



The Parliament of the Commonwealth of Australia

Report on the Provisions of the

**Aviation Legislation Amendment Bill (No. 1) 2001
(formerly Aviation Legislation
Amendment Bill (No. 2) 2000)**

**Senate Rural and Regional Affairs
and Transport Legislation Committee**

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ABBREVIATIONS

AAAA	Aerial Agricultural Association of Australia
ACCC	Australian Competition and Consumer Commission
ASIC	Australian Securities and Investment Commission
CAOs	Civil Aviation Orders
CARs	Civil Aviation Safety Regulations
CASA	Civil Aviation Safety Authority
EVU	Enforceable Voluntary Undertakings
ICAO	International Civil Aviation Organisation
NAAs	national airworthiness authorities
NPRM	Notice of Proposed Rule Making
REM	Revised Explanatory Memorandum
REP	Regulatory Framework Program
VEU	voluntary enforceable undertakings

CHAPTER ONE

THE BILL

Introduction

1.1 The *Aviation Legislation Amendment Bill (No. 2) 2000* passed the House of Representatives on 8 February 2001 after arriving in the Senate the Bill was referred to this Committee for examination and report on 7 February 2001 under the amended title, the *Aviation Legislation Amendment Bill (No. 1) 2001*. Despite this recent name change, documentation, such as the Bills Digest, Explanatory Memorandum, Second Reading Speech and debates concerning the Bill in the House of Representatives referred to in this report still carry the original Bill's title *Aviation Legislation Amendment Bill (No. 2) 2000*.

1.2 The *Aviation Legislation Amendment Bill (No. 1) 2001* is part of an extensive review of civil aviation legislation begun by the Civil Aviation Safety Authority (CASA) This review was started by CASA in July 1996.¹

1.3 During the Bill's second reading speech in the House of Representatives on 12 April 2000 the Commonwealth Minister for Agriculture, Fisheries and Forestry, Mr Warren Truss, stated: "In July 1996 the government announced that the Civil Aviation Safety Authority, CASA, would conduct a complete review of the civil aviation legislation in Australia, with the objectives of harmonising it with international standards of safety regulation and making it shorter, simpler and easier to use and understand."²

1.4 According to the second reading speech: "The primary purpose of this bill is to make a series of small but significant changes to terminology in the *Civil Aviation Act 1988*, which will assist in the development of regulations dealing with aircraft maintenance and maintenance engineer licensing."³

1.5 The Bill's Explanatory Memorandum stated that: "The primary purpose of the *Aviation Legislation Amendment Bill (No.2) 2000* (the Bill) is to make amendments to the *Civil Aviation Act 1988* to facilitate the ongoing review of civil aviation regulations."⁴

1.6 During debate in the House of Representatives it was claimed that the Bill contains three elements: "Firstly, it gives CASA the power to take enforceable written undertakings from people in relation to air safety compliance; secondly, it allows CASA to enter into article 83bis agreements with other national aviation regulatory bodies; and, thirdly, it brings the terminology used in the current act into line with that used by ICAO."⁵

1 See Department of the Parliamentary Library, *Bills Digest* No. 164, 1999-2000., p. 1

2 *House of Representatives Hansard*, 12 April 2000, p. 15754

3 *House of Representatives Hansard*, 12 April 2000, p. 15754

4 *Aviation Legislation Amendment Bill (No 2) 2000*, Explanatory Memorandum, p. 1

5 *House of Representatives Hansard (Proof)*, 7 February 2001, p. 21005

Amendments to the *Civil Aviation Act 1988*

1.7 The Bills Digest stated that the Bill:

... contains a number of amendments to the *Civil Aviation Act 1988* which have the following purposes:

. to introduce terminology which is consistent with the terminology used by the International Civil Aviation Organisation and other national airworthiness authorities, and to harmonise some offences with current Commonwealth criminal drafting policy

. to enable CASA to enter into Article 83bis agreements with other national airworthiness authorities, and

. to give CASA the power to accept written undertakings from people in relation to compliance with civil aviation safety legislation.⁶

Article 83bis agreements

1.8 The Bill gives CASA the ability to enter into what is known as ‘Article 83bis agreements’ with aviation authorities in other countries. Under the *Convention on International Civil Aviation, Chicago 1944*, referred to as the Chicago convention, a country which is party to this convention is generally responsible for the safety regulation of aircraft placed on that country’s register, irrespective of where in the world the particular aircraft is operating.

1.9 The joint submission to the inquiry from the Department of Transport and Regional Services and CASA stated that the provisions set out in the Bill:

... means that an aircraft does not have to be taken off the register of the State in which it is registered, when an operator leases, charters or interchanges the aircraft to an operator in another country. Article 83bis allows the responsible State through its aeronautical authority to transfer its regulatory responsibility to the regulatory authority of the State where the aircraft is operated. In order to transfer safety regulatory responsibilities for an aircraft, the two States concerned must enter into an agreement in respect of the aircraft and notify other States that may be affected by the agreement, either directly or through ICAO. It is also up to the two States concerned to determine the extent of the regulatory powers that are transferred.⁷

1.10 As pointed out in the Bill’s second reading speech:

Some obvious difficulties in administering safety regulations arise when an aircraft registered in one country is operated in another. Article 83bis is a relatively recent addition to the Chicago convention, and enables the transfer of safety regulatory

6 Department of the Parliamentary Library, *Bills Digest* No. 164, 1999-2000., p. 1; see also *Aviation Legislation Amendment Bill (No 2) 2000*, Explanatory Memorandum, p. 1

7 *Submission No 6*, Department of Transport and Regional Services and CASA, p. 1

functions from the state of registration of an aircraft to the state of operation of the aircraft, on agreement of both states.⁸

1.11 After the *Civil Aviation Act* was amended by the *Transport and Communications Legislation Amendment Act (No. 2) 1993* Australia ratified Article 83bis on 2 December 1994.

1.12 The inquiry was told that:

Subsequent advice from the Attorney-General's Department indicated that these amendments gave either the Minister or a delegate from his Department the power to enter into Article 83bis agreements on Australia's behalf. However, further amendment would be required to permit CASA to enter into Article 83bis agreements on Australia's behalf.⁹

1.13 The amendment proposed in this Bill will provide CASA with this capability.

1.14 It is considered appropriate for CASA to be allowed to enter into Article 83bis agreements. It is the view of the International Civil Aviation Organisation (ICAO) that such agreements should be made between the relevant national aeronautical authorities, as they are administrative instruments and do not have the status of treaties.¹⁰

1.15 The House of Representatives was told on 12 April 2000 that the Bill would enable CASA to enter into Article 83bis agreements with overseas aviation authorities on behalf of Australia. Administrative and technical provisions concerning the implementation of these agreements were to be covered in regulations to be developed by CASA and the Department of Transport and Regional Services "in consultation with industry".¹¹

1.16 Mr Peter Ilyk, General Counsel with the Civil Aviation Safety Authority, told the inquiry on 2 March 2001:

... There will be a list of countries whereby CASA will only be able to enter into 83bis agreements with First World countries, and they will be listed in the regulations. The matters that can be included in the 83bis agreements will be included in the regulations. That is there to ensure protection if CASA wants to enter into an 83bis agreement with some Third World country.¹²

1.17 The Assistant Secretary, Aviation Industry with the Department of Transport and Regional Services, Mrs Robyn Beetham, advised the inquiry that; "... the safety of civil aviation must and always will be the prime concern when entering into article 83bis agreements."¹³

8 *House of Representatives Hansard*, 12 April 2000, p. 15755

9 *Submission No 6*, Department of Transport and Regional Services and CASA, p. 2

10 *House of Representatives Hansard*, 12 April 2000, p. 15755; see also *Aviation Legislation Amendment Bill (No 2) 2000*, Explanatory Memorandum, p. 1; see also *Submission*, Department of Transport and Regional Services and CASA, p. 2

11 *House of Representatives Hansard*, 12 April 2000, p. 15755

12 *Evidence RRAT*, CASA, 2 March 2001, p. 15

13 *Evidence RRAT*, Department of Transport and Regional Services, 2 March 2001, p. 3

Advantages of Article 83bis agreements

1.18 Among the advantages claimed to flow on from the ability of CASA to enter into 83bis agreements are:

- Increased economic opportunities and reduced costs for the Australian aviation industry;
- Increased ability of Australian aircraft owners to lease their aircraft to overseas operators when they are under utilised in Australia during periods of low demand; and
- Australian maintenance organisations would possibly have increased opportunities to carry out work on foreign aircraft that would otherwise have been carried out overseas.¹⁴

1.19 It was argued in the House of Representatives that the Bill allows CASA to enter into 83bis agreements which has two significant advantages:

Firstly, it sidesteps the basic administrative problems that arise when an aircraft is registered in one country but is largely being operated in another country. Secondly, it makes easier [sic] in quieter periods for Australian aircraft operators to lease their aircraft to operators overseas, and we have seen that increasingly take place when aircraft might be redundant for one reason or another. This provision will obviously be welcomed by those Australian aircraft operators whose work is largely seasonal, such as charter aircraft, crop-dusters, et cetera, as part of the business opportunities that they can take advantage of. Securing overseas leases has previously been more difficult for Australian operators, as their aircraft were subject to Australian rules, regulations, safety inspections and so on, even if the plane was mostly being operated overseas.¹⁵

1.20 The Department of Transport and Regional Services and CASA are of the view that:

From an overall aviation regulatory perspective, the establishment of Article 83bis agreements with other national airworthiness authorities allow countries to address the difficulties involved in applying safety regulations to an aircraft registered in one country but operated by another party in a different country. Savings in administration costs may also accrue from a simplification in arrangements. The selective use of this tool is seen globally to provide an increase in safety oversight.

