

CHAPTER 2

The Legislation

Background

2.1 The Airspace Bill 2006 and the Airspace (Consequential and Other Measures) Bill 2006 have been introduced as part of the Government's proposed reforms to Australian airspace. These reforms were announced by the then Minister for Transport and Regional Services, the Hon. Warren Truss, in a Ministerial Statement released on 14 September 2006.

2.2 The Statement provided an outline of the Commonwealth Government's (the Government) strategy in relation to airspace reform and confirmed its commitment to completing the implementation of the National Airspace System (NAS) and the NAS reform program. The Government has decided that each further step of the NAS reform program will be reviewed and implemented through a process that includes a safety risk assessment, a cost-benefit analysis and further detailed consultation with the Australian aviation industry.¹

2.3 Under current arrangements, Airservices Australia (Airservices) is the agency responsible for air navigation services provided to aircraft in Australian-administered airspace. In particular volumes of that airspace, Airservices is also responsible for controlling the movement of aircraft to reconcile safety, efficiency, national security, environmental protection and equity of access for all airspace users.² In certain circumstances, this task can also be performed by the Department of Defence (Defence).³

2.4 Airservices also performs the function of airspace regulator and currently makes decisions regarding the type and level of service to be provided in particular levels of airspace and, as necessary, the appropriate level of control it should exercise over the operation of aircraft in that airspace.⁴

2.5 As part of its reform program, the Government has determined that it is not appropriate for Airservices to continue to perform the service provision role in addition to its regulatory role, particularly when decisions about the designation of air

1 Mr Mike Mrdak, DOTARS, *Committee Hansard*, 31 January 2007, p. 2.

2 *Submission 5*, DOTARS, p. 2.

3 There are independent Acts and Regulations that regulate Defence aviation, including the designation of areas for military activities. The Government has indicated that there are no current plans to change these Acts and Regulations in relation to Defence authority, responsibility and accountability concerning airspace.

4 *Submission 5*, p. 2.

routes and the classification of airspace could have a profound impact on the costs borne by users.⁵

2.6 As a consequence, part of the broader strategy outlined in the Ministerial Statement includes changes to the governance arrangements in relation to airspace regulation, with the function of airspace regulation to be transferred from Airservices to the Civil Aviation Safety Authority (CASA). The Government's strategy also includes the establishment of the Office of Airspace Regulation (OAR) as a separate unit within CASA which will administer Australian airspace. The strategy also involves the employment of Defence personnel within the OAR in an attempt to ensure that civil and defence administration of airspace is streamlined.

2.7 The Ministerial Statement identified three key legislative changes required to bring the Government's airspace strategy into effect:

- the creation of the basis for CASA to become the airspace regulator through legislation;
- the transfer of the regulation function from Airservices; and
- bringing CASA under the umbrella of the *Public Service Act 1999* and the *Financial Management and Accountability Act 1997*.⁶

2.8 The first two of these legislative changes are covered by the Airspace Bill 2006 and the Airspace (Consequential and Other Measures) Bill 2006, with the transfer of the existing airspace regulations from Airservices to CASA intended to be completed by 1 July 2007.

2.9 The Government also proposes to introduce legislation to bring CASA under the umbrella of the *Public Service Act 1999* and the *Financial Management and Accountability Act 1997* later in 2007.

2.10 The legislation to establish CASA as the airspace administrator is intended to provide mechanisms to manage the following key drivers of airspace change:

- shifts in airspace usage;
- consultation with key stakeholders regarding future implementation of the NAS;
- new developments in technology and their effect on airspace efficiency and safety;
- global system requirements; and
- shifts in relations between civil and military use and administration of airspace.⁷

5 *Submission 5*, DOTARS, p. 2.

6 *Submission 5*, p. 4.

Key issues

2.11 Evidence provided to the committee indicated a significant level of support for the Government's proposed new regulatory structure. There appears to be considerable support for the transfer of powers and responsibility for the administration and regulation of Australian-administered airspace from Airservices to CASA.⁸ Some organisations however expressed concerns about specific issues, and sought clarification regarding some sections of the legislation.

