



Airspace Bill 2006

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Airspace Bill 2006

Date introduced: 29 November 2006

House: House of Representatives

Portfolio: Transport and Regional services

Commencement: Sections 1 to 3 commence on Royal Assent. The operative provisions (sections 3 to 15) commence on proclamation, or failing that, six months after Royal Assent.

Purpose

To transfer legislative responsibility for civilian airspace management from Airservices Australia (ASA) to the Civil Aviation Safety Authority (CASA).

Background

Under the *Air Services Act 1995*, ASA is the statutory body with responsibility for Australian civilian airspace management. By comparison, under the *Civil Aviation Act 1988*, CASA's primary responsibility is aviation safety regulation.

On 14 September 2006, it was [announced](#) by the Minister for Transport and Regional Services the Hon Warren Truss that plans to move airspace regulatory responsibility from ASA to the Transport Department had been changed in favour of giving it to CASA:¹

The Government has decided to transfer the airspace regulatory function from Airservices Australia to the Civil Aviation Safety Authority (CASA). This will address any perceived conflict of interest between Airservices Australia's service delivery functions and its role as the airspace regulator.

It has previously been announced that the function would be shifted from Airservices Australia to the Department of Transport and Regional Services. The decision to transfer the function to the Civil Aviation Safety Authority (CASA) was taken after careful note of industry views - especially that a dedicated new unit within the safety regulator is the best home for the airspace regulator. The decision reflects the Government's confidence in the reform program currently underway in CASA and CASA's focus on improved regulatory outcomes.

This function will become the responsibility of a distinct operational unit within the Civil Aviation Safety Authority. This unit will be called the Office of Airspace Regulation (OAR) and will have the decision making powers for regulating civil airspace. The primary objective of the airspace regulator is to put in place decisions

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that ensure the safe, orderly and efficient flow of air traffic, cognisant of national security, the protection of the environment, and the equitable use of Australian airspace

Under the move, the costs of airspace regulation would continue to be met through ASA's en-route charges system and not through any new charges.²

The Federal Government's announced intention is to prescribe ASA as a Government Business Enterprise (GBE) under the *Commonwealth Authorities and Companies Act 1997* following the removal of regulatory functions to the Office of Airspace Management.³ The corporation will no longer necessarily be the domestic monopoly provider of tower air traffic and aviation rescue and fire-fighting (ARFF) services.⁴ Note that ASA declared services prices of terminal navigation, ARFF and en route services charges are monitored by the ACCC under Part VIIA of the *Trade Practices Act 1974*.

Minister Truss also announced that a National Airspace Plan would be developed by the Department of Transport and Regional Services (DoTARS) as a statutory instrument to set out levels of service to be provided to aircraft with a risk management and cost-benefit emphasis. While safety has primacy, the Government believed that factors including the environment, national security, access and efficiency deserve consideration (i.e. obviously under its direction).⁵ In the Airspace Bill, this plan has been renamed as the Australian Airspace Policy Statement.

Aviator [Dick Smith](#) has expressed concern that our airspace classifications and procedures have never been properly updated since the old Flight Service non-radar days. He believes that if these changes are not made that we will end up with a major airline crash – most probably a controlled flight into terrain caused in part by the lack of the proper use of the ASA radar system, or even more likely a collision in the circuit area or on the runway at an aerodrome because the air traffic controllers are not using modern international procedures, or at a non-controlled aerodrome because we do not have a UNICOM local radio operator.⁶

The Airspace Bill 2006 passed the House on 7 December and awaits Senate debate. The issues it raises and the airspace debate generally will continue to be acrimonious due to the strong personalities involved and the contention that safety may be compromised in return for cost savings. Any time airspace is changed and with cost savings as the probable driver we might expect safety implications to be raised as an issue. Until the cost versus safety nexus issue is resolved to the satisfaction of all parties involved, aviation controversy will continue.

