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Aviation Legislation Amendment Bill 2002

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I N F O R M A T I O N A N D R E S E A R C H S E R V I C E S

Bills Digest
No. 144 2001-02

Aviation Legislation Amendment Bill 2002

Angus Martyn
Law and Bills Digest Group
29 May 2002

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Aviation Legislation Amendment Bill 2002

Date Introduced: 14 March 2002

House: House of Representatives

Portfolio: Transport and Regional Services

Commencement: Schedule 1 will commence on a day to be fixed by Proclamation, or six months after Royal Assent, whichever is the earlier. Schedule 2 will commence on a day to be fixed by Proclamation, or twelve months after Royal Assent, whichever is the earlier. The remainder of the Act, including Schedule 3, will commence on Royal Assent.

Purpose

The Bill has three main purposes:

- To amend the *International Air Services Commission Act 1992* to alter some of the Commission's decision-making processes regarding allocation of international air route capacity to Australian airlines
- To amend the *Air Navigation Act 1920* to pave the way for the implementation of regulations containing updated aviation security standards and procedures, and
- To repeal the *Federal Airports Corporation Act 1986* and transfer any remaining Federal Airports Corporation contracts, assets and liabilities to the Commonwealth.

Background

The Bill was originally introduced into Parliament in 5 April 2001 as the Aviation Legislation Amendment Bill (No.2) 2001. However, the 2001 Bill was never debated or referred to committee and lapsed with the proroguing of Parliament in October 2001. The Bill is unchanged from the 2001 version.

Schedule 1 - The International Air Services Commission

The International Air Services Commission (the Commission) is an independent statutory body responsible for the allocation of international air route capacity¹ to Australian

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Airlines. The Commission has a part-time Chairperson and two part-time members. It has a small secretariat staffed by officers from the Department of Transport and Regional Services (DTRS).

Under the *International Air Services Commission Act 1992* (the IASC Act), the Commission can only allocate air route capacity to a carrier if it is satisfied that this would be of benefit to the public and is not contrary to a relevant bilateral air service agreement.² In applying the public benefit test, the Commission must use criteria set out by the Commonwealth Transport Minister.³

As part of the National Competition Policy legislative review process, in 1996 the Treasurer directed the then Industry Commission to review Australian policy on international air services agreements and the Commission's air route capacity allocation process. A report was completed in September 1998 by the Industry Commission's successor, the Productivity Commission.⁴

The Aviation Legislation Amendment Bill 2002 (the Bill), proposes three broad changes to the IASC Act. Those changes relating to (i) the objects of the Act and (ii) the need or otherwise for submissions in uncontested allocation decisions, are consistent with recommendations contained in the 1998 report. The third change, that of the delegation of some of the Commission's powers to public service officers, was not explicitly addressed in the report.

The rationale for amending the objectives of the IASC Act seems to be that it is unclear from the current formulation what the primary objective actually is. The 1998 report commented:⁵

The Commission believes that the range of objectives currently specified in the IASC Act may introduce conflict and increase the complexity of the IASC's task... the task of the IASC would be simplified if the objective of the IASC was reduced to a simple, clear statement...it is therefore recommended that the [Act's] objectives...be amended to 'enhance the welfare of Australians by promoting economic efficiency through competition in the provision of international air services'.

In relation to the question of submissions, the report stated in part that:

the Act requires the [Commission] to take submissions whenever new capacity is advertised or a carrier applies for new capacity. Submissions may be made by many parties, including airlines operating on competing routes.... The collection of submissions is an important aspect of a transparent, public review process for contested applications. However, uncontested applications merely involve airlines introducing new services, or supplementing or expanding their range of products...[it is therefore recommended that]...submissions should not be called for unless a contested allocation is referred to the IASC.⁶

In July 1999, the Treasurer and Transport Minister made a joint statement setting out the Government's response to the Productivity Commission's report.⁷ The Productivity

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Commission's recommendations mentioned above were accepted by the Government and the Bill proposes the necessary legislative changes.

