

EXPLANATORY STATEMENT

Issued by the Authority of the Assistant Minister for Home Affairs and Parliamentary
Secretary to the Minister for Home Affairs

Aviation Transport Security Act 2004
Aviation Transport Security Amendment (Carriage of Powders) Regulations
2018

The *Aviation Transport Security Act 2004* (the Act) and the *Aviation Transport Security Regulations 2005* (the Aviation Regulations) establish a regulatory framework to safeguard against unlawful interference with civil aviation in Australia. The Act sets out minimum security requirements and obligations on persons engaged in civil aviation related activities.

The Act and the Aviation Regulations also give effect to Australia's obligations under Annex 17 to the Convention on International Civil Aviation (the Chicago Convention).

Subsection 133(1) of the Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Act.

Subsection 44(1) of the Act provides the regulations may prescribe requirements in relation to screening, receiving clearance, and the circumstances in which clearance is required.

The Regulations introduce restrictions on the carriage of inorganic powders for international flights limiting the amount of inorganic powder a passenger can carry in the aircraft cabin of international flights departing Australia to no more than 350ml. The purpose is to reduce the risk of an explosive or other hazardous substance being smuggled through airport security screening creatively disguised as an item typically found in carry-on luggage. This measure is commensurate with restrictions implemented by several international partners.

The Department of Home Affairs consulted with affected airports, airlines and government agencies on the restrictions, including on implementation issues and public communications. Industry was generally supportive of the proposed measures. The restrictions are expected to have minimal impact on industry and the travelling public due the low volume of inorganic powders carried and the restrictions being implemented through current screening processes.

The Office of Best Practice Regulation (OBPR) was consulted in relation to the amendments to be made by the Regulations. OBPR advised that a Regulatory Impact Statement is not required to introduce regulatory restrictions on the carriage of inorganic powders for international flights (OBPR ID: 24071).

A Statement of Compatibility with Human Rights (the Statement) has been completed in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The overall assessment is that the Regulations are compatible with human rights. A copy of the Statement is at [Attachment A](#).

The Act does not specify any conditions that need to be satisfied before the power to make the Regulations could be exercised.

Details of the Regulations are set out in Attachment B.

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulations commence on 19 December 2018.

Authority:

Subsection 133(1) of the
Aviation Transport Security Act 2004

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Aviation Transport Security Amendment (Carriage of Powders) Regulations 2018

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

This Legislative Instrument will make a series of amendments aimed to ensure Australia's current regulatory framework is well suited to the evolving aviation security threat environment.

The Legislative Instrument amends the Aviation Regulations to introduce regulatory restrictions limiting the amount of inorganic powder a passenger can carry in the aircraft cabin of international flights departing Australia to no more than 350ml.

The restrictions are intended to reduce the risk of an explosive or other hazardous substance being smuggled through airport security screening creatively disguised as an item typically found in carry-on luggage. This measure responds to the increasingly clever attempts by terrorists to mount in-flight attacks by smuggling artfully concealed weapons through security screening. This measure is commensurate with restrictions implemented by several international partners.

The following products are exempt from the quantity restrictions when passing through a liquid, aerosol and gel (LAGs) screening point:

- Cremated human or animal remains;
- If the person is an infant or toddler – a baby product in a quantity that is reasonable having regard to the duration of the flight;
- a medical product for the person (e.g. prescription medication);
- a therapeutic product for the person (e.g. contact lens solution or products, such as heat packs, used in pain therapy) in a quantity that is reasonable for the duration of the flight;
- special dietary requirements (e.g. snacks for diabetics and gluten free or nut free products for allergy sufferers) in a quantity that is reasonable for the duration of the flight;
- samples of powder or powder-like substances used for medical research or reproductive health;
- material or containers required to maintain the temperature, quality or integrity of items described above.

Exemptions also allow certain persons, other than passengers, to be exempt from the quantity restrictions if an inorganic powder is used for carrying out business in the sterile area of the airport or if it forms part of a tool of trade that is required by the person in order to carry out their duties in the sterile area.

