Australian Federation of Air Pilots

Submission to the

Senate Rural and Regional Affairs and Transport Legislation Committee

Regarding the

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

10 May 2004

Background

The Australian Federation of Air Pilots ("the Federation") is the industrial and professional association for commercial air pilots in Australia.

The Federation's membership coverage includes Virgin Blue pilots, Qantas owned subsidiary airline pilots, regional airline pilots, a number of Australian pilots flying for overseas operators, general aviation pilots, helicopter pilots and aerial agricultural pilots. Qantas mainline domestic and international pilots have their own dedicated association. The Federation has over 2000 pilot members, including the majority of those pilots employed by the Civil Aviation Safety Authority ("CASA") as Flying Operations Inspectors ("FOIs").

As a professional association, the members and Federation's staff are active in promoting flight safety and improving Australian and global aviation standards.

The Bill

The Federation understands that the *Civil Aviation Legislation Amendment (Mutual recognition with New Zealand and Other Matters) Bill 2003* ("the Bill") proposes amendments to the *Civil Aviation Act 1988* ("the Act") and relies on corresponding legislation being passed in New Zealand. The legislation aims to put in place a statutory framework for the mutual recognition of aviation related air operator certificates ("AOCs") in relation to large aircraft (greater than 30 seats or 15,000 kilograms).

The *Explanatory Memorandum* states:

> *Mutual recognition will permit an eligible aircraft to carry out an aviation activity in either Australia or New Zealand, whether international or domestic, passenger or cargo, based on an Air Operator's Certificate (AOC) issued by the regulator of their home country.*

According to policy documents, the Bill will reduce the duplication, complexity and added financial burdens on operators. It is intended to promote competition and closer economic relations while ensuring the highest degree of safety and security in air transport.

Areas of Concern

The Federation's major areas of concern in relation to the Bill are:

1. Inadequacy of the definitions relating to "majority of operations" when determining the appropriate regulator for any particular operator;

2. Increased regulatory costs and confusion;

3. Legal uncertainty;

4. The potential exploitation of different industrial requirements between Australia and New Zealand; and

5. The potential loss of Australian pilot jobs to New Zealand.

Inadequacy of the definitions relating to "majority of operations" when determining the appropriate regulator for any particular operator

The Federation notes that under the Bill, operators can:

1. Have their existing Australian or New Zealand AOC recognised in the other country (extended with ANZA privileges) provided they apply to their regulator and are covered by the Air Services Agreement; or

2. Hold a New Zealand AOC for their New Zealand operations and an Australian AOC for their Australian operations (such as, Qantas does currently with an Australian AOC for Qantas and a New Zealand AOC for Jetconnect, and Virgin Blue does with an Australian AOC for Virgin Blue and a New Zealand AOC for Pacific Blue). In this case, neither AOC will be eligible for ANZA privileges authorising the same aviation activities in the other countries, so as not to overlap or create jurisdictional confusion.

For operators, the lower compliance costs of the first option provide a strong incentive to seek ANZA privileges and hold a single AOC.

A key issue is which AOC (Australian or New Zealand) an operator should seek to extend with ANZA privileges. This decision determines which regulatory regime will govern both their Australian and New Zealand operations and accordingly which body, CASA or CAANZ, will oversee, monitor and enforce compliance.

The *Explanatory Memorandum* states:

> *...for safety reasons, operators will be required to hold an AOC issued by the safety regulator best placed to provide effective safety oversight, in practice the regulator of the country where the majority of their operations are located.*

On a common sense reading, this leads the Federation to believe that if they wanted ANZA privileges, Qantas and Virgin Blue would need to extend their Australian AOC and Air New Zealand would need to extend their New Zealand AOC. This is reinforced by the criteria set out in the proposed new section 28B of the Act: Additional conditions for issue of an Australian AOC with ANZA privileges.

