THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

AVIATION LEGISLATION AMENDMENT
(2007 MEASURES NO.1) BILL 2007

EXPLANATORY MEMORANDUM
(Circulated by authority of the Minister for Transport and Regional Services,
The Honourable Mark Vaile, MP)
AVIATION LEGISLATION AMENDMENT (2007 MEASURES NO.1)
BILL 2007

OUTLINE

This Bill amends the *Aviation Transport Security Act 2004* and the *Civil Aviation Act 1988* to further strengthen aviation security and safety.

Schedule 1 to the Bill contains six groups of amendments. There are four sets of amendments to the Aviation Transport Security Act:

1. changes to Transport Security Programs which will more closely align aviation security legislation with maritime security legislation and give certain industry participants greater flexibility during the Transport Security Program process;

2. enhancements to aviation security by allowing broader and more effective coverage of potential acts of unlawful interference with aviation, including additional powers for certain Australian customs officers who operate at security controlled airports;

3. clarification of provisions that relate to the screening and clearing of dignitaries. This amendment will allow the Regulations to specifically describe those dignitaries who are exempt from aviation security screening; and

4. minor modifications to several existing provisions, and a new provision to cover interference with the operations of a security controlled airport by a person who is outside the boundary of the airport.

There are two sets of amendments to the Civil Aviation Act:

5. section 24 is amended so that a person who is outside an aircraft can commit the offence of interfering with aircrew, or endangering an aircraft or passengers; and

6. new Part IV creates a statutory framework that will permit the making of regulations for and in relation to the development, implementation and enforcement of drug and alcohol management plans, and of drug and alcohol testing, for persons who perform, or who are available to perform, safety-sensitive aviation activities.

FINANCIAL IMPACT STATEMENT

There is no significant financial impact for amendments to the Aviation Transport Security Act, so a Financial Impact Statement is not required for the Aviation Transport Security Act amendments.

The cost to government of the drug and alcohol testing amendments to the Civil Aviation Act is expected to be approximately $3 million per year. A Regulation Impact Statement was prepared for the amendment to the Civil Aviation Act to enable the Civil
Aviation Safety Authority (CASA) to oversight mandatory industry drug and alcohol management plans and testing.
Regulation Impact Statement

Mandatory drug and alcohol testing program (Civil Aviation Act)

1 Background and issues

1.1 Background to programme
On 2 May 2006 former Transport and Regional Services Minister, the Honourable Warren Truss MP, announced that the Australian Government will require the aviation sector to introduce mandatory drug and alcohol testing for safety sensitive personnel including flight crew, cabin crew (flight attendants), flight instructors, aircraft dispatchers, aircraft maintenance and repair personnel, aviation security personnel including screeners, air traffic controllers, baggage handlers, ground refuellers and other personnel with airside access, and contractors. The Media Release which contains the announcement is available on the Department of Transport and Regional Services (DOTARS) website.1 This decision was based on a joint report prepared by DOTARS and CASA into the safety benefits of introducing drug and alcohol testing for safety sensitive aviation personnel and which was published in January 2006 (Report). The Report is available on the DOTARS website.2

It is intended that CASA will have oversight of the drug and alcohol testing of safety sensitive personnel in the civil aviation industry and that the regime will consist of two components. The first component will be a drug and alcohol regime to be implemented by the civil aviation industry and those closely associated with its safety sensitive functions and which will include a requirement for industry participants to develop and implement a drug and alcohol programme (Industry Component). While industry participants may elect to randomly test their employees under this first component, it is not intended that such random testing be mandated by CASA. The second component will be a scaleable random testing regime of safety sensitive personnel associated with the civil aviation industry, including those not captured under the drug and alcohol programme conducted by industry (CASA Component). It is proposed that CASA will engage a contractor to undertake random testing on its behalf under this second component.

1.2 Proposed amendments to the Civil Aviation Act 1988
It is proposed that two provisions in the Civil Aviation Act 1988 (Act) be amended to ensure that CASA is empowered to give lawful effect to the drug and alcohol testing regime, especially where it extends to organisations and safety sensitive personnel over which CASA does not already have clear and direct regulatory authority. The first proposed amendment is to section 9 of the Act (which sets out CASA's functions) to specifically include developing, implementing and enforcing, as prescribed by regulations, programmes and standards for the drug and alcohol testing and management of persons performing functions that may affect the safety of civil aviation. The second proposed amendment is to section 98 of the Act (the regulation-making power) to include a power to make regulations for or in relation to the development,

implementation and enforcement of programmes and include standards for drug and alcohol testing. The regulation-making power will also specify, in a non-exhaustive list, the types of regulations that could be made under the Act.

1.3 Purpose of this regulation impact statement
The purpose of this Regulation Impact Statement (RIS) is to assess the costs and benefits of amending the Civil Aviation Act 1988 to allow the creation of regulations giving effect to the proposed drug and alcohol testing of safety sensitive personnel in the civil aviation industry.

1.4 Why Government action is needed
The legislative amendments are required to deliver enhanced safety outcomes to Australian civil aviation, to maintain Australia's international standing as a leader in aviation safety and to deliver the cost benefits to industry that derive from an effective drug and alcohol testing regime. The industry is generally supportive of drug and alcohol testing and Qantas announced on 11 May 2007 that it would subject its staff to drug and alcohol testing.3

While aviation safety in Australia is very good, there are still significant concerns in relation to flight accidents and serious incidents attributable to the use of drugs and alcohol by a small proportion of safety sensitive personnel. The DOTARS/CASA report suggests that the economic cost of drug and alcohol abuse in Australia is around $10 billion annually. An Australian Transport Safety Bureau (ATSB) pilot safety survey on the use of drugs and alcohol showed that that 22.5% of the 1196 pilots who responded indicated that at some point in the previous 12 months they felt that safety had been compromised in some way by alcohol, drugs or prescribed medication. In September 2002, alcohol and drugs were thought to have played a part in a crash that occurred on Hamilton Island in which all six people on board were killed.

Although some airlines have in place limited drug and alcohol testing programmes within their organisation, most safety sensitive personnel in the industry are not part of any drug and alcohol testing programme. Programmes managed by government agencies in the US, UK and the Netherlands have demonstrated the benefits of drug and alcohol testing. These include measuring, managing, preventing and supporting recovery from the use of these substances. Efforts are underway by some member nations of the International Civil Aviation Organization (ICAO) to harmonise drug and alcohol programmes in aviation. The introduction of a drug and alcohol testing regime for the Australian civil aviation industry will improve safety outcomes here.

The benefits accruing from the introduction of a government mandated programme are presented in a cost benefit analysis titled "Drug and Alcohol Testing for the Aviation Sector".4 The cost benefit analysis draws attention to the significant monetary benefits that could be gained from the implementation of a drug and alcohol testing programme for safety sensitive personnel in the air transport industry.

3 The Australian, Friday May 11, 2007
4 http://rrp.casa.gov.au/project/ss0601_report-TACG_cba_0605.pdf The report was prepared by The Allen Consulting Group
The cost benefit analysis found that the economic benefits of implementing a drug and alcohol testing regime are 3.12 to 4.55 times the costs to industry depending on the kind of regime introduced.

To give full effect to the Ministerial announcement on drug and alcohol testing, CASA will need to have oversight of a drug and alcohol testing regime that will cover all safety sensitive personnel associated with the air transport industry. The regime would consist of two components.

The industry component would apply to all organisations employing safety sensitive personnel in the aviation industry and would require those operators to develop drug and alcohol programmes for all their personnel involved in safety sensitive roles. The industry programmes will focus on detection, education and rehabilitation, but not regulatory sanction of employees. While industry participants may elect to randomly test their employees under this component, it is not intended that such random testing be mandated by CASA. CASA will perform audit and compliance activities in relation to industry based drug and alcohol programmes, consistent with its current safety oversight of the aviation industry.

