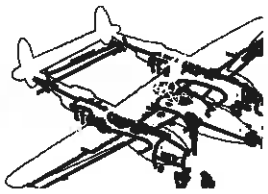

[redacted]

The Chairman,
Aviation Safety Regulation Review,
Department of Infrastructure and Development,
Canberra, ACT.

Response to the ASRR Report.

Dear Sir, 30 June 2014

Along with my aviation sector colleagues, we welcome, in general, the report, and many of the specific findings and I do not propose to comment at length.

The report has raised hopes anew, especially in GA, I sincerely trust their hopes are realised, but it will take major political will to see any change, let alone change covering most or all of your recommendations.

I note that many submissions to the report, both public and others that have been forwarded to me, have called for changes to the Civil Aviation Act 1988, and in particular, ***S.9(A) of the Civil Aviation Act Act 1988.***.

It was acknowledged at the time, in the formation of the original Civil Aviation Authority, that the drafting of the Act was rushed, a case of *"act in haste, repent at leisure"*

Without change to S.9(A), (and preferably some other sections of the Act) the rest of the recommendations of your report are moot.

Particularly in the last five years, a very literal interpretation of this section of the Act has been given as the foundation for increasingly restrictive and prescriptive legislation, regardless of cost to the aviation sector, or serious consideration of achieving "real" risk reduction (more safety).

We cannot afford prescriptive and restrictive legislation to deal with "perceptions of the need for *more safety*".

Indeed, in several venues, the retiring Director of Aviation Safety and CEO of CASA has, in my opinion, stated, quite explicitly, *that S. 9(A) of the Act precludes the following:*

1. Outcome (or performance) based Regulation, and;

2. Demonstrated Risk based regulation, and;

3. Risk assessment of proposed regulations, and;

4. Cost/Benefit Justification of any proposed Risk Based Regulation, and rejection of proposals not cost/benefit justified.

5. Compliance with Government policy generally, and legislative policy in particular, to have all legislation outcome based, with "regulation" as the last resort in securing compliance, not the first.

6. Mandated the cancellation of the Byron era Directive 1/2007, and any cost/benefit justification of regulation (contrary to claims made by CASA on progress in implementation of the Hawke Report at recommendations #7, #13, and #15– see the appendix pages 148/149 to the full ASRR Report).

I note the comment about the ATO dropping "performance based" regulation. During the currency of the CASA Review, officers of the ATO were seconded to provide education to senior CASA officers as to the ways and means of enabling performance based regulation. That the ATO has allegedly abandoned performance or outcome based regulation is NOT a reason why CASA should abandon or not attempt performance or outcome based regulation.

Please let me be clear, I am not advocating any form of amendment to the Act that covers "promote and foster," that was carefully considered by the Minister in 1996/97, during my time as Vice Chairman of the PAP, and was rejected as a conflict of interest, a decision with which I personally agree.

However, without amendment to the Act, and S.9(A) in particular, *to mandate risk based regulation,* there can be little progress in any meaningful way, in addressing the host of problems surrounding CASA.[1]

"Safety" is an emotive word, without dimension, although people in general think they know what it means, "safe/safety" is a matter of perception.

Grandma, looking through the kitchen window at grandson poking the dog with a stick, has a completely difference perception of what is "safe," than her grandchild.

As you and I well know, RISK can be measured, it is trite but true, ***if you can measure it, you can manage it.***

You cannot measure "safe."

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[1] Note: The submission by S.L.Ferrier, well known aviation lawyer, on this point, I am advise a number of other legal professionals made a similar point

That rational risk management is not popular in CASA is an understatement. If the "rules development" rules of the Productivity Commission/Office of Best Practice Regulation/various recommendations of the Australian Law Reform Commission, Attorney-General's Department etc. were followed, ***a good proportion of CASA "rules" would never see the light of day.***

The CASA attitude to risk management and cost/benefit is best seen the Airspace Act 2007. The first "Minister's Airspace Policy Statement" is a model of how airspace and airspace designation should be managed. In contrast, the second such statement is shorn of all rational meaning, "risk management" goes missing, and "safe" becomes the criteria, in words very similar to S.9(A) of the Civil Aviation Act 1988.

In short, the almost immoveable "CASA Culture" rejects rational risk management and the cost/benefit justification of regulation. Without amendment to the Act that will not change.[2]

Without amendments to the Act, a number of your recommendations cannot be enshrined in law, and we cannot afford to continue with vastly different interpretations of the Act (particularly when the "hard core" of CASA prefer the most narrow, extreme and prescriptive interpretations) with each change of CEO/DAS of CASA.

Two versus Three-Tier Legislation

I am very disappointed with the recommendation to move back to three-tier legislation, *a seriously regressive step*.