In short, Article 83bis agreements promote safety by ensuring aircraft are kept close to their regulatory authority.¹⁶

1.21 The Department and CASA went on in their submission to list additional benefits resulting from 83bis agreements:

There can be a considerable reduction in regulatory workload and associated costs for the State in which the aircraft is actually registered, as the State in which the

14 *House of Representatives Hansard*, 12 April 2000, p. 15755

15 *House of Representatives Hansard*, 7 February 2001, p. 21005

16 *Submission No 6*, Department of Transport and Regional Services and CASA, p. 1

aircraft is actually operated can more easily discharge regulatory responsibilities over the aircraft.

- when an aircraft is operated in another State, it can be difficult and costly for the State in which the aircraft is registered to satisfy its regulatory responsibilities under the Chicago Convention.
- CASA, for example, is required to send personnel overseas to monitor maintenance on leased Australian aircraft that are operated overseas.

In addition, the operator would gain administrative cost advantages in dealing directly with the safety regulator of the State in which the aircraft is operated.¹⁷

1.22 According to the Department and CASA:

... Article 83bis agreements should also benefit the Australian aviation industry and the consumer in terms of increased economic opportunities and reduced costs.

By way of example, domestic operators would potentially have greater flexibility and more cost-effective options in operating their aircraft fleets. If these aircraft are subject to an Article 83bis agreement, the operators will not have to return them to Australia to have them serviced in CASA approved facilities. This increased flexibility will make it easier for Domestic operators to lease surplus aircraft to overseas operators during periods of low demand in Australia.

CASA approved Australian maintenance organisations could also have increased opportunities to carry out work on foreign aircraft that would otherwise have been carried out by overseas organisations approved by their State of Registry.¹⁸

1.23 At a public hearing held on 2 March 2001 the Department of Transport and Regional Services stated that the ICAO; "... believes that article 83bis will ensure better regulation and oversight of aviation safety. Such agreements can result in a considerable reduction in regulatory workload and associated costs for the state in which the aircraft is registered as the state in which the aircraft is actually operated can more easily discharge regulatory responsibilities over the aircraft."¹⁹

Safeguards operating with the agreements

1.24 The Department of Transport and Regional Services and CASA argued that it was important to note; "... that regulatory responsibility over an aircraft cannot be transferred to another country unless both countries **specifically** [sic] agree to do so, and that both States must agree on the extent of the responsibilities to be transferred."²⁰

1.25 The joint submission from The Department of Transport and Regional Services and CASA sets out in detail the procedures and criteria required for Article 83bis agreements.²¹

17 *Submission No 6*, Department of Transport and Regional Services and CASA, p. 3

18 *Submission No 6*, Department of Transport and Regional Services and CASA, p. 5

19 *Evidence RRAT*, Department of Transport and Regional Services, 2 March 2001, p. 3

20 *Submission No 6*, Department of Transport and Regional Services and CASA, p. 3

21 *Submission No 6*, Department of Transport and Regional Services and CASA, p. 4

Amendments to *Civil Aviation (Carriers' Liability) Act 1959*

1.26 According to the Bill's Digest:

Schedule 2 of the Bill corrects the error in the cross-references in the definition of 'Australian international carrier' contained in sections 11A and 21A of the *Civil Aviation (Carriers' Liability) Act 1959*, whereby increased liability limits were inadvertently imposed on foreign charter operators. An 'Australian international carrier' will now be either a carrier authorised by Australia to operate scheduled international air services, or a carrier operating a non-scheduled international charter flight permitted under section 15D of the *Air Navigation Act 1920* who is an 'Australian person'. Thus, the increased liability for death or personal injury will not apply to foreign charter operators, but only to Australian charter operators.²²

1.27 According to the Bill's second reading speech this amendment ensures that Australia imposes "certain liabilities only upon Australian airlines, not foreign."²³

Consistent aviation related terminology

1.28 At present the *Civil Aviation Act 1988* includes terminology relating to aircraft maintenance which is unique to Australia. The ICAO has passed a Global Rule Harmonisation Resolution, which urges countries to promote the global harmonisation of national rules for the application of ICAO standards. The ICAO "encourages the use of the precise language of ICAO regulatory standards in national legislation and regulations, as far as practicable."²⁴

1.29 The *Aviation Legislation Amendment Bill (No. 1) 2001* proposes:

... to delete references to uniquely Australian terms and replace them with internationally recognised and accepted terms. The Explanatory Memorandum states that this will not affect current regulations dealing with aircraft maintenance requirements, but will enable CASA to develop new regulations dealing with aircraft maintenance and maintenance engineer licensing that will comply with the ICAO's regulatory standards.²⁵

1.30 The Department of Transport and Regional Services and CASA informed the inquiry that one of the principal components of the reform of aviation safety regulation being undertaken by CASA at present is the alignment of Australian aircraft maintenance philosophies with those of other major international airworthiness authorities and the international standards set by the ICAO:

22 Department of the Parliamentary Library, *Bills Digest* No. 164, 1999-2000., p. 11; see pp. 4-6. See also *House of Representatives Hansard*, 12 April 2000, p. 15755

23 *House of Representatives Hansard*, 12 April 2000, p. 15756

24 Department of the Parliamentary Library, *Bills Digest* No. 164, 1999-2000., p. 2; see also *Submission No 6*, Department of Transport and Regional Services and CASA, p. 7

25 Department of the Parliamentary Library, *Bills Digest* No. 164, 1999-2000., p. 2; see also *House of Representatives Hansard*, 12 April 2000, p. 15755-15756

As part of this process, the *Aviation Legislation Amendment Bill (No.2) 2000* ... amends the *Civil Aviation Act 1988* in a number of ways. Importantly, Items 1, 2 and 3 of Schedule 1 of the Bill amend the definitions of **aeronautical product**, **maintenance**, and **servicing** [sic] respectively.²⁶

Notification of the proposed amendments

1.31 The inquiry was told that public notice of the proposal to amend these definitions was given by way of a Notice of Proposed Rule Making (NPRM) “9901RP” which was issued in May 1999.²⁷

Justification for the amendments

1.32 The Bill’s Explanatory Memorandum details the justification for amending the *Civil Aviation Act 1988* so as to bring about consistency in aviation terminology:

The problem is that the current legislation is ambiguous, disjointed, difficult to comply with and enforce, and does not support future changes to maintenance requirements.

Australia’s aviation safety requirements are currently contained in the *Civil Aviation Act 1988*, Civil Aviation Regulations (CARs) 1988 and 1998 and Civil Aviation Orders (CAOs). With the proposed changes to future legislation, seeking comparative advantage with respect to international aviation trading agreements, there is a recognised need that the Act must be changed to incorporate the new definitions and interpretation necessary to implement new maintenance requirements. Such changes involve the use of the terms “aeronautical product”, “maintenance” and “servicing”. These terms replace existing terminology and reflect the requirements necessary for the enabling legislation dealing with aircraft maintenance. The proposed legislative changes to the Act seek to achieve compliance with ICAO Standards and Recommended Practices and to harmonise with the requirements of other NAAs by removing, wherever practicable, maintenance requirements and terminology currently unique to Australia.²⁸

Benefits of the amendments

1.33 The Explanatory Memorandum claimed that there will be:

... long term cost benefits to those aviation industries involved in international trade which will flow from the legislative changes. Although it is difficult to specify projected cost benefits, it is a clearly recognised fact that in order to contribute and be a partner in the aviation world market with respect to the manufacture of aeronautical products, e.g parts for Boeing aircraft and the overhaul of aircraft engines, it is necessary to use the same terminology and airworthiness documentation to gain access to those markets.²⁹

26 *Submission No 6*, Department of Transport and Regional Services and CASA, p. 7

27 *Submission No 6*, Department of Transport and Regional Services and CASA, p. 7

28 *Aviation Legislation Amendment Bill (No 2) 2000*, Explanatory Memorandum, p. 3

29 *Aviation Legislation Amendment Bill (No 2) 2000*, Explanatory Memorandum, p. 4

CHAPTER TWO

ENFORCEABLE VOLUNTARY UNDERTAKINGS

Voluntary undertakings, an alternative tool

2.1 Mr Peter Ilyk, General Counsel with the Civil Aviation Safety Authority, told the inquiry on 2 March 2001:

Under section 91 of the Civil Aviation Act this parliament has decreed that CASA should ‘develop effective enforcement strategies to ensure compliance with the aviation safety standards’. That same act also requires CASA to encourage a greater acceptance by industry of its obligations to maintain high standards of aviation safety.¹

2.2 Near the end of the Explanatory Memorandum for the *Aviation Legislation Amendment Bill (No. 2) 2000* the following statements are made:

CASA’s enforcement policy determines the way CASA uses its powers to regulate the industry. With limited resources, CASA must ensure that it gives proper focus to the exercise of the powers in order to discharge the trust given to it by the Australian public through the Commonwealth Parliament.

