



INFORMATION, ANALYSIS  
AND ADVICE FOR THE PARLIAMENT

INFORMATION AND RESEARCH SERVICES

Bills Digest  
No. 148 2002–03

## Civil Aviation Amendment Bill 2003

ISSN 1328-8091

© Copyright Commonwealth of Australia 2003

Except to the extent of the uses permitted under the *Copyright Act 1968*, no part of this publication may be reproduced or transmitted in any form or by any means including information storage and retrieval systems, without the prior written consent of the Department of the Parliamentary Library, other than by Senators and Members of the Australian Parliament in the course of their official duties.

This paper has been prepared for general distribution to Senators and Members of the Australian Parliament. While great care is taken to ensure that the paper is accurate and balanced, the paper is written using information publicly available at the time of production. The views expressed are those of the author and should not be attributed to the Information and Research Services (IRS). Advice on legislation or legal policy issues contained in this paper is provided for use in parliamentary debate and for related parliamentary purposes. This paper is not professional legal opinion. Readers are reminded that the paper is not an official parliamentary or Australian government document. IRS staff are available to discuss the paper's contents with Senators and Members and their staff but not with members of the public.

## **Inquiries**

Members, Senators and Parliamentary staff can obtain further information from the Information and Research Services on (02) 6277 2646.

Information and Research Services publications are available on the ParlInfo database. On the Internet the Department of the Parliamentary Library can be found at:  
<http://www.aph.gov.au/library/>

Published by the Department of the Parliamentary Library, 2003

INFORMATION AND RESEARCH SERVICES

Bills Digest  
No. 148 2002-03

Civil Aviation Amendment Bill 2003

Angus Martyn and Matthew James  
Law and Bills Digest and the Science, Technology, Environment and  
Resources Groups  
19 May 2003

## Contents

Purpose.....	1
Background.....	1
Civil Aviation Safety Authority governance issues .....	1
Aviation safety regulation .....	3
The main direction of the Bill.....	4
Main Provisions .....	5
Schedule 1 – Amendments to the <i>Civil Aviation Act 1988</i> .....	5
Concluding Comments.....	12
Endnotes.....	13

# Civil Aviation Amendment Bill 2003

**Date Introduced:** 27 March 2003

**House:** House of Representatives

**Portfolio:** Transport and Regional Services

**Commencement:** The Act itself commences on Royal Assent. However, the earliest main amendments commence on 1 July 2003, with a second round commencing 4 months after Royal Assent.

## Purpose

There two main purposes to the Bill:

- to abolish the CASA board and bring governance of CASA more under the control of the Transport Minister, and
- to revise various CASA investigatory and enforcement powers, particularly regarding suspension and /or cancellation of licenses.

## Background

### Civil Aviation Safety Authority governance issues

The Civil Aviation Safety Authority (CASA) was established in July 1995 as an independent statutory authority under section 8 of the *Civil Aviation Act 1988* (the Act). 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.<sup>1</sup> Under section 9 of the Act, CASA is responsible, amongst other things, for the safety regulation of civil air operations within Australian territory, the operation of Australian registered aircraft, and for the promotion of high standards of aviation safety.

CASA is governed by a [Board of Directors](#), appointed by the Minister for Transport and Regional Services. An Executive Team of 7 is responsible for strategic decision making, supported by a broader Senior Management Group. Within CASA, the Director of Aviation Safety is the chief executive officer and a member of the Board. The Director takes overall responsibility for CASA administration and operational activities. The Board

#### **Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

decides the objectives, strategies and policies to be followed by CASA and ensures that CASA performs its functions in a proper, efficient and effective manner. CASA, the Department of Transport and Regional Services (which includes the Australian Transport Safety Bureau) and Airservices Australia constitute a tripartite structure responsible for providing safe aviation within Australia, each with separate and distinct functions.

CASA is no stranger to management controversies and personality conflicts within its governing Board. After the current Federal Government took office, the CASA Board became the centre of some fierce debates and public campaigns against it. Following wide criticism of the Board, the then Minister for Transport and Regional Services Mr John Sharp facilitated changes to its membership.<sup>2</sup> On 6 May 1997, after new legislation expanded the CASA board to seven positions, Mr Dick Smith was appointed CASA Deputy Chairman under Chairman Justice William Fischer. Mr Laurence Foley later joined the Board. In June, Ms Gabi Hollows and Captain Molloy retired to be replaced by Dr Paul Scully-Power and Mr Bruce Byron.