However, there still appears to be the potential for ambiguity or manipulation in three areas:

Firstly, the proposed new Section 28B(d) provides a list of four matters CASA must have regard to when determining it is able to effectively regulate all the operations covered by the application for ANZA privileges, these being:

> *(i) whether the applicant's supervision of systems that affect the safety of the operations will be principally undertaken from or within Australian territory; and*
> *(ii) whether the applicant's training and supervision of employees involved in those systems will be undertaken principally from or within Australian territory; and*
> *(iii) whether the majority of the resources used in those systems that are required for the operations will be situated within Australian territory; and*
> *(iv) whether the persons who will control the operations will spend the majority of their time in Australian territory; and*

Absent from the list is whether the majority of flying operations is undertaken from or within Australian territory.

Secondly, the Bill also does not take into consideration the "fluid" nature of aviation. For example, Air New Zealand may quite reasonably seek ANZA privileges on its New Zealand AOC but later perform the majority of its flying within and out of Australia, whilst still meeting all of the criteria stipulated in the first area clause. There is reference in the *Explanatory Memorandum* to the transfer of country of certification to New Zealand where an AOC holder can no longer be overseen by CASA. However the trigger mechanism or process to be applied is not described. In essence, the Federation is unaware of any specific provision in the Bill that properly caters for the characteristic and unrelenting fluidity of the airline industry.

Thirdly, the Federation is concerned that ambiguity could arise if an airline were to create complex and "creative" corporate structures to influence which AOC jurisdiction they were deemed to fall under. These types of corporate strategies have commonly been used

to minimise taxation or avoid other legal obligations. As demonstrated in the Ansett collapse and the resulting "pooling" order being sought by the Administrators, airlines are often made up of numerous companies. It appears that companies, wholly and majority owned subsidiaries are treated as separate legal entities for some purposes and grouped together for others. The Bill does not adequately define how related companies will be treated in determining the appropriate AOC with ANZA privileges.

Increased regulatory costs and confusion

The *Explanatory Memorandum* also states:

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

Clearly, this is wrong. The additional travel, accommodation and associated costs with overseeing an Australian AOC holder in New Zealand will not be offset by reduced oversight of New Zealand operators in Australia. Assuming an equal take-up of ANZA privileges in each jurisdiction, this oversight must mean increased travel, accommodation and associated costs to both regulators (costs they do not have now by basically regulating from within their own country). If there is an unequal take-up of ANZA privileges, which is likely due to the different size of the industry in the two countries, it will mean relatively higher costs to one regulator. The possible significance of these, as yet, unknown costs should not be discounted. Nowhere to our knowledge have any figures been published for robust analysis.

Also, the policy line suggests that by reducing administration, duplication and complexity between the jurisdictions there will be a free movement of goods and services leading to greater competition, services, trade and tourism. This increased aviation activity will (and is certainly intended to) create a corresponding increase in activity and consequently the regulatory workload that appears to be ignored.

In a practical sense, while without the power to restrict, suspend or cancel an AOC, CASA professionals such as FOIs will continue to monitor all operations within Australia, including those under a New Zealand AOC with ANZA privileges. This seems to be recognised on the one hand via the provision for temporary stop notices, and ignored on the other via the proposition that it will not significantly increase costs.

Particularly when considered in light of the potential for operators to choose their own regulatory system, the fluid nature of aviation operations and complex corporate frameworks, this situation will very likely lead to confusion between regulators and especially the flying public.

It is likely that the Australian travelling public will believe that any aircraft flying within Australia will be operating to Australian law and regulated by the Australian air safety

framework. They would be surprised to be told to direct their safety enquiry or complaint regarding an Australian domestic flight to CAANZ. They may also find it unusual that so-called comparable safety systems dictate that, for example, one airline within Australia has a minimum number of trained flight attendants for a given flight and aircraft type and a different minimum for another airline conducting the same flight in the same aircraft type.