CASA believes that the vast majority of the industry is committed to working within the safety rules. The introduction of an enforceable voluntary undertaking system will provide CASA with an important new regulatory response to enable it to better deal with relevant breaches and skill deficiencies.²

2.3 It is considered that enforceable voluntary undertakings (EVU) will add to CASA’s range of enforcement tools. According to the Explanatory Memorandum, under this amendment bill CASA will be given:

... the power to accept written undertakings from people in relation to compliance with civil aviation safety legislation. Giving of such undertakings will be completely voluntary – CASA will not have the power to compel the giving of undertakings. However, once a person has given an undertaking, CASA will be able to seek an order from the Federal Court requiring a person to abide by his or her undertaking.³

The Committee understands that this provision of the Bill is modelled on section 87B of the *Trade Practices Act 1974*.⁴

2.4 The inquiry was told:

1 *Evidence RRAT*, CASA, 2 March, p. 10

2 *Aviation Legislation Amendment Bill (No 2) 2000*, Explanatory Memorandum, p. 15

3 *Aviation Legislation Amendment Bill (No 2) 2000*, Explanatory Memorandum, p. 2

4 See *Aviation Legislation Amendment Bill (No 2) 2000*, Explanatory Memorandum, p. 2

There is no doubt that enforceable voluntary undertakings, used appropriately, will be a powerful tool for securing compliance with aviation safety legislation. The power to accept undertakings enforceable by court order will have the effect of filling a gap in the suite of enforcement tools available to CASA, and it could be expected that enforceable undertakings will be used in place of other enforcement tools presently used by CASA which are not suitably adapted to the purpose, for example, unenforceable undertakings or licence suspension action.

... By and large, the other enforcement tools available to CASA are more rigorous, and are less flexible in application and effect, than enforceable voluntary undertakings.⁵

The need for enforceable voluntary undertakings

2.5 The Bills Explanatory Memorandum sets out the main arguments for the establishment of enforceable voluntary undertakings between CASA and aviation operators, namely:

CASA does not consider the range of regulatory responses presently available to it to be adequate in circumstances where:

- (a) CASA becomes aware of facts or circumstances that suggest to it that an individual or organisation has breached the law; and
- (b) no serious and immediate safety risks to fare paying passengers arise from the breach; and
- (c) the breach does not justify CASA taking administrative action (such as suspension or cancellation) against the individual's or organisation's licences, certificates or approvals; and
- (d) it is important to deter a recurrence or continuation of the breach; and
- (e) one or more of the following applies:
 - it is difficult for CASA to prove the breach of the law due to lack of evidence;
 - the law is open to interpretation, for example, because it is drafted in a non-prescriptive, outcome-based style;
 - the breach is relatively minor or technical in nature;
 - the time and resources required to fully investigate the matter and prepare a brief for the DPP is disproportionate to the fine likely to be imposed by a court if the breach were to be proved;
 - in CASA's judgment, the imposition of an administrative fine is in all the circumstances unlikely to deter the individual or organisation from breaching the law in a similar way in the future.⁶

5 *Submission No 6*, Department of Transport and Regional Services and CASA, p. 15

6 *Aviation Legislation Amendment Bill (No 2) 2000*, Explanatory Memorandum, p. 7

2.6 The Department of Transport and Regional Services told the inquiry on 2 March 2001 that that enforceable voluntary undertakings are seen as an; "... effective way of providing CASA and the aviation industry with an option of a less rigorous enforcement for certain minor matters than prosecution and licence action, thus filling the current gap between relatively sanguine measures, such as counselling and training, and action such as cancellation of an air operators certificate."⁷

2.7 CASA told the inquiry in evidence:

... Under the present law, where it detects concern for aviation safety, CASA does not have any significant capacity to choose between action in relation to a graduated response. Generally it may either take informal action, such as counselling, or it may take the ultimate action of prosecution, suspension or cancellation of certificates or licences. In many cases this represents a choice between using a feather duster and a sledge hammer to crack a nut.⁸

2.8 The EVU proposal was intended to provide a mid-range option whereby an operator had an opportunity to remain in operation provided they addressed the underlying safety concerns by compliance with specified conditions.

What enforceable voluntary undertakings will do, how they will operate and legal aspects of the scheme

2.9 The amendments dealing with the establishment of voluntary undertakings would empower CASA to accept binding undertakings from individuals and organisations:

Although individuals and organisations would not be forced to provide undertakings, if undertakings were offered and accepted, they would be capable of being enforced through the courts. Courts would be empowered to make a range of orders against individuals and organisations who were in breach of undertakings, including orders that the individual or organisation comply with the undertaking and orders that the individual or organisation pay an amount of money to the Commonwealth. Failure to comply with a Court order would amount to a contempt of court.⁹

2.10 The Bill's Explanatory Memorandum states:

If there was a breach of an undertaking, CASA would ask the court to make orders against the individual or organisation in breach, *on the basis of the breach of the undertaking*. There should not normally be any need for CASA to prove that the individual or organisation has otherwise had committed an offence against the *Civil Aviation Act* or Regulations. All that CASA would need to prove was that a person had entered into an undertaking and had failed to comply with the undertaking. The Court would then be empowered to issue an order requiring the person to comply with the undertaking and/or to order the person to pay an amount of money to the

7 *Evidence RRAT*, Department of Transport and Regional Services, 2 March 2001, p. 3

8 *Evidence RRAT*, CASA, 2 March, p. 10

9 *Aviation Legislation Amendment Bill (No 2) 2000*, Explanatory Memorandum, p. 12

Commonwealth. The Court would also be empowered to make any other order that the court believed was appropriate in the circumstances.¹⁰

2.11 It has been suggested that as a result of an enforceable voluntary undertaking agreements CASA:

... will be able to seek an order from the Federal Court if a person has breached the undertaking. In this way, breach of the undertaking will itself be evidence of an offence, without the need to separately prove a breach of the *Civil Aviation Act 1988* or regulations. If the Federal Court finds that the person has breached a term of the undertaking, it may make all or any of the following orders:

- . an order directing the person to comply with that term of the undertaking
- . an order directing the person to pay to the Commonwealth an appropriate amount, and
- . any other order that the Court considers appropriate.¹¹

2.12 The Department of Transport and Regional Services and CASA are of the view that:

Enforceable voluntary undertakings will not operate to suspend or cancel licences, nor will they operate to impose fines or criminal sanctions, but will operate to remedy specific instances of non-compliance with safety standards by directly targeting the specific behaviours leading to non-compliance.

... since enforceable voluntary undertakings are in fact enforceable by way of an order from the Federal Court, there will always be an independent judicial body charged with giving effect to the contents of an undertaking. ...

If a person who has given an enforceable voluntary undertaking fails to comply with that undertaking, CASA may seek an order from the Federal Court to enforce the undertaking.

Undertakings are therefore only “enforceable” by order of the Federal Court; CASA has no power to directly enforce an undertaking given to it.

The order of the Federal Court is the instrument that is enforced, not the undertaking itself. Breach of the *order* may constitute contempt of court.

... the Federal Court is not required to issue an order on the terms requested by CASA, nor is it required to issue an order at all. ...

Where a person breaches an undertaking given by them to CASA by deliberately continuing the unsafe conduct which the undertaking was intended to redress, then CASA may consider alternative enforcement action. ...¹²

2.13 The Department of Transport and Regional Services told the inquiry:

10 *Aviation Legislation Amendment Bill (No 2) 2000*, Explanatory Memorandum, p. 12

11 Department of the Parliamentary Library, *Bills Digest* No. 164, 1999-2000, pp. 10-11

12 *Submission No 6*, Department of Transport and Regional Services and CASA, pp.15-16

... CASA has to be able to defend its actions in a court of law if it becomes an issue about a voluntary undertaking and whether it was forced into it or not. It has to justify that it has entered into those undertakings for safety reasons, which is quite an onus on them to prove their case.¹³

2.14 The House of Representatives was told on 7 February 2001 that:

A provision of this bill empowers CASA to take written undertakings from people on aviation safety issues. The undertakings made can then be rendered legally enforceable by the Federal Court. This is an extension of the existing enforcement powers possessed by CASA. Section 87B of the Trade Practices Act allows for an enforceable undertaking to be written by a person or organisation who makes minor breaches against the act. They are useful in that they can bypass the normal lengthy and costly legal proceedings that are normally required.¹⁴

2.15 The issue of legal costs associated with the EVUs was touched on in the Explanatory Memorandum:

Individuals and organisations are likely to obtain some legal advice before entering into undertakings, and this will involve some expense. However, in simple cases the cost of this advice should be minimal, especially as CASA will normally prepare the first draft of undertakings. In the more serious or complex cases, the individuals or organisations involved would normally engage lawyers no matter what regulatory response CASA chose to make, so the proposed undertaking scheme would not add to costs. Overall, the enforceable undertaking scheme is likely to reduce industry costs.¹⁵

2.16 CASA told the inquiry in evidence:

The undertakings themselves will be prepared and vetted by the Office of Legal Counsel. The Office of Legal Counsel will keep an eye out to make sure that any commitments that are given under those EVUs are complied with and, if necessary, take the matter to the Federal Court. ... As part of the process, the Office of Legal Counsel will be undertaking training in relation to those issues in the enforcement manual that are new, which includes the enforceable voluntary undertaking scheme.¹⁶

Advantages provided by the establishment of enforceable voluntary undertakings

2.17 A number of advantages associated with the operation of enforceable voluntary undertakings were set out in the Bill's Explanatory Memorandum:

... In most cases, the formulation and consideration of an appropriate undertaking would be able to be completed quickly, with a relatively low commitment of resources (compared with most alternatives) by both CASA and the individual or organisation concerned.

