

1995

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

AIR SERVICES BILL 1995

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Defence, for the Minister
for Transport Senator the Honourable Robert Ray)

THIS MEMORANDUM TAKES ACCOUNT OF AMENDMENTS MADE BY THE
HOUSE OF REPRESENTATIVES TO THE BILL AS INTRODUCED



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AIR SERVICES BILL 1995

OUTLINE

The purpose of the Bill is to establish Airservices Australia (AA) as a government business enterprise to provide Australia's national airways system. AA's functions will include:

provision of facilities to permit safe navigation of aircraft;

provision of air traffic services, an aeronautical information service, an aviation rescue and fire-fighting service, an aviation search and rescue service, and aeronautical communications; and

- specified aviation environmental activities and regulation.

Airservices Australia will complement the aviation safety regulation role of the Civil Aviation Safety Authority (CASA) which is to be established as a statutory authority under separate legislation by providing a range of safety-related air services.

In the performance of its functions, AA must regard the safety of air navigation as its most important consideration. Subject to this requirement, AA must perform its functions in a manner that ensures that, as far as is practicable, the environment is protected from the effects of aircraft operations.

AA will be governed by a Board comprising a Chairperson, Deputy Chairperson, Chief Executive Officer (CEO) and six other members. The CEO will be appointed by the Board on such terms and conditions as it determines.

Staff will be employed on terms and conditions determined by the Board.

The finance provisions in the Bill, including those relating to the corporate plan, are consistent with provisions contained in the *Commonwealth Authorities and Companies Act 1995*, which establishes core accountability and finance provisions for Commonwealth bodies. The provisions relating to Ministerial direction, the Board, the Chief Executive Officer and miscellaneous matters are explained in the Notes on Clauses.

The Bill provides that AA will be subject to the full range of Commonwealth taxes.

The Bill provides for the Board to set charges for services and facilities. These charges will be subject to the *Prices Surveillance Act 1983*. AA will be able to impose penalties for late payment of service charges and the existing scheme for statutory liens is continued. Specified decisions made by AA in relation to charges and statutory liens may be reviewed by the Administrative Appeals Tribunal.

AA will be able to deal in real property and will not be subject to the *Lands Acquisition Act 1989* in its ordinary dealings.

AA will have the power to make regulations covering a range of matters such as the environmental effects of aircraft operations, designation of airspace and air navigation.

FINANCIAL IMPACT STATEMENT

There are no implications in the Bill for additional costs in the public sector. Industry will continue to fund the services and facilities provided by AA except for search and rescue services, the costs of which will continue to be met from the Budget. Matters associated with the establishment of CASA and transitional arrangements are dealt with in the Civil Aviation Legislation Amendment Bill.

NOTES ON CLAUSES

PART 1 - PRELIMINARY

Clause 1 - Short title

The Bill, when enacted, will be known as the *Air Services Act 1995*.

Clause 2 - Commencement

Subject to subclause (2), the Bill will commence on Proclamation. If the Bill is not proclaimed, it will commence automatically six months after the Act receives the Royal Assent.

Subclause (2) provides that those sections of the Bill that either refer to the *Commonwealth Authorities and Companies Act 1995* (the “CAC Act”) or that implement revised government business enterprise (GBE) accountability arrangements associated with the CAC Act, will commence on the same day as that Act. There are transitional provisions in the Civil Aviation Legislation Amendment Bill 1995 (the CAL Amendment Bill) for the interim application of relevant provisions of the *Civil Aviation Act 1988* (the “CA Act”) to fill the void if this Bill commences before the CAC Act.

Clause 3 - Interpretation

Subclause (1) defines terms used in the Bill. Most of the terms are defined in the same manner as they are in the CA Act. The acronym “AA” is substituted for “the Authority” as it appears in that Act.

Of particular significance are the following:

The term “**Australian-administered airspace**” is defined for the first time as meaning:

- the airspace over Australian territory;
- the airspace over international waters allocated to Australia by the International Civil Aviation Organization (ICAO) and for which Australia has accepted responsibility;
- the airspace administered by Australia on a temporary basis at the request of another country eg this enables Australia to enter into a

contract with a foreign Government to provide services on its behalf.

The term Australian-administered airspace is used in paragraph 8(1)(a) which specifies one of AA's main functions as "providing facilities to permit safe navigation of aircraft within Australian airspace".

The purpose of this definition is to reflect the current situation where infrastructure is no longer provided solely along airways or air routes between centres, but across the whole of the airspace administered by Australia through a combination of ground and satellite based facilities. The air services are provided into oceanic regions and may in future be provided to assist neighbouring states.

- **"Commonwealth jurisdiction aircraft"** has the same meaning as defined in subsection 9AA(1) of the CA Act. It means any aircraft that comes within the scope of one of several of the relevant heads of legislative power conferred on the Commonwealth by the Constitution, namely:
 - (a) aircraft being operated
 - (i) in the course of trade and commerce with other countries or among the States; or
 - (ii) in the course of, or for the purposes of, the provision of services by a trading corporation (within the meaning of paragraph 51(xx) of the Constitution); or
 - (iii) by a foreign corporation (within the meaning of the same paragraph of the Constitution); or
 - (iv) in a Territory, between Territories or between a Territory and a State; or
 - (v) in journeys to or from places that have been acquired by the Commonwealth for public purposes eg: Federal airports; or
 - (b) is in the possession or under the control of the Commonwealth or an authority of the Commonwealth; or
 - (c) being used wholly or mainly for a purpose of the Commonwealth.

The term "Commonwealth jurisdiction aircraft" is used in paragraphs 8(1)(d), 8(1)(e) and 75(2)(f) which deal with AA's environmental "charter". The Bill operates on the basis that the Commonwealth's powers in respect of environmental matters are limited.

Clause 4 - Act binds the Crown

This clause provides that the Act will bind the Crown in all capacities.

Clause 5 - Extension to external Territories

This clause extends the application of the proposed Act to all the external Territories.

Clause 6 - Extra-territorial application

This clause extends the application of the proposed Act outside Australian territory. AA has functions in respect of "Australian-administered airspace" which is defined as including airspace outside Australian Territory.

