

EXPLANATORY STATEMENT

Issued by the Minister for Home Affairs

Aviation Transport Security Act 2004

Aviation Transport Security Amendment (Security Controlled Airports) Regulations 2019

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

- setting the requirements for the screening of persons, goods, and vehicles at airports;
- prescribing the threshold above which an aircraft must be cleared before departure if it is operating a regular public transport or open charter operation; and
- assigning a category to a security controlled airport.

The Act and the Principal 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 relevantly 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.

In addition, regulations may be made pursuant to the provisions of the Act listed in [Attachment A](#).

The *Aviation Transport Security Amendment (Security Controlled Airports) Regulations 2019* (the Regulations) amend the Principal Regulations to:

- provide for a new airport categorisation model and screening threshold for Australian airports; and
- further enhance the safety and security of passengers, airports and aircraft.

The Office of Best Practice Regulation (OBPR) was consulted in relation to the amendments made by the Regulations. The OBPR considers that the amendments do not impose any additional regulatory burden on industry, and the impact on individuals is minor. A Regulatory Impact Statement (RIS) is not required (OBPR ID: 23955).

The disrupted terrorist plot at Sydney Airport in July 2017 highlighted the innovation and determination of individuals seeking to inflict harm on the travelling public. It also reinforced

that aviation remains a high profile target for terrorists. In response, the Government tasked the Inspector of Transport Security to undertake a review into aviation security at Australia's security controlled airports. Broadly, the review recommended several measures to further strengthen security measures at Australia's airports. These regulations give effect to some of these recommendations.

Consultation has occurred with industry and government stakeholders through a number of mechanisms, including via the Department of Home Affairs' Aviation Security Advisory Forum and Regional Industry Consultative Meetings. Key aviation security stakeholders comprise the membership of these groups, which include Australian international, domestic and regional aircraft operators and airports, aviation industry associations, federal police, and government agencies.

Industry stakeholders have been consulted on the proposed airport framework and the new screening threshold, and were provided with an exposure draft of the Amendment Regulations. Consultation responses generally indicated broad support for the new approach. The main concerns raised by industry were about timeframes to achieve new security screening equipment and the capital costs for the major airports. This is why the commencement of the Schedules 1 and 2 to the Amendment Regulations is delayed by up to 12 months, to provide airports with suitable time to make appropriate arrangements.

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

The Act does not specify any conditions that need to be satisfied before the exercise of the power to make the Regulation.

Details of the Regulations are set out in [Attachment C](#).

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

Each schedule to the Regulations commences by notifiable instrument or, if such an instrument is not made within 12 months of registration, the day after the period of 12 months after the instrument is registered. This commencement provides airport operators with time to make changes to equipment and staffing, if necessary. Schedules 1 and 2 are able to commence on the same day, however, Schedule 2 must commence at a time after the commencement of Schedule 1.

AUTHORISING PROVISIONS

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

Relevantly, sections of the Act provide that:

- regulations may prescribe different categories of security controlled airports (section 28A); and
- the regulations may, for the purposes of safeguarding against unlawful interference with aviation, prescribe requirements in relation to one or more of the following: screening; receiving clearance; and the circumstances in which persons, goods (other than cargo) or vehicles are required to be cleared (subsection 44(1)).

Statement of Compatibility with Human Rights

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

Aviation Transport Security Amendment (Security Controlled Airports) Regulations 2019

This Disallowable 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 Disallowable Legislative Instrument

The *Aviation Transport Security Amendment (Security Controlled Airports) Regulations 2019* outlines a new airport categorisation model and screening threshold for Australian airports and seeks to improve the safety and security of domestic passengers, airports and aircraft.

The evolving nature of terrorism continues to test and shape Australia's aviation security standards and regulatory settings. The disrupted terrorist plot at Sydney Airport in July 2017 highlights the innovation and determination of individuals seeking to inflict harm on the travelling public. It also reinforced that aviation remains a high profile target for terrorists.

