



Australian Government

Department of Transport and Regional Services

*File Reference: 2007/1453
Contact Name: Richard Windeyer*

Committee Secretary
Senate Rural and Regional Affairs and Transport Committee
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

Subject: Examination Of The Aviation Legislation Amendment (2007 Measures No. 1) Bill 2007

Dear Secretary

I am writing to provide the Committee with a Submission by DOTARS to the inquiry into the Aviation Legislation Amendment (2007 Measures No. 1) Bill 2007.

The measures contained in the Bill achieve four major outcomes. Two address specific safety and security concerns: the shining of laser lights at aircraft; and, drug and alcohol use by persons who are engaged in safety-sensitive aviation activities. The third clarifies the screening and clearing of dignitaries. The final outcome consists of a number of changes that strengthen the existing regime and improve the operation of current legislation.

The Department welcomes the opportunity to further clarify the Bill through the attached submission and through evidence at the hearing. We would be happy to provide additional information if it would assist the Committee.

The contact officer for this matter is Richard Windeyer, General Manager, Aviation Security Policy, Office of Transport Security, ph 02 6274 6234. A copy of the submission has also been provided to you electronically.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Paul Retter'.

Paul Retter AM
Executive Director
Office of Transport Security
Department of Transport and Regional Services
11 July 2007

OFFICE OF TRANSPORT SECURITY
GPO Box 594 Canberra ACT 2601 Australia

• Telephone: 02 6274 7111 • Facsimile: 02 6274 7994 • Operations Centre 1300 132 400
Website: www.dotars.gov.au • ABN 86 267 354 017

AVIATION LEGISLATION AMENDMENT (2007 MEASURES NO.1) BILL 2007

OUTLINE

This Bill amends the *Aviation Transport Security Act 2004 (ATSA)* and the *Civil Aviation Act 1988 (CA Act)* to further strengthen aviation security and safety by enhancing Australia's robust but flexible legal framework for regulating and maintaining the security and safety of the aviation industry.

There are four sets of amendments to the ATSA:

- (1) changes to Transport Security Programs which will more closely align aviation security legislation with maritime security legislation and give certain industry participants greater flexibility during the Transport Security Program process;
- (2) enhancements to aviation security by allowing broader and more effective coverage of potential acts of unlawful interference with aviation, including additional powers for certain Australian customs officers who operate at security controlled airports;
- (3) clarification of provisions that relate to the screening and clearing of dignitaries. This amendment will allow the Regulations to specifically describe those dignitaries who are exempt from aviation security screening; and
- (4) minor modifications to several existing provisions, and a new provision to cover interference with the operations of a security controlled airport or an aircraft by a person who is outside the boundary of the airport.

There are two sets of amendments to the CA Act:

- (5) section 24 is amended so that a person who is outside an aircraft can commit the offence of interfering with aircrew, or endangering an aircraft or passengers; and
- (6) new Part IV creates a statutory framework that will permit the making of regulations for and in relation to the development, implementation and enforcement of drug and alcohol management plans, and of drug and alcohol testing, for persons who perform, or who are available to perform, safety-sensitive aviation activities.

The provisions achieve four outcomes. Two address specific safety and security concerns: new measures dealing with interference with aviation address the shining of laser lights at aircraft; and, the introduction of drug and alcohol management plans and testing addresses inappropriate drug and alcohol use by persons who are engaged in safety-sensitive aviation activities. The third clarifies the screening and clearing of dignitaries. The final outcome consists of a number of changes that strengthen the existing regime and improve the operation of current legislation. Each outcome is considered in more detail below.

Commencement

All provisions of the Bill will come into force on the day after the Bill receives the Royal Assent.

1. NEW MEASURES DEALING WITH INTERFERENCE WITH AVIATION

Actions which interfere with aviation have implications both for aviation safety and for aviation security. In broad terms, the CA Act provides the statutory framework for

regulating aviation safety in Australia and the ATSA provides the statutory framework for minimising and responding to acts of unlawful interference with aviation.

