



DEPARTMENT OF TRANSPORT AND REGIONAL SERVICES
99 APR -2 AM 10:51
DOCKET SECTION



Our Reference: H96/684

Your Reference:

Contact:

53262

US Department of Transportation Dockets
Docket No. FAA-1998-4758-42
400 Seventh Street SW
Room Plaza 401
WASHINGTON DC 20590

**Australian Department of Transport and Regional Services (DOTRS)
Submission on Docket FAA-1998-4758**

Please find attached the Australian DOTRS submission on Docket FAA-1998-4758 (Security Programs of Foreign Air Carriers).

Jim Wolfe
Assistant Secretary
Aviation Security

22 March 1999

OFFICE OF THE
CHIEF COUNSEL
RULES DOCKET
1999 MAR 26 P 4: 32



Australian objections to the proposed rule change are based on three main areas of concern. These are:

- ***International Law***

The proposed rule change is inconsistent with the international legal framework for Aviation Security (ICAO Annex 17) in that it seeks to impose United States regulations within the territory of other states and on aircraft outside the United States which are not US registered aircraft.

- ***Proper Security Risk Assessment***

The proposed rule departs from the internationally accepted practice of basing security measures on an analysis of the specific threat level against a particular carrier at a **particular** port. The proposed rule change would impose the same security measures on all carriers irrespective of the assessed risk.

- ***Economic Grounds***

As the proposed change is not based on proper risk assessment it has the potential to impose additional, unwarranted costs on international air services to the United States.

These points are expanded in the following sections.

International Law

Aviation security standards and recommended practices are contained in Annex 17 of the Convention on International Civil Aviation (the "Chicago Convention"). The Convention also establishes the International Civil Aviation Organization (ICAO) as the relevant international body overseeing international civil aviation.

Annex 17 outlines those aviation security measures that ICAO has proposed as either necessary or desirable for the safety or regularity of international air navigation. The Annex also requires each Contracting State to nominate an agency responsible for aviation security within that State. Australia has nominated the Commonwealth Department of Transport and Regional **Services** to fulfil that role.

Australia currently implements all Annex 17 standards.

Annex 17 applies the accepted international rule that each Contracting State is responsible for ensuring aviation security (through national regulations) within the territory of that State. There is no role for other states to regulate in

these internal matters. Rather, all member states are encouraged to comply with Annex 17.

This accepted international rule is adopted in the aviation security clauses of bilateral agreements globally. Australia enters into bilateral agreements with other countries for the provision of international air services. However, under the standard (and ICAO recommended) provisions for these agreements, the obligations are as follows:

- the respective Contracting Parties agree to act in conformity with the aviation security provisions of Annex 17, and to require that airlines and international airports within their boundaries act in conformity with the provisions of Annex 17;
- as a result, the Contracting Parties agree to ensure that security measures are effectively applied within their territory to protect aircraft, to screen passengers, etc;
- the Contracting Parties **recognise** that airlines will be required to observe the national regulations of the other Contracting Party on aviation security whilst in the territory of the other Contracting Party; and
- the Contracting Parties agree to look favourably upon any request from the other Contracting Party for reasonable special security measures. Formal consultative mechanisms are provided for.

This latter point is based on paragraph 3.2.2 of Annex 17, which is set out below.

3.2.2 Each Contracting State shall ensure that requests from other States for special security measures in respect of a specific flight or specified flights by operators of such other States, as far as may be practicable, are met.

Thus, when a state wishes to have additional security measures applied to flights into their country, this can **only** be the subject of a request to the country of origin and cannot be made a regulatory requirement. Australian authorities would normally agree to such requests, provided they were based on the level of threat against the carrier concerned.

This is what happened in Australia in 1995 when a global terrorist threat emerged targeting flights to the United States. The US authorities placed additional measures on all flights to the US. Unfortunately some of these measures, particularly the initial passenger profile, were entirely inappropriate and heavily **favoured** US nationals. This resulted in the undesirable situation of US passengers being exempted from rigorous secondary screening whilst Australian passengers (and **also** Australian Customs Officers) were subject to 'pat down' searches before entering aircraft. Security resources were expended on what were, in this instance, negligible threats.

Ultimately the US FAA and Australian authorities jointly reviewed the threat information and the measures applying to Australian airports. A new suite of

security measures for the Australian airports was cooperatively designed between the two authorities. These new measures operated relatively smoothly, with security resources used much more effectively.

This incident highlighted the problems of applying identical measures, framed in the United States, on aircraft operations in countries of which US security policy advisers had little detailed knowledge. A sharing of intelligence information and a cooperative approach along the lines of ICAO Standard 3.2.2 would have resulted, in the first instance, of a consistent set of measures designed jointly by Australian and US authorities to effectively counter what was a real threat.

The proposed United States rule change would be in direct conflict with this accepted international practice in that it would seek to impose US regulations within the territory of other contracting states. The adoption of a similar policy by other nations would lead to the totally unworkable and farcical situation where many different security standards, based on the laws of other nations, would be in operation at a single port.

