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Civil Aviation Legislation Amendment (Mutual  
Recognition with New Zealand and Other Matters)  
Bill 2003

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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. 61 2003–04

Civil Aviation Legislation Amendment (Mutual Recognition  
with New Zealand and Other Matters) Bill 2003

Angus Martyn  
Law and Bills Digest Group  
13 November 2003

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# Civil Aviation Legislation Amendment (Mutual Recognition with New Zealand and Other Matters) Bill 2003

**Date Introduced:** 25 June 2003

**House:** House of Representatives

**Portfolio:** Transport and Regional Services

**Commencement:** New sections 1-3 commence on Royal Assent. However, most of the key operative provisions of the Bill (Schedule 1) commence on a single day to be fixed by proclamation.<sup>1</sup>

## Purpose

To amend the *Civil Aviation Act 1988* to enable the mutual recognition of certain aviation-related safety certification between Australia and New Zealand.

## Background

Whilst the Bill is not long, it is a relatively technical piece of legislation and the Main Provisions section of this Digest reflects this. The key policy issues are highlighted in the Concluding Comments section of this Digest – some readers may wish to consult this first before reading the remainder of the Digest

## The Bill

Under current legislative requirements, aircraft operators operating in both Australia and New Zealand<sup>2</sup> must comply with the provisions of both the Australian and New Zealand aviation safety regulatory frameworks. These frameworks are set by the Civil Aviation Safety Authority (CASA) in Australia mainly under the *Civil Aviation Act 1988* and the Civil Aviation Authority of New Zealand (CAANZ) in New Zealand under the *Civil Aviation Act 1990* (NZ).

The Civil Aviation Legislation Amendment (Mutual Recognition with New Zealand and Other Matters) Bill 2003 ('the Bill') will allow CASA to 'recognise' certain forms of

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safety certification issued by CAANZ for the purpose of satisfying the Australian safety requirements prescribed under *Civil Aviation Act 1988*.<sup>3</sup> The New Zealand parliament is currently considering equivalent legislation – the [Civil Aviation Amendment Bill 2003](#)<sup>4</sup> – that would allow CAANZ to recognise CASA safety certification. A committee [report](#) has recently been completed on the New Zealand Bill.<sup>5</sup>

As discussed later in this Digest, the first form of safety certification to be mutually recognised will be Air Operator Certificates (AOCs). Under the *Civil Aviation Act 1988*, CASA issues AOCs to authorise the flying or operation of aircraft for prescribed purposes by the appropriate legal entity, in most cases an aviation company or organisation. That entity will have demonstrated safe and competent flight activities to the satisfaction of CASA, which can in turn vary the AOC conditions or suspend or cancel the AOC, as it has done on occasion. In essence, an AOC certifies that an airline or aviation company is capable of providing flight services safely.

## Trans-Tasman aviation regulatory agreements

There has been substantial activity by the Australian and New Zealand governments in recent years in relation to Trans-Tasman aviation regulation. In 1996, the Australian and New Zealand governments signed Single Aviation Market (SAM) Arrangements. In November 2000, an ‘open skies’ Air Services agreement was initialled. This agreement lifted various restrictions on Australian and New Zealand airlines in operating some domestic, Trans-Tasman and international flights.<sup>6</sup> A Memorandum of Understanding signed at the time the agreement was initialled foreshadowed the measures contained in the Bill. In a joint Australian-New Zealand press release, the respective Governments said:

To expand the benefits of integration, we have agreed that Australia and New Zealand will recognise each other’s aviation safety approvals by December 2003.

Mutual recognition will enable our airlines to operate to, from and within either country on the basis of their home certification. It will enable Australian and New Zealand airlines to integrate their fleets and make them more efficient and competitive.<sup>7</sup>

In March 2002, Australian and New Zealand Ministers for Transport followed up the aviation safety aspects via an exchange of letters. These letters are not on the public record, but according to the *Explanatory Memorandum*, the Ministers agreed to:

...implement the ‘highest form’ of mutual recognition, namely that an operator that is the holder of an air operator certificate (AOC)... issued in one country will not be required to hold an AOC, or other certificate or permission, to conduct air transport operations in that country.<sup>8</sup>

The Australia-New Zealand bilateral [Air Services Agreement](#) that was initialled November 2000 was formally signed in August 2002 and came into effect in August 2003.

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According to the National Interest Analysis tabled by the Government in Parliament in September 2002:

The purpose of the treaty is to allow direct air services to operate between Australia and New Zealand, which will facilitate trade and tourism between the two countries through freight and passenger transportation and provide greater air travel options for Australian consumers.<sup>9</sup>

Article 5 of the Agreement covers air safety matters. Article 5(1) obliges Australia and New Zealand to recognise ‘certificates of airworthiness, competency and licences’ issued by the other Party provided such documents conform with the standards established by the International Civil Aviation Organisation (ICAO).<sup>10</sup> However, whilst these terms are not defined in the Agreement, probably the best interpretation is that AOCs do not fall within the meaning of any of these terms.<sup>11</sup>

## Implementation of the Bill

In introducing the Bill, the Minister for Regional Services, Territories and Local Government said:

With regard to safety, careful consideration has been given to the issue of whether safety would be compromised by the adoption of mutual recognition. It has been concluded that it will not, because it has been recognised and accepted that Australia and New Zealand have aviation safety standards that are each consistent with international best practice for airline operations using large capacity aircraft.