The CA Act is administered by the Civil Aviation Safety Authority (CASA) and the ATSA is administered by the Office of Transport Security (OTS) within the Department of Transport and Regional Services (DOTARS).

Lasers as a threat to aviation safety and aviation security

Pilots and the aviation community have been concerned for some time that people on the ground have been, either deliberately or intentionally, directing lasers from laser emitting devices against aircraft. Similarly, the activities of airport operators and aircraft operators have been subject to disruption because of lasers being directed into airports and at aircraft that are on the ground.

Commercially available laser emitting devices have various practical applications and a ban on their use would be neither desirable nor practical. However, the improper use of laser emitting devices against aircraft is a growing problem that needs to be addressed because there is sufficient evidence from the cases reported in the media, both in Australia and overseas, to conclude that the relevant behaviour is becoming more common.

The full extent of this problem is not well understood because not all incidents are reported by pilots and very few people who have used laser emitting devices against aircraft have been identified. The number of reported laser attacks on aircraft appears to be increasing over time.

There is no doubt that the act of directing a laser at the cockpit of an aircraft that is in flight creates a potentially serious risk to aviation safety. The risk to aviation security is less certain as it is not clear that there is any intent on the part of people using lasers to use the laser as a weapon.

Based on existing evidence, there is no reason to assume that there is anything sinister in the current use of lasers against aircraft. Laser attacks on aircraft are thought to be primarily in the form of game-based activities, in the sense that thoughtless people appear to be using a laser emitting device to track an aircraft as a 'target' in much the same way that they would try to track a target in a computer game.

The Bill contains two provisions that can be used to deal with the use of a laser emitting device at an aircraft that is in flight, and at security controlled airports:

- section 38B is inserted into the ATSA, and
- subsection 24(1) of the CA Act is amended.

ATSA – section 38B

These new offences will supplement existing criminal provisions. For example, preparing or making a deliberate attack on a person or property with the intention of causing harm will normally fall under various existing offences under the Criminal Code (such as assault, attempted murder, murder and conspiracy), and also under state and territory criminal law. However, Criminal Code offences are not well-adapted to circumstances where there is little or no evidence that a person had any intention to cause harm. For example, a person who is directing a laser at the cockpit of an aircraft that is in flight as part of some sort of tracking game might be able to make an honest claim that they had no intention to do harm, and even that they honestly (albeit unreasonably) doubted that their actions could have even potentially endangered an

aircraft.

New section 38B of the ATSA authorises the making of regulations to prescribe offences with a maximum penalty of 50 penalty units (\$5,500) for an individual. Offences under section 38B must relate to conduct which interferes with or disrupts the activities of the operator of a security controlled airport, or the activities of an aircraft operator (such as an airline) at a security controlled airport. The principal focus of this provision is on protecting airport operators and aircraft operators from prescribed forms of activity that improperly disrupt the operations of the airport or of aircraft using the airport.

New section 38B has been designed to provide a general solution to emerging problems of interference and disruption with aircraft and at security controlled airports. In the case of lasers, it is proposed that regulations to prohibit the use of laser emitting devices to disrupt aviation and airport operations would be made as soon as section 38B comes into force. However, section 38B has a general application and will also be helpful for prescribing offences with respect to any new form of interference or disruption at airports.

Subsection 38B(2) also provides that prescribed offences may relate to conduct that occurs outside the boundaries of a security controlled airport. This is important if the regulations are to extend to a person who shines a laser from outside the airport through a mesh boundary fence towards aircraft or persons on the ground or may shine a laser at an aircraft in the last stages of its approach. Because section 38B is designed to protect airport operators and users, and because section 38B extends to activities that may occur outside the boundaries of an airport, the drafting relies on the incidental area of a range of Commonwealth powers, including the power to make laws with respect to trade and commerce, corporations and Commonwealth places.

CA Act – subsection 24(1)

Existing subsection 24(1) of the CA Act makes it an offence (punishable by imprisonment for two years) for any person who is on board an aircraft to do any act that interferes with the crew member of an aircraft or that threatens the safety of the aircraft or persons on board the aircraft. In its current form, subsection 24(1) does not extend to acts outside the aircraft, such as shining a laser from the ground at the cockpit.