Schedule 2 - Aviation security

The International Regime

Australia is one of over 180 countries which are parties to the 1944 Convention on International Civil Aviation - the so-called 'Chicago Convention'. One of the functions of the Chicago Convention is to promote the adoption of international 'standards and recommended practices' or SARPs. These SARPs are contained in Annexes to the Convention. Annex 17 deals with aviation security. Australia has ratified Annex 17.

Since the terrorist attacks on the United States in September 2001, the International Civil Aviation Organisation (ICAO) has examined ways of improving aviation security. In February 2002, a Ministerial level meeting endorsed the *ICOA Aviation Security Plan of Action*. The Plan includes measures such as:

- regular, mandatory, systematic and harmonized audits to enable evaluation of aviation security in place in all Member States of ICAO;
- identification, analysis and development of an effective global response to new and emerging threats, integrating timely measures to be taken in specific fields including airports, aircraft and air traffic control systems;
- strengthening of the security-related provisions in the Annexes to the Convention on International Civil Aviation, using expedited procedures where warranted and subject to overall safety considerations, notably to provide for protection of the flight deck;
- close coordination and coherence with audit programmes at the regional and sub-regional level;
- processing of the results by ICAO in a way which reconciles confidentiality and transparency; and a follow-up programme for assistance, with rectification of identified deficiencies.

The Plan has yet to be formally adopted by the ICAO governing Council. In terms of strengthening the Chicago Convention Annex 17, a range of issues has been incorporated into Annex 17 and comes into effect from 1 July 2002:

- applicability of Annex 17 to domestic operations where practicable;
- international cooperation relating to threat information;
- certification of screeners;
- access control relating to air crew and airport personnel;

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- in-flight security personnel and protection of the cockpit;
- joint response to acts of unlawful interference;
- definition of aircraft security check and security restricted area;
- measures relating to special categories of passengers (eg. cooperative approach to armed personnel);
- security controls in relation to catering supplies and operators' stores;
- training programs; and
- baggage control.

Commonwealth Law and Policy

In terms of legislation, aviation security is currently regulated under the *Air Navigation Act 1920* and the *Air Navigation Regulations 1947*. In 1995, many of the aviation security measures then in the *Air Navigation Regulations 1947* were transferred to the *Air Navigation Act 1920*.⁸ This was done because the Act restricted penalties for offences under the Regulations to a maximum fine of \$5,000 and this was considered too low in relation to the potential seriousness of the offences.

In 1998, the Australian National Audit Office released a report, *Aviation Security in Australia*.⁹ The overall conclusion of the report was:

6. The ANAO concluded that [the Department of Transport and Regional Development, DTRD¹⁰] has established a regulatory regime which ensures Australia's compliance with the standards embodied in Annex 17. However, there are areas where Australia's aviation security regime can be strengthened even further.

7. The major areas where priority might be given to pursuing improvements to DTRD's aviation security regulatory regime include:

- developing a more robust approach to risk management for managing Australia's aviation security, based on a wide breadth of relevant intelligence sources which would include Australia's aviation industry, so as to ensure that DTRD is identifying, assessing and treating the more critical risks with the most effective strategies;
- completing within the proposed time frame DTRD's current review of its aviation legislative structure and its role as the aviation security regulator;
- developing a longer-term perspective to DTRD's planning structure and the use of performance information to help ensure management is well informed of actual

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progress towards planned achievement and implementation of risk treatment strategies;

- the development of proactive alliances with aviation regulators in neighbouring countries in the Asia-Pacific region, in order to work towards the common achievement of compliance with Annex 17 by international airports and airlines in the region;
- the development of a rigorous systems- and risk-based approach to both the approval of airline security programs and the conduct of airline audits to ensure that not only have airlines evidenced their capacity to comply with Australia's requirements from the start of their operations in Australia but that their subsequent compliance is regularly tested in an efficient and appropriate manner;
- further improvement of the airport audit process and development and implementation of a risk-based approach to regulated agent audits;
- development and implementation of an evaluation strategy for the regular review and analysis of airport, airline and regulated agent audit outcomes; and
- the development of a formal transparent approach to enforcement which would provide not only clear guidance to DTRD staff on the most critical facets of how best to ensure the industry complies with relevant legislation but also a clear message to non-compliant sectors of the industry of the consequences of non-compliance.