Human rights implications

This Legislative Instrument engages the following rights:

Civil and Political Rights

Article 14(2) of the *International Covenant on Civil and Political Rights* (the presumption of innocence) protects the right for individuals charged with a criminal offence to be presumed innocent until proven guilty according to law. The presumption of innocence imposes on the prosecution the burden of proving the charge and guarantees that no guilt can be presumed until the charge has been proved beyond a reasonable doubt.

Strict liability offences engage and limit the presumption of innocence as they allow for the imposition of criminal liability without the need to prove fault for any of the physical elements of the offence.

The Legislative Instrument is seeking to impose strict liability offences for:

- carrying an inorganic powder through a LAGs screening point, unless certain exemption and/or quantity restrictions are met; and
- entering a LAGs cleared area other than through a screening point with impermissible powder.

The strict liability offence provisions are considered reasonable and proportionate to achieve the legitimate objective of maintaining national security by serving as a strong deterrent to passengers and non-passengers carrying inorganic powders and impermissible powders into a LAGs cleared area and in the cabin of an aircraft.

Strict liability is required to ensure the integrity of the regulatory regime, i.e. that inorganic powders are excluded from certain areas of airports and in the cabin of the aircraft, unless the exemption provisions are satisfied.

A strong enforcement regime, including the use of strict liability offences, is necessary to ensure aviation security. The effectiveness of the enforcement regime would be undermined if it were necessary for the prosecution to prove that a person intended not to comply with those provisions.

The scheme to regulate inorganic powders is not complex or detailed and breaches are reduced by the provision of clear signage visible to persons prior to the screening point where they may commit a strict liability offence.

The imposition of strict liability still allows a defendant to raise a defence of honest and reasonable mistake. This ensures that a person cannot be held liable if he or she had an honest and reasonable belief that they were complying with relevant obligations.

The application of the penalty provisions have been developed with regard to the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

Rights of people with disability

The rights of people with disability are protected by the Convention on the Rights of Persons with Disabilities. Some medical and therapeutic items required by people with disability during a flight may be captured by the new measures for inorganic powders. However, specific exemptions have been put in place to ensure that anyone who requires medical or therapeutic items to be available during their flight can lawfully take them on board the aircraft, provided they are screened and cleared in accordance with the established processes.

Rights of the child

The rights of children are protected by the Convention on the Rights of the Child. Some baby products may be captured by the new measures for inorganic powders. However, specific exemptions have been put in place to ensure baby and infant products that are needed during a flight can be lawfully taken on board the aircraft, provided they are screened and cleared in accordance with the established processes.

Conclusion

This Legislative Instrument is compatible with human rights because it provides measures to further strengthen Australia's aviation security and where there may be limitations on human rights, those limitations are reasonable, necessary and proportionate.

Senator the Hon. Linda Reynolds CSC
Assistant Minister for Home Affairs and Parliamentary Secretary to the Minister for Home Affairs

Details of the *Aviation Transport Security Amendment (Carriage of Powders) Regulations 2018*

Section 1 – Name

This section provides that the title of the Regulations is the *Aviation Transport Security Amendment (Carriage of Powders) Regulations 2018* (the Regulations).

Section 2 – Commencement

This section provides for the Regulations to commence on 19 December 2018.

Section 3 – Authority

This section provide that the Regulations are to be made under the *Aviation Transport Security Act 2004* (the Act).

Section 4 – Schedules

This section provides for the *Aviation Transport Security Regulations 2005* (the Principal Regulations) to be amended as set out in the Schedules to the Regulations.

Schedule 1 – Carriage of powders on outbound international air services

Aviation Transport Security Regulations 2005

Item 1 – Regulation 1.03

This item inserts new definitions into regulation 1.03. The definitions to be included are:

- Authorised powder – an authorised powder is defined in new regulation 4.22QB (as set out at Item 17 Part 1 of Schedule 1);
- Baby product – a baby product is products used to care for or feed an infant or toddler, such as infant formula;
- Inorganic powder – an inorganic powder is a powder not consisting of, or derived from, living matter. This includes, but is not limited to, salt and sand;
- Medical product – a medical product is a prescription medicine supplied to a person, such as powdered or liquid medicines;
- Powder – a powder is fine dry particles produced by grinding, crushing, or disintegration of a solid substance, including those presented in clumpy, grain or compressed form. This includes, but is not limited to, flour, coffee, baby formula and milk powders;
- Therapeutic product – A therapeutic product is an item that is not a medical product used to treat or manage a person’s medical condition, such as contact lens solution or special dietary products.