It is also important to note that mutual recognition is not about harmonisation of Australian and New Zealand safety standards. Australia and New Zealand recognise that there are differences between our two systems, including in particular standards, but these can be accepted, as it is the overall safety outcome achieved by each system that is being recognised.<sup>12</sup>

According to information contained in the *Explanatory Memorandum*, CASA has advised the Government that an analysis of the New Zealand and Australian aviation safety systems has been conducted ‘and both sides are confident that aviation can inter-operate safely in the form being considered.’<sup>13</sup> Information supplied by the Department of Transport and Regional Services (DOTARS) to the author indicates that this analysis was partly based on results of ICAO ‘Universal Safety Oversight Audits’ conducted on each country in 1999 and 2001.<sup>14</sup>

As noted by the *Explanatory Memorandum*, a further agreement will need to allow practical implementation of the aims of the Bill:

...a new, overarching, inter-governmental agreement on aviation mutual recognition is under development which, when completed, will set out the principles, objectives and joint understandings between Australia and New Zealand in relation to the mutual

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recognition of aviation-related safety certification. An annex to the new agreement will be an operational agreement between the two aviation safety regulators, CASA and CAANZ, which will establish working arrangements between the two. Only those Australian and New Zealand operators covered by the Air Services Agreement<sup>15</sup> will be eligible for mutual recognition.<sup>16</sup>

As at early November, this inter-government agreement was still under negotiation. Negotiations on the operational agreement between CASA and CAANZ have, however, been concluded, although signature by representatives of the two agencies will apparently be delayed pending Ministerial approval and finalisation of the inter-governmental agreement.<sup>17</sup>

The Government has said mutual recognition will be introduced in a ‘phased approach’, with the first phase to cover AOCs. According to the second reading speech, Ministers have also agreed that the first priority in relation to AOCs are those involving aircraft with more than 30 seats or equivalent. Consideration will then be given to including other types of certificates not already covered by other recognition arrangements.<sup>18</sup> **It is possible that no further amendment to the *Civil Aviation Act 1988* will be required to extend mutual recognition to other certificates because of the regulation-making power inserted by item 35 of Schedule 1.** It is worth noting, however, that in accordance with the general principles of mutual recognition and non-discrimination underpinning the Chicago Convention,<sup>19</sup> Australian aviation safety legislation already provides for limited “mutual recognition” of a large number of safety licences and certificates, through mechanisms whereby CASA issues Australian licences, e.g. flight crew licences, or certificates, eg type acceptance certificates, largely on the basis of equivalent licences and certificates issued by an overseas aviation safety regulator.

The Bill does not affect an airline’s compliance obligations with respect to general air safety laws and other regulations relating to aviation security, curfew, air traffic control, airport slot management, noise and the environment, occupational health and safety, anti-discrimination and trade practices and other business laws.

## Industry and employment effects

It is likely that mutual recognition will have economic implications for aircraft operators and consequent flow-on effects to aircrew and the like. As the *Explanatory Memorandum* puts it:

Mutual recognition may, however, result in a period of structural adjustment in the industry in the medium term. This is because variations in some operational requirements between Australia and New Zealand may be perceived as conferring commercial advantages on operators from one or other of the countries. By way of example, as noted by one stakeholder, there is the potential for considerable disparity between the salaries of Australian and New Zealand pilots operating the same type of aircraft but under different AOCs. This, in turn, may have implications for industrial

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relations even though there is no intention for mutual recognition to impact on the existing employment arrangements of operations on either side of the Tasman....New Zealand AOC holders operating in Australia may benefit from commercial advantage in some areas due to different operational requirements and, possibly, employment conditions. Where this occurs, there could be flow on effects to the Australian economy generally arising from structural adjustment in the industry and, as noted by some stakeholders, the impact on industrial relations.<sup>20</sup>

However, the *Explanatory Memorandum* also comments:

...for safety reasons, operators will be required to hold an AOC issued by the safety regulator best placed to provide effective safety oversight, in practice the regulator of the country where the majority of their operations are located. This will not prevent operators from choosing to hold dual AOCs to cover their separate operations in Australia and New Zealand, if they prefer, though they will not be able to hold an ANZA [Australia New Zealand Aviation] AOC in combination with any other.<sup>21</sup>

It is worth noting that Qantas already operates in New Zealand via its wholly owned subsidiary Jetconnect. Jetconnect commenced operations on domestic services in New Zealand in October 2002, effectively taking over the role of the former franchised Qantas New Zealand operation. It flies Boeing 737-300 aircraft in Qantas livery, but without the *Spirit of Australia* caption. It has a New Zealand AOC and its aircraft are registered in New Zealand.

This industry and employment issue is likely to receive significant attention in Committee hearings should the Bill be referred to (say) the Senate Committee of Regional and Rural Affairs and Transport.