PART 2 - ESTABLISHMENT, FUNCTIONS AND POWERS OF AIRSERVICES AUSTRALIA (AA)

Division 1 - Establishment of AA

Clause 7 - Establishment of AA

This clause establishes AA as a body corporate, which may sue or be sued in its corporate name, and requires judicial notice to be taken of AA's seal on any document.

Division 2 - AA's functions and powers

Clause 8 - AA's functions

Subclause (1) sets out AA's main functions. These are:

- providing facilities, eg air navigation installations such as beacons, to permit safe navigation of aircraft within "Australian-administered airspace";
- providing the following services to meet Australia's obligations under the Convention on International Civil Aviation, Chicago, 1944 or otherwise for promoting the safety, regularity or efficiency of air navigation:

- air traffic services (which includes air traffic control, flight information and alerting services);
 - an aeronautical information service;
 - rescue and firefighting services;
 - a search and rescue service;
 - an aeronautical radio navigation service; and
 - an aeronautical telecommunications service;
- co-operating with the Bureau of Air Safety Investigation (BASI) in relation to the investigation of aircraft accidents and incidents;
 - carrying out specific activities to protect the environment from the effects of, and effect associated with, the operation of "Commonwealth jurisdiction aircraft" (this will include such matters as noise abatement procedures and noise monitoring);
 - any environmental functions prescribed by the regulations that relate to any of the matters associated with the operation of "Commonwealth jurisdiction aircraft" (this will include such matters as investigations of, and providing compensation for, damage caused by wake vortices);
 - any functions conferred on the AA under the *Air Navigation Act 1920*;
 - any other functions, prescribed by the regulations, that relate to any of the matters referred to in the subclause;
 - providing consultancy and management services relating to any of the matters referred to in the subclause; and
 - any functions incidental to any of these functions.

Subclause (2) will enable AA to provide its services and facilities not only within but also outside Australian territory. This would include providing air traffic control in oceanic airspace or training and other services to foreign governments.

Subclause (3) will enable AA to determine in any particular case whether or not to provide services and facilities in accordance with its functions. In a specific location or region it is necessary for discretion to be exercised over the level of service to be provided. AA will have to weigh up the financial and safety impacts of all such decisions. This would be done in consultation with all affected bodies in accordance with clause 10. However, in exercising this discretion AA must regard the safety of air navigation as the most important consideration and, in addition, the Minister may direct AA to provide particular services or facilities under clause 15.

Subclause (4) enables AA to provide services and facilities under contract. Contractual arrangements could be used in situations where AA considers services and facilities are not required at particular locations, having regard to

the safety of air navigation, but where there is a request to provide these services or facilities. An example is the current provision of a control tower at Port Hedland at the request of the local Council. The CAA did not consider this level of service was necessary on safety grounds. Contractual arrangements will also facilitate AA providing services to foreign governments.

Clause 9 - Manner in which AA must perform its functions

Under subclause (1) AA will be required to regard the safety of air navigation as the most important consideration when performing its functions and exercising its powers.

Under subclause (2), AA will be required to exercise its powers and perform its functions in an environmentally responsible manner but this is subject to the safety of air navigation being its most important consideration.

Subclause (3) will require AA to perform its functions in a way that is consistent with Australia's international obligations concerning the safety of air navigation.

Clause 10 - AA must consult and cooperate

This clause will require AA to consult where appropriate, with government, commercial (particularly the aviation industry), industrial (trade unions), consumer and other relevant bodies and organisations including ICAO.

Clause 11 - AA's general powers

Subclause (1) empowers AA to do anything necessary or convenient in relation to the performance of its functions.

Subclause (2) sets out a number of specific AA powers which are not intended to limit the scope of subclause (1). Subject to other provisions of the Bill, these include the powers to:

- enter into contracts;
- acquire, hold and dispose of all forms of property;
- form or join in the formation of companies;
- enter into partnerships;
- let on hire plant, machinery, equipment or goods of the AA that it does not immediately require;

- raise money; and
- do anything incidental to any of its powers.

Subclause (3) provides that AA may provide services and facilities itself, in co-operation with another person or arrange for another person to do so on its behalf. (The reference to 'another person' includes the Commonwealth.)

Subclause (4) enables the AA to appoint one or more bodies to advise it about the performance of its functions. Such bodies might be advisory groups, involving aviation industry or industrial organisation representatives.

This clause is in similar terms to section 13 of the CA Act.

Clause 12 - Delegation of AA's powers by Chief Executive Officer

This clause, which is substantially similar to section 94 of the CA Act, empowers the CEO to delegate any of AA's powers under the Bill to a member of AA's Board or an AA employee. In exercising powers under the delegation, the delegate must comply with the CEO's directions.

Division 3 - Miscellaneous

Clause 13 - Matters to be considered in preparation of corporate plan

This clause deals with the preparation of a corporate plan under section 17 of the CAC Act. Under that provision, the members of the AA Board will be required to prepare annually a corporate plan for submission to the responsible Minister. The plan is to include certain information as a minimum and is a vehicle for AA, as a GBE, to inform the responsible Minister about the strategic direction proposed by AA. Corporate plans are a key element in the Government's accountability arrangements applying to GBEs.

The provisions of the clause complement the CAC Act requirements. In preparing corporate plans the members must consider:

- the need for high standards of aviation safety;
- the objectives and policies of the Commonwealth Government known to the Board;
- any directions given by the Minister under clause 15;
- any payments made by the Commonwealth to AA to fund its search and rescue services;

- the need to maintain a reasonable level of reserves, having regard to estimated future infrastructure requirements;
- the need to earn a reasonable rate of return on AA's assets (other than assets wholly or principally used in the provision of search and rescue services);
- the expectation of the Commonwealth that AA will pay a reasonable dividend;
- any other commercial considerations the Board thinks appropriate.

The list of factors to be considered includes the need for high standards of aviation safety but requires the Board to consider also the Commonwealth's expectations of AA regarding both commercial performance and Commonwealth policies. Particular dividend and rate of return requirements will be set from time to time within the terms of the clause.