In response, the Government tasked the Inspector of Transport Security (ITS) to undertake a review into aviation security at Australia's security controlled airports. Broadly, the review recommended several measures to further strengthen security measures at Australia's airports.

The Department of Home Affairs (the Department) continues to review security settings in the context of evolving threats. This includes ensuring that security requirements are commensurate with risk. The challenge is to maintain the security of the entire network while recognising the differences in threat across international and major domestic aviation operations in comparison to regional and remote airports.

With this in mind, the Department is introducing a new airport categorisation framework. The new framework groups airports with similar risk profiles and sets out the security screening requirements for security controlled airports. The model ensures security and screening requirements are commensurate with the airport risk profile and better reflects the evolving security threat environment. This will see a number of additional measures to strengthen security, including the use of body scanners for domestic flights. The new framework will also support the ongoing sustainability of smaller aviation industry participants by ensuring security measures are more proportionate with their security environment.

The new model is more risk-based, whereby airports are classified into a tier which is based on their overall risk profile and includes departing passenger numbers and aircraft size. The

model also considers the current threat environment, security measure effectiveness, individual airport operating environment and regional profiles

Accompanying the new tier model is a revised aircraft screening threshold, which links to an airport's tier and the aircraft size. The new screening threshold better reflects the change in the threat environment that suggests an increasing trend towards attacks on crowded places including on board aircraft in-flight. It also provides more proportionate security outcomes for smaller, more regional and remote airports, to better reflect the operational diversity and lower complexity of these industry participants. This risk-based approach will also enable Government to focus compliance resources on higher risk areas.

The new tier model and new screening threshold capture a small number of airports and aircraft that were previously not security screened. Once implemented, the result of this more risk-based approach to aviation security screening will see approximately 99 per cent of the travelling public being subject to security screening, contributing to the overall safety and security of Australia's aviation industry. It will also ensure that Australia remains a trusted destination for trade and travel and a world-leader in aviation security.

Human rights implications

This Disallowable Legislative Instrument engages the following rights:

- Right to life and security of the person in Articles 6 and 9 of the *International Covenant on Civil and Political Rights (ICCPR)*
- Right to freedom of movement in Article 12 of the *ICCPR*
- Privacy and reputation in Article 17 of the *ICCPR*

Right to life and security of the person

Article 6 of the ICCPR places a positive obligation on states to protect the right to life. Article 9 of the ICCPR requires states to provide reasonable and appropriate measures to protect a person's physical security.

These regulations will promote the right to life and security of the person by developing a more robust security screening system that protects the lives and security of members of the public at airports. The regulations are risk based and ensure that a more responsive process is put in place to address new security threats in comparison with previous measures, greatly reducing the likelihood of a threat to the right to life and security of the person escaping detection. The regulations note the change in the threat environment that suggest an increasing trend towards attacks on crowded places, and work to mitigate this threat to life by changing the screening threshold to capture a greater proportion of passengers and aircraft, minimising the threat to as great an extent as possible.

Right to freedom of movement

Article 12(1) protects the right to liberty of movement. Article 12(3) provides that limitations may be imposed when necessary for national security, public order and the rights and freedoms of others.

To the extent that more people travelling by air will be captured by the changed categorisation system, the regulations may limit the right to freedom of movement. Should a passenger refuse to undergo security screening, they will not be permitted to fly. The introduction of enhanced security screening technology, such as body scanners, is important to address this threat. Current measures do not include body screening requirements at domestic airports, increasing the threat from non-metallic improvised explosive devices and other weapons, which walk-through metal detectors cannot detect.

To maintain the safety of all passengers and aircraft, this is a reasonable, necessary and proportionate response to the legislative requirement for security screening.

Right to Privacy and Reputation

Article 17(1) of the ICCPR states no one shall be subjected to arbitrary or unlawful interference with his privacy.

The implementation of advanced security screening at Australian airports increases the safety and security of Australia's aviation industry and the travelling public and reflects the evolving threat environment. This will assist to mitigate the threat of non-metallic improvised explosive devices and other weapons, which walk-through metal detectors cannot detect.

