

The Senate

Rural and Regional Affairs and
Transport Legislation Committee

Provisions of the Civil Aviation
Amendment Bill 2003

June 2003

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TABLE OF CONTENTS

MEMBERSHIP OF THE COMMITTEE	iii
CHAPTER ONE	1
THE COMMITTEE’S INQUIRY.....	1
Reference of the Bill to the Committee	1
Purpose of the Bill	1
The Committee’s Inquiry	2
Consideration of the Committee’s Report.....	2
Acknowledgements	2
CHAPTER TWO	3
PROVISIONS OF THE BILL.....	3
Purpose of the Bill	3
Background to the Bill.....	3
Main Provisions of the Bill.....	3
CHAPTER THREE	5
ISSUES RAISED DURING THE COMMITTEE INQUIRY	5
Introduction	5
Consultative Process.....	5
Dichotomy of rule making versus regulation	6
Guidelines for authorisation suspension and reinstatement	8
Proposed appeal lodgement time.....	10
Proposed voluntary reporting model	11
Need or otherwise for additional funding.....	11
CHAPTER FOUR.....	13
CONCLUSIONS AND RECOMMENDATIONS	13
Recommendation	13
APPENDIX ONE	15
SUBMISSIONS.....	15

APPENDIX TWO	17
HEARINGS AND WITNESSES.....	17
Canberra, Monday, 5 May 2003.....	17

CHAPTER ONE

THE COMMITTEE'S INQUIRY

Reference of the Bill to the Committee

1.1 On 26 March 2003, the Senate referred the Civil Aviation Amendment Bill 2003 to the Senate Rural and Regional Affairs and Transport Legislation Committee for inquiry and report by the 16 May 2003 which was subsequently extended to 18 June 2003.

1.2 In referring the Bill to the Committee, the Committee was asked by the Senate to consider the provisions of these proposed reforms to the Civil Aviation Safety Authority's (CASA) governance arrangements and enforcement regime within the Bill.

Purpose of the Bill

1.3 The purpose of the Civil Aviation Amendment Bill 2003 is to:

- a) amend the *Civil Aviation Act 1988* (the Act) to implement a range of reforms to the Civil Aviation Safety Authority's (CASA) governance arrangements and enforcement regime;
- b) abolish the CASA Board and retains CASA as an independent statutory authority, thereby providing the Minister with stronger and more direct control over CASA's governance and accountability in the areas of CASA's policy directions and priorities, performance standards, reporting and consultation processes, and stakeholder and industry advisory machinery;
- c) introduce changes to the functions and accountability of the role of the Director of Aviation Safety ('the Director') to become the Chief Executive Officer (CEO) of CASA, and provide for greater involvement in CASA's oversight by the Portfolio Secretary ('the Secretary');
- d) introduce changes to CASA's enforcement regime including:
- e) automatic stay of CASA's decisions to suspend, vary or cancel a civil aviation authorisation in cases which do not involve a serious and imminent risk to air safety;
- f) revised arrangements relating to CASA's power to immediately suspend an authorisation in cases where it has reasonable grounds to believe there is a serious and imminent risk to air safety;

- g) a demerit point system based on the NSW demerit point system for motor vehicle drivers' licences;
- h) protection from administrative action, based on the system administered by the National Aeronautical Space Administration in the United States on behalf of the Federal Aviation Administration;
- i) a scheme of enforceable voluntary undertakings that will give CASA power to accept a written undertaking from an authorisation holder in relation to compliance with civil aviation safety legislation;
- j) a scheme of enforceable voluntary undertakings that will give CASA power to accept a written undertaking from an authorisation holder in relation to compliance with civil aviation safety legislation.

The Committee's Inquiry

1.4 Following the referral of the Bill, the Committee invited key stakeholder groups to proffer submissions. A list of written submissions is included in Appendix 1 of this report.

1.5 The Committee held a public hearing on the Bill in Canberra on Monday, 5 May 2003. The witnesses who appeared at the hearing are listed in Appendix 2 of this report.

1.6 Published submissions and *Hansard* transcripts of the Committee's hearings on the Bill are tabled with this report. The *Hansard* transcripts of the hearings are available at the Hansard site on the Parliament House homepage on the internet (<http://www.aph.gov.au>).

Consideration of the Committee's Report

1.7 The Committee met on 18 June 2003 to consider its report.

Acknowledgements

1.8 Given the very short time available, the Committee acknowledges the assistance and contribution made to its inquiry by those who prepared written submissions. The Committee also acknowledges the assistance provided at its public hearing on the Bill by witnesses.