Items 2 and 3 – At the end of subregulation 4.04(3)

These items add a second note to subregulation 4.04(3). Regulation 4.04 deals with things to be detected by screening. This note alerts the reader that regulation 4.04 must be read in conjunction with Subdivision 4.11AB which specifies the requirements for screening to detect powders and powder-like substances.

Items 4, 5 and 6 – Regulation 4.11

Regulation 4.11 provides for persons who may enter certain cleared areas other than through a screening point. Subregulation 4.11(1) provides for persons who may enter sterile areas or a liquids, aerosols, and gels (LAGs) cleared areas without being screened. Paragraph 4.11(1)(b) provides that a person may not enter a LAGs cleared area if the person has in their possession an impermissible LAG product.

Item 4 inserts a reference to ‘impermissible powder’ at the end of paragraph 4.11(1)(b) to specify an impermissible powder as an item that cannot be in the possession of a person entering a LAGs cleared area other than through a screening point. This ensures non-passengers cannot carry inorganic powders, for personal use or for undertaking work, into the LAGs cleared area other than through a screening point if certain conditions are met.

Item 5 inserts new subregulation 4.11(4A) which defines ‘impermissible powder.’ An impermissible powder is defined as an inorganic powder in a person’s possession which is not:

- in one or more containers with a total combined volume of 350ml or less; or
- needed for the use or care of the person because of an infirmity; or
- a tool of trade for the person.

A definition of ‘inorganic powder’ is inserted by item 1 above.

Item 6 makes a consequential amendment to the definition of ‘tool of trade’ contained in subregulation 4.11(5) to extend this definition to new subregulation 4.11(4A) inserted by item 5. This applies the definition of ‘tool of trade’ consistently to both the definition of ‘impermissible LAG product’ and ‘impermissible powder.’

Item 7 – Paragraph 4.18B(1)(a)

Subdivision 4.1.1 of the Regulations provides for the general requirements for screening and clearing. Regulation 4.18 requires signs in a form specified in that regulation to be displayed at places of screening passengers and carry-on baggage. Regulation 4.18A requires signs in a form specified in that regulation to be displayed at screening points.

Regulation 4.18B provides that where a screening point is a LAGs screening point, the form of the sign is set out in subregulation 4.22P(2). The screening of powders will occur at LAGs screening points.

Item 7 makes a consequential amendment to regulation 4.18B to change the reference to the form of the sign to be displayed at a LAGs screening point from subregulation 4.22P(2) and replace it with subregulation 4.22QL(2). This item is consequential to item 12 which repeals regulation 4.22P. New regulation 4.22QL is inserted by item 17.

Item 8 – Subregulation 4.22C(6)

This item repeals the definitions of a baby product, medical product and therapeutic product prescribed in paragraph 4.22(6). These definitions are now included in regulation 1.03 (as per item 1), applying the definitions consistently across the Regulations.

Item 9 – Subregulation 4.22I(1)(note)

This item makes a technical amendment to add a reference to regulation 4.22QE to the note in subregulation 4.22I(1).

Regulation 4.22I is contained in Subdivision 4.1.1A which establishes LAGs screening points. Specifically, subregulation 4.22I(1) sets out the things to be detected by screening and specifies LAG products are to be detected at screening points. A note under subregulation 4.22I(1) draws the reader’s attention to regulations which specify other things that must also be screened. This item inserts a reference to new regulation 4.22QE which specifies that inorganic powders must be detected by screening at a LAGs screening point.

Items 10 and 11 – Regulation 4.22J

Items 10 and 11 make technical amendments to the offence provisions in regulation 4.22J to re-draft the provision consistent with current drafting practices. The substance of these provisions has not been changed.

