

1995

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

TRANSPORT LEGISLATION AMENDMENT BILL (NO. 3) 1995

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Transport,
the Honourable Laurie Brereton MP)

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OUTLINE

This Bill amends the *Air Navigation Act 1920* (the AN Act), the *Seafarers Rehabilitation and Compensation Act 1992* (the SRC Act), the *Civil Aviation Act 1988* (the CA Act), and the *Freedom of Information Act 1982* (the FOI Act).

The amendments to the AN Act incorporate powers of air safety investigation which are presently contained in the Air Navigation Regulations and exercised by officers of the Bureau of Air Safety Investigation (BASI) under delegation from the Secretary. The purpose of the amendments to the AN Act is to:

- ensure powers of investigation have a sound legislative basis;

- allow BASI to play an enhanced role in maintaining and promoting aviation safety in Australia; and

- ensure air safety investigation in Australia conforms, as far as practicable, to International Civil Aviation Organisation (ICAO) standards.

Legislation is currently before the Parliament to establish the Civil Aviation Safety Authority (CASA) and Airservices Australia (AA). These two new bodies will replace the Civil Aviation Authority (CAA). CASA will be responsible for the safety regulation of civil aviation in Australia and AA will be established as a government business enterprise to provide the national airways system.

BASI has the specific and independent role of investigating accidents and incidents (including any such occurrences involving the CAA) and promoting safety by identifying deficiencies in the aviation system. These amendments will increase BASI's capacity to conduct more sophisticated, systemic investigations and analysis of air accidents and incidents.

The intention is that aviation safety in Australia will be enhanced by giving CASA, AA and BASI clearly defined roles, functions and reporting responsibilities.

The amendments to the AN Act provide for the Secretary to designate a Departmental position as being that of the Director of Air Safety Investigation (Director). The amendments confer powers and impose obligations on the Director in relation to investigations. These include: securing an accident site, taking custody of aircraft wreckage, collecting information considered pertinent to an investigation and providing written investigation reports to the Secretary.

The Secretary may publish any information in an investigation report considered desirable to promote aviation safety.

In conducting investigations BASI operates in accordance with International Standards and Recommended Practices set out in Annex 13 to the Convention on International

Civil Aviation (the Chicago Convention). Australia is a signatory to, and has ratified, the Chicago Convention, a copy of which appears at Schedule 1 of the AN Act. The amendments to the AN Act incorporate ICAO standards and practices and Annex 13 definitions where appropriate.

The amendments to the SRC Act provide that the Seafarers Safety, Rehabilitation and Compensation Authority (the Authority) is no longer a separate statutory authority and removes all financial provisions relating to the Authority.

All costs relating to the Authority have been met from running costs of the Department of Transport. This arrangement will continue after the amendments come into operation.

The amendments in Schedule 3 are merely amendments consequential upon the amendments to the AN Act. The amendment to the CA Act removes duplication of a provision which occurs as result of the amendments to the AN Act. The amendment of the FOI Act changes a reference to a secrecy provision (an exemption under the FOI Act) in the *Air Navigation Regulations* to a provision in the new Part 2A of the AN Act.

FINANCIAL IMPACT STATEMENT

Consistent with the intention of the amendments to the AN Act an additional \$1.068 million will be made available from Department of Transport funding to enhance the capacity of BASI to conduct safety investigations.

The amendments to the SRC Act will result in a very small reduction in administrative costs because there will be no requirement for separate financial statements to be prepared for the Authority. The savings are estimated to be about \$5,000 per annum.

The consequential amendments to the CA Act and the FOI Act have no financial impact.

NOTES ON CLAUSES

Clause 1 - Short Title

The Bill, when enacted, will be known as the *Transport Legislation Amendment Act (No. 3) 1995*.

Clause 2 - Commencement

The Bill will commence in two stages:

Amendments to the *Seafarers Rehabilitation and Compensation Act 1992* (Schedule 2) will commence on 1 July, 1995; and
amendments to the *Air Navigation Act 1920* (Schedule 1), the *Civil Aviation Act 1988* and the *Freedom of Information Act 1982* (Schedule 3) will commence on the date of Royal Assent.

Clause 3 - Amendments of the *Air Navigation Act 1920*

The *Air Navigation Act 1920* will be amended in accordance with Schedule 1 of the Bill.

Clause 4 - Amendments to the *Seafarers Rehabilitation and Compensation Act 1992*

The *Seafarers Compensation and Rehabilitation Act 1992* will be amended in accordance with Schedule 2 of the Bill.

Clause 5 - Amendments of other Acts

The *Civil Aviation Act 1988* will be amended in accordance item 1 of Schedule 3 of the Bill, and the *Freedom of Information Act 1982* will be amended in accordance with items 2 and 3 of Schedule 3 of the Bill.

NOTES ON SCHEDULE 1

AMENDMENTS OF THE *AIR NAVIGATION ACT 1920*

Item 1.

PART 2A - INVESTIGATION OF ACCIDENTS ETC.

Division 1 - Preliminary

Clause 19AA - Meaning of *accident*

This clause defines the term “*accident*” for the purposes of Part 2A of the Act. The definition is based upon the International Civil Aviation Organisation definition appearing in Annex 13 to the Chicago Convention.

Clause 19AB - Meaning of *serious incident*

This clause defines the term “*serious incident*” for the purposes of Part 2A of the Act. The definition is based upon the International Civil Aviation Organisation definition appearing in Annex 13 to the Chicago Convention.

Clause 19AC - Meaning of *incident*

This clause defines the term “*incident*” for the purposes of Part 2A of the Act. The definition is based upon the International Civil Aviation Organisation definition appearing in Annex 13 to the Chicago Convention.

Clause 19AD - Meaning of *safety deficiency*

This clause defines the term “*safety deficiency*” for the purposes of Part 2A of the Act. This definition is intended to permit investigation of matters which have aviation safety implication, but are not “accidents”, “serious incidents”, nor “incidents” as defined.

Clause 19AE - Meaning of responsible person

This clause defines the term “*responsible person*” for the purposes of Part 2A of the Act. The definition encompasses those people who would be ordinarily responsible for, or have a close connection with, a particular aircraft, such as crew members, the owner or operator, an air traffic controller, or the ground crew.

Clause 19AF - Meaning of cockpit voice recording

This clause defines the term “*cockpit voice recording*” for the purposes of Part 2A of the Act to be any recording of words spoken on the flight deck of an aircraft or any transcript or summary of such a recording.