The new version of subsection 24(1) removes the requirement that the offender must be on board the aircraft when the act of interference or threat occurs.

2. DRUG AND ALCOHOL TESTING

The *Civil Aviation Act 1988* is to be amended to enable the Civil Aviation Safety Authority (CASA) to introduce mandatory drug and alcohol testing to the civil aviation industry similar to those already in place in other transport sectors. The programme will affect approximately 120,000 personnel undertaking safety sensitive aviation activities. The range of activities includes flight crew activities; cabin crew activities; flight instructor activities; aircraft dispatcher and load controller activities; activities involving aircraft maintenance and repair; aviation security activities including activities involving screening; air traffic controller activities; baggage handler activities; ground refuelling activities and any other activity conducted airside.

Background

In March 2004 the Australian Transport Safety Bureau (ATSB) released a report of its investigation into a fatal accident that occurred at Hamilton Island in September 2002. The ATSB recommended that CASA and the Department of Transport and Regional Services (DOTARS) jointly investigate the safety benefits of drug and alcohol testing plans for safety sensitive personnel in the Australian aviation industry.

This work was subsequently undertaken by CASA and DOTARS and following extensive research and consultation with industry their report was released in May 2006. This report concluded that a drug and alcohol testing programme will foster a safer workplace for civil aviation workers and the public will benefit broadly from a safer aviation sector. It recommended that drug and alcohol management plans be introduced for safety-sensitive personnel in the Australian aviation industry.

Benefits

The proposed drug and alcohol management programme can deliver a range of safety benefits – education and awareness for safety sensitive personnel in the aviation industry, deterring usage; identifying personnel who have a problematic use of these substances and removing them from safety sensitive aviation activities; monitoring personnel on return to duty from rehabilitation programmes and contributing to comprehensive, operator managed drug and alcohol policies.

The proposed drug and alcohol programme

The programme is expected to have two elements.

Drug and Alcohol Management Plans

Those companies in the aviation industry which undertake safety sensitive aviation activities will be required to have drug and alcohol management plans that will involve education and support for their employees and various types of testing including testing pre-deployment to safety sensitive aviation activities, post accident and serious incident testing, reasonable cause testing and return to work post rehabilitation testing. These companies will include commercial aircraft operators, aircraft maintenance providers, registered and certified aerodromes, air traffic control service providers and certain contractors. Approximately 67,000 people directly employed by these companies will be covered. Company plans will be regulated and audited by CASA.

To support compliance to offer some deterrent effect, a confirmed positive result without reasonable explanation will lead to a range of CASA enforcement action. Those personnel covered under drug and alcohol management plans, who return a confirmed positive test, will be supported by a company intervention and rehabilitation process.

Random Testing regime

CASA intends to contract an independent testing provider to conduct random testing on CASA's behalf. This independence (from companies required to have a drug and alcohol management plan in place) will ensure the veracity of the random testing; provide a deterrence factor and a means of reaching up to 50,000 personnel undertaking safety sensitive aviation activities, not covered by a drug and alcohol management plan. It is planned to introduce random testing early in 2008.

A cost benefit analysis, conducted on behalf of CASA, found that the highest net benefit occurs when random testing extends to personnel undertaking safety sensitive

aviation activities in both commercial and private aviation. CASA will manage a random testing regime to test all people who are engaged in safety-sensitive aviation activities

Funding

Aviation employers will be responsible for meeting the costs of establishing their drug and alcohol plans. CASA will produce comprehensive guidance material for them.

CASA has received \$9 million funding over three years. This will enable CASA to regulate and audit the employers' plans, to conduct an education campaign about the risk of drug and alcohol abuse in the aviation industry, and to manage a random testing programme that can be scaled to the funding available.

Industry consultation

The aviation industry has been actively involved in the development of this initiative. CASA has conducted 34 national awareness workshops around Australia with the aim of informing the industry and the community of the proposed initiative and receiving feedback. Following extensive consultation with industry on the concept of a drug and alcohol testing programme, (including meetings with the Standards Consultative Committee and its sub-groups, CASA website and direct e-mails), there is broad acceptance of the proposal from both industry and unions.