The measures in these regulations are not arbitrary, as most persons will be required to pass through a body scanner before accessing the sterile area of an airport, and they are lawful as they are required by the *Aviation Transport Security Act 2004* and these regulations. These regulations will change the airport classification framework, which will require all airports which security screen to introduce advanced security screening technology, including the use of body scanners. The right to privacy and reputation is engaged, but is not limited by the use of advanced technologies for security screening such as body scanners. This is because in accordance with the *Aviation Transport Security Act 2004*, a body scanner must only produce a generic image that is gender-neutral from which a person cannot be identified. Body scanners are also not permitted to store or transmit images in any format. To the extent that a person's right to privacy might be engaged by the requirement to pass through a body scanner, any limitation is reasonable and proportionate, since images are not stored or transmitted, nor is the person identifiable.

Conclusion

The Disallowable Legislative Instrument is compatible with human rights because it protects the right to life and places reasonable, necessary and proportionate limitations on the right to

freedom of movement and the right to privacy in order to ensure national security, public order and the rights and freedoms of others.

Details of the *Aviation Transport Security Amendment (Security Controlled Airports) Regulations 2019*

Background

The *Aviation Transport Security Amendment (Security Controlled Airports) Regulations 2019* (the Regulations) amend the *Aviation Transport Security Regulations 2005* (the Principal Regulations) to:

(1) Introduce a new airport categorisation model

The new airport categorisation model better reflects the operational diversity and range of security risks faced by Australian airports and better adapts to the evolving security environment. It also supports the ongoing sustainability of smaller aviation industry participants by ensuring that security measures are more commensurate with their security environment. Specifically, the benefits for smaller operators are more targeted security measures and allow for simpler administrative arrangements. This will provide smaller, lower risk airport operators to direct their resources towards implementing and maintaining security measures.

(2) Amend the definition of a screened air service

The previous 20,000kg maximum take-off weight (MTOW) threshold for a screened air service is amended to be a threshold based on an aircraft's seating capacity. This new threshold of 40 seats or more, and if departing from a Designated, Tier 1 or Tier 2 airport, continues to capture all aircraft with an MTOW of at least 20,000kg and extends to include some additional aircraft.

The amendments strengthen the overall security of the Australian aviation network and create opportunities for streamlining the traveller pathway.

Section 1 – Name

This section provides that the title of the Regulations is the *Aviation Transport Security Amendment (Security Controlled Airports) Regulations 2019*.

Section 2 – Commencement

This section provides for the commencement of the Regulations, which is set out in the table in subsection 2(1).

Table item 1 of subsection 2(1) contains standard technical enabling provisions.

Table item 2 of subsection 2(1) provides for Schedule 1 to the Regulations to commence by a date to be fixed by the Minister by notifiable instrument. If Schedule 1 does not commence

within the period of 12 months beginning on the day after the instrument is registered, Schedule 1 commences on the day after the end of that period.

The reason for commencement by notifiable instrument is to provide sufficient time to airport operators to:

- upgrade screening equipment to new standards;
- upgrade terminal infrastructure (if required) to accommodate new equipment;
- conduct staff training with new equipment; and
- recruit and train staff at new screening airports.

Table item 3 of subsection 2(1) provides for the commencement of Schedule 2. This is essentially the same as for Schedule 1, except that it is not permitted to commence by notifiable instrument at a time that is earlier than the commencement of Schedule 2. The effect is that Schedules 1 and 2 may commence on the same day, however, Schedule 2 must commence at a time after the commencement of Schedule 1.

Similarly, if Schedule 2 does not commence by notifiable instrument within the period of 12 months beginning on the day after the instrument is registered, Schedule 2 commences immediately after Schedule 1 commences.

Subsection 2(2) clarifies that information in column 3 of the table in subsection (1) is not part of the instrument, and that information may be inserted there, or edited, in any published version of the instrument.