Clause 19AG - General definitions

This clause defines numerous terms for the purposes of Part 2A of the Act. The terms are relevant to the exercise of powers by air safety investigators of BASI. The definitions of “*State of design*”, “*State of manufacture*”, “*State of registration*” and “*State of the operator*” are based upon ICAO definitions appearing in Annex 13 to the Chicago Convention. An “*air safety officer*” is defined as the Secretary of the Department of Transport, the Director of BASI, an investigator appointed by the Director, a delegate of the Director, and any other person who performs investigation services under Part 2A.

Division 2 - Reporting of accidents etc.

Clause 19BA - Reporting of accidents and serious incidents

Subclause 19BA(1) requires responsible persons (defined in clause 19AE) to report accidents and serious incidents involving Australian aircraft or which occur in Australian territory and involve non-Australian aircraft to the Director as soon as reasonably practicable and by the quickest means possible. Note that the terms “*Australian aircraft*” and “*Australian territory*” are defined in section 2 of the Principal Act.

Subclause 19BA(2) requires officers of the Civil Aviation Safety Authority (CASA) or Airservices Australia (AA), who are not otherwise responsible persons in relation to an aircraft, to report accidents or serious incidents involving Australian aircraft or which occur in Australian territory and involve non-Australian aircraft that they become directly aware of to the Director as soon as practicable.

By imposing a reporting requirement on both responsible persons and CASA and AA officers who become aware of accidents or serious incidents, subclauses (1) and (2) ensure that the Director is notified of those accidents and serious incidents.

Subclause 19BA(3) provides that a person who intentionally or recklessly breaches subclause (1) or (2) commits an offence.

Subclause 19BA(4) provides that responsible persons who become aware, and CASA and AA officers who become directly aware, of an accident or serious incident are required to give the Director a written report. This item also prescribes the information to be set out in the written report. The information prescribed is based upon ICAO requirements appearing in Annex 13 to the Chicago Convention.

Subclause 19BA(5) provides that a person who intentionally or recklessly breaches subclause (4) commits an offence.

Subclause 19BA(6) provides that where a responsible person or officer of CASA or AA does not know all of the specified details required to be reported under subclause (4), they are required to make a statement to that effect in the report and give the Director a further written report providing that information as soon as is reasonably practicable after they become aware of those details.

Subclause 19BA(7) provides that a person who intentionally or recklessly breaches subclause (6) commits an offence.

Subclause 19BA(8) allows reporting accidents and serious incident under this clause to be done by phone or facsimile.

Subclause 19BA(9) allows the information required to be reported under subclause (1), (2), (4) or (6) to be reported to a person who is a delegate of the Director.

Clause 19BC - Notification to Contracting State

Where an accident or serious incident involves an aircraft for which Australia is not the State of registration nor the State of operation, subclause 19BC(1) requires the Director to notify the relevant State of registration, State of operation, State of manufacture or State of design of the aircraft of the accident or serious incident. The information to be contained in the written notification is set out in subclauses (2) and (3).

Subclause 19BC(2) provides that the written notification to the relevant Contracting State under subclause (1) is required to set out the details contained in a report given to the Director under subclause 19BA(4) and is to indicate the nature of the investigation or inquiry that is being conducted into the accident or serious incident.

Subclause 19BC(3) provides that if a statement is given to the Director under subclause 19BA(6) the written notification to the relevant Contracting State under subclause (1) is required to set out the details contained in that statement.

Subclause 19BC(4) provides that if any of the details required to be included in a report to the Director under clause 19BA become known to the Director after he or

she has sent a written notification to the relevant Contracting State under subclause (1) then the Director must send a further written notification setting out those details to that State as soon as reasonably practicable.

Clause 19BD - Reporting of incidents

Subclause 19BD(1) requires responsible persons to give to the Director written notice of any incident they are aware of, involving an Australian aircraft or which occurs in Australian territory and involves a non-Australian aircraft, within 48 hours after the incident occurs.

Subclause 19BD(2) requires officers of CASA and AA who are not otherwise responsible persons to give to the Director written notice of any incident they are directly aware of, involving an Australian aircraft or which occurs in Australian territory and involves a non-Australian aircraft, within 48 hours after the incident occurs.

Subclause 19BD(3) provides that a person who intentionally or recklessly breaches subclause (1) or (2) commits an offence.

Subclause 19BD(4) prescribes the information that a written notice under subclauses (1) and (2) must contain. The information is substantially the same as that required to be contained in a written report of an accident or serious incident under subclause 19BA(4), and reflects ICAO requirements appearing in Annex 13 to the Chicago Convention.

Division 3 - Investigation of accidents, serious incidents, incidents and safety deficiencies

Clause 19CA - Object of Division

Clause 19CA provides that the object of investigating accidents, serious incidents, incidents and safety deficiencies is to prevent the occurrence of other accidents, serious incidents, and incidents and not for the purposes of apportioning blame or liability. This item is based upon the ICAO statement of the "Objective of the Investigation" appearing in Annex 13 to the Chicago Convention.

Clause 19CB - Director's power to investigate accidents etc.

Subclause 19CB(1) authorises the Director to investigate the circumstances surrounding any accidents, serious incidents and incidents and any safety deficiencies involving aircraft in Australian territory or Australian aircraft outside Australian territory.

Subclause 19CB(2) provides that the Director is not under a duty to investigate a particular accident, serious incident, incident or safety deficiency. This discretion allows BASI to concentrate resources on the occurrences which have significant safety implications.

Subclause 19CB(3) provides that the Director is not subject to any liability for not investigating a particular accident, serious incident, incident or safety deficiency.

Clause 19CC - Director's powers to obtain information etc.

Subclause 19CC(1) authorises the Director by written notice to require persons to answer questions and produce documents, aircraft components or any other thing relevant to an investigation.

Subclause 19CC(2) provides that a written notice under subclause (1) must be signed by the Director and must specify the time and place the person is required to attend to answer questions or produce documents, aircraft components or any other thing relevant to an investigation.

Subclause 19CC(3) provides that where a person is required to attend before the Director, the Director may require that person to answer questions on oath or affirmation and the Director may administer an oath or affirmation to the person.