13 *Evidence RRAT*, Department of Transport and Regional Services, 2 March 2001, p. 4

14 *House of Representatives Hansard (Proof)*, 7 February 2001, p. 21005

15 *Aviation Legislation Amendment Bill (No 2) 2000*, Explanatory Memorandum, p. 14

16 *Evidence RRAT*, CASA, 2 March 2001, p. 20

Voluntary enforceable undertakings can be individually shaped to fit the individual circumstances of each matter and they are, therefore, very flexible. In circumstances where the law is open to interpretation, for example, because it drafted (sic) in a non-prescriptive outcome-based style, undertakings can detail exactly what an individual or operator must or must not do in the particular circumstances. This greatly assists CASA to monitor whether the individual or organisation is complying with their legal obligations and, if necessary, to prove in court that the individual or organisation is not complying. It also assists the individual or organisation to comply.¹⁷

2.18 The Explanatory Memorandum went on to state:

Experience in the ACCC and ASIC with enforceable voluntary undertakings is that they provide an extremely effective means of changing an organisation's culture and that the compliance rate is extremely high.

... enforceable voluntary undertakings are likely to utilise relatively few CASA or industry resources and they create legal obligations on the individuals concerned to undertake training and/or to desist from certain activities. They are also less severe (and less damaging from a reputation perspective) to the individuals involved than administrative action and are flexible enough to deal with the specific circumstances of each case and are able to be put in place quickly.

... CASA believes that the costs involved in an enforceable voluntary undertaking scheme to both itself and industry would be less than the costs involved under current arrangements.

... CASA would expect to be involved in less legal proceedings than it is now, as undertaking enforcement proceedings are expected to be quite rare. Proceedings relating to the enforcement of undertakings should be shorter and more straightforward, because in the normal case it would be much easier to prove a breach of a specific undertaking than the breach of a complex aviation law. The number of prosecutions (in relation to relevant breaches) and AAT proceedings (in relation to skill deficiencies) should reduce, as there will be less need to prosecute and to suspend or cancel licences, certificates and approvals.¹⁸

2.19 CASA is of the view that resources involved in negotiating and reviewing undertakings will be minimal with only about "6 officer hours" being required.¹⁹

2.20 It was submitted to the inquiry that enforceable voluntary undertakings will allow individuals or aviation organisation to continue to earn income without incurring significant expenses.²⁰

2.21 The Bills Digest also lists a number of advantages associated with enforceable voluntary undertakings:

17 *Aviation Legislation Amendment Bill (No 2) 2000*, Explanatory Memorandum, p. 12

18 *Aviation Legislation Amendment Bill (No 2) 2000*, Explanatory Memorandum, p. 13

19 *Aviation Legislation Amendment Bill (No 2) 2000*, Explanatory Memorandum, p. 14

20 *Aviation Legislation Amendment Bill (No 2) 2000*, Explanatory Memorandum, p. 14

Rather than pursue suspected breaches through the litigation process, which can be lengthy and expensive, and in which it may be difficult to prove a breach occurred, undertakings will commit the person or entity in breach to cease the conduct in breach and not resume it. Undertakings may also include terms relating to compensation or actions to correct the breach (such as corrective advertising in the trade practices context). The scope of an undertaking is potentially wider and the terms more flexible than a court-imposed remedy. ...

CASA envisages using enforceable undertakings mainly in situations where CASA has detected regulatory inadequacies or non-compliance with legislation, but a prosecution or cancellation of a licence would be disproportionate, as there is no serious or immediate threat to aviation safety. In its view, enforceable undertakings would ensure compliance with the law, performing an important preventative function, without the technicalities, delays and resource costs associated with court proceedings. Because breach of an undertaking would be enforceable in the Federal Court without the need to independently prove a breach of the Civil Aviation Act 1988 or the regulations, if enforcement becomes necessary CASA would only have to prove the terms of the undertaking and that it has not been complied with.²¹

Support for enforceable voluntary undertakings

2.22 Qantas expressed qualified support for the scheme although noting some concerns:

Qantas has reviewed the proposed section and the Explanatory Memorandum (EM). Based on that review and on discussions with the Australian aviation industry Qantas has concluded that, solely from its perspective, the proposal to introduce Enforceable Undertakings should be supported. However, Qantas has some concerns with the current proposal.²²

2.23 According to Qantas; "... the ability for a major airline to negotiate and provide an enforceable undertaking would be beneficial to the efficient management of the aviation industry."²³

Disadvantages associated with the operation of enforceable voluntary undertakings

2.24 A number of possible disadvantages involving enforceable voluntary undertakings were described in the Bill's Explanatory Memorandum:

Clearly, it is a response that is only available in situations where the relevant individual or organisation involved in prepared to cooperate with CASA. Further, it is possible (although, in practice, unlikely) that a decision by CASA not to accept or vary an undertaking could be subjected to court challenge on administrative law grounds. Any such administrative law challenge would involve the commitment of appropriate human and financial resources by CASA, and would involve delay. Enforcing voluntary undertakings would also involve delay and the commitment of appropriate resources by CASA.²⁴

21 Department of the Parliamentary Library, *Bills Digest* No. 164, 1999-2000, p. 4

22 *Submission No 8*, Qantas, p. 1

23 *Submission No 8*, Qantas, p. 2

24 *Aviation Legislation Amendment Bill (No 2) 2000*, Explanatory Memorandum, p. 13

General criticisms of the agreements

2.25 Mr Richard Katsch was highly critical of the role of CASA in the enforceable voluntary agreements. As stated by Mr Katsch:

... the Aviation Amendment Bill (No 2) is one more step by CASA fleeing its role as a professional safety regulation body...

To seek legislative approval for what is, in essence, a system of patronage for particular players is grossly offensive and indicates clearly that CASA has been unable to achieve its goals using impartial regulation. ...

Individual agreements allowing different operators different requirements depending on the whim of individual CASA officers will make a coherent system even more difficult. The danger of improperly applied influence is obvious.²⁵

2.26 According to one submission to the inquiry:

What is proposed amounts to a total re-write of Australia's aviation legislation. If this Bill passes the Senate, aviation will no longer be governed by the certainty of law but will be governed by bureaucratic discretion. Even if the bureaucracy were properly equipped, trained, and staffed to handle such enormous discretion, there is no certainty that it would continue to be so. ...

The Aviation Legislation Amendment Bill (No 1) 2001 in fact represents the utter failure of the Government's aviation policy. ...²⁶

2.27 Mr Boyd Munro told the inquiry on 2 March 2001 that enforceable voluntary undertakings; "... heralds an era of designer law that will allow law to be tailored for each and every person for every situation and for every operator ... this proposal represents the fact that this government has given up on any attempt to reform the aviation legislation."²⁷

2.28 In his submission to the inquiry Mr Munro set out what he considered to be "specious assumptions" supporting clause 31A of the Bill, namely:

- That accepting enforceable undertakings ought to replace proper investigation of likely contravention's of the law.
- That accepting enforceable undertakings ought to replace the necessity that CASA obtain sufficient proof to bring a contravention to court.
- That accepting enforceable undertakings ought to allow CASA to dictate detailed behavioural requirements on pilots where the law is unclear.
- That enforceable undertakings would be offered voluntarily in practice.
- That the proposed regime is essentially the same as that used by the Australian Competition and Consumer Commission ("**ACCC**") under section 87B of the Trade Practices Act 1974 (Cth).

25 *Submission No 4*, Mr Richard Katsch, p.1

26 *Supplementary Submission No 1A*, Mr Boyd Munro, p. 1

27 *Evidence RRAT*, Mr Boyd Munro, 2 March 2001, p. 23

· That the ability to accept enforceable undertakings is necessary to deter contravention's and to reduce delays in prosecution.

