

**Comments on the recommendations of the
Aviation Safety Regulation Review**

Prepared by: Jim McDowall



29th June 2014

Since 1998 CASA has been working on the Part 103/Part 149 arrangements. The last consultation phase was in 2007. By any stretch, in any organisation, this is glacial pace and this probably goes to the heart of the issue. There is little demand from the sports aviation community, the sports aviation bodies fear the implications and this piece of regulation is well down the priority list of CASA, even though it potentially affects 40% of the aircraft flying in Australia.

As a consequence, there is little faith within the sports aviation community that Part 149 will be adopted by and it SHOULD NOT BE for the following reasons.

Conflict of Interest

It is not possible for a sports aviation body to be both a regulator and an advocate. There are many examples in society where these sorts of conflicts are recognised and avoided, for example a solicitor acting for both sides in an action.

Most sports aviation bodies are set up as associations. Associations are set up for the benefit of members and when a person joins an association the parties enter into a contract. It is a fundamental tenet of law that contracts cannot be altered without the permission of all parties to the contract. Consequently when the rights of a sports aviation body member are altered without reference to the membership the contract is breached.

CASA seems not to recognise that these bodies are subject to legal responsibilities and constraints beyond the various civil aviation laws. For example, CASA's SPORT AVIATION SELF-ADMINISTRATION HANDBOOK 2010 discusses the imposition of a regime of corporate governance adopted from the various Australian Standards. These standards are developed for use in companies and in general terms reflect the subtle but significant difference between a company and an association; that is, a company exists for its own benefit whereas an association exists for the benefit of its members. Consequently, statements in the document such as (page 7):

Compliance management has a reason for its existence: it demonstrates sound corporate governance by the board in the management of company risks, one of which is compliance . Compliance management also adds value to the organisation in terms of reputation and sustainability .

An association, as a sports aviation advocate, is representing the risks of its members whereas the statement above seems to propose that the association is subject to the risk – clearly not so. The association is merely a mechanism for aggregating the risk for the benefit of the regulator (CASA)

Compulsion

It is ironic that a government that stands steadfast against compulsory unionism is prepared to implement systems that require compulsory membership of an organisation in order to fly aircraft that CASA does not want to regulate directly, quite often in situations that result in perverse and draconian outcomes.

For example, a pilot with a PPL or ATPL who wants to fly a powered sailplane away from a GFA club operation has to be a member of the GFA and be subservient to a well meaning, but amateur system whose recent accident history would demonstrate it is dangerous to be a part

of (with regard to the number accidents involving 2 seat gliders with pilots under instruction). In practice, a PPL holder is competent to fly a powered sailplane with a very minimum of instruction, and in keeping with other aspects of these licences.

Delegation of Powers & Rule making

It is usually regarded that a person or body to whom parliament delegates its rule making powers cannot delegate those powers unless it is within the terms of that delegation. Further, it is considered that such rulemaking powers should not be delegated to a private body for the reason that such powers may be used in an oppressive or discriminatory manner.

Section 94 of the Act deals with delegations by the Director of CASA:

94 Delegation by the Director

- (1) *The Director may, in writing, delegate all or any of CASA's powers under this Act, the regulations, or an instrument made under this Act or the regulations, to an officer.*

Similarly, Section 95 deals delegations by the Board. In both cases these delegations are made to employees of CASA.

CASA is empowered to issue Civil Aviation Orders ("CAO") under reg.5 of the Civil Aviation Regulations 1988.

5 Civil Aviation Orders

- (1) *This regulation applies if CASA is empowered or required under these Regulations:*
- (a) *to issue a direction, instruction or notification; or*
 - (b) *to give a permission, approval or authority.*

The Sport Aviation Self-Administration Handbook 2010 makes the following statement:

The main condition is that if participants want to undertake one of the exempted activities they have to belong to a specified organisation . Without full membership people are not legally allowed to take part in these activities .

This statement illustrates the importance of being a member of the appropriate sports aviation body for the purposes of CASA's administration.

By way of example CAO 95.4 deals with the operations of sailplanes and powered sailplanes and installs the Gliding Federation of Australia as the sports aviation body and requires that an aircraft to which this Order applies must not be operated except by an individual who is a member of the GFA. in accordance with the standards specified in the GFA Operational Regulations.

*The "GFA Operational Regulations means the regulations prepared by the GFA, **and approved by CASA**, containing the procedures and instructions necessary to ensure that aircraft to which this Order applies comply with the provisions of CAR 1988 and CASR 1998 applicable to those aircraft and with the conditions specified in subsections 5 and 6." (emphasis added)*

However, the GFA Operational Regulations contains references to documents called Manual of Standard procedures (MOSP) which cover Administration (Part 1), Operations (Part 2), Airworthiness (Part 3), Sports (Part 4); and Development (Part 5).