CHAPTER TWO

PROVISIONS OF THE BILL

Purpose of the Bill

2.1 The purpose of the Civil Aviation Amendment Bill 2003 is to amend the *Civil Aviation Act 1988* (the Act) to implement a range of reforms to the Civil Aviation Safety Authority's (CASA) governance arrangements and enforcement regime.

Background to the Bill

2.2 In line with the Government's announcement in 1996, CASA has been conducting a complete review of civil aviation legislation in Australia. The objective of the review was to harmonise Australia's aviation safety regulations with international standards and make them shorter, simpler and easier to use and understand. This Bill brings together a series of significant changes which stem from the review, and which will improve and clarify the legislative framework for aviation safety.

Main Provisions of the Bill

2.3 Schedule 1 Items 1 to 14 amend the Civil Aviation Act 1988 by repealing definitions of pertaining to roles and responsibilities of the abolished Board, adding descriptions pertaining to changes to Minister's powers in the direction of CASA, and inserting new definitions for the purposes of the new enforcement schemes.

2.4 Schedule 1 Item 15 creates 5 new Divisions in Part III of the Act to establish five new schemes under CASA's enforcement regime.

2.5 Division 3A deals with revised arrangements for the immediate suspension of an authorisation in cases of serious and imminent risk to air safety. Currently, CASA may immediately suspend a licence or certificate (other than an AOC) under regulation 268 of the Civil Aviation Regulations 1988, and an AOC under s.28 of the Act. The new Division 3A amends these arrangements by encompassing the immediate suspension of all authorisations under the Act and the regulations. Regulation 268 will be repealed by regulation amendment. The revised arrangements are designed to enhance fairness by introducing court adjudication of CASA's decisions to immediately suspend authorisation.

2.6 Division 3B introduces a scheme for enforceable voluntary undertakings (EVUs) under new Division 3B, s.30DK, modelled on s.87B of the *Trade Practices Act 1974*. s.30DK will allow CASA to accept a written undertaking from an authorisation holder in connection with a matter arising under the Act or the regulations in relation to which CASA has function or power under the Act or the regulations.

2.7 The proposal for EVUs was introduced previously under the Aviation Legislation Amendment Bill (No. 2) 2000, which subsequently became the Aviation Legislation Amendment Bill (No. 1) 2001, and has been revised to take into account recommendations made by the Senate Rural and Regional Affairs and Transport Legislation Committee which examined that Bill. The changes made are as follows:

- CASA must publish details of an EVU on the Internet;
- the period for which an EVU applies must not exceed 6 months; and
- where CASA considers a person has breached any terms of an EVU and applies to the Federal Court for an order, any order by the Court which requires payment of money to the Commonwealth will be limited in that the Court can only order an amount up to the amount of any financial benefit that the person has obtained directly or indirectly from, and that is reasonably attributable to, the breach of the undertaking.

2.8 Division 3C establishes a new scheme under Division 3C whereby an authorisation holder will be protected from administrative action (suspension, variation or cancellation of their authorisation, or the giving of an infringement notice) if they voluntarily report a contravention of the regulations within 10 days of the contravention to an independent reporting body. Division 3C does not confer any immunity from prosecution.

2.9 Division 3D establishes a new demerit point scheme along the lines of the NSW system of demerit points for motor vehicle drivers' licences, whereby demerit points will be recorded against an authorisation holder's name in relation to the class of authorisations to which the offence relates, and when the specified maximum number of points is reached or exceeded for that class, all the authorisations in that class will be suspended or cancelled.

2.10 Schedule 1 Item 16 amends subsection 31(1) of the Act by providing that a decision by CASA in regard to an application for reinstatement of an authorisation under s.30EF will be reviewable by the AAT. Item 16 also excludes a decision by CASA to immediately suspend an authorisation under new Division 3A from AAT review as the current scheme does not permit such a decision to be reviewed due to the seriousness of the situations that warrant such action. A suspension or cancellation under Division 3D is also excluded from AAT review as the scheme is a self-executing, non-discretionary scheme.

2.11 Schedule 1 Item 17 amends s.31 of the Act by inserting new provisions that provide an automatic stay of CASA's decision to suspend, vary or cancel an authorisation in cases other than a serious and imminent air safety risk.

2.12 Schedule 1 Items 18 to 48 deal with new administrative, functional and reporting arrangements to replace those repealed in Schedule 1 Items 1 to 14 as a consequence of abolishing the board.