· That CASA will become and will forever remain capable of monitoring and enforcing enforceable undertakings.²⁸

2.29 Mr Munro went on to state:

It is clear that CASA anticipates that a regime of enforceable undertakings would, in practice, put enforcement of the law in the hands of bureaucrats rather than the courts. It would replace the need for investigation and proof of contravention of the law with the ability to enforce a contractual agreement that may be extracted under duress.²⁹

2.30 Later in his supplementary submission Mr Munro asserted:

If the legislature has not seen fit to prescribe required conduct in detail, but rather to prescribe outcomes, it must be accepted that the intention of the legislature is to allow pilots to comply in their own manner. For CASA to use an enforceable undertaking regime as an institutionalised mechanism to interpret the law in a manner acceptable to CASA and to prescribe "[in] detail exactly what an individual or operator must or must not do in the particular circumstances", runs contrary to the intention of Parliament.

CASA should not be allowed to avoid accountability by using a regime of enforceable undertakings in lieu of the making of specific regulations under the legislation. It should not be allowed to usurp the roles of Parliament and the courts by putting into effect a regime that the REM clearly anticipates will effectively allow CASA to achieve its own interpretation of the law.³⁰

2.31 During his evidence on 2 March 2001 Mr Boyd commented:

The proposed 31A does not, in any way, limit the circumstances in which a voluntary undertaking may be sought. I think because of its breadth, 31A is a very potentially dangerous thing and it is not simply going to apply to the people who are in CASA today; it will probably be on foot 30 years from now. It will apply in different circumstances and with different people that we do not envisage.³¹

2.32 Mr J W Scritchley told the inquiry:

The legislation gives CASA the power to decide guilt and innocence without recourse to natural justice. Without proof, arrest prosecution or conviction CASA will be able to prevent a person from exercising their pilots licences unless they enter into a 'Voluntary' agreement.³²

28 *Supplementary Submission No 1A*, Mr Boyd Munro, p. 2

29 *Supplementary Submission No 1A*, Mr Boyd Munro, p. 2

30 *Supplementary Submission No 1A*, Mr Boyd Munro, p. 3

31 *Evidence RRAT*, Mr Boyd Munro, 2 March 2001 p. 25

32 *Submission No 5*, J W Scritchley, p. 1

2.33 Although, as noted previously, Qantas generally supports the introduction of enforceable voluntary undertakings it did express concern in its submission for individuals and organisations which do not have the same resources as the major airlines in dealing with the agreements, as stated by Qantas:

As such, there may be a concern that CASA will use Enforceable Undertakings as defacto enforcement.

That is, in circumstances where CASA feels there may have been a “situation involving undesirable safety practices which may not necessarily involve a clear breach of regulatory requirements”, it may threaten prosecution unless the operator agrees to provide an enforceable undertaking which acknowledges CASA’s interpretation of the law. These operators may have no choice but to provide the undertaking.

The ability to enforce an enforceable undertaking removes CASA’s obligation to prove a breach of the law.

If an operator does not have the knowledge or resources to resist CASA, Enforceable Undertakings could become a defacto method of CASA enforcing its interpretation of the law – regardless of the true legal position.³³

Response from CASA

2.34 During its evidence to the inquiry on 2 March 2001 CASA responded to attacks by Mr Munro against the Authority in part by questioning how representative Mr Munro was of the aviation industry in attacking EVUs:

... the committee may hear ... that the overwhelming proportion of industry is violently opposed to EVUs, as evidenced by the numerous responses to Mr Munro’s plea to some sections of the industry to allow him to represent them as their sole representative on this bill. But what is the reality of the situation? Mr Munro may well have a few thousand people sign up, but what does that mean? What percentage of industry is that? What would those people have said if they had a proper No case without all the misleading and emotional rhetoric, let alone a proper Yes case? Who gets to negotiate for the great mass of industry who may want this introduced? Does Mr Munro purport to speak for commercial operators and maintenance organisations? What about the general and the travelling public? Does Mr Munro purport to represent them, or are their views about wanting a tough regulator simply to be ignored as irrelevant?³⁴

Concern with the voluntary aspect of the agreements

2.35 The Aerial Agricultural Association Australia (AAAA), although noting that it was not opposed to the use of enforceable voluntary undertakings “as a means of improving the flexibility available to CASA as a regulator”, went on in its submission to raise concerns about the system. The AAAA was of the view that:

... it is likely there will be little of the ‘voluntary’ involved with them if the alternative is for CASA to still cancel or suspend a licence. In other words, it will

33 *Submission No 6, Qantas, p. 2*

34 *Evidence RRAT, CASA, 2 March 2001, p. 12*

be difficult for any operator or individual pilot to resist any pressure from CASA to enter into a 'voluntary' undertaking.³⁵

2.36 The Director of the Aircraft Owners and Pilots Association, Mr Spencer Ferrier, told the inquiry on 2 March 2001:

... we believe that the section is not capable of having legal force. We refer to 31A(1). This section assumes the free will of the person giving the voluntary enforceable undertaking,... . In reality, the aviator is facing some form of threat of some kind, that the processes presently in existence will be worked against that person. Our submission is that there can be no voluntary enforceable submission on that basis.³⁶

2.37 Another submission attacked the concept of voluntary in these schemes

... Aviation businesses require a plethora of approvals. In that environment, a "voluntary" agreement has no place.³⁷

2.38 A submission to the inquiry from Mr Robert Scott expressed "serious misgivings" concerning CASA's "desire to obtain authority to enforce voluntary undertakings."³⁸

2.39 Mr Scott noted:

Such undertakings are extracted in the climate of a threatened or an actual issue of a "show cause" notice.

Receipt of such notice, or hint thereof, poses an immediate threat to continued possession of a valid licence or entitlement to operate, and as such puts the recipient in peril of the disastrous economic and other consequence which could flow therefrom.

Accordingly the recipient is perforce obliged to enter into almost any undertaking demanded in order to avert this calamity. An arrangement extracted under such circumstances is more coercive in nature than voluntary, and can truly be said to be an arrangement extracted under duress.

Such arrangements should never be set in concrete, but should be nothing more than temporary, pending proper resolution of the matter within the existing framework of the law.

It seems to me that CASA is attempting to obtain an authority to apply enforcement of some arrangement which it has imposed on somebody and which would not be enforceable without resort to this proposed legislation.³⁹

35 *Submission No 2*, Aerial Agricultural Association of Australia, p. 1

36 *Evidence RRAT*, Aircraft Owners and Pilots Association, 2 March 2001, p. 34

37 *Submission No 1*, Mr Boyd Munro, p. 1

38 *Submission No 1*, Mr Robert Scott, p. 1

39 *Submission No 1*, Mr Robert Scott, p. 1

View of the Department of Transport and Regional Services and CASA

2.40 CASA and the Department of Transport and Regional Services in their joint submission to the inquiry advised that: “CASA does not propose to have a power to compel people to give undertakings as to their future behaviour.”⁴⁰

... an enforceable voluntary undertaking is an enforcement tool used to deal constructively with people who are genuinely attempting to do the right thing, but for whatever reason their conduct has fallen short (although not significantly) of the prescribed safety standards. In circumstances where the person refuses to agree that their conduct has been a breach of safety standards, or needs reforming, more serious enforcement action, such as licence suspension and/or fines will be considered by CASA.⁴¹

The criteria for making a decision to take serious enforcement action is set out in the *Enforcement Manual*.⁴²

2.41 The inquiry was told by the Department of Transport and Regional Services and CASA that; “... if a person feels compelled to give an undertaking because they fear another form of enforcement action, the undertaking is only enforceable by order of the Federal Court, an independent judicial body that could be expected to protect the rights of the person giving the undertaking.”⁴³

2.42 During a public hearing in Canberra on 2 March 2001 CASA endeavoured to answer accusations that the voluntary agreements would not be voluntarily entered into. Mr Peter Ilyk commented:

No doubt, later today you will hear lots of criticisms about the EVU system. You will probably hear that it is not voluntary at all, that CASA is such a vindictive organisation that, if you do not enter an undertaking, CASA will take some form of retaliatory action.