Item 10 repeals the heading in regulation 4.22J and replaces it with the heading “Offence – dealing with LAG product surrendered during screening” to ensure consistency with other offence regulations in Subdivision 4.1.1A.

Item 11 repeals paragraphs 4.22(J)(2) and (3) and substitutes new paragraphs to more clearly set out the offences.

Item 12 – Regulation 4.22P

This item repeals regulation 4.22P, which sets out the offence for not complying with signage requirements at LAGs screening points. This offence is being replaced by subregulation 4.22QL (as set out at Item 17 Part 1 of Schedule 1). The offence in new regulation 4.22QL be the same in substance as previous regulation 4.22P.

Items 13 to 16 – Regulation 4.22Q

Regulation 4.22Q allows the Secretary to provide, by written notice, that:

- a thing that would fall within the definition of a LAG product in accordance with the Regulations, is not a LAG product
- a thing that is not a LAG product under the Regulations, is to be treated as a LAG product.

The amendments made by items 13 to 16 make minor technical changes to regulation 4.22Q to improve the wording consistent with current drafting practices. These items do not make any substantive changes to the regulation.

Item 17 – Subdivision 4.1.1AB Powder and powder-like substances

Item 17 inserts new subdivision 4.1.1AB, which prescribes requirements for the carriage and screening of powder and powder-like substances, similar to the requirements for LAGs set out in subdivision 4.1.1A.

Regulation 4.22QA Definitions

This new regulation sets out the definition of ‘exempt person’ and ‘international air service’ for the purposes of this subdivision.

‘Exempt person’ is defined as either a person that is cleared to pass through a screening point without being screened or an aviation security inspector, or a representative of the screening authority, who is lawfully testing the screening system.

A note after the definition of exempt person alerts the reader to the meaning of ‘cleared’ contained in the Act as well as to regulation 4.10 which provides for persons who may pass through a screening point without being screened.

‘International air service’ is defined as not including a closed charter service.

These definitions are the same as the definitions used in relation to the screening of LAGs at subregulation 4.22A.

Regulation 4.22QB Meaning of authorised powder

New regulation 4.22QB defines ‘authorised powder’ setting out which inorganic powders will be considered ‘authorised powders’ for the purpose of this Subdivision. In most cases, this Subdivision provides that it is an offence for inorganic powders in a combined total container volume of more than 350ml to pass through a LAGs screening point.

New subregulation 4.22QB(1) defines ‘authorised powder’ as an organic powder or powder-like substance. A note at the end of the subsection provides examples of organic powders include flour, sugar and spices.

New subregulation 4.22QB(2) provides that an ‘authorised powder’ also includes an inorganic powder where any of the circumstances in subregulations (3) to (6) apply.

Under subregulation 4.22QB(3) an ‘authorised powder’ includes an inorganic powder in the possession of a person travelling on an international air service that is purchased and sealed in accordance with the subregulation. This allows duty-free inorganic powders to be carried on board an international aircraft, subject to screening and other security controls.

Under subregulation 4.22QB(4) an ‘authorised powder’ includes the following:

- cremated remains;
- a baby product (in a quantity that is reasonable having regard to the duration of the flight);
- a medical product (e.g. prescription medication);
- a therapeutic product (e.g. non-prescription medication) in a quantity that is reasonable for the duration of the flight;
- samples of powders used for medical research or reproductive health;

- material and containers required to maintain the temperature, quality or integrity of items described above.

This provision aligns with the meaning of a ‘LAG product’ as set out in subregulations 4.22(C)(2) and (3).

Subregulation 4.33QB(5) provides that an ‘authorised powder’ also includes inorganic powders that are to be used by a person carrying on a business in a landside security zone (for example, gift bottles of sand to be sold in a shop).

An authorised powder also includes an inorganic powder in possession of a person specified in column 2 of regulation 4.62; and where that inorganic powder is a tool of trade for that person (for example cleaning products for cleaning contractors). This enables businesses, such as cleaning companies, who operate on the landside area of an airport before the LAGs screening point to continue operations within a landside security zone at an airport.