Indeed, I am bound to say that even AMROBA is having second thoughts, as their recommendations were apparently based on the "third tier" not being disallowable documents that attract the whole parliamentary legislative process for every amendment.

The three-tier proposal is contrary to:

1. 15 plus years of use of ACs, since the PAP/CASA Review change in 1998.
2. Australian industry practice in general, where AS/NZ or other standards such as ISO are not normally legislated.
3. FAA/NZ/Canada
4. EASA

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[2] "CASA" continually refers to the Gibbs High Court decision that became an early definition of "duty of care", the doctrines of the law of "duty of care" have moved a long way since that era, an era before "risk management" was a term widely used in industry, and well before the first AS/NZ standard on Risk Management. However, "culturally" CASA prefers this decision, that effectively says that if there is any reasonably foreseeable adverse outcome, there is a "duty of care" to prevent the adverse outcome. This meshes nicely with an interpretation of S.9(A) of the Act, that CASA must prevent accidents and incidents, regardless of the cost of the prevention or the likelihood of the preventive measures being effective.

5. All other countries that follow EASA or FAA – including China and most western Pacific Rim countries.
6. Counties that are adapting tailored versions of the NZ regulatory suite, such as PASOs, PNG, Mongolia, with several others in train.

As it stands now, thanks to CASA ignoring the previous policy for two-tier legislation, ***we already have three tiers, without your recommendation.***

The existing Manuals of Standards, MOS, are legislative instruments, as per the Acts Interpretation Act 1901 (Cth) and the Legislative Instruments Act 2003 (Cth) and "Aviation Standards" as per the AMROBA proposal, although intended to be more in the nature of Advisory Circulars, ACs (FAA) or;
Acceptable Means of Compliance, AMC (EASA) will inevitably become legislative instruments, as have the MOS.

Once again, this means Australia is going to adopt a third tier of legislation, contrary to a previously carefully considered decision:

- ***to align with FAA/NZ and EASA.***

Are you aware that the Low Weather Minima criteria for Qantas and Virgin are legislative instruments, usually with a two year sunset clause, so that, every two years, these airlines have to go to the trouble, time and expense (and run the gauntlet of particular CASA FOIs) to re-negotiate these minima, with the possibility of Parliamentary disallowance?

With Part 42/145, with its massive MOS, many smaller maintenance organisations have little hope of gaining Part 145 approvals, the ***CASA manual for assessing applications for a Part 145 approval itself runs to almost 400 pages.***

The current Government has, as a major policy, a Red Tape reduction program. The formal addition of a third tier of legislation runs contrary to this policy. The Government also has a number of other policies designed to lift the burden of regulation from business, particularly small business.

I believe it is generally and accurately acknowledged that a large proportion of CASA regulation has little impact on aviation risk or risk reduction (safety outcomes), the adoption of a third tier of aviation legislation will not assist in lightening the regulatory burden..

The inflexibility of a third tier, which we lived with (and continue to live with) through CAO's[3][4], is well in evidence with MOS, and "aviation standards" will suffer the same fate.

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[3] When CAOs were first introduced (not to be confused with ANOs under the Air Navigation Act 1922) , the CAA OLC belief was that they would be disallowable, this time around, "Aviation Standards" are going to be, but the organs of the Parliament (Senate Standing Committee on Regulations and Ordinances?) declared them subject to Parliamentary disallowance, as they were "enforceable laws".

1. **Advisory Circulars, ACs (FAA)** state they are "A ways but not the only way" to comply with whatever regulation gave rise to the AC, and;

2. **Acceptable Means of Compliance AMC (EASA)**

escape this fate under the Australian Commonwealth system, because they both clearly allow for alternative means of compliance, and thus preserve the flexibility to have plain language technical standards that can be easily amended, and responsive to change.

I sincerely ask you to reconsider this recommendation, and would ask you to go back to AMROBA and ask them if they still support "three tiers" if all the Canadian style "Standards" are to become Legislative Instruments, with all the rigidities that entails.

I have taken the liberty of attaching a two-page brief I prepared for the Royal Federation of Aero Clubs of Australian on Two versus Three Tier legislation .

Yours sincerely,

[redacted]

W.J.R.Hamilton, FNAM, MAIAA.

[4] Based on the inflexible CAO, we were recently "required" by CASA to carry out full stalls in an SA 227 (T-tail Metro) with the Stall/Attitude Warning System disabled. It took a letter from the TC holder to CASA to say that the AFM meant exactly what it said, PROHIBITED. Shortly after, in the same (inadvertently) configuration, a Norwegian Metro was lost in an unrecoverable stall, with all aboard.