On 26 August 1997, the Broderick/Willoughby report into the relationship between the Director of Aviation Safety and the CASA Board made recommendations on corporate governance. On 26 September 1997, CASA Director Mr Leroy Keith left after the Board passed a no-confidence motion in his management strategy to be replaced by Mr John Pike. Chairman Justice William Fischer and member Dr Clare Pollock both resigned in protest at the Board's handling of the former Director. On 24 December 1997, Mr Smith was appointed as Chairman of CASA, with Dr Scully-Power as Deputy Chairman, with Mr Michael Ryan, Mr Tony Pyne and Ms Janine Shepherd joining Mr Bruce Byron and Mr Laurence Foley on the Board. On 1 July 1998, Mr Mick Toller became the new Director of Aviation Safety.

Following a fatal seaplane crash north of Sydney in July 1998, Stephen Skehill was commissioned by the Minister to review CASA's regulation of the seaplane's operators, Aquatic Air. Mr Skehill's report<sup>3</sup> was completed in October 1998 and tabled in Parliament in February 1999. The report found that a small number of CASA actions were defective and not to be preferred, although not improper, including its failure to suspend Aquatic Air. The then CASA Chairman, Mr Dick Smith, was reported as believing that the Skehill report showed the continuing existence of deficiencies at CASA.<sup>4</sup> However, Mr Smith resigned in March 1999 amid allegations of collusion between the CASA board and airlines over a trial of low flight level airspace management. Ms Janine Shepherd resigned on 23 March 1999, while Mr Byron's term of office expired on 30 June 1999. In July 1999, Ms Megan Cornelius was appointed to the Board and Mr James Kimpton became Deputy Chairman with Dr Scully-Power now as Chairman.

In September 1999, the Senate forced the tabling of a second report by Mr Skehill on the appointment of a CASA Board member, Mr Laurie Foley, as Assistant Director, Aviation Safety Compliance. This (second) Skehill investigation into CASA corporate governance cleared Mr Laurie Foley over selection processes. On 19 June 2000, Mr Peter Harris, Secretary of the Department of Transport and Regional Services, joined the Board.

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

In November 1999 the Australian National Audit Office (ANAO) released [Aviation Safety Compliance by CASA](#). While concluding that CASA was a competent agency, the report noted continuing turmoil within CASA that warranted stable management processes. CASA agreed with all of the 13 recommendations relating to safety targets and corporate plans so that procedures and documentation adhered better to regulations. A follow-up ANAO audit [report](#) found in mid-2002 that CASA's management of aviation safety compliance systems had improved with only three new matters arising, although risk identification processes had stalled.

In February 2000, the Federal Government appointed a new consultative body, the [Aviation Safety Forum](#) (ASF), to provide strategic advice to CASA on matters of cultural change, cost structures, the Regulatory Reform Plan (discussed in next section) and policy aspects, and serve as a link to industry interests.

In May 2000, the International Civil Aviation Organisation concluded that Australia's air safety system was generally satisfactory after a safety audit of CASA found some 16 action points. A copy of the Action Plan to address the recommendations may be found on-line at: [www.dotrs.gov.au/avnapt/ipb/icao/usoap.htm](http://www.dotrs.gov.au/avnapt/ipb/icao/usoap.htm). Such outcomes were reassuring in a time of continuing change and Ansett's later eventual demise, amid media claims that CASA was ill-equipped in skills and culture to identify and correct problems and issues that may cause a major air disaster.<sup>5</sup>

In October 2000, the Senate Rural and Regional Affairs and Transport Legislation Committee produced a [report](#) on CASA's actions in relation to another small aviation operator, ARCAS Airways. The report contained details about concealment of unofficial aircraft defect records and led to recommendations for legal prosecutions and the creation of a new position of the Deputy Director of Aviation Safety (Mr Bruce Gemmel) within CASA. CASA responded by taking action on the recommendations and demoted Mr Foley as its head of aviation safety compliance.<sup>6</sup> On 22 December 2000, Mr Foley resigned, to be later 'replaced' by Mr Mike Williams. Mr Peter Harris had left the Board on 19 June 2000, while Mr Pyne and Mr Ryan completed their terms in December 2000.