The (now) Department of Transport and Regional Services (DOTRS) agreed with all of the 14 specific recommendations¹¹ and commenced a review of aviation security legislation. Drafting instructions were released for industry consultation during 1999 and 2000. However, whilst the Aviation Legislation Amendment Bill (No.2) 2001 was introduced in Parliament in April 2001, associated draft regulations were not completed by the time of the September terrorist attacks. Comments on the general approach of the 1999 drafting instruments can be found in the [Bills Digest](#) for the Aviation Legislation Amendment Bill (No.2) 2001.

In December 2001, Federal Cabinet directed DOTRS to conduct reviews on four aviation security areas - passenger screening, baggage screening, airport access control and additional security measures (ASMs)¹². These reviews have incorporated discussions with an established industry consultative group - whose membership includes the peak airline and airports groups, Qantas and Virgin Blue and all airports that handle international traffic - and are likely to be progressively finalised in May and June 2002, probably enabling drafting instructions to be developed by around July 2002.

It is understood that airport security subcontractors and their staff have not been explicitly involved in the review process to date in terms of addressing the issue of training, wage levels and other conditions for security staff. The Australian Liquor, Hospitality and Miscellaneous Workers Union is currently running a campaign in association with its

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Security Our Airports Plan to achieve better wages and conditions for their members employed in security work, who they claim are amongst the lowest paid airport workers.

Airport and aviation security is also provided by Australian Protective Service (APS). The May 2002 Commonwealth budget contains \$128.5 million over four years mainly, to the APS, for additional air security officers¹³, increased airport counter terrorism response capabilities¹⁴ and five more explosive-detection dog teams.

Schedule 2 essentially repeals Part 3 of the *Air Navigation Act 1920*. Part 3 deals aviation security. While the bulk of the proposed new security measures will be contained in regulations, the Bill does introduce provisions into the Act dealing with the gathering, use and protection of aviation security information, including criminal penalties for information-related offences. Note that offences such as hijacking an aircraft or committing an act of violence aboard an aircraft are covered by the *Crimes (Aviation) Act 1991*, which itself is being revised by the Security Legislation Amendment (Terrorism) Bill 2002 [No. 2] to cover domestic flights.

Schedule 3 - Federal Airports Commission

Schedule 3 repeals the *Federal Airports Corporation Act 1986*.

The Federal Airports Corporation (FAC) was created under the *Federal Airports Corporation 1986*. However, following the enactment of the *Airports (Transitional) Act 1996*, the operation of Commonwealth-owned airports was progressively transferred from the FAC to either private lessee companies or Commonwealth owned corporations. This process was largely completed by 30 June 1998 and the FAC ceased operation in September 1998. According to the FAC's 1999 annual report, the last of residual FAC assets and liabilities were transferred to the Commonwealth in September 1999.¹⁵

Main Provisions

Schedule 1 - Amendment of the *International Air Services Commission Act 1992*

Item 1 replaces the existing objects of the Act in section 3 with a slightly altered version. The new version clarifies that the principal object of the Act is to 'enhance the welfare of Australians by promoting economic efficiency through competition in the provision of international air services'.

Item 4 amends existing paragraph 12(1)(b). The effect of the amendment is that the Commission will only be required to invite submissions before making a determination on allocating available capacity *if the regulations require it*. Currently submissions must be invited. Given that the Government supports the Productivity Commission's recommendation that submissions only be invited on contested allocations, presumably it

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will incorporate this position into regulations. The Commissions 2000-2001 annual report suggests that there was only contested allocation application out of the 48 determinations made in 2001.¹⁶

Item 5 amends existing subsections 17(2) and (3). The effect of the amendment is that the Commission will only be required to invite submissions before making a determination regarding renewal of a previous determination on allocating available capacity *if the regulations require it*. The amendments thus mirror the changes introduced by **item 4**. Subsection 17(1) requires the Commission to start its consideration of a renewal of a previous determination at least 12 months before the determination expires.

Item 6 inserts **new section 27AB**, which will enable the Commission to delegate some of its powers and functions to an Australian public service employee in the administering Department.

