

EXPLANATORY STATEMENT

Issued by authority of the Minister for Home Affairs
Aviation Transport Security Act 2004

Aviation Transport Security Amendment (Screening Information) Regulations 2021

The *Aviation Transport Security Act 2004* (the Aviation Act) and the *Aviation Transport Security Regulations 2005* (the Aviation Regulations) operate to give effect to Australia's obligations under Annex 17 to the Convention on International Civil Aviation (the Chicago Convention). In pursuit of this aim, the Aviation Act and the Aviation Regulations establish a regulatory framework to safeguard against unlawful interference with civil aviation in Australia.

Legislative authority

Subsection 133(1) of the Aviation 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.

Further, section 44 of the Aviation Act provides that the regulations may deal with, among other things, the places where screening is to be conducted and the methods, techniques and equipment to be used for screening; and that regulations made under paragraph 44(2)(i) or (j) may provide that some or all of the matters set out in that paragraph are to be specified in written notices made by the Secretary. Paragraph 44(4)(b) of the Aviation Act also provides in part that regulations made under section 44 may prescribe penalties for offences against those regulations. This includes, for an offence committed by an aviation industry participant, other than an operator covered by paragraph 44(4)(a), a penalty not exceeding 100 penalty units.

In addition, subsection 111(2) of the Aviation Act provides, in part, that the regulations may prescribe, as ***aviation security information*** (as defined in subsection 111(1)), statistics relating to the screening of people for entry to cleared areas or cleared zones or that go through a screening process. Also, under subsection 111(3), if the Secretary believes on reasonable grounds that an aviation industry participant has aviation security information, the Secretary may, by written notice given to the participant, require the participant to give the information to the Secretary.

Purpose

The purpose of the *Aviation Transport Security Amendment (Screening Information) Regulations 2021* (the Amending Regulations) is to amend the Aviation Regulations to introduce measures that will:

- require screening authorities to create and retain records relating to security screening measures in place at their screening points;
- provide the Secretary with the power to set performance measures or targets for screening measures by way of a notice given to the screening authority;
- provide a person who has been issued with a notice specifying performance measures or performance targets with the opportunity to have that decision reconsidered by the Secretary in the first instance, and if the Secretary affirms the decision, to have the decision reviewed by the Administrative Appeals Tribunal;

- prescribe penalties for non-compliance with record making and retention requirements or performance requirements or targets set out in a notice;
- prescribe statistical data and contextual information relating to security screening measures as *aviation security information* for subsection 111(1) of the Aviation Act; and
- make supporting technical amendments.

Consultation

Throughout 2017, the Department of Infrastructure and Regional Development, in collaboration with the industry-led Screening Innovation Working Group, developed and agreed to screening performance measures that would require all screening authorities to report explosive trace detection (ETD) usage rates, body scanner (BDS) usage rates, and threat image projection x-ray results. Following Machinery of Government changes in late 2017, the Department of Home Affairs conducted a successful data collection trial with six screening authorities. The trial, which concluded in late 2018, confirmed that there were no major impediments to collecting and reporting data on the proposed performance measures.

However, key findings from the trial showed that without a formal requirement to record the data and provide it on request, some industry participants were slow to respond to a data provision request. Feedback given by trial participants was used to inform the development of the reforms introduced by these amendments.

Additionally, an Exposure Draft of the amendments was distributed to affected industry participants in October 2020 to give industry an opportunity to assist in further refining these measures. Feedback indicated that additional guidance material was required in relation to what is meant by ‘electronic form’ in the amendments. Guidance material on this matter will be ongoing as the regulations are implemented. The consultees were fully supportive of these amendments in the original exposure draft form.

Regulation Impact Statement

The Office of Best Practice Regulation (OBPR) was consulted prior to making the Amending Regulations and has advised that a Regulatory Impact Statement is not required (OBPR Reference 25070).

Financial Impact Statement

The financial impact of the Amending Regulations on the Department of Home Affairs is minor, and any costs associated with the implementation of the amendments will be met from within existing resources.

Generally, screening technologies used by screening authorities already record the data required by the amendments. However, it has been determined that there will be a minimal but unavoidable cost to industry.

Statement of Compatibility with Human Rights

A Statement of Compatibility with Human Rights has been completed in relation to the

Amending Regulations and assesses that the amendments are compatible with Australia's human rights obligations. A copy of the Statement of Compatibility with Human Rights is at **Attachment A**.

Details of the Amending Regulations are set out in **Attachment B**.

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

The Amending Regulations commence on 1 August 2021.

