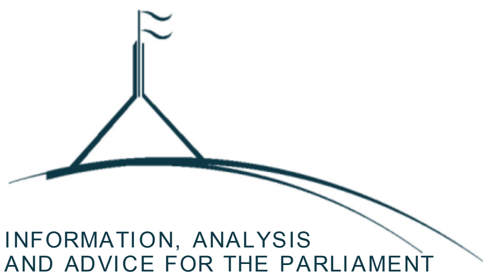

INFORMATION AND RESEARCH SERVICES

Bills Digest
No. 147 2002–03

Civil Aviation Legislation Amendment Bill 2003

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Bills Digest
No. 147 2002–03

Civil Aviation Legislation Amendment Bill 2003

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Law and Bills Digest and the Science, Technology, Environment and Resources Groups
19 May 2003

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Civil Aviation Legislation Amendment Bill 2003

Date Introduced: 27 March 2003

House: House of Representatives

Portfolio: Transport and Regional Services

Commencement: The Act itself and some of the main amendments commence on Royal Assent. Other amendments commence on day fixed by Proclamation, or failing that, 12 months after Royal Assent.

Purpose

To main purposes of the Bill are:

- to amend the *Civil Aviation Act 1988* (the Act) as a prelude to the introduction of new regulations covering aircraft maintenance standards, and
- to repeal section 192 of the *Airports Act 1996* which relates to the 'access to services' regime in Part IIIA of the *Trade Practices Act 1974.*

Background

In its various forms, the Civil Aviation Safety Authority (CASA)[1] has been attempting regulatory reform over the past decade with the estimated completion date steadily slipping. Repeated management and policy changes, plus other factors, combined with complexity of aviation regulations, have contributed to the delays. Reassuringly, the June 2002 release of the Australian National Audit Office Follow-up Audit of the Civil Aviation Safety Authority found general compliance with its 1999 audit recommendations, although the ANAO raised three matters and issues of risk identification. Meanwhile the CASA Regulatory Reform Program has proceeded, with an apparently successful public conference airing earlier this year, and reflecting industry support. This Bill should provide a basis for the regulatory change ahead, in line with international standards.

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Main Provisions

Schedule 1 – Amendment of the *Civil Aviation Act 1988*

Items 1 and **3** insert definitions of 'aeronautical product' and 'maintenance' into subsection 3(1) of the Act respectively. The *Explanatory Memorandum* to the Bill states that:[2]

> [these definitions are] consistent with [those] used by the International Civil Aviation Organisation and by major National Airworthiness Authorities, for example the United States Federal Aviation Administration and the European Joint Aviation Authority.

Item 2 inserts a new definition of 'Australian Aircraft' into existing subsection 3(1) of the Act. The current definition only includes aircraft registered in Australia. **Item 2** will expand this by also including in the definition any aircraft in Australian territory[3], *except* foreign registered aircraft or state aircraft. The practical effect is to expand the range of aircraft subject to aviation safety controls under the Act, regulations, orders etc. According to the *Explanatory Memorandum,* the rationale for this amendment is that[4]

> CASA is currently in the process of re-writing the regulations dealing with registration of aircraft, and operation and maintenance of aircraft which are currently not registered with CASA. The amendment to the definition of "Australian aircraft" is intended to coincide with the commencement of those regulations.

Item 4 amends the definition of 'state aircraft' in existing subsection 3(1). Currently an aircraft that is considered to be 'part' of the Australia Defence Force (ADF) *is not* a state aircraft if it is registered under the civil aviation requirements.[5] State aircraft generally fall outside the scope of the Act. Thus planes leased to the ADF currently continue to come under civil aviation regulation even if used for military purposes. Article 3 of the Chicago Convention[6] provides that:

> this Convention shall be applicable only to civil aircraft, and shall not be applicable to state aircraft…Aircraft used in military, customs and police services shall be deemed to be state aircraft.

Item 4 brings the Act into line with Article 3. It is understood that the ADF is actively reviewing lease arrangements for future support aircraft acquisitions. The change proposed by **item 4** will likely strengthen the possibility that re-fuelling tanker aircraft and liaison aircraft might be acquired by the ADF through lease arrangements rather than outright purchase.

Item 5 inserts a **new paragraph 9(3)(ca)** to give CASA the power to enter into Chicago Convention Article 83*bis* agreements with other countries. Such agreements allow responsibility for civil aviation regulation to be transferred between signatories and are

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usually expressed to apply to certain aircraft where they are registered in one country but actually operate in another. The Minister's second reading speech states:[7]

> While at present there are no 83bis agreements between Australia and another country this provision will facilitate such agreements in the future.
>
> Currently the Minister for Transport and Regional Services has the power to enter into article 83bis agreements but CASA does not. As ICAO considers that such agreements should be made directly between the relevant national airworthiness authorities, because they are administrative instruments of less than treaty status, this bill appropriately transfers the function to CASA.
>
> Administrative and technical provisions concerning the implementation of these agreements will be covered in regulations to be developed by CASA and the department in consultation with industry.
>
> The amendment to transfer the function of entering into 83bis agreements to CASA is consistent with Australia's objective of harmonising our legislative framework with international standards of safety regulation. Such agreements could also benefit the Australian aviation industry and the consumer in terms of increased economic opportunities and reduced costs.
>
> For example, domestic operators would potentially have greater flexibility and more cost-effective options in operating their aircraft fleets and in being able to lease aircraft that are under-utilised in Australia during periods of low demand to overseas operators. Australian maintenance organisations may also benefit due to increased opportunities to carry out work on foreign aircraft that would otherwise have been carried out overseas.

