

2004

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

AVIATION SECURITY AMENDMENT BILL 2004

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Transport and Regional Services,
the Honourable John Anderson, MP)

AVIATION SECURITY AMENDMENT BILL 2004

OUTLINE

The Bill has two parts. The first amends the *Aviation Transport Security Act 2004* ('the ATS Act') and the *Civil Aviation Act 1988* ('the CA Act') to allow background checking (currently criminal records, citizenship and politically motivated violence checks) of holders of security designated authorisations. This will include flight crew and trainee flight crew as defined in the CA Act, but may also be extended to other holders of Civil Aviation authorisations.

The second part amends the ATS Act to include contractors of Airservices Australia as aviation industry participants and the *Aviation Transport Security (Transitional Provisions and Consequential Amendments) Act 2004* to allow certain programs under the *Air Navigation Act 1920* ('the AN Act') to continue as programs under the ATS Act. This will enable existing programs to be gradually transitioned to the new requirements under the ATS Act, rather than existing programs terminating on the day the substantive provisions of the ATS Act commence.

Financial impact statement

Existing budget allocations will be unaffected by this Bill.

AVIATION SECURITY AMENDMENT BILL 2004

NOTES ON CLAUSES

Clause 1: Short Title

1. This clause provides that the Bill will be called the *Aviation Security Amendment Act 2004* once enacted.

Clause 2: Commencement

2. This clause provides that sections 1 to 3 of the Bill will commence on the date of Royal Assent. Schedule 1 and Items 1 and 2 of Schedule 2 of the Bill will commence on the date of Royal Assent and immediately after the commencement of section 3 of the *Aviation Transport Security Act 2004*. Item 3 of Schedule 2 of the Bill will commence on the date of Royal Assent.

Clause 3: Schedule(s)

3. This clause provides that any Schedule to this Act is amended or repealed.

SCHEDULE 1 – Amendments relating to security status checking

Item 1

This item provides that the Director of the Civil Aviation Safety Authority (CASA) has the same meaning as Director of Aviation Safety, as given by section 84 of the *Civil Aviation Act 1988*.

Item 2

This item provides that security designated authorisation has the meaning given by the regulations.

Item 3

This item adds the security status checking division to the simplified overview of Part 4 of the ATS Act.

Item 4

This item inserts Division 9 “Security status checking” into the ATS Act.

Section 74F

This item provides for a simplified overview of Division 9 or Part 4 of the ATS Act.

Section 74G

Subsection (1) provides that the Secretary may determine that a person has an adverse aviation security status.

Subsection (2) provides that when the Secretary makes a determination under subsection (1), the Secretary must give a copy of the determination to the person in question and to CASA.

Subsection (3) provides that, where a determination is made under subsection (1), CASA must as soon as practicable either reject an application for a security designated authorisation, or suspend or cancel an existing authorisation as appropriate.

Subsection (4) provides that a decision to determine that a person has an adverse aviation security status is taken to be prescribed administrative action for the purposes of Part IV of the *Australian Security Intelligence Organisation Act 1979* ('the ASIO Act'). The purpose of this provision is to ensure that advices given by the Australian Security Intelligence Organisation (ASIO) in relation to the status of pilots and other authorisation holders are security assessments for the purposes of the ASIO Act, and are therefore subject to the specific review rights which are provided for under the ASIO Act and the *Administrative Appeals Tribunal Act 1975*.

Section 74H

Paragraph (1)(a) provides that regulations may be made providing for the matters to which the Secretary must have regard for the purposes of deciding whether or not to determine that a person has an adverse aviation security status. It is envisaged that this will include the results of security assessments by ASIO; checks as to a person's immigration status by the Department of Immigration, Multicultural and Indigenous Affairs (DIMIA); and a criminal records check conducted by the Australian Federal Police (AFP).

Paragraph (1)(b) provides that regulations may be made specifying circumstances in which the Secretary must determine that a person has an adverse aviation security status. This envisages certain circumstances where the Secretary will have no discretion but to declare someone as having an adverse security status. These are likely to include circumstances where a person is an unlawful non-citizen, where a person receives an adverse or qualified security assessment from ASIO or where the person has been convicted of certain prescribed criminal offences. These are likely to include convictions for serious offences such as those contained in Part 2 of the *Crimes (Aviation) Act 1991* and Part 5.3 of the *Criminal Code*.

Paragraph (1)(c) provides that regulations may be made specifying circumstances in which the Secretary may determine that a person has an adverse security status. It is envisaged that where a person has a particular criminal history, that the Secretary will have a discretion as to whether to declare the person to have an adverse aviation security status.

Paragraph (1)(d) provides that regulations may be made providing for matters relating to the carrying out of security status checking.

Paragraph (1)(e) provides that regulations may be made authorising the use or disclosure of personal information. The purpose of this provision is to facilitate the flow of information between relevant agencies necessary for background checking of pilots to occur, without those agencies breaching the *Privacy Act 1988*.

Paragraph (1)(f) provides that regulations may be made specifying procedures and other matters relating to the determination of applications for security designated authorisations. This includes, but is not limited to, delaying the determination of such applications pending the outcome of security status checking. This provision will, amongst other things, allow regulations to be made which require CASA to wait until the results of background checking are known before progressing an application for a security designated authorisation.