The second component (CASA component) will be a scaleable random testing regime of all safety sensitive personnel associated with the civil aviation industry, including those not captured under organisation drug and alcohol programmes developed and implemented by industry. It is proposed that CASA will engage a contractor to undertake random testing on its behalf under this component.

To provide a sound legal basis for the development of a drug and alcohol testing regime for the aviation industry two key amendments need to be made to the Civil Aviation Act 1988. These amendments are described in section 3.3 of this Regulation Impact Statement.

### 1.5 Regulation impact statement for regulations

Following the amendments to the Act which are intended to allow the creation of regulations giving effect to the proposed drug and alcohol testing regime, it is intended that a further RIS be prepared for the relevant regulations. It is envisaged that the regulations may include provisions in relation to the following matters, amongst others:

a) the classes of persons who must have, maintain and implement a drug and alcohol testing programme for their employees or other persons under their direct or indirect control or direction, such as contractors, sub-contractors, agents, etc;

b) the required content of a drug and alcohol testing programme, including the types of testing (eg pre-employment, upon reasonable suspicion of drug or alcohol use), requirements for drug and alcohol education of all persons covered by the plan and for the management, treatment, counselling and rehabilitation of persons found to have breached a permissible level of use of a drug or alcohol substance;

c) a regime for the approval of drug and alcohol testing programmes by CASA;
d) the potential consequences for persons who refuse to subject themselves to drug and alcohol testing when requested by their employer in the Industry Component;
e) the substances for the presence of which drug and alcohol testing is to be conducted and the permissible levels (if any) of such substances;

f) the methods by which testing is to be conducted, eg urine tests, saliva tests;

g) the persons by whom and the places at which such testing may be conducted, the qualification such persons or the accreditation that such places must possess, and the equipment that must be used;

h) the period for which a person is not permitted to undertake aviation related duties following positive drug or alcohol testing and other possible consequences including a requirement for the person’s removal (with such force as may be reasonably necessary) from specified aviation related premises and conditions to be satisfied before a person may resume aviation related duties;

i) the decisions which may be reviewable by the Administrative Appeals Tribunal;

j) the management of the records (including records of drug and alcohol testing, test results, programme implementation and programme administration) that must be maintained by a person required to have a drug and alcohol testing programme or by a CASA contractor;

k) the audit, by CASA, of compliance by industry members, with the regulations and with applicable drug and alcohol testing programmes;

l) the contracting out by CASA of its compliance audit and random testing functions;

m) the prescription of fees payable to CASA in relation to functions performed by it, or by a contractor on its behalf; and

n) the creation of offences in relation to the regime, including for persons who refuse to subject themselves to drug and alcohol testing when requested as part of the CASA Component, persons who test positive for drugs or alcohol following testing undertaken as part of the CASA Component and for entities who fail to implement a drug and alcohol testing programme if required to do so under the Industry Component.
1.6 Issues
The safety issues relating to drug and alcohol testing in the civil aviation industry are canvassed in detail in the Report. The Report reviews, amongst other issues, the following key matters:

- some high profile examples of flight accidents/incidents around the world in which the use of drugs or alcohol may have played a part, including the crash that occurred on Hamilton Island in September 2002 that killed all six people on board;
- the existing drug and alcohol programmes in civil aviation industries in other countries, eg the United States (through its Federal Aviation Authority), United Kingdom and the Netherlands;
- statistics on the economic costs of drug and alcohol abuse in various countries, including Australia (which was reported to be approximately $10 billion per annum in Australia in a 1991 paper\(^5\));
- efforts by some member nations of the International Civil Aviation Organization (ICAO) to harmonise drug and alcohol prevention and testing programmes in the aviation sector;
- the existing provisions in Part 67 of the Civil Aviation Safety Regulations 1998 (that prohibit problematic use of substances by applicants for medical certificates) and regulation 256 of the Civil Aviation Regulations 1988 (that proscribes the use of drugs and alcohol by aircraft crew and air traffic controllers while on duty and for eight hours before duty) in relation to which the Report also notes the absence of regulatory mechanisms to monitor such problematic use and the lack of a legislative basis for CASA to test aviation personnel in its capacity as the safety regulator;
- statistics on the use of drugs and alcohol by pilots in Australia, i.e. the June 2005 ATSB pilot safety survey showed that 22.5% of the 1196 pilots who responded indicated that at some point in the previous 12 months they felt that safety had been affected in some way by alcohol, drugs or prescribed medication;
- the dangers of impairment resulting from drug and alcohol use;
- the benefits of drug and alcohol testing, eg to measure, manage, prevent and recover from the use of these substances; and
- the types of drug and alcohol testing that may occur in a programme, i.e. pre-employment, for reasonable cause, post incident or accident, periodic, post treatment or follow up and random, and the greater benefits of some types of testing over others.

The introduction of a drug and alcohol testing regime in the civil aviation industry will not only improve safety but will also allow CASA to more effectively monitor trends in relation to drug and alcohol use in the industry.

The full cost benefit analysis conducted by The Allen Consulting Group and titled "Drug and Alcohol Testing for the Aviation Sector" (August 2006) (Allen Cost benefit analysis) is available on the CASA website.6

2. Objectives
The main objectives of creating a drug and alcohol testing regime for safety sensitive personnel in the Australian civil aviation industry are as follows:

   a) Safety - to ensure the safety of people in the civil aviation industry, including passengers (the safety benefits are examined in detail in the Report).

   b) Workplace benefits - to obtain the commercial/economic benefits which will likely flow from the implementation of such a regime (the workplace benefits are examined in detail in the Allen cost benefit analysis).

   c) Consistency with civil aviation industries around the world and with other industries in Australia (eg mass transports systems such as the road transport and state railway industries, and other industries where safety is regarded as being paramount such as the maritime and mining industries) in which drug and alcohol testing regimes have already been implemented.

   The introduction of a drug and alcohol testing regime in the Australian civil aviation industry will bring this industry in line with other civil aviation industries around the world and with other safety sensitive industries in Australia.

   d) Community expectation - significantly, the public expectation in relation to civil aviation is that drug and alcohol testing forms a component of the safety regime of the industry, just as it does in other mass transport industries.

3. Options
There are a number of options for introducing a drug and alcohol testing regime for safety sensitive personnel in the civil aviation industry. These options are discussed below. As will be evident, the regulatory option is the most effective method of introducing, implementing, and enforcing a drug and alcohol testing regime in the civil aviation industry.

3.1 Self-regulation
The civil aviation industry is already engaged in "self-regulation" in relation to the implementation of drug and alcohol testing programmes. While a few larger airlines have in place some limited drug and alcohol testing programmes within their organisations, most safety sensitive personnel (which includes cabin crew, aircraft

dispatchers, aircraft maintenance and repair personnel, aviation security personnel including screeners, air traffic controllers, baggage handlers, ground re-fuellers and
other personnel with airside access) in the civil aviation industry are not part of any comprehensive drug and alcohol testing programme within the industry.

While industry is generally supportive of drug and alcohol testing, self-regulation will not ensure that the objectives outlined above are met. In particular, self-regulation of this problem will not achieve a satisfactory level of consistency either within the civil aviation industry itself or with other safety sensitive industries in which mandatory drug and alcohol regimes are the norm. A self-regulation option is not viable given the significant public interest in ensuring the safety and security of the civil aviation industry and the fact that a drug or alcohol related event in the civil aviation industry would have a significant impact on the community.