Statement of Compatibility with Human Rights

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

Aviation Transport Security Amendment (Screening Information) Regulations 2021

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 Act 2004* (the Aviation Act) and the *Aviation Transport Security Regulations 2005* (the Aviation Regulations) establish a regulatory framework for the purpose of safeguarding against unlawful interference with civil aviation in Australia in accordance with Annex 17 to the *Convention on International Civil Aviation*, to which Australia is a party.

Australia's security screening regime is a significant part of the safeguarding framework which operates to reduce, manage or remove the risk of an act of unlawful interference with aviation (that is, an act that might threaten the operation of an aircraft or airport, or the safety of a person at an airport or on board an aircraft) occurring.

The amendments made by the *Aviation Transport Security Amendment (Screening Information) Regulations 2021* (the Amending Regulations) build on the measures already in place for Australia's security screening regime.

The security screening function conducted at screening points in all security-controlled airports from which a screened air service operates is the most visible part of Australia's security screening regime. Security screening is conducted to detect weapons, unauthorised explosives and other prohibited items, and prevent these things being taken onto aircraft. Consequently, the screening function must be performed effectively to maintain Australia's aviation security requirements in order to facilitate air travel.

When passing through a screening point to be cleared to enter a sterile area at a security-controlled airport, people, their baggage and personal effects are generally subject to screening by screening authorities using three forms of specialist screening equipment:

- walk-through metal detection or active millimetre wave body scanning equipment;
- x-ray; and
- explosive trace detection.

Many makes and models of the specialist screening equipment create their own records or make their own counts – this equipment effectively records statistical data. Information about screening conducted using such equipment gives context to the statistical data.

Schedule 1 to the Amending Regulations commences on 1 August 2021 and amends the Aviation Regulations to ensure the Department of Home Affairs (the Department) has access to statistical data and contextual information that will give a complete understanding of the performance of the screening function on a national scale and to pinpoint where screening measures or methods may need adjustment to ensure aviation security.

It does this by introducing record keeping and retention requirements for statistical data and contextual information about the location of screening points, the equipment used to conduct screening, and the number of people passing through screening points. To ensure the Department has access to data and information to conduct its analysis, Schedule 1 prescribes an exhaustive list of data and information as **aviation security information**, and will enable the Secretary of the Department to request the data and information. The information prescribed as aviation security information is broadly statistical in nature and includes information such as ‘the screening authority that operates the screening point’, ‘statistical information relating to screening carried out at the screening point’ and ‘the number of persons passing through the screening point in a period’. Information prescribed as ‘aviation security information’ does not include personal information, and the Instrument does not otherwise provide for the collection, use or disclosure of personal information.

Schedule 1 also introduces a new discretion for the Secretary to give a notice to the screening authority that sets measurable, practical and achievable measures in relation to the performance of the screening function, and provides a discretion for this type of notice to be combined with a notice given under existing regulation 4.17, which sets out the methods, techniques, and equipment to be used for screening, thereby simplifying the screening notice scheme.

Access to the statistical data and contextual information will permit analysis of the performance of screening equipment, screening methods and other security screening measures being used or performed at screening points. This analysis will enable focussed and concrete performance measures to be set which will in turn enhance the safety and security of passengers, airports and aircraft.

In addition, Schedule 1 introduces strict liability offences for non-compliance with performance measures set out in a notice, and for non-compliance with record keeping requirements and record retention requirements. A failure by a **screening authority** to comply with a performance measure requirement set out in a notice carries a penalty of 100 penalty units, and a failure by a screening authority to comply with either record keeping or record retention requirements in relation to screening and screening equipment each carries a penalty of 20 penalty units. The Secretary may, by written notice, specify a person (or persons) who is authorised or required to carry out screening at a security controlled airport or part of a security controlled airport to be a ‘screening authority’. In most instances, an airport or airline will act as the specified screening authority, and may sub-contract day-to-day operations to a specialist screening provider.

The strict liability offences and penalties introduced by these amendments operate to deter non-compliance with specified screening performance measures. Deterring non-compliance with the performance measures assists in improving the security screening functions, and ultimately in safeguarding against unlawful interference with aviation. The application of strict liability for these offences is appropriate as

the offences are not punishable by imprisonment, and are not dependent upon a subjective or community standard.

The penalties will be imposed on a screening authority, often an airport operator or an airline, and not on a screening officer (a natural person).

With respect to the possibility that a natural person may also be a screening authority, the following is noted:

- The possibility that a screening authority is an individual/natural person would most likely be restricted to very small regional/remote airports ('Tier 3' airports);
- Tier 3 airports are usually run by a local council and not by an individual; and
- Tier 3 airports are not required to undertake screening activities that would be regulated by the Legislative Instrument.

So while it is not impossible for a screening authority to be a natural person, in practice it is highly unlikely. It is not the intention for the penalties to be imposed directly on individuals.

