

EXPLANATORY STATEMENT

Issued under the authority of the Minister for Infrastructure and Transport.

Sydney Airport Demand Management Act 1997 (the Act)

Sydney Airport Compliance Scheme 2012 (the Scheme)

Purpose of the instrument

A key aim of the *Sydney Airport Demand Management Act 1997* (the Act) is to cap aircraft movements at Sydney's Kingsford Smith Airport (Sydney Airport) at 80 movements an hour. To administer this cap, the Act provides for the development of:

- a slot management scheme, which is developed by the Slot Manager and which provides a system for the allocation of permissions for gate movements at Sydney Airport; and
- a compliance scheme, which is developed by a Compliance Committee appointed by the Minister administering the Act, and which provides for various matters relating to compliance with the requirements of the Act.

The purpose of the *Sydney Airport Compliance Scheme 2012* (the Scheme) is to repeal the existing compliance scheme, *Sydney Airport Compliance Scheme 1998* (the 1998 Scheme) and to replace it with a new compliance scheme that resolves issues identified in the Australian National Audit Office (ANAO) Audit Report No. 29 of 2006-07 into the 'Implementation of the *Sydney Airport Demand Management Act 1997*' (the ANAO audit report). These amendments:

- improve the framework for taking enforcement action and improve the practicality of issuing infringement notices in appropriate cases;
- ensure consistency between the Scheme and Act, as amended in 2008;
- make the provisions consistent with *The Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Provisions* as far as practicable;
- clarify the definition and management of off-slot movements to produce consistent, complete and equitable outcomes consistent with the objectives of the Principal Scheme;
- increase the rate of fines for off-slot movements and introduce an infringement notice regime for no-slot movements;
- clarify the intention that minor offences should receive an infringement notice rather than be the subject of court proceedings;
- remove the restrictions on issuing infringement notices if court proceedings are not initiated for a contravention; and
- remove additional functions of the Compliance Committee to assess compliance against the use-it-or-lose-it test.

Details of the Scheme are set out in the Attachment.

Legislative Authority

Section 48 of the Act provides that there is to be a scheme, known as the Compliance Scheme, for Sydney Airport. Section 49 of the Act provides that the Scheme:

- must identify the circumstances in which gate movements are taken to be off-slot movements;
- must identify the circumstances in which it is appropriate to issue infringement notices and the circumstances in which it is not appropriate to do so;
- must identify the circumstances in which it is appropriate to withdraw infringement notices and the circumstances in which it is not appropriate to do so;
- must specify the rates of fines that may be specified in infringement notices and the circumstances to which the different rates apply, consistent with subsections 20(3) and 20(4) of the Act; and
- may contain other provisions relating to the performance of the Compliance Committee's functions under the Act.

Under section 52 of the Act, the Compliance Committee is permitted to develop a Compliance Scheme for Sydney Airport that is consistent with section 49 and to submit it to the Minister for approval.

Under section 54 of the Act, the Minister may approve the Compliance Scheme if, and only if, the Minister is satisfied that the scheme is consistent with section 49.

Under section 57 of the Act, the Compliance Committee is permitted to develop amendments of the Compliance Scheme and to submit them to the Minister for approval. Under section 58 of the Act, the Minister may approve amendments of the Compliance Scheme if, and only if, the Minister is satisfied that the Compliance Scheme as proposed to be amended would be consistent with section 49 of the Act. The Minister is satisfied that the Compliance Scheme as proposed to be amended would be consistent with section 49 of the Act.

The Scheme is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*. (See subsections 51(1) and 58(2) of the Act.)

Operation of the instrument

The Scheme requires aircraft operators to carry out gate movements within a prescribed tolerance before or after the scheduled slot time. If an operator arrives/departs outside of the prescribed tolerances, and cannot provide an acceptable reason as to why the gate movement took place at the time it did, the operator may be liable for a civil penalty.

The Scheme is administered by a Compliance Committee which is appointed by the Minister or the Minister's Delegate. The Compliance Committee scrutinises these gate movements and the circumstances in which they occurred to ensure that they meet the terms of the Scheme.