Establishment of the Office of Airspace Regulation within CASA

2.12 The Regional Aviation Association of Australia (RAAA) indicated support for the transfer of responsibility for airspace regulation from Airservices to CASA – describing the move as 'logical and appropriate'.⁹ At the same time, however, the RAAA voiced some concern about CASA's capacity to fulfil its new role:

...in view of CASA's current resource management difficulties, the RAAA is not entirely convinced of CASA's ability to perform its new regulatory functions to the standard required.¹⁰

2.13 The Australian Sport Aviation Confederation (ASAC) also supported the proposed regulatory structure, but expressed the concern that matters 'of equity and efficiency did not lie easily with CASA as a regulator',¹¹ and that:

Many in the industry believe that CASA should remain the safety regulator, bound by the requirement to act on safety grounds only and not become involved in the essentially commercial issues of efficiency and access. This approach has been successful especially, but not limited to, such matters as the classification of operations and the applications of AOCs [air operator's certificate]. This concern, which limits CASA to consideration of safety matters only, should not be changed where it applies to the current safety regulatory functions carried out by CASA.¹²

2.14 Qantas Airways Ltd (Qantas) also welcomed the transfer of responsibility from Airservices to CASA, and argued that the bill and its associated instruments and processes 'present a unique opportunity to lay a strong foundation for the future policy, regulation and administration of Australian airspace',¹³ and would have a number of positive results including:

7 *Submission 5*, DOTARS, p. 3.

8 For example, *Submission 1*, ASAC, *Submission 6*, AAA, *Submission 7*, Qantas and *Submission 8*, AIPA.

9 *Submission 9*, RAAA, p. 1.

10 *Submission 9*, p. 1.

11 *Submission 1*, ASAC, p. 2.

12 *Submission 1*, p. 2.

13 *Submission 7*, Qantas, p. 6.

- streamlining of processes which currently involve regulation by three bodies (CASA, Airservices and DOTARS);
- consistency of regulation; and
- separation of policy making, commercial service and regulatory functions.¹⁴

2.15 The Australian Airports Association Limited (AAA) told the committee that they saw benefits in the separation of tasks, with Airservices providing the service rather than being both regulator and operator. The AAA argued that the establishment of the OAR, operating under the oversight of the Chief Executive Officer (CEO) of CASA would:

... strengthen Australia's planning and administration of airspace and negate any perceptions of a conflict of interest between Airservices in its role as both a commercial air navigation service provider and regulator at that level.¹⁵

2.16 During the public hearing, the committee questioned the AAA on the emphasis being placed on independence. Mr Ken Keech, CEO of the AAA, told the committee that:

You do not want too many fingers in the pie. CASA is a large organisation and if it can operate within the confines of CASA independently, so that there is no day-to-day, if you like, intrusion from other CASA people or CASA activities, it ought to get on with the job of regulating airspace.¹⁶

2.17 The committee sought an understanding of how CASA's new responsibilities in relation to the management of airspace would sit with its existing responsibilities in relation to air safety.

2.18 Departmental officers explained that CASA's overriding obligation to safety is set out in section 9A of the *Civil Aviation Act 1988*. In particular, subsection 9A(1) requires that, in exercising its powers and performing its functions, CASA must regard the safety of air navigation as the most important consideration.¹⁷

2.19 The amendment proposed in Item 2 of the Airspace (Consequential and Other Measures) Bill 2006 requires that, subject to subsection 9A(1), CASA is to perform its functions in a manner consistent with the AAPS.

2.20 Mr Mrdak told the Committee that:

14 *Submission 7*, p. 6.

15 Mr John McArdle, AAA, *Committee Hansard*, 31 January 2007, p. 25.

16 Mr Ken Keech AAA, *Committee Hansard*, 31 January 2007, p. 29.

17 Mr Mrdak, DOTARS, *Committee Hansard*, 31 January 2007, p. 10.

... this legislation now makes airspace regulation one of CASA's functions, which it previously was not. But there is no change to section 9A(1). That has been in the CASA legislation and has always been CASA's overriding requirement.¹⁸

Airspace Regulations

2.21 Qantas qualified its support for the establishment of the OAR by adding that in order for the 'framework to function effectively, a number of aspects will require further clarification and attention'.¹⁹ The committee notes in this context that the regulations provided for in clause 11 of the Airspace bill, which will provide for and confer CASA's functions and powers in relation to the administration and regulation of airspace, are yet to be made. The EM to the Airspace bill states, at paragraph 16, that 'it is likely that the majority of these regulations will be in similar terms to the regulations currently contained in Air Services Regulations Part 2'²⁰.