This provision will commence at the same time as the CAC Act. If the CAC Act is not in force on the date when this Bill comes into operation, the provisions of sections 43 to 45 of the CA Act will apply instead, until the CAC Act commences. (This outcome is achieved by the savings provisions of the CAL Amendment Bill.)

Clause 14 - Minister may direct variation of corporate plan

This clause empowers the Minister to direct the members of the AA Board to vary the corporate plan in respect of financial targets and performance indicators within 60 days of receiving it.

The power to vary corporate plans in relation to financial matters assists the Minister to exercise strategic control over AA as part of his/her responsibility as its 'owner' on behalf of the Commonwealth.

This provision will commence at the same time as the CAC Act. If the CAC Act is not in force on the date when this Bill comes into operation, the provisions of section 47 of the CA Act will apply instead, until the CAC Act commences. (This outcome is achieved by the savings provisions of the CAL Amendment Bill.)

Clause 15 - Ministerial directions to AA

Subclause (1) will enable the Minister to give written directions to AA concerning the performance of its functions or the exercise of its powers.

Subclause (2) will require the particulars of any directions given by the Minister in a financial year to be included in the AA annual report for that year.

Subclause (3) will require AA to comply with a direction given under subclause (1) by the Minister.

Subclause (4) will enable the Minister to reimburse AA for any financial detriment incurred as a result of complying with a Ministerial direction given under the clause. The amount to be paid is the sum that the Minister determines in writing to be the amount of that financial detriment. The subclause defines "financial detriment" as including:

- incurring costs that are greater than would otherwise have been incurred; and
- foregoing revenue that would otherwise have been received.

Under subclause (5) AA will not be entitled to any reimbursement in respect of a direction of the Minister requiring AA to carry out environmental activities (see paragraph 8(1)(d)). This exclusion is based on the principle that the 'polluter' should pay for these activities.

Subclause (6) does not affect the operation of the proposed section 28 of the CAC Act which requires the directors of AA to comply with 'general policies' of Government. Section 28 does not cover Ministerial directions as such, but requirements to comply with policies that the Government wishes to have applied broadly across the public sector, eg actions associated with a particular foreign policy matter.

The entitlement to reimbursement under subclause (4) applies only to directions under this section. It does not, therefore, apply to directions given under clauses 14 or 45 of the Bill

In substance this clause combines section 12 ("Directions") and section 48 ("Reimbursement of cost of complying with directions") of the CA Act.

Clause 16 - Minister may give AA notices about its strategic direction etc.

This clause will allow the Minister to notify AA of his or her views on the appropriate strategic direction of AA and the manner in which it should perform its functions.

Notices under this clause would assist the Minister to exercise strategic control over AA without altering its functions or powers as provided by the Act.

Notices would allow the Minister to put to AA in general terms the Government's expectations as owner on, for example, the appropriate balance between its functions, its appropriate strategic direction at turning points in its history, the standard to which its individual functions should be performed or the principles of its operations

Notices would not affect AA's responsibility for business strategies and management.

AA is to take account of notices in performing its functions and preparing its corporate plan. To ensure transparency, AA is to summarise in its annual report, the notices given in the year and the action taken during the year because of notices given under this section in any year.

Clause 17 - Supply of information to Minister's nominee

This clause provides that the Minister may direct AA to give to his or her “**ministerial nominee**”, on request, documents or information relating to the operations of AA. AA must comply with such a direction.

A “**ministerial nominee**” is a person whose responsibilities or duties include advising the Minister about the performance and strategies of AA.

The clause is intended to facilitate, for example, the provision of information to consultants employed by the Minister to review AA's operations. It is also intended to provide protection for members of AA whose fiduciary duty might otherwise prevent the provision of information.

Particulars of directions given in a financial year are to be included in AA's annual report for that year.

Clause 18 - Immunity of AA from State and Territory land use laws

The clause, which is the same in substance as section 11A of the CA Act, will give AA immunity from State land use laws in certain limited circumstances.

A State land use law (as defined in subclause 18(4)) will not apply to AA or its property where it is necessary to perform one of its functions that is directly related to the safety of air navigation, that is, the provision of facilities or the provision of air traffic services and aeronautical communication services. Thus such land use laws would not apply in relation to the use of land to construct radar or other navigational aid facilities but would apply to buildings for administrative purposes. The equivalent CA Act provision has been in force since 1990.

It is intended that this particular provision will only be used where the matter is essential to the performance of AA and negotiations with State or local government authorities have not led to agreement with the parties involved.

PART 3 - BOARD OF AA

The provisions of this Part closely follow those of Part IV of the CA Act. The part has been redrafted and reorganised for consistency with the provisions of the CAC Act and for greater clarity.

Division 1 - Establishment and functions

Clause 19 - Establishment

This clause establishes a Board of AA.

Clause 20 - Functions

Subclause (1) of the Bill gives the Board the functions of:

- deciding the objectives, strategies and policies to be followed by AA; and
- ensuring that AA performs its functions in a proper, efficient and effective manner.

Subclause (2) makes it clear that anything that the Board does in AA's name or on its behalf is to be taken to have been done by AA.

Clause 21 - Membership

Under subclause (1) the Board will consist of 9 members as follows:

- a Chairperson;
- a Deputy Chairperson;
- a Chief Executive Officer; and
- 6 other members.

Subclause (2) provides for members, other than the CEO, to be appointed by the Minister and to hold office on such terms and conditions as are specified in the Bill and as are determined in writing by the Minister. (The terms and conditions provided for by the Bill cover such matters as remuneration and allowances of appointed members, constraints on outside employment, leave of absence, resignation of appointed members and termination of their appointment.)

The terms and conditions of the CEO are provided for in Part 4 of the Bill.

Under subclauses (3) and (4), the Chairperson may be appointed on a full-time or part-time basis but the appointed members are to be appointed on a part-time basis.

Subclause (5) provides that an employee of AA may be appointed as a member of the AA Board.

Subject to drafting improvements this clause is substantially the same as section 33 of the CA Act.

Clause 22 - Delegation by Board

This clause will enable the Board, by resolution, to delegate all or any of its powers to a member or to an employee of AA and provides that a delegate will, in the exercise of a delegated power, be subject to the directions of the Board.