Subclause 19CC(4) provides that where a person is required to attend before the Director that person cannot, without reasonable excuse, fail to attend, or refuse to take an oath or affirmation, or refuse to answer lawful questions, or refuse to produce required documents, aircraft components or any other thing.

Subclause 19CC(5) provides that the Director may retain documents, aircraft components or any other thing produced under subclause (1) for as long as is reasonable and necessary for the purposes of an investigation. This subclause also authorises the Director to make copies of or take extracts from such documents.

Subclause 19CC(6) provides that it is not a reasonable excuse for the purposes of subclause (4) for a person to refuse to answer questions or refuse to produce required documents, aircraft components or any other thing on the basis that to do so would incriminate that person or make that person liable to a penalty.

Subclause 19CC(7) provides that where a person objects to answering questions or producing required documents, aircraft components or any other thing on the basis that to do so would incriminate that person or make that person liable to a penalty subclauses (8) to (10) have effect.

Subclauses 19CC(8) to (10) deal with the situation where a person has objected to the production of documents etc. on the basis that they may incriminate him or her. Subclause 19CC(8) provides that a person who is required by the Director to answer questions or produce documents or aircraft components is not relieved from the obligation of complying with the Director's requirements.

Subclause 19CC(9) provides that any answer to a question or production of documents, aircraft components or any other thing (or any information or thing obtained as a consequence of such an answer or production) given to the Director under subclause (1) cannot be used in evidence against the person in criminal proceedings or any other proceedings for recovery of a penalty (for example disciplinary proceedings).

Subclause 19CC(10) provides that subclause (9) does not prevent an answer being admitted in evidence against the person in proceedings in respect of making a false statement.

Subclause 19CC(11) provides that a person required to attend before the Director to answer lawful questions or produce required documents, aircraft components or any other thing is entitled to be paid expenses in accordance with the regulations.

Powers of investigators in relation to evidential material

Clauses 19CD to 19CS inclusive of the Act comprise a suite of search-and-entry powers exercisable by air safety investigators as part of the investigative process. The powers are based on similar provisions inserted into the *Crimes Act 1914* by the *Crimes (Search Warrants and Powers of Arrest) Amendment Bill 1994* as a result of the Review of Commonwealth Criminal Law. The clauses provide specific powers and safeguards in relation to searching premises as part of an air safety investigation. Specifically, the clauses deal with obtaining and execution of warrants, the collection, examination and retention of “evidential material” (defined in clause 19AG), and compensation where applicable.

Clause 19CD - Powers of entry to premises

Subclause 19CD(1) provides that for the purposes of conducting investigations, investigators may enter any premises to inspect or seize documents, components or anything related to the investigation.

Subclause 19CD(2) provides that an investigator may only enter the premises with the consent of the occupier of the premises or under a warrant issued by a magistrate under clause 19CE.

Subclause 19CD(3) provides that an investigator is not entitled to exercise the powers of entry to premises if he or she cannot provide the occupier with formal identification when asked to do so.

Subclause 19CD(4) provides that where an investigator seeks to enter premises with the consent of the occupier, the occupier must be told by the investigator that he or she may refuse to provide consent to enter.

Subclause 19CD(5) provides that where an investigator obtains the consent of the occupier to enter premises that consent must be in writing.

Clause 19CE - Search warrants

Subclause 19CE(1) provides that an investigator may apply to a magistrate for a warrant to enter premises for the purpose of an investigation.

Subclause 19CE(2) provides that a warrant to search premises can be issued if the magistrate is satisfied by information on oath that there are reasonable grounds for suspecting that there is, or will be, within the next 72 hours any evidential material at the premises. The 72 hour limit permits a warrant to be obtained in advance where information suggests that evidential material is to be taken to the premises.

Subclause 19CE(3) provides that a magistrate must not issue a warrant unless an investigator has either orally or by affidavit provided sound reasons for the issuing of the warrant.

Subclause 19CE(4) sets out the matters which must be specified in a warrant.

Clause 19CF - The things that are authorised by search warrant

Subclause 19CF(1) provides that a warrant authorises entry and search of premises and seizure of any evidential material specified in the warrant. A warrant does not authorise entry etc. outside hours during which it is specified to be executable, subclause 19CF(2). A warrant does not authorise the exercise of powers under clauses 19CH and 19CJ where the exercise of those powers would be contrary to safety procedures applicable to the premises subject to the warrant, subclause 19CF(3).

Subclause 19CG - Specific powers available to investigators executing warrants

Clause 19CG specifies that an investigator has specific powers in relation to a warrant. The investigator or person assisting may take photographs (including video recordings) of the premises etc. for purposes incidental to the execution of the warrant, subclause 19CG(1). Subclause 19CG(2) provides that the execution of a warrant does not end where the investigator leaves the relevant premises for 1 hour or less, or longer if the occupier of the premises consents in writing to that longer period (provided that the warrant is still in force at the end of the period).

Subclause 19CG(3) provides that where the execution of a warrant is stopped by order of a court which is later revoked or reversed on appeal its execution may be completed provided the warrant is still in force.

Clause 19CH - Use of equipment to examine or process things

Subclause 19CH(1) empowers the investigator or persons assisting to bring to the warrant premises any equipment reasonably necessary for the examination or processing of things found at the premises to determine whether they are liable to seizure. If it is not practical to examine or process things at the warrant premises or if the occupier of the premises agrees in writing, things at the premises may be moved to another place so that the examination or processing can be carried out, subclause 19CH(2).

Subclause 19CH(3) provides that when something containing electronically stored information is taken from premises to be examined or processed the occupier must if practicable be informed of the address, time and place of the examination and be allowed to attend the examination. This subclause is linked to subclauses (1) and (2) and applies where it is reasonably necessary to examine or process the things in order to determine whether they are things that may be seized under the warrant.

Subclause 19CH(4) enables an investigator or persons assisting an investigator to operate equipment already at the warrant premises to carry out the examination or processing to determine whether the thing is liable to seizure. This is especially useful for scanning audio and video recordings and the like if the investigator believes on reasonable grounds that the equipment is suitable and if the examination can be carried out without damage to the equipment or thing.

Clause 19CJ - Use of electronic equipment at premises

Subclause 19CJ(1) provides that the investigator or persons assisting the investigator may operate equipment at the premises to see whether individual material is accessible if he or she believes that the equipment may be operated without damaging it. If, upon using equipment in accordance with subclause (1), evidential material is accessible the investigator or persons assisting the investigator may seize the equipment or any disc tape or other associated device or operate the equipment to obtain a print out and seize documents produced or copy the records to another storage device and remove it from the premises, subclause 19CJ(2).