CHAPTER THREE

ISSUES RAISED DURING THE COMMITTEE INQUIRY

Introduction

3.1 Matters raised during the Committee's examination of the Bill are as follows:

- Amount and process of consultation with stakeholders in relation to Mr Anson's initial review and the legislation and regulations based upon the review recommendations
- Options considered in deciding to leave CASA with both the rule making and enforcement roles
- Extent of influence and role of the Minister
- Guidelines for the authorisation reinstatement process in the case where suspension or cancellation would cause financial hardship
- Proposed appeal lodgement time for automatic stay of suspension or cancellation
- The viability of the proposed Voluntary Reporting model
- The need or otherwise for additional funding and time for CASA to implement changes outlined in the proposed legislation

Consultative Process

3.2 In 1999, Mr Ted Anson, Chairman of CASA, was tasked with an independent review of CASA. The new legislation is heavily based on the findings of the review.

3.3 The Committee asked witnesses about the extent of consultation both during the Anson review and subsequent to the review in relation to the recommendations:

Senator O'BRIEN—What process did the department use or consider using for the purpose of consultation to seek responses and views on matters which were relevant to the recommendations?

Mr Dolan—I think we are heading towards territory where there is a somewhat grey area between the policy decision making processes of government and the outcomes of those processes. There was no explicit consultation by the department with stakeholders on the recommendations made by Mr Anson between the time his report was made and the time the government made a decision on how to move forward.

Senator O'BRIEN—So I take it the government decided there would be no consultation process about that decision?

Mr Dolan—My understanding is that the government was of the view that a range of industry views had been made known over a considerable period of time to CASA, to the department and to the government through the Anson process.

Senator O'BRIEN—So the answer is yes? There was no process of consultation once the government had decided upon this course of action?

Mr Dolan—That is correct.

3.4 CASA advised the Committee that they had been consulted in the process of the Anson review, and 2 CASA officers had acted as assistants to Mr Anson during the review process.

3.5 CASA also advised the Committee that their role in the consultative process would be limited to public education after the legislation had been passed.

Mr Toller—I think our current plans are to use *Flight Safety Australia* magazine, which goes out six times a year, bimonthly, to all ARN holders. So that is the way we will ensure that the industry is fully informed, who are the main stakeholders in this.

Senator O'BRIEN—You will not be having consultative meetings, forums—

Mr Toller—We had not planned that, no.

Senator O'BRIEN—So there has been no extended process up to this point and there will not be one afterwards. It will just be a series of articles in magazines?

Mr Toller—Not that we will be a part of, no.

3.6 The Australian Licenced Aircraft Engineers Association (ALAEA) raised their concerns about the level of consultation, indicating their surprise that no aspect of the legislation was brought before the SCC, of which the ALAEA are members.

Dichotomy of rule making versus regulation

3.7 During the hearing the Committee sought details on the options considered in deciding to leave CASA with both the rule making and enforcement roles. The Committee asked whether this decision could be construed as a conflict of interest in having the rule maker also the regulator. The Department of Transport and Regional Services (DOTARS) explained that they did not see the situation as a conflict. DOTARS noted that other options considered are documented in the Anson review, and sought to take questions on this topic on notice since the Anson review is not a tabled document.

3.8 Extent of influence and role of the Minister

3.9 The proposed legislation makes changes to the role and powers of the Minister, and the accountability hierarchy to the Minister. These powers include ability to appoint the CEO of CASA, and to delegate responsibilities to the Secretary. The Committee was interested in why these changes were being made, and whether the increased powers of the Minister would defeat the intent of the legislation to reduce the amount of political intervention:

Senator O'BRIEN—That is what I thought. The ALAEA has asked if the new governance arrangements will rob CASA of some of its protection from political

interference in what should be objective safety airworthiness functions. Can you comment on this concern?

Mr Dolan—Any reading of the proposed legislation and the material that has been provided around it indicates that the minister's powers are explicitly not directed towards CASA's carrying out of its regulatory functions but more to the broader strategic direction of the organisation. So I do not think that is a fair characterisation of what is proposed.

The view that the Minister's role will be of a strategic nature was supported by CASA, who see the Minister's role as one of guidance of the direction of the authority. Operational and safety decision authority remains with the Chief Executive, and the Minister's responsibility in this area remains as is.

Senator ALLISON—Could I ask a quite general question. This is not clear to me from reading the bill. What decisions does the minister now make and, where we have a CASA board, the board makes? What in general terms does the minister decide about and what does CASA and the CEO, as head of CASA, determine, or the secretary?