Subclause (3) provides for the Board by resolution to revoke a delegation. A delegation continues in force in spite of a change in the membership of the Board which passed the original resolution.

Under subclause (4) a certificate signed by the Chairperson making any statement in relation to a delegation under the section will be *prima facie* evidence of the matter stated.

Under subclause (5) a document that appears to be a certificate under subclause (4) is to be taken to have been properly given unless the contrary is established.

This clause is, in substance, the same as section 94A of the CA Act.

Division 2 - Meetings etc.

Clause 23 - Meetings

This clause sets out the basic requirements for meetings of the AA Board.

Subclause (1) requires the Board to hold such meetings as are necessary for the efficient performance of its functions.

Under subclause (2) the Chairperson will be able to convene a meeting at any time but will be required to do so when requested to do so by at least two other members.

Under subclause (3) the Minister will be able to convene a meeting at any time.

Under subclause (4), the Chairperson will be required to preside at all meetings at which he or she is present. In circumstances where the Chairperson is not

present at a meeting, subclause (5) requires the Deputy Chairperson to preside or, if that person is not present, the members present must appoint one of their number to preside.

Subclause (6) provides that a quorum at a meeting is 5 members. Subclause (7) requires all questions arising at a meeting to be determined by a majority of the votes of those members present and voting.

Under subclause (8), the person presiding at a meeting has a deliberative vote and, if necessary, also a casting vote.

This clause is in identical terms to section 39 of the CA Act.

Clause 24 - Procedure at meetings

The provisions of this clause are based on those of section 39A of the CA Act. Subsections (2) and (3) of section 39A of that Act are now included in section 33B of the *Acts Interpretation Act 1901*. (That section allows for meetings to be held by telephone, closed circuit television or any other means of communication. The section also sets out certain circumstances in which a member is to be regarded as being present at a meeting.)

Subclause (2) will enable the Board to invite a person to attend a meeting to advise or inform it on any matter.

Clause 25 - Board resolutions without meetings

This clause sets out a procedure which will enable the Board to take resolutions without meeting.

Similar provisions are incorporated in legislation establishing other GBEs. They are intended to give flexibility to enable urgent matters to be resolved by members of the Board without the necessity of physically attending a face-to-face meeting.

Subject to drafting improvements this clause is substantially the same as section 39B of the CA Act.

Division 3 - Administrative provisions

Clause 26 - Period of appointment of appointed members

Subject to the other provisions in Part 3, an appointed member holds office for a period specified in the instrument of his or her appointment. That period

must not be longer than 5 years. An appointed member is eligible for reappointment (subclause (2)).

Subject to drafting improvements this clause is substantially the same as section 34 of the CA Act.

Clause 27 - Remuneration and allowances of appointed members

This clause provides that all members appointed by the Minister (ie, the Chairperson, Deputy Chairperson and other members apart from the CEO) are to be paid the remuneration that is determined by the Remuneration Tribunal. Where no such determination is in force, the remuneration may be set by regulation.

Appointed members will be paid allowances that are prescribed by the regulations.

Subclause (3) states that clause 27 is subject to the *Remuneration Tribunal Act 1973*. Under subsection 7(11) of that Act, an employee of AA who is an appointed member of the AA Board would not be eligible to be paid any remuneration for performing the duties of an appointed member, unless regulations were made providing for such remuneration.

Subject to drafting improvements, this clause is substantially the same as section 35 of the CA Act.

Clause 28 - Outside employment

Subclause (1) will prohibit a full-time Chairperson from engaging in paid employment outside the duties of the office except with the Minister's approval.

Subclause (2) will prohibit a part-time member from engaging in any paid employment that in the Minister's opinion conflicts with the proper performance of the member's duty.

Subject to drafting improvements this clause is substantially the same as section 36 of the CA Act.

Clause 29 - Leave of absence

Subclause (1) makes provision for the recreation leave entitlements of a full-time Chairperson.

Subclause (2) sets out the Minister's power to grant a full-time Chairperson leave of absence, other than recreation leave, on terms and conditions determined by the Minister in writing. Similarly, under subclause (3), the Minister may grant leave to a part-time Chairperson to be absent from a meeting or meetings of the Board.

Subclause (4) will enable the Chairperson to grant leave to another member to be absent from a meeting of the Board.

Subject to drafting improvements this clause is substantially the same as section 37 of the CA Act.

Clause 30 - Resignation of appointed members

This clause will enable an appointed member to resign from the Board by giving the Minister a written resignation.

Subject to drafting improvements this clause is substantially the same as section 41 of the CA Act. It is a standard provision concerning members appointed to statutory boards.

Clause 31 - Termination of appointment of appointed members

Subclauses (1) and (2) set out all the circumstances in which the Minister will be able to terminate the employment of an appointed member. These include:

- for misbehaviour or physical or mental incapacity;
- if the member becomes bankrupt, or takes other action of a related kind; or
- if the member (other than a full-time Chairperson) engages in paid employment that the Minister thinks conflicts with the proper performance of the member's duties, or is absent, except on leave of absence that is granted under clause 29, from three consecutive meetings of the Board; or
- unsatisfactory performance for a significant period of time; or
- failure, without reasonable excuse, to comply with the requirements of section 21 of the CAC Act. These oblige members of boards of Commonwealth authorities to disclose any pecuniary interest they may

have in a matter to be considered at a Board meeting. Unless the Board or the Minister decides otherwise, the member must not be present when the Board deliberates on the matter. Further, the member must not take part in any decision of the Board on the matter. (Section 40 of the CA Act is in similar terms to section 21 of the CAC Act.)

Subclause (3) will enable the Minister to terminate the appointment of a full-time Chairperson in one or other of two situations, namely:

- if the Chairperson engages in paid outside employment without Ministerial approval; or
- is absent from duty, except on leave of absence, for a specified period.

Subclauses (4) and (5) set out all the circumstances in which the Minister will be able to terminate the appointment of all appointed members, or any of them. The Minister will be able to do so if he or she is of the opinion that:

- the performance of the members or of the AA itself has been unsatisfactory for a significant period of time;
- there has been a failure to comply with clause 17 (supply of information to Minister's nominee) or specified sections of the CAC Act (preparing interim financial statements and supplying them to the Minister; notifying the Minister of significant events and keeping the Minister informed).