Subclause 19CJ(3) provides that the investigator may seize equipment only if it is not practicable to put the material into documentary form or copy them to a storage device.

Subclause 19CJ(4) provides that the investigator or persons assisting the investigator may secure the equipment by locking it up or guarding it if he or she believes on reasonable grounds that the evidential material may be accessible by operating the equipment at the premises but expert assistance is needed to operate the equipment and the evidential material may be destroyed or otherwise interfered with if the equipment is not secured in the meantime. This is necessary to ensure that where the equipment is more sophisticated than expected and cannot be accessed or moved then

the opportunity to obtain expert assistance and to preserve evidential material is not lost. For example, material accessible on a computer can be deleted with a swift series of keystrokes from an operator. It is also possible to program equipment to erase evidence rapidly or after a certain time.

Subclause 19CJ(5) requires investigators to give notice to the occupier of a premises in cases where equipment may be secured for a period not exceeding 24 hours. Equipment may be secured for either 24 hours or until expert assistance is obtained to operate the equipment, whichever happens first, subclause 19CJ(6).

Subclauses 19CJ(7), (8) and (9) deal with the situation where the expert assistance required to operate equipment may not be available within the 24 hour seizure time limit. The investigator to apply to the magistrate who issued the original warrant for an extension of the time needed for securing the equipment if he or she believes on reasonable ground that the expert assistance will not be available in that period, subclause 19CJ(7). The occupier must be given notice and has a right to be heard in relation to the application, subclause 19CJ(8). The application for an extension must be made in the same manner as an application for the issue of a search warrant, subclause 19CJ(9).

Clause 19CK - Retention of things which are seized

Subclause 19CK(1) provides that where an investigator has seized things under clause 19CE the investigator must return those things when they are no longer needed, or within 60 days of seizure, whichever is shorter, subject to disputes as to ownership being resolved.

Subclause 19CK(2) provides that where an investigator has seized a thing under a warrant issued under clause 19CE the investigator must take reasonable steps to return the thing at the end of the 60 day retention period to the person from whom it was seized or to the owner.

Clause 19CL - Court of summary jurisdiction may permit a thing to be retained

If an investigator has seized a thing under a warrant issued under clause 19CE and the investigator still requires possession of the thing at the end of the 60 day retention period the investigator may apply to a court of summary jurisdiction for an order to retain the thing for a further period, subclause 19CL(1).

Subclause 19CL(2) provides that where a court is satisfied that it is necessary for an investigator to retain a thing seized under a warrant for a period greater than 60 days the court may authorise an extension of custody.

Subclause 19CL(3) provides that before a court hears an application for an extension of custody period the court may require other persons to be given notice of the application.

Clause 19CM - Announcement before entry

Subclause 19CM(1) provides that where an investigator or person assisting an investigator is executing a warrant the investigator or person assisting an investigator must announce to any person at the premises that he or she is authorised by a warrant to enter the premises. The investigator must also give any person at the premises an opportunity to allow entry into or onto the premises.

Subclause 19CM(2) provides that the investigator executing a warrant or a person assisting the investigator does not have to comply with the provision of subclause (1) if he or she believes that immediate entry to the premises is required to ensure the effective execution of the warrant.

Clause 19CN - Availability of assistance and use of force in executing

Clause 19CN provides that an investigator executing a warrant may obtain assistance in executing the warrant and use such force against persons and things as is necessary and reasonable.

Clause 19CP - Details of warrant to be given to occupier

Clause 19CP provides that an investigator executing a warrant must supply a copy of that warrant to a person occupying the premises to which the warrant relates, if such a person is present.

Clause 19CQ - Copies of seized things to be provided

Clause 19CQ provides that where an investigator seizes a document, film, computer file or other thing that can be readily copied he or she is required to give the owner of the material a copy of the information seized as soon as practicable after the seizure.

Clause 19CR - Compensation for damage to the electronic equipment

Subclause 19CR(1) provides that if damage is caused to equipment as a result of it being operated as mentioned in clause 19CJ, and the damage resulted from insufficient care being exercised in selecting the person to operate the equipment or by the person operating it, compensation is payable to the owner.

Subclause 19CR(2) provides that when determining the compensation referred to in subclause (1) which may be payable regard is to be had to whether the occupier had provided any warning or guidance to the operation of the equipment. This is to minimise compensation in cases where there has been a deliberate programming of

software to destroy or cause damage if not assessed in a particular manner or when the occupier failed to mitigate damage by providing warning or guidance.

Clause 19CS - Offence of making false statements in applications for warrant

Clause 19CS provides that an investigator must not make any false or misleading statements in applying to a magistrate for a warrant.

Clause 19CT - Report of investigation

This item provides that when an investigation has been completed, the Director must provide the Secretary with a written report of the investigation and any relevant documents the Secretary may require.

Clause 19CU - Publication of report etc.

Clause 19CU provides that no part of a report or a document given to the Secretary under clause 19CT may be published without the written approval of the Secretary. The Secretary may publish any information he or she receives under clause 19CT if he or she considers the publication of the information is desirable to promote aviation safety, subclause 19CU(2). This clause reflects the ICAO principle set out in Annex 13 to the Chicago Convention that the objective of the investigation (and the dissemination of information obtained during the course of an investigation) is to enhance aviation safety, not to assign blame or liability.

Division 4 - Australian investigations in which other Contracting States have an interest

Clause 19DA - Accredited representatives of Contracting States

Clause 19DA sets out the circumstances in which an accredited representative of another Contracting State to the Chicago Convention may participate in an Australian investigation. This clause reflects ICAO requirements as set out in Annex 13 to the Chicago Convention.

Subclause 19DA(1) provides that clause 19DA applies where an accident or serious incident has occurred in Australia and another Contracting State is a relevant State in relation to an aircraft involved in that accident or serious incident. A "relevant State" is defined in subclause 19DA(2).

Subclause 19DA(3) provides that if a relevant State appoints an accredited representative to participate in an Australian investigation that representative is entitled to participate in the investigation, is entitled to ask question of persons who are

required to attend before the Director under paragraph 19CC(1)(a) and shall be given access to any information obtained by the Director relevant to the investigation.

