aviation security in recent years, notably the 2005 [Wheeler Review](#) of airport security,⁴ and the 2006 report of the Joint Parliamentary Committee on Public Accounts and Audit [Developments in Aviation Security since the Committee's June 2004 Report 400: Review of Aviation Security in Australia](#).⁵

There is no information in the Minister's second reading speech or the Explanatory Memorandum to the Bill about whether, or to what extent, the aviation industry has been consulted about the proposed amendments.

Committee consideration

At its meeting of 25 June 2009, the Senate selection of Bills Committee deferred consideration of the Bill until its next meeting.

Position of significant interest groups/press commentary

The Bill does not appear to have generated any significant public comment from the aviation industry or the press.

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3. See <http://www.infrastructure.gov.au/transport/security/aviation/legislation/overview/index.aspx> viewed 21 July 2009.
 4. J Wheeler, *An Independent Review of Airport Security and Policing for the Government of Australia, September 2005*, viewed 21 July 2009, http://dpl/Books/2005/Wheeler_AirportSecurityReview.pdf
 5. See http://www.aph.gov.au/house/committee/jpaa/aviation_security2/report.htm , viewed 21 July 2009.

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Financial implications

According to the Explanatory Memorandum, the amendments contained in the Bill will have ‘no significant financial impact on Government expenditure.’⁶

Main provisions

Schedule 1

Part 1 – Categories of Security Controlled Airports

Existing subsection 28(2) of the Act enables the Secretary of the administering Department to declare an airport to be a ‘security controlled airport’.⁷ Such a declaration allows, amongst other things, the Secretary to then establish airside and landside security zones. There may be different types of such security zones prescribed by regulations, but as their name implies, these zones are intended to provide appropriate levels of security by controlling movements of persons, vehicles, goods etc. However, the Explanatory Memorandum comments:

The declaration of an airport as a ... [security controlled airport] ... generally places the same legislative requirements on all such airports, regardless of their size, location and type of aircraft operating from that airport. The amendments under items 2 and 3 have been developed with the purpose of allowing legislative requirements to be tailored according to the security risk profile of each ... [security controlled airport]. It is intended that [the amendments in Part 1] will enhance regulatory activity, whereby, airports would be better targeted when categorised in accordance with their relative risk profile.⁸

Item 3 inserts **new section 28A**, which will enable regulations to prescribe different categories of security controlled airports. The assignment of a particular category to an individual airport will be done in the same way as airports are now declared to be security controlled airports – that is, by publishing a notice in the *Gazette*, and giving a notice to the airport operator: **item 2**.

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6. Explanatory Memorandum, Aviation Transport Security Amendment (2009 Measures No.1) Bill 2009.
 7. According the Department’s website ‘Approximately 180 airports across Australia are currently declared as security controlled airports. These include all airports that handle regular public transport operations such as all major metropolitan airports most small metropolitan airports and many regional airports. A number of major general aviation airports located in the major cities are also security controlled airports’. See <http://www.infrastructure.gov.au/transport/security/aviation/legislation/overview/airport.aspx>, viewed 21 July 2009.
 8. Op cit., p. 2

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The declaration of an airport as a security controlled airport is reviewable by the Administrative Appeals Tribunal (AAT) under existing **paragraph 126(1)(e)**. **Item 5** inserts a **new paragraph 126(1)(ea)** so that a decision by the Secretary to assign a security controlled airport a particular category will also be reviewable by the AAT.

Part 2 – Inspection Powers

Aviation security inspectors are employees of the administering Department, or State or Federal law enforcement officers. Such inspectors have fairly wide entry and inspection ranging powers under existing section 79 which can be exercised for determining whether a person is complying with the Act and /or investigating a possible contravention of it.

Amongst the inspectors powers are those to enter and inspect any area, building or vehicle under the control of an Accredited Air Cargo Agent or aviation industry participant.⁹ However, where the proposed entry and inspection is in place that is not security controlled airport, ‘reasonable notice’ must first be given: existing subsection 79(3). The Explanatory Memorandum asserts that:

The requirement to provide reasonable notice reduces the effectiveness of inspection activity as it is possible that businesses could quickly alter their practices for the period of the inspection.¹⁰

Items 7 and 8 would delete this reasonable notice requirement in most instances. However, reasonable notice would still be required for entry and inspection of a residence.

Part 3 – Enforceable Undertakings

In addition to offence provisions scattered throughout the Act, Part 8 of the currently contains a range of compliance mechanisms in relation to aviation industry participants. **Item 11** and the related consequential amendments will now allow the Departmental Secretary to enter into enforceable written undertakings with such participants. The Explanatory Memorandum characterises this option as a ‘middle range sanction’ to address ‘regulatory issues and contraventions of the [Act], particularly in instances where the breaches are not serious enough to warrant preventing an [aviation industry participant] from continuing to operate’.¹¹

An enforceable undertaking is voluntary. It may specify that the aviation industry participant, will for the purpose of complying with the Act, take, or refrain from taking,

9. Under the Act, these encompass a wide range of entities, but in general include airport operators, aircraft operators, regulated air cargo agents, persons occupying or controlling an area of an airport; and contractors providing services to these entities.

10. Op cit., p. 4.

11. Ibid., p. 5.

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specified action: **new paragraphs 123A(1)(a)-(b)**. It may also be more anticipatory in nature, requiring that specified action be taken that is directed at ensuring the participant does not contravene the Act, or is unlikely to contravene it, in the future: **new paragraph 123A(1)(c)**.

Such undertakings may be cancelled by the Secretary, or the relevant participant may withdraw from them or have them varied, although only with the consent of the Secretary. In cases where the Secretary considers the person has breached an undertaking, they may seek a variety of court orders, including an order to comply, or payment of some form of financial penalty or compensation: **new paragraphs 123B(2)(a)-(d)**.

Part 4 – Control Directions

Existing sections 74A-74E deal with control directions. These can be used to control the movement of aircraft, and may be given to pilots in command or aircraft operators. There are two types of control directions:

- Compliance control directions, given by aviation security inspectors, are used to ensure compliance with this Act. They may only be given in relation to aircraft that are not in flight.
- Incident control directions, given by the Secretary, may only be given in response to aviation security incidents.

In the case of compliance control directions, aviation security inspectors currently have no power give such directions to airport operators or screening authorities. The Explanatory Memorandum comments:

There have been many instances where it would have been appropriate for such directions to be issued to an airport operator or screening authority. For example, an inspector may wish to issue a compliance control direction to an airport operator or a screening authority that all passengers and their luggage on a particular flight must be screened or rescreened before the aircraft can depart from the airport to ensure compliance with the [Act].¹²

Item 15 inserts **new subsections 74B(1A) and 74(1B)**. These only apply to security controlled airports. The former will allow aviation security inspectors to direct operators to take ‘specified action’ in relation to the airport. The latter will allow aviation security inspectors to direct a screening authority or screening officer to take ‘specified action’ in relation to a screening point. It is unclear whether, in the case subsection 74B(1B), where action was considered necessary in relation to multiple screening points, an inspector could give one direction that would cover all points. Presumably this is the intent of the legislation, so it may be advisable to make these clear.

12. Op cit., p. 7.

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Existing subsection 74C contains penalties for a failure to comply with compliance control directions. The maximum penalties range up to 200 penalty units (\$22,000).¹³ **Item 18** amends **section 74C** to apply the existing penalties in cases of failure to comply with the expanded range of directions contained in **item 15** above. The existing defence of reasonable excuse continues to apply.

13. Although in the case of a corporation, the maximum penalty ranges up to 1000 penalty units (\$110 00).

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