Mr Toller—Currently the minister gives the broad strategic guidance and the board seeks to fulfil his wishes with the strategies that it puts in place for CASA. As I see it, the new arrangement effectively takes out the middle man in terms of strategic guidance. For the authority, it will just be effectively the minister talking direct to the chief executive. But on operational issues, the system remains the same as it is at the moment, which is that CASA is effectively independent.

Senator ALLISON—I am not quite sure. You say 'strategic'. Presumably, the minister is involved in ticking off some strategic plan. But until that strategic plan is revisited, there are no decisions for the minister to make.

Mr Toller—The minister will receive a proposed corporate plan, which will be the three-year strategic plan. He obviously now has the ability to guide both the direction within the corporate plan in future years and perhaps in certain circumstances to make specific wishes known to the authorities as to where it should focus its resources on all issues other than safety issues. So he may say to us, 'I want you to give more support to the aviation manufacturing industry,' or something like that. It is in those sorts of areas that I see him having some more direct input.

Senator ALLISON—You said 'other than safety issues'. Does this mean the minister is not involved in safety issues? Could the minister intervene, for instance, if there was a decision to reinstate the licence? Could that be brought to the minister's attention and he could intervene?

Mr Toller—No. The situation is that operational and safety decisions will remain the remit of the chief executive.

Senator ALLISON—So how is that different from the situation when we had a CASA board in terms of the minister's position?

Mr Toller—In terms of the minister's position, that side of it does not change at all.

The role of the Secretary to the Department within these new arrangements was also discussed, and DOTARS explained that the role of the departmental secretary will be to advise the minister from a whole-of-portfolio perspective about matters that may be relevant to the strategic direction of CASA. To achieve this, the Secretary will need some powers to receive information that otherwise would go direct to the minister and to carry out a few other largely administrative roles.

Guidelines for authorisation suspension and reinstatement

3.10 The Committee was concerned that the sections relevant to authorisation suspension and reinstatement as a result of the demerit point system were not clear.

3.11 The major concerns were that, since the changes to the legislation are directed at smaller aviation operators, suspension or cancellation of authorisations would always constitute a financial hardship. It was unclear to the Committee what might be considered as a financial hardship, under what circumstances reinstatement would be granted and when it might not, the nature of the reinstated authorisation, and what would happen to the authorised agent should they offend while using a reinstated authorisation.

Senator ALLISON—Could you perhaps explain the distinction between those who are entitled on the basis of financial hardship to appeal against the suspension and those who are not? Can you explain more clearly who is and who is not entitled to do that and under what circumstances?

Mr Dolan—The question of who is entitled to do that is restricted, for the purposes of these proposed amendments, to the demerit point scheme itself. The demerit point scheme is aimed at smaller operators in the aviation industry, but a number of them hold in some cases several permissions. You could have a pilot who has both a commercial and a private pilots licence, for example. But when you are talking about large operators with a complex operation, obviously the demerit point scheme does not lend itself to that sort of environment, and a different approach to regulation and enforcement of those sorts of operators—

Senator ALLISON—I will put it another way. What kind of operator is not entitled to seek an appeal or to make an appeal against a suspension once the demerit points have been accumulated?

Mr Dolan—I am trying to characterise it in the terms that anyone who has their licence or permission suspended as a result of the demerit points scheme has the capacity to apply to CASA for reinstatement for severe financial hardship. But if the demerit point scheme does not apply, if it is not used as the enforcement option, that provision does not apply either.

Senator ALLISON—So it is discretionary or it is not non-discretionary? It is not automatic?

Mr Dolan—The suspension of the licence is automatic on reaching 12 points. What happens after that suspension in terms of an appeal does involve an element of discretion.

3.12 Witnesses from DOTARS advised the Committee that the conditions and restrictions upon licences including the reinstated licences would be detailed in CASA's internal documents including their enforcement manuals.

3.13 Witnesses from CASA confirmed for the Committee that there was no automatic reinstatement of licences, that reinstatement would occur based on CASA's discretionary power, and would be based on a number of factors including nature of the offences and recurrence of offences, and CASA would have the option of revoking the reinstatement should conditions continue to be breached.