In mid 2001, the CASA Chairman Dr Paul Scully-Power retired and was replaced by Mr Ted Anson, then Chairman of the Australian Maritime Safety Authority (AMSA). The Government asked Mr Anson to consider the existing CASA Board structure and to report on whether it was appropriate for safety regulation to be a statutory authority. The report was completed in mid-2002 but not publicly released. The main features of the Bill were foreshadowed in the Minister's [announcement](#) of 18 November 2002. These proposed changes seemed to have generally been seen as a move in the right direction by the aviation industry.<sup>7</sup>

## Aviation safety regulation

Separate from the various internal CASA governance issues discussed in the previous section, there remain proposals by independent parties for the general reform of aviation

### **Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

safety regulation. In particular, the role of CASA as law maker, administrator and enforcement regulator has brought about criticisms of conflicts of interest when dealing with the aviation industry. One proposal titled *A New Approach to Aviation Safety*, prepared by a pilot, Mr Bill Hamilton, involves a Civil Aviation Administration to perform most of CASA's technical functions and inspections, reporting to the Minister. If adopted, a degree of self-regulation would apply to general aviation bodies, sports aviation organisations and aerial work operations. A separate Aviation Council comprising aviation industry participants would be responsible for developing policy, risk assessment, legislation, regulatory reviews and other matters that currently occupy CASA resources.<sup>8</sup>

The vagaries of air safety regulation and its long and turbulent history in Australia have proved perplexing. A little history of the attempts towards air safety regulatory reform in Australia is pertinent. A 1987 review was followed by a 1990 harmonisation with New Zealand in relation to Civil Aviation orders. The 1993 regulatory structure validation project (RSVP) was later scrapped, while a 1996 regulatory framework program (RFP) was not completed. A corresponding number of past bills have not managed to pass through the Parliament, such as the *Aviation Legislation Amendment Bill 2001*. In 1999, the Regulatory Reform Program (RRP) began and now CASA aims to deliver the RRP by December 2003 for final Parliamentary approval.

The aim of the RRP exercise is to deliver 'safety through clarity' with fair and effective regulation based on best practice of international standards and an industry knowledge base. As air safety culture has generally been conservative, given aviation technologies, its nature has given rise to a diversity of often-polarised views. Current world issues affecting the debate on air safety include the gap between general aviation and regular air passenger and freight transport training, the growth of management skill requirements, flight automation and training skills, age limits, aircraft pilot type ratings, security aspects and medical standards. Some of these issues might arise in the debate of related Bills<sup>9</sup> currently before Parliament and / or when new regulations are tabled in Parliament later this year.

### The main direction of the Bill

Overall, the Bill will place CASA more directly under Ministerial supervision than previously applied. It is designed to introduce greater procedural fairness in instances of the suspension and /or cancellation of an aviation license. Finally, the introduction of a demerits scheme aligned with self-reporting would seem to shift some onus onto the aviation industry to ensure compliance with appropriate safety standards.

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*



## Main Provisions

### Schedule 1 – Amendments to the *Civil Aviation Act 1988*

**Items 1-9** all make various changes to existing subsection 3(1) of the Civil Aviation Act 1988 (the Act), Subsection 3(1) contains various definitions for terms used in the Act. Notably, **items 1, 3 6, 7 and 8** repeal definitions relating to the CASA board. As the board is being abolished, these terms are no longer required.

**Items 10-12** amend existing sections 12 and 12A. These changes increase the Minister's ability to control how CASA carries out its statutory functions and uses its powers. Currently, the Minister may only:

- give general directions as to the performance of CASA's *regulatory* function (section 12); and
- notify CASA of the Minister's views as to the appropriate strategic direction for CASA and the manner in which CASA should perform its functions (section 12A).

CASA must currently comply with a section 12 direction but must only 'take into account' section 12A notifications.