3.2 Quasi-regulation

In the absence of provisions in the Act and regulations which empower CASA to create, implement and enforce a drug and alcohol testing regime in the civil aviation industry, the following are some realistic options to deal with the issues identified above in relation to drug and alcohol use in the civil aviation industry:

- educate participants in the civil aviation industry about the adverse effects of drug and alcohol abuse;
- encourage commercial participants to create and implement internal drug and alcohol testing programmes; and/or
- develop an unenforceable code of conduct/programme relating to the use of drugs and alcohol which safety sensitive personnel in the civil aviation industry should abide by.

These options do suffer from a number of deficiencies.

First, CASA would not be able to enforce commercial participants’ compliance with their own internal drug and alcohol testing programmes nor impose sanctions on individuals who refuse to submit to a drug or alcohol test, thereby diminishing the deterrent effect which a drug and alcohol testing programme could otherwise have. There would also be a lack of consistency in the implementation of drug and alcohol programmes within the industry in that participants may effectively do as they wish (eg. impose different standards against which drug and alcohol testing is conducted) in the absence of any regulatory oversight by CASA.

Second, it is unlikely that all safety sensitive personnel in civil aviation will voluntarily comply with any code of conduct/programme in the absence of sanctions for non-compliance, particularly those organisations and safety sensitive personnel over which CASA does not already have clear and direct regulatory authority.

Third, in the absence of regulation, CASA would not be able to implement the CASA Component to randomly test any safety sensitive personnel associated with the civil aviation industry, therefore significantly reducing the flight safety benefits that could otherwise be gained from such mandatory random testing undertaken by a regulator.
For example, the CASA Component of the drug and alcohol testing regime which CASA intends to implement will not only test those safety sensitive personnel employed under industry programmes, but will also involve persons in the “general aviation” sector, which include private pilots and the self employed. The Allen Cost benefit analysis assessed the flight safety benefits (i.e. reduced risk of aviation accidents) that would arise from the random testing of safety sensitive personnel in only the commercial aviation sector7 (which is the sector of the industry that is most likely to implement some kind of testing on its own) and compared those benefits to the flight safety benefits that would flow from random testing of safety sensitive personnel in both the commercial aviation and general aviation sectors.8 The Analysis found that the flight safety benefits (as a proportion of the total benefits) rose from 2% to 26%, i.e. random testing of safety sensitive personnel in both the commercial aviation and general aviation sectors has significantly greater flight safety benefits than random testing of only those in the commercial aviation sector. This is because there is a much higher likelihood of a serious or fatal accident in the general aviation sector compared to the commercial aviation sector. The CASA Component will allow CASA to randomly test safety sensitive personnel in the general aviation sector and thereby increase the flight safety benefits that a drug and alcohol testing regime could have.

Fourth, given the potentially devastating effects of accidents resulting from drug and alcohol use in the civil aviation industry, i.e. the injury or death of multiple persons or potentially, a large number of people, from a single event, there is a strong public interest in ensuring that drug and alcohol testing is undertaken in a comprehensive and consistent manner throughout the industry.

In summary, the quasi-regulation option would have limited effectiveness in achieving the desired objectives as stated above. There would be a lack of enforcement provisions to secure participants’ compliance with any drug and alcohol testing regime, a lack of consistency in the implementation of such programmes between commercial participants in the industry and the complete absence of any random testing regime to be conducted by or on behalf of CASA.

3.3 Regulatory option
The regulatory option would involve amendments to the Civil Aviation Act, Civil Aviation Safety Regulations 1998 and the Civil Aviation Regulations 1988 to specifically empower CASA to develop, implement and enforce a drug and alcohol testing regime in the civil aviation industry.

The proposed amendments to section 9 (which sets out CASA’s functions) and section 98 (the regulation-making power) of the Act are required to ensure that CASA is empowered to give lawful effect to the regime, especially where it extends to organisations and safety sensitive personnel over which CASA does not already have clear and direct regulatory authority. These amendments would also provide the basis for the development of regulations and other subordinate legislation necessary to

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7 The Allen Cost benefit analysis defines “commercial aviation” as comprising all passenger operations, security controlled aerodromes, government employees, the air navigation service provider and maintenance organisations.
8 The Allen Cost benefit analysis defines “general aviation” as comprising flying training, business/private, aerial work, aerial agriculture and sport operations and other small aviation businesses.
implement the regime. Some of the matters which the regulations are intended to deal with are set out at paragraph 1.5 above and it is envisaged that there will be regulations which deal with enforcement of the regime by CASA to promote compliance. The analysis in Section 4 is focused on the possible impact of this regulatory option.

Importantly, the regulatory option will:

- ensure that CASA is empowered to have regulatory oversight of the programme and can enforce non-compliance with the programme;
- ensure that CASA is empowered to implement the CASA Component of the regime so that it can randomly test safety sensitive personnel in both the commercial aviation and general aviation sectors;
- ensure that there is consistency in the implementation of internal drug and alcohol testing programmes between commercial participants, eg. the same minimum standards will be used for testing, and collecting and handling information, and every relevant entity in the industry will actually implement a programme;
- ensure consistency with other civil aviation industries around the world and with other mass transport and safety sensitive industries in Australia; and
- enable the options discussed in the Allen Cost benefit analysis to be implemented and thereby reap the benefits described in that Analysis, which include flight safety benefits (i.e. a reduction in the proportion of aircraft accidents attributable to use of drugs and/or alcohol and hence a reduction in the number of deaths and injuries to pilots and passengers), industrial benefits (i.e. reduced workplace injuries, reduced absenteeism, improved productivity and improved workplace outcomes), road safety benefits and health benefits.

As noted by the Report, under the heading, "A Way Forward":

"The introduction by regulation of a minimum standard for drug and alcohol testing, for safety-sensitive roles in the aviation sector, to be managed as appropriate by industry and law enforcement agencies and reported on to the regulator is the key step." \(^9\)

In terms of addressing the problem identified, it appears that a regulatory option is clearly the most meritorious.

4. Impact analysis of regulatory option

If the regulatory option is chosen, then it will be possible for CASA to have oversight of, develop, implement and enforce a drug and alcohol testing regime for safety sensitive personnel in the Australian civil aviation industry.

As part of the preparation for the proposed regulatory change, the Allen Consulting Group was engaged by CASA, in late 2006, to prepare a cost benefit analysis of the Minister's policy announcement, along with a range of potential alternative approaches.

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\(^9\) Page 18 of the Report.
in relation to the implementation of the Minister's announcement in order to assess the impact of going down the regulatory path. That Analysis has now been completed ("Allen Cost benefit analysis") and finds, very clearly, that implementing a drug and alcohol testing regime of the sort assessed would have net benefits for the Australian community. A drug and alcohol testing regime for the civil aviation industry which is similar to the options assessed in the Allen Cost benefit analysis would only be able to be implemented if a regulatory option is selected. The Allen Cost benefit analysis itself notes that the Report suggests that testing would be best administered with CASA regulatory oversight.\(^\text{10}\)

Set out below is an overview of the Allen Cost benefit analysis, the options it considers and the costs and benefits that it identifies.

### 4.1 Overview of the Allen Cost benefit analysis

The Allen Cost benefit analysis assesses eight possible options for the implementation of a drug and alcohol testing regime for safety sensitive personnel in the Australian civil aviation industry.

The various options have been developed by working out the different ways in which a number of key variables could be combined to create a drug and alcohol testing regime. The key variables are:

- **a)** the percentage of employees to be tested (5% or 10%);
- **b)** the sectors of the industry in which testing would be conducted (commercial aviation sector\(^\text{11}\) and/or the general aviation sector\(^\text{12}\));
- **c)** whether an independent testing provider would be used during the testing process to achieve cost savings.