Subject to drafting improvements this clause is similar to section 42 of the CA Act and other legislation establishing statutory authorities which are GBEs.

Clause 32 - Acting appointments

Subclauses (1) and (3) will allow the Minister to appoint members (other than the CEO or an employee) to act as Chairperson or Deputy Chairperson.

Subclause (2) deals with acting appointments to the position of Chairperson if the Chairperson is a part-time member.

Subclause (4) will allow the Minister to appoint a person to act as an "ordinary member" of the AA.

Subclause (5) ensures that certain specified circumstances do not invalidate things done by those holding acting appointments under the clause.

This clause is substantially the same as section 38 of the CA Act, except that it does not include a limitation of 12 months on acting appointments. (That provision is now included in section 33A of the *Acts Interpretation Act 1901*.)

PART 4 - CHIEF EXECUTIVE OFFICER, EMPLOYEES AND CONSULTANTS

Division 1 - Chief Executive Officer

The provisions in this Division are similar to those in Part VII sections 84-90 of the CA Act. However, there are several significant differences which are referred to in the specific explanatory notes on clauses below.

The headings of clauses also differ somewhat from the headings in the CA Act.

Clause 33 - Appointment

Subclause (1) establishes the position of CEO and provides for appointment to be by the Board, in writing. This manner of appointment differs from section 84 of the CA Act under which the CEO of the CAA is appointed by the Minister after receiving a recommendation from the Board.

The change has been made to accord with general Government policy in relation to the appointment of the CEO of a GBE. As the Board is responsible for the business strategies and management of the GBE it should have the right to appoint the CEO.

Under subclause (2) the CEO will be eligible for reappointment.

Subclause (3) provides that the CEO holds office on such terms and conditions as are specified in the Bill and, if appropriate, as are determined by the Board in writing (eg arrangements covering the early termination of the appointment).

Clause 34 - Duties

The CEO is responsible, under the Board, for managing the AA so that anything done in the name of the AA by the CEO is taken to have been done by the AA.

These provisions are the same as those of section 84A of the CA Act.

Clause 35 - Remuneration and allowances

The CEO is to be paid such remuneration and allowances as are determined by the Board - as is the case with the CEO of the CAA (see section 86 of the CA Act).

Clause 36 - Outside employment

This clause prevents the CEO from engaging in outside work except with the Board's approval. This provision reflects section 85 of the CA Act and is consistent with Government policy in respect of GBEs.

Clause 37 - Leave of absence

This clause enables the Board to grant leave of absence to the CEO under terms and conditions determined by the Board in writing (this clause is the same as section 87 of the CA Act).

Clause 38 - Resignation

This provision is identical to section 88 of the CA Act. It allows the CEO to resign by writing to the Board.

Clause 39 - Termination of appointment

Under clause 39 the Board may, at any time, terminate the appointment of the CEO. (Arrangements covering an early termination of a CEO's employment can be included in terms and conditions of his or her appointment that are determined by the Board - see clause 33.) This is the same in substance as section 89 of the CA Act.

Clause 40 - Acting Chief Executive Officer

Subclause (1) will enable the Board to appoint a person to act as CEO during a vacancy or absence of the appointed CEO. The limitation of 12 months on such an appointment in subsection 90(1) of the CA Act has been omitted because it is now contained in section 33A of the *Acts Interpretation Act 1901*. Unlike subsection 90(2) of the CA Act, a person, other than an employee, who acts as CEO is to be paid such remuneration and allowances that the Board determines rather than the same remuneration and allowances as are payable to the CEO. This will enable the Board to remunerate the Acting CEO appropriately, taking account of all the circumstances.

Subclause (3) provides for an employee acting as the CEO to continue to be paid the remuneration and allowances payable to him or her as an employee but also to be paid such additional remuneration and allowances as the Board determines.

Subclause (4) ensures that certain specified circumstances do not invalidate things done by a person acting as the CEO

The provisions of this clause are similar to, but more flexible than, those of section 90 of the CA Act.

Division 2 - Employees and consultants

These provisions are in similar terms to those in sections 91 and 92 of the CA Act.

Clauses 41 and 42 - Employees and Consultants

These clauses will provide for the staff of the AA to be persons employed by the AA on terms and conditions determined by the Board in writing. The transitional provisions contained in the CAL Amendment Bill will initially preserve the existing terms and conditions of employees. The provisions enable AA to engage such consultants as it thinks necessary

These provisions will enable AA to second staff from CASA or another agency to work as staff of the AA for a specified term.

PART 5 - FINANCE

This Part is similar to Part 5 of the CA Act. However, many of the provisions have been redrafted and reorganised for consistency with the CAC Act and for greater clarity.

Division 1 - General

Clause 43 - AA's capital

Subclauses (1) and (2) provide for the initial capital of AA to be the capital of the CAA immediately before the Act comes into force less any amount determined by the Minister and the Minister for Finance as representing the net value of assets transferred to CASA under section 9 of the CAL Amendment Bill.

Under subclause (3) interest will not be payable to the Commonwealth on the capital of AA, but that capital will be repayable to the Commonwealth at the times and in the amounts that the Minister determines in writing. Provision is made for the AA Board to advise the Minister on its financial affairs before the Minister makes a determination.

Clause 44 - Revaluation of assets

The Board will be required to ensure that, at least every 5 years, AA's assets are revalued in a manner it considers appropriate, but which accords with prevailing commercial practice. However, if the Minister and the Minister for Finance disagree with this method revaluations would be carried out in the manner agreed between the Ministers. The revaluations are intended to ensure that AA's assets are valued in an appropriate manner at regular intervals.

This clause is the same as section 54A of the CA Act.

Clause 45 - Payments of dividends by AA to the Commonwealth

Under subclause (1) the Board must recommend to the Minister within 4 months of the end of each financial year that AA will (or will not) pay a dividend of a specified amount for that financial year.

Subclause (2) requires the Board, when making such a recommendation, to have regard to certain matters, including AA's financial results for that financial year and previous financial years, and previous dividend payments.