**Item 10** will insert **new subsection 12(1A)** which will allow the Minister to direct CASA regarding consultation matters. Essentially, the Minister will be able to instruct CASA how to consult, what to consult about, and who to consult with. It is not explicit whether the Minister can prohibit CASA from, for example, consulting with certain bodies, but it seems likely that the power could include this. It is worth noting that existing subsection 12(2) *only* allows any Ministerial directions to CASA regarding 'the performance of its *regulatory function* [to be]...of a *general nature*' [emphasis added]. Regulatory functions are those listed in existing subsection 9(1) and they include matters such as 'developing and promulgating appropriate, clear and concise aviation safety standards'.<sup>10</sup> If part of the process of developing such standards includes consultation with the aviation industry, it is arguable that there is potential for a **new section 12(1A)** direction to be inconsistent with the 'general nature' limitation in existing section 12(2) and thus the direction would be unlawful.<sup>11</sup> However, whether any particular **new section 12(1A)** direction was unlawful in this regard would depend on its specific content and application.

**Item 11** inserts **new subsection 12A(1A)** to clarify that under existing section 12A the Minister cannot include in his / her notification concerning CASA strategic direction views about how a particular case or particular individual authorisation holder should be dealt with.

**Item 12** amends section 12A(2) to require CASA to 'act in accordance' with the Minister's notified views, rather than the current 'take account of' those views. This eliminates the significant discretion that CASA currently has in deciding how to reflect the Minister's views in terms of its strategic direction etc.

#### **Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

**Item 13** inserts **new sections 12C and 12D**.

**New section 12C** allows the Minister to enter into an agreement with the CASA Director in relation to the performance of CASA's powers and the execution of CASA's functions. While the Bill provides no details on the scope of such agreements, the *Explanatory Memorandum* comments that<sup>12</sup>

such an agreement is likely to cover CASA's policy direction, priorities and performance standards

**New subsection 12C(4)** provides that an agreement with the CASA Director cannot have the 'effect of requiring CASA to perform a function or exercise a power in relation to a particular case or a particular holder of a civil aviation authorisation'. The CASA Director must also advise the Minister of any matter that may prevent them from complying with the terms of the agreement.

**New section 12D** allows the Minister to direct CASA to report to the Minister or to the Departmental Secretary about specific arrangements or matters. Presumably this is to ensure CASA is aware that the Minister / Secretary must be kept completely informed about sensitive issues.

**Item 14** inserts **new subsections 28BA(4)-(5)**. Existing section 28BA deals with the conditions that attached to the issue of an airworthiness operating certificate (AOC). If a condition is breached, CASA may suspend or cancel the AOC. **New subsection 28BA(4)** will require CASA to notify the holder and allow it a reasonable time to 'show cause' why CASA should not proceed with a suspension or cancellation. If after this, CASA proceeds, **new subsection 28BA(5)** requires it to include its notification to the holder that the holder has a right to obtain an automatic stay under the **new section 31AA** (see **item 17**).

**Item 15** inserts **new Divisions 3A-3D** which deal with various CASA investigatory and enforcement functions.

**New Division 3A (new sections 30DA-DJ)** is headed 'Serious and imminent risks to air safety'. The *Explanatory Memorandum* prefaces the Division 3A amendments by stating:<sup>13</sup>

Currently, CASA may immediately suspend a licence or certificate (other than an AOC) under regulation 268 of the Civil Aviation Regulations 1988, and an AOC under s.28 of the Act. The new Division 3A amends these arrangements by encompassing the immediate suspension of all authorisations under the Act and the regulations. Regulation 268 will be repealed by regulation amendment.

Note that the above reference to section 28 in the *Explanatory Memorandum* appears to be an error. It is in fact subsection 28BA(3) that allows CASA to suspend or cancel an AOC.

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

**New section 30DB** provides that a holder of a civil aviation authorisation (CAA)<sup>14</sup> must not engage in conduct that constitutes, contributes to, or results in, a ‘serious and imminent risk to air safety’.<sup>15</sup>

Where CASA has ‘reason to believe’ that a holder of a CAA has engaged, is engaged or likely to engage, in conduct that contravenes **new section 30DB** (ie represents a ‘serious and imminent risk to air safety’), they *may* suspend the CAA: **new subsection 30DC(1)**.<sup>16</sup> This ‘serious and imminent risk to air safety’ requirement before CASA can suspend or cancel a CAA seems to be a more onerous threshold than under the current subsection 28BA(3) or regulation 268. Subsection 28BA(3) just talks about a breach of an AOC condition and regulation 268 it is where there is ‘serious risk to air safety’.

