Aviation Transport Security Amendment (Inbound Cargo Security Enhancement) Bill 2013

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Law and Bills Digest Section

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Aviation Transport Security Amendment (Inbound Cargo Security Enhancement) Bill 2013

Date introduced: 21 March 2013

House: House of Representatives

Portfolio: Infrastructure and Transport

Commencement: The 28th day after Royal Assent

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose of the Bill

The Bill will amend the Aviation Transport Security Act 2004¹ (the Act) to:

- enable the Minister to prohibit the carriage of certain cargo into Australian territory on an aircraft through the use of a disallowable instrument and
- correct a technical error in the Act, affecting subsection 65(3) of the Act.

Background

Existing provisions under the Act and the Aviation Transport Security Regulations 2005 allow for a Special Security Direction (SSD) to be issued in circumstances where the Government seeks to prohibit air cargo from entering Australian territory from a specified country. In 2010, the Australian Government issued an SSD for cargo originating in Yemen and later extended it to cargo originating in Somalia.

Special Service Directions

In 2003/2004, when SSDs were introduced into the Act, they were intended to be able to be issued immediately. The Directions are valid for a total of six months, a safeguard which ensures they are suitable for short term threats. At the time of introduction, they were described in the following way²:

[T]he Special Service Directions [are] a specific response to a threat change or increase and requires the Government to examine and review the measures in the broader regulatory context. The new provisions

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2. Section 70(6) notes the expiration of an SSD after a period of three months; section 71 allows the Secretary to extend the period for a further three months.

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serve to retain the Department’s response power, as demanded by SARP 3.1.3\(^3\) (each Contracting State shall establish an organisation and develop and implement regulations, practices and procedures, which together provide the security necessary for the operation of aircraft in normal operating conditions and capable of responding rapidly to meet any increased security threat), and address industry criticisms of the way this power is currently administered.\(^4\)

However, when the threat remains for a period of more than six months, the SSD is not an appropriate measure. Further, the Explanatory Memorandum notes that the ‘mechanism is cumbersome in nature and not suited to a timely response in the interests of national security.’\(^5\) The current requirements under the Transport Security Program require each aircraft operator to manually amend its security documentation and for the Government to individually approve each amendment.\(^6\) The amendments in the Bill will therefore address two key concerns; the effectiveness of legislative arrangements by which the Minister can prohibit certain cargo and the timeliness of such arrangements. Note however that the Bill is not removing the ability for SSDs to be made and an SSD does not need to be in place before an instrument under proposed section 65B is made.

Financial implications

The Government considers that there will be no significant financial impact from the amendments in this Bill.\(^7\)

Statement of Compatibility with Human Rights

As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act.\(^8\)

The Bill creates a new strict liability offence, and therefore engages the right to the presumption of innocence under article 14(2) of the International Covenant on Civil and Political Rights. The Government believes that the ‘threat of improvised explosive devices concealed in air cargo is real and the consequence of such a plot succeeding would be catastrophic’.\(^9\) Further, ‘the need for the

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3. SARPs are Standards and Recommended Practices for Aviation Security established under the Convention on International Civil Aviation (the Chicago Convention).
8. The Statement of Compatibility with Human Rights can be found at page 2 of the Explanatory Memorandum to the Bill.
Government to reduce the risk of prohibited cargo from entering Australian territory warrants the creation of this strict liability offence. A strict liability offence in the heavily regulated environment of aviation security is not unusual or unreasonable and intends to deter non-compliance.

The Government considers that the Bill is compatible with human rights on the grounds that the new offence imposes reasonable, necessary and proportionate limitations on the presumption of innocence.

Key issues and provisions

The purpose of the Act is to establish a regulatory framework to safeguard against unlawful interference with aviation. To achieve this purpose, this Act establishes minimum security requirements for civil aviation in Australia by imposing obligations on persons engaged in civil aviation related activities. In particular, it obliges certain aviation industry participants to develop, and comply with, aviation security programs.