What are the facts? Firstly, there is no evidence to support such an allegation. The making of the allegation does not make it true. On this argument, presumably CASA even now can take legal retaliatory action against people it does not like. EVUs will not change the position. Taken to its logical conclusion, the proponents of this argument must surely be concerned that, if this legislation is defeated, CASA will take immediate retaliatory action against those sections of the industry that voiced criticism of the proposal. Such an argument, of course, is no more than scaremongering and there is no evidence of any systemic culture of vindictiveness in CASA.⁴⁴

2.43 Mr Ilyk went on his evidence to stress that the voluntary agreements would be “entirely voluntary and that CASA cannot force someone into giving and undertaking”:

40 *Submission No 6*, Department of Transport and Regional Services and CASA, p. 17

41 *Submission No 6*, Department of Transport and Regional Services and CASA, p. 17

42 See *submission No 6*, Department of Transport and Regional Services and CASA, p. 17

43 See *submission No 6*, Department of Transport and Regional Services and CASA, p. 17

44 *Evidence RRAT*, CASA, 2 March 2001, p. 11

... CASA has no power of itself to enforce an undertaking. If the person later changes his mind and believes he was coerced into the undertaking they do not have to do anything. They do not have to comply with the undertaking; they can simply ignore it. If CASA then wants to enforce the undertaking it must take the matter to the Federal Court. ... Only after a judicial inquiry will it be possible to enforce an EVU. But now the argument by the opponents of EVUs seems to be, 'Not only can you not trust CASA, you can't even trust the courts' ...⁴⁵

2.44 Mr Ilyk also dealt with the issue whether CASA would seek EVUs where there was a lack of evidence to mount a prosecution for breach of the law:

Strictly speaking, that is correct. ... But in practical terms it is hard to conceive of why CASA would act in that way, particularly as it could only enforce the EVU through the Federal Court. It is likely, however, that CASA could seek an EVU where there was some reasonable basis for suspicion of a breach but the evidence was not sufficient to allow CASA to prosecute.⁴⁶

Issue of consultation and the provision of information

2.45 In March 1998, CASA issued a discussion paper entitled *A New Approach to Enforcement* which was distributed widely within CASA and the aviation industry. This paper set out a number of initiatives related to CASA's enforcement policy and procedures. The discussion paper foreshadowed the introduction of an enforceable voluntary undertaking system. The Explanatory Memorandum commented that:

There was a high response to the discussion paper (31 external responses and 20 internal responses). The responses included responses from individuals and major aviation organisations and operators such as QANTAS, Airline Passenger Safety Association, Flight West Airlines, the Director of Public Prosecutions.⁴⁷

2.46 The Memorandum went on to state:

There were no objections raised by any respondents to the introduction of an enforceable voluntary undertaking scheme. A number of respondents expressed the view that an enforceable, voluntary undertakings scheme was a positive step.⁴⁸

2.47 Mr Ilyk of CASA told the inquiry on 2 March 2001:

After the close of the consultation period in April 1998, the board considered the responses from industry. There were no objections registered to the EVU scheme; in fact, there was a great deal of support for the whole of the board's proposal as outlined in the discussion paper.⁴⁹

2.48 In its joint submission to the inquiry the Department of Transport and Regional Services and CASA commented:

45 *Evidence RRAT, CASA, 2 March 2001, p. 11*

46 *Evidence RRAT, CASA, 2 March 2001, p. 11*

47 *Aviation Legislation Amendment Bill (No 2) 2000, Explanatory Memorandum, p. 14*

48 *Aviation Legislation Amendment Bill (No 2) 2000, Explanatory Memorandum, p. 14*

49 *Evidence RRAT, CASA, 2 March 2001, p. 10*

The power for CASA to accept enforceable voluntary undertakings was first raised by CASA in March 1998, when the then Chairman released the discussion paper *A New Approach to Enforcement*. That discussion paper was circulated, under cover of letter from the Chairman, to relevant government agencies (for example, the Department of Transport & Regional Services and the Director of Public Prosecutions), all holders of Air Operator Certificates and Certificates of Approval, and peak aviation industry bodies.

Notice of the discussion paper was given in CASA's *Aiming Higher* publication (circulated to all 100,000 holders of Aviation Reference Numbers) in March 1998, and the discussion paper could be either obtained from the CASA web site or direct from CASA.

Public comment on the paper was invited for a period of six weeks, and a large number of responses to that paper were received (31 from external sources and 20 from within CASA), from private pilots to charter operators to international airlines. No objections to the enforceable voluntary undertaking proposal were raised by any of the respondents.⁵⁰

2.49 CASA told the inquiry in evidence that the discussion paper was placed on the Authority's website and:

Copies were also made available at all CASA district offices so that industry could get hard copies of the paper and it was available throughout Australia. Included in that discussion paper was the proposal to recommend to the government that it introduced legislation to provide for an enforceable undertaking scheme.⁵¹

2.50 The Committee has examined the discussion paper, *A New Approach to Enforcement*, and notes that although it is nine pages in length the reference to voluntary undertakings occupies only one paragraph in the middle of the document. This paragraph states:

The Board will also recommend to the Government that it enact legislation whereby persons who commit less serious contraventions can enter into voluntary undertakings with CASA in relation to their future conduct (eg agreeing to undertake specific training). These undertakings would be capable of being directly enforced by CASA. With this mechanism, many minor contraventions could be dealt with by undertakings alone.⁵²

2.51 The Committee also notes that the document, dated 2 March 1998, required that responses to its content be sent to CASA by 27 March 1998. It could be argued that such a relatively short response time to examine and formulate a response to the content of the discussion paper was inadequate.

50 *Submission No 6*, Department of Transport and Regional Services and CASA, p. 18

51 *Evidence RRAT*, CASA, 2 March 2001, p. 10

52 Discussion Paper, *A New Approach to Enforcement*, CASA, 2 March 1998, p. 4

2.52 The AAAA advised the inquiry that one of the key reasons why the Association has reservations concerning the scheme was the lack of information that has been provided dealing with how the voluntary undertaking scheme would be administered.⁵³

2.53 The Association went on to state:

While there was consultation with industry through a discussion paper process in 1998, the appearance of the VEU provisions in this Bill at this time has taken the industry by surprise. ...

A more open process may have been for CASA to have raised the proposal for the introduction of VEUs through the current Bill in any of the consultative forums which it has established with industry, such as the Standards Consultative Committee.⁵⁴

2.54 In his submission to the inquiry Mr Boyd Munro commented on the issue of consultation in relation to the amendment bill:

... Affected people have not been consulted. The motions of consultation may have been gone through, but there has been no actual consultation. I sent out an e-mail yesterday to 141 well-informed pilots I have already had responses from 45, NOT ONE (sic) of whom knew anything about this Bill.⁵⁵

2.55 In a supplementary submission Mr Munro stated:

The statement in the REM (Revised Explanatory Memorandum ... that "*a number of respondents expressed the view that an enforceable voluntary undertakings scheme was a positive step*" is breathtaking. Nothing resembling the scheme proposed in the Bill is to be found in the Discussion Paper in question. ...⁵⁶

2.56 In evidence to the inquiry on 2 March 2001 Mr Munro advised that:

...there has been a complete failure of consultation at the coalface. Not only that, but the process that was described to us this morning revealed that people never get to see the actual legislation. The consultation is all vague talk. Frankly, I ignore that. The consultation process surely should begin with the circulation of draft legislation to say 'This is what we propose to put before the parliament.'⁵⁷

2.57 Captain William Hamilton, President of the Aircraft Owners and Pilots Association, told the inquiry on 2 March 2001 that:

... the bill was withdrawn last year. On reintroduction this year, to the best of my knowledge, there was no consultation whatsoever on the reintroduction of the bill. I

53 *Submission No 2*, Aerial Agricultural Association of Australia, p. 1

54 *Submission No 2*, Aerial Agricultural Association of Australia, p. 2

55 *Submission No 1*, Mr Boyd Munro, p. 1

56 *Supplementary Submission No 1A*, Mr Boyd Munro, p. 1

57 *Evidence RRAT*, Mr Boyd Munro, 2 March 2001, p. 25

was most surprised to find that it had been reintroduced into the parliament only a short time before it was in fact introduced.⁵⁸

Question of applicability of the scheme

2.58 In its submission to the inquiry the AAAA commented on what it saw as lack clarity in the Bill in relation to enforceable voluntary undertakings, which the Association refers to as VEUs (Voluntary Enforceable Undertakings), applies:

... the Bill currently identifies its applicability to ‘a person’ which infers that VEUs can be directed at individual pilots as well as Air Operators Certificate (AOC) holders. While this may be an oversight of the legislation or drafting, and may not be CASA’s intent in terms of how they might apply VEUs, it would be much clearer to identify who the VEUs are intended to capture if it is not all pilots.⁵⁹

Review of the scheme

2.59 The Committee understands that the voluntary undertaking scheme will be reviewed after twelve months to decide if it has achieved its “desired objectives”.⁶⁰

Postponement of the scheme’s introduction and training for CASA staff

2.60 The AAAA told the inquiry that:

The amendment to the Bill that the provisions would not come into effect until proclamation of the Bill is a welcome one, and AAAA hopes that this will provide CASA with the opportunity to provide open discussions with industry as to their intentions for implementation of the provision.⁶¹

2.61 Mr Bruce Scott, Minister for Veterans’ Affairs and Minister Assisting the Minister for Defence told the House of Representatives on 8 February 2001 that the “main government amendment” in the Bill:

... provides that the proposed new section 31A of the Civil Aviation Act commence upon proclamation. Postponing the introduction of CASA’s proposed scheme of voluntary undertakings until proclamation will ensure that CASA has adequate time to develop procedures and training for its staff in relation to enforceable voluntary undertakings.⁶²

2.62 The Department of Transport and Regional Services and CASA advised the inquiry that:

The authority to accept voluntary undertakings on behalf of CASA will be delegated to a limited number of senior officers of the Authority, including:

. General Counsel;

58 *Evidence RRAT*, Aircraft Owners and Pilots Association, 2 March 2001, p. 40

59 *Submission No 2*, Aerial Agricultural Association of Australia, p. 2

60 *Aviation Legislation Amendment Bill (No 2) 2000*, Explanatory Memorandum, p. 15

61 *Submission No 2*, Aerial Agricultural Association of Australia, p. 2

62 *House of Representatives Hansard (Proof)*, 8 February 2001, p. 21084

- . Assistant Directors of the Aviation Safety Compliance and Aviation Safety Standards Division; and
- . General Managers in the Aviation Safety Compliance Division.