## Resourcing the regulatory agencies

The *Explanatory Memorandum* states:

It is not anticipated that budget allocations will be affected by this Bill. CASA may incur additional costs in oversighting operations in New Zealand, however these should be offset by a reduction in costs of oversight of New Zealand operators in Australia.<sup>22</sup>

The extent of this 'offset' effect will of course depend on the actual future take-up of mutual recognition by airlines. Should a substantial number of applications be made to CAANZ for New Zealand AOCs with ANZA privileges, this might require extra resources for CAANZ, particularly if these applications are granted. The relevant part of the *Explanatory Memorandum* for the New Zealand Civil Aviation Amendment Bill comments:

For those operators who choose to take advantage of mutual recognition, there will be increased costs to the Civil Aviation Authority arising from the need to provide safety

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supervision and surveillance functions in Australia (for example, travel and accommodation costs). These costs would be recovered from New Zealand airline operators.<sup>23</sup>

The *Explanatory Memorandum* for the Australian Bill flags the possible need for future consequential legislative amendments dealing with cost recovery, taxation, customs and other financial matters.<sup>24</sup> In relation to cost recovery, it seems unlikely that any major decisions will be made in the short term by Australia given that CASA is currently reviewing its funding arrangements.<sup>25</sup>

## Consultation

In February 2003, DOTARS sent out an invitation to comment on the proposed mutual recognition of aviation related certificates. A list of the organisations which received an invitation to comment is at Appendix 2. According to DOTARS, the comments received ‘are encapsulated in the Regulation Impact Statement (RIS)’. The RIS paraphrases a number of comments.<sup>26</sup> Some of them reflect the concerns about industry and employment effects in Australia referred to earlier in this Digest. Other comments were of a positive nature – for example that ‘savings would mainly be administrative but greater advantages will be realised when mutual recognition also encompasses airworthiness and maintenance systems approvals’.<sup>27</sup>

## Main Provisions

### Schedule 1

#### Amendment of the *Civil Aviation Act*

**Items 1-15** introduce various definitions into subsection 3(1) of the *Civil Aviation Act*.

**Item 2** defines what is meant by ANZA activities in Australian territory: they are essentially operations in, or flights in and out of, Australia where these are specifically authorised by an AOC issued by CAANZ. Such an AOC is known as a ‘New Zealand AOC with ANZA privileges’. ANZA is merely an acronym for Australia New Zealand Aviation: **item 1**.

**Item 3** defines what is meant by ANZA activities in New Zealand. This is simply the reverse of **item 2** - operations in, or flights in and out of New Zealand where these are authorised by an AOC issued by CASA.

However, both **items 2 and 3** leave the door open for other forms of safety certification besides AOCs to authorise ANZA activities: **new paragraph (b)** in the respective definitions. Such other forms of certification must be expressly issued<sup>28</sup> wholly or partly for ANZA mutual recognition purposes: see for example **new paragraph (b) in item 6**.

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The *Explanatory Memorandum* comments that the possibility of other forms of safety certification besides AOCs authorising ANZA activities will be ‘subject to agreement between Australia and New Zealand and the required changes to respective regulations and rules’.<sup>29</sup> See also **item 35**.

**Item 4** defines ANZA mutual recognition agreements as being ‘the agreement or arrangement, or agreements or arrangements, as amended and in force from time to time, identified in regulations made for the purposes of this definition’. The intergovernmental agreement currently under negotiation referred to earlier in this Digest will be an ANZA mutual recognition agreement.

**Item 17** adds **new paragraph 7(c)** to provide that the Act applies to such ANZA activities in New Zealand that are authorised by Australian ANZA safety certifications.

**Item 18** adds **new paragraph 9(1)(ba)** which states that safety regulation of ANZA activities in New Zealand that are authorised by Australian ANZA safety certifications are part of CASA’s functions. **Item 19** adds further to CASA functions: **new paragraph 9(3)(aa)** inserts the new function of implementing ANZA mutual recognition agreements.

**Item 20** deals with aircraft on international flights operating into or out of Australian territory. Under existing section 26, such flights must have permission from CASA unless falling within an exemption listed in subsection 26(2). **Item 20** extends this list of exemptions to include where an aircraft is authorised by an (in force) New Zealand AOC with ANZA privileges applying to Australia.

**Item 21** adds **new sections 26A-E** under the heading of a **new Division 1A** – ‘general provisions about mutual recognition with New Zealand of aviation safety certificates’.

**New section 26B** allows CASA to disclose information, including personal information<sup>30</sup> to the CAANZ Director for ‘a purpose connected with the ANZA mutual recognition agreements’. The *Explanatory Memorandum* suggests that such instances would include those ‘for purposes of CAANZ’s routine surveillance to ensure compliance with relevant New Zealand civil aviation legislative provisions by operators conducting ANZA activities in Australia.’<sup>31</sup>

**New section 26C** obliges CASA to consult with the Director of CAANZ before taking any action under the Act or regulations that ‘would or might affect’ ANZA activities in New Zealand that are authorised by an Australian ANZA safety certification – eg an aircraft operator’s right to operate in New Zealand under a CASA issued AOC that carries ANZA privileges. Note that because of the wording of **new paragraph 26C(a)** this obligation only arises if it is required by the ANZA mutual recognition agreements.

**New section 26D** allows the CASA Director to delegate any of CASA’s powers, except Part IIIA powers, to a CAANZ employee<sup>32</sup> ‘for the purposes of the ANZA mutual recognition agreements’. Part IIIA covers CASA’s investigatory powers. As a safeguard, a

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person exercising delegated powers under **new section 26D** is subject to the direction of the CASA Director.