2.22 The committee notes that subclause 11(8) provides that:

Regulations made for the purposes of subsection (1) may make provision for and in relation to CASA delegating functions or powers to another person.²¹

2.23 The committee expressed concern at the apparently wide delegation power conferred under subclause 11(8) and sought clarification regarding the possible interpretation of this provision. Mr Mrdak, Deputy Secretary, DOTARS, referred the committee to paragraph 26 of the explanatory memorandum which states:

This delegation is most likely when decisions are required in the management of Australian-administered airspace. For example, this could occur with respect to the designation and conditions of use of an air route or airway, and the giving of directions in connection with the use or operation of designated routes and airways.²²

2.24 While the committee appreciated the intention of subclause 11(8), it remained concerned that the subclause conferred the power to delegate a very wide range of powers to anyone who fits the all-embracing description of 'a person'. The committee asked the Department to ascertain whether it would be possible to be more specific with regard to the range of powers which could be delegated and to whom they might be delegated.²³

18 Mr Mike Mrdak, DOTARS, *Committee Hansard*, 31 January 2007, p. 9.

19 *Submission 7*, Qantas, p. 6.

20 EM, Airspace Bill 2006, p. 6.

21 EM, Airspace Bill 2006, p. 7.

22 EM, Airspace Bill 2006, p. 6.

23 Senator K. O'Brien, *Committee Hansard*, 31 January 2007, p. 16.

2.25 The Department responded in writing following the hearing that:

Subsection 11(1) specifies that regulations may be made that make provision for and in relation to conferring powers and functions on CASA that are in connection with the administration and regulation of Australian-administered airspace. Any powers or functions that may become delegable under the Airspace Regulations will therefore be specific to the administration and regulation of Australian-administered airspace.

As examples, the Explanatory Memorandum notes that powers will need to be delegated by regulation from CASA in relation to the designation of air routes and airways, the conditions of use of a designated air route or airway, and the giving of directions in connection with the use or operation of a designated air route, airway. In practice, it is likely that regulations will be made which delegate these functions to Air Services Australia.²⁴

2.26 The Department's response also stated that 'if particular regulations in the Airspace Regulations make provision for a power to delegate a specific regulatory function, they will be subject to Parliamentary scrutiny and potentially disallowance'.²⁵

Australian Airspace Policy Statement

2.27 The requirement for the Minister to make an AAPS was seen as a positive development by submitters.²⁶ In particular, the Australian and International Pilots Association (AIPA) stated that:

... the requirement for an *Australian Airspace Policy Statement* under section 8 of the *Airspace Bill 2006* will provide much needed vision for airspace administration and regulation. This is in stark contrast to the previous two imposed iterations of airspace reform, in which a vacuum created by the lack of such strategic direction from Government was exploited in order to push personal, non-consensus agendas.²⁷

2.28 However, the committee noted that the legislation does not set a deadline for the completion of the AAPS and questioned Departmental officers about the absence of a finite time frame for the AAPS.

2.29 Departmental representatives acknowledged the AAPS as being a critical document and indicated that an interim AAPS was currently being developed by the Department, in consultation with Airservices, CASA and Defence. The committee

24 Correspondence from Mr Mike Mrdak, Deputy Secretary, DOTARS, dated 8 February 2007 in response to Question Taken on Notice at 31 January 2007 hearing.

25 Correspondence from Mr Mike Mrdak, Deputy Secretary, DOTARS, dated 8 February 2007 in response to Question Taken on Notice at 31 January 2007 hearing.

26 For example, *Submission 1*, ASAC; *Submission 3*, RFACA; *Submission 6*, AAA and *Submission 9*, RAAA.

27 *Submission 8*, AIPA, p. 1.

was told that the draft Statement would be subject to industry consultation as an interim and would be available for the Minister to consider issuing before 1 July 2007.

2.30 The committee was particularly concerned regarding the impact on CASA's ability to take on its new regulatory responsibilities in the event that the AAPS was not issued prior to the commencement of the Airspace bill.

Senator O'Brien – So, despite any implementation date of the legislation, CASA cannot take on that responsibility until the minister makes that statement. Is that what you are saying?

Mr Mrdak – It can certainly take on the responsibility because it has the statutory responsibility for airspace from that point, but the airspace policy statement is one of the key factors which CASA must have regard to in its decisions and its operations on airspace.

Senator O'Brien – So, if the Minister does not meet that time line, what happens?

Mr Mrdak – CASA would still assume the role of airspace regulator under the legislation without the guidance of the policy statement. But our intention is that there will be a policy statement by 1 July, although effectively it will be an interim one, pending a more detailed policy statement being developed in consultation with the industry.

Senator O'Brien – I am just curious that there is no time line in the legislation. It just says the Minister must make a statement, the Australian airspace policy statement. I am not sure how you enforce a requirement that does not have a time line.

Mr Mrdak – I think much of the effectiveness of the regime we are putting in place is around the guidance provided by the policy statement. So we have always worked on the assumption that there will be a policy statement in effective by the time the legislation takes effect.