Human rights implications

This Disallowable Legislative Instrument engages the right to the presumption of innocence under Article 14(2) of the International Covenant on Civil and Political Rights (ICCPR).

Right to presumption of innocence

The Disallowable Legislative Instrument introduces a strict liability offence for non-compliance with performance measures set out in a notice, and for non-compliance with record keeping requirements and record retention requirements. While the offences are classified as criminal offences in the Instrument, each of the offences do not apply to the general public (applying instead to 'screening authorities'), act as both an incentive to compliance and a deterrent to non-compliance, and do not carry a penalty of imprisonment.

The offence engages article 14(2) of the ICCPR which provides that everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

Importantly, a strict liability offence will not violate the presumption of innocence if it pursues a legitimate objective and is reasonable, necessary and proportionate to that objective. The legitimate objective of the offence is safeguarding against unlawful interference with aviation by promoting performance and target based screening by screening authorities. The offences achieve this objective by introducing the relevant penalties to deter non-compliance with screening targets. The penalties are within the prescribed limits set out in the Act, and are similar to others imposed under the Aviation Regulations. The penalties are also proportionate to the risk posed by screening authorities undertaking insufficient or ineffective screening, including screening with equipment that fails to detect weapons, unauthorised explosives and other prohibited items.

Additionally, it remains incumbent on the prosecution to prove the physical element of each of the offences beyond reasonable doubt. An accused will always have the defence of honest and reasonable mistake of fact. If relied upon, this is an evidential burden on the defence to prove, on the balance of probabilities, that the accused had

an honest and reasonable mistaken belief of fact, which, if those facts existed, would not have constituted an offence.

As noted above in the overview of the Legislative Instrument, these offences will apply to a screening authority and not an individual screening officer. While a natural person is not prevented from being a screening authority it is highly unlikely that they would be. In practice it will only be a body corporate that would have these penalties imposed on them.

For these reasons, to the extent that the strict liability offence engages the presumption of innocence set out in Article 14(2) of the ICCPR, the limitation is reasonable, necessary and proportionate, as it maintains all existing protections contained in Australian law.

Conclusion

This Disallowable Legislative Instrument is compatible with human rights because, to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate to maintaining the integrity of Australia's aviation and maritime security.

Hon Karen Andrews MP, Minister for Home Affairs

Details of the *Aviation Transport Security Amendment (Screening Information Regulations) 2021*

Section 1 – Name

This section provides that the title of the Regulations is the *Aviation Transport Security Amendment (Screening Information) Regulations 2021* (the Amending Regulations).

Section 2 – Commencement

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

Table Item 1 of subsection 2(1) provides for the whole of the Amending Regulations to commence on 1 August 2021.

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 Amending Regulations are made under the *Aviation Transport Security Act 2004* (the Aviation Act).

Section 4 – Schedules

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

Aviation Transport Security Regulations 2005

To maintain Australia’s exemplary aviation security record and to reduce the ongoing risk of an act occurring that might threaten the operation of an aircraft or an airport, or the safety of a person at an airport or on board an aircraft, people and their personal effects are generally subject to screening when they pass through a screening point.

All security-controlled airports from which a screened air service operates require security screening to be performed. This function is conducted by a screening authority that has been assessed as meeting specified requirements and authorised by the Secretary to provide screening services and to conduct the screening function. In most instances, an airport or airline will act as the specified screening authority, and may sub-contract day-to-day operations to a specialist screening provider.

This type of security screening involves the application of human, technical and other means to identify, detect and control weapons, explosives or other dangerous devices, articles, substances, or other prohibited items which may be used to commit an act of unlawful interference against aviation. The specialist screening equipment includes:

- walk-through metal detection or active millimetre wave body scanning equipment;
- x-ray machines; and
- explosive trace detection devices.

Schedule 1 to the Amending Regulations amends the *Aviation Transport Security Regulations 2005* (the Aviation Regulations) to require screening authorities to record and keep prescribed information.

In addition, the amendments prescribe statistical data, and information about activities undertaken, in relation to security screening measures at screening points in security-controlled airports as *aviation security information* within the meaning given in subsection 111(2) of the *Aviation Transport Security Act 2004* (the Act). This amendment will enable the Department to make a request for the prescribed information.

The amendments also expressly permit the Secretary to set performance measures or targets in relation to security screening requirements, to ensure that a sufficient percentage of persons who pass through a screening point are screened in a manner that further reduces the likelihood of any objects or materials that would threaten the integrity of an aircraft entering a secure area of an airport.

Item [1] - Paragraph 3.01C(3)(e)

This amendment inserts the words “or an area of the airport” into paragraph 3.01C(3)(e) of Division 3.1A of Part 3 of the Aviation Regulations after the words “for the airport”.