New subsection 27AB(1) lists these functions and powers. They are:

- Determination allocating capacity (section 7)
- Renew previous determinations (section 8 and subsections 17(2) and (3))
- Review determinations upon application by an Australian carrier to whom capacity is allocated (subsection 10(2))
- Invite applications for available capacity (subsection 12(1))
- Reject an application for allocation of available capacity if it does not comply with form, content, deadline etc requirements (subsection 14(3))
- Publicly notify outcome and reasons in relation to a determination (section 16)
- Renew interim determinations (subsections 18(1)-(3))
- Publicly notify outcome and reasons in relation to a renewal of determination (section 20)
- Invite submissions when conducting a section 10 review of a determination (subsection 22(1))
- Publicly notify outcome and reasons in relation to review of determination (section 27)
- Revoke a previous determination for allocation of capacity when an Australian carrier submits an application for surrendering capacity (section 27AA).

New subsection 27AB(2) provides that the delegation must be in writing and only made with the written agreement of the Departmental Secretary.

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New subsection 27AB(3) provides that regulations *may* restrict the Commission's ability to delegate a power or function to specified circumstances only.

New subsection 27AB(4) provides that if a delegate conducts a review of an allocation determination under subsection 10(2), the delegate is subject to sections 24-26. Sections 24-26 deal with process and criteria issues for subsection 10(2) reviews. In particular, section 24 requires that the Commission (or a delegate) can only vary the allocation if it would be of benefit to the public.¹⁷

New subsection 27AB(5) allows a delegate to request the Commission to undertake the section 10(2) review rather than the delegate. The Commission must comply with the request. The Bill does not provide any guidance as to what situations the delegate might elect to employ **subsection 27AB(5)**. However, the Bill's Explanatory Memorandum suggests this might occur¹⁸

when the circumstances of that application would make the Commission the more competent body to judge whether the applicant is reasonably capable of implementing its proposal - for example where a new airline applies for capacity on a route, or where an application may have implications for the *Trade Practices Act 1974*.

Item 7 is a transitional item. It clarifies that **item 4** only applies to situations where invitations to apply for allocation of capacity were made after the commencement of **item 4**.

Item 8 is also a transitional item. It clarifies that **item 5** only applies to situations where invitations to provide submissions were made after the commencement of **item 5**.

Schedule 2 - Amendment of the *Air Navigation Act 1920*

Items 1 and **2** respectively repeal the definitions of 'airport operator or operator' and 'airport security committee' contained in existing subsection 3(1). These terms are used in existing Part 3, which is repealed by **item 28**, and some of the paragraphs in existing subsection 23A(1), which are repealed by **item 30**.

Item 3 inserts a new term into subsection 3(1), that of 'aviation industry participant'. The term is defined to mean airport and aircraft operators, international air cargo operators and providers of aviation security services who are designated under regulations to be aviation industry participants.

Item 4 inserts a new definition into subsection 3(1), that of 'aviation security information'. The term is defined as information that relates to compliance, or a failure to comply, with regulations under the Act that relate to aviation security.

Items 5 to **25** repeal various definitions currently contained in subsection 3(1). These terms are used in existing Part 3, which is repealed by **item 28**, and some of the paragraphs in existing subsection 23A(1), which are repealed by **item 30**.

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Item 26 repeals existing sections 3AB to 3AF. These sections contain definitions of various technical terms such as 'unlawful interference with aviation'. They are used in existing Part 3, which is repealed by **item 28**, and some of the paragraphs in existing subsection 23A(1), which are repealed by **item 30**.

Item 27 repeals existing section 19 and replaces it with a new version. Both the existing and proposed **new section 19** deal with the carriage of war munitions by an aircraft in Australian territory or an Australian aircraft anywhere. Existing section 19 prohibits the carriage except with the written permission of the Transport Minister. The **new subsection 19(1)** requires the carriage to be done according to regulations otherwise a penalty of up to 7 years imprisonment applies. **New subsection 19(2)** applies Chapter 2 of the Criminal Code to **subsection 19(1)**. The principal fault element required for an offence under subsection 19(1) to occur is recklessness.¹⁹

Item 28 repeals existing Part 3. Part 3 contains the majority of aviation security provisions currently in the Act including passenger screening, passenger baggage, security programs, airport security measures etc. According the Bill's Explanatory Memorandum 'all these...topics will be transferred to the proposed Aviation Security Regulations 2002'.²⁰ However, item 28 also inserts **new sections 20-21E**.