3.14 In its submission on the bill, Air Safety Australia noted the reasons proposed by the 'Demerit Points Scheme' to be Division 3D of the Act,

... is nugatory unless CAR 269(1)(a) is repealed. CAR 269(1)(a) allows CASA to cancel a pilot's license permanently if CASA is satisfied that the pilot has contravened any provision of the Act or the Regulations - even if the pilot has not been convicted of the alleged violation and regardless of how minor it is. There are regulations which do not relate to safety at all, but merely provide for CASA's administrative convenience (such as CAR 5.56(2)).

and

There is great need for a demerit points scheme, especially to protect paying passengers. There have been well-documented cases where a commercial operator is alleged to have committed a series of offences but continued flying. Similarly there have been examples of pilots have been grounded for alleged but unproven offences which did not endanger anyone.

3.15 In its response, DOTARS noted several responses to this point made at the Committee's hearing by CASA's counsel. These points are:

- It is not considered appropriate to proceed with such a proposal as CASA is a regulatory body and as such it should be the repository of the administrative function of suspending or cancelling an authorisation which it has granted if the authorisation holder has breached the relevant legislation or regulations. CASA's power is no different to other Australian regulatory bodies such as the Australian Broadcasting Authority, or to other major aviation regulatory bodies overseas, including the US, the UK, New Zealand and Canada.
- Legal advice on industry's proposal was sought from the Office of the Australian Government Solicitor which advised that any substantive transfer of CASA's power under Regulation 269 to a court would be of doubtful validity as it would conflict with the legal principles concerning the powers and roles of courts exercising Federal jurisdiction, and Federal tribunals. Such a proposal would give a federal court responsibility to make decisions of an administrative nature rather than ruling on questions of law.
- The new enforcement tools will ensure that an authorisation holder will have an avenue of independent review of CASA's decisions in one form or another. The introduction of the automatic stay scheme means that, except in the case of serious and imminent risk to air safety, an authorisation holder will not be grounded while awaiting AAT review; the Federal Court scheme introduces judicial scrutiny of CASA's immediate suspension decisions; the linking of demerit points to the issue of infringement notices means an authorisation holder can challenge the issue of demerit points in court; and finally, the use of EVUs will allow an authorisation holder the opportunity of rectifying a breach before CASA takes any action.
- the intent of the demerit point scheme is that CASA will use this tool to address repeated breaches (of prescribed regulations) committed

by individual pilots rather than large organisations such as the holders of Air Operator Certificates and Certificates of Airworthiness, which are essentially corporations.

3.16 The DOTARS response also noted

- The rationale for CASA's discretion to reinstate a suspended or cancelled authorisation in cases where it would severely impact on the authorisation holder's principal or only income is based on the similar discretion the courts have under the NSW system for motor vehicle drivers licences.
- Therefore, as some pilots similarly derive their principal or only income from flying, it was considered equitable to create a similar avenue of appeal for a reinstated licence where the licence is suspended or cancelled under this scheme. As CASA's power to reinstate a licence will be discretionary, its decisions in such matters will be subject to merits review by the AAT.
- In terms of the issues of allocation of demerit points raised by the ALAE and the GAPAN, demerit points will be incurred for any breach of the (prescribed). The regulations the regulations for this Bill will prescribe the allocation of demerit points around existing penalty points in the current regulations, which are graded into three levels of seriousness.

The Committee draws this matter to the Senates attention.

Proposed appeal lodgement time

3.17 The Committee raised the issue regarding the length of time available for an appeal of suspension to be raised. The ALAEA were concerned that the period of 5 days was not sufficient for operators to submit their appeal, and suggested a period of 14 days might be more appropriate.

Mr Runting—We suggested the extension to 14 days on the basis that, for individual LAMEs who may not even be members of our organisation, we actually provide legal advice and support for our members. But those individual LAMEs who may be out the back of Bourke, for want of a better term, may find it very difficult to get their AAT appeal up and running in a five-day period for whatever reason, be it a lack of finance or a lack of ability or knowledge of how to go about it or a lack of knowledge of what their rights are under the legislation. So that was the basis for that. The 14 days is typical of what has been spoken about in reporting periods for the CASR 1998. I think back to part 47 of the aircraft registration disallowance and the ensuing debate under a special SCC subcommittee. I recall two weeks being bandied about at that time. I believe it did come to pass.

3.18 Witnesses from DOTARS provided a rationale behind the proposed 5 days:

Senator ALLISON—I understand the need for balance. I am trying to also get from you the practical effect of five days versus 14.