Senator O'Brien – ... But, if for some reason that did not happen, I just want to understand what the meaning of the legislation is. I think you are telling us that CASA would assume that responsibility without the ministerial guidance.

Mr Mrdak – That is right.²⁸

2.31 The committee also noted that the timely completion of the AAPS is critical to CASA's ability to establish and staff the OAR. The central importance of the AAPS was highlighted during questioning regarding budget considerations and resource allocated for the OAR. In response to a question regarding proposed resources for the OAR, Mr Bruce Byron, CEO of CASA, told the committee that while CASA had a 'rough understanding of the number of people we need, ... we need to see the

government's airspace plan to get a full understanding of what we need to do to start with.²⁹

Consultation

2.32 The committee received evidence about the need for the Minister to consult widely with the aviation industry on the development of the AAPS and prior to any further implementation of the NAS.

2.33 The RAAA stressed the importance of the requirement for the Minister to consult with both Airservices and CASA prior to making the AAPS and added that it 'would like to think that those bodies would also consult with Industry prior to giving advice to the Minister'.³⁰

2.34 The Royal Federation of Aero Clubs of Australia (RFACA) also raised the issue of consultation with industry, and argued that clause 9:

... needs to be amended to require the Minister to consult with the Aviation Industry before formulating the Airspace policy Statement [sic]. As the industry is the sector that will have to work in the airspace, its views must be ascertained and taken into account. Lack of consultation, or consultation with noisy but unrepresentative sections of the industry lead only to bad policy that will not be accepted and will not work.³¹

2.35 Qantas noted that any 'consultation involving parties other than CASA and Airservices is at the Minister's discretion'³² and stressed the need to develop a formal framework for interaction between stakeholders and argued that:

Such a framework, which we assume would be led by CASA, would serve as the basis for a balanced decision-making process. Provision for a dispute resolution or arbitration mechanism, possibly with the services of an independent expert, may also be appropriate.³³

...

While there is no existing group under current arrangements that could fulfil this role, the current Standards Consultative Committee (SCC) appears to provide a successful model in terms of industry participation, extensive consultation and producing relevant outcomes.³⁴

29 Mr Bruce Byron, CASA, *Committee Hansard*, 31 January 2007, p. 12.

30 *Submission 9*, RAAA, p. 1.

31 *Submission 3*, RFACA, p. 1.

32 *Submission 7*, Qantas, p. 6.

33 *Submission 7*, p. 7.

34 *Submission 7*, p. 7.

Dispute resolution

2.36 Several submitters argued that in addition to the need for a formal consultation process, there is also a need for the legislation to include a mechanism for dispute resolution.

2.37 The AIPA stated that:

AIPA's preference for resolving disputes on airspace classification involves having a default or benchmark airspace classification with the least regulation and procedural requirements (i.e. Class G) and then adjusting this minimum classification when risk levels and operational priorities have been demonstrated to require it. AIPA highlights however, that the change management process determining risk and prioritising operations must be clearly defined within the proposed *Airspace Policy Statement*.³⁵

2.38 The RAAA also argued that the Airspace bill lacks a formal procedure for resolving any conflict which may arise between the Minister's view and the views of the major stakeholders – including CASA, Airservices and industry – particularly in relation to matters of safety. The RAAA suggested that:

Such a procedure must be formalised, inexpensive and transparent if we are to prevent the possibility of a repetition of the National Airspace System debacle of recent years.³⁶

Cost recovery

2.39 The committee received evidence which raised concerns about the issue of cost recovery and the potential impact on industry.³⁷

2.40 The Aviation Safety Foundation Australasia (ASFA) asked the committee to accept that 'airspace regulation will, once the Bill becomes law, be managed by CASA, in conjunction with the Department of Defence, in the national interest'³⁸, and that:

As such, the proposed recovery costs of CASA performing the airspace regulation and administration should only be partially recovered from the civil aviation industry. As the proposed Airspace Bill 2006 is predicated on safety of air navigation being the most important consideration, then a risk assessment on the impost of any charges on industry should become an integral part of the decision making process.³⁹

35 *Submission 8*, AIPA, p. 2.

36 *Submission 9*, RAAA, p. 1.

37 For example, *Submission 2*, ASFA; *Submission 8*, AIPA; and *Submission 10*, RAA.

38 *Submission 2*, ASFA, p. 2.

39 *Submission 2*, p. 3.