Legal uncertainty

The inconsistencies in the regulatory regimes in Australia and New Zealand have the potential to lead to serious uncertainty. For example, on a flight in the country which did not issue the AOC, it is unclear what legal situation exists where compliance with the regime of the country which issued the AOC would put an operator and pilot in breach of regulations where the flight was taking place. In the case of a serious incident, which country's courts would have jurisdiction? It appears to the Federation that the court in the issuing country would not have jurisdiction over something which happened entirely within a separate sovereign state, leaving the courts in the non-issuing country to deal with any criminal or civil litigation. Inconsistencies in the regulations could therefore result in prosecutions or other consequences in the other country, although the operator believed itself to be complying with its obligations.

The potential exploitation of different industrial requirements between Australia and New Zealand

The Federation's greatest concern regarding the potential effect of the Bill without suitable definitions, clarifications and safeguards is the potential exploitation of different regulatory and industrial frameworks for commercial advantage.

Again, the *Explanatory Memorandum* mentions this but does nothing to address it, when it states:

> *Mutual recognition may, however, result in a period of structural adjustment in the industry in the medium term. This is because variations in some operational requirements between Australia and New Zealand may be perceived as conferring commercial advantages on operators from one or other of the countries. By way of example, as noted by one stakeholder, there is the potential for considerable disparity between the salaries of Australian and New Zealand pilots operating the same type of aircraft but under different AOCs. This, in turn, may have implications for industrial relations even though there is no intention for mutual recognition to impact on the existing employment arrangements of operations on either side of the Tasman….New Zealand AOC holders operating in Australia may benefit from commercial advantage in some areas due to different operational requirements and, possibly, employment conditions. Where this occurs, there could be flow on effects to the Australian economy generally arising from structural adjustment in the industry and, as noted by some stakeholders, the impact on industrial relations.*

This issue should not be glossed over lightly.

Currently, the Australian pilot industry is governed by a set of minimum award terms and conditions. Most commonly this is the *Pilots (General Aviation) Award 1998* ("the award"). While most large airline have negotiated formal agreements for terms and conditions above the award, the award remains the minimum "safety net" of twenty allowable matters for any Australian operator/employer.

Similarly, employers in Australia must meet certain minimum OH&S, workcover, taxation and superannuation obligations.

To illustrate the current differences in industrial outcomes it is possible to take the example of a Boeing 737 pilot's entitlement and their employer's obligations:

1. At Virgin Blue under the *Virgin Blue Pilots Agreement 2002*;

2. Under the Pilots (General Aviation) Award 1998 ("the award"); and

3. As currently provided at Pacific Blue in New Zealand via individual contracts with a pilot contracting company, Rishworth Aviation Limited.

Employment	**VIRGIN BLUE**	**THE AWARD**	**PACIFIC BLUE***
Status	employee	employee	contractor
Base salary	Capt - $125,545 F/O - $69,050 - $75,327 - $81,605	Capt - $102,600 F/O - $65,600	Capt - $83,277 F/O - $58,634
Additions	$15,000 per annum pro rata F/Os	-	-
Allowances	Numerous - $101.15 per day - $2,300 LOL	Numerous - $85.35 per day - $1000 LOL	Few - $65.26 per day - $637 LOL
Superannuation	9%	9%	None
Tax	PAYE	PAYE	?
* Conversion of NZ$ to AUS$ based on exchange rate of 1.1768 as published in the *Australian Financial Review* on Wednesday 28 April 2004			

The table above illustrates the difference in terms and conditions between Virgin Blue pilots and their New Zealand based Pacific Blue colleagues (we understand Pacific Blue to be a wholly owned subsidiary of Virgin Blue and that many of the pilots flying for it, under contract, are Australian).

The disparities are even more pronounced between the wages and conditions of Qantas mainline Boeing 737 pilots and their Jetconnect colleagues (similarly, we understand Jetconnect to be a wholly owned subsidiary of Qantas with many Australian pilots flying for it under contract).