Section 3 – Authority

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

Section 4 – Schedules

This section provides for the Principal Regulations to be amended as set out in the Schedules to the Regulations.

Schedule 1 – Security controlled airport categories

Aviation Transport Security Regulations 2005

Clause 1 – Regulation 1.03 (definition of *designated airport*)

This clause repeals the definition of ‘designated airport’ from regulation 1.03 of the Principal Regulations.

The definition is no longer required, due to the amendments in new regulation 3.01B in clause 3 (see further below). New regulation 3.01B prescribes categories of security controlled airports, including the category of ‘designated airport’ in new paragraph 3.01B(a).

As ‘designated airport’ is now a prescribed category of security controlled airport, an airport is now a designated airport because it is assigned to that category by the Secretary under subsection 28(6) of the Act, and not because it falls within the definition of designated airport in regulation 1.03. This means that definition of designated airport is no longer required. Repealing the definition removes any potential confusion for users of the Principal Regulations as it would not be clear on the face of the regulations that an airport becomes a designated airport because a decision of the Secretary under regulation 3.01B rather than because it appears in the definition of designated airport.

Clause 2 – Regulation 1.05A (example)

Under subsection 28(6) of the Act, the Secretary may assign a category to a particular security controlled airport. The amendment made by this clause is consequential to the changes made by item 3. This clause makes an amendment to regulation 1.05A by repealing the note and replacing it to reflect the amended categories set out in new regulation 3.01B.

Clause 3 – Regulation 3.01B

This clause repeals regulation 3.01B – including the examples of security controlled airports set out in column 2 of the table – and substitutes new regulation 3.01B. New regulation 3.01B prescribes categories of security controlled airports as set out in new paragraphs 3.01B(a) to (d).

This clause also inserts a note to refer the reader to subsection 28(6) of the Act. While section 28A of the Act provides the head of power to make regulations about categories of security controlled airports, subsection 28(6) of the Act provides for the method by which particular security controlled airports are assigned a category prescribed under section 28A.

Clause 4 – Regulation 4.01 (subparagraph (a)(i) of the definition of *operational period*)

Clause 5 – Paragraph 4.02(2)(b)

Clauses 4 and 5 respectively amend:

- subparagraph (a)(i) of the definition of ‘operational period’ in regulation 4.01; and
- paragraph 4.02(2)(b)

of the Principal Regulations to refer to a ‘designated airport’ instead of a ‘category 1 security controlled airport’, consequential to the restructure of the categories of security controlled airports in new regulation 3.01B by clause 3.

Clause 6 – Paragraphs 4.09(3)(a) and (b)

This clause repeals paragraphs 4.09(3)(a) and (b), and substitutes new paragraphs 4.09(3)(a) and (b). The amendment utilises the new nomenclature for categories of security controlled airports set out in, and consequential to, the restructure of the categories of security controlled airports in new regulation 3.01B.

Schedule 2 – Screened air services

Aviation Transport Security Regulations 2005

Clause 1 – Regulation 1.03 (definition of *regular public transport operation*)

The amendment made by this clause is consequential to the amendments in clause 5. It also simplifies the existing definition of ‘regular public transport operation’:

- item 5, below, makes amendments in relation to when an operation of an aircraft is a ‘screened air service’. New paragraph 4.02(2)(a) deals, in part, with when a regular public transport operation is a ‘screened air service’; and
- this item refines the definition of ‘regular public transport operation’ so it is expressed simply and in plain English.

Of note is the fact that the service referred to in the revised definition of ‘regular public transport operation’ continues to be an ‘air service’ (as defined). While the words “of an air service” no longer appear in the revised definition of ‘regular public transport operation’, ‘air service’ is defined in section 9 of the Act. It means “a service of providing air transportation of people or goods, or both people and goods”. This wording is utilised in the revised definition. As such, the service referred to in the revised definition continues to be an ‘air service’.