**New section 26E** is effectively the reverse of **new section 26D** in that it allows a CASA staff member to exercise certain powers or functions delegated to them under the *New Zealand Civil Aviation Act*. However, these powers can only be exercised ‘so far as they relate to New Zealand ANZA safety certifications’. Powers or functions under sections 15 (which covers safety and security inspections and monitoring), 21 (power to detain aircraft, seize products and impose conditions and prohibitions) or 24 (general power of entry to place) cannot be exercised under any purported delegation.<sup>33</sup>

The Explanatory Memorandum comments that:

The ‘cross-delegation’ of powers in the new Sections 26D and 26E will only be used for the exercise of domestic administrative powers under the law of the country whose authority delegated the power. Where, for example, the CAANZ wishes to exercise enforcement powers, it would need to ask an authorised CASA investigator to exercise his or her powers under Part IIIA (see Items 32-34). Alternatively for investigations into possible offences, CAANZ would need to make a request through the *Mutual Assistance in Criminal Matters Act 1987*. CASA would be in a similar position in relation to their monitoring and investigations in New Zealand.<sup>34</sup>

Existing subsection 27(2) of the Act prohibits various aircraft operations unless authorised by an AOC or a section 27A permission.<sup>35</sup> **Item 22** amends subsection 27(2) by adding a third type of permission: authorisation under a current New Zealand AOC with ANZA privileges. As the *Explanatory Memorandum* comments:

This is one of the key provisions that give effect to mutual recognition so that those AOCs issued by CAANZ within the mutual recognition scheme would be treated as if they were AOCs issued by CASA.<sup>36</sup>

**Item 24** inserts **new subsections 27(2AA)-(2AC)**. **New subsection 27(2AA)** provides that, for the purposes of ANZA mutual recognition agreements, CASA may *only* issue an AOC ‘that authorises aircraft to operate in, or fly out of New Zealand’ if that AOC *also* authorises operations within, into or out of Australia.<sup>37</sup> Presumably the rationale for this restriction is that it would not make sense for CASA to be the main regulator of aviation safety matters over an aircraft operator under mutual recognition arrangements if that operator did not conduct activities in Australia. However, the **new subsection 27(2AA)** restriction does not apply to CASA’s issuing of AOCs authorising operations into or out of New Zealand, where these AOCs do not carry ANZA privileges: **new subsection 27(2AB)**. The *Explanatory Memorandum* does not give any details of the circumstances in which CASA might issue non-ANZA AOCs that only authorise New Zealand operations. Where CASA does issue an AOC carrying ANZA privileges, it must state that the AOC is issued for mutual recognition purposes: **new subsection 27(2AC)**.

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Foreign registered aircraft that are being used on regulated domestic flights<sup>38</sup> must be specified individually on an AOC: existing subsection 27(2A). However, **item 25** inserts **new subsection 27(2AA)** which excludes New Zealand registered aircraft flying regulated domestic flights from this requirement *provided* they are operating under an Australian AOC with ANZA privileges. In such cases, the AOC may just refer to a class of aircraft rather than the individual aircraft. Presumably this gives an aircraft operator more flexibility in the particular plane they use on a particular flight and this flexibility confers some sort of operating benefit.

Existing section 27AE relates to applications for foreign aircraft AOCs.<sup>39</sup> Where CASA receives an application, it may require the applicant to provide it with information such as an AOC or similar documentation issued by the relevant authority of the country in which the aircraft is registered or operates from. **Item 26** amends subsection 27AE(4) to exclude New Zealand aircraft operating under AOCs with ANZA privileges from the definition of ‘foreign aircraft AOCs’. Thus for these aircraft CASA cannot require the various information covered in existing section 27AE. By comparison, a non-New Zealand operator applying for an Australian AOC with ANZA privileges would need to provide a AOC if required by CASA.

Existing section 28 of the Act provides that CASA can only issue an AOC if satisfied about certain matters. For example, paragraph 28(1)(c) states that in issuing a AOC authorising the operation of a foreign registered aircraft on regulated domestic flights, CASA must be satisfied that the conditions set out in section 28A have been met. **Item 27** amends paragraph 28(1)(c) so that section 28A conditions only come into play *if* the AOC applied for will authorise operations on regulated domestic flights and is *either* an Australian AOC with ANZA privileges that covers an aircraft not registered in either Australia or New Zealand *or* an Australian AOC without ANZA privileges. Again, the aim seems to be to confer advantages on NZ registered aircraft operating under an Australian AOC with ANZA privileges as compared to other foreign registered aircraft.

**Item 28** will add two more matters CASA must be satisfied of before issuing an AOC. The first (**new paragraph 28(1)(d)**) is that CASA must be satisfied that the applicant does not hold a New Zealand AOC with ANZA privileges that covers any of the operations for which the AOC applied for would cover. Fairly obviously, this is designed to stop any operator from holding two separate AOCs that authorise the same air operations thus creating regulatory duplication. The second (**new paragraph 28(1)(e)**) provides that where the AOC sought is an Australian AOC with ANZA privileges, then the additional conditions set out in **new subsection 28B(1)** (inserted by **item 29**) must also be met.

There are four main conditions set out in **new subsection 28B(1)**.

**New paragraph 28B(1)(a)** prevents an Australian AOC with ANZA privileges from being issued if the applicant already holds a CAANZ ‘aviation document’ that authorises any New Zealand operations that would be covered by the AOC applied for. ‘Aviation

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document’ is not defined anywhere in the Bill or the existing Act, however it is defined in section 2 of the *Civil Aviation Act 1990* (NZ) as meaning:

any licence, permit, certificate, or other document issued under this Act to or in respect of any person, aircraft, aerodrome, aeronautical procedure, aeronautical product, or aviation related service.