Paragraph (1)(g) provides that regulations may be made specifying procedures and other matters relating to the issue, suspension or cancellation by CASA of security designated authorisations or the refusal by CASA to issue security designated authorisation. For example, this would enable regulations to be made which prevented CASA from issuing a security designated authorisation to a person unless the applicant has been subject to checks by ASIO, DIMIA and the AFP. It would also allow regulations which provided that CASA must cancel a security designated authorisation where it isn't possible to subject the holder to background checking.

Paragraph (1)(h) provides that regulations may be made providing that applicants for, or holders of, security designated authorisations may request security status checking be undertaken.

Paragraph (1)(i) enables regulations to be made specifying the consequences of a failure of a person to request background checking be undertaken.

Paragraph (1)(j) provides that regulations may be made providing for the collection of fees by CASA on behalf of the Commonwealth, being fees prescribed by the regulations for the purposes of this Division.

Paragraph (1)(k) provides that regulations may be made giving CASA the function of determining that a person has an adverse security status. Such regulations would mean that the determination of whether a person has an adverse security status becomes a function of CASA. Such regulations, together with paragraph (1)(j) and the addition of paragraph 98(3)(v) to the CA Act will allow CASA to impose and collect fees in its own right for the purposes of performing such a function.

Paragraph (1)(l) enables the Director of CASA to delegate all or any one of the functions and powers conferred on CASA under Part 4, Division 9 of the *Aviation Transport Security Act 2004* to a CASA officer at the Senior Executive Services level equivalent. For example, the Director of CASA can delegate to such an officer, the power to determine if a person has an adverse security status.

Paragraph (1)(m) provides that regulations may be made in relation to any other matter related to the operation of this Division.

Paragraph (2)(a) provides that if regulations under paragraph (1)(k) are in force, reference in section 74G and section 74H to the Secretary are taken to be references to CASA.

Paragraph (2)(b) provides that paragraph 74G(2)(b) does not apply to a determination by CASA under subsection 74G(1). This prevents CASA having to furnish a decision to itself.

Paragraph (2)(c) provides that paragraph 126(1)(f) has effect as if the reference in subsection 126(1) to the Secretary included a reference to CASA.

Section 74I

This section provides that Division 9 has effect despite anything in the CA Act or regulations under that Act. The purpose of this provision is to ensure that the provisions of Division 9 and regulations made under Division 9 have effect despite provisions in the CA Act (such as, for example, section 18) or CA Regulations, which might be regarded as being inconsistent.

Item 5

This item adds paragraph (f) and subsections (2) and (3) to section 126 of the ATS Act. The item deals with appeals against decisions made under that Act. This grants a right of appeal against a decision by the Secretary or CASA to declare someone as having adverse aviation security status.

This Item makes it clear that the right to appeal against the Secretary's decision to declare a person to have an adverse security status does not allow the contents of an ASIO assessment to be reviewed by virtue of paragraph 126(f) of the ATS Act. Therefore, the right of appeal under paragraph 126(f) does not supplement or replace the right of appeal against a security assessment under the ASIO and AAT Act.

Item 6

This item inserts a provision into the ATS Act which allows the Secretary to delegate any of his or her powers under Division 9 of Part 4 to a member of the Senior Management Group of CASA.

Item 7

This item inserts a provision into the CA Act which provides that CASA's functions include functions conferred on it under the ATS Act. This includes functions conferred on CASA under regulations made under the ATS Act.

Item 8

This item repeals subsection 9(5) of the CA Act. This is to remove any possibility that CASA is precluded from taking on some security functions.

Item 9

This item provides that regulations may be made under the CA Act formulating a scheme in relation to security status checking.

Item 10

This item adds paragraph (v) to subsection 98(3) of the CA Act. It makes it clear that CASA is able to prescribe fees which CASA can collect in relation to services, applications or requests, or the doing of anything, by CASA under the ATS Act.

SCHEDULE 2 – Amendments relating to transitional provisions

Item 1

This item amends paragraph (f) of the definition of aviation industry participant in section 9 of the ATS Act to ensure that aviation industry participants includes contractors of Airservices Australia as well as contractors of other aviation industry participants. This corrects an oversight which occurred when paragraph (ea) was added to the definition of aviation industry participant.

Item 2

This item amends Schedule 3 of the *Aviation Transport Security (Consequential Amendments and Transitional Provisions) Act 2004* to allow regulations to be made which enable airport security programs approved under the AN Act to continue to be in force as Transport Security Programs under the ATS Act, and Aviation Security Identification Card (ASIC) programs and international cargo security programs approved under the AN Act to continue to be in force as Transport Security Programs or such other programs under the ATS Act as are prescribed by the regulations.

These amendments will allow transitional arrangements to be put in place whereby existing programs under the AN Act do not necessarily come to an end at the commencement of the substantive provisions of the ATS Act.

Item 3

This item provides that the exercise or purported exercise of power under regulation 5 of the *Air Navigation (Aviation Security Status Checking) Regulations 2004* to determine that a person has an adverse aviation security status is taken for all purposes to be, and is taken for all purposes always to have been, prescribed administrative action for the purposes of Part IV of the ASIO Act. The effect of this is that advice provided by ASIO for the purposes of the *Air Navigation (Aviation Security Status Checking) Regulations* will be taken to be security assessments under the ASIO Act.