

Bills Digest
No. 101 2000–01

Aircraft Noise Levy Collection Amendment Bill
2001

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INFORMATION AND RESEARCH SERVICES

Bills Digest
No. 101 2000-01

Aircraft Noise Levy Collection Amendment Bill 2001

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Aircraft Noise Levy Collection Amendment Bill 2001

Date Introduced: 1 March 2001

House: House of Representatives

Portfolio: Treasury

Commencement: Royal Assent

Purpose

To validate retrospectively an aircraft noise levy worth around \$175 million collected from jet aircraft operators at Sydney (Kingsford-Smith) Airport, in light of the discovery of a fundamental flaw in the administration of the scheme since 30 June 1996.

Background

Immediate Context

On 21 February 2001 the Assistant Treasurer, Senator Rod Kemp, announced that an 'administrative oversight' had been uncovered and that the Government would be introducing this Bill to fix it.¹ He acknowledged that although an aircraft noise levy had been collected from jet aircraft operators landing at Sydney Airport since 1995, a Ministerial declaration that Sydney was a 'leviable airport' had not been in place since 30 June 1996. Without such a declaration, collection of the levy is legally invalid.

Aircraft Noise and the Aircraft Noise Levy²

As commuter use of jet aircraft has increased, so has the noise experienced by people in buildings and houses near airports. Political pressure has intensified on governments to take steps to alleviate the effects of aircraft noise, for readily understandable reasons:

Noise (and vibration) caused by transport can have various deleterious effects on health and buildings. Effects may include stress, loss of sleep, loss of concentration due to tiredness following sleeplessness, cardiovascular disease and impairments to learning ability in children and adults. However, the precise health effects of noise are not well understood (Job 1996, p. 101).³

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A House of Representatives Select Committee on Aircraft Noise examined the issue and tabled a report in Parliament in September 1985 entitled *Aircraft Operations and the Australian Community*. Although the then Government rejected some of the Committee's recommendations, some amendments were made to aviation legislation in 1991.⁴

Meanwhile controversy continued to rage about whether Sydney should get a second major airport. Aircraft noise, both existing and projected, assumed great political significance in the debate. In November 1991 the then Government granted approval to the Federal Airports Corporation (FAC) to proceed with construction of a third runway at Sydney's Kingsford-Smith Airport. Apparently the decision was made on the basis that the FAC would implement a number of environmental recommendations including 'polluter-pays' and 'user-pays' principles.⁵ A package of noise amelioration measures was announced in November 1994 when the third runway opened, including a commitment to a noise-related levy on airport users.

In 1995 Parliament passed the *Aircraft Noise Levy Act 1995* and the *Aircraft Noise Levy Collection Act 1995* (the Principal Act). Briefly the Principal Act empowers the Minister to declare that a 'qualifying airport' (that is, one where nearby buildings are forecast to exceed nominated levels of noise and where the Commonwealth is funding a noise amelioration program) is a 'leviable airport'. The declaration is made by notice in the Commonwealth *Gazette* for a specified period. The rate of levy must be struck in a way that the money collected for an airport closely matches the amount expended on the noise amelioration program for that airport at any given time, and that the relative incidence of the levy does not fall more heavily on one leviable airport when compared to another.⁶

Notably, in light of the administrative failure which gives rise to the Bill, the Principal Act imposes an obligation on the Minister 'to ensure that...each qualifying airport is declared a leviable airport as soon as practicable after it is identified as a qualifying airport'.⁷

The scheme has operated to date only at Sydney Airport (invalidly since July 1996 as it turns out).⁸ In the 2000-2001 Budget the Government announced its attention to extend the noise amelioration program to Adelaide, funding 'the insulation of residences and public buildings in areas of high aircraft noise surrounding Adelaide Airport'.⁹ As a consequence the Government simultaneously announced its intention to apply the Aircraft Noise Levy to jet aircraft operators landing at Adelaide. Indeed the Assistant Treasurer, Senator Kemp, said that the 'administrative oversight' which the Bill corrects 'was discovered in preparing a declaration to make Adelaide Airport leviable'.¹⁰

The levy imposed on jet aircraft landing at Kingsford-Smith Airport funds the Sydney Airport Noise Amelioration Program. According to the Assistant Treasurer the levy had raised \$197 million as at 31 January 2001 and program expenditure has reached \$347 million, enabling 'over 3300 homes and over 80 public buildings to be noise insulated'.¹¹

The Department of Transport and Regional Services (DTRS) has outsourced collection of the levy to Air Services Australia, who collect it using the same administrative system as that used in the collection of aircraft landing fees.¹²

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The actual amount levied on each individual operator varies according to the amount of noise. In abbreviated terms, the Auditor-General described it thus:

Variable levy on jet aircraft operators based on the volume of jet aircraft noise emissions above a certain threshold at qualifying airports. Calculated by formula to derive a base levy unit which as at 1 July 1999 was \$167.18. A ceiling applies based on a prescribed maximum percentage increase and movements in the CPI.¹³

According to a Bureau of Transport and Communication Economics Report, airlines 'paying the levy seek to recover the costs by increasing the price for tickets'.¹⁴

The Australian National Audit Office (ANAO) reported that in 1998–99 the levy recovered 62% of the costs of the noise amelioration program at Sydney Airport for that year.¹⁵ The scheme operates on the basis of full cost recovery for noise reduction measures, but the annual costs are recovered over more than one year with the result that the *rate* of cost recovery varies between years and levy collection may continue beyond the point when program funds have been expended. The ANAO notes a number of explanations for this:

The program was in operation one year prior to the commencement of levy collection. Program expenditure is subject to peaks and troughs with costs of \$62 million in the first full year of operation, \$49 million in the second, and \$68 million in the third year. Apart from the difficulty in forecasting the annual program costs, attempting to fully recover costs in the same financial year would impose an onerous financial burden on levy payers. It would also be inequitable from the viewpoint of current airlines, because the investment is designed to reduce the noise from future as well as current airport users. As a result the costs associated with this program will be recovered over several years.¹⁶

DTRS has estimated that the levy will have paid for the noise amelioration program at Sydney Airport by around 2005–2006.¹⁷ This would perhaps explain why the Assistant Treasurer announced, when foreshadowing this Bill, that he had also declared Sydney Airport to be leviable for the period 22 February 2001 to 30 June 2006 inclusive.¹⁸

A Failing in the Administration of the Act

An obvious issue of concern to the Parliament arising from the Bill is the failure by the Government to declare Sydney Airport a leviable airport after 30 June 1996, putting at legal risk around \$175 million in public money. Sydney Airport was duly declared leviable in 1995 for a nine month period ending on 30 June 1996. No subsequent declaration has been made. DTRS is generally responsible for the 'management and collection arrangements for [the] Aircraft Noise Levy' and thus for the Principal Act.¹⁹ However, the Treasury is fixed with specific responsibility for section 7 of the Principal Act, the one dealing with declarations of an airport as 'leviable'.²⁰ The Assistant Treasurer, Senator Kemp, has called it 'an administrative oversight within the Treasury' and said that 'the Secretary to the Treasury has taken full responsibility for the matter'.²¹

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The ANAO did not identify the error in its report of February 2000 entitled *Management of Commonwealth Non-primary Industry Levies*, which examined the administration of a number of government levies including the Aircraft Noise Levy. The objectives of its general performance audit included assessment of the effectiveness of the financial management of the Aircraft Noise Levy. Its criteria addressed, amongst other things, 'the adequacy of...management...in relation to legal compliance'.²² The passages dealing with 'Legal Compliance' and 'Legislative compliance' focused primarily on constitutional issues arising from the requirement in section 81 of the Constitution for payment of certain levies into Consolidated Revenue and the restriction in section 55 on laws imposing a tax (necessitating a discussion of the difference between fees for service and a tax). In doing so the ANAO posed as one question in a checklist:

...whether the imposition and collection of the levy is duly authorised by legislation or regulation.²³

This is the same issue which prompted the Bill. But for ANAO it arose primarily in relation to constitutional requirements, and in the rather different context of a performance audit which focused mainly on the *financial* administration of Commonwealth levies. Nonetheless it is perhaps a little surprising that in the departmental-ANAO exchanges required to carry out the audit, the administrative failure to declare Sydney Airport leviable was not uncovered. Certainly the 'administrative oversight' giving rise to the Bill underscores the validity of the ANAO's observation that:

To ensure that a levy complies with constitutional and other legal requirements, an entity should:

...

- periodically review legislation and regulations against current administrative practice.²⁴

Retrospectivity

Clearly, to be effective, deeming or validating legislation of the kind exemplified in the Bill must operate retrospectively. There is a common law presumption *against* treating legislation as retrospective, *where it is ambiguous* whether Parliament intended it to so operate. But this principle should not be confused with the question of Parliament's *power* to pass retrospective legislation. Where, as in the Bill, Parliament expresses a clear intention that legislation operate retrospectively, it will have that legal effect even if it adversely affects the rights of individuals and other entities. Legislation which affirms what was (mistakenly) understood to be the correct legal position, as this Bill does, is generally seen as less prejudicial to individual liberties than Acts which state a new legal proposition and then apply it to past conduct.

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Main Provisions

The Bill makes only one amendment to the Principal Act which is to add two new subsections to section 7, the section empowering the Minister to declare an airport 'leviable'.