New section 20 allows the Departmental Secretary to require an aviation industry participant to provide him or her with aviation security information 'if [he or she] believes on reasonable grounds' that the participant has information of a kind that is prescribed in the regulations. The Secretary must allow the participant at least 14 days to respond. A person engaging in conduct²¹ that results in a contravention of the Secretary's notice is liable to a fine of up to \$4 950.²² The fact that the requested information might lead to self-incrimination cannot be used as a reason for not providing it (**new section 20A**), although the information can generally only be used for particular purposes (see **new sections 21-21D** below).

New subsections 21(1)-(2) define when aviation security information is 'protected information' and the person providing it a 'protected person'. **New subsection 21(1)** establishes a presumption that these definitions apply when a person gives such information to a Department official, regardless of whether it is provided in response to a **new section 20** notice. However, **new subsection 21(2)** modifies this by stating

Subsection (1) does not apply if:

(a) the information is given to the Departmental official in the course of an investigation by the official that relates to compliance, or a failure to comply, with regulations under this Act that relate to aviation security; and

(b) the information is not given in compliance with a notice under section 20.

The Explanatory Memorandum suggests that **new subsection 21(2)** would apply 'if the person volunteers the information'.²³ In practice, and assuming there is no **new section 20**

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notice involved, it may be questionable how easy it will be to determine whether **new subsection 21(2)** applies.

New subsection 21A(1) restricts the disclosure of protected information by Departmental officials²⁴ to 'purposes of aviation security'. Such officials face a fine of \$4 950 for breaching this restriction.²⁵ However, **new subsection 21A(1)** does not apply where the information is disclosed in the course of prosecuting or defending an alleged **new section 21A(1)** offence or an offence under sections 137.1 or 137.2 of the Criminal Code. The latter are offences of providing false or misleading information or documents.

New section 21B restricts the disclosure of protected information by persons in general, including Departmental officials. Essentially, it may only be disclosed to Department officials, Commonwealth Ministers, members of a Minister's staff nominated by that Minister, an MP or Senator acting in the course of his or her duties as a member of Parliament, an aviation industry participant or person employed by the Public Service. However, in the later two cases²⁶, the information can only be disclosed 'in a form that does not identify, and is not reasonably capable of being used to identify, the protected person': **new paragraph 21B(2)(e)**.²⁷ Again, the offence provisions do not apply where the information is disclosed in the course of prosecuting or defending an alleged subsection 21A(1) offence or an offence under sections 137.1 or 137.2 of the Criminal Code. They also do not apply if the disclosure occurs with the consent of the protected person.

New section 21C states that a person is not to be required to disclose protected information to a court or tribunal except in a prosecution of an offence mentioned in **new subsection 21A(2)** or **paragraph 21B(3)(b)**.

New section 21D provides that neither giving protected information or any information, document or thing obtained as direct or indirect consequence of giving protected information is admissible as evidence is a criminal proceeding or any other proceeding for recovery of a penalty²⁸, other than a proceeding under sections 137.1 or 137.2 of the Criminal Code.

New section 21E clarifies that Chapter 2 of the Criminal Code (which deals with general responsibilities of criminal responsibility) applies to all Part 3 offences.

Items 29-30 are consequential amendments that flow from the repeal of the existing Part 3. Subsection 23A(1) lists those decisions reviewable by the Administrative Appeals Tribunal. **Item 30** repeals existing paragraphs 23A(1)(h) to (u) which list various reviewable decisions made under existing Part 3. **Item 29** is a grammatical alteration.

Schedule 3 - Repeal of the *Federal Airports Corporation Act 1986*

Item 1 repeals the *Federal Airports Corporation Act 1986*.

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Item 2 contains some definitions relating to **item 3**.

Item 3 provides that any Federal Airports Corporation (FAC) assets or liabilities that exist on the day before Schedule 3 commences are to become Commonwealth assets or liabilities on commencement.