In particular, MOSP Part 2 imposes operational conditions on members that go well beyond the CAO and the approved GFA Operational Regulations and are not approved by CASA. In

other words, CASA has permitted the GFA to make rules that are effectively law without formally delegating the power because they cannot.

Further MOSP 1, dictates a requirement that a GFA member must also be a member of a club and a state association. This goes well beyond the missive of CAO 95.4 that people operating gliders be members of the GFA which is an example of a private body making law. The structure of the GFA may also contravene the Corporations Act in that members have no direct say in the election of the Board, the Board members being nominated by State Associations that are not members or party to the rules of the Association.

CAO 95.4 also dictates that:

3.1 Subject to paragraph 3.2, CASA exempts aircraft to which this Order applies from compliance with the following provisions of CAR 1988:

(aa) Parts 4 and 4A, provided that both the GFA Operational Regulations and the GFA Manual of Standard Procedures Part 3 Airworthiness are complied with

GFA Manual of Standard Procedures Part 3 Airworthiness is not approved by CASA . This demonstrates that a private body making law is able to behave in a discriminatory manner. It discriminates against commercial Approved Maintenance Organisations (GFA nomenclature) by requiring standards far greater than those who undertake private or voluntary works (none required).

Further Comments

The report observes(pp89,90):

Self-administration is an efficient, economic and reasonable form of regulation, but is not without its challenges. Most of the management workforces are part-time volunteers and, in some cases, their enthusiasm outstrips their skills and experience, particularly in relation to the demands of corporate governance. There is a marked variability between clubs, particularly in relation to teaching standards and oversight abilities.

Comment: The last sentence reflects a misunderstanding of the various organisational structures employed by SAAO's. For example, the RA-Aus structure is not based on clubs and flight training is based on the GA model.

Control over membership and registrations has been identified as a problem. There may be a number of aircraft that are not under the VH or RA-Aus registration oversight umbrella. The size of the problem is impossible to gauge as aircraft may have been retired or no longer in use; however, this ambiguity supports the argument that there may be aircraft flying without adequate oversight.

Comment: All organisations have disciplinary mechanisms but in the main these are governed by the various Associations Acts. A review of the case law has indicated that the courts place a high standard of proof when an association seeks to amend, limit or curtail the rights of a member. They really are inappropriate bodies to undertake the oversight envisaged for SAAO's by CASA.

There may be an argument that aircraft are flying without adequate oversight but without proof no weight should be placed on this statement. Until aircraft operated in this manner regularly come to the notice of CASA and disciplinary actions result the statement is a nullity.

The combined accident rate amongst GA (VH-registered) and recreational aviation (RA-Aus) is close to the global average; however the RA-Aus rate of fatal accidents has climbed for the last five years and needs enhanced monitoring (see Appendix A9).

Comment: Without an analysis of the reasons why the RA-Aus rate of fatal accidents has climbed for the last five years on such a small sample (low number) it is difficult to mount an argument to justify enhanced monitoring. For example if pilots are willingly breaking the rules and have an accident (eg low flying to check stock) there is little that any monitoring agency can do to prevent this.

.....

The Panel considers that self-administration, if conducted under the principles discussed, is an acceptable system of safety oversight in an environment where risk to third parties is low.

Comment: The third parties should be defined as:

- Other airspace users; and
- People on the ground:

Most sport aviation is conducted away from population centres and outside controlled airspace. Any rules should reasonably provide for minimal oversight in those areas and follow long established operational formats for uncontrolled airspace and landing areas.

International Comparisons

The US is able to “control” the operations of sports aviation without the creation of Part 149 type bodies.

If the intent of CASR 1.003 “Harmonisation with FARs” is to be followed then there would need to be a good reason. If the FAA can manage many more aircraft operating in a wider variety of weather condition with more crowded airspace why would not it be advantageous for Australia to adopt a similar approach.

I understand that Canada operates a more liberal regime, particularly with regard to maintenance of single engine light aircraft and gliders.

Summary

Of all tyrannies, a tyranny sincerely exercised for the good of its victims may be the most oppressive. It would be better to live under robber barons than under omnipotent moral busybodies. The robber baron's cruelty may sometimes sleep, his cupidity may at some point be satiated; but those who torment us for our own good will torment us without end for they do so with the approval of their own conscience.

C. S. Lewis

English essayist & juvenile novelist (1898 - 1963)