A **new subsection 30DC(1)** suspension only lasts for 5 business days after the holder is notified as mentioned above, *unless* CASA applies to the Federal Court within this time for confirmation of the suspension: **new subsection 30DC(3)**.

The suspension power can be utilised even if CASA has issued a ‘show cause notice’ under another part of the Act: **new section 30DD**. In practice, this means that the due process required under other parts of the Act do not restrict the operation of **new section 30DC**. Similarly, the issuing of a stay in relation to an earlier decision to vary, suspend or cancel a CAA does not affect a suspension under **new section 30DC**.

Following a confirmation application by CASA, if the Federal Court is satisfied that there are reasonable grounds to believe that a CAA holder is engaged, or likely to engage,<sup>17</sup> in conduct that contravenes **new section 30DB**, it must make an order which in effect prohibits the holder from doing anything they would otherwise be entitled to do under the (suspended) CAA: **new section 30DE(2)**.<sup>18</sup> The length of the order is to be guided as to what the Court thinks reasonable for CASA to complete an investigation into the conduct and surrounding circumstances that gave rise to the CASA's decision to suspend under **new section 30DC**. However, the Court cannot make the order longer than 40 days, subject to **new section 30DF**.

**New section 30DF** allows either CASA or the holder to apply to lengthen (up to an additional 28 days) or shorten the order. The Court may only vary the order period once. CASA may seek only one extension. The Court may hear two opposing applications together.

**New section 30DG** obliges CASA to investigate the conduct and surrounding circumstances that gave rise to the CASA decision to suspend an authorisation under **new section 30DC**. The investigation must be completed by the end of the Court order, but presumably this includes the provision for the potential extension of an order under **new section 30DF**. It is unclear whether there are any legal consequences regarding validity of the investigation or subsequent enforcement action if CASA fails to meet this deadline.

If the completion of a **new section 30DG** investigation gives CASA reason to believe that a serious and imminent risk to air safety would exist unless the CAA were varied,

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

suspended or cancelled, it may issue a further ‘show cause’ notice not later than 5 business days after the **new section 30DE** Court order ceases to be in force: **new section 30DH**. This step may *only* be taken if the CASA concerns are related to the original reason for **new section 30DC** suspension.<sup>19</sup> The notice must give the holder a reasonable time to reply and show cause why the CAA should not be varied, suspended or cancelled. The suspension of the CAA continues in force for 5 business days after the date specified for the holder to show cause. If after this, CASA still believes there would be a serious and imminent risk to air safety etc and the grounds are again related to the **new section 30DC** suspension, it may vary, suspend or cancel the notice. There appears to be no maximum time limit on the suspension period.

**New Division 3B (new section 30DK)** is headed ‘Enforceable voluntary undertakings’. The Explanatory Memorandum comments:<sup>20</sup>

Division 3B [is]... modelled on s.87B of the *Trade Practices Act 1974*. [It] will allow CASA to accept a written undertaking from an authorisation holder in connection with a matter arising under the Act or the regulations in relation to which CASA has function or power under the Act or the regulations...the proposal for EVUs...has been revised to take into account recommendations made by the Senate Rural and Regional Affairs and Transport Legislation Committee which examined...the Aviation Legislation Amendment Bill (No. 1) 2001.

Under **new section 30DK**, an enforceable voluntary undertaking (EVU) may only last for 6 months, though this may be renewed, and they can be varied, or withdrawn from, if CASA agrees. Details of each EVU must be published on the Internet. EVUs cannot have the effect of requiring holders to pay money to CASA.

If CASA considers that a person has breached any terms of an EVU, it may apply to the Federal Court for an appropriate order. An order may include directing the holder to pay the Commonwealth an amount of up to any financial benefit that the person has obtained directly or indirectly from, and that is reasonably attributable to, the breach of the undertaking.

