



## AVIATION TRANSPORT SECURITY BILL 2003

The *Aviation Transport Security Bill 2003* ("the Bill") was introduced into the House of Representatives on 27 March 2003 by the Minister for Transport and Regional Services.

Together with the *Aviation Transport Security (Consequential Amendments and Transitional Provisions) Bill 2003*, the Bill proposes to replace Parts 3 and 3A of the *Air Navigation Act 1920* with the *Aviation Transport Security Act* ("the ATS Act"). The ATS Act will be accompanied by the *Aviation Transport Security Regulations* ("the ATS Regulations").

The Bill purports to:

- restructure the aviation security regulatory framework by providing a separate piece of legislation that will govern aviation transport security in Australia;
- facilitate future amendments to aviation transport security legislation that may be extended to other transport sectors; and
- align Australian aviation security with the revised International Civil Aviation Organisation standards.

The Bill contains an extensive regulation-making power and introduces a graduated penalty enforcement regime.

### 1 OVERVIEW

A number of general observations are appropriate:

- The Bill proposes only a framework for the imposition of obligations. In almost all respects, the Act will not impose any particular obligation on any person. It is only when Regulations are made that it will be possible to ascertain precisely what conduct is required by an affected party.
- This in turn raises questions about whether or not it is appropriate for an Act to authorise the making of Regulations that might have such far-reaching consequences for affected parties as are proposed here. It may be thought preferable that such significant intrusions on individuals should be positively passed in an Act by the Parliament rather than simply subject to disallowance as Regulations.
- The importance of this point is exacerbated by the extreme breadth and ambiguity of some of the definitions contained in the Bill. For example:
  - anyone who provides any service to an airport or aircraft operator, a regulated air cargo agent or a tenant of premises or licensee at an airport is an "aviation industry participant". Thus, the accountant who prepares the books of the luggage trolley licensee at an airport is liable to be prescribed and required to prepare a transport security program;
  - a travel agent or any other person who offers to arrange carriage by air would seem to fall within the definition of "aircraft operator" simply because they offer to conduct a service of providing air transportation of people or goods notwithstanding that they may in fact have no capacity to operate an aircraft.

- the breadth of the powers proposed to be conferred is extreme - under clause the Secretary may issue a "special security direction" to an aviation industry participant wherever they might be or to any person within the boundaries of a security controlled airport without there being any need for the Secretary to be satisfied that the direction is necessary because of a threat of unlawful interference with aviation, or that the direction is reasonable, or that the action required is proportional and appropriate to the threat.

## 2 TRANSPORT SECURITY PROGRAMS (Part 2)

Not all airport and aircraft operators currently fall under the auspices of aviation security regulation. Part 2 establishes a regime for the development and approval of *transport security programs* ("TSPs") by various *aviation industry participants*.

Clause 12 establishes that:

- an operator of a '*security controlled airport*';
- an operator of a prescribed air service; and
- a participant of a kind prescribed in the regulations,

must each develop, and comply with, an approved TSP. Failure to do so is a strict liability offence, punishable by 200 penalty units in the case of airport operators.

Clause 28 authorises the Secretary to declare an airport a '*security controlled airport*' for the purposes of the ATS Act.

Clause 15 establishes that all *aviation industry participants* must comply with the TSP of each other aviation industry participant, as appropriate. Non-compliance is not an offence, but could be the subject of an enforcement order.

Clauses 16 - 17 deal extensively with the form and content of TSPs. These provisions are significantly more comprehensive than their predecessors. In particular, clause 16 provides that a TSP must:

- demonstrate several matters, including that the participant is aware of, and has the capacity to meet the specific obligations imposed on it under the Act; and
- set out the activities and strategies developed by the participant, including the technology, equipment and procedures used by the participant to maintain aviation security and how the participant will respond to aviation security incidents.

In addition, the ATS Regulations may prescribe other matters to be dealt with by TSPs generally or by particular TSPs.

Clauses 18 - 26 set out the procedure for approval, revision and cancellation of TSPs, including a requirement that TSPs must be revised every 5 years.

In the absence of a contrary provision, it seems that all costs associated with developing, implementing and/or complying with a TSP will be borne by each relevant industry participant.

### 3 AIRPORT AREAS AND SECURITY ZONES (Part 3)

Clause 28(1) defines an *airport* as “an area of land or water (including any buildings, installations or equipment situated in the area) intended for use either wholly or partly in connection with the arrival, departure or movement of aircraft. It also includes any area that is controlled by the airport operator that is contiguous with such an area of land or water.”

Clauses 28 - 34 authorise the Secretary to declare an airport to be a *security controlled airport*, within which the Secretary may establish:

- airside and landside areas; and
- airside and landside security zones.

