



## Civil Aviation Legislation Amendment (Mutual Recognition with New Zealand) Bill 2005

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Law and Bills Digest Section

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## Civil Aviation Legislation Amendment (Mutual Recognition with New Zealand) Bill 2005

**Date Introduced:** 23 June 2005

**House:** Senate

**Portfolio:** Transport and Regional Services

**Commencement:** Sections 1 to 3 commence on the date of Royal Assent. However, most of the key operative provisions of the Bill (items 1 to 19, 21 to 28 and 32 to 40 of Schedule 1) commence on a single day to be fixed by proclamation. Items 20 and 29 to 31 of the Schedule commence on varying dates according to when specified events occur, such as the intergovernmental arrangements coming into force.

### Purpose

To amend the Civil Aviation Act 1988 to enable the mutual recognition of certain aviation-related safety certification between Australia and New Zealand in relation to large aircraft (greater than 30 seats or 15,000 kgs).

### Background

This Bill was first introduced into Parliament in June 2003, and was the subject of a comprehensive [Bills Digest No. 61](#) (2003-04). The 2003 Bill was referred to the Senate Rural and Regional Affairs and Transport Legislation Committee ('the Committee') which tabled its [report](#) on 17 June 2004.<sup>1</sup> The Bill lapsed with the proroguing of the 40<sup>th</sup> Parliament and was reintroduced on 23 June 2005 with one major change.

The previous Bill established a statutory framework for recognition of other safety certificates (such as maintenance) to be made via regulations without further legislative amendment. **The Committee recommendation to remove the ability for mutual recognition to be extended beyond Air Operator Certificates (AOCs) by regulations has been taken into account in this Bill.**<sup>2</sup>

The Committee report recommended at paragraph 2.59 that 12 months after the commencement of the mutual recognition of AOCs, CASA should conduct a comparative assessment of the safety records of airlines operating in Australia under both Australian and New Zealand AOCs. CASA should report the findings to the Commonwealth Parliament within a further 6 months.

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New Zealand has implemented mirror amendments to its *Civil Aviation Act 1990* by adding '[Part 1A – ANZA Mutual Recognition](#)', which passed into law on 18 March 2004.<sup>3</sup> This was also preceded by a Parliamentary Committee [report](#).

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.

### **Basis of policy commitment**

Under current legislative requirements, aircraft operators operating in both Australia and New Zealand 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* ('the Act') and the Civil Aviation Authority of New Zealand (CAANZ) in New Zealand under the *Civil Aviation Act 1990* (NZ).

The *Explanatory Memorandum* explains the perceived problem in the following terms:

This results in duplication, complexity, and added administrative and financial burdens on operators which may in turn deter operators from establishing air services in the other country. This is inconsistent with the intention of the 'open skies' Air Services Agreement to promote competition among Australian and New Zealand operators, including on domestic routes.<sup>4</sup>

The Civil Aviation Legislation Amendment (Mutual Recognition with New Zealand) Bill 2005 ('the Bill') will allow CASA to 'recognise' certain forms of safety certification issued by CAANZ for the purpose of satisfying the Australian safety requirements prescribed under *Civil Aviation Act 1988*.

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

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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>5</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>6</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 ‘purest and 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>7</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. 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>8</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>9</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.

### **Mutual recognition and aviation safety**

The most controversial aspect of the Bill was whether it would affect Australian aviation safety. It was primarily this issue that led to a dissenting report by the non-Government members of the Senate Committee.

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In introducing the Bill, Senator Kay Patterson on behalf of the Minister for Transport and Regional Services 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>10</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>11</sup>

As evidence for the assertion that safety standards would not be diminished under mutual recognition, the DOTARS noted in their submission to the Senate Committee that both countries had consistently met International Civil Aviation Organisation (ICAO) safety standards through the ICAO's audit process.<sup>12</sup>

While the majority Committee generally accepted the notion that Australia and New Zealand presently generate ‘comparable safety outcomes’,<sup>13</sup> they noted two main differences between the two countries’ regulatory systems:

- New Zealand AOCs do not permit sky marshals on aeroplanes; and,
- The required ratios of flight attendants to passengers; 36:1 in Australia and 50:1 (stipulated as passengers to seats) in New Zealand.

The majority Committee stated that ‘any operator in Australia, regardless of whether its AOC has been issued in Australia or New Zealand, will ‘be subject to Australia's aviation security requirements’.<sup>14</sup>

This issue may require clarification. In a press release dated 31 December 2001, the Government announced as part of its Air Security Officer (ASO) (or ‘sky/air marshals’) initiative that ASOs would operate from that day on Australian domestic flights and that by the end of 2002, 111 ASOs ‘will have completed their training and be operating on domestic and international flights.’<sup>15</sup> Agreements with the Singapore (2003) and the United States (2004) have been signed, but negotiations continue with New Zealand, Canada and Indonesia. ASOs are currently not operating on international flights from New Zealand into or out of Australia. Whether the provisions of Australian law or New Zealand AOCs would have a material effect on the mutual recognition process is not yet clear.