A description of the eight options and each of their net present value benefit to the community and benefit cost ratio is set out below. While none of the options assessed reflects precisely the approach that is proposed to be taken, Option 3 reflects, reasonably closely, the kind of model that is likely to be implemented by CASA. This is also the model which has the highest benefit cost ratio when compared to the other identified options. Option 3 provides for the commercial aviation industry to implement a drug and alcohol programme and for random testing to be conducted across both the commercial and general aviation sectors.

### 4.2 Options identified in the Allen Cost benefit analysis

**a)** **Option 1 (commercial aviation sector only - industry bears cost - 5%)**

The main elements of Option 1 are as follows:

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\(^{10}\) Page 1 of the Allen Cost benefit analysis.

\(^{11}\) The Allen Cost benefit analysis defines “commercial aviation” as comprising all passenger operations, security controlled aerodromes, government employees, the air navigation service provider and maintenance organisations.

\(^{12}\) The Allen Cost benefit analysis defines “general aviation” as comprising flying training, business/private, aerial work, aerial agriculture and sport operations and other small aviation businesses.
i) only the commercial aviation sector will be required to implement internal drug and alcohol programmes for safety sensitive personnel;
ii) the commercial aviation sector will be responsible for all aspects associated with the introduction of such internal programmes, including random and other forms of testing;

iii) the commercial aviation sector must conduct testing on 5% of safety sensitive personnel; and

iv) the general aviation sector would not be required to have drug and alcohol programmes for safety sensitive personnel and would not be randomly tested.

Under Option 1, the net present value benefit to the community is $122,316,537 and the benefit cost ratio is 3.12.

a) **Option 2 (commercial aviation sector only - industry bears cost - 10%)**

This option is identical to Option 1, except that the commercial aviation sector must conduct testing on 10% of safety sensitive personnel.

Under Option 2, the net present value benefit to the community is $158,172,670 and the benefit cost ratio is 3.16.

b) **Option 3 (commercial and general aviation sectors - independent testing provider bears cost - 5%)**

The main elements of Option 3 are as follows:

v) only the commercial aviation sector will be required to implement internal drug and alcohol programmes for safety sensitive personnel;

vi) the commercial aviation sector will be responsible for all aspects associated with the introduction of such internal programmes, including random and other forms of testing; and

vii) an independent testing provider will undertake and coordinate random testing of 5% of safety sensitive personnel in both the commercial aviation sector and general aviation sector.

Under Option 3, the net present value benefit to the community is $219,867,598 and the benefit cost ratio is 4.55.

a) **Option 4 (commercial and general aviation sectors - independent testing provider bears cost - 10%)**

This option is identical to Option 3, except that the independent testing provider will undertake and coordinate random testing on 10% of safety sensitive personnel.

Under Option 4, the net present value benefit to the community is $280,201,438 and the benefit cost ratio is 4.41.
b) **Option 5 (commercial and general aviation sectors - industry bears cost - 5%)**

The main elements of Option 5 are as follows:

viii) only the commercial aviation sector will be required to implement internal drug and alcohol programmes for safety sensitive personnel;

ix) the commercial aviation sector will be responsible for all aspects associated with the introduction of such internal programmes, including random and other forms of testing; and

x) the commercial aviation sector and general aviation sector will undertake random testing of 5% of safety sensitive personnel and will be responsible for meeting the costs of such random testing.

Under Option 5, the net present value benefit to the community is $218,053,153 and the benefit cost ratio is 4.42.

a) **Option 6 (commercial and general aviation sectors - industry bears cost - 10%)**

This option is identical to Option 5, except that the commercial aviation sector and general aviation sector will undertake random testing of 10% of safety sensitive personnel.

Under Option 6, the net present value benefit to the community is $276,996,159 and the benefit cost ratio is 4.24.

b) **Option 7 (commercial aviation sector only - independent testing provider bears cost - 5%)**

This option is identical to Option 1, except that the independent testing provider will coordinate and undertake random testing.

Under Option 7, the net present value benefit to the community is $123,933,965 and the benefit cost ratio of 3.21.

c) **Option 8 (commercial aviation sector only - independent testing provider bears cost - 10%)**

This option is identical to Option 2, except that the independent testing provider will coordinate and undertake random testing.

Under Option 8, the net present value benefit to the community is $161,377,949 and the benefit cost ratio is 3.31.
4.3 Comments on costs
The Allen Cost benefit analysis considered that a drug and alcohol testing programme for safety sensitive personnel in the civil aviation industry would have costs for government, industry and affected individuals.

a) Costs to Government to administer the regime will include:
   
i) $1,000,000 to develop the relevant legislation and education/training products including a generic drug and alcohol programme (acceptable means of compliance) which can be easily adopted by small businesses (assumed to be incurred in the first year of the analysis);

   ii) $200,000 for a database to collect and analyse test result data (assumed to be incurred in the second year of the analysis);

   iii) $480,000 for approving employer drug and alcohol programmes (assumed to be incurred in the second year of the analysis); and

   iv) $450,000 in staff costs for drug and alcohol programme auditing and compliance monitoring (assumed to grow at the wage growth rate for the duration of the analysis).

a) Costs to industry will include costs relating to:
   
v) Developing a drug and alcohol programme: while CASA will prepare a generic drug and alcohol programme as an acceptable means of compliance, it is expected that larger aviation employers will need to tailor or develop their own programme to their business circumstances. These costs are expected to be $100,000 for very large employers, $75,000 for large employers and $100 for small employers (as such employers are likely to simply adopt the CASA model programme).

   vi) Education: it is estimated that it will take one hour per employee to brief all relevant employees about the introduction of the drug and alcohol programme to the organisation.

   vii) Drug and alcohol testing: these costs will vary depending on the type of testing conducted by the employer, whether initial screen tests return position results and who bears the cost of testing. It is estimated that testing will cost approximately $130 per person, which includes the cost of professional counselling and the cost for the medical review officer’s time but excludes the cost of employees' time off work if they test positive. It also assumes delivery of testing to a geographically dispersed workforce, including those located at aerodromes.

   viii) Industry test coordination: it is estimated that the businesses in the commercial aviation sector will incur coordination costs (in terms of managing staff who are being tested, managing staff who have tested positive, and managing pre-employment and reasonable suspicion testing) of
$8 per employee for 5% random testing and $14 per employee for 10% random testing.
ix) Reporting: it is expected that the cost of the commercial aviation sector for reporting back to CASA the numbers and results of all tests and on follow-up activities for those employees who test positive will be four hours of an employee’s time per year per business.

x) Backfilling: while passenger aircraft are not expected to be delayed by this policy, all businesses, including small businesses, will incur the cost of backfilling for those people that test positive. This cost is estimated to be 140% of the average salary for one day (which includes 100% of the person's average earnings in the transport sector plus 20% for labour on-costs, plus 20% for lost ‘gross’ profit that the individual would have contributed to the business).

a) Personal costs for those tested: there may be personal costs to individuals who are tested in terms of an impact on that person's privacy and civil liberties but these costs cannot be quantified. As the Allen Cost benefit analysis notes, nowadays there is little sustained civil liberties objection to roadside random breath testing. Therefore the cost to a person's privacy and civil liberties is unlikely to be significant and is justifiable in the circumstances.