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The Senate Committee report

The Bill was referred to the Senate Standing Committee on Rural and Regional Affairs and Transport. The committee tabled its [report](#) on 28 February 2007. Its recommendations were:

Recommendation 1

2.51 The Committee recommends that clause 8 of the Airspace Bill 2006 be amended to require that a statement made under subclause 8(1) must be made not later than 1 July 2007 and that such a statement must be published in a readily accessible form in addition to the tabling requirements which apply pursuant to subclause 8(5) of the bill.

Recommendation 2

2.52 The Committee recommends that subclause 9(1) of the Airspace Bill 2006 be amended to require the Minister to consult with key representatives of the Australian aviation industry, as selected by the Minister, before making the Australian Airspace Policy Statement.

Recommendation 3

2.53 The Committee recommends that subclause 11(8) of the Airspace Bill 2006 be amended to either specify the range of powers and functions which can be delegated or the category of person to whom such powers and functions can be delegated.

Recommendation 4

2.54 The Committee recommends that, subject to the preceding recommendations, the Senate pass the Airspace Bill 2006 and the Airspace (Consequential and Other Measures) Bill 2006.

Financial implications

The Explanatory Memorandum states that:⁷

A new ongoing policy function in the Department of Transport and Regional Services ('DoTARS') will be established. It will include provision of advice on airspace policy and development and maintenance of the Australian Airspace Policy Statement.

It goes on to say that the cost to DoTARS will be \$4.2 million for the 2007-08, with funding for subsequent years to 'be reviewed'. A major element of this cost is the development of the Australian Airspace Policy Statement, which will presumably require an expansion of the current Office of Airspace Management within DoTARS. Note that

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this office is a different entity to the proposed Office of Airspace Regulation, which will be a part of CASA.

No information is provided with respect to CASA. Presumably the costs involved to CASA of its assumption of airspace management responsibility will be recouped by appropriate 'user pays' charges.

Main provisions

New section 3 sets out the object of the Airspace Bill 2006 (the Bill). It is:

to ensure that Australian-administered airspace is administered and used safely, taking into account the following matters:

- (a) protection of the environment;
- (b) efficient use of that airspace;
- (c) equitable access to that airspace for all users of that airspace;
- (d) national security.

Thus, although safety is the primary objective that must guide the decisions and practices of CASA and the DOTARS Minister (the Minister), they are obliged to consider the matters listed in (a)-(d) as far as they are relevant to the particular decision or practice. However, the weighting to be given to any of them in such consideration is, within reason, a matter for CASA and the Minister.

New section 8 requires for the Minister to make an Australian Airspace Policy Statement. The intent seems to be to put various matters relating to how the Government intends to manage airspace on the public record. Notably, the Statement must outline the Government's objectives for airspace and air navigation services and also set out the processes to be followed where consideration is being given to changing airspace classifications and the like: **new subsection 8(2)**. In relation to the latter, the Parliament Secretary's second reading speech comments:⁸

Importantly, the statement will require that major changes to Australian airspace will be made only after the results of a risk analysis, a detailed examination of the potential costs and benefits, and inclusive consultation with stakeholders to rigorously test proposed changes before they are implemented.

Note that **new section 8** does not actually make mention of risk analysis or cost benefit analysis. Presumably however it is the Government's policy intention to include such concepts in the Statement – **new subsection 8(3)** effectively provides that the Minister may include any matter in it that he or she thinks appropriate.

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The Statement must be consistent with the Chicago Convention, except where Australian airspace management or standards are different from Chicago standards and these differences have been duly notified as required under Chicago Convention procedures.⁹ In such cases, the Statement must be consistent with the notified different standards.

The Minister must consult CASA, ASA and any ‘other person or body the Minister thinks appropriate’ before making the Statement. According to the Explanatory Memorandum, the Department of Defence will be consulted,¹⁰ although again this is not required under the legislation.

In terms of the scope of the Statement, the Explanatory Memorandum comments:

It is likely that the first Statement will be developed as an interim statement in order to be in place at the point that regulations conferring relevant airspace functions and powers upon CASA and removing those functions and powers from Airservices are made. This will ensure that CASA has a complete legislative framework for administering and regulating Australian-administered airspace in place. Once the first instrument has been made it will form the basis for a longer term plan.