Ms Parker—Yes. CASA's decision will not take effect until that automatic stay is either continued while the AAT is considering it and then it is dependent on what the AAT decides, or it will take effect five days after the operator does not take on board

the opportunity to go to the AAT. They could decide to leave it to the last minute, yes. But in deciding to give an automatic stay, it is important that they are not allowed to continue flying if they are a high enough serious risk to be a danger to air safety. It was considered that five days was the best balance for that reason. CASA's decision cannot take effect while the automatic stay is in effect. Therefore, after five days, if they do go to the AAT, then the stay continues. But if they do not, then CASA's decision takes effect.

Proposed voluntary reporting model

3.19 The Committee ascertained that the proposed voluntary reporting model is based on the United States model where the agency that manages the voluntary infringement reports is independent of the agency responsible for regulation.

3.20 The scheme allows for operators to report (once in five years) voluntarily an infringement and, assuming it meets with the criteria for eligible reporting, they can then be exempted from further action in relation to that infringement. The "once in five years" rule is designed to prevent repeat offenders from seeking regular protection.

Mr Ilyk—The scheme proposed here is in fact modelled on the American one. Under the American one, what happens is that the administrator is prevented from taking certificate action or licence action on the basis of a voluntary report. It does not prevent prosecution action. In this case under this scheme, CASA is prevented from taking administrative, certificate or licence action on the basis of voluntary report. CASA cannot grant an immunity from criminal prosecution. On that basis, criminal offences for prosecution purposes are not subject to this scheme.

Mr Gemmell—I cannot see any way that this scheme would discourage reporting compared to the current arrangements that we have today. Currently you are required under the rules to report accidents and incidents. That remains. Under this scheme, if you report them, you can get an indemnity under certain conditions and there are certain conditions under which you cannot. It is certainly a step forward. Others might argue you could have done it better. But it is certainly a step forward. As Mr Ilyk said, it is modelled on the system in the United States.

3.21 In response to ALAEA's concern that later legislation could come into effect and revoke the protected status for infringements reported voluntarily, DOTARS responded via a question on notice response that "...there is no intention to retrospectively invalidate the protection afforded by "reportable contraventions" by later deeming them to be no longer reportable". DOTARS state that "...a reportable contravention does not include a contravention that causes or contributes to an accident or serious incident." This intimates that only those contraventions which would not attract criminal prosecution under current legislation will be deemed reportable.

Need or otherwise for additional funding

3.22 The Committee was concerned that the implementation of the changes slated in the legislation would have an undisclosed financial impost on CASA.

3.23 The Committee were reassured by both DOTARS and CASA that these changes, which included public education, and staff training would not require any significant changes in funding.

3.24 In response to the Committee's question regarding the cost to changes in their information management systems, CASA have advised that the envisaged changes can be accommodated within existing database structures, and the resultant costs will be minimal, and will be met from CASA's existing resources.

CHAPTER FOUR

CONCLUSIONS AND RECOMMENDATIONS

4.1 The Committee has considered the matters dealt with in its inquiry in Chapter three.

4.2 The Committee draws to the attention of the Senate those matters dealt with in submissions to the Committee and in the course of its public hearing on the Bill.

4.3 The Committee concludes that no amendment to the Bill appears to be warranted on the basis of the matters considered by the Committee.

Recommendation

The Committee recommends that the Civil Aviation Amendment Bill 2003 referred to the Senate Rural and Regional Affairs and Transport Legislation Committee on 26 March 2003 be considered by the Senate and be passed unamended.

Senator Bill Heffernan
Chair

APPENDIX ONE

SUBMISSIONS

Submission No	Author
1	Civil Aviation Safety Authority
2	The Guild of Air Pilots and Air Navigators
3	Australian Airports Association
4	DoTaRS
5	Australian Licenced Aircraft Engineers Association
6	Air Safety Australia
7	Aviation Maintenance Repair Business Association (AMROBA)
8	Mr Maurice J Egge

APPENDIX TWO

HEARINGS AND WITNESSES

Canberra, Monday, 5 May 2003

Department of Transport and Regional Services

Mr Martin Dolan, First Assistant Secretary, Aviation and Airports Policy
Division

Dr Doug Hartley, Director of CASA Reform

Ms Marlene Parker, Policy Officer

Civil Aviation Safety Authority

Mr Mick Toller, Director of Aviation Safety

Mr Bruce Gemmell, Deputy Director

Mr Peter Ilyk, General Counsel

Mr Rob Elder

Australian Licenced Aircraft Engineers

Mr Michael O'Rance, Federal President

Mr Paul Runting, Technical Officer

Mr Tim Haywood, Assistant Federal Secretary