Clause 19DB - Delegation of conduct of investigation

Subclause 19DB(1) provides that where an accident or serious incident has occurred in Australia and another Contracting State is the State of registration or the State of the operator in relation to an aircraft involved in that accident or serious incident then the Director may delegate all or part of any investigation to a person nominated by an accredited representative of that Contracting State.

Subclause 19DB(2) provides that if a delegation is made under subclause (1) the provisions of this Part have effect as if a reference to the Director were a reference to the delegate, and the delegation will have effect as if made under clause 19CE. This subclause is intended to make clear that an accredited representative of a Contracting State to whom the Director has delegated all or part of any investigation is able to exercise all the powers of the Director in relation to the investigation.

Clause 19DC - Participation in investigations by advisers

This clause sets out the circumstances in which an accredited representative of another Contracting State to the Chicago Convention may appoint advisers to participate in an Australian investigation. The term “adviser” is defined in clause 19AG. This clause reflects ICAO requirements as set out in Annex 13 to the Chicago Convention

Subclause 19DC(1) provides that where an accident occurs in Australia and citizens of relevant Contracting States die in an aircraft involved in the accident then subclause (2), (3) and (4) apply.

Subclause 19DC(2) provides the Director may authorise an adviser to visit the scene of the accident or serious incident.

Subclause 19DC(3) requires the Director to provide, at the request of the adviser, access to all known factual information obtained by the Director relevant to the investigation.

Subclause 19DC(4) requires the Director to provide, at the request of the adviser, all information the Director possesses relating to the identification of the citizens of the relevant Contracting State and provide reasonable assistance in identifying those citizens.

Subclause 19DC(5) defines a relevant Contracting State for the purposes of this clause. The definition is substantially the same as that appearing in subclause 19DA(2).

Clause 19DD - Provision of investigation reports to certain contracting states

Clause 19DD provides that where an accident occurs in Australia and an aircraft registered in another Contracting State was involved in the accident and the Director has given the Secretary an investigation report of the circumstances of the accident then the Minister must, as soon as practicable, forward a copy of the report to that Contracting State and the State of the operator of the aircraft, the State of manufacture of the aircraft, the State of design of the aircraft and any Contracting State that has participated in the Australian investigation.

Clause 19DE - Provision of information to Contracting State that conducts investigation

Clause 19DE provides that where an accident, serious incident or incident occurs in Australia and a person conducts an investigation of that occurrence under the law of another Contracting State or under appointment by another Contracting State then the Director must, at the request of that Contracting State, give all factual information available to the Director and relevant to the investigation to that Contracting State. This item reflects ICAO requirements as set out in Annex 13 to the Chicago Convention that information concerning safety occurrences should be shared between Contracting States.

Clause 19DF - Further investigation of accident

Subclause 19DF(1) provides that where new and significant information becomes available after an investigation of an accident, serious incident or incident is completed then the Director must conduct a further investigation if he or she conducted the initial investigation or, if the initial investigation was conducted by another Contracting State the Director must give that information to that Contracting State.

Subclause 19DF(2) provides that subclause 19CB(1) applies to any further investigation conducted by the Director under subclause (1).

Division 5 - Accidents and serious incidents outside Australian territory

The provisions of Division 5 set out the circumstances in which an Australian air safety investigator may participate in an investigation relating to an accident or serious incident involving an Australian aircraft that occurred outside Australian territory, where that investigation is being conducted by another Contracting State.

Clause 19EA - Investigation of accidents and serious incidents that occur to Australian Aircraft outside Australian territory

Subclause 19EA(1) merely defines the scope of clause 19EA. The clause applies if an accident or serious incident involving an Australian registered, operated, designed, or

manufactured aircraft occurs in another Contracting State. Subclause 19EA(2) allows the Minister to authorise an Australian investigator to participate in an investigation being undertaken or initiated by another Contracting State, or to appoint an Australian accredited representative to another Contracting State's investigation, and subclause 19EA(3) authorises the Minister to appoint advisers to assist the Australian accredited representative in the investigation of another Contracting State.

Clause 19EB - Investigation of accidents etc. that occur outside Australian territory to which section 19EA does not apply

Subclause 19EB(1) authorises the Minister to appoint an Australian accredited representative to participate in an investigation by another Contracting State where the aircraft involved in an accident or serious incident is not an Australian aircraft but Australia has been asked to provide assistance or facilities or advisers to the state conducting the investigation.

Subclause 19EB(2) requires the Minister to appoint an Australian investigator to investigate the circumstances surrounding accidents or serious incidents to Australian aircraft in the territory of another country that is not another Contracting State, or to delegate the investigation to a Contracting State.

Clause 19EC - Investigation of incident occurring outside Australian territory

Clause 19EC allows the Minister to authorise an Australian investigator to investigate the circumstances surrounding any incident involving an Australian aircraft outside Australian territory.

Clause 19ED - Powers of investigators

Clause 19ED applies where an investigator referred to in subclause 19EA(2) or 19EB(2) is conducting an investigation on Australian territory, subclause 19ED(1). Subclause 19ED(2) provides that an Australian investigator undertaking such an investigation will have all the powers of the Director.

Clause 19EE - Provision of information to Contracting State that conducts investigation

Subclause 19EE(1) provides for the application of clause 19EE. Subclause 19EE(2) requires that the Director provide any other Contracting State with any information the Director may have that is relevant to an investigation that State may be undertaking.

Subclause 19EE(3) provides that the Director may authorise an investigator to conduct an investigation in Australian territory that is relevant to an investigation being undertaken by some other Contracting State.

Subclause 19EE(4) provides that any investigator authorised by the Director to conduct an investigation in Australian territory under subclause (3) by some other Contracting State will have the powers, duties and immunities of the Director.

Division 6 - Powers in relation to accident sites

Clause 19FA - General definitions

This clause defines the term “*access period*” for the purposes of Division 6.

Clause 19FB - Accident site

This clause defines an accident site, for the purposes of Division 6, as:

- a site where an accident (as defined in clause 19AA) has occurred;
a site on which there is an impact point caused by an aircraft that has been involved in an accident; or
- a site on which there is an aircraft that has been involved in an accident.

Clause 19FC - Accident site premises

This clause defines accident site premises for the purposes of Division 6 as:

- premises on which there is an accident site; or
premises which it is necessary to enter to get to premises on which there is an accident site.