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The issue of cabin crew numbers was also not resolved. The Committee noted that both Australian and New Zealand safety programs meet those required internationally (the ICAO standards) and that attendant numbers are one aspect of the safety program. It appreciated that as one aspect of the two countries programs the two requirements are not comparable. It also accepted that both countries have determined the cabin crew levels with regard to the manufacturers' minimum requirements for evacuation. This led to the recommendation in the majority Committee report that a safety review be conducted in 12 months time, as noted above.<sup>16</sup>

### **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 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>17</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>18)</sup>

A table of possible costs and benefits is provided on pages 8-9 of the *Explanatory Memorandum*, as well as a table of comments received from consultations with affected stakeholders on pages 10-13.

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

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*Spirit of Australia* caption. It has a New Zealand AOC and its aircraft are registered in New Zealand.<sup>19</sup>

Industry and employment issues received some attention in the Senate Committee report. The Flight Attendants Association of Australia's (FAAA) submission highlighted the different pay and conditions available to Australian and NZ cabin crew:

We are on an award, while flight attendants in New Zealand who have been hired and who are New Zealand based are on contract, so there is no award for New Zealand flight attendants. Their workload with regard to flying duties is significantly higher than ours and their rest periods are shorter than ours.<sup>20</sup>

The *Explanatory Memorandum* notes that:

Mutual recognition deals with safety and the acceptance that both jurisdictions have comparable safety standards. The initiative is not intended to impact on existing employment arrangements on either side of the Tasman or to have industrial implications, however with different systems some industrial matters have been brought into focus. Ultimately, companies will need to manage their own industrial issues.<sup>21</sup>

## **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 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>

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In evidence to the Committee, DOTARS indicated that while mutual recognition would necessitate both CASA and CAANZ conducting surveillance in the other country, CASA already monitored Australian operators in New Zealand. Accordingly, 'it would not be a huge impost'.<sup>25</sup>

### **Implementation of the Bill**

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 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 August 2005, this inter-governmental arrangement was still under negotiation and partly contingent on the passing of the Bill. Negotiations on the operational arrangement 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>26</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.<sup>27</sup> Consideration will then be given to including other types of certificates not already covered by other recognition arrangements but this will have to be done by further legislation, not regulations.

It is worth noting, however, that in accordance with the general principles of mutual recognition and non-discrimination underpinning the Chicago Convention, 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.

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## Position of Non-Government Parties

The Labor and Democrat Senators on the Committee issued a Dissenting Report stating that they did not accept the findings of the report, due to what they perceived to be a lack of research behind the main premise of comparable safety standards between Australia and New Zealand, and the cost/benefit analysis of changes wrought by the Bill:

Labor does not accept that the Government has presented any evidence to support the premise that Australia and New Zealand present comparable safety outcomes. No comparative study of the regulations and practices pertaining to Australia and New Zealand has been undertaken, rather, the Australian Government has relied on the fact that both Australia and New Zealand have met ICAO audit conditions.<sup>28</sup>

The Senators felt that recent research which showed a ‘clear correlation between higher crew ratios and more effective (ie safer) aircraft evacuations had not been taken into account’. They believed that the safety review the Committee recommended should have been undertaken before the Bill was passed, as ‘it defies logic to undertake this basic research after the change has been made.’<sup>29</sup>

## Main Provisions

### Schedule 1

#### ***Amendment of the Civil Aviation Act 1988***

**Items 1-13** 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.

**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 arrangement currently under negotiation referred to earlier in this Digest will be an ANZA mutual recognition agreement.

**Item 15** 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.

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**Item 16** 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 17** adds further to CASA functions: **new paragraph 9(3)(aa)** inserts the new function of implementing ANZA mutual recognition agreements.

**Item 18** 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 18** 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 19** 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 'for the purposes of the ANZA mutual recognition agreements'. Part IIIA covers CASA's investigatory powers. As a safeguard, a 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.

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

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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>32</sup>

Existing subsection 27(2) of the Act prohibits various aircraft operations unless authorised by an AOC or a section 27A permission. **Item 21** 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>33</sup>

**Item 23** 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. 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)**.

Foreign registered aircraft that are being used on regulated domestic flights must be specified individually on an AOC: existing subsection 27(2A). However, **item 24** inserts **new subsection 27(10)** 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. 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 25** 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

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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 26** 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 27** 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 28**) 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 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>34</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. As the *Explanatory Memorandum* comments, this requirement is also on-going by virtue of the

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**new section 28BAA(2)** (see **item 31**). 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 Act contains a ‘change of country of certification’ provision, 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 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 33** inserts a **new subsection (2)** requiring the holder of an Australian AOC with ANZA privileges to 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) (Item 28) to comply with relevant New Zealand law, which will also be an on-going requirement by virtue of the proposed section 28BAA(2) (Item 31).<sup>35</sup>

**Item 34** 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.

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**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 Australian 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 sections 11C and 11D in the New Zealand Act.

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)**.