The Federation is concerned that the Bill may lead to the undercutting of Australia's award, superannuation, taxation and Occupational Health and Safety systems. Any Australian government must view with concern a Bill which attacks the basis of a Retirement Incomes policy with the imminent retirement of the "baby boomer" generation.

The highly competitive nature of the aviation industry and the growth of the low-cost model have increased the sensitivities to these types of cost advantages.

The Federation is concerned that the Bill has the potential to:

- Create an unequal playing field for Australian operators in their own country;
- Undermine the Government's award structure and superannuation regime designed to provide a safety net for all employees;
- Compromise equal pay for equal work principles;
- Reduce Australian taxation revenue; and
- Create legal or industrial disputes.

Industrial issues, when left unresolved, have the real potential to escalate to the point that they can affect safety. It is worth noting that although the United States has a free trade agreement with Mexico and Canada, aviation is specifically excluded from its scope. The Federation submits that this is because the problems above are potentially disastrous in an industry with the characteristics of aviation.

The potential loss of Australian pilot jobs to New Zealand

Without additional safeguards, the possible end result of the proposed legislation is the movement of Australian pilot jobs to New Zealand operators. The work could still be performed within Australia, however, the employer would technically be a New Zealand operator, governed by New Zealand industrial, taxation and corporate law. This potential reclassification of Australian pilot employment to New Zealand pilot employment or

contracting to a New Zealand pilot-providing company is not in the Australian public interest.

Conclusion and Recommendations

Overall, the Federation requests that the Senate Rural and Regional Affairs and Transport Legislation Committee ("Committee") to recommend the rejection of the Bill and its intent. If this is not achievable then the Committee must address the following:

1. Clarify the definition of which AOC an operator can apply for under the Bill, so as to avoid manipulation or possible "gaming" by companies leading to outcomes such as Qantas or Virgin Blue companies flying under a New Zealand AOC with ANZA privileges for operations in Australia. This may include provisions that:
   - Require formal consideration of where the majority of an operators flying is performed when determining whether to grant ANZA privileges;
   - Provide a trigger and process or mechanism for the transfer of jurisdiction in the case of genuine changes in a company's operation affecting where the majority of operations are based; and
   - Effectively group or "pool" related companies together so that operators are not tempted to "game" the system for commercial advantage.

2. Recognise that the anticipated cost neutrality of the Bill is extremely unlikely. There will be increased cost, and the degree to the increase will depend upon factors such as the take-up of AOCs with ANZA privileges, the distribution of these ANZA privileges (i.e. whether they involve New Zealand or Australian AOCs), the currently unknown level of cost associated with regulating offshore and the overall increase in flying (trade and tourism) that the Bill may encourage.

3. Address legal uncertainty as to jurisdictional issues and the effect of inconsistencies between the regulatory systems, especially in the case of an incident occurring under an AOC with ANZA privileges in the non-issuing country. A possible solution may be to include a provision that operation in accordance with an AOC with ANZA privileges is a complete defence to any criminal or civil proceedings in the non-issuing country.

4. Take steps to address the potential exploitation or avoidance of Australian industrial, regulatory and/or taxation systems. To a large extent this should be addressed through "tightened" definitions and provisions detailed in point 1, such that any operator who mainly flies within Australia must have an Australian AOC and be regulated by all Australian law.

5. Safeguard Australian pilot employment and take steps to ensure that the Bill does not create the unintended consequence of former Australian pilot positions being performed by employees of, at least technically, New Zealand operators or through New Zealand pilot contracting companies.

In principle, we support uniform and consistent regulation and enforcement in each country and in the long term, even a single regulatory authority. However, the Federation is mindful that on the way to this goal, without strong definitions and safeguards, the Bill could inadvertently start a competitive "race to the bottom" of regulatory and industrial conditions and requirements. This will have potentially adverse industrial, economic and/or safety outcomes.