Regulation 4.22QC Offence—inorganic powder passing through LAGs screening point

New regulation 4.22QC creates a new offence for passing through a LAGs screening point with larger amounts of inorganic powders. A person will commit an offence if:

- they are not an exempt person, and
- they pass through a LAGS screening point with an inorganic powder; and
- the inorganic powder is in containers with a combined total volume of more than 350ml; and
- the powder is not an authorised powder.

New subregulation 4.22QC(2) provides the offence contained in subregulation (1) is a strict liability offence. This is consistent with other screening offences. It is appropriate that this offence is a strict liability offence to provide an adequate deterrent to persons attempting to carry inorganic powders into a LAGs cleared area or on-board an international air service.

The penalty for this offence is 50 penalty units. This penalty is consistent with the maximum penalties that may be prescribed for offences relating to the requirements for screening and clearing (see subsection 44(4) of the Act).

Regulation 4.22QD Offence – entering a LAGs cleared area other than through a screening point with impermissible powder

New regulation 4.22QD establishes a new strict liability offence for a person entering a LAGs cleared area other than through a screening point, who is in possession of an impermissible powder as described in Item 5. This provision mirrors current regulation 4.22HA in relation to LAGs products.

The penalty for this offence is 20 penalty units. This penalty is consistent with the maximum penalties that may be prescribed for offences relating to the requirements for screening and clearing (see subsection 44(4) of the Act) and with regulation 4.22HA, which creates an offence for a person entering a LAGs cleared area other than through a screening point with a LAG product in their possession.

This offence is a strict liability offence, consistent with the LAG product offence in regulation 4.22HA. It is appropriate that this offence is a strict liability offence to provide an

adequate deterrent to non-passengers carrying impermissible inorganic powder into a LAGs cleared area or on board an international air service.

Regulation 4.22QE – Things to be detected by screening – inorganic powder

New regulation 4.22QE specifies that inorganic powders are to be detected by screening at a LAGs screening point unless it is not technically possible to do so.

This regulation provides reference, through a note, to other things required to be detected by screening under regulations 4.04 and 4.21. It also provides reference through notes to when a person or a person's carry-on baggage must be cleared under regulations 4.08 and 4.15.

Regulation 4.22QF Offence – dealing with inorganic powder surrendered during screening

New regulation 4.22QF inserts a new offence provision regarding dealing with inorganic powders surrendered during screening. This provision mirrors regulation 4.22J in relation to LAG products.

New subregulation 4.22QF(1) requires a screening authority to put in place appropriate procedures for the handling and destruction of inorganic powders surrendered as a result of screening.

New subregulation 4.22QF(2) provides that a screening authority commits an offence if they put in place procedures for the handling and destruction of an inorganic powder surrendered as a result of screening, and those procedures are not in accordance with laws of the places where the screening occurs.

New subregulation 4.22QF(3) provides that a screening authority commits an offence if an inorganic powder surrendered during screening is not handled and destroyed in accordance with those procedures.

The penalty for the offences in subregulations (2) and (3) is 50 penalty units, consistent with the maximum penalty that may be prescribed for offences relating to the requirements for screening and clearing (see subsection 44(4) of the Act), and the LAG product offence in regulation 4.22J (as set out in Item 11 Part 1 of Schedule 1).

It is important to have procedures and processes in place concerning the destruction of inorganic powders to ensure the items are handled and destroyed in way that does not pose a security risk to aviation operations or allow the items to be reused.

Regulation 4.22QG Offence – preventing destruction of surrendered inorganic powder

New regulation 4.22QG establishes that a person commits an offence if the screening authority has put in place procedures for the destruction of inorganic powder surrendered because of screening, and the person prevents the destruction of the item.

The penalty for this offence is 20 penalty units. This penalty amount is consistent with the maximum penalties that may be prescribed for offences relating to the requirements for screening and clearing (see subsection 44(4) of the Act), reflecting the importance of destroying items surrendered during screening. The offence is consistent with the LAGs offence in regulation 4.22K.