Item 4 provides that, in relation to any court proceedings to which the FAC was a party on the day before Schedule 3 commences, the Commonwealth is to be substituted for the FAC on commencement and have the same rights and obligations in relation to those proceedings as the FAC.

Concluding Comments

Parliament is being asked to pass a Bill that, in Schedule 2, establishes the framework for what is likely to be a substantially revised aviation security regime. The main operational content of the regime will be in regulations, and it is unlikely that an exposure draft of these will be ready before August 2002 at the earliest. In addition, neither the Bill nor the Explanatory Memorandum provide any guidance on whether the Bill will have some type of link with the airport security and information-gathering measures contained in the Border Security Legislation Amendment Bill 2002. This said, the Bill will only come into effect on proclamation or 12 months after Royal Assent, allowing a reasonably long period to develop satisfactory regulations based on the current reviews of security issues mentioned in the background section of this Digest.

Endnotes

- 1 This includes both passenger and freight services.
- 2 Subsection 7(2).
- 3 Subsection 7(3). Criteria are contained in sections 4-8 of the Ministers policy statement dated April 1997. See: <http://www.dotrs.gov.au/ftp/pub/iasc/polst97.pdf>
- 4 *International Air Services* Productivity Commission Report No.2, 11 September 1998, See: <http://www.pc.gov.au/inquiry/airserv/index.html>
- 5 *ibid.*, p. 154.
- 6 *Ibid.*, pp. 164–5.
- 7 'International Air Services' *Joint Statement* The Hon John Anderson and the Hon Peter Costello 3 June 1999, at: http://www.dotrs.gov.au/media/anders/archive/1999/jun_99/a79_99.htm
- 8 The amending legislation was the Transport Legislation Amendment (No.2) 1995.

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- 9 ANAO report No. 16 1998/99.
- 10 Now DOTRS.
- 11 One subject to qualification.
- 12 ASM are special measures taken to address a particular security issue or potential threat that might arise from time to time.
- 13 The intention to place security officers in aircraft was first announced in 2001: see 'Introduction of Air Security Officers', *Media Release*, Minister for Justice and Customs 19 November 2001 at: http://www.ag.gov.au/aghome/agnews/2001newsjus/e245_01.htm
- 14 This was largely foreshadowed in early 2002: see *Enhanced Counter Terrorist Presence at Airports*, *Media Release*, Minister for Justice and Customs 25 January 2002 at: http://www.ag.gov.au/aghome/agnews/2002newsjus/e05_02.htm
- 15 Covering letter to the Minister from DTRS Secretary dated 22 September 1999. There appears to be no annual report for 2000.
- 16 IASC 2000-2001 *annual report*, p. 12.
- 17 Note that, unlike subsection 7(3), section 24 does not specify that the 'public benefit' test must be considered with reference to the criteria set down by the section 11 Ministerial policy statement.
- 18 *Explanatory Memorandum*, p. 7.
- 19 Recklessness with respect to a circumstance or a result is defined in the Criminal Code as 'he or she is aware of a substantial risk that the [circumstance / result] will occur and having regard to the circumstances known to him or her, it is unjustifiable to take the risk'.
- 20 *Explanatory Memorandum*, p. 10. The Aviation Security Regulations 2002 are the as yet undrafted regulations referred to in the background section of this digest.
- 21 'Engage in conduct' includes failing to do an act, for example, failing, without a lawful excuse, to supply the information specified by the Secretary.
- 22 The actual penalty is 45 penalty units. 1 penalty unit is \$110.
- 23 *Explanatory Memorandum*, p. 11.
- 24 Disclosure by persons other than Departmental officials are covered by section 21B.
- 25 It is not necessary that the disclosing official knows the information is protected information - it is sufficient that he or she is reckless about whether it is protected or not.
- 26 That is, information disclosed to aviation industry participants or persons employed by the Public Service.
- 27 It is understood that this is to allow general information to be disclosed about aviation security to airlines, non-DOTRS public servants etc, whilst restricting more sensitive information to a more limited range of persons.
- 28 This would include administrative fines currently in place under the Air Navigation Regulations.

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