The above is also related to the definition of ‘airline’ in subsection 134(2) of the Act. An airline is defined to mean a person engaged in the provision of air services.

Clause 2 – Subregulation 3.01A(1) (definition of *maximum weight*)

This clause repeals the definition of ‘maximum weight’ in subregulation 3.01A(1). This amendment is consequential to the amendments made by item 5, below. Item 5, below, amends regulation 4.02 to change the screening threshold from one based on the maximum take-off weight of an aircraft to one based on an aircraft’s seating capacity.

Clause 3 – Subparagraph 3.01C(2)(c)(i)

Clause 4 – Paragraph 3.01C(2)(d)

Regulation 3.01C of the Principal Regulations sets out matters that the Secretary may consider before assigning a particular security controlled airport a category under subsection 28(6) of the Act.

Under subregulation 3.01C(2) of the Principal Regulations, the Secretary relevantly may consider whether aircraft operate regular public transport operations or open charter operations to or from the airport (paragraph (c)) or whether aircraft operate closed charter operations to or from the airport (paragraph (d)). If they do operate either of these operations, the Secretary may consider the seating capacity of those aircraft rather than the maximum weight of those aircraft. In the case of paragraph 3.01(2)(c), the Secretary may also consider the average number of revenue passengers departing the airport each year as part of those operations.

Clauses 3 and 4 omit the reference to ‘maximum weight’ in subparagraph 3.01C(2)(c)(i) and paragraph 3.01C(2)(d) of the Principal Regulations and replace it with a reference to ‘seating capacity’. These amendments are consequential to the amendments made by clause 5.

Clause 5 – Subregulations 4.02(1), (1A) and (2)

Clause 6 – Subregulation 4.02(4)

Regulation 4.02 of the Principal Regulations prescribes the meaning of screened air service. Prior to the commencement of the Amendment Regulations:

- subregulation 4.02(1) required that an aircraft must be a cleared aircraft before departure if it is operating a regular public transport operation or an open charter operation with a maximum weight of at least 20,000 kilograms (as determined by reference to subregulation 4.02(1A));
- subregulation 4.02(2) provided for additional aircraft to be cleared aircraft in prescribed circumstances, including where the aircraft departs from the same airport apron (as determined by reference to subregulation 4.02(3)) as an aircraft described in subregulation 4.02(1); and
- subregulation 4.02(4) provided that an aircraft described in subregulations (1) or (2) is a ‘screened air service’.

Clauses 5 and 6 repeal subregulations 4.02(1), (1A), (2) and (4) and substitute it with new subregulation 4.02(2) only. Subregulation 4.02(3) is required on an ongoing basis because the meaning of ‘apron’ is necessary for the new definition of ‘screened air service’ set out in new subregulation 4.02(2).

The new definition of ‘screened air service’ in subregulation 4.02(2) provides that an operation of an aircraft is a screened air service if the operation falls within either paragraph (a) or paragraph (b).

Paragraph 4.02(2)(a) provides that an operation of an aircraft is a screened air service if:

- the operation is a regular transport operation or an open charter operation (subparagraph (i));
- the aircraft has a seating capacity of 40 or more persons (subparagraph (ii)); and
- the operation operates from a designated airport, a tier 1 airport or a tier 2 airport (subparagraph (iii)).

Paragraph 4.02(2)(b) provides that an operation of an aircraft is a screened air service if:

- the operation operates from a designated airport (subparagraph (i));
- the aircraft departs from the same apron as an aircraft (known as the *other aircraft*) that is operating a screened air service to which paragraph (a) applies (subparagraph (ii)); and
- the aircraft is scheduled to depart within the operational period of the other aircraft (subparagraph (iii)).

In essence, the new definition in subregulation 4.02(2) changes the screening threshold is changed from one based on the maximum take-off weight (as was previously determined by subregulation 4.02(1)) of an aircraft to one based on an aircraft’s seating capacity (new subparagraph 4.02(2)(a)(ii)). The new definition also makes clear that regulation 4.02 is a definition.