Regulation 4.22QH Offence – not screening for inorganic powder

New regulation 4.22QH inserts a new offence where a screening authority does not screen for inorganic powder if:

- an international air service operates from the airport; and
- the screening authority has established a LAGs screening point; and
- the screening authority has not put in place appropriate measures to prevent a person carrying inorganic powders, other than in the specified circumstances, through the screening point.

The penalty for this offence is 50 penalty units, consistent with the maximum penalties that may be prescribed for offences relating to the requirements for screening and clearing (see subsection 44(4) of the Act). This provision mirrors the offence in relation to LAG products contained in regulation 4.22N.

Regulation 4.22QJ Notices by the Secretary – authorised powder

New regulation 4.22QJ allows the Secretary to provide, by written notice, that:

- a thing that would fall within the definition of an authorised powder in accordance with the Regulations, is not to be an authorised powder; and
- a thing that would not fall within the definition of authorised powder under the Regulations, is to be treated as an authorised powder.

New subregulation 4.22QJ(3) provides that this notice making power may apply to a thing, or a class of things carried by a particular person or class of persons, that is taken on a particular flight.

New subregulation (3) make the provision consistent with subregulation 4.22J in relation to LAG products, as amended by Items 13, 14, 15 and 16.

Subdivision 4.1.1AC – Signs at LAGs screening points

This item also inserts new subdivision 4.1.1AC which sets out the signage requirements at LAGs screening points, including the combined signage requirements for LAGs and inorganic powders. The signage requirements are being amended to take into account the screening of powders.

Regulation 4.22QK Definitions

Regulation 4.22QK inserts a definition of ‘international air service’ for the purpose of new subdivision 4.1.1AC that is consistent with definitions in regulation 4.22A and new regulation 4.22AQ.

Regulation 4.22QL Offence-sign at LAGs screening point

Regulation 4.22QL inserts a new offence provision where a screening authority fails to display a sign in the prescribed form at a LAGs screening point. This provision replaces the offence provision which is repealed by item 12. The new offence specifies the form of sign that must be displayed at a LAGs screening point. The new specified signs will include a reference to inorganic powders.

This offence carries a penalty of 50 penalty units, consistent with the maximum penalties that may be prescribed for offences relating to the requirements for screening and clearing (see

subsection 44(4) of the Act) consistent with the penalty amounts prescribed for failing to display signs in the appropriate form at other screening points as per regulations 4.18 and 4.18A.

Items 18 and 19 – Regulations 4.22R (definition of ICAO guidance material)

Item 18 inserts a new the definition of ICAO guidance material in subregulation 4.22R to mean the ICAO Aviation Security Manual 10th Edition 2017. That is, the definition refers to a more current version of the ICAO Aviation Security Manual.

Item 19 repeals the definition of International Civil Aviation Organization (ICAO) guidance material in subregulation 4.22R, as the document referred is no longer current.

Item 20 – Regulation 4.22(R) (paragraph (a) of the definition of security tamper-evident bag)

This item removes the reference to ICAO guidance material in subregulation 4.22R as it is no longer current and replaces it with reference to current ICAO Aviation Security Manual as defined in Item 19.

Items 21 to 23 – Regulation 4.22T

These items insert the words ‘inorganic powder’ into regulation 4.22T. This means that the current offence for a business for not sealing a LAG product in an ICAO technical compliant security tamper-evident bag (STEB) also applies to businesses failing to treat inorganic powders in the same manner.

The addition also means that the current offence for a business for not sealing a LAG product in a STEB that meets the security requirements in Regulation 4.22S also applies to an inorganic powder.

Item 24 – In the appropriate part in Part 10

Item 24 inserts new Division 12 into the Regulations. Division 12 clarifies and facilitates the transitional arrangements for regulation 4.22QL. Regulation 4.22QL creates an offence for not displaying a sign in the specified form at a LAGs screening point.

This item proposes that the form of the sign prescribed by Regulation 4.22QL, for the first month after Item 17 commences, can either be in the form set out in new subregulation 4.22QL(1) or (2), or the form set out in the existing subregulation 4.22P(1) or (2) of the Aviation Regulations.