The second condition is that CASA be advised by the DOTARS that the applicant for an Australian AOC with ANZA privileges is eligible for consideration under the terms of the mutual recognition agreements: **new paragraph 28B(1)(b)**. As mentioned earlier, these agreements are still under negotiation, but DOTARS has indicated that an Australian airline will have to meet the various criteria set out in Article 2 of the 2002 Air Services Agreement.<sup>40</sup>

**New paragraph 28B(1)(c)** provides that CASA must be satisfied that the applicant has complied, or ‘is capable of complying’ with the relevant New Zealand regulations applicable to the operator in relation to their ANZA activities in New Zealand.<sup>41</sup> As the *Explanatory Memorandum* comments,<sup>42</sup> this requirement is also on-going by virtue of the **new section 28BAA** (see **item 10** in **Schedule 2**). Thus a subsequent failure to comply would require CASA to remove the ANZA privileges from the AOC, although the other authorisations contained in the AOC would remain in force.

The fourth condition is that CASA must be satisfied that it ‘will be able to effectively regulate all operations’ covered by the AOC: **new paragraph 28(1)(d)**. **New subparagraphs (i)-(iv)** list the various matters that must be taken into account by CASA in making a decision on this question. Again this is an on-going requirement. If CASA considers it can no longer effectively regulate, the *Explanatory Memorandum* suggests that the mutual recognition agreements will provide ‘for [a] transfer of country of certification to New Zealand’. The New Zealand Aviation Amendment Bill 2003 contains a ‘change of country of certification’ provision (new section 11I), but it does not contain the ‘effectively regulate’ concept. It does, however, require that the holder of a New Zealand AOC with ANZA privileges be essentially based in New Zealand: **new paragraphs 11G(4)(d)-(g)**.

**New paragraph 28B(1)(e)** allows further conditions on AOCs to be provided in the regulations.

In reaching a decision on the above, **new subsection 28B(2)** requires CASA to consult the CAANZ Director in relation to the matters covered in **new paragraphs (1)(a), (c), (d), and (e)**.

Existing section 28BD requires the holder of an AOC to comply with all requirements of the Act, the regulations and the Civil Aviation Orders that apply to them. **Item 30** inserts a **new subsection 30(2)** requiring the holder of an Australian AOC with ANZA privileges to

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comply with the equivalent New Zealand legislation, rules etc so far as they apply to the ANZA activities covered by the AOC. The *Explanatory Memorandum* comments:

Generally speaking holders of Australian AOCs with ANZA privileges will only have to comply with the New Zealand rules of the air applicable to flight and operation of the aircraft. This requirement is effectively the same as the condition imposed by the proposed paragraph 28B(1)(c) to comply with relevant New Zealand law, which will also be an on-going requirement by virtue of the proposed section 28BAA (Item 10 Schedule 2).<sup>43</sup>

**Item 31** inserts **new sections 28C-28F** under a new heading ‘Subdivision F – Other provisions relating to Australian and New Zealand AOCs with ANZA privileges’

**New section 28C** deals with the obligations of the holder of a New Zealand AOC with ANZA privileges applying to Australia, including keeping CASA informed of certain matters. In particular, if the AOC is varied, the holder must give a copy of the AOC to CASA within 7 days of receiving it themselves from CAANZ. A breach of this obligation is a strict liability offence carrying a per-day penalty of 2 penalty units (\$220), for individuals, or 10 penalty units (\$1 100) for companies.

**New section 28D** allows the CASA director to issue a ‘temporary stop notice’ to a holder of a New Zealand AOC with ANZA privileges requiring them to stop any or all ANZA activities in Australia covered by the AOC. This power can only be used if the Director considers that the activities in question ‘constitutes a serious risk to civil aviation safety in Australia Territory’: **new subsection 28D(2)**, and cannot be delegated: **new subsection 28D(7)**. **New subsection 28D(4)** requires the Director to include in the notice ‘the facts and circumstances’, which, in their opinion, give rise to the serious risk. The Director must also provide a copy of the notice to the CAANZ Director as soon as practical after the notice has been given to the holder: **new subsection 28D(5)**. A failure by CASA to comply with **new subsection 28D(4)** and / or **(5)** does not invalidate the notice. The notice takes effect when given to the holder and remains in force for the time specified in the notice up to a limit of 7 calendar days: **new subsection 28D(3)**. **New section 28D** is very similar to new sections 11C and 11D in the New Zealand Civil Aviation Amendment Bill 2003.

By virtue of existing sections 29 and 30A, a violation of a stop order can be penalised by imprisonment and/or a court-imposed ‘exclusion order’. An exclusion order can effectively prevent a person or company from conducting aircraft operations.

An in-force temporary stop notice may be revoked by the CASA Director on any grounds. However, it must be revoked if CASA receives notice from the CAANZ Director of ‘that Director’s decision in response to the Australian temporary stop notice, whether or not the decision is to take action’: **new subsection 28E(2)**. There seems to be no equivalent of **new subsection 28E(2)** in the New Zealand Bill. The Bill sheds no light on **what action CASA can take if the CAANZ takes either no action on the stop order or action that**

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**CASA thinks does not adequately deal with the problem that prompted the stop order in the first place.** However it is understood that the operational agreement between the two agencies referred to earlier in this Digest has a dispute resolution mechanism that might be called into play in such a scenario.