Proposed subsection 7(7) will deem a declaration that Sydney Airport is a leviable airport to have been duly made for the period from 1 July 1996 to 21 February 2001.

Proposed subsection 7(8) ensures that subsection 7(4) of the Principal Act will not apply to this one-off retrospective deemed declaration. Subsection 7(4) imposes obligations on the Minister in making a declaration. The Explanatory Memorandum refers to those aspects of subsection 7(4) which regulate the way the rate of levy is struck (as referred to above) to provide inter-airport equity and a tight match between collection and expenditure at any one date. But it does not refer to another aspect of subsection 7(4) which is perhaps equally pertinent and a little more embarrassing, namely the obligation on the Minister to ensure that a qualifying airport is declared a leviable airport 'as soon as practicable after it is identified as a qualifying airport'.²⁵

Endnotes

- 1 Senator Rod Kemp, Assistant Treasurer, *Aircraft Noise Levy Collection Amendment Bill 2001*, Press Release, 21 February 2001.
- 2 A more detailed background to the introduction of the Aircraft Noise Levy can be found in an earlier Bills Digest dealing with the Aircraft Noise Levy Bill 1995. See Allison Ballard, *Aircraft Noise Levy Bill 1995*, Bills Digest No 96 of 1995, Department of Parliamentary Library, Canberra, 11 May 1995 also available at the DPL website <http://search.aph.gov.au/search/ParlInfo.ASP?action=view&item=5&from=browse&path=Legislation/Bills+Digests/1995&items=140> (2 March 2001).
- 3 Bureau of Transport and Communication Economics, *Taxes and Charges in Australian Transport: A Transmodal Overview*, Working Paper 34, AGPS, 1997, also available at <http://www.dotrs.gov.au/ftp/pub/bte/wp34.pdf> (2 March 2001).
- 4 For more information see Allison Ballard, op cit.
- 5 Ibid, p. 4.
- 6 Section 7 of the *Aircraft Noise Levy Collection Act 1995*.
- 7 Subsection 7(4) of the *Aircraft Noise Levy Collection Act 1995*.
- 8 A local scheme (not governed by Commonwealth legislation) apparently operates in relation to late-night landings at Cairns Airport: Bureau of Transport and Communication Economics, op cit.
- 9 Department of Transport and Regional Services, *Portfolio Budget Statements 2000–01: Transport and Regional Services Portfolio*, Budget Related Paper No. 1.15, Canberra, 2000,

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also available at the department's website

http://www.dotrs.gov.au/budget/0001/new_measures.htm (2 March 2001). The revenue from the levy on jets landing at Adelaide Airport is estimated to rise from \$4.1 million in 2000-01 to \$6.9 million in 2003-04. Estimated expenditure on noise amelioration over the four years is as follows: \$10.3 million in 2000-01, \$24.2 million in 2001-02, \$23.7 million in 2002-03 and \$5.5 million in 2003-04.

- 10 Senator Rod Kemp, op cit.
- 11 Mr Hockey, House of Representatives, *Debates*, Second Reading Speech, 1 March 2001, p P21424 (proof version).
- 12 The Auditor-General, *Management of Commonwealth Non-primary Industry Levies*, Audit Report No. 32 1999-2000, Performance Audit, Australian National Audit Office, Canberra, 2000, para 3.7, also available at the ANAO website <http://www.anao.gov.au/> (2 March 2001).
- 13 Ibid at Figure 4.4.
- 14 Bureau of Transport and Communication Economics, op cit.
- 15 The Auditor-General, op cit, Figure 4.3.
- 16 Ibid, para 4.21.
- 17 Ibid.
- 18 Senator Rod Kemp, op cit.
- 19 Department of Transport and Regional Services, op cit, Output Group 5—Revenue Administration, also available at the department's website <http://www.dotrs.gov.au/budget/0001/table2-2.pdf> (2 March 2001).
- 20 Commonwealth of Australia, *Administrative Arrangements Order*, 21 October 1998 (as amended).
- 21 Senator Rod Kemp, op cit.
- 22 The Auditor-General, op cit, para 1.12.
- 23 Ibid, para 2.7.
- 24 Ibid, Figure 1.2 (on the basis that 'regulations' is treated as shorthand for all legislative instruments including declarations published in the *Gazette*).
- 25 Paragraph 7(4)(c) of the *Aircraft Noise Levy Collection Act 1995*. Sydney Airport was a qualifying airport in late 1995 and the *original* declaration was made in a timely fashion. Strictly speaking, a declaration that continued its status as a leviable airport from 1 July 1996 would not have been made close to its identification as a qualifying airport. Nonetheless the spirit and arguably the terms of paragraph 7(4)(c) are at odds with Sydney Airport lacking, for a prolonged period, formal legal status as a leviable airport.

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