Under subclause (3) the Minister must respond in writing to the Board's recommendation within 30 days, either accepting the recommendation or directing AA to pay a different dividend.

Subclause (4) sets out the matters which the Minister must have regard to when acting under subclause (3).

Under subclauses (5) and (6), a dividend approved or directed to be paid by the Minister must be paid by AA to the Commonwealth within 8 months after the end of that year and payment may be made out of AA's profits for the financial year to which the payment relates or AA's profits for any earlier financial year or a mixture of both.

The clause is in similar terms to those of section 56 of the CA Act

Clause 46 - Interim dividends

The clause provides for AA to pay interim dividends by 15 June in the financial year to which the dividend relates. The interim dividend procedure mirrors, as far as practicable, the procedure in clause 45 for the payment of dividends.

Clause 47 - Borrowing by AA from the Commonwealth

This clause will enable the Minister for Finance, on behalf of the Commonwealth, to lend money to AA on terms and conditions determined by the Minister for Finance.

Clause 48 - AA may give security over its assets

These provisions enable AA to give security over all or part of its assets.

The clause is based on section 60 of the CA Act.

Clause 49 - Hedging through currency contracts etc.

Subject to certain requirements this clause enables AA to enter into and deal with approved contracts for hedging purposes in relation to such matters as:

- money raised by AA
- investment of money by AA
- commodity purchases by AA
- a transaction in foreign currency.

Subclauses (2) and (3) provide constraints on the exercise of this power by AA, requiring that it comply with guidelines given to it by the Minister. The purpose of these controls is to ensure that these constraints are used to manage financial risk and do not become speculative.

The terms “approved contract” and “hedging purposes” are defined in subclause (4).

The clause is a simplified version of section 62A of the CA Act and is consistent with similar provisions in other legislation establishing GBES.

Clause 50 - Extra matters to be included in annual report

The clause complements section 9 and Schedule 1 of the CAC Act, which provide a core of common annual reporting requirements for Commonwealth authorities. As well as the CAC requirements, the members are to include in the annual report an assessment of the adverse effect (if any) on profitability of meeting the non-commercial commitments imposed on AA.

Annual reports under the CAC Act are to be given to the responsible Minister by the 15th day of the 5th month after the end of the financial year and then tabled in the Parliament. They are to include a report of operations and financial statements (both prepared in accordance with Finance Minister's Orders) and an Auditor-General's report on the financial statements.

This provision is intended to commence at the same time as the CAC Act. However, if the CAC Act is not in force on the date when this Bill comes into operation the provisions of section 48 of the CA Act will apply instead until the CAC Act commences. (This outcome is achieved by the savings provisions of Part 3 of the CAL Amendment Bill.)

Division 2 - Taxation matters

Clause 51 - Liability to taxes etc.

Under this clause AA will be liable to pay all Commonwealth taxes. It will not, however, be liable to pay tax, other than payroll tax, under any State or Territory law.

The clause is based in substance on section 55 of the CA Act.

Division 3 - Services charges for AA services and facilities

This Division sets out the procedure under which AA can charge the aviation industry for its services.

Clause 52 - Board can set charges for services and facilities

Subclause (1) provides for the Board to make a written determination that sets service charges and penalties for late payment.

Subclause (2) will allow for the determination to either fix the amount of the service charge and/or penalty or set out a method under which the amount of the service charge and/or penalty may be calculated.

Subclause (3) requires that a service charge be reasonably related to the costs of the services provided.

Subclause (4) specifies information to be included in the determination.

Subclause (5) requires that the determination be made public. (The charges determination will be subject to the *Legislative Instruments Act 1995*.)

Subclause (6) provides that the section does not apply to services and facilities provided under contract.

Clause 53 - Minister's role in setting service charges and late payment penalties

Under this clause the Minister will be required to approve determinations of service charges and late payment penalties.

Subclause (1) requires the Board to give the Minister written notice of a proposed determination that will introduce a new service charge or penalty, or vary an existing service charge or penalty. The notice must specify the reason for the new service charge or penalty or the intended variation of the earlier determination and the date on which the determination will come into force.

Subclause (2) will enable the Minister to either approve or disapprove the proposed determination within 30 days, after having regard to AA's duties and responsibilities under the proposed Act.

Subclause (3) specifies that the Board cannot make a determination unless the Minister has approved it or the 30 day period has elapsed without the Minister giving notice of approval or otherwise.

Clause 54 - Procedure if Prices Surveillance Act applies

This clause modifies the Ministerial approval mechanism contained in clause 53 where the Prices Surveillance Authority (or its proposed successor body the Competition Commission) proposes to conduct an inquiry into the supply of services by AA.

Subclause (1) provides that the Board's power to set service charges has effect subject to the *Prices Surveillance Act 1983*. This will enable the Prices Surveillance Authority (or its proposed successor body, the Competition Commission) to oversee AA's service charges.

Subclause (2) will require AA to give the Minister a copy of any notice it receives under the *Prices Surveillance Act 1983* relating to a proposed determination of a service charge (or the withdrawal of such a notice).

Subclause (3) will require AA to give to the Minister a copy of any report AA receives made under the *Prices Surveillance Act 1983* on an inquiry held in relation to the supply of services by AA.

Under subclause (4) the 30 day time period referred to in subclause 53(2) does not begin until the Minister receives a notice under the *Prices Surveillance Act 1983* or a copy of the report under subclause (3).

Subclause (5) sets out circumstances in which the Minister may disapprove a proposed determination and substitute a fresh one.

Under subclause (6), the Minister's determination has effect as if it had been made by the Board.

These provisions are intended to enhance the effectiveness of the Minister's power to approve or disapprove charges by providing the Minister with the opportunity to consider any report of the Prices Surveillance Authority (or its successor body the Competition Commission) before making his or her decision and by enabling the Minister to set charges to replace those which are unacceptable.

Clause 55 - Penalty for late payment of service charge

Subclause (1) provides that, if a service charge is not paid by the due date, the person liable for the charge is also liable to pay penalty interest. The rate of penalty interest is set by the Board and included in the determination.