Consultation

Section 17 of the *Legislative Instruments Act 2003* requires a rule-maker to be satisfied that any consultation they consider to be appropriate and reasonably practicable to undertake has been undertaken before making a legislative instrument.

In 2007, a Slot Management Scheme and Compliance Scheme Working Group (the Working Group) was established to consider measures, through a consultative process, to address the findings and recommendations of the audit report. The Working Group comprised representatives from the Commonwealth, Airservices Australia, the Sydney Airport Slot Manager, Sydney Airport Corporation Limited, Qantas Airways, Virgin Australia, Regional Express and the Board of Airline Representatives of Australia. The Compliance Committee formally accepted the Working Group's recommendations on which the Scheme is based.

In 2012, the abovementioned private sector and government agencies and the Civil Aviation Safety Authority were provided the opportunity to comment on a final consultation draft of the Scheme.

The Scheme was drafted in consultation with the Office of Legislative Drafting and Publishing, the Australian Government Solicitor and the Attorney-General's Department.

Regulation Impact Statement

The Office of Best Practice Regulation (OBPR) has considered the matter and formed an opinion that the regulatory changes arising from the Declaration are minor or machinery in nature and that no further regulatory impact analysis is required. The OBPR regulatory impact statement exemption number is 13683.

Statement of compatibility

This legislative instrument is compatible with human rights as it does not raise any issues in relation to the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Commencement

The Scheme comes into force on 28 October 2012.

Transitional arrangements

The Principal Scheme will continue to apply to aircraft movements that took place before 28 October 2012.

Empowering Provision

Subsection 54(2) of the Act.

ATTACHMENT

Details of the Sydney Airport Compliance Scheme 2012

Part 1 – Preliminary

Part 1 is a preliminary part. It provides the title by which the Scheme may be cited and includes definitions of the key terms used in the Scheme.

Section 1 – Citation

This section provides that the Scheme is the *Sydney Airport Compliance Scheme 2012*.

Section 2 – Definitions

The term *Act* is defined to mean the *Sydney Airport Demand Management Act 1997*.

The term *block time* for a flight, is defined to mean the scheduled time between the first movement of the aircraft after its external doors have been closed in preparation for take-off, and the last movement of the aircraft immediately before the moment when, after landing, it comes to a standstill and the engines are turned off. The definition closely mirrors the definition of ‘gate movement’ in the Act.

The term *civil contravention* has the same meaning as that given by Division 3 of Part 3 of the Act, being a contravention of a civil penalty provision.

The term *scheduling season* has the same meaning as that given by the Slot Management Scheme, being northern summer or northern winter.

The term *slot group* has the same meaning as that given by the Slot Management Scheme.

The term *slot series* has the same meaning as that given by the Slot Management Scheme.

The terms *aircraft*, *Compliance Committee*, *gate movement*, *infringement notice*, *no-slot movement*, *off-slot movement*, *operator*, *slot*, *Slot Management Scheme* and *Slot Manager* used in the Scheme are defined in the Act.

Part 2 – When a movement is taken to be off-slot (Act ss 49 (1))

This Part identifies the circumstances in which gate movements are taken to be off-slot movements.

Section 3 – Movements that are taken to be off-slot movements

This section provides that a gate movement is taken to be an off-slot movement if, for a flight with a block time of less than 3 hours, the movement occurs more than 15 minutes before or after the slot. If the flight has a block time of 3 hours or more, the gate movement will be taken to be off-slot if the movement occurs more than 30 minutes before or after the slot.

The tolerance time is a uniform 15 minutes or 30 minutes before or after the time of the slot depending on the flight's block time, regardless of whether the slot is part of a series or group or a single slot.

Block times are based on actual historical data on a sector for an aircraft type if history exists. Otherwise, they are based on calculations considering en route winds and aircraft performance amongst other factors such as runway configuration at departure and arrival airports. The tolerance for block times of 3 hours or more is greater in recognition of a range of factors that may have a greater effect on the punctuality of longer flights.