The purpose of the amendment is to recognise that, at an airport, there may be one screening authority for the entire airport, or there may be a number of aviation industry participants who are the screening authority for an area of an airport.

If the words “or an area of the airport” were not included, there is a small possibility that the paragraph could be construed to apply only to a screening authority that has

responsibility for conducting screening for an airport in its entirety.

This amendment makes paragraph 3.01C(3)(e) consistent with other provisions of the Aviation Regulations, for example subregulation 4.03(2).

The effect of this amendment is to acknowledge and allow for the variety of screening authority arrangements in place in remote or regional airports, and in small and large metropolitan airports.

Item [2] – After regulation 4.17

This amendment inserts new regulation 4.17A, which deals with the Secretary's requirements for screening using certain types of equipment. New regulation 4.17A gives effect to paragraph 44(2)(j), subsection 44(3), and paragraph 44(4)(b) of the Aviation Act.

The ultimate aim of security screening is to ensure that no prohibited items, prescribed weapons, or explosives are carried onto an aircraft.

Subregulation 4.17A(1)

New subregulation 4.17A(1) provides that regulation 4.17A applies in relation to a screening authority that is responsible for operating a screening point through which people pass to access sterile areas of a security controlled airport.

The purpose and effect of this subregulation is to make clear that new regulation 4.17A applies to a specific and appropriate cohort of persons, being the relevant screening authority.

Subregulation 4.17A(2)

New subregulation 4.17A(2) provides an express discretion for the Secretary to give a written notice to a screening authority, that specifies requirements in relation to screening carried out at a screening point using x-ray equipment fitted with threat image projection software, a walk-through metal detector, body scanning equipment, or explosive trace detection equipment.

'Threat image projection software' is software that produces images of a weapon or prohibited item that is superimposed over personal effects that are screened by the x-ray equipment. These images are used to ensure that the operator of the equipment recognises a 'threat' when it is shown on the equipment's screen, and responds to the 'threat' in the appropriate manner.

The purpose and effect of this subregulation is to give the Secretary the discretion to specify to the screening authority, by written notice, requirements relating to screening that is carried out at the screening point using x-ray equipment with threat image projection software, a walk through metal detector or explosive trace detection equipment.

Subregulation 4.17A(3)

New subregulation 4.17A(3) provides that, without limiting subregulation 4.17A(2), requirements specified in a notice given under that subregulation may include performance measures, or a performance target that must be met in relation to screening.

The purpose and effect of this subregulation is to expressly include in the discretion, set out in subregulation 4.17A(2), the power for the Secretary to set measurable, practical, and achievable performance measures in relation to the performance of screening activities undertaken at screening points for those persons and their personal items that are required to be screened.

Subregulation 4.17A(4)

New subregulation 4.17A(4) provides a discretion that expressly permits the Secretary, in considering whether to specify a requirement under subregulation 4.17A(2), to have regard to a variety of matters that go to informing the decision. These matters include Australia's international obligations (for example those under Annex 17 of the Convention on International Civil Aviation), aviation security intelligence and information, audit findings, the number of persons passing through screening points, the information that can be recorded by or about equipment and any other relevant information.

The purpose and effect of this subregulation is to give a general description of the types of matters the Secretary may consider when exercising the discretion to set measurable, practical, and achievable performance measures in relation to the performance of screening activities undertaken at screening points for those persons and their personal items that are required to be screened.

Subregulation 4.17A(5)

New subregulation 4.17A(5) provides a discretion for the requirements specified in a notice given for the purposes of regulation 4.17A to be combined with a notice given under regulation 4.17.

The purpose of this subregulation is to allow for, but not mandate, a single notice to be given that specifies matters under regulation 4.17 and that specifies requirements under regulation 4.17A.

The effect of this subregulation is to reduce an administrative burden. This subregulation allows the Secretary to give a combined notice in relation to methods, techniques and equipment to be used for screening, the persons who, or things that, must not pass through a screening point, and requirements relating to screening using x-ray equipment with threat image projection software, a walk through metal detector or explosive trace detection equipment. This in turn allows a relevant aviation industry participant to refer to a single notice to determine its obligations in relation to those matters.

Subregulation 4.17A(6)

New subregulation 4.17A(6) makes a screening authority's failure to comply with requirements set out in a notice given to it under subregulation 4.17A(2) a strict liability offence. This offence carries a penalty of 100 penalty units.

The *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers* (the Guide) was considered when drafting was undertaken on the matter of strict liability in relation this new offence. To ensure that aviation security is maintained within Australia's security controlled airports, it is imperative that aviation industry participants comply with requirements set out in notices given under the Aviation Regulations.