Subclause (2) limits the penalty to the equivalent of 1.5% of the unpaid amount of the charge for each month or part of a month during which it is unpaid.

Subclause (3) makes it clear that the penalty need not be calculated on a monthly basis.

Clause 56 - Recovery of service charge and late payment penalty

This clause provides that any unpaid service charge or late payment penalty may be recovered as a debt in a court.

Clause 57 - Remission of service charge and late payment penalty

This clause makes provision for the Board or an authorised employee to remit the whole or part of a service charge or late payment penalty.

Division 4 - Statutory lien for unpaid service charges etc.

Because of the nature of AA's services and facilities and their essentiality for the maintenance of a safe system of air navigation, it is very difficult for these services to be withdrawn selectively when service charges have not been paid. In order to minimise the impact of bad debts on charges to the aviation industry as a whole, a scheme of statutory liens has been in place for many years with

the general acceptance of the industry This Division enables AA to continue the system of statutory liens

Provisions in this Division are substantially the same as those found in Division 2 of Part VI of the CA Act.

Regulations will be made under this Bill based on regulations in the Civil Aviation Regulations.

Subdivision A - Imposition of statutory lien

Clause 58 - Imposition of statutory lien

Where a service charge or late payment penalty on the charge remains unpaid after the due date, subclause (1) enables an entry to be made in the Register of Statutory Liens, the effect of which is to vest a statutory lien in respect of the aircraft in AA (subclause 2). The lien covers the service charge, penalties and any further outstanding amounts in respect of the aircraft (subclause 3)

Clause 59 - Effect of statutory lien

This clause elaborates on the effect of a statutory lien.

The key provisions are subclauses (2) and (3). Under subclause (2) the provisions of the clause apply in spite of any encumbrance or sale of the aircraft

Subclause (3) sets out the status of a statutory lien in relation to priorities amongst creditors and the purposes of the distribution of the proceeds of a sale made under clause 66 of the Bill. A statutory lien has effect as a security interest in respect of the aircraft, ranking in priority.

- after any security interest (other than a floating charge) concerning the aircraft created before the time of the registration of the statutory lien where that security interest covers a debt that is incurred before that time; and
- before any other security interest.

Clause 60 - Limitations on scope of statutory lien

Under subclauses 60(1) and (2), provision is made for a person prescribed by the regulations to make a written request for a certificate under the section.

If requested, an authorised employee must issue a certificate stating whether a statutory lien applies and providing details of any service charge or late payment penalty that is payable and unpaid in respect of the aircraft. The certificate must state, in respect of any such charge or penalty, the amount of it and the date on which it became payable.

Subclause (3) provides that where a certificate has been issued, a statutory lien on the aircraft does not cover any unpaid service not set out in the certificate. Similarly, the lien does not apply to any late payment penalty that is not specified in the certificate.

This clause is a modification of section 76 of the CA Act. Among other things, it includes a requirement that additional information is to be included in a certificate.

Clause 61 - Cessation of statutory lien

This clause sets out the circumstances in which a statutory lien ceases to have effect.

When a lien ceases to have effect, the Registrar must make an entry in the Register as required by the regulations.

Clause 62 - Notice relating to statutory lien

Subclause (1) will require the Registrar to publish in the *Gazette* a notice containing prescribed particulars of a statutory lien entered in the Register and to take reasonable steps to serve copies of the notice on such persons prescribed in the regulations. The regulations will prescribe the following particulars:

- the number of the lien;
- the date (and time) the lien was created;
- the description and registration mark of the aircraft;
- the name and address of the person by whom the charge is payable.

Subclause (2) provides that a failure to publish such a notice does not affect the operation of clause 58 ("imposition of statutory lien") or clause 61 ("cessation of statutory lien").

Clause 63 - Register of statutory liens

This clause will require AA to keep a Register of Statutory Liens to be maintained and open to public inspection in the manner prescribed by the regulations.

Subdivision B - Seizure and sale of aircraft

Clause 64 - Seizure of aircraft

Subclauses (1) and (2) will empower authorised employees of AA to seize and retain possession of an aircraft where debts covered by the statutory lien are unpaid after 9 months.

Subclause (3) requires reasonable steps to be taken to give notice of the seizure to specified persons, namely:

- those who, in the authorised employee's opinion, have a security interest in the aircraft;
- each person who is an owner, operator, lessee, hirer, charterer or pilot in command of the aircraft; and
- any other persons prescribed by the regulations.

Subclause (4) specifies information that must be contained in any notice given under subclause (3).

Subclause (5) is a safeguard provision which prevents an authorised employee from seizing an aircraft under the clause if the employee fails, on request by the owner, operator or pilot in command of the aircraft, to produce proof of authorisation.

Clause 65 - AA must insure seized aircraft

This clause will require AA to insure an aircraft that is to be seized and provides for the insurer's premium to be an extra debt payable to AA, although not a debt capable of being secured by the lien.

The insurance must be for the benefit of the person or persons prescribed by the regulations. The regulations will prescribe the following persons:

- the Authority;
- a person, who in the opinion of an authorised person, has a security interest in the aircraft; and

- the owner of the aircraft.

Clause 66 - Sale of aircraft

This clause empowers AA to sell the aircraft whether or not it has been seized, where debts covered by the statutory lien are unpaid after 9 months.

Subclause (3) requires AA, before selling the aircraft, to take reasonable steps to give reasonable notice of the sale to the persons referred to in clause 64 (**Seizure of aircraft**).

Clause 67 - Application of proceeds of sale

The proceeds of a sale under clause 66 must be dealt with in accordance with the regulations. The regulations will require AA, as soon as practicable after the sale, to publish in a newspaper in each State and Territory, a notice inviting persons that claim to have a security interest in the aircraft to make a claim in respect of that interest. The AA can then approve (in full or in part) or reject the claim. If the claim is rejected, the decision may be reviewed by the Administrative Appeals Tribunal.

Clause 68 - Order of application of payments of outstanding amounts

This clause provides that any amounts received by AA in discharge of outstanding amounts covered by a statutory lien are taken to be applied successively in the discharge of those amounts in the order in which they became payable.