Clause 19FD - Accident site powers

Clause 19FD outlines the powers investigators have in relation to an accident site. These powers include taking control and securing the accident site for the access period, physically securing aircraft wreckage, taking measurements and photographs, taking equipment onto the crash site and removing wreckage and components.

These powers are intended to give effect to the ICAO requirement set out in paragraph 5.6 of Annex 13 to the Chicago Convention that:

“The investigator-in-charge shall have unhampered access to the wreckage and unrestricted control over it to ensure that a detailed examination can be made without delay by authorised personnel participating in the investigation”.

Clause 19FE - Powers of entry to accident site

Subclause 19FE(1) provides that, for the purposes of accident investigation, an investigator or person assisting an investigator may enter accident site premises and exercise accident site powers with the consent of the occupier or otherwise in accordance with this Division.

Subclause 19FE(2) provides that an investigator is not entitled to enter accident site premises and exercise accident site powers if the investigator has not complied with a demand from the occupier to produce his or her identity card for inspection.

Subclause 19FE(3) provides that before obtaining the consent of the occupier under subclause (1) an investigator must inform the occupier he or she has the power to enter accident site premises and exercise accident site powers even if consent is refused.

Subclause 19FE(4) provides that if an investigator obtains the consent of the occupier to enter accident site premises and exercise accident site powers the investigator must ask the occupier to sign an acknowledgment of that consent, which acknowledgment contains the day and time the consent was given.

Clause 19FF - Announcement before entry

Clause 19FF provides that before entering accident site premises the investigator or person assisting the investigator must announce that he or she is authorised to enter the premises and must give the occupier an opportunity to allow entry.

Clause 19FG - Availability of assistance and use of force in entering accident site premises

Clause 19FG provides that in entering accident site premises without the consent of the occupier an investigator may obtain such assistance or use such force as is necessary and reasonable in the circumstances.

Clause 19FH - Offence of entering etc. accident site without permission

Clause 19FH provides that a person must not enter or remain upon a secured accident site under the control of an investigator without the permission of the investigator.

Clause 19FJ - Removal of or interference with aircraft

Subclause 19FJ(1) provides that where an aircraft has been involved in an accident in Australian territory the aircraft, wreckage and anything in the aircraft or wreckage is automatically deemed to be in the custody of the Director.

Subclause 19FJ(2) provides that no person may intentionally or recklessly remove or interfere with an aircraft, wreckage or anything in the aircraft or wreckage which is in the custody of the Director except with the Director's permission or as allowed by subclause (3).

Subclause 19FJ(3) allows persons to move an aircraft, wreckage and anything in the aircraft or wreckage, without the permission of the Director, for the purposes of protecting the safety of persons on or near the aircraft and to remove mail, animals or customs goods from the aircraft and to protect the aircraft from further damage or loss.

Subclause 19FJ(4) allows the Director to authorise any person to deal with an aircraft or wreckage in the Director's custody for the purposes of an investigation.

Subclause 19FJ(5) authorises the Director to remove and test any part or component of the aircraft and any goods or baggage carried on the aircraft.

Subclause 19FJ(6) provides that the Director may test any part or component of the aircraft or goods or baggage on the aircraft to destruction. This item reflects the fact that an investigation may require deliberate testing to destruction or that a thing may be destroyed in the course of testing.

Clause 19FK - Protection of Director etc. from liability in certain cases

Clause 19FK provides that in regard to an aircraft, wreckage and anything in the aircraft taken into the Director's custody under subclause 19FJ(1) the Director, an investigator or any other person is not liable for any actions or omissions taken in good faith and without negligence.

Clause 19FL - Aircraft etc. of Contracting State to remain undisturbed on request

This clause is intended to give effect to ICAO requirements set out in Annex 13 to the Chicago Convention.

Subclause 19FL(1) provides that if another Contracting State is the State of registration or State of the operator of an aircraft involved in an accident in Australian territory, then the Director must take all reasonable and practicable steps to comply with a request from that Contracting State that the aircraft and its contents remain

undisturbed until inspected by an accredited representative of the Contracting State. The Director is to facilitate the accredited representative's access to the aircraft and its contents.

Subclause 19FL(2) provides that if another Contracting State is the State of manufacture of an aircraft involved in an accident in Australian territory, then the Director must, so far as is reasonably practicable, comply with a request from that Contracting State that the aircraft remain undisturbed until inspected by an accredited representative of the Contracting State.

Subclause 19FL(3) provides that in determining whether compliance with a request under subclause (2) is reasonably practicable the Director is to consider the proper conduct of the investigation and the avoidance of undue delay in returning the aircraft to normal service.

Subclause 19FL(4) provides that if the aircraft of another Contracting State lies in a restricted or prohibited area then the Director may refuse access to that area to the accredited representative of the Contracting State. However, the Director must arrange removal of the aircraft from that area to allow the accredited representative access.

Clause 19FM - Release of aircraft etc. from custody of Director

Subclause 19FM(1) provides that clause 19FM applies to the release of an aircraft, wreckage or anything in the aircraft or wreckage involved in an accident where retention is no longer necessary for the purposes of the investigation.

Subclause 19FM(2) states that subject to subclauses (3) and (4) the Director must release custody of the aircraft, its parts or contents to the owner of the aircraft or a person authorised in writing by the owner to take custody, if the aircraft is an Australian aircraft. Otherwise the Director must release custody to a person designated by the aircraft's State of registration.

Subclause 19FM(3) provides that upon completion of an investigation if the Director receives a request in writing from another Department, Commonwealth agency or State or Territory Government for an aircraft, wreckage or anything in the aircraft to be released to their custody for some other lawful purpose then subclause (4) applies. Subclause 19FM(4) provides that the Director must comply with a request under subclause (3).

Division 7 - Administration

Clause 19GA - Director of Air Safety Investigation

This clause authorises the Secretary to designate, by notice in writing, a particular office within the Department as the office whose occupant is the Director of Air Safety

Investigation, and that the person who occupies the designated position is the Director of Air Safety Investigation.

Clause 19GB - Functions of Director

This clause specifies the functions of the Director of Air Safety Investigation in broad terms. These functions include ensuring the effective operation of Part 2A, to carry out Australia's obligations as a Contracting State of the Chicago Convention in accident and serious incident investigation, and to carry out the duties and exercise the powers conferred on the Director under the Principal Act or under any other Commonwealth law.