Industry is supportive of the initiative and expects to be actively engaged to ensure that the programme will be cost-effective.

CASA will continue to consult extensively with industry on the development of the regulations which will define how the programme is to be implemented. For example, regulations will specify the requirements for a company plan and the scope and nature of the testing programme to be undertaken by CASA.

Following the making of the regulations, CASA will deliver an industry focused education and awareness campaign in the months leading up to the introduction of random testing and the commencement date of drug and alcohol management plans. This second stage of education and awareness will focus on the 120,000 personnel who will come under the random testing regime.

3. SCREENING AND CLEARING OF DIGNITARIES

Provisions that relate to the screening and clearing of dignitaries are clarified. The amendment will allow the Aviation Transport Security Regulations to specify dignitaries who are exempt from screening. Exempting dignitaries from screening does not exempt them from provisions contained in legislation prohibiting the carriage of weapons and prohibited items on to screened air services.

Dignitaries currently exempted from screening include: the head of a foreign state (including the Pope); the head of the executive government of a foreign country; the head of a member of APEC who is visiting Australia for the purpose of attending APEC Forum meetings; the Secretary-General of the United Nations; the Minister of the executive government of a foreign country responsible for foreign affairs; and, heads of missions accredited to Australia and either resident in Australia or arriving to commence such a posting, their spouse, and children, under 18 years old, accompanying their parent.

Dignitaries are currently exempted by notices made under sections 41 and 42 of the ATSA.

If passed prior to the APEC leaders' week, in September this year, this measure will assist in the facilitation of that event.

4. FURTHER ENHANCEMENTS TO THE ATSA

Transport security programs

Many aviation industry participants are required to have a Transport Security Program (TSP) that plays a vital role in the way they manage their aviation security obligations. The amendments:

- enable an industry participant to request that their TSP be cancelled;
- allow applicants more time to provide further information that is requested to support their application;
- make it clear that if a TSP is varied, revised or altered that the TSP is not extended for a further five years, and
- enable the Secretary to approve a TSP for a period of less than five years. A TSP must be for a period of at least 12 months.

The amendments have been designed after consultation with industry.

Enhanced aviation security powers for Australian customs officers

Certain officers of the Australian Customs Service (ACS) who operate at security controlled airports are given more effective coverage with respect to potential acts of unlawful interference with aviation. These amendments give effect to a recommendation made by Sir John Wheeler in his report "An Independent Review of Airport Security and Policing for the Government of Australia", and will complement the work of airport police by allowing customs officers to provide an initial immediate response to potential acts of unlawful interference with aviation.

Crown immunity

The Bill amends the provisions relating to Crown Immunity from prosecution to ensure that a state or territory agency that operates a security controlled airport does not enjoy Crown immunity and is subject to the Act in the same way as any other airport operator.

Definition of unlawful interference with aviation

The definition of *unlawful interference with aviation* in section 10 of the ATSA plays an important role in the operation of the Act and, in particular, forms the basis of the definition of *aviation security incident*. The definitions also identify those aviation security incidents that must be reported to the Department.

The Bill expands the definition of *unlawful interference with aviation* to include an attempt to commit an act of unlawful interference with aviation. This introduces further clarity into the definition by ensuring that any attempt at unlawful interference is itself treated as an unlawful interference with aviation.

Further, the Bill will make taking control of an aircraft by any trick or false pretence an unlawful interference with aviation. This amendment is consistent with the definition of *acts of unlawful interference* in Annex 17 to the Convention on International Civil Aviation (the Chicago Convention) which was recently revised by the International Civil Aviation Organization (ICAO).

Currently, under the ATSA, putting the safety of an aircraft at risk by giving false information is unlawful interference with aviation. This Bill extends this and makes it clear that giving information that is not false but which is misleading will also be unlawful interference.

On-board security

An amendment to paragraph 62(1)(aa) of the ATSA will ensure that there is no doubt that the Regulations may prescribe security features that must be included on board any type aircraft.