Items 6-8 amend the wording of offences in existing section 20AA for flying aircraft contrary to safety requirements. **Items 6** and **7** make no practical changes to the offences or the punishment for breach – they merely update the language to make it consistent with the style of the *Criminal Code Act 1995*. The same changes were contained in the *Aviation Legislation Amendment Bill (No.1) 2001*, but that Bill lapsed with the proroguing of Parliament in October 2001. **Item 8**, although similar to the provision it replaces (existing paragraph 20AA(3b)), does seem to introduce some new requirements in order for an offence to occur, particular in **new paragraph 20AA(4)(c)** and **(d)**.

Item 11 makes a similar stylistic change to the existing offence in section 24 of tampering with an aircraft if this endangers aircraft safety etc. However, it is curious that an offence new paragraph 24(2)(b) mentions the requirement of 'endanger the safety' twice. It is not clear whether there is a technical reason for this or whether it is a drafting oversight.

Item 9 substitutes a **new subsection 20AB(2)** for the existing version. The subsection deals with carrying out of maintenance on aircraft or aircraft parts. It currently only requires that the maintenance person be authorised by regulations if the work relates to an

Australian aircraft *in Australian territory*. **Item 9** will extend this requirement to Australian aircraft regardless of where it is. The *Explanatory Memorandum* says:[8]

> the change will bring the Act into line with Australia's international obligations under the Chicago Convention to control the safety of Australian registered aircraft wherever they are situated.

Authorisation will also be required for maintenance done in Australia on any aeronautical product. The *Explanatory Memorandum* says nothing about why this addition has been incorporated into the bill.

Items 10 and **12-14** make minor consequential changes.

Item 15 amends paragraph 28(3)(c). Existing section 28 *requires* CASA to issue an Air Operator's Certificate (AOC) *only* if it is satisfied of certain matters.[9] One of these is that the applicant must have 'key personnel…[that] have appropriate experience in air operations to conduct or to carry out the AOC operations safely'. Included in the definition of key personnel is 'the head of the aircraft *maintenance part* (if any) of the organisation'. **Item 15** replaces 'aircraft maintenance' in this definition with 'aircraft airworthiness and maintenance control' in this context. The *Explanatory Memorandum* comments that this change is to recognise the situation where:[10]

> many aircraft operators do not have aircraft maintenance done "in house", and therefore there may be no person who could be regarded as "the head of the aircraft maintenance part" of the operator's organisation. The addition of the word "control" is designed to ensure that even when aircraft maintenance is not done by the aircraft operator itself, if a particular person is responsible for making arrangements for aircraft maintenance, then that person will be part of the operator's ***key personnel*** for the purposes of section 28 of the Act.

No information is given in the *Explanatory Memorandum* as to whether CASA has been refused an AOC application because of the issue which **item 15** addresses.

Where the AOC would authorise the operation of a foreign registered aircraft on regulated domestic flights, CASA must also be satisfied of additional matters before issuing the AOC. These matters are listed in section 28A. One of these is that the AOC applicant must have informed CASA 'of the country or countries in which maintenance, other than daily maintenance, was carried out on the aircraft during that year'. **Items 16** and **18** replace the term 'daily maintenance' with 'line maintenance', as the apparently the later is the standard international aviation industry term.[11] The definition of 'line maintenance' includes malfunction rectifications performed en route and at base stations during transit, turn-around or night stops – thus maintenance of this kind does not have to be reported under section 28A.

Item 17 also relates to section 28A matters. Specifically, existing paragraph 28A(1)(g) requires that, where an aircraft the subject of an AOC application is leased, CASA must be given information on the person responsible for operational control over the aircraft. **Item**

17 widens this requirement to include information on the person responsible for the controlling the airworthiness and maintenance of the aircraft.

Items 19 and **20** amends subsection 32AHA(1). Under certain circumstances, section 32AHA allows a magistrate to order that evidence (goods, records etc) seized under section 32AH to be retained by an 'investigator' beyond the normal time periods specified in section 32AH. These time periods are 60 days, or completion of any relevant proceedings,[12] providing in the latter case the prosecution is started within that 60 days.