Clauses 35 - 38 provide that the ATS Regulations may deal with an extensive range of matters that relate to the declared areas and zones, including:

- access to the area or zone (including conditions of entry and identification) and to aircraft;
- security checking (including background checking) of persons with access;
- screening of people, vehicles or goods for entry;
- patrolling and the provision of lighting, fencing and storage facilities;
- approval of building works within, or adjacent to, to the area or zone;
- movement, management or operation of aircraft, vehicles and other machinery;
- management of people, goods and vehicles within the area or zone; and
- maintaining the integrity of the area or zone.

It seems that once an area or zone is established and becomes subject to the regulatory requirements, the airport operator may lose a substantial degree of control over the use and maintenance of that particular area or zone, even though the cost of meeting the regulatory requirements will be borne by the industry participant, as appropriate.

In light of this, section 34 specifically requires that the Secretary ‘takes into account’ the views of the airport operator and the existing physical and operational features of the airport, when establishing an airside area, or an airside or landside security zone.

Generally speaking, this would require the Secretary to do the following:

- notify an airport operator of its intention to establish the airside area or security zone;
- allow the airport operator a reasonable opportunity to make submissions to it in relating to the proposed zoning; and
- give due consideration to any submission so made by the airport operator,

before the zoning takes place. On the text of the Bill, it seems that a consultation process is not required for the establishment of a landside area, even though the ATS Regulations may apply equally to designated landside and airside areas. It is unclear whether this is a drafting error.

#### 4 OTHER SECURITY MEASURES (Part 4)

Part 4 of the Bill provides for a range of 'other security measures' that go beyond the concept of area-based security controls discussed above.

Key requirements include:

- the screening and clearing of persons prior to entering designated airport areas (clauses 40 - 44) - note that off-site screening, for example at a hotel or a Customs bond store, is not prohibited;
- the creation of offences relating to the carriage of 'weapons' and other 'prohibited items' within designated areas or zones (clauses 45 - 60); and
- the issue of 'special security directions' ("SSDs") by the Secretary in relation to actual or perceived threats of unlawful interference with aviation (clauses 66 - 74).

The SSD regime replaces, and substantially mirrors, the current arrangements relating to 'additional security measures' or 'ASMs'.

Key features of the new SSD regime are as follows:

- a SSD must be given in writing or clearly displayed at the place of compliance;
- a SSD remains in force for a period of 3 months, unless the Secretary extends the period for a further 3 months (following consultation).
- where a SSD remains in force for a continuous period of 6 months, upon expiry, the Secretary cannot issue the same or similar SSD to the relevant person for a period of 6 months; and
- failure to comply with a SSD, or confidentiality requirements relating to a SSD, is a strict liability offence.

In the absence of a contrary provision, it seems that the cost of implementing the specified security measures will be borne by the relevant industry participant.

#### 5 REPORTING OF SECURITY INCIDENTS (Part 6)

Clause 104 requires airport operators to report *aviation security incidents* to:

- the Secretary;
- the Australian Federal Police or the police force of the relevant state or territory; and/or
- any other person to whom the incident relates, such as an aircraft operator.

The phrase '*aviation security incident*' is not defined in the Bill and it is uncertain what type of activity or event would constitute a security incident.

#### 6 CONTRAVENTION AND ENFORCEMENT (Part 8)

The Bill introduces a graduated penalty regime, including strict liability, enforcement orders and a demerits points system. In some areas, the Bill creates offences covering the same conduct as the strict liability provisions, but requires proof of a fault element on the part of the accused (for example, clause 46 - weapons in airside areas and landside security zones).

Clause 6 establishes that an offence against the ATS Act is a criminal offence.

## **7 OTHER KEY FEATURES**

*Commencement:* The substantive provisions of the ATS Act will come into force on a date to be proclaimed but no later than 12 months from the date of Royal Assent.

*Application to external Territories:* Clause 5 states clearly that the ATS Act will extend to every external Territory.

*Powers of officials:* Part 5 of the Bill establishes four classes of persons who may exercise powers for the purposes of preventing unlawful interference with aviation. These persons are aviation security inspectors, law enforcement officers (ie police and protective services officers), airport security guards and screening officials. Amongst other things, these persons are authorised to enter and search the airport's security controlled areas.

*Information-gathering:* Part 7 of the Bill confers on the Secretary an extensive power to collect and disseminate information relating to aviation security.

## AVIATION TRANSPORT SECURITY (CONSEQUENTIAL AMENDMENTS AND TRANSITIONAL PROVISIONS) BILL 2003

This Bill was also introduced into the House of Representatives on 27 March 2003 by the Minister for Transport and Regional Services. It proposes to amend the following Acts:

- *Air Navigation Act 1920* - to repeal redundant provisions and provide for a transitional period;
- *Australian Protective Service Act 1987* - to extend the arrest powers of Australian Protective Service Officers to airport environments; and
- *Air Services Act 1995, Crimes (Aviation) Act 1991 and Sea Installation Act 1987* - to make minor and technical consequential amendments.