If CASA receives from CAANZ a copy of a temporary stop notice applying to the holder of an Australian AOC with ANZA privileges, CASA must consider the notice immediately and decide, as soon as practicable, what action (if any) it should take under the Act or regulations in relation to the AOC or its holder: **new subsection 28F(1)**. In deciding what action to take, **new subsection 28F(2)** requires that CASA must comply with the ANZA mutual recognition agreements. The *Explanatory Memorandum* comments:

It is anticipated that [the ANZA mutual recognition] agreements will set out agreed procedures to be followed when a temporary stop notice is received.<sup>44</sup>

There seems to be no equivalent of the **new subsection 28F(2)** requirements in the New Zealand Bill.

CASA must advise the Director of CAANZ of its decision and, if it decides to take action, what the action is: **new subsection 28F(3)**. The *Explanatory Memorandum* also states that:

The CASA is also obliged to consult the Director of CAANZ under the new section 26C (see Item 21), before formally notifying its decision, if the action would affect ANZA activities in New Zealand.<sup>45</sup>

However, **new section 26C** only obliges such consultation if specifically required by the ANZA mutual recognition agreements, and these are not yet available, so the *Explanatory Memorandum* statement seems anticipatory. Also, **new section 26C** only talks of 'before taking action'. It is far from clear that announcing a decision to take action (action is not defined in the Bill or Act) is itself action within the meaning of **new section 26C**.

Existing section 32AC allows an investigator, with the consent of the occupier, to enter and inspect premises to ascertain whether 'relevant legislation' is being complied with. **Items 32-34** make consequential amendments to existing monitoring / inspection powers to take account of the mutual recognition scheme. **Item 33** amends the definition of 'relevant legislation' in existing subsection 32AC(2) to include the *New Zealand Civil Aviation Act 1990* (and associated regulations and rules). However, an entry and inspection by an [Australian] officer for the purposes of *New Zealand Civil Aviation Act 1990* compliance can only be carried out if a request has been made by CAANZ under the ANZA mutual recognition agreements: **item 32**. **Item 34** imposes a similar restriction to **item 32** on when an application can be made to a magistrate for a warrant to enter premises for *New Zealand Civil Aviation Act 1990* compliance purposes.

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Existing section 98 allows regulations to be made on a variety of matters relevant to the Act. **Item 35** inserts **new subparagraph 98(3)** to allow regulations to be made for the ‘mutual recognition of aviation safety certifications in accordance with the ANZA mutual recognition agreements’. The *Explanatory Memorandum* comments:

While AOCs, as the most significant civil aviation approval, will be the first document to be recognised, the mutual recognition obligation can be extended to all aviation documents that are not covered by the *Trans-Tasman Mutual Recognition Act 1997* with the agreement of both Governments. Such documents could include certificates for aircraft maintenance organisations.<sup>46</sup>

### **Amendment of the *Civil Aviation (Carriers Liability) Act 1959***

**Items 36** and **37** amend the existing definition of ‘airline licence’ and ‘charter licence’ in existing section 26 of this Act. The effect of this is that operators flying under a New Zealand-issued AOC with ANZA privileges have the same liability and requirement to carry insurance as if they were flying under an Australian-issued AOC .

## Schedule 2

### **Amendments to the *Civil Aviation Act 1988***

As mentioned earlier in this Digest, existing section 28 of the *Civil Aviation Act 1988* provides for various matters of which CASA must be satisfied before issuing an AOC. In addition, an AOC is subject to the condition that the AOC holder must *continue* to satisfy CASA in relation to section 28 matters: Civil Aviation Orders, section 82.0, paragraph 4.4. The *Explanatory Memorandum* comments that:

The opportunity has been taken to lift this fundamental condition [ie that a holder must continue to satisfy CASA in relation to section 28 matters] from a relatively obscure piece of legislation...into the Act where it properly belongs.<sup>47</sup>

**Item 10** achieves this ‘lifting’ by inserting a **new subsection 28BAA(1)** which imposes the condition that CASA must remain satisfied of the matters set out in existing paragraphs 28(1)(a) and (b). In relation to Australian AOCs with ANZA privileges, **new subsection 28BAA(2)** provides that these are subject to the condition that CASA must remain satisfied of the matters set out in **new paragraphs 28B(1)(a), (c) and (d)**, and that the Secretary of the Department<sup>48</sup> has *not* advised CASA that the holder of the AOC is no longer eligible for ANZA privileges under the ANZA mutual recognition agreements. Note that **new subsection 28BAA(2)** says nothing about compliance with **new paragraph 28B(1)(e)**. **New paragraph 28B(1)(e)** allows for further conditions on AOCs to be provided in the regulations.

**Item 8** inserts **new paragraph 28BA(1)(aa)** which imposes the condition set out in **new section 28BAA** on all AOCs.

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Finally, **item 9** inserts **new paragraph 28BA(1)(aa)** which provides that, if a **new section 28BAA** condition is breached, the AOC continues to authorise operation of aircraft according to its terms. This is consistent with what happens for breaches of other conditions imposed under existing sections 28BD, 28BE, 28BF, 28BG, 28BH and 28BI (see existing paragraph 28BA(1)(a) and subsection 28BA(2)).

## Concluding Comments

This Bill is part of a substantial and continuing policy trend to liberalise regulation of Australian-New Zealand aviation. The Government has said that Air Operators Certificates are possibly just the first phase in the mutual recognition regime. As mentioned earlier in this Digest, it is possible that no further amendment to the *Civil Aviation Act 1988* will be required to extend mutual recognition to other aviation safety-related certificates.