Such officers will receive training in the policy and procedures for use of enforceable voluntary undertakings.⁶³

2.63 The Department and CASA went on to state:

... while all CASA operational staff will be trained in the policy behind and use of enforceable voluntary undertakings, they will not be required to draft them.⁶⁴

... once a person has agreed to give an undertaking it will be drafted by CASA lawyers to ensure clarity, consistency, and legal certainty.⁶⁵

The issue of consistency of offences with the Criminal Code

2.64 The Department of Transport and Regional Services and CASA in their joint submission to the inquiry noted that:

Items 5, 6, 7, 8 and 9 of Schedule 1 of the Bill amend sections 20AA, 20AB and 24 of the *Civil Aviation Act 1988* to incorporate the new maintenance terms defined in Items 1, 2 and 3 of the Schedule.

Sections 20AA, 20AB and 24 are provisions within the *Civil Aviation Act 1988* which create offences. In redrafting the provisions to incorporate the new maintenance terms, the legislative drafters at the Office of Parliamentary Counsel reworded the provisions to accord with the *Criminal Code Act 1995*, with particular reference to Division 5 of Part 2.2 of that Act.

Chapter 2 of the *Criminal Code Act* is scheduled to commence operation on 15 December 2001 (Item 1, Schedule 1, *Criminal Code Amendment (Application) Act 2000*). It is the Government's intention that, as far as practicable, all offence provisions in Commonwealth Acts be amended, prior to 15 December 2000, to be consistent with the Criminal Code.⁶⁶

2.65 This submission went to state:

All offences in Commonwealth Acts are proposed to be made consistent with the Criminal Code prior to its commencement on 15 December 2001, and all Commonwealth agencies are being asked to assist the Attorney-General's Department in the formulation of harmonisation Bills on a portfolio-by-portfolio basis. It is intended that all offences in the *Civil Aviation Act* will be amended by a portfolio amendment Bill prior to December 2001.⁶⁷

63 *Submission No 6*, Department of Transport and Regional Services and CASA, p. 14

64 *Submission No 6*, Department of Transport and Regional Services and CASA, p. 15

65 *Submission No 6*, Department of Transport and Regional Services and CASA, p. 15

66 *Submission No 6*, Department of Transport and Regional Services and CASA, p. 9

67 *Submission No 6*, Department of Transport and Regional Services and CASA, p. 9

Criminal responsibility

2.66 According to the Department of Transport and Regional Services and CASA:

Subsections 20AA(3) and (4) of the *Civil Aviation Act 1988* currently provide that an Australian aircraft must not commence a flight unless the aircraft has a certificate of airworthiness and there is a maintenance release in force for the aircraft (unless the Civil Aviation Regulations permit flight without those two documents). Subsection 20AA(5) provides that the owner, operator, hirer or pilot of an aircraft who knowingly or recklessly operates an aircraft in contravention of subsections (3) and (4) is guilty of an offence punishable by a term of imprisonment of up to 2 years.⁶⁸

2.67 The Correction to the Explanatory Memorandum for the *Aviation Legislation Amendment Bill (No. 2) 2000* issued by the Minister for Transport and Regional Services stated that:

... regulatory action may only be taken to cancel, suspend or vary an Air Operator's Certificate as a result of a breach of subsection 20AA(3) or (4) if that breach occurs knowingly or recklessly. Whilst it is arguable that currently such regulatory action can occur in the absence of a mental element for a breach of subsection 20AA(3) or (4), the better view is that it cannot. CASA has always taken a purposive interpretation of the subsections, and as a result only takes regulatory action where it is satisfied on the balance of probabilities that the alleged offender has knowingly or recklessly committed the breach...⁶⁹

2.68 The inquiry was told:

The legal position of a person who has operated an Australian aircraft without a certificate of airworthiness or which has not had all required maintenance undertaken on it is not changed by the amendments to section 20AA of the Act. Should the person have done so knowingly or recklessly, then he or she is subject to a criminal sanction of up to 2 years' imprisonment ...⁷⁰

The issue of mental state

2.69 The issue of mental state in relation to criminal responsibility in the operation of an aircraft is complex. The Bills Digest sets out the following information in relation to this issue:

The Bill also contains provisions designed to harmonise some of the criminal offences contained in the *Civil Aviation Act 1988* with the general principles of criminal responsibility set out in Chapter 2 of the Commonwealth Criminal Code. The Bill amends some offences, but not others. It seems that only those provisions that were amended to incorporate the new terminology have been harmonised with the Criminal Code. The other offence provisions will need to be harmonised before Chapter 2 of the Commonwealth Criminal Code commences on 15 December 2001.

68 *Submission No 6*, Department of Transport and Regional Services and CASA, p. 10

69 *Aviation Legislation Amendment Bill (No 2) 2000*, Correction to Explanatory Memorandum, p. 1

70 *Submission No 6*, Department of Transport and Regional Services and CASA, p. 11

The offences amended by the Bill all specify the mental state which is a component of the offence. Some offences in the *Civil Aviation Act 1988* already specified a mental element, namely, knowledge or recklessness, and this is not altered in the substituted provisions, although the offences are re-worded.

Other offences in the *Civil Aviation Act 1988* did not specify a mental element, but the provisions substituted in the Bill do. At first blush (sic), this seems a major departure from the earlier drafting. However, it in fact merely formalises what would have been the result when the current provisions are interpreted in light of the common law. At common law there is a presumption that a mental state is an essential element of a criminal offence, even if the statute defines an offence by reference only to its physical elements (the acts or omissions which constitute it), and does not refer to any mental state.

Each of the three offences amended by the Bill consists of conduct combined with circumstances (flying an unregistered aircraft, carrying out maintenance without permission, and tampering with an aircraft or aeronautical product in a way that may endanger the safety of the aircraft, persons or property). At common law, a mental state would be implied for these offences, although it is not clear if it would be intention or recklessness or a lesser state. The mental state that would apply under the Criminal Code to an offence consisting of acts plus the surrounding circumstances would be intention, knowledge or recklessness. The Bill specifies that the mental state for these three offences is knowledge or recklessness. This is clearly consistent with the Criminal Code, and may or may not be the same as the present, common law, position.⁷¹

Arguments against custodial sentences

2.70 Mr Munro in his submission to the inquiry argued that:

The criminal provisions should not provide custodial sentences in cases where a person endangers his own person or property but no-one else's. An example is the new 24(2). Note that Section 20A(2) of the Act was amended in 1995 to remove the criminal sanction where dangerous conduct does not endanger the person or property of another person. This is in line with provisions of the ICAO convention.

... new sections 20AA(1) 20AA(3). These are essentially paperwork offences. They are not difficult to detect and can be adequately deterred by a financial penalty....⁷²

CASA's response

2.71 Mr Ilyk of CASA told the inquiry that:

... there is absolutely no basis for saying that there is a custodial sentence for a breach of an EVU. The custodial sentences in the bill relate to breaches of criminal law and that criminal law can only be enforced through the courts, and that is the role of the DPP, not CASA.⁷³

71 Department of the Parliamentary Library, *Bills Digest* No. 164, 1999-2000., pp. 2-3; see also pp. 7-10

72 *Submission No. 1*, Mr Boyd Munro, p. 1

73 *Evidence RRAT*, CASA, 2 March, p. 13

CHAPTER THREE

POSSIBLE AMENDMENTS

Limiting the scope of Enforceable Voluntary Undertakings (EVUs)

3.1 The possibility was raised during the inquiry of amending section 31A of the Bill to make it clear that CASA could only agree to an EVU so as to comply with provisions of the *Civil Aviation Act 1988*. This amendment would hopefully moderate fears among sectors of the aviation industry that CASA could possibly use EVUs to interfere in, or affect, non-aviation safety matters.¹

3.2 The General Counsel with the Civil Aviation Safety Authority, Mr Peter Ilyk, told the inquiry on 2 March 2001:

As it stands, the act sets out what CASA's functions are. Those functions are restricted to safety. At the moment, if CASA tried to impose a non-safety condition, it would be invalid and the Federal Court would so hold, but if the idea is to put that in writing, to put it beyond doubt, that would certainly be a helpful provision. It is ultimately a matter for government.²

3.3 Mr Ilyk later stated that, whilst he did not believe such an amendment was necessary, "in order to allay fears, having such a non-discrimination provision in the bill to make it abundantly clear would probably be very helpful."³

3.4 The Committee recommends that the Bill be amended to limit the application of enforceable voluntary undertakings proposed by the Bill to matters arising under the *Civil Aviation Act 1988*.