Currently, Part 4 of the Act outlines requirements on the following aviation transport security matters:

(a) screening and clearing (Division 2)

(aa) examining and clearing (Division 2A)

(b) weapons (Division 3)

(c) prohibited items (Division 4)

(d) on-board security (Division 5)

(e) persons in custody (Division 6)

(f) special security directions (Division 7)

(g) control directions (Division 8)

(h) security status checking (Division 9).

The amendments made by this Bill will insert another category, prohibiting the entry of specified kinds of cargo (Division 6A). It will not omit or replace any existing categories.

Schedule 1 of the Bill amends the Act to facilitate new arrangements to prohibit the entry of certain cargo into Australian territory. Item 1 will amend the simplified overview of Part 4 of the Act (in section 4) to specify that this Part ‘also allows the Minister to make a legislative instrument

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11. Explanatory Memorandum, p. 3.
12. See section 3 of the Act.
prohibiting the entry of specified kinds of cargo into Australian territory.’ Items 2 and 3 will amend the Definitions section of the Act to include definitions of Foreign Affairs Minister and Trade Minister respectively. These are required because proposed subsection 65B(3) requires the Transport Minister to consult with both Ministers before making an instrument under proposed section 65B.

Item 5 will insert proposed new Division 6A – Prohibiting entry of certain cargo into Australian territory, into Part 4 of the Act.

The simplified overview of the Division states that the Division will allow the Minister to make a legislative instrument prohibiting the entry of specified kinds of cargo into Australian territory and failing to comply with such an instrument is an offence (proposed section 65A).

Proposed section 65B allows the Minister to prohibit the entry of specified kinds of cargo. Proposed subsection 65B(2) defines that the instrument may relate to all or any of the following:

(a) some or all of a class of persons to whom this Act applies
(b) cargo originating from a particular country
(c) cargo transiting through a particular country
(d) cargo packaged in a particular way
(e) cargo that meets, or is more or less than, a specified weight
(f) cargo that comes within a specified weight range.

Unlike the existing SSDs, the instrument made under proposed section 65B will not lapse after a specific time period.

Proposed section 65C is a new offence provision that could apply to an aircraft operator or any other aviation industry participant. If the Minister has made an instrument under section 65B, and a person fails to comply with that instrument, then the penalty imposed is up to 200 penalty units (for an aircraft operator) or for any other aviation industry participant, 100 penalty units. This is a strict liability offence, meaning that it consists of only a physical element (the doing of, or failure to do, an act). The application of strict liability to an offence means that a fault element such as intention to do the act, or not do the act, is not required to be proved. This is to ensure that the legislation can be enforced more effectively, as proving a person’s intention to commit the offence in these

13. “Kinds” would have the same meaning as “class”. Subsection 13(3) of the Legislative Instruments Act 2004 provides that: If enabling legislation confers on a rule-maker the power to make a legislative instrument: (a) specifying, declaring or prescribing a matter; or (b) doing anything in relation to a matter; then, in exercising the power, the rule-maker may identify the matter by referring to a class or classes of matters.
14. It is curious what class of persons could fit into this cargo prohibition. There is no specific explanation of this subparagraph. It may be that it means a prohibition on the cargo carried by a particular class of persons but this is not explicit from the present drafting.
15. A penalty unit is defined under section 4AA of the Crimes Act 1914 as $170.
circumstances would be difficult. Further, the purpose of the offence provision is to encourage compliance with the regulatory regime, not to target and heavily penalise individual persons.

Other Provisions

Schedule 2 makes technical amendments to a 2011 amendment to paragraph 65(3)(b) of the Act. Currently, due to a drafting error, the paragraph specifies that an accredited air cargo agent may be subject to a penalty of 100 penalty units. The Bill will correct the error to insert into paragraph 65(3)(c) that an accredited air cargo agent may receive a penalty of up to 50 penalty units.

Concluding comments

This Bill will allow the Transport Minister to prohibit certain cargo from entering Australia by creating a more rigorous legislative arrangement than currently exists. There does not appear to be a specific catalyst for this Bill and the similar Special Security Directions are infrequently used. However, the Bill is on the whole clearly drafted and the offence provision for failing to comply seems appropriate and proportionate. The Bill also corrects a drafting error to paragraph 65(3)(b) of the Act.
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