4.4 Comments on benefits

a) The Allen Cost benefit analysis identified four main groups of benefits associated with the implementation of a drug and alcohol testing regime.

i) Flight safety benefits — a reduction in the proportion of aircraft accidents attributable to use of drugs and/or alcohol and hence a reduction in the number of deaths and injuries to pilots and passengers and associated damage to property. The implementation of a regime for the drug and alcohol testing of people who perform safety sensitive functions in the civil aviation industry is critical for the ongoing security and safety of civil aviation in Australia. There are potentially devastating and widespread ramifications for members of the public (and indeed, anyone who flies on civil aircraft) resulting from persons performing safety sensitive roles who work under the influence of drugs or alcohol and the implementation of a preventative programme can help to reduce the risk of deaths and injuries.

ii) Industrial benefits, including:

A. reduced workplace injuries, assuming that the average cost of a workplace injury is $30,000;

B. reduced absenteeism, assuming that 4% of the workforce are absent for four days per year due to alcohol and drug consumption and 70% of those absent would not be absent if random testing was conducted at 5% of the workforce every year and all of those that would have been absent would no longer be absent if 10% are randomly tested;
C. improved productivity for employees who would otherwise have attended work in a state in which they were alcohol or drug affected, assuming that 7% of the workforce attend work at least once per year while under the influence of alcohol and those that attend work under the influence are 25% less productive than they would otherwise be if they were not drug or alcohol affected; and

D. improved workplace outcomes (mainly in reduced staff turnover) due to screening out safety sensitive personnel who test positive in pre–employment testing, assuming that 15% of people who would have tested positive to a pre-employment drug and alcohol test would be terminated in their first year, another 7% would be terminated in their second year, another 2% in their third year, and another 1% in their fourth year and the cost of staff turnover is expected to be 90% of the annual salary for aviation and space services.

iii) Road safety benefits — a reduction in the number of alcohol related road injuries as a result of fewer safety sensitive personnel driving to and from work (or, to a lesser extent, on weekends or time off) who are affected by drugs or alcohol.

iv) Health benefits — a reduction in health costs to safety sensitive personnel and the community more broadly due to reduced risky alcohol and drug consumption.

a) The Allen Cost benefit analysis made the following specific comments about the benefits of having a drug and alcohol testing regime:

v) in relation to all of the eight options, they are likely to result in a net benefit to the community, with benefit cost ratios ranging from 3.12 through to 4.55;

vi) in relation to Options 1 and 2, the majority of the benefits (70%) flow from workplace benefits (including reduced indirect costs of worker’s compensation, turnover and absenteeism and improved productivity). The total safety benefits comprise 24% of the benefits, including 22% from improved road safety and 2% of the benefits from a reduced risk of aviation accidents;

vii) in relation to Options 3, 4, 5 and 6, which include random testing of safety sensitive personnel in the general aviation sector, the flight safety benefits arising from the reduced risk of aviation accidents increases to 26% of the total benefits due to the much higher likelihood of a serious or fatal accident in the general aviation sector. In addition, the total safety benefits of this option (including aviation and road safety) comprise 45% of the benefits. That is, the net present value of flight safety benefits would be around $70 million (for 5% random testing of safety sensitive personnel) and $90 million (for 10% random testing). It is said that these benefits above would be sufficient to justify the introduction of the drug and alcohol testing regime;
viii) randomly testing 10% of safety sensitive personnel results in a higher net benefit than testing 5% of safety sensitive personnel since it is expected to have a higher deterrent effect; and

ix) the choice of the delivery option, i.e. who is responsible for the costs of conducting testing, makes little difference to the cost benefit results.

4.5 General comments
There are various means by which to implement a drug and alcohol testing regime for safety sensitive personnel in the Australian civil aviation industry, eight of which have been discussed in some detail in the Allen Cost benefit analysis and in the summary of that Analysis above. Importantly, the Allen Cost benefit analysis reveals that the implementation of a drug and alcohol testing regime in the civil aviation industry will result in a significant net benefit to the Australian community, including aviation and road safety benefits and workplace benefits.

It is most likely that CASA will implement a model which closely reflects Option 3 of the Allen Cost benefit analysis, i.e. the commercial aviation sector will be required to implement internal drug and alcohol programmes for safety sensitive personnel at its own cost and CASA will engage an independent testing provider to undertake and coordinate random testing of safety sensitive personnel across the whole civil aviation industry. The net present value benefit to the community of Option 3 is estimated at $219,867,598 and the financial benefits of implementing this option are 4.55 times the costs associated with implementing the option.

5. Consultation statement
In the Media Release by the Minister for Transport and Regional Services, the Minister stated:

“I encourage the aviation industry to make full use of the consultative processes in place to ensure that the most appropriate form of regulation, in an Australian context is achieved.”

CASA is committed to working cooperatively with the aviation community to maintain and enhance aviation safety. This is especially important as far as the development of standards and regulatory material is concerned. As foreshadowed in CASA’s 1999 Corporate Plan, the Standards Consultative Committee (SCC) is the regulatory standards and services industry consultative body that has been formed to meet this corporate objective.

The SCC brings together CASA staff and representatives from a diverse range of aviation community organisations to work jointly during the development phase of regulatory material. The SCC examines proposed regulatory changes to determine if they are worth pursuing and assists CASA in the allocation of priorities to those projects.
Aviation community experts then work together with CASA staff in subordinate groups (SCC subcommittees, project teams and working groups) on the detailed development of regulatory material (both new regulations and amendments).

The SCC has been briefed on progress of the drug and alcohol initiative at its last three meetings held in August 2006, November 2006 and March 2007.

A discussion group of Government and Industry participants to discuss issues around Drug and Alcohol testing in the aviation industry was established as a prelude to the normal Standard Consultative Committee (SCC) process. The group met on three occasions on 1 June 2006, 4 July 2006 and 8 August 2006. The group was made up of representatives from airports, airlines, charter operators, flying training organisations, and Airservices Australia.

Based on consultation to date (including 34 education and feedback sessions with industry, a targeted survey of larger industry participants, a website and email address for industry feedback) there is broad acceptance of the proposal from both industry and unions.

A project team has recently been established with direct linkages to the SCC. To ensure that the project team is inclusive and to ensure that all relevant issues are identified and duly considered, it is staffed with subject matter experts who are broadly representative of those who will be affected by project outcomes. to assist with the development of regulatory material and consider issues such as the definition of "safety sensitive personnel". The project team will meet regularly to undertake ongoing consultation in relation to the most effective means by which to implement a regulatory structure for drug and alcohol testing in the civil aviation industry.

6. **Recommended option**

As set out in Section 3.3 above, the regulatory option is the most effective method of introducing, implementing, and enforcing a drug and alcohol testing regime for safety sensitive personnel in the civil aviation industry. The regulatory option will ensure that CASA is empowered to have regulatory oversight of the regime and can enforce non-compliance with the regime, and that CASA can implement the CASA Component of the regime so as to conduct random testing in relation to people undertaking safety sensitive functions associated with the civil aviation industry. It will also ensure that there is consistency in the implementation of internal drug and alcohol testing programmes between commercial participants and will bring drug and alcohol testing in the Australian civil aviation industry into line with other civil aviation industries around the world and with other safety sensitive industries in Australia.

The regulatory option will enable the options discussed in the Allen Cost benefit analysis to be implemented and thereby reap the benefits described in that Analysis, which include flight safety benefits, industrial benefits, road safety benefits and health benefits. It is likely that a model which closely reflects Option 3 of the Allen Cost benefit analysis will be implemented with the support of regulations. It can be expected that the benefits of implementing the regime will be approximately 4.5 times the costs of implementing the regime.
Accordingly, it is recommended that the *Civil Aviation Act 1988* be amended to empower CASA to introduce, implement and enforce a drug and alcohol testing regime for safety sensitive personnel in the civil aviation industry.