Subdivision C - Interference with aircraft under statutory lien

This subdivision contains offences in relation to aircraft subject to statutory liens.

Clause 69 - Removal from Australian territory of aircraft under statutory lien

Subclause (1) prohibits a person who knows that a statutory lien is in effect in respect of an aircraft from removing the aircraft from Australian territory without the prior approval of an authorised employee. A maximum of 3 years imprisonment applies to the offence.

Subclause (2) provides that a person is taken to have known that a statutory lien was in effect in respect of an aircraft if the person ought reasonable to have

known that fact, having regard to that person's abilities, experience, qualifications and other attributes and all the circumstances surrounding the alleged contravention.

Proposed clause 69 will replace the substantially similar offence contained in section 78A of the *Civil Aviation Act 1988* which prohibits a person who knows, or has reasonable grounds to believe, that a statutory lien is in effect in respect of an aircraft from removing the aircraft from Australian territory without prior approval. The existing provision clearly attaches criminal liability to negligent acts. The new provision was drafted with the express intention of removing mere negligence from the scope of this offence.

Although the test for liability may be objective in part (ought reasonably to have known) it is subjectively based (whether the person having regard to his or her individual traits, etc, should have known). Thus the proposed clause is directed at creating an offence, the mens rea of which covers both actual knowledge and recklessness and takes into account the characteristics of the defendant and all the surrounding circumstances.

Clause 70 - Dismantling etc. aircraft under statutory lien

Subclause (1) prohibits a person who knows that a statutory lien is in effect on an aircraft from detaching any part or equipment from the aircraft without authority. A maximum of 2 years imprisonment applies to the offence.

Subclause (2) provides that a person is taken to have known that a statutory lien was in effect in respect of an aircraft if the person ought reasonable to have known that fact, having regard to that person's abilities, experience, qualifications and other attributes and all the circumstances surrounding the alleged contravention.

Proposed clause 70 will replace the substantially similar offence contained in section 78 of the *Civil Aviation Act 1988* which prohibits a person who knows, or has reasonable grounds to believe, that a statutory lien is in effect in respect of an aircraft from detaching any part or equipment from the aircraft without prior approval. The existing provision clearly attaches criminal liability to negligent acts. The new provision was drafted with the express intention of removing mere negligence from the scope of this offence.

Although the test for liability may be objective in part (ought reasonably to have known) it is subjectively based (whether the person having regard to his or her individual traits, etc, should have known). Thus the proposed clause is directed at creating an offence, the mens rea of which covers both actual knowledge and recklessness and takes into account the characteristics of the defendant and all the surrounding circumstances.

Subdivision D - Miscellaneous

Clause 71 - Protection of AA etc. from legal actions

Under this clause, neither AA nor a person acting for it is liable for any loss or damage to an aircraft occasioned in the course of duties associated with the seizure and possession of an aircraft except where the loss or damage was wilfully or negligently caused by AA or such persons.

Clause 72 - Review of decisions

This clause will confer a right on persons affected by decisions under clause 57 (**remission of service charge or penalty**), subclause 58(1) (**imposition of statutory lien**), paragraph 61(1)(c) (**cessation of statutory lien**), subclause 64(2) (**seizure of aircraft**) or 66(2) (**sale of aircraft**) to have the decisions reconsidered, initially by AA as an internal review and subsequently by the Administrative Appeals Tribunal.

The notification of review rights is not required in this provision as section 27A of the *Administrative Appeals Tribunal Act 1975* requires this.

PART 6 - MISCELLANEOUS

Clause 73 - Lands Acquisition Act

The *Lands Acquisition Act 1989* does not apply in relation to or prevent a range of dealings in land by AA including acquisition by agreement, granting of a lease or granting of a licence to occupy or dispose of land owned by AA. The *Lands Acquisition Act 1989* will continue to apply in respect of any compulsory acquisition of land by AA.

This provision is to remove the legislative constraint that would prevent AA exercising its power to deal in real property under clause 11.

The clause is based on section 97 of the CA Act.

Clause 74 - Conduct by directors, servants and agents

This clause provides guidance to a court in prosecutions for an offence against the Bill against a body corporate. Subclause (1) provides that it is sufficient to show that the conduct was engaged in by a Director, or a servant or agent of the body corporate within the scope of that person's actual or apparent authority and that the director, servant or agent had the state of mind.

Under subclause (2) any conduct engaged in on behalf of a body corporate by a director, servant or agent within the scope of his or her authority is taken for

the purposes of a prosecution to have been engaged in, also, by the body corporate unless it proves that it took reasonable precautions and exercised due diligence to avoid the conduct

Subclause (3) provides that in proceedings for an offence under the Bill where it is necessary to establish the state of mind of an individual concerning particular conduct, it is enough to show that the conduct was engaged in by a servant or agent of the individual within the scope of his or her authority and that the servant or agent had the state of mind.

Subclause (4) makes it clear that any conduct engaged in on behalf of an individual by a servant or agent in the scope of his or her authority is taken, for the purposes of a prosecution for an offence under the Bill, to have been engaged in also by the individual - unless the individual proves that he or she took reasonable precautions and used due diligence to avoid the conduct.

Subclause (5) If an individual is convicted of an offence and he or she would not have been convicted except for the effect of subclauses (3) and (4) of the clause, he or she is not liable to be imprisoned for the offence.

Subclause (6) defines the terms “director”, “engage in conduct”, “offence against this Act” and “state of mind”. The definition of “state of mind” in relation to a person, includes:

- (a) the person's knowledge, intention, opinion, belief or purpose; and
- (b) the person's reasons for the intention, opinion, belief or purpose.

This clause is in similar terms to section 97A of the CA Act.

Clause 75 - Power to make regulations

This clause enables regulations to be made for the purposes of the Act.

In particular, regulations can be made:

- in relation to the various services provided by AA and, in particular, specifying the powers exercisable by AA or its employees in respect of those services;
 - regulating the environmental effects of the operation of “Commonwealth jurisdiction aircraft”. This will enable AA to perform an aviation environmental regulation function;
 - or the purposes of the statutory liens provisions of the Act; and
- imposing penalties for a contravention of the regulations.