**New Division 3C (new sections 30DL-DR)** is headed ‘Protection from administrative action for voluntary reporting’. As its name implies, this division creates a scheme whereby a CAA holder *may* be protected from administrative action (suspension, variation or cancellation of their authorisation, or the giving of an infringement notice) if they voluntarily report certain breaches. However, it *does not* confer any immunity from prosecution for a criminal offence.

The specifics of the reporting scheme are to be established by regulations: **new section 30DN**.

**New section 30DO** prevents CASA from taking administrative action in respect of a ‘reportable contravention’ if the relevant CAA holder can prove<sup>21</sup> to CASA that they reported the contravention to a nominated person<sup>22</sup> within 10 days, providing this is before

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

an infringement or show cause notice was issued. Reportable contraventions exclude breaches of regulations that are deliberate, or fraudulent, or cause, or contribute to an accident or serious incident<sup>23</sup> or a breach that is specified in regulations for the purpose: **new section 30DL**. A **new section 30DO** protection can be utilised by a CAA holder only once every five years: **new section 30DQ**.

**New section 30DR** provides some protection against self-incrimination in relation to voluntary reporting. The fact the report was made and the contents of that report cannot be used as evidence in any criminal proceedings against the CAA holder.<sup>24</sup> However this protection only applies if, at the time the proceedings commence, the contravention is still reportable within the meaning of **new section 30DL**. Presumably therefore if clear evidence emerged, after the voluntary report was made but before the criminal proceedings, that the contravention was deliberate rather than say negligent, the holder would not be protected.

**New Division 3D** is headed ‘Demerits points scheme’.

The various offences to which the demerit scheme will apply, and the number of demerits points applying to each offence, are to be prescribed in regulations: **new section 30DT**.

**New section 30DV** applies where a suspension or cancellation under **new Division 3D** would have applied to an authorisation had the authorisation not already been cancelled through an earlier action by CASA. In cases where this first cancellation is later set aside by the Administrative Appeals Tribunal (AAT), **new section 30DV** allows for regulations to provide that a Division 3D suspension or cancellation then applies.

**New section 30DY** deals with the situation where the holder has their CAA suspended for the first time under the demerit point scheme. Suspension occurs where the holder incurs 12 or more demerit points in relation to the same class of CAAs (see further below regarding the meaning of class) over a three year period. In such cases, CASA must issue a notice suspending all of the holder’s authorisations in that class.<sup>25</sup> The length of the suspension is on a sliding scale according to how many demerit points the holder incurred:

- 12-15 points - 90 days
- 16-19 points - 120 days
- 20 or more points - 150 days

Thus if a person had 11 points and then incurred another 5 points through a prescribed offence, they would be suspended for 120 days.

A holder whose CAA has been suspended or cancelled under the demerit scheme may apply for a reinstatement: **new section 30EF**. CASA may choose to reinstate a particular CAA only if it is satisfied that the suspension or cancellation of that authorisation would cause the holder severe financial hardship because they are not able to earn their principal or only income without it. CASA may impose conditions on the reinstatement as it thinks

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

appropriate. Presumably **new section 30EF** can also be used to reinstate all CAAs within a class.

Regulations must prescribe ‘classes to which a particular [CAA] belong[s]’: **new section 30DU**. This last point relates to **new section 30DX**, which provides that ‘demerit points are incurred in relation to the class of authorisations to which the offences relates’. While the wording of the Bill is not very clear on the role of these classes, the Explanatory Memorandum states that:<sup>26</sup>

when the specified maximum number of points is reached or exceeded for that class, all the authorisations in that class will be suspended or cancelled. For example, where an authorisation holder accrues several points against their commercial pilot licence, and several points against their private pilot licence, all their pilot licences will be subject to suspension or cancellation. However, if the person also holds maintenance authorisations, for example, those authorisations are not suspended or cancelled.

Where a holder has previously been suspended, less demerit points are required before a second suspension takes place - only 6 demerit points in relation to the same class of authorisations over three years is required. The suspension periods for the second occurrence are:

- 6 – 9 points - 90 days
- 10-13 points - 120 days
- 14 or more points - 150 days

Note that all demerit points that contribute to a suspension or cancellation are to be disregarded for the purposes of subsequent calculations of demerit points: **new section 30EE**.