The Intergovernmental Agreement needed to give practical operation to mutual recognition scheme is still under negotiation.

As noted earlier in this Digest, due to differing operational requirements, aircrew salaries etc between Australian and New Zealand, the implementation of the proposed mutual recognition regime will likely have some implications for both aircraft operators and their employees and associated workers. Presumably more information on the likely magnitude of these effects will be forthcoming should the Bill go to a Committee for inquiry.

There are some noticeable differences between parts of the Bill and the corresponding provisions in the New Zealand Civil Aviation Amendment Bill. Some these are more stylistic or result simply from variations in structure and drafting style of the two Acts to be amended. However, it would be useful if more information on some differences – for example in relation to **new paragraph 28(1)(d)** and **new section 28E(2)** – was available.

## Endnotes

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- 1 Note that the House of Representatives Scrutiny of Bills Committee has sought the relevant Minister's advice 'as to whether it would not be possible to include a provision to the effect that if Schedule 1 has not commenced within (say) one year of Assent, it shall be deemed to have been repealed at that time'. See Alert Digest 8/03, p. 10.
  - 2 This includes services that just fly in or out of Australia / New Zealand, as opposed to services that fly *within* Australia / New Zealand.
  - 3 Other forms of aviation safety, security, environment regulation, etc set down by other legislation are not affected by the Bill.

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- 4 See <http://www.knowledge-basket.co.nz/gpprint/docs/bills/20030641.txt>.
- 5 See <http://www.clerk.parliament.govt.nz/Content/SelectCommitteeReports/64bar2.pdf>.
- 6 Specifically, the 'open skies' agreement allowed Australian and New Zealand international airlines to operate across the Tasman and then to third countries without restriction. Previously 'beyond services' of this kind were restricted in terms of allowable capacity (12 Boeing 747s per week) and third-country destinations (a maximum of 11 countries). In addition, the international airlines of both countries were permitted to operate dedicated freight operations from any international airport in Australia and New Zealand to third countries.
- 7 'Australia-New Zealand Open Skies Agreement', *Joint Media Release*, The Hon John Anderson MP and the Hon Mark Gosche MP, 20 November 2000. See [http://www.ministers.dotars.gov.au/ja/releases/2000/november/a182\\_2000.htm](http://www.ministers.dotars.gov.au/ja/releases/2000/november/a182_2000.htm).
- 8 P. 3.
- 9 National Interest Analysis, paragraph 6  
[http://www.aph.gov.au/house/committee/jsct/augustandseptember2002/treaties/nzopenskies\\_nja.pdf](http://www.aph.gov.au/house/committee/jsct/augustandseptember2002/treaties/nzopenskies_nja.pdf). The Joint Standing Committee on Treaties recommended that the Agreement be ratified: see report at <http://www.aph.gov.au/house/committee/jsct/augustandseptember2002/report/chapt6.pdf>.
- 10 The wording of Article 5(1) is derived from Article 33 of the Chicago Convention.
- 11 Certainly this is the view of DOTARS: personal communication 24 October 2003.
- 12 The Hon Wilson Tuckey, House of Representatives *Debates* 25 June 2003 p. 17422.
- 13 P. 12.
- 14 DOTARS, personal communication 11 September 2003.
- 15 If 'operators covered by the Air Services Agreement' means SAM Airlines under Article 2 of the Agreement, these airlines do not have to be New Zealand or Australian airlines: Article 2(6).
- 16 P. 4.
- 17 DOTARS, personal communication 24 October 2003.
- 18 The Hon Wilson Tuckey, *op cit*.
- 19 See Article 33.
- 20 P. 7 and 9.
- 21 P. 11.
- 22 P. 2.
- 23 P. 7.
- 24 PP. 7–8.

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- 25 This said, the *Explanatory Memorandum* does say that ‘consideration is, in fact, being given to allowing CASA the power to impose fees for overseas inspections however this will involve a separate amendment of the Civil Aviation (Fees) Regulations’.
- 26 See pp. 10–13 of the *Explanatory Memorandum*.
- 27 P. 10 of the *Explanatory Memorandum*.
- 28 By CASA or CAANZ.
- 29 P. 16.
- 30 Personal information is ‘information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion’: section 6 of the *Privacy Act 1988*.
- 31 P. 20.
- 32 CAANZ employees are not defined.
- 33 Note however, new section 23B(2A) proposed by the New Zealand Civil Aviation Amendment Bill 2003 does actually allow the CAANZ Director to delegate these powers to CASA officers.
- 34 P. 20.
- 35 A section 27A permission covers foreign registered aircraft.
- 36 P. 21.
- 37 The types of operations authorised by the AOC in respective countries need not be the same: it may authorise passenger operations in Australia but only allow for freight operations in New Zealand.
- 38 Regulated domestic flights are essentially flights that are not undertaken as part of flights into or out of Australia.
- 39 Note that foreign aircraft AOCs cannot authorise regulated domestic flights.
- 40 Personal communication 24 October 2003.
- 41 A similar condition is found in new paragraph 11G(2)(c) of the New Zealand Civil Aviation Amendment Bill 2003.
- 42 P. 23.
- 43 P. 24.
- 44 P. 28.
- 45 P. 28.
- 46 P. 29.
- 47 P. 31.
- 48 That is, the Secretary of DOTARS.