7. **Strategy to implement and review the preferred option**

It is envisaged that a drug and alcohol testing regime for safety sensitive personnel in the Australian civil aviation industry be expressly provided for in section 9 (which deals with CASA's functions) and section 98 (which deals with CASA's regulation-making power) of the *Civil Aviation Act 1988* and supplemented by regulations which will set out the details/mechanisms for the development, implementation and enforcement of the preferred option following continued consultation with the Australian community.

Following Royal Assent to the amendments to the Act, regulations will be prepared requiring industry programmes to be developed and implemented without delay. Even before regulatory obligations are introduced requiring that drug and alcohol programmes be implemented employers may develop their internal drug and alcohol testing programmes and some industry programmes may begin ahead of the legislative obligation for the same. CASA’s oversight of those programmes and the CASA managed independent random testing may commence as soon as the regulations are made.

In accordance with the process adopted for other aviation safety regulations, the drug and alcohol testing regime will be subjected to a post implementation review two years after implementation.

NOTES ON CLAUSES

Clause 1: Short Title

The short title is the *Aviation Legislation Amendment (2007 Measures No. 1) Act 2007*.

Clause 2: Commencement

All provisions of the Bill will come into force on the day after the Bill receives the Royal Assent.

Clause 3: Schedule(s)

Each Act that is specified in the Schedule to the Bill is amended or repealed as set out in the applicable items in the Schedule, and any other item in the Schedule will have effect according to its terms.

SCHEDULE 1 – AMENDMENTS

Schedule 1 amends the *Aviation Transport Security Act 2004* and the *Civil Aviation Act 1988* to enhance Australia’s robust but flexible legal framework for regulating and maintaining the security and safety of the aviation industry.

*Aviation Transport Security Act 2004*

Overview of amendments to the Aviation Transport Security Act

Transport security programs
Many aviation industry participants are required to have a Transport Security Program (TSP) that plays a vital role in the way that they manage their aviation security obligations. The amendments in items 6-12 have been designed after consultation with industry and have a number of effects. An aviation industry participant will be able to ask for its TSP to be cancelled, for example, if a particular aircraft operator no longer intends to operate a regular public transport service, or no longer intends to operate a particular airport then that party should be able to have their TSP cancelled. The process by which TSPs are processed is also enhanced by varying deadlines when further information is needed.

Enhanced aviation security powers for Australian customs officers
Certain officers of the Australian Customs Service (ACS) (‘eligible customs officers’) who operate at security controlled airports are given more effective coverage with respect to potential acts of unlawful interference with aviation. These amendments give effect to a recommendation made by Sir John Wheeler in his report “An Independent Review of Airport Security and Policing for the Government of Australia”, and will complement the work of airport police by allowing customs officers to provide an initial immediate response to potential acts of unlawful interference with aviation.
Eligible customs officers will only exercise these powers when a law enforcement officer is not immediately available and when prompt action is required to prevent a security event from developing or continuing, or when intervention is necessary to detain persons believed to have been involved in a security event. The intention is that if an eligible customs officer takes action under these powers to deal with persons or vehicles, the eligible customs officer will only do so pending the arrival of a law enforcement officer who will determine what further action is required. Customs officers have no power to question a person who is stopped in the exercise of these powers.

**Screening and clearing of dignitaries**
Provisions that relate to the screening and clearing of dignitaries are clarified. New section 131 will allow the Regulations to specify dignitaries who are exempt from screening.

**Other Aviation Transport Security Act amendments**
Subsection 7(2) is amended so that Crown immunity does not apply to the operator of a security controlled airport.

The definition of “unlawful interference with aviation” in section 10 is amended to conform with amendments to Annex 17 to the Convention on International Civil Aviation (the Chicago Convention).

New section 38B permits the Regulations to prescribe offences by persons with respect to activities that cause disruption of, or interference to, aviation or airport operations within the airport. This extends the coverage of the Act to disruptive actions that take place outside the boundaries of a security controlled airport.

Paragraph 62(1)(aa) is inserted so that the Regulations may prescribe security features on board an aircraft.

**Item 1 – Section 7 – Act to bind the Crown**

Item 1 replaces the existing subsection 7(2) (which deals with Crown immunity from prosecution for a breach of the Act) to ensure that a state or territory agency that operates a security controlled airport is subject to the Act in the same way as any other airport operator.

**Item 2 – Section 9 - Definitions**

Item 2 inserts a new definition of the term ‘eligible customs officer’. The full definition is found in new subsection 89B(1).

**Items 3, 4 and 5 – Section 10 - meaning of unlawful interference with aviation**

Items 3, 4 and 5 amend the definition of unlawful interference with aviation in section 10 of the Act. This definition plays an important role in the operation of the Act, and in particular forms the basis of the definition of aviation security incident (defined in
section 99). In addition, the definitions also identify those aviation security incidents that must be reported to the Department.

The definition of *unlawful interference with aviation* is also used in provisions such as section 67 (the Secretary may give a special security direction) and as a limit in various regulation-making powers including sections 35, 36, 36A, 37, 38 and 38A (control of the various types of airport areas and zones), section 44 (screening and clearing requirements), section 52 (requirements with respect to weapons) and section 60 (requirements with respect to prohibited items).

Item 3 amends subsection 10(1) by expanding the definition of *unlawful interference with aviation* to include an attempt to commit an act of unlawful interference with aviation. This change introduces further clarity into the definition by ensuring that any attempt at unlawful interference is itself treated as an unlawful interference with aviation.

Item 4 extends the coverage of paragraph 10(1)(a) so that taking control of an aircraft by any trick or false pretence will be an unlawful interference with aviation. This amendment is consistent with the definition of *acts of unlawful interference* in Annex 17 to the Convention on International Civil Aviation (the Chicago Convention) which was recently revised by the International Civil Aviation Organization (ICAO). Existing paragraph 10(1)(a) specifies that it is an unlawful interference with aviation to take control of an aircraft by force, or threat of force, or by any other form of intimidation, but it was not clear that this provision included peaceably taking control of an aircraft by means of subterfuge or deceit.

Item 5 amends paragraph 10(1)(g) so that putting the safety of an aircraft at risk by giving misleading information will be an unlawful interference with aviation. Paragraph 10(1)(g) is currently restricted to the giving of false information, so it is not clear whether it currently includes the giving of information that is not false but which is misleading.

**Item 6 – Section 19 - Approval**

Item 6 repeals the existing subsection 19(4) and replaces it with a new subsection 19(4) that makes it clear that, in the case of an application for a TSP being refused due to the failure of the Secretary to make a decision within the time allowed, which is now described as within “the consideration period” an appeal may be made to the Administrative Appeals Tribunal. The “consideration period” is defined at new subsection 19(7).

The item also introduces new subsections 19(5) to (7). The combined effect of these provisions is to allow the Secretary to issue a notice to extend the time allowed to consider an application for a TSP when the Secretary requests further information relevant to the approval of the TSP from the applicant. The total extension of the consideration period allowed for the provision of further information can not be more than 45 days.
Item 7 – Section 20 - When a program is in force

Item 7 repeals existing subsection 20(3) which, in conjunction with the current section 24, only allows the Secretary to approve a TSP for a fixed period of five years. The new provision authorises the Secretary to approve a TSP for any period of at least 12 months but not more than five years. If the Secretary does not specify a time period when approving the TSP, the TSP is approved for five years.

Item 8 – Section 21 - Secretary may direct participants to vary programs

Item 8 ensures that, when a TSP is varied in accordance with a direction by the Secretary, the varied TSP is not taken to be a new TSP. This means that a variation to a TSP will not change the date when the TSP is due to expire.