The 2003 Bills Digest noted that there seemed to be no equivalent of **new subsection 28E(2)** in the New Zealand Bill. This was resolved by the amendment of the NZ Bill to include a provision in identical terms.

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>36</sup>

In this vein, a stakeholder concern listed in the *Explanatory Memorandum* is what happens if CASA believes a New Zealand AOC holder should be grounded for safety reasons but this is not agreed or actioned by CAANZ. The Government has responded that:

It is highly unlikely that the regulators would take a significantly different view however a dispute resolution mechanism is being contemplated. If mutual recognition were significantly compromised by an event of this kind, it would need to be brought to the attention of the responsible Ministers of Australia and New Zealand.<sup>37</sup>

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

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>38</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 35-36** make consequential amendments to existing monitoring / inspection powers to take account of the mutual recognition scheme. **Item 36** 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 35**. **Item 37** imposes a similar restriction to **item 35** 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.

**Item 38** inserts new paragraph 98(3AA) which confirms that the regulations cannot allow for the mutual recognition of ANZA safety certifications other than AOCs.

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

**Items 39** and **40** 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 .

## **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. Any

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extension will now have to be effected by legislation, rather than by regulations as was proposed by the 2003 Bill.

The controversial issue raised by the Bill is whether in fact the safety schemes of Australian and New Zealand aviation industries are comparable, especially with regard to cabin crew to passenger ratios, and on what qualitative evidence this assessment is based.

The intergovernmental and CASA-CAANZ arrangements needed to give practical operation to mutual recognition scheme are still under negotiation. There are some differences between parts of the Bill and the corresponding provisions in the New Zealand *Civil Aviation Amendment Act 2003*. Some of 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 subsection 28F(2)** – was available.

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. There may also be funding impacts on the regulatory bodies, CASA and CAANZ.

## Endnotes

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- 1 Rural and Regional Affairs and Transport Legislation Committee. Report on 'Provisions of the Civil Aviation Legislation Amendment (Mutual Recognition with New Zealand and Other Matters) Bill 2003'. 17 June 2004.  
[http://wopared.parl.net/Senate/committee/rrat\\_ctte/completed\\_inquiries/2002-04/civilaviation\\_nz/report/civilaviation.pdf](http://wopared.parl.net/Senate/committee/rrat_ctte/completed_inquiries/2002-04/civilaviation_nz/report/civilaviation.pdf), accessed 22 July 2005.
- 2 Schedule 1, Item 35 in the 2003 Bill has been removed and replaced with Item 38 in the 2005 Bill.
- 3 Civil Aviation Amendment Bill (3 March 2004 No. 64-3).
- 4 *Explanatory Memorandum*, p. 4.
- 5 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.
- 6 '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).

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- 7 *Explanatory Memorandum*, p. 8.
- 8 National Interest Analysis, paragraph 6,  
[http://www.aph.gov.au/house/committee/jsct/augustandseptember2002/treaties/nzopenskies\\_nia.pdf](http://www.aph.gov.au/house/committee/jsct/augustandseptember2002/treaties/nzopenskies_nia.pdf).  
The Joint Standing Committee on Treaties recommended that the treaty be ratified; see  
<http://www.aph.gov.au/house/committee/jsct/augustandseptember2002/report/chapt6.pdf>.
- 9 The wording of Article 5(10 is derived from Article 33 of the Chicago Convention.
- 10 Senator Kay Patterson, Senate *Debates*, 23 June 2005, p. 7.
- 11 *Explanatory Memorandum*, p. 12
- 12 Report, p. 8–9.
- 13 *ibid.*, p. 9, quoting DOTARS Submission 1, p. 2.
- 14 Report, p. 16.
- 15 Minister for Justice and Customs press release, ‘Air Security Officers Take Off’, 31 December 2001, accessed at:  
<http://www.ag.gov.au/WWW/JUSTICEMINISTERHOME.NSF/Web+Pages/5F4495AC1521CBABCA256B58007DC397?OpenDocument> (19 March 2003).
- 16 *ibid.*, at: paragraph 255.
- 17 *ibid.*, p. 7.
- 18 *ibid.*
- 19 Jet Connect is discussed in the Senate Report at paragraph 2.45, p. 14. and paragraph 248, p. 15.
- 20 Transcript of Evidence, 12 May 2004, p. 16.
- 21 *Explanatory Memorandum*, p. 13.
- 22 *ibid.*, p. 2.
- 23 *ibid.*, p. 7
- 24 *ibid.*
- 25 Report, paragraph 2.15, p. 8.
- 26 Communication with CASA 3 August 2005.
- 27 *Explanatory Memorandum*, p. 4.
- 28 Dissenting Report, p. 23–24.
- 29 *ibid.*, p. 23.
- 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*.

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- 31 *Explanatory Memorandum*, p. 19.
- 32 *ibid.*, p. 20.
- 33 *op. cit.*
- 34 Personal communication, 24 October 2003.
- 35 *Explanatory Memorandum*, p. 24.
- 36 *ibid.*, p. 29.
- 37 *ibid.*, p. 12.
- 38 *ibid.*, p. 29.

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