Section 4 – Movements that are taken not to be off-slot movements

Section 4 recognises that circumstances may arise which are beyond the control of the operator and which will prevent compliance with the prescribed tolerances in section 3. To account for this, this section has the effect of providing that a gate movement that is outside those tolerances is, in appropriate cases, nevertheless not an off-slot movement. If the circumstances that caused the gate movement to take place at the time it did were not within the operator's control, the gate movement is taken not to be off-slot.

Part 3 – When an infringement notice is appropriate (Act ss 49 (2))

The infringement notice scheme is intended to provide a more efficient means of dealing with contraventions of certain civil penalty provisions as an alternative to instituting civil penalty proceedings. It protects the integrity of the cap and establishes a clear guide for operators as to the range of sanctions which may be levied if an infringement occurs.

The civil penalty provisions under the Act, in respect of which infringement notices may be issued, are fault-based prohibitions, involving knowledge or recklessness as fault elements. It is usual for infringement notice provisions to be strict liability, rather than fault-based, provisions. This is to ensure that enforcement officers are easily able to make an assessment of guilt or innocence under an infringement notice scheme; proof of fault often involves a complex assessment of evidence to establish a person's state of mind. This feature arises from the Act, and not from the Scheme. However, the Act ensures that the Compliance Committee will be readily able to assess whether to issue an infringement notice despite the provisions being fault-based. Under subsection 19(1) of the Act, the Compliance committee is able to direct the Slot Manager to issue an infringement notice so long as it *reasonably believes* that an operator has committed a civil contravention under the Act.

This Part identifies the circumstances in which it is appropriate to issue an infringement notice to a person for a contravention of a civil penalty provision, and the circumstances in which it is not appropriate to do so.

An infringement notice is able to be issued in relation to more than one contravention. The Act does not impose a limit to the number of infringement notices that a person can be issued.

This Part also identifies the circumstances in which it is appropriate to withdraw an infringement notice that has been issued, and the circumstances in which it is not appropriate to do so.

Section 5 – Infringement notices for no-slot movements

A general aim of the Scheme is that no-slot movements would result in court proceedings to seek heavier penalties in cases of serious no-slot contraventions, but the Scheme is drafted so that an infringement notice could be issued for no-slot movements in less serious cases.

Subsection 5(1) provides that an infringement notice may be given in relation to any contravention of section 12 of the Act (no-slot movement), subject to this section. The Act defines a no-slot movement as a movement occurring on a day for which the operator has not had a slot permitting the movement allocated.

No-slot movements fall into essentially two different categories:

- a movement in respect of which no slot has been allocated at all; and
- a movement in respect of which a slot has been allocated, but which occurs on the day after the day for which the slot was allocated.

The former type of no-slot movement is viewed as a fundamental breach of the slot system which disrupts other airport users which have applied for a slot. The note after subsection 5(1) indicates the expectation that such no-slot movements should be dealt with by civil proceedings instituted in the Federal Court by the Slot Manager.

The latter kind of no-slot movement is considered a less serious contravention, in recognition of an attempt by the operator to use the allocated slot. Accordingly, the expectation is that an infringement notice should be issued in respect of such a movement.

Subsection 5(2) provides that it is not appropriate to issue an infringement notice for a contravention of section 12 of the Act if the Slot Manager has instituted proceedings in the Federal Court for the payment of a pecuniary penalty. This is intended to avoid the possibility of an operator being penalised twice for the same contravention.

Subsection 5(3) recognises that circumstances may arise which are beyond the control of the operator and prevent a movement using the allocated slot. This subsection has the effect of providing an exemption from receiving an infringement notice in appropriate cases. If the Compliance Committee believes the circumstances that caused the gate movement to take place on the day it did were not within the operator's control, it is not appropriate to issue an infringement notice.

Subsection 5(4) provides that it is not appropriate to issue an infringement notice before the end of the scheduling season in which the contravention occurred. It is usual for infringement notice schemes to require infringement notices to be issued immediately after a contravention. However, this would not be practical under the Scheme. Postponing the issuing of infringement notices until the end of a season is required so that the total number of contraventions for the period, and the appropriate penalty, can be calculated.