Item 9 – Section 22 - Participants may revise programs

This item supplements Item 8 and ensures that a variation to a TSP does not change the date when the TSP is due to expire.

Item 10 – Section 23A - Alterations to programs

This item inserts a note making it clear that an alteration to a TSP does not extend the period that TSP is in force beyond the period it was originally approved.

Item 11 – Section 24 - Programs must be revised every 5 years

Item 11 repeals the requirement that a TSP must be revised every five years. This is consistent with amendments made at items 8 to 10 which allow the Secretary to approve a TSP for a period of at least 12 months but no more than five years, so that all TSPs will ultimately expire. An aviation industry participant is responsible for ensuring that it always has a current TSP in place.

Item 12 – Section 26A - Cancelling transport security programs on request

Item 12 provides that a TSP holder may request that their TSP be cancelled. Hitherto there has been no mechanism to relieve an aviation industry participant, who no longer wishes to remain in operation, from the obligations of their approved TSP. This provision is consistent with a provision contained in the Maritime Transport and Offshore Facilities Security Act 2003 for maritime industry participants.

Item 13 – Section 27 - Simplified overview of Part 3 – Airport areas and zones

Item 13 adds a paragraph to the end of the simplified overview of Part 3 that appears at section 27: new Division 5 of Part 3 which permits the Regulations to include offences for causing disruption or interference in relation to security controlled airports.
Item 14 – Section 38B Offences for causing disruption or interference in relation to security controlled airports

Item 14 inserts a new Division 5 at the end of Part 3 of the Act. New Division 5 consists of a single provision, new section 38B, which authorises the making of regulations prescribing offences in relation to the disruption to or interference with the activities of the operator of a security controlled airport, or the activities of an aircraft operator at a security controlled airport. Because the initial stages of every disruptive incident must be handled as a potential security threat, any conduct which disrupts airport activities has the potential to divert law enforcement and security staff from other security tasks. Thus disruptions at airports create an environment in which serious security threats are less likely to be detected quickly.

New offences that are created by regulations made under section 38B will only be able to impose a pecuniary penalty. The maximum penalty that may be prescribed for this purpose is 50 penalty units (currently $5,500).

New section 38B is needed because the existing regulation making powers in the Act are not well adapted to creating offences that effectively deter disruptive activities within those parts of a security controlled airport that are not screened, such as baggage check-in at airports where there is screening, or the entire terminal building at regional airports from which no screened flight departs. Examples of disruptive conduct within an airport include making remarks about bombs in baggage at check-in or at screening points and leaving items of baggage or parcels unattended within the terminal building.

Similarly, the existing regulation making powers do not permit the regulation of disruptive conduct outside the boundaries of an airport even if the conduct has the direct effect of severely disrupting the activities of the airport operator or of an aircraft operator. Examples of conduct outside an airport that might disrupt airport operations include directing light emitting devices (such as laser devices) into the airport through or over the top of the airport’s perimeter fence. Although some such incidents may not pose a direct threat to aviation, all incidents inevitably invite a serious security response because the activity has to be investigated quickly to determine whether there is a serious risk. As with any regulatory offence, an inadvertent or stupid first offence would normally be dealt with by means of an appropriate warning, but the existence of a set of appropriately crafted offences in the Regulations is expected to provide a sensible deterrent for deliberate and repeat offenders.

Because new section 38B deals with disruptive conduct that takes place outside the boundaries of a security controlled airport, the new provision has been drafted so that there is no doubt that it relies on a wide range of Commonwealth constitutional powers. This approach ensures that any regulations that are made under section 38B can be made for the purpose of protecting the activities of corporations, and for protecting and encouraging trade and commerce. Airports are increasingly busy places and need to be appropriately protected from disruptive activities.
Item 15 – Section 62 - On-board security

Item 16 inserts new paragraph 62(1)(aa) to ensure that there is no doubt that the Regulations may prescribe security features that must be included on board an aircraft.

Item 16 – Section 75 - Simplified overview of Part 5 – Powers of officials

Item 16 amends section 75, which is an overview to Part 5, to include ‘eligible customs officers’ in the list of officials who hold powers under the Act.

Item 17 – Ordinary search or frisk search

Item 17 inserts new sub-section 84(1A) that ensures a search conducted under the Act by a law enforcement officer must, if practicable, be conducted by a person of the same sex as the person being searched. This is consistent with searches conducted under the provisions of the Crimes Act 1914.

Item 18 – Division 3A – Eligible customs officers

Item 18 inserts new Division 3A into Part 5 of the Act.

New section 89A – Simplified overview of Division
New Division 3A deals with the powers of ‘eligible customs officers’. This suite of powers is largely drawn from powers already given to law enforcement officers under the Aviation Transport Security Act, although the power of a customs officer to physically restrain a person is abated when a law enforcement officer arrives.

These new powers for eligible customs officers also include stop and search provisions, request to leave an aircraft, airport or an area or zone of an airport, restrain and detain until the persons can be dealt with by a law enforcement officer and the removal of vehicles from an area or zone of an airport if the officer is unable to have the vehicle removed by the person in control of it. These provisions have been developed in discussion with the Australian Customs Service. As the provisions have been drawn from existing provisions we are seeking to have three new offences written into the Aviation Transport Security Act which are equivalent to those found in the earlier provisions.

New section 89B – Eligible customs officers
This provision further describes which officers of the Australian Customs Service (ACS) will be ‘eligible customs officers’. Only eligible customs officers will be qualified to exercise the powers under the Act that are set out in the remaining new provisions in new Division 3A. Eligible customs officers are ACS officers who are on duty at an airport and who have had the appropriate training to enable them to exercise these powers. This training will be prescribed in regulations because it is subject change from time to time. The requirements for the issue and use of identification cards and uniforms will also be prescribed in the regulations.
New section 89C – Stopping and searching persons
The form of this provision is modelled on existing powers that are exercised by law
enforcement officers (section 84). This provision enables an eligible customs officer to
stop a person who is in an airside area and conduct an ordinary search or frisk search of
the person if the officer reasonably believes that is necessary to do so for the purposes of
safeguarding against unlawful interference with aviation. A person of the same sex as
the person being searched must, if practical, conduct the ordinary search or frisk search.
If an eligible customs officer stops a person, the officer must identify themselves as an eligible customs officer to the person, tell the person why they have been stopped, and if the person is to be searched, the officer must tell the person the reason for the search.

If the person engages in conduct that hinders or obstructs an eligible customs officer in the exercise of a power there is an imprisonment penalty of two years for the person. There is an imprisonment offence for the person since they are interfering with the operation of the Act for safeguarding against the unlawful interference with aviation.

**New section 89D – Stopping and searching vehicles**
The form of this provision is modelled on existing powers that are exercised by for law enforcement officers (section 85). This provision enables an eligible customs officer to require the driver of a vehicle to stop the vehicle and search the vehicle in an airside area for the purposes of safeguarding against unlawful interference with aviation.

If an eligible customs officer stops a vehicle, the officer must identify themselves as an eligible customs officer to the driver of the vehicle, tell the driver why the vehicle has been stopped, and if the vehicle is to be searched, the officer must tell the person the reason for the search.

Before an eligible customs officer searches a vehicle that was not stopped by the officer, if there is a driver or person in control of the vehicle, the customs officer must identify themselves as an eligible customs officer to the driver of the vehicle and tell the driver why the vehicle is to be searched.

If the person engages in conduct that hinders or obstructs an eligible customs officer in the exercise of a power there is an imprisonment penalty of two years for the person. There is an imprisonment offence for the person since they are interfering with the operation of the Act for safeguarding against the unlawful interference with aviation.