This situation would apply at US ports as well as those in other countries. If this practice was to become widespread among signatories to the Convention, then major US international ports could be faced with having to comply with up to 180 different regulatory regimes.

If the United States believes that the existing standards and recommended practices on aviation security (as set out in Annex 17) are inadequate, then it should raise these issues for discussion/consideration within the ICAO framework.

Proper Security Risk Assessment

It is accepted international practice for the aviation security measures applied to the operations of an airline at a particular port to be based on an assessment of risk. It is not unusual to have different risk assessments, and therefore different security measures, for carriers flying on the same route.

This is particularly true when the risk assessment is based on threats of politically motivated violence. These threats are usually directed against the interests of a particular country or group of countries. Over recent years the majority of these threats have been directed at the United States. Therefore it is not uncommon for US carriers to be operating under a higher threat level than foreign carriers flying on the same routes. This situation is likely to persist into the future.

The supporting documentation for the NPRM states that it was the intent of Congress to ensure that all Americans would be guaranteed adequate protection from terrorist attacks on international flights arriving in or departing from the United States, regardless of the nationality of the air carrier providing the service.

The Australian authorities believe that the current regulatory regime already achieves this objective. History suggests that air carriers based in the country under threat are often seen as targets for terrorist action. However it is very rare for citizens of the country under threat to be attacked while travelling on air carriers from other countries,

The proposed rule change could lead to the situation where a threat against a specifically identified carrier became the justification for additional measures to be imposed on other carriers, without any risk assessment that would justify such action. This approach flies in the face of any basic risk management process.

Imposing unnecessary and costly security measures on low risk flights could well have the effect of decreasing the effectiveness of the international aviation security system by diverting security resources away from those areas in which they are most needed.

Economic Grounds

If implemented, the proposed change could lead to significant additional costs for Australian Airports and for those non-US airlines operating services between Australia and the United States.

These additional costs would be passed on in the form of higher passenger fares and airfreight rates on the Australia – US route. Such increases would have a negative impact on Australia's tourism industry and export trade. The United States is currently Australia's fourth largest source of overseas visitors, accounting for 9% of the total, and takes 18% (by value) of Australia's airfreight exports.

Non-US airlines, principally Qantas and Air New Zealand, account for the bulk of traffic on the Australia – US route. In the year ending June 1998 the non-US airlines carried just over 60% of the outbound traffic from Australia to the United States,

Under current risk assessment arrangements a specific security threat against US interests would only require additional security measures to be introduced by the US carrier. The other carriers would retain their normal security levels.

If, under the proposed rule change, the non-US airlines were required to adopt identical security measures to those of the US carrier this would mean that over 30,000 passengers a month would be subject to the additional security measures for which there **was** no justification. This would add significantly to the cost of operations, increase delays and reduce customer service levels.

These additional, unnecessary, security measures would also have a significant impact on airport capacity, particularly in Sydney. Sydney is

Australia's largest international gateway and the venue for the 2000 Olympic Games. Flights undergoing additional measures would take longer to process, thus reducing the peak capacity of the terminal facilities and spreading the effects to other routes and airlines that had no connection to the original threat.

Conclusion

Based on the above arguments the Australian DOTRS strongly objects to the proposed rule change and urges the Federal Aviation Administration to reconsider the introduction of this change.

Department of Transport and Regional Services

March 1999

United States Department of Transportation Notice of Proposed Rulemaking on Security Programs of Foreign Air Carriers (Docket No. FAA-I 9984758)

Australian Department of Transport and Regional Services Submission

Introduction

This document forms the response by the Australian Department of Transport and Regional Services (DOTRS) to the United States Federal Aviation Administration's Notice of Proposed Rulemaking (NPRM) on Security Programs of Foreign Air Carriers (Docket No. FAA-1998-4758). This submission has been prepared by the Aviation Security and Olympics Branch of DOTRS, but has the full support of Australia's international airlines and major international airport operators.

The proposed rule change would implement provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (the 'Hatch Amendment') and would have the effect of changing the aviation security requirements for foreign air carriers operating to and from US ports.

Foreign air carriers flying to or from the United States are required to operate under an aviation security program that has been approved by the US Federal Aviation Administration (FAA). The current regulation allows the FAA to approve a program if it provides passengers with a level of protection similar to the level provided by US air carriers serving the same airports. The amended regulation will require foreign air carriers to operate under identical security measures to those required of US carriers operating to and from the same airports.

The practical effect of this change would be to force any foreign carrier flying into the United States on the same route **as a** US carrier to implement identical security measures to those in force for the US carrier. If, for example, a US carrier **was** required to implement additional security measures **at** an Australian airport, based on a specific threat against US interests, then all other carriers flying from that airport to the United States would be required to adopt identical security measures, irrespective of the assessed level of risk,

Summary of DOTRS Position

The Australian DOTRS strongly objects to the proposed rule change and urges the Federal Aviation Administration to reconsider the introduction of this change.