Clause 19GC - Investigators

This clause designates the Director, and whomever he appoints from time to time, to be an investigator.

Clause 19GD - Identity cards

This clause requires an investigator (including the Director) to have an identity card which is in approved form and incorporates a recent photograph of the investigator. Where a person ceases to be an investigator he or she must, as soon as practicable, return the card to the Director.

Clause 19GE - Delegation by Director

Clause 19GE provides that the Director may, by signed writing, delegate all or any of the Director's statutory powers to an officer of the Department or an investigator who is not an officer of the Department. This provision will allow the Director to delegate his powers to persons such as accredited representatives or advisers from other Contracting States to the Chicago Convention or to investigators appointed from an operator or manufacturer of an aircraft.

Division 8 - Miscellaneous

Clause 19HA - Disclosure of information by Director for aviation safety purposes

Subclause 19HA(1) provides that where the Director believes it is necessary for the purposes of air safety, he or she may disclose information obtained in the course of investigations to any other person.

Subclause 19HA(2) provides that where the Director believes it is desirable in the interest of safety promotion he or she may publish any information (other than an investigation report given to the Secretary under clause 19CT which the Secretary has not released). Published information must not identify a person by name, subclause 19HA(3). Note that under the *Acts Interpretation Act 1901* "person" includes a body politic or corporation. This provision reflects the fact that the object of an investigation is to enhance aviation safety, not to apportion blame or liability.

Clause 19HB - Powers in relation to aircraft accident, serious incidents and incidents

This clause provides that the powers and functions of a Commonwealth agency or a person (except a member of the Australian Federal Police) to investigate an aircraft accident, serious incident or incident under another law of the Commonwealth operate subject to the provisions of Part 2A. This clause makes it clear that the Director's powers of investigation in relation to aircraft accidents etc. have primacy over all Commonwealth agencies with air safety investigation powers, except the Australian Federal Police.

Clause 19HC - Disclosure of air safety records to a court or person

This clause sets out the circumstances in which "air safety records" (defined in clause 19AG) may be disclosed and produced in civil proceedings. The clause gives effect to the ICAO requirement in paragraph 5.12 of Annex 13 to the Chicago Convention that such records should not be made available except for investigation purposes "unless the appropriate authority for the administration of justice", i.e. a court, "determines that their disclosure outweighs the adverse domestic and international impact such action may have on that or any future investigation".

Subclause 19HC(1) provides that no person who is or has been an air safety officer shall disclose or produce to any other person or to a court an air safety record, except for air safety investigation purposes.

Subclauses 19HC(1A) to (4) provide exemptions from the rule in subclause (1):

Subclause 19HC(1A) provides that clause 19HC does not apply to an air safety record that is a cockpit voice recording. Note that clauses 19HE to 19HL deal with cockpit voice recordings;

subclause 19HC(1B) provides that clause 19HC does not apply to criminal proceedings, investigations relating to a criminal offence or a proceeding relating to bail;

subclause 19HC(2) provides that subclause (1) does not apply to the disclosure of an air safety record to the Secretary;

subclause 19HC(3) provides that subclause (1) does not apply to the disclosure of an air safety record by the Director under clause 19HA; and

subclause 19HC(4) provides that subclause (1) does not prohibit an air safety officer from disclosing an air safety record to a court if an order is made under subclause (6).

Subclauses 19HC(5) to 19HC(7) deal with court orders for disclosure. Subclause 19HC(5) provides that a person may apply to an appropriate court for an order that an air safety record must be disclosed or produced to a court. Subclause 19HC(6) provides that an appropriate court may order disclosure of an air safety record if satisfied that it is in the public interest having regard to the adverse domestic and international impact such an order may have on the investigation to which the record relates or to any future investigations. Subclause 19HC(7) provides that where an appropriate court makes an order for the disclosure of an air safety record that it also make an order restricting access to the air safety record, unless satisfied such an order would not be in the interests of justice.

Clause 19HD - Compliance with subpoenas etc.

Subclause 19HD(1) provides that an air safety officer is not obliged to comply with a subpoena or similar direction issued by a court in relation to civil proceedings to attend and answer questions or produce air safety records relating to an accident, serious incident or incident within 6 months of the occurrence of that accident, serious incident or incident.

Subclause 19HD(2) provides that a person who has obtained a subpoena or similar direction described in subclause (1) may apply to the issuing court for an order that the subpoena or similar direction be complied with.

Subclause 19HD(3) provides that a court may order compliance with a subpoena within 6 months of an accident etc. if it considers that it is desirable, in either the interests of justice or the performance by the court of its functions, to do so.

Clause 19HE - Evidence of cockpit voice recordings - criminal proceedings

Clauses 19HE to 19HL inclusive provide a comprehensive scheme for the use of cockpit voice recordings as evidence in court. The clauses replace section 27A of the Principal Act, which is repealed by item 2 of Schedule 1 of this Bill.

Clause 19HE provides that a cockpit voice recording made during the flight of an aircraft operated by an Australian operator is not admissible as evidence in any criminal proceedings in an Australian court against a crew member of that aircraft.

Clause 19HF - Evidence of cockpit voice recordings - civil proceedings

Subclause 19HF(1) provides that a cockpit voice recording made during the flight of an aircraft operated by an Australian operator is not admissible as evidence in any civil proceedings in an Australian court.

Subclause 19HF(2) provides that, notwithstanding subclause (1), a party to damage proceedings may apply to a court for an order to allow the cockpit voice recording to be admitted as evidence in the proceedings.

Clause 19HF(3) provides that where a party has requested an order for a cockpit voice recording to be admitted as evidence in a damages proceeding, the court must first determine whether it is in the public interest to allow the recording to be admitted in evidence or excluded from evidence.

Clause 19HF(4) provides that where a court makes an order for a cockpit voice recorder to be admitted as evidence in a damages proceeding it shall be admitted despite the provisions of subclause 19HF(1).

Clause 19HF(5) defines the terms “*damages proceedings*” and “*Australian court*” for the purposes of the clause.

Clause 19HG - Examination by court of cockpit voice recording under 19HF(3)

Clause 19HG applies if a court examines a cockpit voice recording under subclause 19HF(3), subclause 19HG(1).

Subclause 19HG(2) restricts the court access to the cockpit voice recorder to the persons constituting the court and the legal representatives of the parties to the proceedings and other parties as the court may direct.