The reason for this is that the Scheme is designed around two annual scheduling seasons running 30 to 31 weeks and 21 to 22 weeks in duration respectively. Over each season an operator is able to conduct up to 20% of its movements off-slot without contravening the Act. This calculation cannot be performed properly until the end of each scheduling season, as the operator's scheduled number of movements can change throughout the season. The scheme would be more complicated and less efficient if infringement notices were issued immediately, as many would have to be withdrawn, and the amounts of the fines re-calculated throughout the season.

However, section 9 of the Scheme addresses this principle, by requiring that operators be notified at intervals throughout each scheduling season whether each contravention of the Act is one that would be likely to result in issue of an infringement notice. This allows operators to adjust their operations as necessary so as to avoid the receiving infringement notices.

Subsection 5(5) provides that it is not appropriate to issue an infringement notice more than 12 months after the alleged contravention. It is unfair to expect an alleged offender to produce evidence to defend against a minor charge that occurred more than a year previously.

Section 6 – Infringement notices for off-slot movements

A general aim of the Scheme is that off-slot movements are generally to be dealt with by infringement notices, but the Scheme is drafted so that off-slot contraventions may result in court proceedings if it was considered appropriate to seek heavier penalties.

The aim of subsections 6(1) and 6(2) is to set the on-time performance target for gate movements operated at Sydney Airport at 80 per cent.

The method used by the Compliance Committee in making its assessment is based on sets of slots, being:

- a slot group; or
- a slot series; or
- the single slots allocated to an operator in a scheduling season.

Subsection 6(2) provides that it is appropriate to issue an infringement notice in relation to a contravention of section 13 of the Act by a gate movement that was conducted as part of a particular set of slots if:

- (a) the movement resulted in more than 20% of the gate movement conducted in relation to that set of slots being off-slot movements; or
- (b) a movement as described in paragraph (a) has already occurred, and the movement in question was an off-slot movement that occurred after that movement.

Subsection 6(3) provides that it is not appropriate to issue an infringement notice for a contravention of section 13 of the Act in any other circumstances.

Subsection 6(4) provides that it is not appropriate to issue an infringement notice for a contravention of section 13 of the Act if the Slot Manager has instituted proceedings

in the Federal Court for the payment of a pecuniary penalty. This is intended to avoid the possibility of an operator being penalised twice for the same contravention.

Under subsection 6(5), it is not appropriate to issue an infringement notice before the end of the scheduling season in which the contravention took place. This is because subsection 6(2) relies on elements that can only be properly determined at the end of a scheduling season.

Subsection 6(6) limits the issuing of infringement notices to within 12 months of the alleged contravention. It is unfair to expect an alleged offender to produce evidence to defend against a minor charge that occurred more than a year previously.

Section 7 – Withdrawal of infringement notices

This section provides that it is appropriate to withdraw an infringement notice where new facts come to light which suggest that the person served with the notice did not commit the contravention or where the contravention is being dealt with by a civil suit by the Slot Manager. It is also appropriate to withdraw an infringement notice that was issued more than 12 months after the relevant gate movement.

It is not appropriate to withdraw an infringement notice in any other circumstances.

Part 4 – Rates of fine for infringement notices (Act ss 49 (3))

This Part specifies the penalties that may be imposed under an infringement notice for each contravention by an operator during a scheduling season. Subsection 20(4) of the Act provides that the maximum penalty for a contravention under the Scheme cannot be more than one-fifth of the maximum pecuniary penalty that the Federal Court can order a person to pay. Accordingly, the penalties specified in this Part do not exceed 40 penalty units for a natural person or 200 penalty units for a body corporate.

It is usual for the amounts payable under infringement notices to be lower than this, and such amounts usually do not exceed 12 penalty units for a natural person or 60 penalty units for a body corporate. Infringement notice penalties are set at a relatively high level under the Scheme because the Scheme would not operate effectively if the penalties were set in accordance with the range of levels of penalties that are usually used for infringement notices.