A publicly available register of a enforceable voluntary undertakings

3.5 The possibility of establishing a register of EVU agreements was raised during the hearing on 2 March 2001 in an effort to make operation of EVUs as transparent as possible. Mr Boyd Munro responded to such a proposal by stating:

... if you did decide to bring in voluntary undertakings they most certainly should be public. One of the things which seriously undermines aviation safety in this country is that people are very suspicious of the secret arrangements which CASA has with other aviators.... I certainly feel that if we do go down the voluntary undertaking route they should be public.⁴

1 *Evidence RRAT, CASA, 2 March 2001, p. 21*

2 *Evidence RRAT, CASA, 2 March 2001, p. 21*

3 *Evidence RRAT, CASA, 2 March 2001, p. 22*

4 *Evidence RRAT, Mr Boyd Munro, 2 March 2001, p. 24*

3.6 The Committee recommends that an appropriate form of publicly available register of enforceable voluntary undertakings be provided for in the Bill and that the Bill be amended accordingly.

Limitation on the duration of enforceable voluntary undertakings

3.7 During his appearance at a public hearing held on 2 March 2001, Mr Boyd Munro suggested that if there was a limitation placed on the duration of on EVUs at the time they were made this would make them less threatening to sectors of the aviation industry:

... if the maximum time were to be three months and then CASA had to go to the person and get another one, that would make them much less threatening, but the way they are they are a life sentence—once you sign the thing you are stuck with it until you die.⁵

3.8 The Committee does not recommend a specific duration period for EVUs but does consider that a time limit should apply.

3.9 The Committee recommends the following new sub-clause be added to proposed new section 31A :

(5) CASA cannot accept an undertaking from a person for a period of more than six (6) months, but may accept a further undertaking from the person after a previous undertaking ceases to have effect.

Penalties imposed by a court

3.10 In its submission to the inquiry Qantas drew attention to further possible amendment of the Bill. According to Qantas:

... one issue which must be addressed relates to the proposed section 31A(4)(b) which allows the Court, where there has been a breach of an undertaking [ei, EVU] to impose a penalty of an amount that the Court considers appropriate in the circumstances.

Not even the Trade Practices Act provides this discretion.

Maximum penalties, if they are to be imposed, must be certain and, Qantas believes, be in proportion to the maximum penalties otherwise payable for a similar offence under the Civil Aviation Act and Regulations.⁶

3.11 This issue was explored by the Committee at its hearing on the Bill in the context of the desirability of applying a custodial sentence for a breach of the terms of an undertaking.

3.12 The Committee recommends that, for the avoidance of doubt, new subsection 20AA (1) set out in the Bill be amended by adding the words in *italics*:

Maximum penalty: Imprisonment for two (2) years at the discretion of the Court.

5 *Evidence RRAT*, Mr Boyd Munro, 2 March 2001, p. 29

6 *Submission No 8*, Qantas, p. 2

Other matters – compulsory third party insurance for pilots

3.13 During the public hearing held on 2 March 2001 Mr Spencer Ferrier of the Aircraft Owners and Pilots Association called for an “...immediate review and consideration to extend to the private operation some form of compulsory third party insurance, so as to bring Australia’s private aircraft travelling public in to line with the standards of insurance and benefits that can be expected in almost every other form of transport.”⁷

3.14 Later in his evidence Mr Ferrier advised that:

... there is an urgent need for compulsory third party insurance to be extended to passengers in aircraft engaged in private operations, that a ceiling is an appropriate way to stop that insurance getting out of hand and to provide some kind of surety, from a forward point of view, for people stepping into the aircraft....⁸

3.15 Mr Ferrier proposed that this result be achieved by amendment of the appropriate legislation to require such insurance by all private aircraft operators.

Although the issue of compulsory third party insurance for private aircraft operators and pilots is outside the terms of reference of this inquiry the Committee recommends that the Minister refer this proposal to an independent professional consultant for assessment and report.

**Senator Winston Crane
Chairman**

7 *Evidence RRAT*, Aircraft Owners and Pilots Association, 2 March 2001, p. 33

8 *Evidence RRAT*, Aircraft Owners and Pilots Association, 2 March 2001, p. 34

**DISSENTING REPORT FROM
SENATOR KERRY O'BRIEN AND SENATOR SUE MACKAY
ON BEHALF OF THE AUSTRALIAN LABOR PARTY
AND FROM SENATOR JOHN WOODLEY
AND SENATOR BRIAN GREIG
ON BEHALF OF THE DEMOCRATS**

**CONSULTATION WITH THE INDUSTRY PRIOR
TO THE INTRODUCTION OF
ENFORCEABLE VOLUNTARY UNDERTAKINGS**

D.1 Senators O'Brien, Mackay, Woodley and Greig are concerned that the proposed enforceable voluntary undertakings have not been subjected to a proper consultative process with the aviation sector.

D.2 According to the Department of Transport ¹ the Civil Aviation Safety Authority's normal approach to consultation is to release a discussion paper for comment. The Authority then considers the responses to that paper. Having considered those responses CASA releases a Notice of Proposed Rule Making [NPRM] that is closer in form to the proposed legislation. The Authority then prepares a summary of responses received in response to the NPRM and drafting instructions then go to the Office of Legislative Drafting.

D.3 Based on the evidence provided to the Committee that consultative process was not followed in relation to the proposed introduction of enforceable voluntary undertakings.

D.4 Mr Ilyk advised the Committee that a discussion paper that contained information about proposed voluntary enforceable undertakings was circulated in March 1998².

D.5 The discussion paper to which Mr Ilyk referred contained just one paragraph about enforceable voluntary undertakings and provided only a general view of what was being proposed.

D.6 Proper consideration would also include the full implications, including costs to the industry, of entering into these undertakings

D.7 Senators O'Brien, Mackay, Woodley and Greig consider that the consultative process followed in relation to enforceable voluntary undertakings was inadequate and recommend that CASA undertake further consultation with the industry.

¹ *Evidence RRAT*, Department of Transport and Regional Services, 2 March 2001, p. 6-7

² *Evidence RRAT*, Department of Transport and Regional Services, 2 March 2001, p. 10

D.8 Senators O'Brien, Mackay, Woodley and Greig further recommend that the following proposed amendments to the system of enforceable voluntary undertakings be considered as part of that consultation.

D.9 An amendment to limit the application of enforceable voluntary undertakings to matters arising under the *Civil Aviation Act 1988*.

D.10 An amendment to provide for a publicly available register of enforceable voluntary undertakings.

D.11 An amendment to limit an undertaking to a period of no more than six (6) months, but provide for a further undertaking from a person after a previous undertaking has ceased to have effect.

D.12 Mr Ilyk advised the Committee that CASA is not yet able to administer enforceable voluntary undertakings. He said the Authority would need to provide training to the officers who will actually enter into these undertakings.

D.13 Senators O'Brien, Mackay, Woodley and Greig are therefore also concerned that CASA is seeking the legislative authority to enter into enforceable voluntary undertakings without having the capacity to properly administer them.

D.14 It is the view of Senators O'Brien, Mackay, Woodley and Greig that the Parliament and the aviation industry should have a clear appreciation of how the Authority plans to administer these undertakings prior to their introduction.

D.15 Senators O'Brien, Mackay, Woodley and Greig recommend that the manner in which CASA plans to administer this new safety compliance tool also be the subject of consultation with the industry.

D.16 It was not clear from evidence to the Committee how the introduction of enforceable voluntary undertakings will operate with existing compliance tools, specifically Civil Aviation Regulation number 33, Civil Aviation Regulation number 5.38 and section 28BB of the Civil Aviation Act which relates to compliance with conditions placed on an Air Operating Certificate [AOC].

D.17 These powers already provide CASA with intermediate powers between the observation of a breach and legal enforcement.

D.18 Senators O'Brien, Mackay, Woodley and Greig recommend that the consultative process include consideration of the effectiveness of existing compliance tools and the relationship between the existing regulatory regime and the proposed enforceable voluntary undertakings.

Senator Kerry O'Brien

Senator Sue Mackay

Senator John Woodley

Senator Brian Greig

APPENDIX ONE

SUBMISSIONS

Submission No:	Name
1, 1A	Mr Boyd Munro
2	Aerial Agricultural Association of Australia Ltd
3	Mr R L Scott
4	Mr Richard Katsch
5	Mr J W Scritchley
6	Department of Transport and Regional Services and Civil Aviation Safety Authority
7	Mr Ian Wall
8	Qantas Airways Limited
9	Mr Roger Verney

APPENDIX TWO

WITNESSES

List of Witnesses

Canberra, Friday, 2 March 2001

Department of Transport and Regional Services

Mr Michael Frazer
Acting Director, Safety and Regulatory Policy,
Mrs Robyn Beetham
Assistant Secretary, Aviation Industry
Mr Simon Clegg
Principal Lawyer, Legal Group and Director, Aviation Legal
Mr Robert Elder
Executive Manager, Government Industry and International Relations

Civil Aviation Safety Authority

Mr Richard Yates
Assistant Director, Aviation Safety Standards
Mr Terence Farquharson
Acting Assistant Director, Aviation Safety Compliance Division
Mr Geoffrey KIMBER
Senior Counsel, Office of Legal Counsel
Mr Peter ILYK
General Counsel, Office of Legal Counsel

Aircraft Owners and Pilots Association of Australia

Captain William Hamilton
President
Mr Spencer Ferrier
Committee Member and Director

Mr Boyd Munro (Private capacity)