The strict liability provision in new regulation 4.17A help ensure that requirements set out in a notice given to an aviation industry participant under regulation 4.17A are adhered to by the aviation industry participant.

New regulation 4.17A is made for the purposes of paragraph 44(4)(b) of the Aviation Act which provides that Regulations made under section 44 may prescribe penalties for offences against those regulations. Paragraph 44(4)(b) further provides that, for an offence committed by an aviation industry participant, other than an accredited air cargo agent or a participant covered by paragraph (a), the penalties must not exceed 100 penalty units. The penalty set out in new subregulation 4.17A(6) is at the maximum that can be set under paragraph 44(4)(b).

Whilst the penalty of 100 penalty units is above the maximum recommended to be imposed by regulations under the Guide, it is considered appropriate to have a higher penalty for this offence to act as both an incentive to compliance and a deterrence to non-compliance.

Such a strong deterrent is appropriate to enact in delegated legislation because of the security-sensitive nature of the aviation environment, which may be targeted by criminal enterprises, or other adversaries, intent on causing harm. This penalty amount is consistent with penalties for similar offences in provisions of the Aviation Regulations, and is commensurate with the risk to aviation security posed by the recipient of a notice given under regulation 4.17A failing to comply with requirements set out in the notice.

It is also noted that the penalty applies to a limited number of persons, specifically security screening authorities, and not to the general public. This means that the enhanced deterrence is tailored specifically to an appropriate cohort of persons, and not the public at large. As a consequence, this is a reasonable penalty to impose, as it has the necessary element of deterrence whilst not being a manifestly excessive penalty for a strict liability offence.

As noted above, notices given under subregulation 4.17A(2) specify requirements relating to the equipment used to conduct screening.

A failure by a screening authority to comply with any specified requirements set out in such a notice could create a possibility that a person who intends to commit an unlawful interference with aviation may not be detected. This poses a serious risk to aviation security.

The effect of this amendment is to make clear that a failure to comply with the requirements set out in a notice given under subregulation 4.17A(2) is such a risk to aviation security that the appropriate penalty of 100 penalty units will apply to a person who commits the offence.

Item [3] – Subregulation 4.24(1)

This amendment omits the words “screening authority at” and substitute the words “screening authority for” in subregulation 4.24(1).

The purpose and effect of this amendment is to recognise that a screening authority may be a screening authority for the entirety of an airport, or may be the screening authority for an area of an airport.

This amendment is consequential to the amendment made by Item [1] above.

Item [4] – Record-keeping requirements relating to screening equipment

This amendment inserts a new Subdivision 4.1.3 – Record keeping requirements in Division 4.1 of Part 4 of the Aviation Regulations.

New Subdivision 4.1.3 introduces new regulation 4.40 - Record-keeping requirements relating to Secretary's notices for screening.

New subregulation 4.40(1)

New subregulation 4.40(1) provides that regulation 4.40 applies in relation to a screening point through which persons enter a sterile area of a security controlled airport.

Currently, screening authorities who operate a screening point or screening points in security-controlled airports are not required to make or keep records that relate to the screening point or screening points that they operate.

The purpose and effect of this amendment is to make clear that the new requirement to keep records relating to screening equipment applies to all screening authorities for the screening point or points they operate at security-controlled airports.

New subregulation 4.40(2)

New subregulation 4.40(2) provides that the screening authority that is responsible for operating the screening point must make records in an electronic form.

Examples of 'electronic form'

To comply with the requirement that records be in electronic form, a screening authority could:

- maintain a spreadsheet that records the relevant information that could be attached to an email or uploaded as an attachment to an electronic form;
- scan one or more hand written records and/or provide additional contextual supporting material that could be attached to an email or uploaded as an attachment to an electronic form;
- use an application developed for that purpose; or
- use data collected by the equipment and saved on the equipment or data storage device).

The data requested for transmission in electronic form may, for example, be in a spreadsheet with clear descriptive headings. Requested records and supporting documents could be provided as .CSV, .XLSX, .XLS, .PDF, DOC, DOCX, or RTF file types.

New subregulation 4.40(2) requires that the records are sufficient to demonstrate that the screening authority is complying with any binding notices given under regulation 4.17 that relate to the screening carried out at the screening point.

The records must also be sufficient to demonstrate compliance with requirements that are specified in a notice given under regulation 4.17A that relate to screening carried out at the screening point

The purpose of this amendment is to make clear that records that demonstrate compliance with binding notices given under regulation 4.17 or the requirements in notices given under regulation 4.17A relating to the screening equipment used by the operator of a screening point must be in a format that is suitable for electronic transmission.