2.41 Recreational Aviation Australia (RAA) also supported the partial recovery of the costs of airspace regulation and administration from the civil aviation industry. However, RAA argue 'that for VFR [visual flight rules] operations outside controlled airspace the status quo should remain with no cost impost on those operations'.⁴⁰

2.42 The RFACA also expressed concern that the changes to airspace administration may result in extra charges going through to Airservices, an increase in air navigation charges and higher costs to the industry.⁴¹

2.43 In evidence, Mr Mike Mrdak, Deputy Secretary of DOTARS gave the committee an overview of the budget arrangements being put in place for the establishment of the OAR. Mr Mrdak indicated that:

- the government has made \$2 million available to CASA this financial year for the establishment of the OAR;
- the \$2 million is being budget funded and will not be a direct cost to the industry and will allow the OAR to be established and staff trained by 1 July 2007;
- funding of the OAR beyond 1 July 2007 will be done through a resourcing agreement between CASA and Airservices for at least the first three years (subject to a review);
- it is intended that CASA's costs in operating the OAR will be recovered from Airservices ; and
- the Government has allocated \$4.2 million to DOTARS in the forward estimates for 2007-08 (for the development of the Airspace Policy Statement and for its ongoing policy role in relation to airspace).⁴²

Committee comment

2.44 The committee has considered the provisions of the Airspace Bill 2006 and the Airspace (Consequential and Other Measures) Bill 2006 and acknowledges that these bills have been introduced as part of the Government's ongoing reforms to the regulation of Australian airspace.

2.45 The committee's inquiry has highlighted the significance of the Minister's Australian Airspace Policy Statement (AAPS) in providing policy guidance to CASA in the exercise of its functions and powers in relation to airspace regulation. The committee notes that processes are in train to develop an interim AAPS and that there is an expectation that the Minister will make this interim AAPS by 1 July 2007. The committee also notes that there is an expectation that this interim statement will be reviewed and replaced by a more detailed AAPS after 1 July 2007.

40 *Submission 10*, RAA, p. 1.

41 Mr Graham King, RFACA, *Committee Hansard*, 31 January 2007, p. 21.

42 Mr Mike Mrdak, DOTARS, *Committee Hansard*, 31 January 2007, p. 5.

2.46 The Committee is of the opinion that the timely release of the AAPS is central to the smooth transfer of the function of airspace regulation from Airservices Australia to the Civil Aviation Safety Authority. While noting the expectation that an interim statement will be in place at the point that the responsibility for management of Australian airspace is transferred from Airservices to CASA, the committee also believes it is desirable that the Parliament and the Australian aviation industry have some confidence that this will be the case. The committee therefore recommends that the Airspace bill be amended to provide that the Minister must make the AAPS within a specified timeframe. The committee notes that subclause 8(5) of the bill provides that the AAPS will be a legislative instrument and must be tabled as required by the *Legislative Instruments Act 2003*, but it is not disallowable and is not sun-settable. In addition to this tabling requirement, the committee considers it highly desirable that the statement be published in a readily accessible form.

2.47 The committee's inquiry has also highlighted the importance of consultation with key stakeholders in the development of the AAPS. The Committee notes that in announcing these reforms, Minister Truss acknowledged that regardless of individual views regarding the NAS reforms, industry was keen to be involved in the policy development process and that this would require 'more genuine consultation on future reforms'.⁴³

2.48 The Minister also stated that future reforms will be subject to the results of closer consultation with stakeholders and take account of the impact of upcoming technological developments, adding that:

The application of better analysis and consultation should reduce unproductive controversy. Better analysis and consultation on reforms may ultimately see future reforms put in place sooner than otherwise.⁴⁴

2.49 The committee considers that this commitment to industry consultation would be given more effective legislative expression if the Airspace bill were amended to require the Minister to consult with the Australian aviation industry, rather than to leave this to Ministerial discretion.

2.50 The committee remains concerned at the apparent breadth of the delegation power conferred under subclause 11(8) of the Airspace bill and recommends that limits be set in relation to the types of powers that may be delegated and the categories of people to whom these powers may be delegated.

Recommendation 1

2.51 The Committee recommends that clause 8 of the Airspace Bill 2006 be amended to require that a statement made under subclause 8(1) must be made

43 Ministerial Statement on Australian Airspace, *Better Australian Airspace Management*, The Hon. Warren Truss, Minister for Transport and Regional Services, 14 September 2006, p. 2.

44 Ministerial Statement on Australian Airspace, *Better Australian Airspace Management*, The Hon. Warren Truss, Minister for Transport and Regional Services, 14 September 2006, p. 3.

not later than 1 July 2007 and that such a statement must be published in a readily accessible form in addition to the tabling requirements which apply pursuant to subclause 8(5) of the bill.

Recommendation 2

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

Recommendation 3

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

Recommendation 4

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

Senator the Hon. Bill Heffernan
Chair