Subclause 19HG(3) provides that persons having heard part or all of a cockpit voice recording in court may not, at the direction of the court, publish or communicate part or all of that recording in a way not specified by the court. A person cannot contravene this subclause, subclause 19HG(4).

Clause 19HH - Where a court makes an order under 19HF(3)

This clause applies if a cockpit voice recording is admitted as evidence as the result of an order under subclause 19HF(3), subclause 19HH(1).

Subclause 19HH(2) provides that a cockpit voice recording admitted into evidence in a civil proceeding for damages is not evidence for the purpose of determining liability of a crew member who is the subject of the cockpit voice recording.

Subclause 19HH(3) provides that a cockpit voice recording can be used as evidence of negligence of a crew member but only for determining the liability of some other party.

Subclause 19HH(4) provides that the cockpit voice recording or part of a cockpit voice recording used in proceedings can only be published or communicated as directed by the court, and no such direction may be contravened, subclause 19HH(5).

Clause 19HJ - Cockpit voice recording etc. not to be grounds for disciplinary action

This clause provides that no employer may take disciplinary action against an employee on the grounds of contents of a cockpit voice recorder made of the employee.

Clause 19HK - Disclosure of cockpit voice recordings

This clause provides that no person shall make any information contained in a cockpit voice recording public otherwise than in an air safety investigation, in criminal proceedings (other than proceedings against a crew member), or in civil proceedings for which a release order has been made under subclause 19HF(3).

Clause 19HL - Sections 19HE and 19HF not to affect the admissibility of other evidence

This clause provides that nothing contained in clauses 19HE or 19HF affects the admissibility in any proceedings of words spoken on the flight deck provided that evidence is not in the form of cockpit voice recording or a transcript of a recording.

Clause 19HM - Determination of standards

Subclause 19HM(1) provides that the Director may, by orders published in the *Gazette*, determine standards for flight data and cockpit voice recorders. Such recorders are safety investigatory tools which are required to be carried by certain classes of Australian aircraft under the *Civil Aviation Regulations*. The standards determined may be specified by reference to published Australian or foreign standards, subclause 19HM(2).

Clause 19HN - Day of effect of standards

Clause 19HN provides that a standard for a flight data or cockpit voice recorder takes effect on the day the order establishing the standard is published in the *Gazette* or on a later day specified in the order.

Clause 19HP - Standards to be disallowable instruments

This item provides that standards for flight data recorders and cockpit voice recorders set under subclause 19HM(1), and orders revoking, varying or modifying such standards, are disallowable instruments for the purposes of section 46A of the *Acts Interpretation Act 1901*.

Clause 19HQ - Arrangements with States, Australian Capital Territory, Northern Territory and Norfolk Island

The issuing of warrants under Division 3 of Part 2A cannot be regarded as being an exercise of judicial power of the Commonwealth, nor is it incidental to the exercise of such a power. The power is administrative, and the mere conferral of a power on a State or Territory officer to issue a warrant would be beyond the legislative competence of the Commonwealth Parliament. For this reason clause 19HQ provides for a procedure to enable the Commonwealth to enter into arrangements with States and Territories to confer authority on State and Territory magistrates to issue warrants.

Clause 19HR - Compensation for acquisition of property

Where the operation of Part 2A would result in the acquisition of property from a person other than on just terms, compensation is payable to that person, subclause 19HR(1). In determining the amount of compensation payable, regard must be had of any damages or compensation already received by that person as a result of the same event or transaction which resulted in the acquisition, subclause 19HR(2).

Subclause 19HR(3) defines the terms “*acquisition of property*” and “*just terms*” to have the same respective meanings as in paragraph 51(xxxi) of the Constitution.

PART 4 - MISCELLANEOUS

Item 2.

Item 2 repeals section 27A of the Principal Act, which deals with the disclosure and admissibility of cockpit voice recordings. These are now dealt with comprehensively in clauses 19HE to 19HL inclusive of item 1.

NOTES ON SCHEDULE 2

AMENDMENTS OF THE *SEAFARERS REHABILITATION AND COMPENSATION ACT 1992*

Item 1.

Item 1 repeals section 108 which is the section which establishes the Seafarers Rehabilitation & Compensation Authority (Authority) as a body corporate with its own legal identity.

Item 2.

Item 2 amends the Heading to Part 8 consequential upon the repeal of Division 3 of Part 8.

Item 3.

Item 3 repeals Division 3 of Part 8 which contains financial provisions relating to the Authority. As the Authority will not be a separate body corporate, it is not appropriate that the Act should include separate financial provisions.

The specific sections within Division 3 of Part 8 which are being repealed are:

Section 120 which applies Division 3 of Part XI of the *Audit Act 1901* to the Authority. The main effect of section is to require the preparation of financial statements and an annual report. The requirement for the Authority to prepare an annual report is to be included in proposed new section 125A.

Section 121 provides for the payment of money to the Authority and how that money is to be applied.

Section 122 requires the Authority to prepare estimates of receipts and expenditure.

Section 123 exempts the Authority from taxation.

Section 124 provides that the Authority may borrow money.

Item 4.

Item 4 inserts a new section 125A to require the Authority to prepare an annual report. The annual report must be provided to the Minister as soon as practicable after the end of each financial year and must be tabled within 15 sittings days after the Minister receives it.

NOTES ON SCHEDULE 3

AMENDMENT OF THE *CIVIL AVIATION ACT 1988*

Item 1.

Item 1 repeals section 32AL of the *Civil Aviation Act 1988*, which states that the powers and functions of an investigator under the *Civil Aviation Act* are exercised subject to the provisions of Part XVI of the *Air Navigation Regulations*. This provision is made redundant by clause 19HB in item 1 of Schedule 1 of the Bill.

AMENDMENT OF THE *FREEDOM OF INFORMATION ACT 1982*

Items 2 and 3.

Items 2 and 3 replace the reference to “*Air Navigation regulations*, subregulation 283(1)” in Schedule 3 of the *Freedom of Information Act 1982* with a reference to “*Air Navigation Act 1920*, subsection 19CU(1)”. The effect of this amendment makes subclause 19CU(1), inserted into the *Air Navigation Act* by Schedule 1 of this Bill, a secrecy provision for the purposes of subsection 38(1) of the *Freedom of Information Act*. That is, reports submitted to the Secretary under clause 19CT are exempt from disclosure under the *Freedom of Information Act*.