The penalties comprise a graduated system starting with small penalties for low level contraventions, increasing to large penalties for persistent offenders. This system is consistent with the recommendation of the ANAO audit report. It is also consistent with the findings of the Industry Working Group on the Compliance Scheme, which reviewed the level of penalties under the current Act and Scheme in light of the ANAO audit report.

The relatively high level of penalties for persistent offenders is required due to the economic conditions of the airline sector in which profit from non-compliance is potentially very high. Aircraft operators include large corporations with significant financial resources. The opportunity-cost of compliance may be higher than non-compliance in certain circumstances. Penalties must therefore be significant to provide adequate deterrence and prevent penalties simply being paid as a cost of doing business. Moreover, persistent offenders are most likely to be those for whom

the opportunity-cost of compliance outweighs that of non-compliance. Therefore a high value penalty is especially important to prevent persistent contraventions.

These levels of penalties are consistent with subsection 14(3) of the Act, which provides for a high level of penalties in order to protect the integrity of the maximum movement limit, which was one of the main objects of the Act. These levels of penalties were also envisaged when the Act was first enacted. The Second Reading Speech for the originating Bill for the Act expressly stated that the Compliance Scheme would provide initially for relatively small fines, but persistent offenders would find an exponential increase in the level of fines for the second and third offences, up to the maximum.

Section 8 – Rates of fine for civil contraventions

Consistent with section 20 of the Act, this section sets out the rates of fine payable according to the number of civil contraventions a person has committed in a scheduling season.

The penalties can vary with the total number of contraventions (off-slot plus no-slot movements) in a given period, as known at the time the infringement notice is issued.

The given period relates to a northern summer or northern winter scheduling season. This is an important factor in determining comparative penalties as generally a northern summer scheduling season is approximately 31 weeks and a northern winter scheduling season is 21 weeks.

Section 8 provides a table of the number of penalty units for an individual and a body corporate which correspond to the number of contraventions (off-slot and no-slot) by an operator in a scheduling season. At present, a penalty unit equals \$110 (*Crimes Act 1914*, section 4AA).

Part 5 – Performance of the Compliance Committee’s functions

This Part describes what is required prior to the issuing of an infringement notice.

Section 9 – Notification of operators when contraventions found

The Compliance Committee is required to meet at least once per calendar year but in practice currently meets about six times per year to consider potential off-slot and no-slot movements.

When the Compliance Committee identifies a gate movement that might constitute a civil contravention, it is required to inform the relevant operator of its intention to direct the Slot Manager to issue an infringement notice. It is required to do this as soon as practicable after the relevant meeting of the Compliance Committee.

It is envisaged that this would put operators on notice regarding how many off-slot and no-slot movements they have conducted during the scheduling season, and would provide an incentive to minimise the number of contraventions during the rest of the scheduling season.

A notice could also potentially provide an opportunity for intended recipients to bring evidence to the Compliance Committee about the circumstances that caused the movement to take place at the time it did.

Section 10 – When decision on infringement notices should be made

Section 10 provides that as soon as practicable after the end of a scheduling season, the Compliance Committee must decide in relation to each operator whether to give a direction to the Slot Manager to issue an infringement notice.

This encourages timely analysis by the Compliance Committee so that infringement notices are able to be issued within 12 months of the date of the relevant gate movement.

Part 6 – Repeal and transitional

Part 6 repeals the Principal Scheme and provides the transitional arrangements.

Section 11 – Repeal of the *Determination of the Sydney Airport Compliance Scheme 1998*

Subsection 33(3) of the *Acts Interpretation Act 1901* provides that where an Act confers a power to make, grant or issue any instrument (including rules, regulations or by-laws) the power shall, unless the contrary intention appears, be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument. Section 11 repeals the Principal Scheme.

Section 12 – Transitional provisions

Section 12 is a transitional provision. It provides that, despite the repeal of the Principal Scheme by section 11, the Principal Scheme continues to apply to aircraft movements that took place before 28 October 2012 (the commencement date of the Scheme). The effect of this provision is that the Compliance Committee would continue to apply the Principal Scheme when assessing off-slot movements that took place before this date as if it had not been repealed.