**New section 89E – Requests to leave aircraft, airport or areas or zones**
This provision permits an eligible customs officer to request the person to leave the aircraft, the area or zone or the airport if the officer reasonably suspects that a person on a prescribed aircraft, or in an area or zone of a security controlled airport, is committing, or has committed, an offence against the Act.

If a request is made to a person and the person fails to comply with the request, the person commits an offence. The maximum penalty that may be prescribed for this refusal is 50 penalty units.

**New section 89F – Power to physically restrain persons**
This provision enables an eligible customs officer to physically restrain a person if the officer reasonably suspects that a person in an area or zone of a security controlled airport is committing, or has committed, an offence against this Act. If an eligible customs officer detains a person, the person may only be detained until that person can be dealt with by a law enforcement officer.
When an eligible customs officer is restraining and detaining a person, the officer must not use more force or subject the person to greater indignity that is necessary and reasonable.

**New section 89G - Removing vehicles from areas or zones**
The form of this provision is modelled on existing powers that are exercised by law enforcement officers (section 88). This provision enables an eligible customs officer to remove a vehicle if the officer reasonably suspects that a vehicle in or near an area or zone of a security controlled airport presents a risk to aviation security, or a vehicle is in an area or zone of a security controlled airport without proper authorisation. However, before removing the vehicle, the eligible customs officer must make reasonable efforts to have the person in control of the vehicle remove the vehicle. In removing the vehicle, an officer must not use more force, or subject a person to greater indignity, than is necessary and reasonable to remove the vehicle from the area or zone and make reasonable efforts to avoid damaging the vehicle.

**New section 89H – Other powers not affected**
The Aviation Transport Security Act does not limit any powers that an eligible customs officer holds under any other Act.

**Item 19 – Section 91 - Airport security guards**

Item 19 insert new paragraph 91(1)(d) to make it clear that a person who is an airport security guard is not a person who is an eligible customs officer. This ensures a clear differentiation of the roles of eligible customs officers from airport security guards and law enforcement officers.

**Item 20 – Section 126 - Review of decisions by Administrative Appeals Tribunal**

Item 20 will omit the words “section 19” from subsection 126(1)(a) and replace them with “subsection 19(2) or 19(4)”. This is as a result of the amendments to transport security programs under section 19 that allow for an aviation industry participant to apply for a review of the decision not to approve their TSP.

**Item 21 – Section 131 – Immunities and privileges**

Item 21 clarifies that, apart from certain screening and clearing requirements, privileges and immunities conferred under the Commonwealth Acts specified in subsection (1) upon certain dignitaries, diplomats and other persons are not affected by the Act or regulations. Subsection (2) has been inserted to allow the Act or regulations to set out requirements for the screening and clearing of dignitaries which will not be limited by the Acts referred to in subsection 131(1).

**Item 22 – Application – Transport security programs**

Item 22 specifies that the amendment made by Item 7 only applies to Transport Security Programs given after this item commences. Item 8 applies to Transport Security Programs approved before or after this item commences.
Civil Aviation Act 1988

**Item 23 – new paragraph 9(1)(da) – functions of CASA**

Item 23 inserts new paragraph 9(1)(da) to give Civil Aviation Safety Authority (CASA) the new function of administering new Part IV of the Civil Aviation Act which provides for drug and alcohol management plans and testing.

**Item 24 – new subsection 24(1) – interference with a crew member**

Existing subsection 24(1), which prohibits a person from interfering with a crew member or doing an act which threatens the safety of the aircraft or of a person on board, is limited to persons who are on board an aircraft. Item 24 substitutes a new subsection 24(1) which extends the coverage of the offence to include persons who are outside the aircraft. For example, a person on the ground who deliberately directs a laser emitting device at an aircraft will commit an offence under new subsection 24(2).

**Item 25 – new Part IV (Drug and alcohol management plans and testing)**

**Overview of new Part IV**

New Part IV of the Civil Aviation Act 1988 establishes a statutory framework in which regulations may be made to permit CASA to require drug and alcohol management plans and testing of persons performing safety-sensitive aviation activities that impact directly or indirectly on the safety of civil air operations in Australian territory, or the operation of Australian aircraft outside Australian territory. Subject to the regulations, CASA will be able to regulate and will also be able to monitor compliance with company drug and alcohol management plans, and carry out its own random testing programme, covering persons who perform, or are available to perform, safety-sensitive aviation activities.

**New section 33 – Definitions**

New section 33 defines some terms that are used in Part IV, namely body sample, drug or alcohol test, positive test result, safety-sensitive aviation activities, and testable drug.

**New section 34 – General regulation-making power**

New subsection 34(1) authorises the making of regulations for and in relation to the development, implementation and enforcement of drug and alcohol management plans covering persons who perform, or who are available to perform, safety-sensitive aviation activities.

New subsection 34(2) authorises the making of regulations in relation to drug and alcohol tests but only in relation to those persons who perform, or who are available to perform safety-sensitive aviation activities.

New subsection 34(3) limits the scope of regulations that may be made under section 34 in that such regulation cannot be made unless the performance of the safety-sensitive aviation activities could be adversely affected by alcohol and drugs.
New section 35 – Drug and alcohol management plans
Section 35 specifies some matters that can be made the subject of regulations made under subsection 34(1) (which authorises the making of regulation in relation to drug and alcohol management plans). These matters include persons who must develop a plan, persons who must be covered by a plan (for example, an employee may be covered by the employer’s plan), the content of plans, record keeping and information gathering, and technical matters such as how CASA processes a draft plan.

New section 36 – Drug or alcohol tests
Subsection 36(1) specifies matters that may be included in regulations made under Subsection 34(2) which authorises the making of regulations in relation to drug and alcohol tests. Such matters include persons who must give a sample for testing, the conduct of tests, authorising persons or bodies to conduct tests, technical matters related to testing, and the use and disclosure of test results. Regulations can also prescribe when a person who has failed or refused a drug test can resume safety-sensitive aviation activities (see paragraphs 36(1)(n) and (o)).

Testing under drug and alcohol plans will occur before a person is deployed to undertake safety-sensitive aviation activities and also where there is reasonable suspicion of inappropriate drug or alcohol use, as well as after an accident or serious incident, and as part of a return to work programme.

Subsection 36(4) provides that the results of drug and alcohol tests are not admissible in legal proceedings other than proceedings under the Civil Aviation Act and Regulations, or in other proceedings that are prescribed in the Regulations for this purpose. The kinds of proceedings that could be prescribed for this purpose might include: prosecution action (or sentencing proceedings) under other Commonwealth and/or State legislation (for example, breach of other transport-safety related laws) in which such evidence could be relevant and helpful to the Crown as it might be to a defendant; the prosecution of Commonwealth offences that follow on from decidedly aviation-related conduct; civil and administrative proceedings involving disciplinary and dismissal action taken in respect of persons carrying out safety-sensitive aviation activities (employers and employees).

New section 37 – Conferral of administrative powers
Subsection 37(1) allows regulations that are made for the purposes of subsection 34(1) (which deals with drug and alcohol management plans) and subsection 34(2) (which deals with drug and alcohol testing) to confer the power to make an administrative decision on a person who is specified in the Regulations. Subsection 37(2) in turn allows the Regulations to permit such a person to delegate that power to another person.

New section 38 – Conferral of power to make legislative instruments
Regulations related to drug and alcohol management plans (subsection 34(1)) and drug and alcohol tests (subsection 34(2)) may empower CASA to make legislative instruments, but any such legislative instrument may not prescribe a penalty.
New section 39 – General regulation-making power not limited
Section 39 ensures that the specific provisions in new sections 35, 36, 37 and 38 do not operate to limit section 34.