The literal meaning of the current wording of 32AHA(1) means that any application for extended retention of evidence can only be made following the expiration of the 60 day period. Accordingly, an investigator may be technically required to return seized evidence before being able to apply for an extended retention order. **Item 20** will allow an application (and a subsequent order) to be made *before* the expiration of the 60 day period if 'there is a reasonable likelihood that [relevant] proceedings will not commence' before the end of the 60 days. The *Explanatory Memorandum* provides no indication whether the current wording of 32AHA(1) has lead to loss of evidence etc in cases where it has had to be returned due to proceedings not commencing within the 60 day period.

Item 19 makes a minor stylistic wording change.

Items 21 and **23** amend existing section 32AL. This provision allows, under certain circumstances, 'a court of competent jurisdiction' to authorise CASA to go ahead and destroy specified things seized under section 32AH. The *Explanatory Memorandum* comments that:[13]

> It [is] not very clear from the current provision which court had jurisdiction to issue an order for destruction or disposal of seized goods, which may range in value from a few dollars' worth of fireworks to aircraft components worth several thousands or tens of thousands of dollars

The amendments will specifically give a magistrate the power to grant an order authorising destruction. No details are given whether CASA currently applies to magistrates for destruction orders, and if so, whether any orders have been challenged by the owners of the relevant property.

Item 22 also amends to section 32AL. It will allow CASA to seek a court order permitting it to dispose of goods seized under section 32AH, rather than their destruction. An example of disposal would include selling them.

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

Items 1 and **2** amend the definition of 'Australian aircraft' and 'state aircraft' respectively to make them consistent with the changes proposed in **Items 2** and **4** of Schedule 1.

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Schedule 3 – Amendment of the *Airports Act 1996*

Item 1 repeals section 192 of the *Airports Act 1996.* Section 192 relates to the access to services regime in Part IIIA of the *Trade Practices Act 1974.* This regime is designed to:

> facilitate third parties obtaining access to the services of certain essential facilities of national significance. The notion underlying the regime is that access to certain facilities with natural monopoly characteristics, such as electricity grids or gas pipelines, is needed to encourage competition in related markets, such as electricity generation or gas production. Access to such facilities can be achieved if a person seeking access is successful in having the service 'declared' and then negotiates access with the service provider.

Part IIIA can be applied to major airports *either* through a simple determination decision by the Transport Minister under section 192 of the *Airports Act 1996 or* through a much more involved process by the Treasurer under Part IIIA itself. Under section 192, there are effectively no considerations that the Transport Minister has to take into account in making a determination. In addition, the Transport Minister *must* make the determination as soon as practical after the expiry of the airports 'designated period'[14] – rather than the more discretionary decision by the Treasurer under Part IIIA. The one major constraint under section 192 is that it appears the determination cannot be renewed beyond its expiry date specified when the determination was made. It is understood this is because section 192 was intended as an interim measure only. As noted in the second reading speech, as at July 2003, only Sydney (Kingsford Smith) airport would be the only airport subject to section 192. The Minister commented that:[15]

> The section has become redundant in the sense that declaration of airport services is currently available under the provisions of part IIIA of the Trade Practices Act 1974. Repeal of the section will ensure that all airports are subject to uniform statutory provisions in regard to providing access to certain essential facilities.

The proposed repeal of section 192 seems consistent with the comment of the Productivity Commission in a recent report that it:[16]

> has not been persuaded that there is a case for the continuation of *special* access provisions that impose more easily satisfied declaration criteria for airports than other industries.

Notwithstanding the Productivity Commission's view, Sydney (Kingsford Smith) airport plays a key role in the overall competitiveness of Australia's aviation system. It would therefore be useful if the Government provided more information why section 192 has no possible utility in relation to this airport.

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Endnotes

1 The Civil Aviation Safety Authority (CASA) was established in 1995 as an independent statutory authority under section 8 of the *Civil Aviation Act 1988.* CASA was formed out of the old Civil Aviation Authority, which was split in two, with service provider functions being taken up by the new Airservices Australia.

2 At pp. 10-11.

3 This includes the airspace over the mainland, territorial sea and external territories.

4 At pp. 10-11.

5 Existing section 4 excludes state aircraft from the main civil aviation requirements in Part III of the Act.

6 Its full name is the 1944 Convention on International Civil Aviation.

7 The Hon Peter McGauran, House of Representatives *Debates* 27 March 2003 p. 13755.

8 At p. 13.

9 Note that section 28 does not actually *prohibit* CASA from issuing an AOC even if it is not satisfied of all relevant matters.

10 At p. 13.

11 *Explanatory Memorandum* p. 14.

12 That is, proceedings in relation to prosecution of an offence.

13 At p. 15.

14 This is usually a twelve-month period starting when a lease is granted on the airport: subsection 192(5) of the *Airports Act 1996*.

15 Op cit.

16 *Price Regulation of Airport Services*, Report no. 19 January 2002, p. xxxiv. The report can be downloaded at http://www.pc.gov.au/inquiry/airports/finalreport/airports.pdf.

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