**New section 30EB** provides that where a CAA is suspended under another provision of the Act or the regulations, the suspension period under the demerits scheme will not start until the other suspension ceases. Regulations may also be made for other situations to avoid the concurrent serving of suspensions.

**Under new section 30EC**, if a holder has previously had a CAA in a particular class suspended twice, the next time they exceed the demerit points limit, the authorisation must be cancelled by CASA for 3 years. The limit is 6 demerit points over 3 years. The CAA holder will not be entitled to apply for, or be granted, a CAA of the same class during that time (although as already mentioned, there is scope for cancelled/suspended authorisations to be reinstated under **new section 30EF**).

Existing section 31 of the Act sets out the types of CASA actions that may be reviewed by the AAT. **Item 16** amends existing section 31(1) to take account of the new types of actions introduced by the Bill. Specifically, the changes provide that a decision by CASA under **new section 30EF** (application for reinstatement of an authorisation) is reviewable

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

but suspensions of an authorisation under **new Division 3A** (serious and imminent air safety risk) or suspensions or cancellations under **new Division 3D** are not.

**Item 17** inserts **new sections 31A-31D**. These provide for an ‘automatic’ stay of CASA’s decision to suspend, vary or cancel an authorisation other than a decision under **new Division 3A**.

Under **new section 31A**, any decision that first requires a ‘show cause’ notice to be given will not come into effect until the end of the fifth business day after CASA notifies the relevant CAA holder of its decision. However, should the holder apply for an AAT review of the decision by the fifth business day, the stay will continue in force until the AAT makes its decision, or until 90 days after CASA originally notified the holder of its decision, *whichever occurs first*. If the holder subsequently withdraws their application, the stay lapses: **new section 31B**.

**Items 18-25** make various consequential amendments to the Act to reflect the abolition of the CASA board. For example, the responsibility for preparing the CASA’s corporate plan will now reside with the Director. The Minister must approve the plan.

**Item 26** deals with the appointment of the CASA Director. Existing subsection 84(1) states that the Minister must obtain a recommendation from the Board before appointing a Director. **Item 26** substitutes a **new subsection 84(1)** which requires that the Minister receive a report from the Departmental Secretary before appointing the Director. The Explanatory memorandum comments that:<sup>27</sup>

this provision is intended to provide procedural fairness in line with the appointment of Portfolio Secretaries under section 58 of the *Public Service Act 1999*.

**Item 33** inserts a new **section 84B** which sets out the Director’s functions. These include:

- deciding on CASA’s objectives, strategies and policies;
- ensuring that CASA performs its functions in a ‘proper, efficient and effective manner’;
- ensuring CASA complies with section 12, 12B and 12D Ministerial directions; and ensuring CASA acts in accordance with the Minister’s views under s.12A.

**Item 33** also creates a **new subsection 84C** that introduces a standard set of disclosure and personal responsibilities through the *Commonwealth Authorities and Companies Act 1997*.

**Item 38** amends **section 89** to provide that the Minister must receive a report from the Secretary prior to terminating the Director.

**Item 42** amends **section 91** to provide that the Director is responsible for setting the terms and conditions of CASA staff.

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

**Item 43** allows the Director to make written delegations of any of CASA's powers to a CASA staff member. A similar delegation may be made by the Director of certain of his or her own powers – namely those relating to corporate plans (existing sections 44 and 45) and employment of CASA staff (section 91).

Any **new section 12D** Ministerial direction, or any **new section 12C** agreement between the Minister and the Director, must be tabled in Parliament within 15 sitting days: **items 45-46**.

## Concluding Comments

During the Ansett aircraft maintenance crisis over 2000-01, the airline's Boeing 767 jets were first grounded by CASA just before Christmas 2000, but CASA then let them fly again, including one aircraft with an acknowledged fault risk. CASA placed conditions on Ansett operations and maintenance procedures, although it emerged that CASA had granted Ansett an extension for inspections a year previously. Just prior to Easter 2001, CASA grounded ten of Ansett's Boeing 767 aircraft. The continuing problems were said to reflect a lack of control and alleged deficiencies in CASA's surveillance perhaps due to cost cutting and staff cutbacks. CASA threatened Ansett with the withdrawal of its Air Operators Certificate (AOC). Such action at the very time of highest passenger volumes was to prove a major (or possibly fatal) blow to the airline's continued operations, but begs the question as to why proper surveillance and remedial actions were apparently not taken earlier. While the world and Australia may have lost one of its oldest international airlines, Australia's blemish free record of no fatal passenger jet crash here remains intact. It is debateable whether this performance is primarily attributable to Australia's relatively benign flying environment and low air traffic levels or due to stringent safety administration, or some combination of both.