New subregulation 4.40(3)

New subregulation 4.40(3) provides that a screening authority that makes a record under subregulation 4.40(2) must keep the record, in electronic form, for two years after the end of the period to which the record relates. This requirement applies even in circumstances where the screening authority ceases to be a screening authority, or ceases to be responsible for operating the screening point, before the end of the two-year period.

The specification of that period of time has a dual purpose. It will provide certainty to industry regarding how long the records must be kept and will permit the Department to retrieve relevant data collected over a set period to accurately monitor and review the performance of security screening processes, and to access, analyse and compare the relative security screening results achieved at different airports nationwide, in a consistent manner over a period of time.

Data collected over a short period of time may only indicate that a screening authority is satisfying its obligations under the Aviation Act or Aviation Regulations, or meeting requirements under Aviation Security notices. Alternatively, it may indicate a screening authority is having difficulty satisfying those obligations and requirements. This information could be used by the Department to direct education programs or to conduct focussed compliance activities, but it may not assist the Department to evaluate screening methods, processes and equipment.

However, up to two years' worth of data collected from security-controlled airports nationwide is sufficient for the Department to identify and analyse screening performance trends or unanticipated developments at local or national levels, and to validate or assess screening methods and the comparative performance of equipment types or models.

This in turn permits the Department to provide targeted information to industry, develop new general guidance materials, or to include additional detail for requirements relating to screening in notices given under regulation 4.17 or new regulation 4.17A.

The extension of the application of the requirement to keep records for two years even when the relevant person is no longer a screening authority, or is no longer responsible for operating a particular screening point is to ensure that the whole body of records for every screening point for a given two year period remains available.

The records from every screening point for the relevant two-year period will provide a complete picture of the operation of the national screening regime over that period.

While maintaining a record for two years even after a person has ceased being a screening authority is acknowledged to be an administrative burden, an incomplete national record may not reveal all screening trends, or may not show that changes need to be made to notices setting out requirements for screening. An incomplete national record may also not reveal unanticipated vulnerabilities to unlawful interferences with aviation, and as a consequence is a risk to aviation security.

The purpose and effect of new subregulation 4.40(3) is to ensure that all relevant records remain available in a format that can be transmitted to the Department for a set period of time which is sufficient for the Department to identify and analyse any trends arising from the performance of a screening function. These records will allow the Department to create well-informed guidance materials or relevant information for industry, undertake targeted compliance activities that directly address identified issues and will ensure that no data that might indicate a security vulnerability is omitted.

New subregulation 4.40(4)

New subregulation 4.40(4) provides for a strict liability offence and penalty for non-compliance with this record keeping requirement.

New subregulation 4.40(4) specifies that a person who is an aviation industry participant who is subject to a requirement under subregulation 4.40(2) or (3), and who engages in conduct that breaches the requirement commits an offence of strict liability for which a 20 penalty unit penalty applies.

Similar to Item [2] of this instrument, the Guide was also considered when drafting was undertaken on the matter of strict liability in relation to this new offence. To ensure aviation security, it is imperative that aviation industry participants comply with requirements set out in notices given under the Aviation Regulations.

The strict liability provision in new subregulation 4.40(4) helps ensure that requirements set out in a notice given to an aviation industry participant under regulation 4.17A are adhered to by the aviation industry participant by being both an incentive to comply and a strong disincentive to non-compliance.

As with the penalty prescribed by Item [2] of this instrument, this penalty is appropriate to enact in delegated legislation because the aviation environment continues to be an attractive target for criminal enterprises or other adversaries intent on causing harm.

The 20 penalty unit penalty amount is consistent with penalties for similar offences in provisions of the Aviation Regulations and is under the limit prescribed by paragraph 44(4)(b) of the Aviation Act. The penalty is also commensurate with the risk to aviation security posed by an aviation industry participant failing to comply with requirements set out in the Aviation Regulations or notices given under the Aviation Regulations, particularly those that relate to conducting screening of persons and any items that must be cleared to enter sterile areas of a security controlled airport.

It is also noted that this penalty applies to a limited number of persons, specifically security screening authorities, and not to the general public or to the aviation industry more broadly. This means that the deterrence is tailored specifically to an appropriate cohort of persons, and not the public or industry at large. As a consequence, this is a reasonable penalty to impose, as it has the necessary element of deterrence whilst not being a manifestly excessive penalty for a strict liability offence.

The effect of this amendment, in conjunction with the information prescribed for section 111 of the Aviation Act set out in the amendment made by Item [5] below, is that the Department can be certain that the screening authority will be able to provide the prescribed information when it is requested.

New subregulation 4.41(1)

New subregulation 4.41(1) provides that the regulation applies if any of the equipment listed in the paragraphs are listed.