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## Appendix 1

### Australian-New Zealand Air Services Agreement, Article 5 (Safety)

1. Each Party shall recognise as valid, for the purposes of operating the air transport provided for in this Agreement, certificates of airworthiness, certificates of competency and licences issued or validated by the other Party that are still in force, provided that the requirements for such certificates or licences at least equal the minimum standards that may be established pursuant to the Convention. Each Party may, however, refuse to recognise as valid for the purpose of flights undertaken pursuant to rights granted under Article 3 (Grant of Rights), certificates of competency and licences granted to or validated for its own nationals by the other Party.

2. Each Party may request consultations at any time concerning the safety standards maintained by the other Party including, but not limited to, the safety standards relating to aeronautical facilities, aircrews, aircraft and their operation. Such consultations shall take place within thirty (30) days of that request.

3. If, following such consultations, one Party finds that the other Party does not effectively maintain and administer safety standards and requirements in these areas that are at least equal to the minimum standards established at that time pursuant to the Convention, the first Party shall notify the other Party of those findings and the steps considered necessary to conform with those minimum standards, and that other Party shall take appropriate corrective action. Failure by the other Party to take appropriate action within a reasonable time, or in any case within fifteen (15) days, shall be grounds for the application of paragraph 7 of Article 2 (Designation, Authorisation and Revocation) of this Agreement.

4. Notwithstanding the obligations mentioned in Article 33 of the Convention, it is agreed that any aircraft operated by the airline(s) of one Party on services to or from the territory of another Party may, while within the territory of the other Party, be made the subject of any examination by the authorised representatives of the other Party, on board and around the aircraft to check both the validity of the aircraft documents and those of its crew and the apparent condition of the aircraft and its equipment (in this Article called “ramp inspection”), provided this does not lead to unreasonable delay.

5. If any such ramp inspection or series of ramp inspections gives rise to:

(a) serious concerns that an aircraft or the operation of an aircraft does not comply with the minimum standards established at that time pursuant to the Convention; or

(b) serious concerns that there is a lack of effective maintenance and administration of the safety standards established at that time pursuant to the Convention;

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the Party carrying out the inspection shall, for the purposes of Article 33 of the Convention, be free to conclude that the requirements under which the certificate or licences in respect of that aircraft or in respect of the crew of that aircraft had been issued or rendered valid, or that the requirements under which that aircraft is operated, are not equal to or above the minimum standards established pursuant to the Convention.

6. In the event that access for the purpose of undertaking a ramp inspection of an aircraft operated by an airline(s) of one Party in accordance with paragraph 4 above is denied by the representative of that airline(s) the other Party shall be free to infer that serious concerns of the type referred to in paragraph 5 above arise and draw the conclusions referred to in that paragraph.

7. Each Party reserves the right to suspend or vary the operating authorisation of an airline(s) of the other Party immediately in the event the first Party concludes, whether as a result of a ramp inspection, a series of ramp inspections, a denial of access to a ramp inspection, consultation or otherwise, that immediate action is essential to the safety of an airline operation.

8. Any action by one Party in accordance with paragraphs 3 or 7 above shall be discontinued once the basis for the taking of that action ceases to exist.

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## Appendix 2

### Parties receiving the 10 February 2003 departmental letter (including an invitation to comment) and information sheet.

Overnight Airfreight Operators Association	Australian Federation of International Freight Forwarders
Regional Aviation Association of Australia	Aircraft Operators and Pilots Association
Board of Airline Representatives Australia	Australian Federation of Air Pilots
Australian and International Pilots Association	Sunstate Airlines
Qantas Airways Ltd	Aviation Safety Forum, c/o Civil Aviation Safety Authority
Australian Airports Association	Australian and International Pilots Association
Regional Express Airlines	Horizon Airlines Pty Ltd
Jetcraft Aviation	Macair Airlines
National Jet Systems	Skippers Aviation Pty Ltd
Skywest Airlines Pty Ltd	Sunshine Express Airlines Pty Ltd
Virgin Blue Airlines Pty Ltd	Aeropelican Air Services Pty Ltd
Airlines of South Australia	Regional Pacific Airlines Pty Ltd
Eastland Air/ Moore's Air Charter	Alliance Airlines
Aviation Policy/ Air Freight Export Council of Western Australia	Air Transport Unit, Public Transport Division (QLD)
Air Transport Council, Department of Transport (NSW)	National Director, Cargo and Trade, Australian Customs Service
National Director, Border Intelligence and Passengers, Australian Customs Service	Transport Markets Unit, Department of the Treasury
Competition and Consumer Policy Division, Department of the Treasury	Australian Competition and Consumer Commission
National Standards Commission	Australian Consumers' Association
Transport Planning Agency, Transport SA	Department of Infrastructure, Planning and Environment (NT)

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Department of Infrastructure, Energy & Resources (TAS)	New Zealand and Papua New Guinea Branch, Department of Foreign Affairs and Trade
Chief Minister's Department (ACT)	Dept of Infrastructure (VIC)
Dept of Innovation, Industry and Regional Development (VIC)	Flight Attendants' Association of Australia
Airnorth Regional Airlines	Skytrans Australia
Aircruising Australia Limited	Australian Airlines Limited
McCafferty's Air Charter Pty Ltd	Pel-Air Express Pty Limited
Sherwell Aviation Pty Ltd	Air Charter Co-ordinators
Whitaker Air Charter	Transair
Five Star Aviation Pty Ltd	

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