With the intended abolition of the CASA board, a comparison might be made with the Australian Maritime Safety Authority (AMSA). As an organisation that also reports to the Minister, AMSA operates with a board in much the same manner as CASA but to monitor maritime safety. Whether the peculiarities of air safety management deserve special treatment warrants wider scrutiny and perhaps comparison with the regulatory arrangements applying in other countries, to see whether they utilise statutory authorities and, whether they split regulation from enforcement institutions, according to mode.

### **Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*



## Endnotes

---

- 1 'New Air Authorities to replace CAA', *Press release*, The Hon Laurie Brereton MP, 28 March 1995.
- 2 *Australian*, 10 July 1997.
- 3 *Review of the Regulation by the Civil Aviation Safety Authority of Aquatic Air Pty Ltd trading as South Pacific Seaplanes*.
- 4 *Canberra Times*, 19 February 1999, 9 October 1999; *Bulletin*, 13 June 2000.
- 5 Sandilands, B. 2002 'Dead Safe', *Australian Financial Review*, 12 January, p. 19.
- 6 *CASA Media Release*, 12 October 2000.
- 7 'Reforms on course, say pilots' *The Australian*, 20 November 2002.
- 8 Phelan, P. 2002 'Rescuing aviation in Australia', *Aircraft and Aerospace*, January/February, pp. 34-6.
- 9 The Civil Aviation Legislation Amendment Bill 2003 and the Aviation Transport Security Bill 2003.
- 10 Paragraph 9(1)(c).
- 11 The leading case regarding the issue of statutory powers to make *general directions* is *Aboriginal Legal Services v Minister for Aboriginal and Torres Strait Islander Affairs*: [1996] 96 FCR 565. The Federal Court considered the meaning of subsection 12(1) of the ATSIC Act, which required ATSIC to exercise its powers in accordance with such 'general directions' as were given to it by the Minister. From this case, it is clear that a general direction must not only apply to a particular case or to a particular decision, but must be applied generally, similar to a binding guideline. However, a general direction may validly result in some limitations on the exercise of a body's power, for example by directing a body to take certain factors into account in making a decision.
- 12 *Explanatory Memorandum*, pp. 18-19.
- 13 At p. 19.
- 14 This is defined in Subsection 3(1) of the Act as 'an authorisation under the regulations to undertake a particular activity (whether the authorisation is called an authority, licence, certificate, rating or endorsement or is known by some other name)'. This includes an AOC.
- 15 This phrase is not defined.
- 16 The notice of suspension given to the CAA holder must include a summary of subdivisions C and D which essentially deal with what happens after a suspension. However, no information on the potential availability of a review of a CASA decision by the AAT is required.
- 17 Unlike the CASA power of suspension under **new subsection 30DC(1)**, the mere fact that the CAA holder has *previously engaged* in conduct contrary to **new section 30BD** is insufficient for the Court to make under **new section 30DE**.
- 18 In considering whether to make an order, the Court must also have regard to section 3A and subsection 9A(I), both of which emphasise the aviation safety focus of the Act.

**Warning:**

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.*

*This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*

- 19 If the investigation only produces a different concern, presumably CASA have to go back to **new section 30DC** and start over.
- 20 At pages 20-21.
- 21 Essentially this proof requires the holder have written acknowledgement of the report from the prescribed person.
- 22 This person will be prescribed by regulation: **new section 30DM**.
- 23 This includes 'serious damage' to any property.
- 24 However there is no 'derivative use' immunity.
- 25 They would also not be entitled to reapply for authorisation, subject to **new section 30EF**.
- 26 At p. 22.
- 27 At p. 26.

***Warning:***

*This Digest was prepared for debate. It reflects the legislation as introduced and does not canvass subsequent amendments.  
This Digest does not have any official legal status. Other sources should be consulted to determine the subsequent official status of the Bill.*