New subregulation 4.41(2)

This new subregulation provides that the screening authority that is responsible for the screening point must record the information listed in the paragraphs of that subregulation.

New subregulation 4.41(3)

New subregulation 4.41(3) provides that a record will be taken to be made in accordance with subregulation 4.41(2) if the record meets each of the criteria in paragraphs (a) to (c). Paragraph (a) provides that the record will be in accordance with subregulation 4.41(2), if the only reason it would otherwise not be in accordance, is due to an inaccuracy in the information recorded. Paragraph (b) covers the situation where the information is unable to be recorded by the equipment listed in paragraphs 4.41(2)(f), (g), (h) or (i). Finally, paragraph (c) provides that a record is made in accordance with subregulation 4.41(2) if the screening authority made all reasonable efforts to ensure that the information is accurate.

New subregulation 4.41(4)

New subregulation 4.41(4) provides that a screening authority that makes a record under new subregulation 4.41(2) must keep the record for two years after the end of the period to which the record relates. This requirement applies even in circumstances where the screening authority ceases to be a screening authority, or ceases to be responsible for operating the screening point, before the end of the two-year period.

New subregulation 4.41(5)

New subregulation 4.41(5) provides for a strict liability offence and penalty for non-compliance with this record keeping requirement.

New subregulation 4.41(5) specifies that a person who is an aviation industry participant who is subject to a requirement under new subregulation 4.41(2) or (4), and who engages in conduct that breaches the requirement commits an offence of strict liability for which a 20 penalty unit penalty applies.

Item [5] – At the end of Part 6A.

This amendment inserts a new regulation 6A.02 – Aviation security information - information about screening points.

New subregulation 6A.02(1)

New subregulation 6A.02(1) provides that, for the purposes of section 111 of the Aviation Act, information relating to a screening point that people pass through to enter a sterile area of a security controlled airport is prescribed.

The purpose and effect of new subregulation 6A.02(1) is to prescribe statistical and contextual information in relation to the screening authority that operates the screening point, and the airport, terminal and location within the terminal the screening point operates in. This amendment also prescribes information about the

number of persons passing through the screening point in a period of time, and the number of persons each type of equipment is used to screen in that period.

New subregulation 6A.02(2)

New subregulation 6A.02(2) specifies the information that is prescribed in relation to x-ray equipment that is fitted with threat image projection software (described in Item [2] of this explanatory statement). In circumstances where this type of equipment is used for screening, the make and model of the equipment and the name and version of the software used in the equipment are specified. For each 'threat image' projected by the software, the day and time the image is projected, the type of the threat, and the outcome of the projection are specified.

The purpose and effect of new subregulation 6A.02(2) is to prescribe information in relation to x-ray equipment that is fitted with threat image projection software.

New subregulation 6A.02(3)

New subregulation 6A.02 (3) specifies the information that is prescribed for walk-through metal detectors. In circumstances where this type of equipment is used for screening, the make and model of the equipment and the number of persons who pass through the detector in a period are specified.

The purpose and effect of new subregulation 6A.02(3) is to prescribe information in relation to walk-through metal detectors.

New subregulation 6A.02(4)

New subregulation 6A.02(4) specifies the information that is prescribed for body scanning equipment. In circumstances where this type of equipment is used for screening, the make and model of the equipment, the number of persons scanned by the equipment in a period, and the day and time the scan took place are specified.

The purpose and effect of new subregulation 6A.02(4) is to prescribe information in relation to body scanning equipment.

New subregulation 6A.02(5)

New subregulation 6A.02(5) specifies the information that is prescribed for explosive trace detection equipment. In circumstances where this type of equipment is used for screening, the make and model of the equipment, the number of persons the equipment was used to screen in a period, the number of 'double-positive' results in each period, and the day and time each 'double-positive' result occurs are specified.

'Double positive', a term widely recognised and understood by screening authorities, refers to a positive result that occurs in two sequential tests on an individual. In this case, it means that when an individual is screened using explosive trace detection equipment and the test returns a positive result for explosive traces, a second test is then undertaken. A double positive result occurs when the second test also returns a positive result for explosive traces.

The purpose and effect of new subregulation 6A.02(5) is to prescribe information in relation to explosive trace detection equipment.

The overall purpose of new regulation 6A.02 is to permit the Department to obtain a complete picture, and therefore a better understanding, of security screening measures

used by screening authorities at screening points around Australia.

This complete picture will permit monitoring of screening authority compliance with requirements set out in the Aviation Act, the Aviation Regulations, and with notices given to them. An additional purpose is that the Department is able to compare and contrast equipment (and software versions) used by all screening authorities for specified screening methods. A consequence of having a clearer understanding of the effectiveness and efficiency of screening methods and equipment types is that if the information indicates non-compliance, the Department is better able to direct education or guidance campaigns or to plan compliance activities.