New section 10 requires the Statement to be reviewed every three years. It does not require a new one to be made as a consequence of the review. There is no explicit requirement for consultation in the review process, although **new section 9** implies such consultation will occur if a new Statement is made.

The Statement is a legislative instrument, but is not disallowable: **new subsection 8(5)**.

New section 11 allows for regulations to be made under the Airspace Bill 2006 giving CASA the powers and functions relevant to the administration and regulation of Australian-administered airspace.

These regulations may set out that CASA can charge a fee for the ‘performance of a function, or the exercise of a power’: **new subsection 11(5)**. There is standard provision that such charge must not amount to taxation: **new subsection 11(7)** – in other words any charge must reasonably reflect the total cost of the relevant service provided by CASA.

New subsection 11(8) allows the regulations to deal with circumstances under CASA may delegate its functions and powers to another person: **new subsection 11(8)**. The Bill itself does not place any limitations on the delegation. The Explanatory Memorandum comments:¹¹

... delegation is most likely when decisions are required in the management of Australian-administered airspace. For example, this could occur with respect to the designation and conditions of use of an air route or airway, and the giving of directions in connection with the use or operation of designated routes and airways.

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As noted earlier in this Digest, the Senate Committee reviewing the Bill recommended changes to the delegation power.

New section 12 deals with matters bearing on CASA's performance of the functions and powers conferred on it by the Regulations made under **new section 11**.

CASA must 'foster' the efficient use of Australian-administered airspace and equitable access to it by all users: **new subsection 12(1)**. It must also 'take into account' the capacity of Australian administered airspace to accommodate changes in its use and national security: **new subsection 12(2)**. As mentioned above,¹² the requirement to 'take into account' confers significant discretion on the decision-maker as to the weight given to the relevant matter and as such it is arguable that it is less onerous than the requirement to 'foster' in **subsection 12(1)**. **Subsection 12(4)** states that the above matters are subject to 9A to 11A of the *Civil Aviation Act 1988*. Section 9A states that safety navigation is the most important priority for CASA, and section 11 requires CASA's actions to be consistent with the Chicago Convention and any other international agreements on air navigation. Section 11A is to be inserted by the Airspace (Consequential and other Measures) Bill 2006 – it requires that CASA cannot act inconsistently with the Australian Airspace Policy Statement unless it first informs the Minister.

New section 13 requires that CASA must conduct 'regular reviews' of airspace classifications and air navigation service providers, as well more general matters including airspace use and management covering safety, efficiency of use and equitable access. No timeframe is specified, and the section is silent on whether the reviews are to be made public.

New section 14 allows the Minister (or the Secretary, if the Minister so delegates) to require CASA to give written advice to him or her on any matter related to the Statement, or CASA's functions or powers set out in the regulations made under **new section 11**.

New section 15 is a standard provision on making regulations.

Endnotes

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1. *Airspace Management Reform in Australia*, the Hon Warren Truss, Media Release 14 September 2006. Note that the media release incorporated a Ministerial Statement from which this quote is taken.
 2. *ibid.*
 3. *ASA Corporate Plan July 2006-June 2011*, 2006, section 1.3. The Plan can be accessed at: <http://www.airservices.gov.au/aboutus/corpdocuments/corporateplan.pdf>.
 4. *ibid.*, section 4.1.

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5. *ibid.*
6. Brad Norington, 'Air Crash Inevitable, says Smith' *The Australian* 7 December 2005 p. 8.
7. Explanatory Memorandum, p. 2.
8. The Hon De-Anne Kelly, House of Representatives, *Debates* 29 November 2006, p. 7.
9. Article 37 of the Chicago Convention provides standards and recommended practices dealing with wide range of matters concerned with the safety, regularity and efficiency of air navigation. These standards and practices are generally included in Annexes to the Chicago Convention. In cases where a State finds it impracticable to comply in all respects with a standard, or to bring its own regulations or practices into full accord with a standard, that notification be given to ICAO, the State must notify ICAO of this difference under Article 38 of the Convention
10. Explanatory Memorandum, p. 6.
11. Explanatory Memorandum, p. 8.
12. See discussion of **new section 3**.

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