The overall effect of new regulation 6A.02, in conjunction with the record keeping requirements set out in the amendment made by Item [4] above, is that the Department can be certain that the screening authority will be able to provide the prescribed information when it is requested.

Item [6] – At the end of Part 8.

This amendment inserts a new regulation 8.07 – Reconsideration in relation to screening targets.

New regulation 8.07 introduces a new power for the Secretary of the Department to reconsider certain decisions made in relation to a notice given under new regulation 4.17A (introduced by Item [2] of this instrument). New regulation 8.07 also introduces a new review power for the Administrative Appeals Tribunal (the Tribunal) if the notice recipient is not satisfied with the Secretary's decision.

New subregulations 8.07(1) and (2)

New subregulations 8.07(1) and (2) provides that a person who is given a notice under new regulation 4.17A specifying requirements, may make a written application to the Secretary for reconsideration of the decision to specify the requirement.

The purpose and effect of new subregulations 8.07(1) and (2) is to make clear how a notice recipient may make an application for reconsideration of a decision by the Secretary to specify a requirement in a notice given under regulation 4.17A.

New subregulation 8.07(3)

New subregulation 8.07(3) provides the mandatory requirements that the Secretary must follow if an application is made under subregulation (1) that is in accordance with subregulation (2) (paragraphs 8.07(3)(a) and (b)).

In those circumstances, the Secretary must reconsider the decision to specify a requirement made in the original regulation 4.71A notice (paragraph 8.07(3)(c)), and give notice in writing that the decision has been either affirmed, or varied, or that the decision has been set aside and a new decision has been made in substitution (subparagraphs 8.07(3)(d)(i), (ii), and (iii)).

The purpose and effect of new subregulation 8.07(3) is to mandate requirements that must be followed by the Secretary if an application for reconsideration is made in accordance with the formal requirements set out in new subregulations 8.07(1) and (2).

New subregulation 8.07(4)

New subregulation 8.07(4) provides a timeframe in which the decision on an application must be made. If, within 30 days after the application is made, the Secretary does not make a decision under paragraph 8.07(3)(d), the Secretary is taken to have affirmed the decision in the notice given under regulation 4.17A.

The purpose and effect of new subregulation 8.07(4) is to make the timeframe for a response clear and to give certainty regarding what is taken to have occurred if a decision is not made within the specified timeframe.

New subregulation 8.07(5)

New subregulation 8.07(5) provides a person who was given a notice under new regulation 4.17A an opportunity to make an application to the Tribunal for review of a decision, made by the Secretary under regulation 8.07, to affirm decisions.

This includes a decision taken to have been affirmed by the lapse of the 30-day period outlined in subregulation 8.07(4).

The purpose and effect of new subregulation 8.07(5) is to provide a notice recipient with an option to pursue a review by the Tribunal of a decision made by the Secretary to specify a requirement in a notice given under regulation 4.17A.

The overall purpose and effect of new regulation 8.07 is to give a notice recipient two avenues to have the notice decision considered anew – reconsidered by the Secretary in the first instance, and reviewed by the Tribunal if not satisfied with the Secretary's reconsideration decision.

Part 2 – Application of Amendments

Item [7] - In the appropriate position in Part 10

This amendment inserts new Division 18 into Part 10 of the Aviation Regulations.

New Division 18, which deals with amendments made by the *Aviation Transport Security Amendment (Screening Information) Regulations 2021*, inserts new regulation 10.42.

New subregulation 10.42(1)

New subregulation 10.42(1) provides that new regulations 4.40 and 4.41 apply in relation to screening carried out on or after 1 August 2021, when the Amending Regulations are to commence.

The purpose and effect of this subregulation is that a screening authority will be required to keep records in relation to the screening authority's compliance with any notices given under regulation 4.17 and regulation 4.17A, and will be required to keep records in relation to the type or types of screening equipment it operates, where the screening equipment is located, and the number of tests conducted using screening equipment, carried out on or after 1 August 2021.

New subregulation 10.42(2)

New subregulation 10.42(2) provides that for the purposes of new regulation 6A.02, it

does not matter whether screening occurred before, on or after 1 August 2021, when the Amending Regulations are to commence.

The purpose and effect of this subregulation is that, for information prescribed as aviation security information that relates to a screening point through which persons enter a sterile area of a security controlled airport, statistical data or contextual information about screening collected in relation to a screening point for which the screening authority is responsible, it does not matter whether the screening occurred before, on or after 1 August 2021.